DELBERT FRANK ELLIOTT,

Grievant,

v. **Docket No. 98-DJS-199**

DEPARTMENT OF MILITARY AFFAIRS & PUBLIC SAFETY/

DIVISION OF JUVENILE SERVICES,

Respondent.

D E C I S I O N

Grievant, Delbert Frank Elliott, filed a grievance at level four, as authorized under W. Va. Code §29-6A-4(e), following his dismissal from employment as a Youth Services Worker II at the West Central Regional Detention Center. A level four hearing was conducted in this matter in the Grievance Board's office in Wheeling, West Virginia, on August 11, 1998, at which time Grievant appeared pro se, and the Division of Juvenile Services (Respondent) was represented by Donald L. Darling, Senior Deputy Attorney General. This matter became mature for decision on September 27, 1998, the due date for Grievant's post-hearing submissions.

On May 26, 1998, Phyllis H. Carter, Director of the Division of Juvenile Services, advised Grievant that his employment was terminated, effective that date. Ms. Carter stated the reason for the action was gross misconduct and insubordination on May 19, 1998. She continued in pertinent part:

On Tuesday, May 19, 1998 upon arriving for work you met with Mr. Doug Mitchell, Director of the West Central Regional Juvenile Detention Center. The purpose of this meeting was two-fold. First Mr. Mitchell informed you of the results of the recent investigation which involved concerns of your job performance and conduct as a staff member of the detention center. He explained that the investigation was concluded and resulted in the following findings:

On different occasions you have escalated situations with residents, creating dangerous circumstances that haverequired other staff to intervene.

You had knowledge of the fact that a former resident of the detention center was on runaway status, and the whereabouts of that juvenile, and did not report this information to the director of the

center. Such action is perilous, illegal, demonstrates poor judgement, and in no way advocates for the safety of a child as is expected of detention center employees.

You made contact with a former resident without first seeking approval from the director of the detention center. This is an improper activity which is not condoned by the Division of Juvenile Services. Only in unusual and extenuating circumstances should youths be contacted after leaving the center and then, approval to establish contact must be granted by the director.

You took the opportunity to make unaccompanied visits to female residents while they were in their rooms. This is an inappropriate practice. Should any circumstances arise that require staff members to enter a female resident's room, male staff members must be accompanied by a female staff person or a female staff person should enter the room unaccompanied.

Mr. Mitchell explained that you, if so inclined, could respond to the findings of the investigation. He furthermore told you that as a result of these findings that you would not continue to serve as a lead worker but would remain as a Youth Service Worker II at the same pay.

Following the discussion of investigative results, Mr. Mitchell also spoke with you on May 19, 1998 about your leaving the job site without permission on May 14, 1998. On that date following an incident between another staff member and a resident, of which you were not involved, and stationed several feet away, you suddenly displayed volatile and disruptive behavior, walked out of the center while shouting that you would 'go off' if you did not leave the site. Lead worker Tom Worstell warned you of possible disciplinary action, however you chose to abandon your responsibilities by leaving the site. You returned to work on May 15, 1998 and following a discussion with Mr. Worstell, you determined that it would be in your best interest to take annual leave on May 15 and May 18, 1998.

Upon your return to work on May 19, 1998, Mr. Mitchell met with you and directed you to submit to a psychiatric examination by Dr. Ralph Smith. He explained that the directive was a result of 1) the responsibility of the Division of Juvenile Services to maintain a secure facility for juveniles, and [a] safe workplace. 2) your leaving the work site while displaying volatile and disruptive behavior on the date of May 14, 1998; 3) statements received during the aforementioned investigation that described your behavior as erratic and fluctuating; [and,] 4) your own occasional statements that you had difficulty coping on the job. Mr. Mitchell explained that the Division of Juvenile Services would pay for

the examination and all associated costs. At that time you chose not to comply with the directive, after which Mr. Mitchell verbally reprimanded you. He then redirected you to submit to a psychiatric examination by Dr. Smith, cautioning you that failure to comply with the directive would result in a recommendation to the division central office for your dismissal from employment. Again, Mr. Mitchell noted that the division would bear all expenses associated with and including the examination. He provided you with ample opportunity to make your decision after which you chose not to comply with the directive and once again walked off the job site without permission.

On May 20, you contacted Mr. Mitchell and stated that you had reconsidered the directive and now wished to comply. It is my determination that you were given ample opportunityon May 19, 1998 to comply with the directive. Also, on that same date, you left the job site without permission. Both of these acts were grossly insubordinate and intolerable. Employees are expected to adhere to the directives of their supervisors. The refusal of an employee to perform any lawful directive by their supervisor is cause for severe disciplinary action.

* * *

In this matter you chose to disobey both repeated verbal directives of your supervisor. Such insubordinate conduct makes it difficult for management in general, and your supervisor in particular, to carry out leadership responsibilities while you are at the workplace. Your blatant and flagrant insubordination, as well as your disruption of orderly government processes, warrants your dismissal. Your repeated repudiation of your supervisor's authority disrupted and undermined the employee-employer relationship and eliminated any likelihood that any lesser penalty would cause you to change your conduct and behavior. So that you may realize the seriousness of your continual actions, I would be remiss if I failed to share with you that willful disregard of the employer's interests or wanton disregard of the standards of behavior which the employer has a right to expect of its employees results in a determination of 'gross misconduct'.

* * *

In disciplinary matters, the employer has the burden of proving each element of the charges by a preponderance of the evidence. W. Va. Code §29-6A-6; Miller v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket

No. 92-DOH-325 (Dec. 31, 1992). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). Respondent asserts that in a juvenile detention facility stability, safety, and security for residents and employees is imperative. In consideration of the matters cited in Director Carter's letter, it was deemed necessary for Grievant to undergo a psychiatric examination to determine his fitness for continued employment in this setting. Grievant's refusal to submit to the examination, on two occasions, is characterized as gross and willful insubordination by Respondent. Compounding this insubordinate action was Grievant's departure from work prior to the end of his shift, and without permission, on May 19, 1998. Respondent argues that Grievant's actions constitute gross misconduct, and justify his immediate dismissal for cause, as provided by Division of Personnel Rule 12.2.

Consistent with W. Va. Code §29-6A-6, Grievant elected not to testify at hearing. He also chose not to respond to Respondent's post-hearing memorandum of law. In his opening statement, Grievant stated that he had been harassed on several occasions, stressing his physical capabilities. He did not identify who had harassed him, but indicated that it was in reference to horseplay by other staff members, which had been allowed to continue, despite his efforts. Grievant opined that his dismissal was in retaliation for those efforts. Grievant also submitted Respondent Policy Memorandum 2104, “Guide to Progressive Discipline”. He argues that a lesser level of discipline was warranted, and that he had been denied due process when Respondent failed to give him notice and an explanation of the charges prior to the dismissal.

Discussion

Because Grievant does not dispute the charges made against him, and offered no evidence to establish that he was subject to retaliation, the only issue to be addressed iswhether he was entitled to a lesser penalty under a progressive discipline policy.

An allegation that a particular disciplinary measure is disproportionate to the offense proven or otherwise arbitrary and capricious is an affirmative defense, and Grievant bears the burden of demonstrating that the penalty was clearly excessive or reflects an abuse of agency discretion, or an inherent disproportion between the offense and the personnel action. Jones v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Thompson v. W. Va. Dept. of Health

& Human Serv., Docket No. 94-HHR-254 (Jan. 20, 1995).

Division of Personnel Regulation 12.2 provides:

Fifteen (15) calendar days after notice in writing to an employee stating reasons, the appointing authority may dismiss any employee for cause. The appointing authority shall allow the employee a reasonable time to reply to the dismissal in writing, or upon request to appear personally and reply to the appoint authority or his or her designee. The appointing authority shall file the reasons for dismissal and the reply, if any, with the Director of Personnel. Fifteen days notice is not required for employees in certain cases when the public interests are best served by withholding the notice or when the cause of dismissal is gross misconduct. An appointing authority may dismiss an employee after oral notice, confirmed in writing, when the dismissed employee's action(s) constitute a threat to the safety or welfare of persons or property.

By his own admission, Grievant was feeling stressed. Melvin Mitchell, Director of the West Central Regional Juvenile Detention Center, testified that on the first occasion when Grievant had left the worksite prior to the end of shift, without permission, he had displayed volatile behavior, and shouted that he would “go off” if he did not leave. Mr. Mitchell explained that in correctional parlance to “go off” means to engage in violentbehavior.

Although Respondent could have applied the progressive disciplinary policy cited by Grievant, it chose not to proceed in that direction. The policy does not require that an employee be given a verbal warning, written warning, suspension, and demotion, prior to dismissal. In fact, it notes that in some instances, severe levels of discipline will be imposed for a first offense. Because Respondent has a duty to the residents and employees to provide a safe work environment, immediate dismissal was permitted. Given the facts of this case, dismissal does not appear to have been an arbitrary and capricious action. An action is arbitrary and capricious if the agency making the decision did not rely on criteria intended to be considered; explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985). An action may also be arbitrary and capricious if it is willful and unreasonable without consideration of facts. Black's Law Dictionary, at 55 (3d Ed. 1985). Arbitrary is further defined as being “synonymous with bad faith or failure to exercise honest judgment.” Id, Trimboli v. W. Va. Dept. of Health and Human Servs./Div. of Personnel, Docket No. 93-HHR-322 (June 27, 1997).

Respondent considered appropriate criteria and acted in a manner consistent with applicable policies. There is no evidence the decision was made in bad faith.

In addition to the foregoing discussion, it is appropriate to make the following formal findings of fact and conclusions of law.

Findings of Fact

1. Grievant was first employed by the Division of Juvenile Services as a Youth Service Worker II, on April 25, 1991. He transferred to the West Central Regional Juvenile Detention Center in Parkersburg, West Virginia, on March 16, 1992.

2. Grievant engaged in a number of unacceptable actions, including leaving work without permission prior to the end of his shift on May 14, 1998.

3. Upon his return to work on May 19, 1998, Respondent advised Grievant that he was to undergo a psychiatric evaluation to determine his ability to continue in the position of Youth Service Worker.

4. Grievant refused to submit to the psychiatric evaluation.

5. Grievant was advised by his supervisor that his failure to comply with the evaluation would result in a recommendation that he be dismissed from his employment.

6. Grievant refused to submit to the evaluation a second time, and walked off the job, without permission, at 4:35 p.m. He had been scheduled to work from 3:00 to 11:00 p.m.

7. On May 20, 1998, Grievant contacted Mr. Mitchell and stated that he would undergo the evaluation. Grievant's offer was not accepted.

Conclusions of Law

1. In disciplinary matters, the employer has the burden of proving each element of the charges by a preponderance of the evidence. W. Va. Code §29-6A-6; Miller v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). Apreponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

2. Respondent has proven by a preponderance of the evidence that Grievant engaged in insubordination and gross misconduct which warranted his dismissal for cause.

3. Respondent has proven by a preponderance of the evidence that dismissal without a fifteen

day notice was permissible under Division of Personnel Rule 12.2, because Grievant's action constituted a threat to the safety or welfare of persons or property.

4. An allegation that a particular disciplinary measure is disproportionate to the offense proven or otherwise arbitrary and capricious is an affirmative defense, and Grievant bears the burden of demonstrating that the penalty was clearly excessive or reflects an abuse of agency discretion, or an inherent disproportion between the offense and the personnel action. Jones v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Thompson v. W. Va. Dept. of Health & Human Serv., Docket No. 94-HHR-254 (Jan. 20, 1995).

5. Grievant failed to prove that he was entitled to a lesser penalty under Respondent's progressive disciplinary policy, or that the level of discipline was arbitrary and capricious.

Accordingly, the grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7 (1998). Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

Date: November 20, 1998 _____

Sue Keller

Senior Administrative Law Judge