W. TODD HAYES,

Grievant,

v.

DOCKET NO. 98-DJS-220

WEST VIRGINIA DIVISION

OF JUVENILE SERVICES,

Respondent.

DECISION

Grievant, W. Todd Hayes, challenges his dismissal from employment as a Correctional Counselor II at the West Virginia Industrial Home for Youth ("WVIHY"). (See footnote 1) He seeks reinstatement to his position with full back pay. This matter was filed directly at level four, pursuant to the expedited grievance procedure of W. Va. Code § 29-6A-4, on June 23, 1998. A hearing was held in the Grievance Board's office in Morgantown, West Virginia, on August 19, 1998. This matter became mature for consideration on November 9, 1998, upon receipt of the parties' proposed findings of fact and conclusions of law.

The following narrative will be supplemented by formal findings of fact later in this Decision.

Background

Grievant began employment at WVIHY as a Correctional Counselor in October of 1997. His duties included one-on-one counseling with residents at WVIHY, along withorientation and instruction regarding rules and regulations of the facility. In addition, Grievant was frequently asked to assist the correctional officers when they were short- handed, requiring him to function as a correctional

officer. (See footnote 2) In fact, just two days prior to the incident for which Grievant was terminated, he had received a commendation from his supervisor and WVIHY's superintendent for his exemplary service and attitude during staff shortages. Grievant's Exhibit 1.

On Sunday, May 17, 1998, Grievant reported to work at 12:00 p.m., as scheduled. On the way to his office, Grievant encountered Correctional Counselor Crystal Hall, who was very upset. She explained to Grievant that, as she walked toward the building which housed their offices, some residents yelled sexually-oriented obscenities at her from the windows of their rooms in a residence hall, Standard III. Grievant immediately reported the incident to the shift supervisor, Lt. Donald VanScoy. (See footnote 3) Lt. VanScoy told Grievant to wait while he gathered some other correctional officers, so that they could close the windows and “make a show of force” to the residents. (See footnote 4) Lt. Vanscoy returned with Officers Brian Hall, Kevin Kellar and Jeff Adkins, along with Recreation Specialist Allan Cody. The lieutenantordered the others, including Grievant, to accompany him to Standard III.

Upon arriving at Standard III, the group proceeded to the floor where the yelling had come from, visiting residents' individual rooms. Witnesses in this grievance testified that Lt. VanScoy, accompanied by the others, “interrogated” each resident, shouting at them and asking questions in an effort to find out who was responsible for the obscenities yelled
at Ms. Hall.

First, Lt. Vanscoy, Mr. Cody and Grievant entered the room of Resident P.T. (See footnote 5) As Grievant closed the window, Lt. VanScoy pushed P.T. into the wall as he yelled at him. Grievant testified that, while his back was turned, he heard a sound that sounded like a slap, and when he turned around, P.T. was in the corner. Grievant assumed that Lt. VanScoy had “slapped him into the corner.” Brian Hall testified that, from where he stood in the hallway, (See footnote 6) he saw Lt. VanScoy push P.T. into the wall. There was no evidence offered at the level four hearing which would indicate that P.T. was injured.

The next room entered was J.M.'s, who was lying on the floor wrapped in a blanket. (See footnote 7) Lt. VanScoy entered first, grabbed J.M., pulled him to his feet, and forcefully pushed him against the wall. Both Grievant and Officer Hall testified that Lt. VanScoy then proceeded to strike J.M. repeatedly. Grievant testified that Lt. VanScoy struck J.M. with his hands,elbows and knees in the head, abdomen and thighs. Officer Hall only saw Lt. VanScoy hit J.M. on top of the head. Officer

Adkins was also present in J.M.'s room at the time, but he did not testify at the level four hearing.

Grievant testified that, during the physical altercation between Lt. VanScoy and J.M., both parties were yelling, and that each time he was struck, J.M. raised his hands to block the blows and screamed louder at the lieutenant. However, no evidence indicated that J.M. ever struck Lt. VanScoy. After J.M. had been struck several times, Grievant decided to intervene. He perceived that Lt. VanScoy “went after” J.M. more viciously as J.M. screamed and put his hands up. Therefore, Grievant went over to J.M., put his hands on J.M.'s arms and told him to calm down. J.M. had his eyes closed, and Grievant asked J.M. to look at him, because Grievant was trying to assess whether J.M. was injured. J.M. then “slid to the floor,” and Lt. VanScoy ended the assault. Grievant testified that he was afraid to physically challenge Lt. VanScoy, because Lt. VanScoy was in a position of superiority at the time and is a physically larger person than Grievant.

Officer Hall witnessed Lt. VanScoy striking J.M., but he did not see what Grievant was doing. Officer Kellar did not see Grievant in J.M.'s room, but he saw that Lt. VanScoy and Officer Adkins “had J.M. against the wall.” When this incident was investigated, J.M. stated that Grievant “held” him while Lt. VanScoy assaulted him, but no witnesses or evidence offered in this grievance support J.M.'s version of events.

The group then proceeded to the next room, where Resident J.T.M. was seated at a desk. While Lt. VanScoy screamed in J.T.M.'s face, Officer Adkins held J.T.M.'s headup, underneath the chin, to force J.T.M. to look at Lt. VanScoy. (See footnote 8) At one point during the encounter, Lt. VanScoy pushed J.T.M. in the chest, causing his chair to tip backwards, and it ended up leaning against the bed. Grievant was in J.T.M.'s room when these events occurred. J.T.M. was not injured. (See footnote 9)

After visiting some other residents' rooms, Grievant and some of the officers returned to J.T.M.'s room and found a letter he had been writing to his mother, which stated that “kids” were getting “beaten up by the lieutenant.” Resp. Exhibit 12. Grievant removed the letter from J.T.M.'s room at Lt. VanScoy's direction and later gave it to Captain Elder during the investigation of the incident. Grievant was not charged with any misconduct with regard to the letter.

After “visiting” several rooms on the floor, the group returned to J.M.'s room, because Lt. VanScoy wanted to make sure J.M. was not injured. Finding a few bruises on J.M.'s body, Lt. VanScoy instructed J.M. to tell anyone who asked that he had received the injuries while playing basketball.

The lieutenant also told J.M. that, if he reported the incident, Lt. VanScoy would say that J.M. had made a threatening gesture toward him.

As the officers were leaving Standard III, Grievant asked Lt. VanScoy if he (Grievant) should prepare a report of the incident. Lt. VanScoy told Grievant that he would personally take care of filing a report. He also told Grievant and the other officers that, ifany questions were asked, the “story” would be that J.M. had approached Lt. VanScoy in a threatening manner, and Lt. VanScoy had only responded in self defense. Officers Stout and Hall, along with Grievant, testified to Lt. VanScoy's orders regarding filing of a report and the “story.”

The following day, May 18, 1998, Lt. VanScoy asked Grievant to help him complete a “Passive Physical or Mechanical Restraint Form.” Respondent's Exhibit 9. This form is completed by any officer who is required to physically respond to a resident who is behaving violently. Lt. VanScoy completed the portions of the form describing the incident, stating that “[J.M.] jumped up and entered my personal space with his fists clenched in a threatening manner.” He then described his response to J.M.'s behavior, stating that he (Lt. VanScoy) “placed [his] hands on [J.M.'s] chest and pushed him out of [his] personal space.” Lt. VanScoy reminded Grievant what the agreed “story” was, and told Grievant to complete the counseling portion of the form, consistent with Lt. VanScoy's version of events. Grievant completed the form, stating that he had confronted J.M. regarding his threatening advance toward Lt. VanScoy with clenched fists, counseling the resident with regard to controlling his anger and frustration.

J.M. was examined by Jan Smiley, R.N. at WVIHY, at 7:00 a.m. on May 18, 1998, the day following the incident. The portion of the Restraint Form completed by her indicated that the only visible sign of injury on the resident was a “healing bruise/abrasion on left side of back/shoulder.”

Also on May 18, Grievant attempted to report the events of the preceding day to his supervisor, Unit Manager Matthew Biggie. Grievant testified that, when he told Mr. Biggie he needed to tell him something, Mr. Biggie said “I can't talk to you. My hands are tied.” The record contains no explanation for Mr. Biggie's response, and he did not testify at the level four hearing.

Captain Roger Elder, Chief Correctional Officer at WVIHY, was ordered by Superintendent James Ielapi to investigate the events of May 17, 1998. Captain Elder interviewed all of the employees and residents involved. Grievant was initially interviewed on the evening of May 18, 1998, and he related to Captain Elder the story he was instructed by Lt. VanScoy to tell. This interview was not recorded.

However, on the following day, Grievant was summoned to Superintendent Ielapi's office, where he was asked by Superintendent Ielapi and Mr. Biggie whether he had anything more to tell. At that time, Grievant decided to tell the truth, and he did so in a recorded interview with Captain Elder (Respondent's Exhibit 8).

On May 20, 1998, Grievant was suspended without pay for fifteen days, pending investigation, and then suspended for an additional fifteen days on June 2, 1998. Grievant was summoned to Superintendent Ielapi's office on June 15, 1998, at which time Grievant was told termination had been recommended. Grievant testified that he understood Superintendent Ielapi to say that he was being dismissed, and he did not know that it was merely a recommendation from Director Carter. (See footnote 10) Therefore, Grievant merely asked Mr. Ielapi if he had any advice, and made no further statement. Superintendent Ielapi testified that Grievant's response was not unusual for an employee being notified of his recommended dismissal. Grievant was dismissed by letter of the same date, June 15, 1998. Although somewhat lengthy, a large portion of Director Carter's dismissal letter will be included here, because its details are crucial to the outcome of this Decision:

> The purpose of this letter is to advise you that we have concluded our review of the investigation regarding an incident on May 17, 1998, and to advise you of my decision to dismiss you from your position of Correctional Counselor II with the West Virginia Division of Juvenile Services, **for gross misconduct**, effective immediately. . . .
>
> On Monday, June 15, 1998, Superintendent James Ielapi held a discussion with you regarding the nature of your misconduct. Mr. Ielapi shared with you that disciplinary action was being considered. Your response was “I do not have anything to say, do you have any advice for me and I understand.” After reviewing your response(s) and the circumstance, I have decided that this dismissal is warranted.
>
> So you may understand the specific reasons for this personnel action, I recount the following events which were revealed as a result of the investigation of this matter:
>
>> On Sunday, May 17, 1998, prior to 12:00 p.m. loud shouts were being made by residents of Standard Building. These shouts were reportedly in the form of sexual obscenities directed toward female staff and residents.
>>
>> Verbal complaints were filed regarding this negative resident behavior.

At the direction of Lt. VanScoy, a group of male staff responded to Standard Building.

At approximately 12:15 p.m. you entered Standard III with the group of male staff, where Lt. VanScoy shouted at the residents while pacing up and down the hallway. Lt. VanScoy was shouting words to the effect that “you have not learned your lesson yet.”

Shortly thereafter, you entered three (3) residents' rooms:

1. Resident PT . . . was in his . . . room . . . when you, Lt. VanScoy and Recreation Specialist Cody entered his room. Lt. VanScoy forcefully pushed PT into a corner, and while yelling and cursing him, threatened to “Rip his head off and shit down his neck.” . . .

2. Resident JTM . . . was in his . . . room . . . . You, Lt. Vanscoy, [CO] Adkins, [CO] Keller, Recreation Specialist Specialist Codyand [CO] Hall entered his room. [CO] Adkins grabbed his neck and held his head up making him look at Lt. VanScoy. Lt. VanScoy leaned over the corner of his desk, shouting at him. Lt. VanScoy pushed JTM while seated in his chair, backward into his bed. [CO] Adkins was pushing up under his jaw.

3. Resident JM . . . was in his . . . room . . . . You, Lt. VanScoy, and [CO] Adkins entered his room. Lt. VanScoy picked him up from a prone position . . . and slammed him into the window screen and wall. **While you held him against the wall, Lt. VanScoy continuously hit him in the stomach, ribs and head with closed fist.** Additionally, JM was kneed in the stomach, leg and groin, as well as elbowed in the back by Lt. VanScoy.

In all three cases cited above you and the other staff members left the residents unattended. You failed to seek medical attention for the residents and/or report mechanisms.

* * *

> As a Correctional Counselor, you were employed to perform rehabilitative services at a State correctional institution . . . . You have been expected to provide for the security of the institution, maintain control over the residents, provide for the residents' welfare while encouraging their rehabilitation within the structured programs of the facility, and protect the general public. Your actions, as described below, have not only compromised the security of the institution, but also your leadership position with the residents. Your actions diminish the effectiveness of your leadership and is not acceptable behavior for residents to emulate. Therefore, I conclude that you have failed to fulfill the duties and responsibilities of your position as a correctional counselor.
>
> **I find that your willful and intentional disrespectful conduct is an act of insubordination. Your statements demonstrate a blatant disregard for the authority of the management of [WVIHY].** . . . Insubordination encompasses more than an explicit order and subsequent refusal to carry it out. It also involves a flagrant or willful delay or disregard for implied directions of an employer.
>
> The State of West Virginia and its agencies have reason to expect their employees to observe a standard of conduct which will not reflect discredit on the abilities and integrity of their employees, or create suspicion with reference to their employees' capability in discharging their duties andresponsibilities. I believe the nature of your misconduct is sufficient to cause me to conclude that you did not meet a reasonable standard of conduct as an employee of the West Virginia Division of Juvenile Services on May 17, 1998, thus warranting this dismissal.

Grievant's Exhibit 2 (emphasis added). (See footnote 11)

Discussion

Pursuant to W. Va. Code § 29-6A-6, the burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. 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).

Director Carter's letter dismissing Grievant from employment with DJS is somewhat convoluted, but it appears that she terminated Grievant for “gross misconduct” and for insubordination. At the level four hearing, Respondent for the first time charged that Grievant had violated various provisions of Division of Corrections policies, including policies dealing with child abuse. However, none of

these policies were cited in the quite extensive letter which explained the reasons for Grievant's dismissal or at any other time prior to the level four hearing. Accordingly, because Grievant was not given prior notice of any of these charges, and he had no opportunity to respond to them, only the charges stated in Ms. Carter's termination letter are properly before this Grievance Board. Yates v. Civil Service Comm'n, 154 W. Va. 696, 178 S.E.2d 798 (1971); See Frisenda v. Divisionof Corrections, Docket No. 97-CORR-373 (March 24, 1998).

Director Carter stated in the termination letter that Grievant was being dismissed in accordance with the Division of Personnel's Administrative Rule, Section 12.02, which allows dismissal of classified employees “for cause.” The West Virginia Supreme Court of Appeals has determined that classified employees may be dismissed for misconduct which is of a “substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention.” Syl. Pt. 1, Oakes v. W. Va. Dept. of Fin. and Adm., 164 W. Va. 384, 264 S.E.2d 151 (1980); See Westfall v. W. Va. Dept. of Trans., Docket No. 97-DOH-349 (Jan. 16, 1998); Hercules v. W. Va. Div. of Highways, Docket No. 97-DOH-006 (Apr. 17, 1997). Faced with defining “gross misconduct” justifying discipline or dismissal, the Court in Thurmond v. Steel, 159 W. Va. 630, 225 S.E.2d 210 (1976) declined, deciding that the severity of the employee's misconduct should be evaluated and considered in the context of the circumstances of each case.

Factually, the only charges against Grievant which have been proven are that he was present in the rooms of residents P.T., J.T.M., and J.M. while those residents were being interrogated verbally and/or physically by Lt. VanScoy. The most serious of charges, i.e. that Grievant “held [J.M.] against the wall” while Lt. VanScoy continuously hit him, is not supported by any evidence. Captain Elder testified that he simply did not believe J.M.'s allegation in this regard, and he did believe Grievant's explanation that he was touching J.M. while trying to calm him down. Officers Hall and Kellar, who were both eye witnesses to Lt. VanScoy striking J.M., did not see Grievant “holding” J.M. In fact, Officer Kellar stated that he saw Officer Adkins and Lt. VanScoy holding J.M. against the wall, notGrievant. Both of the investigations into this incident, by Captain Elder and by the Department of Health and Human Resources (Respondent Exhibit 5), concluded that Grievant did not hold J.M. in order to enable Lt. VanScoy to continue to strike him. Therefore, it is difficult to understand how Director Carter concluded that this did, indeed, occur. This charge has not been proven by Respondent.

Respondent has also failed to prove insubordination in this case. Insubordination involves the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle v. Bd. of Directors, So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). However, this Grievance Board also recognizes that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988), citing Weber v. Buncombe County Bd. of Educ., 266 S.E.2d 42 (N.C. 1980). In Sexton, the Administrative Law Judge noted that insubordination had been shown through an employee's "blatant disregard for the authority" of his second-level supervisor. Sexton, supra at 10. Moreover, "employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990), citing Meads v. Veterans Admin., 36 M.S.P.R. 574 (1988); Daniel v. U.S. Postal Serv., 16 M.S.P.R. 486 (1983); Davis v. Smithsonian Inst., 13 M.S.P.R. 77 (1983).

It is difficult to understand why Director Carter felt Grievant was insubordinate under the circumstances presented here. In fact, it was Grievant's obedience of direct ordersfrom a superior, Lt. VanScoy, that led to his dismissal. The only conduct charged in the dismissal letter which DJS has proven Grievant engaged in was failing to stop Lt. VanScoy and then not reporting the lieutenant's actions. However, Grievant was placed in the unenviable position of being told specifically by Lt. VanScoy to lie about what happened, a directive which Grievant later reconsidered. It would seem that Grievant was expected to be insubordinate in one respect, i.e., disobeying Lt. VanScoy, in order to comply with institutional policies. This is a difficult choice to expect an employee to make.

It is undisputed that, when Grievant was functioning in a security-related capacity, Lt. VanScoy, as shift commander, had the authority to give him orders. Additionally, Grievant testified that Lt. VanScoy had, in the past, been consulted on Grievant's performance evaluations, in order to provide input regarding Grievant's performance as a fill-in correctional officer. To compound the situation, Lt. VanScoy had been employed at WVIHY for a number of years, (See footnote 12) while Grievant had only been there a few months. It is simply unreasonable to expect Grievant, under these circumstances, to have disobeyed the direct orders of Lt. VanScoy. Ironically, just prior to this incident, Grievant had been formally commended for his willingness to assist the security staff and for

displaying the spirit of “teamwork,” which is arguably what he did by submitting to Lt. VanScoy's authority. The undersigned does not find his conduct to be insubordinate.

Where the employer fails to establish all of the charges which were alleged to support a particular disciplinary action, the penalty imposed must be reviewed to determine if it is excessive in the circumstances. Hunt v. W. Va. Bureau of Employment Programs,Docket No. 97-BEP-412 (Dec. 31, 1997); See Walters v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-086 (Jan. 23, 1995). The only charge that has been proven is that Grievant was present in the rooms of three residents who were subjected to verbal and/or physical abuse by Lt. VanScoy. Respondent contends that it was Grievant's responsibility to stop the abuse as it occurred and report it to WVIHY administrators, and his failure to do so warranted termination from employment.

Grievant argues that dismissal is far too severe a penalty for his transgressions. A punishment may be determined to be excessive when the employee establishes that it was clearly disproportionate to the offense, displaying an abuse of agency discretion. Hunt, supra; Jones v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Overbee v. W. Va. Dept. of Health & Human Resources, Docket No. 96- HHR-183 (Oct. 3, 1996). In addition, Overbee, supra, provides that “deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation.” However, in Hercules, supra, the Grievance Board held “[d]ismissal as a disciplinary measure must be reserved for circumstances when nothing else but the removal of the employee from the work environment will do.”

Grievant is not the first employee to be dismissed for his response to a superior's misconduct. In Viers v. W. Va. Dept. of Transp., Docket No. 97-DOH-562 (March 25, 1998), the grievant was discharged for fighting with his supervisor, who had attacked Grievant without provocation. The Grievance Board found that dismissal was an excessive punishment under these circumstances. The grievant had reacted as best he could in a difficult situation, entirely brought upon him by a superior's misconduct, and removing him from the workplace served no public interest. Respondent has not proven that Grievant's actions rise to the level of misconduct which warrants removal. See Oakes, supra. This was a highly unusual situation, involving various circumstances which merit mitigation of the punishment Grievant received. However, this is not to say that Grievant's misconduct was not of a serious nature. He did observe juveniles being treated abusively, did not report the abuse, and then attempted to assist the perpetrator in covering up the incident.

W. Va. Code § 29-6A-5(b) provides authority to an administrative law judge of the Grievance Board to "provide such relief as is deemed fair and equitable." While Grievant's conduct did not justify dismissal from employment, it does merit punishment. Employees of juvenile correctional facilities should not take lightly their responsibility for the health and safety of the minors in their care. Therefore, while Grievant should not have been dismissed, the undersigned finds that an appropriate penalty for his conduct is a 45-day suspension without pay. (See footnote 13) See Hunt, supra. This discussion will be supplemented by the following formal findings of fact and conclusions of law.

Findings of Fact

1. Grievant was employed as a Correctional Counselor II at WVIHY from October of 1997 until his dismissal on June 15, 1998.

2. On May 15, 1998, Grievant received a commendation from his supervisor and the superintendent of WVIHY for his assistance to correctional officers at the institution; he was complimented for his exemplary attitude and spirit of teamwork. 3. On May 17, 1998, residents of Standard III at WVIHY yelled obscenities from their windows at a female employee of the institution.

4. In response to the residents' conduct, Lt. Donald VanScoy, shift commander, assembled a group of correctional officers and other employees, including Grievant, to close the residents' windows and make a "show of force."

5. Grievant was present in the rooms of three residents while Lt. VanScoy was verbally and physically abusive to the residents, including hitting and striking Resident J.M. several times.

6. Resident J.M. received a bruise to his chest during the altercation with Lt. VanScoy, but he was not otherwise injured.

7. Grievant was instructed by Lt. VanScoy to say that J.M. had threatened Lt. VanScoy, and that he had only pushed J.M. against the wall.

8. Grievant asked if he should prepare a report regarding the incident, and Lt. VanScoy said he (Lt. VanScoy) would take care of it.

9. At the time of the incident, Lt. VanScoy was the security officer in charge of the institution, and, at such times, Grievant was directed to obey Lt. VanScoy's orders.

10. Because Grievant assisted with security at the institution from time to time, Lt. VanScoy

was consulted regarding Grievant's performance evaluations.

11.

Grievant did not report Lt. Vanscoy's conduct to WVIHY officials.

12. Grievant assisted Lt. VanScoy in lying about the incident on May 17, 1998, stating on a Restraint Form and during verbal questioning that Resident J.M. had been the aggressor.

13. Grievant told the truth about the incident the day following his initial interviewwith the investigating officer.

14. Grievant was suspended without pay, then subsequently dismissed for gross misconduct and insubordination.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee 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).

2. Classified employees may be dismissed for misconduct which is of a “substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention.” Syl. Pt. 1, Oakes v. W. Va. Dept. of Fin. and Adm., 164 W. Va. 384, 264 S.E.2d 151 (1980); See Westfall v. W. Va. Dept. of Trans., Docket No. 97-DOH-349 (Jan. 16, 1998); Hercules v. W. Va. Div. of Highways, Docket No. 97-DOH-006 (Apr. 17, 1997).

3. Insubordination involves the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle v. Bd. of Directors, So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989).

4. Respondent did not prove by a preponderance of the evidence that Grievant held a juvenile resident against a wall in order to assist a correctional officer in physically abusing the resident.

5. Respondent proved by a preponderance of the evidence that Grievant waspresent while a correctional officer was abusive to juvenile residents, did not report the abuse, and was untruthful about the incident.

6.

Grievant's conduct was not insubordinate.

7. Where the employer fails to establish all of the charges which were alleged to support a particular disciplinary action, the penalty imposed must be reviewed to determine if it is excessive in the circumstances. Hunt v. W. Va. Bureau of Employment Programs, Docket No. 97-BEP-412 (Dec. 31, 1997); See Walters v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-086 (Jan. 23, 1995).

8. A punishment may be determined to be excessive when the employee establishes that it was clearly disproportionate to the offense, displaying an abuse of agency discretion. Hunt, supra; Jones v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Overbee v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-183 (Oct. 3, 1996).

9. Grievant established that dismissal was disproportionate to the charges ultimately proven in this matter. A 45-day suspension without pay is the maximum appropriate penalty in these circumstances. See Hunt, supra.

Accordingly, this grievance is **GRANTED**, and DJS is ORDERED, consistent with this Decision, to reinstate Grievant to his position as a Correctional Counselor II at WVIHY, with back pay for the period since his dismissal, except for a 45-day suspension period.

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 grievanceoccurred, and 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: December 14, 1998 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

WVIHY is a maximum security facility for juvenile offenders who have committed serious offenses, including murder. Juvenile services and facilities were formerly within the Division of Corrections. However, the Division of Juvenile Services ("DJS") was created in early 1998, and DJS continues to utilize all former policies of the Division of Corrections.

Footnote: 2

Neither of the parties appeared to have any difficulty with the concept of a counselor functioning as a correctional officer when needed. However, Grievant had previously been employed as a correctional officer at Mt. Olive Correctional Complex, so he had been trained as an officer at the West Virginia Corrections Academy.

Footnote: 3

As shift supervisor, Lt. VanScoy was the correctional officer responsible for all security matters during that particular shift. All security personnel were under his command and supervision.

Footnote: 4

The officers who testified in this case stated that the residents had been warned that the windows would be closed if any improper behavior occurred, so they were not surprised that Lt. VanScoy wanted everyone to get together to go close the windows on Standard III. Closing windows under similar circumstances had been a past practice at the institution.

Footnote: 5

In view of state law requiring that juvenile criminal records be kept confidential, only the initials of the juvenile residents of WVIHY will be used in this Decision. See W. Va. Code § 49-5-17.

Footnote: 6

Throughout the duration of the "visits" to the residents' rooms, officers or personnel who were not actually inside the rooms were usually standing in the hallway just outside the particular room, viewing the events as they occurred.

Footnote: 7

There was some speculation by witnesses that J.M. was pretending to be asleep, because he heard Lt. VanScoy yelling and knew the officers were on their way.

Footnote: 8

DJS officials alleged that Officer Adkins was applying some sort of "pressure hold" under J.T.M.'s chin, but this allegation is unsupported by any evidence introduced in this grievance.

Footnote: 9

Other residents' rooms were entered during this series of events, but Grievant was only charged with misconduct regarding P.T., J.T.M., and J.M. Accordingly, the other residents need not be discussed here.

Footnote: 10

However, Grievant's suspension letters clearly notified him that he could meet with Superintendent Ielapi to contest

the charges.

Footnote: 11

Director Carter's letter is unclear, at best, regarding which of Grievant's actions were considered "gross misconduct" or "insubordinate." In addition, she makes no mention of Grievant's initial assistance to Lt. VanScoy in "covering up" what happened. Therefore, Grievant was clearly not charged with any misconduct in that regard.

Footnote: 12

Lt. VanScoy was also dismissed because of this incident, and he has a grievance currently pending at level four.

Footnote: 13

Grievant had also requested attorney fees, but the Grievance Board does not have the authority to grant attorney fees at level four. Viers, supra; Hall v. W. Va. Dept. of Transp., Docket No. 96-DOH-433 (Sept. 12, 1997); Chafin v. Boone County Health Dept., Docket No. 95-BCHD-362 (June 21, 1996).