JEFFREY ADKINS,

Grievant,

v. **DOCKET NO. 98-DJS-266**

WEST VIRGINIA DIVISION

OF JUVENILE SERVICES,

Respondent.

DECISION

Grievant, Jeffrey Adkins, challenges his termination from employment as a Correctional Officer I for the West Virginia Industrial Home for Youth (WVIHY). He seeks reinstatement and back pay. This matter was filed directly at level four on July 22, 1998. A level four hearing was held in the Grievance Board's office in Morgantown, West Virginia, on October 27, 1998. Grievant was represented by counsel, George Surmaitis, and Respondent was represented by Assistant Attorney General Scott McKinney. This grievance became mature for consideration on December 17, 1998, upon receipt of the parties' written proposals.

Background and Arguments

Grievant's termination resulted from an incident on May 17, 1998, during which one or more juvenile residents of WVIHY were physically and/or verbally abused. (See footnote 1) Grievant was terminated by Division of Juvenile Services (DJS) Director Phyllis Carter, by correspondence dated June 15, 1998. The termination letter stated as follows:

> 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 Officer I 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 it is not fair, I have seen a lot worse happen around here, like Sgt. Collins and Lt. Winters. Also, I have worked hard for this institution and do not feel this is fair. I am making a request to see the completed investigation and face my accusers! After reviewing your response 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. Donald VanScoy, a group of male staff responded to Standard Building.

At approximately 12:00 noon, you entered the visitation area of Standard Building, where Lt. VanScoy instructed Case Manager Jackie Valentine to close the visitation area and to allow no visitors or resident movement until further notice.

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

Shortly thereafter, Lt. VanScoy entered three (3) residents' rooms:

1. Resident PT . . . was in his . . . room . . . when Lt. VanScoy, Correctional Counselor Hayes 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.” You, CorrectionalOfficers Kellar, Hall, and Stout were in the hallway observing these events.

2. Resident JTM . . . was in his . . . room . . . . You, Lt. Vanscoy, [CO] Kellar, Correctional Counselor Hayes, Recreation Specialist Cody and [CO] Hall entered his room. You grabbed his neck and held his head up making him look at Lt. VanScoy. Lt. VanScoy leaned over the corner of his desk, yelling at him. Lt. VanScoy pushed JTM in the chest while seated in his chair, backward into his bed. You were pushing up under his jaw.

3. Resident JM . . . was in his . . . room . . . . You, Lt. VanScoy, and Correctional Counselor Hayes entered his room. Lt. VanScoy picked him up from a prone position . . . and slammed him into the window screen and wall. While you were holding 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 these matters through the proper Institutional mechanisms.

* * *

As a Correctional Officer, you were employed to perform security work at a State juvenile 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 officer.

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]. The charge of insubordination is commonly related to an employee's refusal to obey an order of a supervisor. Employees are expected to adhere to the directives of their supervisors. The refusal of an employee to perform any lawful directive by their supervisors is cause for severe disciplinary action. Anemployee is expected to respect authority and does not have the unfettered discretion to delay, disobey or ignore clear instructions. 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 and responsibilities. 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.

Joint Exhibit 1 (emphasis added).

Although Director Carter's letter is somewhat convoluted, it appears that the wrongful acts with which Grievant is charged include “pushing up under [JTM's] (See footnote 2) jaw,” holding JM while Lt. VanScoy struck him, and failing to seek medical attention for residents or report the incident. Respondent contends that Grievant used excessive force against residents and failed to report the abuse inflicted by Lt. VanScoy, violating state law and institutional policies.

Grievant contends that the only charge Respondent has proven in this grievance is that he failed to report Lt. VanScoy's actions. That being his only transgression, the penalty of discharge is, Grievant argues, too severe.

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 againstan 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). 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. Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998); Miller v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997).

At the level four hearing, Grievant exercised his right not to testify, pursuant to W. Va. Code § 29-6A-6. Therefore, Grievant argued that a taped interview conducted by Captain Elder, the investigating

officer, and a report prepared by Captain Elder containing summaries of Grievant's statements, should not be introduced into evidence. The parties requested a ruling on this issue prior to the submission of their post-hearing arguments, so the undersigned issued an order dated November 30, 1997, finding that W. Va. Code § 29-6A-6 does not prohibit the admission of these documents into evidence. (See footnote 3)

The first of the allegations against Grievant involves an alleged “pressure hold” he used on Resident JTM. WVIHY contends that, while trying to force JTM to look at Lt. VanScoy while being interrogated, Grievant exerted force upon an area under the jaw or chin area, which causes extreme pain. Various correctional personnel at WVIHY testified that such pressure holds are sometimes used in order to control inmates. Correctional Counselor Todd Hayes, who was in JTM's room at the time, testified that it appeared that pressure was being applied by Grievant with two fingers under JTM's jaw, but he could not tell how much. He did not see any bruises or marks on JTM after the incident, and he did not say that JTM exhibited any symptoms of being in pain.

Recreation Specialist Cody and Lt. VanScoy both testified that Grievant lightly placed two fingers under JTM's chin to get him to look at Lt. VanScoy. Both stated that there did not appear to be any pressure being applied. In his recorded interview with Captain Elder, Grievant also stated that he only placed his fingers under JTM's chin to turn his head, without applying a “pressure hold.”

There is insufficient evidence to conclude that Grievant used excessive force on JTM. Only Mr. Hayes stated that pressure was used, but he could not testify as to how much. Correctional officers who testified at level four explained that, when pressure points are used for control, the pain is quite intense, usually causing an immediate physical response. There is no evidence to indicate that JTM exhibited any signs of pain or any other response to the alleged pressure hold under his jaw. Respondent has failed to prove this charge.

The second allegation is that Grievant assisted in holding JM while Lt. VanScoy repeatedly struck him. In his taped interview, Grievant stated that, when he saw Lt. VanScoy going after JM, he (Grievant) ran over and attempted to place his hands on JM's arm. At that point, Lt. VanScoy “slammed” JM into the window. Grievant did not explain why he was attempting to hold onto JM's arm. Then, as Lt. VanScoy began striking and kneeing JM, Grievant stated that he placed one arm behind JM's head_to keep it from striking the wall_and used the other to balance himself against the wall.

Counselor Hayes was in JM's room, and testified that, after Lt. VanScoy threw JMagainst the screen, Grievant was holding onto JM's shoulder and lower arm, facing JM, while Lt. VanScoy was striking JM with his hands and knees. Mr. Hayes stated that it appeared that Grievant was restraining the resident while Lt. VanScoy struck him. Although he was in JM's room for the entirety of the assault, Mr. Hayes never saw Grievant's arm behind JM's head, as Grievant described in his interview.

Correctional Officer Hall observed the events in JM's room from the hallway. He testified that he saw Lt. VanScoy and Grievant standing side by side, facing JM, and that together they forced JM against the wall. Grievant was holding onto JM's arm as they did this. At that point, another officer came out of JM's room, closing the door, so Officer Hall did not see anything more. Recreation Specialist Cody was standing in the doorway of JM's room, and he testified that it appeared that Grievant was standing “against” JM. However, he stated that it was difficult for him to see everything, because there were people blocking his view. (See footnote 4)

Captain Elder investigated the incident, but he was not present when it occurred. Nevertheless, he testified that he believed Grievant placed his arm behind JM's head to prevent it from hitting the wall. He stated he did not believe Grievant used any force on JM, in spite of the statements given by other witnesses. However, in his investigative report, prepared shortly after all of the interviews were conducted, Captain Elder stated “[i]t can reasonably [be] concluded that CO I Jeff Adkins assisted in the holding forcefully, residents in place to enable them to be struck, or yelled and cursed at[.]” Captain Elder wasnot questioned regarding this apparent discrepancy between his report and his level four testimony, and he made no attempt to explain it. Under cross examination, when Captain Elder was questioned regarding whether Grievant was abusive toward JM, he stated:

> A: No, sir. . . . I don't believe that his actions toward him, with regard to his arm behind his head, was an attempt to abuse [JM], it was to protect him.
>
> Q: And that helps you establish your case against Lieutenant VanScoy, doesn't it?
>
> A: Yes, sir, from what he told me.

An Administrative Law Judge is charged with assessing the credibility of the witnesses that appear before her. Lanehart v. Logan County Bd. of Educ., Docket No. 95- 23-235 (Dec. 29, 1995); Perdue v. Dept. of Health and Human Res./Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993). The United States Merit System Protection Board Handbook ("MSPB Handbook") is helpful in setting out factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984). Some factors to consider in assessing a witness's testimony are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Id. Additionally, the ALJ should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness' information. Id.

In the instant case, the testimony of three eye witnesses conflicts with Grievant's statements regarding his conduct in JM's room. Because his statements are contained only in a written, transcribed interview, it is impossible to assess Grievant's demeanor orattitude. Moreover, he was obviously motivated to be untruthful regarding his assistance in an assault upon a juvenile resident. The undersigned finds little evidence upon which to give Grievant' statements much credibility under these circumstances.

On the other hand, all of the witnesses at level four testified that they either saw Grievant holding or assisting in restraining JM in some fashion while he was struck, kneed or pushed by Lt. VanScoy. Also of significance is the fact that Officer Hall and Mr. Cody were witnesses testifying on Grievant's behalf, and both stated they saw him engaging in the conduct described. Moreover, no eye witnesses saw Grievant place his hand behind JM's head to prevent injury, as Grievant claimed. The level four witnesses seemed forthright in their testimony, and there are no known reasons why they would "conjure up" a story to incriminate Grievant. Grievant himself admitted that he initially attempted to grab JM's arm, just before Lt. VanScoy allegedly pushed him into the wall. He offered no explanation for this. The undersigned has no choice but to believe the eye witnesses who testified to what they saw, and all of them saw Grievant engage in the conduct of which he is accused.

As to the final allegation, Grievant does not dispute that he failed to report Lt. VanScoy's conduct. Rather, he contends that the alleged abuse did not consist of any closed fist punches, so the conduct

was not as severe as Respondent contends. Accordingly, Grievant believes that termination of his employment is too severe a penalty for his mere failure to report, so his punishment should be reduced. However, in view of the undersigned's finding that Grievant assisted in abuse inflicted on a resident, Grievant's argument in this regard need not be addressed.

Director Carter stated in the termination letter that Grievant was being dismissed inaccordance 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).

Grievant has been charged with gross misconduct and insubordination. The "term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." Graley v. W. Va. Parkways Economic Dev. and Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991) (citing Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985). The West Virginia Supreme Court of Appeals has stated "[i]t is not our intention to establish any general rule which will serve to define what is or is not gross misconduct justifying discipline, suspension or dismissal. Each case must be determined upon the facts and circumstances which are peculiar to that case. We have no desire to establish any rule which would exact from State employees such perfection of conduct as to create an intolerable burden. We would protect the employee against frivolous, trivial and inconsequential charges; or charges based on conduct which has no rational nexus with the duties to be performed or the rights and interests of the public." Thurmond v. Steele, 159 W. Va. 630, 225 S.E.2d 210 (1976). See Mindel v. United States Civil Serv. Comm'n,312 F. Supp. 485 (N.D. Cal. 1970); Kidd v. W. Va. Dept. of Tax and Revenue, Docket No. 91-T-127 (Dec. 17, 1991).

The Thurmond Court went on to state "[i]f, however, the misconduct is of a substantial nature and can be shown to affect directly the rights and interests of the public by bearing directly in a substantial manner on the duties which the employee is required to discharge, then the employing authority and

the Civil Service Commission have the power and the duty, upon such a showing, to enforce such remedial steps, including a dismissal, as may be found proper under all of the circumstances of the case." Thurmond, supra.

The undersigned finds that Grievant's physical assistance in the use of excessive force and abuse upon a juvenile resident constitutes gross misconduct. Although a correctional officer is charged with controlling inmates, he also must, especially when juveniles are involved, protect them from the misconduct of other officers. Moreover, juvenile institutions must be able to expect that those directly entrusted with the protection and control of their residents do not harm or abuse them. Not only did Grievant fail to protect JM, but he actively participated in an unjustified assault upon him. There is no evidence in this case which shows that excessive force was necessary in order to control or restrain JM. Grievant's actions are totally unacceptable conduct for a correctional officer, and Respondent was justified in terminating his employment.

As to the charge of insubordination, Respondent has failed to state what specific act Grievant committed which was allegedly insubordinate. 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 (May31, 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).

An employer cannot sustain a charge of insubordination when it does not specify what actions or conduct of an employee were allegedly disobedient. Respondent has failed to do so here. “In order to establish insubordination, the employer must not only demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, but that the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination.” Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995). In order to prove such a charge, the burden is upon the employer to specify what directive was issued to Grievant or what policy existed which he disobeyed. Zimowski v. Mineral County Board of Education, Docket No. 98-28-050 (July 20, 1998). Although insubordination was stated as a basis for

Grievant's discharge in the termination letter, Respondent did not address the issue of insubordination either at the level four hearing or in its post-hearing brief. Accordingly, Respondent has not proven by a preponderance of the evidence that Grievant engaged in insubordination.

Grievant has also been charged with violating policies of WVIHY. Policy 229.13, entitled "Institutional Child Abuse & Neglect," requires all employees to report any incident of child abuse to the Superintendent or his designee. Clearly, Grievant personallywitnessed and participated in child abuse upon a resident, in violation of this policy. (See footnote 5)

Additionally, Grievant has been charged with violating provisions of Policy Directive 400, "Employee Standards of Conduct and Performance." This policy is twenty pages in length, and it contains numerous provisions regarding offenses and discipline that may be administered. However, Respondent did not specify at the level four hearing what particular provisions of this policy were violated by Grievant, nor were the specific charges argued in Respondent's post-hearing brief. Therefore, it would be quite unfair to Grievant for the undersigned to engage in a guessing game as to which provisions of Policy 400 he was charged with violating. These charges have not been sufficiently stated by Respondent and cannot be addressed.

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 Officer I at WVIHY.

2. On May 17, 1998, residents of Standard III at WVIHY yelled obscenities from their windows at a female employee of the institution.

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

4. Grievant was present in the rooms of two residents while Lt. VanScoy was verbally and physically abusive to the residents, including hitting and striking Resident JM several times.

5. Grievant physically restrained Resident JM while he was struck by Lt. VanScoy.

6. Grievant touched Resident JTM under the chin to make him look at Lt. VanScoy while being interrogated, but he did not use a "pressure hold" on the resident. 7.

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

8. 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 has proven by a preponderance of the evidence that Grievant restrained a juvenile resident in order to assist a correctional officer in physically abusing the resident.

5. Respondent proved by a preponderance of the evidence that Grievant was present while another correctional officer was abusive to juvenile residents and did not report the abuse.

6.

Grievant's conduct was not insubordinate.

7. Grievant's actions constituted gross misconduct, for which termination of employment is proper.

8.

Grievant violated WVIHY policies by failing to report child abuse.

Accordingly, this 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, 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 toappeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

Date:

January 11, 1999

_____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

For a detailed account of the events which occurred that day, see the decision in a related grievance, Hayes v. W. Va. Division of Juvenile Services, Docket No. 98-DJS-220 (Dec. 14, 1998).

Footnote: 2

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

Footnote: 3

See Thomas v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR- 378 (June 12, 1997), where the Grievance Board held that a statement given in the course of an official investigation is not "compelled" testimony "in a grievance hearing" as contemplated by the statute.

Footnote: 4

Lt. VanScoy was the only other witness on Grievant's behalf; however, he was not questioned regarding Grievant's conduct in JM's room. This is presumably due to credibility issues, because the lieutenant has consistently denied that he struck JM in any fashion.

Footnote: 5

Grievant was first notified that this policy and Policy Directive 400 were being used as bases for the charges against

him at the level four hearing. However, in accordance with Hamilton v. W. Va. Div. of Highways, Docket No. 94-DOH-1116 (Nov. 29, 1995), notification of the legal or policy basis for the charges against an employee, provided at the level four hearing, is sufficient notice. To the extent that Hayes v. W. Va. Division of Juvenile Services, Docket No. 98-DJS-220 (Dec. 14, 1998), is inconsistent with this precedent, it is overruled.