THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

MICHAEL REPHANN,

Grievant,

v. **Docket No. 07-DJS-046**

Denise M. Spatafore

Administrative Law Judge

DIVISION OF JUVENILE SERVICES/

VICKI V. DOUGLAS JUVENILE CENTER,

Employer.

DECISION

Michael Rephann ("Grievant") initiated this proceeding on November 13, 2006, challenging a written reprimand he received on November 8, 2006. After denials at the lower levels, Grievant appealed to level four on February 5, 2007. Prior to convening the scheduled level four hearing, the parties agreed to submit this matter for a decision based upon the lower level record, on April 2, 2007. The parties having no desire to submit written arguments, this grievance became mature for consideration on that date. Grievant was represented in this matter by Jack Ferrell of CWA, and Respondent was represented by Steven Compton, Assistant Attorney General.

Synopsis

Grievant contends that, because his position is that of Field Training Officer ("FTO"), his

immediate supervisor is the director of the facility. Therefore, on the occasion in question, he believe he was not insubordinate or disrespectful when he refused an order of a higher-ranking correctional officer. Respondent argues that, on that particular day,Grievant was assigned to a correctional officer shift and was responsible to the officer in charge. Accordingly, his refusal of a direct order from his superior officer constituted disrespectul conduct, disruptive behavior, and failure to follow a supervisor's instructions. Grievant was also reprimanded for engaging in a verbal altercation with another officer on the same day.

The following material facts have been proven by a preponderance of the evidence of record.

Findings of Fact

1. Grievant has been employed by the Division of Juvenile Services ("DJS") at the Vicki V. Douglas Juvenile Center ("Douglas") for approximately four years.

2. Grievant's classification title is Correctional Officer 2 ("CO 2"). On an unspecified date, Grievant became the Field Training Officer ("FTO"), who is responsible for administering all continuing education and training for staff of the facility. Grievant continues to be classified as a CO 2.

3. The FTO is designated as being under the direct supervision of the facility director. However, Douglas Director Janice McCown informed Grievant, upon assigning him FTO duties, that he would be called upon from time-to-time to work as a correctional officer in a security position.

4. Because the facility was short-handed, Director McCown placed Grievant on the work schedule as a correctional officer on October 13, 2006, and on October 20, 2006, working a 7:00 a.m. to 7:00 p.m. shift each day. Grievant normally works from 8:00 a.m. to 4:00 p.m., when he is performing his duties as FTO. 5. When Director McCown placed Grievant on the schedule as a correctional officer on the two dates in question, she used red ink, to alert Grievant to the fact that he was on duty as an officer, not as FTO, and on a different shift than normal.

6. On October 13, 2006, Grievant did not understand that he was to be working as a correctional officer and performing security duties. Director McCown spoke with him that same day, explaining that the red shift notation meant that he was assigned as a security officer during that time period. She also telephoned Grievant the following week on Monday or Tuesday, to make sure that he understood he was assigned to work as an officer that Friday, October 20.

7. On October 20, 2006, Timothy Creasey, CO 3, was assigned as shift supervisor. At

approximately 7:05 a.m., Corporal Creasey radioed Grievant, asking him for assistance with a juvenile who was arriving at the institution under the influence of drugs/alcohol, who had been brought in by a law enforcement officer. Grievant refused to come to the intake area twice when he was requested to do so by Corporal Creasey.

8. After Corporal Creasey had contacted Grievant a third time for assistance, Grievant arrived at the intake area. He asked Corporal Creasey if there were other officers on duty. When told that there were two other officers “on the floor,” Grievant told Corporal Creasey that he had paperwork to do and that Corporal Creasey “needed to do this” [deal with the intake process for the resident] himself. Corporal Creasey again told Grievant he needed his assistance, to which Grievant responded “It's not going to happen.” Corporal Creasey advised Grievant that, if he was not going to help him, he should “clock out and go home,” and Grievant refused, returning to his normal work station. DJS Ex. 4 at Level III and Level III Tr. at pp. 13-14. 9. The other two officers on duty on October 20, 2006, were working at other posts which they could not leave to assist Corporal Creasey.

10. Later in the morning on October 20, 2006, Grievant got into a verbal altercation with another CO 2. When Officer Barrow, a more senior officer, told Grievant to do something, Grievant refused and angrily said “you will respect me.” This incident resulted in Officer Barrow's blood pressure rising to a very dangerous level, requiring him to see the facility's nurse and eventually going home.

11. On November 1, 2006, Director McCown issued a “Written Reprimand and Corrective Action Plan,” advising Grievant that his conduct violated DJS Policy Directive 4.01, “Employee Standards of Conduct and Performance,” specifically provisions prohibiting disrespectful conduct, disruptive behavior, and failure to follow supervisor's instructions. Grievant was advised that he is to obey superior's instructions at all times and that future infractions would constitute “willful noncompliance” with established procedures and would be subject to further discipline.

Discussion

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; *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

Grievant contends that he rightfully refused to assist Corporal Creasey, due to his belief that, as FTO, his direct supervisor and only superior is Director McCown. He also argues that he believed that, because Corporal Creasey was allegedly leaving the facility in the early afternoon on October 20, he did not have to perform security duties untilCorporal Creasey left. However, there is no explanation in the record for Grievant's assumption that was only to work security in the afternoon that day, when it is undisputed that he was scheduled for a 7 a.m. to 7 p.m. shift.

Although not worded as such, it is obvious that Grievant's conduct, while also clearly violating various DJS policies, also constitutes insubordination. “[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid.” *Butts v. Higher Education Governing Board/Shepherd College* 212 W. Va. 209, 569 S.E.2d 456 (2002). Although the cases are not clear as to what constitutes "wilfulness," the cases seem to suggest that for a refusal to obey to be "wilful," the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order. *See* Annotation, Dismissal of Teacher - "Insubordination", 73 A.L.R.3d § 3 (1977). *Butts, supra*.

Even if one assumes that Grievant honestly believed, for whatever reason, that Corporal Creasey did not have supervisory authority over him on the occasion in question, this does not excuse or alter the insubordinate nature of his conduct. Supervisor or not, Corporal Creasey made a valid request for assistance from a correctional officer, which Grievant wilfully, defiantly, and angrily refused. Grievant is well aware of the rules and procedures of the institution, and that correctional officers are needed and expected to assist with security-related situations. Corporal Creasey was obviously performing an intake procedures on a difficult juvenile, and it was Grievant's responsibility to respond to a reasonable request or order for assistance. In addition, Grievant's altercation the sameday with another officer provides further evidence of his defiant and angry attitude toward his fellow officers and his responsibilities as a correctional officer.

Not only was Grievant's conduct insubordinate, it also violated DJS policy directives regarding employee standards of proper conduct. Unquestionably, Grievant's behavior on October 20 was disrespectful, disruptive, and constituted failure to follow directives as expected.

“Considerable deference is afforded the employer's assessment of the seriousness of the

employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge cannot substitute her judgement for that of the employer. *Jordan v. Mason County Bd. of Educ.*, Docket No. 99-26-8 (July 6, 1999); *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997).

The undersigned finds that it was reasonable and within Respondent's discretion to issue a written reprimand for Grievant's misconduct. The following conclusions of law support this Decision.

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; *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). 2. “[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid.” *Butts v. Higher Education Governing Board/Shepherd College* 212 W. Va. 209, 569 S.E.2d 456 (2002). 3. Respondent has proven by a preponderance of the evidence that Grievant's conduct on October 20, 2006, was insubordinate and violated conduct standards applicable to DJS employees.

4. Respondent's imposition of a written reprimand for Grievant's behavior was not unreasonable or an abuse of discretion.

Accordingly, this grievance is **DENIED.**

This decision is final upon the parties and is enforceable in the Circuit Court of Kanawha County. Any party may appeal this decision to the Circuit Court of Kanawha County within thirty days of receipt of the decision. This decision is not automatically stayed pending the outcome of the appeal. W. Va. Code § 6C-2-5(c). Neither the West Virginia Public Employees Grievance Board nor any of its administrative law judges is a party to such appeal and should not be so named.

Date: April 30, 2007

DENISE M. SPATAFORE

Administrative Law Judge