WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

CHRISTOPHER STACY,

Grievant,

v. **Docket No. 2008-0280-MAPS**

DIVISION OF CORRECTIONS/

ANTHONY CORRECTIONAL CENTER,

Respondent.

D E C I S I O N

Grievant, Christopher Stacy, filed this grievance against Respondent, the West Virginia Division of Corrections/Anthony Correctional Center, on August 22, 2007, protesting a thirty-day suspension, without pay, for an incident involving use of force on an inmate.

The Statement of Grievance provides:

1. I Christopher V. Stacy did not violate policy directive 129.00.

2. I Christopher V. Stacy used appropriate level of force based on perceived threat of bodily harm, level or resistance which was verbal noncompliance, verbal aggression and violation of reactionary gap by offender.

3. There is disparity between this and other employee suspensions based on suspension guidelines.

4. On the day of the incident which resulted in suspension without pay other personnel had knowledge I was filing a report for hostile work environment to which there has been no response.

As relief Grievant seeks:

1. Dismissal of suspension without pay with full reimbursement of lost pay.

2. Personnel record expunged of all documentation related to this matter.

3. Investigation and resolution of hostile work environment claim filed in report dated 20 July 2007.

A Level I Hearing was held on September 13, 2007. A recommended decision was tendered by Hearing Examiner, Paula Gardner. Said decision was reviewed, concurred with and adopted by Jim Rubenstein, Commissioner of Corrections, on September 14,2007, whereby Grievant's thirty-day suspension without pay was affirmed. At the request of Grievant, both parties agreed to waive Level II (mediation), and a Level III hearing was convened in the West Virginia Public Employees Grievance Board's Beckley office on January 16, 2008. Grievant appeared in person and by representative John Robinson. Respondent was represented by John H. Boothroyd, Esquire. This case became mature for decision on February 15, 2008, the deadline for the submission of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant is employed as a Substance Abuse Therapist at the Anthony Correctional Center, a correctional facility designed to house and treat youthful criminal offenders. Grievant intervened and used physical force in a situation, where five other employees were present, with no less than three of the employees closer to the offender than Grievant. Evidence of record does not demonstrate the physical force used was justified, reasonably provoked and/or needed at the point that it was initiated and administered. The use of physical force because an inmate is verbally rude, loud or argumentative is unacceptable. There is no evidence that either the investigation or suspension was motivated by any bias or prejudice against Grievant. Grievant's actions were in violation applicable Policy.

This grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1 1. Grievant is employed by Respondent as a Substance Abuse Therapist I at the Anthony Correctional Center.

2 2. The Anthony Correctional Center is a correctional facility designated to house and treat youthful criminal offenders. *See* W. Va. Code § 25-4-1 (Centers for housing youthful male law offenders). The Anthony Correctional Center is operated under the authority of the West Virginia Division of Corrections ("Corrections").

3 3. On July 20, 2007, inmate Sergio Southall entered into Unit Management at the Anthony Correctional Center in order to speak with his case manager, Michelle Vance. Inmate Southall was upset over his inability to call his lawyer from the phone in his dorm because his lawyer's phone number had recently been changed .

4 4. Ms. Vance has an office in Unit Management and her office is one of several offices situated off of the common area/room in Unit Management. At the time inmate Southall was speaking with Vance, inmate Southall was standing just inside the doorway of Ms. Vance's office.

5 5. It is common practice of inmates to enter Unit Management when they need to discuss matters with staff who are located in the Unit Management offices. None of the staff members, including Grievant, expressed a problem with inmate Southall being in the unit management offices.

6 6. At the time inmate Southall was in the doorway speaking to Ms. Vance, there were a total of six staff members sitting in the office. These staff members were Michelle Vance, Rodney Pomeroy (Correctional Counselor I), David Delp (Case Manager), Grievant Christopher Stacy, Jeremy Summerlin (Correctional Counselor I), and Lieutenant JohnnieRichmond (Uniformed Correctional Officer). Lieutenant Richmond was in uniform at the time of the incident.

7 7. The doorway in which inmate Southall was standing cut to the far left in the front wall of Ms. Vance's office. From the perspective of inmate Southall, who was looking into Vance's office from the doorway, Pomeroy was sitting by the left wall, slightly to the left and roughly three to five feet ahead of inmate Southall. Ms. Vance was seated several feet behind Pomeroy, near the corner of

the left back wall. Delp was positioned against the back wall, on the other side of a round table between him and Vance. Grievant would have been the furthest away from inmate Southall, sitting close to the corner of the back, right side wall. Lt. Richmond was sitting inside the office, just to the right of the doorway and would have been approximately one or two feet away from inmate Southall. Summerlin was sitting behind a desk, which was located in the front right area of the office. Summerlin was to the right of inmate Southall and behind where Lt. Richmond was seated. In the common area of Unit Management, just outside of Ms. Vance's office, there was another staff member, Stormy Murphy (Substance Abuse Therapist I) making copies approximately five to six feet to the left of inmate Southall. (Personnel positioning is diagramed by Respondent Ex. 7 and 11).

8 8. In response to his inability to call his lawyer from the dorm, Ms. Vance informed inmate Southall that he needed to submit a new phone list sheet with the lawyer's new number and that she would make sure the changes were made so that inmate Southall could call from the dorm. Further, Ms. Vance asked inmate Southall about tworecent letters found in his possession and earlier disciplinary write- ups. (See footnote 1) Ms. Vance also addressed possible problems with inmate Southall's “blue sheet” hours and how it might affect inmate Southall's status in programming. (See footnote 2) The ramifications of these issues could negatively affect inmate Southall's incarceration. (See footnote 3) Southall was rude and argumentative during the discussion. The estimated length of the overall discussion was about three to five minutes before Grievant ended the discussion.

9 9. During the course of the conversation between offender Southall and Case Manager Vance, in an office setting with five other staff personnel in the immediate vicinity, Grievant took exception with inmate Southall and interrupted/ended the discussion with the use of force against inmate Southall.

10 10. Grievant communicated verbal comments and/or commands directed at inmate Southall. (See footnote 4) Within seconds Grievant physically compelled Southall out of Vance'soffice and into the common area of the unit . Grievant initiated contact with open hands and gave a grabbing kind of shove which knocked Southall back. Once past the office doorway, Grievant grabbled/shoved inmate Southall and turned him around . Grievant physically compelled Southall toward the exit/sally port (See footnote 5) door. Grievant had one or more hands on Southall's back and/or arm forcefully escorting him. Grievant pushed offender Southall out the sally port door at the other end of the common area. Grievant closed the sally port door and returned to Vance's office.

11 11. On July 20, 2007, the day of the incident, Acting Warden Hoke had Captain Jeff Brown, who was the “watch commander” and the highest ranking correctional officer at the Anthony Correctional Center at the time, speak with witnesses to determine what had happened.

12 12. The same day of the incident all seven staff members, including Grievant, wrote “incident reports” describing what had happened. All of these reports are a part of the record.

13 13. The incident reports of the six witnesses, David Delp, Michelle Vance, Jeremy Summerlin, Lt. Johnnie Richmond, Rodney Pomeroy, Stormy Murphy and Captain Jeff Brown, all attempt to describe the level of force used by Grievant. Each describes the events with minor deviation of specific wording and vantage point details but each depicts virtually the same chain of events.

14 14. The day of the incident, both Captain Brown and Acting Warden Hoke spoke with Grievant. Grievant's verbal account of the incident did not differ from his writtenincident report. Yet, it did not provide the facts specific information or detail of the other witnesses' account of events .

15 15. Grievant's incident report read:

On 20 July 2007, I, Substance Abuse Therapist I Chris Stacy was in Unit Management at approximately 1330 hours when Offender Sergio Southall #44049 was being interviewed by Case Manager Michelle Vance. Offender Southall was asking if he was going to recieve [sic] a write-up for an incident that occurred earlier. Offender Southall began to speak loud verbally and became agitated. I interrupted the interview and ordered Offender Southall to step out into the Sally Port of Unit Management. When he refused, I turned him around and escorted him to the Sally Port. End of Report.

16 16. Grievant made both Acting Warden Hoke and Captain Brown aware that he felt that the Anthony Correctional Center should not have to put up with an inmate who gets loud or does not obey orders.

17 17. Acting Warden Hoke's August 2, 2007, letter to Grievant, specifically noted “[y]ou also stated that you do not have to 'put up with mouthy inmates,' and that you would do the exact same thing in the future. That statement, your report and verbal account leads me [to] believe that you do not understand that what you did was not necessary nor do you fully grasp the consequences of your actions.” (Resp. Ex. 3).

18 18. Acting Warden Hoke discussed the matter with Terri Arthur from Corrections' Human

Resources in Charleston, West Virginia, on the day of the event. The decision was made to suspend Grievant for fifteen days pending the outcome of an investigation into the incident. Acting Warden Hoke then ordered Associate Warden Plumley to conduct an investigation into the incident. 19 19. Associate Warden Plumley reviewed all the incident reports and all of the witnesses were interviewed by Associate Warden Plumley on July 23, 2007. Witness interviews were recorded and transcribed. (Resp. Ex. 9).

20 20. On July 26, 2007, Associate Warden Plumley submitted to Acting Warden Hoke an "investigation summary." (Resp. Ex. 4). Plumley's findings and conclusions were:

> It was substantiated that Chris Stacy submitted a written report and verbal account of the incident which did not describe the incident in detail and failed to mention the extent of force used. It was also substantiated that Chris Stacy intervened and used physical force in a situation where five other employees were in the same office and one employee was outside the door and none of these employees felt that physical force was justified, according to Policy Directive, provoked and/or needed at the point that it was initiated and administered.

Further Associate Warden Plumley met with Acting Warden Hoke to discuss his investigation.

21 21. Acting Warden Hoke discussed the incident, Plumley's report and Grievant's explanations with Wayne Armstrong, Director of Human Resources for Corrections. It was determined that Grievant's use of force was unjustified and outside of policy guidelines. Respondent was of the opinion that termination was not warranted, but that a suspension of thirty days was appropriate. This suspension included the fifteen days that Grievant had been suspended pending the investigation.

22 22. In the August 3, 2007, letter of suspension, Acting Warden Hoke informed Grievant that under Policy Directive 129.00 Grievant's use of force was considered a "failure to comply with policy directives, operational procedures, or post orders," "instances of inadequate or unsatisfactory job performance," "disruptive behavior," and "physical abuse of an inmate." (Resp. Ex. 1). Among other information the letter noted that:

> On 26 July 2007 an investigation was conducted by Associate Warden of Programs Marvin Plumley. It was substantiated that you submitted a written report and verbal account of the incident that did not describe the incident in detail and failed to mention the extent of force used. It was also substantiated that you intervened and used physical force in a situation where six other employees were present, with three of the employees closer to the offender than you were. There is no evidence to show that physical force was justified, according to Policy Directive 129.00, provoked and/or needed at the point that it was initiated and administered.

23 23. Grievant admits that he did not feel threatened when seated in Vance's office.

24 24. Grievant decided on his own to end the ongoing discussion between inmate Southall and Southall's case manager, Michelle Vance. Prior to ending the discussion, Grievant had not been an active participant in the discussion.

25 25. It is common for inmates to get argumentative at the Anthony Correctional Center. (Testimony of Captain Brown). Argumentative language, in and of itself, is not recognized as justification for use of force against an inmate. (Resp. Ex. 9).

26 26. Staff at the Anthony Correctional Center are taught that when giving an inmate a verbal direction or order, an inmate should be given sufficient time to process and comply with the verbal direction. If the inmate then fails to comply with the order, staff should repeat the verbal direction. – (See footnote 6) 27 27. Grievant did not attempt to ask inmate Southall to calm down, lower his voice or adjust his conduct in any manner. Grievant did not attempt to defuse the “situation,” instead he “snapped” or “exploded.” At the same time he first spoke to inmate Southall, Grievant was also getting out of his seat and quickly approaching Southall.

28 28. Inmate Southall was provided no more than a few seconds to react to Grievant's command. The verbal directive was issued suddenly when inmate Southall was actively engaged in a discussion with Case Manager Vance.

29 29. The force used by Grievant would be likened to “intermediate control tactics hard” which is defined under Policy Directive 312.02 (Less-Lethal Use of Force), as “tools or techniques when applied in accordance with manufacturers' recommendations and/or approved training guidelines which have a higher potential for injury but are less likely to cause permanent injury or death.” The use of “intermediate control tactic hard” is justifiable when lower levels of control, i.e., officer presence, verbal direction, intermediate control tactics soft, have failed or been deemed unsafe to attempt.

30 30. Grievant did not make any attempt to utilize Lieutenant Richmond in his attempt to control inmate Southall. At the time of Grievant's intervention, Lt. Richmond was seated approximately one foot away from inmate Southall.

31 31. Security at the Anthony Correctional Center is the primary job duty of uniformed correctional officers, such as a Lt. Richmond. Correctional officers are considered “sworn staff” under Policy Directive 312.02 and are staff “whose job descriptions are empowered by the West Virginia

State Code to control, investigate, apprehend, or arrest inmates committed to the custody of the Commissioner of Corrections." 32 32. Under West Virginia Division of Personnel classification specifications, the "nature of work" for a Substance Abuse Therapist I is described as "[u]nder general supervision, performs professional work at the full-performance level interviewing clients to obtain information on the history and severity of their addiction. Is required to develop and maintain successful collaborative contacts with mental health agencies. In conjunction with treatment team, plans for discharge of client by determining after-care activities, continued counseling and living arrangements conducive to continued sobriety and recovery. Performs related work as required."

33 33. At the Anthony Correctional Center, a Substance Abuse Therapist is a non- uniformed position or "civilian staff" position under West Virginia Division of Correction Policy Directive 312.02 (Less-Lethal Use of Force). Non-uniformed/civilian staffs are trained in the use of force and may be called upon to assist correctional officers in controlling inmates or may be called upon to act on their own as required. Non- uniformed/civilian staff may occasionally cover a security post for a correctional officer. Security, however, is not a primary job duty for non-uniformed/civilian staff.

34 34. Based on the interviews and incident report s of the witnesses, Captain Brown, Associate Warden Plumley and Acting Warden Hoke all believed and concluded that Grievant's actions were inappropriate. Grievant used unjustified force and had acted outside the scope of use of force policy and training.

35 35. Grievant maintains that he made no mistakes and would take the same actions if presented with the same situation.

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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92- HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer

has not met its burden. *Id.*

Grievant asserts that the sanction imposed by Respondent was unwarranted and too severe for the incident in question. Grievant does not deny his actions but, in so many words, contends the conduct was reasonable and permissible in the context of the circumstance. Respondent maintains that the decision to suspend Grievant was appropriate given the applicable directives with regard to the use of force and Grievant's actions in the circumstances of this case.

The State of West Virginia Division of Corrections' Policy Directive 313.04 (Restrictions on the Use of Physical Force) states under "policy" that:

> It is the policy of the West Virginia Division of Corrections to maintain a mechanism that ensures that appropriate procedure and practice restrict the use of physical force to instances of justifiable self-defense, protection of others, protection of property, prevention of escapes, and to maintain or regain control, and then only as a last resort, and in accordance with appropriate statutory authority.

Corrections' Policy Directive 312.02 covers "less-lethal use of force" and states "it is the policy of the West Virginia Division of Corrections to maintain a mechanism that delineates appropriate guidelines concerning the use of physical, less-lethal force by division personnel." Policy Directive 312.02, Section V, F, 7 states that "[a]ny employee of the division who violates the guidelines set forth in this policy is subject to disciplinary action including verbal/written reprimand, suspension/dismissal, as warranted by the findings and conclusions of an administrative inquiry or investigation."

Pursuant to Policy Directive 312.02, Section V, F, 2 "[a]ny staff person using physical, less-lethal force beyond the control level of verbal direction (except for routine application of mechanical restraints) must be able to clearly articulate in a written report the level of resistance faced, the level of control used, and that control was effected in the lawful performance of duty." Grievant failed to do this in his incident report. The incident reports of the six witnesses, Delp, Vance, Summerlin, Lt. Richmond, Pomeroy and Murphy, all attempt to describe the level of force used by Grievant. While the testimony of these eye witnesses vary in some detail, their individual recollections provide a very thorough review of events.

Case manager Michelle Vance was in the midst of a discussion with inmate Southall, Grievant rose up from his chair, approached inmate Southall and uttered verbiage to the effect "we're not going to listen to this. Get out." (See footnote 7) (Resp. Ex. 7 and Ex. 9). WhileGrievant was telling inmate Southall to get out, Grievant was also moving toward inmate Southall. Inmate Southall did not

move from the doorway. Grievant made contact with inmate Southall by pushing Southall open handed in the chest, with force, compelling him backwards. The series of events were quite quick. Inmate Southall stumbled back into the common area of Unit Management and may have made contact against a desk. Inmate Southall spoke words of a colorful nature (profanity). Grievant established physical dominance of inmate Southall and engaged in actively escorting inmate Southall toward the sally port door, which was located on the other side of the common area in Unit Management. Inmate Southall was pushed out of the sally port door and Grievant closed the door behind him and returned to Vance's office. Some witnesses describe the incident as follows: "[i]t seemed like he [Grievant] exploded," "it appeared he [Grievant] just snapped," Grievant was a little upset, but not out of control,"we were all in a little bit of shock that this happened and it happened this way." Grievant testified he was not angry. Lt. Richmond went out with inmate Southall into the sally port area on the other side of thesally port door after Grievant had pushed inmate Southall out. Once in the sally port, inmate Southall told Lt. Richmond that he had done nothing to deserve being assaulted and Lt. Richmond responded that inmate Southall did get loud. In Vance's office, after the incident, Grievant stated that he was going to write a report and that, reflecting on the probability that inmate Southall would be leaving Anthony Correctional Center, Grievant reckoned perhaps he too would be leaving over "this."

The testimony of the witnesses are consistent even though the incident happened fast and unexpectedly. There is no evidence that any of the witnesses would be biased against Grievant. Three of the witnesses, Pomeroy, Summerlin and Murphy, participated in a car pool with Grievant. Pomeroy's testimony gave Grievant the benefit of the doubt as to a perceived threat. Pomeroy, moreover, looked out for Grievant and advised him to make sure he [Grievant] wrote a good "use of force" report. Ms. Vance's comments to Grievant after the incident inquired as to whether inmate Southall did anything, i.e., swung at Grievant, which would cause inmate Southall to be removed from the Anthony Correctional Center. (See footnote 8) Lt. Richmond attempted to defend Grievant Stacy's actions when inmate Southall complained to him in the sally port area. The incident reports of the six witnesses included details, sequences of events, and statements, such as cursing made by inmate Southall, which could be considered helpful/favorable to Grievant. The testimony of these six witnesses is believable and not biased against Grievant.

Grievant testified that individuals in the office had been discussing Southall's recent write-ups,

including possession of contraband, to-wit: coffee, and that based on Southall'sdisciplinary history and criminal record, he believed Southall to be dangerous. (See footnote 9) Grievant contends that his "intuition" caused him to believe that action needed to be taken and he rose out of his chair and went to inmate Southall to remove inmate Southall from Vance's office. Grievant testified that he told inmate Southall that he had heard enough and to go to the sally port and get out. It is clear that Grievant expected inmate Southall to leave the office immediately. However, it is not established that Grievant permitted Southall sufficient time to comply prior to the use of force. Other than verbally expressing his displeasure with the information being presented and contending error with regard to his phase status, it is not established that inmate Southall made aggressive movements, justifying the use of physical force on his person. (See footnote 10)

Policy Directive 312.02 (Less-Lethal Use of Force) cautions that "[t]he non-verbal intimidation signals should be used for information to mentally prepare the officer for a possible attack by an inmate, not as justification for the officer to attack the inmate." (Section V, C, 1, c). This is consistent with Captain Brown's testimony that an inmate being argumentative and loud does not justify use of force. Physical abuse of inmates isnot tolerated and, in the past, has resulted in terminations or lengthy suspensions. The West Virginia Supreme Court has taken an absolute stand against such abuse, holding that Article III, Section 5 of the West Virginia Constitution, prohibits state prison administrators and correctional officers from using physical force on inmates, absent imminent and present danger of harm to others, themselves or state property and that any officer who practices brutality may be discharged from his employment, provided that the charges against him are proved in keeping with civil service regulations. *Harrah v. Leverette*, 165 W.Va. 665, 679, 681, 271 S.E.2d 322, 330, 332 (1980). Assuming that inmate Southall was trying to use non-verbal intimidation, Grievant should have done what the witnesses did; be watchful. Grievant was the personnel furthest away from inmate Southall.

Per witness testimony, Corrections' Policy Directives and West Virginia Supreme Court opinion, the use of force because an inmate is rude, loud or argumentative is unacceptable. The evidence also dispels any claim that Grievant's actions were done in self-defense or to regain control. Five witnesses testified that inmate Southall had not taken any action that made them feel threatened and none believed that the situation was out of control. All six witnesses, including Lt. Richmond and Pomeroy who were right by inmate Southall, did not deem it necessary to take any action. At best,

inmate Southall's continued argumentativeness caused them to observe inmate Southall more closely. Grievant Stacy maintains that he acted without anger and appropriately under policy, yet none of his actions reflect a measured approach as set forth under Policy Directive 312.02 (Less-Lethal Use of Force). Assuming a situation existed, Grievant did not attempt todefuse the situation or use force as a last resort. Moreover, Grievant Stacy is inconsistent on when he was threatened or to what extent.

By a preponderance of the evidence it is established that Grievant improperly initiated the use of force. Grievant testified that he pushed, turned and used a joint lock on inmate Southall to gain control and lead inmate Southall out to the sally port door. Grievant readily acknowledges these actions. While Grievant maintains that he did nothing wrong, this point of view is not shared by Respondent, nor is it validated by applicable policy directives.

The first level of control per Policy Directive 312.02 (Less-Lethal Use of Force) is “officer presence.” At the time of Grievant's intervention, Lt. Richmond was seated one foot away from inmate Southall. If inmate Southall had gotten out of control or on the verge of getting out of control, Lt. Richmond was right there with handcuff restraints. Ms. Vance felt in control of the discussion. The second level of control per Policy Directive 312.02 (Less-Lethal Use of Force) is “verbal direction.” Section V, E, 2, describes “verbal direction” as:

a. Verbal direction is defined as the officer's command of direction or arrest.

b. Good communication skills or verbal direction can resolve the majority of situations.

c. Often, the mere presence of an officer and proper verbal direction will be sufficient to persuade most inmates to follow an officer's directions.

d. In any verbal confrontation, fear and anger must be defused before an inmate will be able to understand the officer's commands. This will require good communication skills and patience.

e. Successful communication techniques can prevent many verbal confrontations from escalating to a physical level.

Grievant fails to comprehend the seriousness of his conduct and has given every indication that, if faced with the same situation, he will do the same thing. This is in spite of Corrections making it abundantly clear that such actions are unacceptable. “[C]onsiderable deference is afforded the

employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Miller v. Higher Education Policy Commission / Marshall University*, Docket No. 03-HEPC-340 (January 21, 2004). The Respondent asserts that, in the context of prison administration, this deference must be given great flexibility. Courts must afford great deference and flexibility to prison officials in their management of these volatile environments. *Sandin v. Connor*, 515 U.S. 472 (1995). More specifically, "courts are not to interfere with the day-to-day management of prison systems, which must be allowed to anticipate security problems and to adopt innovative remedies for the almost insurmountable, perpetual problems that plague correctional institutions." *Diggs v. Snider*, 333 Ill. App.3d 189, 775 N.E.2d 40 (2002) citing, *Turner v. Safley*, 482 U.S. 78, 89, 107 S.Ct. 2254, 2262 (1987). In the case at hand, deference must be given to Corrections' assessment of Grievant's conduct. A decision was made to suspend Grievant rather than fire him. Disciplining Grievant for his inappropriate conduct is well within the purview of Corrections' authority as Grievant's employer. Respondent's decision to suspend Grievant for thirty days without pay has not been established to be an abuse of Respondent's discretion or authority in the facts of this case.

Grievant has not identified any other employee who, under similar circumstances, received a lesser punishment or was treated more favorably. Grievant has not put forward any evidence to indicate he was working under a hostile work environment outside of theinvestigation and suspension for use of force. There is no evidence that either the investigation or suspension was motivated by any bias against Grievant.

The following Conclusions of Law support the decision reached.

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Conclusions of Law

36 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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

37 2. Respondent demonstrated by a preponderance of the evidence that Grievant did

use force against an inmate and that such force was unjustified and in violation of West Virginia Division of Corrections policy directives and training. West Virginia Division of Corrections' Policy Directive 313.04 (Restrictions on the Use of Physical Force).

38 3. West Virginia Division of Corrections' Policy Directive 129.00, authorizes suspension in the event of a singular incident infraction of a serious nature.

39 4. Grievant failed to meet his burden of demonstrating the penalty was clearly excessive or reflects an inherent disproportion between the offense and the personnel action.

40 5. Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of theemployee'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); *Perry v. Dep't of Health & Human Res.*, Docket No. 04-HHR-192 (Aug. 17, 2004). The evidence in this case does not establish mitigating circumstances that warrant lessening of Grievant's suspension.

41 6. Respondent has met its burden of proof by a preponderance of the evidence, and proven the charges against Grievant that led to his suspension.

Accordingly, this grievance is DENIED.

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. *See* W. Va. Code § 6C-2-5. 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

Date: November 14, 2008

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Landon R. Brown

Administrative Law Judge

Footnote: 1

— Ms. Vance and other staff members in Vance's office were discussing these letters and inmate Southall's recent disciplinary write-ups prior to inmate Southall's arrival at the office. In response to inmate Southall's concerns about possible disciplinary actions, Vance was unable to answer with specificity what future disciplinary action would be taken.

Footnote: 2

— A phase system is utilized at the facility. An offender phases up based upon recognized achievements. This information is documentation and part of this data is referenced as blue sheet hours. There were some discrepancies with regard to offender Southall's phase status and the then available paper work. According to Ms. Vance, a missing "blue sheet" was later found, which reflected inmate Southall's missing hours and showed he was correctly in phase two of programming.

Footnote: 3

Work hours are important to inmates because they have to earn those hours to advance through the program. Unlike other DOC facilities, offenders between the age of eighteen and twenty-two are placed into the Anthony Center Correctional program by sentencing judges for a period of six months to two years. If the offender successfully completes the program, the sentencing judge is under a statutory obligation to grant the offender a period of probation. W. Va. Code § 25-4-6.

Footnote: 4

The exact wording is inconsistent from witness to witness. Grievant testified that he told inmate Southall that he had heard enough and to go to the sally port and get out. Nevertheless it is undisputed that Grievant did not attempt to ask inmate Southall to calm down, lower his voice or adjust his conduct in any manner.

Footnote: 5— A "sally port" is an area between units which can be secured.

Footnote: 6

— A Basic Communications Techniques Quiz completed by Grievant has the following question regarding an inmate's non-compliance with verbal direction:

24. During a cell search an offender (John Doe) enters the cell after being asked to stand outside the cell door. Identify the direction you would give him to get what you want.

a. Please stand outside

b. Inmate Doe, stand outside now.

c. Inmate Doe, please stand here (Pointing outside door)

d. Doe, please get out of here.

The correct answer for question number 24 was c., which was correctly answered by Grievant on the quiz. (Resp. Ex. 12).

Footnote: 7

The exact words reportedly uttered by Grievant varies slightly from witness to witness;

*(1) According to Jeremy Summerlin, after inmate Southall had said he wanted to get the f*** out of the Anthony Correctional Center, Grievant stated that he was not going to listen to this s*** and to go ahead and get on the wall. (Resp. Ex. 7, Resp. Ex. 9, p. 12-17).*

*(2) According to David Delp; Southall had gotten upset and stated to go ahead and ship him the f*** out. Grievant became very upset and took exception to inmate Southall. (Resp. Exh. 7, Resp. Exh. 9, p. 1-5). (3) According to Jeremy Summerlin, after inmate Southall had said he wanted to get the f*** out of the Anthony Correctional Center, Grievant stated that he was not going to listen to this s*** and to go ahead and get on the wall. (Resp. Ex. 7, Resp. Ex. 9, p. 12-17).*

(4) According to Lt. Johnnie Richmond, during the discussion over missing "blue sheet" hours, inmate Southall stated in a loud voice that they might as well ship him out of there. (Resp. Ex. 7). Lt. Richmond heard Grievant say something to the effect of I'm tired of hearing this, get out. (See footnote 11) (Resp. Ex. 9, p. 9-12).

(5) According to Rodney Pomeroy, inmate Southall, while insisting that he was done with the Anthony Correctional Center, took steps in and out of the doorway. (See footnote 12) (Resp. Ex. 7). The last step, placed inmate Southall barely inside door frame of Vance's office. Grievant got up from his chair, told inmate Southall to get on the wall and when inmate Southall did not comply, Grievant initiated contact with open hands and gave a grabbing kind of shove that knocked inmate Southall back two to three steps. Pomeroy testified that the time between Grievant instructing inmate Southall to get on the wall and initial physical contact was a "couple of seconds." (Resp. Exh. 9, p. 17-21).

Footnote: 8

Grievant responded to Vance to the effect "yeah, I guess while you're at it they need to get rid of me too." (Resp. Ex. 9, p.5-9).

Footnote: 9

Grievant, however, also testified that he did not feel threatened while he was sitting in his chair in Vance's office.

Footnote: 10

The lowest level of physical force set forth in Policy Directive 312.02 (Less-Lethal Use of Force) is "intermediate control tactics soft. (Section V, E, 3 & 4) These are "tools or techniques when applied in accordance with manufacturers' recommendations and/or approved training guidelines have minimal implications of injury." Intermediate control tactics soft is "a level of control used for any level of resistance by an inmate when lower levels of control have failed or been deemed unsafe to attempt." (Emphasis added). Policy Directive 312.02, Section V, D identifies these lower levels of control as "officer presence" and "verbal direction." Policy does not equate a failure to immediately answer with a stiffening of the body as "resistance" and states that even

"[a]n inmate's dialogue that offers the threat of possible resistance to an officer's commands is not normally considered resistance until the inmate physically resists control." (Section V, C, 2, a) (Emphasis added). Per policy, inmate Southall was not offering "resistance."

Footnote: 11

— Lt. Richmond informed Plumley that it seemed that Grievant said these words as he went by him, but the words might have been said when Grievant got up from his chair.

Footnote: 12

— Summerlin testified that during the overall discussion, inmate Southall appeared in and out of the doorway.