THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JOSHUA JAMES LEWIS,

Grievant,

v. **Docket No. 2009-1682-MAPS**

WEST VIRGINIA REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY/ SOUTH CENTRAL REGIONAL JAIL,

Respondent.

DECISION

Grievant Joshua Lewis is employed by the Respondent Regional Jail and Correctional Facility Authority ("RJ&CFA") as a Correctional Officer ("CO") and assigned to the South Central Regional Jail ("Jail"). Grievant was suspended for fifteen working days by letter dated May 29, 2009. The suspension was related to an incident that took place in the Jail on October 15, 2008, in which Grievant is alleged to have used inappropriate and excessive force against an inmate. On June 19, 2009, Joshua Lewis filed a grievance contesting his suspension. Grievant alleges that Respondent denied him due process, created a hostile work environment, violated policy and was guilty of gender based discrimination. As relief, Grievant seeks to have the suspension reversed and all reference of it removed from his record. Additionally, Grievant seeks to be paid for the time he was suspended and a letter of apology. [1]

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[1] It has been decided numerous times that an apology is not a remedy that is available at level three of the grievance procedure. *Lawrence v. Bluefield State Coll.,* Docket No. 2008-0666-BSC (June 19, 2008); *Emrick v. Wood County Bd. of Educ.*, Docket No. 03-54-300 (Mar. 9, 2004); *Hall v. W. Va. Div. of Corr.*, Docket No. 89- CORR-687 (Oct. 19, 1990). Grievant's request for an apology is denied and will not be addressed further.

This grievance was filed directly at level three because it involves a suspension without pay. W. VA. CODE § 6C-2-4 (a)(4). A level three hearing was held in the Charleston office of the Public Employees Grievance Board on September 30, 2009. Grievant attended the hearing pro se. Respondent was represented by Chad M. Cardinal, Esquire, RJ&CFA General Counsel. Following the hearing, the parties agreed to submit Proposed Findings of Fact and Conclusions of Law, the last of which was hand delivered on October 28, 2009. This matter became mature for decision on that date.

Synopsis

Grievant was suspended for inappropriate and excessive use of force against an inmate. Respondent was able to prove that Grievant used a dangerous and unnecessary technique in attempting to subdue an inmate and submitted a false report regarding that incident. Grievant failed to demonstrate that Respondent's disciplinary action was improper in any way. A fifteen-day suspension was justified and appropriate. Accordingly, the grievance is DENIED.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant is a Correctional Officer employed by Respondent and assigned to the South Central Regional Jail. Grievant has been so employed for roughly two years.

2. On October 15, 2008, CO 2 Donna Baisden and CO Michael Burdette were escorting a female inmate to the A-5 Unit where the inmate was to be housed. The inmate

was twenty-nine years old, five feet four inches tall and weighed approximately one hundred twenty-five pounds.[2]

3. During the intake process and while she was being escorted to the A-5 Unit, the inmate was verbally abusive, using coarse language and calling Officer Baisden vulgar names. At one point, Officer Baisden placed the inmate in a "transport wrist lock" because the inmate was resisting being escorted to her Unit.

4. When they reached the door to A-5, the inmate turned and attempted to hit Officer Baisden with her property bag.[3] Officers Baisden and Burdette attempted to gain control of the inmate by placing her in a "straight arm bar takedown" and a call was made for officer assistance.[4]

5. Grievant and CO Robert Bess were at Central Control when Grievant heard Sergeant J. T. Binion ask CO Amanda Haverty to step to the A-5 door. Grievant asked Sergeant Binion if there was a problem and was told to walk down to A-5.

6. When Grievant arrived at the door to Unit A-5, Officer Baisden was attempting to place the inmate in a straight arm bar takedown. Grievant rushed to the door and tackled the inmate and both Officers Baisden and Burdette, knocking all three of them to the floor. Grievant was also on the floor, on top of the inmate.

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[2] The name of the inmate is not revealed because she did not appear at the hearing and her identity is not relevant to the resolution of this grievance.

[3] During the hearing, a property bag was not clearly described. From the statements and the testimony, it appears to be a light-weight bag that contains clothes and personal items issued to the inmate for use while incarcerated.

[4] No testimony was offered regarding who made the call for assistance or what is required of other officers once such a call is made.

7. Officers Robert Bess and Amanda Haverty joined the other three Correctional Officers and at this point there were five officers on the floor with the inmate, some actually on top of the inmate, holding her down.

8. Two nurses also responded to the officer needs assistance call and were asked to bring restraints. While the inmate was held down, one of the officers applied leg restraints to her.

9. The inmate's arms were pinned underneath her and Grievant repeatedly shouted at her to "prone out." The inmate did not respond to that command.[5]

10. When the inmate failed to respond to his command, Grievant struck her at least twice on the upper back, between her shoulder blades, with his elbow. Such a downward thrust and hitting a person with an elbow is typically referred to as an elbow strike.

11. Elbow strikes and blows to the spinal region are not acceptable techniques for Correctional Officers to use with inmates to force compliance because they present an unreasonable risk of causing serious injury or death. Other, less dangerous, techniques are taught to Correctional Officers for use in situations like the one encountered on October 15, 2008.

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[5] Testimony indicate that the command "prone out" is an instruction for the inmate to lie flat on her stomach and spread her arms and legs out so that the officers have access to control these limbs. The prisoner had just been admitted to the facility and there is no evidence that she was familiar with correctional jargon. Under the circumstances, it is easy to understand why the inmate did not respond to this arcane command.

12. CO 2 Baisden reached out to stop Grievant Lewis from administering any more elbow strikes and verbally told him to stop. Grievant did not administer any more elbow strikes after being told to stop by Officer Baisden.

13. The inmate was placed in arm and leg restraints and escorted to the medical unit where she was examined by Nurse Terry Walker to determine if she sustained injuries while being subdued. No injuries were found and the inmate was escorted to her holding unit.

14. Grievant has received training in appropriate use of force and techniques for self defense, and has successfully completed the Defensive Tactics examination. Grievant has been provided the same training, at the same frequency, that is provided to all Correctional Officers employed by the RJ&CFA.

15. Corporal Timothy King[6] is a Defensive Control Instructor at the Jail. Corporal King saw Grievant raise his elbow two or three times and each time bring it down on the inmate's back. Shortly after the incident Corporal King asked Grievant, "when do we teach elbow strikes in DT (Defensive Tactics)" Grievant responded that it was not taught. Corporal King then asked Grievant why he used elbow strikes on the inmate and Grievant responded by saying, "OK, I fucked up."

16. Grievant was required to file an incident report regarding the episode with the inmate at A-5 unit. He described his actions regarding the elbow strikes as follows:

> I instructed the inmate to prone out, with loud verbal commands repeatedly, when [the inmate] did not comply I then attempted to use pressure point

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[6] Corporal King is classified as a CO 3 and has been employed at the Jail as a Correctional Officer for seven years. Immediately prior to being employed at the Jail Corporal King served as a Correctional Officer at a facility in Maine for seventeen years.

> compliance, which was ineffective. At that time, I then attempted a brake heal stun with my right arm, but lost my balance, causing me to land my elbow between her shoulder blades.

Respondent's Exhibit 1.

17. When confronted with the written reports of other COs, Grievant admitted that his report was inaccurate and stated that he changed it at the recommendation of a supervisor who allegedly implied that Grievant should word his report in a more favorable way.

18. Paul O'Dell, Jr. is the investigator for the RJ&CFA. Mr. O'Dell was assigned to investigate Grievant's actions related to the incident that occurred on October 15, 2008. The investigation began on October 24, 2008, and a final report was submitted on May 29, 2009. Investigator O'Dell concluded that:

- CO Lewis used poor judgment when he tackled the inmate and the two correctional officers;
- CO Lewis' incident report and accounts of the events did not agree with the reports and statements of the other Correctional Officers;
- CO Lewis used inappropriate and excessive force in an attempt to control the situation.

19. Grievant was stationed in the Control Center, where he had minimal contact with inmates, while the investigation was being conducted.

20. On March 26, 2009, a predetermination conference was held with Grievant, South Central Administrator John McKay, RJ&CFA Chief of Operations John King and RJ&CFA General Counsel Chad Cardinal. At that conference, Grievant admitted that he used inappropriate force when dealing with the inmate and that he had filed a false incident report.

21. After the predetermination meeting, the first recommendation of the group was to dismiss Grievant. After taking into consideration Grievant's work record, the fact that he admitted his mistakes and that he seemed determined to correct his behavior, the discipline was reduced to a suspension of fifteen working days without pay.

22. Grievant was given a letter of suspension dated May 29, 2009, officially suspending him for fifteen days. The letter indicated that Grievant violated, among others, the following sections of the RJ&CFA policies:

- Policy 3010, ¶ 3: "The use of excessive force shall not be tolerated. The use of force, except in compliance with Regional Jail Authority policy, shall result in discipline.";
- Policy 3010, ¶ 18: " All employees shall submit required or requested reports in a timely manner and in accordance with applicable regulations. No employee shall falsify reports or documents, or knowingly allow inaccurate or incorrect material or information to be submitted as valid. All employees are required to provide relevant, truthful and complete information when required to by a supervisor or investigator."; and
- Policy 9031, Procedure B, ¶ 1: "Force which is used when unnecessary or which exceeds that which is necessary to accomplish a legitimate purpose, is illegal. . . ."

23. Chief of Operations King reported Grievant's actions on October 15, 2009, to the West Virginia State Police but no criminal charges were brought related to the incident.

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 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No.

H-88-005 (Dec. 6, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

There is no doubt that Grievant struck the inmate between her shoulder blades with his elbow. The incident reports varied as to how many times this occurred, but all agreed that Grievant struck the inmate at least two times before CO 2 Baisden stopped him.[7] The RJ&CFA's Legislative Rule related to jail standards states:

> Inmates shall be protected from personal abuse, corporal punishment, personal injury, disease, property damage and harassment. **In instances where physical force or disciplinary detention is required, only the least restrictive means necessary to secure order or control shall be used.** Administrative segregation shall be used to protect inmates from themselves or other inmates.

(Emphasis Added) 95 C.S.R. 1 § 15.9. Additionally, RJ&CFA Policy states:

> The use of excessive force shall not be tolerated. The use of force, except in compliance with Regional Jail Authority policy, shall result in discipline.

Policy 3010 ¶ 3. If the force used by Grievant was not the least restrictive force necessary to restrain the inmate, he violated 95 C.S.R. 1 § 15.9 and discipline is required pursuant to Policy 3010 ¶ 3.

Corporal Eric Croasmun is a defensive tactics instructor at the Jail. He testified that all instructors teach the Correctional Officers to never strike with their elbows and never strike

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[7] Most of the COs reported that Grievant struck the inmate with his elbow two times. One CO reported that it occurred five times.

an inmate near the spine. Both of these techniques carry an unacceptable risk of serious injury to the inmate. Administrator McKay has 25 years of experience in correctional facilities and has been a certified physical restraint instructor since 1990. He stated that elbow strikes are, by definition, dangerous and could be considered deadly. Corporal King, a defensive control instructor with nineteen years of experience as a Correctional Officer, agreed that elbow strikes should not be used to gain control of an inmate. *See* Finding of Fact 15 *supra.* Both Corporal Croasmun and Administrator McKay stressed that a Correctional Officer must take into consideration the size and strength of an inmate in assessing how much force is appropriate to detain him or her.

The inmate in this case was a female who was five feet four inches tall and weighed one hundred and twenty-five pounds. She was being held down by four other Correctional Officers and Grievant. According to the experienced training officers, use of elbow strikes is dangerous, excessive and inappropriate in all situations. It was even more so given the size of the inmate, as well as the fact that she was already pinned down and rendered helpless by the officers.

Discipline was appropriate for the elbow strikes alone. However, Grievant also falsified his incident report by stating that he was attempting to apply a legitimate compliance technique and slipped, rather than admitting that he had intentionally struck the inmate, more than once, in the back, with his elbow. The RJ&CFA Legislative Rule requires that "any employee who uses physical force shall prepare a written report of the incident and submit it to the jail facility administrator." 95 C.S.R. 1 § 11.34. RJ&CFA Policy 3010 ¶ 18, provides that: "no employee shall falsify reports or documents, or knowingly allow inaccurate or incorrect material or information to be submitted as valid." Grievant violated

this policy when he misrepresented the facts in his official incident report to indicate that he accidently hit the inmate with his elbow, rather than truthfully stating what he had done. Grievant admitted that his report was inaccurate but stated that he changed it when a Corporal at the Jail suggested that he might want to supply less detail. The Corporal did not order Grievant to change his report and nor instruct him to make false statements. Ultimately, it was Grievant's responsibility to abide by the Authorities rules and policies. Respondent proved that Grievant violated Respondent's rules and policies by using excessive and dangerous force in controlling an inmate and submitting a false report in an effort to hide his actions. The suspension given to Grievant for these actions was justified and appropriate.

Grievant raised a number of defenses for his action. First he alleged that Respondent subjected him to a hostile environment by placing him on administrative duties during the investigation. Grievant averred that placing him in the Control Center amounted to punishment because he could not perform the full array of duties expected of a Correctional Officer. Grievant also stated that he was subjected to ridicule by his fellow Officers because he was on administrative assignment. This Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 97-23-088 (June 13, 1997); *Rogers v. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2009-0685-MAPS (Apr. 23, 2009). The point at which a work environment becomes hostile or abusive does not depend on any "mathematically precise test." *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, at 22, (1993). Instead, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the

circumstances." *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 81,118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (quoting *Harris, supra*); These circumstances "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris, supra* at p.23.

Respondent was required by its Legislative Rule to place Grievant on administrative assignment while the investigation was being conducted. 95 C.S.R. 1 § 4.10 requires that "A staff person charged with alleged maltreatment of an inmate shall not work directly with any inmate until an investigation is completed." Respondent assigned Grievant to work at the Control Center during the course of the investigation in compliance with that Rule. Grievant presented evidence of two occasions when other Correctional Officers generally made fun of him regarding his placement at the Control Center. Grievant never complained about this treatment to his supervisors nor did he provide any evidence to indicate that it caused him embarrassment or effected his employment. Grievant did not provide proof that would indicate that he was subjected to a hostile work environment.

Grievant opined that he was subjected to gender-based discrimination because he allegedly received more severe punishment for striking a female inmate than he would have received if he had struck a male inmate. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008). Grievant did not present any evidence regarding disciplinary actions taken against any correctional officer for using excessive force against a male inmate to show that he or she was treated differently than Grievant. Rather Grievant Lewis speculated that he would not have received a fifteen day suspension had he struck a man. Grievant did not prove that he was treated differently than any other Correctional Officer and his claim of discrimination must fail.[8]

Finally, Grievant notes that investigations of alleged misconduct by Correctional Officers should be conducted within a reasonable time. Grievant argues that he was denied due process because the investigation took more than seven months to complete. Given the fact that written incident reports were submitted by nearly all of the witnesses to the events of October 15, 2008, it is surprising that the investigation took seven months to complete. However, Mr. O'Dell is the sole internal investigator for the RJ&CFA and must prioritize his time accordingly. Moreover, there is no evidence that the investigation was intentionally delayed, that Grievant was denied any rights to defend himself against the charges or that Grievant was harmed in any appreciable way as a result of the delay in

[8] The only time the gender of the inmate was considered was in determining the amount of force that would be necessary to gain compliance. Obviously, larger, stronger inmates require more force. However, it was shown that the type of force used by Grievant would be excessive regardless of the size or gender of the inmate involved.

completing the investigation.

Considering the totality of the circumstances, Respondent proved by a preponderance of the evidence that the discipline given to Grievant was justified and reasonable. Accordingly, the grievance is DENIED.

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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. Respondent proved, by a preponderance of the evidence, that Grievant violated its rules and policies by using inappropriate and excessive force against an inmate and intentionally submitting a written incident report with false information. *See* 95 C.S.R. 1 §§ 11.34 and 15.9; RJ&CFA Policy 3010 ¶ 3 and ¶ 18; RJ&CFA Policy 9031, Procedure B, ¶ 1. Based upon the totality of the circumstances, Respondent proved, by a preponderance of the evidence, that the discipline given to Grievant for violation of these rules and policies was justified and appropriate.

3. The point at which a work environment becomes hostile or abusive does not depend on any "mathematically precise test." *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, at 22, (1993). Instead, "the objective severity of harassment should be judged from the

perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 81,118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (quoting *Harris, supra*); These circumstances "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris, supra* at p.23.

4. Grievant did not prove that he was subjected to a hostile work environment.

5. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

6. Grievant failed to prove that Respondent discriminated against him.

7. Grievant failed to prove that the length of the investigation or his assignment to administrative duties resulted in a denial of his due process rights.

Accordingly, the grievance must be DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *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 (2008).

DATE: DECEMBER 17,2009.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE