THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SHARLEAN K. ELLIOTT,

Grievant,

v. **Docket No. 2008-1510-MAPS**

WEST VIRGINIA DIVISION OF
JUVENILE SERVICES/
GENE SPADARO JUVENILE CENTER,

Respondent.

DECISION

At all times relevant to this grievance, Sharlean Elliott ("Grievant") was employed by the Division of Juvenile Services ("DJS") and worked at the Gene Spadaro Juvenile Center in Fayette County, West Virginia.[1] Grievant was classified a Youth Specialist 2.[2] Grievant was suspended from employment for fifteen working days by letter dated April 18, 2008, and signed by Dale Humphreys, Director of DJS. Grievant was suspended for her involvement in an incident with residents of the facility that occurred on March 24, 2008.[3] A level one grievance was filed contesting the suspension on April 29, 2008 and a level one conference was held on June 2, 2008. The grievance was denied at level one and an Order of Unsuccessful Mediation was entered after level two on September 4, 2008.

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[1]While this grievance was pending, Grievant applied for and received a position as a Correctional Officer with the Regional Jail and Correctional Facility Authority.

[2] A Youth Specialist 2 is equivalent to a Corrections Officer 2 and performs similar duties in the juvenile detention facility as a Corrections Officer 2 would perform in an adult facility.

[3] There were allegations cited in the suspension letter in addition to the events of March 24, 2008. Those allegations will be explored herein, however, all of the allegations relate to the incident or matters disclosed while the incident was being investigated.

A level three hearing was held in Beckley, West Virginia, on March 4, 2009. Grievant represented herself at this hearing and DJS was represented by Stephen R. Compton, Senior Assistant Attorney General. Following the hearing, the parties agreed to submit proposed Findings of Fact and Conclusions of Law on or before April 30, 2009. Respondent submitted a written Fact/Law Proposal and Grievant relied upon a combined exhibit and analysis that she submitted and discussed at the hearing. This grievance became mature for decision on May 1, 2009, the day Respondent's proposal was mailed.

Synopsis

Grievant was involved in a short altercation with a resident while on duty. As a result of the investigation into the incident, Grievant was charged with a variety of policy violations and suspended for fifteen working days which is the equivalent of three work weeks. Respondent proved that Grievant violated DJS policy and procedures, but did not prove that Grievant's acts were as egregious as alleged. The suspension of Grievant is upheld. However, the length of the suspension was disproportionate to the offense and mitigation is granted.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance.

Findings of Fact

1. Grievant Sharlean Elliott was employed as a Youth Specialist 2 by DJS and assigned to the Gene Spadaro Juvenile Center ("facility").

2. On March 24, 2008, Grievant was supervising residents in the dining area after breakfast. All but two of the residents had left the dining area and returned to A Unit[4].

3. Resident AT and AJ[5] remained in the dining area and had not washed off the table where they had eaten breakfast. Wiping the tables is a requirement of the residents when they finish eating.

4. Grievant instructed AT and AJ to wash off their table and return to A Unit.

5. AT refused to wipe off the table and started to walk to A Unit. Grievant was standing at the door to A Unit and told AT that no one was leaving the dining room until the table was wiped off. Grievant started to walk away from the door with AT and AT attempted to go around Grievant and out of the door.

6. Grievant stepped in front of the door to A Unit and blocked AT's exit. AT became verbally abusive with Grievant.[6]

7. AT stepped back from Grievant, and Grievant reached out with her right hand for AT's left shoulder.

8. When Grievant reached for AT with her right hand, AT knocked Grievant's arm in front of AT with her left arm. Grievant's right hand was deflected across AT's neck

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[4] A Unit is the area of the facility where the rooms of female residents of the facility are located. The residents that were involved with the incidents leading to Grievant's suspension were housed together in A Unit.

[5] The names of juveniles are generally not specified in Grievance Board decisions in an effort to protect their confidentiality. Consistent with that practice, the juvenile residents involved in this incident will be identified by their initials only.

[6] In her incident report, Grievant noted that when she blocked to door to A Unit, AT shouted, "Oh you did not just do that, you fuckin' bitch. Get out of my way. I'm not washing that table."

by AT's left hand. During this encounter, Grievant was holding a cup of coffee in her left hand.

9. When Grievant's hand was deflected across AT's neck, AT shouted that Grievant had grabbed her by the throat and was trying to choke AT.[7] This created a commotion and the other female residents from A Unit came back into the dining room to see what was happening.

10. AT continued to refuse to wash the table and shout at Grievant. Resident AJ took a wash cloth and washed the table. Grievant then called Youth Specialist Jeremy Treadway to assist her.

11. Youth Specialist 2, Jeremy Treadway, came into the dining room and escorted AT to the discipline assessment room.

12. Ralph Terry, Director of the Gene Spadaro Juvenile Center, was standing in the kitchen when the incident took place. He was behind a small window and could hear Grievant and AT arguing. He saw that Grievant was holding a coffee cup, but did not see an altercation between Grievant and AT.

13. Pursuant to the Daily Base Log[8] for March 24, 2008, the "verbal altercation" between AT and Grievant began at 7:40 am. AT was escorted to the assessment room by Youth Specialist Treadway at 7:42 am. Grievant's Exhibit 9. The start time is consistent with the incident report filed by Grievant. Grievant's Exhibits 6 and 7.

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[7] Grievant reported that AT screamed "Let go of my throat, does everyone see, she's got her hand around my throat."

[8] The Daily Base Log is the official record of times and events that occur in the facility. Events are recorded by the base operator as they are reported by the staff in the facility. On March 24, 2008, the base operator was Youth Specialist Jeff Williams.

14. According to her incident report, Grievant had an additional incident with one of the residents from A Unit at 7:45 am. Grievant's Exhibit 8.

15. Grievant saw resident AS sitting on a table directly under the A Unit counselor's office window. Grievant told AS to get off the table. AS refused until Grievant started to radio Youth Specialist Treadway for assistance. AS then got off the table and said, "Ms. Elliott, why don't you just quit your job. No one likes you, you fucking bitch." Grievant did not reply and AS continued, "Never mind, just wait until a bunch of us get together and beat the hell out of you and you won't have a job anymore." Grievant then filed an incident report and referred AS for discipline. Grievant's Exhibit 8.

16. Director Terry left the kitchen and went around to the dining room upon hearing the verbal disputes between Grievant and the A Unit residents.

17. According to the Daily Base Log, Director Terry arrived in the dining room at 7:49 am. Director Terry ordered the residents to line up, he talked to them about their behavior and directed them to proceed to their classes.

18. On March 26, 2008, AT had a hearing before Kanawha County Circuit Judge, Irene Berger. The purpose of the hearing was to review AT's progress in her placement at the Gene Spadaro Juvenile Center. At the hearing, Sara Seabolt, a Department of Health and Human Resources ("DHHR") employee, testified that Grievant had tried to choke AT and was currently under investigation. No investigation had been conducted into the allegation that Grievant had tried to choke AT and Ms. Seabolt had not spoken with Grievant.[9]

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[9] Ultimately, it became apparent that Grievant never tried to choke AT and Seabolt's testimony was inaccurate and precipitous at best.

19. Based upon the testimony of Ms. Seabolt, Judge Berger included in her Review Order that Grievant Elliott was to have "no contact with [AT] directly or indirectly and have no bearing on [AT's] success in the program." Respondent's Exhibit 1.

20. On March 27, 2008, an investigation was conducted regarding the incident with AT and Grievant by Trina Griffin, an investigator for DJS. Ms. Griffin conducted interviews of Grievant, Treadway, Director Terry, Robin Hatfield (a nurse at the Spadaro Facility) and the female residents in A Unit. Another DJS employee, Gordon Clark, participated in the investigation.

21. An investigator for the Institution Investigation Unit ("IIU") of the DHHR also participated in the interviews to determine if the incident resulted in child abuse. That investigator was Angel Pemberton.

22. During Grievant's interview she became confused about the facts and gave conflicting details. For example, she indicated that AT struck her in the face during the incident; however, neither her incident report nor any of the other contemporaneous reports indicated that had happened. Additionally, she stated that she had radioed to ask if AT needed to be seen by the nurse; however, Nurse Hatfield testified that she did not receive that call.

23. The residents were not kept separated during the interviews and once each resident was interviewed she was allowed to return to the unit to converse with the remaining residents until all of them were eventually interviewed.

24. Even though only AT and AJ remained in the dining room when the altercation between Grievant and AT began, many of the residents claimed to have seen

Grievant grab AT by the throat. Their statements varied dramatically. The following are summary examples:

- PW - Grievant grabbed AT by the neck with one hand and backed AT away from the door. Grievant didn't have anything in her other hand.
- AT(2)[10] - Grievant had a cup of coffee in one hand and her other hand was by AT's shoulder. AT pushed Grievant and then stomped off toward control.
- NW - Grievant grabbed AT by the throat and held her there for ten seconds until AT pushed her away. Grievant grabbed AT with one hand but had nothing in the other.
- SB - Grievant put down her coffee and put two hands around AT's neck to choke her.
- AS - Grievant held one hand up until AT pushed it away. Grievant had a cup of coffee in her other hand.

25. There is a complaint box at the Spadaro Facility called the PREA[11] Box. The box is intended as a means for residents to make complaints about treatment by staff to the DJS administration without staff knowing about it. It is intended as a measure to prevent and prosecute sexual assault incidents in correctional facilities.

26. The PREA Box had been in the A Unit for several months but no reports had been found in it until after the March 24 incident. It was checked as part of the investigation and several complaints were found. Since the box had not been checked daily or immediately prior to the March 24 incident it is impossible to verify whether the dates on the complaints found in the box were accurate.

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[10] A different resident with the initials AT from the one in the altercation with Grievant. Where more than one resident share the same initials a numerical designation will be added.

[11] PREA stands for Prison Rape Elimination Act.

27. When the investigators emptied the PREA Box on March 31, 2008, they found eleven written complaints.[12] Those complaints all related to Grievant, were admitted as exhibits and can be summarized as follows:

- AT 3/24/08 - "Ms. Elliott grabbed me by the neck and said she was pressing assault charges when all I did was remove her hand from my neck." Respondent's Exhibit 3a.
- AT 3/10/08 - "Ms. Elliott is being very rude. She has mood changes and yells at us for no reason." Respondent's Exhibit 3i.
- PG 3/24/08 - "I was sitting in the dining room when AT was grabbed by the throat by Ms. Elliott." Respondent's Exhibit 3b.
- HJ 3/24/08 - "I witnessed Ms. Elliott grabbing the resident [AT] by the neck and I don't think it is right." Respondent's Exhibit 3d.
- AJ 3/24/08 - "Mrs. Elliott is always grabbing my buttox [sic], and touching my chest and that really offends me and makes me feel uncomfortable." Respondent's Exhibit 3e.
- AT(2) 3/24/08 - "Ms. Elliott has smacked me and touched my butt more than once and I have asked her not to, but it has made me feel very uncomfortable, I do not like what she has been doing or saying to me or the other residents." Respondent's Exhibit 3f.
- AT(2) 3/24/08 - "Mrs. Elliott has been making very rude comments about me and talking about my business to other peers and kids." Respondent's Exhibit 3j.
- AS 3/20/08 - "Ms. Elliott was grabbing the girls' asses and bragging about it to me." Respondent's Exhibit 3g.
- AS 3/24/08 - Accused Grievant of yelling at her and pushing her twice. Respondent's Exhibit 3h.
- AS 3/24/08 - "Mrs. Elliott approached a resident while they were arguing by grabbing her by the throat and yelling. Then when the girl assaulted her for grabbing her, she got on the radio and yelled for staff and said the girl had hit her" Respondent's Exhibit 3c.
- AS 3/30/08 - "Ms. Elliott told me I was fat and had a big stomach." Respondent's Exhibit 3k.

28. When confronted about the complaints of touching the residents, Grievant admitted to lightly smacking one resident on the behind to encourage her to move from one

[12] Residents AT, AT(2), and AS had multiple complaint forms in the PREA Box. The complaints were made by six residents.

place to another. She characterized it as the kind of smack a mother might make in jest with her daughter. The resident smiled and moved on.

29. During the investigation, some of the resident's stated that Grievant cussed at them. Grievant admitted that she sometimes used mild cuss words around the residents but never cussed *at* them. Grievant stated this was a problem she had been working on.

30. The DHHR IIU issued a report finding that "child abuse has not occurred." Respondent's Exhibit 6.

31. Investigator Griffin concluded that Grievant inaccurately informed the investigators that Specialist Treadway was on the carpet in the dayroom when she had her altercation with AT. Griffin concluded that Treadway was actually in B Unit when the altercation took place. This conclusion was not supported by the statements given to the investigators.

32. In response to a question by the investigator, Specialist Treadway stated:

> . . . We were leaving the dining room and I took the guys back to B Unit. Well *before I went to B Unit* I heard Ms. Elliott and another resident arguing, I didn't really know what they were saying because *I was across the dayroom* but they were arguing and then I went over there to check the situation out . . .

(Emphasis added) Respondent's Exhibit 7. After that, Specialist Treadway escorted AT to the assessment room.

35. Treadway indicated that he was in B Unit when the second altercation occurred. The incident reports demonstrate that the second incident did not involve

resident AT but resident AS instead. Treadway was in B Unit when this altercation occurred but not when the incident involving AT and the choking allegation started.[13]

36. While Grievant's accounts of the incidents varied from time to time, she appeared to be sincere and there is no indication that she intentionally mislead or lied to the investigators.[14]

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).

The letter of suspension given to Grievant on April 18, 2008, basically lists three infractions allegedly committed: first, the incident with AT; second, allegations of

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[13] As Treadway's statement continues, it becomes clear that he is confused about where he was during which incident.

[14] Investigator Griffin found that Grievant lied about making a radio call to the medical section for an evaluation of AT. Treadway's testimony was that a radio call could have been made but he did not hear one and the nurse's testimony conflicted with Grievant's.

inappropriate contact and language; and, third, making false statements to the investigators. The totality of these charges led to a suspension of fifteen working days.

With regard to the incident with AT, it is alleged that Grievant failed to follow proper discipline procedures by not de-escalating a physical confrontation and then escalating it as it went forward. This action is alleged to be in violation of accepted policy or practice in confrontation situations. The accepted practice in situations of physical confrontations appears to be for the staff person to step away from the confrontation and allow the resident to leave and then report the resident for insubordination and discipline.[15] In this situation, Grievant stepped in front of the A Unit door and prevented AT from leaving the dining room without first wiping the table as she had been instructed. When AT attempted to back away, Grievant reached for her shoulder to try to stop AT.[16] At that point, AT deflected Grievant's right arm by raising her left arm and forcing Grievant's arm down across the front of AT's body. Grievant's hand crossed AT's neck as it was being deflected and that is when AT accused Grievant of choking her.

The accusation that Grievant choked AT was ridiculous on its face. Grievant reached for AT with her right hand and she was holding a cup of coffee in her left hand during the entire exchange. If she meant to do AT any harm she would not have kept her coffee in her hand. Additionally, some of the residents of A Unit either wrote complaints

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[15] It is stated that this *appears* to be the accepted practice because no documentation of this policy or practice was presented. Rather there was only testimonial evidence regarding the appropriate procedure to be followed in these situations.

[16] In her statement to the investigators, Grievant indicated that she reached for AT because she was afraid AT was going to back into the tables. It is impossible to accurately ascertain what was in Grievant's thoughts, but from the combination of the statements it appears more likely that Grievant was trying the stop AT so that she could talk with her.

about Grievant choking AT or gave statements that they saw Grievant choke AT. However, the only residents in the room were AT and AJ. The others had no opportunity to witness anything that happened. Their statements are contradictory, with some saying that Grievant choked AT with one hand and others saying she used both hands. All of the residents who accused Grievant of grabbing AT's neck stated that Grievant had nothing in her other hand. The adults who saw the incident through a window or from across the room confirmed that Grievant was holding a cup of coffee. The statements of the residents are more consistent with a contrived attempt to get Grievant in trouble (like AS had threatened) than an accurate account of a witnessed event. *supra,* Finding of Fact 15. According to the Daily Log[17] the entire incident took only two minutes; from the start of the verbal exchange at 7:40 a.m. to AT being escorted to the assessment room at 7:42 a.m. This hardly was enough time for a verbal exchange, movement from the table to the door, and for Grievant to violently attack AT. The allegation that Grievant grabbed AT by the throat and choked her is simply not true.

What is apparent is that Grievant did not follow the accepted practice for dealing with confrontations by residents. The testimony regarding this practice indicated that when AT refused to wipe the tables and attempted to leave the room, Grievant should not have blocked the door to impede her exit. This action was more likely to lead to an escalation of the confrontation that could possibly lead to violence. Rather the accepted practice would have been for Grievant to allow AT to leave and report her insubordination for

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[17] The Daily Log is kept contemporaneously by an officer who is removed from the situation. The procedures of the facility require that the Log be kept regularly and accurately. Therefore it is the most reliable source for the time frame of this incident.

discipline. Grievant's failure to follow the accepted practice in this confrontation situation did lead to an escalation that put Grievant in the position of being accused of choking AT. DJS may discipline Grievant for the violation of the accepted policy and procedures. *See generally Scott v. Div. of Corr.*, Docket No. 02-CORR-183 (Jan. 29, 2003); *Boyes v. Higher Educ. Policy Comm'n,* Docket No. 01-HEPC-433 (Feb. 5, 2002).

As part of this allegation regarding the choking incident DJS noted that:

> . . . the incident led Judge Irene Berger. . . to issue an order that required the division to keep you away from the resident. Having a judge issue an order of that type negatively impacts the facility and the staff that work there.

Grievant's Exhibit 2.

The Order from Judge Berger was an embarrassment to the Facility, but Grievant played no role in that embarrassment. The Order was based upon the sworn testimony of a DHHR employee who had not witnessed the incident and admitted that it was still under investigation. That employee's inaccurate, precipitous, and prejudicial testimony, that Grievant choked AT, was the reason for Judge Berger's Order. Neither Grievant nor anyone else who could give an accurate account of the event was given an opportunity to clarify the situation. Grievant did not cause or contribute to the issuance of the Order and should not be punished for the embarrassment it caused.

The next allegation is that Grievant touched residents' buttocks and cursed at them. There were three comments in the PREA Box alleging that Grievant touched the residents on the behind. There is a serious credibility issue with these comments. In situations where the existence or nonexistence of certain material facts hinges on credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't*

of Health & Human Res., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health & Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge 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's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

It is revealing that two of the comments were made by AS and AJ. AS was the resident that told Grievant on March 24, 2008, that the residents were going to get together and get her fired.[18] On March 27, 2008, eleven complaints were found in the PREA Box that had not been utilized for months prior to that date. Seven of the eleven complaints were made by three residents who were disciplined earlier that day. AS made three of the complaints and AJ was one of the residents involved in the verbal altercation with AT and Grievant. All of these complaints were found on the same day, shortly after that difficult

[18] Originally AS indicated that the residents were going to get together and beat Grievant up. Apparently, an alternative strategy was considered and deployed.

incident.[19] These factors render the complaints found in the PREA Box suspect and lacking credibility.

When confronted with these allegations, Grievant admitted that she had cussed in front of the residents but never cursed at them. The only evidence offered regarding what was actually said was provided by Grievant who indicated that she would say words like "shit" or "damn" on occasion but nothing that might be considered more obscene.[20]

With regard to touching the residents on the bottom, Grievant described one incident where she was ushering the residents from one point to another. Grievant told the residents to get moving or she would have to smack them. She lightly smacked resident NW on the butt and told her to get moving. Grievant described this action as something a mother would do with her daughter and said it was done in that way. The resident laughed and went on. When Grievant was asked if she had touched other residents in that way, Grievant stated that she could not remember any other incident. Given the lack of credibility of the complaints in the PREA Box this was the only incident of touching a resident on the buttocks that was proven by a preponderance of the evidence.

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[19] One of the complaints was dated 3/10/08 and another was dated 3/20/08. Both of these complaints were made by residents who made complaints dated 3/24/08. As stated herein, it was not possible to verify the accuracy of the dates on the complaints.

[20] It becomes increasingly difficult to determine which words are considered to be inappropriate for public use or taboo in today's society. At least one of the words discussed herein is regularly used in public media and no longer subject to censorship by the FCC unless it is connected with reference to a God. For a complete discussion on the social and legal implications of the use of one taboo word, *see "Fuck,"* Center of Interdisciplinary Law and Policy Studies Working Paper Series No. 39, by Christopher M. Fairman, Associate Professor of Law, Ohio University Moritz College of Law.

Nevertheless, smacking a resident on the buttocks, even in jest, is not appropriate for DJS correctional staff. No specific policy was introduced prohibiting such contact with residents and no one testified about the existence of such a policy or rule. Additionally, the IIU unit of DHHR investigated this conduct and did not find that any of Grievant's conduct constituted abuse. However, in her report, the IIU investigator stated that the DJS "administration should review and reiterate appropriate boundaries and language with Mrs. Elliott." Respondent's Exhibit 6. As became apparent in this case, such familiarity with the residents can be easily misconstrued and lead to serious allegations and consequences for the staff person as well as the facility.

Finally, it was alleged that Grievant misled and lied to the investigators. While Grievant's statements contained inconsistencies, it did not appear that she was intentionally misleading the investigators regarding the basic facts of the events that took place on March 24, 2008. The first inconsistency centers around whether AT actually hit Grievant. Grievant made no mention that AT had hit her in the incident report that Grievant prepared on March 24, 2008. Yet in her interview with the investigators on March 27, Grievant indicated that AT had struck her in the head more than once. In her testimony, Grievant admitted that she did not complete her incident report properly by failing to report the number of times AT hit her. Failing to accurately report an incident is a violation of DJS policy. The reports and logs are the written records of incidents that take place in the facility and must he kept accurately for the protection of the residents and the staff.

The next allegation of deceit was that Grievant misled the investigators about the location of Specialist Treadway when the altercation began between Grievant and AT. Treadway's interview begins with him saying that he was still in the dayroom on his way to

B Unit when the first altercation broke out. The first altercation was between Grievant and AT. By the end of the interview, Treadway was convinced he was in B Unit where he and the male residents witnessed the altercation through the window. Obviously, Specialist Treadway was confused regarding his whereabouts. Grievant, on the other hand, was consistent in her belief that Treadway was still in the carpeted area of the dining room when the incident started. It is difficult to understand why Grievant was accused of intentionally misleading the investigators on this point. Treadway did not offer any information that clarified the events in question, so his specific location when the event took place is hardly relevant or helpful in determining what took place between Grievant and AT.

Similarly, there is a dispute between Grievant and Nurse Hatfield as to whether Grievant radioed medical to have AT examined after their confrontation. The testimony of Grievant and Nurse Hatfield are diametrically opposed on this issue. Grievant stated that she radioed medical to see if AT should be assessed for injury since AT accused Grievant of choking her. Grievant stated that the Nurse told her that it was up to her, so Grievant decided that there was no need for a medical inspection. Nurse Hatfield states vehemently that she did not receive a radio call and that she would never leave it up to a staff person to decide if a medical assessment needed to be made. Both Grievant and Nurse Hatfield have motive for their particular view point.[21] However, this point again seems rather minute because Treadway escorted AT to the assessment room and did not note any injury to her.

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[21] Grievant because it supports her version of the incident and the Nurse because it would have been improper for her to leave the decision as to the need for a medical assessment to the Youth Specialist.

Further, he noted that AT complained about Grievant on her way to the assessment room but did not register any physical complaint. While there is a significant difference in the events reported by the two staff members, the issue in dispute lends nothing to the investigation of the incident between Grievant and AT. AT was obviously not injured in any way.

Upon hearing her testimony and reviewing her statement, it was clear to the undersigned that Grievant became upset and confused during the interview and told inconsistent versions of the event. However, it was equally apparent that Grievant's confusion over these details was not intended to be deceptive or evade blame. Grievant openly admitted that she blocked AT's exit from the dining room and attempted to make AT comply with her directive. This action had the effect of escalating the confrontation whether that was Grievant's intent or not. She also admitted to smacking a resident on the behind and cussing occasionally. The issues of inconsistency were not related to the specific charges and were more likely the result of confusion and emotional distress than a deliberate attempt to escape culpability.

Ultimately, Grievant did commit acts that were not consistent with proper deportment of a Youth Specialist. She did not follow the accepted procedure in a confrontation situation which led to an escalation of a verbal altercation into a minor physical interaction. Grievant also became too familiar with a resident by smacking her on the bottom and she occasionally cussed in the presence of residents. These actions are a legitimate basis for DJS to subject Grievant to discipline. The only issue left in this case is whether the fifteen day suspension assessed by DJS was too severe and should be mitigated.

The argument that discipline is excessive given the facts of the situation is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989). DJS asserts that Grievant did not specifically request mitigation so the defense was waived and should not be considered.

Grievant did not specifically discuss mitigation. She did strongly contest the characterization of her statements as lies; she alleged she should not be punished for smacking a resident on the butt unless society is ready to indict the entire athletic community; that her cussing was minor and that she was not responsible for the embarrassment caused by the Judge's Order. In short, she argued that her punishment was too harsh. The West Virginia Supreme Court of Appeals has stated that the grievance process is not intended to be "a procedural quagmire where the merits of the cases are forgotten." *Spahr v. Preston County Bd. of Educ.*, 182 W.Va. 726, 730, 391 S.E.2d 739, 743 (1990); *Ewing v. Board of Educ. of County of Summers*, 202 W.Va. 228, 503 S.E.2d 541 (1998). While Grievant did not specifically state the term "mitigation," she raised the defense extensively throughout her testimony. To deny this *pro se* Grievant access to the defense under these circumstances would clearly be contrary to the West Virginia Supreme Court's ruling in *Spahr, supra.*

This Grievance Board has held that "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 the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). Mitigation of a penalty is considered on a case-by-case basis. *Conner v. Barbour County Bd. of Educ.*, Docket No. 95-01-031 (Sept. 29, 1995); *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. *Pingley v. Div. of Corr.*, Docket No. 95-CORR-252 (July 23, 1996).

Grievant's work history was satisfactory until the incident on March 24, 2008. While Grievant did not back down from the verbal confrontation with AT, the seriousness of this situation was blown out of proportion by the false accusations made by the residents that Grievant choked AT. The entire confrontation lasted only two minutes[22] and at worst Grievant reached for AT and AT deflected her arm and caused Grievant's hand to pass over AT's neck. Grievant's testimony was that in a meeting with her shortly after the incident, Director Miller did not express concern with Grievant's action.

One of the issues cited for Grievant's suspension was Judge Berger's Order that Grievant stay away from AT. While this Order was understandably an embarrassment for

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[22] The undersigned is acutely aware that a great deal of mayhem can occur in two minutes. *See 13 Seconds: A Look Back at the Kent State Shootings,* by Philip Caputo. Fortunately, in the present situation, no one was armed.

the DJS and the facility, Grievant had no culpability in that situation. Grievant also admitted to smacking a resident on the behind in a motherly way. This was not an appropriate act, but again was not nearly as drastic as it was portrayed. The accusation placed by the residents in the PREA Box were clearly part of a previously announced plan to cause Grievant's dismissal. In truth, the resident that Grievant actually smacked laughed when the incident happened and did not place a complaint in the PREA Box with the others.

Finally, the allegations of Grievant's lying are also overblown. Grievant did not try to deceive the investigators regarding the important issues of her confrontation with AT and her inappropriate contact and language with residents. The inconsistencies in her statements were generally related to facts of minor significance and appeared to be related to confusion and agitation.

Ultimately, Grievant's conduct proved to be much less serious and offensive than it was portrayed. Since the suspension of fifteen days was based upon the totality of Grievant's actions as they were portrayed in the investigation report and the suspension letter, that penalty was clearly disproportionate to Grievant's actual offenses. Even taking into consideration the deference that is due to DJS in determining the seriousness of Grievant's actions, the imposition of a fifteen day suspension was an abuse of discretion under the totality of the circumstances. Given the facts that Grievant did not choke AT, was not responsible for Judge Berger's Order, and only committed an isolated and minor error of judgement in playfully smacking a resident on the butt, a five day suspension is appropriate. Therefore, the Grievance is Granted only to the extent that the suspension

of Grievant is reduced from fifteen days to five days and Grievant must be made whole for the additional ten days she was suspended. In all other respects, 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). "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).

2. The argument that discipline is excessive given the facts of the situation is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

3. The grievance process is not intended to be “a procedural quagmire where the merits of the cases are forgotten." *Spahr v. Preston County Bd. of Educ.*, 182 W.Va. 726, 730, 391 S.E.2d 739, 743 (1990); *Ewing v. Board of Educ. of County of Summers*, 202 W.Va. 228, 503 S.E.2d 541 (1998). Through the presentation of her case, Grievant raised the affirmative defense that the penalty imposed upon her was disproportionate to her offense.

4. "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." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

5. Mitigation of a penalty is considered on a case-by-case basis. *Conner v. Barbour County Bd. of Educ.*, Docket No. 95-01-031 (Sept. 29, 1995); *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. *Pingley v. Div. of Corr.*, Docket No. 95-CORR-252 (July 23, 1996).

6. Given the totality of the circumstances, the penalty imposed by DJS upon Grievant was so disproportionate to her offense that it constituted an abuse of discretion.

Accordingly, the Grievance is GRANTED IN PART, AND DENIED IN PART. Respondent is ORDERED to reduce the fifteen day suspension without pay imposed upon Grievant to a five day suspension without pay, and to pay her ten days of back pay plus interest at the statutory rate, and credit her with any benefits she lost due to the excess ten days of suspension.

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: August 28, 2009

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE