THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DERRICK E. JETT,
Grievant,

v. **Docket No. 2009-0845-MAPS**

DIVISION OF JUVENILE SERVICES/
WV INDUSTRIAL HOME FOR YOUTH,
Respondent.

DECISION

Grievant Derrick E. Jett filed this grievance on January 5, 2009, challenging his termination from his position of Correctional Officer 2 at the West Virginia Industrial Home for Youth and the West Virginia Division of Juvenile Services. He seeks as relief to be reinstated along with back pay and the return of his annual and sick leave.

As this grievance concerned a termination, Grievant filed directly to level three following his dismissal. W. VA. CODE § 6C-2-4(a)(4). A level three hearing was conducted on April 1, 2009, before the undersigned Administrative Law Judge at the Grievance Board's office in Westover, West Virginia. Grievant appeared in person and by his representative, Jack Ferrell, CWA Local 2055. Respondent appeared by Steven R. Compton, Senior Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law on May 4, 2009.

Synopsis

Grievant was terminated for committing child abuse of a resident while escorting the resident from the Institution's school back to his unit. The evidence established that the

resident sustained bruising and swelling to his face and eye as a result of the unnecessary use of force by Grievant. In addition, an independent investigation was conducted by the Institutional Investigation Unit of the Department of Health and Human Resources which found Grievant responsible for committing child abuse of a resident. Grievant did not challenge this finding. Once Grievant was found to have committed child abuse and it was determined he should not work around juveniles, the inescapable consequence was that Grievant could not fulfill the duties of a juvenile correctional officer. This grievance is denied.

After a detailed review of the entire record, the undersigned makes the following Findings of Facts:

Findings of Fact

1. Grievant had been employed as a Correctional Officer at the West Virginia Industrial Home for Youth since June 17, 2006.

2. The incident in question centers around the transport of a resident RC[1] from the Johnson school premises at the Industrial Home to the main building because of RC's admittedly inappropriate behavior, including a threat to stab a teacher.

3. The transport of resident RC was first attempted by Officer Melvin Shipley, who first applied handcuffs to the unruly resident. Once the handcuffs were applied, resident RC pulled away from Officer Shipley. Resident RC continued to resist while Officer Shipley was transporting him out of the Johnson school.

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[1]The parties recognized the need to protect the privacy of the juvenile and followed the traditional practice of using the initials of the juvenile resident.

4. At the bottom of the second set of steps outside, resident RC resisted and Officer Shipley took the resident to the ground. At this time, Officer James Cain came out of the Johnson school to assist and Grievant came from another area of the school to assist. All three Officers proceeded down the roadway to the main building with the resident. Grievant was on the resident's right side, Officer Shipley was on the resident's left side, and Officer Cain was behind the resident. Resident RC again pulled away and was taken to the ground. The resident was picked up and the Officers began transport once again.

5. The resident was cursing and resisting during most of this incident. At one point, resident RC tried to pull away and spat at Grievant's face and mouth. Resident RC charges that Grievant then struck him in the face three times. Other personnel came to assist and took over the transport to the security unit, with Grievant returning to his duties at the school building.

6. Resident RC later complained of soreness to his face and jaw. Photographs taken the morning after the incident show that RC's face was bruised and his eye was blackened.

7. Grievant maintained throughout the investigation and the level three proceeding that he did not strike RC as alleged.

8. Lori Glover, Investigator for the Institutional Investigative Unit of the Department of Health and Human Resources, determined that Grievant had committed child abuse against the resident. Her recommendation to the West Virginia Industrial Home for Youth was that Grievant should no longer have access to minors based on the child abuse finding.

9. Grievant was notified on November 17, 2008, of that finding and his right to appeal that determination. Grievant did not appeal the findings of the investigation.

10. On December 10, 2008, Dale Humphreys, Director, notified Grievant of his termination effective December 21, 2008. The correspondence provided, in part, the following:

> Your conduct in this matter was inappropriate, unprofessional and is inconsistent with the values and philosophy of the Division of Juvenile Services. This conclusion was also made manifest in the independent investigation conducted by the Institutional Investigation Unit of the Department of Health and Human Resources which found you culpable/responsible for abuse of a child. They further find that you should have no further contact with juveniles based upon this instance of abuse.

11. The determination that Grievant committed child abuse and should not be around juveniles prevents him from being able to fulfill the duties of a juvenile correctional officer.

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. *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.*

Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965). Additionally, Division of Personnel Rule 143 C.S.R. 3.39 defines "Fitness" as "suitability to perform all essential duties of a position by virtue of meeting the established minimum qualifications and being otherwise qualified."

This matter presented the undersigned with witness accounts that consisted of inconsistencies and discrepancies. In situations where the existence or nonexistence of certain material facts hinges on witness 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 and 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*.

Grievant introduced the testimony of correctional officers Melvin Shipley and James Cain who were present with Grievant during the transport of the resident. Although neither officer claims that they saw Grievant strike the resident in the face, both acknowledge that it was possible Grievant could have struck the resident. Officer Shipley stated that he was not paying attention to Grievant during the takedown and that Grievant could have punched the resident but he did not see that happen. Officer Cain testified that he was focused on the resident the whole time and did not see Grievant strike the resident. Officer Cain also indicated that no officers were holding the resident's head and he did not see the school principal approach the scene in his vehicle. Grievant admitted he was holding the resident's head. Officer Cain, when pressed for details, conceded that it was possible that Grievant struck the resident.

Grievant also called Officer Richard Townsend who testified that he saw the resident beating his face against his cell door which caused the injury to his face. This explanation is not plausible for several reasons. The door to the cell has a jagged grate attached to it in order to prevent residents from striking it. The injury to the resident was consistent with a punch and not with striking the door. In the unlikely event that the resident had struck the door with his face as Officer Townsend described, he would have suffered lacerations over his face and head. The resident did not have any injuries consistent with that account. No other officer witnessed this behavior from the resident. No incident report

of this activity was logged in on the October 2008 date of this alleged behavior. Officer Townsend produced a copy of an incident report at level three that he claims to have written in December 2008 regarding the incident. In that report he makes a conclusion that the resident beating his face against the door caused his bruising and swelling. Captain Richard Eve testified in rebuttal that the December report from Office Townsend was not logged in as required by policy and that, as Captain, he reviews all incident reports and that he did not have any recollection of this report. Officer Townsend has been suspended for falsifying a state document in an unrelated matter, a charge which he does not deny.

The investigation determined that Grievant's version of the events, along with the other officers present, had many inconsistencies and did not comport with the physical evidence. For example, Grievant admitted holding the resident's head between his legs during one of the take downs; however, he claims he did not hear the resident complain of any pain or discomfort. Officer Shipley testified that he told Grievant to ease up on the resident. Officer Cain heard the resident complain that he could not breathe while the Grievant was on him.

Resident RC was interviewed about the incident and his version of events remained the same throughout the investigation. His version of events was also consistent with the physical evidence. The nurse who assessed RC's condition after the incident confirmed that the resident told her that he had been hit. The resident admitted that he was acting improperly, was using abusive language, and that he spat in Grievant's face. Investigator Glover indicated that despite repeated efforts to question his account and discredit it, the resident remained consistent in his representations. The undersigned concludes that the

Respondent has proven by a preponderance of the evidence that Grievant used unnecessary force which caused injury to the resident.

The other issue presented to the undersigned is whether Respondent violated any statutes, policies, rules, or regulations in terminating Grievant's employment. The evidence presented by Respondent was clear; Grievant was employed as a Correctional Officer 2 and one of the specific job duties of the position is working with juveniles. Grievant failed to challenge the finding of the Department of Health and Human Resources that he committed child abuse and should no longer have access to minors. It is clear Grievant is unable to perform an essential duty of the juvenile correctional officer position, and, therefore, does not meet the definition of fitness as defined by the Division of Personnel.

The following Conclusions of Law support the decision reached:

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. *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.*

2. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting

the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965).

3. In situations where the existence or nonexistence of certain material facts hinges on witness 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 and 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*.

4. "Fitness" for a classified position is defined as "suitability to perform all essential duties of a position by virtue of meeting the established minimum qualifications and being otherwise qualified." Division of Personnel Rule 143 C.S.R. 3.39.

5. Respondent has proven by a preponderance of the evidence that Grievant's employment was terminated for good cause, and demonstrated Grievant was not able or suited to perform the essential duties of his position.

Accordingly, this grievance is **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: May 27, 2009

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Ronald L. Reece
Administrative Law Judge