THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DAYMON LAVON ELDER,
Grievant,

v. **Docket No. 2010-0111-MAPS**

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

DECISION

Grievant Daymon LaVon Elder filed this grievance on April 23, 2009, challenging his termination from his position of Correctional Officer 5 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.

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 November 4, 2009 and February 2, 2010, before the undersigned Administrative Law Judge at the Grievance Board's office in Westover, West Virginia. Grievant represented himself. Respondent appeared by Steven R. Compton, Senior Assistant Attorney General. This matter became mature for consideration upon the conclusion of the second day of hearing.

Synopsis

Grievant was terminated for committing child abuse of a resident by utilizing a restraint technique which caused injury to the resident. The evidence established that the resident did not resist or attempt to fight Grievant at any point during the use of the full

nelson restraint. Grievant was trained and aware of proper escort and restraint holds. 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 restraint of resident MC who was unwilling to return to his room.[1]

3. On the afternoon of March 22, 2009, MC used his intercom to request permission to use the restroom and brush his teeth. MC exited his room but was asked by an officer to unplug the television. Several other residents had been watching the television from their room windows and were arguing about the choice of stations. Those residents then turned their ire to MC when he unplugged the television. MC then refused to go back into his room and wanted the officers to open the doors for the other boys so

[1]The undersigned recognizes the need to protect the privacy of the juvenile and follows the traditional practice of using the initials of the juvenile resident.

that he could straighten out matters on his own. Other correctional officers then tried to talk MC down from his agitated frame of mind and convince him to return to his room.

4. MC continued to refuse, but was not aggressive toward the officers. At this point a call was made for assistance and, following a series of events related to viewing the situation on a monitor, Grievant went to the unit.

5. Grievant asked MC to return to his room. MC continued to refuse the commands. Grievant came up behind MC and applied a full nelson hold on the resident. MC was picked up off the floor with this improper restraint. Grievant moved MC into his room and placed the resident on his bed. MC was restrained by Grievant with the full nelson hold, which resulted in MC's face being in the mattress. MC then complained to Grievant that he was having difficulty breathing. Once MC's legs and arms were secured, Grievant released the hold and backed out of the room.

6. Later that afternoon MC noticed red dots on his face when he went to take a shower. The on-duty nurse thought it was a rash from the chemical used to clean the restrooms and gave MC benadryl.

7. On March 23, 2009, MC still had the red areas and swelling around the eyes and some pressure felt behind the eyes.

8. On March 24, 2009, MC was seen by the faculty doctor who determined that the resident had "periorbital edema with a petiachal rash." The doctor asked MC who had choked him and the resident told of Grievant's hold on him when he refused to return to his room. The doctor opined that the resident's injuries could only have occurred by lack of oxygen and/or cranial pressure. Investigation of Alleged Abuse or Neglect, Respondent's Exhibit 3, Level Three.

9. Grievant was trained and aware of proper escort and restraint holds.

10. 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 by report dated March 24, 2009. 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.

11. Grievant was notified on April 15, 2009, of that finding and his right to appeal that determination. Grievant did not appeal the findings of the investigation.

12. On April 10, 2009, Dale Humphreys, Director of the Division of Juvenile Services, notified Grievant of his termination effective April 23, 2009. The correspondence provided, in part, the following:

> As you know, you were previously suspended without pay on March 25, 2009 pending investigation. That investigation determined that on March 22, 2009, you were involved in a restraint of a resident who was passively refusing to return to his room. At that time you were the highest ranking officer at the scene. Although there were other officers around to assist, you unnecessarily and prematurely took physical control of the resident by yourself utilizing a restraint technique that easily could have caused a more serious injury to the resident. You continued this unreasonable and unnecessary restraint until the resident arrived back to his room. The resident did not resist or attempt to fight you at any point during the restraint nor did you request any assistance from other officers at the scene. Your unprofessional handling of the entire situation was contrary to the training you have received and was in direct violation of Division policy and procedure. This is especially troubling considering you are a high ranking officer at the facility.

13. 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. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 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). In other words, "[t]he 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).

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."

Grievant acknowledges that he was at a shift briefing when shift supervisor Sgt. Brian Timmons received a phone call from the Programming Unit stating that MC was refusing to return to his room. A short time later, Sgt. Timmons called up the unit security camera and Grievant saw MC in an animated conversation with unit staff. At that time a second call was made and Grievant observed MC throw down his shirt and toothbrush on the unit floor and take an aggressive stance against staff. Grievant and Sgt. Timmons reported to the unit and upon entering the unit, commanded the resident to return to his room. The resident stated that he was going to hit the first officer that touched him. Grievant saw the resident lift his arms up as if to assault the staff. Grievant reacted by coming from behind the resident, placed his arms under the resident's arm pits and around the neck and moved him into the room.

Once inside the room the Grievant positioned himself in a manner to direct the resident onto the bed with other officers assisting. At one point the resident said he could not breathe, but Grievant asserts he did not have any pressure on the resident's neck and replied that if you can talk you are breathing. Grievant talked to staff on the unit after the incident and was told that MC was crying and stated that he knew he was wrong and should have returned to his room.

Grievant acknowledges that he acted out of proper protocol, but did so because he thought the resident was going to strike staff. Grievant denies putting pressure on the resident's neck and that he never intended to cause injury to the resident. Nevertheless, the doctor's report indicates that the resident's injuries could only have occurred by lack of oxygen and/or cranial pressure. This is especially troubling because the report indicates that prolonged or severe cranial pressure and/or lack of oxygen can have severe and even

life threatening effects. The undersigned can come to no other conclusion than the Respondent has proven by a preponderance of the evidence that Grievant used unnecessary force which caused injury to the resident. Grievant's employment was terminated for good cause.

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 5 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. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

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. "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.

4. 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: April 12, 2010

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Ronald L. Reece
Administrative Law Judge