

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**PETER LUNSFORD and FRANKLIN KELLY,
Grievant,**

v.

Docket No. 2016-1368-CONS

**REGIONAL JAIL AND CORRECTIONAL FACILITY
AUTHORITY/WESTERN REGIONAL JAIL,
Respondent.**

DECISION

Grievants, Peter Lunsford and Franklin Kelly were both employed as Correctional Officers at the Western Regional Jail (“Jail”) which is operated by Respondent, Regional Jail and Correctional Facility Authority (“RJCFA”). Mr. Lunsford and Mr. Kelly filed identical expedited level three grievance forms¹ dated February 8, 2016, alleging:

Grievant was terminated contrary to the Administrative Rules governing WV Public Employees; there was no progressive discipline/viol due process. Respondent violated administrative rule 12.2 – D – dismissal- 15 days written notice was not provided; No opportunity to respond was provided. Respondent violated employee’s liberty and/or property interest in violation of WV Code Sec 29-6-10.²

As relief the Grievants seek “reinstatement as well as back pay and lost wages.” The grievances were consolidated for hearing and decision by order dated March 9, 2016.

A level three hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance Board on May 3, 2016. Grievants appeared personally and were represented by Abraham J. Saad, Saad Dixon Law Office. Respondent, Regional Jail and Correctional Facility Authority, was represented by Leah Macia, RJCFA General

¹ See W.Va. CODE § 6C-2-4(a)(4).

² The statement of grievance is reproduced herein as it appeared on the grievance forms.

Counsel. This matter became mature for decision on June 3, 2016, with receipt of the parties Proposed Findings of Fact and Conclusions of Law.

Synopsis

Both Grievants were involved in an incident which occurred while restraining a prisoner at the Jail. CO Kelly was dismissed for allegedly pushing a restraint chair under the prisoner forcing him to fall into the chair even though the prisoner was compliant. CO Lunsford was dismissed for allegedly punching the prisoner with a closed fist in retaliation for being bitten by the prisoner. A video of the incident shows the prisoner being seated in the chair and being struck twice by CO Lunsford. There was insufficient evidence presented to prove that the prisoner was forced to fall into the chair by CO Kelly. Additionally, CO Kelly, who is a trainer of defense tactics for the RJCFA provided undisputed testimony that the strikes he delivered to the prisoner were appropriate defensive measures under the circumstances and his actions did not violate the agency's rules and procedures.

Respondent did not prove that Grievants engaged in misconduct which warranted terminating their employment. Accordingly, the Grievances are GRANTED.

Findings of Fact

1. Grievant, Peter Lunsford, worked at the Western Regional Jail for over three years. He held the classification of Correctional Officer 4 and the rank of Sergeant.
2. Grievant, Franklin Kelly, was a Correctional Office 2 at the Western Regional where he was initially employed in June 2008 after being honorably discharged from military service.

3. Both Grievants have been extensively trained in proper inmate restraint techniques, defensive tactics, and proper use of force for COs. Correctional Officers receive defensive tactics training annually while employed by Respondent.

4. In addition to serving as a CO 2, Grievant Kelly was selected to be a disciplinary hearing officer, a booking officer and was firearms certified. Grievant Kelly was sent to the training academy to receive additional training to become a defensive tactics instructor. He passed that course and is a certified instructor in PPCT³ defense tactics. Pursuant to this certification, Grievant Kelly is charged with teaching the proper use of those techniques to other COs employed by Respondent.

5. Grievant Lunsford has not received any disciplinary action during his employment and Grievant Kelly has only been disciplined once for a minor isolated incident which occurred in 2001.⁴ Both Grievants were considered to be good correctional officers and valued employees.⁵

6. On January 10, 2016, an inmate at the Jail became unruly and began to destroy property in his cell. Ultimately, he broke the sprinkler head in his cell which caused the sprinkler system to engage spraying water into the cell.

7. “Popping” the sprinkler head in his cell causes a significant amount of difficulty for the correctional officers. The water for the facility needs to be turned off until the sprinkler head can be replaced and remote emergency response organizations have to be notified immediately that there is no need for them to respond. Additionally, the sprinkler heads, when broken, may produce metal shards which may be used as a

³ Pressure Point Control Tactics.

⁴ The witness could not remember any details regarding this incident.

⁵ Uncontested testimony offered at the level three hearing.

weapon to cut correctional officers or inmates. The correctional officers are required to remove the inmate from his cell while it is being dried and a search can be made for shards.

8. Sergeant Lunsford initiated a “calculated response”⁶ to the inmate’s action. Due to the inmate’s prior violent behavior and the fact that he was making threats to continue damaging property, it was determined that the inmate should be placed in restraints while he was being transported to the medical department for examination and dry clothing.

9. Grievants, Sergeant Lunsford and CO2 Kelly, as well as Corporal Michael York and CO2 Mary Hendricks made up the response team. CO2 Hendricks was assigned to video the entire response process while the remaining officers applied the restraints and transferred the inmate.

10. The inmate was restrained with wrist and ankle shackles. His wrists were behind his back and he was able to walk without difficulty. The four officers escorted the inmate from his cell to the medical waiting room. During the entire trip the inmate was threatening to continue popping the sprinklers, destroy property and harm COs as much as he could.

11. As a result of the inmate’s ongoing threats, Sergeant Lunsford determined that further restraint was necessary while the inmate was given a cooling down period.

⁶ Calculated Response – A supervised, coordinated response to an existing threat which is or can be contained, and there is no immediate, direct threat to the inmate or others. A calculated response allows for a pre-planned response, use of protective equipment, and often the employment of “team tactics” which can include crisis intervention/conflict resolution techniques. *WVRJCFA Policy and Procedure Statement – Use of Force by Regional Jail Personnel* (Grievants Exhibit 1).

Grievant Lunsford decided to place the inmate in a chair restraint while he was given time to cool down and become more composed.⁷

12. Grievant Kelly retrieved the restraint chair and brought it into the medical waiting room. Grievant Lunsford and Corporal York brought the inmate into the room and turned him so he was facing away from the chair so he could sit down. While the inmate was bending to sit, Grievant brought the chair under him very quickly.⁸ The inmate sat down into the chair. The chair did not make contact with the inmate's legs and force him to fall into the chair.⁹

13. Once the inmate was in the chair, Grievant Kelly, who was standing behind the chair, reached over the high back of the chair and attempted to place his hand on the inmate's forehead and bring his head back to the chair. Because CO2 Kelly is not very tall and the inmate was attempting to lean forward, Grievant Kelly did not reach the inmate's forehead and could not bring it back to the chair for a more secure position.¹⁰

14. Grievant Lunsford and Corporal York continued to attempt to secure the inmate's legs and arms. The inmate lunged forward and bit Grievant Lunsford on the forearm. Grievant Lunsford pushed the inmate's head back and then struck the inmate

⁷ No one is contesting that this was an appropriate strategy for dealing with the inmate under the circumstances.

⁸ Grievant Kelly testified that he brought the chair forward too quickly because he was tired and frustrated.

⁹ Testimony of all officers present at the time. The video of the incident shows the chair coming forward quickly and the inmate sitting down in the chair. It cannot be determined from the video whether the inmate sat in the chair from impact with it or voluntarily. Given the undisputed testimony offered, it is more likely that not that he sat in the chair voluntarily.

¹⁰ Grievant Kelly's hand slid back over the top of the inmate's head. To his credit, Grievant Kelly did not grasp the inmate's hair to secure his head after missing the forehead.

on the side of the head near his face to force the inmate's head against the chair back where he could not bite Grievant Lunsford or Corporal York.

15. The push and the strike occurred quickly and no other officer had control of the inmate's head. Grievant Lunsford closed his fist when he brought it back for the strike, but his knuckles were turned up when he hit the inmate resulting in him striking the inmate with the heel of his hand and not his knuckles. Once his hand struck the inmates head Grievant Lunsford maintained contact, holding the inmate's head back until the other officers could help maintain control. While it occurred quickly and with force, Sergeant Lunsford's strike was a controlled movement rather than an angry punch.¹¹

16. Once the inmate was under control, Grievant Lunsford disengaged and allowed Grievant Kelly and Corporal York to complete the process of securing the restraints. He held the bite up to the video camera for documentation and proceeded to the medical room for treatment. The bite was bruised and bleeding. (Grievant's Exhibit 2, an enlarged color picture of the bitten area.

17. While Grievant Kelly and Corporal York continued with the restraints, the inmate held his arm behind his back so it could not be secured to the arm of the chair. Grievant Kelly leaned forward in an effort to gain better leverage on the arm and the inmate thrust forward and head-butted Grievant Kelly causing a very slight abrasion on CO2 Kelly's forehead. Thereafter, the two officers were able to complete the process of securing the inmate to the chair.

18. Pursuant to RJCFA regulations, the inmate was examined by a nurse as soon as he was secured to the chair. Additionally, the inmate remained under observation

¹¹ Respondent Video Exhibit A – Video file “SVD 0751”.

during the entire cooling down period and the inmate was periodically checked by the nurse. The inmate did not report any injury and no injury was visible to the nurse who examined him. The video did not show that the inmate had any marks, scratches, bruises, or abrasions where he was struck by Grievant Lunsford.

19. Grievant Lunsford testified that he administered a “Hard Empty-Hand Control” technique as response to the biting attack of the inmate. Biting is considered a very serious and high level attack by an inmate because it is always intended to inflict injury on the victim and it runs the additional risk of exposure to infections from dangerous pathogens such as Hepatitis and HIV, which the inmates may be carrying.¹²

20. The *WVRJCFA Policy and Procedure Statement – Use of Force by Regional Jail Personnel* defines the Empty-Hand Control technique as follows:

Empty-Hand Control (Soft/Hard) – The lowest level of physical force available generally used to overcome low levels of resistance and noncompliance. Soft empty-hand control techniques may include pain compliance techniques, joint locks, and leverage locks. Hard empty-hand control generally includes strikes, stuns and handcuffing while encountering resistance. *Id.*

21. The first paragraph of the *Procedure* section of the policy sets out the difficulty in establishing hard line specific procedures to follow in fast moving, fluid and dangerous situations by stating:

It must be understood that no two use of force encounters will be exactly alike. No policy can provide specific guidelines dictating the immediate response of staff who unexpectedly and rapidly find themselves involved in a situation requiring a forceful response. *Id.* (Emphasis in original)

¹² The likelihood of contracting these illnesses is increased by illegal drug use. The Jail population has a higher percentage of drug abusers than the general public. Due to privacy requirements, the correctional officers do not know if a particular inmate is infected so they must treat any exposure as if it could lead to a dangerous infection.

22. Grievant Lunsford applied an Empty-Hand hard control technique consistent with RJCFA training. This defense technique is a legitimate first response to a higher level of attack from the inmate. A closed-fist strike falls within the definition of an Empty-Hand hard control technique.¹³

23. An investigation of the incident was conducted by RJCFA Inspector, Jackie Elston. Inspector Elston prepared a report of the investigation which included *inter alia* summaries of interviews, pictures, findings and conclusions. It is not apparent when the report was completed.¹⁴ (Respondent Exhibit 1).

24. Both Grievants were suspended without pay for a period of forty-five days while an investigation was conducted into the incident that occurred on January 10, 2016. The suspensions were initiated verbally on January 11, 2016, and a letter confirming the suspensions was sent to each Grievant the next day. (Respondent Exhibit 2).

25. On January 29, 2016, each Grievant attended a separate predetermination conference. In addition to the Grievant, each conference was attended by: April Darnell, Director of Human Resources; Carl Aldridge, Captain; J.T. Binion, Chief of Operations; Katrina Kessel, Assistant Director of Human Resources; and Rochelle Elliot, Human Resources Manager.

¹³ All of the officers who were present and personally witnessed the incident testified separately to this fact. They have all been regularly and repeatedly trained in the Use of Force policy and CO2 Kelly is a trainer in proper defensive techniques. They all testified that no excessive force was utilized by either Grievant in this incident. No testimony was offered to dispute this interpretation of the policy as it relates to the actions of the Grievants in these specific circumstances.

¹⁴ Respondent offered the report as an exhibit in its case in chief, but Inspector Elston was not called to testify.

26. Grievant Lunsford was dismissed from employment by letter dated February 2, 2016, and signed by Director of Human Resources, April Darnell. The reasons cited in the letter were: violation of Policy #3010 – *Code of Conduct* by using excessive force; Policy #9031 – *Use of Force by Jail Personnel* by using force to punish an inmate; *Procedure A* – Using force in excess of that necessary to accomplish restraint. All of these charges relate to Sergeant Lunford's striking the inmate in the January 10, 2016 incident. (Respondent Exhibit 3)

27. The letter dismissing Grievant Kelly was also dated February 2, 2016, and signed by Director Darnell. The reasons cited for this disciplinary action cited violation of the same policies based upon the following:

On January 10, 2016, while an inmate was standing to be placed in a restraint chair, you aggressively shoved the restraint chair underneath the inmate out of aggression and frustration. Furthermore, video footage indicates that you shoved the inmate on the forehead while trying to secure him.

(Respondent Exhibit 3).

Discussion

As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges against the Grievants by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008).

... See [*Watkins v. McDowell County Bd. of Educ.*, 229 W.Va. 500, 729 S.E.2d 822] at 833 (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education*, 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). See also *Hovermale v. Berkeley Springs Moose Lodge*, 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) ("Proof by a preponderance of the

evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence.”) . . .

W. Va. Dep’t of Trans., Div. of Highways v. Litten, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievants were permanent state employees in the classified service. 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). See also *Sloan v. Dep’t of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004)(per curiam). “*Oakes v. W. Va. Dept. of Finance and Administration, supra*, requires that a violation sufficient to support a dismissal be of a substantial nature and that if it involves a violation of a statute or official duty it must be done with wrongful intent.” *Serreno v. West Va. Civil Serv. Comm’n*, 169 W. Va. 111, 115, 285 S.E.2d 899, 902 (1982) (per curiam). “‘Good cause’ for dismissal will be found when an employee’s conduct shows a gross disregard for professional responsibilities or the public safety.” *Drown v. W. Va. Civil Serv. Comm’n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988).

Grievants were dismissed from employment for allegedly using excessive force in restraining an inmate on January 10, 2016. Grievant Lunsford is accused of hitting the inmate in the head with a closed fist in retaliation for the inmate biting him. Respondent

argues that this violated *West Virginia Regional Jail Authority Policy and Procedure #3010 – Code of Conduct* because it constituted excessive use of force which was not in compliance with Regional Jail Policy;¹⁵ Policy # 9031 which states that “Force cannot be used to punish an inmate.” (Emphasis in original); and *Procedure A*, because striking the inmate was unnecessary to accomplish the purpose of restraining the inmate. In essence, Respondent alleges that Grievant Lunsford hit the inmate in retaliation for biting him rather than as a strategy to accomplish a safe restraint.

Grievant Kelly was dismissed for pushing the chair rapidly up to the back of the inmate which allegedly caused the inmate to fall into the chair. This action is alleged to have violated the same policies cited for Grievant Lunsford. Respondent avers that Grievant Kelly’s actions were motivated by anger and frustration and constituted inappropriate use of excessive force.

As evidence, Respondent offered the video files of the incident recorded by CO2 Hendricks, a “Report of Investigation” prepared by Inspector Elston, and the letters of suspension and dismissal issued to each Grievant. No testimony was offered as direct evidence or in rebuttal. The letters provide detail into the reasons for the dismissals, but provide no evidence to prove the allegations contain therein. CO2 Hendricks and both Grievants testified that the video was taken by her in accordance with the RJCFA policy which requires proper documentation of incidents where restraint is necessary. Additionally, both Grievants testified that they had seen the video files and the videos

¹⁵ Policy #3010 – Code of Conduct States in part: “The use of excessive force shall not be tolerated. The use of Force,(sic) except in compliance with Regional Jail Authority shall result in disciplinary action.

accurately and completely reflected the incident. Grievants objected to the admission and use of the Report as evidence because it constituted hearsay.

“Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered for the truth of the matter asserted.”¹⁶ The Report of Investigation is a narrative of the steps followed by the investigator as well as findings and conclusions reached regarding the actions of the Grievants during the incident. It also includes written statements and summaries of statements made by individuals interviewed by the investigator. None of these statements were made at the hearing under oath. Accordingly, we start with the understanding that the Report of Investigation and the findings made therein are hearsay. “[T]he primary reason for the exclusion of hearsay is that there is no way for the trier of fact to judge the trustworthiness of the information.”

Handbook on Evidence for West Virginia Lawyers, Vol. 2, 4th Edition, Franklin D. Cleckley, © 1994. The evidence is inherently unreliable because; it denies the accused the opportunity for cross examination of the speaker at the time it is being made, it often lacks the sanction of being made under oath, and it facilitates the use of perjured evidence. *Id.*

Under the statutes and procedural rules relating to grievances, the formal rules are not applicable in the grievance procedure. See generally W. VA. CODE 6C-2-4(a)(3). The issue is one of weight rather than admissibility. This reflects a legislative recognition of two unique factors in grievance proceedings; the participants are often not lawyers and are not familiar with the technical rules of evidence, as well as the reality that the triers of fact are not lay jurors, but administrative law judges who are trained to understand and

¹⁶ *Handbook on Evidence for West Virginia Lawyers*, Vol. 2, 4th Edition, Franklin D. Cleckley, © 1994.

take into account the reasons why some forms of evidence are much less reliable than others. Accordingly, an administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. *Warner v. Dep't of Health and Human Resources*, Docket No. 07-HHR-409 (Nov. 18, 2008); *Miller v. W. Va. Dep't of Health and Human Resources*, Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ.*, Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996). That means that hearsay evidence, while generally admissible, will be subject to scrutiny because of its inherent susceptibility to being untrustworthy.

In applying that scrutiny, administrative law judges apply the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. See, *Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (March 11, 2010) (affirmed by the Circuit Court of Kanawha County, WV, June 9, 2011).

There was no reason to believe that the investigator was not available to testify and be subject to cross examination regarding the report, especially the findings and conclusions therein. This was particularly important since some of the conclusions

reached were counter to the consistent testimony of all of the witnesses who were present. Without that testimony and the ability to cross examine the declarant there is no way for the undersigned to measure the “trustworthiness of the information” contained in the report. Consequently, the Report of Investigation can be given no weight as evidence. *Kennedy supra; see also, Mullins v. Reg. Jail & Corr. Facility Auth.*, Docket No. 2013-1660-MAPS (Dec. 20, 2013).

What remains is the video files. CO2 Hendricks testified that she took the video as part of her duties which include the documentation of incidents where restraint of an inmate is necessary. Grievants testified that they had seen the videos and they accurately and completely reflect the incident. No one raised any issue regarding their authenticity or to indicate that the video files had been altered. The video files are entitled to weight and are the only evidence supporting Respondent’s disciplinary actions.

Concerning the allegations against Grievant Kelly, the video shows that he pushed the restraint chair toward the inmate while the inmate was facing in the opposite direction. The inmate was in a position to begin sitting as the chair approached. When the chair reached the inmate, he flopped into the chair. It cannot be determined with certainty from the video whether the inmate fell into the chair from an impact with it or he just sat down when the chair arrived.

Corporal York was present when the incident took place and was standing to one side of the inmate holding his arm. Corporal York was in a position where he could see if the chair made impact with the inmate. He testified credibly that it did not. Corporal York stated that the chair may have touched Grievant’s heals, but it did not hit him in the legs. Corporal York noted that if the chair made impact with the inmate’s heels it was minor

contact and did not force the inmate to fall into the chair. This testimony is consistent with the lack of a reaction from the inmate which one would expect if he were hit with a chair and forced to fall backwards into it.

While Grievant Kelly admitted that he moved the chair up rapidly, which could have been a problem, he did not hit the inmate with the chair and did not employ excessive force in restraint of the inmate. Respondent did not prove, by a preponderance of the evidence, that Grievant Kelly committed the misconduct that was the basis for his discipline.

With regard to Grievant Lunsford, the video reveals the actions occurring when he was bitten by the inmate. While Grievant Lunsford was working at the side of the chair with the restraints, the inmate lunged forward and bit Grievant Lunsford on the forearm. Grievant Lunsford pushed the inmate's head back and then struck the inmate on the side of the head near his face to force the inmate's head against the chair back where he could not bite Grievant or Corporal York. Corporal York moved quickly to push the inmate back into the chair and attempted to secure him to as well

The push and the strike occurred quickly and no other officer had control of the inmate's head when it was delivered. Grievant Lunsford closed his fist when he brought it back for the strike but his knuckles were turned up when he hit the inmate resulting in him striking the inmate with the heel of his hand and not his knuckles. Once his hand struck the inmate's head, Grievant Lunsford maintained contact holding the inmates head back until the other officers could help maintain control. While it occurred quickly and with force, Sergeant Lunsford's strike was a controlled movement rather than an angry punch.

Grievant Lunsford said that he reacted instinctively to the bite and struck the inmate. Respondent took that statement to mean that he lost control and hit the inmate out of anger. However, it appears more likely that the regular training took over and Grievant Lunsford instinctively used a technique he had been taught repeatedly for such an incident.

Grievant Lunsford, Grievant Kelly, Corporal York, and CO2 Harrison all testified that the strike delivered by Corporal Lunsford was a hard empty-hand strike which was a reasonable and appropriate response to the inmate's action and an attempt to protect the officers and the inmate from further injury. A hard "empty-hand control" is described in the Jail's policy related to use of force as follows: "Hard empty-hand control generally includes strikes, stuns and handcuffing while encountering resistance." The policy also notes that the strike is "the lowest level of physical force available generally used to overcome low levels of resistance and noncompliance."¹⁷

All of these officers have taken the defensive tactics training on several occasions. CO2 Kelly has passed a course at the academy in this area and is certified as a trainer. He has been training officers in these techniques for two years. All of the officers were present at the event, and at least two of them (the Grievants) had viewed the video. They all testified that the actions of Grievant Lunsford were consistent with their training and no excessive force was used. There is no evidence on the record that disputes this consistent testimony. The actions on the video are also consistent with the definitions of an empty-hand strike set out in the Use of Force Policy. Additionally, a close examination of the video reveals that Grievant Lunsford turned his knuckles up and struck the inmate

¹⁷ WVRJCFA Policy and Procedure Statement – Use of Force by Regional Jail Personnel.

with the heel of his hand. That action is not consistent with a punch that was made in anger. Respondent did not prove by a preponderance of the evidence that Grievant Lunsford committed the alleged misconduct which was the basis of his discipline.

Since Respondent failed to prove the charges against either Grievant by a preponderance of the evidence the Grievances are GRANTED.

Conclusions of Law

1. As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges against the Grievants by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008).

2. An administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. *Warner v. Dep't of Health and Human Resources*, Docket No. 07-HHR-409 (Nov. 18, 2008); *Miller v. W. Va. Dep't of Health and Human Resources*, Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ.*, Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996). That means that hearsay evidence, while generally admissible, will be subject to scrutiny because of its inherent susceptibility to being untrustworthy.

3. In applying that scrutiny, administrative law judges apply the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the

consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. See, *Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (March 11, 2010) (affirmed by the Circuit Court of Kanawha County, WV, June 9, 2011).

4. The Report of Investigation is hearsay and under the circumstances of this case, can be given no weight as evidence.

5. Respondent failed to prove the charges against either Grievant by a preponderance of the evidence.

Accordingly, the Grievances are GRANTED.

Respondent is Ordered to immediately reinstate Grievant Lunsford and Grievant Kelly to the positions they held prior to their dismissal, and restore all benefits they may have accrued and the ranks they held. Additionally, Respondent is Ordered to pay both Grievants back pay plus statutory interest from the date they were initially suspended until the date they are reinstated.

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: SEPTEMBER 28, 2016.

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE