**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**EDWARD MUCKLOW,**

**Grievant,**

**v.** **Docket No. 2017-0903-MAPS**

**DIVISION OF JUVENILE SERVICES,**

**Respondent.**

## DECISION

Grievant, Edward Mucklow, filed an expedited level three grievance dated September 1, 2016, against his employer, Respondent, Division of Juvenile Services, stating as follows: "[s]uspension without good cause." As relief sought, the Grievant seeks, "[t]o be made whole in every way including back pay with interest and benefits restored."

The level three hearing was conducted on October 25, 2016, before the undersigned administrative law judge at the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person, and by his representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by counsel, Benjamin Freeman, Esquire, Assistant Attorney General.[1] This matter became mature for decision on December 5, 2016, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

[1] On November 10, 2016, Mr. Freeman submitted Respondent's post-hearing submissions well in advance of the set mailing date. On December 5, 2016, Celeste Webb-Barber, Assistant Attorney General, again submitted proposed Findings and Fact and Conclusions of Law on behalf of Respondent. The two proposals appear to be the same.

## Synopsis

Grievant is employed by Respondent as a Correctional Counselor I. Respondent suspended Grievant for five days without pay for "failing to meet acceptable performance standards" by being in possession of a pocket knife while at work, and for asking a juvenile "if he had been smoking a crack pipe." Grievant denies being in possession of the knife and denies making the statement to the juvenile. Grievant argues that suspension was improper. Respondent failed to meet its burden of proving its claims by a preponderance of the evidence. Therefore, this grievance 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 is employed by Respondent at the Correctional Counselor I at the Putnam County Youth Reporting Center. Grievant has been employed by Respondent for two years.

2. Joshua Woods is the Putnam County Youth Reporting Center Program Director. Mr. Woods is Grievant's direct supervisor. Jason Wright is the Director of Community Based Programs at DJS. Mr. Wright is in Grievant's chain of command, but not his direct supervisor. Upon information and belief, Mr. Wright is above Mr. Woods in the chain of command.

3. On July 28, 2016, Grievant was at a Teays Valley, West Virginia, church with a group of juveniles who were performing community service. Also present at the church that day was Emily Brown, who at that time, was also employed by Respondent.

Upon information and belief, another DJS employee, Caitlyn Moriarty, was present at the church that day.

4. At some point while Grievant and the others were at the church on July 28, 2016, the church's pastor asked Grievant to help him by opening a locked basement door so that the church's clothing closet could be accessed for the community service work. Grievant assisted the pastor and opened the door.[2]

5. Also, while at the church on July 28, 2016, Grievant had a conversation with one of the juveniles during which the word "crack" was used.

6. Sometime after July 28, 2016, two of the employees present that day at the church reported up the chain of command that Grievant had used a knife to open the locked door, and had asked a juvenile if "he had been smoking a crack pipe." Upon information and belief, the two employees reported this to Joshua Woods. Thereafter, at some point, Mr. Woods reported the same to Jason Wright.

7. Neither of the employees who made the report to Mr. Woods completed an incident report or drafted a written statement. It appears that all of the reporting and communications about the alleged incidents were verbal. Further, there was no investigation in to the allegations. Based upon the evidence presented, it appears that the pastor was not asked about the events of July 28, 2016, nor was anyone else. It appears that management took the word of the two reporting employees then began discussions about discipline.

[2] *See*, testimony of Edward Mucklow, Grievant. There is a dispute as to how Grievant opened the door. Such will be addressed in the discussion section of this decision.

8. Neither Jason Wright nor Joshua Woods were present at the church on July 28, 2016, and did not witness either alleged incident.

9. Program Director Joshua Woods conducted a predetermination conference with Grievant on August 11, 2016, about the alleged incidents on July 28, 2016. When asked about making the "crack" comment, Grievant stated that he did not recall making such a statement. It is disputed whether Grievant admitted to using his pocket knife to open the door at the church during this meeting.

10. By letter dated August 15, 2016, Grievant was suspended from work without pay for five working days for "failing to meet acceptable performance standards" arising out of the two incidents alleged to have occurred on July 28, 2016, at the church. It is unknown who made the decision to suspend Grievant.

11. The August 15, 2016, suspension letter states that the disciplinary action was being taken "in accordance with the West Virginia Division of Juvenile Services Policy 138.00 and also as outlined and in accordance with the West Virginia Department of Personnel Administrative Rule 12.3." No other policies, procedures, or rules are mentioned in the letter. DJS Policy 138.00 is not quoted or summarized in the suspension letter, and the policy was not presented as evidence at the hearing. Therefore, it is unknown what this policy says.

12. No policies were introduced as exhibits at the level three hearing in this matter. Further, none of the witnesses offered by Respondent were able to testify about any applicable policies with any specificity, or detail.

13. Caitlyn Moriarty was not called to testify at the level three hearing.

14. Upon information and belief, Grievant served his five-day suspension from August 22, 2016, through August 26, 2016.

**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. W.VA. CODE ST. R. § 156-1-3 (2008); *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.*

Respondent asserts that it suspended Grievant without pay for five working days for "failing to meet acceptable performance standards" for allegedly using a pocket knife to open a locked door for the pastor of the church and for asking a juvenile "if he had been smoking a crack pipe." Grievant denies making the comment to the juvenile and denies having a knife at the church that day. Grievant admits to opening the door at the request of the pastor, but asserts that he used the file implement on his "multi-tool" to open the door. Grievant further asserts that the "multi-tool" has no knife blades, and he presented the same during the level three hearing in this matter. Grievant also argues that despite what Mr. Woods claims, he did not admit to using a pocket knife to open the door during his predetermination. Grievant argues that he told Mr. Woods about the "multi-tool" and showed it to him during the predetermination.

In support of its claims that Grievant had used a knife to open the locked door and asked the juvenile about "smoking crack," Respondent presented Emily Brown as a witness. Ms. Brown had been at the church on July 28, 2016. However, she testified that she did not see Grievant in possession of a knife or use a knife to open the door. Instead she testified that she saw Grievant doing something to the door, and heard the pastor ask Grievant to open the door, and heard a conversation between Ms. Moriarty and Grievant concerning a knife. Also, Ms. Brown testified that Ms. Moriarty had told her about the conversation afterwards. Therefore, Respondent is relying mostly upon hearsay to prove its claim about the knife.

Under the statues and procedural rules regarding the grievance process, the formal rules of evidence are not applicable in grievance proceedings, except as to the rules of privilege recognized by law. *See* W. VA. CODE § 6C-2-4(a)(3). The issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings. Accordingly, an administrative law judge must determine what weight, if any, that is to be accorded hearsay evidence in a disciplinary proceeding. *See Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (March 11, 2010), *aff'd*, Kan. Co. Cir. Ct., Civil Action No. 10-AA-73 (June 9, 2011); *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).

The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with firsthand 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), *aff'd*, Kan. Co. Cir. Ct., Civil Action No. 10-AA-73 (June 9, 2011)*; Gunnells v. Logan County Bd. of Educ.,* Docket No. 97-23-055 (Dec. 9, 1997); *Sinsel v. Harrison County Bd. of Educ.,* Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't,* Docket No. 90-H-115 (June 8, 1990).

Ms. Brown testified that she did not see a knife. Ms. Brown testified that she overheard a portion of a conversation between Grievant and Ms. Moriarty, and that she and Ms. Moriarty discussed the incident before they made the report to Mr. Woods. Ms. Brown was not party to the conversation, never saw a knife, and appears to have relied on Ms. Moriarty's account to conclude that Grievant used a knife to open the door. Therefore, Ms. Brown's testimony regarding the knife is entitled to no weight. Further, Ms. Moriarty was not called as a witness, and nothing is known about her availability to

testify. Further, there are no sworn statements, or any written statements at all, from either Ms. Brown or Ms. Moriarty. Additionally, the pastor was not called as a witness.

Mr. Woods testified that Grievant admitted at his predetermination that he had the knife at the church that day. Grievant denies this entirely, and testified that he told Mr. Woods about the multi-tool during the predetermination, and showed it to him that day. Mr. Woods was not asked about a multi-tool. Upon information and belief, no one else was present at the predetermination conference, and the same was not recorded. Respondent offered into evidence a document purported to be a memo, or summary, drafted by Mr. Woods to Mr. Wright about what occurred at the predetermination conference.[3] However, Mr. Woods was asked nothing about it at the level three hearing. This document alone is hearsay. As there was no testimony about it from Mr. Woods, or even Mr. Wright, it is entitled to little, if any, weight. Respondent offered no policy concerning knives at the level three hearing. However, Grievant appeared to acknowledge during his testimony that he knew of the policy, and such was why he had purchased the multi-tool so that he could be in compliance. Respondent has the burden of proof in this matter. Given the evidence presented, the undersigned cannot conclude that Respondent has proved by a preponderance of the evidence that Grievant had a knife while working on July 28, 2016, in violation of policy. Therefore, Respondent has not met its burden on this charge.

Regarding the "crack" comment, Ms. Brown testified that she was not a party to the conversation and that she just overheard only that one short comment, "you're smoking crack," and nothing before or after that comment. Ms. Brown specifically testified

[3] *See*, Respondent's Exhibit 2.

that she heard nothing about a "crack pipe." Respondent has asserted that Grievant asked the juvenile "if he had been smoking a crack pipe." It is unknown exactly where Ms. Brown was in relation to Grievant at the time she claims to have heard the comment. The undersigned finds it unusual that Ms. Brown would only hear that one short statement, and nothing else. Ms. Brown did not testify that she walked away, or anything like that, after the comment, and there has been no claim that other noise was drowning out the sound. Ms. Brown's testimony about the "crack" comment is unreliable, at best. The only other witnesses Respondent called at the level three hearing were not at the church on July 28, 2016. Instead, they received their information from Ms. Brown and Ms. Moriarty. Grievant testified that he had been talking to the pastor about a cracked basement pipe which had caused a leak, and a juvenile asked about the same. Grievant denies asking the juvenile if he had been smoking a crack pipe. Respondent has failed to prove by a preponderance of the evidence that Grievant made the statement as asserted. Further, even if Respondent proved that Grievant had made the statement, Respondent presented no policy prohibiting such at the level three hearing. No specific policy is referenced in the suspension letter, either. The suspension letter references DJS Policy 138.00, but no evidence was presented to establish what that policy says. The only other policy referenced is the Administrative Rule 12.3, which pertains to suspensions in general, and is a readily accessible public record. None of Respondent's witnesses could identify a policy that such could have violated, and no one identified what "acceptable performance standards" are. Therefore, this grievance is GRANTED.

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. W.VA. CODE ST. R. § 156-1-3 (2008); *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. Under the statues and procedural rules regarding the grievance process, the formal rules of evidence are not applicable in grievance proceedings, except as to the rules of privilege recognized by law. *See* W. VA. CODE § 6C-2-4(a)(3). The issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings. Accordingly, an administrative law judge must determine what weight, if any, that is to be accorded hearsay evidence in a disciplinary proceeding. *See Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (March 11, 2010), *aff'd*, Kan. Co. Cir. Ct., Civil Action No. 10-AA-73 (June 9, 2011); *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).

3. The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with firsthand 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), *aff'd*, Kan. Co. Cir. Ct., Civil Action No. 10-AA-73 (June 9, 2011)*; Gunnells v. Logan County Bd. of Educ.,* Docket No. 97-23-055 (Dec. 9, 1997); *Sinsel v. Harrison County Bd. of Educ.,* Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't,* Docket No. 90-H-115 (June 8, 1990).

4. Respondent has failed to prove by a preponderance of the evidence that Grievant engaged in the conduct with which he was charged. Respondent has further failed to prove by a preponderance of the evidence that Grievant's suspension without pay was justified.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to remove all references to the five-day suspension from Grievant's personnel file and from any other files maintained by Respondent, to restore to Grievant all benefits lost as a result of the

five-day suspension, including seniority, and to pay him back pay for the five days he was suspended, plus interest.

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 (eff. July 7, 2008).

**DATE: March 9, 2017.**

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**Carrie H. LeFevre**
**Administrative Law Judge**