

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BECKY L. WOOD,
Grievant,

v.

Docket No. 2017-1796-MAPS

**DIVISION OF JUVENILE SERVICES/
LORRIE YEAGER JR. JUVENILE CENTER,**
Respondent.

DECISION

Grievant, Becky L. Wood, is employed by Respondent, Division of Juvenile Services at Lorrie Yeager Jr. Juvenile Center ("LYJJC"). On March 4, 2017, Grievant filed this grievance against Respondent stating,

Employer alleges a failure to follow Policy Directives, Operational Procedures and established standards of conduct without a specific mention [of] said policies, procedures or standards of conduct. Furthermore[,] the Grievant contends that she did in fact follow standard procedures, Policy Directives, Operational Procedures, [and] Use of Force techniques as instructed by the WVDJS Academy, and common practice as established by not only the leadership at the Lorrie Yeager Juvenile Jr. Center, but also the Leadership at Central Office. Furthermore[,] on February 22nd 2017 there was no Pre-determination hearing, as Lieutenant William Westfall advised the Grievant that she was cleared in the investigation with Resident A[.]M[.] Grievant contends that the Written Reprimand used in his progressive discipline action to increase the level of discipline has no connection, is a stretch at best to be considered similar in nature, and furthermore[,] has discrepancies with another employee's discipline issued [which] is contradictory in nature. Grievant contends that two (2) days as defined by WVDOP is considered 16 hours and not 24 hours, and is used in this context by WVDJS to appear less severe in nature. Finally[,] the Grievant contends that she is a victim of disparate treatment, and harassment whereas EEO violations are evident.

For relief, Grievant seeks:

The Suspension be rescinded and any reference concerning the suspension expunged from any and all records and/or files bearing the Grievant's name or any variation thereof. To be free from retaliation, harassment and otherwise to be made whole. Any other relief the Grievance [B]oard may deem necessary and appropriate. In so much as the Written Reprimand which is referenced in this disciplinary action may be expunged from the Grievant's files when proven to be issued in contradiction to other actions and inaccurate to events. To be paid for any overtime hours that the Grievant was unavailable for. Finally[,] that all monies be reimbursed to the Grievant with interest due as defined in WV State Code.

The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held over two days on June 14, 2017, and September 21, 2017, before the undersigned, at the Grievance Board's Charleston, West Virginia office. Grievant was represented by Joseph S. Wood. Respondent was represented by counsel, Celeste Webb-Barber, Assistant Attorney General. This matter became mature for decision on October 23, 2017, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as a Correctional Officer IV. Respondent suspended Grievant for alleged violation of policy for unnecessarily entering a resident's room and for unnecessary use of force. Respondent failed to prove Grievant violated policy as alleged. Accordingly, the 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 LYJJC as a Correctional Officer IV, holding the rank of Sergeant. Grievant has been employed by Respondent since July 1,

2014. Grievant has been employed in the corrections field for approximately eighteen years total. In her position, Grievant served as a Shift Commander.

2. LYJJC is a juvenile detention facility that houses both male and female juveniles. Juveniles detained in the facility are referred to as “residents.”

3. On the evening of November 25, 2016, Grievant was stationed in the control room. Grievant instructed resident G.S.¹ by intercom that he was required to go to bed due to the order of Respondent’s Hearings Examiner for a previous infraction. G.S. complied, but slammed his door. Grievant again contacted G.S. by intercom and instructed him that his behavior in slamming the door was inappropriate. G.S. became verbally abusive to Grievant. Grievant, again told G.S. this behavior was inappropriate and disconnected the intercom. G.S. continued to try to contact Grievant through the intercom and Grievant stated she would not speak with him until he was calm. After G.S. had calmed, he again contacted Grievant by intercom and requested that she come to his room so that he could apologize and discuss another issue with her. Grievant agreed to do so. Grievant assigned relief for herself in the control room and went downstairs to G.S.’s room.

4. G.S.’s room is off the dayroom. There is a video camera in the dayroom that records footage of the dayroom. G.S.’s door is across the room from the camera. The camera has no audio. The video shows the dayroom with G.S.’s door shut. There are multiple residents and two COIs seated at tables. COI Matthew Bailey is seated at a

¹ The undersigned will follow the past practice of the West Virginia Supreme Court of Appeals in cases involving underage individuals and will refer to the initials only of the involved residents. See *In the Matter of Jonathan P.*, 182 W.Va. 302, 303 n. 1, 387 S.E. 2d 537, 538 n. 1 (1989).

table across the room from G.S.'s door. COI Dustin Minor is seated at a table behind COI Bailey. COI Bailey appears to point at Grievant as she is off-screen, but immediately appears from the direction he was pointing. Grievant walks with purpose across the dayroom to G.S.'s door. Grievant can be observed walking fairly quickly, but not unusually so. As Grievant is walking, a resident appears to attempt to get COI Bailey's attention, who has stood up with his back towards G.S.'s door and is gesturing to residents close to him. The resident then turns back to look at G.S.'s door and pounds his fist into his hand. Grievant announces herself and calls for the door to be unlocked. Grievant opens the door. As Grievant opens the door, G.S. can be seen standing in the doorway. As soon as the door is opened, Grievant enters the room. Grievant's contact with the resident cannot be seen on the video. COI Bailey is across the room with his back to the door as Grievant opened the door, and only turns toward the room after the door is already opened. After Grievant has been in the room for several seconds, COI Bailey then crosses the room to G.S.'s door and stands outside the door. Grievant is in G.S.'s room for forty-four seconds. She then leaves the room, closing the door in a normal manner.

5. On November 26, 2017, Grievant filed an incident report detailing the incident. Neither COI Bailey nor COI Minor filed an incident report.

6. On November 29, 2016, Investigator, Kathleen Faber, was assigned to conduct a use of force investigation of the incident. Ms. Faber interviewed COI Bailey, COI Minor, G.S., another resident, and Grievant. Ms. Faber concluded Grievant had violated Respondent's Code of Conduct, Policy # 125 by unnecessarily entering a

resident's room. Investigator Faber did not explain why she believed Grievant's entry into the room was unnecessary.

7. On December 2, 2016, COI Bailey filed a confidential report at the direction of Facility Director Travis White after Mr. White questioned him about the incident. In his confidential report, COI Bailey stated that he saw Grievant walking towards the room. He did not state Grievant appeared angry. He states that after Grievant entered the room the resident stood up and Grievant shoved him. He stated that he moved closer while Grievant was in the room "talking." He states Grievant said to G.S. he "need[ed] to watch himself" and slammed the door on her way out.

8. Respondent's Code of Conduct, Policy # 125.44 states, "Employees shall not have inappropriate interactions with residents, including but not limited to, horse playing, wrestling, hairstyling, hugging, unnecessarily entering a resident's room, etc."

9. On November 13, 2016, resident A.M. was threatening harm to himself. While seated at a table in the dayroom, A.M. said he was going to "end it all" and grabbed himself by the chin and pulled his own head around to his shoulder, at an angle, twisting and placing strain on his neck in a threat to break his own neck. Five officers and a staff member responded. The staff member and several officers, including Grievant, attempted to verbally deescalate the situation. After several minutes of A.M. continuing to twist his neck, risking injury, Grievant, as shift commander, determined physical intervention was necessary.

10. Four officers restrained A.M. and took him to the floor, face down, as one officer filmed the incident. As A.M. was taken to the floor, he resisted the restraint by stiffening his body, squirming, and attempting to pull his limbs away from officer control.

One officer was positioned at A.M.'s left leg, and placed his knee on the back of A.M.'s left thigh, and his hands on A.M.'s back to restrain his upper body. A second officer was positioned at A.M.'s left side and appears to attempt to restrain his left arm. The third officer restrained A.M.'s head as A.M. was banging his head on the floor. Grievant was positioned at A.M.'s right side and attempted to restrain A.M.'s right arm. A.M. placed his right hand and arm under his body and grabbed his clothing to prevent Grievant from restraining his arm. A.M.'s right leg was loose. Grievant called for handcuffs to be applied. The officer on A.M.'s leg and the officer on A.M.'s left side pulled A.M.'s arm behind his back and applied the handcuff to A.M.'s left hand. Grievant continued to struggle to pull A.M.'s hand from under his body. As the left cuff is applied, A.M. twists and struggles and kicks his right leg, and a fifth officer then restrains A.M.'s right leg. A.M. continues to struggle. After the left cuff is applied, the officer stationed at the right side of A.M.'s body joined Grievant in trying to pull A.M.'s hand out from under his body, but still could not. Grievant then delivered two light closed fist punches to A.M.'s right upper arm in an attempt to hit the radial nerve to get A.M. to release his clothing so his hand could be pulled from under his body to be handcuffed. Within a few seconds of the punches, Grievant and the right-side officer succeeded in pulling A.M.'s hand out from under his body and cuffing that hand.

11. After A.M. was restrained, three officers carried him up the stairs to his room. While being carried, A.M. attempted to hit his head against the wall. Once A.M. was taken to his room, officers placed him seated on the bed. A.M. then jumped onto the bed and attempted to jump off onto the floor. Officers caught A.M. and again took him to the floor to restrain him. While on the floor, A.M. repeatedly hit his head on the floor.

12. The radial nerve controls the thumb, index, and middle finger. Striking the radial nerve causes the hand to open by reflex. Although the optimal spot to hit the radial nerve is just below the bend of the elbow, the radial nerve runs all the way up the arm.

13. Following the incident, all involved officers completed incident reports.

14. On January 19, 2017, Investigator, Courtney Phillips, was assigned to investigate the use of force. Ms. Phillips viewed the video of the incident and interviewed all the officers involved in the incident. Ms. Phillips concluded Grievant had violated Respondent's Code of Conduct, Policy # 125, "The use of any unnecessary and/or excessive force shall not be tolerated." Ms. Phillips determined that "unnecessary force" had occurred in that the two closed fist strikes Grievant applied to the resident's upper arm were unnecessary.

15. Respondent's Use of Physical Force and Restraints Policy # 306 controls use of force in the facility based on a "force continuum" that proscribes different levels of control to meet different levels of resident resistance.

16. The policy defines "defensive resistance" as: "The resident is physically resisting any attempt to control the resident by using defensive, physical actions. With this level of resistance the resident attempts to push or pull away in a manner that does not allow staff to establish control and there has been no attempt to harm staff by the resident.

17. The policy defines "active aggression" as: "Active aggression is when a resident attacks staff to overcome attempts to compliance techniques. The attack is a physical assault on staff in which the resident strikes, attempts to strike, or uses techniques in a manner that may result in injury to the resident, the staff, or others.

18. The policy defines “soft empty hand control techniques” as: “These techniques are designed to deal with passive resistance and in most cases defensive resistance. These techniques include joint locks, strength techniques, pressure points, and distraction techniques that cause little to no injury, and are designed to deal with low levels of resistance.

19. The policy defines “hard empty hand control techniques” as: “These are techniques that are designed to control active aggression and may be used during these types of situations. These techniques include defensive counter strikes, such as a knee strike, straight punch, radial strike, median strike, angle kick, palm heel strike. These techniques are only to be used when a staff person is being physically assaulted, or witnessing a third party being physically assaulted by a resident. For example, when a resident: 1) is choking another resident or staff, 2) has grabbed a staff member or other resident and refuses to release, and is an immediate threat, or 3) is attempting to gain access to a weapon and will not release it.”

20. The policy further explains the administration of physical force:

a. Examples of out-of-control behavior and conditions for use of physical force:

- i. Justifiable self-defense
- ii. The resident is in the processes of assaulting another person
- iii. The resident is in the process of willfully destroying state property
- iv. The resident is attempting suicide
- v. The resident is inflicting wounds upon him or her self.
- vi. Prevention of an escape
- vii. Disruption of facility safety and security caused by refusal of residents to follow instruction.

b. Limitations on the use of physical force:

- i. The amount of physical force applied shall not exceed the force necessary to gain control of the resident and ensure the safety of the resident, staff or others, prevent serious damage to the facility, and ensure facility security and order.
- ii. Use of physical force must be approved and supervised by the Shift Supervisor unless the resident's behavior constitutes an immediate threat to him or herself, other residents, staff, or other person or property and order of the facility.

21. On February 8, 2017, a predetermination hearing was held with Grievant by Facility Director Travis White regarding the November 25, 2016 incident with G.S. in which he informed Grievant that a two-day suspension was being contemplated.

22. A predetermination hearing was not held regarding the November 13, 2016 incident with A.M.

23. By letter dated February 27, 2017, Division Director Bond suspended Grievant for two working days for the two incidents, for a total of twenty-four hours. The letter does not specifically state what policies Grievant violated, but rather provides a brief description of the incidents and concludes Grievant, as a sergeant, "did not meet a reasonable standard of conduct." The letter states: "Statements confirm that you appeared agitated when you approached Resident GS's door, stepped into his room, and push him onto his bed when he stands up. You are heard raising your voice towards this resident and slamming the door when you leave his room." The letter further states, "[D]ocumentation shows you using unnecessary force during the restraint of Resident AM on November 13, 2016, when you strike him twice with closed fist on the upper arm areas.

You had stated that you were trying to hit the nerve in the lower arm area, but video shows that Resident AM's arm was partially tucked under him at the time."

Discussion

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2008). "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 it was justified in suspending Grievant for unnecessarily entering a resident's room in one instance and an unnecessary use of force in another instance in violation of policy when Grievant had previously received a written reprimand and is to be held to a higher standard as a supervisor. Grievant asserts Respondent failed to prove the charges against her and, in the alternative, argues that the suspension was discriminatory, Respondent failed to provide her with a predetermination conference for one of the incidents, and that the penalty of suspension should be mitigated.

As proof of the charges, Respondent presented two investigative reports, which included incident reports and purported transcripts of the investigatory interviews. The only direct witness testimony offered was that of COI Bailey regarding the incident with G.S. No other person who witnessed either incident was called to testify. Grievant testified on her own behalf and provided the testimony of Craig Roberts, Associate

Warden, who had previously served as a training officer and then as the Deputy Director of Training at the Corrections Academy.

The investigative reports, incident reports, confidential report, and purported transcripts are hearsay². Relevant hearsay is admissible in administrative hearings. *Gunnells v. Logan County Bd. of Educ.*, Docket No. 97-23-055 (Dec. 9, 1997). However, “there is no requirement, statutory or otherwise, that it be afforded any particular weight. Generally, written statements, even affidavits, may be discounted or disregarded unless the offering party can provide a valid reason for not presenting the testimony of the persons making them.” *Comfort v. Regional Jail & Corr. Facility Auth.*, Docket No. 2013-1459-CONS (Apr. 18, 2013) (citing *Simpson v. W. Va. Univ.*, Docket No. 2011-1326-WVU (May 3, 2012); *Cook v. W. Va. Div. of Corrections*, Docket No. 96-CORR-037 (Oct. 31, 1997)). “In the absence of any sworn witness testimony, a hearsay investigative report, standing alone, may be insufficient to meet the employer’s obligation to prove the charges in a disciplinary action by a preponderance of the evidence.” *Cole v. Regional Jail & Corr. Facility Auth.*, Docket No. 2016-1451-MAPS (June 28, 2016) (citing *Comfort v. Regional Jail & Corr. Facility Auth.*, Docket No. 2013-1459-CONS (Apr. 18, 2013)).

The Grievance Board has applied 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

² “Hearsay includes any statement made outside the present proceeding which is offered as evidence of the truth of the matter asserted.” BLACK’S LAW DICTIONARY 722 (6th ed. 1990).

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. *Id.*; *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).

The investigative reports themselves are merely the summary and opinion of the investigators, who had no knowledge of the incidents, and are entitled to no weight. As to the incident reports and “transcripts” of the investigatory interviews attached to the investigative reports, Respondent offered no reason why those witnesses were not called to testify. The incident reports are in writing, routinely made, and electronically signed, but they are not sworn. The purported transcripts of the investigatory interviews are not certified by a transcriptionist, nor are they verified by the persons who were interviewed.

As the facts are in dispute, credibility determinations must be made. In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ 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. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

The charges against Grievant relating to the November 25, 2016 incident with G.S. were based on the video evidence of the incident and the statements of Grievant, COI Matthew Bailey, COI Dustin Minor, G.S., and resident T.R. Respondent called only COI Bailey to testify. At the time of the incident, COI Bailey had only been employed as a correctional officer approximately eight months. In his level three testimony, COI Bailey appeared to take the proceeding seriously and he was thoughtful in his answers. However, COI Bailey appeared to be nervous during his level three testimony and he admitted in his level three testimony that he was nervous during the investigatory interview. COI Bailey appeared to become less sure of his answers as he was cross-examined. COI Bailey appears to have been concerned that his own behavior during the incident might be questioned during the investigation.

COI Bailey did not file an incident report following the incident. He filed a confidential report seven days after the incident only at the direction of Director White after Director White questioned him about the incident. In his confidential report, COI Bailey stated that he saw Grievant walking towards the room. He did not state Grievant appeared angry. He states that after Grievant entered the room the resident stood up and Grievant shoved him. He stated that he moved closer while Grievant was in the room “talking.” He states Grievant said to G.S. he “need[ed] to watch himself” and slammed the door on her way out.

On December 8, 2016, COI Bailey then was interviewed for the investigation. In his initial statement during the interview, he stated that Grievant was walking “pretty fast”

and “with a purpose” towards the room, that she entered the room, that it “looked like” G.S. stood up, that Grievant shoved him and started raising her voice. He stated that he went to the doorway because they were particular about entering a resident’s room, especially when it is opposite sex. COI Bailey said that Grievant told the resident to “watch himself” and slammed the door as she left. COI Bailey was questioned about being seated when Grievant came down the door and whether the officers were supposed to be doing a room check. When the investigator asked if he saw the resident lunge toward Grievant or if she just put her hand up to push him down, COI Bailey responded by justifying his own behavior, that if he thought the resident was making active aggression towards Grievant that he would have intervened. He was hesitant in his answers with statements like, “I don’t know,” and “maybe” and “from what I could tell.” In addition, COI Bailey said that it was a “pretty long shot” to see Grievant from where he was in the room and with her standing in front of the door. Although COI Bailey said that he really did not know what had been said over the intercom and could not hear what was said in the room, he speculated, “it doesn’t seem like that’s the way a person should really handle the situation but...” Although COI Bailey had not said in his report or in the interview to that point that Grievant was angry or yelling, the investigator questioned him stating:

Investigator: “So you stated that she was angry?”

COI Bailey: “She wasn’t calm. Yeah, I mean I don’t, well, I really don’t want to say...”

Investigator: “If she was yelling...”

COI Bailey: “...she was highly agitated, yeah.”

COI Bailey stated that he disagreed with Grievant entering the room because she was the opposite sex of the resident and that she should have had at least two people and videotaped it.

At the level three hearing, COI Bailey, in his initial narrative of the incident, did not state the Grievant was agitated, yelling, or that she slammed the door. When questioned about her demeanor as she came down the stairs, he simply said she was walking fast. He characterized the interaction between Grievant and G.S. in the room as “a disagreeing conversation” and that, “a couple of times” he could hear both their voices. He again stated that he disagreed with Grievant entering the room, stating that she should have had backup and a camera. When questioned again about Grievant being angry, COI Bailey was hesitant in his answer, and stated that Grievant may have just been walking fast. When asked to read the portion of the interview transcript regarding Grievant being angry, COI Bailey seemed confused and stated he was not sure he understood the interview question fully and that he felt the question was limited to the answer of angry. On cross examination, COI Bailey admitted that it was difficult to see exactly what happened in the room. He stated that an officer should always get a camera before entering a room. He admitted that it’s not uncommon for Grievant to walk fast. He admitted that it was not uncommon for an officer to use a loud voice during a use of force incident. COI Bailey also testified that he and COI Minor were doing a “tour watch” when Grievant came into the dayroom.

Therefore, COI Bailey’s story regarding Grievant’s demeanor, tone of voice while in the resident’s room, and whether she slammed the door changed between the report, the interview, and his testimony. He consistently stated that Grievant entered the room,

the resident was seated, stood up, and Grievant shoved him. COI Bailey's story regarding the room entry, Grievant slamming the door, and that he and COI Minor performing "tour watch" is directly contradicted by the video evidence. His story is also contradicted by the investigatory interview with G.S., in which G.S. states he was standing, not seated. COI Bailey testified that he and the other officer in the dayroom were doing "tour watch," which was to check residents in rooms. The video shows they were both sitting at tables in the dayroom and they only stood up when Grievant entered the dayroom. Contrary to COI Bailey's assertion that Grievant entered the room, G.S. stood up, and Grievant shoved him, the video shows that the resident is in the doorway when Grievant opens the door. The video also shows COI Bailey was not in a position to clearly view what happened. COI Bailey was across the large room with his back to the door when Grievant first opened the door. He only looked in Grievant's direction after the door is already completely open. The resident is clearly visible between Grievant, who is positioned to the left in the doorway, with her hand still on the open door, and the door. As the resident's head is even with her head, he is clearly not seated. COI Bailey's testimony does not support the charges against Grievant.

COI Minor did not complete an incident report or testify at level three, but a transcript of his investigatory interview was included in the report. COI Minor's statement is entitled to little weight. COI Minor did not say that Grievant was angry when she went to the room, only that she was in a hurry. Only at the very end of the interview, while COI Minor was speculating about the incident, did he state that Grievant was "heated" when she left control. COI Minor provided no information why he thought Grievant was "heated" when she left control and COI Minor was on the floor of the dayroom, so would not have

been able to hear or see Grievant leaving control on the second floor. Once Grievant was on the ground floor, COI Minor did not see Grievant enter the room, but stated that she started “yelling” once she entered the room. COI Minor initially said he did not hear what was said in the room, but upon further prompting he stated that Grievant’s yelling was to tell G.S. to stop yelling and that when she entered the room she asked what G.S. wanted or what he said. COI Minor stated that, after the incident, Grievant told him that the resident had “stepped up to her and she reacted, trying to defend herself and pushed him back down onto his bed. COI Minor also stated that when he talked to the residents after the incident, some said that G.S. had stepped up to Grievant before she pushed him and some said he did not. COI Minor’s interview supports the consistency of Grievant’s story regarding the incident, in that she told him the same immediately after the incident. COI Minor’s interview does not support that Grievant was agitated when she went to the room or that her entry into the room was unnecessary. COI Minor’s statement that Grievant asked G.S. what he wanted and yelled telling G.S. to stop yelling supports Grievant’s story that she had come down to talk to G.S. about something he wanted to talk about and that she had elevated her voice in response to G.S.’s behavior once in the room.

The investigator interviewed G.S. who admitted he had cursed Grievant over the intercom, stated that Grievant “stormed” down the stairs. G.S. stated that he was standing at the door, but that he stepped away when Grievant opened the door. He stated Grievant came into the room and pushed him and he fell. G.S. stated Grievant was “in a pissy mood.” G.S. denied that he asked Grievant to come to his room. G.S. stated that Grievant had cursed at him both over the intercom and in his room. G.S. was disciplined for this

incident and was upset over things that Grievant had stated in her report in his discipline. G.S.'s statement is entitled to no weight. G.S. did not testify and the transcript is not verified by G.S. G.S.'s assertion that he had stepped back from the door is directly contradicted by the video evidence that showed he was standing in the doorway. There is no other evidence that Grievant cursed at G.S. G.S. also had motive to lie because he was angry with Grievant over his discipline.

The investigator interviewed resident T.R. T.R. stated that Grievant came down, opened the door, got in G.S.'s face, started yelling at him, and pushed him. T.S. then gave mostly "yeah" and "no" answers to questions. T.R.'s statement is entitled to no weight. T.R. did not testify and the transcript is not verified by T.R. Although there is no evidence of bias against Grievant, T.R.'s interview was not very detailed. It is unclear what was T.S.'s opportunity to observe the incident. It is unclear what was the nature of T.R.'s relationship with G.S. T.R. also omits that G.S. was standing in the doorway.

Respondent offered no witness testimony as to the November 13, 2016 incident. All involved persons filed incident reports, which were included in the investigation report. Multiple reports stated that A.M. had said he would "end it all" or that he was attempting to break his own neck. The reports discuss the restraint in varying detail, but no report mentions the two strikes to the arm.

The investigator interviewed the involved officers more than two months after the incident. As in the other investigation, transcripts of the interviews were made, which were not certified by a transcriptionist or verified by the interviewees. All of the officers stated that A.M. was attempting to harm himself. Multiple officers stated that A.M. stated he was going to "end it all." Several discussed that A.M. had a history of self-harm and

threats of suicide. The investigator did not ask any of the officers whether they believed A.M. was aggressive in the restraint, and only asked one other officer about the strikes to the arm, who stated he had not seen the strikes. COII Steven Cumberlege is the officer that came in towards the end to restrain A.M.'s legs and stated that A.M. was "kicking pretty hard" and flailing his feet.

In Grievant's interview, the investigator did ask about the strikes, and Grievant answered multiple times that she was attempting to hit a nerve to get A.M. to release his hold. It appears from the transcript that Grievant and the investigator were likely gesturing during this discussion regarding the nerve and strike placement. Grievant appears to say that it was difficult to see the arm the way A.M.'s sweatshirt was pulled.

Craig Roberts, Associate Warden of Programs, Lakin Correctional Center, testified regarding the use of force with A.M. Mr. Roberts had previously served as a use of force instructor and then as the Deputy Director of Training at the Corrections Academy. In his role as Deputy Director, he estimates he performed approximately five hundred use of force reviews. Mr. Roberts has not personally worked in a juvenile facility, but he was familiar with the policy and the juvenile centers because they were part of the Corrections Academy while he was there. Mr. Roberts' demeanor was serious, professional, and he appeared very knowledgeable. Mr. Roberts testified that he has worked with and known Grievant and her representative since the 1990s. Although that could indicate a bias for Grievant, Mr. Roberts' answers to questions appeared thoughtful and unbiased. In Mr. Roberts' opinion, A.M.'s actions qualified as a threat of self-harm and that, although it appeared to be ineffective, Grievant's strikes to the arm would constitute a good faith effort to strike the radial nerve.

Director Bond, Facility Director White, and Assistant Training Director Deusenberry all had professional, appropriate demeanors, and none appeared to have any bias against Grievant. Ms. Bond resigned from her position in July 2017 to take a new position outside of the agency. Ms. Bond stated she only “vaguely” remembered the discipline of Grievant. As to A.M. Ms. Bond agreed that officers have a duty to protect a resident from self-harm, but that she did not recall A.M. threatening self-harm. It is undisputed from the video and the accounts of the officers involved that A.M. was threatening self-harm. Ms. Bond did not believe Grievant was attempting a radial strike, because A.M.’s forearm was under his body, even though the radial nerve runs through the upper arm as well. As to the incident with G.S. Ms. Bond insisted that Grievant was already in the room, when the video clearly shows G.S. was in the doorway when Grievant opened the door. Mr. White appeared concerned about the G.S. incident because he said Grievant’s account was inconsistent with the resident’s account because the resident had said they exchanged words over the intercom. Grievant’s account was not inconsistent. Both Grievant’s incident report and her investigatory interview also state that the interaction with G.S. began with him cursing her over the intercom. Mr. White also states that officers said Grievant was angry when she went downstairs and that he thought that the officer who had relieved her said she was angry. Again, Mr. White is mistaken or relaying on evidence that was not in the investigative report or presented at level three. The officer who relieved Grievant was not interviewed and neither other officer actually said she was angry when she came down to the room. However, they appeared to be either unfamiliar with or mistaken about important evidence, or relied on evidence that was not presented at level three. Mr. Deusenberry does not appear to have been involved in the decision-

making process, but had reviewed the videos. Mr. Deussenberry stated he did not know the reason why Grievant had gone to G.S.'s room. As to A.M., Mr. Deussenberry's opinion was that there was no active aggression, only defensive resistance and that Grievant should have administered a joint lock on the wrist. As A.M.'s wrist was under his body, obviously this was not a technique Grievant could have used. Mr. Duesenberry did state that use of force to prevent self-harm was covered in the policy to prevent further injury, but that an officer would only use empty hand soft technique unless the resident had a weapon. As will be discussed more fully below, the policy is certainly not clear on this issue.

Grievant is credible. Grievant's demeanor was calm and quiet. She appeared forthright in her answers and was responsive to questions on direct and cross examination. Grievant's story regarding the two incidents has remained consistent, is supported by the video evidence, and is plausible. As to the incident with G.S., Grievant consistently stated that she contacted G.S. by intercom because he had slammed his door. When she attempted to correct him, he began cursing her, and she disconnected the intercom call. G.S. continued to contact Grievant by intercom and she disconnected several times when G.S. continued to be vulgar. She stated that, after a few times of disconnecting the intercom, G.S. contacted her by intercom and was calm and apologized and said he wanted to apologize and talk to her about something else in person. Grievant said she walked quickly because she was in a hurry. Grievant stated that as she stepped to the door, G.S. stepped toward her, she pushed him away from her, and he fell on the bed. Grievant stated that G.S. sat on the bed for the rest of the exchange, and then Grievant left the room. Grievant admitted she was loud. During the interview, the

investigator repeatedly cut Grievant off and would not allow her to finish her answers. The investigator lectured Grievant at length. The investigator also stated, "Because in a court of law if someone saw the video and saw what you did, with the evidence when I get done interviewing the rest of the kids, it's not going to look good, Sarge." The investigator also stated that the two COI's said "oh my God, that was so wrong what she did" which is not at all what the interview transcripts show. The investigator repeatedly made statements about what all the residents and officers had seen and said which were not supported by the evidence in the investigative report. The investigator repeatedly stated that, because Grievant had walked quickly to the door that showed she was angry, even though Grievant attempted to explain multiple times that she was simply in a hurry. It is clear that the investigator had already made up her mind before she interviewed Grievant or finished the investigation. The investigator never interviewed the officer who relieved Grievant from control, who would have been able to confirm whether or not Grievant was agitated when she went down to see G.S.

As to the incident with A.M., except for omitting the strikes to the arm from her incident report, Grievant's story has remained consistent. A.M. was threatening self-harm and she was concerned. Grievant had delivered the strikes to the arm in an attempt to hit the nerve to make him release so his hands could be secured. Grievant's account of the seriousness of the concern for A.M.'s safety is consistent with the accounts of the other officers and the video evidence. Grievant's assertion that she was trying to hit the nerve is supported by the credible testimony of Mr. Roberts that the radial nerve does run all the way up the arm.

The suspension letter does not make clear exactly what Grievant was disciplined for relating to the November 25, 2016 incident. The letter does not identify the specific policies Grievant is accused of violating. Director Bond states in the letter: "Statements confirm that you appeared agitated when you approached Resident GS's door, stepped into his room, and push him onto his bed when he stands up. You are heard raising your voice towards this resident and slamming the door when you leave his room." The suspension letter further states that in the predetermination hearing on this incident, "Director White stressed the importance of not entering a resident's room unless absolutely necessary and following each and every DJS policy." Investigator Faber substantiated in her report only that Grievant violated Respondent's Code of Conduct by "unnecessarily entering a resident's room." Facility Director White testified Grievant was disciplined for unnecessarily entering a resident's room. Further, in its PFFCL, Respondent appears only to argue that this incident violated Respondent's policy prohibiting unnecessary room entry. Therefore, this decision will analyze whether Respondent was justified for suspending Grievant for violating the policy prohibiting unnecessarily entering a resident's room.

The statement in the suspension letter regarding Grievant's actions is not supported by the evidence. There is no credible evidence that Grievant was "agitated" when she went to the room. The only real evidence is that she was walking quickly, which is customary for Grievant. Grievant's story about why she went to the room and her assertion that she was not angry when she went to the room is credible. The letter stated Grievant stepped into the room and pushed the resident when he stood up. No one, including the resident, other than COI Bailey states this is what happened. As previously

discussed, COI Bailey was not in a position to see what happened, and the video evidence directly contradicts his account. The resident was in the doorway when Grievant opened the door, which placed him in her inside position. Grievant pushed him out of her inside position, as she was trained to do, and was proper. This action to remove the resident from her inside position placed Grievant inside the resident's room. The letter finally states, that Grievant was heard raising her voice towards the resident and slamming the door when she left the room. Once in the room, Grievant did raise her voice, but the video clearly shows she did not slam the door. Grievant admits that she raised her voice, but states it was in response to the resident being in her inside position. However, even if Grievant did raise her voice improperly after the resident invaded her inside position, as Grievant appears to have only been charged with unnecessary room entry, that does not prove in any way that Grievant's entry into the room was improper.

The policy states, "Employees shall not have inappropriate interactions with residents, including but not limited to, horse playing, wrestling, hairstyling, hugging, unnecessarily entering a resident's room, etc." Although the policy does not specifically define what is meant by "unnecessarily entering a resident's room," reading that phrase with the other behaviors listed indicates it is meant to prohibit overly-friendly interaction between staff and residents. This was not an overly-friendly interaction. Grievant went to the resident's room at the request of the resident to address the resident's inappropriate behavior and discuss an undisclosed "issue" the resident wished to discuss. There is nothing to indicate the resident had requested Grievant to enter his room for an overly-personal reason. Grievant went to the room for a proper purpose at the request of the resident, entered the room when the resident entered Grievant's inside position, forcing

Grievant to push the resident away and farther into the room. Grievant remained in the room to address the resident's improper behavior. The entry was directly related to Grievant's performance of her job. Further, multiple witnesses testified it was common for correctional officers to enter residents' rooms related to their duties.

None of Respondent's witnesses testified that Grievant violated any other policy or procedure during this incident. In reviewing the recording Gary Deusenberry, Assistant Training Director, testified that he did not see anything wrong with opening the door but that going in the room by herself was "probably not good" because it was cross gender. He stated that Grievant should have had someone as backup, but on cross admitted that this was not required by policy, it was just "a good practice." Facility Director White testified that he "would not recommend" going into a room by herself, but did not state it violated policy or procedure. Facility Director White recommended the level of discipline to Director Bond based on his determination that Grievant went to the room by herself and she appeared to be upset.

Respondent appears to argue that the entry into the room was unnecessary because Grievant should not have gone to the resident's room while she was "agitated." Respondent failed to prove Grievant was agitated when she came down to the room. Grievant credibly testified she was not agitated. Grievant's statement that residents insult her daily, so she is numb to such statements due to the length of her employment as a correctional officer, is plausible. Grievant walking quickly is not evidence to prove she was agitated. Further, to the extent that Grievant's raised voice while in the room and the alleged slamming of the door lead to the conclusion that Grievant was angry when she came down, Grievant did not slam the door, and there is really no proof that she raised

her voice inappropriately. Even if she did raise her voice inappropriately, this occurred only after the resident invaded her inside position, forcing her to push him away. Respondent failed to prove Grievant's actions violated the policy prohibiting unnecessarily entering a resident's room.

Further, Respondent did not prove it was more likely than not that Grievant used unnecessary force in the restraint of A.M. Grievant admits that she delivered two light closed-fist strikes to A.M.'s upper arm. However, Grievant asserts this force was necessary because A.M. was displaying active aggression and was an immediate threat to himself. A.M. had a history of self-harm and A.M.'s threat of self-harm is what began the restraint. Grievant testified credibly that she was concerned for A.M. because his threat of harm and the length of time it was taking to get him under control. A.M. was banging his head on the floor, and continued to try to bang his head on the floor as the officers restrained him. Despite the attempted restraint of four officers, A.M. was still struggling and twisting his body. Grievant was concerned about A.M. hitting his head on the floor. As the attempt at restraint continued, A.M. began kicking. Although the video is not completely clear, as it only shows part of A.M.'s legs, it does appear that A.M. is attempting to kick fairly hard with his free leg, and may have actually twisted his body enough that his right leg was also free. Multiple other officers stated in their incident reports and interviews that A.M. was kicking, and the officer that eventually secured his legs said he was kicking "pretty hard." Further, Grievant's concern that A.M. would continue to attempt self-harm is supported by the remainder of the incident in which A.M. did attempt to hit his head on walls as he is carried to his room and, once in his room,

threw himself on the floor and repeatedly hit his head on the floor before he could be restrained again.

Grievant asserts A.M. was active aggressive due to the kicking and attempts to harm himself. Although much of A.M.'s action during the restraint is defensive resistant, A.M.'s kicking appears to meet the definition of active aggression in that it could be an attempt to strike staff or using a technique that may result in injury. It certainly appears to be more than the pushing or pulling away described by the definition of defensive resistance. The policy states that hard empty hand control techniques may be used during active aggression. Therefore, the attempted radial strike appears justified under the definition of active aggression for the kicking. However, the policy goes on to state that the techniques may only be used when a resident is physically assaulting a staff member or third party. This is not consistent with the definition of active aggression that also includes attempts to strike or use of techniques that may result in injury to the resident, staff, or others. Respondent appears to rely on this second part of the policy in stating that a radial strike was improper.

Of most concern in this situation is A.M.'s clear threat of self-harm and attempts to self-harm. A.M. had threatened suicide by threatening to break his own neck³ and during the restraint, A.M. banged his head on the floor and continued to attempt to bang his head

³ Respondent's representatives gave the impression they did not believe that A.M. was actually threatening real harm to himself. However, it is clear from the statements of the officers and the video that A.M. was in distress and that the threat of self-harm was real. A.M. had a history of self-harm and threats of self-harm. While there was no medical evidence presented regarding whether A.M. could have successfully broken his own neck, A.M. certainly could have caused injury to his neck and there is no question A.M. had the desire to self-harm as evidenced by his repeated banging of his head on the floor during the restraint, and in attempting to jump from his bed and again banging his head on the floor after he was returned to his room.

on the floor. Respondent's policy does not clearly address what level of force is justified in such a situation. The policy does state that administration of physical force may be used if a resident is attempting suicide or if the resident is inflicting wounds upon him or her self, however, neither the section on levels of resistance nor the section on levels of control specifically include attempts to self-harm. The only part of these sections that may apply is "uses techniques in a manner that may result in injury to the resident" under active aggression, in which case, a radial strike may be used.

Under the section on administration of physical force, the policy states "the amount of physical force applied shall not exceed the force necessary to gain control of the resident and ensure the safety of the resident, staff or others. . . ." The restraint began due to A.M.'s threat of self-harm. Other use of force had not been sufficient to gain control of A.M. and ensure his safety. Four officers struggled with A.M. for almost a minute, during which he banged his head and attempted to bang his head, and twisted and kicked. Grievant and another officer together could not pull A.M.'s hand from under his body. The longer the restraint proceeded, the more likely injury would come to A.M. Grievant delivered two light strikes to A.M.'s arm in an attempt to get him to release his clothing, which did not cause injury, and A.M. released his hold within a few seconds of the strikes. Soft empty hand control techniques had been ineffective to control A.M. and the wrist lock technique Mr. Duesenberry asserted should have been used was not physically possible. Therefore, it appears Grievant applied only the force necessary to control A.M. to ensure his safety.

Respondent failed to prove Grievant violated policy in either incident for which she was charged. As Respondent failed to prove the action taken was justified, there is no

need to address Grievant's additional arguments that the decision to suspend her was discriminatory and that Respondent failed to provide her with a predetermination hearing for the A.M. incident.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2008). "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. Respondent failed to prove Grievant violated policy in either incident for which she was charged.

Accordingly, the grievance is GRANTED. Respondent is ORDERED to remove the suspension from all records related to Grievant and to reimburse Grievant twenty-four hours of pay, plus statutory interest, from the date of the suspension to the date of reimbursement, as well as any benefits she may have earned.

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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: December 6, 2017

Billie Thacker Catlett
Chief Administrative Law Judge