ALLEN CODY,

Grievant,

v. **Docket No. 98-DJS-230**

DIVISION OF JUVENILE SERVICES,

Respondent.

D E C I S I O N

Grievant, Allen Cody, employed as a Recreation Specialist by the Division of Juvenile Services (Respondent), filed a grievance at level four on May 25, 1998, contesting his suspension from employment at the West Virginia Industrial Home for Youth (WVIHY), a maximum security facility for juvenile offenders. Grievant stated, “I followed orders given and did not carry out any actions. This is a defamation of my character. Also my job description doesn't have me doing these things.” On June 29, 1998, Grievant filed a grievance directly at level four pursuant to W. Va. Code §29-6A-4(e), contesting the termination of his employment. Grievant alleged, “[m]y termination at Ind. Home [for] Youth was brought on by irreconcilable differences and disparate treatment . . . .”

The grievances were consolidated for hearing on September 14, 1998. Grievant was represented by George P. Surmaitis, Esq., and Respondent was represented by Donald Darling, Senior Deputy Attorney General, and C. Scott McKinney, Assistant Attorney General. Proposed findings of fact and conclusions of law were submitted by the parties on October 26, 1998, and the matter became mature for decision with the filing of a redacted Joint Exhibit #1 on November 6, 1998.

Background

Phyllis H. Carter, Director of the Division of Juvenile Services, advised Grievant by letter dated June 16, 1998, that his employment was terminated, effective June 30, 1998. The reason given for the action was that Grievant had engaged in misconduct. Director Carter noted that the dismissal was in accordance with the Division of Personnel's Administrative Rule, Section 12.02, and provided an extensive statement relating to cause, provided here in pertinent part:

On June 16, 1998, Superintendent James Ielapi held a discussion with you regarding the nature of your misconduct. Mr. Ielapi shared with you that disciplinary action was being considered. Your response was 'that's fine if that is what has been decided'. After reviewing your response and the

circumstances, I have decided that this dismissal is warranted.

So you may understand the specific reasons for this personnel action, I recount the following events which were revealed as a result of the investigation of this matter:

On Sunday, May 17, 1998, prior to 12:00 p.m. loud shouts were being made by residents of Standard Building. These shouts were reportedly in the form of sexual obscenities directed toward female staff and residents.

Verbal complaints were filed regarding this negative resident behavior. At the direction of Lt. Donald VanScoy, a group of male staff responded to Standard Building.

At approximately 12:15 p.m. you, the group of male staff, and Lt. VanScoy entered Standard III, where he began shouting at the residents while pacing up and down the hallway. Lt. VanScoy was shouting words to the effect that 'you have not learned your lesson yet.'

Shortly thereafter, Lt. VanScoy entered three (3) residents' rooms:

1. Resident PT #19487 was in his STD III Room #2 when you, Lt. VanScoy and Correctional Counselor Hayes entered his room. Lt. VanScoy forcefully pushed PT into a corner, and while yelling and cursing at him, threatened him to 'Rip his head off and shit down his neck.' Correctional Officers Adkins, Kellar, Hall and Stout were in the hallway observing these events.

2. Resident JTM #19505 was in his STD III Room #4. You, Lt. VanScoy, Correctional Officer Kellar, Correctional Counselor Hayes, Correctional Officer Adkins and Correctional Officer Hall entered his room. Correctional Officer Adkins grabbed his neck and held his head up making him look at Lt. VanScoy. Lt. VanScoy leaned over the corner of his desk, shouting at him. Lt. VanScoy pushed JTM while seated in his chair, backward into his bed. Correctional Officer Adkins was pushing up under his jaw.

3. Resident JM #19471 was in his STD III Room #3. Lt. VanScoy, Correctional Officer Adkins and Correctional Counselor Hayes entered his room. Lt. VanScoy picked him up from a prone position (resident was lying on the floor attempting to sleep) and slammed him into the window screen and wall. While being held against the Wall by Correctional Officer Adkins and Correctional Counselor II Hayes, Lt. VanScoy continuously hit him in the stomach, ribs and head with closed fist. Additionally,

JM was kneed in the stomach, leg and groin, as well as elbowed in the back by Lt. VanScoy.

In all three cases cited above you and the other staff members left the residents unattended. You failed to seek medical attention for the residents and/or report these matters through the proper Institutional mechanisms.

Later, on May 17, 1998, you spoke with the residents involved in this matter. Your comments were questioning the residents['] recall of events and suggesting that bruises may have occurred during authorized recreational activity. I find that your comments were improper and an attempt to cause confusion regarding the incident. I conclude that such was a deliberate attempt to interfere with any subsequent investigation.

By letter dated May 20, 1998, you were suspended without pay for a period of 15 days, pending investigation. This suspension without pay was extended for up to an additional 15 days by letter dated June 2, 1998.

As a Recreational Specialist, you were employed to provide recreational activities at a State juvenile institution, West Virginia Industrial home for Youth. You have been expected to provide for the security of the institution, maintain control over the residents, provide for the residents' welfarewhile encouraging their rehabilitation within the structured programs of the facility, and protect the general public. Your actions, as described below [sic], have not only compromised the security of the institution, but also your leadership position with the residents. Your actions diminish the effectiveness of your leadership and is not acceptable behavior for residents to emulate. Therefore, I conclude that you have failed to fulfill the duties and responsibilities of your position as a recreational specialist at a juvenile institution.

I find that your willful and intentional disrespectful conduct is an act of insubordination. Your statements demonstrate a blatant disregard for the authority of the management of West Virginia Industrial Home for Youth. The charge of insubordination is commonly related to an employee's refusal to obey an order of a supervisor. Employees are expected to adhere to the directives of their supervisors. The refusal of an employee to perform any lawful directive by their supervisors is cause for severe disciplinary action. An employee is expected to respect authority and does not have the unfettered discretion to delay, disobey or ignore clear instructions. Insubordination encompasses

more than an explicit order and subsequent refusal to carry it out. It also involves a flagrant or willful delay or disregard for implied directions of an employer.

The State of West Virginia and its agencies have reason to expect their employees to observe a standard of conduct which will not reflect discredit on the abilities and integrity of their employees, or create suspicion with reference to their responsibilities. I believe the nature of your misconduct is sufficient to cause me to conclude that you did not meet a reasonable standard of conduct as an employee of the West Virginia Division of Juvenile Services on May 17, 1998, thus warranting this dismissal.

* * *

Discussion

Although Director Carter commented that Grievant's “willful and intentional disrespectful conduct is an act of insubordination”, it appears that the basis for thedismissal was misconduct consisting of his failure to seek medical attention for the residents, his failure to report the incident, and his later conversations with the residents, suggesting to them that bruises were the result of authorized recreational activity.

At hearing, Respondent offered the testimony of William Todd Hayes who recollected the events of May 17, 1998. Mr. Hayes provided detailed information relating to the events which occurred in each resident's room, but was unsure of whether Grievant was in the room or hallway, and did not know what actions Grievant had witnessed. Nevertheless, he opined that Grievant was aware of what was occurring. Mr. Hayes testified that Lieutenant VanScoy later stated that resident JM had jumped up at him in a threatening manner with clenched fists, and that he had been subdued, and that any marks or bruises on the resident were from playing basketball. In a conversation with Grievant, Mr. Hayes recalled that Grievant had advised that Lieutenant VanScoy would “take care of everything”.

Correctional Officer Brian Hall testified that he was also requested to assist Lieutenant VanScoy on May 17, 1998. Officer Hall was also unaware of Grievant's location at any time during the incident, but believed that he was in JM's room at some point. Officer Hayes also recalled that Grievant stated he and Officer Hayes had “taken care of” things, and nothing would be said.

Additionally, Respondent offered the investigative report compiled by Captain Roger Elder. This

report included transcripts of Captain Elder's interviews with the residents. Only two, JM and JTM mentioned speaking with Grievant after the incident. JM stated “Cody had asked me if I had seen him put his hands on me and I said no.” JTM recalled that Grievant “had told me about how he felt about what had happened, not rather how hefelt, but his point of view he had told me that [he] would have never put his hands on me. Not unless I was gonna do something to him or I was doing something to hurt somebody else. And he said the only reason he was there was because when they call him he has to show up, he has to be there whenever anything goes down.”

Testifying on his own behalf, Grievant denied engaging in any wrongdoing, and stated that he did not observe any need for securing medical care for any of the residents or filing an incident report. He denies any efforts to cover-up the incident and recalled that Lieutenant VanScoy had simply stated that he would “take care of it”. Grievant asserts that his relationship with Superintendent Ielapi had been “rocky” because he “stands up for what is right”, and has fought nepotism and favoritism. Grievant opined that Superintendent Ielapi had made sure Grievant did not receive salary increases and encouraged other employees to write him up every day. Even though the investigation was conducted by Captain Elder, who had referred his findings to Ivin Lee, Deputy Director of Juvenile Services, and the letter of dismissal was issued by Director Carter, Grievant stated his belief that the termination of his employment was the result of his ongoing feud with the Superintendent.

In support of this theory, Grievant offered the testimony of Hope Coleman, a former co-worker, who opined that Superintendent Ielapi appeared to search for problem areas with Grievant. She recalled his displeasure over some recreational plans, and directed that Grievant develop them in a different manner. Ms. Coleman also recalled Captain Elder complaining about Grievant's work.

Pursuant to W. Va. Code §29-6A-6, the burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges againstan employee by a preponderance of the evidence. Miller v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992).

The only policy cited by Director Carter in the dismissal letter, Personnel Administrative Rule Section 12.02, allows dismissal of classified employees “for cause”. The West Virginia Supreme Court of Appeals has determined that classified employees may be dismissed for misconduct which is of a “substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute

or official duty without wrongful intention." Syl. Pt. 1, Oakes v. W. Va. Dept. of Fin. and Adm., 164 W. Va. 384, 264 S.E.2d 151 (1980); See Westfall v. W. Va. Dept. of Transp., Docket No. 97-DOH-349 (Jan. 16, 1998); Hercules v. W. Va. Div. of Highways, Docket No. 97-DOH-006 (Apr. 17, 1997).

The evidence presented in this matter establishes that Grievant accompanied Lieutenant VanScoy and others, at the Lieutenant's request, to Standard III on May 17, 1998, after a female employee had complained that the residents were shouting sexually- oriented obscenities at her from their windows. Grievant proceeded from room to room while one or more officers interrogated and/or physically assaulted the residents. Grievant did not engage the residents verbally or physically during the incident.

The charge that Grievant engaged in a cover up of the activities of May 17, is unsupported by the evidence. After reviewing the statements of all the affected residents, only two stated they even spoke with Grievant regarding this incident. Neither resident made any indication that Grievant implied or inferred that their injuries were sustained while engaging in recreational activities.

The evidence of record indicates that one or more residents may have sufferedbruises from the physical assault. No medical records were produced, and the statements given to Captain Elder by the residents do not indicate that medical assistance was requested. Absent a request for medical care, or visual observation for such a need, Grievant did not act improperly in this case by not summoning the health care professional.

It is undisputed that Grievant did not file an Incident Report or otherwise notify administrators of the incident. Grievant testified that he did not observe anything that warranted a report. Donald VanScoy testified that Grievant asked if he needed to file an incident report, and was told that it was not necessary. Grievant's failure to file a report, and more importantly his determination that a report was not warranted, is disturbing. The evidence establishes that he was in the doorway, or just outside the doorway in the hall, throughout the incident. Because of this proximity, Grievant necessarily saw and/or heard what was going on in those rooms.

Division of Corrections Policy 229.13 requires every staff member to report all incidents of child abuse, defined as physical injury, excessive or abusive work or exercise assignments, as well as the striking of a resident with any part of the body or with any object. (See footnote 1) Grievant is aware of this responsibility because the policy requires that every employee read and sign a prepared statement which defines child abuse and neglect, and requires the employee to report all incidents to

the Superintendent or his/her designee. Grievant either did not believe that he needed to file a report based on Lieutenant VanScoy's representation that he would take care of the matter, or improperly applied his own standard of worthiness to the situation, determining that the matter did not warrant thefiling of a report. Representations that another employee would file a report does not relieve Grievant of his obligation. Neither is the filing of a report discretionary, based upon an employee's perception of need. Policy simply required Grievant to report the incident. This he failed to do.

To the extent that insubordination was a ground for dismissal, it is unclear to the undersigned exactly what conduct exhibited by Grievant was the basis for this claim. The letter references willful and intentional disrespectful conduct; however, the conduct is not described. The letter continues to note that insubordination encompasses more than the refusal to obey an explicit order, and includes a flagrant or willful delay or disregard for implied directions of an employer. Any implied directions disregarded by the Grievant were not specifically identified. Therefore, Respondent has failed to prove that Grievant exhibited insubordination in this case.

In summary, a review of the charges stated in the dismissal letter establishes that Respondent has proven only that Grievant did not report coworkers acting improperly, specifically, treating juvenile residents in an abusive manner. Because only one charge was proven, mitigation of the punishment will be considered. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity. “When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved.” Huffstutler v. Cabell County Bd. of Educ., Docket No. 97-06-150 (Oct. 31, 1997); Pingleyv. Div. of Corrections, Docket No. 95-CORR-252 (July 23, 1996); Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994).

Grievant had read Respondent's policy on “Institutional Child Abuse and Neglect”, and his failure to file a report on the actions of Lieutenant VanScoy is serious in nature. However, Grievant has worked at WVIHY since 1988, and the record does not indicate that his performance has been unsatisfactory prior to this incident. To subject Grievant to the same punishment as the individual who physically assaulted the residents, and may have attempted to cover up the incident, is excessive.

Therefore, it is determined that dismissal is not warranted in this matter. Consistent with the provision of W. Va. Code §29-6A-5 that Administrative Law Judges may "provide such relief as is deemed fair and equitable", the disciplinary action is reduced to a forty-five (45) day suspension without pay.

In addition to the foregoing discussion, it is appropriate to make the following formal findings of fact and conclusions of law.

Findings of Fact

1. Grievant was employed by Respondent as a Recreation Specialist at IHY in 1988, and held that position continuously until his dismissal on June 30, 1998.

2. On May 17, 1998, after a female employee complained that residents of Standard III shouted obscenities from their windows at her, Lieutenant Donald VanScoy assembled a group of Correctional Officers and other employees, including Grievant, to close the windows and make a "show of force".

3. Grievant was present in the doorway or the hall when Liuetenant VanScoy engaged in verbal and physical abuse of the residents.

4. Grievant did not report Lieutenant VanScoy's conduct to IHY officials, eitherby filing an Incident Report, or a Child Abuse and Neglect report.

5. Evidence does not establish that Grievant made any effort with the residents or his co-workers to cover up the events of May 17, 1998.

6. Grievant was suspended and later dismissed for misconduct and insubordination.

Conclusions of Law

1. Pursuant to W. Va. Code §29-6A-6, 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. Miller v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992).

2. Personnel Administrative Rule Section 12.02, allows dismissal of classified employees "for cause". The West Virginia Supreme Court of Appeals has determined that classified employees may be dismissed for misconduct which is of a "substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention." Syl. Pt. 1, Oakes v. W. Va. Dept. of Fin. and Adm., 164 W. Va. 384, 264 S.E.2d 151 (1980); See Westfall v. W. Va. Dept. of

Trans., Docket No. 97-DOH- 349 (Jan. 16, 1998); Hercules v. W. Va. Div. of Highways, Docket No. 97-DOH-006 (Apr. 17, 1997).

3. Division of Corrections Policy 229.13 requires every staff member to report all incidents of child abuse, defined as physical injury, excessive or abusive work or exercise assignments, as well as the striking of a resident with any part of the body or with any object. 4. Respondent proved by a preponderance of the evidence that Grievant failed to report an incident of possible child abuse, as required by Division of Corrections Policy No. 229.13.

5. Respondent failed to prove by a preponderance of the evidence that Grievant engaged in insubordination.

6. Where the employer fails to establish all of the charges which were alleged to support a particular disciplinary action, the penalty imposed must be reviewed to determine if it is excessive under the circumstances. Hayes v. W. Va. Div. of Juvenile Services, Docket No. 98-DJS-220 (Dec. 14, 1998); Hunt v. W. Va. Bureau of Employment Programs, Docket No. 97-BEP-412 (Dec. 31, 1997).

7. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Huffstutler v. Cabell County Bd. of Educ., Docket No. 97-06-150 (Oct. 31, 1997); Pingley v. Div. of Corrections, Docket No. 95-CORR-252 (July 23, 1996); Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994).

8. Grievant established that dismissal was disproportionate to the charges proven in this matter.

Accordingly, the grievance is **GRANTED**, and Respondent ORDERED to reinstate Grievant to the position of Recreation Specialist, with the discipline reduced to a forty-five (45) day suspension. Grievant is awarded backpay from the date of his dismissal, minusthat for the period of suspension.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7 (1998). Neither the West Virginia Education and State Employees Grievance Board nor any of its

Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

Date: December 18, 1998 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

Juvenile services and facilities were previously governed by the Division of Corrections, and continue to utilize those policies.