TODD ALAN WAGNER,

Grievant,

v. **Docket No. 97-RJA-578**

REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY,

Respondent.

D E C I S I O N

Grievant, Todd Alan Wagner, employed by the Regional Jail and Correctional Facility Authority (Respondent) as a Correctional Officer II at the Northern Regional Jail, filed an expedited grievance, as is permitted by W. Va. Code §29-6A-4(e), at level four on December 24, 1997, following the termination of his employment on December 18, 1997. A level four hearing was conducted in the Grievance Board's Wheeling office on February 11, 1998, at which time Grievant was represented by Timothy F. Cogan, Esq., and Respondent was represented by Chad M. Cardinal, Esq., Assistant Attorney General. The matter became mature for decision on March 23, 1998, with the submission of Respondent's response to Grievant's proposed findings and conclusions.

Background

At approximately 6:45 a.m. on November 22, 1997, a disturbance began in Pod A, Section 6, at the Northern Regional Jail (NRJ), when the inmate in cell 8 stripped, coated himself with butter, and began shouting and throwing things, including himself, around the cell. Sergeant James Robinson evaluated the situation and called for assistance. Between twenty and twenty-five NRJ and Division of Corrections officers, including Grievant, responded. The officers first attempted to subdue the inmate by injecting pepper spray through the “bean hole” of the cell door. When that proved ineffective, another officer attempted to spray pepper foam through the crack between the door and the frame. Much of the foam splashed back onto the officers, causing varying levels ofdiscomfort. The officers next had the cell door opened, at which time the inmate came bursting out into the day room area. Because he was so slippery from the butter, several correctional officers wrestled him to the floor and secured him in a Stokes basket. The inmate was taken to the medical unit where he reported blood in his urine. Apparently, he first claimed to have caused the harm to himself, but later

recanted. The inmate was transported to a local hospital for examination, and was returned to NRJ the same day. The record does not include the results of this medical evaluation.

Shortly after this incident, an investigation was ordered based upon allegations that Grievant and Sergeant Robinson had failed to comply with procedures on cell extraction, that they had assaulted the inmate, and that Grievant had left his post without being relieved. First Sergeant Larry Bunting conducted the investigation, interviewing sixteen individuals, including the accused and the inmate. The investigation report was completed on December 12, 1997.

Jimmy B. Plear, Respondent's Chief of Operations, notified Grievant that his employment was terminated by letter dated December 18, 1997. That document stated in pertinent part:

I am informing you of my decision to dismiss you from your at-will employment as a Correctional Officer II with the West Virginia Regional Jail and Correctional Facility Authority's Northern Regional Jail, effective immediately.

* * *

The investigation conducted by Acting First Sergeant Larry Bunting, and your own admissions revealed that; on Saturday November 22, 1997, while you were working as the Booking Officer, you responded to Sergeant James Robinson's request for officer assistance. Sergeant Robinson made this general request from Pod A, Section 6 at approximately 0645 hours. You left your duty post without being properly relieved. Your abandonment of your post left this area unmanned except for a civilian Booking Clerk. The investigation also revealed, you left your post earlier in the shift without being properly relieved.

You proceeded to Pod A, Section 6, where you assisted Sergeant Robinson and others in extracting inmate William Pennington from his cell #8. After removing inmate Pennington from the cell, he was forced to the floor to subdue and hand cuff. You admitted to, and were observed striking inmate Pennington several times on his back; you stated that you used an open hand, however, several eyewitnesses stated that you used a closed fist. Striking an inmate under these circumstances was not reasonably necessary. The blows were delivered unnecessarily for many reasons, among them; the inmate was in a prone position, there were approximately twenty- four (24) other officers in the section poised to provide proper assistance, and other less violent alternatives of maintaining control were readily available.

Your actions are a violation of Document #3010 Paragraphs 3, 7, and 18, and Document #9031 of the West Virginia Regional Jail & Correctional Facility Authority's Policy and Procedure Manual.

Document #3010, paragraph 3 provides that:

"The use of excessive force will not be tolerated. The use of force, except in compliance with, [RJA] policy, shall result in disciplinary action."

Document #3010, paragraph 7 provides that:

"No employee shall leave their assigned post or the facility without being properly relieved or given proper authorization by a supervisor. Proper relief shall include the communication of special observations, orders or situations to relieving personnel."

Document #3010, paragraph 18 states:

"All employees shall conduct themselves, whether on or off duty, in a manner which earns the public trust and confidence inherent to their position. No employee shall bring discredit to their professional responsibilities, the Authority, or public service."

Policy #9031 provides that:

"All employees of the West Virginia Regional Jail and Correctional Facility Authority shall use only that force reasonably necessary to gain control of an inmate."

The State of West Virginia and its agencies have reason to expect their employees to observe a standard of conduct which willnot reflect discredit upon the abilities and integrity of their employees, or create suspicion with reference to their employees' capability in discharging their duties and responsibilities. I believe the nature of your misconduct is sufficient to conclude that you do not meet a reasonable standard of conduct as an employee of the Northern Regional Jail.

* * *

Argument

Respondent filed a Motion to Dismiss this grievance based upon the fact that Grievant was an at will employee. Respondent argues that as an "at will" employee, Grievant can be terminated for good

reason, no reason, or bad reason, provided that he is not terminated for a reason that violates a substantial public policy. Grievant was terminated for striking an inmate, and for abandoning his post, reasons which do not contravene public policy; however, Respondent continues, even if Grievant had not admitted to the charges, the dismissal could simply be for “no reason”, and Grievant would still be entitled to no relief.

Grievant responds that the termination of employment was in retaliation for his having filed a previous grievance in March 1997. Grievant additionally argues that Division of Personnel Regulation 13.05 provides that in cases requiring punishment, “like penalties shall be imposed for like offenses.” Grievant asserts that this rule does not indicate that it does not apply to at will employees, and creates a right or expectation that proportionality will be applied to a disciplinary situation. In this case, Grievant argues that dismissal was too severe for the alleged offenses when correctional officers at another RJA institution failed to follow procedures, and allowed an inmate to carry a pistol into the jail, were merely suspended for five days and given letters of reprimand.

It is undisputed that Grievant holds a classified-exempt position, and thereby serves as an atwill employee. See Roach v. Regional Jail Auth., 482 S.E.2d 679 (W. Va. 1996);Willis v. W. Va. Bureau of Commerce, Office of Miner's Health, Safety and Training, Docket No. 97-MHST-136 (June 9, 1997). As noted by Respondent, an at will employee serves at the will and pleasure of the appointing authority, and can be terminated for good reason, no reason, or bad reason, provided that he is not terminated for a reason that violates a substantial public policy. Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775 (1993). See Harless v. First Nat'l Bank, 162 W. Va. 116, 246 S.E.2d 270 (1978). Grievant argues that the termination of his employment was the result of reprisal, an act proscribed by public policy.

Reprisal is defined as “retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to address it.” W. Va. Code §18-29-2(p). A grievant claiming retaliation may establish a prima facie case of reprisal by presenting evidence as follows:

(1) that he/she engaged in a protected activity, e.g., filing a grievance;

(2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

(3) that the employer's official or agent had actual or constructive knowledge that the employee

engaged in the protected activity; and,

(4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Gruen v. Bd. of Directors, Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Fareydoon-Nezhad v. W. Va. Bd. of Trustees/Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994). If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation byoffering legitimate, nonretaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

In support of his claim of reprisal, Grievant offered a letter dated September 18, 1996, from NRJ Administrator Jerry Hedrick memorializing a conversation in which he requested that Grievant not bring firearms on NRJ property. Grievant also provided a copy of a grievance form dated March 15, 1997, in which he complained that “I am being denied my right to self protection to and from work because I cannot secure my firearm in/on state property.” Attached was a level two response in which Mr. Hedrick denied the grievance. Grievant claims to have also filed incident reports in December 1995, and February or March 1997, suggesting that arrestees should be in handcuffs. Finally, Grievant adduced testimony from Mr. Hedrick that he had viewed an incident which occurred during the transitory period when the Penitentiary was closing, and employees were being transferred to the NRJ, when Grievant's behavior with his secretary was not acceptable. Because Grievant filed a prior complaint, he has established a prima facie case of reprisal.

Mr. Plear testified that the termination was not based upon any matter other than the actions which Grievant admitted to having taken during the November 22, 1997, incident. Mr. Plear specifically denied that the decision was based upon the previous grievance, noting that the complaint had not been pursued further than level two. Noting that the prior grievance involved an innocuous issue, Mr. Plear observed that he had no motivation for retaliation, and that he held no grudge against Grievant for filing a grievance, which he perceives as business, not personal in nature. Mr. Plear's response establishes a legitimate, nonretaliatory reason for the action, and constitutes

arebuttal of the prima facie case. There is no evidence that the NRJ Administrator made the decision to terminate Grievant's employment, and in any event, Mr. Hedrick's perception of Grievant's behavior more than two years earlier is deemed too distant in time to warrant a finding of reprisal. There is no evidence that Grievant's reports suggesting that incoming inmates be handcuffed, provoked reprisal.

Grievant does not offer any evidence that Mr. Plear's explanation for the termination was merely pretextual; therefore, he has failed to establish that the termination of his employment was the result of reprisal.

Grievant's argument relating to proportionality of discipline does not apply in this matter. Although Grievant asserts that Division of Personnel Rule 13.05, upon which he relies, does not indicate that it does not apply to at will employees, applicable law relating to will and pleasure employees, cited supra, is controlling. Even if Rule 13.05 should apply, the example provided by Grievant involves employees who failed to properly conduct a pat-down search of an incoming inmate. That situation is not comparable to leaving an assigned post without obtaining relief, and use of excessive force on an inmate. Further, Mr. Plear testified that other employees have been terminated for the same reasons as those herein.

Even if Grievant were not an at will employee, he could not prevail in this matter because he admits that he twice left his post without obtaining relief, and that he struck the inmate four times. Although he offers a variety of explanations, none exonerate him. For example, he asserts that while he left his post, it was at the direction of Sergeant Robinson, who was his supervisor. It is interesting that one correctional officer states that she heard Sergeant Robinson call for Grievant specifically, but no one else heard that call. Even Sergeant Robinson testified that he did not call anyone byname. Grievant also claims that he did not leave the booking office unattended because the civilian clerk was there, and the clerks upon occasion were known to escort inmates. This argument is not persuasive because the correctional officer on duty is to be relieved before leaving the post, and the civilian clerks are not to perform the duties of the correctional officers. The fact that Grievant notified another employee not to open any doors does not alleviate him of his responsibility to remain at his post.

Grievant claims that he applied four open handed blows to the inmate's shoulder area, which he believed to be consistent with policy, because the inmate held his hand under his body and someone

shouted to watch out for “a piece of steel”. No other individual interviewed in this matter stated that he heard such a warning. Further, Respondent's determination that four such blows was excessive is not unreasonable given that the inmate was 5' 9" tall, and weighs150 pounds, while Grievant is approximately 6' 0" tall and weighs 280 to 300 pounds. In summary, Grievant's admission that he abandoned his post twice in one day, and his admitted use of force on an inmate would justify the termination of his employment even if he were not an at will employee.

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 has been employed by the Regional Jail and Correctional Facility Authority since July 1995, and was classified as a Correctional Officer II at all times pertinent to this decision.

2. At approximately 6:45 a.m. on November 22, 1997, a call for assistance was made when an inmate in Pod A-6, cell 8 began to engage in violent and uncontrollable behavior. Approximately twenty to twenty-five officers responded to the call.

3. Grievant was assigned as Booking Officer at the time he heard the call. He immediately responded, leaving only a civilian employee in the Booking Office.

4. Grievant participated in extracting the inmate from his cell, and suffered exposure of pepper mace in his eyes during the process. Grievant engaged in some physical contact with the inmate after he was taken to the floor, including four open-handed strikes to the inmate's shoulder. Suffering a loss of vision from the pepper spray, Grievant was finally led away from the scene and obtained medical assistance.

5. Grievant had left his post earlier in his shift when he responded to another call for assistance.

6. The position of Correctional Officer II is classified exempt, making Grievant an at will employee.

Conclusions of Law

1. In dismissal cases involving classified employees, the burden of proof is upon the employer to establish the charges relied upon by a preponderance of the evidence, and to establish good cause for dismissing an employee. W. Va. Code §29-6A-6. In cases involving the dismissal of classified exempt employees, state agencies do not have to meet this legal standard. Logan v. W.

Va. Regional Jail and Correctional Auth., Docket No. 94-RJA-225 (Nov. 29, 1994).

2. Classified exempt state employees may be dismissed from employment for any reason not violative of the Constitution or a substantial public policy. A classified exempt employee bears the burden of proving his dismissal was unlawful. Logan, supra; Parker v. W. Va. Health Care Cost Review Auth., Docket No. 91-HHR-400 (June 30, 1992). 3. Reprisal is defined as "retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to address it." W. Va. Code §18-29-2(p).

4. A grievant claiming retaliation may establish a prima facie case of reprisal by presenting evidence as follows:

(1) that he/she engaged in a protected activity, e.g., filing a grievance;

(2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

(3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and,

(4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Gruen v. Bd. of Directors, Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Fareydoon-Nezhad v. W. Va. Bd. of Trustees/Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994). If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

5. Respondent successfully rebutted the prima facie case of reprisal made by Grievant.

6. Grievant failed to prove that the legitimate, nonretaliatory reasons given for the termination of his employment were pretextual. 7. Grievant failed to prove that Respondent had any legal obligation to impose a lesser form of punishment for the charged offenses.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the circuit court of the county in which the grievance occurred, within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7. 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: April 29, 1998 _____

SUE KELLER

Senior Administrative Law Judge