KEVIN KELLAR,

Grievant,

v. **Docket No. 98-DJS-234**

DIVISION OF JUVENILE SERVICES,

Respondent.

D E C I S I O N

Grievant, Kevin Kellar, employed by the Division of Juvenile Services (Respondent), at the West Virginia Industrial Home for Youth (WVIHY), (See footnote 1) filed an expedited grievance on July 13, 1998, as is permitted by W. Va. Code §29-6A-4(e), following his demotion from Correctional Officer III to Correctional Officer II. (See footnote 2) Grievant asserts that the action was based on untrue accusations and was "without sufficient cause". An evidentiary hearing was conducted on November 17, 1998, in the Grievance Board's Morgantown office. Grievant appeared pro se, and Respondent was represented by C. Scott McKinney, Assistant Attorney General. After both parties waived the opportunity to file proposed findings of fact and conclusions of law, the matter became mature for decision at the conclusion of the hearing.

Background

Phyllis H. Carter, Director of the Division of Juvenile Services, advised Grievant by letter dated June 15, 1998, that following a review of the investigation regarding an incident at WVIHY on May 17, 1998, she had made the decision to demote him from the position of Correctional Officer III at a salary of $21,288.00, to Correctional Officer II with a salaryof $20,232.00, effective July 1, 1998. Director Carter also determined, "I find your misconduct warrants a suspension without pay." (See footnote 3) She noted that the disciplinary action was being taken in accordance with Division of Personnel Administrative Rule, Section 11.04.

The Director continued:

On June 15, 1998, Superintendent James Ielapi held a discussion with you regarding the nature

of your work deficiencies. Mr. Ielapi shared with you that disciplinary action was being considered. Your response was “What does that mean money wise”, ”If there is a loss of pay, I will appeal it”, “I have never had any supervisory training”, “I have never been informed that I am second in command to a lieutenant”. After reviewing your response(s) and the circumstances, I have decided that this action 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 12:00 noon Lt. VanScoy entered the visitation area of Standard Building, where Lt. VanScoy instructed Case Manager Jackie Valentine to close the visitation area and to allow no visitors or resident movement until further notice.

At approximately 12:15 p.m. Lt. VanScoy entered Standard III, where he began shouting at the residents while pacing up anddown 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 Lt. VanScoy, Correctional Counselor Hayes, and Recreation Specialist Cody 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.' You, Correctional Officers Adkins, 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 Counselor Hayes, Recreation Specialist Cody and Correctional Officers Adkins and 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 I, 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.

The investigation reveals, you failed to formally report these matters. As a Corporal you had a responsibility to enforce the policies and procedures established by the Department. The employees under your supervision rely on you for training, leadership and direction in complying with the rules andregulations. It is then the subordinate's responsibility to apply your instructions in the work place. Obviously, if there is a lack of positive and supportive supervision, employees cannot perform their duties with confidence that their work product is in compliance with Departmental policy and/or procedure. It is your primary responsibility to plan, assign, supervise, evaluate and secure the resources necessary to ensure the successful performance of the employees under your supervision. I conclude that your failure to exercise supervisory skills and to follow policy make it difficult, if not impossible, to enforce compliance with policy by your staff. This clearly demonstrates your inadequate leadership, supervisory performance and judgement.

As part of a remedial development process, you will be assigned additional training in these areas and be an active participant.

As a Correctional Officer, you were employed to provide security work 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' welfare while encouraging their rehabilitation within the structured programs of the facility, and protect the general

public. Your actions, as described below, 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 correctional officer.

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 alsoinvolves a flagrant or willful delay or disregard for implied directions of an employer.

So that you may realize the seriousness of your actions I would be remiss if I failed to share with you that willful disregard of the employer's interests or wanton disregard of the standards of behavior which the employer has a right to expect of its employees results in determination of “gross misconduct.” The West Virginia Supreme Court has previously found that where “. . . the government was charged with the responsibility of guarding a penitentiary inmate and also protecting the public . . . It was [the officers] solemn responsibility to perform this function and . . . blatant refusal to do so cannot be condoned . . . .” Therefore, you must learn to discipline yourself in the matters previously cited. Any further infractions of the nature will result in more severe disciplinary action.

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 Industrial Home for Youth on May 17, 1998, thus warranting this demotion.

* * *

Discussion

While the June 15, 1998, letter states that the demotion is for misconduct, and later notes that “willful and intentional disrespectful conduct is an act of insubordination”, it appears that the basis for the demotion was misconduct consisting of Grievant's failure to seek medical attention for the residents, and his failure to report the incident. At hearing, Respondent offered the testimony of Correctional Officer Brian Hall regarding theevents of May 17, 1998. Officer Hall testified that he and Grievant were recruited by Lieutenant VanScoy to attend to the situation in Standard Building, but only recalled Grievant' presence in resident JM's room.

Officer Hall stated that he stood in the doorway while Lieutenant VanScoy and Officers Adkins and Grievant entered the room. He observed Lieutenant VanScoy hit the resident, at which time Grievant exited the room, closing the door on his way out. Officer Hayes indicated that Grievant did not make any comment and walked down the hall. He was not aware of what Grievant did next, but saw him again a few minutes later. He was aware that Grievant left the hall shortly thereafter, and that Lieutenant VanScoy commented that Grievant had been sent “to do something else”.

Captain Roger Elder, Chief Correctional Officer at WVIHY, testified regarding his investigation of the incident. He stated that after gathering all the information, he concluded that Grievant had been on the hall, but did not inflict abuse on any resident, and left during the incident. Captain Elder observed that Grievant was second in command, and had a duty to respond to Lieutenant VanScoy's behavior, which Grievant knew was not proper. In response to Grievant's claim that he had not been given supervisory training, Captain Elder confirmed that supervisory training had not been offered since Grievant's promotion; however, he noted that Grievant would have learned the rules and policies during a period of apprenticeship, and that his skills had been confirmed when he passed a promotional test and review by an interview board. Reporting abuse is not limited to supervisors in any event, Captain Elder stated, but rather is the responsibility of every employee. The Captain concluded that he continues to assign Grievant as a supervisor, and opined that while Grievant had made a bad judgment call in this instance, he has theskills and abilities to continue as a good officer.

Deputy Director of Juvenile Services Ivin B. Lee reviewed Captain Elder's investigative report and testified that she concurred with the discipline imposed upon Grievant because as second in command, Grievant was in charge when Lieutenant VanScoy began acting out of control. She also determined that Grievant should have reported the incident, and recommended the demotion.

Consistent with W. Va. Code §29-6A-6, Grievant elected not to testify at hearing, but offered the testimony of Correctional Officer Don Stout. Officer Stout stated that he was working as the lead officer on Standard III on May 17, 1998, and that he neither heard or saw any abuse of the residents. (See footnote 4) In a closing statement, Grievant asserted that Respondent had failed to prove that Lieutenant VanScoy had acted improperly, therefore, Grievant could not have acted improperly. He also noted that the suspension referred to by Director Carter had not been imposed, and that he was still working in a supervisory capacity.

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).

The only policy cited by Director Carter in the dismissal letter, Personnel Administrative Rule Section 11.04, provides that an employee may be subject to aninvoluntary demotion which is defined as “a reduction in pay and/or a change in classification to a lower classification due to the inability of an employee to perform the duties of a classification or for improper conduct.”

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 was present during some portion of the incident while one or more officers interrogated and/or physically assaulted the residents. Grievant did not engage the residents verbally or physically during the incident, but was in the room of at least one resident during a physical assault.

The evidence further indicates that one or more residents may have suffered bruises 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, or needed.

It is undisputed that Grievant did not file an Incident Report or otherwise notify administrators of the incident. The evidence establishes that he was present when Lieutenant VanScoy began to physically assault resident JM, but exited the room and shut the door during the incident. Based on this undisputed evidence, it is concluded that Grievant knew the abuse was occurring.

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 anyobject. (See footnote 5) 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 failed to fulfill his duties under this policy.

To the extent that insubordination was a ground for demotion, 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 disciplinary letter establishes that Respondent has proven 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 theclarity 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).

While Grievant's failure to file a report on the actions of Lieutenant VanScoy is serious in nature, the record does not indicate that his performance has been unsatisfactory prior to this incident. To subject Grievant to the same measure of discipline as those employees who actively engaged in the abuse would have been inequitable; however, Respondent did not dismiss Grievant, as it did with other employees involved in this incident, but rather imposed a one-step demotion.

While it is understandable that Grievant finds the action harsh, it cannot be determined that the level of discipline was not commensurate to the infraction, or was extraordinary to the degree that it was arbitrary and capricious or otherwise improper.

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 Correctional Officer III at WVIHY prior to July 1, 1998. This classification placed him in the position of second highest ranking correctional officer at the institution.

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 when Lieutenant VanScoy engaged in verbal and physical abuse of resident JM. During the incident, he left the room, closing the door behind him.

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

5. Grievant was demoted 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 11.04, provides that an employee may be subject to an involuntary demotion which is defined as "a reduction in pay and/or a change in classification to a lower classification due to the inability of an employee to perform the duties of a classification or for improper conduct."

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. Demotion was not a disproportionate disciplinary measure for the charge proven in this matter.

Accordingly, the grievance is **DENIED**.

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 23, 1998 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

WVIHY is a maximum security facility for juvenile offenders, located at Salem, West Virginia.

Footnote: 2

The hearing originally scheduled for September 1, 1998, was continued when Grievant requested that his grievance be the last of five related matters heard.

Footnote: 3

Notwithstanding this comment, Grievant was never subjected to a suspension, and received only the demotion as a form of discipline.

Footnote: 4

On cross-examination, Officer Stout confirmed that he had been suspended as a result of the incident, but that he did not file a grievance.

Footnote: 5

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