**APRIL D. CAYTON,**

**Grievant,**

**v.** **Docket No. 98-DJS-178**

**DIVISION OF JUVENILE SERVICES,**

**Respondent.**

## D E C I S I O N

Grievant, April D. Cayton, employed by the Division of Juvenile Services (Respondent) as a Correctional Officer II at the West Virginia Industrial Home for Youth, filed a level one grievance on March 5, 1998, in which she alleged the charges upon which a ten day suspension had been imposed were "unjust and untrue." She requested that her record be cleared, and back pay for the period of the suspension. The grievance was denied at levels one, two, and three, and appeal was made to level four on May 27, 1998. An evidentiary hearing was conducted on August 4, 1998, at which time Grievant was represented by Jack Ferrell of the Communications Workers of America, and Respondent was represented by Donald Darling, Senior Deputy Attorney General. After both parties declined the opportunity to file proposed findings of fact and conclusions of law, the matter became mature for decision on August 4, 1998. (See footnote 1)

The events underlying this matter are undisputed and may be set forth as the following formal findings of fact.

### Findings of Fact

1. Grievant April Cayton had been employed by Respondent for approximately five and one-half years, and was assigned as a Correctional Officer II at the West VirginiaIndustrial Home for Youth (WVIHY), at all times pertinent to this decision.

2. On December 8, 1997, Grievant was preparing Courtney, a female resident, for transportation to the United Hospital Center in Clarksburg for treatment necessitated by a reaction to medication. (See footnote 2) Sergeant Tammy Winters and Nurse Phyllis Sembello were present during the procedure.

3. While Grievant was placing shackles on Courtney's ankles, Sergeant Winters directed the resident to move her feet backwards. Sergeant Winters then used her foot to move the resident's

feet, causing her to fall to the floor.

4. Grievant did not seek medical assistance for the resident from Nurse Sembello at the time of the fall, nor did the resident receive treatment at the hospital for any injuries suffered as a result of the incident.

5. Nurse Rick Kimble completed an incident report dated December 10, 1997, at the direction of Sergeant Winters, after he reported to Nurse Sembello that he waited outside approximately seven minutes prior to Grievant picking up the paperwork for the resident's transportation. Mr. Kimble stated in his report that Grievant was talking with another officer while he waited.

6. In mid-afternoon of December 8, 1997, Grievant completed an incident report, at Sergeant Winters' direction, regarding her departure from the institution that morning. Grievant stated that she had been stopped by Correctional Officer I A. Viani, who inquired as to her destination. Grievant noted on the form that she had not been told the reason for the report and that it was completed under protest. 7. On December 9, 1997, Grievant completed an incident report as follows:
On 8 Dec 97, at approx 8:25 A/M, I COII April Cayton was preparing Dx Resident [Courtney], #506 to be transported to United Hospital Center. At which time, I instructed Dx [Courtney] 'to place her left cheek & shoulders against the wall, with your thumbs pointing down.' After she was in this position I then instructed her to 'place her feet together and back out.' This resident complied but was still was [sic] not backed out far enough. At this time I instructed Dx [Courtney] 'to back out a little further.' This resident moved out a little bit more at which time I felt this resident was backed out far enough. Sgt. Winters who was my shift supervisor at this time placed her right foot at the top of resident [Courtney's] feet and said 'she instructed you to move out!' Dx [Courtney] said to Sgt. Winters 'I'm gonna fall!' Sgt. Winters then stated 'no you won't. I've got you, now back out!' At this time Sgt. Winters forcefully moved the resident['s] feet with her right foot, causing this resident to fall to the floor.

8. As the result of this incident report, an investigation was conducted by Captain Roger Elder, Chief Correctional Officer. In his December 26, 1997, report to WVIHY Superintendent James. Ielapi, Captain Elder concluded that the resident had slid down the wall of her own accord, and not due to any action taken by Sergeant Winters, that Grievant and Sergeant Winters had a past history of personal conflict, and that Grievant had purposely falsified an official document by an exaggeration of facts. Captain Elder surmised that Grievant had made the accusation against Sergeant Winters to

cover up “any attention being given to her failing to follow a Supervisor's instructions in failing to respond in an emergency situation, that being the emergency transport of a resident to a local hospital emergency room.”

9. An independent investigation of this incident conducted by the Department of Health and Human Resources concluded that there was no evidence of child abuse in the incident reported by Grievant. 10. By letter dated February 19, 1998, Superintendent Ielapi notified Grievant that she would be suspended for ten working days, effective February 28, 1998, through March 11, 1998. The suspension was based upon inadequate or unsatisfactory job performance, failure to respond immediately to an emergency situation, and falsifying records whether through misstatement, exaggeration, or concealment of facts.

## Discussion

Superintendent Ielapi testified that he imposed the suspension for three reasons. First, Grievant had not timely reported an incident of child abuse. He stated that incident reports are to be completed by the end of the officer's shift, and Grievant did not file a report until the following day. Second, Grievant had not sought medical assistance for the resident from either the nurse in attendance at WVIHY or at the emergency room. If the resident had suffered any physical harm at the time, Grievant did not aid her in any way. Finally, two separate investigations failed to determine that Sergeant Winters had engaged in child abuse, therefore, he concluded that Grievant had made a fraudulent complaint to implicate her supervisor. Superintendent Ielapi noted that because this was Grievant's second “Class B” offense, she was subject to a suspension of sixteen to thirty days; however, he considered mitigating circumstances and reduced the suspension to ten days.

___Grievant asserts that the incident report she completed relating Sergeant Winters' action with the resident was true to the best of her knowledge. When asked why she delayed in making the report, Grievant stated that after going home and clearing her head she concluded that Sergeant Winters' had acted improperly and that it was not a trivial incident. Grievant stated that she believed incident reports were to be completed within twenty-four hours, and that the policy may have changed immediately after this incident. Grievant denied that her motive for filing the incident report was retaliation for Sergeant Winters' demand that she complete the previous incident report regarding the delay in leaving the institution, although she characterized the supervisor as exhibiting a rude manner.

In disciplinary matters, the employer has the burden of proving the charges by a preponderance of the evidence. W. Va. Code §29-6A-6; Miller v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR0501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. Hammer v. W. Va. Div. of Corrections, Docket No. 94-CORR-1084 (Nov. 30, 1995); Leichliter v. W. Va. Dept. of Health & Human Serv. Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden of proof. Hammer, supra.

Grievant's suspension was based on three violations of Section 7 of Policy Directive 400.00, Employee Standards of Conduct and Performance. Specifically, the charges stated in the February 19, 1998 suspension letter are as follows:

A 5 - "Inadequate or unsatisfactory job performance",

C 3 - "Failure to respond immediately to an emergency situation", and,

C 4 - "Falsifying any records whether through misstatement, exaggeration, or concealment of facts".

By her own account of events, Grievant did not respond immediately when the resident fell to the floor. She testified that when the resident stood up there was no blood from any injuries. However, she failed to call Nurse Sembello to check the resident for anyother harm. Grievant also failed to mention to hospital personnel that the resident may have been injured from the fall. Clearly, Grievant took no action on the resident's behalf to obtain medical evaluation and/or treatment for any injuries. Additionally, Grievant did not complete an incident report until the next day. When an employee observes another employee acting in a manner to injure a resident, immediate action is necessary. Child abuse may be defined as an emergency situation, and Grievant was reasonably expected to seek immediate assistance for the resident and to promptly report the individual who engaged in the action.

Although Grievant opined that the incident report she completed was true to the best of her knowledge, it was worded in such a way as to trigger two investigations of child abuse. Also, it would appear from her lack of attention to Courtney that Grievant did not believe the resident was injured by Sergeant Winters, and there is no evidence that she or the resident requested any medical assistance. Subsequently, two independent investigations concluded that no child abuse occurred.

Given these facts, Respondent's conclusion that Grievant falsified the record by exaggeration was reasonable.

The failure to respond immediately to an emergency situation, and falsification of records by exaggeration, individually and jointly constitute inadequate and unsatisfactory job performance.

In November 1997, Grievant had been issued a letter of reprimand after she had allowed two police officers, who were part of a tour group, to enter the facility wearing their firearms. Grievant had failed to identify all of the tour group parties, and failed to ask if anyone on the bus was in possession of a firearm, weapon, or contraband. Although this infraction warranted a five to fifteen day suspension, Superintendent Ielapi consideredmitigating circumstances, i.e., Grievant's years of service and a recommendation from a supervisor, and reduced the discipline to a letter of reprimand. Because the present grievance involves a violation of policy committed approximately one month later, Grievant was subject to a longer suspension, but again, it was shortened by Superintendent Ielapi. Upon consideration of the foregoing, it cannot be determined that the charges were untrue, or the discipline improper.

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

## Conclusions of Law

1. In disciplinary matters, the employer has the burden of proving the charges by a preponderance of the evidence. W. Va. Code §29-6A-6; 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. The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. Hammer v. W. Va. Div. of Corrections, Docket No. 94-CORR-1084 (Nov. 30, 1995); Leichliter v. W. Va. Dept. of Health & Human Serv. Docket No. 92-HHR-486 (May 17, 1993).

3. Respondent has proven by a preponderance of the evidence that Grievant completed an incident report in which she exaggerated an act of a supervisor to such an extent that it triggered two investigations of child abuse. This act constituted inadequate or unsatisfactory job performance. 4. The imposition of a ten day suspension was appropriate when Grievant had

committed a prior offense of comparable magnitude approximately one month earlier, and had received a letter of reprimand at that time.

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: September 24, 1998 _____

Sue Keller

Senior Administrative Law Judge

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*Footnote: 1*

*At some point following the incidents addressed in this decision Grievant resigned her employment with Respondent. Because the requested relief includes backpay, Grievant may continue to pursue this matter despite her change in status.*

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*Footnote: 2*

*Consistent with Grievance Board practice, juveniles will be addressed by their first names only.*