DONALD VANSCOY,

Grievant,

v. **DOCKET NO. 98-DJS-244**

WEST VIRGINIA DIVISION
OF JUVENILE SERVICES,

Respondent.

DECISION

Grievant, Donald VanScoy, filed this grievance directly at level four on July 14, 1998, after he was discharged from his position as a correctional officer at the West Virginia Industrial Home for Youth ("WVIHY"). He seeks reinstatement and back pay. A level four hearing was held in the Grievance Board's office in Morgantown, West Virginia, on October 26, 1998. Grievant was represented by counsel, George Surmaitis, and Respondent was represented by Assistant Attorney General Scott McKinney. This matter became mature for consideration upon receipt of the parties' post-hearing briefs on December 17, 1998.

Background and Arguments

Grievant's discharge resulted from an incident which took place at WVIHY on May 17, 1998. On that particular day, Grievant was operating as shift supervisor, meaning that he was the commanding officer in charge of security at the institution. A female employee reported that residents of Standard Hall yelled sexually-oriented obscenities at her from their rooms. In response, Grievant assembled several correctional officers and other male personnel to close the windows and "make a show of force" to the residents.

Upon arrival at Standard Hall, Grievant went to the floor from which the shouts had originated, and began pacing up and down the hall, screaming at the residents. He thenled the others from room to room, interrogating individual residents. Respondent alleges that Grievant was physically violent

with at least two residents, shoving Resident PT (See footnote 1) against a wall and striking Resident JM several times, without provocation by either resident. Respondent contends that Grievant's actions constituted excessive force, child abuse, and violated various institutional policies. The Division of Juvenile Services ("DJS") further alleges that Grievant conspired to conceal his misconduct by falsifying reports and directing the residents and employees involved to lie about what happened. He was terminated for gross misconduct on June 15, 1998.

Grievant testified that JM approached him in a threatening manner, and that he pushed JM against the wall in order to restrain him. He denied that he struck JM as alleged, and that he only used enough force to achieve control of a violent resident. He also denied that he used force on any other residents or that he made any attempt to engage in a "coverup." Grievant argues that Respondent's case is based upon inconsistent and unreliable evidence, and that it has not proven that he engaged in the conduct for which he was discharged.

Discussion

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). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998); Miller v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997).

Three witnesses testified on behalf of Respondent. Correctional Counselor Todd Hayes was in the rooms with Grievant at all times, and Officer Brian Hall observed the events from the doorway of each room. Captain Roger Elder was not present when the alleged incidents occurred, but he conducted an investigation for WVIHY, interviewing all of the employees and residents involved.

Mr. Hayes testified that, when he entered PT's room, Lt. VanScoy was shouting in PT's face "I'll rip your head off and shit down your neck." While Mr. Hayes had his back turned, he thought he heard a "slap." When he turned around, Grievant and PT were standing face to face. He did not see Grievant push PT. Observing from the doorway, Officer Hall testified that he saw Grievant push PT

against the wall and make the comment set forth above.

Grievant, Mr. Hayes and Officer Jeffrey Adkins entered JM's room. According to Mr. Hayes, without any provocation from JM, Grievant forcefully pushed him into the window screen, where he proceeded to repeatedly strike JM with his hands, knees and elbows. During this attack, JM screamed at Grievant and held his hands up against Grievant, presumably to protect himself. Mr. Hayes testified that Officer Adkins was holding onto JM while the blows were administered by Grievant. Mr. Hayes then intervened, attempting tocalm JM, at which time Grievant stopped hitting him. Officer Hall observed part of these events from the doorway, testifying that he saw Grievant push JM against the screen and hit him twice on the head. At that point, Officer Kevin Kellar, who had closed the window in JM's room, exited the room, closing the door behind him. Officer Hall did not see what happened after the door was closed, but heard JM crying and yelling. Neither Mr. Hayes nor Officer Hall saw or heard any threatening conduct on the part of JM.

Testifying on Grievant's behalf, Officer Kevin Kellar stated that he saw no violence against any resident at any time on May 17, 1998. He closed the windows both in PT's and JM's rooms, but saw none of the events testified to by other witnesses, including Grievant. However, he did state that he was only in JM's room for possibly thirty seconds, and that Grievant and Officer Adkins “may” have been talking to JM in the corner of the room. Recreation Specialist Allen Cody also testified on Grievant's behalf, stating that he only saw Grievant and PT standing “chest to chest” while talking. He also testified that he saw Grievant restrain JM. He did not see Grievant strike JM in any way, but he did not recall being in JM's room after the door was closed.

Grievant denies pushing or touching PT in any fashion. He also denies striking JM. He testified that, when he entered JM's room, JM began to approach him with his fists clenched in a threatening manner. As JM came close to him, he pushed JM against the window and restrained him in order to get control of him. They struggled some against the wall, because JM was still “resisting.” He stated that, although his memory was not clear, he probably did “tap” JM on the head “to get his attention.” Grievant claims he did not strike, knee, or elbow JM.

Captain Elder testified regarding his investigation of the events of May 17. Heinterviewed the residents and employees involved, most of them more than once. He questioned each one verbally at first, taking notes. He then took recorded statements from them, at which time he destroyed his notes from the first meeting. Although statements were conflicting, Captain Elder concluded that

Grievant used excessive, unprovoked force on residents. He also concluded that the incident and other forms completed by Grievant were falsified, because they stated that JM was only restrained because of threatening behavior toward Grievant. Captain Elder took pictures of JM the day after the incident, which show large bruises on his chest and back.

An Administrative Law Judge is charged with assessing the credibility of the witnesses that appear before her. Lanehart v. Logan County Bd. of Educ., Docket No. 95- 23-235 (Dec. 29, 1995); Perdue v. Dept. of Health and Human Res./Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993). The United States Merit System Protection Board Handbook ("MSPB Handbook") is helpful in setting out factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984). Some factors to consider in assessing a witness's testimony 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. Id. 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' information. Id. In a case such as this, with completely opposing and conflicting stories regarding Grievant's actions, credibility determinations are crucial to the outcome of the grievance. Grievant has taken great issue with Respondent's reliance on the testimony of Mr. Hayes. Mr. Hayes admitted that he initially backed up Grievant's version of the incident involving JM, but, upon reflection, decided to tell the truth to investigators two days after the incident. Mr. Hayes testified he was directed by Grievant to complete the counselor's portion of a passive restraint form, which is required any time a resident is forcibly restrained. Because Grievant had already described the incident on the form, Mr. Hayes felt he had no choice but to corroborate Grievant's story. However, he quickly realized the truth was necessary in such a serious case, and provided truthful information to Captain Elder the following day. (See footnote 2)

The undersigned finds Mr. Hayes to be a credible witness. His initial fear and confusion, causing him to give a false account of these events, is understandable. However, his explanation of the events has remained consistent since May 19, 1998, when he told Captain Elder what really happened. Moreover, Grievant's counsel specifically questioned Mr. Hayes as to whether DJS had promised him any benefit in return for his testimony against Grievant, and Mr. Hayes denied this.

There is no evidence that Mr. Hayes engaged in any such “bargaining” with DJS. In fact, it was only through the grievance procedure that Mr. Hayes was found to have been unjustifiably dismissed for the events of May 17, 1998. Grievant has not established any bias or motivation to lie on the part of Mr. Hayes. In addition, Mr. Hayes' version of events is corroborated by Officer Hall. (See footnote 3) However, Grievant contends that, since Officer Hall only saw Grievant strike JM twice on the head, that is all that happened. He further argues that these two “taps,” as he describes them, were not excessive force and were necessary to contain JM. Grievant has conveniently forgotten that Officer Kellar closed JM's door just after the two strikes on the head, so the only eye witnesses to the events after that point are Mr. Hayes and Grievant. Officer Hall's testimony is credible, and he has absolutely no motive to be dishonest regarding the events involved here. In fact, his statements since the investigation began have remained entirely consistent, and he was the only employee present who was courageous and honest enough to immediately report the incident. He also stated affirmatively that he saw Grievant push PT into the wall.

Between Mr. Hayes and Grievant, Mr. Hayes is the more credible witness. Grievant's contention that he was “threatened” by JM simply does not ring true. All of the witnesses, except Grievant, testified that JM is smaller in stature than Grievant. In addition, there is no evidence at all that JM made any particular statements which could have reasonably caused Grievant to conclude that he was in physical danger. Moreover, Grievant claims only that JM had his fists clenched. Did he also have them raised, as if to strike Grievant? Would this not be an important detail which Grievant should not have omitted? There were also a number of other officers and male personnel present, both in and outside the room. Why did Grievant feel so threatened that he had to forcefully attack JM in order to “control” him? If JM did attempt to attack Grievant, the attempt wouldobviously have been quickly aborted by Grievant and the others present. It simply does not make sense that Grievant felt the need to violently attack JM under the circumstances as he described them. Moreover, as Captain Elder explained, if JM had behaved as Grievant alleged, a forceful restraint was not the protocol. An officer first must attempt to calm the resident down, and avoid a physical altercation, if possible. Grievant obviously failed to do this.

As to Officer Kellar and Mr. Cody, they were both quite vague in their testimony. In his statement given immediately after the incident occurred, Officer Kellar did not even remember being in JM's room. However, at level four, he recalled closing the window. Nevertheless, if he was only in the room

for approximately 30 seconds, as he claims, it is easily believable that he was present either before the attack began or during a “lull” in the activity. Mr. Cody stated he was “in and out” of the doorway of JM's room. He was also admittedly outside the room when Grievant initially attacked JM, so he would have no way of knowing if JM had threatened Grievant as Grievant alleged. When asked what he did after allegedly watching Grievant “restrain” JM, Mr. Cody could not even remember whether he stayed in the room or not. He stated “I was in the room and out of the room. I really don't remember.” He also did not recall Officer Kellar leaving the room and closing the door behind him. The testimony of Officer Kellar and Mr. Cody is of little assistance and is not persuasive.

Grievant has asked the undersigned to give no credence to the contents of the report prepared by Captain Elder, because it contains summaries of statements of witnesses who were not called to testify in this grievance. However, insofar as the report itself corroborates the evidence already in the record, it will be given some weight. Theoverwhelming evidence in the report, including statements made by other witnesses, corroborates the already credible evidence that Grievant attacked JM violently, without any obvious reason for doing so. Accordingly, the undersigned concludes, in view of all of the credible evidence in this case, that Grievant used excessive force against a juvenile resident without justification or provocation. (See footnote 4)

As to Resident PT, it can reasonably be concluded that Grievant pushed him into a wall. Mr. Hayes had his back turned, but Officer Hall stated unequivocally that he saw this occur. Again Officer Kellar and Mr. Cody were vague and stated they were “in and out” of the residents' rooms, so they did not necessarily see all the events that transpired in PT's room. Grievant also used excessive force on PT without provocation or justification.

The evidence also conclusively establishes that Grievant engaged in an attempt to conceal his misconduct. The restraint form speaks for itself, and it clearly depicts an untrue version of the events in JM's room. Mr. Hayes testified that he was told by Grievant to tell anyone who asked that JM had approached him in a threatening manner, and that Grievant had only restrained him. Grievant has emphasized the fact that Officer Hall testified he was not given similar instructions by Grievant. However, Officer Hall's actual testimony, when asked whether Grievant made any statements regarding a “story” about the incident, was that he remembered something, but simply could not recall everything that was said. This is not inconsistent with Mr. Hayes' testimony. Grievant was also dismissed for conduct related to resident JTM. His termination letter charges that he pushed

JTM, who was seated in a chair, back against the bed, so that the chair was leaning against the bed. The evidence concerning this charge is conflicting, and the undersigned cannot reasonably conclude that Grievant pushed JTM as alleged. Nevertheless, the remainder of the charges against Grievant have been proven and provide sufficient basis for his dismissal.

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).

Grievant has been charged with gross misconduct. The "term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." Graley v. W. Va. Parkways Economic Dev. and Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991) (citing Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985). The West Virginia Supreme Court of Appeals has stated "[i]t is not our intention to establish any general rule which will serve to define what is or is not gross misconduct justifying discipline, suspension or dismissal. Each case must be determined upon the facts and circumstances which are peculiar to that case. We have no desire to establish any rule which would exact from Stateemployees such perfection of conduct as to create an intolerable burden. We would protect the employee against frivolous, trivial and inconsequential charges; or charges based on conduct which has no rational nexus with the duties to be performed or the rights and interests of the public." Thurmond v. Steele, 159 W. Va. 630, 635, 225 S.E.2d 210 (1976). See Mindel v. United States Civil Serv. Comm'n, 312 F. Supp. 485 (N.D. Cal. 1970); Kidd v. W. Va. Dept. of Tax and Revenue, Docket No. 91-T-127 (Dec. 17, 1991).

The Thurmond Court went on to state "[i]f, however, the misconduct is of a substantial nature and can be shown to affect directly the rights and interests of the public by bearing directly in a substantial manner on the duties which the employee is required to discharge, then the employing authority and the Civil Service Commission have the power and the duty, upon such a showing, to enforce such remedial steps, including a dismissal, as may be found proper under all of the circumstances of the

case." Thurmond, supra.

The undersigned finds that Grievant's use of excessive force and abuse upon juvenile residents in his custody constitutes gross misconduct. Juvenile correctional institutions must be able to expect that those directly entrusted with the protection and control of their residents do not harm or abuse them. There is no evidence in this case which shows that force was necessary in order to control or restrain JM or PT. In addition, Grievant falsified official documents in order to conceal his misconduct. Grievant's actions are totally unacceptable conduct for a correctional officer, and Respondent was justified in terminating his employment.

At the level four hearing, Respondent for the first time charged that Grievant had violated various provisions of Division of Corrections policies, including policies dealing withchild abuse. Grievant objected, because none of these policies were cited in the quite extensive letter which explained the reasons for Grievant's dismissal or at any other time prior to the level four hearing. However, in accordance with Hamilton v. W. Va. Div. of Highways, Docket No. 94-DOH-1116 (Nov. 29, 1995), notification of the legal or policy basis for the charges against an employee, provided at the level four hearing, is sufficient notice.

Grievant is charged with violating Policy 229.13, “Institutional Child Abuse & Neglect.” This policy defines child abuse as follows:

> Abuse may occur any time a staff member applies, attempts to apply, or knowingly allows to be applied, physical injury upon a resident.
>
> Abuse includes 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.

Clearly, Grievant violated this policy when he repeatedly struck JM.

Additionally, Grievant has been charged with violating provisions of Policy Directive 400, “Employee Standards of Conduct and Performance.” This policy is twenty pages in length, and it contains numerous provisions regarding offenses and discipline that may be administered. However, Respondent did not specify at the level four hearing what particular provisions of this policy were violated by Grievant, nor were the specific charges argued in Respondent's post-hearing brief. Therefore, it would be quite unfair to Grievant for the undersigned to engage in a guessing game as

to which provisions of Policy 400 he was charged with violating. These charges have not been sufficiently stated by Respondent and cannot be sustained.

This discussion will be supplemented by the following formal findings of fact and conclusions of law.

Findings of Fact

1. Grievant was employed as a correctional officer at WVIHY for approximately twelve years.
2. On May 17, 1998, residents of Standard III at WVIHY yelled obscenities from their windows at a female employee of the institution.
3. In response to the residents' conduct, Grievant, who was working as shift commander, assembled a group of correctional officers and other employees to close the residents' windows and “make a show of force.”
4. While interrogating PT, Grievant forcefully pushed him into a wall without justification or provocation.
5. Grievant repeatedly struck JM without justification or provocation.
6. JM did not approach Grievant in a threatening manner, and he did not attack Grievant in any way.
7. Grievant falsified an incident report and a passive restraint form, in order to conceal his misconduct in using excessive force upon JM.
8. Grievant instructed employees of WVIHY to lie about what happened in JM's room.
9. Grievant's employment was terminated on June 15, 1998, for gross misconduct.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and theemployer must meet that burden by proving the charges against an employee 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. 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. Respondent has proven by a preponderance of the evidence that Grievant used excessive force upon juvenile residents without justification or provocation.

4. Grievant falsified reports and directed other employees to lie about his conduct, in order to conceal his use of excessive force

5. Grievant violated WVIHY's institutional policy against child abuse when he physically assaulted a juvenile resident.

6. Grievant's actions constituted gross misconduct, for which termination of employment is proper.

Accordingly, this 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 grievanceoccurred, and 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:

January 13, 1999

_____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

In view of state law requiring that juvenile criminal records be kept confidential, only the initials of the juvenile residents of WVIHY will be used in this Decision. See W. Va. Code § 49-5-17.

Footnote: 2

For a more detailed explanation of Mr. Hayes' conduct and the undersigned's conclusions regarding his credibility, see Hayes v. W. Va. Division of Juvenile Services, Docket No. 98-DJS-220 (Dec. 14, 1998).

Footnote: 3

Officer Hall was the only employee who was not disciplined for the incident involved, because he immediately reported it to his supervisor.

Footnote: 4

Grievant also takes issue with Captain Elder's investigative techniques, particularly his practice of destroying the notes of an initial interview once a recorded statement is taken. The undersigned finds nothing unusual about this practice. The notes would obviously no longer be necessary, once an entire interview is on tape.