THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

RICHARD ALLEN TOWNSEND, JR.
Grievant,

v. **Docket No. 2012-0089-MAPS**

DIVISION OF JUVENILE SERVICES/
INDUSTRIAL HOME FOR YOUTH,
Respondent.

DECISION

Grievant, Richard Townsend, filed this grievance on July 22, 2011, challenging his termination from his position of Correctional Officer II at the West Virginia Industrial Home for Youth. He seeks as relief to be reinstated with a cleared record, along with back pay and benefits. This grievance was denied at level one following a conference conducted on August 30, 2011. A mediation session was conducted on April 25, 2012. The grievance was placed in abeyance until June 8, 2012, by order entered on April 30, 2012. A level three hearing was conducted before the undersigned Administrative Law Judge on January 17, 2013, at the Grievance Board's Westover office location. Grievant appeared in person and by his representative, Jack Ferrell, Communications Workers of America. Respondent appeared by its counsel, Steven R. Compton, Senior Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on March 5, 2013.

Synopsis

Grievant was terminated for the use of unnecessary and excessive force on a resident during a restraint. Grievant counters that Respondent failed to offer evidence to

support the allegation that Grievant hurt the resident or was guilty of the charges against him. Grievant contends that the resident caused his own injuries to his eyes in an effort to have Grievant terminated. The record established that Respondent proved, by a preponderance of the evidence, that Grievant used unnecessary and excessive force which resulted in an injury to the resident. This grievance is denied.

The following findings of fact are based upon the record developed at level three.

Findings of Fact

1. Grievant was employed as a Correctional Officer II at the West Virginia Industrial Home for Youth.

2. On June 23, 2011, Division of Juvenile Services Investigator, Kathleen Faber, was at the facility when she spoke with the resident in question and noticed that both of his eyes were blood red. The resident reported to Ms. Faber that the Grievant choked him on June 19, 2011.

3. Ms. Faber called for the Respondent's medical personnel to examine the resident. The resident was transported to the local hospital for further assessment of his injuries. The medical staff informed Ms. Faber that the resident's injuries were consistent with being choked.

4. Ms. Faber obtained a security video of the incident as part of her investigation. The video shows the resident approach a table in the unit and sit on it. Within seconds of the resident sitting on the table, Grievant approaches the resident and pulls him off of the table onto the floor. A struggle ensues with Grievant placing the resident in a choke hold. Two other officers then respond to assist in controlling the resident.

5. The time that elapsed after Grievant began giving the verbal commands and when he first placed his hands on the resident was approximately fifteen seconds. Grievant failed to allow reasonable time for the resident to comply with the commands or for the situation to de-escalate.

6. Grievant was not assigned to the side of the unit in which this incident took place. There were two other officers nearby who were assigned to that side of the unit; however, Grievant did not ask for their assistance prior to making physical contact with the resident.

7. Ms. Faber determined that Grievant did not demonstrate proper use of force or follow the continuum of de-escalation. Ms. Faber also found that the Grievant used excessive force against the resident.

8. Grievant failed to utilize any de-escalation techniques and his use of physical force was premature and unnecessary. Grievant violated policy when he failed to notify a supervisor or involve other officers in the unit prior to engaging in physical force since the resident was being passive and not actively aggressive. The techniques used by the Grievant were dangerous and the injuries to the resident's eyes were consistent with having a restricted airway.

9. Based on this incident, along with a history of progressive discipline, Grievant was terminated from employment by letter dated July 7, 2011. The letter, marked and admitted as Respondent's Exhibit Number 1, stated, in pertinent part, the following:

> A recent investigation found that on Sunday, June 19, 2011, you initiated a physical altercation with Resident SW while on the 205 unit. Said resident was sitting on top of one of the dayroom tables and was refusing to go to his room. You claimed you instructed him three times to go to his room and he did not comply. Rather than call for assistance, you singlehandedly take him

> off of the table and down to the floor. During the restraint, you repeatedly placed the resident in an apparent chokehold, causing injury to the resident. This resident was later taken to the hospital for treatment. You did not make a reasonable effort to get him to comply without the use of force. Your actions led to an unnecessary use of force which escalated into a physical altercation causing injury to the resident. The force used by you to place this resident in his room was excessive, inappropriate and/or a violation of Division policy and facility operational procedure.

Discussion

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. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v.*

Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965). Additionally, Division of Personnel Rule 143 C.S.R. 3.39 defines "Fitness" as "suitability to perform all essential duties of a position by virtue of meeting the established minimum qualifications and being otherwise qualified."

In the instant case, Grievant did not have justification to act as he did when he used excessive force in removing the resident from the table. Although the resident had refused to move from the table, Grievant did not give the resident reasonable time to comply with the verbal commands before engaging in the physical confrontation. The video of the incident demonstrates that the actions of the resident during the struggle were more likely defensive measures to stop the Grievant from choking him. Grievant was trained not to use a choke hold because of the serious risk of injury. This entire incident could have been avoided, or performed in concert with fellow officers according to appropriate training, but for the improper actions of the Grievant.

Grievant denies any wrongdoing and has not asked the undersigned to mitigate his discipline. In any event, this incident alone justifies the sanction imposed by the Respondent. The record of this grievance demonstrates that Respondent has met its burden of proof and established by a preponderance of the evidence that Grievant was terminated for good cause.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. 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. Procedural Rules of the W. Va. Public Employees

Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

2. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965).

3. "Fitness" for a classified position is defined as "suitability to perform all essential duties of a position by virtue of meeting the established minimum qualifications and being otherwise qualified." Division of Personnel Rule 143 C.S.R. 3.39.

4. Respondent has proven by a preponderance of the evidence that Grievant's employment was terminated for good cause, and demonstrated Grievant was not able or suited to perform the essential duties of his position.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included

so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: April 5, 2013

Ronald L. Reece
Administrative Law Judge