THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JIMMY L. BARNETT,
Grievant,

v. **Docket No. 2013-0086-MAPS**

DIVISION OF JUVENILE SERVICES,
Respondent.

DECISION

Grievant, Jimmy L. Barnett, was employed by Respondent, Division of Juvenile Services. On July 25, 2012, Grievant filed this grievance against Respondent for improper termination. For relief, grievant seeks reinstatement, back pay, benefits, attorney's fees and costs.

The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4) on July 25, 2012. A level three hearing was held on October 26, 2012, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by counsel, C. Page Hamrick. Respondent was represented by counsel, Steven R. Compton, Senior Assistant Attorney General. This matter became mature for decision on December 5, 2012, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was dismissed from employment as a Correctional Officer II at a juvenile center for excessive use of force. Grievant was attacked by an adult resident and sustained a concussion during the attack. He has no memory of the actions he took during the following restraint of the resident. Respondent did not prove that the resident's injuries were caused by Grievant, although Respondent did prove some

improper conduct. Grievant's actions were unconscious and, therefore, not intentional. Respondent failed to prove it had good cause to terminate Grievant, a twenty-one year veteran of civil service, when his improper conduct was unconscious due to the concussion he sustained. Accordingly, the grievance is granted.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant was previously employed as a Correctional Officer II by Respondent, Division of Juvenile Services, at James H. "Tiger" Morton Juvenile Center. The center houses youth charged with crimes that would be punishable by incarceration if committed by adults.

2. Grievant had served as a Correctional Officer for over twenty one years, and had no prior disciplinary history. Grievant had previously received a demotion, but that was not due to discipline, but rather to illness that required Grievant to take leaves of absence so that he was no longer able to serve as a Corporal.

3. On the morning of June 19, 2012, Grievant and two other officers, Correctional Officer II, Keino Johnson, and Correctional Officer, Alison Gardner, were supervising fifteen to twenty juvenile residents in the multi-purpose room while the residents were on break between breakfast and the start of classes. The residents were seated in groups of two to three around individual tables.

4. At approximately 8:23 a.m., resident T.H.[1] violently attacked resident C.D. Although the center is a juvenile facility, T.H. was eighteen years old at the time.

5. Grievant and Officer Johnson responded to break up the attack. Grievant attempted to restrain T.H., while Officer Johnson restrained C.D.

6. Grievant was unable to restrain T.H., and in the struggle Grievant was knocked down to the floor, flat on his back. While Grievant was on the floor, T.H. attacked Grievant, repeatedly punching him in the face. T.H. was between Grievant's legs and "in his guard,"[2] such that Grievant was unable to defend himself. The attack was so violent that Grievant wondered if he might actually be killed.

7. Corporal James Dunlap, Grievant's commanding officer, then responded from elsewhere in the facility. Corporal Dunlap pulled T.H. off Grievant and rolled over with him to the floor. Grievant rolled over on top of the two. T.H. continued to resist and a struggle ensued with the three rolling around on the floor. The three ended up in a "dogpile"[3] with Corporal Dunlap on the bottom, T.H. in the middle, and Grievant kneeling over top. T.H. was not adequately restrained and struggled throughout. Corporal Dunlap and Grievant were "hindering each other" in the restraint.[4] Corporal Dunlap several times ordered Grievant to stop. Shoes, radios, and other objects littered the

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[1] The undersigned will follow the past practice of the West Virginia Supreme Court in cases involving underage individuals and will refer to the initials only of the involved residents. *See In the Matter of Jonathan P.,* 182 W.Va. 302, 303 n. 1, 387 S.E. 2d 537, 538 n. 1 (1989). Although T.H. is no longer a minor, his residence at the center was due to offenses committed as a juvenile.

[2] Level three testimony of Corporal James Dunlap.

[3] Level three testimony of Correctional Field Training Officer, Kellen Cordie.

[4] *Id.*

floor where the struggle occurred. During much of the incident, the other residents were nearby, and the atmosphere was chaotic and loud.

8. Although Corporal Dunlap testified he had T.H. restrained, it is apparent from T.H.'s continued resistance, other witness testimony, and the video, that this was not the case. At one point, although Corporal Dunlap believed T.H. to be adequately restrained with handcuffs, and had hoisted him to his feet to remove him, T.H. kicked Grievant in the groin.

9. Correctional Field Training Officer, Kellen Cordie, Officer Johnson, and Officer Pearson all observed portions of the incident, but no one observed the entire incident. There is surveillance video of the incident, but portions of the incident are not recorded due to camera angles and inexplicable freezing of frames. What video is available is mostly choppy and unclear.

10. During the attempted restraint, Grievant delivered improper knee strikes to the ribs of T.H. The proper area to deliver knee strikes is only to the upper thigh. Grievant also attempted to deliver several closed fist strikes.

11. Grievant was blacked out during most of the restraint and does not remember his actions. His last coherent memory is of T.H. repeatedly punching him in the face and thinking that he might be killed.

12. T.H. sustained injury to his arm and scratches and bruises to his face. Although the forearm injury was characterized as a bite mark, it is not apparent from the photograph if this is so, and there was no medical evidence presented as to the nature of the injury.

13. Following the incident, the video shows Grievant slumping down the wall and walking away unsteadily, requiring assistance to walk from Officer Cordie. Officer Johnson then escorted Grievant on to medical. Grievant was disoriented and incoherent.[5] He was not able to answer simple questions and was obviously impaired.[6] An ambulance was called.

14. The paramedic arrived at 8:44 a.m. and found Grievant's primary symptom was "Altered Level of Consciousness." Grievant was "very confused" and was unable to give the day, month, or year when questioned. Grievant had swelling and bruising to his face, neck, and the back of his head. Grievant was "confused" and "combative."[7]

15. Grievant was taken to the hospital where he was given Morphine for his pain. Grievant reported to the physician that he had "blacked out for a short period of time." Grievant was diagnosed with a concussion and periorbital contusion.[8]

16. At the time of the hearing, four months after the incident, Grievant still had visible damage to his eye area that was readily apparent to the undersigned from across the room.

17. Grievant was immediately suspended without pay on June 19, 2012. By letter dated July 18, 2012, Respondent dismissed Grievant for use of "excessive

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[5] Level three testimony of Officer Johnson.

[6] *Id.*

[7] Grievant's Exhibit No. 3.

[8] *Id.*

physical force in violation of Division policy by striking the resident in the face/head area and biting him on the forearm."[9]

Discussion

The burden of proof in disciplinary matters rests with the employer to prove that the action taken was justified, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. *See* W. VA. CODE ST. R. § 156-1-3 (2008); *Ramey v. W. Va. Dep't of Health,* Docket No. H-88-005 (Dec. 6, 1988). "The 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). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

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); *See also* W. VA. CODE ST. R. § 143-1-12.02 and 12.03 (2012). The West Virginia Supreme Court of Appeals has also stated that "the work record of a long-term civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." *Buskirk v. Civil Serv.*

[9] July 18, 2012 letter to Grievant from Division of Juvenile Services Director, Dale Humphreys, attached to Grievance Form.

Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985). *See Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983); *Serreno v. W. Va. Civil Serv. Comm'n*, 169 W. Va. 111, 285 S.E.2d 899 (1982).

Respondent argues that termination was justified due to the gross misconduct of Grievant. 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." *Crites v. W. Va. Dep't of Health &Human Res*., Docket No. 2011-0890-DHHR (January 24, 2012); *Graley v. W. Va. Parkways Economic Dev. & 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)). *See Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sept. 13, 2002).

Respondent introduced pictures of T.H. to illustrate the injuries he sustained. The photographs show injuries sustained to T.H.'s face and arm. There are no injuries alleged that could have been caused by improper knee strikes to the ribs. Respondent termed the injury to T.H.'s arm as a bite mark. Respondent introduced no medical evidence as to the extent or nature of any of the injuries to T.H. There is no proof that the injury is a bite mark. Further, the evidence simply does not prove that any of T.H.'s injuries were caused by Grievant. T.H. had attacked another resident, who fought back. T.H. then attacked Grievant, while Grievant was mostly helpless on the ground. In addition, the surveillance video seems to show Corporal Dunlap rolling over T.H's head and upper body, and there were multiple objects lying on the floor that could have injured T.H. as they were rolling around on the floor. Given the circumstances, it is

impossible to tell which, if any, of the injuries T.H. sustained were caused by Grievant. If any of the injuries were caused by Grievant, it is further impossible to tell whether they were incurred while Grievant was helpless on the ground and entitled to defend himself from attack, or after.

Therefore, whether excessive force was used must be determined through witness testimony.[10] Accordingly, the undersigned must make credibility determinations. In assessing the credibility of witnesses, some factors to be considered ... 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. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). 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's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

There is no one who witnessed the entire incident, and the video of the incident is of such poor quality it has limited usefulness in determining the truth of the events. All witnesses had varying levels of distraction, and the scene itself was chaotic and loud. The most useful witness was Officer Cordie. Her demeanor was good and she had the least distraction as she had a limited role in the restraint in that she only

[10] The surveillance video should have provided better evidence of the events; however, the tape is of such poor quality that it is of little help. The undersigned is particularly disturbed that, even while the action was in frame, during portions of the action the frame would freeze even though the time on the video continued to count. This is beyond the normal choppiness of surveillance video.

provided shackles and removed objects from the floor. However, Officer Cordie witnessed the event only after Corporal Dunlap had pulled T.H. off Grievant, and then only witnessed portions of the attempted restraint as she was absent while fetching restraints and checking on Officer Johnson's situation. Her testimony was consistent and plausible, her demeanor and attitude towards the proceeding were proper, and she appeared to have no interest or bias. Her testimony regarding what she did witness was credible, and is therefore sufficient to find that Grievant delivered improper knee strikes. Officer Pearson saw only portions of T.H.'s attack on Grievant, but testified clearly and credibly that T.H. landed three to four "solid" punches to Grievant's face while he was on the ground. His testimony was plausible, consistent, and he demonstrated an appropriate attitude to the proceeding. Officer Johnson had a very limited opportunity to witness the restraint, but he testified credibly regarding Grievant's condition immediately following the incident. He was matter-of-fact and confident in his answers, had an appropriate attitude towards the proceeding, showed no bias, and his testimony was consistent and plausible.

Corporal Dunlap's demeanor appeared to be hostile and angry towards Grievant. He appeared biased against Grievant, and that bias seems to have affected his view of Grievant's condition during the attempted restraint. Although he was very confident in his testimony that Grievant punched T.H. and was not disoriented, that confidence is not supported by the other evidence. Officers Cordie and Johnson both testified to Grievant's unsteadiness, of which the video also demonstrates, and the medical records and further testimony of Officer Johnson show Grievant's disorientation. The scene was chaotic, as described by the witnesses and apparent from the video, and the video and

other witness testimony indicate that Corporal Dunlap's view would have been obscured by his position on the bottom of the dogpile and his struggle to maintain control of T.H. Further, he asserted in his testimony that he had T.H. adequately restrained and that Grievant was simply interfering. That testimony is also not supported by the evidence as the video shows T.H. was still struggling, Officer Cordie testified that T.H. was still struggling, and, most importantly, after Corporal Dunlap said T.H. was restrained, T.H. kicked Grievant in the groin, demonstrating very clearly that T.H. was not restrained. Regarding the punches Corporal Dunlap alleges Grievant delivered, his testimony is more certain than the circumstances justify. Although it is not plausible that Corporal Dunlap saw these strikes with the degree of clarity to which he testified, it is more likely than not that Grievant attempted to deliver some closed fist strikes during the struggle.

Grievant has consistently maintained that he was blacked out during the attempted restraint due to the violent punches he received from T.H. His statements are consistent with the medical evidence, the testimony of Officer Johnson, Officer Cordie, and Officer Pearson, and the video. He appeared honest and forthright. He had served as a correctional officer without incident for over twenty-one years. Although he would have obvious motive to lie to regain his job, his testimony appeared to be truthful. Grievant's testimony regarding the attack by T.H. and his lack of memory of the incident is credible.

In addition, the undersigned must assess Officer Cordie's hearsay testimony that T.H. told her Grievant bit him. Relevant hearsay is admissible in administrative hearings. *Gunnells v. Logan County Bd. of Educ.,* Docket No. 97-23-055 (Dec. 9, 1997). The Grievance Board has applied the following factors in assessing hearsay testimony:

1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. *Id.*; *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-H-115 (June 8, 1990). The only evidence that the mark was from a bite, other than T.H.'s hearsay statement, is the photograph. The photograph is not clear enough to determine if the mark is actually a bite. Further, Officer Cordie testified that, at the time, she thought the mark was a carpet burn. T.H. demonstrated an intent to do harm to Grievant by his violent attack on Grievant, and his continued attack upon Grievant by kicking him in the groin even while partially restrained. Given that intent to harm, no other evidence that Grievant bit T.H., and no evidence, other than the photograph, that the injury was even a bite mark, the hearsay statement of T.H. can be given no weight.

Though it is unclear the extent of the injuries to T.H. caused by Grievant, if any, or the severity of the improper conduct, it is clear that there was some improper conduct on the part of Grievant in delivering improper knee strikes and attempting to deliver closed fist strikes. However, it is Grievant's contention that he has no memory of his

actions and was essentially unconscious during the attempted restraint. The charge of gross misconduct requires "willful" or "wanton disregard," which requires intent on the part of the Grievant. If Grievant's actions were not conscious, then he lacked the ability to form intent and any misconduct would not be willful or wanton. Grievant's testimony is credible and is supported by medical records, the surveillance video, and other witness testimony. Grievant testified that T.H.'s punches to his face were so violent that he feared for his life. Officer Pearson saw T.H. land several "solid" punches to Grievant's face while Grievant was lying helpless on the ground. Corporal Dunlap saw T.H. on top of Grievant, between his legs and "in his guard." These punches resulted in serious injury to Grievant. Four months later, the injury to Grievant's eye area was still visible to the undersigned from across the hearing room. Grievant's medical records show he sustained a concussion and periorbital contusion. Grievant's injuries were extensive enough that he was given Morphine for the pain in the emergency room.

The surveillance video and the testimony of Officers Cordie and Johnson show that, after the incident, Grievant was unsteady on his feet. Medical records show that Grievant was confused, disoriented, and combative, and he was diagnosed with a concussion. Officer Johnson testified that, directly after the incident, Grievant was incoherent and disoriented. He was stumbling, and did not know his name, the date, or the time. Given Grievant's testimony, all the supporting evidence, and Grievant's lack of disciplinary history over a twenty-one-year career, it is credible that Grievant was unconscious during the improper contact with T.H.

Respondent seems to reject Grievant's claim out of hand, but this appears to be due to a misunderstanding of the meaning of "unconsciousness" as claimed in this

case. While seemingly novel to the grievance process, unconsciousness, otherwise known as automatism, is a defense in criminal matters specifically recognized by the West Virginia Supreme Court. *See State v. Hinkle*, 200 W. Va. 280, 489 S.E.2d 257 (1996). Automatism is "[b]ehavior performed in a state of mental unconsciousness or dissociation without full awareness…applied to actions or conduct of an individual apparently occurring without will, purpose, or reasoned intention on his part…" BLACK'S LAW DICTIONARY 134 (6th ed. 1990). The Court has further specifically recognized that automatism can be caused by concussion. *Hinkle*, 200 W. Va. at 17, 489 S.E.2d at 285. The Court's acceptance of this defense in criminal matters is instructive in this case. If unconsciousness can negate the required intent in a criminal matter, absolving a defendant from liability for otherwise criminal actions, it can certainly prevent the Respondent from establishing good cause to fire a protected state employee. Respondent has failed to prove it had good cause to terminate Grievant, a twenty-one year veteran of civil service, when his improper conduct was unconscious due to the concussion he sustained.

Turning to the remedies requested by Grievant, he cannot be awarded attorney's fees. "[A]n ALJ for the Grievance Board is not authorized by law to grant attorney's fees. W. VA. CODE § 6C-2-6; *Long v. Kanawha County Bd. of Educ.*, Docket No. 00-20-308 (Mar. 29, 2001); *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June 21, 1996); *Cosner v. Dep't of Transp.*, Docket No. 2008-0633-DOT (Dec. 23, 2008). West Virginia Code § 6C-2-6 states in part, '(a) [a]ny expenses incurred relative to the grievance procedure at levels one, two or three shall

be borne by the party incurring the expense.' W. VA. CODE § 6C-2-6." *Stuart v Div. of Juvenile Serv*. Docket No. 2011-0171-MAPS (Sept. 23, 2011).

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. W. VA. CODE § 29-6A-6; *Ramey v. W. Va. Dep't of Health,* Docket No. H-88-005 (Dec. 6, 1988). "The 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). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

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); *See also* W. VA. CODE ST. R. § 143-1-12.02 and 12.03 (2012). The West Virginia Supreme Court of Appeals has also stated that "the work record of a long-term civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985). *See Blake v. Civil Serv. Comm'n*, 172

W. Va. 711, 310 S.E.2d 472 (1983); *Serreno v. W. Va. Civil Serv. Comm'n*, 169 W. Va. 111, 285 S.E.2d 899 (1982).

3. 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." *Crites v. W. Va. Dep't of Health &Human Res*., Docket No. 2011-0890-DHHR (January 24, 2012); *Graley v. W. Va. Parkways Economic Dev. & 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)). *See Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sept. 13, 2002).

4. Relevant hearsay is admissible in administrative hearings. *Gunnells v. Logan County Bd. of Educ.,* Docket No. 97-23-055 (Dec. 9, 1997). The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. *Id.*; *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec.

31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-H-115 (June 8, 1990).

5. While seemingly novel to the grievance process, unconsciousness, otherwise known as automatism, is a defense in criminal matters specifically recognized by the West Virginia Supreme Court. *See State v. Hinkle*, 200 W. Va. 280, 489 S.E.2d 257 (1996). Automatism is "[b]ehavior performed in a state of metal unconsciousness or dissociation without full awareness…applied to actions or conduct of an individual apparently occurring without will, purpose, or reasoned intention on his part…" BLACK'S LAW DICTIONARY 134 (6th ed. 1990). The Court has further specifically recognized that automatism can be caused by concussion. *Hinkle*, 200 W. Va. at 17, 489 S.E.2d at 285. The Court's acceptance of this defense in criminal matters is instructive in this case. If unconsciousness can negate the required intent in a criminal matter, absolving a defendant from liability for otherwise criminal actions, it can certainly prevent the Respondent from establishing good cause to fire a protected state employee.

6. Respondent has failed to prove it had good cause to terminate Grievant, a twenty-one year veteran of civil service, when his improper conduct was unconscious due to the concussion he sustained.

Accordingly, the grievance is **GRANTED**. Respondent is **ORDERED** to reinstate Grievant to his position as a Correctional Officer II at James H. "Tiger" Morton Juvenile Center effective June 19, 2012, to pay him back pay to that date, with statutory pre-judgment interest on the back pay, and to reinstate all other benefits to which he would have otherwise been entitled, effective that date.

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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: January 8, 2013

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Billie Thacker Catlett
Administrative Law Judge