CALVIN ANDERSON, .

Grievant, .

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v. . Docket Number 96-CORR-040

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WEST VIRGINIA DIVISION OF .

CORRECTIONS at INDUSTRIAL HOME .

FOR YOUTH, .

Employer. .

DECISION

Grievant, Calvin Anderson, was terminated from his position of Correctional Counselor (See footnote 1) at the Industrial Home for Youth (hereinafter referred to as Home) by the West Virginia Division of Corrections, effective January 25, 1996. Thereafter, he filed this grievance at level four of the Grievance Procedure for State Employees pursuant to W. Va. Code §29-6A-4(e), on January 29, 1996. An evidentiary hearing was held on February 21, 1996, at the Upshur County Courthouse in Buckhannon, West Virginia. The case became mature for decision on that date.

Grievant was dismissed by the Employer for alleged negligent performance of duty, violation of safety rules and inadequate job performance, connected to an incident that occurred on November 30, 1995, when a resident at the Home was attacked and beaten by other residents. By letter dated December 5, 1995, Grievant was suspended for thirty days pending an investigation into the incident. He was given notice of his termination by letter of January 10, 1996, from Superintendent James J. Ielapi, after it was concluded that his conduct, considered together with his disciplinary record,

warranted his dismissal.

Grievant contends that his conduct on the night in question was neither inappropriate nor in direct contravention of the Employer's established policies and rules. He further contends that even if his conduct is somehow determined to have been questionable, it did not justify his termination from employment. He seeks reinstatement to employment and a transfer to another institution with the Division of Corrections. The Employer asserts that Grievant violated established policies and rules, and his termination was justified.

Pursuant to W. Va. Code §29-6A-6, the Employer bears the burden of proving the facts supporting its case by a preponderance of the evidence. In attempt to satisfy this burden, the Employer presented the testimony of Captain Guilda Ash, Chief Correctional Officer at the Home, who summarized the contents of, and theconclusions contained within the formal, written, investigative report she prepared in connection with her investigation of the November 30, 1995 fight. The report was also presented into the record. Further, Superintendent Ielapi testified concerning the reasons why he decided to fire Grievant.

The Home is an institution of the Division of Corrections that houses adjudicated delinquents committed to it by the State's court system. The Home consists of more than one building. The incident in question occurred during the evening shift on what is known as the 1st Hall in the Jones Building. This floor is designated as a “security unit.” (See footnote 2) On duty on November 30, were Correctional Officers Kilgore, Grimm and Grievant. Apparently, at the time of the fight, Officer Grimm was not present on the floor. Also, at this time, Officer Kilgore was a recently hired, probationary employee.

On November 30, 1995, at approximately 9:00 p.m., resident M (See footnote 3) , while locked in his room, loudly and continually requested that he be allowed to use the restroom. At this time, only Officer Kilgore and Grievant were staffing the floor. Officer Kilgore decided to let M leave his room and go to the bathroom, and he also asked if any of the other residents in the immediate vicinity wanted to do the same because it was close to the time when all of the residentson this hall were to be secured (locked in) for the evening. Officer Kilgore unsecured M and three other residents who went to the bathroom and shower facilities at this time. Two other residents must have already been in the restroom or somewhere else unsecured. Apparently, shortly after that, Officer Kilgore then decided to lock down resident W while he believed the others were still in the restroom. Immediately

after doing this, he noticed that M was entering the room of resident T. He went to T's room and M and T were attempting to fight. Officer Kilgore restrained M and locked him in his room and T in his room. The other residents exited the restroom and he locked them down.

During this brief period, Grievant was apparently on the phone as he had been taking calls during the shift. Officer Kilgore notified Grievant of the incident between M and T and they went to M's room to check on him. When they entered M's room, he insisted he was fine and that he wanted them to leave. He was loud, uncooperative and using profanity. (See footnote 4) Grievant and Officer Kilgore noticed that M had a red bump on his head and what appeared to be dried blood under his nose, along with a wet shirt. They decided that he did not need any first aid or medical attention.

The log that the officers kept on the floor that night, which was mainly filled out by Officer Kilgore, indicated that M was secured but yelling and screaming between 9:00 p.m. and 9:20 p.m. when he was excused to go to the bathroom. It shows that he was secured and quiet at 9:30 p.m. Officer Kilgore prepared anincident report at approximately 11:25 p.m. in which he recounted the events described above. The incident report suggests that the two residents were engaged in a struggle prior to being restrained. Later, at approximately 1:05 a.m., Officer Kilgore completed another incident report describing in more detail what had happened. According to this incident report, and Officer Kilgore's statement made during the subsequent investigation, Grievant suggested that they check on M immediately after the residents were locked down, and he also later notified the shift supervisor of the incident.

As a result of the investigation, which included the taking of statements from Grievant and Officer Kilgore, along with those of M and all of the residents who were in the bathroom together between 9:00 p.m. and 9:20 p.m., it was concluded that M had been thrown in the shower and beaten by five other residents while in the restroom. (See footnote 5) After the evening shift on November 30, 1995, two other officers took M to a local hospital emergency room. It was determined that he had bruises on his chest, shoulder, face and head, and a small cut behind his ear. Earlier that evening, Officer Kilgore concluded on a Passive Physical or Mechanical Restraint Form that M had a bloody nose and a bruise above his left eye.

In the investigative report, Sargent Ash concluded that Grievant had to have been aware of the fact that six residents werein the bathroom simultaneously. She also concluded that Grievant failed to inform the shift supervisor that any follow-up medical attention was needed for M and failed to

provide him with follow-up medical attention. It was also concluded that he failed to complete an incident report that he should have done. Sargent Ash opined that Grievant's conduct amounted to a violation of the following offenses as listed in the Division of Correction's Policy on Employee Standards of Conduct and Performance: Inadequate, unsatisfactory job performance; failure to observe precautions or personal safety posted rules, written or oral safety instructions; and violating safety rules when there is a threat to life. Sargent Ash's conclusion was that Grievant should be dismissed from employment. (See footnote 6)

At the hearing, Superintendent Ielapi testified concerning his review of the investigative report and an investigative report prepared by the West Virginia Department of Health and Human Resources. (See footnote 7) He also testified that he considered Grievant's employment record with the Division of Corrections and detailed what disciplinary actions had been imposed on Grievant by him in the past. He testified concerning a brief phone communication that he had with Grievant on the evening of November 30, 1995, after the fight had occurred. Mr. Ielapi, during his testimony, mentionedthe fact the Grievant was a “senior” officer and the most senior officer on the floor the night of the fight. He opined that Grievant “should have known better” than to have let more than one resident in the bathroom at the same time, and also that he would have fired Grievant solely on the basis of the fact that he failed to follow-up on giving medical treatment to M.

Grievant testified on his own behalf and explained his version of the facts. He stated that he did not see any of the residents enter the restroom at or around the time of the fight because he was on the phone. He testified that he was unaware that the fight in the restroom took place. Grievant stated that his only knowledge of M getting hit was based upon what he was told by Officer Kilgore. Then, he testified that he suggested they check M over to see if he was injured and, when he did not believe M was injured, he thought there was no need for medical treatment. In any event, he opined that he did not believe M had engaged in an altercation that was any more major than usual for him. He said that he did not complete an incident report but told Officer Kilgore to prepare one because he had witnessed the incident and was the only one with personal knowledge of the facts. He noted he did inform his shift supervisor of the fact that M had entered T's room and engaged in a scuffle, the only information that he possessed at the time. (See footnote 8) Grievant admitted that, in hindsight, maybe he should have looked at M more closely to determine if he was injured more severely than first thought; however, he stated that he did not believe him to be badly injured. He

opined that if his failure to have adequately checked M for injuries is the only thing he did wrong, he should not have been dismissed. Grievant denies any inference or allegation that simply because he was more senior than Officer Kilgore that he had a duty to watch over him or to assure that he did not let more than one resident in the bathroom simultaneously. He opined that if that is what happened, then even Officer Kilgore, a probationary employee, should have known that was not appropriate, and should not have needed to be told otherwise.

The West Virginia Department of Corrections has adopted a written policy (Policy 400) governing employee standards of conduct and performance. This policy sets forth and explains the Department's progressive disciplinary policy, along with a description of the types of offenses that may warrant the imposition of discipline. Offenses are distinguished based upon their severity and categorized as either class A, B or C offenses, with A offenses being the least severe in nature and C being the most egregious. This policy also sets forth recommendedpunishments for the various classes of offenses, and the length of time each offense is to be considered “active.” Mitigating and aggravating circumstances are also to be considered relevant in assessing the appropriate penalty.

Grievant was charged in the dismissal letter with having acted negligently resulting in the injury of a resident (class C offense), having violated a safety rule where a threat to life was present (class C), and having failed to observe a safety rule (class B). It was also noted in the termination letter that Grievant had been suspended for 2 days in July 1991 for gross misconduct, had been suspended for thirty days in June 1992 for misconduct, and for 10 days in March 1994 for misconduct. At the hearing, Mr. Ielapi also noted that Grievant had been given a written reprimand on November 17, 1995, for not having notified his shift supervisor that he had used mechanical restraints (hand- cuffs) on a resident.

It is evident from the testimony of Mr. Ielapi, and the language of the dismissal letter, that most of the conclusions from the investigation of Sargent Ash formed the basis of the charges against Grievant. It was believed that Grievant was aware more than one resident went to the bathroom at the same time, leading to the assault on M, because of the proximity of the phone to the entrance to the bathroom. This formed the basis for the class C offense of negligence. Apparently, it is believed that Grievant's failure to obtain medical care for M constituted the class C offense of violation of safety rules and a class B offense alsocalled a failure to observe personal safety rules. In the dismissal letter, it was noted that Grievant did not thoroughly examine M after the altercation and that

he did not report the incident. Again, reference was made in the dismissal letter to the fact the Grievant was the most senior officer on duty. And, in Mr. Ielapi's testimony, he referred to Grievant's responsibility to supervise the less senior officer because of Grievant's experience.

The first issue in addressing the charges is whether it can be inferred that Grievant was aware the six residents were allowed to go to the restroom together; and therefore, the assault on M could be attributed to his negligence or failure to follow some established standards. (See footnote 9) Basically, Sargent Ash testified that Grievant had to have seen the residents go to the restroom if he were on the phone because the phone is in the hallway, only ten feet or so away from the bathroom door. Grievant testified that he believed he was on the phone when the boys entered the restroom but opined that he may also have been locking a resident down. According to Grievant, he did not know the boys were in the restroom together; therefore, he could not be sure when they entered together or where he was at the time. He estimated that the phone is approximately thirty-five feet away from the restroom door. The employer's evidence on this issue (Sargent Ash's opinion testimony) does not establish by a preponderance of the evidence that Grievant knew the six residents were in the bathroom together. While it may be true that he could have known, the evidence does not show that he did. Whether Grievant could have seen the restroom door from the area where the phone is located is immaterial if the evidence does not establish exactly when the incident took place and where Grievant was at the time. It is understood that Grievant is assuming he was on the phone when Officer Kilgore let the residents go to the restroom; however, this assumption does not enable the Employer to establish the fact that he knew what happened. It is understood the Grievant could not have prevented Officer Kilgore from allowing more than one resident to go to the bathroom if he did not know it was occurring. (See footnote 10) Throughout the hearing, Grievant was a credible witness and there was no direct, competent testimony refuting that he was not aware more than one resident was in the restroom at the same time. Therefore, to the extent that Grievant was charged with having acted negligently based upon this assumption by the Employer, the class C or B offense attributed to this alleged misconduct has not been proven. (See footnote 11) The dismissal letter says that Grievant did not immediately report that the assault occurred. The evidence does not prove that he knew the assault occurred or that if he had known, he, as opposed to Officer Kilgore, had the duty to report the assault. The evidence does establish that he did inform both his shift supervisor and Mr. Ielapi that M had engaged in a scuffle in T's room. This is even supported by Mr. Ielapi's

testimony. In any event, because it is determined that Grievant did not know that M had been assaulted in the bathroom until later, it cannot be concluded that he acted inappropriately in failing to report something of which he had no knowledge.

What the record does establish is that Grievant immediately became aware that M had engaged in a physical altercation with T because Officer Kilgore had told him. The record also shows that M received what was later found to be many minor injuries (many bruises and one small cut behind the ear) as a result of having been assaulted in the restroom. Both Grievant and Officer Kilgore, at that point, had the duty to thoroughly check M to ascertain the extent of his injuries to the best of their ability and skill. Grievant testified that he briefly checked M but believed that hewas all right based upon his conduct and statements. He further stated that it is often advisable, at times, to let a resident “cool off” or calm down after an altercation so that he might later cooperate more thoroughly. While this may be the case, here, it is determined, based upon the facts, that M should have been more thoroughly checked for injuries immediately. This conclusion is drawn, in part, on the fact that M's clothes were wet and that he had stated he fell in the shower, an act that could cause severe damage in itself. Grievant was negligent in performing his duties in this regard.

It is interesting that both Mr. Ielapi and Sargent Ash made many references to Grievant being the more senior officer on duty, and to him having violated safety rules and policies and other responsibilities of his position. However, no specific job descriptions, classification specifications, written instructions, regulations, policies or other sources of authority were introduced to define specifically what were Grievant's responsibilities. There is nothing in the record to support the conclusion that Grievant was Officer Kilgore's supervisor or mentor. There was no evidence introduced concerning what actions a correctional officer must take when encountering a resident who has engaged in a fight or who had been the victim of an assault. In this case, common sense should have mandated that M be thoroughly checked for injuries by the two officers on the floor. However, it is difficult for the Undersigned, at this point, to be able to classify Grievant's neglect of duty under the Department's Policy400's categorization of offenses. Grievant was charged with having violated “safety rules” but no safety rules were discussed or made a part of the record.

As noted, Policy 400 defines and lists examples for the three classes of offenses for which the Employer's employees may be disciplined. Class A offenses are defined as “the types of behavior least severe in nature but which require correction in the interest of maintaining a productive and

well-managed work force." Class B offenses are recognized as "acts and behavior which are more severe in nature and are such that a Third Class B offense should normally warrant removal." Class C offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant an extended suspension or removal. Also, under the list of examples of these various offenses is a "catch- all" which states "other actions of similar nature and gravity." Further, Policy 400 states that an employee who commits a third offense, under any of the classifications, may be dismissed. Therefore, it can be inferred that an employee of the Department may be dismissed for three offenses of any nature and severity, absent, mitigating circumstances.

Grievant contends that his actions, even if it were to be determined that he failed to adequately obtain medical attention for M, did not justify his termination. He also maintains that one of the offenses relied upon by Mr. Ielapi was not active at the time of his termination. Mr. Ielapi testified that even if the only charge established is that Grievant had not arranged forsufficient medical attention to be provided to M, his termination should still be upheld as it was the most serious error on his behalf.

Grievant's most recent discipline, a written reprimand dated November 17, 1995, can be categorized as a class A offense based upon nature of the act and the punishment imposed. His March 1994 suspension was classified as a B offense. There is no indication as to what the June 1992 offense was classified as although it was called misconduct and carried with it a hefty, thirty-day suspension. In order for it to be active, it would have to be classified as a class C offense as that offense remains in one's personnel file for four years. Class B offenses are active for three years while class A are active for two years. In any event, given the one charge proven here, Grievant's active disciplinary history now contains three offenses within a two year period. With the testimony of Mr. Ielapi, it is determined that Grievant's termination was justified both based upon the conduct itself and his prior disciplinary record as it relates to the Department's progressive disciplinary policy. Therefore, this grievance is hereby denied.

The following findings of fact are properly deduced from the evidentiary record in the case.

Findings of Fact

1. On November 30, 1995, at approximately 9:20 p.m., a resident at the Industrial Home for Youth, M, was assaulted by one or more residents while in the bathroom. Immediately thereafter,M got into a scuffle with one of the other residents (T) in that resident's room. M was restrained and

placed in his room.

2. At the time of the assault, Grievant and one other officer were present on the floor.

3. Grievant was not aware that M was in the bathroom with other residents or that the assault had occurred.

4. After the assault, Grievant was told by his fellow officer that M had been involved in a physical altercation, the one that occurred after the assault in the bathroom. Then, he and the other officer checked on M in his room. They discovered that his clothes were wet, that he had what appeared to be a bruise on his forehead and a small amount of dried blood under his nose.

5. Grievant did not thoroughly inspect M for injuries and took no further steps to have him checked.

6. Grievant suggested that the officer who had witnessed the altercation (the one in T's room) complete an incident report.

7. Grievant notified his shift supervisor that he was aware M had engaged in a fight with T.

8. Grievant related to Superintendent Ielapi on the phone that M had been in a fight with T.

9. Grievant has been the subject of disciplinary action three times within the last two years.

10. Grievant was negligent in the performance of his duties as a Correctional Officer by not thoroughly checking M for injuries and making sure that the appropriate medical treatment was provided within a reasonable time. The following conclusions are law are set forth to support the conclusion herein.

Conclusions of Law

1. The Employer has the burden of proving the charges supporting Grievant's dismissal by a preponderance of the evidence. W. Va. Code §29-6A-6. The Employer has met its burden of proof in this case.

2. Pursuant to the Department of Corrections's Policy 400, the Employer had just cause to terminate Grievant's employment.

Therefore, this grievance is hereby **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A- 7. 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.

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ALBERT C. DUNN, JR.

Administrative Law Judge

March 18, 1996

Footnote: 1

Grievant was working as a Correctional Officer at the time of his termination, although his actual classification had been changed to Correctional Counselor because he was in the process of being transferred from his current assignment.

Footnote: 2

No evidence was presented to explain the significance of this designation.

Footnote: 3

The initials of the youths housed at the Home will be used in this decision in place of their full names as their identity is not relevant for purposes of deciding the case.

Footnote: 4

It was indicated that this was common behavior for M.

Footnote: 5

There is information in the investigative report that does not support this conclusion, however, the correctness of this finding is not at issue herein.

Footnote: 6

The opinions, conclusions and recommendations concerning Officer Kilgore are not relevant to this discussion.

Footnote: 7

This report was not accepted as evidence, although it was offered, as no one connected with its preparation was called as a witness.

Footnote: 8

Grievant also spoke with Mr. Ielapi on the evening of November 30, 1995, when Mr. Ielapi called the floor. Grievant

testified that he told Mr. Ielapi of the incident which he believed had taken place and that he was told to apply ice to M's face if needed. This is supported by Mr. Ielapi's testimony. At timesduring the hearing, Grievant was asked if he had obtained ice for M's face and he indicated that he did not. His testimony was that he did not believe it to be necessary and, in any event, he could not have obtained ice because he could not leave the floor being that officer Grimm was already on another detail. This minor fact is of little relevance to the charges supporting Grievant's termination.

Footnote: 9

During Mr. Ielapi's testimony, it was hinted to that Grievant let the residents go to the bathroom together so that resident M could be assaulted, i.e., Grievant engaged in a conspiracy to have a resident assaulted. This inference or assumption is not supported by any evidence of record.

Footnote: 10

Grievant's point is also well-taken that Officer Kilgore should have known that this was inappropriate, without guidance from him.

Footnote: 11

Again, it is not clear from either the testimony of the Employer's witnesses or the language of the termination letter what conduct on behalf of Grievant has been associated which each class of offense charged. It does appear Grievant's alleged misconduct in allowing more than one resident out of his room to go to thebathroom was classified as both a class C and B offense. This would not be appropriate given that the offenses are based upon the severity of the misconduct; either Grievant's one specific act was severe or it was not. Generally, the labeling of one's misconduct is not as important as proving that the act itself occurred. However, in this case, as in other cases dealing with the Department's Policy 400, the labeling of the offense is of some importance as the Policy spells out recommended punishments and establishes the length of time that prior misconduct can be considered active.