TOMMY BURCHELL,

Grievant,

v. Docket No. 97-BOT-011

BOARD OF TRUSTEES/MARSHALL UNIVERSITY,

Respondent.

D E C I S I O N

On June 19, 1996, Grievant, Tommy Burchell, was "suspended without pay pending the resolution" of the charges of theft of Marshall University ("MU") property. On October 10, 1996, Grievant's employment was terminated "due to gross misconduct and the theft of university property." Although the charges are stated differently according to the two letters of notification sent to Grievant, they resulted from the same alleged incident of theft.

Procedurally, there is some confusion in this case. Grievant contacted the Human Resources Office, as directed by his suspension letter to appeal the suspension. On June 24, 1996, the same individual who recommended the suspension conducted the Level I hearing. Obviously, the appeal was denied pending further investigation into the theft charges. Grievant was directed tofile at Level II of the grievance procedure. It appears Grievant did not file at Level II over his suspension.

After Grievant's suspension was changed to a termination, he filed a grievance over his termination. It appears a Level I hearing was conducted on October 18, 1996, and the prior decision to terminate Grievant was upheld. A Level II hearing was mutually scheduled for Monday, November 18, 1996, and was unilaterally continued to November 25, 1996, on Friday, November 15, 1996, without Grievant's consent. Grievant protested this continuance. Thereafter, counsel for both parties discussed and agreed to waive Levels II and III and to proceed directly to Level IV. This grievance was then filed directly to Level IV, and the Undersigned Administrative Law Judge agreed to allow the parties to file directly at Level IV.

A Level IV hearing was held on April 16, 1997, after several continuances for good cause. This case became mature for decision on May 23, 1997, the deadline for the parties' proposed findings of fact and conclusions of law.

Grievant was employed by MU for approximately thirteen years. He began employment with Buildings and Grounds, and about one year later he changed positions and worked for Parking and Transportation. As a Parking Attendant II, Grievant issued parking tickets, collected money from parking meters, and maintained the parking lots. He utilized much of his own equipment to maintain these lots such as a blower, weed eater, shovels, pruner, and rakes. Grievant stores this equipment in one of MU's locked buildings with MU's permission. On June 6, 1996, Grievant testified on behalf of Mr. Larry Crowder at his Level III suspension hearing. Mr. Mike Meadows, Director of the Facilities Plant and Mr. Crowder's Supervisor, represented MU, presented MU's case, and cross-examined all the witnesses. Mr. Burchell's testimony was factually supportive of Mr. Crowder's grievance.

Mr. Meadows, the same individual who presented MU's case against Mr. Crowder, testified that Saturday, June 15, 1996, he came out of his office around 4:00 p.m., and from the MU running track, observed Grievant in a locked area where materials are stored. He watched Grievant place several pieces of aluminum bleacher material in the back of his truck, leave the storage area, and drive off. The distance Mr. Meadows was from the man he identified as Grievant varied during Mr. Meadows testimony, but it was from 30 to 40 feet. There is a chain link fence between the track and the storage area. Respondent submitted pictures of the area, and there are many objects in front of and right behind the fence which would obstruct a clear view into the storage area. Respondent's Exh. 5. Mr. Meadows also saw a black pickup truck, and Grievant drives a black truck. Mr. Meadows has known Grievant for six or seven years, and stated he "knew it was him."

Mr. Meadows did not speak or wave to Grievant, nor did he call MU's Department of Public Safety ("DPS") to report his observations. He waited until the following Monday morning, June 17, 1996, and asked Grievant's supervisor, Ms. Mary Wilson, if she knew of any reason for Grievant's actions. Ms. Wilson stated sheknew no reason why Grievant would be in an unauthorized area on a Saturday. Mr. Meadows then reported what he had seen to his supervisor, Dr. Gross. DPS was called in, and an investigation followed.

Mr. Thomas Johnson, Director of DPS, testified he was told of the theft at 9:00 a.m. on June 17, 1996, and was told to conduct an investigation, which he did. Later that day, DPS called Grievant to its office, read him his Miranda rights, which he waived, and interrogated him about his whereabouts on Saturday, June 15, 1996. According to the DPS report, Grievant initially denied being on campus, but later stated he had been at MU in the morning to drop off some trash in a dumpster near the Physical Plant Compound, and to pick up his equipment as he had a mowing job in Ohio that morning.

Grievant was not given a time frame for these questions, and had some difficulty reciting all of the activities he participated in that day. Grievant denied he was in the locked area and denied placing any of MU's materials in his truck. Mr. Johnson asked to see Grievant's keys, and Grievant had a key to enter the storage area. Several witnesses agree this lock has not been changed for at least eight years, and that Grievant had originally been given this key to use when he parked cars during basketball games.

Grievant was informed he was suspended until the investigation was completed, and Officer Jim Terry escorted Grievant to the building where he kept his equipment so he could pick it up. Officer Terry also followed Grievant home and asked if he couldsearch the area around his house. Grievant granted this request, and Officer Terry searched Grievant's garage and yard. No MU property was found. He did not search inside Grievant's home. There was no indication that Officer Terry asked to search Grievant's house, or that such request was refused. DPS also checked with the junk yards in the Huntington area and no such aluminum materials had been turned in.

Mr. Johnson went to the storage compound and found that the materials in question were haphazardly stored, and, as there was no inventory of these materials, there was no way to know what materials and how much of them had been taken. Witnesses also stated the aluminum material was the type of scrap that had been frequently sold at MU's "yard sales."

After DPS completed its investigation, on June 19, 1996, MU filed a criminal complaint against Grievant for petit larceny in Cabell County's Magistrate Court. The warrant for grievant's arrest stated Grievant stole $300.00 worth of "Aluminum Bleachers." Grievant was subsequently arrested.

During the investigation, Mr. Meadows informed Mr. Johnson he had also seen someone

on the track at the time Grievant was there. A DPS officer located this witness, Mr. Richard Giles, on June 18, 1996. Mr. Giles is a 68 year old, retired gentleman. He usually goes to the track twice a day to run and walk for three miles. He testified he went to the track twice on Saturday, June 15, 1996; at 8:00 a.m., and again at 3:30 p.m. He saw a "stockily built" man, about 5 feet 9 inches tall with a balding head loading what hethought was two or three pieces of aluminum siding material into the back of a black pickup truck. He was about 20 to 25 feet from this man, and they waved at each other. (See footnote 1)

As with Mr. Meadows' observations, his view was obstructed by the fence and the various pieces of equipment scattered around the track and the enclosure. He did not notice whether the man in question was missing any teeth. (See footnote 2) Mr. Giles was somewhat unclear about the date he was interviewed and about the dates of the Magistrate proceedings. (See footnote 3) Mr. Giles was never shown any type of photo lineup nor was he given as opportunity to observe and identify Grievant; but identified Grievant as the man he observed on June 15, 1996, at the criminal proceedings in Magistrate Court three and one half months later. Grievant stated he did not know Mr. Giles, and that he must be mistaken in his identification.

Grievant pleaded not guilty in Magistrate Court, and after the presentation of testimony, the case against Grievant was "dismissed with prejudice" on October 3, 1996. (See footnote 4) After these charges weredismissed in Magistrate Court, Mr. Johnson, on October 4, 1996, recommended to Mr. William Burdette, Acting Director of Human Resources, that Grievant be terminated for proven theft of MU's property, unauthorized occupation or use of University facilities (i.e., entering a secured area), and improper use of University issued equipment (i.e., utilizing a key to enter the secured area). Mr. Burdette agreed with Mr. Johnson's assessment, and on October 10, 1996, terminated Grievant's employment for theft and gross misconduct. This alleged "gross misconduct" was not specified. Grievant chose to testify at his grievance hearing, and gave up his right under W. Va. Code § 18-29-6 as it relates to self-incrimination. He stated he did not steal anything from the storage area, and was not in the storage area on the day in question. He indicated he was at the dumpster behind this area at about 11:00 a.m. on that morning, picked up his equipment on MU's campus, and went to Ohio to mow a yard. He returned from Ohio about 3:00 p.m. and returned his equipment to the

locked building where he stored it. He then went to "The House of Billiards" looking for a Mr. Roger Meehing, the owner of the yard he had mowed, so he could get paid. Mr. Meehing was not there so he stayed and waited for him and played some pool. He left after three or four hours.

Grievant submitted into evidence a sheet of paper he wrote on June 17, 1996, after he had been questioned by DPS. On this sheet,he identified several individuals he had talked to while he was at the pool hall. He did not call any of these individuals as witnesses. He denied he initially told DPS he was not on Campus.

Grievant stated he received the key to the storage area several years ago, to park cars during basketball games. He never returned the key because no one ever asked for its return.

Grievant also stated he had kept a couple pieces of the aluminum material in the back of his truck for several years to assist him in loading and unloading his equipment. He testified he obtained these pieces from a friend, who had bought the material at one of MU's yard sales several years ago. There was no testimony by Respondent's witnesses to contradict these statements.

Grievant indicated he had several "run ins" with Mr. Meadows, and Mr. Meadows "chewed him out" for issuing parking tickets to his daughter when she used a contractor's parking pass illegally. Mr. Meadows denied he had ever had any trouble or problems with Grievant and did not remember any of these incidents.

Grievant's unrebutted testimony was that many of the people who testified for Mr. Crowder at his suspension hearing have had "bad things" happen to them. He reported the two student helpers who testified at Mr. Crowder's grievance hearing were fired one month later and replaced with Manpower employees. He also stated that Ms. Arlene Ferguson, a twenty year employee, received an unrequested transfer shortly after this hearing. (See footnote 5) Grievant alsobelieves Mr. Meadows was angry with him for his testimony in the grievance.

Grievant also testified about the behavior of another MU employee, and the majority of this testimony was affirmed by other MU witnesses. Sometime in September, DPS received an anonymous phone call informing them that Mr. Mike Justice was stealing bleacher material from MU. DPS videotaped him the following work day and observed him placing bleacher material in the back of his black pickup truck. DPS followed Mr. Justice and requested the

police arrest him, after he had driven approximately five miles away from the MU campus. When pulled over, Mr. Justice explained he was taking the bleacher materials to the work site, but had decided to get gas first and then go by his house to drop off money to his wife before he returned to work. The criminal charges against Mr. Justice were dropped, and he received a ten day suspension. Mr. Justice drives a black pickup truck, is approximately the same height as Grievant, has a stocky build, does not have missing teeth, and is younger than Grievant. Witnesses indicated the two gentleman in question do not look alike, but it is clear they could look alike from a distance of twenty to twenty- five feet or from thirty or forty feet. Additionally, no witness was able to indicate the worth of the materials that were alleged to have been stolen. Although it is clear the bleacher material has some value, as these aluminum pieces were used to construct bleachers at the volleyball field, the worth of three or four pieces is unknown, as Respondent was unable to demonstrate its worth at the Level IV hearing. However, the value of the material does not have to be demonstrated, as MU's Classified Staff Handbook notes an employee can be suspended or discharged without warning for "[t]heft of or malicious damage to University property (equipment, tools, vehicles, machinery, supplies, etc.)." Resp. Exh. 7.

Arguments and Issues

Because this is a disciplinary grievance, the burden of proof is on Respondent to prove the stated charges against Grievant, by a preponderance of the evidence. W. Va. Code § 18-29-6. Grievant's dismissal letter charged him with theft of university property and "gross misconduct." This gross misconduct was not identified in the letter. Because nothing in the letter clarified this gross misconduct, Respondent cannot, at the Level IV hearing, identify additional specific charges against Grievant. Grievant denies any wrongdoing.

If it is found that Grievant committed the act of theft of MU bleacher material, another issue that would need exploration is, whether was the action of dismissal is appropriate given the evidence of record, the small value of the materials taken, the punishment placed on other employees, and Grievant's long, unblemished record of employment. See Blake v. Civil Serv. Comm'n, 172 W. Va. 711, 310 S.E.2d 472 (1983).

Discussion

"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. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. "If the evidence is evenly balanced between the parties, there can be no recovery" by the party bearing the burden of proof. Adkins v. Smith, 142 W. Va. 772 (1957).

For the most part, the witnesses in this proceeding did not appear to be anything other than "forthright in their testimony." Bd. of Educ. of the County of Mercer v. Wirt, 453 S.E.2d 402, 412 (W. Va. 1994). There is no doubt that Mr. Meadows and Mr. Giles saw someone in the storage area placing pieces of aluminum in the back of a black pickup truck on June 15, 1996. The fact that must be proved, by a preponderance of the evidence, is whether that person was Grievant. As with many such cases, Respondent's case is dependent upon eyewitness testimony. Justice Brennan stated in United States v. Wade, 388 U.S. 218 (1967):

> A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. A commentator has observed that "[t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor - perhaps it is responsible for more such errors than all other factors combined." Wall, Eye-Witness Identification in Criminal Cases 26 [1965]. Suggestion can be created intentionally or unintentionally in many subtle ways. And the dangers for the subject are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest.

Justice Brennan also noted "the vagaries of eyewitness identification are well-known", it is important to reduce the "dangers inherent in eyewitness identification", and to decrease the suggestiveness surrounding these identifications. He explained eyewitness testimony is "peculiarly riddled with innumerable dangers and factors which might seriously, even crucially, derogate from a fair trial." Id.

The dangers of inaccurate identification and suggestibility are particularly evident when

the witness first sees the accused in the court room situation, as it is already clear who the prosecution thinks committed the crime. Uviller, "The Role of the Defense Lawyer at a Lineup in Light of the Wade, Gilbert, Stovall Decisions", 4 Crim.L.Bull., 273, 281-84 (1968). See Moore v. Illinois, 434 U.S. 220 (1977); Kirby v. Illinois, 406 U.S. 682 (1972)(suggestive lineups conducive to irreparable mistakesviolates due process). Additionally, it has been noted that delay in identification of a suspect diminishes the reliability of the identification. Russell v. United States, 408 F.2d 1280 (D.C. Cir. 1969).

The eyewitness testimony at the Level IV hearing must be examined with the above statements in mind. Mr. Giles did not know nor had he ever met Grievant. He saw someone from twenty to twenty-five feet through a chain link fence and was able to describe a man who fit Grievant's general description. This description would also fit hundreds of men in West Virginia, i.e. 5 feet 9 inches; stocky build; driving a black pickup truck. It also fits the description of Mr. Justice.

Unfortunately, the next time Mr. Giles saw Grievant was at Magistrate Court for the criminal proceedings. No type of pre- trial identification was performed, thus Mr. Giles, an elderly individual, "saw" someone once for a few seconds as he rounded the track during his afternoon exercise. On October 3, 1996, three and one half months later, Mr. Giles identified Grievant as the man he had seen in the storage enclosure as grievant sat as the accused in a criminal court. These factors are so suggestive as to taint Mr. Giles' eyewitness identification. It is more likely than not, that any individual meeting the basic description would have been identified by Mr. Giles as the man in the storage area.

Additionally, there are some basic problems with Mr. Meadows' identification of Grievant. Although Mr. Meadows knows Grievant, he viewed the individual in the enclosure from thirty to forty feetaway through a chain link fence with his view obstructed by a variety of objects of varying sizes. Mr. Meadows did not explain why he did not move closer to the area to obtain a better view, nor why he did not speak to Grievant and ask him what he was doing. Mr. Meadows as Director of the Physical Plant had every right to question Grievant about his being in an unauthorized area on a Saturday afternoon. Further, Mr. Meadows did not call campus security to follow Grievant so he could be caught "red-handed" with the proof of his theft.

Mr. Meadows' credibility was also called into question with his past confrontations with Grievant over the parking issue, which he does not remember, but the Undersigned finds occurred. Grievant's testimony on this issue was credible, and Mr. Meadows agreed he allowed his daughter to use the contractor's parking pass. Another problem with Mr. Meadows' testimony is the timing of his observations. These observations occurred only nine days after Grievant's testimony in Mr. Crowder's suspension grievance. Grievant has alleged the affirmative defense of reprisal and states Mr. Meadows' testimony is reprisal for this favorable testimony and for ticketing his daughter.

Reprisal is defined in W. Va. Code § 18-29-2(o) as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;

2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989) and Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Gruen v. Bd. of Directors/Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997). If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering

legitimate, nonretaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

Grievant has established a prima facie case of reprisal. He participated in a grievance hearing and testified for the grievant. He was subsequently accused of theft by the individual who presented the case against Mr. Crowder, nine days after the grievance hearing. Although Respondent did not speak directly to the reprisal issue raised by Grievant, it is assumed its responsewould be that reprisal played no role in any of its actions. Grievant stole material; therefore he was fired. The Undersigned is faced with deciding if Mr. Meadows intentionally misidentified Grievant to retaliate against Grievant for his prior testimony and ticketing his daughter, or if these recent events colored his view of the man he saw in the parking lot. As previously stated, the Undersigned believes Mr. Meadows saw a man in the storage enclosure. That he can be positive that the man was Grievant is the real issue.

Given that Mr. Meadows was far away from the man, his view was obstructed by the fence and various objects, he took no action to confirm his belief the man was Grievant by either calling out his name or walking closer, he knew of no reason why Grievant would be in a locked enclosure where he should not be on a non-work day, and he probably would have liked the man he saw to be Grievant; all these factors call into question Mr. Meadows' eyewitness testimony. Additionally, Grievant has a similar build to Mr. Justice and drives a black pickup truck. Accordingly, the Undersigned finds Mr. Meadows' eyewitness identification to be questionable.

The record presents other evidentiary issues that must be considered. First, it is an administrative law judge's responsibility to assess the credibility of the witnesses before her. Some factors to be considered 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. Harold J. Asher and 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.

Grievant presented with an appropriate demeanor. He answered questions forthrightly. Respondent did not present any evidence or incidences to demonstrate that Grievant was dishonest, and it is noted that Grievant was placed in a position of some trust, as he routinely emptied parking meters for MU, and thus dealt with sums of money without incident. Grievant's story was plausible, and he not only waived his rights to remain silent, but allowed Officer Terry to search his house and garage.

Of course, as with all individuals accused of wrongdoing, Grievant has a biased interest in the outcome of these proceedings and could have a motive to present false testimony. Further, according to the DPS report, Grievant gave some inconsistent statements after he waived his Miranda rights and agreed to be questioned. The DPS reports Grievant originally denied he was on Campus, and then later, during that same questioning, said he was. When all is said and done, the Undersigned finds Grievant's testimony to be generally credible.

Another problem with MU's case is that Grievant agreed to a search of his home, and this search revealed nothing. This searchtook place right after Grievant was informed he was suspended for theft, and Officer Terry followed Grievant home. Thus, Grievant had no time to conceal any materials he had allegedly stolen.

The other, and of course interesting problem, is the information about Mr. Justice. DPS received a call that he was stealing bleacher material from the storage area and subsequently DPS videotaped him taking bleacher material from the locked storage area. Mr. Justice's story, as told to the undersigned by several witnesses, is not plausible. This story was not rebutted or retold in another way. While some witnesses indicated Grievant and Mr. Justice do not look alike, it is entirely plausible that two men, who are the same height and have the same basic build, and who drive black pickup trucks could be mistaken for each other by a man forty feet away, or by a man who first saw the individual once for less than a minute while running, and, supposedly, the second time at the criminal trial, sitting as the accused. Accordingly, the Undersigned finds it is entirely possible that Grievant could have been misidentified.

The one other question that is raised by this whole proceeding is why MU would terminate a long-term employee with a good record of service for the alleged theft of basically worthless material. It is understood that MU truly believed Grievant took the materials even after the

criminal charges were dismissed with prejudice. But here was an employee with a good record, many years of service, who even brought his own tools to work so he could do a better job. After a review of the complete record, the Undersigned makes the following Findings of Fact and Conclusions of Law to supplement the above-discussion.

Findings of Fact

1. Grievant was employed by MU for approximately thirteen years. He began employment with Buildings and Grounds, and approximately one year later he changed positions and worked for Parking and Transportation. As a Parking Attendant II, Grievant issued parking tickets, collected money from parking meters, and maintained the parking lots. He utilized much of his own equipment to maintain these lots such as a blower, weed eater, shovels, pruner, and rakes. Grievant stored this equipment in one of MU's locked buildings with MU's permission.

2. On June 6, 1996, Grievant testified on behalf of Mr. Larry Crowder at his Level II suspension hearing. Mr. Mike Meadows, Director of the Facilities Plant and Mr. Crowder's Supervisor, represented MU, presented MU's case, and cross-examined all the witnesses. Mr. Burchell's testimony was factually supportive of Mr. Crowder's grievance.

3. At least three people, other than Grievant, who testified at Mr. Crowder's suspension hearing, have had negative changes in their employment.

4. Prior to the June 15, 1996 incident, Mr. Meadows had indicated to Grievant his displeasure about Grievant ticketing his daughter for illegally using a special parking pass.

5. On Saturday, June 15, 1996, Mr. Meadows came out of his office around 4:00 p.m., and from the area of the MU running track observed someone in a locked area where materials are stored. From a distance of about forty feet, he watched the individual, whom he believed to be Grievant, place several pieces of aluminum bleacher material in the back of his truck and then drive away. Mr. Meadows did not report the incident until Monday, June 17, 1996.

6. On that same day, Mr. Richard Giles, a sixty-eight year old, retired ROTC instructor, also saw a man in the storage enclosure, sometime after 3:30 p.m., placing aluminum pieces in the back of a black pickup truck. The men waved to each other.

7. Mr. Giles later identified Grievant as the man in the enclosure. This identification took place three and one half months later, when Grievant sat as the accused in Magistrate Court.

8. At the time of the June 15, 1996 incident, Grievant had a key to the storage area that he had been given several years before to use while he parked cars during basketball games. He kept this key because no one had ever asked for it back. (See footnote 6)

9. DPS investigated the theft, and then filed charges against Grievant in Magistrate Court alleging he had stolen $300.00 worth of bleachers, when in reality the material had been aluminum bleacher scraps, the value of the material was unknown as no onecould assess how much material had been taken, and no one knew the monetary value of the pieces of material.

10. Grievant's garage and the area surrounding his house were searched on the morning of June 17, 1996, and no property belonging to MU was found.

11. Grievant was suspended from employment pending the resolution of the charges against him.

12. Magistrate Court dismissed the charges against Grievant with prejudice.

13. Shortly thereafter Grievant was dismissed from employment for theft and gross misconduct. The nature of this gross misconduct was not specified.

14. Sometime in September 1996, DPS received an anonymous tip stating an MU employee, Mr. Mike Justice was stealing this same bleacher material. He was videotaped taking the material and was stopped driving away from the Campus with this material in his black pickup truck. MU filed criminal charges against Mr. Justice, but these were dropped after he told a rather implausible story about his actions. He received a ten day suspension.

Conclusions of Law

1. In a disciplinary grievance, the burden of proof is on Respondent to prove the stated charges against Grievant, by a preponderance of the evidence. W. Va. Code § 18-29-6.

2. "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 thefact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not

necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying [; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064.

3. "If the evidence is evenly balanced between the parties, there can be no recovery" by the party bearing the burden of proof. Adkins v. Smith, 142 W. Va. 772 (1957).

4. "[T]he vagaries of eyewitness identification are well- known", and it is important to reduce the "dangers inherent in eyewitness identification", and to decrease the suggestiveness surrounding identifications, especially since eyewitness testimony is "peculiarly riddled with innumerable dangers and factors which might seriously, even crucially, derogate from a fair trial." United States v. Wade, 388 U.S. 218 (1967).

5. The dangers of inaccurate identification and suggestibility are particularly evident when the witness first sees the accused in the court room situation, as it is already clear who the prosection thinks committed the crime. Uviller, "The Role of the Defense Lawyer at a Lineup in Light of the Wade, Gilbert, Stovall Decisions", 4 Crim.L.Bull., 273, 281-84 (1968). See Moore v. Illinois, 434 U.S. 220 (1977); Kirby v. Illinois, 406 U.S. 682(1972)(suggestive lineups conducive to irreparable mistakes violates due process).

6. Delay in identification of a suspect diminishes the reliability of the identification. Russell v. United States, 408 F.2d 1280 (D.C. Cir. 1969).

7. The manner in which Mr. Giles identified Grievant as the man he saw in the storage enclosure: given the length and manner of his observations, the delay between the incident and the proceedings in Magistrate Court, and the setting in which Grievant was identified, the Magistrate Court, was so suggestive as to make the testimony practically worthless in proving Grievant committed the wrongdoing of which he is accused.

8. Reprisal is defined in W. Va. Code § 18-29-2(o) as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it."

9. To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;

2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

4) that there was a casual connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

See Webb v. Mason County Bd. of Educ., Docket no. 89-26-56 (Sept. 29, 1989) and Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Gruen v. Bd. of Directors/Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997). If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for the adverse action. If the respondent rebut the claim if reprisal, the employee may then establish by a preponderance if the evidence that the offered reasons are merely pretextual. Webb, supra.

10. Grievant established a prima facie case of reprisal.

11. Some factors to be considered in assessing a witness's credibility are the witness's: 1) demeanor; 2) opportunity or capacity to perceive an communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Harold J. Asher and 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 no existence of any fact testified to by the witness; and 4) the plausibility of the witness's information. Id. 12. After a review of the above-identified factors the Undersigned finds the testimony of Grievant to be generally credible.

13. Given that Grievant established a prima facie case of reprisal, and in reviewing the factors to be assessed when determining credibility, the Undersigned Administrative Law

Judge finds Mr. Meadows' identification of Grievant as the man in the storage area is questionable.

14. Respondent failed to prove by a preponderance of the evidence that Grievant was more likely than not the individual who removed aluminum bleacher scraps from the locked storage.

Accordingly. this grievance is GRANTED. Respondent is ORDERED reinstate Grievant immediately, with back pay plus interest from June 6, 1996, and any other benefits to which he would have been entitled if he had been employed, to his former position at the Parking and Transportation Division, and is to remove all material pertaining to his suspension and dismissal from his personnel file.

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.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: August 29, 1997

Footnote: 1

The DPS report, in its accusation against Grievant, stated Grievant acted with stealth within the enclosure as he knew he was committing a criminal act.

Footnote: 2

At the Level IV hearing, Grievant's counsel pointed out that his client had very few front teeth. Respondent did not present any evidence on whether Grievant has a partial plate that he routinely wears.

Footnote: 3

The Magistrate proceeding was continued several times.

Footnote: 4

The parties attempted to present evidence as to why the case was dismissed. Respondent indicated that the county prosecutor had failed to prove a key element of the case; the value of the materials that Grievant had stolen. Grievant's counsel indicated that testimony had been taken and the "court should speak through its orders." Without a transcript of these proceedings theUndersigned is reluctant to draw any conclusions from the Magistrate's decision other than what she ruled; "DISMISSED W/PREJUDICE."

Footnote: 5

It should be noted that on July 1, 1996, the Level II Grievance Evaluator found MU had not met its burden of proof for the disciplinary charges against Mr. Crowder, and he recommendedthe grievance be granted. Dr. J. Wade Gilley adopted this recommendation, reversed the suspension, but refused to expunge the suspension materials from Mr. Crowder's file. In a Level IV Decision, these materials were ordered removed from Mr. Crowder's personnel file. Crowder v. Bd. of Trustees/Marshall Univ., Docket No. 96-BOT-320 (Mar. 31, 1997).

Footnote: 6

The locked storage area where the aluminum material was stored was in a different location from where Grievant stored the equipment he used to clean the parking lots. The aluminum storage area is open, but surrounded by a fence. The storage area where Grievant stored his equipment, apparently, was a building.