MARK WELLS,

Grievant,

v. Docket No. 99-DOH-245

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Mark Wells, filed this grievance against his employer, the Division of Highways ("DOH"), directly to Level IV on June 14, 1999, alleging in his lengthy Statement of Grievance that his thirty day suspension for violation of the Drug-Free Workplace Policy was "unwarranted" as the events discussed in his suspension letter happened on his own time. He requests as relief that "the suspension be recinded (sic) because it is unwarranted because of lack of severeity (sic) of the offense, pay reinstated and removal of sespension (sic) from record."

As this was a disciplinary grievance, it was expedited to Level IV. After several continuances by agreement of the parties, a Level IV hearing was held on October 4, 1999. This case became mature for decision on October 19, 1999, after receipt of Grievant's proposed findings of fact and conclusions of law. **(See footnote 1)**

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed as a Transportation Technician by DOH for seven years.

2. Grievant's position necessitates a lot of travel, and he and his partner, Kevin Sullivan, are usually on the road four days a week. They stay in a variety of motels along their required route. Their duties consist of mapping the roadways of a section of the state and reporting conditions, changes, and developments. Grievant and Mr. Sullivan used to share the daily

driving duties.

3. Grievant's drivers' license was revoked on December 18, 1997, because of a May 24, 1997 DUI. When Grievant lost his driver's license, he told Mr. Sullivan he was unable to drive because of eye problems. After that time Mr. Sullivan did the daily driving. (Grievant's testimony.)

4. In earlier years, Grievant and Mr. Sullivan would use the state car for evening entertainment such as visiting friends, going to ball games, and checking out dog breeders. Later, after several discussions with their supervisor, Mr. Robert Anthony, about driving the state car after hours only "as required", Mr. Sullivan became reluctant to use the state car in the evening for anything but going out to eat.

5. Grievant is a restless person by nature, and found Mr. Sullivan's reluctance to go out in the evenings very confining. 6. During the time Grievant did not have a driver's license, he went out by himself in the evenings (driving the car) approximately three to four times a month. (See footnote 2) **(Mr. Sullivan's testimony.)**

7. During the week of April 19, 1999, Grievant and Mr. Sullivan, were mapping roads in and around Seneca Rocks. They were to remain in this area Monday though Thursday.

8. On Monday, Grievant and Mr. Sullivan went to the grocery store to buy provisions for the week. Grievant bought a twelve pack of beer and took it to his room. He drank most of the beer that night. (Grievant's testimony.)

9. On Wednesday night, April 21, 1999, Grievant came to Mr. Sullivan's room to get the state car keys. After he drank three beers, he drove the state car to Elkins and went to a bar and later a bar/pool hall. Grievant took two beers with him in a sack in case he went to a friend's house. He did not drink this beer. (Grievant's testimony.)

10. Grievant left the bar/pool hall about 1:20 a.m. on April 22, 1999. Grievant had been told a police officer was outside, and when Grievant saw this officer, Elmer Canfield, he went up to him and engaged him in conversation. (See footnote 3) **(Grievant's testimony.)**

11. Officer Canfield first saw Grievant when he was walking down the middle of the road talking to himself. During the conversation with Grievant, Officer Canfield noted Grievant slurred his words, had the odor of alcohol on his breath, had difficulty maintaining his balance, and had red eyes. Officer Canfield assessed Grievant was intoxicated.

12. Officer Canfield arrested Grievant for public intoxication. When Grievant tried to walk away from him and did not return after being asked twice to do so, Officer Canfield added the charge of obstructing an officer. (Grievant's and Officer Canfield 's testimony.)

13. Officer Canfield has worked many years in law enforcement and had been trained both in the army and at the State Police Academy to assess whether people were intoxicated.

14. At the time he was arrested, at 1:30 in the morning, Grievant had not decided how he would get back to the motel. He had thought about going to his friend's house, but had not called him to see if this would be all right.

15. Officer Canfield found car keys in Grievant's possession, but Grievant did not discuss the car. Later, Officer Canfield found a state car parked close to the bar/pool hall. Inside the car he saw a gas ticket with Grievant's name on it He tried Grievant's keys, and they opened the door. He found two unopened beer cans in the vehicle. Later, someone at the police station notified DOH's district office about the car.

16. Grievant was not given a breathalyzer test, and he was unable to make a phone call until later that morning.

17. Grievant pled no contest to the charges of public intoxication and obstructing a police officer and paid a $150.00 fine.

18. Mr. Sullivan was informed by his supervisor of the situation, and he checked Grievant and himself out of the motel and picked Grievant up at the jail. 19. The incident was investigated by Howard Mullins, Special Assistant to the Commissioner's office. He talked to Grievant on April 30, 1999, about the incident and asked Grievant that if he were to summarize the situation would it be correct to say that:

> **[H]e had been driving a state vehicle on a suspended license and had had a few beers in his motel room before driving to a bar with two more beers in his state vehicle.**

Grievant agreed. Later, Mr. Mullins wrote this statement in his report, and Grievant signed this statement on May 3, 1999. (See footnote 4)

20. Grievant met with Mr. Norman Roush, the Deputy Commissioner and Acting Director of the Planning Division, on May 17, 1999. Grievant was presented with Form RL- 544 which informed him that a thirty day suspension was the planned disciplinary action. Grievant was

allowed at that time to respond orally to the recommendation, and then signed the form indicating receipt.

21. After Grievant had signed the form, Grievant and Mr. Roush discovered they had not filled in a section of form RL 546, Summary of Employee's Remarks. Mr. Roush wrote in this section while he said out loud what he was writing. This section reads, "Mark indicated he felt that this suspension or some action would be taken." Grievant did not do anything to indicate to Mr. Roush that he disagreed with this statement, he merely shrugged his shoulders. **(See footnote 5)** **22. Grievant's suspension letter is dated June 1, 1999. Grievant was unclear when he received this letter, but is certain he did not have eight days notice before the suspension began, because he was on the road and did not return to his house until Thursday evening, June 3, 1999.**

23. Grievant's suspension letter indicated the charges against Grievant were serious and warranted dismissal; however, he was given the lesser penalty of a 30 day suspension in case he had "a substance abuse problem that can be remedied through treatment." Resp. Ex. No. 3, Grievant's Suspension letter.

24. In June 1998, Grievant's name came up during a routine check as not having a driver's license. His supervisor, Mr. Anthony, was directed to check this out and verify Grievant's status. On July 1, 1998, Grievant and his supervisor discussed the situation. Grievant gave Mr. Anthony a handwritten note which stated he had informed Mr. Anthony that his license had been "temporarilly (sic) suspended over missing a hearing for a trafic (sic) violation" but this violation had been subsequently dismissed altogether. Grievant also added a sentence stating, "I now have my driver's license." **(See footnote 6)**

25. Grievant believed at the time that he had a valid driver's license because the court charges had been dropped. He later checked with DMV, and found out his beliefwas incorrect, and he did not have a valid driver's license. Grievant never returned to Mr. Anthony to correct this error.

26. Grievant received a written reprimand on October 28, 1996, for misuse of his travel card. Grievant had made "excessive charges" on this card while on sick leave. Resp. Ex. 13.

Issues and Arguments

At hearing and in his post hearing submissions, Grievant made numerous arguments. He averred he did not receive the eight days notice required by West Virginia Division of Personnel ("DOP") Administrative Rule 12.3 prior to his suspension. Grievant noted he was out of town working, therefore he could not have received this notice in a timely manner. Grievant also argued Respondent did not prove the charges. Although some what unclear, Grievant also maintained DOH's policy of not allowing employees to use the state vehicle for off-hours activities was very difficult for him, because he is a restless person. He stated that since his partner would not drive the state vehicle after work except for food, he was in essence forced to drive the car without a license to go out. He also asked that the policy governing the use of a state vehicle be clarified. Grievant further argued the penalty was excessive.

Respondent argued it met its burden of proof and proved the charges by a preponderance of the evidence. Respondent also noted that the facts of this case would have been sufficient to discharge Grievant, but it gave him a suspension instead so hecould use this opportunity to seek help either from the Employee Assistance Program or a counselor of his choice. **(See footnote 7)**

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. 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 and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

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 Sections 12.2 and .3, Administrative Rules, W. Va. Div. of Personnel (June 1, 1998). Although this is not a dismissal grievance, it is a lengthy suspension, and the type of misconduct will be examined to assess whether it was substantial. The West Virginia Supreme Court of Appeals has also stated that "the work record of a long-term civil service employee is afactor 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). This grievance requires a determination of whether Respondent has proven facts upon which the suspension was based.

The issues raised by Grievant will be discussed separately.

A. Notice

The first issue to address is Grievant's complaint that he did not receive proper notice of the suspension. Grievant alleged he did not receive the required eight days notice prior to his suspension. The West Virginia Division of Personnel Administrative Rule 12.3 speaks to suspensions and states:

> **Suspension - Eight (8) calendar days after oral notice confirmed in writing or by written notice, the appointing authority may suspend any employee without pay for cause or to conduct an investigation regarding an employee's conduct which has a rational nexus to the employee's performance of his or her job. The suspension shall be for a specific period of time, except where an employee is the subject of an indictment or other criminal proceeding. The appointing authority shall allow the employee being suspended a reasonable time to reply in writing, or upon request to appear personally and reply to the appointing authority or his or her designee. The eight (8) calendar day notice is not required for employees in certain cases when the public interests are best served by withholding the notice. The appointing authority shall file the statement of reasons for the suspension and the reply, if any, with the Director of Personnel.**

Grievant was notified orally and in writing on May 17, 1999, by Mr. Roush, that a thirty day suspension was being recommended. Grievant was also given an opportunity to speak to Mr. Roush on that day before a final decision was imposed. The suspension letter was subsequently mailed on June 1, 1999, a Tuesday, with the suspension to begin on June 9, 1999. Grievant did not remember when he received this letter, but was certain he did not receive eight days notice. Grievant's argument is without merit. The actions taken by

Respondent meet the conditions of the Division of Personnel's Regulation 12.3 that requires an eight calendar day notice. See Buskirk, supra; Clark v. W. Va. Bd. of Regents, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981). Grievant was informed on May 17, 1999, of the 30 day suspension, and he was also given a chance to respond at that time and discuss the action with Mr. Roush. Grievant indicated he thought he would receive some discipline for his actions. The suspension letter was not sent until June 1, 1999, again giving Grievant time to file a written response. The letter gave Grievant nine days, from the date of the letter, before the suspension began. There was also no indication Grievant spoke to, or attempted to speak to, Assistant Commissioner Thomas Badgett prior to his suspension, as was his right pursuant to the suspension letter. The Notice given to Grievant is sufficient.

B. Merits of the case

The stated reasons for Grievant's suspension were four-fold: 1) violation of the Drug Free Workplace Policy; 2) driving a state vehicle without a driver's license; 3) unauthorized use of a state vehicle; and 4) operation of a state vehicle while under the influence of alcohol.

Respondent has proven these charges. Indeed, Grievant's testimony supported many of the facts giving rise to the disciplinary action. He testified he did not have a driver's license, and he drove the state car to Elkins. He testified he had consumed threebeers before he drove this car, and he had placed two beers in the car with him. Although he believed the three beers he drank before he drove the vehicle was insufficient to impair his driving ability and should not have counted as driving under the influence, this belief is incorrect.

The Drug Free Workplace Policy states a workplace is "where work is performed in connection with the employee's State employment." This Policy confirms that state automobiles are considered as a part of the "workplace", and "the presence of . . . alcohol in the body system . . . [is] prohibited in the Workplace." Resp. Ex. No. 4, Drug Free Workplace Policy. "Employees who are in violation of the provisions of the Drug Free Workplace Policy shall be subject to disciplinary action up to and including termination." Id. Additionally, this Policy specifies that a finding of guilt includes a plea of no contest. Thus, the Drug Free Workplace Policy has a zero tolerance for the consumption of alcohol, and any amount in the body system in the workplace is a violation, and thus, can be seen as driving under the influence. R H S v. Regional Educ. Serv. Agency, Docket No. 96- RESA-348 (Mar. 31, 1997);

Felix v. Dep't of Public Safety, Docket No. 94-DPS-143 (Feb. 15, 1995).

Grievant admits he had three beers before he drove the state vehicle. This act is a violation of the Drug Free Workplace Policy, and constitutes operation of a state vehicle while under the influence of alcohol. See Smith v. W. Va. Dep't of Health and Human Resources, Docket No. 98-HHR-512 (June 1, 1999); Edens v. Dep't of Highways, Docket No. 98-DOH-224 (Feb. 26, 1999); Perdue v. W. Va. Dep't of Health and Human Resources, Docket No. 93-HHR-050 (Feb. 4, 1994). Grievant also admits he drove thestate car without a driver's license, thus there is no need to discuss further whether this charge was proven. The final charge, unauthorized use of a state vehicle, is also proven through Grievant's own statements. He drove the automobile without a driver's license, and this constitutes unauthorized use.

Respondent has met its burden of proof and demonstrated Grievant engaged in the acts with which he was charged in the dismissal letter. Employers have the right to expect employees to follow the law, rules, and regulations of the agency for which they work. See Hatfield v. Dep't of Corrections, Docket 98-CORR-020 (Apr. 30, 1998); Scarberry v. Bureau of Employment Programs, Docket No. 94-BEP-625 (Jan. 31, 1995); Smith v. Dep't of Corrections, Docket No. 93-CORR-538 (May 17, 1994). Employers also have the right to expect their employees to obey the laws of the state of West Virginia that govern their behavior, especially as it impinges on their employment. See generally Morrison v. Dep't of Labor, Docket No. 99-LABOR-146 (Aug. 31, 1999).

C. Interpretation of DOH's Assignment and Use of Transportation Vehicles Policy **The policy in question states that "[a]ny employee engaged in official reimbursable travel away from the home station may park a state vehicle at the hotel/motel and may use the vehicle as required." Grievant seeks to have the undersigned Administrative Law Judge interpret this Policy, and argues this section of the Policy should allow employees to use the vehicle for entertainment purposes after work hours. The undersigned Administrative Law Judge declines to interpret this Policy, as it is clear this Policy cannot cover, by any stretch of the imagination, Grievant's behavior. "As required" does notinclude a state employee, without a driver's license, drinking and then driving a state vehicle to a bar. Grievant has violated this Policy.**

D. Severity of the Punishment

Additionally, Grievant argued the penalty was excessive. The undersigned Administrative Law Judge may mitigate the discipline if the imposed penalty is clearly excessive or clearly disproportionate to the offense. In assessing whether this discipline was excessive or disproportionate the undersigned Administrative Law Judge must look at the totality of the circumstances. Some factors to be considered in the mitigating analysis include the employee's past disciplinary record, the clarity of notice to the employee of the rule violated, whether the employee was warned about the conduct, and other mitigating circumstances. See Stewart v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 91-ABCC-137 (Sept. 19, 1991). As previously stated in Buskirk, supra, "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." See Blake, supra; Serrino, supra. However it must be noted that considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation. Overby v. W. Va. Dep't of Health and Human Resources, Docket No. 96-HHR-183 (Oct. 3, 1996).

Respondent has demonstrated that it had "good cause" to suspend Grievant. His behavior constituted "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than . . . trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, Oakes, supra;Guine, supra; See also Section 12.3, Administrative Rules, W. Va. Div. of Personnel (June 1, 1998).

As noted in the suspension letter Grievant could have been dismissed for the proven misconduct, but he was given the lesser penalty of a 30 day suspension in case he had "a substance abuse problem that can be remedied through treatment." Obviously the employer mitigated Grievant's discipline even before he received it. The discipline imposed here was not clearly excessive, and further mitigation is not warranted. See e.g. Hammer v. Div. of Corrections, Docket No. 94-CORR-1084 (June 11, 1997).

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 and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

2. Respondent has met its burden of proof by a preponderance of the evidence and demonstrated that Grievant: 1) violated the Drug Free Workplace Policy; 2) drove a state vehicle without a driver's license; 3) engaged in unauthorized use of a state vehicle; and 4) operated a state vehicle while under the influence of alcohol. 3. The term, "as required", utilized in DOH's Assignment and Use of Transportation Vehicles Policy does not include the behaviors of Grievant described above in Conclusion of Law Number 2.

4. The notice Grievant received of his suspension was adequate, and met the requirements of the West Virginia Division of Personnel Administrative Rule 12.3.

5. Mitigation of punishment imposed by an employer should be granted only where there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects of rehabilitation. See Overby v. W. Va. Dep't of Health and Human Resources, Docket No. 96-HHR-183 (Oct. 3, 1996).

6. No mitigation is appropriate in this situation.

Accordingly, this grievance is DENIED.

Any party, or the West Virginia Division of Personnel, may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: November 24, 1999

Footnote: 1

Grievant was represented by Marilyn Kendall of the West Virginia State Employees Union, and DOH was represented by Attorney Krista Duncan. Ms. Duncan elected not to submit proposed Findings of Fact and Conclusions of Law, and instead stood on the record made at hearing.

Footnote: 2

Grievant testified he did not think he had ever driven the car except for the incident at issue, and believed Mr. Sullivan answered that question "a little too fast."

Footnote: 3

Grievant stated he did not believe he was impaired.

Footnote: 4

At the Level IV hearing, Grievant said he told Mr. Mullins this statement was not correct, but after Mr. Mullins told Grievant nothing was going to come of this investigation, Grievant signed the document. Mr. Mullins testified that when Grievant asked him what would happen next, he informed Grievant he did not know as that was not his decision.

Footnote: 5

At the Level IV hearing Grievant indicated that this statement was incorrect, and he disagreed with it. He stated he did not say anything at the time because Mr. Mullinshad told him nothing was going to happen to him.

Footnote: 6

During a portion of his testimony, Grievant stated Mr. Anthony knew he did not have a license and understood why he had stopped driving, and Mr. Sullivan was doing all the driving. Later, Grievant confirmed he had told Mr. Anthony he had a valid driver's license, and showed him a current driver's license. It was unclear how or why Grievant had a driver's license, but it was clear it was revoked at the time he showed this driver's license to Mr. Anthony.

Footnote: 7

Grievant did not seek help through the Employee Assistance Program.