KAREN MORRISON,

Grievant,

v. **Docket No. 99-LABOR-146**

WEST VIRGINIA DIVISION OF LABOR,

Respondent.

D E C I S I O N

Grievant, Karen Morrison, employed by the West Virginia Division of Labor ("DOL") appealed this grievance to Level IV on May 10, 1999. She grieves her three day suspension from work, received for renewing a contractor's license that had lapsed for more than two years. Grievant maintains she has been discriminated against, progressive discipline has not been followed, and her due process rights were violated. The requested relief is removal of the suspension letter from her personnel file and compensation for lost wages.

This disciplinary action was appealed to Level II, (See footnote 1) and a decision upholding the disciplinary action taken by Grievant's immediate supervisor, Robert Goff, was rendered by Robert F. Miller, Deputy Commissioner, on February 16, 1999. A Level III hearing was held by Robert Miller, General Counsel for DOL, acting as designee for the Labor Commissioner on March 3, 1999. (See footnote 2) A Level III decision denying the grievance was rendered on April 21, 1999. Grievant appealed to Level IV, arguing Respondent had defaulted on the grievance at Level II. After a hearing, a Level IV Order Denying Default was entered on June 18, 1999. On July 6, 1999, the parties informed the undersigned Administrative Law Judge they did not want a Level IV hearing on the merits of the case, wished to submit the case on the record below, and wished to rely on the proposed Findingsof Fact and Conclusions of Law submitted at that level. Thus, this grievance became mature for decision on that date. (See footnote 3)

Issues and Arguments

Grievant makes three arguments. First, Grievant maintains her due process rights were violated by the failure of Respondent to provide her with an opportunity to be heard and notice and

explanation of the charges against her. Second, Grievant alleges progressive discipline has not been followed, and the punishment she received for this minor offense is too severe. Third, Grievant argues she is being treated in a discriminatory manner as DOL has not disciplined other similarly situated employees in the same way.

Respondent argues the disciplinary action was precipitated by Grievant's renewal of a contractor's license that had lapsed for more than two years. This action is prohibited by the West Virginia Contractor Licensing Act, W. Va. Code § 21-11-12, and Legislative Rule 28-2-5. Respondent asserts it did not abuse its discretion or otherwise act improperly by suspending Grievant for three days, and Respondent notes it considered Grievant's previous work record, including good evaluations and two prior written reprimands in determining the severity of the discipline to be imposed. Respondent avers Grievant's action of renewing the license was not a mere mistake, but a conscious decision to override the authority of W. Va. Code § 21-11-12. Thus, Respondent maintains Grievant's action was intentional conduct which could damage DOL's credibility.

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact. It is noted Grievant chose not to testify as is her right pursuant to statute; thus, the evidence of record presented by Respondent is basically unrebutted.

Findings of Fact

1. Grievant began employment with DOL in 1991.

2. Grievant performs routine tasks related to the renewal of contractor licenses. She does not have any decision-making authority regarding the granting or the renewal of licenses in non-routine circumstances.

3. On October 1, 1991, W. Va. Code § 21-11-2(a) was passed. It states:

> A license which is not renewed on or before the renewal date shall lapse. The board may establish by regulation a delayed renewal fee to be paid for issuance of any license which has lapsed: Provided, That no license which has lapsed for a period of two years or more may be renewed.

4. This statute is supported by Legislative Rule 28-2-5, which allows the holder of a valid license to renew on or before the expiration date.

5. Knowledge of this statute is essential in the performance of Grievant's day-to-day duties.

6. During Grievant's employment with the DOL, she has received favorable job evaluations.

7. Sometime after she began employment with DOL, Grievant was counseled by then DOL administrator, Chris Quasebarth, about issuing a license to a non-qualified company. (See footnote 4)

8. On August 6, 1996, Grievant received her first of two written reprimands. The first letter of reprimand dealt with Grievant making inappropriate comments about members of the public who came into DOL's offices with contractor licensing inquiries, and inappropriate outbursts in the office setting, including foul language. 9. Grievant's second letter of reprimand, dated September 10, 1997, was in response to her failure to send notice of hearings to the Contractor Licensing Board. Grievant grieved this letter of reprimand, and this grievance was denied at Level IV. See Morrison v. Dep't of Labor, Docket No. 97-DOL-490 (Jan. 15, 1998).

10. The license in question was originally issued to D&D Construction on May 18, 1994, and this license was valid until May 19, 1996. On May 19, 1996, D&D Construction was notified it was delinquent. The company made application for renewal on November 4, 1996, but its contractor's license could not be renewed because D&D Construction was not in good standing with Workers' Compensation and Employment Security. It was so notified on December 10, 1996, and its fee was retained until D&D Construction could become compliant.

11. A Cease and Desist Order dated August 1998 advised D&D Construction it should cease operating without a valid contractor's license.

12. On November 2, 1998, Shirley Starcher, an Office Assistant II with DOL, received a Cease and Desist Order for D&D Construction. One of Ms. Starcher's responsibilities is to issue a cease and desist number to each contractor who receives a Cease and Desist Order. The cease and desist number is then entered into the company's computer records.

13. When checking the computer files, Ms. Starcher found data indicating the company had renewed its license on May 19, 1998.

14. By statute, May 19, 1998, was the last date D&D Construction could renew its license. Therefore, it appeared the license was properly renewed per W. Va. Code § 21-11-12. However, Ms. Starcher questioned why a Cease and Desist Order, charging D&D Construction with operating without a valid license, would have been issued in August 1998, if the company had a valid license.

15. Ms. Starcher concluded there were discrepancies in D&D Construction's records, and contacted her supervisor, Mr. Goff. Mr. Goff directed Ms. Starcher to discuss the situation with Ms.

Barbara Gandy, an Office Assistant III and the lead worker in this area.

16. After Ms. Starcher consulted with Ms. Gandy, they discovered the computer actually revealed the license had been renewed on September 2, 1998, even though the renewal date was listed as May 19, 1998.

17. The computer screen also indicated Grievant had been the employee to renew this untimely application, as her initials were on the screen indicating the action taken.

18. Grievant did not ask anyone before taking this action expressly disapproved by statute and regulation. (See footnote 5)

19. Ms. Gandy and Ms. Starcher corrected the renewal date, indicating the license was renewed on September 2, 1998. The renewal date correction was recorded on the comment screen as November 2, 1998.

20. While Ms. Starcher and Ms. Gandy were correcting the renewal date for D&D Construction, Grievant entered Ms. Starcher's work area.

21. When Ms. Gandy asked why Grievant had renewed D&D Construction's license after the expiration date, Grievant stated D&D had not paid its Workers' Compensation premiums due to pending litigation with the state Workers' Compensation Division. Grievant expressed to Ms. Gandy her belief D&D should not be penalized for non-payment of Workers' Compensation premiums due to pending litigation. 22. Prior to this instance, Ms. Gandy had overheard Grievant explain to a contractor that even if he had paid his license renewal fee before the two year statutory period, he could not renew his license without the timely submission of documentation indicating his good standing with the state Workers' Compensation Division.

23. Grievant's action of back dating the computer screen indicates she was aware of the prohibition of renewing a license after the two tear time limit, and indicates Grievant made a judgment to allow for the re-licensure of D&D Construction although it did not meet the statutory time requirements.

24. On November 12, 1998, the Contractor Licensing Board requested that an investigation be made into the circumstances surrounding D&D Construction's license renewal.

25. On December 4, 1998, Mr. Goff met with Grievant and asked her to submit a written explanation as to why she renewed D&D Construction's license.

26. In a memorandum dated December 4, 1998, Grievant informed Mr. Goff she had renewed

D&D Construction's license because the renewal fee had been sent within the two year statutory limit. Grievant indicated it was her belief that because the fee had been timely received, she could renew the license upon receipt of notice of good standing with Workers' Compensation, even if such notice was received after the two year limit. Grievant also indicated her issuing of the renewal was a mistake, and all the employees in the unit believed such action could be taken.

27. A discussion with the other employees revealed no such understanding.

28. DOL has no statute, rule, or policy allowing a contractor's license to be renewed beyond the two year period if unemployment and/or Workers' Compensation matters are not resolved.

29. On December 15, 1998, Mr. Goff had another meeting with Grievant to discuss D&DConstruction and other issues regarding Grievant's job performance. Grievant continued to state her action in renewing D&D Construction's license was a mistake, and Mr. Goff continued to indicate that such renewal could not occur by mistake, but required an intentional action and decision on Grievant's part.

30. Two other issues of possible inappropriate action by Grievant were discussed in the December 15, 1998 meeting. Grievant denied wrongdoing in both these incidences, and Mr. Goff elected to not pursue these issues after he heard Grievant's explanation.

31. During the December 15 meeting, Grievant presented Mr. Goff with a number of computer printouts regarding other contractor licenses which she alleged were renewed by co- workers after the two-year time period had elapsed. Mr. Goff gave Ms. Gandy these printouts and asked her to investigate.

32. During Ms. Gandy's investigations of the printouts submitted by Grievant, she discovered only one of the licenses had been renewed improperly after the two-year statutory limitation. This license was renewed by a probationary employee, Justin Cox, who had been working in the licensing division for approximately six weeks at the time of the error. Mr. Goff determined Mr. Cox had not received the proper training during his probationary period, and he had inadvertently renewed the license after the two-year period. Mr. Cox was counseled regarding this matter.

33. On January 7, 1999, Mr. Goff again met with Grievant and advised her he was considering what disciplinary action to take based upon the D&D Construction matter, as he felt this situation was very serious. He also advised Grievant she could submit information to him arguing against

disciplinary action.

34. At the January 7 meeting, Grievant continued to insist she made a mistake when sheissued the renewal license to D&D Construction. Mr. Goff again informed Grievant that her action could not be a mistake, but was instead a conscious decision to override the policy regarding the two-year statutory limit.

35. In considering disciplinary action against Grievant, Mr. Goff reviewed Grievant's work record including Grievant's performance evaluations, two prior letters of reprimand, the circumstances surrounding the renewal of D&D Construction's license, and how Grievant's renewal of D&D Construction's license would impact the operation and credibility of the Contractor Licensing Section of DOL.

36. Initially, Mr. Goff considered both termination and suspension. The Division of Personnel, which assisted Mr. Goff in the disciplinary matters, recommended a five day suspension. Because of Grievant's prior good evaluations, and the fact that a five day suspension during the Christmas/New Year holiday period would cause Grievant to lose holiday pay, Mr. Goff decided on a three day suspension.

37. By letter dated and hand delivered to Grievant on January 12, 1999, Mr. Goff informed Grievant she would be suspended from employment for three work days without pay. Grievant was notified that her suspension would begin on Thursday, January 21, 1999, and continue through Monday, January 25, 1999. The letter stated Grievant had renewed D&D's contractor license, "while admitting you knew it had been expired for over two years." (Emphasis in original).

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 assufficient 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.

I. Due Process

The first issue to address is Grievant's complaint that her due process rights were violated. The

due process rights afforded an individual for less than a termination, or "a temporary deprivation of rights may not require as large a measure of procedural due process protection as a permanent deprivation." Waite v. Civil Serv. Comm'n, 161 W. Va. 154, 241 S.E.2d 164 (1978) (citing North v. Bd. of Regents, 160 W. Va. 248, 233 S.E.2d 411 (1977)). Prior to a thirty-day suspension Waite, a civil service employee like Grievant, had a sufficient property interest to require notice of the charges and an opportunity to present her side of the story to the decision-maker. Waite at 170. Further, the West Virginia Supreme Court of Appeals has recognized that "due process is a flexible concept, and that the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985) (citing Clark v. W. Va. Bd. of Regents, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)).

Accordingly, Grievant was entitled to an explanation of the charges and an opportunity to respond to the charges. Buskirk at Syl. Pt. 3. Grievant knew the action Mr. Goff was concerned about was the renewal of D&D Construction's license after it had lapsed for more than two years. Grievant received numerous opportunities to explain her actions. Mr. Goff also informed Grievant on January 7, 1999, that he was ready to decide what disciplinary action should be taken, and she would have one last opportunity to offer her side of the story. Grievant has proven no due process violations on the part of Respondent. Grievant also alleged she did not receive the required eight days notice prior to her suspension. This argument is without merit. Grievant was notified on January 12, 1999, she would be suspended. This meets the conditions of Division of Personnel's Regulation 12.3 that requires an eight calendar day notice.

II. Progressive Discipline and Severity of the Punishment

Grievant argues her decision to renew the license was the result of a misunderstanding of the statute and rules and regulations of DOL. The evidence does not support Grievant's argument. Grievant had worked in the renewal section for some time. Shortly before she renewed D&D Construction's license, she was overheard by Ms. Gandy explaining to another contractor that his license could not be renewed after two years. Further, if Grievant were confused about what steps to take in this "new" situation, a business in litigation with another agency, the proper action was to ask her supervisor what to do, and not to decide for herself. Grievant engaged in an intentional act and violated the statute and the rules when she renewed this license. Even in her post-hearing

submissions she still failed to see the seriousness of this act, and stated, "she disagrees the renewal of D&D Construction's license was improper." She also stated she "disagrees with the Director[']s interpretation of the statutes, policies, and rules and their application regarding Contractors Licensing." Respondent has met its burden of proof and demonstrated Grievant engaged in misconduct deserving of disciplinary action. Grievant's conduct showed a disregard for the rules and regulations which governed the actions of her agency.

Grievant also argues progressive discipline was not followed. Although this argument was not discussed in any detail, it will be addressed. Grievant had received two prior written reprimands for misconduct which could best be defined as either insubordination or willful neglect of duty. The action in this instance is of a similar nature; Grievant acted in a manner which was potentiallyembarrassing for Respondent and not in keeping with the law. It is clear this act was of a more serious nature than the two prior acts. A three day suspension is in keeping with the progressive discipline policy, as the next disciplinary step after a written reprimand is a suspension. (See footnote 6)

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 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 v. Civil Service Comm'n, 172 W. Va. 473, 310 S.E.2d 472 (1983); Serrino v. W. Va. Civil Service Comm'n, 169 W. Va. 111, 285 S.E.2d 899 (1982). Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects of 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. Her pattern of behavior constitutes "misconduct of a substantial nature directly affecting the rights and interest ofthe public, rather than . . . 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 Section 12.03, Administrative Rules, W. Va. Div. of Personnel (June 1, 1998).

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). The discipline imposed here was not clearly excessive. See e.g. Hammer v. Div. of Corrections, Docket No. 94-CORR- 1084 (June 11, 1997). Grievant did not demonstrate mitigation is appropriate in this situation.

III. Discrimination

Grievant argues she has been discriminated against as other employees who were similarly situated were not disciplined in the same manner. W. Va. Code § 29-6A-2(d) defines discrimination as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing."

To prove discrimination a grievant must establish a prima facie case which consists of demonstrating:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated [to] actual job responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

If a grievant establishes a prima facie case, a presumption of discrimination exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, a grievant may still prevail if he can demonstrate the reason given by the respondent was pretextual. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievant's argument must fail as she has not proven she was similarly situated to the employee to whom she compares herself. An investigation revealed a probationary employee, Justin Cox, had

improperly renewed a contractor license when he had been with the division for six weeks. Mr. Goff found Mr. Cox had not been properly trained in the renewal of contractor licenses, and Mr. Cox was counseled about this matter. There was no indication Mr. Cox had a past disciplinary record similar to Grievant's. Grievant was a long-term, experienced employee with a history of prior disciplinary offenses, and she was knowledgeable about the renewal procedures. Therefore, she and Mr. Cox cannot be considered similarly situated employees.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. Pursuant to W. Va. Code § 21-11-12, a contractor's license that has lapsed for a period of two or more years may not be renewed. Additionally, Legislative Rule 28-2-5 specifies a license may be renewed on or before the two year time period. 3. Since D&D Construction's contractor license had lapsed approximately five months beyond the two year statutory limit for renewal as of September 2,1998, Grievant expressly violated the provisions of W. Va. Code § 21-11-12 and Legislative Rule 28-2-5 by renewing the license.

4. An agency can consider past disciplinary action imposed against an employee when following its progressive disciplinary policy and deciding the appropriate penalty for misconduct.

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. Grievant has failed to prove DOL did not follow its progressive discipline policy.

7. W. Va. Code § 29-6A-2(d) defines discrimination as “any difference in the treatment of

employees unless such differences are related to the actual job responsibilities of employees are agreed to in writing."

8. To prove discrimination a grievant must establish a prima facie case which consists of demonstrating:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated [to] actual job responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

If a grievant establishes a prima facie case, a presumption of discrimination exists, which therespondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, a grievant may still prevail if he can demonstrate the reason given by the respondent was pretextual. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

9. Grievant has failed to meet her burden of proof and demonstrate she was similarly situated to another employee who was treated differently.

10. Grievant was afforded the due process required prior to the imposition of this suspension, as she received an explanation of the charges and an opportunity to respond to those charges. Syl. Pt. 3, Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985) (citing Clark v. W. Va. Bd. of Regents, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)).

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 recordcan be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: August 31, 1999

Footnote: 1

No information was given about filing to Level I.

Footnote: 2

The two Robert Millers are not related.

Footnote: 3

Grievant was represented by Larry Walker, and Respondent was represented by Senior Assistant Attorney General Kelli Talbott.

Footnote: 4

It is noted that in the post-hearing submissions, Grievant's representative indicated this statement was false. Since there is no conflicting testimony on record, it is accepted as true.

Footnote: 5

From the testimony, it appears that after Grievant had renewed this license she discussed it in generalities with Ms. Gandy. Ms. Gandy did not know the company was D&D Construction.

Footnote: 6

Grievant did not submit the progressive discipline policy of DOL, but did refer to and outline the steps in a post-hearing submission. As Respondent did not challenge this lower level information, these steps were assumed to be correct.