THOMAS HILL,

Grievant,

v. **DOCKET NO. 01-BEP-513**

W. VA. BUREAU OF EMPLOYMENT PROGRAMS/

MANAGEMENT INFORMATION SYSTEMS,

Respondent.

DECISION

Thomas Hill filed this grievance directly at Level IV on September 21, 2001, stating:

> Agreement between my 'director' and myself 'was met', but I was terminated anyway. My 'manager' reported incorrect info to my director to cause his decision to terminate me. My 'supervisor' relayed false info to all concerned because he and my manager had conspired against me before to fire me. They claimed my performance time was too slow. No other employee was persecuted as I was!

As relief, he seeks, "To regain my employment position of Programmer/Analyst II to prove once and for all that my performance is better than most. Also, receive backpay."

The Level IV hearing was held over three days on November 5, 2001, January 7, 2002 and February 25, 2002. Grievant appeared *pro se* and Patricia J. Shipman, Esq., represented Respondent. The parties agreed to submit their proposed findings of fact and conclusions of law by July 22, 2002 (See footnote 1) .

I find the following facts have been proven by a preponderance of the evidence:

FINDINGS OF FACT

1. Grievant was employed by Respondent as a Programmer/Analyst II from August 5, 1999 to September 7, 2001.

2. On September 7, 2001, Bureau of Employment Services Commissioner Robert J. Smith informed Grievant by letter of his decision to dismiss Grievant effective that date. Respondent's Exhibit No. 17. He stated in part,

> This action is a result of your negligence in performance of your duties as demonstrated by your continuing failure to meet the performance standards of your position, despite the agency's repeated attempt of remediation.
>
> . . .
>
> It is unfortunate that you have demonstrated unacceptable work performance. Your supervisors have offered you ongoing advice and opportunity to resolve your productivity problem. Accordingly, your actions have caused your supervisors and me to lose faith in your ability to perform the duties of the position that you occupy. An employer has a basic right to expect its employees to carry out their assignments in a professional, timely and responsible manner as well as adhere to the policies of the agency.

3. The letter also presented a 13-point chronology of Grievant's work, corrective action plan and disciplinary history, from July 24, 2000 to August 17, 2001.

4. Grievant was hired into the Management Information Systems (MIS) Application Support Unit on the Unemployment Compensation Benefit Support Team on the strength of a resume that indicated 15 years programming experience. His prior experience was as a systems programmer analyst, which is greatly different from the application programmer analyst duties he was being hired to perform. 5. Initially, Grievant's immediate supervisor was Mark Elkins, now a Programmer Analyst IV, who also supervised another Programmer Analyst II and a Programmer Analyst I. Mr. Elkins had recently been promoted, and Grievant filled his old position.

6. Grievant was expected, when he was first hired, to have a period of adjustment while he familiarized himself with the applications and processes he would be working with. After two months on the job, he was given an Employee Performance Appraisal by Mr. Elkins, with an overall rating of 1.91, (See footnote 2) "Meets Expectations." Respondent's Exhibit No. 1. Of 23 elements rated, he was scored Meets Expectations in 21, and Needs Improvement in two. The two areas where he needed improvement were "Exhibits ability to secure and evaluate facts before taking action," and "Work output matches expectations established." The evaluation included an improvement and/or developmental plan that suggested Grievant ask more questions and attempt program changes in the testing environment. It also stated Mr. Elkins would work more closely with Grievant to help him learn and stay focused on his job responsibilities.

7. Grievant's lack of production and slow project completion was to be a persistent theme

throughout his tenure in the MIS department. His ability to quickly become familiar with the new systems was hindered by excessive leave use and an inability to fully concentrate on the task at hand, due to medical problems and severe depression and anxiety. Despite the slow output and consistent failure to meet deadlines, Grievant's work, when completed, was of the highest quality with no errors. 8. Grievant completed his probationary period and was re-evaluated at the end of December, 1999. He was again rated in the "Meets Expectations" range. In the Summary Comments section, Mr. Elkins noted,

> Tom has been employed for 5 months. Tom shows a very friendly attitude toward all co-workers and customers, and gets along very well with his team members.
>
> Tom must produce much faster to meet the performance standards of his position. He has completed only one assignment (of low complexity) thus far, which is much lower than what is expected of a Programmer/Analyst II with over 15 years of experience. He has shown some improvement the last 3 weeks, but needs to consistently progress in the next several months to develop into an effective team member. He is barely meeting the overall expectations for this position.

Respondent's Exhibit No. 2. (See footnote 3) Grievant's response to this evaluation was, "I will most definitely continue to improve both the quality and quantity of my work to exceed expectations. I know I can accomplish my goals and I will. There will be no more performance appraisals like this. I will continually seek improvement with perseverance and determination." Respondent's Exhibit No. 2.

9. On March 17, 2000, Grievant was again evaluated and placed on a Corrective Action Plan (CAP). Joyce Watson, Applications Support Manager and the next line supervisor above Mr. Elkins, noted in a memorandum to Grievant of that date that his recent evaluation fell below the "Meets Expectations" level. Respondent's Exhibit No. 3. She detailed a plan in which Grievant's tasks would be detailed in writing by his supervisor, Grievant would prepare self-reports of work completed and how his time was spent, and each work task would be monitored and evaluated upon completion by Mr. Elkins. Grievant would also be re-evaluated after 90 days. Ms. Watson stated, "[I]f you cannot show marked improvement, I will have to consider a recommendation for your termination. If you show marked improvement, we will decide at that time whether to continue this monitoring process or stop." (Emphasis in original.)

10. Because Grievant was at that time in the middle of an assignment, the plan was not officially implemented until mid-April. On August 9, 2000, Ms. Watson informed Grievant by memorandum that, "According to all the documents that we have kept on your assignments during

the time frame, there has been no improvement in your productivity." Respondent's Exhibit No. 5. She also noted Grievant had used almost 70 hours of leave in June and July, had been frequently reporting to work late, and had been observed taking too long for lunch breaks.

11. Ms. Watson's August 9, 2000, memorandum also informed Grievant:

> It was discussed and documented in our March meeting about this corrective action plan, that if you did not show marked improvement after the 90 day period, I would have to consider a recommendation for your termination. At this point, I would like to inform you that I am giving you until September 30, 2000 to show this marked improvement or I will recommend your termination. We would consider marked improvement to be completing the next assignments given to you within the 10% "meets expectations" range and without any errors that could have been avoided.

12. From January 1, 2000 through June 30, 2000, Grievant used 134.5 hours of sick and annual leave. Respondent's Exhibit No. 6.

13. Grievant's Task Assignment Worksheets for the five tasks assigned to him during the period of his CAP show only one was completed within the allotted time. Each worksheet contained a description of the work and an estimation of its complexity and estimated hours needed for completion. Grievant signed each worksheet under thestatement, "I agree with the estimates and understand the specifications as explained to me." The one assignment completed was of low complexity. The original estimated hours for completion of these tasks was 190, and these estimates were revised during the projects to 278. Grievant completed the projects in 344 hours, 28% more than the time allotted.

14. A second CAP was implemented on August 9, 2000. Grievant was at that time also warned in writing that his excessive use of leave was a problem, as was his use of the Internet on work time for non-business purposes.

15. Grievant completed 3 projects during the second CAP. He completed two of these projects within the estimated times, the first 80% above expectations, the second 19% below expectations, and the third 33% above expectations, an average of 7% above expectations. (See footnote 4) Respondent's Exhibit No. 20.

16 Grievant was warned in writing by Ms. Watson on October 30, 2000, that his productivity was still below expectations, and this time warned, "If you cannot start producing more work and become more dependable, I will be forced to locate another lower position for you." Respondent's

Exhibit No. 9.

17. Beginning January 23, 2001, Ms. Watson began requiring Grievant to provide daily work updates to her and Mr. Elkins, listing work accomplished, new assignments and any problems he was having.

18. In February, 2001, Grievant was placed on leave restriction, and given a 3- day suspension because his productivity was lower than expectations. He did not grieveeither action. A third CAP was also designed, to be implemented after Grievant's return to work.

19. The third CAP was not actually implemented until April 12, 2001, because Grievant had been working on a past-due assignment. The CAP detailed a procedure for Grievant to provide a "document of understanding," a detailed written analysis and work plan for each assignment. He would then use the same procedures as in the past to monitor the tasks as he worked on them. Grievant would be given one assignment of moderate complexity during the period of this CAP, broken down into three segments. Joint Exhibit 2B.

20. On June 22, 2001, Ms. Watson sent a Memorandum to Personnel Administrator Thomas Rardin seeking advice on what to do about Grievant, noting that at the time it was not likely Grievant would complete his current assignment, that he had been regularly coming to work an hour late, and he was not consistently providing daily work reports as he was directed to do.

21. On July 27, 2001, Rob Norvell, MIS director, met with Grievant to discuss his work. Following the meeting, in which Grievant stated he could complete the project in the allotted time, he informed Grievant by memorandum that "As per our agreement, we will hold off any recommendation for termination unless you go past the hours estimated. If this occurs, you will leave us no alternative than to go ahead with this recommendation." Respondent's Exhibit No. 13. Both Grievant and Mr. Norvell signed the memorandum.

22. Grievant completed the assignment on August 29, 2001. It was originally estimated to take 158 hours and finally estimated to take 166 hours. Grievant completed the project in 279.5 hours, exceeding the allotted time by 68%. 23. Grievant received another performance appraisal, for the period January 19, 2001 through July 25, 2001, on August 7, 2001. Respondent's Exhibit No. 18. He was scored 1.43, "Needs Improvement." Of 23 elements rated, 10 were in the "Meets Expectations" category, and 13 were in the "Need Improvement" category. Grievant disagreed with this rating, saying:

> Negatives have been multiplied while positives have been divided in this performance evaluation. This should not surprise me, because I know many memos to management and personnel have been skewed this way. There is no way that I can agree with this evaluation, because I know I have improved since the last one. I can't believe or agree with these ratings.

24. On August 17, 2001, Mr. Norvell met with Mr. Elkins to discuss Grievant's work, and sent Grievant a memorandum listing his decisions based on that discussion. He denied Grievant's request to increase the hours estimated to complete one part of the project. He also noted Grievant spent too much time on administrative tasks, and told him to spend no more than one hour per day on these unless attending meetings. He stated he calculated an expected completion date of noon, August 27, 2001, for the assignment based on the remaining estimated hours plus 15%, noting Grievant was lagging behind the estimate. He stated, "The assignment must be completed by this date. This memo and plan is considered an addendum to the Agreement we signed on July 27, 2001."

25. Mr. Norvell calculated that there were 35 hours remaining based on Grievant's analysis document, and with 15% padding, 40.5 hours should be needed to complete the project. Working 6.5 hours per day, Mr. Norvell decided Grievant would need 6.5 (See footnote 5) days. 26. On the 20th, Grievant worked six hours on the project, using 1.5 hours for administrative time. On the 21st, Grievant worked four hours on the project, 1.5 hours on administrative work and took two hours sick leave for a doctor's appointment. On the 22nd, Grievant logged six hours on the project and 1.5 hours administrative time. On the 23rd, he logged two hours on the project, 3.5 hours administrative time, including a team meeting, and two hours sick leave. On the 24th he logged six hours work and 1.5 hours administrative time. the 25th and 26th were weekend days, and on the completion deadline date of August 27, Grievant logged six hours on the project and 1.5 hours administrative time. Grievant's Exhibit No. 1.

27. Although Grievant argued he completed work on the project on the 27th, but the user was not available to test and approve the project, his log shows 1.5 hours work on the 28th with four hours sick leave used and a two-hour power outage, and on the 29th shows 4.5 hours work and 1.5 hours sick leave, and the note "request completed and approved by user."

28. On August 31, 2001, Mr. Norvell sent a memorandum to Commissioner Smith stating, "I would like to recommend that Thomas Hill, a programmer/analyst II in MIS have his employment terminated." Respondent's Exhibit No. 15. He briefly summarized Grievant's performance problems

and the steps taken to try and improve his work. Commissioner Smith then sent Grievant the termination letter identified above in Finding of Fact No. 2.

DISCUSSION

___Grievant was terminated for disciplinary reasons, and the burden of proof in disciplinary matters rests with the employer, who must meet that burden by proving thecharges 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.

"The West Virginia Supreme Court of Appeals has determined that classified employees may be dismissed for misconduct which is of a 'substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention.' [citations omitted] Faced with defining 'gross misconduct' justifying discipline or dismissal, the Court . . . declined, deciding that the severity of the employee's misconduct should be evaluated and considered in the context of the circumstances of each case." Hayes v. W. Va. Div. of Juvenile Justice, Docket No. 98-DJS-220 (Dec. 14, 1998).

"Deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-183 (Oct. 3, 1996). "However, in [Hercules v. W. Va. Div. of Highways, Docket No. 97-DOH-006 (Apr. 17, 1997)], the Grievance Board held '[d]ismissal as a disciplinary measure must be reserved for circum- stances when nothing else but the removal of the employee from the work environment will do.'" Hayes, *supra.*

"In assessing whether the decision was excessive or disproportionate the undersigned must look at the totality of the circumstances. Some factors to be consideredin 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. [citations omitted]. As stated in [Buskirk v. Civil Service Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985)] '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.' [citations omitted]." Farley

v. W. Va. Dep't of Health and Human Resources, Docket No. 02-HHR-145 (July 29, 2002).

Respondent proved that Grievant exhibited, from the day he completed his probationary period, a pattern of intolerably low performance that defied Respondent's patience and Herculean efforts to facilitate his improvement. Time after time, he was given projects well within his abilities, and he consistently failed to meet his employer's reasonable expectations that these projects be completed within the time allocated to do so. He was not a long-term employee with an established record of acceptable performance. Although the quality of Grievant's work was beyond reproach, he never seemed to grasp the concept that his employer and its clients were depending on him to get work done timely and use his work time efficiently. Further, Grievant never gained the understanding of the MIS systems necessary to allow him to complete his projects without wasteful inefficiencies.

Respondent was aware that Grievant suffered psychological and medical problems that contributed to his performance failures, but Grievant never requested any sort of accommodation for these problems. Further, Respondent allowed Grievant to make his own estimates of the time needed to complete his projects, and frequently lengthenedthese estimates. Respondent made it known to Grievant that he could ask for help and get any assistance he needed, but Grievant declined to take advantage of these offers.

One troubling factor in this case is the final project assigned to Grievant. His Statement of Grievance and argument he presented at the hearing allege that this project was completed before the deadline in fewer hours than estimated by Mr. Norvell. However, Respondent's evidence shows Grievant worked on the project all day on its due date, even though it was due by noon, and on two days afterwards. This evidence was unrebutted. Grievant chose not to testify, so his unsworn statements cannot be used as evidence to support his argument, and he presented no documents or witnesses that contradict Respondent's evidence. (See footnote 6) Further, it is noted that the deadline and time estimate Mr. Norvell provided were only for one part of the third segment of the overall assignment, a mere fraction of the total work expected. As a whole, Grievant exceeded his own estimate of the time required for the project by 113.5 hours.

Respondent has an expectation that its employees will perform their jobs in a professional manner, meeting both quality and quantity requirements, and Grievant did not meet that expectation. Throughout his entire employment with Respondent, he was given every opportunity to meet that expectation. Such a long-term failure, in the face of 3 CAP's and other disciplinary actions, is

misconduct of a substantial nature. He was repeatedly warned of the consequences of his actions, and he clearly understood what was expected of him. He was given more than one “second chance.” His prospects for rehabilitationhave been proven to be negligible. Based on this performance record, his termination was justified.

The following conclusions of law support this decision:

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. “The West Virginia Supreme Court of Appeals has determined that classified employees may be dismissed for misconduct which is of a 'substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention.' Syl. Pt. 1, Oakes v. W. Va. Dept. of Fin. and Adm., 164 W. Va. 384, 264 S.E.2d 151 (1980); See Westfall v. W. Va. Dept. of Trans., Docket No. 97-DOH-349 (Jan. 16, 1998); Hercules v. W. Va. Div. of Highways, Docket No. 97-DOH-006 (Apr. 17, 1997). Faced with defining 'gross misconduct' justifying discipline or dismissal, the Court in Thurmond v. Steel, 159 W. Va. 630, 225 S.E.2d 210 (1976) declined, deciding that the severity of the employee's misconduct should be evaluated and considered in the context of the circumstances of each case.” Hayes v. W. Va. Div. of Juvenile Justice, Docket No. 98-DJS-220 (Dec. 14, 1998). 3. "Deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-183 (Oct. 3, 1996). “However, in [Hercules v. W. Va. Div. of Highways, Docket No. 97-DOH-006 (Apr. 17, 1997)], the Grievance Board has held that '[d]ismissal as a disciplinary measure must be reserved for circumstances when nothing else but the removal of the employee from the work environment will do.'” Hayes, *supra*

4. “In assessing whether the decision was excessive or disproportionate the undersigned 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 v. Civil Service Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985)] '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 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)." Farley v. W. Va. Dep't of Health and Human Resources, Docket No. 02-HHR-145 (July 29, 2002).

5. Respondent met its burden or proving Grievant's performance record justified his termination.

For the foregoing reasons, this grievance is hereby **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.

Date: September 11, 2002 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

The lengthy time between the last hearing date and the mature date was to allow for preparation of the transcript, which Respondent undertook to have done by a court reporter, who provided certified transcript. Respondent provided copies to both the undersigned and Grievant.

Footnote: 2

The rating scale is: 1.00 to 1.50 = Needs Improvement; 1.51 to 2.50 = Meets Expectations; and 2.51 to 3.00 = Exceed Expectations.

Footnote: 3

Due to what appears to be a copying error, only the odd-numbered pages of this exhibit are in evidence.

Footnote: 4

The projects were estimated to require 55 hours to complete, and Grievant completed them in 51 hours, beating the projection by 7%.

Footnote: 5

The actual figure is 6.23 days.

Footnote: 6

Grievant did elicit testimony that the project was completed with no errors, and is currently in use, contrary to Mr. Norvell's beliefs, but did not adduce evidence as to when it was completed, that the user actually was unavailable, or why he logged several hours work on the project after the deadline.