RON EVANS,

Grievant,

v v.

Docket No. 02-INS-108

DEPARTMENT OF TAX and REVENUE/

INSURANCE COMMISSION,

Respondent.

D E C I S I O N

Grievant, Ron Evans, was employed by the Department of Tax and Revenue/Insurance Commission, ("Commission"). He filed this grievance on April 19, 2002. His Statement of Grievance reads:

> **Termination: Gross Misconduct; Employer states that I failed to deposit funds in my possession, see attached letter.** (See footnote 1)
>
> **Relief Sought: Strict proof of charges: Position reinstatement. Back pay, Removal of alleged charges from my permanent record, No loss of time or break of service.**

As the grievance was a termination, it was filed directly to Level IV. After several continuances at Grievant's request, a Level IV hearing was held on July 26, 2002. This case became mature for decision on August 26, 2002, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 2)

Issues and Arguments

Respondent maintains Grievant's termination for gross misconduct was appropriate, as

Grievant had stolen money from the Commission. Grievant testified he did not take themoney, and he believes he was discharged because administration does not like him and made him a scapegoat for their "sloppy" procedures that created the loss. (See footnote 3)

Procedural Issue

At the start of the Level IV hearing, Respondent's attorney, Greg Elam, informed the undersigned Administrative Law Judge that Grievant's attorney had notified him approximately 24 hours before, that he intended to call him as a witness. (See footnote 4) **Mr. Elam objected to this procedure as he believed this was an attempt to gain a third continuance, which Grievant's attorney had requested, and to which Respondent had objected. Mr. Elam asserted that if he was called as a witness, he would then no longer be able to serve as counsel.**

Grievant's attorney, Chris Moffatt, stated Mr. Elam was an essential witness, he would not ask for his removal as counsel for Respondent, and the information he needed from Mr. Elam dealt with the pre-termination meeting held with Grievant. Mr. Elam noted this information could be obtained from other witnesses who attended the meeting, including Grievant. Grievant's attorney indicated Grievant was going to testify, and he did. Respondent also noted it was going to call several of the other people present at the meeting as witnesses, and Grievant could ask them about the pre-termination meeting. (See footnote 5)

Mr. Elam cited Smithson v. United States Fidelity Co., 411 S.E.2d 850 (W. Va. 1991), to support his position that he should not be called as a witness. A review of Smithson indicated counsel could only be called in limited circumstances, one of which was when the needed information could not be obtained elsewhere. Moreover, when counsel is called as a material witness he should remove himself from the case immediately. Id., Syl. Pt 2. Given these directions from Smithson, Grievant's motion to call Mr. Elam as a witness was denied, and Mr. Moffatt's objection was noted.

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

Findings of Fact

1. Grievant had been employed as an Accounting Technician III with the Insurance Commission for approximately three years at the time of his discharge.

2. In early March 2002, Linda Shive, an Office Assistant, discovered that some of the spread or deposit sheets had not come back. The return of these sheets to her office section would indicate the money her section had taken in had been deposited. She reported this discrepancy to her supervisor, Jane Strother, Director of Agent Licensing.

3. Ms. Strother reported this finding to Darlene Parsons, who is in charge of the Administrative Section, the place where the checks and cash go after leaving the Licensing Division. 4. Ms. Parsons performed an audit and discovered approximately $285.00 was not accounted for since July 2001. This money was marked as received in the Licensing Division, but no spreadsheets had been returned noting the money had been deposited.

5. All the funds that had not been deposited were small sums of cash. All checks that had been received, which are the majority of the funds received by the Commission, had been deposited.

6. Thereafter Michael Riley, Internal Auditor, also conducted an audit and found the same information. In his March 19, 2002 report he found cash was missing only from the Licensing Division.

7. On March 21, 2002, several administrators from the Commission and its attorney met to discuss the issue, and they believed the next order of business was to track various sums of cash money, and find out where in the system it disappeared. A "sting" was set in motion.

8. On Friday, March 22, 2002, Ms. Strother placed ten dollars in the system for deposit. As was the usual practice, she wrapped the money in a transmittal form and placed it in the outgoing basket for pick up by the mail runner. Mr. Riley watched her fill out the necessary forms and wrap the money.

9. This money was watched as it passed through the system. The money successfully reached Grievant, and it was watched during the time it was in his possession. 10. The money remained on Grievant's desk for a period of time, and throughout this time period, various individuals surreptitiously checked to see if the money was still there. 11. The same individuals watched to see who approached Grievant's desk, and would check the money again if someone had gotten papers, etc., from Grievant's desk while he was gone.

12. The money was still on Grievant's desk when he left for the weekend. **(See footnote 6)**

13. Over the weekend, Ms. Parsons checked on the money to see if it was still there after the custodian had departed. It was.

14. Bill Kenny, Assistant to the Commissioner, and Ms. Parsons checked on the money on Monday morning, March 25, 2002, and it was still there. Mr. Kenny kept watch throughout the day, and the money remained on Grievant's desk. Grievant filled out the necessary forms for the check deposits, but no forms were completed for the cash. When Grievant left at the end of the day, Mr. Kenny checked Grievant's desk, and neither the money nor the transmittal slip was on Grievant's desk.

15. On April 1, 2002, Ms. Strother put five dollars with a transmittal slip in the mail box for pick up. This money successfully reached Grievant's desk. Again, the money was watched during the day in the same manner as before. This money was processed for deposit by Grievant, and given to Ms. Parsons.

16. On April 4, 2002, Ms. Strother again put five dollars with a transmittal slip in the mail box for pick up. This money successfully reached Grievant's desk. Again the money was watched during the day in the same manner as before. Grievant completedthe deposit slip for the check transactions, but did not complete the deposit slip for the cash. These slips are to be completed at approximately the same time.

17. Ms. Parsons waited an hour, and then asked if anyone had any cash. Grievant then completed the cash transaction form and turned it and the money into her.

18. On Friday, April 5, 2002, Ms. Strother prepared six dollars in the same manner described above. This money successfully reached Grievant's desk. Again the money was watched during the day in the same manner as before. When Grievant left at 4:00 p.m., his usual quitting time, Mr. Kenny checked his desk, and neither the money nor the transmittal slip was on Grievant's desk. Mr. Kenny and Ms. Parsons went through Grievant's desk, the shredder, and trash, and they did not find the money or the transmittal slip.

19. Mr. Kenny waited until Monday, April 8, 2002, to see if the money would turn up. When it did not, he called Grievant into the office at 3:45 p.m., and dismissed him from employment for theft and failure to deposit funds in his possession.

20. Initially, Grievant was not suspected as the culprit. Administration did not know who

was taking the money, and that is why they devised the "sting."

21. During part of his employment, Grievant had trouble with his attendance and on August 21, 2001, he was placed on restricted leave. He was off payroll from June 1, 2001 to June 15, 2001. Grievant stated he was no in financial difficulty during this time because his mother paid his living expenses.

22. Grievant continued to have trouble maintaining a leave balance, and received a second memo on September 19, 2001, noting his failure to properly complete therequired doctor's excuse, on September 17, 2001, and his continued problems with attendance. **(See footnote 7)**

23. Grievant stated he received a note containing jokes from Mr. Kenny on August 21, 2001, that he found offensive. He testified he wrote a memo to Ms. Parsons approximately one month later to complain about this note. Mr. Kenny testified he did not send the note to Grievant, and Ms. Parsons testified she did not receive the memo. The undersigned Administrative Law Judge finds the data is insufficient to prove Grievant received and/or complained about the jokes.

24. Contrary to Grievant's testimony, Mr. Kenny did not curse "all the time" in the office.

25. Ms. Parsons counseled Grievant, once approximately two years ago, about sexually harassing her. There was no evidence that Grievant repeated his behavior or that he required further counseling.

26. Sometime before his termination, Grievant had broken up with his girlfriend and went around the office asking for donations, such as towels, furniture, etc., to assist him in setting up a household because he had nothing.

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 generallyrequires 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 Section 12.2 and .3, Administrative Rules, W. Va. Div. of Personnel (June 1, 1995).

I. Credibility

The first issue to address is one of credibility, as Grievant testified he did not steal any money. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR- 371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Resources, Docket No. 95- HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95- 23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993).

The United States Merit System Protection Board Handbook ("MSPB Handbook") is helpful in setting out factors to examine when assessing credibility. Harold J. Asher andWilliam C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984). The Grievance Board has applied these factors in many cases, and considers the following in assessing a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge 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. See Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD-216 (Dec. 28, 1999); Perdue, supra.

In evaluating the available evidence, the undersigned finds the fact-based testimony about

the "sting" operation to be credible. The money was watched and checked repeatedly throughout the day and even on the weekends. No one initially believed Grievant was the culprit, and Ms. Parsons testified she just couldn't believe Grievant could or would steal the money.

Grievant's assertions that he did not steal the money, fly in the face of several witnesses' testimony. Their testimony was plausible, no bias was demonstrated, and the testimony among these witnesses was internally consistent. These witnesses displayed no animosity toward Grievant, which would reveal a bias.

While it is true Grievant had some difficulties with his attendance, Mr. Kenny reported Grievant's attendance had improved, and he no longer viewed Grievant as a problem employee. On the other hand, Grievant, repeatedly stated Mr. Kenny and Ms. Parsons had treated him badly, and reported Ms. Parsons had consistently harassed him with memos detailing his weaknesses. Additionally, Grievant stated he was not having anyfinancial problems while he was off payroll because his mother was supporting him. Clearly, when you need someone else to pay all your bills, you are having financial problems. It was also noted that Grievant had a tendency to exaggerate. For example, he first stated Ms. Parsons had talked to him for hours about the sexual harassment; then he testified she had talked to him all day. Given the facts presented, Grievant's denial is difficult to credit.

II. Gross misconduct

Grievant was charged with gross misconduct. The next issue to address is whether Respondent met its burden of proof and demonstrated by a preponderance of evidence that Grievant stole the money. The "term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." Graley v. W. Va. Parkways Economic Dev. and Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991) (citing Buskirk, supra).

Clearly, the theft of the money entrusted to an employee demonstrates "a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." This would seem to be especially true when the funds are those of a state and are needed for the conducting of the state's business. Respondent

has met its burden of proof and demonstrated Grievant took sixteen dollars, and it was not unreasonable for Respondent to also believe Grievant took all, or part, of the other approximately $260.00 that was missing.

III. Mitigation/Severity of Penalty The argument that Grievant's termination is excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

"When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997). Mitigation of a penalty is considered on a case by case basis. Conner v. Barbour County Bd. of Educ., Docket No. 95-01-031 (Sept. 29, 1995); McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. Pingley v. Div. of Corrections, Docket No. 95-CORR-252 (July 23, 1996). This Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when 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'sassessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute her judgement for that of the employer. Tickett v. Cabell County Bd. of Educ.,

Docket No. 97-06-233 (Mar. 12, 1998); Huffstutler v. Cabell County Bd. of Educ., Docket No. 97-06-150 (Oct. 31, 1997).

In assessing the above-cited factors, I find the employer has substantial discretion to determine a penalty, and the undersigned Administrative Law Judge cannot substitute her judgement for that of Respondent. Although reasonable people might differ over whether termination was an unduly harsh penalty for the offenses proven, the theft of sixteen dollars, the undersigned Administrative Law Judge is unable to conclude that the Commission abused its substantial discretion in designating the penalty in question. An employer must have complete trust in the individuals handling its funds. Grievant took the state's money, and this is "misconduct of a substantial nature directly affecting the rights and interest of the public." Oakes, supra.

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

Conclusions of Law

1. Pursuant to W. Va. Code § 29-6A-6, 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. 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 ismore likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993).

2. 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 Section 12.02 and 03, Administrative Rules, W. Va. Div. of Personnel (June 1, 1995).

3. "The term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of

standards of behavior which the employer has a right to expect of its employees." Graley v. W. Va. Parkways Economic Dev. and Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

4. Respondent has met its burden and established Grievant was guilty of gross misconduct - theft.

5. Grievant was terminated for misconduct of a substantial nature directly affecting rights and interests of the public.

6. An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995). See Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

7. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997).

8. "Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when 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 for rehabilitation." Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996).

9. Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute her judgement for that of the employer. Tickett v. Cabell County Bd. of Educ., Docket No. 97- 06-233 (Mar. 12, 1998); Huffstutler v. Cabell County Bd. of Educ., Docket No. 97-06-150 (Oct. 31, 1997).

10. Given the charges proven against Grievant, the penalty is not disproportionate or excessive, nor is the penalty arbitrary and capricious. See Lanehart,supra; Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994); Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991).

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: September 13, 2002

Footnote: 1

The attached letter was Grievant's termination letter dated April 10, 2002.

Footnote: 2

Grievant was represented by Attorney Chris Moffatt, and Respondent was represented by its Attorney, Greg Elam.

Footnote: 3

Although Grievant alleged Respondent had sloppy accounting procedures, Grievant did not clarify exactly what changes should be instituted, except employees should sign for each article they receive. It appeared from the testimony that such a change could be very time consuming. Whether to change procedures is a management decision, and Mr. Kenny, Assistant to the Commissioner, testified no other money or checks had "gone missing" during his tenure. Accordingly, this argument will not be addressed further.

Footnote: 4

No subpoena had been requested by Grievant's attorney for Mr. Elam.

Footnote: 5

Grievant subpoenaed no witnesses for the Level IV hearing. It is noted that Grievant's questioning about the pre-termination meeting was minimal.

Footnote: 6

Grievant testified Ms. Parsons told him not to lock money in his desk because he was often absent and she could not get to it. Ms. Parsons testified this was untrue, she had a key to Grievant's desk, and she could retrieve money and checks when Grievant was absent.

Footnote: 7

Grievant stated he did not receive this memo, but it was in his personnel file and Ms. Parsons stated she wrote it and gave it to Grievant.