MICHELLE L. BLANEY,

Grievant,

v. **Docket No. 04-BEP-352**

BUREAU OF EMPLOYMENT PROGRAMS/UNEMPLOYMENT COMPENSATION DIVISION,

Respondent.

DECISION

The grievant, Michelle L. Blaney ("Blaney"), is employed by the respondent Bureau of Employment Programs ("BEP") in the Benefit Payment Control section of the Unemployment Compensation Division. Blaney was suspended for thirty days for various infractions relating to the improper use of her state-owned computer and BEP e-mail account. In her statement of grievance, dated September 21, 2004, Blaney states "I believe this was done in part in retaliation to complaints that I have voiced." Although she does not dispute the chief factual allegations, Blaney takes issue with the severity of the disciplinary suspension and, for relief, asks that the "decision [be] reversed or amended to [a] lesser form of punishment."

While not factually complex, this grievance suffers from some procedural quirks through which it prematurely reached Level IV of the grievance process. Blaney proceeded through Level II below. Before the Level II decision was issued, however, Blaney sent documents to the West Virginia Education and State Employees Grievance Board ("the Grievance Board"). The matter was set for a Level IV hearing upon the mistaken belief that the grievance was being initiated at Level IV. This mistake wasdiscussed at the outset of the Level IV hearing, and the parties were given the option of remanding to Level III or proceeding at Level IV. The parties elected to waive Level III and go forward at Level IV. (See footnote 1)

The Level IV hearing took place on January 27, 2005, in the Charleston offices of the Grievance Board. Blaney represented herself. BEP was represented by Jeffrey G. Blaydes, Esquire. This

grievance matured for decision on March 14, 2005, by which date the Grievance Board had received written, post-hearing submissions from each party. Blaney characterized her submission as a written closing argument, while BEP tendered a proposed decision.

Findings of Fact

After careful review of the entire record, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence or, where so noted, were stipulated by the parties:

1 1. Blaney is employed in the benefit payment control section ("Benefit Payment Control Section") of Cost Center 5106. The Benefit Payment Control Section is charged with recovering benefit overpayments.

2 2. In addition to her state employment, Blaney owns and operates Honeysuckle Ridge Candles, a private, for-profit business engaged in the manufacture and sale of candles and related items. (See footnote 2) Resp.Exh.2, Tab K. 3 3.

Blaney's direct supervisor is the manager of Cost Center 5106.

4 4.

The next level of supervision is vested in Richard Burton, Assistant Director of Unemployment Compensation ("Assistant Director Burton").

The Audit

5 5.

Allegations of misuse of e-mail and other computer-related abuses within the Benefit Payment Control Center came to light during an investigation triggered by a complaint from Blaney about a coworker.

6 6. As a result of the allegations regarding computer and e-mail abuse, Assistant Director Burton asked for an audit of computer use by all seven employees in the Benefit Payment Control Section, including the manager.

7 7. The audit, which was performed by William L. Faber, Jr., ("Mr. Faber") from Information Services and Communications ("IS&C"), covered the period from June 8, 2004, through June 18, 2004. This time period was selected by Mr. Faber.

8 8. Each BEP computer has a unique IP address that identifies its location and the employee to whom it is assigned.

9 9. With respect to Internet use, a list of all of the websites visited by each employee was compiled by Mr. Faber during the audit. The list of sites visited by Blaney consisted of 38 pages. Resp.Exh.2, Tab D ("Detail of Destinations by User"). Based upon his experience in conducting such audits, Mr. Faber described this as heavy usage.

10 10. In the lists of web sites visited by audited employees, a URL that did not begin with "www" was probably a pop-up, over which the employee had no control, whereas a URL that began with "www" would most likely have been a site that the audited employee accessed on purpose. 11 11. In performing an audit of e-mail use, Mr. Faber downloaded all of the e-mails that were remaining in each audited employee's state-issued e-mail account during the period of the audit.

The Matrix

12 12. Assistant Director Burton reviewed four boxes of material that had been downloaded during the computer-use audit, identified various types of computer-use violations, and created a matrix by assigning point values to each type of violation.

13 13. In assigning points on the discipline matrix, Assistant Director Burton relied upon Administrative Directive 4100.10 (the E-mail Acceptable Use and the Internet Acceptable Use sections of the Computer and Internet Security and Usage Policy), Administrative Directive 4100.14 (BEP Information Technology Resources Acceptable Use Policy), Administrative Directive 4100.20 (Use of BEP Facilities, Equipment and Supplies), and Administrative Directive 6400.01 (Conduct). Resp.Exh.2, Tabs A and B. At the time she was hired, Blaney executed acknowledgments that she had read BEP's Administrative Directives relating to computer, Internet, and e-mail use. Resp.Exh.2, Tab E.

14 14. Administrative Directive 4100.10, which is titled "Computer and Internet Security and Usage Policy," (See footnote 3) includes, in part, the following directives and limitations on the use of BEP e-mail accounts:

> Please keep private e-mail reception to a minimum, and use your home account or a web-based account for private, non-agency correspondence. . . . Using Bureau e-mail to intimidate or harass others is prohibited. Using Bureau e-mail to send obscene, bigoted or abusive language or images(cartoons, photos, art, etc.) is also prohibited. . . . Bureau accounts are also not to be used for personal gain or profit-making purposes.

15 15. The Computer and Internet Security and Usage Policy (Administrative Directive 4100.10) also states that Internet use “is limited to work purposes only.” It cautions that BEP can and will track Internet use and, should misuse be discovered, disciplinary action or dismissal could result.

16 16. Administrative Directive 4100.14, which is titled “BEP Information Technology Resources Acceptable Use Policy,” contains similar prohibitions on the use of BEP's information technology for, in part, the following activities:

16.a a.
To “[d]istribute offensive or harassing statements, disparage others based on race, national origin, sex, sexual orientation, age, disability, or political or religious beliefs,” or

16.b b.
To “[d]istribute or solicit sexually oriented messages or images,” or

16.c c.
For “[c]ommercial purposes, product advertisements, or 'for profit' personal activity,” or

16.d d.
For “[v]iewing, transmitting, retrieving, saving, or printing any electronic files, whether visual or textual, which may be deemed as sexually explicit.

17 17. Administrative Directive 4100.20, which is titled “Use of BEP Facilities, Equipment and Supplies,” reiterates “[t]he basic principle . . . that those in public service **should use their positions for the public benefit and not for their private gain or the private gain of another**.” In other words, the directive provides that “public employees are prohibited from using state facilities, equipment and supplies for personal gain.”

18 18. Administrative Directive 6400.01, which addresses employee conduct, sets forth the expectation that employees will “be courteous to their follow [sic] workers[.]” Inaddition, this Directive includes a prohibition on, among other things, “[m]aking disrespectful and degrading comments to or about others.”

19 19. Assistant Director Burton assigned higher point values to violations that related to types of conduct that had been the subject of training by BEP, such as sexual harassment and racial discrimination.

20 20. An employee only received points for initiating or forwarding offending e-mail, not receiving it. This was under the theory that an employee should not be held accountable for something sent by another person, over which the employee had no control.

21 21. Based on the address lines of some of the e-mails, the audit also extended to four employees who were not under Assistant Director Burton's supervision.

22 22. For each type of violation, points were only counted once, no matter how many times that particular type of violation was repeated.

23 23. Assistant Director Burton identified the following types of violations and assigned each a point value, as set forth below:

Excessive internet [use]

5 points

Conducting personal business

10 points

[Conducting] financial transactions

5 points

Sexually explicit [material]

10 points

Improper jokes

5 points

Male [or female] bashing

5 points

Racially explicit [material]

10 points

Resp.Exh.1. 24 24. The points received by each of the audited employees, and the infractions

for which the points were assigned, are set forth in Respondent's Exhibit 1. The names of the employees have been redacted so that they are only identified by a Book Number.

25 25. Assistant Director Burton determined what type of disciplinary action he would recommend based upon the number of points an employee received, as described below:

Verbal reprimand

5-10 points

Written reprimand

15-25 points

Suspension

30-45 points

Dismissal

50 or more points

Resp.Exh.1.

26 26. Ten of the twelve audited employees received some level of discipline.

Blaney's Results from the Audit

27 27. During the nine working days included in the audit period, Blaney worked 7.5 hours each day except for June 11, 2004. On that date, she only worked 4 hours.

28 28.

The parties stipulated “that Ms. Blaney received and forwarded the e-mails

that are attached in the exhibit notebook at Tabs F, G, H, I, J, and L on a state computer during work hours, and that these activities violate Bureau of Employment Program policies that are cited in the suspension letter relating to computer use and use of state facilities.”

29 29. Blaney used her state-issued e-mail account for private, non-agency correspondence. Resp.Exh.2, Tab L. 30 30. The “jokes” and images forwarded by Blaney from her state-issued e-mail account included materials that were, variously, racially offensive, sexually offensive, obscene, sexually explicit, and demeaning to men. Resp.Exh.2 at Tabs G, H, I, and J.

31 31. The parties also stipulated that Blaney “has received and sent e-mails relating to the operation of Honeysuckle Ridge Candles, a business owned and operated by Ms. Blaney, and that

these e-mails were sent and received on a state e-mail address for the purpose of furthering her private business enterprise, Honeysuckle Ridge Candles."

32 32. Blaney's use of her state computer and e-mail address in activities in furtherance of her for-profit business, Honeysuckle Ridge Candles, is illustrated by Blaney's exchange of e-mails with "Donna." Their e-mail correspondence related to setting up a website for Honeysuckle Ridge Candles. Resp.Exh.2, Tab F.

33 33. Another example of Blaney's actions, and at least one financial transaction on behalf of Honeysuckle Ridge Candles, is Blaney's receipt of an e-mailed notice, dated May 12, 2004, regarding the upcoming date for automatically renewing the domain name of "HONEYSUCKLERIDGECANDLES.COM." This notice was sent to Blaney's state- issued e-mail address. This was not an isolated occurrence. Blaney engaged in on-going communication regarding the domain name for Honeysuckle Ridge Candles using her state-issued e-mail address, as reflected by the fact that the e-mail regarding automatic renewal of the domain name 1) was sent to her BEP e-mail address, 2) reminded Blaney that she needed to have current credit card information on file, and 3) asked her to review and update the credit card information that was on file for her.

34 34. Blaney browsed the Internet to find reading material or to research non-work- related questions that she found interesting. The example provided by Blaney was thatshe used the Internet to investigate the source of a rude gesture involving the middle finger.

35 35. Tab D in Respondent's Exhibit 2 contains a list of Internet sites visited by Blaney during work hours on days Blaney was at work in the audit period. The contents of Tab D reflect that Blaney used the Internet, as well as her state e-mail account, in furtherance of her for-profit, commercial business, Honeysuckle Ridge Candles, because a number of the Internet sites she visited related to candle-making and supplies for candle- making. For instance, "www.howtomakegelcandles.com" appears on page 34 of Tab D in Respondent's Exhibit 2. Page 37 of that same exhibit contains a large number of candle- related sites, such as "www.candlesupply.com" and "www.candlewic.com," that were visited by Blaney.

36 36. None of the sites that were visited during times that would normally be breaks or lunch time were considered by Assistant Director Burton for purposes of determining if an employee had engaged in excessive Internet use.

37 37. The audit revealed that Blaney visited over 500 non-work-related Internet sites on her

state-owned computer, which was more than any of the other audited employees during the time period in question.

38 38. Blaney, who is identified as Book Number 10 in Respondent's Exhibit 1, received a total of 50 points, which were accumulated as follows:

Internet use (non-work related sites)

5 points

Conducting personal business

10 points

[Conducting] financial transactions

5 points

Sexually explicit e-mails

10 points Inappropriate jokes in e-mails
5 points

Male bashing in e-mails

5 points

Racially explicit [material] in e-mails

10 points

Resp.Exh.1. This was the highest number of points received by any of the audited employees.

39 39. In addition to receiving the most points, Blaney had the most types of violations.

30-Day Suspension

40 40. In a memorandum to Daniel Light, Director of the Unemployment Compensation Division ("Director Light"), dated August 25, 2004, Assistant Director Burton summarized the results of the computer-use audit, as they related to Blaney. Resp.Exh.2, Tab A. His initial recommendation, as contained in that memorandum, was that Blaney's employment be terminated.

41 41. Upon consultation with Director Light, Assistant Director Burton amended his recommendation. In a subsequent memorandum, also dated August 25, 2004, Assistant Director Burton recommended that "Ms. Blaney be terminated or serve a thirty day suspension." Resp.Exh.2, Tab A.

42 42. The decision to reduce the recommended discipline was based, in part, upon a comparison of Blaney's misconduct with the misconduct of another employee who had previously been dismissed for reasons that included, among other things, violations of BEP's policies regulating computer use by its employees.

43 43. By correspondence, dated August 31, 2004, Director Light provided Blaney notice of the conduct attributed to her and identified the administrative policies she wasdeemed to have violated through that conduct. She was given one week in which “to explain or refute the allegations.” Resp.Exh.2, Tab A.

Blaney's Response

44 44. Blaney submitted a three-page document entitled “Responses to listing of alleged actions committed by me during June 8, 2004 to June 18, 2004.” (See footnote 4) Resp.Exh.2, Tab A. It is summarized, as follows:

44.`.a a.
Internet use - She did not dispute the extent of her Internet use but, instead, argued that she would often scan the Internet to find something to read while doing tasks such as stuffing envelopes. She also postulated that some of the Internet use reflected in the computer audit might have occurred when she took lunch or a break at odd times.

44.`.b b.
Operating a personal business - Blaney asserted that she did not operate a personal business during work hours. She seems to believe that she cannot be held accountable on this point if she did not engage in selling her products at the office.

44.`.c c.
Utilized BEP resources to operate her personal business - Her comments on this issue relate to the fact that she does not use BEP resources to print the labels, tags, or color brochures she uses in connection with her business, Honeysuckle Ridge Candles.

44.`.d d.
Made financial transactions utilizing BEP resources - In this context, Blaney discusses the use of a service called

"Pay-pal," which apparently facilitates paying for purchases over the Internet. Although she asserted that she has never made a sale through Pay-pal, Blaney acknowledged that she had set up and used her Pay-pal account to pay for purchases she made over the Internet. In defense of her actions in this regard, Blaney explained that she did not see any difference between "paying for an item on line or writing a check andtaking it to the mailbox outside." She opines that "paying on line probably takes less time."

44.`.e e.

Ordered business supplies utilizing BEP resources - Blaney acknowledged that she has ordered such things as personal checks, gifts and clothing while at work. She also acknowledged that she has ordered "some bears while at work." (See footnote 5) Her defense of this is that she did not do it in excess and tried to limit these activities to times outside of her normal work hours, or during breaks.

44.`.f f.

E-mailed sexually explicit material and e-mailed jokes containing improper material - Again, Blaney concedes the conduct but asserts that she only forwarded such material to people who had previously sent her e-mails of the same ilk. She also asserts that the e-mails she forwarded had been sent to her by coworkers.

44.`.g g.

E-mailed material containing male bashing - Blaney's response to this is that she received and forwarded e-mails containing jokes about a broad spectrum of people but considered that this was acceptable because she "know[s] the difference between a joke and someone being mean spirited."

44.`.h h.

E-mailed racially explicit photographs - Again, Blaney asserts that she only forwarded such e-mails to coworkers who had sent her similar materials in the past. All of the photographs at issue show black people. Nonetheless, Blaney states, "I have not singled out any one or two races. I find things can be humorous about anyone of any race." In an amazing display of condescension and lack of sensitivity, Blaney tried to characterize the photographs in question as complimentary to blacks (demonstrating creativity, talent,

> and a sense of humor on the part of blacks generally) as opposed to demeaning. She also added that if her coworkers saw or heard something on her computer that offended them, they “were watching” Blaney “a little too closely” and, she suggested, “need[ed] to find other ways to entertain themselves.

44.`.i i.

> In conclusion, Blaney stated, “I understand that I have done things that are against the rules and I am sorry if anyone was hurt by this. I will make it a point to watch what I say so no one will be upset or feel as if I am being critical to them. I work very hard at my job and I believe I do a very good job.”

Resp.Exh.2, Tab A.

45 45. There has been no suggestion that Blaney does not perform her job in a satisfactory manner.

46 46. Blaney testified, without contradiction, that, as a general rule, she did not sell her Honeysuckle Ridge Candles products to fellow employees.

47 47. The audit revealed the use of a BEP computer by one employee to make a purchase of some item from e-Bay for that employee's personal use, which Blaney has attempted to equate to her actions on behalf of Honeysuckle Ridge Candles.

48 48. An employee who was identified as Book Number 11 received the second highest number of points, but only had four types of violations. This employee was not within Assistant Director Burton's chain of command. (See footnote 6)

49 49. The appropriate supervisor recommended that the employee identified as Book Number 11 receive a two-week suspension. For reasons that were not clear, this other employee (Book Number 11) had not yet begun her suspension as of the time of the Level IV hearing in this grievance.

50 50. Blaney received ten points for forwarding a racially explicit e-mail that she had received from a fellow employee, who was also under Assistant Director Burton's supervision. Resp.Exh.2, Tab I (“5 signs that u live in 'da hood'”). That same employee had forwarded Blaney an e-mail containing one of several jokes that Assistant Director Burton considered “inappropriate.” Resp.Exh.2,Tab H (“Girls Night Out”). 51 51. No employee under Assistant Director Burton's supervision, other than Blaney, received points for both an inappropriate joke and racially-explicit

material. Because the same employee forwarded both the inappropriate “Girls Night Out” and the racially explicit e-mail to Blaney, at least one other employee under Assistant Director Burton's supervision should have received points in both categories.

52 52. Although Blaney had forwarded several different jokes that fell within the “inappropriate” category, she only forwarded one that was considered racially explicit. 53 53. Removal of ten points for the racially explicit category would leave Blaney with 40 points, which still falls within the range of points for which Assistant Director Burton considered suspension to be an appropriate disciplinary action.

Discussion

In disciplinary matters, the employer bears the burden of proving, by a preponderance of the evidence, the grounds upon which discipline was imposed upon an employee. W. Va. Code § 29-6A-6, *Davis v. Dep't of Motor Vehicles*, Docket No. 89-DMV- 569 (Jan. 20, 1990). “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 & Human Res*., Docket No. 92-HHR-486 (May 17, 1993). In this case, Blaney admitted that she engaged in conduct that violated Bureau of Employment Program policies. This conduct was otherwise established by the material downloaded during the computer audit, in any event.

There is no question that BEP has met its burden of proof, and that Blaney's misconduct provided a predicate for imposing discipline. There are, however, other issues that Blaney raised that need to be addressed.

Discrimination

In her statement of grievance, Blaney asserted that she was suspended, “in part in retaliation” for having voiced complaints. However, based on the evidence presented and the arguments made by Blaney, it does not appear that she was trying to state a claim of reprisal, which is defined as “the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it.” W. Va. Code § 29-6A-2(p). Instead, it appears that Blaney was trying to assert a claim of discrimination. This belief as to the basis for Blaney's grievance is supported by her written post-hearing submission, in which she states

> I would like to show that Mr. Burton purposely singled Ms. Blaney out for excessive, unfair and severe punishment. This disparity of treatment is shown in the inconsistent way Mr. Burton used the Discipline Matrix system. . . . [H]e created the Discipline Matrix to reach his personal goal of suspending/dismissing Ms. Blaney.

Blaney also asserted that she would “show that most of the points on Ms. Blaney's total [on the discipline matrix] were put there intentionally to add points when other employees were given no points.”

Blaney's perception that Assistant Director Burton held ill-will toward her stemmed from the fact that she had complained about the lighting near her work station. The matter was addressed and resolved nearly a year before the computer audit that led to Blaney's suspension. She did not cite any other conflicts or interactions with Assistant Director Burton to support her assertions that he was manipulating the discipline matrix in order to enhance the level of discipline that could be imposed upon her. Not only did Blaney fail to introduce any credible evidence to support this theory, but it flies in the face of the objective manner in which the points were assessed and the discipline imposed. All of the employees in Blaney's unit were audited, including the manager. Ten of twelve audited employees received some level of discipline. The points and discipline imposed on Blaney were based on conduct that was, for the most part, admitted by Blaney.

With one exception, each employee who engaged in the same activities as Blaney received the same points she did. There was, however, an error regarding points for racially explicit material. If 10 points for the racially explicit category were removed, the total attributed to Blaney would be 40 points. This is still 10 points more than any other employee received. As previously noted, a total of 40 points remains within the range of points for which Assistant Director Burton considered suspension to be an appropriate disciplinary measure. Therefore, such remedial action would not alter Blaney's circumstance in any appreciable way.

Blaney has failed to demonstrate that the failure to count the racially explicit e-mail against the employee who forwarded it to her was intentional on the part of Assistant Director Burton. Given the large volume of downloaded material he was required to review, it is not surprising that there was at least one omission. This sole aberration in the way the points were distributed does not provide a strong enough foundation to support Blaney's assertion that Assistant Director Burton was manipulating the data so that he could suspend or dismiss her. Nor does it rise to the level of proving a case of discrimination.

Discrimination is defined as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreedto in writing by the employees.” W. Va. Code § 29-6A-2(d). This same definition is found in the statutes relating to education employees. W. Va. Code § 18-29-2(m). In discussing a discrimination claim raised by an education employee, the Supreme Court of Appeals of West Virginia noted that “[t]he crux of such claims is that the complainant was treated differently than **similarly situated** employees[.]” *Bd. of Educ. v. White*, 605 S.E.2d 814, 818 (W. Va. 2004)(emphasis added).

Blaney tries to argue that she was treated differently than the other audited employees in terms of how points were assigned and in the level of discipline imposed. The point system utilized by Assistant Director Burton undercuts any argument Blaney might make that she was being treated differently. With the exception of the racially explicit material, discussed above, the audited employees received the same points for the same conduct. Blaney's points were based on her computer use and e-mails, as disclosed by the audit. The discipline imposed upon Blaney reflects the fact that she accumulated more points than anyone else in the audit. This is not the type of disparity that supports a claim of discrimination, as it is directly tied to Blaney's own misconduct.

Furthermore, Blaney is actually unique among the audited employees in that she is the only one who owns a registered, commercial business. Although Blaney made assertions that some of her coworkers were also engaged in private, commercial businesses, she did not introduce any evidence to support this assertion. The audit did not reveal any other audited employee who was using a BEP computer or a state-assigned e- mail address to conduct activities in furtherance of a commercial enterprise, such as Blaney did with respect to her business, Honeysuckle Ridge Candles. To the extent that Blaney asserts that there was “[n]o proof of a business being conducted (for personal gain, or not)” she relies upon an overly narrow definition of conducting business. She may not have taken orders for candles on her computer at work, but she clearly engaged in activities that were intended to further the interest of Honeysuckle Ridge Candles. For instance, the notice about renewing the domain name for her business was sent to Blaney at her state-assigned e-mail address. Another example is the correspondence Blaney maintained with the person who was going to create a web page for Honeysuckle Ridge Candles.

Her use of her state-owned computer and state-assigned e-mail to engage in conduct that furthered her commercial undertaking distinguishes Blaney from her coworkers and forecloses any

credible argument she might have made that she was similarly situated to the other audited employees. In light of the fact that Blaney is unable to demonstrate that she is similarly situated to her coworkers with respect to the behavior that led to disciplinary action, she is unable to prove that she has been subjected to discrimination.

Mitigation of Punishment

Blaney argues that her 30-day suspension is too harsh and, in her statement of grievance, asks that it be “reversed or amended to [a] lesser form of punishment.” In her post-hearing submission, Blaney opines that her punishment should be “reduced to a verbal reprimand” and that she should receive “back pay for 30 working days, all leave should be restored and any record of the suspension removed from all files.”

To obtain the extraordinary relief of mitigation of punishment, Blaney bears the burden of proving that her suspension was clearly excessive, reflects an abuse ofdiscretion on the part of the agency, or that it is inherently disproportionate to Blaney's misconduct. *Yerkovich v. Dep't of Health & Human Res./John Manchin Sr. Health Care Center*, Docket No. 05-HHR-049 (May 5, 2005)(citing *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995)), *Brown v. Dep't of Health & Human Res*., Docket No. 04-HHR-216 (Oct. 15, 2004). This is a difficult burden in light of the fact that an employer is vested with substantial discretion in the area of discipline. *Hodges v. Monroe County Bd. of Educ*., Docket No. 04-31-233 (Sept. 30, 2004).

Blaney's arguments and explanations as to why her misconduct does not merit a 30-day suspension do not do her credit. She takes the view that people should be able to take a joke and, in this vein, does not seem to recognize that her actions in forwarding offensive e-mails were inappropriate. Regardless of her personal opinion on these matters, she cannot dispute that her actions in distributing offensive, bigoted e-mails violated the express provisions of BEP policies.

With respect to her excessive use of the Internet, Blaney practically blames BEP for making her perform relatively mindless tasks, such as stuffing envelopes. She asserts that “[f]olding, stuffing and taping envelops [sic] is a very boring and mindless task which I have requested, for 3 years, be sent to the mailroom to be run through the folding/stuffing machine. This practice was started about two weeks ago, which has saved hours of man time.” Resp.Exh.2, Tab A.

Nonetheless, Blaney admits that, while performing such tasks, she surfed the Internet for something interesting to read “instead of staring at the side of my co-workers heads.” Resp.Exh.2,

Tab A. Regardless of whether she thought the mailroom should havebeen performing such tasks in her stead, Blaney's excessive use of the Internet for non- work-related purposes violated BEP policy.

She also argues that no e-mails of “sexually explicit material, inappropriate nature, male bashing or racially explicit material” were found on her computer. This is hairsplitting at its finest. While Blaney's statement may be true, it is of no moment. Blaney did not receive points for having such e-mails on her computer. Nor did she receive points for having received such e-mails from someone else. The points were assigned on the basis that Blaney had distributed such e-mails in contravention of BEP policies.

The record is replete with examples of Blaney's use of her BEP computer and state- issued e-mail address to further her business, Honeysuckle Ridge Candles. She engaged in correspondence relating to developing a web page for her company, she ordered teddy bears for her company, she exchanged e-mails and credit card information in order to renew a domain name for her company. In light of such evidence, Blaney's assertion that there was “[n]o proof of a business being conducted (for personal gain, or not)” cannot be supported.

Blaney also argues that there was “[n]o proof of a financial transaction-taking [sic] place at the office.” As previously noted, she was engaging in financial transactions in order to retain her domain name. She admitted purchasing teddy bears for use by Honeysuckle Ridge Candles. She also admitted using a Pay-pal account to pay for purchases she made over the Internet. Blaney's assertion that using Pay-pal “probably takes less time” than “writing a check and taking it to the mailbox outside,” misses the point. Contrary to BEP policy, she engaged in financial transactions using her state computer and e-mail address. One of Blaney's arguments is that she was not the only employee who conducted personal business on the office computer. She points to the fact that another employee ordered at least one item over the Internet for that employee's personal use. The difference is that Blaney used her state-owned computer and her state-issued e-mail address in furtherance of her commercial enterprise, Honeysuckle Ridge Candles. There is a significant, qualitative difference between the commercially-related activities of Blaney and the action of her coworker in ordering an item for personal use. As previously discussed, while she may not have been selling her products from her state computer or her state-provided e-mail address, Blaney was clearly engaging in activities that were intended to advance the interests of her commercial business, Honeysuckle Ridge Candles.

The Grievance Board has previously recognized that "[m]itigation of the penalty may be in order where some grounds upon which a disciplinary action was based are not proven, or where other factors show that the penalty is clearly disproportionate to the misconduct." *Woods v. Dep't of Corrections*, Docket No. 97-CORR-491 (Jan. 14, 1998)(citing *Hercules v. W. Va. Div. of Highways*, Docket No. 97- DOH-006 (Apr. 17, 1997)). As reflected in the foregoing discussion and the findings of fact, the grounds upon which BEP relied in imposing disciplinary action on Blaney were proven.

Blaney has not established that the resulting discipline was excessive, constituted an abuse of BEP's discretion with regard to disciplinary matters, or is inherently disproportionate to her misconduct. The disciplinary matrix and the use of point values for the various types of misconduct bring objective criteria to the process and ensure that all of the audited employees receive the same treatment for similar misconduct. This is an important consideration because "[m]itigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity." *Pingley v. Div. of Corrections*, Docket No. 95-CORR-252 (July 23, 1996). Where, as here, the employer's actions have been fair and objective, mitigation is not warranted.

Blaney had the most types of violations and the highest number of points for her misconduct. The resulting suspension cannot be considered excessive when the level of Blaney's misconduct is compared to that of the other audited employees.

BEP's use of the objective point system and discipline matrix illustrates the fact that BEP did not abuse its substantial discretion in imposing the 30-day suspension on Blaney. This conclusion is further supported by the fact that Assistant Director Burton retrenched from his original intention to recommend that Blaney be dismissed. Having considered the disciplinary action taken against at least one other BEP employee (See footnote 7) and, thereafter, reducing the recommendation for Blaney's discipline, demonstrates that BEP exercised its discretion in a fair and balanced fashion.

Blaney has failed to establish an inherent disparity between the level of her misconduct and her disciplinary suspension. She violated published policies that had been provided to BEP employees. In addition, the violations to which Assistant Director Burton assigned the highest point values were areas in which BEP had provided training. Despite published policies and sensitivity training, Blaney's actions impinged upon all of these areas. Given the volume of her transgressions, and the fact that she was using stateequipment and facilities in furtherance of her business, Honeysuckle Ridge

Candles, it cannot be said that the 30-day suspension was disproportionate.

Conclusions of Law

1 1.

In disciplinary matters, the employer bears the burden of proving, by a preponderance of the evidence, the grounds upon which discipline was imposed upon an employee. W. Va. Code § 29-6A-6, *Davis v. Dep't of Motor Vehicles*, Docket No. 89-DMV- 569 (Jan. 20, 1990).

2 2. "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 & Human Res*., Docket No. 92-HHR-486 (May 17, 1993).

3 3. At a minimum, Blaney violated the provisions of BEP's Computer and Internet Security and Usage Policy (Administrative Directive 4100.10) by forwarding obscene e- mails. (Resp.Exh.2, Tab G), by forwarding e-mails containing bigoted materials. (Resp.Exh.2, Tab I), by using her BEP e-mail account in connection with Honeysuckle Ridge Candles, a business she operated for personal gain and profit. (Resp.Exh.2, Tab F), by using the Internet for non-work-related purposes (Resp.Exh.2, Tab D).

4 4. Blaney violated the provisions of the BEP Information Technology Resources Acceptable Use Policy (Administrative Directive 4100.20) by using the BEP computer for "[c]ommercial purposes" and "'for profit' personal activity" in connection with Honeysuckle Ridge Candles.

5 5. By distributing e-mails that were variously disrespectful and degrading to men, women, and blacks, were sexually explicit, or otherwise inappropriate (Resp.Exh.2at Tabs G, H, I, and J), Blaney violated the BEP Information Technology Resources Acceptable Use Policy, as well as the provisions of BEP's Administrative Directive 6400.01, which sets forth BEP's expectations with regard to an employee's conduct and treatment of others.

6 6. Blaney's activities on behalf of her business violated BEP's policy on "Use of BEP Facilities, Equipment and Supplies" and the underlying principle that "public employees are prohibited from using state facilities, equipment and supplies for personal gain."

7 7. BEP met its burden of proving the grounds upon which Blaney's 30-day suspension was predicated.

8 8. To the extent that Blaney attempted to make a claim that she was the victim of discrimination, she has failed to establish that she was treated differently than similarly situated

employees[.]" *Bd. of Educ. v. White*, 605 S.E.2d 814, 818 (W. Va. 2004). Accordingly, this claim fails.

9 9. Blaney, who bore the burden of proof on the issue of mitigation, failed to establish that her suspension was clearly excessive, resulted from abuse of discretion on the part of the agency, or was inherently disproportionate to her misconduct. *Yerkovich v. Dep't of Health & Human Res./John Manchin Sr. Health Care Center*, Docket No. 05- HHR-049 (May 5, 2005)(citing *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01- 394 (Jan. 31, 1995)), *Brown v. Dep't of Health & Human Res*., Docket No. 04-HHR-216 (Oct. 15, 2004). 10 10. There is no basis upon which to grant the extraordinary relief of mitigation of the discipline imposed upon Blaney in this case. *Overbee v. Dep't of Health & Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). Blaney's cavalier attitude about the misconduct in which she engaged does not lend support to her request for mitigation of her disciplinary suspension. 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 West Virginia Code section 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:

July 26, 2005

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JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

In so doing, BEP abandoned its previously-filed motion to dismiss.

Footnote: 2

BEP introduced exhibits at Level IV in the form of an exhibit notebook with tabbed sections identified as A through H.

The notebook, which was introduced in toto as "Respondent's Exhibit 2," shall be cited as Resp.Exh.2. References to a specific section of the notebook shall be identified herein as "Resp.Exh.2, Tab __."

Footnote: 3

The copy of this policy that was admitted without objection reflects that it was revised in July 2004, which was after the computer audit took place but before the disciplinary suspension was imposed on Blaney.

Footnote: 4

Blaney argued that certain of her conduct took place during breaks or at lunchtime. This argument is not addressed separately because it does not appear that activities conducted on her own time were of concern to BEP except to the extent that such activities were otherwise violative of BEP policies relating to proper conduct with respect to other employees or relating to limitations on the use of BEP computers and e-mail addresses.

Footnote: 5

Blaney's candle business includes selling teddy bears dipped in scented wax.

Footnote: 6

Certain employees outside of the Benefit Payment Control Center were also subjected to discipline as the result of the audit. This was because, during the course of the audit, it was discovered that these employees had been the sources of some of the offending e-mails received in the Benefit Payment Control Center.

Footnote: 7

Gorman v. Bureau of Employment Programs, Docket No. 03-BEP-206 (July 16, 2004).