CRYSTAL HALL,

Grievant,

v. Docket No. 05-DJS-297

DIVISION OF JUVENILE SERVICES,

Respondent.

D E C I S I O N

On August 18, 2005, Crystal Hall ("Grievant"), employed by the Division of Juvenile Services ("DJS") at the Industrial Home for Youth ("IHY"), filed a grievance directly to level four following her demotion from Assistant Superintendent to Case Manager. Grievant asserts that the demotion was without sufficient cause, and that she was not afforded due process prior to the disciplinary action being imposed. Grievant requests reinstatement with back pay. An evidentiary hearing was conducted at IHY on November 14 and 15, 2005. Grievant was represented by Kelly J. Kimble, Esq. of Reed and Kimble, and DJS was represented by Assistant Attorney General Steven R. Compton. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before February 1, 2006.

The following facts have been derived from a preponderance of the evidence admitted into the level four record.

Findings of Fact

1. Grievant has been employed by DJS for approximately ten years, all at the IHY. Grievant was initially hired as a Correctional Counselor 2, and progressed to CaseManager, then to Unit Manager, and in May 2004, to Assistant Superintendent of Treatment Programs.

2. The position of Assistant Superintendent of Treatment Programs is assigned to the Division of Personnel classification of Corrections Program Manager I, pay grade 16, with an annual salary of $36,000.00.

3. After being promoted to Assistant Superintendent, Grievant continued to act as Unit

Manager for the two departments she had previously managed, the Female Unit and the Diagnostic Unit, until those positions were filled on November 1, 2004, and April 1, 2005, respectively.

4. In June 2005, DJS central office administrators received an anonymous letter stating, "On June 1, 2005, afternoon, Rec. Assistant Loretta Cress walked into the gym and caught Assistant Superintendent Crystal Hall with her hand in Unit Manager Scott Smallridge's pants. This is not her first time nor second. It has been said that Crystal takes care of her favorites. I strongly suggest you look into the salary Scott received and compare it to the other unit managers."

5. Acting DJS Director Cynthia Largent-Hill contacted IHY Superintendent Matthew Biggie by telephone on June 7, 2005, and after disclosing the information she had received, requested that he investigate the matter.

6. After discussing the incident with Grievant and Mr. Smallridge, Superintendent Biggie was satisfied that nothing improper had occurred; however, Director Largent-Hill insisted that a letter of reprimand be placed in Grievant's file.

7. Mr. Smallridge requested that Ms. Cress, his fiancee, contact Director Largent-Hill to resolve the matter. Ms. Cress complied, and spoke with Ms. Largent-Hill bytelephone on the afternoon of June 7, 2005. She reported having seen what she considered to be offensive contact, specifically Grievant's hand on Mr. Smallridge's buttocks. She did not report seeing Grievant's hand in his pants, as alleged in the anonymous letter. (See footnote 1)

8. Because Superintendent Biggie did not believe that the incident warranted a letter of reprimand, he placed a letter of counseling in Grievant's personnel file, and forwarded a copy to the central office.

9. Superintendent Biggie's letter was subsequently removed from Grievant's file, and on June 23, 2005, DJS Equal Employment Opportunity ("EEO") Coordinator Brenda Hoylman requested the State EEO office conduct an investigation of the allegations made in the anonymous letter.

10. The EEO investigation was completed and forwarded to Director Largent-Hill under cover memorandum dated July 29, 2005. The investigators made four findings: 1) that Grievant touched Smallridge on the back of his upper thigh and low rear; 2) Smallridge

was not offended by the behavior; 3) touching a subordinate in that manner, intentionally or not, is not appropriate; and 4) Grievant and others make inappropriate comments of a sexual nature occasionally during department head/unit manager meetings. The investigators recommended that all administrative and treatment staff receive EEO/Sexual Harassment training, and that IHY management take appropriate action to ensure that Grievant does not touch coworkers inappropriately. 11. As a result of complaints and incidents concerning IHY administration, DJS conducted an internal investigation between July 21 and August 4, 2005, in which employees were asked what they perceived the positive and negative aspects of IHY to be, and how the leadership roles were functioning within the facility.

12. Many of the approximately fifty individuals interviewed complained about Grievant's inaccessibility, her failure to adhere to her regular work schedule, her preferential treatment of a group of favorites (clique), and her unprofessional demeanor.

13. In early August, Ms. Largent-Hill requested that Grievant meet with her on August 8, 2005. Grievant declined due to the unavailability of her counsel.

14. By letter dated August 8, 2005, Director Largent-Hill notified Grievant that she was to be demoted, effective August 16, 2006, to Case Manager. The demotion entailed a reduction from pay grade 16 to pay grade 12.

15. Ms. Largent-Hill explained the action in her letter as follows:

Some of [the] issues that have been related to me include, but are not limited to, favoritism, cliques, disparate treatment, lateness, inaccessibility, lack of leadership and inappropriate comments to staff.

A preliminary audit/review of your time cards for the period of January 1, 2005 - present showed unacceptable and inaccurate time keeping. As you are aware, the time clock is required to be used for all employees to record their time. Although it may be permissible to hand write time due to unavoidable situations, a substantial portion of your time was hand written on your time cards. When your time cards were compared to the gate house records, there were substantial inconsistencies which, in many instances, showed over reporting of one or more hours. Many employees of IHY commented on the fact that you come and go as you please. As a supervisor, your are to lead by example and this is clearly an example that DJS can not and will not tolerate.

Moreover, I have received the final report from the State EEO Office concerning the complaint filed against you. Their findings support that you did touch Mr. Scott Smallridge "on the back of his upper thigh and low rear." Although Mr. Smallridge was not offended by this behavior, it was witnessed by another employee. EEO found that touching a subordinate in that manner, intentionally or not, is not appropriate. Additionally, their findings confirmed that you and others on your staff "make inappropriate comments of a sexual nature occasionally during department head/unit manager meetings." To allow, much less participate, in this type of conduct demonstrates a lack of leadership.

Your behavior serves as a role model to the residents. Your unacceptable behavior causes me to conclude that you are ineffectual in creating a positive role model for these residents to follow. I conclude that your failure to exercise supervisory skills and to follow policy make it difficult, if not impossible, to enforce compliance with policy by your staff. The examples clearly demonstrate your inadequate leadership, supervisory performance and judgment, and warrant this personnel action.

I believe there exists sufficient evidence for me to conclude that you did not meet a reasonable standard of conduct...and that your conduct is unbecoming to a state employee.

You may respond to the matters of this letter, either in writing or in person provided you do so within eight (8) calendar days of the date of this letter.

16. Mr. Compton traveled to IHY to personally deliver the letter to Grievant, and to answer any questions she might have. Although scheduled to work, Grievant was not at IHY, and the letter was left with the Assistant Superintendent of Security.

17. By memorandum dated March 25, 2004, Superintendent Biggie notified all staff they were not to clock in prior to three minutes before or after their scheduled shift without their supervisor's prior approval. Only emergency situations involving the residents constituted an exception to the rule, and violators were subject to discipline.

18. Grievant frequently did not clock in upon her arrival at IHY. Many times this failure was due to Superintendent Biggie calling her directly into his office before she had reached the time clock. Sue Vogt, Grievant's secretary, manually completed Grievant's time cards.

When Grievant was unsure of her time of arrival or departure, Ms. Vogt woulduse the gatehouse records. This procedure did not always accurately reflect Grievant's time at IHY.

19. Assistant Superintendent is a salaried position, and an employee holding that classification receives a set compensation regardless of the hours worked. However, Grievant was the only one of four Assistant Superintendents who did not regularly clock in and out.

20. Superintendent Biggie allowed Grievant to exercise considerable scheduling flexibility to accommodate her childcare arrangements. This flexibility was extended to other employees, but not to the same degree as Grievant.

21. Grievant also adjusted her work schedule due to medical problems she was suffering. Since being diagnosed with lupus, Grievant periodically had difficulty with mobility, and would report to IHY later than her scheduled time. Grievant either worked late, or used leave in these instances.

22. For a significant period of time Grievant held the position of Assistant Superintendent, she also served as Unit Manager for two units. The record is not clear why the two Unit Manager positions were not filled more promptly, but many employees believe that Grievant was holding the Diagnostic Unit position until Scott Smallridge became qualified. He was, in fact, subsequently appointed to that position.

23. Grievant did not have the authority to promote or grant salary increases, but could make recommendations to Superintendent Biggie.

24. Because of her responsibilities for three positions, Grievant had a considerable number of individuals who wanted to discuss matters with her, and she wasoften not available. Other employees, referred to as her favorites, or part of her clique, had no difficulty gaining access to her.

25. Grievant was frequently late for meetings.

26. Laughter was often heard coming from her office.

27. Sexual banter, ranging from innuendo to more explicit language, was engaged in by IHY employees, including Grievant.

28. Grievant had not previously been disciplined for any of the matters addressed by Director Largent-Hill, and in most instances, had acted with the knowledge and consent of Superintendent Biggie.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *W. Va. Code* § 29-6A-6; *Hoover v. Lewis County Bd. of Educ.*, Docket No. 93-21-427 (Feb. 24, 1994); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which is determined by their opportunity for knowledge, information possessed, and manner of testifying. *See Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). *Black's Law Dictionary*, 5th ed. at 1064. In other words, "[t]he 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 Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.; See Adkins v. Smith*, 142 W. Va. 772, 98 S.E.2d 712 (1957); *Burchell v. Bd. of Trustees/Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

DJS asserts that because Grievant's actions had caused her to lose the trust and respect of her subordinates, her demotion was reasonable and justified for the reasons cited by Director Largent-Hill. Grievant argues that the reasons for demotion were not supported by the evidence, and even if proven, the demotion was excessive, and in violation of DJS's progressive discipline policy. Grievant further asserts that she was denied due process prior to the demotion. The various charges will be reviewed separately.

Pre-deprivation procedural due process

The first issue to address is Grievant's argument that she was given insufficient pre-deprivation due process. Grievant asserts that DJS failed to afford her notice and a conference prior to imposition of the discipline, as is required by DJS Policy 4.01 “Standards of Conduct.” Section 3.01B.2 of that policy states in pertinent part:

Disciplinary action refers to a formal corrective measure based on a violation of established Standards of Conduct which includes discussion of the offense, an explanation of the evidence, and issuance of a written notice.

The undersigned also takes administrative notice that Section 4.03, "Notice To Employee of Disciplinary Demotion Or Transfer In Lieu Of Suspension Or Removal Action," states in paragraph A:Prior to any demotion or transfer in lieu of removal, suspension, or removal actions, an employee shall be given written notice of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.

Thus, the DJS policy provides employees with pre-deprivation due process consistent with that required by federal and state law. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494, (1985); *Bd. of Educ. of the County of Mercer v. Wirt,* 453 S.E.2d 402 (W. Va. 1994).

DJS argues that Director Largent-Hill made an attempt to meet with Grievant, who refused to appear at the suggested time and place without presence of counsel. DJS asserts that Grievant was not entitled to have an attorney present for the meeting, and that her refusal to meet with Director Largent-Hill constituted a waiver of the right to a pre- deprivation conference. DJS further notes that Grievant was notified in the August 8, 2005, letter that she had the opportunity to respond in writing or to request a meeting, and did not do so.

Because Director Largent-Hill made a good faith effort to meet with Grievant, DJS was not required to delay the disciplinary action. Subsequently, Grievant was informed in writing of the charges against her, and identified the causes for the demotion. Again, Grievant was invited to respond within a given time frame, but failed to do so. Thus it appears Grievant twice declined the opportunity to avail herself of a conference to respond to the charges. Further, Grievant's interests are fully protected by this grievance procedure which allowed her to proceed directly to the final administrative level. Therefore, Grievantfailed to establish a due process violation, or that she has suffered any harm as a result of her own decision not to meet with Director Largent-Hill.

<u>Merits</u>

Inappropriate behavior - In addition to the incident involving Mr. Smallridge, DJS established that Grievant and other employees engaged in banter of a sexual nature. A specific example cited involved Michael Heath, a Unit Manager, who wore a shirt with a small tag on it with the word "Lucky." Grievant, and others, teased Mr. Heath for several weeks

about "getting lucky," and trying to hook him up so that he could get "lucky."

The Division of Personnel Policy on Prohibited Workplace Harassment. **(See footnote 2)**

That policy defines sexual harassment as:

Any unsolicited and unwelcome sexual advances, requests for sexual favors, or other verbal, written, or physical conduct of a sexual nature when:

1. Submission to such conduct is made either explicitly or implicitly as a term or condition of an individual's employment.

2. Submission to or rejection of such conduct is used as the basis for personnel actions affecting an employee.

3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Sexual harassment is verbal and/or physical conduct which includes, but is not limited to:

1. Sexually-explicit or implicit propositions.

2. Improper questions about an employee's private life.

3. Sexually discriminatory ridicule, insults, jokes, or drawings.

4. Undesired, intentional touching such as embracing, patting, or pinching.

*** * *7. Repeated sexually-explicit or implicit comments or obscene and suggestive remarks that are objectionable or discomfiting to the employee.**

Management is potentially liable for acts of illegal harassment in the workplace unless it can be demonstrated that the employer took immediate and appropriate corrective action. However, the EEO report also found that other employees also made inappropriate comments of a sexual nature, and recommended that all administrative and treatment staff receive EEO/Sexual Harassment training. Specific disciplinary action for Grievant was not recommended, only that DJS "take appropriate action to ensure that [she] does not touch coworkers inappropriately."

The next charge involved Grievant's failure to use the time clock to record the hours she worked. DJS presented many of Grievant's time cards on which her time of arrival and departure were frequently handwritten rather than stamped in. By her own testimony, Grievant did not maintain her time cards, but delegated that responsibility to her secretary. Superintendent Biggie's March 25, 2004, memorandum regarding clocking in and out was

directed to "all staff," indicating that even classified-exempt staff were to use the time clock. Other Assistant Superintendents consistently recorded their time at work by this method. At hearing, Superintendent Biggie testified on Grievant's behalf, stating that he did not believe it was important for salaried employees to use a time clock, and that he was frequently responsible for Grievant's failure to clock in because he would call her into hisoffice immediately upon her arrival. (See footnote 3) **Grievant stated that she was too busy to keep her time cards.**

Indeed, Grievant likely was very busy performing the duties of three positions. However, she should not have delegated the responsibility of completing her time cards to her secretary, Sue Vogt, who testified that she often lacked personal knowledge regarding Grievant's time, and had to check with the gatehouse. Those records were not error free, nor were Grievant's time cards. Nevertheless, DJS did not establish by a preponderance of the evidence that Grievant had intentionally misrepresented her time on the cards, or that she had flagrantly ignored use of the time clock. Certainly, the Superintendent's attitude towards the time clock indicated to Grievant that her manually completed cards were acceptable.

The next reason for the demotion was Grievant's lateness in reporting to work and meetings. Grievant admits that she reported to work late when she was suffering from a physical condition which has subsequently been diagnosed as lupus. During flare-ups of the condition, she experiences difficulty in movement which delays her arrival at work. In response to DJS's assertion that she had not provided this information during the interviews, Grievant stated that she did not want anyone to know of the problem. The evidence supports Grievant's claim that she used leave time, and worked at home, to ensure her work was completed. Grievant also argues that it is a practice of DJS to allowschedule flexibility to accommodate employees' personal needs. Examples of this were time to schedule dental appointments, or to go hunting. Accepting that schedule flexibility was permitted and utilized by employees at IHY, the problem in this instance is that Grievant took advantage of the flexibility so often her tardiness was problematic for other employees who needed to see her.

Director Largent-Hill also cited Grievant's inaccessibility. Many employees testified at level four that it was difficult to meet with Grievant. Individual accounts varied from long waits in Ms. Vogt's office, to unreturned calls. However, these same employees testified that other

individuals appeared to have no accessibility restrictions, and were frequently heard laughing in Grievant's office. These individuals were referred to as Grievant's "clique," and it was suspected by some IHY employees that they benefitted from her favoritism. Grievant reasonably noted that it was necessary for her to confer with certain individuals on a frequent and regular basis. However, her claim of an open-door policy is simply not accepted given the considerable testimony to the contrary.

In summary, DJS has proven that Grievant did not meet performance expectations.

Mitigation

The remaining issue is whether demotion was too severe in this instance. An allegation that a particular disciplinary measure is disproportionate to the offense proven 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. BarbourCounty 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).

"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 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 Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). Grievant asserts that even if the allegations are proven, demotion was excessive and in violation of the progressive discipline policy. Grievant cites her exemplary work history, lack of notice of the prohibited conduct, and lack of uniformity in the measure of discipline imposed. DJS argues

that it has properly acted within its discretion to determine the appropriate penalty for this particular situation.

One purpose of DJS Policy 4.01, "Employee Standards of Conduct and Performance," is to "establish a fair and objective process for correcting and treatingunacceptable conduct or work performance." The policy includes a three-class categorization of offenses, from least to most severe, with a non-exhaustive listing of specific actions constituting each offense. Correction of unacceptable performance may begin with an informal counseling process, and the measure of discipline increases through three offensives, which may result in dismissal. Demotion with prejudice is a severe measure of discipline in that it results in a reassignment to a lower classification, with an attendant, ongoing reduction of pay.

Important factors in this instance are that Grievant is a ten-year employee of DJS with an unblemished record. Grievant was not charged with violating any specific DJS policy, rule or regulation. Director Largent-Hill did not define any of the "issues" serving as a basis for the action as a Class Offense. Grievant acted with the knowledge and consent of the IHY Superintendent. DJS did not afford Grievant the opportunity to improve her performance prior to the demotion.

Director Largent-Hill testified that Grievant had not been selected for the Assistant Superintendent's position by central office personnel, who had concerns regarding her ability to perform satisfactorily in the role, but was promoted in concession to Superintendent Biggie's urging. Grievant's demotion is clearly tied to Superintendent Biggie's dismissal.

"Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v.Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the

case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

The evidence establishes that DJS acted in an arbitrary and capricious manner in demoting Grievant. Given the nature of the issues raised by DJS, and the circumstances of the situation, a letter of reprimand outlining any performance deficiencies placed in Grievant's personnel file is appropriate in this case. In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *W. Va. Code* § 29-6A-6; *Hoover v. Lewis County Bd. of Educ.*, Docket No. 93-21-427 (Feb. 24, 1994); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989).

2. DJS established that Grievant did not perform some of her duties and responsibilities in a satisfactory manner. 3. An allegation that a particular disciplinary measure is disproportionate to the offense proven 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).

4. "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).

5. "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." *Overbee*

***v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96- HHR-183 (Oct. 3, 1996). 6. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp.v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.**

7. Grievant has established that demotion was clearly disproportionate to the offense proven, that DJS abused its discretion, and acted in an arbitrary and capricious manner when it demoted her.

Accordingly, the grievance is GRANTED, and DJS ORDERED to reinstate Grievant as Assistant Superintendent at IHY, with back pay and all benefits to which she is entitled. A letter of reprimand, citing any performance deficiencies and expectations may be placed in her personnel file.

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: MARCH 10, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.Ms. Cress left IHY shortly thereafter, having accepted employment elsewhere. She was not interviewed during the EEO or the internal investigations, and did not testify at the level four hearing.

Footnote: 2

[2]Mr. Heath testified at level four that the "lucky" joking did "start getting to him," and that another individual asked him to do something about it.

Footnote: 3

[3]Superintendent Biggie conferred with so Grievant frequently many employees speculated that he could not run IHY without her advice.