# THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

**KENNETH PATRICK,**

**Grievant,**

**v.** **Docket No. 05-DOH-046**

**Sue Keller**

**Senior Administrative Law Judge**

**DEPARTMENT OF TRANSPORTATION/**

**DIVISION OF HIGHWAYS,**

**Respondent.**

## D E C I S I O N

Kenneth Patrick ("Grievant"), employed by the Division of Highways ("DOH") as a Transportation Engineering Technologist, filed a level one grievance on April 8, 2004, in which he alleged "[m]y employer has suspended me unfairly and not as per DOP or DOH policy, has failed to perform evaluations as per DOP policy." For relief, Grievant requested "[t]o be made whole and all DOH policies to be made available to all employees." The grievance was denied at all lower levels prior to appeal being made to level four on February 14, 2005. (See footnote 1) The matter was subsequently transferred to the undersigned on December 4, 2007.

DOH asserts that the suspension was imposed based upon Grievant's improper use of his work computer, *i.e.*, viewing pornographic websites. Further, time spent in this activity resulted in Grievant neglecting his job duties. Grievant's response is difficult to discern, but appears to consist of a denial to the extent that he argues that no one saw him viewing pornographic web sites, that it was impossible to view all the sites on the list, and the web sites may have been on his computer as the result of viruses, worms, or popups. DOH has proven by a preponderance of the evidence that Grievant engaged in prohibited activities.

The following facts have been derived from a preponderance of the credible evidence admitted

into the lower-level record.

Findings of Fact

1. Grievant has been employed by DOH, classified as a Transportation Engineering Technologist at all times pertinent to this grievance.

2. On January 16, 2004, documents displaying nudity and people involved in sexually explicit activity was found on the printer used by employees in the DOH District Three Maintenance Division.

3. District Engineer Rusty Roten checked the internet history on computers assigned to the printer where the sexually explicit material was discovered, and found the same website listed on the computer assigned to Grievant.

4. Beverly Myers, District Three Information Systems Coordinator, investigated Grievant's computer usage and found that the temporary internet file section revealed many sexually oriented websites had been visited, and twenty-four sexually explicit movie files had been downloaded from the internet. This activity had occurred during Grievant's regularly scheduled work hours.

5. Ms. Myers also identified twenty-two viruses on the computer assigned to Grievant. 6. When approached with the information gathered by Ms. Myers, Grievant acknowledged that he had visited sexually explicit websites.

7. On February 19, 2004, Mr. Roten completed a Form RL-544 in which he recommended a five-day suspension for Grievant for “viewing internet web sights [sic] you visited which were not job related and the material content was completely inappropriate and unacceptable. Not only were you in violation of the Department's computer policy, but you were wasting work time and not performing your assigned duties.”

8. In response, Grievant completed a Form RL-546 in which he argued that he had been denied progressive discipline, and that the discipline should be mitigated based on his work history.

9. By letter dated March 17, 2004, DOH Human Resources Director Jeff Black notified Grievant that he would be suspended for a period of five working days for his “failure to comply with the Department's policy on the acceptable use of the computer system. More specifically: a review of your computer's history showed over a period of several days you engaged in viewing material on web sites that were inappropriate and unacceptable and are in no way job related. Viewing these web sites kept you from performing your duties and showed conduct unbecoming one in a managerial position.”

10. The suspension was subsequently reduced to three days following Grievant's meeting with Assistant Commissioner Jerry Bird on March 25, 2004.

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. *W. Va. Code* § 29-6A-6; *Ramey v. W. Va. Dep't of Health*,Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept 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.*

Grievant concedes that he viewed pornographic material on his work computer. This activity is in violation of the West Virginia Department of Transportation Administrative Procedures, Volume I, Chapter 10, “Acceptable Use of Computer Systems and Related Equipment.” This policy provides, in part, that certain uses of State-supported network computers are completely unacceptable, including personal revenue-generating, political, religious, or amusement purposes. Certainly, the viewing of pornography would constitute amusement purposes. The policy further provides the penalty for engaging in unacceptable computer usage may result in immediate suspension and/or dismissal. The Grievance Board has previously held that use of a state computer to access pornographic websites constitutes insubordination by the employee, for failing to follow the employer's directives and policies. *White v. Bureau of Employment Programs/Workers Comp. Div.*, Docket No. 99-BEP-496 (May 22, 2000). Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(*per curiam*). *See Riddle v. Bd. of Directors, So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ*., Docket No. 26-89-004 (May 1, 1989). "[F]orthere to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts, supra*. "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990).

By Grievant's own admission he was insubordinate. The “Acceptable Use Of Computer Systems and Related Equipment” Policy is specific. The equipment and internet access are the property of the State of West Virginia and are for official use only. Grievant admitted he looked at sexually explicit sites. Even if Grievant had not admitted he looked at sexually explicit sites, Respondent has established by a preponderance of the evidence that Grievant engaged in this inappropriate behavior. Accordingly, Respondent has demonstrated that Grievant engaged in “a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Butts supra.*

Grievant does not specify which DOP and DOH policies were not followed when imposing the suspension. The DOH “Acceptable Use Of Computer Systems and Related Equipment” Policy informs employees that any violation may result in disciplinary action, up to and including dismissal. The Policy further warns that some violations, including the transmittal of pornography, may result in civil or criminal prosecution. DOH Administrative Operating Procedures, Section II, Chapter 6, “Disciplinary Action; Suspension and Dismissal” provides a guide of infractions and possible disciplinary actions. This document indicates that suspension may be imposed for a first offense involving a failure to followmajor instructions. An official policy would reasonably be considered a major instruction. It is also noted that dismissal is listed as a possible first offense for unauthorized use of state vehicles and/or material.

The Division of Personnel Administrative Rule, Section 12.3 provides “[a]n appointing authority may suspend any employee without pay for cause or to conduct an investigation regarding an employee's conduct which has a reasonable connection to the employee's performance of his or her job.” Section 5 of the Rule provides that in cases involving “dismissals for cause and other disciplinary actions, appointing authorities shall impose like penalties for like offenses.” Grievant has failed to prove that the suspension violated any DOP or DOH policy.

Finally, Grievant argues that his work history was not properly reviewed or weighted when determining the discipline to be imposed. The argument Grievant's suspension 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 acase 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 Corr*., 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'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). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned 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).

Assistant Commissioner Bird has already mitigated the discipline, reducing the suspension from five to three days. The evidence does not support further reduction of the suspension. In addition to the foregoing findings of fact and discussion, the following formal conclusions of law are appropriate.

## Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. *W. Va. Code* § 29-6A-6; *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "The

preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Resources*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(*per curiam*).

3. Grievant's violation of DOH's “Acceptable Use of Computer Systems and Related Equipment” policy constituted insubordination.

4. Grievant failed to demonstrate that DOH violated any agency or Division of Personnel policies when the suspension was imposed.

5. 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 includeconsideration of an employee's long service with a history of otherwise satisfactory work performance. *Pingley v. Div. of Corr*., Docket No. 95-CORR-252 (July 23, 1996).

6. The suspension has been reduced by Assistant Commissioner Bird from five to three days, and the evidence does not support further reduction of the discipline.

Accordingly, any party 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: JANUARY 31, 2007** _____

**SUE KELLER**

**SENIOR ADMINISTRATIVE LAW JUDGE**

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Footnote: 1 *.Grievant withdrew the evaluation issue at level three.*