WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

CONNIE BRAGG

Grievant,

v. Docket No. 2008-1522-CONS

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Connie Bragg, initiated this proceeding against the West Virginia Department of Transportation, Division of Highways ("WVDOH"), Respondent, alleging that the WVDOH suspended her and ultimately terminated her without “good cause.” Grievant has requested to “be made whole” including restoration of job, pay, tenure and benefits. On February 19, 2008, Grievant filed an expedited grievance at level three of the grievance process. This grievance, challenging a suspension without pay, was consolidated with a subsequent grievance challenging Grievant's termination. A level three hearing was convened in the Board's Charleston office on July 7, 2008. Grievant appeared in person and with representative Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by Carrie Dysart, Equire. This case became mature for decision on August 5, 2008, the deadline for the submission of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant pursued a consolidated grievance alleging that the WVDOH suspended and ultimately terminated her without “good cause.” Subsequent to a thirty day suspension, Grievant was terminated after having been found asleep at her desk, by hersupervisor, as well as being found in an impaired state at work to the extent Grievant was not able to perform work duties. Grievant's thirty day suspension was the result of her attempt to use sick leave for a time period, where it was determined that Grievant was unavailable for work because she was incarcerated. Grievant had been suspended for unauthorized leave on at least two prior occasions before receiving the thirty day suspension. Throughout Grievant's tenure of employment she had received various forms of progressive discipline ranging from warnings to suspensions. Respondent demonstrated by a preponderance of the evidence that Grievant's continued violation of workplace standards was just cause for her dismissal. This grievance is DENIED.

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

Findings of Fact

1 1. Grievant's employment with the WVDOH commenced on January 18, 1982. At the time of dismissal, May 2, 2008, Grievant was assigned to the Accounts Payable Section of the Finance Division classified as an Account Technician III.

2 2. Respondent, a West Virginia State agency, subscribes to progressive disciplinary measures.

3 3. Grievant has been disciplined on multiple occasions pursuant to the West Virginia Division of Highways' Progressive Disciplinary Action Policy. Throughout Grievant's tenure of employment with Respondent, she received various forms of progressive discipline ranging from warnings to suspensions.

4 4. As a result of multiple prior leave related abuse incidents, Grievant was subject to Restrictive Leave. Grievant was required to have leave pre-approved pursuant to Division of Personnel Administrative Rule § 14.5.

5 5. In early February 2008, Grievant was employed with leave restrictions. She had previously served a five day suspension for unauthorized leave. A recommended ten day suspension was pending for unauthorized leave and recommendations of suspension for

other instances of misconduct were also pending.

6 6. Pursuant to a February 12, 2008, Disciplinary Letter, Grievant was suspended for eighteen days, which included a three day suspension for unacceptable work performance, a five day suspension for use of inappropriate language, and a ten day suspension for unauthorized leave. Ultimately, this period of suspension was from February 18, 2008, to March 13, 2008.

7 7. On a number of occasions, Grievant was warned that further misconduct on her part could result in a recommendation for her dismissal (e.g., Respondent's RL-544 forms). The last verifiable written notice was provided with the March 6, 2008, Disciplinary Letter and a February 12, 2008, RL-544 form (Resp. Ex. 3) which stated:

> This recommended suspension will serve as Ms. Bragg's final warning, and the next instance of unauthorized leave or other misconduct will result in a recommendation for dismissal.

8 8. Pursuant to the March 6, 2008, Disciplinary Letter, Grievant was suspended for thirty (30) days for unauthorized leave and an attempt to use Sick Leave inappropriately. Specifically, the suspension letter in pertinent part stated:

> The reason for your suspension is unauthorized leave and an attempt to use Sick Leave inappropriately. This behavior has been of a recurringnature despite receiving prior disciplinary action including two previous suspensions for similar conduct. More specifically:
>
> On February 6, 2008 you did not report to work. A message was left for your supervisor indicating that you were unable to report due to illness and would need to take Sick Leave for the absence. However, it was later determined that you were in fact incarcerated at the South Central Regional Jail on February 6, 2008 and unavailable for work.
>
> Your suspension will begin on March 13, 2008. You will report back to work on April 24, 2008 at your regular scheduled time.

9 9. April 24, 2008, was Grievant's first day back to work after a thirty day suspension. The same day, Grievant's Supervisor Donna Cox noticed that Grievant appeared to be asleep

at her desk. Supervisor Cox took no action at that time.

10 10. Supervisor Cox did not work on Friday, April 25, 2008.

11 11. On April 28, 2008, when Supervisor Cox again observed Grievant sleeping at her desk, Grievant was awakened/roused by Ms. Cox. Supervisor Cox was accompanied by Respondent's legal counsel on April 28, 2008.

12 12. A variety of individuals ranging from WVDOH employees, State Equal Employment Opportunity (EEO) Investigators and Capitol Security Personnel, each reported that Grievant appeared impaired at work on April 25, 2008. The reports included information regarding Grievant's speech (slurred), her appearance (glassy eyed, dilated pupils and drooling), her ability to perform everyday tasks (failure to remember her phone number, inability to stay focused and inability to organize her thoughts), and her instability (swaying and staggering while walking).

13 13. Melody Jordan, Internal EEO Manager, met with Grievant on April 25, 2008, with regard to an on-going investigation and witnessed Grievant exhibit behavior thatconvinced Ms. Jordan that Grievant was impaired. Ms. Jordan witnessed Grievant stagger, slur her words and exhibit an irregular speech pattern. Ms. Jordan contacted her supervisor regarding Grievant's behavior. Grievant was not the subject of the investigation.

14 14. Donald Raynes, Director, State EEO Office, communicated with Grievant on April 25, 2008, and was of the opinion that Grievant demonstrated behavior which indicated that Grievant had “issues.” Mr. Raynes did not know the cause of Grievant's apparent impairment, however, observed behavior that demonstrated to him Grievant was impaired; slurred speech, stumbling, dilated pupils and inability to focus her thoughts. Mr. Raynes contacted responsible agents of Respondent.

15 15. Larry 'Mike' Vasarhelyi is the Chief Investigator of the Claim Section, Legal Division of Respondent. (See footnote 1) **He was contacted on April 25, 2008, regarding Grievant's behavior. It was reported to him that Grievant was in a 'state.' Reports that Grievant was 'out of it' were received from at least two co-workers.**

16 16. Investigator Vasarhelyi contacted Capitol Security.

17 17. Randy Mayhew and Scott Duff, Capitol Security Officers, and Mr. Vasahelyi went to Grievant's work area.

18 18. Mr. Vasarhelyi observed Grievant on April 25, 2008, and was of the opinion that Grievant was definitely under the influence of something (glassy eyes, slurred speech and impaired motor skills). It was his assessment that Grievant was impaired to the degree that she was unable to perform work type functions. 19 19. Capitol Security Officer, Randy Mayhew, observed Grievant on April 25, 2008, and he was of the opinion that Grievant was impaired. (See footnote 2) Officer Mayhew directly communicated with Grievant. He observed her speech to be slurred, her balance to be unstable and to him, she didn't appear to be fully coherent (her actions, voice, motor skills did not appear normal). He would not have permitted Grievant to drive. Further, Officer Mayhew observed Grievant's condition improve during the one hour time period he was with, and/or in the work area of, Grievant.

20 20. Finance Division Director, Fred Thomas, determined that Grievant was unable to perform her work related duties on April 25, 2008.

21 21. Grievant's state of impairment lessened with the passage of time.

22 22. Jeff Black, Human Resources Director, observed Grievant exhibiting symptoms of impairment, however, he did not remove her from the workplace.

23 23. Director Black met with Grievant in Director Thomas' office intending to send her home as a result of her impaired state. Mr. Black determined that discipline measures were warranted, but did not believe that sending Grievant home was the best course of action.

24 24. Director Black's meeting with Grievant on April 25, 2008, was two to three hours subsequent to the first report(s) that Grievant was impaired. 25 25. As the Human Resources Director for WVDOH, it is an essential part of Mr. Black's job duties to be knowledgeable with regard to personnel procedure, and he is routinely involved with employee disciplinary matters.

26 26. Respondent's drug testing policy established procedure for “reasonable suspicion” testing for “covered” employees (e.g., employees holding commercial drivers licenses). See WVDOT Drug Free Workplace Policy & Overview of WVDOT Drug and Alcohol Testing Policies, (Gr. Ex. 1). The procedure is not applicable to all employees of the West Virginia Department of Transportation.

27 27. No witness testified that he or she detected the smell of alcoholic beverage on Grievant.

28 28. Grievant's termination was recommended and ultimately carried out subsequent to a series of workplace incidents that took place on April 24, 25, and 28, 2008.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *Davis v. W.Va. Dep't. of Motor Vehicles*, Docket No. 89-DMV-569 (Jan.22, 1990); *Broughton v. W. Va. Div. of Highways*, Docket No. 92-DOH-325 (Dec. 31, 1992); *Ramey v. W.Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "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 does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying; [this] determines the weight of the testimony." *Petry v. Kanawha County Bd. of Educ*., Docket No. 96-20-380 (Mar. 18, 1997). *See 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).

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 DOP Administrative Rule, 143 CSR 1, Sections 12.2 and 12.3 (July 1, 2007). The West Virginia Supreme Court of Appeals has also stated that "the work record of a long-term civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985). *See Blake v. Civil Serv. Comm'n*,

172 W. Va. 711, 310 S.E.2d 472 (1983); *Serreno v. W. Va. Civil Serv. Comm'n*, 169 W. Va. 111, 285 S.E.2d 899 (1982). It is noted Grievant is a long-term employee as she had been employed for more than twenty-six years with the State of West Virginia. It is also of record that throughoutGrievant's tenure of employment she has received various forms of progressive discipline ranging from warnings to suspensions.

Grievant's grievance form contends Respondent is without good cause to terminate her employment. At the level three hearing, Grievant's Union Representative, Gordon Simmons, alludes that Respondent's actions may have some basis in retaliation. Representative Simmons did not necessarily abandon this contention as a motivating factor of Respondent, but offered little direct evidence of record to support the notion as a distinct cause of action. (See footnote 3) Respondent asserts that the disciplinary action(s) taken were proper and in accordance with its applicable progressive disciplinary policy.

Grievant's thirty day suspension was the result of what was determined to be unauthorized leave, and an attempt to use Sick Leave inappropriately. Grievant did not report to work on February 6, 2008, and information was provided to Respondent, by Grievant's husband, indicating that Grievant was unable to report to work due to illness. Upon further review, it was determined that Grievant was incarcerated. Grievant's Representative very artfully avers the proposition that Grievant could be sick and incarcerated; one condition does not necessarily exclude the other. This is true. Respondent did not establish with certainty Grievant's state of health while incarcerated. Grievant applied for a Medical Leave of Absence (MLOA) without pay for February 6, 2008, through and including February 11, 2008, (3 days). Grievant presented to Respondent an excuse slip predicated upon a February 7, 2008, visit to HealthPlus. Respondent deniedGrievant's request. Respondent's February 22, 2008, denial letter informed Grievant that her request for MLOA could not be approved as submitted. In relevant part, the letter stated:

> [Y]ou were unavailable for work on February 6, 2008 due to your incarceration in the West Virginia South Central Regional Jail and therefore you will be charged with unauthorized leave for that day. Thus your MLOA cannot be approved as submitted.
>
> If you would like to have your request reconsidered for February 7, 2008 and February 8, 2008 please have your treating physician complete the enclosed form DOP-L3 and return it to this Office no later than March 7th 2008. Emphases

added.

Personnel decisions are not made in a vacuum. An employer must not rush to judgement, however, they cannot be expected to ignore known facts in the context of the situation. Respondent explained their rationale for disallowing Grievant's request and for charging her with unauthorized leave. The rationale is sound. Grievant had been suspended for unauthorized leave on at least two prior occasions. Grievant's representation to Respondent was not fully forthcoming and perhaps deceitful. Grievant to this day has not *per se* stated she was sick. The medical slip presented does not provide that Grievant was sick. (Resp. Ex. 3). It, in fact, is a request that Respondent excuse Grievant from work on specified days. Further, when given the opportunity to meet with Agency personnel to further discuss the matter, Grievant elected to forego the meeting. It is more likely than not, incarceration made Grievant unavailable for work on February 6, 2008, not an illness as Grievant would conveniently have us believe.

Grievant chose not to testify at the level three hearing. This is her right. However, the undersigned cannot find in the circumstances of this case a fact not in evidence. IfGrievant was ill on February 6, 2008, then she needed to provide sufficient evidence to establish her illness. Given the information known to Respondent, then and now, it is reasonable to conclude that Grievant's absence was an unauthorized leave. Further, Respondent did not abuse its authority by suspending Grievant for thirty days, given that Grievant had previously been disciplined on multiple occasions for incidents related to leave abuse.

The issues presented by this case are whether Respondent proved the facts from which disciplinary action were based and whether said facts were a sufficient basis for terminating Grievant's employment.

In order to decide whether Respondent has met its burden of proof, it is first necessary to resolve the issue of witness credibility, as the testimony of Respondent's witnesses is crucial with regard to pertinent facts and issues. Therefore, credibility determinations are required in this case. 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 Res*., Docket No. 96-HHR-371 (Oct. 30,

1996); *Pine v. W. Va. Dep't of Health & Human Res*., 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 Res./Huntington State Hosp*., Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess 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*.

Respondent's witnesses did not demonstrate any bias and the information presented was unambiguous, plausible and persuasive. Their testimony was consistent, consistent with information as reported at the time of events, and consistent from witness to witness. Grievant failed to prove any credible motive for these witnesses to lie. The totality of the testimony confirms Grievant exhibited behavior on April 25, 2008, that demonstrated that she was impaired. Witnesses' testimony provided information regarding Grievant's speech (slurred), her appearance (glassy eyed, dilated pupils and drooling), her compromised ability to perform everyday tasks (inability to stay focused and inability to organize her thoughts) and her instability (swaying and staggering while walking). Grievant's degree of impairment lessened with the passage of time, but it is uncontested that Grievant was in an impaired state for significant period of time while at work on April 25, 2008.

A number of Respondent's witnesses either were former police officers or had received training with regard to recognizing and dealing with individuals under the influence of drugs and alcohol. Donald Raynes, Director, State EEO Office, is a certified investigator, who has received extensive training in questioning and assessing interviewees. During the course of an EEO investigation on April 25, 2008, Mr. Raynes interviewed Grievant with regard to another matter. Grievant was a witness not the subjectof the investigation. Mr. Raynes drafted a written statement at that time which described Grievant's conduct. Mr. Raynes testified that when Ms. Bragg entered the room it was it was obvious to him that something was impairing

her ability to function. “She appeared to stagger and her words were very slurred” and “she could not keep her thoughts organized”. . . “her eyes were dilated and she seemed to be drooling out of one side of her mouth.” After the interview was over, she again staggered and it was apparent that Grievant was having trouble with everyday tasks. Each of Respondent's witnesses confirmed this and/or similar conduct by Grievant. Individually, all were of the opinion that Grievant exhibited behavior which demonstrated that Grievant was impaired. In addition to the aforementioned testimony regarding Grievant's impaired state on April 25, 2008, Donna Cox, Grievant's Supervisor testified that she observed Grievant appearing to be asleep at her desk on April 24, and April 28, 2008. This testimony was credible.

The undersigned, who had an opportunity to observe the demeanor of the witnesses and to assess their words and actions during their testimony, determines the testimony of Ronald Raynes, Larry Vasarhelyi, Randy Mayhew, Jeff Black and Melody Jordan to be credible. The statements of these witnesses were consistent with each other, consistent with prior statements, and internally consistent. There was no indication that the witnesses were being untruthful. The undersigned is of the opinion that witnesses accurately reported what they witnessed and further the information provided was reliable, consistent, and specific in facts, and detail. Thus, based upon the credible testimony of Respondent's witnesses, fortified by the specificity of the information and combined with the fact that Grievant does not dispute the contentions, the undersigned finds that Grievant was in an impaired state while in the employment of Respondent on April 25, 2008. Grievant, through her Union Representative, avers that the source of her impaired state could have been a medical condition or some other explanation. Respondent did not identify with certainty the source or cause of Grievant's impairment. Representative Simmons highlights with much emphasis that Respondent has not provided direct evidence that Grievant's actions were caused by alcohol or drug use. Further, Representative Simmons notes Grievant's alleged willingness to be tested, at the time of the event, for drug and/or alcohol use. (See footnote 4) However, Respondent's failure to prove the cause of Grievant's condition does not fully dismiss the obviously impaired behavior of Grievant on April 25, 2008.

Respondent established by a preponderance of the evidence that Grievant was impaired to the degree she was unable to her perform job duties on April 25, 2008. This is a pivotal fact.

Conversely, Grievant did not establish her impaired state was based upon an excusable reason. Grievant did not testify, and did not offer a viable explanation for the state she was found to be in at work. Respondent's decision to pursue disciplinary measures is within the discretionary authority of an employer.

Considerable deference is afforded to an employer's assessment of the seriousness of an 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 his 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 whether the disciplinary action was excessive or disproportionate, the undersigned must look at the totality of the circumstances. As previously stated, "the work record of a long-term civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." *Buskirk, supra*. "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.

It should be noted that it was not just one isolated event that ultimately resulted in Grievant's termination. Before Grievant was terminated, she had been disciplinedregarding

her work and inappropriate workplace conduct. Grievant was made aware that termination was an option upon the next instance of misconduct. Grievant's behavior was disruptive. Respondent terminated Grievant's employment only after less severe disciplinary actions failed to sufficiently alter her inappropriate work place behavior. If the most recent conduct had been a first offense and if there had not been a number of other incidents, a warning or suspension may have been in order. However, when combined with previous incidents, termination is not a disproportionate response when the facts are viewed *in toto*. Respondent's decision to discharge Grievant was not an arbitrary or capricious action and there was not sufficient evidence presented that justify mitigating the punishment.

Grievant failed to demonstrate the disciplinary action taken by Respondent was clearly excessive or reflects an inherent disproportion between the offense and the personnel action. Once an employee has started down the path that Grievant was on, and continues to repeat inappropriate behavior, one more example of those actions can be sufficient for termination. This is why progressive discipline is often used, so an employee can see the error of her ways and correct them before that next act, which can result in termination.

The evidence presented by Respondent was persuasive, clear, and convincing. The record establishes that after returning to work following a thirty day suspension, on April 24, 2008, Grievant was observed appearing to be asleep at her desk. Then again, on April 28, 2008, Grievant was observed sleeping at her desk and had to be awakened by her supervisor. Additionally, on April 25, 2008, it was determined that Grievant was unable to perform her work duties. Grievant was on notice that further misconduct wouldresult in a recommendation for her dismissal. Consequently, in accordance with the WVDOH's progressive disciplinary policy and Grievant's behavior on April 24, 25, 28, and the multiple disciplinary actions that she had received in the past, Grievant was terminated. The undersigned finds that Respondent provided ample evidence of a credible nature to support its decision to terminate Grievant employment. Respondent's stated reason for dismissal was Grievant's continued violation of workplace standards. This is reasonable and rational. Grievant's termination was recommended and ultimately carried out based on a series of workplace incidents subsequent to multiple disciplinary actions. Respondent has proven by a preponderance of the evidence that Grievant's employment was terminated for good cause.

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Conclusions of Law

1 1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008)*; Davis v. W. Va. Dep't. of Motor Vehicles*, Docket No. 89-DMV-569 (Jan.22, 1990); *Broughton v. W. Va. Div. of Highways*, Docket No. 92-DOH-325 (Dec. 31, 1992); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). In dismissal cases involving classified employees, the burden of proof is upon the employer to establish the charges relied upon by a preponderance of the evidence and to establish good cause for dismissing an employee. *Davis, supra*., *Broughton, supra.*

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 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*. "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 does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." *Petry v. Kanawha County Bd. of Educ*., Docket No. 96-20-380 (Mar. 18, 1997).

3 3. The argument that discipline 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). In assessing whether the disciplinary action was excessive or disproportionate, the undersigned must look at the totality of the circumstances.

4 4. Considerable deference is afforded to an employer's assessment of the seriousness of an 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 hisjudgment 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).**

5 5. Respondent terminated Grievant's employment only after less severe disciplinary action failed to sufficiently alter her workplace behavior.

6 6. Respondent established Grievant's employment was terminated after a series of workplace incidents in accordance with applicable progressive disciplinary principles.

7 7. Respondent demonstrated by a preponderance of the evidence that Grievant's continued violation of workplace standards was just cause for her dismissal.

8 8. Respondent has established by a preponderance of the evidence that Grievant's employment was terminated for good cause.

Accordingly, this grievance is DENIED.

This Decision is final upon the parties and is enforceable in the Circuit Court of Kanawha County. Any party may appeal this decision to the Circuit Court of Kanawha County within thirty days of receipt of the Decision. This Decision is not automatically stayed pending the outcome of the appeal. W. Va. Code § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: September 29, 2008

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Landon R. Brown

Administrative Law Judge

Footnote: 1

Larry 'Mike' Vasarhelyi is a former police officer whose current job classification with Respondent is

Transportation Service Manager I.

Footnote: 2

Grievant requested and was given the opportunity to contact her attorney. Officer Mayhew had some prior familiarity with Grievant. Capitol Security Officer Mayhew was a former police officer with twenty-seven years of services.

Footnote: 3

The rationale for Respondent's actions (e.g., motivation) in this case was put into question. The fundamental elements needed to substantiate an allegation of reprisal were not presented. Retaliation as a distinct cause of action was not pursued in this matter and will not be discussed further.

Footnote: 4

Respondent has a substance abuse policy which specifies procedures for the testing of covered employees on the basis of reasonable suspicion. However, the procedure is not applicable to all employees. Grievant was not employed in a job classification subject to mandatory drug and alcohol testing. See Overview of WVDOT Drug and Alcohol Testing Policies.