THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DANNY BRENT VAUGHAN,

Grievant,

v. **DOCKET NO. 2009-1521-DOT**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

DECISION

Danny Brent Vaughan ("Grievant") challenges the decision of Respondent Department of Transportation/Division of Highways ("DOH"), suspending him from his employment for a period of 15 days. The May 6, 2009, "Statement of Grievance" provides that "Progressive Discipline Plan was not followed [Administrative Operating Procedures, Section II, Chapter 6] [.] No oral or written warning before 15 day suspension was imposed." As relief, Grievant seeks "120 hours of pay and 21 days of tenure."

As this is a disciplinary grievance, the matter proceeded directly to Level Three. *See* W.VA. CODE § 6C-2-4(a)(4). A Level Three hearing was held before the undersigned Administrative Law Judge ("ALJ") on July 23, 2009, in Charleston, West Virginia. Grievant appeared pro se and Respondent appeared by and through its counsel, Barbara L. Baxter, Esquire.

This matter became mature for decision at the end of the Level Three hearing as both parties declined to submit proposed findings of fact and conclusions of law.

Synopsis

Grievant knowingly utilized internet tools to circumvent the DOH's network security and web filtering. He did this in an effort to download files from webpages that are known

to illegally traffic copyrighted material. Grievant admits circumventing computer security and accessing certain web pages. However, Grievant argues that the DOH violated its progressive discipline policy and his 15-day suspension was disproportionate to the offense.

According to DOH policy, an employee may be suspended for a single serious incident. The DOH did not err when interpreting the language of its policy. The Grievant has not met his burden of establishing, by a preponderance of the evidence, that mitigation is appropriate. This grievance is **DENIED**.

Based upon a detailed review of the record, the undersigned makes the following findings of fact:

Findings of Fact

1. At all relevant times hereto, Grievant was employed as an evaluation engineer with the DOH at District Two in Huntington, West Virginia. In his position, he performs structural analysis on bridges to ensure the bridges are safe for traffic.

2. Grievant has been employed by the DOH for approximately 1 ½ years. Throughout his tenure, Grievant's work has been satisfactory.

3. Grievant signed and was aware of the DOH's computer use agreement.

4. The State of West Virginia Office of Information Security and Compliance is charged with monitoring the computer systems and ensuring computer security for the State of West Virginia's computer system(s).

5. On October 8, 2008, Grievant decided to download some movies and music from the internet. The sites he tried to visit were blocked by filters. He knew and understood

that the filters were there to keep employees off certain websites. Level Three, Testimony of Danny Brent Vaughan. The direct route to the sites were blocked. In order to access the websites, Grievant had to find a way around the blocks.

6. In order to access the downloading websites that utilize peer-to-peer file sharing systems, the Grievant had to circumvent network security and web filtering. Grievant did circumvent network security and web filtering. To accomplish this task, Grievant searched the internet for websites that would allow him to browse the network anonymously (and get around network security and web filtering). These sites are often called proxy anonymizers. Once Grievant found a proxy anonymizer website that was not blocked by web filtering, he was able to access internet sites known to traffic illegal copyrighted material.

7. Grievant searched for and downloaded at least one movie between October 8, 2008, and October 9, 2008. The movie concerned the tragedy of 9/11.

8. Between October 8, 2008, and October 9, 2008, Grievant also searched for and accessed workplace inappropriate, adult-oriented media. *See* Level Three, Respondent's Exhibit 6.[1]

9. Between 8:00 a.m. on October 8, 2008, and 2:45 p.m. on October 9, 2008, the

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[1] It is unclear whether any of these videos or pictures were actually downloaded. From the record, it appears Grievant searched for nude paparazzi pictures of Brittany Spears and searched for "Jenna" files. Level Three, Respondent's Exhibit 6. Grievant also accessed the website "www.ftvgirls.com." *Id*. When examining the names of the addresses accessed by Grievant (some of which appear to indicate file download attempts), the following terms appear: "Jayme Langford . . . compilation including her one and only anal scene," "Jenna Jamison," "Girls Kata amp Ivana fisting," "leslie in first time fist cum," "leslie talks about how to squirt," "FTV special insertion," "Stone Temple Pilots" and "www.freemarijuanachurch.org." *Id*. It also appears that the Grievant attempted to delete his search history. *Id*.

"Office of Technology's security event monitoring system detected that a computer on the DOT network was using Peer-to-Peer software" to download material on a State-owned computer. Level Three, Respondent's Exhibit 1. The user visited a variety of websites that traffic illegally in copyrighted material. *Id*. The user in question, was the Grievant. Level Three, Testimony of Danny Brent Vaughan.

10. The Office of Technology reported the security breach to the DOH. Grievant was thereafter notified.

11. On or about January 8, 2009, Grievant was given notice that it was being recommended that he be suspended without pay for 15 days. Grievant was given the opportunity to respond in writing and a meeting was scheduled for January 21, 2009.

12. On or about January 21, 2009, Grievant met with Keith Chapman, District Two Manager. Grievant provided a written statement concerning the charges. Level Three, Respondent's Exhibit Three. The Grievant's written statement generally states that there "was no malicious intent behind my [Grievant's] internet use infractions . . . ." Level Three, Respondent's Exhibit 1.

13. Grievant was suspended for 15 days without pay for circumventing the computer security system and downloading at least one movie.

14. Respondent's policy prohibits certain use of State-owned technology equipment. These prohibited uses include, but is not limited to:

> a. Using for, or in support of, unlawful, improper, or prohibited activities as defined by federal, state, and local laws or regulations or applicable state agency policy.
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> b. Violating applicable civil or criminal laws, regulations, policies, or agreements governing software licensing, copyright, and other information

> or communications technology issues. Accessing, storing, or transmitting potentially threatening, offensive, or harassing information (messages, images, or other media), including but not limited to material that could be construed as insulting, abusive, threatening, offensive, obscene, pornographic, profane, sexually oriented or sexually explicit, defamatory, harassing, or discriminatory, or otherwise inappropriate or illegal.
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> c. Attempting to gain unauthorized access to any system, resource, or equipment.
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> d. Using technological resources without authorization or for an unauthorized or improper purpose.
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> e. Attempting to undermine network security, to impair network functionality, or to bypass restrictions set by system administrators.
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> f. Conducting private or personal activities for personal gain or profit.
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> g. Using agency resources, including but not limited to email, computers, and the agency internet connection for personal and non-business reasons and in a manner or with such frequency that would tend to interfere with the performance of official duties or create a reasonable perception of such interference.

Level Three, Respondent's Exhibit 4. "Violation of this policy may result in disciplinary action, up to and including dismissal." *Id*. *See* Level Three, Testimony of Jeff Black.

15. Using proxy anonymizers to circumvent computer network security and web filtering is a violation of Respondent's computer usage policy.

16. Using a DOH computer to access websites that are known to illegally traffic in copyright protected music and videos is a violation of the Respondent's computer usage policy. Using a DOH computer to download a movie that is potentially copyright protected is in violation of Respondent's computer usage policy. Using a DOH computer to access websites that contain adult-oriented media is a violation of Respondent's computer usage policy.

17. Respondent's progressive discipline policy provides as follows:

> A single performance issue or instance of misconduct may warrant immediate drastic action, including dismissal. Less serious performance issues or instances of misconduct may be handled on the basis of "progressive discipline," which does not merely punish the employee, but is intended to allow the employee an opportunity to meet the expected standards of work performance or conduct. Discipline is progressive when an employee is not subject to immediate dismissal for an initial offense but is given a lesser penalty. The initial penalty could be an oral reprimand, a written reprimand, a demotion, or a suspension. The imposition of a more severe penalty is warranted when there is an insufficient improvement in work performance and/or conduct; there is a failure to sustain improved work performance and/or conduct; or there is a persistent failure to meet the expected standards of work performance or conduct.

Level Three, Grievant's Exhibit 5; Respondent's Exhibit 5.

Discussion

The burden of proof in a disciplinary grievance rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88 005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & 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*.

In this matter the Respondent has met its burden of proving that the Grievant violated DOH policy by knowingly circumventing the computer security system and downloading, or attempting to download, internet files that would otherwise be prohibited. DOH policy clearly prohibits circumventing network security and web filtering to access websites that are known to illegally traffic copyright protected material. *See* Finding of Fact

14 *supra*. The Grievant admits that he knowingly circumvented the computer security system to access prohibited websites, which included sites that host peer-to-peer file sharing systems. Level Three, Testimony of Danny Brent Vaughan. Further, Grievant admits he downloaded at least one movie. *Id*.

The primary considerations in this grievance is whether the DOH violated its progressive discipline when it suspended the Grievant, and whether mitigation is appropriate. This ALJ finds no violation of progressive discipline. The DOH did not abuse its discretion so as to warrant mitigation of the punishment.

First, the DOH did not violate its progressive discipline policy as a single serious incident may warrant a suspension. DOH policy provides that:

> A single performance issue or instance of misconduct may warrant immediate drastic action, including dismissal. Less serious performance issues or instances of misconduct may be handled on the basis of "progressive discipline," which does not merely punish the employee, but is intended to allow the employee an opportunity to meet the expected standards of work performance or conduct. Discipline is progressive when an employee is not subject to immediate dismissal for an initial offense but is given a lesser penalty. *The initial penalty could be an oral reprimand, a written reprimand, a demotion, or a suspension*.

(Emphasis added). Level Three, Grievant's Exhibit 5; Respondent's Exhibit 5. In this matter, the DOH did not dismiss the Grievant but imposed a 15-day suspension. The DOH's interpretation of its progressive discipline policy was not erroneous because, based upon the language of the policy, an employee may be suspended for a single, serious instance of misconduct. *See also Townsend v. W.Va. Div. Juvenile Servs.*, Docket No. 2008-1501-MAPS (Mar. 19, 2009); *Stiles v. Dep't of Health & Human Res.*, Docket No. 07-

HHR-162 (March 31, 2008).[2]

Secondly, in recognition of the specific facts presented, mitigation of the suspension is inappropriate. Mitigation of a penalty is considered on a case by case basis. *Conner v. Barbour County Bd. of Educ.*, Docket No. 95-01-031 (Sept. 29, 1995). 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). 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 & Human Res./Welch Emergency Hosp.*, Docket

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[2] Grievant produced documents he obtained from the DOH's intranet that he suggest supports his argument that the DOH violated progressive discipline. Level Three, Grievant's Exhibit 3. The document produced by the Grievant provides that "[a]n employee may be suspended without prior warning/reprimand of disciplinary action for any form of unacceptable personal conduct or unsatisfactory job performance based upon the severity of the offense." *Id*.

No. 96-HHR-183 (Oct. 3, 1996).

"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).

Grievant has been an employee with the DOH for a relatively short period of time. Not long before the incident in question, he was advised of the Respondent's computer usage policy. He was aware that certain websites and activities were not permitted. Indeed, when attempting to access certain websites, web filtering informed him that the websites were blocked. Thereafter, he found a way to outwit the system and used an internet tool to circumvent the security system and download (or attempt to download) material that was potentially copyright protected.[3] Moreover, it appears that some of the media he viewed or accessed was adult oriented.

A 15-day suspension is generally consistent with similar suspensions upheld by this

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[3] Whether an employee is acting with intentional disregard for his or her duties and/or workplace policies is an appropriate consideration when determining whether to mitigate the punishment. *See generally Bone v. W.Va. Dep't of Corrections*, 163 W.Va. 253, 255 S.E.2d 919 (1979); *Stafford v. Regional Jail & Corr. Fac./Southern Regional Jail*, Docket No. 2009-0583-MAPS (Mar. 30, 2009). In this instance, it is clear that Grievant intentionally took steps to circumvent the computer security system. This was not an accident and required the Grievant to conduct research to find the necessary tools and websites.

tribunal.[4] Indeed, in one prior case where an employee utilized tools to circumvent internet security, this Board has upheld a 30-day suspension. *See Davis v. Dep't of Health & Human Res./Bureau for Children and Families*, Docket No. 00-HHR-344/388 (Sept. 4, 2001). Mitigation is not appropriate given the circumstances.

The Grievant has not established, by a preponderance of the evidence, that the DOH abused its discretion. When considering the totality of the circumstances, a 15-day suspension for circumventing the computer security system and downloading at least one movie is not excessive. The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. The burden of proof in a disciplinary grievance rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88 005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not."

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[4] *See Lanham v. Kanawha Co. Bd. of Educ.*, Docket No. 01-20-577 (Feb. 28, 2002)(finding grievant was properly suspended for 10 days after he accessed pornographic material online at work); *Blaney v. Bureau of Employment Programs/Unemployment Comp. Div.*, Docket No. 04-BEP-352 (July 26, 2005)(upholding a 30-day suspension where grievant improperly used email and used the computer system to conduct her personal business). In one case, a dismissal was upheld where the employee accessed pornographic material on a work computer. *Kennard v. Tucker Co. Bd. of Educ.*, Docket No. 01-47-591/628 (Mar. 12, 2002). In some cases, dismissal has been found appropriate when the employee has previously displayed poor performance. *See Spade v. Dep't of Health & Human Res.*, 06-HHR-322 (June 4, 2007)(upholding a dismissal, in part due to excessive internet usage); *Goreman v. Bureau of Employment Programs/Employment Servs. Div.*, Docket No. 03-BEP-206 (July 26, 2005)(upholding a dismissal for poor performance and repeated violations of the computer usage policy); *White v. Bureau of Employment Programs/Worker's Comp.*, Docket No. 99-BEP-496 (May 22, 2000)(upholding a dismissal where the employee had a history of poor conduct and viewed pornography on the internet).

Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

2. Respondent has established, by a preponderance of the evidence, that the Grievant violated DOH policy when he circumvented network security and web filtering in an effort to download files from the internet.

3. Under DOH policy, an employee may be suspended for a single act of serious misconduct.

4. The DOH did not violate its progressive discipline policy when it suspended the Grievant for 15 days because the Grievant circumvented the computer security system, downloaded at least one movie and attempted to access media that would otherwise be blocked by computer security.

5. Mitigation of a penalty is considered on a case by case basis. *Conner v. Barbour County Bd. of Educ.*, Docket No. 95-01-031 (Sept. 29, 1995). 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). 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).

6. Grievant has not met his burden of proving, by a preponderance of the evidence, that the discipline was excessive in light of the totality of the circumstances.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* 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 WEST VIRGINIA 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* W. VA. CODE R. §156-1-6.20 (2008).

Date: August 25, 2009

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Mark Barney
Administrative Law Judge