WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

WILLIAM WATSON, JR.,

Grievant,

v. **Docket No. 2009-0558-DHHR**

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR BEHAVIORAL HEALTH AND HEALTH FACILITIES/MILDRED MITCHELL-BATEMAN HOSPITAL,

Respondent.

DECISION

William Watson Jr. ("Grievant") filed this Grievance against his employer, the West Virginia Department of Health and Human Resources/Bureau for Behavioral Health and Health Facilities/Mildred Mitchell-Bateman Hospital (hereinafter "Respondent" or "Bateman") on or about October 23, 2008, after being suspended for five days and "demoted." His "Statement of Grievance" provides as follows:

> I, Bill Watson, was accused of and found not guilty of either knowing about or having participated in the copper theft at Mildred Mitchell-Bateman Hospital. At my predetermination meeting with Mary Beth Carlisle, she said that even though there was no evidence that I had anything to do with this case I am still being moved from my department as a Security Guard and placed in Dietary as a food service worker. I also feel that management at Bateman Hospital is using my past against me.

As relief, the Grievant seeks reinstatement as a security guard and expungement of "any allegations or notes to the above copper theft."[1]

This Grievance was denied at Level One by decision dated February 17, 2009. A

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[1] Grievant does not challenge his five-day suspension.

Level Two mediation was held on July 23, 2009. A Level Three hearing was held before the undersigned Administrative Law Judge ("ALJ") on September 30, 2009, at the Grievance Board's Charleston, West Virginia, office. Grievant appeared by and through his representative, Jay Miser, UE Local 170, West Virginia Public Workers Union. Respondent appeared by and through its counsel, Assistant Attorney General Jennifer K. Akers. This matter became mature for decision on October 28, 2009, upon receipt of the last of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant was suspended pending an investigation into a copper theft. Upon conclusion of the investigation, Respondent found the Grievant had no involvement in the theft. Nevertheless, it suspended Grievant for five days and demoted him from security guard to Food Service Worker because the Grievant admitted during an interview that he "dozed off" when working night shift. Grievant was further disciplined because he spoke with other employees, outside the workplace and after working hours, when Respondent instructed him to have no contact with anyone employed by Bateman.

Respondent's no-contact directive is overly broad and encroaches upon the Grievant's fundamental right to freedom of association, and his fundamental and common -law right to privacy. Accordingly, it is void and the Grievant should not and cannot be disciplined for contacting his colleagues after working hours.

Upon consideration of the totality of the evidence, Grievant openly and honestly admitted during the investigation that he sometimes "dozed off" during the night shift. This admission was very general and unrelated to any particular incident. The penalty of a five-day suspension plus demotion was clearly disproportionate to the offense.

Accordingly, this grievance must be **GRANTED**.

The following findings of fact are based upon a thorough review of the record produced in this matter:

Findings of Fact

1. Grievant was employed by Mildred Mitchell-Bateman Hospital as a Security Guard. He has been employed with Bateman for over nine years. As a Security Guard, Grievant was responsible for ensuring the safety and security of all hospital grounds, including patients and staff. At all times in question, Grievant was assigned to the midnight shift.

2. In September 2008, a fellow employee[2] reported that Grievant may have been involved in a copper theft that occurred on hospital property.

3. As a result of this information, on September 16, 2008, Grievant was suspended pending the outcome of an investigation into the allegations. In the letter notifying him of the suspension, Grievant was informed that he was restricted from all areas of the hospital except the Human Resources office. He was also informed that he "was not to contact ***any*** staff member other than the Director of Human Resources, your [Grievant's] union representative or myself [the Chief Executive Officer of Bateman]."[3] (Emphasis in the original). Level Three, Respondent's Exhibit 2.

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[2] The employee who made this report, Mr. Cook, was hired under temporary contract by Bateman. Ultimately, his contract was not renewed. At Level Three, Mr. Cook was described as a "trouble maker" and often called Grievant the "weak link" in Bateman's security. Level Three, Testimony of Milissa Parker. Testimony indicated that Mr. Cook wanted Grievant's full-time security position. *Id*.

[3] There is no written policy that requires this directive during an investigation.

4. An investigation was conducted concerning Grievant's involvement in the copper theft at Bateman. Level Three, Testimony of Daniel Persinger. The allegation of Grievant's involvement in the copper theft was unsubstantiated. Grievant was not involved in the copper theft.

5. On October 8, 2008, Bateman rescinded Grievant's suspension regarding the copper theft. Level Three, Respondent's Exhibit 3. Nevertheless, Grievant was issued a five-day suspension and demoted to a position as a Food Service Worker. But for the incident in question, Grievant would not have been moved to the Food Service Worker position. Level Three, Testimony of Kieth Anne Worden.

6. Grievant's new position was in the same pay grade and he suffered no loss of salary.[4]

7. Grievant was suspended and demoted because during the course of the investigation (1) he admitted to "dozing off" while working night shift and (2) he contacted three individuals who were employed at Bateman. Level Three, Respondent's Exhibit 1.

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[4] Both of these positions were in Paygrade 3. From the Level One exhibits, it appears the Grievant earns less than $15,000 annually. Technically, the Grievant was not "demoted" pursuant to the West Virginia Division of Personnel rules because there is no evidence of change in "rank as measured by salary range, minimum qualifications, or duties, or a reduction in an employee's pay to a lower rate in the pay range assigned to the class." 143 C.S.R. 1 § 3.27. Nevertheless, this Grievance Board has recognized that a "functional demotion" occurs where an employee is "reassigned to duties of less number and responsibility without salary reduction or authorization. . . ." *Dickey & Lockhart v. Div. of Labor,* Docket No. 2008-1820-CONS (Jan. 21, 2009); *Gillespie v. W. Va. Dep't of Corrections*, 89-CORR-105 (Aug. 29,1989); *Dudley v. Bureau of Senior Servs.*, Docket No. 01-BSS-092 (July 16, 2001). Grievant's job change is treated as a functional demotion because he was moved as punishment and would not have been moved but for the incidents cited in the disciplinary letter. *See* Level Three, Testimony of Kieth Anne Worden; Respondent's Exhibit 3.

8. No one has ever reported or complained that the Grievant was "dozing off" on the job. Grievant's direct supervisor has never observed Grievant "dozing off" on the job. Level Three, Testimony of Daniel Persinger. However, during a meeting with Bateman administration, Grievant admitted that on occasion he had "dozed off" while working the midnight shift. Level Three, Testimony of Kieth Anne Worden.

9. While suspended, on September 16, 2008, at approximately 5:45 p.m., Grievant contacted Karen Bledsoe, a Bateman security guard, at her home after work hours. Grievant has known Ms. Bledsoe for over eight years. He called and asked her what was "going on." During the conversation, Grievant was very upset and angry about his suspension pending the investigation. Level Three, Testimony of Karen Bledsoe. Ms. Bledsoe and Grievant did not discuss the copper theft incident.

10. While suspended, Grievant also contacted Milissa Parker, a Bateman Switchboard Operator, at her home and after work hours. Grievant and Ms. Parker were friends. Grievant had purchased an automobile directly from Ms. Parker. He telephoned her to inform her that he currently was not receiving a paycheck and it may be a while before he would be able to make his next payment. Level Three, Testimony of Milissa Parker.

11. Grievant additionally had contact with John A. Albright, a Bateman employee.[5] Mr. Albright has known Grievant for several years. He lives down the street from Grievant and sees him outside of work "pretty often." He saw and spoke with Grievant while he was

[5] Mr. Albright does not work on the same shift as Grievant.

suspended. The only thing Grievant asked Mr. Albright concerning work was whether Mr. Albright had been interviewed. Mr. Albright and Grievant did not discuss the investigation.

12. When speaking with Ms. Bledsoe, Ms. Parker and Mr. Albright, Grievant did not attempt to coerce or threaten any coworker for participating in the investigation. Nor did he attempt to alter their statements or testimony.

13. Throughout his employment tenure, Grievant has received good performance evaluations. Level One, Unmarked Exhibits. *See also* Level Three, Exhibit 3. Grievant is and was a good employee. Level Three, Testimony of Kieth Anne Worden. In his over nine years of service, he has been disciplined one time for horseplay. During this horseplay incident, several other employees, including a nurse supervisor, were disciplined. Grievant received a written reprimand. Level Three, Testimony of Daniel Persinger.

14. In the past, other employees have only received a suspension (or less) for sleeping on the job. Level Three, Grievant's Exhibit 2. Level Three, Testimony of Kara Anderson.

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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). *See 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.*

Permanent state employees who are in the classified service can only be disciplined 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 Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004)(per curiam)(recognizing the viability of the "good cause" standard pronounced in *Oakes*).

In this case, the Grievant was suspended for five days and demoted to a dietary position cooking breakfast at 5:00 a.m. because (1) he stated that he had on occasion "dozed off" when working the night shift and (2) while suspended for nearly a month pending an investigation that found he committed no wrongdoing, he had contact, outside of the workplace, with three individuals employed by Bateman. Grievant does not challenge his five-day suspension, but only challenges his functional demotion to the Food Service Worker position.

First, Respondent has established that the Grievant "dozed off" when working the night shift because the Grievant admitted he "dozed off." The record is clear and undisputed. There was a copper theft. Grievant was suspended and investigated. It was found that he had nothing to do with the theft. Then, Bateman looked for and found a reason to discipline the Grievant. "Dozing off" while on duty is generally actionable under

Bateman's *Progressive Disciplinary Action* policy. Level Three, Grievant's Exhibit 1. Clearly, such conduct reflects poorly upon the hospital and raises a potential safety concern. *Id*. During a predetermination meeting on October 6, 2008, with Grievant, Daniel Persinger, Grievant's immediate supervisor, and Kieth Anne Worden, Director of Human Resources at Bateman, Grievant admitted he "dozed off." *See* Level Three, Respondent's Exhibit 3. The record does not reflect any particular time when the Grievant "dozed off." Nor has anyone ever observed or reported that the Grievant was "dozing off" on night shift. *See* Level Three, Testimony of Kieth Ann Worden. In light of the Grievant's admission, the Respondent has established, by a preponderance of the evidence, that the Grievant has "dozed off" while working the night shift.

The second reason Grievant was punished, as outlined in the October 8, 2008, suspension/demotion letter, was "insubordination," because "during the investigation you [Grievant] admitted to calling individuals to discuss the allegations although your suspension letter specifically directed you not to stating . . . 'You are not to contact <u>*any*</u> staff member other than the Director of Human Resources, your union representative (if he or she is an employee), or myself [Bateman CEO].'" (Emphasis in original). Level Three, Respondent's Exhibit 3, Exhibit 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). *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]or there 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[6]; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts*, *supra*. In other words, there must be not only a willful refusal to obey an order, but the order must also be reasonable and valid.

The Grievant challenges Bateman's "no contact" directive based upon constitutional grounds. Both the WEST VIRGINIA CONSTITUTION and UNITED STATES CONSTITUTION grant citizens the right to freedom of association, the right to privacy, and penumbric "liberty" interests borne out of substantive due process.[7] When discussing the right to freedom of association, one federal court of appeals has explained it this way:

> [t]he Constitution protects two distinct types of association: (1) freedom of expressive association, protected by the First Amendment, and (2) freedom of intimate association, a privacy interest derived from the Due Process Clause of the Fourteenth Amendment but also related to the First Amendment. *See Roberts v. United States Jaycees*, 468 U.S. 609, 617-18, 82 L. Ed. 2d 462, 104 S. Ct. 3244 (1984); *Akers v. McGinnis*, 352 F.3d 1030, 1035 (6th Cir. 2003); *Corrigan v. City of Newaygo*, 55 F.3d 1211, 1214-15 (6th Cir. 1995). With respect to expressive association, the Supreme Court "has recognized a right to associate for the purpose of engaging in those

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[6] "[F]or a refusal to obey to be 'wilful,' the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order." *Id*. When one acts with willfulness there is purpose or design, actual or constructive. *Kelly v. Checker White Cab*, 131 W. Va. 816, 823, 50 S.E.2d 888, 893 (1948). Willfulness is not mere inattention or heedlessness. *Id*. Willfulness implies "a conscious purpose to do wrong. Doing a thing knowingly and willfully implies not only a knowledge of the thing done, but a determination to do it with evil purpose or motive." *United States v. Ramey*, 336 F.2d 512, 515 (4th Cir. 1964).

[7] Of course, those rights contained in the U.S. CONSTITUTION are applicable to the states by and through the FOURTEENTH AMENDMENT. Relatedly, the West Virginia Supreme Court of Appeals typically interprets the W.VA. CONSTITUTION in a manner consistent with the U.S. CONSTITUTION.

> activities protected by the First Amendment--speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts*, 468 U.S. at 618. Concerning intimate association, the Supreme Court "has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Id*. at 617-18.
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> The Supreme Court has explained that the right to intimate association "receives protection as a fundamental element of personal liberty." *Id*. at 618. The kinds of personal associations entitled to constitutional protection are characterized by "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." *Id*. at 620. In *Board of Directors of Rotary International v. Rotary Club of Duarte*, the Court emphasized that although the "precise boundaries" of the intimate association right were unclear, constitutional protection was not restricted to relationships among family members. 481 U.S. 537, 545, 95 L. Ed. 2d 474, 107 S. Ct. 1940 (1987). Instead, the Constitution "protects those relationships . . . that presuppose 'deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctly personal aspects of one's life.'" *Id.* (quoting *Roberts*, 468 U.S. at 619-20). Therefore, in addition to marriage, courts have recognized both personal friendships and non-marital romantic relationships as the types of "highly personal relationships" within the ambit of intimate associations contemplated by *Roberts*. *See*, e.g., *Akers*, 352 F.3d 1039-40 ("Personal friendship is protected as an intimate association.").

Anderson v. City of LaVergne, 371 F.3d 879, 884-889 (6th Cir. 2004). *See also Akers v. McGinnis*, 352 F.3d 1030, 1039-40 (6th Cir. 2003); *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472 (2003), *overruling Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841 (1986). Whenever a state actor, such as a state agency, orders or forbids certain interpersonal contact outside the workplace that normal citizens enjoy, associational and privacy

concerns are implicated. *See Briggs v. North Muskegon Police Dep't*, 563 F. Supp. 585 (W.D. Mich. 1983), *aff'd*, 746 F.2d 1475 (6th Cir. 1984).

Hence, the Constitution protects against state encroachment upon personal friendships. The genesis of this intimate relationship right flows from both the freedom of association and a citizen's "liberty" interests. Once it is determined that an "intimate relationship" exists, the analysis then turns to whether the state actor's conduct constituted a "direct and substantial interference" with the association. *Akers*, 352 F.3d at 1040. "A 'direct and substantial interference' with intimate associations is subject to strict scrutiny, while lesser interferences are subject to rational basis review." *Id.*

In this grievance, Grievant contacted three employees outside of work at their homes. The first person Grievant contacted was Ms. Bledsoe. From the record, it appears that Grievant and Ms. Bledsoe have known each other for eight years. He telephoned her at home and presumably had her home telephone number. Upset and angry about being wrongly accused of being a thief, he asked Ms. Bledsoe "what was going on."

Next, Grievant had contact with Milissa Parker, a Bateman Switchboard Operator, at her home and after work hours. Grievant and Ms. Parker were friends. Grievant had purchased an automobile directly from Ms. Parker. He telephoned her to inform her that he currently was not receiving a paycheck and it may be a while before he would be able to make his next payment. Level Three, Testimony of Milissa Parker.

Lastly, Grievant had contact with John A. Albright, a Bateman employee. Mr. Albright has known Grievant for several years. He lives down the street from Grievant and sees him outside of work "pretty often." He saw and spoke with Grievant while he was

suspended. The only thing Grievant asked Mr. Albright concerning work was whether Mr. Albright had been interviewed. Mr. Albright and Grievant did not discuss the investigation.

This ALJ hereby finds that Grievant had the type of friendships and social contacts with Ms. Bledsoe, Ms. Anderson and Mr. Albright that are protected under the hybrid right to intimate association. Indeed, interpersonal contact with friends and neighbors appear to be the precise type of associations protected by the Constitution. Insofar as the Respondent's policy forbids "any" contact with persons that Grievant has "intimate associations," it is hereby declared void, unenforceable and contrary to law.

In addition to the right of intimate association, in West Virginia, state employees also enjoy a parallel common-law right to privacy. *Golden v. Bd. of Educ.*, 169 W.Va. 63, 285 S.E.2d 665 (1981); *Powell v. Paine*, 221 W. Va. 458, 655 S.E.2d 204 (2007). "In West Virginia, the right of privacy, including the right of an individual to be let alone and to keep secret his private communications, conversations and affairs, is a right the unwarranted invasion or violation of which gives rise to a common-law right of action for damages." Syl. Pt. 1, *Roach v. Harper*, 143 W.Va. 869, 105 S.E.2d 564 (1958). *See Baughman v. Wal-Mart Stores, Inc.*, 215 W. Va. 45, 592 S.E.2d 824 (2003); *Twigg v. Hercules Corp.*, 185 W.Va. 155, 406 S.E.2d 52 (1990). When considering whether the Respondent's "no contact" directive violates Grievant's common-law right to privacy, this ALJ must balance the Grievant's right to privacy against the Respondent's interests. *Baughman*, 215 W. Va. 45, 48, 592 S.E.2d 824, 827.

Bateman's interest in keeping Grievant from contacting other persons employed by Bateman, outside of work, relates entirely to its investigation. Specifically, it forbade contact to ensure that its fact-gathering process was not tainted. When recognizing

Bateman's interest in investigative integrity, it seems the Grievant has an equal, though polemic interest in contacting other employees to ensure that his own fact-gathering is not tainted by Bateman's administration.

In terms of the Grievant's other interests, first, he has a personal privacy/associational interest in contacting Bateman employees outside of the workplace. As indicated by the evidence in this case, he purchased a vehicle from one employee and his communication related to him making payments. Similarly, he talked with a Bateman employee that was his personal friend who he frequently saw outside of work. This employee lived down the street from the Grievant.

In addition to Grievant's privacy interest, Grievant also has an interest in defending himself against the false accusation of being a thief.[8] Clearly, Grievant may not coerce, threaten or attempt to alter another employee's statement or testimony, and there is no indication Grievant attempted to do so in this case. Nevertheless, in light of the Grievant's property interest in his employment, it seems he may conduct his own investigation and obtain witnesses for his defense.

When balancing the Grievant's interests against the Respondent's interest, the Grievant's interests substantially and significantly outweigh Bateman's interest. Grievant

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[8] This ALJ further notes that the "no contact" directive also has serious procedural due process implications. See generally *Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981); *McLendon v. Morton*, 162 W.Va. 431, 249 S.E.2d 919 (1978). For example, while under suspension, Grievant would practically not be permitted to conduct his own investigation and prepare for the filing of a grievance. This seems especially unfair given the Grievant was accused of and under investigation for being a thief, which not only affects his employment status but would likely affect his standing and stature in the community. *See* Eric Mitnick, PROCEDURAL DUE PROCESS AND REPUTATIONAL HARM: LIBERTY AS SELF-INVENTION, 43 U.C. Davis L. Rev. 79 (2009).

has a privacy interest in communicating with others outside of the workplace. Likewise, he has an interest in conducting his own investigation. Bateman's "no contact" policy is overly broad and void.

In conjunction with his constitutional challenges, Grievant argues that the penalty imposed, a five-day suspension plus demotion, is disproportionate to the offense. This ALJ is persuaded by the Grievant's argument in light of the totality of the circumstances. The argument that discipline is excessive given the facts of the situation is an affirmative defense. Grievant bears the burden of demonstrating the penalty was clearly excessive and reflects an abuse of Bateman's discretion or an inherent disproportion between the offense and the punishment. *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

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

Nevertheless, a lesser disciplinary action may be imposed when mitigating circumstances exist. *See Conner v. Barbour County Bd. of Educ.*, Docket No. 95-01-031 (Sept. 29, 1995). 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. *See Pingley v. Div. of Corr.*, Docket No. 95-CORR-252 (July 23, 1996). When assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995)(citations omitted).

First, the offenses committed are considered. Grievant was not caught sleeping. Nor has anyone ever filed a complaint about him sleeping. During an investigation into an act he did not commit, Grievant openly and honestly stated that he had "dozed off" while working night shift. Additionally, the Grievant contacted three employees after he was instructed to have no contact with any staff member when he was wrongfully accused of copper theft. Two of the contacts were totally unrelated to the investigation.

Secondly, Grievant's work history is considered. Grievant has worked at Bateman for over nine years. His performance evaluations have consistently been good. Various witnesses testified to the high quality of Grievant's work. While the Grievant does have one small blemish in his record, a reprimand for horseplay, overall his service to Bateman has been exemplary.

Lastly, the penalty imposed on other employees for like offenses is considered. In the past, at least one employee has received only a suspension for actually sleeping on the job. One witness, Kara Anderson, a nurse supervisor at Bateman, testified that mere reprimand was the most appropriate course of action.

In light of the totality of the evidence, mitigation is appropriate. The penalty of five -days suspension and demotion to Food Service Worker "is clearly disproportionate to the employee's offense" *Overbee v. Dep't of Health & Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). Even assuming Bateman's "no contact" directive is valid, the penalty must still be mitigated to a five-day suspension.

In summation, the Respondent has proven, by a preponderance of the evidence, that the Grievant "dozed off" on the midnight shift as the Grievant has admitted he "dozed off." Insofar as the Respondent seeks to punish Grievant for violation of its "no contact" directive, the directive is overly broad and therefore invalid. Even assuming the directive is valid, the penalty imposed is still disproportionate to the offense and must be reduced.

The following conclusions of law are appropriate in this matter:

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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). *See 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.*

2. Permanent state employees who are in the classified service can only be disciplined 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 Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004)(per curiam).

3. It is a violation of Respondent's Policy for an employee to "doze off" on the job and employees are generally warned that "dozing off" is not permitted. Level Three, Grievant's Exhibit 1.

4. Respondent has established, by a preponderance of the evidence, that Grievant has "dozed off" while working the night shift.

5. Citizens of the United States enjoy a right to intimate association which incompasses the right to communicate and have interpersonal contact with friends and neighbors. *See Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244 (1984); *Anderson v. City of LaVergne,* 371 F.3d 879 (6th Cir. 2004).

6. In West Virginia, state employees enjoy a common-law right to privacy. *Golden v. Bd. of Educ.*, 169 W.Va. 63, 285 S.E.2d 665 (1981); *Powell v. Paine*, 221 W. Va. 458, 655 S.E.2d 204 (2007). "[T]he right of privacy, including the right of an individual to be let alone and to keep secret his private communications, conversations and affairs, is a right

the unwarranted invasion or violation of which gives rise to a common-law right of action for damages." Syl. Pt. 1, *Roach v. Harper*, 143 W.Va. 869, 105 S.E.2d 564 (1958).

7. When determining whether a particular directive by a state agency violates the common-law right to privacy, the employee's privacy interests and the employer's interests must be balanced. *Baughman v. Wal-Mart Stores, Inc.*, 215 W. Va. 45, 48, 592 S.E.2d 824, 827 (2003).

8. Grievant's interests clearly and substantially outweigh the Respondent's interest.

9. Insofar as the Respondent attempted to forbid Grievant's contact outside of work with other Bateman employees, such directive is contrary to law and overly broad.

10. "Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995)(citations omitted). The 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 No. 96-HHR-183 (Oct. 3, 1996).

11. Even assuming the Respondent's "no contact" directive is valid and enforceable, Grievant has proven, by a preponderance of the evidence, that the penalty

imposed upon him was clearly disproportionate to the offense committed and mitigation of the punishment is appropriate.

Accordingly, this Grievance is **GRANTED**. Respondent is hereby **ORDERED** to reinstate Grievant to his position as a Security Guard at Mildred Mitchell-Bateman Hospital. Further, Respondent is **ORDERED** to remove any mention or allegations of copper theft from the Grievant's personnel file.

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* 156 C.S.R. 1 § 6.20 (2008).

Date: December 31, 2009

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Mark Barney
Administrative Law Judge