THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MARK JEFFREY MILLER,

Grievant,

v. **DOCKET NO. 2009-1472-DOT**

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Mark Jeffrey Miller ("Grievant") challenges the decision of Respondent Division of Highways ("DOH") to dismiss him from his employment. The March 30, 2009, "Statement of Grievance" provides as follows: "[u]njustified [d]ismissal." As relief, the Grievant seeks "[r]einstatement of position with back pay and benefits, from date of dismissal."

As this grievance is disciplinary in nature, Grievant filed directly to Level Three. W.VA. CODE § 6C-2-4(a)(4). A Level Three hearing was held on June 20, 2009, in Charleston, West Virginia, before the undersigned Administrative Law Judge ("ALJ"). Grievant appeared pro se. Respondent appeared by and through its counsel Barbara L. Baxter. This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on August 25, 2009.

Synopsis

Grievant, a seventeen-year employee of DOH, is a firearm enthusiast. On May 6, 2009, he unknowingly and unintentionally brought a satchel into the workplace that contained a firearm. He had previously used this satchel to transport firearms to and from a shooting range. A coworker stumbled upon the firearm and reported her find. Grievant was then required to take the firearm home, secure it and return to work. He was

thereafter dismissed from his employment and filed this grievance.

The Respondent has established, by a preponderance of the evidence, that the Grievant violated the *Workplace Security Policy* when he brought a firearm inside the workplace. Possession of a firearm inside the workplace is a serious offense that cannot be taken lightly. Nevertheless, the penalty of dismissal is disproportionate to the offense in light of the Grievant's unblemished seventeen-year record of service and the totality of the circumstances.

Accordingly, this grievance is **GRANTED**, in part and **DENIED**, in part.

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 the DOH as the maintenance storeroom/stockroom supervisor in District II, which encompasses the Huntington, West Virginia, area. Grievant worked out of the District II storeroom.

2. Grievant had been employed by the DOH for approximately seventeen years.

3. Grievant worked his way up through the ranks of DOH to attain a supervisor position. He was promoted twice. He began working in the early nineties as a mechanic. He worked his way up and became a storekeeper. Then, in 2007, he became supervisor for the maintenance storeroom.

4. Throughout his seventeen year tenure, Grievant has never received a negative performance evaluation.

5. Throughout his seventeen year tenure, Grievant has never been disciplined.

6. Grievant is a full-time employee of the DOH. He is also a full-time student at Marshall University where he is majoring in Accounting. Grievant is very busy.

7. In what spare time he does have, Grievant enjoys participating in the shooting sports. He enjoys target shooting. As with many participants involved in the shooting sports, Grievant is also a firearm enthusiast. He collects firearms and many of his firearms are collector pieces. Grievant owns 15-20 firearms. Level Three, Testimony of Mark Jeffrey Miller. Grievant sometimes talked about targets, making targets and tactical shooting gear with his coworkers. Level Three, Testimony of Mark Jeffrey Miller; Testimony of Mary A. "Robin" Keesee.

8. Several individuals in the Grievant's workplace were interested in firearms and the shooting sports. In the past, Grievant has brought firearms in his vehicle and showed them to other employees after work. These firearms were all cased and unloaded, prior to Grievant showing them to others.

9. One employee previously brought Grievant a box of specialty steel-core ammunition he had purchased. This employee wanted Grievant to try it out.

10. The West Virginia Division of Personnel's *Workplace Security Policy*, effective May 1, 1995, and last revised on July 1, 2002, provides as follows:

> III. POLICY: It is the policy of the State of West Virginia to take reasonable measures to ensure the health, safety, and welfare of State employees and the general public they serve, while in the buildings or on the grounds of the State Capitol Complex and all other State government workplaces by screening mail and monitoring and limiting the access of all individuals to State government workplaces. In addition, this policy prohibits the possession, by an unauthorized individual, of any firearm or dangerous/deadly weapon or the exhibition of threatening behavior in any public-owned or leased building or work site.

* * * *

B. Possession of a Firearm or Dangerous/Deadly Weapon

1. The possession of firearms or dangerous/deadly weapons in the workplace by any individual, **including any individual who possesses a license to carry a concealed weapon, is prohibited.** Any employee who violates this prohibition shall be subject to disciplinary action, up to and including dismissal and may be subject to arrest and criminal prosecution.

2. The above prohibition (III.B.1.) does not apply to the following:

a. Any federal, state, or local government security or law enforcement personnel, or other employee (e.g., Wildlife Biologist) who, because of the nature of his or her work, is duly authorized by his or her appointing authority to possess a firearm while engaged in his or her official capacity.

b. Cased and unloaded hunting equipment, firearms, etc., secured in a locked personal vehicle on State property.[1]

(Emphasis in original).

11. Section IV, Part A, of the West Virginia Division of Personnel's *Workplace Security Policy* discusses the responsibility of agencies. It provides that it is an agency's responsibility to:

• Post the Workplace Security Policy in a central location of the agency, and at all satellite offices and to post the Workplace Security Poster at all entrances, exits, and throughout each work site.
• Distribute a copy of the Policy and the appropriate Workplace Security Acknowledgment Form (Appendix A or B) to each current employee, new employees during enrollment and orientation; and maintain the signed acknowledgment form in each employee's personnel file.
• Establish internal procedures to ensure a safe working environment and develop specific plans to respond to and defuse potentially dangerous or threatening situations.
• Ensure that employees are taught how to respond and what agencies to call when dealing with hazardous or dangerous situations which involve

[1] Hence, an employee may have a cased and unloaded high-powered rifle in his or her vehicle on state property and not be in violation of the policy. Likewise, it appears an employee may also have ammunition in his or her vehicle and not be in violation of the policy.

threatening behavior, firearms, suspected explosive devices, or biohazards.
• Enforce the provisions of this policy and administer appropriate disciplinary action for any violation.

12. Supervisors have a responsibility to cover the *Workplace Security Policy* and other DOH policies with new employees, following a new employee Orientation Checklist. The Grievant has not trained or oriented any new employee.

13. DOH had no signed acknowledgment that the Grievant actually received and was aware of the *Workplace Security Policy* as required by the policy. *See Workplace Security Policy*, Appendix A.

14. DOH did not post the *Workplace Security Policy* anywhere in the Grievant's workplace as required by the policy. *See* Level Three, Grievant's Exhibit 1 (DOP's Workplace Security Poster); Grievant's Exhibits 2 and 3 (pictures of the building's entrances and exits). Nor is the policy posted on the DOH's internet website. Level Three, Testimony of Mark Jeffrey Miller.

15. As a supervisor, Grievant should have known of the *Workplace Security Policy*. Nevertheless, Grievant did not have actual knowledge of the policy. *Id*.

16. During the last week of February, 2009, Grievant placed several firearms in his pick-up truck. He had two or three different firearm cases and a "range bag." He and a friend had plans on going to the shooting range. On or about February 27, 2009, Grievant and his friend met at the range for target shooting. After leaving the range, Grievant carried all of his firearms into his home. He "ran out of hands" when carrying his belongings into his home and placed one firearm in the satchel he used for work. *Id*.

17. During late February, 2009, and early March, 2009, Grievant was beginning to

prepare for final examinations for the courses he was taking at Marshall University. During the month of February, 2009, Grievant was tired and somewhat "absentminded." Level Three, Testimony of Mary A. "Robin" Keesee.

18. On March 6, 2009, Grievant carried his satchel into work not remembering or recognizing that he had put a firearm in it. *See* Level Three, Testimony of Mark Jeffrey Miller. Grievant did not knowingly or intentionally bring the firearm into the workplace. Grievant placed his satchel on the floor, in his office, near his desk.

19. On March 6, 2009, another storeroom employee, Mary A. "Robin" Keesee, entered the Grievant's office to put time sheets on his desk to sign. While Mrs. Keesee was in the Grievant's office, the phone rang and she walked around the Grievant's desk to answer the phone.

20. As she walked around the front corner of the desk, she tripped over the Grievant's satchel and a firearm fell out of the satchel and onto the floor.[2] Mrs. Keesee was not certain what to do at that point in time, but was concerned about the safety of leaving the firearm out on the floor.

21. Mrs. Keesee called Barbara King, a long-time employee of District II, who was working as the Secretary for the District II Manager, Keith Chapman. She also served as Comptroller.

22. Mrs. Keesee was told by Ms. King to put the firearm back into the satchel. Ms. King explained to Mrs. Keesee that she would come to the Grievant's office as soon as she was able to do so. Ms. King called the Administrative Services Manager for District II,

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[2] It appears that the firearm was in a holster when it fell out of the satchel. *See* Level Three, Respondent's Exhibits 1 and 3.

Harold Jones, and asked him to accompany her to the Grievant's office to act as a witness. They did not call law enforcement authorities or the Division of Personnel for guidance.

23. Mrs. Keesee placed the firearm back in the Grievant's satchel.

24. Ms. King and Mr. Jones entered the Grievant's office and observed the firearm in the satchel. They took the firearm out of the satchel and took pictures of it with Mrs. Keesee's camera phone. Level Three, Respondent's Exhibit 3. They took the firearm out of its holster and took pictures with the camera phone. Level Three, Respondent's Exhibit 4. Then, they put the firearm back in the holster and placed it back in the satchel.

25. The firearm was a Smith & Wesson, Model 19, nickel plated, .357 caliber, dual-action revolver. Its cylinder held six rounds. Rounds could be observed in the cylinder of the firearm.

26. Mr. Jones called DOH Human Resources in Charleston to report the problem and request guidance. Jeff Black, Director of Human Resources, told Mr. Jones to require the Grievant to unload the firearm, take it off of state property, and if he needed, to take it home, secure it and return to work.

27. Mr. Jones and Mr. Chapman, District II Manager, went to Grievant's workplace and informed him of the firearm. When asked about having a firearm, Grievant stated that he did not think he had a firearm in the workplace. Upon direction from Mr. Chapman, Grievant removed the firearm from the satchel, ensured it was unloaded, took it home, secured it, and then returned to work. Upon returning from his home, Grievant told Mr. Chapman that having the firearm at work "was stupid" and he "should not have had the

weapon there."[3] After returning to work, Grievant finished out his work day.[4]

28. Grievant has never displayed threatening or assaultive behavior in the workplace. Level Three, Testimony of Mary A. "Robin" Keesee.

29. DOH has a "zero tolerance" policy for violations of the *Workplace Security Policy*. When dismissing an employee it does not consider whether an act was intentional or the employee's work history. Level Three, Testimony of Keith Chapman. It was recommended that the Grievant be dismissed without a "notice period." Level Three, Respondent's Exhibit 6.

30. On April 10, 2009, Grievant was dismissed from his employment with the DOH. Level Three, Grievant's Exhibit 4. He was told to immediately leave the premises and he did so. Level Three, Testimony of Keith Chapman.

Discussion

The burden of proof for disciplinary claims 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,

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[3] After the Grievant was approached by Mr. Chapman and Mr. Jones, he realized that he violated a policy. It appears Grievant thought and made statements that he guessed he would receive a three-day suspension. Level Three, Testimony of Barbara King (rebuttal testimony); Mark Jeffrey Miller (rebuttal testimony).

[4] District II Manager Keith Chapman told the Grievant that he had no idea what the punishment would be. The punishment was not made at the "district level."

1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

Grievant is a permanent state employee in the classified service. Permanent 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 Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004)(per curiam). "*Oakes v. W.Va. Dept. of Finance and Administration*, *supra*, requires that a violation sufficient to support a dismissal be of a substantial nature and that if it involves a violation of a statute or official duty it must be done with wrongful intent." *Serreno v. West Va. Civil Serv. Comm'n*, 169 W. Va. 111, 115, 285 S.E.2d 899, 902 (1982)(per curiam). "'Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. West Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777(1988).

"Where an act of misconduct is asserted in a notice of dismissal, it should be identified by date, specific or approximate, unless the characteristics are so singular that there is no reasonable doubt when it occurred. If an act of misconduct involves persons or property, these must be identified to the extent that the accused employee will have no reasonable doubt as to their identity." Syl. Pt. 2, *Clarke v. W. Va. Bd. of Regents*, 166

W.Va. 702, 279 S.E.2d 169 (1981); Syl. Pts. 4 and 5 of *Snyder v. Civil Serv. Comm'n*, 160 W.Va. 762, 238 S.E.2d 842 (1977); *Bryant v. Dep't of Transp./Div. of Motor Vehicles*, Docket No. 06-DMV-225 (May 22, 2009). The Grievant is charged with bringing a firearm into a state building, namely, the storeroom where he worked, on May 6, 2009.[5]

Respondent has established, by a preponderance of the evidence, that Grievant possessed a firearm inside the District II storeroom on May 6, 2009. Grievant admits to possessing the firearm. The *Workplace Security Policy* prohibits the possession of a firearm inside the workplace. Finding of Fact 10 *supra*. On May 6, 2009, Grievant unknowingly and unintentionally brought a firearm in his satchel. He admitted that the firearm was in his satchel. Upon being notified by Mr. Chapman that the firearm was in his possession, Grievant took the firearm home, secured it, and returned to work.

Grievant's possession of the firearm does not fit within an exception provided for in the policy because (1) Grievant is not duly authorized to carry a firearm in his position and/or (2) the firearm was not " cased," "unloaded" and "secured in a locked personal vehicle on State property." *Id*. Respondent has established, by a preponderance of the evidence, that the Grievant possessed a firearm in the workplace in violation of policy. The only disputed issue is whether the punishment imposed was arbitrary and capricious so as

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[5] The May 10, 2009, letter of dismissal cryptically states that "during the investigation process" it was learned that the Grievant brought a firearm in the workplace two days prior to March 6, 2009. DOH has not presented evidence to support this contention. However, Grievant did testify that he had previously brought cased and unloaded firearms to work in his vehicle. The DOH did not precisely address this issue in its proposed findings of fact and conclusions of law. Insofar as this claim could be considered a charge in this grievance, this ALJ hereby finds that the DOH has not met its burden of proving this charge by a preponderance of the evidence, or, in the alternative, this ALJ finds this charge was abandoned by the DOH.

to warrant mitigation of the penalty.

Respondent has a "zero tolerance" policy when it comes to violations of the *Workplace Security Policy*, and the Grievant was dismissed for unknowingly and unintentionally bringing the firearm into the workplace on May 6, 2009. Under West Virginia law, a lesser discipline may be imposed by this tribunal where the offense is disproportionate to the punishment. 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 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). *See Austin v. Kanawha County Bd. of Educ.*, Docket No. 97-20-089 (May 5, 1997). 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); *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995).

As an initial matter, it must first be recognized that the offense committed by the Grievant was serious. Regardless of any mitigating factor, the facts remain that the Grievant was a supervisor, he should have known of the *Workplace Security Policy*, and he violated the policy by carrying a firearm into the workplace. These uncontested facts must be weighed against the mitigating factors.

First, the Grievant's period of service and work performance are considered. "The work record of a long time 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, 285, 332 S.E.2d 579, 585 (1985)(per curiam)(citations omitted). In the matter *sub judice*, the Grievant is a veteran employee of seventeen years. He has worked his way up through the ranks. He started out as a mechanic. In 2007, Grievant was placed into a storekeeper supervisor position. Throughout his career, he has never been disciplined. Nor has the Grievant ever received a negative performance evaluation.

Secondly, punishment for similar or like offenses is another factor to be considered. *Phillips*, *supra*. When considering the punishment given to other employees in similar incidents, the record indicates that the DOH adopts a "zero tolerance" policy for violations of the *Workplace Security Policy*. Level Three, Testimony of Keith Chapman. This is so, even though the *Workplace Security Policy* does not mandate automatic dismissal for violations. By adopting this zero-tolerance approach, it is clear that the DOH did not take into account other relevant factors when determining whether "good cause" for dismissal exists or whether a particular punishment is disproportionate to the mitigating factors.[6] *See generally J.M. v. Webster Co. Bd. of Educ.*, 207 W.Va. 496, 534 S.E.2d 50 (2000)(recognizing the problematic nature of the "zero-tolerance approach" in the context of firearms in the school).

Third, the "clarity of notice" the Grievant received about the rule is considered. *Stewart v. Alcohol Beverage Control Comm'n*, Docket No. 91-ABCC-137 (Sept. 19, 1991). Prior to 1995, DOH apparently did not have a policy which prohibited firearms inside the

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[6] Previous decisions have addressed firearms and "good cause" for dismissal. In *Wright v. Div. of Highways*, Docket No. 97-DOH-285/347 (Nov. 26, 1997), this tribunal refused to mitigate a suspension where (1) grievant violated the *Workplace Security Policy* by having six firearms in the workplace; (2) grievant charged the DOH for numerous travel trips when the trips were not taken; and (3) Grievant spent the night in a "field office" on many occasions. Unlike *Wright*, Grievant in his case did not act intentionally, did not fraudulently request travel pay and did not use state property for personal gain. *Cf. Hammer v. Div. of Corr./Huttonsville Corr. Cntr.*, Docket No. 94-CORR-1084 (Nov. 30, 1995)(mitigating a dismissal to a 10-day suspension in light of the totality of the circumstances where the employee brought a loaded firearm to work in his vehicle and prisoners were near the vehicle). *See also West Va. Dep't of Corrections v. Lemasters*, 173 W. Va. 159, 313 S.E.2d 436 (1984)(holding that dismissal of a correctional officer was appropriate where the employee sold a firearm to a dangerous felon inmate the day after the inmate's release).

workplace. Then, in 1995, the *Workplace Security Policy* went into effect. While the DOH may have had a zero-tolerance policy when it comes to dismissing employees for violation of the policy, the record is unmistakably clear that it did not take its responsibilities and duties under the policy as seriously. Under the policy, it is the obligation and duty of the DOH to "distribute" the policy to all employees and "maintain the signed acknowledgment form in each employee's personnel file." In this matter, even assuming Grievant was advised of the policy, it did not maintain an acknowledgment form for the Grievant. Similarly, under the policy, DOH was required to "[p]ost the Workplace Security Policy in a central location of the agency, and at all satellite offices and to post the Workplace Security Poster at all entrances, exits, and throughout each work site." At the Grievant's work site, there was no posting.

Lastly, other mitigating factors must be considered. As the facts of this grievance indicate, Grievant did not knowingly and intentionally bring a firearm into the workplace on May 6, 2009. Where an individual acts with blatant disregard of a clear and direct policy, dismissal may be warranted. *See Bone v. W.Va. Dep't of Corrections*, 163 W.Va. 253, 255 S.E.2d 919 (1979)(finding dismissal appropriate where a correctional officer intentionally acted in contravention of a direct order); *Gouge v. Civil Serv. Comm'n*, 181 W. Va. 814, 384 S.E.2d 855 (1989)(finding no "good cause" for dismissal, in part, due to the fact that the employee's conduct was intentional). As aforementioned, the clarity of notice is not entirely clear. Yet, as a supervisor, Grievant should have known of the policy. *See Snedegar v. W.Va. Div. of Corr./Anthony Corr. Cntr.*, Docket No. 2008-1889-MAPS (Jan. 15, 2009)(recognizing a supervisor's performance is held to a higher standard). Even

assuming Grievant had some general conception of the policy, the evidence does not suggest that the Grievant intentionally brought the firearm into the workplace on May 6, 2009.

Grievant enjoys participating in the shooting sports. In late February of 2009, he placed several firearms in his pick-up truck to take to the shooting range. After returning from the range, while carrying his belongings into his home, he placed one firearm in a satchel he typically carries to work. The firearm haphazardly slipped the Grievant's mind because he was beginning to prepare for his college final exams. Indeed, as the DOH worker who reported the firearm violation testified, Grievant seemed a little "absentminded" during this time frame. Thereafter, on May 6, 2009, Grievant brought the firearm into the workplace.

There is no evidence of a willful intention to violate the policy. There is no indication that there was anything in the workplace that would lead even an unreasonable person to feel the need to bring a firearm. Grievant had no abnormal conflict with any employee or person in the workplace. Grievant has never displayed threatening or assaultive behavior in the workplace. The culmination of these facts all lead to the conclusion that the Grievant made a very "stupid" mistake. Finding of Fact 27 *supra*.

In summation, the DOH has met its burden of proving the Grievant violated the *Workplace Security Policy* on May 6, 2009. The Grievant has established, by a preponderance of the evidence, that the penalty imposed was disproportionate to the offense. There exists no "good cause" for dismissal. *Oakes*, *supra*. In light of the seriousness of the offense, a forty-day suspension is warranted. When calculating this

amount, this ALJ looks to past decisions concerning firearms in the workplace and the particular facts of this grievance. *See* Footnote 6 *supra*.

Conclusions of Law

1. The burden of proof for disciplinary claims 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*.

2. Permanent 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).

3. Pursuant to the *Workplace Security Policy*, it is a violation for an unauthorized employee to possess "any firearm or dangerous/deadly weapon" in the workplace, unless it is "[c]ased and unloaded hunting equipment, firearms, etc., secured in a locked personal vehicle on State property."

4. Respondent has established, by a preponderance of the evidence, that Grievant

violated the *Workplace Security Policy*.

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 met his burden of proving, by a preponderance of the evidence, that his dismissal was excessive in light of the totality of the circumstances. No "good cause" exists for dismissal. *Oakes*, *supra*.

Accordingly, this grievance is **GRANTED**, in part, and **DENIED**, in part. Respondent is hereby **ORDERED** to reinstate Grievant to his position. Grievant's dismissal is hereby mitigated to a suspension of forty days. Respondent is further **ORDERED** to pay Grievant all pay and benefits he would have earned had he not been dismissed, minus forty-days pay for the appropriate forty-day suspension.

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: September 29, 2009

Mark Barney
Administrative Law Judge