WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ROBERT H. DAVIS
Grievant,

v. **Docket No. 2010-1196-NRCTC**

NEW RIVER COMMUNITY AND TECHNICAL COLLEGE,
Respondent.

D E C I S I O N

Grievant, Robert H. Davis, filed this grievance against his employer New River Community and Technical College ("New River"), Respondent on March 4, 2010, protesting the termination of his services. The statement of grievance provided: "Wrongful termination: Accusations made in a letter of termination are not factual, which can be disputed and proven false." As relief, Grievant sought: "Full employment reinstated at my position and full rights given to my assigned duties for the last several years."

This matter was filed as an expedited grievance directly to level 3 pursuant to WEST VIRGINIA CODE § 6C-2-4. A level three hearing was held before the undersigned Administrative Law Judge on May 14, 2010, in the Grievance Board's Charleston office. Grievant appeared in person and was represented by legal counsel Derrick W. Lefler, Esquire. Respondent was represented by counsel, James "Jake" Wegman, Assistant Attorney General. The grievance became mature for decision on or about July 1, 2010, the deadline for the submission of the parties' proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals.

Synopsis

Grievant was dismissed from his employment with Respondent after not directly informing his supervisor of absences from the work place. New River employees are to notify their respective supervisor if ill or unable to work for any reason and to follow the institution's established procedures for absences from work. The notification shall be given to the immediate supervisor or designee, as determined by established procedures. Grievant undertook reasonable and calculated actions to deliver the information to his immediate supervisor, i. e. having a coworker e-mail his supervisor.

During the litigation of this grievance, both parties argued inadequate performance of required notification. Respondent acknowledged Grievant's actions as undertaken satisfied the purpose and spirit of the policies regarding notification. The timely delivery of the information that Grievant was not able to attend work on a given day was delivered. Grievant's failure to completely follow a directive of his employer warranted disciplinary action. Respondent did not establish by a preponderance of the evidence that Grievant's action(s), constituted insubordination, warranting dismissal. Grievant demonstrated that the penalty imposed was disproportionate to the offense, establishing his termination as an abuse of discretion. Grievance Granted.

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

Findings of Fact

1. Grievant, Robert H. Davis, was employed by New River Community and Technical College (hereinafter "New River") as a LAN Specialist, with a working title of Network/Telecommunications Manager.

2. Grievant had been employed by New River and its predecessor, Bluefield State College, for 13 years.[1] Information Technology has overall responsibility for all IT and work is planned and orchestrated requiring people to meet at various times and places. Grievant performed work related duties regarding computer and networking support on five New River campuses.

3. New River employees are to notify her/his supervisor if ill or unable to work for any reason and to follow the institution's established procedures for absences from work. The notification shall be given to the immediate supervisor or designee, as determined by established procedures of New River. (G Ex 1). New River Board of Governor Policy 18 (Employee Leave) § 2.9; (R Ex 10). Higher Education Policy Commission Series 38 § 2.9 (effective November 19, 1992).

4. Chief Information Officer, Dr. David Ayersman, was Grievant's supervisor during the time period relevant to this grievance.

5. Prior to Dr. Ayersman's employment with Respondent in 2007, Grievant had been supervised by Roger Griffith. For an undisclosed period, there was some confusion as to who directed Grievant's assigned duties and who was Grievant's direct supervisor. Relevant to this grievance there is no confusion as to who is Grievant's supervisor.

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[1] New River Community and Technical College is one of West Virginia's newest independently accredited institutions of higher education. Founded July 1, 2003, by enactment of the West Virginia Legislature, the college was independently accredited February 8, 2005. New River was created by combining the community and technical college component of Bluefield State College with Glenville State College's community and technical college campus in Nicholas County (Summersville).

6. Dr. Ayersman provided employees with multiple methods of communicating absences to him including providing employees with his email, phone, and cellular phone number.

7. Dr. Ayersman wrote Grievant a number of emails regarding the proper procedure for taking leave. (R Ex 1, Series of e-mails ranging in date July 2008 - March 2010). Grievant was aware that he needed to notify Dr. Ayersman regarding his absences from work.

8. New River's Classified Employee Handbook[2] states that, "[i]f, for any reason, an employee is unable to report to work as scheduled, the employee should notify her/his supervisor at the earliest possible time with the reason and the expected duration of the absence." (R Ex 7).

9. The Handbook provides that disciplinary action, including suspension or dismissal, may be taken whenever an employee's conduct interferes with the operation of her/his department. Further, the Handbook allows dismissal of employees for "just cause" including insubordination, refusal to comply with institutional rules, and for habitual absence from work without permission or proper explanation.

10. Grievant's personnel files contained letters, characterized as "written warnings" from February 2009 and October 2009.[3] There is some ambiguity with regard

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[2]New River's Handbook was adopted from Bluefield State College as New River transitioned into an independent community college.

[3] Respondent's witnesses, administrative personnel of New River, use the terms written reprimand and warning letter interchangeably. In the context of employment law the terms written reprimand and warning letter are not synonymous. However, in the circumstances of this case it is specifically acknowledged and recognized that the administrative personnel of New River, use the terms reprimand and warning letter synonymously.

to Grievant's receipt of these documents.[4] Grievant's personnel file does not contain acknowledgment or verification of delivery to, or receipt by Grievant.

11. The February 11, 2009, and October 20, 2009, written warnings authored by Dr. Ayersman to Grievant were for missing work and failing to properly contact his supervisor. (R Ex 2, 3).

12. The February 11, 2009 Letter of Reprimand relates to Grievant's notification of his anticipated absence from work and directs Grievant to contact Dr. Ayersman directly. The letter indicates the contact may be through e-mail, phone call to Ayersman's office or to his cell phone.

13. The October 20, 2009 letter relates to absences during the week of October 13, 2009. The letter indicates Grievant contacted Ayersman relaying an illness on Tuesday, October 13, 2009 which was anticipated to require one to two days of absence, and Grievant was absent for four days. Grievant returned to work at the beginning of the following work week and was charged for the days he was absent due to illness. Dr. Ayersman was aware of the reasons for Grievant's absence.

14. On the dates of February 9, 11, 12, and 18, 2010, New River employees were operating in accordance with New River Procedure for Inclement Weather. Classes were cancelled but staff was to report as the campus was not closed. (Gr Ex 3).

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[4] Grievant by counsel challenges the delivery and receipt of these documents. Grievant recalls conversations in February 2009 regarding the issue(s) discussed in the February letter but contends he was not provided this and/or the October 2009 document. Grievant avers he became aware of and obtained these documents on March 3, 2010, upon review of his personnel file in the Human Resources office. Respondent contends the documents were hand delivered to Grievant.

15. Grievant was absent from work at New River on February 9, 2010. Grievant failed to directly contact his immediate supervisor Dr. Ayersman at New River's Beaver, West Virginia campus. The rationale provided for this included alleged complications of the inclement weather.[5] Grievant did successfully contact Jeff Garlow, the next senior employee, located at the New River's Beckley, West Virginia campus.

16. Grievant requested Mr. Garlow e-mail Dr. Ayersman and inform him that Grievant would not be to work on that day. Mr. Garlow sent the email while still on the phone with Grievant.

17. On February 11th and 12th, 2010, Grievant was delayed in arriving at his work site and he did not communicate any explanation of his late arrival to his supervisor on the 11th and 12th of February 2010. Grievant later requested and was charged one half day leave for each day.

18. On February 18, 2010, Grievant experienced difficulty getting to work. Grievant did not contact his supervisor, Dr. Ayersman directly. Grievant contacted co-worker Garlow and requested that he e-mail Dr. Ayersman and inform him of Grievant's absence due to car troubles and the inclement weather. Mr. Garlow completed this e-mail during the telephone conversation with Grievant. Subsequently, Grievant requested, and was charged leave for February 18, 2010.

19. On February 22, 2010, Dr. Ayersman recommended that Grievant's employment be terminated to New River's President Dr. Ted Spring and New River's

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[5] Grievant's attempts to directly contact Dr. Ayersman were unsuccessful. Grievant's explanation for his inability to directly call Dr. Ayersman's office related to ongoing technical difficulties at New River's Beaver campus; inclement weather; and because of inferior dial-up internet service at his rural location.

Executive Vice President and Chief Academic Officer Dr. Harry Faulk. (R Ex 4). The rationale communicated for this recommendation was due to Grievant's failure to notify his supervisor regarding absences.

20. Dr. Ayersman's February 22, 2010, recommendation for termination stated:

> I am recommending that Robert Davis be terminated for his continued insubordination.
>
> On multiple occasions Robert has failed to show up for work and he has neglected to inform me, his supervisor. I have even given him two written warnings with copies in his personnel file clearly explaining to him that this behavior is simply unacceptable. In spite of this, he has been absent from work for multiple days in the past two weeks and he has failed to inform me of these absences.

21. On February 23, 2010, President Spring issued an "Intent to Terminate Employment" notification to Grievant. (R Ex 6).

22. The Intent to Terminate letter referenced a February 2009 written warning for failure to adhere to New River policies and procedures for reporting absences, and an October 20, 2009 "second written warning" regarding failure to adhere to New River policies and procedures set forth for reporting absences from work. The letter made reference to alleged failures on the part of Grievant to report for work or contact his immediate supervisor prior to absences. Specific reference was provided to absences on February 9 and 18, 2010, and half days on February 11 and 12, 2010. The letter also asserted that Grievant's failure to report absences "has resulted in projects under your responsibility being delayed" and "has resulted in your supervisor being unable to plan for a continuation of the projects." (R Ex 6).

23. The Intent to Terminate letter informed Grievant that he could request a predermination hearing. Grievant requested a hearing and it was held on March 3, 2010.

24. At the predermination hearing, Grievant did not state that he had never received the two warning letters from Dr. Ayersman cited in the February 23, 2010, Intent to Terminate letter.

25. President Spring did not accept the explanations given by Grievant as satisfactory justification for Grievant's failure to contact Dr. Ayersman regarding absences from work. President Spring was of the opinion that Grievant did not adequately explain his conduct.

26. Following the March 3, 2010 pre-termination hearing, President Spring issued a Notice of Termination dated March 5, 2010 to Grievant. (R Ex 9). President Spring noted that Grievant "acknowledged that [he] had been instructed to contact [his] supervisor directly."

27. The Notice of Termination specified that Grievant was terminated for failing to follow New River policies and procedures. The specific reasons listed included:

- Insubordination by failure to follow directives issued by Dr. Ayersman.
- Failure to report for duty and/or report absences from work as set forth in New River Classified Employee Handbook.

(R Ex 9).

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 Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). 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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Respondent asserts Grievant was properly terminated as a result of Grievant's failure to follow applicable rule and policy by not reporting his absences to his supervisor. Specifically, Respondent New River maintains that pursuant to known policy and practices, an employee is required to notify his supervisor about absences from the worksite. However, Grievant repeatedly failed to notify his supervisor, Dr. David Ayersman regarding absences from assigned duties, thus Grievant's employment was terminated. Grievant challenges Respondent's disciplinary actions and argues that dismissal was too severe a sanction in the context of this case.

"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). *See also Trimble v. W. Va. Bd. of Directors,* 209 W. Va. 420, 549 S.E.2d 294 (2001). New River's Policy and Handbook require employees to notify their supervisor of absences. Specifically, under New River Board of Governor Policy 18 (Employee Leave) § 2.9,

> "[a]n employee is required to notify her/his supervisor immediately if ill or unable to work for any reason and to follow the institution's established

> procedures for absences from work. The notification shall be given to the immediate supervisor or designee, as determined by established procedures of New River." (Gr Ex 1; *see also* R Ex 10).

Additionally, New River's Classified Employee Handbook states, "[i]f, for any reason, an employee is unable to report to work as scheduled, the employee should notify her/his supervisor at the earliest possible time with the reason and the expected duration of the absence." (R Ex 7). The Handbook provides, "failure of notification can result in discipline, including termination." It is within the purview of Respondent's authority to dismiss employees for "just cause" including insubordination, refusal to comply with institutional rules, and for habitual absence from work without permission or proper explanation. *Id*.

In the vein of progressive discipline, Respondent's argument highlights and encompasses the warnings of prior disciplinary communications. The February 11, 2009, letter issued by Dr. Ayersman to Grievants states:

> "I have repeatedly needed to remind you that prior notification is required before you take leave. On multiple occasions you've been absent from work without notifying me in advance and only after I find out about your absence and request that you complete a Request for Leave have you done so.
>
> You MUST notify me directly. Simply informing a colleague or co-worker is not sufficient. You may contact me with an email message, a phone call to my office phone, or by calling my cell phone. Without some advance notice your absence from work is an unapproved absence and it leaves me severely unprepared to address issues that arise in your area of responsibility. . .
>
> This letter is intended to serve as your final warning. More severe disciplinary action, possibly even termination, will be taken if this recurs."

(R Ex 2). Respondent contends termination of Grievant's employment was proper and justified as a result of Grievant's recurring failure to conform his conduct as required and specifically requested.

In opposition to the instant disciplinary action (termination), Grievant appears to raise a due process issue with regard to one or more prior disciplinary action(s) of Respondent. Grievant's termination was preceded by a letter dated February 23, 2010 from President Spring setting forth New River's "Intent to Terminate Employment." The Intent to Terminate letter referenced a February 11, 2009 written warning for failure to adhere to New River policies and procedures for reporting absences, and an October 20, 2009 "second written warning" regarding failure to adhere to policies and procedures set forth for reporting absences from work. Grievant's personnel files contained these letters, characterized as "written warnings." However, Grievant testified that prior to March 3, 2010, upon review of his personnel file in the Human Resources office, he had not received these documents. March 3, 2010 was the date of the predetermination hearing.

It is noted that there is a distinction between being aware of an issue(s) and proper receipt of disciplinary documents. This point cuts both ways. It is recognized and determined as a finding of fact by this ALJ that all parties of this grievance, in one form or another, is contesting imperfect notice. Not lack of essential knowledge but actionable notification of information.

Dr. Ayersman wrote Grievant a number of emails regarding proper procedure for taking leave. (R Ex 1). Grievant was aware there was an ongoing issue with his absence from work without contacting his supervisor. Dr. Ayersman and Grievant discussed the issue face to face, this is acknowledged by both men. However, there is a factual disagreement as to the delivery and receipt of written disciplinary documents on the issue. This contention is not necessarily a minor point. Proper notice of disciplinary action has a bearing on the action and future disciplinary sanctions. Grievant's personnel file does

not contain any acknowledgment or verification of delivery to, or receipt by Grievant of the documents in discussion. Due process and progressive discipline are not concepts to be easily discounted.[6]

"Employers have the right to expect employees to come to work on time and to follow orders that do not impinge on their health and safety." *Page v. W.Va. Dep't of Health and Human Res.*, Docket No. 02-HHR-049 (July 5, 2002), *Brooks v. Dep't of Health and Human Res.*, Docket No. 03-HHR-182 (Nov. 14, 2003). "Failure of [an employee] to report to work and to report the absences to the [employer] as previously directed amounts to insubordination and wilful neglect of duty justifying disciplinary action." *Carrell v. Kanawha County Bd. of Educ.*, Docket No. 20-87-036-1 (Apr. 8, 1987), *citing Kidd v. Kanawaha County Bd. of Educ.*, Docket No. 20-86-096 (Apr. 23, 1986); *Strickler v. Hampshire County Bd. of Educ.*, Docket No. 04-14-133 (Jan. 24, 2005). 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, 212, 569 S.E.2d 456, 459 (2002, *per*

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[6] The West Virginia Supreme Court of Appeals has recognized that "due process is a flexible concept, and that the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) (*citing Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)). An employee who possesses a recognized property right or liberty interest in his employment should not be deprived of that right without proper notice. Further, it has been found that under some circumstances, due process requires an educational institution to impose progressive disciplinary sanctions in an attempt to correct an employees conduct before it may resort to termination. W. Va. Const. art. III, § 10." Syl. Pt. 6, *Trimble v. W. Va. Bd. of Directors,* 209 W. Va. 420, 549 S.E.2d 294 (2001*); Bachman v. Potomac State Coll. of W. Va. Univ.,* Docket No. 07-HE-198 (Jan. 17, 2008).

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; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts*, *supra*. It is not determined that Grievant was insubordination.

To what degree Grievant's alleged attempts to contact Dr. Ayersman directly were made in good faith is dubious at best.[7] Grievant was aware he was to notify his immediate supervisor in the event he was unable to attend work. However, Grievant undertook actions which were reasonably calculated to deliver the necessary information to his immediate supervisor, i. e. having a coworker e-mail his supervisor. In assuring the delivery of the necessary information to his immediate supervisor, while perhaps not technically complying with his supervisor's directive, Grievant's actions satisfied the paramount concern of the policy, begrudgingly acknowledged by his supervisor and other New River administrators. Ironically, during this matter, both parties argue inadequate notice of required information.[8]

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[7] Grievant's explanation for his inability to directly communicate with Dr. Ayersman's office was related to ongoing technical difficulties at New River's Beaver campus. Grievant's attempts to call Dr. Ayersman's cell phone were misdirected and said calls were not completed. Lastly, Grievant professes attempts to e-mail Dr. Ayersman through New River's internet site. However, because of inferior dial-up internet service at his rural location, Grievant was unable to access New River's site from his home.

[8] Grievant contends written reprimand documents were not provided to him while acknowledging the conversation(s) regarding the subject matter in discussion. Respondent does not dispute that Grievant contacted New River personnel and conveyed the information of his absences on February 9 and February 18, 2010 in a prompt manner. Rather, Respondent contends that Grievant's failure to contact Dr. Ayersman directly is a violation of policy and a directive, warranting dismissal.

Grievant's actions as undertaken satisfied the purpose and spirit of the policies regarding notification, the timely delivery of the information that Grievant was not able to attend work on a given day. The undersigned is not persuaded that Grievant's behavior should be interpreted as insubordination, warranting the disciplinary action levied by Respondent. It is not established that Grievant intentionally refused to obey a directive. Grievant did not directly communicate with his immediate supervisor, a technical shortcoming, not an action in the facts of this case deemed insubordination.

Grievant's submitted proposal following the level three hearing asserts mitigation of the penalty. 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). "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). 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 recognizes the mitigation of a punishment imposed by an employer as extraordinary relief.

In consideration of Grievant's termination as discipline, the circumstances surrounding the events in question must be considered. The events upon which Grievant's termination occurred were during a two-week period in February 2010 and, in the course of a winter season with snowfall of unusual frequency and volume. A paramount consideration and concern regarding notification of employees absence is the timely communication of absence to supervisors. In this matter, on the days in question, Grievant's supervisor received the leave notification in a timely fashion for the days Grievant was not present. Further, the record and testimony does not reflect that Grievant was chronically absent from work, nor chronically tardy for work. Some inferences were made that unless absences were properly reported, an employee would maintain an artificially enhanced leave balance. It was not established that Grievant was under reporting his absences from the workplace. Grievant has been employed by New River and its predecessor, Bluefield State College, for 13 years.

No finding of fact is made with regard to when Grievant received a copy of the February 11, 2009 and October 20, 2009 Disciplinary Letters. As previously noted, both parties of this action contest at one time or another imperfect notice, not lack of the information but how the information was conferred. Grievant's behavior could be

interpreted as a deliberate passive-aggressive form of rebellion and Grievant was consciously disrespecting supervisory personnel undermining their status, prestige, and authority. Thus, his behavior warrants severe disciplinary action. However, this position was not established by the facts of the case.

Dr. Ayersman had a variety of corrective actions short of termination to modify Grievant's behavior. His recommendation to terminate Grievant was an extreme penalty. Further, it was in response to a technical shortcoming, not overt insubordination. Respondent had available to it a range of disciplinary measures to address circumstances presented as identified in the Intent to Terminate letter, including reprimand or suspension. The discipline chosen was the most severe and extreme disciplinary option available. The expressed rationale for this extreme measure was not persuasive. The evidence presented by Respondent fails to establish that, to any extent, Grievant's technical failure to contact his immediate supervisor, either on those days where he advised his immediate supervisor through e-mail from a coworker of his need to take leave, or those days where Grievant was in transit to the workplace and arrived late due to inclement weather and hazardous travel conditions, that New River suffered any deleterious impact or that the performance of Grievant's job duties, or the job duties of any other New River employee were negatively impacted.

Constitutional due process principles may be used to determine whether disciplinary action taken by a public higher educational institution against a tenured [employee] is too severe for the infraction occasioning such discipline. W. Va. Const. art. III, § 10." Syl. Pt. 5, *Trimble v. W. Va. Bd. of Directors,* 209 W. Va. 420, 549 S.E.2d 294 (2001). Under the particular circumstances of the case at hand, the termination of Grievant's employment

was disproportionate and beyond reasonably corrective action necessary to address Grievant's conduct. Grievant demonstrated that the penalty imposed was so clearly disproportionate to the offense that it reflects an abuse of discretion. A more proportionate penalty for a technical shortcoming, as in the facts of this case, is a suspension of ten working days without pay.

The following conclusions of law support this Decision.

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 Bd. 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

2. An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995); *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

3. "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).

4. 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 clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation. *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

5. Grievant demonstrated the penalty levied was clearly excessive or reflects an inherent disproportion between the offense and the personnel action.

6. Given the totality of the circumstances, the penalty imposed by Respondent upon Grievant was so disproportionate to the offense that it constituted an abuse of discretion.

Accordingly, this grievance is **GRANTED** in part. Respondent is **ORDERED** to rescind the termination of Robert Davis effective ten working days after Grievant's separation from service. Prospective back pay and benefits are granted to Grievant from this period forward. The amount of prospective back-pay must be balanced against any known mitigation factors such as subsequent employment compensation or unemployment benefits received. Grievant should be returned to the assigned duties of a LAN Specialist,

with a working title of Network/Telecommunications Manager employed by New River Community and Technical College. No other relief is granted by this Order.

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 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 15, 2010

Landon R. Brown
Administrative Law Judge