WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DENISE RHINES,
Grievant,

v. **Docket No. 2010-0242-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/OFFICE OF MATERNAL CHILD & FAMILY HEALTH,
Respondent.

DECISION

Grievant Denise Rhines filed a grievance against her employer, Department of Health and Human Resources ("DHHR") on August 18, 2009. Her statement of grievance reads, " Wrongful Termination." For relief, Grievant stated she was seeking "Reinstatement of employment at level of last employment or better." However, during the first day of hearing, Grievant informed the undersigned and Respondent's counsel that she had obtained employment elsewhere and was seeking back pay, but not reinstatement.[1]

Because this grievance is contesting a dismissal, Grievant elected to file directly to level three of the Public Employees Grievance Procedure. *See* W. VA. CODE § 6C-2-4(a)(4). A two day level three hearing was held at the Grievance Board's Charleston office on July 14, 2010, and October 27, 2010. Grievant appeared pro se, and Respondent was represented by Heather Laick, Assistant Attorney General. This case became mature on December 7, 2010, upon receipt of the parties' findings of fact and conclusions of law.

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[1]Upon hearing that, Respondent made a motion to dismiss stating there was no relief available. This motion will be addressed below.

Synopsis

Respondent terminated Grievant for a history of poor performance and misconduct. Respondent asserts Grievant has had a history of work performance issues. Respondent also avers Grievant mishandled client information and disclosed confidential client information in violation of federal law.

Grievant argues that she was held to a different performance standard than her coworkers. Grievant asserts that the policies continually changed, making it difficult for Grievant to consistently perform at expectations. Grievant also avers she was targeted and picked on by her superiors.

Respondent has met its burden in this matter. Therefore, this grievance is DENIED.

Findings of Fact

1. Grievant was employed by DHHR as a Social Service Worker II in Kanawha County.

2. Grievant was terminated by letter dated August 5, 2009. The reasons stated poor performance and mishandling client information.

3. On September 21, 2007, Linda Shaffer, Systems Point of Entry Director and Grievant's immediate supervisor, met with Grievant and a coworker to discuss complaints by both that the other was failing to complete recording logs. Both Grievant and her coworker were instructed to complete the recording logs on any action they took and place it in the client's file.

4. On October 4, 2007, Cathy Capps-Amburgey, the Children with Special Health Care Needs Program Director, and Ms. Shaffer met with Grievant concerning her behavior

at a two day training conference. Specifically, Ms. Capps-Amburgey addressed Grievant arguing with a presenter, falling asleep while laying her head on the table, and loud burping.

5. On October 11, 2007, Ms. Shaffer was reviewing Grievant's cases and noticed that recording log entries were not in chronological order. Ms. Shaffer emailed Grievant asking that she ensure the entries were in chronological order, so as to assist others who needed the most current information on cases.

6. Between October 23, 2007 through October 24, 2007, Grievant was off payroll due to personal reasons.

7. On October 25, 2007, Grievant and the Unit Nurse had a confrontation. Phil Edwards, the Infant, Child and Adolescent Health Division Director, and Ms. Shaffer met with both Grievant and the Unit Nurse to establish rules for the two women to follow when working together.

8. On March 7, 2008, Ms. Shaffer contacted Grievant via email to inquire as to the status of several pending cases. Ms. Shaffer became aware that these cases were still pending because Grievant had failed to follow through with her work. In an attempt to fix the problem, Ms. Shaffer asked Grievant to begin using a calendaring system to keep track of items and due dates.

9. On March 10, 2008, Grievant approached Ms. Shaffer and stated that she wanted to color code the files in order to keep track of due dates. Ms. Shaffer explained that because Grievant's coworkers also dealt with the files, the team needed to agree on a solution. Ms. Shaffer held a meeting with everyone involved and decided on a system that would work for the majority of the team. Grievant requested that the files be color coded and placed in chronological order. It was determined that suggestion was too time

consuming for the others. Grievant then stated she couldn't help it if her coworkers were too stupid to understand the color coding system.

10. The leave policy at the office required Grievant to complete a leave slip and have a supervisor sign the slip before leaving. On March 12, 2008, Grievant left a leave slip in Ms. Shaffer's in-basket for approval, even though Grievant knew Ms. Shaffer had left for the day, and another supervisor was available.

11. On March 13, 2008, Ms. Shaffer, Mr. Edwards, and Lisa Steele, Human Resources Manager, met with Grievant to discuss her inappropriate comments during the team meeting concerning her coworkers being too stupid to understand the color coding system and her unapproved leave slip from the prior day. Mr. Edwards suggested that Ms. Shaffer provide Grievant with training on how to use the Groupwise calendaring system, but Grievant indicated she did not want to use a calendaring system.

12. On March 14, 2008, Ms. Shaffer suggested Grievant use an expandable folder to assist with the pending cases. Grievant explained that would not work for her. Ms. Shaffer reiterated Grievant had to either use the expandable folder, the GroupWise calendar system, or a monthly planner. Grievant told Ms. Shaffer to pick one, and Ms. Shaffer picked the expandable folder.

13. On March 19, 2008, Ms. Shaffer became aware that Grievant had circumvented the Unit Nurse, with whom she had bickered in the past, and sent questions via email to the Nursing Director. Ms. Shaffer instructed Grievant to email any such questions to the Unit Nurse and to remember to copy Ms. Shaffer on any work related emails.

14. On March 27, 2008, Grievant emailed Ms. Shaffer a color-coded spreadsheet and said that she would keep track of her cases in this manner. Ms. Shaffer once again instructed Grievant to use the expandable folder system.

15. On April 10, 2008, Ms. Steele and Ms. Shaffer met with Grievant to discuss going off payroll, as this happened once again. During that meeting, Grievant informed Ms. Steele and Ms. Shaffer that she was being harassed by a coworker and it was causing stress. Grievant then explained to Ms. Steele that when she identified a problem, there was no resolution. Ms. Steele said she would meet with Grievant and the coworker separately. Grievant was also presented with an Employee Performance Improvement Recommendation ("EPIR") which implemented leave restrictions on Grievant.

16. On May 8, 2008, Ms. Steele and Ms. Shaffer met with Grievant for a follow-up meeting from the complaint levied during the April 10th meeting. Grievant informed Ms. Steele and Ms. Shaffer that she did not speak to the Nurse. Grievant was provided with a copy of DHHR's Employee Conduct Policy, which states, "Employees are expected to follow directives of their superiors; conduct themselves professionally in the presence of residents/patients/clients, fellow employees and the public." Grievant was informed that she needed to interact with the Nurse in a professional manner in order to complete tasks.

17. On May 20, 2008, Ms. Steel and Ms. Shaffer met with Grievant concerning Ms. Shaffer's realization that Grievant was still not entering all necessary information in the database or keeping the entries in chronological order. At the meeting, Grievant was instructed that she must enter client information on recording logs in the Assessment Unit database and that they must be kept in chronological order so other employees could find the information when necessary. Because Grievant had not used any leave, Ms. Shaffer

removed the restrictions outlined in the EPIR, with the understanding that should Grievant go off the payroll during the evaluation period again, the EPIR would be reinstated.

18. On May 22, 2008, Grievant emailed Ms. Shaffer to inform her that Grievant had come up with an alternative way to share information about her cases without having to enter the information on a recording log in the database. Grievant stated that she had placed her pending cases on the shared drive so that Ms. Shaffer could see them. Ms. Shaffer again explained that the information must be kept in the Assessment Unit database and not in a folder on the shared drive. Ms. Shaffer explained to Grievant that this method would require Grievant enter the data twice and be more time consuming.

19. Sometime in May 2008, Grievant had a confrontation with the Assessment Unit Office Assistant. Grievant accused the Office Assistant of doing the Unit Nurse's work instead of Grievant's. When the Office Assistant tried to explain that was not the case, Grievant told her to "shut up."

20. On May 29, 2008, Ms. Shaffer, Ms. Steele, and Mr. Edwards met with Grievant concerning the confrontation between her and the Office Assistant. Grievant was informed that her behavior would not be tolerated. The supervisors also discussed the fact that Grievant continued to refuse to follow Ms. Shaffer's directives to enter information in the database, instead of saving it to a shared drive and Grievant's refusal to use the expandable folder calendaring system. Grievant was informed that the supervisors would be taking disciplinary action. Grievant agreed to apologize to the Office Assistant.

21. On June 6, 2008, Grievant received a verbal reprimand for insubordination and violation of the Employee Conduct Policy, was presented with a copy of the Employee Workplace Harassment Policy, and was placed on an EPIR. The EPIR set forth a plan

dealing with completing work assignments within agreed time frames; interacting in a courteous, professional manner with coworkers, supervisors, and others on a daily basis; demonstrating professionalism; following Respondent's policy and procedures; and keeping to the assigned work hours.

22. During the meeting on June 6, 2008, to discuss the verbal reprimand and the EPIR, Grievant admitted that she had never started using the expandable folder calendaring system that she had been repeatedly instructed to use. Grievant was again instructed to begin using the expandable folder calendaring system and informed that she would receive further discipline if she continued to ignore the directives of her supervisor.

23. On June 16, 2008, Terra Hoff was hired into Ms. Shaffer's position as Grievant's immediate supervisor and Ms. Shaffer was promoted and began working as Ms. Hoff's supervisor.

24. On June 19, 2008, Grievant approached Ms. Hoff and told her that she would like to use a color coded calendar system. Ms. Hoff told Grievant she was not familiar with the process, as she had just started as supervisor. Ms. Hoff instructed Grievant to use the expandable folder system instead. Grievant stated she had either lost the folder or thrown it away, so Ms. Hoff provided Grievant with a new one.

25. On July 18, 2008, Ms. Shaffer, Ms. Hoff, and Ms. Steele met with Grievant to discuss her current EPIR. The supervisors informed Grievant that her EPIR would continue until the end of her evaluation period because she was still not utilizing the expandable folder system as she had continuously been directed.

26. When reviewing the database used by Grievant's unit, Ms. Hoff noticed that Grievant was taking too long to complete her part of the process and that she was not

meeting the time lines of the assessment team. On July 28, 2008, Ms. Hoff and Ms. Shaffer met with Grievant after a review showed ten (10) cases had not had any action taken on them in at least eight (8) days. Grievant was supposed to take action on the cases within three (3) days of receiving them. Grievant responded she was behind and did not have time to work on them. Ms. Hoff reviewed one of Grievant's files and pointed out that the recording log was not being kept in chronological order, even though Grievant had been told repeatedly that the recording logs must be in chronological order. Grievant was once again instructed to place the logs in chronological order.

27. On July 29, 2008, Ms. Hoff reviewed two cases with Grievant that were incorrect. One of the files had a recording log entry with several comments added to it on later dates, instead of creating new entries for each action, as required, in order to quickly find the most recent events in the file. Ms. Shaffer and Ms. Hoff reminded Grievant that recording logs must be kept in chronological order, and they explained that if her actions continued they would be considered insubordination and she would be disciplined further.

28. On August 4, 2008, a review of a client's recording log showed that Grievant had attempted initial contact with the client, but no letter was sent to the family requesting they contact Grievant. Ms. Hoff, upon noticing this, asked Grievant if contact was made with the family. Grievant responded by showing Ms. Hoff a copy of the recording log. Ms. Hoff then asked for a copy of the letter, if one had in fact been sent. The next day Grievant admitted she had not sent the letter to the family and contact had not been made. Ms. Hoff instructed Grievant to contact the family immediately and not to enter false information in the recording logs again.

29. On August 8, 2008, Respondent received a complaint stating that Grievant had contacted an out-stationed field team three times to schedule a doctor's appointment for a child. Ms. Hoff and Ms. Shaffer received the complaint and met with Grievant. Grievant was aware that the Unit Nurse was in charge of making doctor appointments and that the Nurse had to gather medical records and verify certain information for each client before these appointments could be made.

30. Ms. Hoff had also discovered that Grievant had placed in a recording log that the client's income had been verified, when it had not been.

31. A meeting was held on August 8, 2008, with Grievant to discuss the complaint and the incorrect information in the recording logs. Grievant was informed she would be receiving disciplinary action for insubordination.

32. By letter dated September 3, 2008, Grievant was issued a written reprimand for unacceptable behavior, specifically insubordination. The letter chronicled the litany of issues from September 21, 2007 through August 8, 2008.

33. Grievant was placed on an EPIR on September 3, 2008. The issues were her willingness to accept and complete assignments within agreed time frames; interacting in a courteous, professional manner with coworkers, supervisors and others; demonstrating professionalism in all aspects of the position; and following Respondent's policies and procedures.

34. On September 10, 2008, it was discovered that Grievant was practicing social work without a license, in violation of State law, as Grievant had allowed her license to lapse. Grievant met with Pat Moss, Office Director of the Office of Maternal, Child and Family Health. Grievant was demoted without prejudice and placed in an Office Assistant

position. On October 8, 2008, Grievant's license was reissued, and she was returned to her position of Social Service Worker II.

35. On February 13, 2009, after Ms. Shaffer and Ms. Hoff became aware Grievant still was not using the expandable folder calendaring system as instructed, they met with her and issued a verbal reprimand for insubordination.

36. Ms. Steele, Ms. Hoff, Ms. Shaffer, and Christina Mullins, Division Director, met with Grievant on February 25, 2009, to discuss an email exchange regarding Grievant being directed yet again to use the expandable file calendaring system and to enter information in the Assessment Unit database.

37. As part of the coaching procedure Ms. Hoff suggested she shadow Grievant. While Ms. Hoff was sitting at Grievant's desk, Grievant asked if it would be alright to listen to her earphones. Ms. Hoff agreed because at that point she and Grievant were not interacting. When Ms. Hoff witnessed Grievant not following procedure, Ms. Hoff asked her to remove the earphones. Grievant did not comply with this request. Only after being asked several times did Grievant remove the earphones.

38. Ms. Hoff noticed that Grievant did not work a chart from beginning to end, as she had been asked. Ms. Hoff believed this was affecting Grievant's completion time. When Ms. Hoff stopped Grievant to explain the correct procedure was to complete one file before starting another, Grievant argued with Ms. Hoff, asserting procedure had been changed frequently. Grievant then placed her earphones back on and danced around in her seat looking at the computer screen, ignoring Ms. Hoff.

31. On April 10, 2009, Grievant was placed on an EPIR because she received a "Fair, but Needs Improvement" overall rating on her Employee Performance Appraisal. Ms.

Hoff, Ms. Steele, and Ms. Shaffer met with Grievant and reviewed the EPIR with her. The EPIR addressed accepting and completing work within agreed time frames and following Respondent's policy and procedures. Grievant was also asked to complete a time study of her work activities for the following week and provide it to Ms. Hoff.

32. On April 27, 2009, Ms. Hoff sent Grievant an email regarding three charts she had worked on. Grievant responded argumentatively stating Grievant wanted Ms. Hoff to give her a detailed time line, including explaining each assignment's priority.

33. On May 4, 2009, Ms. Hoff sent Grievant an email requesting the time study for the week of April 13th through April 17th, which was requested of Grievant at the April 10th meeting. Grievant informed Ms. Hoff that she was leaving for the day and would submit the time study the next day.

34. Grievant submitted the time study on May 5, 2009, but it was incomplete. There was no information provided for April 16th between 10:30 a.m. and 2:25 p.m. and for April 17th between 12:45 p.m. and 5:00 p.m. Grievant stated she had left early on those dates. Leave slips submitted by Grievant did not support that statement.

35. On May 12, 2009, Ms. Hoff sent Grievant an email informing her that due to the circumstances of one specific case, Ms. Hoff had decided to give it to the Unit Nurse to complete the entire process. This was an unusual case, and Ms. Hoff provided Grievant with her rationale for this decision. On May 13, 2009, Grievant sent an argumentative email in response questioning Ms. Hoff's decision.

36. On May 13, 2009, Ms. Hoff approached Grievant regarding a case that Grievant had not acted on in a week. Grievant became angry and raised her voice. When Ms. Hoff attempted to calm Grievant down, Grievant began mocking Ms. Hoff. Grievant's

behavior continued to escalate until another coworker contacted Ms. Shaffer to intervene. Later that day, Grievant entered a recording in the client's recording log representing the confrontation with Ms. Hoff.

37. On May 18, 2009, Ms. Steele, Ms. Shaffer and Ms. Hoff met with Grievant to discuss the incident from May 13, 2009. Grievant again became argumentative. Grievant was informed that she would be placed on a three day suspension and was to immediately amend the recording log that contained subjective comments about her supervisor. The three day suspension began June 3, 2009.

38. On June 26, 2009, Ms. Hoff, Ms. Shaffer, and Ms. Steele met with Grievant and informed her that her EPIR would remain in effect until August 31, 2009, which was the end of the next evaluation period. The supervisors also informed Grievant that they were adding a requirement to the EPIR that Grievant behave in a courteous professional manner, provide quality work, and meet her unit goals.

39. On July 9, 2009, Grievant left work at 12:15 p.m. without obtaining approval or notifying anyone that she was leaving. As a result Grievant was charged for unauthorized leave.

40. On July 24, 2009, Grievant violated federal HIPPA regulations when she disclosed confidential client medical information to a third party. Grievant had been trained on HIPPA regulations.

41. As a result of the events that occurred in July 2009, as well as Grievant's lengthy history of performance deficiencies and misconduct, the decision was made to terminate her. A predetermination conference was held on August 4, 2009, and Grievant's termination was effective on August 20, 2009.

Discussion

Motion to Dismiss

Because Respondent made a motion to dismiss orally the first day of hearing when Grievant indicated she was not seeking to be reinstated, but merely wanted back pay, that issue will be addressed first. Respondent asserted that this grievance should be dismissed as there was no longer appropriate relief to grant.

First, back pay is an appropriate relief that can be granted should a grievant prevail. Second, to dismiss a grievance involving a termination when a grievant has obtained alternative employment would be counter-intuitive to the case law that requires grievants who have been terminated to mitigate their damage. *See Mason County Bd. of Educ v. State Superintendent of Schools*, 295 S.E.2d 719, 170 W. Va. 632 (W. Va. 1982) and *Dixon v. DOT* 2010-1108-DOT (Dec. 20, 2010).

Because back pay is an appropriate remedy, Respondent's motion to dismiss is denied.

Merits

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *Hoover v. Lewis County Board of Education*, Docket No. 93-21-427; *Landy v. Raleigh County Board of Education*, Docket No. 89-41-232. A preponderance of the evidence is defined as "evidence which is 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." *Black's Law Dictionary* (6th ed. 1991); *Leichliter v. West Virginia Department of Health & Human*

Resources, Docket No. 92-HHR-486. Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

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).

Respondent asserts Grievant was terminated as a result of the extensive history of performance issues, mishandling client information in violation of federal law, and failure to follow required procedure for taking leave. Grievant argues she has been singled out and set up to fail in as much as the procedures kept changing making it difficult for her to perform her duties.

Respondent has clearly proven that there were issues with Grievant's work product and attitude. As set forth above, Grievant has been routinely counseled and placed on improvement plans. Respondent has followed its progressive disciplinary policy. Respondent's policy on "Progressive Disciplinary Action" provides for a system that begins with a verbal reprimand, followed by a written reprimand, suspension and then dismissal. However, the policy also specifically states that it should be followed in "most cases," but that "decisions as to the severity of disciplinary action shall be made on a case-by-case basis." DHHR Policy Memorandum 2104.

Grievant argues she has been unfairly targeted and the procedures kept changing so that it became difficult to perform her duties. While Grievant did prove some of the

procedures changed, the changes do not seem significant enough to cause Grievant additional issues with her work product. In fact, there was consistency in the fact that Grievant needed to update the recording logs, process her cases in a timely manner, and use the expandable folder calendaring system.

With respect to the mishandling of client information, Grievant had been trained in the federal law as it relates to personal and confidential client information. Yet, Grievant on two separate occasions disclosed client information to third parties not authorized to have the information.

Grievant cites to one anomaly where Ms. Hoff informed Grievant she would not be receiving a specific case due to the circumstances and that the Unit Nurse would be completing the entire process of the application. Ms. Hoff made this decision after receiving information from the treating physician concerning the time-sensitive nature of the case. Grievant argues she then was disciplined for the same conduct when she called the field team three times to make an appointment for a client. Grievant was to open the files, make the initial contact with the family, and obtain information. The Unit Nurse then reviewed the medical records and made appointments for the clients.

These two circumstances are different. First, it was Ms. Hoff who made the decision to have the Unit Nurse complete the entire process of the application, and Ms. Hoff made this decision based on the need of the client after speaking with the physician. Grievant, however, took it upon herself to step into the role of Unit Nurse and attempt to make an appointment for a client. Grievant did not discuss her action with Ms. Hoff, and did not appear to have a clear rationale as to the reasons behind her action. In addition, Grievant did not call once, but three times, causing the field team to call Ms. Hoff and complain.

Grievant has also indicated that she felt ostracized. From the testimony, if that occurred, it was not through the actions of anyone other than the Grievant herself. Testimony continually revealed that Grievant was combative with her coworkers, whether it was telling them they were too stupid to understand her proposed system or telling them to shut up. This caused great tension in the workplace. Not only did the testimony of this behavior convince the undersigned, but Grievant's behavior during the hearing solidified it. Grievant would sit and laugh during testimony, especially Ms. Hoff's testimony. Grievant was asked to cease that conduct out of respect for the process, as well as the witness. Respondent has met its burden of proof in this matter.

While Grievant did not specifically argue that the undersigned mitigate the punishment levied against her, it seems appropriate to address mitigation given the circumstances of this case. In 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). 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 and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

Based on the number of years there have been issues with Grievant's performance and attitude, as well as the amount of time she has continually refused to follow the directives of her superiors, there has been no showing that termination is clearly disproportionate to the employee's offenses so as to be considered an abuse of discretion. Therefore, for the reasons stated, this grievance is DENIED.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *Hoover v. Lewis County Board of Education*, Docket No. 93-21-427; *Landy v. Raleigh County Board of Education*, Docket No. 89-41-232. A preponderance of the evidence is defined as "evidence which is 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." *Black's Law Dictionary* (6th ed. 1991); *Leichliter v. West Virginia Department of Health & Human Resources*, Docket No. 92-HHR-486. Where the evidence equally supports both sides, a party has not met its burden of proof. 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. Respondent met its burden of proof in this matter.

4. In 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). 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 and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

5. Grievant did not show that termination was clearly disproportionate to the offenses.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by 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: February 1, 2011

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Wendy A. Elswick
Administrative Law Judge