THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

STEPHEN EDWARD VANCE,

Grievant,

v. **Docket No. 2010-1594-DEA**

DIVISION OF REHABILITATION SERVICES,

Respondent.

DECISION

Stephen Vance ("Grievant") was employed by the Division of Rehabilitative Services ("DRS") in the Driver 2 classification until he was dismissed from employment in a letter dated June 16, 2010. Mr. Vance filed a grievance dated June 17, 2010, alleging that his employment was wrongfully terminated and seeking reinstatement as a Driver 2, as well as transfer to another state agency. Pursuant to the provisions of W. VA. CODE § 6C-2-4(a)(4), Mr. Vance filed his grievance directly to level three.

The first day of the level three hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board on October 4, 2010. Grievant Vance appeared and was represented by Frank Litton, Esquire. Respondent DRS was represented by Katherine A. Campbell, Assistant Attorney General. Administrative Law Judge ("ALJ") Wendy Elswick conducted the hearing. At the conclusion of the hearing the parties indicated that they believed they had reached a settlement. ALJ Elswick gave the parties thirty days to complete the settlement and provide a signed copy to the West Virginia Public Employees Grievance Board. After thirty days no settlement was reached and the grievance was scheduled for a second day of hearing.

The second day of hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance Board on March 10, 2011. ALJ Elswick had left employment with the Grievance Board and the grievance was assigned to the undersigned ALJ to conduct the remainder of the level three hearing and render a decision. Grievant appeared at the second day of hearing and was represented by Frank Litton, Esquire. Respondent DRS was represented by Katherine A. Campbell, Assistant Attorney General. At the conclusion of the hearing, the parties agreed to submit proposed findings of fact and conclusions of law the last of which was received by the West Virginia Public Employees Grievance Board on April 13, 2011. The grievance became mature for decision on that date.

Synopsis

Grievant was dismissed from employment as a Driver 2 with the DRS for unprofessional behavior toward a client of the Respondent. Grievant was accused of, among other things, calling a client by pet names, lurking around the client when he did not need to be present and making an inappropriate telephone call to the client's hotel room to inquire about the status of her marriage. These actions were exacerbated by the fact that the client was visually impaired, was totally reliant upon the program drivers for any transportation and was away from home and unfamiliar with her surroundings.

Grievant denied some of the allegations and claimed others were exaggerated. He opined that termination of his employment was excessive given the nature of his actions.

Respondent was able to prove that Grievant acted unprofessionally toward a client whom he knew to be in a vulnerable situation. Grievant had been previously warned regarding some of the activities with which he was charged. Given the totality of the

circumstances, Respondent demonstrated that dismissal was not disproportionate to the charges alleged and proven. The grievance is denied.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant was employed by the West Virginia Division of Rehabilitative Services as a Driver 2 on February 1, 2000.

2. Grievant worked as a Driver 2 for the DRS until he was dismissed by letter dated June 16, 2010.

3. Part of the mission of the DRS is to provide a service program designed to give students who have limited or no vision comprehensive skills so that they can function, live and work independently. Programs in Braille, daily living, domestic arts, computer assets technology, adjustment to disability, and career support are provided to the clients.

4. Participants in these programs come from all over West Virginia. Those who live outside the Charleston area stay in a hotel for the duration of the course of study. Because these clients are clinically blind, they must rely upon the program drivers to transport them to and from their classes.

5. Grievant's duties as a Driver 2 include driving Program staff[1] and clients to classes, meetings and program functions, as well as work in the garage to maintain the vehicles which are used in the program. Grievant also was responsible for some record

[1] Some members of the program staff are also vision impaired.

keeping regarding the transportation he provided.[2]

6. There were two drivers employed by the DRS program during all times relevant to the grievance; Stephen Vance and Michael Ray.

7. Because the participants are vision impaired and are not used to being away from home and in unfamiliar environments, they tend to be vulnerable and uneasy about participation in the DRS program.[3]

8. Tina Perdue is a visually impaired adult who lives in Mercer County and started participating in the DRS in the Blind Adjustment Unit on April 6, 2010.

9. While Ms. Perdue participated in the program she stayed at the Civic Center Holiday Inn Express on Virginia Street in Charleston. She depended upon the DRS Drivers to pick her up each day and transport her to and from the Blind Adjustment Unit each weekday.

10. Ms. Perdue's rehabilitation counselor had been trying to get Ms. Perdue in the program for ten years, but Ms. Perdue had been reluctant to participate because she

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[2]Joint Exhibit 3, West Virginia Division of Personnel Classifications Specifications for the Driver 2 classification.

[3] Sheri Koch is the Program Office Supervisor for the DRS Blind and Visually Impaired Services Program. She has been with the program for many years and is also visually impaired. She explained that travel is a very big issue for the students because any time they are going any where they are at the mercy of the driver. She explained that she is still uncomfortable taking taxis in cities when she travels, and wonders if she has a driver who will do what he is supposed to do. In regard to this issue, Ms. Koch testified:

> It is absolutely critical that the individual riding to and from our programs be safe, and be comfortable in knowing that this is only going to be a professional ride. . .

Level three testimony of Sheri Koch.

was anxious about being housed in Charleston and being that far from home. Like many of the clients for the program, Ms. Perdue was apprehensive and trying to adjust to the challenges of being in a new and uncomfortable environment.

11. Within two weeks of Ms. Perdue starting the program, Grievant Vance began calling her by pet names such as Red, Muffy and Muffin.

12. Ms. Perdue would tell Grievant that her name was Tina and he would quit using the pet names for a short period of time and then begin again. Eventually, Ms. Perdue told Supervisor Koch that Grievant was continually calling her pet names and it made her very uncomfortable.

13. In a meeting with Grievant, Ms. Koch reminded him that he was supposed to call clients by their names and not use pet names and Grievant agreed that he would. Grievant did not call Ms. Perdue by pet names after being admonished by Ms. Koch.

14. Ms. Perdue noticed that Grievant was often in the halls of the training center when she was around and Grievant would occasionally interrupt classes Ms. Perdue was attending to tell her that he would be transporting her.[4] There was no business related reason for Grievant to engage in these activities.[5]

15. Grievant regularly transported Ms. Perdue and a teenage client Seth,[6] after

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[4] The classes were often taught one-on-one with Grievant and her instructor being the only people in the room.

[5] During the investigation of the charges against Grievant, he told the investigator that he was only checking to see if Ms. Perdue was ready to leave. Grievant later testified that these allegations were simply not true.

[6] Because Seth is a minor and the use of his full name is not necessary for the determination of this decision it will not be used herein.

they completed their daily programs. This trip usually started between 3:00 p.m. and 3:15 p.m. each weekday. The two clients would ride together and Grievant would drop Ms. Perdue off at the Holiday Inn Express first. Grievant would then transport Seth to the parking lot of the Harding Family Restaurant in Mink Shoals, where Seth's father would pick him up. Seth's father usually arrived between 3:45 and 3:50. Grievant and Seth usually waited a few minutes for Seth's father to arrive. The trip from the center to Mink Shoals lasted approximately twenty minutes.

16. The drivers keep a log in the DRS vehicles to record time, mileage and locations of each trip they drive. The driver must fill in the time and mileage each time he gets in the car to drive staff or students. The log is to be completed immediately before embarking and upon completion of the trip.

17. On the afternoon of April 21, 2010, Grievant wrote on the log that he left for Mink Shoals at 3:10 p.m.[7] This was the normal time for this trip on a daily basis.

18. On April 21, 2010, Grievant decided to drop Seth off at Mink Shoals before taking Ms. Perdue to the Holiday Inn Express. This made Ms. Perdue uncomfortable because it was a change in routine, but she did not object.[8]

19. Grievant had to drive near the Holiday Inn Express on his way to Mink Shoals and little time would have been lost by dropping Ms. Perdue off on the way rather than

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[7] There is some controversy as to the time Grievant left for this trip as will be discussed in detail herein.

[8] Grievant claims that he was late in leaving on this date and wanted to go straight to Mink Shoals so Seth's father would not have to wait for them or worry because they were not there. He also claims to have asked for Ms. Perdue's consent before taking her to Mink Shoals. Ms. Perdue disputes this assertion but she did find out where they were heading shortly after setting out.

taking her to Mink Shoals to drop off Seth.

20. When an investigation was conducted into this matter, Grievant told the investigator, James Quarles, that Grievant was late in leaving on the Mink Shoals run on April 21. Grievant alleged that he had made a run for Michael Ray that afternoon because Mr. Ray had an appointment away from work. Grievant indicated that the afternoon run had made him late and he left for the Mink Shoals run around 3:20 p.m.

21. The time log submitted for Michael Ray for April 21, 2010, indicates that he was at work from 1:00 p.m. through 3:45 p.m. and did not leave work for an appointment.[9]

22. At the level three hearing, Grievant testified that he was late leaving on the Mink Shoals run because he had been called into the office by Ms. Koch to discuss an upcoming trip he was going to have to drive. Grievant testified that Ms. Koch called him into her office as he was preparing to leave and he was delayed until 3:25 p.m.

23. When Grievant arrived at Mink Shoals with Seth and Ms. Perdue they waited between ten and fifteen minutes for Seth's father to arrive.[10]

24. Grievant drove Ms. Perdue back to the Holiday Inn Express without incident. The two engaged in some conversation, but were generally quiet.

25. Grievant testified that he spoke with Michael Ray when he returned to the center and Mr. Ray indicated that he had an appointment on the morning of April 22, 2010, and asked Grievant to pick up Ms. Perdue and another client, Josh, at the Holiday Inn Express on that morning.

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[9] Respondent's Exhibit 10. Daily Work Record of Michael Ray.

[10] This appears to be the standard time Grievant and Seth waited for Seth's father when they left the center at the regular time.

26. Michael Ray's Daily Work Record indicates that he left the center on the afternoon of April 21, at 3:45 p.m. This was while Grievant was engaged in the Mink Shoals run.

27. Mr. Ray's Daily Work Record also indicates that he was at work from 7:45 a.m. through 12:45 p.m. on April 22. Mr. Ray did not take off work that morning and was available to pick up Ms. Perdue on that morning as usual.[11]

28. Between 6:00 p.m. and 6:30 p.m. on April 21, 2010, Grievant called Ms. Perdue at her room at the Holiday Inn Express from his home telephone. After initial salutations Grievant asked Ms. Perdue if he could ask her a question and she said he could. Grievant then asked Ms. Perdue if she was truly happily married. She replied that she was and had been for eighteen years. Grievant then stated: "Well, this call never materialized." Ms. Perdue replied: "Well, then you shouldn't have made it," and hung up.[12]

29. Grievant testified that he called Ms. Perdue to let her know that he would be picking her up in the morning rather than Mr. Ray. He stated that Ms. Perdue stated that she had to get off the phone because her husband might call and he was very jealous. Grievant testified that he replied that: "It is kinda sad to be with someone like that."[13]

30. This incident made Ms. Perdue extremely upset and afraid to be transported to school by Grievant. After this incident, she asked that she be transported by Mr. Ray and when she heard Grievant's voice in the hall at the center she asked the instructor to close

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[11] Respondent's Exhibit 10.

[12] Level three testimony of Tina Perdue.

[13] Level three testimony of Grievant Vance.

the door.[14]

31. Grievant stated that he was unable to contact the other client who was also staying at the Holiday Inn Express regarding the transportation change scheduled for the morning of April 22.

32. This was the only time Ms. Perdue had been called regarding a transportation change since she had been in the program. The clients and the Drivers are instructed that the appropriate procedure for transportation changes is for either party to contact Sheri Koch and she will contact all parties who need to be informed. It is inappropriate for Drivers to contact the clients directly.[15]

33. On May 2, 2010, Grievant drove to Moorefield and Keyser to pick up clients who were participating in a DRS conference in Charleston WV. Grievant went to the lobby and helped the clients to their rooms.[16]

34. Ms. Perdue was sitting in the restaurant while Grievant was standing in the lobby. Ms. Perdue's husband was outside smoking when he noticed that Grievant was in the lobby and the husband believed Grievant was staring at Ms. Perdue. The husband approached Grievant and a verbal altercation broke out wherein the husband warned Grievant to stay away from Ms. Perdue.

35. Ms. Perdue reported this incident, as well as her other concerns, to Ms. Koch

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[14] Ms. Perdue stated that the call made her so upset that she became physically ill.

[15] Undisputed level three testimony of James Quarles, DRS Assistant Director of Administrative Services.

[16] Grievant helped the clients get their bags into the hotel and the desk clerk asked him to assist getting the clients to their rooms.

and she reported them to DRS Assistant Director, James Quarles. Assistant Director Quarles then conducted an investigation into the incidents involving Grievant and Ms. Perdue.

36. When Mr. Quarles interviewed Grievant and asked him if he called Ms. Perdue at her hotel room, Grievant first denied making the call but then recanted and said that he made the call to tell Ms. Perdue about a change in her transportation schedule.

37. On June 14, 2010, Mr. Quarles conducted a predetermination conference with Grievant. At that time he explained the charges against Grievant and gave him an opportunity to respond to them. Grievant gave a typed statement of response to Mr. Quarles.[17]

38. On June 16, Grievant was presented with a letter in which his employment with the DRS was terminated. Grievant signed that he received the letter but that he did not agree with the allegations against him.

39. DRS employees are expected "to be objective in all relationships with clients to insure all actions are in the best interest of the client. In this regard DRS employees are prohibited from developing "emotional or sexual relations with clients."[18]

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[17] At one point in his testimony Grievant indicated that he prepared the written statement on May 7, the day after his first meeting with Mr. Quarles. March 10, 2011, transcript page 66. Later he testified that he was unable to finish the statement until the first week of June. March 10, 2011, transcript page 70. This discrepancy alone has no bearing on the charges but it is another instance where Grievant's statements about the events were inconsistent.

[18] Respondent's Exhibit 3 "The West Virginia Rehabilitative Division of Services General Expectations for Conduct for DRS Employees." On December 13, 2006, Grievant signed a statement indicating that he had received this document, that his supervisor had explained it to him and that he understood it.

40. Grievant received an "Awareness Certificate Form" on March 23, 2001, indicating that he had been trained that his relationships with DRS clients was supposed to be professional and not personal. Grievant signed this certificate indicating that he understood this policy and that failure to comply could lead to discipline.[19]

41. On May 9, 2000, Grievant received a written warning concerning "nuisance conduct by WVRC staff and contract personnel." Grievant was also warned against allowing clients to "stand in vehicles while traveling." Respondent's Exhibit 9.

42. Grievant received a written warning dated July 11, 2000. This warning was concerning Grievant putting prank pages through to other drivers while they were transporting clients. Respondent's Exhibit 8.

43. Grievant received a memorandum containing a written warning dated August 14, 2000, regarding the use of profanity in the office. Respondent's Exhibit 7.

44. On August 16, 2000, Grievant received a written memorandum of warning regarding "Improper Use of the Library Computer." Grievant was admonished for using the library computer to access "banned web sites." Respondent's Exhibit 6.

45. On February 16, 2001, Grievant Vance was issued a memorandum on the subject of "Sexual Harassment Warning." The reason for the warning was that he made statements to a fellow employee indicating that she was fat and that he was attracted to fat women. He also was referring to the co-worker by the pet name "Dear." Grievant was warned to cease this conduct and was given a copy of the West Virginia Division of Personnel Policy of Sexual Harassment. Grievant was instructed "to thoroughly read the

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[19] Respondent's Exhibit 4.

policy and adhere to ALL of it's contents." (Emphasis in original) Respondent's Exhibit 5.

46. Each of the five written warnings issued to Grievant indicated that a repeat of the conduct could result in more disciplinary action "up to and including discharge." Respondent's Exhibits 5 through 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 W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "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). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.

Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, 175 W. Va. 279, 281; 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir. W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994).

Respondent DRS asserts that Grievant's conduct toward Ms. Perdue constituted a violation of the *The West Virginia Rehabilitative Division of Services General Expectations for Conduct for DRS Employees* ("Code of Conduct") and the West Virginia Division of Personnel Prohibited Workplace Harassment Bulletin. Respondent demonstrated that Grievant called Ms. Perdue by pet names even though he had previously been given a written warning against such conduct with a co-worker in the past. Additionally, Grievant altered the route by which he took clients home and kept Ms. Perdue in the vehicle with him for roughly forty minutes longer than necessary, twenty of which was with Grievant alone; loitered in the hallway and unnecessarily interrupted Ms. Perdue's instruction; and made an inappropriate telephone call to Ms. Perdue's hotel room inquiring about the stability of her marriage. Respondent avers that Grievant's actions amount to unprofessional conduct by attempting to establish a personal, emotional relationship with a program participant, which is prohibited by the DRS Code of Conduct.

Grievant does not deny that he called Grievant by pet names or that he interrupted her class occasionally. He points out that he stopped this activity when he was directed to by Sheri Koch. He admits that he made a telephone call to Ms. Perdue's room and commented on her marriage. He alleges that the reason for the call was work related and

he only commented on Ms. Perdue's marriage after she brought up that her husband was jealous. Grievant also alleges that the investigation conducted by Mr. Quarles was not consistent with the procedure set out in the West Virginia Division of Personnel Prohibited Workplace Harassment Bulletin and that his conduct did not reach the level of actual sexual harassment pursuant to that Bulletin. Finally, Grievant argues that termination of his employment was disproportionate to the conduct with which he is charged.

Respondent DRS has established a Code of Conduct for their employees and emphasizes the importance of the employees maintaining a professional relationship with their clients. Assistant Director Quarles noted that their clients are visually impaired and come to the Center from a sheltered life. Therefore, when they arrive at the center they are very dependent on others and very vulnerable. Due to the vulnerability of the clients, Mr. Quarles noted, "we have to have trustworthy drivers that are aware of these frailties that these clients have and we can't have our drivers interfering in their personal lives and asking them personal questions. . ." Grievant knew about this requirement and had been warned about inappropriate action with a co-worker on a previous occasion. Grievant's actions with Ms. Perdue were in direct conflict with the expectations of professional conduct.

It is of little comfort that he quit calling the client by pet names and following her in the halls after he was instructed not to. By that time he had already caused the client to be uncomfortable in the program. Additionally, his call to the client's hotel room was in violation of established procedures and was made in an effort to initiate a personal and emotional relationship with the client.

Grievant's accounts of the telephone conversation and the trip to Mink Shoals differ widely from the accounts of Ms. Perdue. Grievant alleges that he was running late on April

22, 2010, and had to take Seth to Mink Shoals before dropping Ms. Perdue at the Holiday Inn Express so that he would not be late in meeting Seth's father. Ms. Perdue testified that they left right after class at the usual time and there was no reason for taking her to Mink Shoals. Grievant's travel log indicates that they left for Mink Shoals at the regular time, 3:10 p.m. and both he and Ms. Perdue testified that they waited for ten or fifteen minutes for Seth's father to arrive, as usual. Grievant told Mr. Quarles that he was late leaving for Mink Shoals because he had to take an afternoon run for Michael Ray who had an appointment that day. Mr. Ray's time sheet indicated that he was present and working all afternoon on April 21. Grievant testified that the reason he had to leave late was that he was called into Sheri Koch's office to talk about a future run.

With regard to the telephone call to the client's room, Grievant states that he called Ms. Perdue to tell her that he would be picking her up in the morning because Mr. Ray had an appointment that he had to attend on the morning of April 22. Grievant stated that he returned to the center after 4:00 p.m. on April 21 and Mr. Ray told him then that he needed Grievant to take the morning run the next day. However, Mr. Ray's time sheet indicated that he left the Center on April 21, before Grievant arrived and that he was present at work at 7:30 a.m. on April 22, and did not leave work that morning.

The Grievance Board has applied the following factors to assess a witness's testimony: (1) demeanor; (2) opportunity or capacity to perceive and communicate; (3) reputation for honesty; (4) attitude toward the action; and (5) admission of untruthfulness. Additionally, the administrative law judge should consider (1) the presence or absence of bias, interest or motive; (2) the consistency of prior statements; (3) the existence or nonexistence of any fact testified to by the witness; and (4) the plausibility of the witness'

information. *See Gramlich v. Div. of Motor Vehicles,* Docket No. 2010-0929-DOT (June 14, 2010); *Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth.,* Docket No. 2009-1588-DOT (Dec. 1, 2009); *Elliott v. Div. of Juvenile Serv.,* Docket No. 2008-1510- MAPS (Aug. 28, 2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD- 216 (Dec. 28, 1999).

Grievant's account of the incidents in this case are not credible. He has an obvious motive of evading discipline. More importantly, his testimony is not consistent with his prior statements and is inconsistent with the clear records of the DRS, some of which he completed.[20] On the other hand, there is no apparent motive for Ms. Perdue to fabricate her account. She specifically stated that Grievant asked her if she was truly happily married and when he received an affirmative reply he stated, "Then, this conversation never materialized." The accounts of the incidents given by Ms. Perdue are credible.

Respondent DRS demonstrated that Grievant intentionally violated the DRS Code of Conduct by attempting to engage in a personal, emotional relationship with a client. This attempt not only violated the requirement of professional conduct but had the effect of making the client very uncomfortable and anxious about continuing in the program. The requirement of professional conduct was established and emphasized to avoid such problems. Respondent has met its burden of showing that discipline was appropriate for Grievant's conduct.

The remaining issue is whether the penalty of dismissal was too severe. "The argument a disciplinary action was excessive given the facts of the situation, is an

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[20] Grievant's struggle with veracity may add another obstacle to Respondent trusting him with vulnerable clients.

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)." *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001). 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). 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).

Respondent has given Grievant five written warnings for misconduct in the past. Grievant accurately notes that nine years passed between the last warning and the present conduct and Grievant has received satisfactory evaluations in the meantime. However, that does not change the fact that DRS has given Grievant numerous opportunities to bring his conduct in line with agency expectations and Grievant has continued to fail to do so. Additionally, Respondent is charged with the safety and welfare of a vulnerable population. It is essential that they be able to trust their drivers to treat these clients professionally and respectfully because the drivers will often be alone with these clients. Respondent has demonstrated that they can no longer trust Grievant to maintain such a professional demeanor. Accordingly, the penalty of dismissal is appropriate and the grievance is denied.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "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). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. The employer must demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, 175 W. Va. 279, 281; 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir. W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30,

1994).

3. Respondent proved by a preponderance of the evidence that Grievant Vance violated *The West Virginia Rehabilitative Division of Services General Expectations for Conduct for DRS Employees* and that its decision to dismiss Grievant was justified.

4. "The argument a disciplinary action was 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)." *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

5. Grievant failed to prove that the disciplinary action taken against him was disproportionate to his actions or reflected an abuse of discretion. Mitigation of the punishment is inappropriate given the totally of the circumstances in this matter.

Accordingly, the 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: JUNE 23, 2011.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE