WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BRIAN BRECK,

Grievant,

v. **Docket No. 2011-1542-PutED**

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Brian Breck ("Grievant"), filed this expedited Level Three grievance on April 20, 2011, against his employer, Respondent Putnam County Board of Education ("Respondent"), stating as follows:

> Grievant was suspended for ten days for a confrontation with his supervisor. Grievant contends that the confrontation was provoked by his supervisor and that it amounted to little more than a spirited conversation. Grievant contends that his supervisor was equally or more at fault for the confrontation. Grievant asserts that he was not guilty of insubordination, Grievant also alleges disparate treatment as his supervisor was not punished for the incident and that the punishment was too severe.

For relief, Grievant seeks "compensation for the wages for the ten days for which he was suspended, restoration of all lost benefits, pecuniary and nonpecuniary, and removal of all references to his suspension and the underlying incident from his personnel records."

The Level Three hearing was held before the undersigned administrative law judge on September 15, 2011, at the Grievance Board's Charleston, West Virginia, office. Grievant was represented by counsel, John E. Roush, Esquire, West Virginia School Service Personnel Association. Respondent was represented by counsel, Rebecca Tinder,

Bowles Rice McDavid Graff & Love, LLP. This matter came mature for consideration upon receipt of the parties' proposed Findings of Fact and Conclusions of Law on October 18, 2011.

Synopsis

Grievant received a ten-day suspension for insubordination for the conduct he displayed toward his supervisor during an argument stemming from a work assignment. Respondent met its burden of proving insubordination on the part of the Grievant. Grievant failed to offer sufficient evidence in support of mitigating his suspension. Further, Grievant failed to meet his burden of proving his claim of disparate treatment. Therefore, this grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant, Brian Breck, is employed by Respondent as a HVAC II in General Maintenance. Sam Housley, Maintenance Supervisor, is Grievant's immediate supervisor.

2. On March 25, 2011, Grievant was assigned to check/change HVAC filters at Hurricane Middle School. Sam Housley assigned Frank Hanson to assist Grievant on this job because some of the filters at this school are in the ceiling, and Grievant would need help with the ladder and with moving ceiling tiles. Mr. Housley is also Mr. Hanson's supervisor.

3. Because Mr. Hanson had another job to do first that morning in Buffalo, West Virginia, he met Grievant at Hurricane Middle School ("HMS") between 10:30 a.m. and 11:00 a.m.

4. After starting that morning at HMS, Grievant discovered that he needed different sized filters to finish the job. Accordingly, Grievant would need to go to the maintenance office to get the needed filters. Mr. Hanson informed Grievant that he needed to go to the maintenance office to speak with someone about ordering parts for another job. As such, Grievant suggested that they go have lunch together, then go to the maintenance office. Mr. Hanson reluctantly agreed and offered to drive them in his van.

5. Riding together in Mr. Hanson's van, Grievant and Mr. Hanson went to lunch, then to the maintenance office. After completing their respective business at the maintenance office, the two headed back to HMS. On their way, they passed Mr. Housley in his vehicle on Teays Valley Road.

6. Soon thereafter, Mr. Housley telephoned Mr. Hanson, and instructed Mr. Hanson to turn around and meet him at West Teays Elementary School ("WTES"). Mr. Hanson complied.

7. Upon arriving at the parking lot at WTES, Mr. Hanson parked his vehicle, exited the same, and walked up to Mr. Housley's vehicle. Grievant remained in Mr. Hanson's van. When Mr. Hanson exited the van, Grievant adjusted his cell phone to begin recording audio.[1]

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[1]Unbeknownst to Mr. Housley, Grievant secretly recorded their argument using his cell phone. Grievant informed school administration of the recording on the day of the incident and offered it to them to review. This recording was played on the record at both the Level One and Level Three hearings.

8. While still seated in his vehicle, Mr. Housley questioned Mr. Hanson about why he and Grievant were in his van and why the two were not at HMS. Mr. Hanson explained that they had started the job, but that Grievant needed filters, and that he needed to speak to someone at the maintenance office about ordering parts for another job. So, they had gone to lunch and to the maintenance office together, and were returning to the HMS when Mr. Housley called him.

9. At first, Mr. Housley instructed Mr. Hanson to tell Grievant to get in his own van and to do his own work. Before Mr. Hanson could go back to his van to do so, Mr. Housley stated that he would tell Grievant himself.

10. Mr. Housley exited his van, walked to the passenger side of Mr. Hanson's van and began addressing Grievant. Mr. Housley said to Grievant, something to the effect of, "What are you doing?" The two began to argue. Mr. Housley then told Grievant to, "Get in your van and go get the filters and get back on the job." Mr. Housley then turned and began to walk back to his van. During this part of the argument, Grievant explained to Mr. Housley that he had already got the filters he needed, and was heading back to the jobsite.[2]

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[2] *See*, cell phone audio recording which was made a part of the Level Three hearing record. There is no official transcript of the cell phone recording. Respondent's counsel had someone prepare an informal transcript, which was provided to the undersigned and counsel for the Grievant at the Level Three hearing. However, it is noted in the informal transcript that many of the comments made by Grievant, Mr. Hanson, and Mr. Housley are described as "unintelligible." The undersigned has relied on the recording itself, and not the informal transcript in deciding this grievance. It is further noted that the undersigned reviewed the recording at slower speeds to better understand what was said during the conversation at issue. It is noted that the undersigned detected certain discrepancies between what was written in the informal transcript and what the parties said during the argument. However, it is noted that parts of the argument were difficult to hear and /or understand.

11. In response, Grievant began to exit the van and said, "Sam, this shit is going to end between me and you, buddy. This shit is going to end between me and you. I've had enough of this crap."[3] In response to Grievant, Mr. Housley said, "Don't talk to me like that." *See*, cell phone audio recording.

12. The two men proceeded to yell at one another and over one another in the parking lot in front of WTES, while school was in session. During this argument, Grievant yelled, "You don't have to treat me with disrespect," "You have no reason to treat me this way," and threatened to file a grievance. To which, Mr. Housley responded, "You go right ahead; I've had over forty. I don't care."[4] Mr. Housley and Grievant then continued to shout at and over one another about filters and about Grievant being in Mr. Hanson's van.[5]

13. Finally, this argument began to wind down when Mr. Housley shouted, "No, no, no! Hold on. The filters–yes. I told him but I didn't tell him to take you to get no damn filters. You've got a van over there. You should have went and got filters. He can help you out on the filters. That's exactly what I told you, but I'll tell you what. I don't want to hear no more about it. To tell you the truth, I want you to get in your van over there, and you meet me in the main office right now. I'm serious." *See*, cell phone recording.

14. The argument then ended with this exchange:

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[3] On the informal transcript, Grievant's statement is listed as being "Damn, this shit is going to end between me and you, buddy." The words "damn" and "Sam" are easily confused.

[4] The reference to "forty" grievances is not included on the informal transcript. As Grievant and Mr. Housley were talking over one another at this point, this part of the conversation was difficult to discern.

[5] Again, the undersigned still does not see the problem with Grievant riding with a coworker to the maintenance office and/or to lunch.

Grievant: “Okay.”

Grievant: “I’ll meet your there at the end of the day.”

Mr. Housley: “Right now!”

Grievant: “Okay.”

Mr. Housley: “Right now!”

See, cell phone audio recording.

15. Mr. Hanson drove Grievant back to HMS. Grievant then got in his van and drove to meet Mr. Housley at the main office.

16. Mr. Housley telephoned Assistant Superintendent Brad Hodges about the incident. When Grievant and Mr. Housley arrived at the main office, Mr. Hodges had them wait in separate rooms while he started investigating the incident. Mr. Hodges, as well as Superintendent Hatfield and Barb Brazeau, interviewed Grievant, Mr. Housley, and Frank Hanson, separately. Grievant informed Mr. Hodges and Mr. Hatfield of his cell phone recording during their meeting at the board office. However, Mr. Hatfield declined to listen to the recording.

17. Mr. Hodges and Superintendent Hatfield discussed the matter and decided to suspend Grievant without pay for ten days for insubordination.

18. Brad Hodges informed Grievant of his ten-day suspension on March 25, 2011. Further, Superintendent Hatfield informed Grievant of his suspension by letter dated March 25, 2011. As stated in the letter, Grievant’s suspension was to begin on March 28, 2011, and he would be allowed to return to work on April 11, 2011.

19. On April 19, 2011, the Respondent ratified Grievant’s ten-day suspension without pay. Grievant was so informed by letter dated April 20, 2011.

20. Sam Housley was not disciplined for his conduct during the March 25, 2011 incident.

Discussion

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *See*, W. VA. CODE § 18-29-6; *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). "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). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

WEST VIRGINIA CODE §18A-2-8 states, in part as follows:

> (a) Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge. . . .

W. VA. CODE § 18A-2-8(a).

Respondent has charged Grievant with insubordination for his conduct during the argument with his supervisor on March 25, 2011. Respondent further contends that

Grievant's behavior violated the Employee Code of Conduct. Respondent suspended Grievant for ten days without pay for insubordination. By letter dated March 25, 2011, Superintendent Hatfield informed Grievant of his suspension, stating as follows:

> You are hereby suspended from your employment without pay for ten (10) working days, beginning March 28, 2011. You may return to work on April 11, 2011.
>
> The reason for this action is the insubordination that you displayed today with your supervisor, Sam Housley. Mr. Housley stated that you were a passenger in the van driven by one of the other maintenance employees, Frank Hanson, when Mr. Housley asked Mr. Hanson to meet him at West Teays Elementary School to discuss a matter. When Mr. Housley finished his discussion with Mr. Hanson, he came up to the passenger side of the car and told you to get back to Hurricane Middle School to do your job. By your own admission, you did not follow this directive. You exited the van, got in Mr. Housley's face and said 'This shit between the two of us needs to stop.' A heated discussion between the two of you ensued in the front parking lot of the school.

Grievant, however, characterizes his exchange with Mr. Housley as a "confrontation" and "little more than a spirited conversation." *See,* Statement of Grievance. Further, Grievant argues that he was not insubordinate during his exchange with his Mr. Housley, he did not fail to follow any directives, and that his actions warranted no discipline. Grievant also argues disparate treatment in that, although Mr. Housley acted no differently than he, Housley received no discipline.

In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Conner v. Barbour County Bd. of Educ.,* Docket No. 94-01-394 (Jan. 31, 1995). "[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 willful; and (c) the order (or rule or regulation) must be reasonable and valid. *Butts v. Higher Education Governing Board/Shepherd College,* 569 S.E.2d 456 (W. Va. 2002). The Grievance Board has previously recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988) (*citing Weber v. Buncombe County Bd. of Educ.*, 266 S.E.2d 42 (N.C. 1980)). However, "[i]t is not the label a county board of education attaches to the conduct of the employee . . . that is determinative. The critical inquiry is whether the board's evidence is sufficient to substantiate that the employee actually engaged in the conduct." *Allen v. Monroe County Bd. of Educ.*, Docket No. 90-31-021 (July 11. 1990); *Duruttya v. Mingo County Bd. of Educ.*, Docket No. 29-88-104 (Feb. 28, 1990).

Moreover, an employer has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority . . . ." *McKinney v. Wyoming County Bd. of Educ.,*Docket No. 92-55-112 (Aug. 3, 1992) (citing *In re Burton Mfg. Co.,* 82 L.A. 1228 (Feb. 2, 1984)). "Certainly, an employer is entitled to expect its employees to conform to certain standards of civil behavior." *Redfearn v. Dep't of Labor*, 58 MSPR 307 (1993). All employees are 'expected to treat each other with a modicum of courtesy in their daily contacts.' *See Fonville v. DHHS*, 30 MSPR 351 (1986)(*citing Glover v. DHEW,* 1 MSPR 660 (1980)). Abusive language and abusive, inappropriate, and disrespectful behavior are not acceptable or

conducive to a stable and effective working environment. *Hubble v. Dep't of Justice,* 6 MSPR 659, 6 MSPR 553 (1981). *See Graley v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 99-PEDTA-406 (Oct. 31, 2000)."

Further, the Employee Code of Conduct provides that "[a]ll West Virginia school employees shall: maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination; demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior and immediately intervene in any code of conduct violation." 126 C.S.R. 162 § 4 (W. Va. Dept. of Educ. Policy 5902).

Grievant does not deny what he said to Mr. Housley. From the evidence presented, it is quite clear that Grievant and Mr. Housley argued. It was a heated argument, during which each yelled at the other, shouted over one another, and each used profanity. However, the two did not physically fight.

The March 25, 2011, incident began when Mr. Housley saw Grievant riding in the van with Mr. Hanson. The actual altercation started with Mr. Housley exiting his van, walking to Mr. Hanson's van where Grievant was seated, approaching Grievant, and proceeding to tell Grievant, none too kindly, to get into his own van and go do his own work. The undersigned really does not understand Mr. Housley's actions here. Why was it so wrong for Grievant and Hanson to ride together to the maintenance office, when each had business there, have lunch, then return to their job site? Mr. Housley had assigned the two to work together that day. Mr. Hanson testified that he had been reluctant to have lunch with Grievant, even though such is not against any rule and he has lunch with other

co-workers without issue, because he feared getting into trouble. The undersigned finds this troubling.

Regardless, Grievant's conduct during the March 25, 2011, incident was clearly insubordinate. Instead of going back to HMS to finish the filter work as he had been told, Grievant chose to reignite the argument, after Mr. Housley had already headed back to his vehicle, by yelling "Sam, this shit is going to end between me and you, buddy. . . ." This exchange between Grievant and Mr. Housley was far more than a "spirited conversation," or simple difference of opinion. It was a heated argument. Grievant was disrespectful and somewhat hostile toward his supervisor. Further, Grievant's conduct violated the Employee Code of Conduct. The undersigned understands Grievant's desire to address what he perceived to be a problem with his supervisor; however, the way Grievant chose to address it was wholly inappropriate and warranted discipline.

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 Resources/Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge cannot substitute her judgment for that of the employer. *Jordan v. Mason County Bd. of Educ.*, Docket No. 99-26-080 (July 6, 1999); *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997).

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). *See Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

"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. . . ." *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994). *See Austin v. Kanawha County Bd. of Educ.*, Docket No. 97-20-089 (May 22, 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).

Grievant was suspended for ten days for the insubordinate conduct he displayed on March 25, 2011. A year prior, Brad Hodges, Director of Administrative Services, met with Grievant about his attitude and conduct toward Mr. Housley. *See*, Letter dated March 23, 2010, Board Exhibit #1 at the Level 1 proceeding ("LL"). In his March 23, 2010 letter, Mr. Hodges described Grievant's attitude toward Mr. Housley as "disrespectful," and his

actions, "insubordinate." *See*, LL Board's Exhibit #1. By that same letter, Grievant was informed that "any future disrespect or insubordination actions on your part will result in disciplinary actions and/or your being placed on an improvement plan." *See*, *Id.* In addition to the meeting on March 22, 2010, Mr. Hodges had met with Grievant on other occasions to address his attitude and behavior toward Mr. Housley. Grievant does not dispute this.

Grievant had a history of being disrespectful and insubordinate to Mr. Housley. Grievant was cautioned in March 2010 that he would be disciplined for any future disrespectful or insubordinate acts. Nonetheless, Grievant continued to be insubordinate, and was suspended accordingly. As WEST VIRGINIA CODE section 18A-2-8 allows for the suspension of an employee for insubordination, the issue becomes whether the length of the suspension was appropriate. Grievant presented no evidence that any other similarly situated employee who was insubordinate to his or her supervisor received a lesser punishment. Given Grievant's conduct on March 25, 2011, and that Mr. Hodges had attempted to correct Grievant's behavior before and had warned Grievant that future insubordinate or disrespectful acts toward his supervisor would result in disciplinary action, the undersigned cannot find that the ten-day suspension was excessive, arbitrary, or capricious. Moreover, given the evidence presented, mitigation is not warranted.

Lastly, Grievant argues "disparate treatment," or discrimination, in that his supervisor was not punished for his behavior during the March 25, 2011 incident, even though his supervisor engaged in the argument, yelled, and used profanity. WEST VIRGINIA CODE section 6C-2-2 defines discrimination as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of

the employees or are agreed to in writing by the employees." *See*, W. VA. CODE § 6C-2-2. In order to establish a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

The Board of Education of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

Grievant and his supervisor, Mr. Housely, are not similarly situated employees. Housley is a supervisor; Grievant is not. Although both work in the maintenance department, their jobs are totally different. However, the undersigned is in no way trying to imply that a supervisor is allowed to yell at a subordinate. Grievant presented no other evidence to support his claim of disparate treatment, or discrimination. Therefore, Grievant has failed to meet his burden of proving his claim of disparate treatment by a preponderance of the evidence.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995);

Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). "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).

2. An employee of a county board of education may be suspended or dismissed only for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a *nolo contendere* to a felony charge. *See*, W. VA. CODE § 18A-2-8.

3. In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Conner v. Barbour County Bd. of Educ.,* Docket No. 94-01-394 (Jan. 31, 1995). "[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 willful; and (c) the order (or rule or regulation) must be reasonable and valid. *Butts v. Higher Education Governing Board/Shepherd College,* 569 S.E.2d 456 (W. Va. 2002).

4. The Grievance Board has previously recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton*

v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988) (*citing Weber v. Buncombe County Bd. of Educ.*, 266 S.E.2d 42 (N.C. 1980)).

5. An employer has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority . . . ." *McKinney v. Wyoming County Bd. of Educ.,*Docket No. 92-55-112 (Aug. 3, 1992) (citing *In re Burton Mfg. Co.,* 82 L.A. 1228 (Feb. 2, 1984)). "Certainly, an employer is entitled to expect its employees to conform to certain standards of civil behavior." *Redfearn v. Dep't of Labor*, 58 MSPR 307 (1993). All employees are 'expected to treat each other with a modicum of courtesy in their daily contacts.' *See Fonville v. DHHS*, 30 MSPR 351 (1986)(*citing Glover v. DHEW,* 1 MSPR 660 (1980)). Abusive language and abusive, inappropriate, and disrespectful behavior are not acceptable or conducive to a stable and effective working environment. *Hubble v. Dep't of Justice,* 6 MSPR 659, 6 MSPR 553 (1981). *See Graley v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 99-PEDTA-406 (Oct. 31, 2000)."

6. 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). *See Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

7. "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 Resources/Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996).

8. In order to establish a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show: (a) that he or she has been treated differently from one or more similarly-situated employee(s); (b) that the different treatment is not related to the actual job responsibilities of the employees; and, (c) that the difference in treatment was not agreed to in writing by the employee. *The Board of Education of the County of Tyler v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

9. Respondent has proven by a preponderance of the evidence that Grievant was insubordinate on March 25, 2011.

10. The Grievant's ten-day suspension without pay was not excessive, arbitrary or capricious.

11. Grievant has failed to meet his burden of proving disparate treatment, or discrimination, by a preponderance of the evidence.

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 (eff. July 7, 2008).

DATE: February 13, 2012

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Carrie H. LeFevre
Administrative Law Judge