WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KEVIN PHILLIPS,
Grievant,

v. **Docket No. 2012-0373-MAPS**

DIVISION OF CORRECTIONS/
MT. OLIVE CORRECTIONAL COMPLEX,
Respondent.

D E C I S I O N

Grievant, Kevin Phillips, filed a grievance against the Division of Corrections, Mount Olive Correctional Complex (Mt. Olive or "MOCC"), Respondent, on October 5, 2011. Grievant protests his dismissal from employment with the Mt. Olive Correctional Complex. The grievance statement set forth:

> I was wrongfully terminated on 09-26-11, from my employment as a Correction Officer II at Mt. Olive. There was not good cause to support my termination. My termination violates state/federal law regarding persons with disabilities and employer's responsibility to provide reasonable accommodation.

The grievance requested as relief:

> Reinstatement to my job with backpay (with interest) and benefits, including seniority, job and shift assignment, attorneys's fees and costs.[1]

As authorized by W. VA. CODE § 6C-2-4(a)(4) the grievance was filed directly to Level III of the grievance process. A level three hearing was held before the undersigned

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[1] It is well established that the Grievance Board does not have the authority to award attorney fees. *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*,Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June 21, 1996). WEST VIRGINIA CODE § 6C-2-6 is entitled, "Allocation of expenses and attorney's fees." It specifically states: "(a) **Any expenses incurred** relative to the grievance procedure at levels one, two or three **shall be borne by the party incurring the expense**." Emphasis added.

Administrative Law Judge on January 20, 2012, and on April 2, 2012, in the Grievance Board's Beckley facilities. Grievant was represented by counsel, Kathryn Reed Bayless. Respondent was represented by John Boothroyd, Assistant Attorney General. This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on May 1, 2012. Both parties submitted fact/law proposals.

Synopsis

Grievant was dismissed from employment with Respondent for his failure to comply with a mandatory directive to report to a shift commander at the end of regular scheduled shifts for potential overtime assignment and failing to submit required documentation of leave time. Grievant argued while he did work overtime on the day in discussion, he was unaware of the obligation to report for overtime assignment per the directive, and it is his recollection that he completed the appropriate form for payment of authorized leave. Various safety constraints and applicable regulations require that Respondent compel employees to work overtime to cover staff shortages from time to time. While such administrative actions are a recognized authority of this employer, implementation of compulsatory overtime has been a point of contention with some personnel. Grievant did not demonstrate that he should not have been punished for his failure to comply with the directive in effect during the time period relevant to this matter.

Respondent proved by a preponderance of the evidence that Grievant was aware of the obligation to report to the Shift Commander for possible overtime, and Grievant did not report to appropriate supervisory personnel at the conclusion of his duties. Further, appropriate paperwork/leave slip, which Grievant had been constructively informed needed to provide for an authorized day of leave, was not received by the deadline date. In light

of Grievant's previous disciplinary and work history, which included four separate suspensions for unauthorized absences and a written reprimand for calling off when scheduled for mandatory overtime, Respondent's decision to terminate Grievant is not found to be unreasonable or excessive. Respondent established essential facts by a preponderance of the evidence. Grievant violated applicable governing rules, policies, and regulations. Accordingly this grievance is DENIED.

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

Findings of Fact

1. Grievant, Kevin Phillips, was employed as a Correctional Officer (CO) at Mount Olive Correctional Center. Grievant commenced employment with Respondent on or about November 1, 2003. His classification at the time of the instant termination action was CO II.

2. Mount Olive Correctional Center ("MOCC") is a correctional facility owned and operated by the State of West Virginia operating through the Division of Corrections ("DOC"). MOCC employs more than 370 individuals in various classifications and job titles. MOCC is a maximum security prison. MOCC must have a minimum number of security staff working at all times.

3. Correctional Officers at MOCC are "subject to mandatory overtime requirement and must be available for assignment to any location in the State of West

Virginia. Mandatory overtime is necessary when the minimum number of security staff cannot be met by regular shifts or voluntary overtime.[2]

4. The classification description form pertaining to a Correctional Officer II position identifies mandatory overtime as a condition of employment. *See* Resp. Ex. 2.

5. During the time period relevant to this matter, correctional officers who were assigned to mainline security posts[3] had been performing significant amounts of overtime, including sixteen-hour days (eight-hour regular shift plus eight hours of overtime) and needed relief from such overtime burdens. Mt. Olive determined that the correctional officers who were assigned to the satellite areas, who were not being required to perform similar significant amounts of overtime, could be used for overtime assignments as well, and help reduce the amount of overtime that was being required of the correctional officers who were assigned to main line security posts.

6. On August 26, 2011, Major Robert Rhodes issued a memorandum informing all Watch Commanders,[4] as well as all Captains, Lieutenants and Sergeants at Mt. Olive that effective August 29, 2011, all satellite areas[5] at Mt. Olive will be utilized when

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[2] MOCC has had some type of mandatory overtime policy in effect since it opened in 1994, due to the need to cover all security posts.

[3] Mainline security posts include the Central Control unit, the Main Yard, Visitation, Specialized Security units, Segregation units and General Population/housing units.

[4] Watch Commander and Shift Commander are terms which are used interchangeably for the same post.

[5] The satellite areas at MOCC consist of the Security Audit unit, the Transportation unit, the Security Training Coordinator, the Industries/Food Service Security Unit, the Bailiff, The Slayton Work Camp, and the K-9 unit.

considering institutional need for overtime, and that each officer from Correctional Officer I through Correctional Officer IV assigned to satellite areas shall report individually to the shift's Watch Commander at the end of their scheduled work day for an overtime assignment.

7. Major Rhodes' memorandum to Watch Commanders concerning "Use of Employee Resources," (Grievant Ex. 1), was not distributed to individual correctional officers assigned to work satellite areas of the facility. The memo was not posted in the satellite areas. The memo was not posted anywhere in the MOCC facility.[6]

8. On August 27, 2011, Lieutenant James Jones, the Security Support Commander over the satellite areas, met with supervisors in the satellite areas about Major Rhodes' memorandum and discussed the notification of correctional officers assigned to the satellite areas about the need to report to the Shift Commander for possible overtime.

9. At the time of Major Rhodes' memorandum, Gievant was assigned to the Main Dining Room which is a satellite area at Mt. Olive. Prior to the memo, individuals working in satellite areas were not disposed or compelled to perform mandatory overtime to the degree of other correctional officers.

10. Grievant was taking a leave day when his supervisor, Sergeant Ramsey, met with most satellite employees, to discuss the new "policy" about overtime, and directed them to comply with the memo.

11. Lt. James Jones had a conversation with Grievant, on August 29, 2011, regarding Grievant's responsibility to perform overtime per Major Rhodes' directive.

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[6] The "Use of Employee Resources" memo was verbally rescinded shortly after its issuance. Allegedly, shift commanders complained the implementation of the process was an impractical and difficult method of assigning overtime.

12. Prior to Major Rhodes' August 26, 2011 directive, Grievant disclosed, in February 2011, to his employer that he suffered from attention deficit hyperactivity disorder ("ADHD") and sought accommodation.

13. On or about February 15, 2011, Grievant had made a request of Mt. Olive that they not give him any overtime as an accommodation to his ADHD under the Americans with Disabilities Act. (Resp. Ex. 1, Gr Ex. 6).

14. On or about March 29, 2011, the West Virginia Division of Corrections responded in writing to Grievant's request not to be required to work overtime. The March 29, 2011 letter signed by Wayne Armstrong, then Director of Human Resources, informed Grievant that:

> …[I]t is clear from the Accommodation Request Form that your doctor is stating the accommodation you need is to be exempt from overtime. An essential function of your job is that you be at work when needed. Your failure to be available for work poses an undue hardship on your employer. Since your attendance has been at best sporadic and it has been determined that your availability for work is undependable, it has been decided that you transfer to day shift operations beginning Monday, March 21, 2011.
>
> You have been assigned a regular shift and do not work "swing shifts" where your schedule "flip flops." Your doctor notes that your only "accommodation" should be to exempt you from mandatory overtime. It is Corrections' position that this does not create a qualifying disability under the meaning of the American's with Disabilities Act. *(Case Citations omitted)*
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> * * *
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> Please note that you attendance at work is an essential function of your job in this prison environment. Mandatory overtime is necessary to ensure proper safety of staff and inmates. Given staffing and vacancy levels, your request poses an undue hardship on Corrections. Accordingly you will be expected to work as directed.

The March 29, 2011 letter (three-page document with additional attachments) did not inform Grievant that he would be exempt from mandatory overtime if so directed by MOCC.

15. Human Resources Director Armstrong advised Grievant that mandatory overtime was considered by DOC to be an essential function of his job and that his request for accommodation posed an unnecessary hardship upon MOCC. Armstrong also advised that Grievant would be transferred to day shift. Resp. Ex. 5. The transfer was made to assist Grievant in improving his attendance. Resp. Ex. 1. Placing Grievant in the satellite area minimized the overtime assigned to him.

16. Major Rhodes' memorandum pertaining to the obligation to report to the Shift Commander for possible overtime, became effective on August 29, 2011. Lt. Jones made notes on the back of his copy of the memorandum as to his own notification actions to other regarding the matter. Lt. Jones' hand written notes set forth:

> Met with Sgt Ramsey Sgt Shumate, John Young, Linda Randolph, Bridgett Harvey, David Williams on 27 Aug 2011 Advised to report to shift commander each day after their regular scheduled work day to see if they were needed for OT. (12-16 hours)
>
> 29 Aug 11 Sgt Ramsey notified me he had met with Mitchell and Harvey regarding seeing shift comm. Each day before they leave for OT (12-16 hours)
>
> 29 Aug 11 met with Kevin Phillips in Jane Wests office and advised him to see the shift commander each day after his regular scheduled shift to see if he was needed for OT. (12-16 hours).

Lt. Jones wrote the note regarding his meeting with Grievant on August 29, 2011, the same date he spoke with Grievant. Lt. Jones also verbally informed Sergeant Ramsey that he had notified Grievant about Major Rhodes' directive.

17. In order to keep track of the correctional officers who were assigned to the satellite areas when they reported after their regular shifts to the Shift Commander, a "Satellite Mandatory Overtime Roster August 2011" chart was created and used by Shift Commanders and Assistant Shift Commanders.

18. On August 29, 2011, the "Satellite Mandatory Overtime Roster August 2011" has the notation "p" for Grievant. The notation "p" means that the correctional officer had reported to the shift commander and was passed over for mandatory overtime.[7] *See* Lieutenant Curtis Dixon testimony.

19. On August 30, 2011, Grievant reported to work at 10:30 a.m. and worked until 8:15 p.m.; his regular shift generally ended at 6:30 p.m.[8] When his recognized duties were completed, he left the satellite area and went to Central Control as he usually did and turned in certain tools such as: kitchen knives and other instruments which needed to be secured. Grievant did not communicate with a shift commander before leaving the facility.

20. Neither Captain Caudill nor Lieutenant Dixon, Grievant's superiors, were contacted, either in person, radio or by telephone by Grievant to see if he was needed to perform overtime on August 30, 2011. Lt. Dixon marked Grievant on the "Satellite Mandatory Overtime Roster August 2011" with the notation "f" due to his failure to report.

21. On the next day, August 31, 2011, as Grievant arrived at the MOCC facility, he was stopped by Sgt. Egnor. Egnor had been ordered to talk to Grievant about his failure to report to a supervisor on August 30, 2011. Egnor inquired as to why Grievant had not checked in with his shift commander before leaving the facility on his previous shift.

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[7]Assistant Shift Commander Lt. Dixon was not assigned to the Assistant Shift Commander post on or about 7:00 p.m. on August 29, 2011 when Grievant clocked out from work on that day and he did not mark the "p" on that day. Grievant does not allege he presented himself to a shift commander for overtime on August 29, 2011.

[8] Grievant's post requires him to close down the main dining room. If the main dining room is kept open late or there is a delay in closing it, Grievant is required to work over the scheduled eight-hour shift.

22. Grievant told Sgt. Egnor that he took the kitchen tools to Central Control on August 30, 2011, after closing the kitchen, that Assistant Shift Commander Dixon was not in his office in Central Control at that time and that he then went home. Egnor inquired again as to why Grievant had not reported to Dixon prior to leaving and Grievant responded with a "no comment."

23. One other Correctional Officer, other than Grievant, also failed to report to the Shift Commander for possible overtime at the conclusion of his scheduled shift. Disciplinary action was requested, said CO resigned from employment with Respondent prior to disciplinary action transpiring.

24. There is a history of disciplinary actions being levied against Grievant during his tenure of employment at MOCC. A list or description of previous counseling/coaching sessions and/or improvement periods include:

June 30, 2005	Suspension 3 working days
August 11, 2005	Suspension 5 working days
October 16, 2008	Suspension 10 working days
March 3, 2009	Suspension 15 working days
June 30, 2010	Sixty day improvement period for attendance
July 24, 2010	Restricted leave period due to attendance (approx one year)

Further, there are "numerous" memorandums and documentation addressing Grievant's unauthorized leave and failure to report to work as scheduled dating from August 2004 to April 2011.[9]

[9] The number of documents relating to separate and distinct unauthorized leave and failure to report to work events is perceived to be in excess of (23) twenty-three spanning the tenure of Grievant's employment with Respondent. See Resp. Ex. 31.

25. Grievant has extensive history of disputes with Respondent including, but not necessarily limited to, mandatory overtime and failure to report to work as scheduled.[10]

26. On August 30, 2011, Lt. Dixon sent a memorandum to Major Rhodes informing him that on that date Grievant failed to report to either him or Captain Caudill. The memo was forwarded to Lt. Jones who had Sergeant Michael Egnor talk with Grievant on August 31, 2011.

27. On August 31, 2011, Sgt. Egnor talked with Grievant and on the same day sent a memorandum to Lt. Jones regarding the matter:

> This memorandum is to inform of the conversation I had with Correctional Officer Two Kevin Phillips as you requested, this conversation was concerning Officer Phillips not going to see the Shift Commander after his shift as instructed by yourself. Officer Phillips said he went to control and turned is [sic] tools in and no shift Commander was present so at that time he went home. I once again ask Officer Phillips why he did not speak with a shift Commander, and his response at this time was no comment.

28. After receiving Sgt. Egnor's memorandum, Lt. Jones sent a memorandum to Major Rhodes requesting that discipline be taken against Grievant stating:

> On 29 August 2011, COII Kevin Phillips was advised: all Employees working in Satellite Areas were required to see the Shift Commander to see if they were needed for mandatory overtime after completion of their regular scheduled shift. Shift Commander, Lt. Curtis Dixon reported that Officer Phillips failed to see him or Captain Steve Caudill after his regular scheduled shift on 30 August 2011.

Resp. Ex. 11. Lt. Jones' memorandum set forth Grievant's response to Sgt. Egnor and listed prior counseling/corrective actions regarding Grievant taken by Mt. Olive, including prior disciplinary suspensions. In response to Lt. Jones' memorandum is a hand-written notation "Prepare letter for dismissal. M*** 31 Aug 11." See Resp. Ex 11.

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[10] In addition, it is not established with clarity, the time period or justification for the actions, but Grievant has also been discharged by Respondent twice prior to the instant action.

29. Conduct that is subject to discipline under Corrections' Policy Directive 129.00 (Progressive Discipline), Section J includes:

> •Failure or delay in following a supervisor's instructions, performing assigned work or otherwise complying with applicable, established written policy or procedures.
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> •Leaving a work site without permission or proper relief during working hours.
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> •Refusal to work required overtime.
>
> •Refusal to obey security-related instructions.

30. On or about August 19, 2011, a memorandum regarding "Accountability for Scheduled Time Not Worked" was posted on the bulletin board beside the time clock used by all MOCC employees. The memo stated:

> When you are absent for any reason, the proper paperwork will need to be turned into your supervisor and the payroll department in an accurate and timely manner. This is a mandatory requirement for your continued employment.
>
> Beginning 31 August 2011, there will be posted a list of employees who have missing paperwork. You will be responsible for reviewing the posting and providing your supervisor and payroll with the proper documents. If they are not received by the requested date, on the posting, you will be docked for the period of time, in question, on the very next pay period. Progressive discipline will begin, at this point, which could eventually terminate your employment.

31. The bulletin board by the time clock at MOCC is used to post information, notices and memoranda regarding time keeping matters.

32. Grievant worked on August 22, 23, and 24, 2011, and would have clocked in and out each day.

33. On August 28, 2011, Grievant called in sick prior to his scheduled shift. The phone call was received and noted by Sergeant B. Bereznak.

34. Mt. Olive's Operational Procedure #1.21 (Attendance, Authorized Leave & Overtime Program), Section V, Subsection B, 2 requires that "[a]nnual/Sick Live [sic] Slips

(Applications for Leave With Pay – Form DOP L-1) are to be turned in to the Payroll Department with two (2) days of returning to work."

35. Payroll records never received a leave slip from Grievant for his August 28, 2011 absence.

36. Grievant worked on August 29, 30, and 31, 2011 and on September 5, 6, 7, and 11, 2011.

37. On or about September 12, 2011, Mt. Olive posted a memo on the bulletin board beside the employees' time clock which listed "[s]ecurity employees that need to turn paper work to their Supervisor and Payroll: For Pay Period (8/16N-8/31/11)." Grievant was listed in this memo - "Phillips, Kevin – No leave slip for 8/28." At the bottom of the memo, these security employees were informed that the paper work needed to be turned in no later than 20 September 2011.

38. Grievant worked on September 12, 14, 15, 17, 18, 20, 21, 22, 25, and 26, 2011.

39. Grievant indicates that he never saw the posted September 12, 2011 memo and had no idea he was missing a leave slip. Grievant indicates that he gave a leave slip for his August 28, 2011 absence to Sgt. Ramsey and did so the next day on August 29, 2011. Grievant's recollection is that he filled the slip out in the morning and placed it in Sgt. Ramsey's desk. There is no evidence as to what happened to this alleged form, but such a form did not make it to the payroll office.

40. Sgt. Ramsey's practice upon receiving a leave slip was to store the slips in his desk in a drawer dedicated to paperwork, and bring the leave slips to payroll the same

day. Sgt. Ramsey's desk drawer was accessible to approximately three other correctional officers assigned to his area. Sgt. Ramsey's desk is not secure.

41. Sgt. Ramsey did not remember getting a leave slip from Grievant for the August 28, 2011 absence. Payroll records indicate that payroll did receive one leave slip from Grievant dated August 29, 2011, requesting annual leave for September 8, 2011. This leave slip was approved by Sgt. Ramsey on August 29, 2011, and stamped received by payroll on September 1, 2011.[11]

42. On September 22, 2011, a memo from Warden David Ballard was issued to Grievant informing him that his absence on August 29, 2011, was considered unauthorized leave. The West Virginia Division of Personnel's Administrative Rules, Rule 14.6 states that "[t]he appointing authority shall use unauthorized leave only in cases when the employee fails to obtain the appropriate approval, according to agency policy for the absence." Mt. Olive's Operational Procedure #1.21 (Attendance, Authorized Leave & Overtime Program), Section IV defines unauthorized leave as "[a]bsenteeism from work without authorization" and sets forth the procedure for employees to get leave approved.[12]

43. Mt. Olive's Operational Procedure #1.21(Attendance, Authorized Leave & Overtime Program), Section V, Subsection N sets forth that:

> Placement onto Unauthorized Leave Payroll Status shall be considered misconduct on the part of the employee and grounds for action under WVDOC Policy Directive 129.00 "Progressive Discipline" as follows:

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[11] Sgt. Ramsey was at work on August 29 and 30, 2011, but absent on August 31, 2011. A review of other leave slips of Grievant submitted to payroll in August and September of 2011 indicate that those leave slips that went through Sgt. Ramsey were approved generally on the same day and received by payroll shortly thereafter.

[12] Form DOP L-1 requires that the application for leave with pay be approved by the employee's supervisor.

- First Offense: Written Reprimand
- Second Offense: Three (3) Day Suspension
- Third Offense: Five (5) Day Suspension
- Fourth Offense: Ten (10) Day Suspension
- Fifth Offense: Dismissal

44. Corrections' Policy Directive 129.00 Section V, Subsection J sets forth in its list of offenses intended to be illustrative but not all-inclusive of conduct subject to discipline the following conduct:

> 4. Unauthorized absence.
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> 14. Failure or delay in following a supervisor's instructions, performing assigned work or otherwise complying with applicable, established written policy or procedures.

45. On September 26, 2011, a predetermination meeting was held for Grievant where Grievant was informed that MOCC was considering terminating his employment. The response of Grievant at the predetermination meeting was summarized in the September 26, 2011 dismissal letter as:

> You stated that you were not sure if you turned in a request slip for 28 August 2011, but you would check at home. You stated you worked about 3 hours of overtime on 30 August 2011, stopped in control for approximately 5 minutes and nothing was mentioned to you. You did not know you were in the wrong. You were asked if you were willing to work overtime in the future and you stated "No comment." You stated that you had addressed that before and had nothing else to say. You stated that you want to be a part of this team and are willing to do some overtime. You stated that your mind and body are not made to work 80 hours[13] and that you have children.

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[13] The 2011 Absentee Calendar for Grievant indicates that the longest hours worked by Grievant in any week for 2011 was 43.00 hours. For the week of August 28, 2011, Grievant worked 27 hours.

46. Prior to the present disciplinary action, Grievant's work and disciplinary history included:

- Non-disciplinary dismissal from basic training on August 16, 2004 due "his repeated behavior of misconduct and his unauthorized absence."

- Three day suspension due to an unauthorized absence on May 12, 2005.[14]

- Five day suspension due to an unauthorized absence on June 13, 2005.[15]

- Unauthorized leave taken on November 14, 15, 2007 which could have lead to a suspension.

- Written reprimand on May 28, 2008, due to the grievant having called off sick numerous times when he was scheduled to work mandatory overtime.

- Placement on sick leave restriction from September 2008 through September 2009 due to unreliable work attendance.

- Ten day suspension given on October 16, 2008.[16]

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[14] The June 30, 2005 letter of suspension notes "You [the grievant] were to report to Montgomery General Hospital for duty. Your partner, Donald Slack, contacted you at approximately 1915. You informed him that you were at Smither's McDonalds and were in route to MGH. At approximately 2000 COII Slack contacted the facility and advised Captain Ronnie Williams that the inmate that you were scheduled to secure had been released from MGH. COII Slack informed Captain Williams that you had never reported to duty and that he had made several other attempts at contacting you and had gotten only the answering machine. Captain Williams attempted to contact you by telephone at approximately 2030, 2100 and 2230 hours but received no answer." The suspension letter noted that after reviewing the information contained in the letter the grievant advised Mt. Olive "I understand the suspension, I deserve this and apologize." The suspension letter further noted that in April 2005 he had received a verbal reprimand for unauthorized absence and in May 2005 he had received a written reprimand for unauthorized absence.

[15] The suspension letter notes that Grievant failed to provide a physician statement for his absence after having been issued a directive on June 9, 2005 to provide such statements for his absences. The suspension letter notes Grievant's response as "[y]ou responded that you had gotten your attendance under control and since this day in question you had been at work.

[16] The suspension was given due to his failure to submit a memorandum to the Warden requesting the use of annual leave in lieu of sick leave (which had been exhausted) to cover several absences in August and September 2008.

- Fifteen day suspension given on March 3, 2009.[17]

- Placement on sick leave restriction from July 2010 through July 2011

- Employee Performance Appraisal -3 for the rating period of January 2010 through December 2010 received on January 23, 2011 which rated Grievant's performance as "needs improvement."[18]

47. Policy Directive 129.00 (Progressive Discipline), Section V, G 4, states that dismissal "[m]ay be issued when infractions/deficiencies in performance and/or behavior continue after the employee has had adequate opportunity for correction or the employee commits a singular offense of such severity that dismissal is warranted."

48. Respondent's September 25, 2011 termination letter, Resp. Ex 1, is four pages long. The document informs Grievant of Respondent's decision to dismiss him as a result of unsatisfactory work performance and unsatisfactory absences. Warden David Ballard indicated that the dismissal was in compliance with Division of Corrections Policy Directive 129.00 - Progressive Discipline and the WV Division of Personnel Administrative Rules. Among other relevant information, the termination letter, after an extensive review of Grievant's disciplinary history, stated that, "The Division of Corrections has the right to expect its employees to meet certain standards and expectations. The preceding is representative of your unsatisfactory level of performance. While any one issue would not

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[17]The suspension was given due to the grievant's failure to present proper paperwork and receive proper authorization for absences from the pay period of September 16 through September 30, 2008. The suspension was given upon Grievant's return from a Medical Leave of Absence.

[18] Regarding "Availability For Work," it was commented "Officer Phillips needs to improve his attendance has called off a total of 58 times for the year. This includes MOT [mandatory overtime], VOT [voluntary overtime], and regular scheduled days. He is not a dependable team member and his presence cannot be relied upon for planning purposes."

necessarily constitute failure to meet expectations when viewed singularly, the cumulative effect is, however, one of unacceptable performance."

Discussion

This grievance involves disciplinary actions; the burden of proof in disciplinary matters rests with the employer. The employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Grievant seeks relief from the disciplinary actions of Respondent. This decision addresses the charges that Grievant failed to report to the Shift Commander for possible

overtime assignment and Grievant neglected to provide payroll with leave documentation.[19] This grievance revolves around termination of Grievant's employment and whether the employer has met its burden required to sustain its disciplinary action.

Credibility

In reaching a decision in one or more of the issues associated with the parties, herein, certain facts in dispute must be addressed, including a determination of conduct and reasonable effect of misconduct, if established, in the circumstances of this case.

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dept. of Health & Human Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dept. of Health & Human Resources*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995)*; Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994). In the circumstances of this case, it is necessary to assess and address the credibility of the specific testimony of Security Support Commander, Lt. James Jones and Grievant regarding events in discussion.

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[19] Whether this employer has properly concluded that ADHD is not a recognized disability requiring accommodation, or whether the employer has properly concluded that the request for accommodation creates an undue hardship are questions which are not before the undersigned administrative law judge. This decision does not, and it should not be interpreted that this decision infers a position regarding Grievant's contended disability and MOCC's duty to reasonable accommodate his condition by exempting him from performing mandatory overtime.

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 the following: 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's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra.*

The undersigned had an opportunity to observe the demeanor of the witnesses and to assess their words and actions during their testimony. Credibility assessments were made from direct observations as well as review of the record.

In the present case, Lt. Jones testified that he spoke to Grievant on August 29, 2011, about reporting to the Shift Commander per Major Rhodes' directive and, on the same day, documented this notification in his notes. Grievant has denied that Lt. Jones spoke to him on August 29, 2011, and instructed him that he needed to report to the Shift Commander after he finished his shift. Grievant disputes notice of Major Rhodes' memorandum. A conversation between Grievant and Lt. Jones transpired. What is critical to one or more of the issue(s) currently in litigation is what, if any, notice was delivered to Grievant regarding an obligation to present himself at the conclusion of his regular shift for potential assignment of overtime. Grievant's responsibility to perform overtime if so directed is not of dispute, Grievant disputes notice of the obligation to present himself for potential assignment per Major Rhodes' memorandum.

According to MOCC, most employees in satellite areas were instructed immediately as to the new overtime procedure. Grievant was taking a leave day on August 26, 2011, when his supervisor, Sergeant Shawn Ramsey, met with most satellite employees, discussed the new "policy" about overtime, and directed them to comply with the memo. Lt. Jones testified that he met with Grievant in a hallway on August 29, 2011, and told Grievant of the overtime requirement per the memo and he made a contemporaneous notation of that notification. (Grievant Ex. 1). Lt. Jones further informed Sgt. Shawn Ramsey he had met with Grievant.

Sergeant Ramsey recalled that Lt. Jones had a conversation with him about meeting with Grievant. Sgt. Ramsey testified that Lt. James Jones indicated to him that Grievant have been advised about overtime. Ramsey could not testify to what Jones specifically said about overtime during the conversation with Grievant. Such information is persuasive, not conclusive.

Grievant testified that the conversation with his supervisor on August 29, 2011, did not concern a reporting requirement but related to the need for Grievant to work overtime due to the Ramadan observance on August 30, 2011. At the level three hearing, Grievant contends he was never told about the overtime memo, was not given a copy of the memo and did not know that he was required to report to the shift commander for a possible additional overtime assignment prior to leaving his post on August 30 after working 1 3/4 hours of overtime. Interestingly, Grievant stated at the November 15, 2011, Workforce West Virginia hearing that he had heard rumors that people were checking in with the shift commander, but was never directly told or never saw any documentation confirming such

a requirement. Additionally, he didn't think that it applied to him if there was such a rule. *See* Unemployment Eligibility Hearing Transcript, pg. 42, Gr. Ex. 5.

According to Lt. Jones, after he informed Grievant of Major Rhodes' memorandum, Grievant responded to him that he understood what he was telling him and that he had doctor's orders which did not allow him to work overtime. Lt. Jones communicated with Grievant that he knew nothing of Grievant having a medical limitation or an excuse from performing overtime and if there existed such documentation he could have his doctor provide this documentation to Mt. Olive and it could be looked into. Lt. Jones did not tell Grievant that Major Rhodes' directive did not apply to him.

The demeanor of Lt. Jones at the grievance hearing was level headed and he seemed to make a bona fide effort to respond honestly to inquiries regarding his interaction with Grievant. Jones testified with what was conveyed as proper attitude and respect toward the proceedings. His mannerisms and demeanor did not convey any obvious bias or deception. He explained with clarity what he communicated to Grievant regarding the directive. The witness's behavior was consistent with the information presented.[20] Further, Lt. Jones' verbal testimony concurred with his written notes made at the time of events.

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[20] One of Lt. Jones' responsibilities was to make sure that everyone in his area complied with the memorandum. Initially, he met and informed supervisory officers about the memorandum. He followed up with Sgt. Ramsey as to rank and file officers who had since been informed. And when he encountered a CO (e.g., Grievant and others) who had not yet been informed of Major Rhodes' memorandum on the day the memorandum was to become effective, he informed that officer of the memorandum. It would have been inconsistent for Lt. Jones to let the Grievant pass and not bring up Major Rhodes' memorandum. It also would have been inconsistent for Sgt. Ramsey to not inform Grievant unless he had been told that someone else had already talked to Grievant. Lt. Jones' overall actions pertaining to this situation are consistent with how a responsible veteran officer should/would act after he had received Major Rhodes' memorandum.

The plausibility of the information, as presented, was credible. No bias or nefarious agenda was evident. The witness did not offer unsolicited partiality or irrational conjecture. It is recognized that Lt. Jones' credibility is a critical element of this matter. The facts pertaining to Grievant's notice as presented by Lt. Jones is a crucial linchpin to Respondent's disciplinary actions toward Grievant. Lt. Jones' testimony was not evasive or convoluted. The testimony of Security Support Commander, Lieutenant James Jones, is found to be credible.

The undersigned is persuaded that Lt. Jones communicated with Grievant regarding the obligation to report to the Shift Commander at the conclusion of Grievant's regular scheduled shift. However, Grievant, for what can be identified as a variety of possible rationale, did not comply. Grievant may have believed he was exempt from further overtime, perceived he had fulfilled his obligation, misunderstood the directive, or was just outright defiant. Grievant has an acknowledged dispute with Respondent over what is reasonable overtime. Grievant's explanation for his behavior is not persuasive. Grievant was aware that others were checking in with the shift commander upon conclusion of their scheduled shifts. Citing November 15, 2011 Workforce West Virginia Hearing. On August 30, 2011, at the conclusion of his shift, Grievant chose not to directly address the issue. Grievant's actions were manipulative and deliberate. For one reason or another Grievant chose to rely on his perceived exception to additional overtime assignment. Respondent has understandably deemed Grievant's behavior as unsatisfactory work performance warranting disciplinary action.

Grievant's defense relies heavily on his denial of a key fact to undermine Respondent's justification for disciplinary actions. Grievant has the obvious bias and

motive to be untruthful in this matter. Grievant's denials of alleged notice is cursorily plausible but not reliable. Grievant's alleged actions are consistent with past attitude regarding overtime. Grievant's lack of notice contention is not supported by external evidence.[21] Grievant's testimony that no one informed him to report to the Shift Commander is conspicuously inconsistent with other independent factors. Grievant's disputed conduct in the current matter is not unlike prior attitudes demonstrated toward determination of Respondent not to his liking. Grievant's denial of notice was not persuasive or consistent with the characteristics demonstrated by Grievant. Grievant's explanation as to why he left his post on August 30, 2011, after working overtime and not checking in with a supervisor, is not deemed credible. Grievant's denial of notice by Lt. Jones is found to be factually inaccurate.

In review of the credibility factors cited above, analysis indicates that Lt. Jones testimony should be viewed as reliable; the witness conducted himself in a manner at the hearing and time relevant to events, consistent with having told Grievant about Major Rhodes' memorandum on August 29, 2011, and he recorded events in writing the same day they occurred. The demeanor of Lt. Jones' testimony was straightforward, plausible and persuasive. Lt. Jones' testimony is found to be reliable with regard to establishing

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[21] Grievant's immediate actions at Mt. Olive on August 31, 2011, were inconsistent with his testimony that he had not reported to the Shift Commander because no one had told him he had to report to the Shift Commander. Assuming no one had told him to report to the Shift Commander, Grievant's first response to Sgt. Egnor's question why Grievant did not report to the Shift Commander would have been something to the effect "because no one told me to." Instead, Grievant responded "no shift commander was present at that time he went home" and "no comment." Neither response would have been relevant if Grievant had just found out from Sgt. Egnor that he was supposed to report to the Shift Commander.

notice. Grievant was aware of Respondent's expectation and his obligation to present himself for potential assignment of overtime duty.

Merits

Grievant actually worked overtime on August 30, 2011. Nevertheless, Grievant failed to govern his actions in accordance with the duly authorized directive of his employer in effect at that time. The undersigned is sympathetic to Grievant's contention that an employee should not be punished for violating a new rule which is unknown to the employee. However, as discussed earlier, as the trier of fact, this ALJ determines that Grievant was aware of the obligation. Grievant choose not govern his action in accordance with his employer's explicit directive.

Conduct that is subject to discipline under Corrections' Policy Directive 129.00 (Progressive Discipline), Section J includes:

- Failure or delay in following a supervisor's instructions, performing assigned work or otherwise complying with applicable, established written policy or procedures.
- Leaving a work site without permission or proper relief during working hours.
- Refusal to work required overtime.
- Refusal to obey security-related instructions.

Grievant's explanation as to why he left his post on August 30, 2011, after working overtime and not checking in with a supervisor, prior to departing the facility, has not exonerated him from disciplinary actions.

Insubordination

Insubordination has been defined as the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *Riddle v. Bd. of Directors/So. W. Va.*

Community College, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). 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). This 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)).

There was an obligation for Grievant to perform as directed by his duly authorized supervisory personnel. “An employee's belief that management’s decisions are incorrect or the result of incompetence, absent a threat to the employee’s health and safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. *Vickers v. Bd. of Directors/W. Va. State College,* Docket No. 97-BOD-112B (Aug. 7, 1998). *See Parker v. W. Va. Dep't of Health and Human Resources*, Docket No. 97-HHR-042B (Sept. 30, 1997).” *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003).

"Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. *See Day v. Morgan Co. Health Dep't*, Docket No. 07-CHD-121 (Dec. 14, 2007). Refusal to work mandatory overtime, when directed to do so, constitutes insubordination. *Arbogast v. Div. of Corrections*, Docket No. 2008-1758-CONS (Jan. 30, 2009); *Hill v. Div. of Corrections*, Docket No. 2010-0113-MAPS (Jan 6, 2010).

Various safety constraints and applicable regulations require that Respondent compel employee to work overtime to cover staff shortages from time to time. Grievant's refusals to cooperate with Respondents' endeavors to maintain lawful staffing level is a disciplinary matter. The evidence presented establishes by a preponderance of the evidence that Grievant failed to conform to a reasonable order of a superior entitled to give such an order. Respondent met its burden of proof in this case.

In addition to the foregoing charge, it is alleged that Mt. Olive's payroll never received a leave slip from Grievant for his absence on August 28, 2011.

Mt. Olive's Operational Procedure #1.21 (Attendance, Authorized Leave & Overtime Program), Section V, Subsection N sets forth that: Placement onto Unauthorized Leave Payroll Status shall be considered misconduct on the part of the employee and grounds for action under WVDOC Policy Directive 129.00 "Progressive Discipline." Section IV defines unauthorized leave as "[a]bsenteeism from work without authorization" and sets forth the procedure for employees to get leave approved.

A list of security employees who lacked paperwork for absences during the last payroll period in August 2011 was posted by the time clock. Resp. Ex. 21. Grievant's name is listed as lacking a leave slip for August 28, 2011. *See also* FOF 30 - 32. MOCC employees had received a memo from the Warden dated August 19, 2011, advising that a new procedure for notification of proper paperwork regarding absences was being implemented. Resp. Ex. 19. Constructive notice is established.

Respondent has acknowledged that the leave paperwork matter was a secondary offense, not the primary basis for the termination. However, it was also provided that such an offense can be sufficient justification given repetitive offenses. Grievant's rationalization for Payroll's failure to receive the requested document has evolved. At the September 26, 2011, predetermination meeting, Grievant provided he was not sure if he had turned in a request slip for 28 August 2011. At the level three hearing Grievant's recollection was that after some reflection, he is of the belief that he did in deed complete a DOP-1.[22]

Grievant also testified that he never saw the August 19, 2011, memorandum that was posted on the bulletin board which alerted employees that as of August 31, 2011, there would be a posted memorandum listing those employees with missing paperwork and that all employees were responsible for checking that memorandum. This is in the shadow of Grievant's testimony that he knew he was on thin ice and was extra careful. Grievant supposedly went a full month without looking at the main bulletin board where Mt. Olive posted all its important notices and memoranda about time keeping matters.

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[22] Payroll records indicate that payroll did receive one leave slip from the grievant dated August 29, 2011, requesting annual leave for September 8, 2011. This leave slip was approved by Sgt. Ramsey on August 29, 2011, and stamped received by payroll on September 1, 2011.

Evidence establishes that MOCC on or about September 12, 2011, put out a memorandum which informed Grievant that payroll did not have his leave slip for August 28, 2011, and that he needed to get the leave slip to payroll before September 20, 2011. The requested form was never received in the payroll office. Respondent has met its burden of proof related to the required paperwork concerning Grievant's leave request for the day of August 28, 2011.

Grievant has been provided opportunity to tell his side of the story. He was advised of the contemplated disciplinary action. During the span of Grievant's employment with Mt. Olive, Grievant has had repeated issues with his attendance, reporting for duty and reporting for mandatory overtime.

Respondent has met its burden of proof related to the most serious charge levied against Grievant, the charge related to failure to report to a shift commander at the end of his shift on August 30, 2011. The preponderance of the evidence establishes that Grievant was aware of his obligation. In these types of situations, Respondent has substantial discretion to determine what it perceives to be the appropriate disciplinary action. Problems with attendance, failure to follow instructions related to maintaining adequate staffing, and continued failures to provide required paperwork for leave taken are misconduct of a substantial nature which justify disciplinary action. Respondent chose to terminate the employment of this classified Grievant.

"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).

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). Mitigation is not found to be appropriate in the circumstance of this case. 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). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge shall not substitute his judgement for that of the employer. *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). *Meadows, supra.*

The following conclusions of law are appropriate in this matter:

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 Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008).

2. 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. Dep't of Finance & Admin.,* 164 W.Va. 384, 264 S.E.2d 151 (1980).

3. Insubordination has been defined as the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *Riddle v. Bd. of Directors/So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994). 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. Respondent demonstrated that Grievant was insubordinate.

6. An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and a 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 taken. *Conner v. Barbour County Board of Education*, Docket No. 94-01-394 (Jan. 31, 1995). *See Martin v. W. Va. Fire Commission,* Docket No. 89-SFC-145 (Aug. 8, 1989).

7. 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."

Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996).

8. Respondent established by a preponderance of the evidence that Grievant is culpable for actions which are of a substantial nature, and not trivial or inconsequential, or a mere technical violation.

9. Respondent chose to terminate the employment of this classified Grievant. 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).

10. Mitigation of a penalty is considered on a case-by-case basis. *Conner v. Barbour County Bd. of Educ.*, Docket No. 95-01-031 (Sept. 29, 1995); *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also includes consideration of an employee's long service with a history of otherwise satisfactory work performance. *Pingley v. Div. of Corr.*, Docket No. 95-CORR-252 (July 23, 1996).

11. Mitigation is not found to be appropriate in the circumstance of this case. Respondent has substantial discretion to determine a penalty, and the undersigned Administrative Law Judge will not substitute his judgement for that of the employer. *See Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996); *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).

12. Grievant failed to prove that the penalty levied was clearly excessive or reflects an abuse of discretion. In light of Grievant's previous disciplinary and work history, the disciplinary action taken is not disproportionate or excessive, nor is the penalty arbitrary and capricious.

13. Respondent demonstrated good cause for dismissal of Grievant from employment.

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: September 11, 2012

Landon R. Brown
Administrative Law Judge