THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JEFFREY J. DYKE,

Grievant,

v. **Docket No. 2012-0346-MAPS**

DIVISION OF CORRECTIONS/
PAROLE SERVICES,

Respondent.

DECISION

Grievant Jeffrey J. Dyke filed this expedited Level Three grievance on September 28, 2011, challenging the three-day suspension without pay imposed upon him for various alleged policy violations.[1] As relief sought, the Grievant requests that "all disciplinary action concerning this matter be vacated and removed from my record."

A Level Three hearing was held on January 26, 2012, and February 21, 2012, before the undersigned administrative law judge at the Grievance Board's Charleston, West Virginia office. Grievant appeared in person, *pro se*. Respondent appeared by counsel, John H. Boothroyd, Esquire. This matter became mature for decision on March 29, 2012, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was suspended for three days without pay for allegedly violating various Department of Corrections policies by using a computer system password in which he called a co-worker a name. Grievant's employer had required him to disclose the

[1] Grievant's Statement of Grievance is six type-written pages in length. The same is being incorporated by reference herein as if stated in its entirety.

password to the co-worker during an email exchange. Grievant's co-worker, not knowing what the words used in the password meant, and not taking the time to review their definitions, assumed the words were vulgar in nature. The co-worker complained to Grievant's supervisor, who then asked Grievant to change his password. The co-worker, not happy with the supervisor's course of action, immediately filed an EEO complaint against Grievant alleging sexual harassment. An EEO investigation revealed no evidence to substantiate the co-worker's sexual harassment claims. However, the EEO investigators alleged that Grievant had violated various DOC policies. Acting only upon the findings of the EEO investigators, Respondent suspended Grievant for three days without pay. Grievant denied all charges against him. Grievant also asserted that Respondent violated certain information security policies by requiring him to disclose his password to another.

Respondent proved that Grievant violated two DOC policies by using insulting language toward a co-worker and by exhibiting unprofessional conduct. However, Respondent failed to prove all of the other charges it alleged against Grievant. Grievant demonstrated that the discipline imposed was clearly excessive.

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 is employed as a Parole Officer II by Respondent, West Virginia Division of Corrections/Parole Services at the Parkersburg, West Virginia Parole Office. Steve Spaulding, Northwestern Regional Director, is Grievant's immediate supervisor.

2. Robert Arnold is the Northern District Supervisor, and is Steve Spaulding's immediate supervisor.

3. At all times relevant herein, Brandon Chase Armstrong was employed by Respondent as an Office Assistant III at the Central Office in Charleston, West Virginia. Matt Currence, head of electronic monitoring for Parole Services, and Delbert Harrison were Mr. Armstrong's immediate supervisors.

4. Delbert Harrison is the Director of Parole Services. In the chain of command, Mr. Harrison is the immediate supervisor of Robert Arnold. Given his position as Director of Parole Services, Grievant, Mr. Arnold, Mr. Spaulding, Mr. Armstrong, and Mr. Currence would ultimately answer to Mr. Harrison.

5. Jim Ielapi is the Deputy Commissioner of The Division of Corrections. Mr. Ielapi is higher in the chain of command at the Division of Corrections/Parole Services than Mr. Harrison.

6. At all times relevant herein, Wayne Armstrong, the father of Brandon Chase Armstrong, was the Director of Human Resources for the Division of Corrections and served as the Division's Equal Employment Opportunity ("EEO") Coordinator.

7. As a Parole Officer II, Grievant regularly works with an electronic monitoring system used to monitor the whereabouts of parolees. This electronic monitoring system is provided by a company called Elmotech.

8. The electronic monitoring system automatically sends email to the parole officers, such as Grievant, each morning regarding the comings and goings of the parolees assigned to them.

9. As part of his job, Mr. Armstrong performed administrative tasks regarding the electronic monitoring system, collecting electronic monitoring fees from parolees, data entry, reviewing reports, as well as other administrative tasks that Mr. Currence needed completed. *See*, Testimony of Brandon Chase Armstrong.

10. Mr. Armstrong would also routinely send parole officers email messages that duplicated those sent by the electronic messaging system.

11. Mr. Armstrong does not supervise the parole officers or any other employee.

12. On June 15, 2011, Mr. Armstrong, with the permission of his supervisor, sent the following email message to all of the parole officers and their supervisors because he claimed to have received complaints from Elmotech about officers forgetting their system passwords:

> I need from each of you your username and your password for the EM system. For those of you who don't have this information you need to call the monitoring center and have that setup, I cannot make changes to your information, however, we seem to be having an issue with officers not using the system or forgetting their name/password. This way a master list can be kept of the p.w. you have selected so if you do forget it we can just pull the list and you can avoid calling the M.C. to request that information.
>
> Enhanced Officers, since you have the ability to make changes in the system I will ask you to send this information to Matt, that way only he has the info for the people who can make changes in the system. . . .

See, Respondent's Exhibit 5.

13. In response to this email, some officers readily provided Mr. Armstrong their passwords. However, some, including Grievant, did not.

14. Several of the officers contacted did not agree with providing the information Mr. Armstrong was requesting.[2]

15. Grievant did not wish to provide Mr. Armstrong with his username and password because he believed it contrary to password security.

16. Northwestern Regional Supervisor, Steven Spaulding, was another of those individuals who did not immediately provide Mr. Armstrong with his username and password. Mr. Spaulding had recently attended a training session on security and password protection during which attendees were advised never to divulge their passwords to anyone. As such, he was reluctant to comply with Mr. Armstrong's request.

17. Mr. Armstrong sent at least four email messages requesting this information from the officers who had not yet provided it, including Grievant. Mr. Armstrong made his fourth request for this information on July 11, 2011. The subject line for this email message reads as follows: "EM Username and Password. 4th request!"

18. After Mr. Armstrong's fourth request for the information, Mr. Spaulding provided his username and password to Armstrong.

19. After the fourth email request on July 11, 2011, Grievant had not provided Mr. Armstrong with the requested information.

20. After Mr. Armstrong's July 11, 2011, email Mr. Harrison, Director of Parole Services, contacted Grievant and asked him to provide Mr. Armstrong with his username and password.

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[2] *See*, testimony of Steven Spaulding.

21. On July 12, 2011, at 9:10 a.m., Grievant sent Mr. Armstrong the following email message, copying Mr. Harrison, Mr. Arnold, and Mr. Spaulding:

> Brandon,
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> As much as I would like to be with you Monday, I have an appointment that I can't miss. Therefore, I will go against the Directives of the State of West Virginia to duplicate information that ELMO Tech already has, if I do forget my password, which I sincerely doubt I will, I will call ELMO Tech instead of you. With great reluctance…..my username is-jdyke; my password is –Chaseisaquerulousmeacock.
>
> With all due respect,
>
> Jeffrey J. Dyke, NW/7
> Parole Officer II.

See, Respondent's Exhibit 6.

22. Chaseisaquerulousmeacock was not Grievant's password until the time came for him to provide it to Mr. Armstrong. He changed it. Grievant feared giving Mr. Armstrong the real password he had been using because he feared that divulging such could make him vulnerable to hacking with respect to his other accounts and personal matters.

23. Upon receiving the email and seeing Grievant's password, Mr. Armstrong became angry. Although he chose not to look up the words "querulous" and "meacock," Mr. Armstrong took immediate offense, believing that in his password, Grievant had called him a "queer" and had made a reference to Grievant's penis and oral sex.[3] Whereupon, Mr. Armstrong went to Mr. Harrison and complained about Grievant's password.

[3] *See*, testimony of Brandon Chase Armstrong.

24. In response to Mr. Armstrong's complaint, Mr. Harrison telephoned Grievant, asking him why he did not want to give Mr. Armstrong his password. During this telephone conversation, Mr. Harrison asked Grievant to change his password. Thereafter, Mr. Harrison sent the following email message to Grievant and Mr. Armstrong, copying Mr. Spaulding and Robert Arnold:

> I've asked PO Dyke to change his password to something more appropriate and furnish to Chase. As I understood him, his concern was giving his password to anybody was against policy, I don't see it as against policy to provide passwords so something with responsibilities in EM can access individual offenders in times of need or an unavailable PO or to the PO if a password is forgotten. I'll leave the attitude and response of PO Dyke up to his supervisors to review and deal with.

See, Respondent's Exhibit 6.

25. Mr. Arnold understood Mr. Harrison's email as a directive to look into Grievant's actions. *See*, testimony of Robert Arnold.

26. At the time Mr. Harrison sent this email, Mr. Armstrong was outside taking a smoke break. When he returned, he read the Mr. Harrison's email. Mr. Armstrong was not pleased with Mr. Harrison's response. Mr. Armstrong believed that Mr. Harrison's response was not appropriate, and that Mr. Harrison should have taken some action against Grievant, instead of leaving Grievant's response and his attitude to Grievant's supervisors.[4]

27. So, on that very day, in an effort to resolve the situation in a manner more suitable to him, still without having taken the time to look up the definitions of the words used in Grievant's new password, Mr. Armstrong immediately walked upstairs to the

[4] *See,* testimony of Brandon Chase Armstrong.

Human Resources Office, that being his father's office, to file an EEO complaint against Grievant alleging sexual harassment in violation of established Division of Corrections Policy and philosophy.[5]

28. There, Mr. Armstrong consulted Katrina Kessell, assistant to Wayne Armstrong, who also chose not to look up the definitions of the words, but assisted Mr. Armstrong in completing the EEO complaint forms.

29. Normally, Brandon Chase Armstrong's father, Wayne Armstrong, would have received the EEO complaint and began the EEO investigation process. However, given his relationship to the complainant, upon receipt, Wayne Armstrong took his son's EEO complaint straight to Deputy Commissioner Jim Ielapi.[6]

30. Deputy Commissioner Ielapi made the decision to take Wayne Armstrong off the processing and investigation of Mr. Armstrong's EEO complaint. Instead, Deputy Commissioner Ielapi took charge of the processing and investigation of Mr. Armstrong's EEO complaint.

31. Deputy Commissioner Ielapi ordered the investigation into Mr. Armstrong's complaint, and appointed Katrina Kessel and James Rollins, from the state EEO Office, to investigate the same.

32. On or about July 19, 2011, Katrina Kessel contacted Robert Arnold and officially informed him of the EEO complaint and the investigation. Further, on that same date Mr. Arnold was given a letter regarding the EEO complaint and investigation to deliver to Grievant and his immediate supervisor, Steve Spaulding. This letter was dated July 19, 2011, and is signed by Jim Ielapi. *See*, Respondent's Exhibit 7. It is

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[5] *See,* testimony of Brandon Chase Armstrong.
[6] *See*, testimony of Jim Ielapi.

noted that despite Wayne Armstrong supposedly not being party to this investigation, he was carbon copied on this letter as Director of Human Resources. *See, Id.*

33. This letter states, in pertinent part, as follows: "[i]t is very important to maintain confidentiality. You are strongly advised not to discuss this investigation with your co-workers. Any conversation could damage credibility as well as the investigator's ability to collect evidence." *See, Id.*

34. Grievant was officially informed of the EEO complaint and investigation on July 19, 2011, by letter bearing the same date. *See, Id.*

35. Because Mr. Armstrong filed his EEO complaint and that investigation had commenced, Robert Arnold and Steve Spaulding were prohibited from dealing with Grievant's email response to Mr. Armstrong and Grievant's attitude, as Mr. Harrison had directed on July 12, 2011.[7] Accordingly, the EEO investigation caused there to be a delay in management reviewing and/or addressing Grievant's conduct in his email exchange with Mr. Armstrong.

36. Grievant did not change his password on July 12, 2011, as directed by Delbert Harrison. Grievant intended to change it as directed. However, on that same day, the EEO complaint was filed, and Grievant believed it best to leave the password unchanged until the EEO investigation was concluded.

37. For their investigation into the EEO complaint, Ms. Kessel and Mr. Rollins interviewed Brandon Chase Armstrong, Grievant, and Steve Spaulding on August 1, 2011. However, Delbert Harrison, Robert Arnold, and Matt Currence were not interviewed as part of the EEO investigation.

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[7] *See*, testimony of Robert Arnold and Steve Spaulding.

38. Ms. Kessel and Mr. Rollins completed their investigation, the results of which are chronicled in a report dated August 12, 2011. Ms. Kessel sent this final report to Deputy Commissioner Ielapi.

39. Delbert Harrison, Robert Arnold, and Steve Spaulding were never provided a copy of the EEO investigation report because such are to remain "confidential."

40. In a letter to Grievant dated August 23, 2011, Deputy Commissioner Ielapi explained that the investigation did not substantiate Mr. Armstrong's allegations of sexual harassment in violation of EEO policies. However, Mr. Ielapi explained that the investigators concluded that Grievant violated the following non-EEO policies and/or procedures: WV Division of Corrections Policy Directive 105.03-Acceptable Use of E-mail; and, Prohibited Workplace Harassment 20010 Refresher. Further, the investigators concluded that Grievant was guilty of "insubordination (Deliberately disobeying a direct order by Director Harrison)." *See*, Respondent's Exhibit 9.

41. Further, by copy of this letter, Deputy Commissioner Ielapi directed Mr. Harrison to take "the necessary course of action as it relates to your actions in this matter." A copy of this letter was also sent to Wayne Armstrong as Director of Human Resources. *See, Id.*

42. By email correspondence dated August 26, 2011, Katrina Kessel provided Mr. Arnold with a copy of Deputy Commissioner Ielapi's August 23, 2011, letter, and advised him that the EEO investigation had concluded. Further, Ms. Kessel advised that the original letter would be delivered to Mr. Arnold through interdepartmental mail in

a confidential envelope, and instructed Mr. Arnold to hand-deliver the same to Grievant. *See,* Respondent's Exhibit 8.

43. The evidence is unclear as to when Grievant actually received the August 23, 2011, letter from Mr. Ielapi advising that the EEO investigation had been completed. Mr. Arnold testified that he believed he may have delivered the letter to Grievant on August 30, 2011.

44. No internal DOC investigation into Grievant's actions or conduct was ever conducted. Deputy Commissioner Ielapi simply adopted the findings of the EEO investigators with respect to Grievant's alleged violations of DOC policy and/or procedure.

45. On August 29, 2011, Mr. Harrison asked Matt Currence if Grievant had changed his password as directed on July 12, 2011. On that same day, Mr. Currence informed Mr. Harrison that Grievant had not yet changed his password from chaseisaquerulousmeacock. *See*, email dated August 29, 2011, Respondent's Exhibit 17.

46. On September 6, 2011, Mr. Harrison emailed a draft of a letter detailing the disciplinary action he intended to impose on Grievant to Katrina Kessel for her review. This proposed disciplinary action was in accord with the policy and procedure violations Ms. Kessel alleged Grievant committed in her EEO investigation report. *See*, Respondent's Exhibit 19.

47. On that same day, Katrina Kessel emailed Mr. Harrison the following reply:

Delbert,

> The letter looks good as you have covered all the areas that were founded in the investigation. Although, I'm not sure why Mr. Dyke has yet to change his password as of August 29th according to the email from Matt Currence. Also, I suggest that you have Mr. Dyke provide you with copies of certificates for the DOP classes you have required him [to] attend since it's part of the disciplinary action. DOP usually provides the certificates on the day of the training or normally within a week of completion.
>
> I am forwarding the letter to Mr. Ielapi for his review and any comments/suggestions he may have.

See, Respondent's Exhibit 19.

48. On September 8, 2011, Robert Arnold and Steve Spaulding, who attended telephonically, conducted a pre-determination meeting with Grievant to address the issues raised by Ms. Kessel, Mr. Rollins, and Deputy Commissioner Ielapi. At this meeting, Grievant was advised that he was being suspended for three days without pay based upon the findings of the EEO investigation. During this meeting, Grievant denied the charges against him and provided Mr. Arnold with the definitions of the words "querulous" and "meacock."[8]

49. On September 12, 2011, Mr. Arnold delivered to Grievant a letter bearing the same date that informed Grievant that he was being suspended for three days without pay for various policy violations and he was ordered to attend four training sessions offered by the Division of Personnel regarding internet use and appropriate interaction with co-workers. This letter states, in pertinent part, that

> [a]n internal investigation has revealed that you are in violation of the following policies:

[8] According to Steve Spaulding, a second pre-determination meeting was held on September 9, 2011, and Mr. Spaulding appeared in person at that meeting. *See*, testimony of Steve Spaulding.

1. Violations of WV Division of Correction's Policy Directive #129.00, under V., Procedure, J.

   #4 Instances of disrespectful conduct or the use of insulting, abusive or obscene language to or about others.

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

   #28 Unprofessional treatment of persons contrary to division policy, operational procedure, court order or philosophy.

2. Violations of WV Policy Directive #105.03, under V., Procedure, C.

   #5 In order to respect the intended usage of systems for electronic mail, mail that will intimidate or harass other individuals, mail that involves the use of obscene, bigoted or abusive language.

E.#3 Using profane, obscene, offensive or inflammatory speech or to personally attack any individual or entity.

3. Violations of the Division of Personnel Prohibited Workplace Harassment 2010 Refresher signed and dated by you on June 4, 2010. Paragraph 3 reads, in part,

   "Although sexual orientation is not covered by policy or law, this type of harassment can fall under the sexual harassment category. It can be non-verbal: winking, displaying pornographic or other offensive materials in the workplace; or offensive e-mails . . ."

See, Respondent's Exhibit 1. It is noted that the word "insubordination" is not used in this letter.

50. Grievant changed his password from chaseisaquerulousmeacock to "nepotism" on or about September 12, 2011, and the same was provided to his supervisors.

51. By email dated September 13, 2011, Mr. Harrison informed Grievant that his new password was unacceptable and directed Grievant to change his password to "northwestseven." Further, Mr. Harrison informed Grievant that, "**[a]ny future password changes for any work program shall be cleared through your immediate supervisor and Robert Arnold before entering.** Your supervisors are to notify me of any non-compliance issues. Thank you." (emphasis added). *See*, Grievant's Exhibit 5.

52. Grievant's suspension began on September 19, 2011, and ended on September 21, 2011. Grievant served his suspension and returned to work on September 22, 2011. Grievant also completed the training sessions listed in the letter dated September 12, 2011.

53. In accordance with Mr. Harrison's September 13, 2011, email directive, on September 22, 2011, when it came time to change his email password, Grievant asked Mr. Spaulding for permission to change his password to "stupidity." Mr. Spaulding denied Grievant's request and instructed him to "pick something less inflammatory." *See*, Grievant's Exhibit 6.

54. Again, in accordance with Mr. Harrison's September 13, 2011, email directive, on September 26, 2011, Grievant proposed the word "ridiculous" as his new password.

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health,* Docket No. H-88-005 (Dec. 6, 1988). "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 &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.*

First, it must be said that this entire complicated saga resulted from Brandon Chase Armstrong's failure to consult a dictionary. The undersigned remains bewildered by the fact that Mr. Armstrong would file an EEO complaint alleging sexual harassment against a co-worker without taking the time to look up the definitions of the words he believed harassing. Mr. Armstrong's mistaken belief that by his password, Grievant called him a "queer" and made reference to his penis and/or oral sex set the wheels of this debacle in motion. Then, this motion was perpetuated by Mr. Armstrong's annoyance with Delbert Harrison for failing to discipline Grievant on July 12, 2011, which compelled Mr. Armstrong to avail himself of his father's office to file an EEO complaint against Grievant alleging that Grievant sexually harassed him by using "chaseisaquerulousmeacock" as his Elmotech password. The undersigned is equally bewildered by Katrina Kessel's, an employee of Mr. Armstrong's father in the Human Resources Office, and who was later appointed to be the EEO investigator on Mr.

Armstrong's claim, failure to consult the dictionary before assisting Mr. Armstrong in filling out the EEO complaint forms and accepting the complaint as filed.

Nonetheless, the real issue in this grievance is whether Grievant's conduct warranted the discipline he received. Respondent asserts that it was correct in suspending Grievant for three days without pay for various violations of Policy Directives 129.00 and 105.03, and the Division of Personnel Prohibited Workplace Harassment 2010 Refresher. Grievant denies the allegations made against him, and asserts that Respondent improperly required him to disclose his passwords to Mr. Armstrong and his supervisors in violation of Office of Technology policy and WEST VIRGINIA CODE § 61-3C-1 *et seq.*[9] Grievant further asserts that Respondent failed to conduct an investigation into the incident, improperly relied on the EEO investigation report instead of investigating the incident itself, and failed to follow its Progressive Discipline Policy.

Respondent, based upon the EEO investigators' report, alleges that Grievant's use of chaseisaquerulousmeacock as his password and its dissemination by email to Mr. Armstrong and others violated the following sections of West Virginia Division of Corrections Policy Directive 129.00 (V)(J): "(4) instances of disrespectful conduct or the use of insulting, abusive or obscene language to or about others;" and, "(28) unprofessional treatment of persons contrary to division policy, operational procedure, court order or philosophy." Further, Respondent asserts that the same violates Policy Directive 105.03 (V)(C)(5) "in order to respect the intended usage of systems for

[9] The undersigned will not address whether the actions of Respondent regarding the disclosure of passwords violated any criminal statutes as such is not within the purview of the WVPEGB.

electronic message (i.e., e-mail), an employee shall not send forged electronic mail, mail that will intimidate or harass other individuals, mail that involves the use of obscene, bigoted or abusive language," (E)(3) "using profane, obscene, offensive or inflammatory speech or to personally attack any individual or entity," and the Division of Personnel Prohibited Workplace Harassment 2010 Refresher which stated in pertinent part, "[a]lthough sexual orientation is not covered by policy or law, this type of harassment can fall under the sexual harassment category. It can be nonverbal: winking, displaying pornographic or other offensive materials in the workplace; or offensive e-mails. . . ."

The words "querulous" and "meacock" do not mean at all what Mr. Armstrong assumed. Granted, Grievant admitted to the EEO investigators that he wanted the password to sound "dirty," these words have no sexual connotations. The word "querulous" is defined by Merriam-Webster as "1.: habitually complaining, 2. Fretful, whining."[10] The word "meacock" is defined as "an uxorious, effeminate, or spiritless man."[11] Clearly, these words were not meant to compliment Mr. Armstrong, but they are not profane, obscene, or bigoted, and do not at all refer to anyone's sexual orientation. Mr. Armstrong was mistaken to believe otherwise. Mr. Armstrong's belief that these words had a sexual connotation is his own fault. He chose not to review the definitions of the words. Just because he thought the words were obscene, does not mean that they are. This situation is akin to one in which an individual becomes offended at being called a "*homo sapien*."

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[10] *See*, merriam-webster.com.
[11] *See,* dictionary.com.

Respondent further argues that Grievant violated Policy Directive 129.00(V)(J)(14) "[f]ailure or delay in following a supervisor's instructions, performing assigned work or otherwise complying with applicable, established written policy or procedures" by failing to promptly change his password as directed by Mr. Harrison's email on July 12, 2011. Deputy Commissioner Ielapi called this "insubordination" in his letter of August 23, 2011. The West Virginia Supreme Court of Appeals has held that, for 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 Educ. Interim Governing Bd./Shepherd Coll.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (per curiam). The disobedience must be willful, meaning that "the motivation for the disobedience [was] contumaciousness or a defiance of, or contempt for authority." *Id*., 212 W. Va. at 213, 569 S.E.2d at 460 (citation omitted).

Grievant asserts that he did not immediately change his password because of the pending EEO investigation, and he did not want to tamper with evidence, or interfere with that investigation. Deputy Commissioner Ielapi's letter dated July 19, 2011, which informed Grievant of the EEO complaint and investigation states, "[i]t is very important to maintain confidentiality. You are strongly advised not to discuss this investigation with your co-workers. Any conversation could damage credibility as well as the investigator's ability to collect evidence." See, Respondent's Exhibit 7. The EEO complaint and investigation most certainly complicated this matter. The initiation of the EEO complaint and the resulting investigation prohibited Mr. Arnold and Mr. Spaulding from addressing Grievant's conduct as Mr. Harrison directed in his July 12, 2011, email.

The EEO investigation was not completed until August 2011, and Grievant was not informed that it was completed until on or about August 29, 2011. Grievant's predetermination meeting was held on September 8, 2011. Grievant changed his password from chaseisaquerulousmeacock on or about September 12, 2011.

Given the totality of the circumstances, the undersigned cannot find that Grievant's conduct in failing to change his password promptly after Mr. Harrison's July 12, 2011, email is a violation of Policy Directive 129.00(V)(J)(14), or an act of insubordination. The EEO investigation prohibited Mr. Arnold and Mr. Spaulding from dealing with Grievant's conduct, or talking to him about the same, and, apparently, no one advised Grievant about what he should or should not do while the EEO investigation was pending. The undersigned can understand why Grievant was apprehensive about changing his password when the EEO investigation was pending. Therefore, in this very limited situation, Grievant's failure to promptly comply with Mr. Harrison's July 12, 2011, directive is excusable.

The bigger issue in this matter is whether Respondent had the authority to require Grievant to disclose his Elmotech password to Mr. Armstrong, or anyone else. Respondent appears to assert that because the State's Office of Technology (OT) has nothing to do with Elmotech, and because no harm could be done if one accessed the system with another's password, OT's password security password policies do not apply. Grievant argues that divulging his password to the Elmotech system to Mr. Armstrong, or anyone, would place him at risk of being hacked, both at work and in his personal life, because people tend to use things they can remember as passwords, and often use the same or similar passwords for bank accounts and other private

information. Grievant argues that this is why he changed his password before he was required to provide it to Mr. Armstrong. Respondent's argument is nothing more than hair-splitting, and is without merit. State personnel receive computer password security training from OT. As a way to protect the State's computer network and information, state personnel are trained to never disclose their passwords to anyone. Mr. Armstrong's request that all of the probation officers provide him with their usernames and passwords runs contrary to the training the personnel had received. In fact, Steve Spaulding testified that he had been reluctant to provide Mr. Armstrong with his information because he had recently attended a training session on OT security during which attendees were told to never disclose such information. Mr. Spaulding was one of the last people to provide his username and password to Mr. Armstrong. Respondent should never have allowed Mr. Armstrong to seek and obtain the usernames and passwords for Elmotech from the staff. From the evidence presented, it was needless, and ran afoul of the information security training the staff has received.

Additionally, Mr. Harrison clearly violated OT security policy by requiring Grievant to disclose all of his future passwords for ***all work programs*** to Mr. Arnold and Mr. Spaulding. *See,* Grievant's Exhibit 5. The evidence presented demonstrates that Grievant is being forced to seek authorization from his supervisor(s) for every password he uses at work, not just for Elmotech. *See*, Grievant's Exhibits 6 and 7. Such a requirement is most certainly a violation of OT security policy.

The undersigned understands why Grievant was upset by having to provide his username and password to Mr. Armstrong. The undersigned can also understand why Grievant thought to change his password to something completely different from all

other passwords he used; however, by changing his password to chaseisaquerulousmeacock and emailing the same to Mr. Armstrong, Grievant was just being a smart aleck and wanted only to insult Mr. Armstrong, which he obviously did. Grievant's conduct was disrespectful and unprofessional. Although this name-calling was childish, it really does not rise to the level of being abusive, inflammatory, or harassing. The same is true of Grievant's attempt to change his password to "nepotism."

"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). 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 her judgment for that of the employer. *Trickett 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.*

Grievant's conduct was unprofessional and insulting, and he could have handled the situation better, but let us not forget he was being compelled to violate certain computer password security policies. From the evidence presented, it does not appear that Grievant has a history of misconduct, or that he had been disciplined prior to his suspension. It does not appear that he was "coached," or verbally counseled for any similar past misconduct. No one has alleged that Grievant was a poor employee or that he failed to perform his job in a satisfactory manner. Grievant did not commit any EEO violations and did not, in any way, engage in sexual harassment. Grievant engaged in name-calling and acted childishly. It cannot be helped that Mr. Armstrong jumped to conclusions about what those names meant. However, Mr. Armstrong's misguided overreaction cannot justify punishing Grievant more severely.

The undersigned acknowledges that Respondent is afforded considerable deference in assessing the seriousness of Grievant's misconduct, but this Respondent has overestimated the seriousness of Grievant's offense, and has further failed to recognize that it was violating OT policy by requiring Grievant to provide his passwords to others. Moreover, Respondent conducted no real investigation into the July 12, 2011, incident. Respondent simply relied on the EEO investigators' assessment of

which DOC policies Grievant violated. This is not the job of the EEO office. The investigators found nothing to substantiate Mr. Armstrong's sexual harassment allegations. That is where the EEO investigation should have ended. However, the EEO investigators took it upon themselves to determine which, if any, DOC policies Grievant violated. The undersigned is intrigued by this, especially as Ms. Kessel worked for Mr. Armstrong's father. Given the totality of the circumstances and the evidence presented, the undersigned concludes that the three-day suspension without pay imposed upon Grievant is excessive and disproportionate to his offense.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health,* Docket No. H-88-005 (Dec. 6, 1988).

2. Respondent proved only that Grievant violated DOC Policy Directive 129.00(V)(J)(4) and (28) by insulting Brandon Chase Armstrong in his July 12, 2011, email message. Grievant's conduct was unprofessional.

3. The West Virginia Supreme Court of Appeals has held that, for there to be "insubordination," the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd./Shepherd Coll.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (per curiam). The

disobedience must be willful, meaning that "the motivation for the disobedience [was] contumaciousness or a defiance of, or contempt for authority." *Id*., 212 W. Va. at 213, 569 S.E.2d at 460 (citation omitted).

4. Respondent failed to prove that Grievant engaged in an act of insubordination toward Delbert Harrison.

5. Respondent failed to prove that Grievant used abusive, obscene, profane, bigoted, or inflammatory language toward Brandon Chase Armstrong in violation of DOC policy.

6. Respondent failed to prove that Grievant used email to harass or intimidate Brandon Chase Armstrong.

7. "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).

8. 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).

9. 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 her judgment for that of the employer. *Trickett 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.*

10. Grievant demonstrated that the discipline imposed was clearly excessive. Therefore, mitigation of the discipline imposed upon Grievant is warranted.

Accordingly, this Grievance is **GRANTED in part, and DENIED in part**.

The three-day suspension is **ORDERED REMOVED** from Grievant's record, and is reduced to a written reprimand for violating Policy Directive 129.00 (V)(J)(4) and (28) only. Respondent is also **ORDERED** to pay Grievant three days of backpay, with interest, and to restore all other benefits which Grievant lost as a result of the three-day suspension, including leave and retirement benefits. Further, Respondent is **ORDERED** to cease requiring Grievant to disclose his passwords to his supervisors.

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: October 16, 2012.

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Carrie H. LeFevre
Administrative Law Judge