WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DONALD MATNEY

Grievant,

v. **Docket No. 2011-0972-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/ WELCH COMMUNITY HOSPITAL,

Respondent.

DECISION

Grievant, Donald Matney, has been employed by the Department of Health and Human Resources ("DHHR") as a Shopkeeper 3 at Welch Community Hospital ("Hospital") for nearly twenty-five years. Mr. Matney filed a level three grievance[1] form dated January 7, 2011, alleging that his employment was "Terminated without good cause." As relief, Grievant seeks: "To be made whole, including back pay with interest & all benefits restored."

A level three hearing was conducted in Beckley, West Virginia, on November 21, 2011. Grievant personally appeared with his representative, Gordon Simmons, West Virginia Public Workers Union, UE Local 170. Respondent was represented by Michael E. Bevers, Esquire, Assistant Attorney General. Following the hearing, the parties agreed to submit written Proposed Findings of Fact and Conclusions of Law, the last of which was received by the West Virginia Public Employees Grievance Board on January 19, 2012. This matter became mature for decision on that date.

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[1] Since this grievance is contesting the termination of employment, Grievant exercised his right pursuant to W. Va. Code § 6C-2-4(a)(4) to file directly at level three.

Synopsis

Respondent terminated Grievant's employment when it was discovered that the computer assigned to him at the Hospital had been used to access web-sites which had been prohibited by his employer. Respondent characterized the content of these web sites to be pornography.[2] Respondent argues that it has a zero-tolerance policy related to accessing pornography from work computers and therefore Grievant had to be dismissed.

Grievant admitted that he left his computer turned on and unattended for a period

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[2] The examples of the web-site content introduced as evidence were mostly made up of pictures of nude women. In determining the constitutionality of an anti-pornography ordinance the West Virginia Supreme Court noted:

> The controlling test was set forth by the United States Supreme Court in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973). HN2Material which meets this standard is considered obscene, thus it is not afforded the First Amendment freedoms of speech or press protections: (a) Whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin*, [408 U.S. 229] at 230 [92 S. Ct. 2245, 2246, 33 L. Ed. 2d 312, 315 (1972)], quoting *Roth v. United States*, [354 U.S. 476] at 489 [77 S. Ct. 1304, 1311, 1 L. Ed. 2d 1498, 1509 (1957)]; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the "utterly without redeeming social value" test of *Memoirs v. Massachusetts,* 383 U.S. [413] at 419 [86 S. Ct. 975, 978, 16 L. Ed. 2d 1, 6 (1966)], 413 U.S. at 24, 93 S. Ct. at 2615, 37 L. Ed. 2d at 431. n2.

Butler v. Tucker, 416 S.E.2d 262, 264-265, 187 W. Va. 145, 147-148 (W. Va. 1992). Since neither party questioned whether the material viewed was pornographic or obscene the term "pornography" will be used herein but the undersigned makes no determination as to whether the material met the legal standard for that term.

of ninety minutes to two hours each morning, including the day that the pornography was accessed. He demonstrated that he was not present at the computer when it was used to access the prohibited cites. Grievant violated policy related to information security, but this violation was not sufficient to justify the termination of his employment given his quarter of a century of commendable work performance.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Donald Matney, Grievant, had been employed at the Welch Community Hospital for twenty-four years and ten months when his employment was terminated. He is classified as a Shopkeeper 3.

2. The Hospital Chief Executive Officer ("CEO"), Walter J. Garrett, described Grievant as a good employee who has been with the Hospital for a long time. It was not contested that Grievant Matney was an exemplary employee until the incident that led to the termination of his employment.

3. On December 29, 2010, Respondent received a Network Violation Report ("NVR")[3] from the Office of Technology indicating that the work computer assigned to Grievant was used to access prohibited internet sites on October 28, 2010. The Office of technology technicians were able to determine that the computer was logged in using

[3] The entire report was admitted as Respondent's Exhibit 1. The term "Network Violation Report" is defined in the Office of Technology's *Network Violation Management Procedure* as: "A summary of 24 hours of activity supporting the contention that a serious policy violation has occurred". Procedure No: WVOT-PR1018 § 6.4, Respondent's Exhibit 4.

Grievant's unique identification number and the IP address for the computer assigned for Grievant's use at the Hospital.

4. The NVR indicates that Grievant successfully logged onto the computer at approximately 6:30 a.m. on October 28. Respondent's Exhibit 1, page 6 and Respondent's Exhibit 2. The report summary states that the designated computer user unsuccessfully attempted to access pornographic web-sites between 6:00 a.m. and 8:00 a.m. This activity triggered an examination of the internet activity of this computer which indicated that several pornographic sites were accessed by someone using that computer on October 28. The report details indicate that those sites were visited between 7:00 a.m. and 7:30 a.m. Respondent's Exhibit 1, pages 4 and 5.

5. The use of computer equipment owned by the State of West Virginia or operating on the State computer network may not be used "for viewing, transmitting, receiving, saving, or printing sexually explicit material."[4] Additionally, state employees are required to guard against access to computer files and devices when they are away from their work stations by taking such precautions as locking or logging off of their computers or locking their office.[5]

6. The Hospital received other NVRs related to access of prohibited internet sites at other computers in the Hospital during the same time period.

7. CEO Garrett contacted his supervisor regarding the NVRs related to Grievant

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[4] Respondent's Exhibit 3, Office of Technology *Policy: Information Security*, Policy No. WVOT-PO1001, Appendix A, Page 17. *See also:* Respondent's Exhibit 6, DHHR Policy Number 0501, *Use of Information Technology,* Appendix B.

[5] Respondent's Exhibit 3, Policy No. WVOT-PO1001 § 5.2.3, Page 7.

and other employees. CEO Garrett was instructed that the DHHR has a "zero tolerance" practice[6] related to accessing pornography with State computers and if Grievant could not that he did not use the computer to access the prohibited web-sites, he had to be dismissed from employment.

8. CEO Garrett held a predetermination conference with Grievant on January 4, 2011, to inform Grievant that he was accused of violating Information Security policies by accessing pornographic internet sites from his computer. Grievant denied accessing pornographic sites and noted that he had reported having viruses on his computer which the Hospital IT person removed.

9. On the same day as this meeting, CEO Garrett gave Grievant a letter terminating Grievant's employment for the following reasons:

> [T]he computer assigned to you attempted visiting numerous known pornographic websites. [On October 28, 2010,] [d]uring the hours of 6:00 a.m. and 8:00 a.m., your computer was denied access to over 5 requested sites or files that were categorized as known pornographic or offensive search engine keywords. The activity was traced back to a DHHR computer that was logged [using Grievant's unique access code].
>
> Other attempts to log in to those sites by you on October 28, 2011, were successful, as indicated by the documents provided by the Office of Technology. The West Virginia Department of Health and Human Resources has a zero tolerance practice regarding this type of behavior and will not be tolerated at Welch Community Hospital.

Respondent's Exhibit 9.

10. CEO Garrett first became aware of the zero tolerance practice during his

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[6] CEO Garrett initially referred to the zero tolerance stance as a policy. After he noted that there was not a written policy on the subject, he corrected himself to indicate that it was a zero tolerance practice.

discussion of the NVR with his supervisors. To his knowledge, the practice has not been reduced to writing and he had never informed any of the Hospital of the zero tolerance practice before that date. Because of the zero tolerance practice, CEO Garrett did not take Grievant's many years of successful service with the DHHR into consideration when deciding to terminate Grievant's employment.

11. Grievant's computer is in his office which is inside the Hospital storeroom area. Grievant does not lock his office when he is away from his desk but the storeroom is locked.

12. A universal key is issued to many people on the Hospital staff and any employee with a universal key can unlock the store room.[7]

13. Grievant's normal work day began at 6:30 a.m. and ended at 2:30 p.m. Each day, Grievant would log into his computer and then take packing slips from supplies that had been received at the Hospital to a copier to make copies. The copier was in another section of the Hospital, away from the storeroom. Because the packing slips varied in size and shape Grievant had to copy each one separately and then he would e-mail a copy of the slip to his computer for record keeping. This process took at least one hour each day and one and one half to two hours every Friday morning.[8]

14. Because of the daily tasks related to the copying of the packing slips, it is more likely than not that Grievant was not at his computer when the pornographic web-

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[7] Grievant estimated that this might be as many as two hundred people. Testimony of Grievant Matney, Level 3 Hearing.

[8] October 28, 2010, fell on Thursday.

sites were accessed from the internet at his computer.[9]

15. The computer assigned Grievant Matney is relatively old and very slow. Because it takes so long to re-boot, Grievant and the Hospital Information Technology ("IT") specialist set the computer so it would not automatically shut down while Grievant was away from it. There is no reason to believe that the management of the Hospital was not aware of this problem and the steps that had been taken to address it.

16. Grievant produced a letter given to a DHHR employee of William R. Sharpe, Jr. Hospital on September 9, 2010, indicating that computer with her Log On and Password were used to "view inappropriate information of a sexual nature."[10] The employee was suspended for a period of seventeen calendar days. Grievant's Exhibit 2.

Discussion

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought

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[9] Honorably, Respondent admitted that "The Department does not know who used Mr. Matney's computer to access the pornography." Respondent's Proposed Findings of Fact and Conclusions of Law, Conclusion 23, Page 12.

[10] The computer involved in that incident was assigned to a nurses station under the accused employee's control and she indicated that the employees utilized search terms as "hairy old man" or "dirty/fat old man" in an effort to obtain funny pictures to post on the computer. Evidently these searches also accessed explicit sexual pictures as well.

to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ., Docket* No.96-20-380 (Mar. 18, 1997). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

CEO Garrett testified that Grievant Matney's employment was terminated because the computer assigned to Grievant was used to access prohibited pornographic web-sites. CEO Garrett testified that he had no discretion in this matter. Because of the Respondent's zero tolerance practice, if Grievant could not prove that he was not the person who accessed the prohibited web-sites, CEO Garrett had to dismiss Grievant. This position is consistent with content of the letter of dismissal provided to Grievant. Respondent's Exhibit 9.

Grievant argues that Respondent has failed to meet its burden of proof because there is no direct evidence that Grievant was the person who accessed the prohibited internet content. Grievant admits that he left his computer unattended while it was logged on, thus making the computer vulnerable to inappropriate use by others. However, Grievant notes that he did so with the assistance of the Hospital IT staff because the computer was out-dated and extremely slow. Grievant argues that the zero tolerance practice is not written and has not been revealed to employees or routinely followed. Finally, Grievant argues that the penalty of dismissal is wholly disproportionate to any violation of policy Grievant was proven to have committed and it should be reduced in recognition of Grievant's many years of exemplary service.

An employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, [175 W. Va. 279, 284,] 332 S.E.2d 579, 581(W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir. W. Va. State College,* Docket No. 93-BOD-436 (Dec. 30, 1994). The West Virginia Supreme Court of Appeals has held that the work record of a long-time tenured state employee is a factor to be considered in determining whether "good cause" making discharge is an appropriate disciplinary measure in cases of misconduct. *See Blake v. Civil Service Commission*, W. Va., 310 S.E.2d 472 (1983); *Serreno v. West Virginia Civil Service Commission*, W. Va., 285 S.E.2d 899 (1982); *Buskirk supra.* Grievant, as a tenured state employee, had a property interest in his employment. *Perry v. Sindermann*, 408 U.S. 593 (1972), cited in *Jones v. Nicholas County Bd. of Educ.*, Docket No. 92-34-305 (July 28, 1993), *aff'd*, Nos. 93-AA-213, 94-AA-76 (Kanawha County Cir. Ct. Apr. 5, 1995). "When an individual is deprived of this interest, certain procedural safeguards are merited. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985)." *Jones*, *supra*.

The Office of Technology as well as the various state agencies have developed policies and procedures to protect the state's computer system from attack by viruses and malware which could result in significant disruption to the agencies' operation and essential services to the state's citizens. Pornographic web-sites are believed to be particularly dangerous for containing such problems because they are not regularly monitored and updated by reputable companies.[11] Consequently, both the Office of Technology and the DHHR have specific policies prohibiting the use of state computers "for viewing, transmitting, receiving, saving, or printing sexually explicit material."[12] Additionally, state employees are required to guard against access to computer files and devices when they are away from their work stations by taking such precautions as locking or logging off of their computers or locking their office.[13] Grievant was dismissed for allegedly violating those policies.

It is undisputed that Grievant's computer was utilized on October 28, 2010, between 6:40 a.m. and 8:00 a.m. to access prohibited internet sites. However, Grievant was able to demonstrate that his regular work schedule routinely takes him away from his computer during that period of time each day. Respondent did not prove that Grievant violated any policy related to accessing and viewing prohibited web-sites.

Respondent did prove that Grievant left his computer logged on every day while he

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[11] Level 3 testimony of Christopher Avis, Office of Technology Information Security Officer.

[12] Respondent's Exhibit 3, Office of Technology *Policy: Information Security*, Policy No. WVOT-PO1001, Appendix A, Page 17. *See also:* Respondent's Exhibit 6, DHHR Policy Number 0501, *Use of Information Technology,* Appendix B.

[13] Respondent's Exhibit 3, Policy No. WVOT-PO1001 § 5.2.3, Page 7.

was away from it for more than an hour. This practice did violate the DHHR Information Security Policy No. WVOT-PO1001 § 5.2.3 which states:

> Employees must guard against access to files and take precautions to protect IT devices when away from the workstation. This includes but may not be limited to the following:
> - Logging off computer;
> - Locking computer; and/or
> - Locking file cabinets and drawers.

However, the Hospital Information Technology staff knew about this practice and assisted Grievant by disabling the Computer's automatic shut off program which would automatically shut Grievant's computer down if it was out of use for a specified period of time. This was done because Grievant's computer took several minutes to re-boot each time it automatically shut down and Grievant did not wish to lose that time when he could be productive. While it is not known whether the upper management acquiesced in this practice, it was condoned by the personnel charged with Hospital computer security.

Respondent argues that its zero tolerance practice dictates Grievant's dismissal if his computer was utilized to access pornography even if Respondent cannot prove Grievant was not the person to actually access the prohibited internet sites. This position is flawed for a number of reasons. First, the practice is not reduced to writing and is too vague for an employee to know how to adjust his conduct to avoid its consequences. One does not know if the practice relates to accessing prohibited sites or failing to adequately safeguard the computer. No testimony was provided as to how this practice was applied in the past except the example provided by Grievant. In that case, the employee failed to adequately safeguard her computer and she was suspended. Based upon this limited application of the practice, it would appear that it did not apply to the facts in this case.

Without more detail, the practice is simply too vague to be enforceable.

More importantly, the zero tolerance practice is inconsistent with the West Virginia Supreme Court's rulings that tenured State employees may only be terminated for good cause. These rulings are based in the concept that long-term state employees have a property interest in their continued employment.[14] The Court has held that this property interest may not be taken away by a state employer without good cause and factors that must be weighed in determining good cause are the length and character of the employee's employment with the State. *See Blake v. Civil Service Commission*, W. Va., 310 S.E.2d 472 (1983); *Serreno v. West Virginia Civil Service Commission*, W. Va., 285 S.E.2d 899 (1982); *Buskirk* [175 W. Va. 279, 284,] 332 S.E.2d 579, 581(W. Va. 1985).

In this case, Grievant Matney has been employed by the Hospital for almost twenty-five years. Respondent conceded that Grievant had been an exemplary employee until the incident that gave rise to the termination of his employment. Yet, CEO Garrett stated that the zero tolerance practice prohibited him from considering Grievant's long and successful tenure when deciding to dismiss him. Rather, if Grievant could not prove that he did not personally access the prohibited web-sites, CEO Garrett had to terminate his employment.[15] Because Respondent did not take into consideration Grievant's twenty-five years of capable service, it violated his due process rights and did not prove that there was

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[14] *See* Syl. Pt. 4, *Waite v. Civil Service Commission,* 161 W. Va. 154, 241 S.E.2d 164 (1997) which states:

> A State civil service classified employee has a property interest arising out of the statutory entitlement to continued uninterrupted employment.

[15] To his credit, CEO Garrett noted that Grievant had been with the Hospital for a long time and having to dismiss Grievant was a sad day for him. Level 3 testimony of CEO Garrett.

good or just cause to terminate Grievant's employment. In fact, all that Respondent proved was that Grievant violated the DHHR information security policy by leaving his computer unattended while he was away from it for long periods of time and that violation was condoned by the same Hospital staff assigned to safeguard the security of the Hospital computer system; the Information Technology Officer. Clearly, this is not misconduct of a substantial nature directly affecting rights and interests of the public which would justify the termination of the employee who had been a faithful and productive employee of the Hospital for nearly a quarter of a century.

Respondent did not prove that good cause existed to terminate Grievant's employment but, as noted before, did prove that he violated the Information Security Policy and discipline short of dismissal is warranted. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994). *See Austin v. Kanawha County Bd. of Educ.*, Docket No. 97-20-089 (May 5, 1997).

In this case, Grievant committed a security breach by leaving his computer logged on and unattended. Another DHHR employee at a DHHR operated Hospital allowed co-workers to utilize her computer for downloading prohibited internet content a few months before the incident involving Grievant's computer. That employee received a seventeen

"calendar day suspension. Grievant's Exhibit 2.[16] Given the fact that Grievant's violation was known and aided by the Hospital IT staff and his long and blemish-free service to the Hospital up to that date, a suspension of ten working-days is the most that would be reasonable.

Because Respondent failed to prove that there was good cause to terminate Grievant's employment the grievance is GRANTED in part and DENIED in part.

Conclusions of Law

1. As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.* Docket No.96-20-380 (Mar. 18, 1997).

2. An employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly

[16] It is not clear how many actual work days the employee actually lost during that period.

affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, [175 W. Va. 279, 284,] 332 S.E.2d 579, 581(W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir. W. Va. State College,* Docket No. 93-BOD-436 (Dec. 30, 1994).

3. The work record of a long-time tenured state employee is a factor to be considered in determining whether "good cause" exists for discharging the employee in cases of misconduct. *See Blake v. Civil Service Commission*, W. Va., 310 S.E.2d 472 (1983); *Serreno v. West Virginia Civil Service Commission*, W. Va., 285 S.E.2d 899 (1982); *Buskirk supra.* Grievant, as a tenured state employee, had a property interest in his employment. *Perry v. Sindermann*, 408 U.S. 593 (1972), cited in *Jones v. Nicholas County Bd. of Educ.*, Docket No. 92-34-305 (July 28, 1993), *aff'd*, Nos. 93-AA-213, 94-AA-76 (Kanawha County Cir. Ct. Apr. 5, 1995).

4. "A State civil service classified employee has a property interest arising out of the statutory entitlement to continued uninterrupted employment." Syl. Pt. 4, *Waite v. Civil Service Commission,* 161 W. Va. 154. 241 S.E.2d 164 (1997). "When an individual is deprived of this interest, certain procedural safeguards are merited. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985)." *Jones*, *supra*.

5. Respondent's zero tolerance practice did not allow Grievant's long successful employment history to be weighed against the nature of the policy infraction and therefore

resulted in the termination of his employment without a determination of good cause in violation of Grievant's due process rights. *See Blake v. Civil Service Commission*, W. Va., 310 S.E.2d 472 (1983); *Serreno v. West Virginia Civil Service Commission*, W. Va., 285 S.E.2d 899 (1982); *Buskirk supra*.

6. Given the totality of the circumstances surrounding the policy violation and Grievant's twenty-five years of unblemished service, Respondent did not prove by a preponderance of the evidence that there was good cause to terminate Grievant's employment.

7. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994). *See Austin v. Kanawha County Bd. of Educ.*, Docket No. 97-20-089 (May 5, 1997).

9. Given the totality of the circumstances surrounding the policy violation, Grievant's twenty-five years of unblemished service, and the penalty imposed on an employee in similar circumstances, a suspension of ten working-days without pay is appropriate.

Accordingly, the grievance is GRANTED in part, and DENIED in part. Respondent is Ordered to immediately reinstate Grievant with all benefits and back pay plus statutory interest minus ten days of pay at his daily rate for which he is suspended.

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: MARCH 30, 2012.

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE