WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KEVIN GEORGE MOORE,
Grievant,

v. **Docket No. 2012-0431-CONS**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,
Respondent.

D E C I S I O N

Grievant, Kevin Moore, filed a grievance against the West Virginia Department of Transportation - Division of Highways, Respondent, on September 23, 2011, protesting the administrative action of his employer. The grievance stated, "Suspension from work without pay due to false allegations." The relief sought was "(r)eturn to work as soon as possible and receive lost wages." Grievant filed a second grievance on October 14, 2011, which stated:

> "I was wrongfully dismissed from my duties on 9-30-11 due to false accusations that have been made with no evidence to prove their worthy."

As relief, the Grievant stated:

> "This has been traumatic on me and my family. I am asking for pay starting September 12, until current date and time, along with job reinstatement with all benefits."

The two grievances were consolidated by Order dated October 21, 2011. A level three hearing was held before the undersigned Administrative Law Judge on January 24, 2012, April 26 and 27, 2012, at the Grievance Board's office in Charleston, West Virginia. Grievant was represented by Amy C. Crossan, Esquire, of Bouchillon, Crossan and Colburn, L.C. Respondent was represented by counsel, Barbara Baxter, Esquire, on January 24, 2012, and Michael Folio, Esquire, on April 26 and 27, 2012. This matter

became mature for decision upon final receipt of the parties' proposed findings of fact and conclusions of law on May 24, 2012. Both parties submitted fact/law proposals.

Synopsis

Respondent suspended Grievant while conducting an investigation into allegations of misconduct (supplying/selling pain pills to a co-worker). Respondent terminated Grievant from his duties as Transportation Crew Supervisor I for violation of applicable provisions of the WV Drug and Alcohol Free Workplace Policy. Respondent asserts that Grievant provided narcotics on a frequent basis, at the work-site, to an identified subordinate employee. Grievant denied the allegations, contending he has never provided his duly prescribed Oxycontin medication to any employee of Respondent. Grievant asserts that Respondent failed to meet the elements of just cause when terminating him. Grievant also asserts that, if the allegations were proven, mitigation of penalty is warranted.

Respondent had to prove the allegations by a preponderance of the evidence. Respondent met its burden of proof demonstrating that Grievant committed misconduct of a substantial nature. It is not established that mitigation is warranted by the facts, circumstance or severity of the discipline levied. 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 Moore, began his employment with the Division of Highways in June, 1995. Grievant has been regularly assigned to the Logan, Man and Chapmanville Department of Highways ("DOH") throughout his career. Grievant received promotions during his career and was ultimately promoted to the position of Transportation Crew Supervisor I in the District 2 Logan County Maintenance Organization of DOH. This promotion was on or about January 27, 2011.

2. The West Virginia Division of Personnel has promulgated a Drug and Alcohol Free Workplace Policy ("Policy") effective October 1, 1991, and revised October 1, 2004. (Respondent's Exhibit No. 1). The Policy prohibits, among other things, "the use, possession, purchase, distribution, [or] sale" of controlled substances at the workplace. Controlled substances include Schedule II narcotics such as Oxycontin and Roxycontin.[1]

3. On June 13, 1994, Grievant executed an Employee Drug Awareness Certification Form in which he acknowledged that he received the Policy, agreed to abide by the Drug and Alcohol Free Workplace Policy, and acknowledged that he would be disciplined or terminated for violating the Policy. (Respondent's Exhibit No. 2).

4. Grievant has prior disciplinary history with Respondent.

5. On November 14, 2003, Grievant was a party to a "last chance agreement" with Respondent. Grievant took unauthorized leave from July 28, 2003 through November

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[1] Oxycontin is a controlled-release form of a narcotic pain killer for continuous or extended use. There are various doses of oxycontin. Roxycontin is also a narcotic pain killer that works by dulling the pain perception center of the brain. There are also varying doses of roxycontin. However, generally speaking, layman sometimes incorrectly use the two different terms 'oxy' and 'roxi' interchangeably to designate a stronger or weaker dosage of the narcotic, Oxycodone.

16, 2003. (Respondent's Exhibit No. 7). Grievant's supervisors wanted to terminate Grievant for his unauthorized leave but Jeff Black, Director of Human Resources Division, overruled the termination request and decided to give Grievant further opportunity as an employee of Respondent.[2]

6. After entering into the 2003 Agreement, Director Black felt "that he had been had" based upon "rumors" that he heard and that he regretted the decision to enter into the Agreement. Mr. Black received information from Grievant's supervisors indicating that Grievant was involved in selling or trading his Schedule II prescription drugs.

7. Subsequent to 2003, Grievant was transferred to different locations of Respondent partly in response to the suspicion that Grievant was selling or trading his Schedule II prescription medication to Respondent's employees and others. Testimony Mike Kolota, Respondent's County Supervisor in Logan County, West Virginia.

8. Director Black learned that the physician who prescribed Grievant's Schedule II drugs was Dr. D. H. Webb, and that Dr. Webb has a reputation of prescribing unnecessary and medically inappropriate Schedule II medication.

9. Judicial notice is taken that Dr. Webb was involuntary terminated from the West Virginia's Worker's Compensation program for prescribing medically unnecessary narcotic therapy to patients. Further, Dr. Webb's Ohio medical license was involuntarily terminated in 2001 by the Ohio Board of Medicine for "intentionally" deceiving the Ohio Board of Medicine. (Respondent's Exhibit 8). Dr. Webb was sanctioned by Ohio Medicaid

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[2] Grievant provided medical evidence to document limitations resulting from a motorcycle accident. Grievant is prescribed Schedule II narcotics, Oxycontin and Roxycontin as part of narcotic therapy.

and involuntarily terminated from Ohio's Medicaid program for lying to the Ohio Board of Medicine. (Respondent's Exhibit 5).

10. David Collins, a Transportation Worker 2, is employed by Respondent and for a time, worked with Grievant. As a result of the nature of duties and work stations involved, the span of their concurrent employment period is not clearly specified.[3]

11. On July 19, 2011, David Collins reported to work and advised his supervisors that he had a drug problem. On that day, employee Collins informed his supervisors that Grievant had been supplying him with Oxycontin pills. Collins had become addicted to this Schedule II narcotic. Mr. Collins requested that Respondent remove Grievant and him from each other's assignments.

12. David Collins does not blame Grievant for his use of narcotics. As stated by Mr. Collins, he is "a grown man" and is responsible for his own actions.[4] Mr. Collins has used illegal substances in the past, prior to the time period herein discussioned, such as cocaine and marijuana.

13. Samantha Collins, employee Collin's wife called his boss, Mike Kolota, Highway Administrator II, Logan County. Mrs. Collins had learned her husband had been using illegal substances and was of the belief that Grievant had been instrumental in

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[3] David Collins indicated that Grievant first 'gave' him a pill prior to a time period where the two men worked on the same crew, but arguably out of the same work station. More specifically, Mr. Collins testified at the level three hearing that he started working with Grievant in February 2011. However, he first received a pill from Grievant in November of 2010, during Snow Removal Ice Control (SRIC) season.

[4] Mr. Collins has used illegal drugs prior to the instant events. Employee Collins failed Respondent's drug screen in 2008, testing positive for cocaine. For that, he was suspended for five days and required to talk to a substance abuse counselor.

supplying said substance. Mrs. Collins requested that Grievant and her husband not work on the same crew (together).

14. Samantha Collins signed a statement on July 22, 2011, witnessed by Mike Kolota and Tim Pullen, Chief Field Operator, District Two, which stated that her husband had disclosed his drug use to her on July 20, and that he had paid Grievant for drugs.

15. David Collins has admitted that during the time that he was addicted to oxycontins, that he stole five to ten thousand dollars ($5,000.00 - $10,000.00) from his father, and lied to his wife.[5] Collins also acknowledged that he had purchased drugs off the street from random people, estimating that during the course of events he bought drugs from 5-10 other people.

16. David Collins took 1-2 oxycodone pills per day, which he frequently obtained at the worksplace from Grievant, in addition to random individuals on the street, during the course of events.

17. After employee Collins self-reported to Respondent, he was eventually suspended for fifteen (15) days. Respondent sanctioned David Collins for taking illegal substances on state time and required him to take a substance abuse course.

18. Mr. Collins did not attend any treatment facility for his addiction. Rather, he detoxified at home, under the care and oversight of his wife. Mrs. Collins started performing drug screens at home on her husband after the drug use was discovered, giving him a test just a couple of months before the hearing. To this day, she watches him take the test.

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[5] It is known that Mrs. Collins expressed concern regarding sums of money missing/ unaccounted for in their mutual bank account(s). David Collins also took money from his father's account for drugs. Mr. Collins acknowledged that he has, at times, lied to his wife and told her differing stories about his drug use.

19. Respondent conducted a preliminary investigation regarding employee Collins' allegations. Respondent's investigation included, among other things, various interviews of Grievant, David Collins, Samantha Collins, and a variety of co-workers. Respondent investigated allegations that Grievant sold, exchanged, or bartered his prescribed Schedule II narcotic therapy to Respondent's employees at Respondent's worksite.

20. Upon the completion of Respondent's preliminary investigation, Respondent gave notice to Grievant, by letter dated September 12, 2011, informing him that he was suspended without pay for at least 10 days. (Respondent's Exhibit 3). Grievant was advised that his suspension was necessary "so the agency may conduct and complete an investigation of on the job conduct on your part that may violate the State's Drug and Alcohol Free Workplace Policy."

21. Respondent considered the situation to be significant and provided Grievant with notice of the allegations levied, the charges against him and an opportunity to respond.

22. As part of Respondent's investigation, Human Resources Director Black met at least two separate times with Grievant. Grievant was provided opportunity to provide information, and/or explanation that could possibly support his contention that he did not engage in drug trafficking conduct.

23. Kevin Quinlan, Investigator II for the Respondent, was further assigned to investigate the allegations against Grievant. He was contacted in early September 2011. The allegations were made around July 20, 2011. Quinlan did not know why there was a

delay between the allegation and the starting of his investigation. Quinlan's written report to Respondent is dated September 22, 2011.[6] (Grievant's Exhibit 4)

24. Kevin Quinlan, an experienced investigator, met with Grievant and Mr. Collins on more than one occasion. Investigator Quinlan also interviewed and questioned the parties' spouses and a number of co-workers. Quinlan provided an edited version of his notes in his written report.

25. Investigator Quinlan was aware of some inconsistences with regard to Grievant's rendition of events. Further, Investigator Quinlan was not fully aware of what lengths Mr. Collins had gone to secure narcotics. Nevertheless, Investigator Quinlan provided opinion as to his belief regarding the reliability of the information provided by employees Collins and Grievant to Respondent.

26. Investigator Quinlan was not the decision maker regarding the ultimate disciplinary actions taken by Respondent regarding Grievant or employee Collins.

27. Jeff Black, Director of Human Resources Division, was convinced that David Collins was being truthful regarding receiving narcotics from Grievant on a regular and frequent basis.

28. Subsequent to its investigation and review by various administrative personnel, Respondent concluded that Grievant had sold, exchanged, and/or bartered his prescribed Schedule II narcotic therapy to one or more employees of the agency. (Respondent's Exhibits 9 and 10; Testimony of Kevin Quinlan; Jeff Black; and Harold Jones).

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[6] Mr. Quinlan tendered his investigative report to Krista Black, Esquire, DOH Legal Division. It is recognized that Ms. Black provides legal advise to Respondent.

29. On September 30, 2011, Human Resources Director Jeff Black informed Grievant that he was terminated as a Transportation Crew Supervisor 1 effective that day. Grievant was advised that he was being dismissed because he violated "the state Drug and Alcohol Free Workplace Policy, as well as state and federal laws regarding the illegal sale or distribution of controlled substances. More specifically, between November 2010 and July 2011, you provided Oxycontin pills on a regular basis to a subordinate employee, David Collins, during working hours. On at least one occasion during the winter of 2011, during working hours, you provided the same to another employee, Donald Davis." (Respondent's Exhibit 4).

30. Grievant is prescribed a large amount of pain medication. He is prescribed this medication by D. H. Webb, Pain Management Specialist.[7]

31. Dr. Webb, Grievant's physician, testified telephonically. He is a physician located in Huntington, WV, that practices in the area of pain management. Grievant has been a patient of Dr. Webb since October of 2002. Grievant has extensive back issues for which Dr. Webb prescribes pain medication. Dr. Webb performs drug screens and pill counts on his patients. He has done so with regard to Grievant, and had never perceived a problem with regard to Grievant and his usage of the medication. It is Dr. Webb's opinion that Grievant would not be able to function and work as hard as he does if he were not taking the medications as prescribed.

32. Respondent called Christopher Bowman, M.D., a primary care physician in Teays Valley that treats patients from pediatrics to geriatrics, to testify telephonically at the

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[7] Also see finding of fact (FOF) 9.

level three hearing. Dr. Bowman reviewed Grievant's records with Dr. Webb. There were varying levels of oxycontins in Grievant's system at the time of identified tests. Dr. Bowman is of the opinion that this meant that Grievant did not regularly take the medications as prescribed. Dr. Bowman's treatment of pain is associated with his patients and any chronic or end of life pain that they may have.

33. Tim Pullen, Chief Field Operator, District Two, has known Grievant a long time. Mr. Pullen also knew Grievant's late father and believed the senior Moore to be an honorable man and a friend. Supervisor Pullen, at a time prior to the instant grievance, had an opportunity to speak to Grievant regarding rumors and stories relating to drug distribution. Mr. Pullen was instrumental in Grievant's transfer from the Corridor G garage back to the Logan garage in 2006, somewhat due to respect for Grievant's father. No formal allegations were ever levied against Grievant in 2006. *See* Pullen Testimony, *see also* Testimony Mike Kolota, Respondent's County Supervisor, Logan County, West Virginia.

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not."

Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). 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 is a permanent state employee in the classified service. Permanent 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. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965). *See also Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004) (per curiam). "'Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. West Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777(1988).

A former co-worker of Grievant's, David Collins, is employed by Respondent as a Transportation Worker 2. Employee Collins presented Respondent with information regarding his drug use and allegation that Grievant, a supervising employee, was instrumental in supplying him on a regular basis with a narcotic substance. This "voluntary admission" of David Collins was, in part, due to his wife's outrage and his desire to remain married to her. The self-reporting of Collins prompted Respondent to investigate and

ascertain appropriate action regarding allegation that an employee in a supervisory position was distributing a narcotic substance (Oxycontin and Roxycontin pills) at the workplace.[8]

The West Virginia Division of Personnel's Drug and Alcohol-Free Workplace Policy ("Policy") prohibits, among other things, "the use, possession, purchase, distribution, [or] sale" of controlled substances at the workplace. Oxycontin and Roxycontin are Schedule II narcotics constituting a designated controlled substances. State agencies are required to enforce the provisions of the Policy and take appropriate action regarding violations, an employee may be subject to disciplinary action, including dismissal. Investigation into the allegation(s) lead Respondent to the conclusion that Grievant sold, exchanged, or bartered his prescribed Schedule II narcotic therapy to one or more employees at Respondent's work-site. Respondent considered the situation to be significant. Ultimately Respondent determined Grievant's conduct constituted gross misconduct and terminated his services as a Transportation Crew Supervisor for violation of the State Drug and Alcohol-Free Workplace Policy.

Grievant contents that Respondent failed to meet the elements of just cause when terminating him. Grievant denies that he ever gave or sold pills to anyone, including David Collins and/or Daniel Davis, another employee of Respondent. Grievant denied that Collins paid him money or traded personal items for pills. Grievant testified that he had befriended employee Collins, giving him advice and loaned him money to pay a shoplifting fine. Grievant testified that he takes his pain medication as prescribed and did not sell or

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[8] Respondent is aware and recognizes that Grievant is prescribed Oxycontin and Roxycontin as pain management treatment. It is not his possession of the medicine, but the distribution of the narcotic to one or more employees at Respondent's work-site that was pursued as misconduct.

give such medication away. Lastly, Grievant also asserts that, if the allegations were proven, mitigation of penalty is warranted. Employee Collins received a few days of suspension and mandatory attendance of a substance abuse course, while Grievant was dismissed from employment.

In order to determine the proper disposition of this grievance matter, a baseline of truth is needed. Yet, in the circumstance of this case, much of the facts are disputed and are clouded by the nature of the activity. Credibility assessment is warranted.

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 the credibility of David Collins' and Grievant's testimony regarding the events in discussion. It is also deemed prudent to address the specific testimony of one or more of Respondent's witnesses.

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 Administrative Law Judge (ALJ) 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.

The undersigned ALJ observed Grievant during his testimony. Grievant's demeanor demonstrated that he was aware of the severity of the issue(s) being analyzed. The gravity of the situation was readily acknowledged. Grievant testified that he has always taken his Schedule II therapy as prescribed. However, in 2006, Grievant was indicted in Logan County after he was secretly recorded by law enforcement in which he discussed his plan to receive stolen property in exchange for Oxycontin. Grievant appeared before the Logan County Circuit Court with legal counsel and admitted guilt to the crime. (Respondent's Exhibit 9). At the instant level three hearing, Grievant attempted to disavow the elements of his crime, alleging that the Logan County prosecutor misrepresented facts to the Circuit Court Judge. Grievant entered a voluntary admission of guilt under oath. It is troubling that Grievant now attempts to distance himself from the acknowledged facts. Grievant's

credibility is dubious. It is believed that Grievant has attempted to deceive this Board and contradict the record of the Logan County Circuit Court action at which he appeared in person under oath, with counsel, and admitted guilt to the crime of larceny. Grievant's denial was more than a misunderstanding regarding the nature of the crime. In the face of a sworn record of the Logan County Circuit Court, Grievant testified that the record is false, that an officer of the court misrepresented material facts, and that he (Grievant) was acting as a dutiful son to ease the burden of others (e.g. family interest). Grievant's statements were more problematic than exonerating. Grievant's testimony on the issue lacks believability and undermined his credibility. Grievant's statements tend to indicate a conscious effort to deceive this trier of fact. The undersigned finds that such testimony reflects a deliberate and calculated attempt to manipulate the truth.

If Grievant now denies previously established facts, evident by Circuit Court documents, and cited tape recording, it is not difficult to fathom Grievant would and does deny the facts of a "he said, she said situation." Grievant denies he exchanged, bartered or sold his prescribed medication to David Collins. Grievant offers convenient platitudes and circular argument regarding this disputed contention. Grievant relies heavily on the fact that Mr. Collins is an admitted drug user and has demonstrated dishonest behavior in acquiring funds to finance his addiction. Such is the nature of a drug addict, entangled in an addiction.

It is found that Grievant is no stranger to legal proceedings and demonstrated deliberate and calculated attempts to down play his culpability for past actions. The instant matter is not the first time Grievant has been suspected and/or accused of exchanging narcotics for goods and/or services. *See* FOF #7, #33 and Respondent's Exhibit 9.

Grievant's demeanor and alleged conduct toward this accuser (David Collins) is not plausible as presented by Grievant. The undersigned is persuaded that it is more likely than not that Grievant is being untruthful regarding his participation in Mr. Collins' addiction. It is specifically found that Grievant's testimony is untrustworthy and unreliable regarding his role in providing narcotics to subordinate Collins.

It is not thought or believed that employee Collins is an innocent lamb, lead astray by an evil doer, Mr. Collins is an adult responsible for his own actions, as is Grievant. Collins has acknowledged several unpleasant truths about his past conduct. He is also highly motivated to alter and adjust his actions to an acceptable standard of conduct.

David Collins was not an overly eager witness. Respondent's Counsel was at times required to pry information out. Mr. Collins answered Counsel's inquiries with reserve, tending to respond to the question without much elaboration. Employee Collins was not evasive but he wasn't exactly volunteering information. Witness Collins exhibited the demeanor of an individual with subject matter knowledge but not necessarily happy about sharing the information. Such attitude was not inappropriate. There was an air of truthfulness to the words he spoke. This trier of fact is of the belief that David Collins was providing substantially accurate information.

Mr. Collins acknowledges that he had used illegal substances in the past, prior to the time in question herein, such as cocaine and marijuana. Further, during a time period relevant to this grievance Mr. Collins was arrested on a shoplifting charge for shoplifting Nyquil at a Rite-Aid pharmacy, and he was also charged with possession of a controlled substance at that same time. Mr. Collins had failed a drug screening in 2008, testing positive for cocaine. For that, he was suspended for five days and required to talk to a

substance abuse counselor. It is recognized that Mr. Collins risked losing his job with Respondent, his marriage to his wife, and potentially criminal penalties by disclosing his addiction to Oxycontin. It is not established that Collins harbors ill-will toward Grievant.

At the level three hearing, David Collins testified in detail about the manner in which Grievant sold, exchanged, and bartered Schedule II narcotics. Collins testified how at first Grievant offered him free Oxycontin pills. Eventually, a drug dependency condition was established. Ultimately, Grievant required Collins to pay for pills, exchange household items or equipment, or perform manual labor at Grievant's residence. Mr. Collins testified that Grievant often exchanged the pills in a room at Respondent's Logan County facility in which there is no surveillance camera. Collins further testified that he would at times wait after work for one or two hours to get a pill from Grievant.[9] Collins admitted that during the time that he was addicted to oxycodone, that he stole money from his father and lied to his wife.

In assessing the trustworthiness of the information provided by David Collins, the undersigned was mindful of the above-cited material, the possibility of agency interest, consistency of statements and the plausibility of the witness's information. The demeanor of Mr. Collins demonstrated appropriate respect and cooperation with the instant grievance process. It is very likely that employee Collins is not accurate regarding every detail, e.g., the amount of time he might wait after work for Grievant or the precise number of individuals from whom he has purchased Oxycontin pills; However it is perceived that he was truthful regarding the subject matter. David Collins obtained Oxycontin pills from

[9] Grievant challenges the accuracy of the length of time Collins contented he waited after work for Grievant. It is noted that the time estimate identified tends to be grandiose.

Grievant on a repetitive and frequent basis. This information is deemed credible and reliable. It is found that it is more likely than not that employee David Collins frequently took 1-2 narcotic pills (e.g., Oxycontin) per day, which he often obtained from Grievant, in addition to the random people on the street, during the course of events.

Samatha Collins, wife of David Collins, testified at the level three hearing. Her testimony was demonstrative but the weight it holds regarding Grievant's culpability is restricted. Her resolve was inspired. There is no doubt she loves her husband. She could and would not abide by her husband's drug usage. Mrs. Collins testified as to the steps she took to bring about resolution of events. Mrs. Collins' first-hand knowledge regarding Grievant distribution of narcotics is limited. She has first-hand knowledge of her husband's dependency and misuse of family funds.[10] However, she only knows what her husband may have told her regarding his various suppliers. Mrs. Collins testified that a number of their former possessions were transported to the possession of the Grievant. The justification for such transference is disputed. Grievant contends Dave Collin's services were voluntary and one or more property transferences were payment of an outstanding loan provided. Mrs. Collins is of a different belief. Mrs. Collins was a credible witness but her direct knowledge regarding the issue(s) in dispute is circumscribed at best.

An undetermined amount of the information of this case collected by Respondent was not limited to first-hand testimony. This fact was not lost to the undersigned. *See*

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[10] Mrs. Collins confronted her husband about money missing from their account, and he disclosed the drug problem to her. She testified that her husband spent a $5,000 compensation check that he got in November 2010, and a $3,000 tax return on drugs. He also took money from his father's account and further sold and/or exchanged household goods to buy drugs.

Investigator Quinlan's report to Respondent dated September 22, 2011. (Grievant's Exhibit 4). There are varying degrees of reliable information. An administrative law judge must determine what weight, if any, is to be given to hearsay evidence in a disciplinary proceeding. *Warner v. Dep't of Health and Human Resources,* Docket No. 07-HHR-409 (Nov. 18, 2008); *Miller v. W. Va. Dep't of Health and Human Resources,* Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ.,* Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996). The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements.[11] *Gunnells v. Logan County Bd. of Educ.,* Docket No. 97-23-055 (Dec. 9, 1997); *Sinsel v. Harrison County Bd. Of Educ.,* Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dept. of Health/Kanawha-Charleston Health Dep't,* Docket No. 90-H-115 (June 8, 1990).

In applying the above-cited factors to determine what weight, if any, should be afforded to hearsay evidence, the undersigned is readily aware that administrative

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[11] The Unites States Merit System Protection Board Handbook ("MSPB Handbook") set forth these factors for consideration when assessing hearsay. *See Borninkhof v. Department of Justice,* 5 MSBP 150 (1981).

personnel of Respondent had knowledge of or their collective memories were refreshed pertaining to workplace gossip regarding Grievant. However, it is not found that Grievant's culpability was determined by Respondent pursuant to unsubstantiated rumor. The majority of the statements by Respondent's witnesses called to testify were consistent with each other, consistent with their prior statements, internally consistent, and consistent with the documentary evidence.[12] The demeanor of the majority of the witnesses was straightforward, and their testimony was plausible.

Merits

The West Virginia Division of Personnel ("DOP") has in place a Drug and Alcohol Free Workplace Policy, which is applicable to all state employees. Respondent's Exhibit 1. The Policy prohibits, among other things, "the use, possession, purchase, distribution, [or] sale" of controlled substances at the workplace. The Drug and Alcohol Free Workplace Policy and the Respondent's Administrative Operating Procedures specifically permit Respondent to terminate an employee for selling, exchanging, and/or bartering of a controlled narcotic substances such as Oxycontin and Roxycontin in the workplace.

The primary issue in this grievance is whether or not the Grievant sold or gave Oxycontin to a co-worker. Grievant argues Respondent did not have sufficient credible

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[12] It is not readily apparent why but Don Davis, an employee identified as receiving narcotics from Grievant, did not testify at the level three hearing. It is not known if Mr. Davis is still employed by Respondent. Davis' written statement provided to Respondent and referenced in its September investigative report is not part of the level three record. Respondent contended that Grievant supplied a pill to Don Davis in the winter of 2011. The quasi-evidence was hearsay testimony of Investigator Quinlan that Mr. Davis took one-half of a pill received from Grievant. See September 22, 2011 Investigation Report. No direct testimony relevant to this allegation is of record.

evidence before it to substantiate its allegations. Grievant objects to hearsay and unsubstantiated rumor as proper evidence. His objections are relevant and were not ignored by the undersigned. Conversely, it is also evident that Respondent was attempting to diligently determine the truth regarding the issue under investigation. In dismissal cases involving classified employees, the burden of proof is upon the employer to establish the charges relied upon by a preponderance of the evidence and to establish good cause for dismissing an employee. *Davis v. W. Va. Dept. of Motor Vehicles,* Docket No. 89-DMV-569 (Jan. 22, 1990); *Broughton v. W. Va. Div. of Highways,* Docket No. 92-DOH-325 (Dec. 31, 1992).

A portion of the evidence reviewed by Respondent consisted of reports from the investigation and witnesses with limited first-hand knowledge of Grievant's day-to-day contact with other employees. In reaching its determination to discipline Grievant, decision-making administrative personnel of Respondent were aware of hearsay information pertaining to Grievant. The issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings. It is more probable than not that persistent rumor had *some* influence on Respondent's ultimate determination. Nevertheless, as stated previously, it is not found that Grievant's culpability was determined by Respondent pursuant to unsubstantiated rumor. Credibility between the accuser, Mr. Collins, and Grievant is paramount in the circumstances of this matter. The undersigned finds the testimony of David Collins to be credible. See Credibility Assessment, *supra.*

Several witnesses testified at the Level Three hearing. Decision-making administrative personnel of Respondent did not rush to judgement. Jeff Black, Director of Human Resources Division, performed some preliminary inquiries. Then, Kevin Quinlan, Investigator II for the Respondent, was assigned to investigate the allegations against Grievant. Kevin Quinlan, an experienced investigator, met with Grievant and David Collins on more than one occasion. Several of Grievant's depictions of his interactions with Collins are not perceived as plausible. Investigator Quinlan interviewed and questioned numerous co-workers and the parties' respective spouses. Quinlan's written report to Respondent is dated September 22, 2011. (Grievant's Exhibit 4). It is noted that relevant hearsay is admissible in administrative hearings. *Gunnells v. Logan County Bd. of Educ.*, Docket No. 97-23-055 (Dec. 9, 1997). Quinlan provided an edited version of his notes in his written report. While Investigator Quinlan was not fully aware of what lengths Collins had gone to secure narcotics from other sources other than Grievant, he did formulate an opinion as to his belief regarding the reliability of the information provided by employee Collins regarding Grievant distributing Oxycontin pills. Investigator Quinlan was of the opinion that the information provided to him by employee Collins regarding receiving narcotics from Grievant was valid.[13] Further, Director Black also believed that David Collins was being truthful regarding receiving narcotics from Grievant on a regular and frequent basis.

"Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner

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[13] Quinlan testified that it would not have affected his determination of credibility had he known that Collins also stole money from his father or if he had known that Collins bought drugs off the street.

contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind,* Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.,* Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil,* 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker,* 547 F. Supp. 670 (E.D. Va. 1982)). The arbitrary and capricious standard of review does not permit an administrative law judge to simply substitute his judgment for that of the employing agency. *See generally, Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982); *Trimboli, supra*, *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

It is not established that Respondent arbitrarily and capriciously concluded Grievant violated applicable workplace policy. Respondent diligently sought to determine the truth of this matter. Respondent's investigation and review by various administrative personnel, provided information of diverse weight but *en totem* said evidence was not such that the conclusion reached is unreasonable. Grievant's denial is not credible.

It is established that depending on the job each day, identified employees of Respondent may ride together to the job-site. They would meet at the garage and be dispatched to where they were assigned to work that day. Mr. Collins was not on Grievant's crew daily. Whether Collins worked with Grievant on any given day depended

on the job to be completed that day. Nevertheless, Grievant and David Collins communicated with one another on a frequent basis. The two were, for a time, to some extent, friends who spent time together at the job and on their own accord. Grievant has access to a significant amount of Schedule II narcotic medication, Oxycontin and Roxycontin pills. Collins testified he frequently obtained from Grievant, in addition to random people on the street, 1 or 2 such narcotic pills per day over the due course of several months in late 2010 and first half of 2011. The nature of the activity being attested to does not readily lend itself to witnesses.

David Collins credibly testified that he provided cash, goods, and labor to Grievant in exchange for Grievant's Oxycontin and Roxycontin pills. Grievant's sniping at incidental details was not persuasive. Collins provided detail about the manner in which Grievant sold, exchanged, and bartered his Schedule II narcotics, explaining how at first Grievant provided free Oxycontin pills. Then, eventually, Grievant expected some kind of reciprocity, requiring up to $70.00 per pill, exchange of household items or equipment, or performance of manual labor at Grievant's residence. Employee Collins testified that often the pills exchange transpired in a room at Respondent's Logan County facility in which there is no surveillance camera.

The undersigned concludes from the evidence presented that Grievant's denial of this conduct is unreliable. *Several* of Grievant's depictions of his interactions with Collins are not perceived as plausible. (Emphasis added.) Evidence of record indicates that Grievant sold, exchanged, and/or bartered his prescribed Schedule II narcotic therapy to David Collins, and in all likelihood other employees. Grievant's statements offering convenient explanations regarding disputable information are not persuasive. It is more

likely than not that Grievant engaged in impermissible drug trafficking on state property during work hours. Such conduct is "good cause" to predicate the dismissal of a classified employee. Such misconduct is of a "substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention." Respondent established by a preponderance of the evidence proper rationale to justify its decision to terminate Grievant's employment.

Mitigation

It is clear that Grievant does not wish to lose his job; nevertheless, Respondent's position in this matter is lawful. The Drug and Alcohol Free Workplace Policy and the Respondent's Administrative Operating Procedures specifically permit the Respondent to terminate an employee for selling, exchanging, and/or bartering narcotics on state property during state compensated time. Grievant avers that his termination was inconsistent with the disciplinary action given to an employee guilty of the same offense. Highlighting that David Collins, the other employee, received a fifteen (15) day suspension, Grievant asserted mitigation of penalty is warranted because of his lengthy employment history and the disproportionate punishment received by the other employee alleged to be involved.

In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case-by-case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995).

Respondent has met its burden of proof relevant to the principle charge against Grievant. However, the undersigned may mitigate the discipline imposed if the penalty assessed is clearly excessive or clearly disproportionate to the offense. Factors to be considered in this analysis include the employee's past disciplinary record, the clarity of notice to the employee of the rule violated, whether the employee was warned about the conduct, and mitigating circumstances. *Stewart v. W. Va. Alcohol Beverage Control Comm'n*, Docket No. 91-ABCC-137 (Sept. 19, 1991)*; Buskirk v. Civil Service Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985). 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 include consideration of an employee's long service with a history of otherwise satisfactory work performance. *See Pingley v. Div. of Corr.*, Docket No. 95-CORR-252 (July 23, 1996). 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).

The evidence presented by Respondent is convincing, the disciplinary measures taken were not done without forethought and Grievant had previously been extended the benefit of the doubt in the face of persistent unsubstantiated rumors, e.g., see FOF #7, #22 and #33. Discretion does not mandate leniency. While Grievant notes that Collins did not lose his job, the two employees are not similarity situated. Grievant was employed as a

supervisory position, with a heightened sense of responsibility.[14] Further, Grievant is found to be culpable for distribution. Such an offense is perceived by many to be more severe than general drug usage. Additionally, Mr. Collins came forward, self-reported and took responsibility for his actions. Respondent is of the opinion that Collins could be rehabilitated.

Given the considerable deference afforded to employers in disciplinary situations, the undersigned is without sufficient justification to rule that the discipline imposed was excessive. Respondent has substantial discretion to determine penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute his judgment for that of the employer. Respondent's prescribed sanctions are not in violation of any identified rule, regulation or statute. The events of this matter are regrettable, but the undersigned cannot find that the discipline levied was so disproportionate to the offense(s) that the sanctions indicate an abuse of discretion. It is not established that mitigation is warranted by the facts, circumstance or severity of the discipline levied.

The following conclusions of law are appropriate and 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

[14]As a supervisor, Grievant may be held to a higher standard of conduct, because he is properly expected to set an example for those employees under his supervision, and to enforce the employer's proper rules and regulations, as well as implement the directives of his supervisors. *Wiley v. Dept. of Natural Res.*, Docket No. 96-DNR-515 (March 26, 1988); *Lilly v. Dep't of Transp.*, Docket No. 07-DOH-387 (June 30, 2008); *Henry v. Div. of Highways*, Docket No. 2011-0944-DOT (Aug. 31, 2011).

Grievance Bd. 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." *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).

2. Administrative rules of the West Virginia Division of Personnel provide that an employee in the classified service may be dismissed for "cause." 143 C.S.R. § 12.2, Administrative Rule, W. Va. Div. of Personnel. The phrase "good cause" has been determined by the West Virginia Supreme Court of Appeals to apply to the dismissal of employees whose misconduct was of a "substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention." *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980);*Serreno v. W. Va. Civil Serv. Comm'n*, 169 W. Va. 111, 285 S.E.2d 899 (1982); *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965). *See also Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004) (per curiam). "'Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. West Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777(1988).

3. West Virginia Division of Personnel's Drug and Alcohol Free Workplace Policy prohibits, among other things, the unlawful use, possession, purchase, distribution, or sale of controlled substances at the workplace.

4. An administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. *Weik v. Div. of Natural Resources,* Docket No. 2011-1270-DOC (Dec. 7, 2011); *Kennedy v. Dep't of Health and Human Resources,* Docket No. 2009-1443-DHHR (Mar. 11, 2010); *Warner v. Dep't of Health and Human Resources,* Docket No. 07-HHR-409 (Nov. 18, 2008); *Miller v. W.Va. Dep't of Health and Human Resources,* Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ.,* Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996).

5. 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 v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994).

6. Grievant's denial of the allegations against him was not credible.

7. Respondent established by a preponderance of the evidence that Grievant engaged in conduct which violated applicable provisions of WV Drug and Alcohol Free Workplace Policy.

8. "[M]itigation 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). Mitigation is not warranted by the facts of this case.

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: October 25, 2012

Landon R. Brown
Administrative Law Judge