THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JAMES BRIAN SMITH,

Grievant,

v. **Docket No. 2012-0412-MAPS**

DIVISION OF CORRECTIONS/MOUNT OLIVE CORRECTIONAL COMPLEX,

Respondent.

DECISION

Grievant James Brian Smith filed this expedited Level Three grievance on October 13, 2011, against his employer, Respondent Division of Corrections/Mount Olive Correctional Complex, challenging the disciplinary demotion he received on September 27, 2011, which became effective on November 1, 2011.[1] As relief sought, the Grievant requests the following:

> 1. Retain the Rank of Sergeant with the pay that I received prior to this action which includes but not limited to senority [sic], accrual of sick and annual leave time, etc.
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> 2. Removal of past disciplinary actions from Personnel File that is older than a (2) two year time period.
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> 3. If demotion to Correctional Officer II from Correctional Officer IV occurs before final decision is issued. Back pay (My Correctional Officer IV pay prior to this incident) from the effective day of demotion to effective day of decision to include any additional overtime.
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> 4. If applicable any and all expenses pertaining to said grievance (court costs, filing fees, travel reimbursements, etc) be paid.[2]

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[1] Mr. Smith's Statement of Grievance is several pages in length. As such, the Statement of Grievance is incorporated by reference herein as if stated in its entirety.

[2] An ALJ for the Grievance Board is not authorized to grant attorney's fees. W. VA.

> 5. Monetary payment for the undue anguish it placed upon me and my family. The personal, professional and public humiliation brought on by this action. Final Amount to be discussed considered and or agreed upon by all parties.
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> 6. If grievance is granted be free from retaliatory actions.[3]

A Level Three hearing was held on February 12, 2012, before the undersigned administrative law judge at the Raleigh County Commission on Aging, in Beckley, West Virginia. Grievant appeared in person with his Representative, Lee Harper. Respondent appeared by counsel, John H. Boothroyd, Esquire.

At the conclusion of the hearing, the parties agreed to submit proposed Findings of Fact and Conclusions of Law by March 16, 2012. Respondent submitted its proposed Findings of Fact and Conclusions of Law on March 9, 2012. Grievant did not submit proposed Findings of Fact and Conclusions of Law for the undersigned's consideration. Therefore, this matter became mature for decision on March 16, 2012.

Synopsis

Grievant was demoted from his position as a Correctional Officer IV to that of a Correctional Officer II for failing to provide proper supervision and security to the main yard of the correctional complex during an open house event. Respondent asserts that Grievant's conduct that day violated numerous facility policies and procedures, including

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CODE § 6C-2-6*; Long v. Kanawha County Bd. of Educ*., Docket No. 00-20-308 (Mar. 29, 2001); *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June 21, 1996); *Cosner v. Dep't of Transp.*, Docket No. 2008-0633-DOT (Dec. 23, 2008). West Virginia Code § 6C-2-6 states in part, "[a]ny expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expense.'" Thus, the Board has no authority to grant attorney's fees as sought by Grievant.

[3] *See*, Statement of Grievance, page 5.

causing a breach of facility security. Respondent argues that Grievant's conduct that day, coupled with his disciplinary record, warrants demotion. Grievant argues that he did not violate any policies or procedures and that the demotion was inappropriate and excessive. Grievant also asserts that his past disciplinary record should not have been considered in deciding whether to impose disciplinary action against him. Respondent demonstrated that Grievant's conduct violated its policies and procedures, and that the demotion was appropriate. Grievant failed to prove that his demotion was clearly excessive, disproportionate to his offense, or an abuse of discretion. Further, Grievant failed to offer sufficient evidence in support of mitigating his demotion. Therefore, this grievance is DENIED.

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

Findings of Fact

1. Grievant is employed as a Correctional Officer at the Mount Olive Correctional Complex. At the time of the events discussed in this grievance, Grievant was a Correctional Officer IV, which is a supervisory position, holding the rank of Sergeant. Grievant was promoted to the position of Correctional Officer IV in April 2004.

2. Mount Olive Correctional Complex is a maximum security prison which houses male felons in West Virginia.

3. On September 18, 2011, an open house event was held at Mount Olive. During open houses, the facility hosts larger numbers of visitors than usual, and common areas normally off-limits to the public, such as the main yard, are open to the

inmates and their visitors. During the September 18, 2011, open house, there were 594 civilian visitors on the main yard, in addition to approximately 200 inmates.[4] Deputy Marvin Plumley served as Open House Coordinator.

4. The abnormally high number of visitors at the facility during an open house and the visitors being allowed in areas normally closed to the public creates additional security concerns. Accordingly, extra personnel, consisting of non-uniformed staff volunteers and correctional officers, are needed to work during open houses. Staff volunteers use "sign-up sheets" to volunteer in advance to work during open houses.

5. On September 18, 2011, Grievant was assigned to work as the Officer-in-Charge of the main yard during the open house. Grievant had worked as the Officer-in-Charge of the main yard before.

6. As the Officer-in-Charge of the main yard, Grievant was responsible for the supervision of the main yard and the staff assigned to it.[5] Grievant would have reported to the Shift Commander, Lieutenant Scott Rogers, on September 18, 2011.

7. At the start of his shift, Grievant was not provided a list of correctional officers and non-security staff assigned to his area during the open house on September 18, 2011.

8. In the morning before visitors began to arrive for the open house, Grievant made efforts to obtain a staffing list by speaking with James Vaught and Deputy Warden Marvin Plumley. Mr. Vaught informed Grievant that copies of the list for non-

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[4] *See,* testimony of Warden David Ballard.

[5] *See,* testimony of Deputy Warden Marvin Plumley.

security staff were located near the time clock. Mr. Vaught also stated that the Shift Commander may have a list, as well.[6]

9. Mr. Vaught later went to get a staff list for himself at the time clock and saw Grievant there.

10. Sometime after speaking with Mr. Vaught and Deputy Warden Plumley, Grievant asked Shift Commander, Lt. Scott Rogers, for his list of non-security staff. However, Lt. Rogers did not have such list.

11. Grievant did not return to Deputy Warden Plumley and inform him that he was unable to locate a staffing list for his assigned area.

12. Copies of the non-security staff members assigned to Grievant that day could have been requested at the main administrative building. However, Grievant did not ask anyone in the main administrative building to make a copy for him or to provide him with a copy.

13. Correctional Officer Clinton Caruthers was assigned to the main yard on September 18, 2011.[7] Further, because of the need for extra security during the open house, Sgt. Mike Egnor and Sgt. Cavin Wood were also assigned to the main yard.[8]

14. In addition to the correctional officers assigned to Grievant, several non-security staff volunteers were assigned to Grievant to work in the main yard.[9]

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[6] *See,* testimony of James Vaught and Deputy Warden Marvin Plumley.

[7] *See,* September 18, 2011, Daily Shift Roster, Respondent's Exhibit 9.

[8] *See*, Open House Memorandum dated September 8, 2011, Respondent's Exhibit 6.

[9] *See,* Non-Security Staffing List, Respondent's Exhibit 8.

15. Between 11:00 a.m. and 12:00 p.m. Warden David Ballard and Deputy Warden Plumley conducted a walk through in the main yard. During their walk through, neither Warden Ballard nor Deputy Warden Plumley noticed any employees on the main yard.

16. Upon seeing no employees on the main yard, Warden Ballard radioed Associate Warden of Security Paul Parry and informed him that no staff was on the main yard and instructed Parry to take care of it.[10] Any employee with a radio could have heard Warden Ballard's call to Parry, including Grievant.

17. After Warden Ballard's call to Associate Warden Parry, several staff members came out onto the main yard and took their posts.

18. After receiving the call from Warden Ballard, Associate Warden Parry located Grievant in the staff dining room and told Grievant to take care of the situation on the main yard. Grievant stated that he would take care of it.

19. As Officer-in-Charge, Grievant would have been responsible for arranging security coverage for the main dining room during lunch.

20. While he was in the staff dining room, Grievant heard Warden Ballard's radio call to Associate Warden Parry about there being no staff on the main yard.

21. After speaking with Associate Warden Parry, Grievant went to Central Control where Lt. Rogers was working. Grievant appeared upset. Grievant placed his

[10] *See,* testimony of Warden David Ballard.

keys and radio on Lt. Rogers' desk and informed Lt. Rogers that he was sick and going home. Grievant did not give Lt. Rogers any further information.[11]

22. Lt. Rogers contacted Associate Warden Parry and informed him that Grievant had reported to the office stating he was sick and going home. Upon learning that Grievant had left work, Associate Warden Parry contacted Sgt. Wood and assigned him to the Officer-in-Charge position.[12]

23. Associate Warden Parry, Deputy Warden Plumley, and Warden Ballard discussed taking disciplinary action against Grievant for his failure to provide supervision and security coverage for the main yard and for leaving work as he did on September 18, 2011.

24. Warden Ballard instructed Deputy Warden Plumley to perform a complete review of Grievant's employment and disciplinary history and to make a recommendation to him as to what disciplinary action to take against Grievant for his September 18, 2011, conduct.

25. Deputy Warden Plumley reviewed Grievant's employment history as directed and found that since 2006 Grievant had been suspended three times and had received two written reprimands. Further, the records indicated that Grievant had a history of taking unauthorized leave and had been placed on leave restriction in 2010. Deputy Warden Plumley also reviewed Grievant's Employee Performance Appraisals ("EPA") from 2001 to 2011, noting the times when Grievant received ratings such as "needs improvement," "does not meet expectations," or "fair, but needs improvement" in

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[11] *See,* Memorandum from Lt. Rogers to Major Robert Rhodes dated September 18, 2011, Respondent's Exhibit 3.

[12] *See,* Memo from Paul Parry to Marvin Plumley dated September 18, 2011, Respondent's Exhibit 2.

various categories on the evaluations.[13] Based upon his review, Deputy Warden Plumley recommended that Grievant be terminated.

26. In determining what disciplinary action to take against Grievant, Warden Ballard considered Grievant's conduct on September 18, 2011, along with Grievant's disciplinary history. Although he considered terminating Grievant, Warden Ballard decided that demotion would be more appropriate.

27. On September 27, 2011, Deputy Warden Marvin Plumley conducted a predetermination meeting with Grievant. Deputy Warden Plumley informed Grievant of the charges against him and provided Grievant an opportunity to respond to the same. Deputy Warden Plumley also informed Grievant that Warden Ballard was considering demoting him. Grievant's only explanation for failing to provide security for the main yard on September 18, 2011, was that he was not provided a roster of staff assigned to him to work on the main yard during the open house.

28. After considering Grievant's response to the charges against him, Warden Ballard determined that demotion was the appropriate disciplinary action to take against Grievant.

29. After the predetermination meeting, Grievant was provided a copy of the demotion letter from Warden David Ballard dated September 27, 2011.

30. Grievant was demoted two pay grades to the position of Correctional Officer 2, effective November 1, 2011.

31. Until filing the instant grievance, Grievant had not sought the removal of any of his disciplinary records from his personnel file.

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[13] *See,* testimony of Deputy Warden Marvin Plumley, Warden David Ballard, and Demotion Letter dated September 27, 2011, Respondent's Exhibit 1.

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 Employee Grievance Bd. 156 C.S.R. 1 § 3; *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.*

Respondent asserts it properly demoted Grievant from his position as a Correctional Officer IV, pay grade 12, to the position of Correctional Officer II, pay grade 10.[14] Respondent asserts that Grievant's conduct violated Policy Directive 129.00, Section V. (J)(3) abusing state work time; (5) instances of inadequate or unsatisfactory job performance; (14) failure or delay in following a supervisor's instructions, performing assigned work or otherwise complying with applicable, established written policy or procedures; and (47) breach of facility security or failure to report any breach or possible breach of facility security.[15] *See, Id.* Respondent asserts that Grievant was demoted from his supervisory position because his conduct demonstrated that he could not perform effectively as a supervisor. Grievant denies the charges against him and

[14] This was a demotion with prejudice which resulted in a reduction in Grievant's gross monthly pay from $2,837.00 to $2,554.00. *See,* Respondent's Exhibit 1.

[15] Respondent cites both the September 18, 2011, incident and Grievant's past work history as the basis for the disciplinary demotion.

asserts that he was at all times following procedure and orders. Grievant further asserts that his demotion was improper.

The evidence presented establishes that on September 18, 2011, while walking the main yard with Deputy Warden Plumley during the open house event, Warden Ballard saw no employees on the yard. Deputy Warden Plumley noted that he also saw no employees. There should have been both uniformed officers and non-uniformed staff volunteers working on the yard during the event. Both Warden Ballard and Deputy Warden Plumley were familiar with the employees and would have recognized them on sight. Because there were approximately 800 people on the yard at the time, both civilian visitors and inmates, Warden Ballard deemed the absence of employees on the yard a security breach and radioed for security coverage on the yard. After Warden Ballard's radio call, he saw employees begin to arrive on the yard. Grievant, however, seems to argue that staff members were already on the yard, but Warden Ballard and Deputy Warden Plumley did not see them.[16] Grievant offered no evidence to support this claim. Grievant called no witnesses to testify that they were providing security or working on the yard at the time in question. Further, when Associate Warden Parry spoke to Grievant in the staff dining room after Warden Ballard's radio call, Grievant did not refute Parry's statement about the need for staff on the yard. Instead, Grievant said something to the effect of "I'll take care of it." During the predetermination meeting with Deputy Warden Plumley, Grievant did not claim that staff was on the yard. Instead, Grievant argued only that he was not provided a staffing roster of staff assigned to him.

[16] *See,* Statement of Grievance and testimony of Warden David Ballard.

Therefore, Grievant seemingly implied that he was unable to perform his job because he was not given a staffing roster.

The job classification description for a Correctional Officer IV lists the following as the position's nature of work: "[u]nder general supervision, serves as a shift supervisor or unit supervisor or in a mid-level specialized supervisory capacity. The officer supervises the enforcement of rules, regulations and state law necessary for the control and management of offenders and the maintenance of public safety. The officer supervises and reviews the work of subordinates to ensure the orderly functioning of a facility or unit . . . ."[17] Further, Mount Olive Correctional Complex Post Order 3A-08 for the Main Recreation Yard lists the following as one of the daily duties and responsibilities of officers assigned to this position: "[e]nsure that at least one (1) Officer assigned to this post remains available on the Recreation Yard at all times (unless otherwise authorized)." *See,* Respondent's Exhibit 10. As the Officer-in-Charge of the main yard, Grievant was responsible for ensuring that the main yard was secure and supervised. From the evidence presented, Grievant violated this post order by leaving the main yard unattended and unsupervised during the open house. Granted, as Officer-in-Charge of the main yard, Grievant would also have had to arrange security for the main dining room during meal time, which explains why he was in the staff dining room at the time of the radio call, but it was his responsibility to make sure the main yard was secured at all times.

Grievant's argument that Mount Olive's failure to provide him with a staffing list somehow explains or excuses his conduct is without merit. The evidence presented

[17] *See,* Job Classification Specification, Respondent's Exhibit 15.

establishes that Grievant was not provided a copy of the staffing list for the non-uniformed volunteer staff assigned to him during the open house and that he took some steps to obtain one. The undersigned is not sure why Grievant failed to ask for a copy of the list at the administrative building, or from Deputy Warden Plumley, when he was unable to otherwise obtain a copy. Grievant had from 7:00 a.m. when his shift started until approximately 11:30 a.m., when Warden Ballard made the radio call, to get a copy of the list, but failed to do so. As Officer-in-Charge of the main yard, a supervisory position, Grievant had the responsibility of knowing who he was to supervise and providing supervision and security to his assigned areas, but he failed to do so. Clearly, Grievant could have obtained a staffing roster. Grievant received the daily roster which listed the name of the uniformed officer assigned to him to work the main yard. With that, Grievant should have been able to ensure that at least one officer was providing security for the yard, especially when Grievant left the main yard to go to the staff dining room. Accordingly, Respondent has proved that Grievant violated Post Order 3A-08. Such caused a breach of facility security, and establishes that Grievant performed his job in an unsatisfactory manner.

Next, Respondent asserts that Grievant violated Policy Directive 129.00 Section V. (J)(14) by failing to follow Associate Warden Parry's instructions to take care of the security situation on the main yard after Warden Ballard's radio call. The exchange between Associate Warden Parry and Grievant occurred in the staff dining room after Parry received the radio call from Warden Ballard. The evidence presented demonstrates that immediately following the exchange with Associate Warden Parry, Grievant, appearing upset, went to Central Control, placed his keys and radio on Lt.

Rogers' desk, and informed Rogers that he was sick and going home. No evidence was presented to establish that Grievant got coverage for the main yard before going to Central Control. Further, Grievant did not mention to Associate Warden Parry moments before that he was ill, going home, or that he was going to Central Control. Respondent has demonstrated that Grievant failed to follow Associate Warden Parry's instructions to address the security situation on the main yard. Instead, apparently upset by the morning's events, Grievant decided to go home and did so.

In determining the disciplinary action to take against Grievant, Warden Ballard considered Grievant's conduct on September 18, 2011, as well as his disciplinary history and his past EPAs. Warden Ballard considered terminating Grievant. Grievant argues that his prior disciplinary actions and EPAs should not have been considered in the decision to demote him. It does not appear that at any point prior to September 18, 2011, Grievant had requested any of records of his disciplinary history be removed from his personnel file, or that he had successfully challenged any of these disciplinary actions or EPAs.

"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.* Because Warden Ballard initially considered terminating Grievant, Warden Ballard had a duty to review Grievant's work record.

A review of Grievant's disciplinary history shows the following: Grievant received a three-day suspension in February 2006 for "violating Equal Employment Opportunity and Sexual Harassment policies by telephoning and sending emails using insulting, abusive language to a female officer during work hours;" Grievant received a written reprimand in September 2006 for "use of disrespectful and insulting language towards another employee;" Grievant received a ten-day suspension in September 2009 for "failure as the Officer-in-Charge to properly supervise a use of force incident and for falsifying and concealing facts in the incident report;" Grievant received a five-day suspension in February 2010 for "failure to follow established procedures for reporting off work;" and in April 2011, Grievant received a written reprimand for "use of insulting, abusive or obscene language during an argument with another employee while at work." Further, Grievant's EPAs for the years 2009, 2010, and 2011 indicate that Grievant was evaluated as needing to improve his work performance regarding his attendance, including call offs from work, and his attitude/professionalism.

A demotion with prejudice is "[a] reduction in a pay and/or change in job class to a lower job class due to the inability of an employee to perform the duties of a position

or for improper conduct . . . .” 143 C.S.R. 1 § 11.4. Further, the Division of Corrections Policy Directive 129.00, “Progressive Discipline,” Section V(G)(3) states that “[d]emotion shall be for cause and may be the final attempt at corrective action, prior to dismissal.” “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).

Respondent was within its rights to demote Grievant for his conduct on September 18, 2011. Respondent was also within its rights in considering Grievant’s disciplinary history when deciding what type of disciplinary action to take against him. Grievant’s disciplinary history shows that he had received written reprimands and suspensions in the past. In fact, two suspensions Grievant received were for “failure as the Officer-in-Charge to properly supervise a use of force incident and for falsifying and concealing facts in the incident report” and for “failure to follow established procedures for reporting off work.” The conduct at issue in this grievance is similar to that for which Grievant had received lesser discipline in the past. Grievant has failed to meet his burden. Respondent’s decision to demote Grievant complies with the progressive discipline policy, and was not excessive or an abuse of discretion.

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 Resources/Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996). Grievant presented no evidence to suggest that other employees had received lesser discipline for like conduct. Further, Grievant presented no evidence to demonstrate his demotion was an abuse of discretion. Given the deference afforded the employer in disciplinary actions, and the lack of evidence that the discipline imposed upon Grievant was disproportionate to the offense, mitigation is not warranted.

For the foregoing reasons, this grievance is DENIED.

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 Employee Grievance Bd. 156 C.S.R. 1 § 3; *Ramey v. W. Va. Dep't of Health,* Docket No. H-88-005 (Dec. 6, 1988).

2. A demotion with prejudice is "[a] reduction in a pay and/or change in job class to a lower job class due to the inability of an employee to perform the duties of a position or for improper conduct . . . ." 143 C.S.R. 1 § 11.4.

3. Further the Division of Corrections Policy Directive 129.00, "Progressive Discipline," Section V(G)(3) states that "[d]emotion shall be for cause and may be the final attempt at corrective action, prior to dismissal."

4. Respondent proved by a preponderance of the evidence that Grievant failed to provide supervision and to ensure security coverage to the main yard in violation of Division of Corrections policies and procedures which resulted in a breach of facility security and that the discipline imposed for his conduct was appropriate.

5. "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).

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

7. Grievant failed to prove that the penalty he received was clearly excessive or reflects an abuse of discretion. Further, Grievant did not prove that the penalty imposed was disproportionate to his inappropriate conduct. As such, mitigation of the demotion is not warranted.

Accordingly, this Grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See,* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also,* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

DATE: July 17, 2012.

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Carrie H. LeFevre
Administrative Law Judge