

**WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**SAMUEL W. RUTHERFORD,**

**Grievant,**

**v.**

**Docket No. 2020-1568-CONS**

**DIVISION OF HIGHWAYS,**

**Respondent.**

**DECISION**

Samuel W. Rutherford, Grievant, filed grievances against his employer the West Virginia Department of Transportation, Division of Highways ("DOH"), Respondent challenging disciplinary actions taken against him. Grievant protest Respondent's disciplinary actions and alleged prohibitive conduct. The three (3) grievances were consolidated into the above-styled matter at level three.

On January 21, 2020, Grievant filed at level one of the grievance process, the first of three grievances (docket number 2020-0832-DOT) alleging harassment. On February 3, 2020, Grievant filed a second grievance at level one (docket number 2020-0881-DOT) regarding a written reprimand and allegedly being denied union representation. By separate orders dated May 26, 2021, both of the grievances were denied at level one. Grievant appealed. On October 27, 2020, Grievant filed a third grievance at level three (docket number 2021-1306-DOT) regarding the issuance of a 2-day suspension. The grievance statement provides "Grievant was suspended without just cause." Collectively, Grievant requests to be made whole including removal of the written reprimand, overturning of the suspension(s) and to be treated fairly, free of harassment.

By Order dated September 9, 2022, the grievances **2020-0832-DOT, 2020-0881-DOT, and 2021-1306-DOT** were consolidated to the instant matter (2020-1568-CONS) at level three. A level three hearing was held before the undersigned Administrative Law Judge on April 6, 2022 at the Grievance Board's Charleston office. Grievant appeared in person and was represented by Michael L. Hansen, Project Field Organizer, UE Local 170, who appeared by Zoom. Respondent appeared by and through District Manager, Brian Cooper and was represented by counsel Reginia L. Mayne, Division of Highways, Legal Division. At the conclusion of the level three hearing, the parties were invited to submit written Proposed Findings of Fact and Conclusions of Law which were submitted by both parties. This matter became mature for decision on May 16, 2022, upon receipt of the last of the submitted proposals.<sup>1</sup>

### **Synopsis**

Grievant is a Transportation Worker 2 Equipment Operator employed by Respondent. Grievant protests a written reprimand and suspension for not performing up to work standards and failure to conduct himself properly during interactions with supervisors. Respondent contends that Grievant is repeatedly questioning management's decisions and arguing with his supervisor regarding job directions. Grievant is disruptive and in violation to established work standards. Respondent by a

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<sup>1</sup> Grievant withdrew the part of this consolidated grievance dealing with the alleged denial of representation. On April 6, 2022, at the level three hearing, Grievant by Representative dropped allegations that Respondent improperly denied Grievant requested representation at a meeting, where the topic of the meeting being conducted, could reasonably lead to discipline. This issue will not be discussed further.

preponderance of the evidence established proper justification for disciplinary action. Accordingly, the 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 is a Transportation Worker 2 (TW2) Equipment Operator assigned to District Seven with Respondent Division of Highways and has been employed since March 23, 2004.

2. A Transportation Worker performs a variety of skilled and semiskilled work at the full performance level in the operation, maintenance and repair of State facilities, highways, institutions, and buildings. TW2 is not management or responsible for determining crew activities. Grievant is considered an experienced employee and an experienced equipment operator.

3. Brian Cooper is the Highway District Manager for District Seven (D-7) and has been employed by Respondent since July 5, 1995. The district in discussion includes six West Virginia counties. The responsibilities of a District Manager are vast. Such duties include, but are not necessarily limited to, maintenance, construction, and personnel issues. District Manager Cooper testified at the level three hearing.

4. The authority of a Highway Administrator is below that of District Manager. A DOH Highway Administrator is responsible for administering highway operations in accordance with established procedures and policies.

5. Rodney Cheuvront is the Highway County Administrator for Braxton County and is charged with administrative supervisor for all of the workers in the county among other responsibilities. Administrator Cheuvront testified at the level three hearing.

6. Eric Belknap is a Construction Supervisor. A Highway Construction supervisor is below the Highway County Administrator position but above Transportation Worker 3 Crew Chief classification. Supervisor Belknap has been employed with Respondent since 2008.

7. Depending upon the type and the assigned task of a crew, a crew chief will accompany the crew and be “in charge” for the day. Crew Chiefs are responsible for the direct supervision of transportation workers. Crew size varies with the task and project being accomplished. From time-to-time individual transportation workers are temporarily upgraded to crew chief position to supervise a crew for a variety of reasons.

8. Lloyd King is one of three permanent crew chiefs in Braxton County and supervises various crews of transportation workers in the county. Crew Chief King testified at the level three hearing.

9. Trevor Harper is also one of the permanent crew chiefs in Braxton County and supervises crews of transportation workers in the county.

10. Grievant was given an RL-544 (Notice to Employee), written reprimand, on January 13, 2020 for failing to meet the “Standards of Work Performance and Employee Conduct” in relation to an equipment operation and a brush clearing incident on January 2, 2020. R. Ex 3. Chapter 6, Section II, A 3, 6, and 8 of DOH Standards of

Work Performance and Employee Conduct was specifically cited. Ultimately, Grievant was given a one-day suspension. See January 28, 2020 Decision Correspondence, R Ex 3 This grievance was previously assigned Docket No. 2020-0832-DOT.

11. It is undisputed fact that Grievant and other crew members were sent to cut and clear a path of trees and brush from an identified job site. They were instructed to first cut the foliage and put the debris through a chipper on site.

12. Grievant choose to express his opinion and suggestions to management regarding conditions of equipment and/or other ways to perform the job assignments.

13. After Grievant's supervisor(s) arrived on the job site, the working instructions were adapted/ altered. The rationale for the alteration is not necessarily an agreed fact. Nevertheless, the instructions to the crew changed. One or more crew chiefs instructed the workers that the debris needed to be "windrowed" to create a path down to the culvert.

14. Loyld King, a crew chief, specifically authorized the crew to windrow the debris verses put the material in the chipper. Windrowing the debris material required the removal and/or clearing of the debris material and placing it in an organized row outside of the designated pathway.

15. Grievant knew of the directives and was aware the area was to be cleared.<sup>2</sup>

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<sup>2</sup> After being given instructions and before leaving HQ parking lot, reportedly, Grievant stated "If they wanted the area cleaned then Lloyd, Trevor and Rodney need to go out and help ... or do it themselves." See R Ex 3, RL-544 attachment.

16. At the time of this event, Grievant was obese and his dexterity and stamina may have affected his ability to dispose of debris with the same proficiency as other workers. Nevertheless, Grievant again choose to express his opinion regarding the given task. Grievant held a different opinion regarding how the debris could/should have been handled.

17. Grievant was observed sitting on a tree stump roughly 15 feet over the hill with a chain saw in hand, continuing to voice his opinion and dissatisfaction with Respondent's leadership.

18. County Administrator Rodney Chevront arrived on the job site and demonstrated how to windrow the cut brush. The Highway Administrator position outranked all other at the site. Administrator Chevront undisputedly provided an example of how to properly clear debris at this work sight in a windrow fashion.

19. Grievant's exact conduct subsequent to crew leader(s) instructions and Administrator Chevront's action is disputed.<sup>3</sup>

20. Grievant was given specific instructions to clear a path but ignored them and continued to clear the brush the way he felt was appropriate. Grievant cut up bushes and foliage with a chain saw and left the debris in piles on the ground.

21. Grievant's oral and physical conduct was communicated up the ranks.

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<sup>3</sup> Versions vary: Grievant's statement indicates that he was working, clearing the brush/trees and multiple supervisors coming to the job site and gave conflicting instructions about the clearing process. While others perceived that Grievant was doing more complaining than actual working. He was observed siting and/or resting more often than not and NOT actively clearing debris in either of the methods instructed, for one reason or another.

22. Grievant was given a written reprimand for failing to meet the “Standards of Work Performance and Employee Conduct” for his conduct on January 2, 2020. R. Ex 3. Further, Grievant was given the opportunity to meet with District Manager Cooper on January 17, 2020.

23. Grievant appeared for the meeting on January 17, 2020 and provided a lengthy explanation of his version of events that occurred on January 2, 2020.

24. District Manager Cooper was made aware and/or communicated with both witnesses and Grievant regarding Grievant’s comments and actions on January 2, 2020.

25. A letter was issued on January 28, 2020, notifying Grievant of his one day suspension, beginning on February 4, 2020, for violation of DOH Standard of Work Performance and Conduct. R. Ex 3.

26. The West Virginia Division of Highways Administrative Operating Procedures Section III, Chapter 6, specifically addresses standards of work performance and conduct. Generally, the Division of Highways expects its employees to meet certain standards of work performance and conduct regardless of the type of work or unit to which they are assigned. These standards include, but are not limited to, the following:

3. Maintenance of a high standard of personal contact and courtesy in dealing with the public, fellow employees, subordinates, supervisors, and officials.

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6. Compliance with accepted safe working practices.

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8. Performance of assigned duties in accordance with the

standards and instructions given by an appropriate supervisor;

See, Division of Highways Administrative Operating Procedures, Disciplinary Action, § 2, Ch. 6, II.A.3, 6, & 8

27. Further, Grievant was given an RL-544, written reprimand, on January 23, 2020, for poor job performance while operating heavy equipment on January 10, 2020, near the Servia Rest Area, I-79.

28. Grievant is an experienced equipment operator and has knowledge and know-how with regard to the use of a Cat Grader.

29. On January 10, 2020, Grievant was tasked with operating a Cat Grader with the purpose of grading an identified shoulder of Interstate 79. Grievant's actions with regard to this ditching project was instrumental in preventing improper drainage. Another employee had to redo Grievant's work from the previous day causing excess expenses and undue hardship for the organization.

30. Grievant was informed he had the opportunity to meet with District Manager Cooper at the District Manager's office on January 30, 2020, to discuss the January 10, 2020 infractions.

31. Grievant appeared for the meeting on January 30, 2020, without a union representative even though he had prior knowledge that the meeting would involve disciplinary action.

32. The meeting commenced. At some point during the January 30<sup>th</sup> meeting, Grievant decided he would like to have a union representative present during the



discussion. Grievant had several disciplinary issues pending and Grievant admittedly could not keep the dates and issues straight.

33. District Manager Cooper contacted Respondent's central Human Resources in Charleston. Cooper was directed to stop the meeting and continue when Grievant and his representative could be present. District Manager Cooper stopped the meeting as directed.

34. Throughout the remainder of the year, multiple attempts were made to reschedule the meeting with Grievant and his union representative.<sup>4</sup> For a variety of reasons, mutual dates and times were never consummated. *Citing* May 26, 2021, L1 Decision.

35. District Manager Cooper eventually sent a certified letter dated August 6, 2020, to Grievant advising that the disciplinary meeting was not optional and must be rescheduled. Ultimately, a meeting did occur (date not provided).

36. Respondent issued an RL-544 to Grievant for poor job performance, Respondent, (Central Office) determined Grievant violated applicable workplace standards. The work performed by Grievant was not satisfactory for his skill level.

37. Grievant previously filed a grievance (2020-0881-DOT) claiming Respondent erred by holding a disciplinary meeting without a union representative

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<sup>4</sup> West Virginia Public Employees Grievance procedure provides for representation at disciplinary actions. See WV Code §6C-2-3; an employee may designate a representative who may be present at any step of the procedure as well as at any meeting that is held with the employee for the purpose of discussing or considering disciplinary action.

present.<sup>5</sup> The issue of whether Respondent was justified in issuing an RL-544 to Grievant for poor job performance on January 10, 2020, was not rebutted.

38. Grievant did not protest the proposed facts of January 10, 2020. Construction Supervisor, Eric Belknap, was of the opinion that Grievant's job performance was not up to standards. Supervisor Belknap believed that a written reprimand was necessary to document Grievant's job performance because Grievant has had issues in the past.

39. Lastly the third disciplinary action at issue in this grievance, regards a 2-day suspension issued to Grievant for failing to follow the instructions of his supervisor on August 18, 2020 (formerly Docket No. 2021-1306-DOT).

40. On Aug 18, 2020, Grievant was instructed to tailgate stone on Tague Road and Plantation Drive.

41. Grievant was of the opinion that another road, Cool Spring Road, needed gravel. Grievant was heard to verbalize his opinion by an administrative agent of Respondents, Highway County Administrator Rodney Cheuvront.

42. Despite instructions given, Grievant chose to lay gravel on an alternate site, Cool Spring Road.

43. The daily assignment orders are in dispute.

44. Grievant maintains he was authorized to lay gravel. Respondent maintains Grievant was given permission on the 19<sup>th</sup> to finish Cool Springs Road with

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<sup>5</sup> This issue is no longer being pursued by Grievant, officially withdrawn at L3 Hearing.

one more load after his initial malfeasance and given strict instructions to follow orders from there out.

45. District Manager Cooper met with Grievant. To assist in resolving lingering questions, District Manager Cooper requested and reviewed the DOT-12's and OE28's (work orders) for the entire week of the incident in question. District Manager Cooper is of the opinion that Grievant is guilty of "willfully disobeying a direct instruction, clear instruction." Mr. Cooper wrote a memo to the file. R. Ex 5.

46. A letter was issued on September 28, 2020, notifying Grievant he is suspended from work for 2-days, beginning October 6, 2020, for violation of DOH Standard of Work Performance and Conduct. (formerly Docket No. 2021-1306-DOT).

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### **Discussion**

In disciplinary matters, the employer bears the burden to prove by a preponderance of the evidence that the disciplinary action taken was justified. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018).

. . . See [*Watkins v. McDowell County Bd. of Educ.*, 229 W.Va.500, 729 S.E.2d 822] at 833 (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education*, 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). See also *Hovermale v. Berkeley Springs Moose Lodge*, 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) ("Proof by a preponderance of the evidence requires only that a party

satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence.”). . .

*W. Va. Dep’t of Trans., Div. of Highways v. Litten*, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision). 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, the party bearing the burden has not met its burden. *Id.*

Respondent maintains discipline was proper in that Grievant has a pattern of refusing to adhere to work standards and has failed to conduct himself properly during interactions with supervisors. In addition to the current disciplinary actions, Grievant was disciplined for similar issues on November 12 and December 12, 2019. Respondent is of the belief that Grievant’s attempts to question management’s decisions and arguing with his supervisor over directions is causing undo strife and an unpleasant work environment. Respondent maintains Grievant’s conduct fails to meet applicable standards of work performance. Issues in dispute in the instant matter are the disciplinary actions of a written reprimand and suspension(s) issued to Grievant (formerly grievances 2020-0832-DOT, 2020-0881-DOT, and 2021-1306-DOT).<sup>6</sup>

Grievant maintains Respondent’s disciplinary actions were excessive and that the penalties are an abuse of discretion. Grievant requests to be made whole including

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<sup>6</sup> At the Level 3 hearing on April 6, 2022, Grievant withdrew the part of the consolidated grievance dealing with the alleged denial of representation (Docket No. 2020-0881-DOT below).

removing the written reprimand, overturning of the suspension(s), and being treated fairly, and free of harassment.

The Division of Highways expects its employees to meet certain standards of work performance and conduct regardless of the type of work or unit to which they are assigned. Examples of poor performance or misconduct warranting discipline include, but are not necessarily limited to, written reprimand, suspension, and dismissal. See *generally*, WV Division of Highways Administrative Operating Procedures. Repeated and excessive inability to follow clear and decisive instructions from an individual properly empowered to provide such instructions is recognized as problematic.

On January 2, 2020, Grievant was instructed with the rest of the crew to take a woodchipper to the site and cut brush and small trees to create a path to access a culvert. A safe path was needed for the people that would be working on the culvert. Workers were instructed to put the wood and brush detritus through the woodchipper. Grievant refused to use the chipper that was available to complete the job. Grievant argues that the equipment was unsafe, and that he believed it was not proper to use it. When crew chief, Lloyd King, came out to check on the work, Grievant cited concern and problems regarding the operation of the chipper. In response, a crew chief told Grievant to *windrow* the material, which would mean that instead of cutting up the brush it would be cut and swept completely out of the path. Grievant did not do this; rather, he just cut the brush up and left the debris lying in small chunks on the ground. Among other rationalization, Grievant's proclamation is that he didn't understand what he was supposed to do. Gr. L3 testimony. Grievant's testimony was plausible, but not

persuasive. Grievant's words seemed convenient and disingenuous. Rodney Cheuvront, Braxton County Administrator, provided Grievant with a clear example of windrowing. While it is possible that Grievant was unfamiliar with the word "*windrow*," Grievant is a 18-year employee, it is absurd for Grievant to represent this was the first time he had ever had to cut and dispose of foliage in a fashion similar to the one demonstrated to him by the County Administrator Cheuvront.

Grievant's testimony was not a convincing explanation for his actions. Grievant was assigned to cut brush and trees using a chain saw and a woodchipper so a path could be made for laying pipe. Grievant did not adhere to an acceptable level of workplace conduct. Grievant did not keep his opinion and disapproval with the work assignment to an acceptable level. Respondent highlights that it was necessary for a crew to go out some days later and cut the path as it should have been the first day. Grievant was disciplined for failing to carry out an explicit order—including when it was modified to take into consideration the concerns of Grievant about the woodchipper—and arguing with his crew chief about the use of the chipper and about windrowing—a one-day suspension was imposed on Grievant. Respondent is acting within its recognized authority. Grievant made it no secret that he disagreed with the directives given. This may have been acceptable to a certain level. Yet, Grievant further neglected to properly perform the duties. The combination of the two facts compels Respondent to address what some reference as, mild insubordination.

Respondent further argued that it was necessary to discipline Grievant for his job performance on January 10, 2020. While operating a Cat Grader, Grievant improperly

graded a shoulder of Interstate 79, “preventing proper drainage.” DOH provides that Grievant is an experienced operator and should have known how to properly use the grader for ditching projects. Again, other employees were task with redoing Grievant’s work from the previous day causing excess expenses and undue hardship in the organization. Grievant did not deny culpability for improper performance of duty on January 10, 2022.

In regard to the grievance dated October 27, 2020, it was explained that on August 17, 2020, assignments were given out to crews by Rodney Cheuvront, Braxton County Administrator, who handed out the work orders to the crew chiefs. As part of the daily orders, crew chief, Lloyd Kind, gave Grievant instructions to lay stone on Tague Road. Grievant left the garage, giving no indications that his orders were unclear to him, and proceeded to spread several loads of stone he was given on Cool Springs Road. This was caught that evening and the next morning by County Administrator Cheuvront, who compared the Daily Orders to the Form DOT-12, the Daily Work Report, and DOT Operator’s Daily & Weekly Checklist for Transportation and Heavy Equipment, DOT Form OE-28. R. Ex 5. Grievant disputes the accuracy and/or reliability of the documentation. Grievant was confronted about his actions in not following instructions on the 17<sup>th</sup> and was told again to take stone to Tague Road the next day, the 18<sup>th</sup>. That morning, Administrator Cheuvront immediately heard Grievant in the break room loudly arguing with Lloyd King and the other crew chief about another road that the Grievant felt should get stone on that day - Cool Spring and Rollyson Hollow. Mr. Cheuvront intervened and told Grievant to just follow orders for the day, which

meant putting stone on Tague Road. Chevront, L3 testimony. However, Grievant intently, by mistake, or rationale not completely clear, went back to Cool Spring Road. At that time, Grievant's actions were without proper authorization.<sup>7</sup> On the 19<sup>th</sup>, Grievant was given permission to finish Cool Springs Road with one more load and was given strict instructions to follow orders from there out.

Administrator Chevront brought Grievant's actions (insubordination) to the attention of Brian Cooper, District Engineer for District 7, via an RL-544. District Manager Cooper met with Grievant and got his side of the story. District Manager Cooper requested and reviewed the DOT-12's and OE28's for the entire week of the incident in question. He concluded that Grievant was in fact guilty of "willfully disobeying a direct instruction, clear instruction." R. Ex 5. Grievant's convoluted debate regarding work assignment documentation was not persuasive. Having served a one-day suspension on January 28, 2020, for a similar infraction, Grievant was issued a two-day suspension from Respondent's main office in Charleston.

West Virginia Department of Transportation, Division of Highways has established and recognized standards of workplace performance and conduct that an employer can reasonably expect its employees to meet. See Division of Highways

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<sup>7</sup> An Administrative Law Judge is charged with assessing the credibility of the witnesses. See *Lanehart v. Logan County Bd. of Educ.*, Docket No. 9523235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93HHR050 (Feb. 4, 1994). 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 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. 99BOD216 (Dec. 28, 1999); *Perdue, supra*.



Administrative Operating Procedures. Grievant disregarded explicit instructions regarding what he was assigned to do and did task(s) that he felt more like doing and this theme seems to be repeated with Grievant and valid work instruction(s). The examples discussed are not isolated instances of miscommunication as Grievant tends to suggest. For one reason or another, Grievant tends to find himself contrary to clear directions from individuals empowered to properly direct his workplace conduct. This behavior, individually and collectively, is a violation of applicable work performance standards and conduct. An employer must be able to reasonably control and direct the work assignments of its employee. Respondent's disciplinary actions were not arbitrary or capricious.<sup>8</sup> Respondent by a preponderance of the evidence established that the disciplinary action taken was justified.

Interestingly enough, at times, Grievant does not seem to be arguing that the disciplinary action against him was disproportionate to the offense proven, or otherwise arbitrary and capricious, but that it was based upon the lies of his superiors, who told him to do things and then lied about it later. This posture, in the light of the instant review, is wholly inadequate. Respondent established Grievant's conduct beyond a reasonable degree of certainty. By a preponderance of the evidence, it is established

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<sup>8</sup> 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 contrary to the evidence before it, or reached a decision that is 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). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 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." *Id.*

that Grievant violated the recognized standard of conduct for the West Virginia Department of Transportation, Division of Highways. There are repeated examples of Grievant doing what he chose to do despite what he was assigned to do. Respondent has disciplined Grievant in a progressive manner.

The work record of a long-time civil service employee is a factor to be considered in determining disciplinary actions. "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 & Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996); *Olsen v. Kanawha County Bd. of Educ.*, Docket No. 02-20-380 (May 30, 2003), *aff'd*, *Kanawha Cnty. Cir. Ct.* Docket No. 03-AA-94 (Jan. 30, 2004), appeal refused, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004). The fact pattern of the instant matter does not dictate mitigation.

The following conclusions of law are appropriate in this matter:

### **Conclusions of Law**

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. See Procedural Rules of Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018). "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 party bearing the burden has not met its burden. *Id.*

2. An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

3. West Virginia Department of Transportation, Division of Highways has established and recognized standards of workplace performance and conduct that an employer can reasonably expect its employees to meet. See Division of Highways Administrative Operating Procedures.

4. DOH Disciplinary Action Policy authorizes and permits disciplinary action, including suspensions for examples of poor performance or misconduct. See WV Division of Highways Administrative Operating Procedures Section III, Chapter 6, subsections II and III.

5. "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 & Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct.

3, 1996); *Olsen v. Kanawha County Bd. of Educ.*, Docket No. 02-20-380 (May 30, 2003), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), appeal refused, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004).

6. “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); *Cooper v. Raleigh County 17 Bd. of Educ.*, Docket No. 2014-0028-RaLED (Apr. 30, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

7. Respondent proved by a preponderance of the evidence that Grievant violated WVDOH Standards of Work Performance and Conduct. Respondent established repeated improper behavior by Grievant.

8. Respondent met its burden of proof justifying disciplinary action.

9. It is not determined that Respondent abused its discretion in the circumstances of this consolidated grievance. Mitigation of the levied disciplinary is not deemed warranted.

48.

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 § 6C25. 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 § 29A54(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 (2018).

**Date: June 23, 2022**

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**Landon R. Brown**  
**Administrative Law Judge**