THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DEBRA SVIRIDENKO,
Grievant,

v. **DOCKET NO. 2017-1771-WVU**

WEST VIRGINIA UNIVERSITY,
Respondent.

DECISION

Grievant, Debra Sviridenko, filed this grievance directly at level three, against her employer, West Virginia University, on February 24, 2017, after she was notified that her employment was being terminated. The statement of grievance reads:

> The Grievant was terminated effective February 10, 2017 for "illegal activities," which were deemed to constitute gross misconduct subject to immediate dismissal. Grievant has a 23 year history of employment with positive annual reviews. She acknowledged her misconduct before an investigation had to be done. Anxiety caused by medical concerns contributed to a terrible lapse in judgment which will not be replicated.

As relief Grievant sought "the imposition of a discipline less harsh than termination."

The parties requested that a mediation session be scheduled prior to the level three hearing, and a mediation session was held on April 4, 2017. A level three hearing was held before the undersigned Administrative Law Judge on April 10, 2017, in the Grievance Board's Westover office. Grievant was represented by Jacques R. Williams, Hamstead, Williams & Shook, PLLC, and Respondent was represented by Samuel R. Spatafore, Assistant Attorney General. This matter became mature for decision on receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law, on May 11, 2017.

Synopsis

Grievant's employment was terminated by Respondent for theft. Grievant admitted to the misconduct, but argued the penalty imposed was too severe, pointing to her offer of restitution, counseling, and community service, and her statement that she was remorseful, and she could be rehabilitated. Respondent no longer trusts Grievant. Grievant did not demonstrate that the penalty imposed was disproportionate to the offense.

The following Findings of Fact are made based on the evidence presented at level three.

Findings of Fact

1. Grievant was employed by Respondent, West Virginia University ("WVU"), for 23 years, and was a Materials Handler in the Mail Center at the Health Sciences Center.

2. Grievant's duties included receiving mail addressed to WVU personnel, signing for mail, and sorting and distributing Health Sciences Center mail. The Health Sciences Center mail room receives mail containing money and confidential patient information.

3. By letter dated February 9, 2017, Grievant was advised by Cathy Patterson, Assistant Director, Facilities Management, that her employment would "be terminated effective February 10, 2017, for the reasons outlined in the February 3, 2017 letter."

4. By letter dated February 3, 2017, Grievant was advised by Ms. Patterson that Respondent intended to terminate her employment, effective February 10, 2017, and she would be provided the opportunity to discuss this matter with Ms. Patterson prior to a final

decision. The letter states that Grievant had "admitted to your supervisor and to the University Police Department that you had stolen gift cards from unclaimed, returned certified mail and used them for personal purchases on more than one occasion. Your actions are considered gross misconduct and subject to immediate dismissal."

5. On February 1, 2017, Charlotte Workman, Project Operations Specialist at WVU, sent an email to Ms. Patterson stating that $25 Walmart gift cards had been sent, by certified mail, by WVU to participants in a particular project, and she had been "notified through the postal tracking that some were returned to sender," in December 2016 and January 2017. Ms. Workman indicated that her office had provided copies of the "tags and signature forms" to the Health Sciences Center post office in an effort to locate 10 missing returned envelopes which contained gift cards. Ms. Workman then asked Ms. Patterson if there was any other action her department could take to locate the missing returned gift cards.

6. On February 1, 2017, Grievant advised Ms. Patterson that Becky Friend from the WVU Prevention Research Center had complained to her that several $25 Walmart gift cards were missing from the mail room.

7. On February 2, 2017, Ms. Patterson met with Grievant, Dale Miller and Amanda Statler from the mail room, and John Smith and Lori Fletcher from receiving, to inquire as to whether any of these employees had any information related to the returned envelopes containing the gift cards. None of these employees indicated that they had any knowledge regarding what had happened to the gift cards. Grievant pointed out that some mail had been thrown in the trash at times. Employees must use key cards to unlock and enter the mail room. Ms. Patterson returned to her office and ran a report on the card

reader to look for any unauthorized entry into the mail room. Finding no unauthorized entry, Ms. Patterson then called the WVU Police, Ms. Workman, and mail room and central receiving personnel to set up a meeting for 9:00 a.m. the next morning, advising the employees that WVU Police personnel would also be in attendance.

8. The next morning, February 3, 2017, prior to the scheduled 9:00 a.m. meeting, Grievant advised Ms. Patterson that she had taken the gift cards, she apologized, she offered to pay restitution immediately, and she told Ms. Patterson she had five gift cards with her to return.

9. Grievant then met with Cody Smith, Senior Officer with the WVU Police Department, and advised her of her rights. Grievant agreed to an interview, and she was interviewed by Lieutenant Sherry St Clair, an Investigator with the WVU Police Department, and Lieutenant Hamon, Mr. Smith's Supervisor at the WVU Police Department. Grievant admitted during the interview that she had opened mail which had been returned to the mail room at the Health Sciences Center as undeliverable, removed 18 gift cards from the mail, and used 13 of the gift cards for personal items. Grievant signed for the return of 16 of the envelopes, while another employee had signed for 2 of the envelopes. Grievant returned 5 Walmart gift cards to Officers St Clair and Hamon. Grievant cried and seemed remorseful to Lieutenant St Clair during the interview, and she at some point apologized and offered to make restitution, perform community service, and undergo counseling.

10. The envelopes were opened by Grievant on December 16 and 28, 2016, and January 17, 18, and 25, 2017. Grievant told Lieutenant St Clair she knew there were gift cards in the envelopes because she could feel them.

11. Grievant recognized what she had done was wrong. She was in a lot of pain at the time of the thefts, and her judgement was clouded.

12. There are two full-time employees assigned to the Health Sciences Center mail room, but at times only one of the employees is in the mail room.

13. Ms. Patterson no longer trusts Grievant, and is not sure she could be left in the mail room alone. Ms. Patterson believed that cameras would need to be installed in the mail room and in central receiving to monitor Grievant's behavior were she to be returned to her job. Ms. Patterson did not consider discipline other than dismissal, and she gave no consideration to whether Grievant could be rehabilitated.

14. Grievant's performance evaluation dated August 30, 2016, rated her performance as a "valuable performer" in five of the seven categories rated, and as "exceeds requirements" in the remaining two areas. The only other possible ratings on the evaluation form are "development needed" and "substantially exceeds requirements." Grievant's overall rating on this evaluation was "valuable performer."

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. *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 and Human Res.*, Docket No. 92-HHR-486 (May 17,

1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

Grievant's employment was terminated for theft, which was characterized as gross misconduct. "The 'term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees.' *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991) (*citing Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985)). *See Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sept. 13, 2002)." *Jolliffe v. W. Va. Univ.*, Docket No. 2013-0970-WVU (June 25, 2013). The Grievance Board has long held that theft of state property constitutes gross misconduct, and represents good cause for dismissal of a classified state employee. *Symns v. W. Va. Dep't of Transp.*, Docket No. 94-DOH-091 (July 7, 1994); *Brown v. W. Va. Dep't of Commerce, Labor & Envtl. Resources*, Docket No. 92-T&P-473 (Apr. 8, 1993).

Respondent's Disciplinary Procedure defines gross misconduct as "of substantial actual and/or potential consequence to operations or persons, typically involving flagrant or willful violation of policy, law, or standards of performance or conduct. Gross misconduct may result in any level of discipline up to and including immediate dismissal at the supervisor's discretion." The Disciplinary Procedure lists "Dishonesty and/or falsification of records" as behaviors which are considered gross misconduct. Grievant admitted she opened returned mail, stole returned gift cards, used them for personal item

purchases, and she knew this was wrong. There is no doubt that Grievant's actions certainly constitute gross misconduct.

Grievant argued that the penalty imposed should be mitigated. "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. [State] Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989)." *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995)(citations omitted). The Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). "Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge shall not substitute her judgement for that of the employer.

Tickett v. Cabell County Bd. of Educ., Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997)." *Meadows, supra.*

Grievant argued that *Overbee, supra*, "stands for the proposition that an employee's 'prospects for rehabilitation' is an important factor in assessing whether termination is the appropriate discipline," and that Respondent was required to consider her prospects for rehabilitation in determining the appropriate penalty. Grievant's counsel concluded from this that the undersigned would not be substituting her judgement for Respondent's should the penalty be mitigated. Grievant then pointed to Grievant's 23 years of employment, her work history prior to the theft, and the fact that she was remorseful and stated at the level three hearing "that her prospects of being rehabilitated from her misconduct are good."

The undersigned disagrees with Grievant's counsel's reading of *Overbee*. The undersigned finds no discussion in that case which indicates that an employee's prospects for rehabilitation **must** be a consideration, or even that this is an important factor. As Respondent pointed out, *Overbee* does, however, state clearly that, "[u]ndoubtedly, theft of state property is one of the most serious offenses an employee can commit; the value of the property is of little consequence."

Grievant was responsible for handling the mail entering the Health Sciences Center, which was a position requiring that the employee be trustworthy. There is no doubt that Grievant's conduct was egregious, and that she violated the trust placed in her, not once, but on five separate dates over a period of over a month. By her own admission, Grievant knew what she was doing was wrong, but she continued to remove the returned gift cards. Perhaps as Grievant has stated, she has learned her lesson. However, Respondent no

longer trusts Grievant's judgement, and for good reason. The penalty imposed was not clearly disproportionate to the offense.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. *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 and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

2. Respondent demonstrated that Grievant opened mail returned to Respondent on at least five separate occasions, and stole and used the gift cards which were inside the returned envelopes.

3. "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. [State] 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).

4. In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995)(citations omitted). The Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). "Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge shall not substitute her judgement for that of the employer. *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997)." *Meadows, supra.*

5. The penalty imposed was not clearly disproportionate to the offense.

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

_____

BRENDA L. GOULD
Deputy Chief Administrative Law Judge

Date: June 15, 2017