WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CHERYL CASDORPH,
Grievant,

v. **Docket No. 2018-2005-CONS**

DIVISION OF REHABILITATION SERVICES,
Respondent.

D E C I S I O N

Cheryl Casdorph, Grievant, filed this grievance against her employer the West Virginia Division of Rehabilitation Services, Respondent, protesting disciplinary action. The grievance form as filed on February 13, 2018, was after Grievant had been officially notified of a three-day suspension which contained the same language as a prior filed grievance statement,[1] "Suspension without good cause". The request for relief also identical requested, "To be made whole in every way including back pay with interest and benefits restored."

As authorized by W. VA. CODE § 6C-2-4(a)(4), this consolidated grievance was filed directly to level three of the grievance process.[2] A level three hearing was held before the undersigned Administrative Law Judge on October 11, 2018, at the Grievance Board's Charleston office. Grievant appeared in person with representative Gordon Simmons, Steward, UE Local 170, West Virginia Public Workers Union. Respondent was represented by David Moss, Operations Manager in the Disability

[1] Grievant filed an identical grievance statement on January 25, 2018, prior to the imposition of the suspension. Respondent moved to dismiss this earlier grievance; however, this Grievance Board consolidated it with the February 13, 2018, filing, resulting in the current docket number reflecting a consolidated grievance.

[2] W. VA. CODE § 6C-2-4(a)(4), provides that an employee may proceed directly to level three of the grievance process upon agreement of the parties, or when the grievant has been discharged, suspended without pay, demoted or reclassified resulting in a loss of compensation or benefits.

Determination Section, and by counsel Anthony D. Eates II, Deputy Attorney General. The parties were provided the opportunity to present written Proposed Findings of Fact and Conclusions of Law documents. Both parties submitted PFOF/COL submissions and this matter became mature for decision on or about November 9, 2018, on receipt of the last of these proposals.

Synopsis

Respondent suspended Grievant for continued unacceptable work performance. Respondent contends Grievant has failed to perform her job at a level consistent with the expectations of her position. Grievant did not effectively challenge the objective performance data showing that she continually performs at a level well-below that of her co-workers; rather, Grievant blamed her supervisor (the system), an assertion Respondent persuasively contradicted. Grievant also contended that the three-day suspension was illogical and counterproductive because it effectively caused her to be further behind in her work. Respondent, by a preponderance of the evidence, justified disciplinary action. The disciplinary action of a three-day suspension is not established to be excessive or found to be unreasonable. 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 is a disability examination specialist trainee, Grievant has been employed with Respondent since August 20, 2016, at the Charleston office of the Disability Determination Services (DDS) section of the West Virginia Division of Rehabilitation Services.

2. Grievant was a State worker prior to her employment with Respondent with the Workers Compensation Commission and the Medical Examiner's Office.

3. David Moss, Operations Manager for Respondent's Disability Determination Section ("DDS"), has been employed by Respondent for thirty-two (32) years. Mr. Moss testified and served as the agency representative at the level three hearing of the instant grievance.

4. There are two DDS offices in the state, one in Charleston and another in Clarksburg. The two DDS offices receive, process and decide applications for disability benefits administered through the federal Social Security Administration. The disability applications submitted to Social Security Administration field offices in the northern part of the state are sent to the Clarksburg DDS office, and the applications submitted in the southern part of the state are sent to the Charleston DDS office. Both Grievant and Operations Manager Moss work out of the Charleston DDS office.

5. Respondent's DDS offices administer a federal program, the federal government determines Respondent's budget, hiring and reviews its productivity with respect to Respondent's disability determination functions.

6. The duties of Disability Evaluation Specialists are to develop initial and/or reconsideration cases, review and analyze medical and vocational evidence, telephone doctors, hospitals and claimants to clear up conflicting information or to obtain further medical information, request medical examinations if there is not enough evidence to determine a case, file information and evidence into appropriate case files. A Specialist obtains medical evidence, abstract information, summarizes the case, and assists in making the decision as to whether a claimant is eligible for disability benefits.

7. Disability Evaluation Specialists are initially hired as "trainees." Due to federal budgetary reasons, they are generally hired in groups. Accordingly, multiple trainees began their employment on August 20, 2016, the date Grievant was hired.

8. Upon hiring, trainees are not immediately required to process disability applications. Rather, they first attend a six to eight-week long classroom training that covers the body systems, the program, and the computer database required for the position. Trainees are also placed in a "training unit" with a supervisor who is theoretically equipped with necessary experience to assist trainees as they begin to process cases.

9. Grievant was assigned to training supervisor, Katherine Parrish.

10. Ms. Parrish served as a unit supervisor in DDS from June 2011 through the middle of April 2018. She was Grievant's immediate supervisor during the time period relevant to the three-day suspension.

11. The number of cases assigned to trainees gradually increases during the trainee's first year of employment. The production goals for trainees are set lower than those for regular specialists.

12. DDS examiners undergo a one-year probationary period of initial employment as a trainee. A decision on whether to retain probationary DDS employees is typically made by review of the eighth, ninth and tenth months of initial employment, considered to be the "critical three months", as a basis to decide if the employee "is going to be able to handle the job."

13. After one year, trainees typically advance, lose the "trainee" status, and become a regular Disability Evaluation Specialist.

14. Grievant has never advanced beyond the trainee status. Grievant had worked in DDS for over two years at the time of the level three hearing.[3]

15. Disability Evaluation Specialists are evaluated by identified standards and established procedure.[4] Such identified standards include but not necessarily limited to:

> (1) Production, which refers to the number of completed cases within a specified amount of time. Typically, specialists are expected to close 9 cases per week.
>
> (2) Mean Processing Time, which refers to the amount of time that DDS has a claim from assignment to closure. The average Mean Processing Time for the Charleston DDS office is around 73 days.
>
> (3) Aged Case Rate, which refers to percentage of claims a specialist has pending that are over 100 days old. Across the State, Respondent's average Aged Case Rate is 12.74%.
>
> (4) Consultative Examination Rate, which refers to percentage of claims for which the specialist concludes there is not sufficient information available to make a determination, and, therefore, must purchase a Consultative Examination from a physician other than the claimant's treating physician. Respondent's statewide average Consultative

[3] Operations Manager Moss testified, without contradiction, that in his twenty years as administrator or supervisor in DDS, he has never seen a specialist remain as a trainee for two years.

[4] In referring to Disability Evaluation Specialists, Respondent uses the term "specialist" and "examiner" interchangeably. Additionally, the terms "application," "claim" and "case" are used interchangeably.

Examination Rate is around 41%.
R Ex 1

16. When applications are sent to DDS from the field offices, they are assigned randomly to specialists. Specialists are capped at maximum of 100 claims at a time. Once a specialist has 100 claims pending, they no longer receive new cases, which causes additional cases to be assigned to other specialists.

17. On June 30, 2017, Respondent issued Grievant a written reprimand for unacceptable performance. The reprimand, which Grievant did not grieve, details Grievant's evaluations and performance improvement plans from her initial hire to February 22, 2017. Respondent explained to Grievant its expectations of her for the months of April 2017, May 2017, and June 2017, and emphasized the importance of that three-month review. Respondent met with Grievant to review her performance and her failure to meet the specified goals at the end of April, May, and June 2017; and established another performance improvement plan with specified expectations for the month of July 2017. R Ex 3

18. Grievant's performance data for the period of April 3, 2017 through June 30, 2017, is set forth in Respondent's Exhibit 2. Grievant's performance was below that of her fellow Disability Evaluation Specialist Trainees for the same time period.

19. Grievant's performance did not sufficiently improve in the six-month period of July 2017 through December 2017. Respondent issued Grievant the three-day suspension on February 12, 2018, that is the subject of the instant grievance. R Ex 4

20. Specifically, with respect to production, Respondent set an expectation of 9 cases per week, and Grievant completed no more than 6.5 in any of the six months reviewed. Looking at Mean Processing Time, the expectation was set at 79 days or less, and Grievant was never below 93 days, and was as high as 150 days. Grievant's Aged Case Rate expectation was set at 13% or less, and she was never lower than 26.99%, and was as high as 38.70%. Grievant's accuracy rate was set at 90.6%, and she achieved that in four of the six months reviewed. Finally, Grievant expected Consultative Examination Rate was set at 39.9%, and she achieved that in one month, but was between 52.94% and 76.4% in the other five months.[5] R Ex 4

21. The February 12, 2017, suspension letter is signed by Marijane Waldron, Respondent's administrative director. Waldron did not testify at the level three hearing of the instant grievance.

22. In the suspension letter, Respondent listed a sampling of emails between Grievant and her supervisor, Katherine Parrish, which Respondent purports to demonstrate that Ms. Parrish offered assistance to Grievant to improve her performance. *See* R Ex 5 through 11 and R Ex 13.

23. In April 2018 Ms. Parrish, Grievant's immediate supervisor, was promoted to a quality assurance supervisor and ceased being Grievant's supervisor. Ms. Parrish testified at the level three grievance hearing.

24. Ms. Parrish's workspace was about 20 to 25 feet from the Grievant's workspace. She was available in person, by email, and by instant messenger to assist

[5] Grievant did not dispute the accuracy of the above-referenced performance data upon which her suspension was based.

the trainees in her unit. Respondent introduced a non-exhaustive sampling of 30 emails from Ms. Parrish between November 10, 2016, and October 27, 2017, demonstrating Ms. Parrish's advice, guidance, and direction to Grievant. R Ex 13

25. In part, to assist Grievant with the ECAT system,[6] Ms. Parrish developed a training guide. R Ex 12 Further, in addition to Ms. Parrish, Respondent assigned a senior adjuster, Chris Hall, to assist Grievant with her duties.

26. Grievant expressed the belief that Ms. Parrish did not sufficiently assist her and wanted to be placed in a different unit.

27. Operations Manager Moss denied Grievant's request. He explained to some degree his reasoning as follows:

> And I've been in administration. A lot of times when an examiner is struggling, one of the first reactions is that they want out of that unit. That's not a good place for them. My feeling is that we create training units for a specific purpose, to take care of the trainees. We have supervisors who have the time and desire and knowledge to work with the trainees, answer questions.

Mr. Moss added:

> [Grievant] was in what I consider to be a very good unit with very good people.

(Moss L3 testimony)

28. Operations Manager Moss was of the opinion that Supervisor Parrish was trying very hard to assist Grievant.

29. Grievant indicates that her performance would have been better had she been placed in a unit other than Ms. Parrish's unit.

[6] ECAT stands for "Electronic Claims Analysis Tool."

30. Multiple trainees began their employment in DDS on the same day as Grievant. Grievant's performance was well-below that of her fellow trainees who were also under Ms. Parrish's supervision. Grievant's performance deficiencies continued after she was assigned a different supervisor in April of 2018.

Discussion

As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018). "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, Cheryl Casdorph, is employed by Respondent, Division of Rehabilitation Services, as a Disability Evaluation Specialist Trainee in the Disability Determination Section. By letter dated February 12, 2017, Respondent suspended Grievant for three (3) days for her job performance determined by her supervisor(s) and objective data, for continued unacceptable work performance. R Ex 4 five-page document (Grievant's failure to meet deadlines in processing her assigned caseload).

Grievant's assertion is that she was not being provided adequate help and/or training. Grievant indicates that her performance would have been better had she been placed in a unit other than her immediate supervisor Katherine Parrish.

Operations Manager David Moss testified that DDS examiners undergo a one-year probationary period of initial employment as a trainee. The decision on whether to retain probationary DDS employees is typically made by review of the eighth, ninth and tenth months of initial employment, considered to be the "critical three months," as a basis to decide if the employee "is going to be able to handle the job." Mr. Moss testified, without contradiction, that in his twenty years as administrator or supervisor in DDS, he has never seen a specialist remain as a trainee for two years. Moss was aware of one or more requests by Grievant to be moved to a different supervisor than Katherine Parrish, and that Grievant "seemed to feel that (Parrish) was not being fair with her, not helping her." Moss testified he hadn't see any evidence of that and based on all the information he had Parrish was trying very hard to help Grievant. Among other evidence Respondent cites to a not all-inclusive example of thirty emails from Supervisor to Grievant giving advice, guidance, direction, etc. R Ex 13

While Grievant may not agree, Operations Manager, Moss was of the opinion ("feeling") that Grievant was in the best place she could be in and that putting her in an outside unit could only be detrimental to her performance. (Moss L3 testimony) Operations Manager Moss, who had been a training supervisor for several years, opined the training units were created for specific purposes, to take care of trainees; the agency has supervisors who have the time, the desire and knowledge to work with the trainees. These individuals (experienced supervisors) understand their job is to answer

questions and help the trainee.[7]

"A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with the employee's effective job performance or health and safety." *Ball v. Dep't of Transp.*, Docket No. 96-DOH-141 (July 31, 1997). "Management decisions are to be judged by the arbitrary and capricious standard." *Adams v. Reg'l Jail and Corr. Facility Auth.*, Docket No. 06-RJA-147 (Sept. 29, 2006).

An Administrative Law Judge is charged with assessing the credibility of the witnesses.[8] *See Lanehart v. Logan County Bd. of Educ*., Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp*., Docket No. 93-HHR-050 (Feb. 4, 1994). 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 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

[7] December 28, 2016 email from Supervisor Parrish to Grievant; "Not everyone is going to tell you the same thing the same way. If you get confused, ask me. I will do my best to break things down for you." R Ex 6

[8] 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. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

(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, other witnesses, other statements, and the statement itself; 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. *Gunnells v. Logan County Bd. of Educ.*, Docket No. 97-23-055 (1997); *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-8-115 (June 8, 1990).

David Moss, Operations Manager in the Disability Determination Section, who served as the agency representative for Respondent at the level three hearing, testified with the disposition of an individual attempting to provide fundamental understanding. He had been actively involved with the fact pattern of the situation in discussion. There was no detected presence of bias. Operations Manager Moss testified with the demeanor that is traditionally demonstrated by a conscientious witness. When asked for factual information and when inquiry was made regarding his opinion and the basis for his actions, Mr. Moss’s responses were appropriate. The plausibility of this witness's

information was readily apparent. The definition of industry terms and explanation of data was persuasive. Data cited was documented by evidence of record. R Exs 2, 3, 4, and 13 Grievant did not credibly dispute the data specified by Respondent as Grievant's productivity levels. Mr. Moss testified in a manner demonstrating due deference to the issues in contention. He was an effective witness, who's testimony is deemed credible.

Data maintains that Grievant's work performance needed improvement and her superiors found her performance to be unsatisfactory. R Exs 2 and 3 Grievant was verbally counseled on numerous occasions concerning her work performance. Caseload reviews were conducted. Grievant was placed on a Process Improvement Plan. A plethora of the caseload reviews noted what action needed taken for each case and provided dates for accomplishment. R Ex 4 Grievant failed to meet the job expectations for a disability examination specialist trainee. L3 testimony Despite the fact that Grievant has worked in the Disability Determination Section for over two years, at the time of the level three hearing, she had not advanced beyond the trainee status.

Grievant's testimony was not persuasive. The witness's over use of generalities and conclusionary statements did not establish or build a proper issue of dispute. Grievant has an opinion on how she could be trained but her preferred method of treatment (learning process) alone, is insufficient to establish that the training she received was inadequate. Grievant was provided procedural tutorial, subject matter training, written guidelines and one-on-one sessions. Grievant's rendition of events was disjointed. Grievant's distaste for her supervisors' teaching fashion is clear but it is not established that Respondent's expectations are unreasonable. Grievant's work

performance was not equal to that of the majority of her co-workers. Denial of a transfer request is not necessarily evidence of hostility. Grievant's testimony and demeanor was far short of the substance needed to be persuasive. Grievant tended to agree with overly inclusive statements of conclusions, offered as first-hand testimony; this was not effective direct testimony. It is not found that Respondent was establishing a harsher work expectation for Grievant than others.

In most employee-employer situations, the employee is not empowered to dictate their supervisor or training regimen.

Grievant was verbally counseled on numerous occasions concerning her work performance. It is not established that Respondent had unrealistic demands or failed to provide Grievant adequate opportunity to succeed. Respondent established by a preponderance of the evidence legitimate reasons existed for Respondent to want to motivate Grievant and ultimately disciple her for failing to perform at an acceptable level.[9]

[9] Disability claimants are out of work, injured or sick. They need a prompt decision from Respondent when they apply for benefits. DDS takes a little over two months on average to reach a determination, and that's a long time to the claimant. However, for many of the claimants whose application have been assigned to Grievant, they must wait much longer, which is unfair and unacceptable. *See* Moss L3 testimony.

It is recognized that Grievant disagrees with Respondent resorting to punitive disciplinary measures to address Grievant's work performance. Grievant asserts the three-day suspension was an illogical and counterproductive discipline. Grievant set forth for consideration that Respondent's action(s) could be considered arbitrary and capricious.[10] Grievant highlights that the three-day suspension impeded, rather than assisted or enabled Grievant in catching up on the caseload backlog. Grievant suggested the decision to suspend could not be reasonably expected or intended to help solve the problem it was purportedly correcting.

The irony that the punishment for Grievant's ineffective work performance is a three-day suspension is not lost on this ALJ. Yet, other than creatively stating her belief that the punishment effectively caused her to be further behind in her work, Grievant has not established the discipline to be unduly. Corrective and/or disciplinary measures extract a toll on an employee, some more severe than other. There is no showing that this particular disciplinary measure is clearly disproportionate to Grievant's offense or *per se* indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of an employee's conduct and the prospects for rehabilitation. *Overbee v. Dep't of Health and Human Resources/Welch Emergency*

[10] 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." *Eads, supra* (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982))." Also *See generally Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996). It is readily apparent that Respondent has attempted to implement progressive discipline in managing the activities of Grievant.

Assuming *arguendo* that Grievant's contention is tantamount to raising a mitigation defense, such contention must fail under the facts of this case. The record plainly demonstrated that, since Grievant's initial hire in August 2016, Respondent counseled Grievant, imposed performance improvement plans, and issued a written reprimand, prior to resorting to a three-day suspension. This to many would be recognized as progressive corrective action. Grievant was specifically informed at the time of her June 2017 written reprimand, "you are hereby warned of possible additional disciplinary action if your performance does not improve." R Ex 3 Respondent by a preponderance of the evidence has established reliable rationale to justified disciplinary action. The disciplinary action of a three-day suspension in the circumstances of this matter is not established to be excessive or found to be unreasonable.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. Procedural Rules of the 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 employer has not met its burden. *Id*.

2. Respondent established by a preponderance of the evidence that Grievant demonstrated identified below standard performance levels. Respondent established rational and reasonable justification for disciplinary action.

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. 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).

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 and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996).

6. Grievant did not demonstrate that the penalty imposed by Respondent was clearly excessive or an abuse of discretion. Grievant has failed to establish that mitigation of the three-day suspension was warranted in the circumstance of this matter.

7. Respondent by a preponderance of the evidence has established reliable rationale to justify disciplinary action. The disciplinary action of a three-day suspension in the circumstances of this matter is not established to be excessive or found to be unreasonable.

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 (2018).

Date: December 4, 2018

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Landon R. Brown
Deputy Chief Administrative Law Judge