THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

GARY CONNELLY,
Grievant,

v. **Docket No. 2018-2077-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR CHILDREN AND FAMILIES,
Respondent.

DECISION

Grievant, Gary Connelly, is employed by Respondent, Department of Health and Human Resources within the Bureau for Children and Families. On April 11, 2018, Grievant filed this grievance against Respondent stating, "Due process not followed." For relief, Grievant seeks "[r]emoval of suspension and recover 3 days of pay. Re-assignment of position. New supervisor requested." The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4).

A level three hearing was held on July 10, 2018, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant appeared *pro se*.[1] Respondent was represented by counsel, Mindy M. Parsley, Assistant Attorney General. This matter became mature for decision on August 2, 2018, upon final receipt of the Respondent's written Proposed Findings of Fact and Conclusions of Law. Grievant did not submit written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as a Social Services Worker III in the Centralized Intake Unit. Grievant protests his suspension from employment for poor

[1] For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

performance. Respondent proved the charges against Grievant and that suspension was justified given Grievant's chronic performance deficiencies, the seriousness of the precipitating incident, and Grievant's failure to demonstrate any understanding of the seriousness of the incident or accept any responsibility. Grievant failed to prove mitigation is warranted. Accordingly, the 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 by Respondent as a Social Services Worker III in the Centralized Intake Unit.

2. The Centralized Intake Unit takes reports of suspected abuse and/or neglect for the entire state for both Child Protective Services ("CPS") and Adult Protective Services ("APS") and operates twenty-four hours a day, seven days a week.

3. Rebeccah D. Carson is the Director of the Centralized Intake Unit, and the Centralized Intake Unit employs nine supervisors. There are supervisors available to workers twenty-four hours a day, seven days a week.

4. Workers in the Centralized Intake Unit take reports of suspected abuse by interviewing the reporter and entering the pertinent information in Respondent's computer system called FACTS. Workers make the initial determination of the level of safety concern and refer the reports to supervisors for review within timeframes based on the workers' determination of the level of safety concern. If there is a present danger, which is an "immediate, significant and clearly observable family condition (or threat to child

safety) occurring in the present tense, endangering or threatening to endanger a child,"[2] that is considered an emergency situation that must be immediately reviewed with a supervisor.

5. Supervisors assign the cases to county offices for follow-up based on the information the worker has placed in the referral. If the information appears inadequate, the supervisor can staff the case with the worker for more information. However, as reports are confidential, the reporter is not required to give a name or contact information, so it is not always possible to get more information if the worker fails to obtain all necessary information from the reporter in the initial call. Reports that do not meet the definition of abuse or neglect are "screened-out" and not assigned for follow-up. Half of the "screened-out" referrals are reviewed for errors and the county offices can also appeal to Director Carson any decision made by the Centralized Intake Unit supervisors.

6. Before they can begin taking reports, workers must take several months of training and pass competency testing.

7. Grievant was hired into the Centralized Intake Unit in December 2016 and was assigned to supervisor Patricia Ferrell.

8. Grievant passed his competency testing in March 2017 and began taking telephone reports.

9. Grievant received an Employee Performance Appraisal Form EPA-2 on March 17, 2017, which rated his performance as "fair, but needs improvement." The EPA-2 fails to adequately identify what specific areas of performance needed improvement. In the section "Performance Development Needs," in which specific areas of needed

[2] Grievant Exhibit # 4.

improvement were supposed to be identified, Ms. Ferrell only listed the general worker expectations. The "General Comments" section further provides little specific identification of needed improvement, stating only:

> Gary has completed his DHHR trainings and passed his competency testing. He is on the phones taking other calls and APS referrals. He needs to be able to enter data in the computer, accurately capture what the reporter is telling him and be able to ask follow up questions. He needs to be able to navigate Facts and work on this data entry. Gary needs to keep his meetings with his licensing social worker for his SW permit. CPSS will meet with Gary and provide guidance and coaching to assist him in his job duties. Gary needs to keep in contact with supervisor and inform of any problems or concerns that he is having so that they can be addressed.

10. From the beginning, Ms. Ferrell observed that Grievant was not spending enough time on the telephone with the reporters and that his referrals were only a few sentences long. Grievant was slow navigating the computer system. All the supervisors were concerned with the lack of information in Grievant's referrals.

11. Ms. Ferrell reviewed individual cases with Grievant to explain insufficiencies and also listened in on calls to provide coaching through live instant messaging during the calls.

12. At some point, Ms. Ferrell discovered that Grievant was taking notes on notepaper rather than entering the information directly into the computer system as required. The computer system is set up to ensure that all information is gathered, and by taking handwritten notes rather than using the system, Grievant was missing important information. Ms. Ferrell instructed Grievant not to take notes but to use the computer system.

13. Grievant's quantity and quality of work was consistently less than that of other workers with similar levels of experience and Ms. Ferrell was required to spend more time coaching Grievant than other workers.

14. In addition to providing inadequate information in his referrals, Grievant also missed present danger in reports and disclosed the identity of confidential reporters in his referrals. Ms. Ferrell reviewed these problems with Grievant, but he continued to make the same mistakes. This was of significant concern to Ms. Ferrell as the failure to recognize present danger placed child safety at risk and disclosing confidential reporters is both against the law and potentially places the reporter's safety in jeopardy.

15. After informal coaching and counseling failed to improve Grievant's performance, on September 18, 2017, Grievant was placed on a work improvement plan that was provided to him by email the next day. The work improvement plan provides three areas of required improvement: complete quality intakes, increase number of intakes, and document sufficient information. To improve his performance, the plan required Grievant to take refresher training on "Present Danger" and pass a test on the same with an 85% or higher, to increase his number of intakes to a minimum of seven per day on average, to "document sufficient information about the general information, caregiver information, child information, maltreatment and nature, including safety threats in his referrals," and to identify other areas of needed additional training or assistance needed within fourteen days so that it could be addressed during the improvement period. Grievant's documentation would be reviewed by supervisors who would review at least half of Grievant's intakes using an evaluation tool provided in the improvement plan.

16. On October 2, 2017, Grievant received an Employee Performance Appraisal Form EPA-3, which rated his performance as "Needs Improvement." Grievant was rated as "needs improvement" on eighteen of the twenty-three individual rating criteria. Ms. Ferrell included thorough comments regarding the deficiencies. Some relevant comments included:

> Gary will obtain crucial referral information and write it down on paper but fails to put it in the referral narrative, which significantly affects his creditability as a worker. When CPSS staffs with him, he is able to answer questions about intakes that he did not provide all necessary information for supervisors to consider when making screening decisions. Gary needs to keep his supervisor informed of work issues, seek supervisory input, identify Emergency response intakes and notify ER supervisors accordingly.
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> Gary's work output fails to meet expectations. He does not complete his work in a timely manner. He leaves referrals on his workload even after CPSS has advised how to proceed and send for screening. He does not get his workload checked nightly and things are missed. CPSS has informed him multiple times on what to do with the referral to get it off his workload. Gary's failure to progress as a trained worker results in his work quantity being less than that of a brand new worker.
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> Gary needs to be able to ask pertinent questions (sic) He has been told multiple times by CPSS to provide all information in the referral but he still fails to do so at this time. He will abbreviate names and facilities instead of typing out group home he will put GH in the referral. He also will put the reporter name in the referral narrative, he struggles with giving the reports away. He struggles with putting the correct names in for clients as well as mandated reporters. He still struggles taking referrals and thinks that once CPS referral is taken and it should have been an APS referral that it can simply be deleted. He has been taken off CPS calls and had to be retrained on present dangers. He is currently taking both CPS & APS referrals and has not mastered quality intakes at this point during his time in CI. He needs to improve his quality of documentation and interviewing skills in order to ensure the safety and well-being of the children and families we serve.

The following relevant expectations were placed in the summary comments of the evaluation:

> Gary needs to follow CI expectations, follow his work improvement plan and continue to staff with CPSS and seek advice and guidance. He needs to show improvement in his work performance. Gary needs to demonstrate the skills that are needed to perform his job at a satisfactory level, including interviewing and documentation. Gary needs to seek assistance when needed instead of completing work incorrectly, causing delays and repeated tasks. Gary needs to earn trust and respect by providing accurate and thorough referrals.

17. Despite the continued coaching and retraining, Grievant's performance failed to improve during the improvement period.

18. Director Carson was in the process of reviewing Grievant's performance to impose discipline when she became aware of yet another serious incident involving one of Grievant's referrals.

19. In March 2018, Grievant received a report of a child fatality from a nurse at a hospital. A four-month old baby had passed away in the hospital due to an ongoing medical condition. The death was expected due to the baby's medical condition, so the nurse did not suspect abuse or neglect, but reported the death due to her knowledge of an open Child Protective Services case with the family. The family had other small children and had residences in two separate counties as they were temporarily residing near the hospital for the baby to receive treatment.

20. In Grievant's referral, he stated that the baby had died from respiratory distress and failure to thrive, that the whereabouts of the other children were unknown, and that the parents were in two different counties. He did not state that the death was

expected due to medical causes or that abuse or neglect was not suspected by the reporting nurse. As a result, the reviewing supervisor assigned it as a critical incident and two counties responded immediately, contacting the family on the night the baby had died, when CPS had no right to do so as there was no suspicion of abuse or neglect.

21. By letter dated March 16, 2018, Director Carson notified Grievant that a predetermination conference had been scheduled stating the following allegations:

> Performance issues including not documenting referral information accurately, causing a safety risk to victims and unlawful CPS intervention due to inaccurate documentation. Failure to show performance improvements after retraining and a work improvement plan. Inability to demonstrate an understanding of safety factors and CPS policy related to CPS intakes. Most recently a referral was inaccurately documented to identify a critical incident and require CPS intervention, although the reporter indicated to you that abuse/neglect was not suspected. Due to your continual and numerous mistakes, your performance of your duties as a SSWIII, Centralized Intake specialist, is inadequate.

22. On March 27, 2018, a predetermination conference was held, attended by Grievant, Director Carson, and Ms. Ferrell. Grievant accepted no responsibility for his poor performance. Regarding the incident of the child fatality, he asserted that the nurse had not stated that abuse and neglect were not suspected and did not express any understanding of the seriousness of intruding on a grieving family with no cause. Grievant asserted that it was the supervisor who was responsible for any mistake in the child fatality case and blamed the supervisors in general for his shortcomings. Further, despite having required additional training, coaching, and improvement plan, Grievant appeared surprised that the supervisors had no confidence in his work.

23. By letter dated April 10, 2018, Director Carson suspended Grievant for three days for poor performance in violation of CPS Policy 3.2 and Grievant's worker

expectations in accordance with Respondent's Policy Memorandum 2104, *Progressive Correction and Disciplinary Action*. In the letter, Director Carson discussed, in detail, the prior history of coaching and improvement plan and the seven incorrect referrals Grievant had made since the completion of the improvement plan. Director Carson explained the issues with the referrals as follows:

> 11326782 – wrong screening decision made due to insufficient information; sent for reconsideration & screened out, no allegations of abuse/neglect.
> 11329821 – assigned as Critical Incident, two counties responded, should have been screened out, no abuse/neglect.
> 11326271 – reported as Critical Incident, could not answer supervisor's questions; assigned 0/72.
> 11326498 – poor quality intake, not identifying all maltreaters or maltreatment types.
> 11329147 – reported as present danger, to supervisor but did not meet the criteria for an immediate response/Present Danger.
> 11329151 – did not accurately document capacity in an APS referral, poor quality referral.
> 11328078 – failed to enter that family had termination of parental rights (aggravated circumstances).

Director Carson explained her decision to suspend Grievant rather than issue a lesser form of discipline as follows:

> [T]his performance issue is chronic, significant, and your recent inaccurate documentation resulted in CPS investigative intervention that was not supported by WV Code or DHHR CPS Policy. When you did not document that abuse/neglect was not suspected in the death of a child in referral 11329821, you set CPS intervention in motion with an immediate response to initiate an unwarranted investigation. That exposed this agency, and yourself, to unnecessary liability. With your education, training, retraining, weekly coaching, and on the job experience, you should be able to gather and document sufficient information to allow supervisors to make an accurate decision. Your inability to gather accurate, thorough information had significant

ramifications, including unjustified CPS intrusion during the traumatic loss of a child.

24. Respondent failed to submit a complete DHHR Policy Memorandum 2104 as an exhibit and submitted only an incomplete copy of CPS Policy 3.2 as an attachment to the suspension letter.

Discussion

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. W.VA. CODE ST. R. § 156-1-3 (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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), ***aff'd***, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

Respondent asserts Grievant's suspension was proportionate to the allegations and that mitigation is not appropriate. Grievant argues Respondent should have followed progressive discipline and either issued a second improvement plan or given him no more than a written warning. Grievant did not dispute that the referrals at issue were not adequate, but asserted that he was slow to learn because he had no prior experience and because he did not receive adequate training. Grievant did dispute that his referral on the child who died in the hospital was improper, stating he was justified in referring the matter as a critical incident. Although Grievant asserted in filing his grievance that his due process rights had been violated, Grievant provided no explanation during the level three hearing how his due process rights were violated, therefore, that issue will not be addressed further.

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995)*; Perdue v. Dep't of Health & Human Res.*, Docket No. 93-HHR-050 (Feb. 4, 1994). Accordingly, the undersigned must make credibility determinations. In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ 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. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Director Carson was credible. Her demeanor was serious, forthright, and professional. She demonstrated clear familiarity with the issues concerning Grievant's work, and her memory of events was supported by her detailed testimony. There was no allegation or indication she had any bias, interest, or motive in the grievance, other than to defend her decision. Director Carson's testimony was supported by the testimony of Ms. Ferrell and by the documentary evidence.

Ms. Ferrell was credible. Her demeanor was calm and professional on direct examination. On cross examination, Ms. Ferrell was, at times, clearly frustrated, which caused some of her answers to be less responsive. However, this appears to have been directly caused by Grievant's obvious disrespect of Ms. Ferrell and his repeated interruption of her during her questioning, despite repeated instructions from the undersigned for Grievant not to interrupt Ms. Ferrell or to attempt to argue with her. Ms. Ferrell's testimony was supported by the testimony of Director Carson and by the documentary evidence. Although it was apparent Ms. Ferrell and Grievant dislike each other, there was no allegation Ms. Ferrell had any bias, interest, or motive to lie, and there was no indication her testimony was untruthful.

Grievant was not credible. Grievant's demeanor was poor. He repeatedly interrupted and was argumentative with Ms. Ferrell and Director Carson, despite the undersigned's repeated direction not to do so. Throughout Grievant's questioning of the two witnesses, he attempted to argue and testify. The undersigned explained multiple times that only statements made under oath could be considered in the decision and that Grievant should take notes of anything he disagreed with from the witnesses' testimony so that he could refute those statements in his own testimony. Grievant continued to attempt to argue during questioning, failed to take notes, and testified only briefly. Grievant was argumentative and evasive in answering questions on cross examination. Grievant denied having been placed on an improvement plan, despite the email showing he received it and the credible testimony of Director Carson and Ms. Ferrell regarding the plan. Regarding the child fatality case, Grievant's testimony was not persuasive. Grievant testified the baby had been in the hospital the month before for a respiratory

condition and that the baby had been ill the day before and had not been taken to the hospital at that time. He testified that the reporter did not say whether the condition was due to a birth defect or because of drug or alcohol abuse during pregnancy. Grievant introduced as an exhibit an article about neonatal abstinence syndrome, but when questioned on the purpose of the exhibit he would not answer conclusively whether he believed the baby had neonatal abstinence syndrome. Further, Grievant's testimony supports Director Carson and Ms. Ferrell's complaints about Grievant's failure to gather necessary information in his referrals. If the reporter did not say what was the cause of the baby's condition, that is clearly necessary information that Grievant failed to get from the reporter.

In addition to the witness testimony, the statement of the nurse who reported the child fatality was presented as evidence of Grievant's failure to accurately document the report. The statement of the nurse is hearsay as the nurse was not called to testify. "Hearsay includes any statement made outside the present proceeding which is offered as evidence of the truth of the matter asserted." BLACK'S LAW DICTIONARY 722 (6th ed. 1990). Relevant hearsay is admissible in administrative hearings. *Gunnells v. Logan County Bd. of Educ.,* Docket No. 97-23-055 (Dec. 9, 1997).

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. *Id.*; *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-H-115 (June 8, 1990).

As the identity of a reporter is confidential by statute, the nurse's testimony or signed statement were unavailable. The nurse would have been a disinterested witness to the events and, as a mandatory reporter, it can be assumed that her statement is the type of statement she would routinely make in her job. The nurse's statement was contained in the agency's records, but those records were not presented as evidence. However, Director Carson and Ms. Ferrell testified credibly regarding the nurse's statement as contained in the agency records that they had reviewed. The only evidence contrary to the nurse's statement is Grievant's assertion she did not tell him that abuse and neglect were not suspected. As discussed previously, Grievant is not credible. The hearsay statement of the nurse is relevant and is credible.

Respondent must prove that the disciplinary action it took against Grievant was justified. Respondent disciplined Grievant, in part, for violation of Respondent's policy. However, Respondent failed to enter into evidence a complete copy of the policy Grievant was accused of violating. Part of the policy was attached to the suspension letter, but crucial parts of the policy are missing from that document. Despite being given opportunity to submit the complete policy, Respondent failed to do so. Therefore, the incomplete policy cannot be considered as evidence.

While it is unclear if Grievant violated Respondent's policy as alleged due to the absence of the policy in the record, it is clear from the record Grievant had serious performance deficiencies as reflected in his evaluation and performance improvement plan. The testimony of Director Carson and Ms. Ferrell proves that those performance deficiencies continued despite significant efforts to assist Grievant to improve his performance. Their testimony further proves that Grievant's continued deficiency caused a situation in which CPS unlawfully intruded upon a grieving family, exposing the agency to potential liability, for which Grievant demonstrated no understanding and accepted no responsibility. Respondent has proven the charges against Grievant.

Grievant argues that suspension was not justified because Respondent should have provided him with an improvement plan or lesser form of discipline. Discipline for Respondent's employees is governed by Respondent's Policy Memorandum 2104, *Progressive Correction and Disciplinary Action*, as cited in the suspension letter. Neither party entered the policy into evidence. Therefore, it is unclear whether the level of discipline complies with Respondent's policy. However, given Grievant's chronic performance deficiencies, the seriousness of the incident with the child fatality, and Grievant's failure to demonstrate any understanding of the seriousness of the incident or accept any responsibility, suspension appears to be a justified penalty.

"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). An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995). *See Martin v. W. Va. State Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989). "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). *See Austin v. Kanawha County Bd. of Educ*., Docket No. 97-20-089 (May 20, 1997).

Grievant's work history and evaluation were poor. The penalty was not clearly disproportionate to the offence given Grievant's repeated failure to address his deficiencies, which culminated in the unlawful intrusion of CPS into a grieving family, and for which he accepted no responsibility and demonstrated no understanding of the seriousness of the situation. Grievant provided no evidence of penalties given to other employees guilty of similar offences. Grievant was clearly made aware of the deficiencies in his performance and given significant time and resources to correct his deficiencies. Grievant failed to prove mitigation is warranted.

The following Conclusions of Law support the decision reached.

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. W.VA. CODE ST. R. § 156-1-3 (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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), ***aff'd***, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

2. Respondent proved the charges against Grievant and that suspension was justified given Grievant's chronic performance deficiencies, the seriousness of the incident with the child fatality, and Grievant's failure to demonstrate any understanding of the seriousness of the incident or accept any responsibility.

3. "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). An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ*., Docket No.

94-01-394 (Jan. 31, 1995). *See Martin v. W. Va. State Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989). "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). *See Austin v. Kanawha County Bd. of Educ*., Docket No. 97-20-089 (May 20, 1997).

4. Grievant failed to prove mitigation is warranted.

Accordingly, the 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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: September 11, 2018

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Billie Thacker Catlett
Chief Administrative Law Judge