THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DONALD S. HALL,
Grievant,

v. **DOCKET NO. 2018-0439-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

This grievance was filed at level three of the grievance procedure by Grievant, Donald S. Hall, on August 29, 2017, after he was dismissed from his employment by Respondent, Division of Highways. The statement of grievance reads, "[m]y dismissal was not handled correctly by various partties [sic]." The relief sought by Grievant is "[r]einstatement to previous position or something equivalent."

A level three hearing was held before the undersigned Administrative Law Judge on December 13, 2017, at the Grievance Board's Westover, West Virginia office. Grievant appeared *pro se*, and Respondent was represented by Jason Workman, Esquire, Legal Division. This matter became mature for decision on January 22, 2018, the deadline for submission of written proposals. Respondent submitted Proposed Findings of Fact and Conclusions of Law by the deadline. Grievant declined to submit written argument.

Synopsis

Grievant was dismissed from his employment by Respondent for unauthorized leave after he reported to work late or failed to report to work, and did not call in to report off work, on multiple occasions. Grievant was suspended for this behavior five times prior to

being dismissed, yet did not correct his behavior. Grievant's behavior was caused by his abuse of alcohol, and he was aware of this, and sought help from Respondent. Respondent's personnel provided Grievant with information to contact a substance abuse facility, but Grievant did not follow through in getting help for his alcohol abuse problems. Respondent proved the charges against Grievant. Grievant did not provide evidence of any mitigating circumstances which would support a reduction of the penalty imposed.

The following Findings of Fact are made based upon the record developed at the level three hearing.

Findings of Fact

1. Grievant was employed by the Division of Highways ("DOH" or "Respondent"), as a Highway Engineer Trainee in District 4. He began working for DOH as a part-time employee in 2009, and was hired as a full-time employee in August or September 2011.

2. By letter dated August 15, 2017, Grievant was advised that his employment with Respondent was being terminated, effective August 30, 2017, for failure to meet performance and conduct standards. The dismissal letter recites specifically that Grievant failed to appear for work on June 29, 2017, as scheduled, and did not have leave approved for that day. The letter states that Grievant had been disciplined previously for this same failure to meet attendance standards, and had failed to correct the behavior.

3. Grievant did not appear for work on June 29, 2017, and he did not call off work for that day or request leave in advance. Grievant met with his supervisor on July 19, 2017, and provided written remarks at that time, stating, "I do not think. I understand I broke the rul[e]s, but I have a problem with alcohol. I need help. Are there any program[s]

you have. I was out the evening before drinking[,] got home at 2AM. I set 2 alarms and could not get up. If you decide to go with the termination could I be al[l]owed to resign. If I go through a program would I be al[l]owed to come back."

4. About two weeks prior to June 29, 2017, Grievant had reported to work two or three hours late, and had not called in to report off work. The new District Manager, Donald Williams, met with Grievant, Grievant's supervisor, and Anthony Paletta, District 4 Human Resources Director, regarding this instance of Grievant reporting to work late. Mr. Williams made the decision to give Grievant one more chance to correct his behavior. He decided that Grievant would not be disciplined for this latest incident, and would be paid for the time, but advised Grievant that he expected him to correct this behavior.

5. Grievant was suspended for 15 days without pay beginning March 6, 2017, for unauthorized leave, having reported to work one hour late on December 16, 2016, without prior approval, and he did not call in to report he would be late, all in violation of the leave restriction/improvement plan he had been placed on.

6. Grievant was suspended for 10 days without pay beginning January 9, 2017, for unauthorized leave on October 7 and 11, 2016, before and after a holiday. Grievant had called in to report that he was sick, but he failed to provide a physician's statement as required, as his leave usage had been so restricted due to prior instances of unauthorized leave.

7. Grievant was suspended for five days without pay beginning October 24, 2016, for unauthorized leave on July 14 and 15, 2016. Grievant had not called in to report off work and he failed to provide a physician's statement as required, as his leave usage had been so restricted due to prior instances of unauthorized leave.

8. Grievant was suspended for three days without pay beginning June 23, 2015, for reporting to work one and a half hours late on May 12, 2015, and failing to call in to report off work.

9. Grievant was suspended for one day without pay on June 3, 2015, for failing to report to work on May 6, 2015, and failing to call in to report off work.

10. Grievant was late for work on January 27, 2015, and did not report to work as scheduled on February 10, 2015, and did not call in to report off work. Grievant was charged for unauthorized leave on February 10, 2015, which was documented in writing, and was warned that future violations could result in further disciplinary action, including dismissal.

11. Grievant has been habitually late for work without calling off work for several years. His first supervisor, Brian Radabaugh, allowed Grievant to make up the time when he was late, did not require him to call off work until 9:30 or 10:00 a.m., and did not charge him with unauthorized leave when he came in late and had not called off work. At the time he was dismissed from his employment, Grievant had a new supervisor, Josh Vincent, and Grievant was aware that he was required to call in by 7:45 a.m. to report off work.

12. Sometime in May of 2016 or 2017, Grievant advised Mr. Paletta that he had a binge drinking problem, and could not get up in the mornings after he had been drinking. Mr. Paletta referred Grievant to treatment at the Summit Center, and asked if he wanted him to call the facility. Grievant told Mr. Paletta he would make the call, and Mr. Paletta gave Grievant the telephone number. Grievant did call the Summit Center, and was referred to an Alcoholics Anonymous ("AA") program. Grievant did not ever attend the AA meeting/program.

13. Grievant was not told by anyone at DOH that he could take annual leave or sick leave while he was attending a program to attempt to resolve his alcohol abuse issues. Grievant has not attempted to get help with his alcohol abuse issues since the termination of his employment.

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*.

The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989). A state civil service employee can only be dismissed "'for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' *Oakes v. West Virginia Department of Finance and Administration,* [164 W. Va. 384,] 264 S.E.2d 151 (1980)." Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985).

Respondent demonstrated that Grievant did not report to work as scheduled, and did not call off work as required, on multiple occasions, and was repeatedly warned and disciplined that this behavior was not acceptable and that he needed to correct this behavior. Grievant was provided with contact information for a facility to assist with his alcohol abuse problem, and chose not to take advantage of the AA program this facility referred him to, nor did Grievant otherwise correct his behavior. Respondent proved the charges against Grievant, and that Grievant continued his inappropriate behavior despite Respondent's efforts to make clear to him that the behavior could not be tolerated.

Grievant did not deny the charges, but believed that he should not have been fired. The argument that discipline is 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 agency 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). "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).

Mitigation of a penalty is considered on a case by case basis. *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are

generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. *Pingley v. Div. of Corr*., Docket No. 95-CORR-252 (July 23, 1996); *aff'd, Cir. Ct. of Kanawha County*, Civil Action No. 96-AA-120 (Sept. 25, 19997)..

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).

Grievant presented no evidence that there were mitigating circumstances other than his alcohol abuse problem. Grievant was provided with information on assistance with this problem, but did not avail himself of this assistance, even after his employment was terminated. Grievant did not demonstrate that his behavior would change if he were reinstated, or otherwise that the punishment imposed should be reduced.

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).

2. The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989). A state civil service employee can only be dismissed "'for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' *Oakes v. West Virginia Department of Finance and Administration,* [164 W. Va. 384,] 264 S.E.2d 151 (1980)." Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985).

3. Respondent demonstrated good cause for dismissal of Grievant from his employment.

4. The argument that discipline is 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 agency 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). "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).

5. 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).

7. Grievant did not demonstrate that Respondent abused its discretion when it decided he should be dismissed from his employment.

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: February 9, 2018