THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

PAUL HILEMAN and CHARLES NAPIER,
Grievants,

v. **DOCKET NO. 2017-2054-CONS**

REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY/SOUTHWESTERN REGIONAL JAIL,
Respondent.

DECISION

Separate grievances were filed directly at level three of the grievance procedure by Grievants, Paul Hileman and Charles Napier, on February 22, 2017, after each was demoted from a supervisory position to Correctional Officer 2. The statement of grievance on the two grievance forms is identical, and reads, "[t]he Grievant's punishment was inconsistent with the punishment of other officers; additionally, one of the allegations in support of punishment was the Grievant's language was 'disrespectful,' indicating that such action would not be tolerated; however, Grievant's supervisor, Chief Operations Officer J.T. Binion's language was 'disrespectful' to Grievant and Grievant's counsel during hearing." The relief sought by Grievants is to be reinstated to their respective supervisory positions.

The two grievances were consolidated, and a level three hearing was held before Administrative Law Judge William B. McGinley on September 29, 2017, in the Grievance Board's Charleston office. Grievants were represented by Robert B. Kuenzel, Esquire, Kuenzel Law, PLLC, and Respondent was represented at the level three hearing by William R. Valentino, Assistant Attorney General. Proposed Findings of Fact were

submitted by the parties, and this matter was subsequently reassigned to the undersigned Administrative Law Judge for administrative reasons. After a review of the written proposals filed by Grievants' counsel, the undersigned held a telephonic conference on February 27, 2018. Respondent was allowed until March 15, 2018, to submit a response to Grievants' written proposals, and this matter became mature for decision on receipt of the same on that date.

Synopsis

Grievants were employed by Respondent in supervisory positions at the Southwestern Regional Jail. They were both demoted to Correctional Officer 2 positions, which are non-supervisory positions, after engaging in horseplay, which involved touching subordinates with cut off broom handles and play-fighting each other and subordinates with the broom handles during work hours. They were also found to have engaged in calling subordinates inappropriate names. Grievants did not deny the charges, but argued demotion was too severe a penalty. Grievants did not demonstrate that the penalty imposed was clearly excessive or an abuse of discretion.

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

Findings of Fact

1. Grievant Napier has been employed by the Regional Jail and Correctional Facility Authority ("RJA") for more than 20 years. Prior to his demotion, he was a Correctional Officer 4, Sergeant, at the Southwestern Regional Jail ("SRJ"), and had served in this position since December 16, 2015. As a Correctional Officer 4, Grievant

Napier was responsible for overseeing all officers assigned to a work shift and all work during the shift.

2. Grievant Hileman has been employed by the RJA for several years. Prior to his demotion, he was a Correctional Officer 3, Corporal, at the SRJ, a supervisory position, and had served in this position since February 1, 2016. As a Correctional Officer 3, Grievant Hileman was responsible for assisting with the daily operations during the shift.

3. The SRJ houses more that 500 inmates, which require supervision at all times. There are normally 13 officers on each shift.

4. Grievants were suspended without pay by RJA on January 18, 2017, for an indefinite period, pending an investigation into their conduct.[1]

5. By letters dated February 17, 2017, Grievants were advised by RJA Human Resources Director April Darnell that they were being demoted, with prejudice, to Correctional Officer 2 positions, pay grade 10, which are non-supervisory positions, with a reduction in pay, effective March 18, 2017. Grievants were relieved of all supervisory duties effective immediately. The letters state the reasons for the demotion of each Grievant was a finding that "it was common practice for you and a fellow ranking officer, to use a cut off broom handle to 'horseplay' around with subordinate officers. The investigation also discovered that you would 'tap' subordinate officers with the broom handle hard enough so they would feel it. The investigation revealed that you used abusive language when talking to subordinates." The letters concluded that this behavior created a hostile work environment, in violation of the Division of Personnel's Workplace

[1] The record does not reflect the period of the suspension, or whether Grievants were paid for any period of the suspension at the conclusion of the investigation.

Harassment Policy, and violated the RJA Code of Conduct, citing specifically general regulation numbers 16, 19, 33, 40, and 41 of the Code of Conduct. The letter to Grievant Hileman also cites Code of Conduct general regulation number 18. The letters further noted that Grievants were to be role models for other employees, and were to set an example, and that the noted "behavior is not an acceptable behavior for employees to emulate," and that "the nature of your behavior is sufficient to cause me to conclude that you do not meet a reasonable standard of conduct as a supervisor . . ., thus warranting this demotion."

6. RJA's Code of Conduct states that "[t]his policy requires the highest level of conduct from all employees." The Code of Conduct lists many numbered general regulations. Those listed in the demotion letter state as follows.

> 16. All employees shall remain alert, observant, and occupied with facility business during their tour of duty. All employees shall conduct themselves in a manner which will reflect positively upon the Authority and its employees.
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> 18. All employees shall submit required or requested reports in a timely manner and in accordance with applicable regulations. No employee shall falsify reports or documents, or knowingly allow inaccurate or incorrect material or information to be submitted as valid. All employees are required to provide relevant, truthful, and complete information when required by a supervisor or investigator.
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> 19. All employees shall conduct themselves, whether on or off duty, in a manner which earns the public trust and confidence inherent to their position. No employee shall bring discredit to their professional responsibilities, the Authority, or public service. Employees are required to perform duties with discretion, enthusiasm, and loyalty.
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> 33. At all times, employees shall maintain a professional demeanor and are to be respectful, polite, and courteous and refrain from using abusive and obscene language in their contacts with inmates, other employees, and the public. This is a prime factor in maintaining order, control and good discipline in the facility.

40. Employees shall not show careless workmanship or negligence which may result in spoilage, waste or destruction of facility equipment.

41. No employee shall abuse state work time; examples include, unauthorized time away from the work area, use of state time for personal business, abuse of sick leave, loafing, wasting time or inattention to duty.

7. The West Virginia Division of Personnel's Prohibited Workplace Harassment Policy lists the types of conduct that may constitute nondiscriminatory hostile workplace harassment in a state workplace, and includes behaviors such as destructive criticism, persistently demeaning, belittling, and ridiculing an employee, and threatening, shouting at, and humiliating an employee, particularly in front of others. The Policy indicates that this type of harassment "consists of unreasonable or outrageous behavior that deliberately causes extreme physical and/or emotional distress."

8. An investigation was conducted by RJA Deputy Chief of Operations R. Craig Adkins, into allegations made by employees of SRJ that Grievants had called subordinate officers at the SRJ "assholes," and that they were fighting each other with broken broom handles while on duty, and striking officers with them. Mr. Adkins interviewed a number of employees of SRJ, and produced a written report. The report states that a search of Grievants' office resulted in a broom handle being found under a desk and three broom handles being found in a locked cabinet. Each broom handle had been written on with an individual designation as follows: "Z-tard adjuster," "Sweet Mary," "Mr. Clean Shiner," and "Mustache Eraser." The report concluded that Grievant Hileman was reluctant to provide complete information to the investigator, that Grievants "used cut off broom handle sticks, they fashioned, to horse play with subordinates by striking them on their bodies," that Grievants exhibited "[h]ostility toward employees," that Grievants "are directly responsible

for creating an environment enabling and participating in horse play and hostility towards employees as well as contract employees," and that their "actions are unprofessional and violate agency policy."

9. RJA Correctional Officer 2 Pamela McNeely is an employee at SRJ, and has been assigned for some time to Central Control at SRJ. From her work station, she observed Grievants playing with broom handles outside their office, and hitting other officers with the broom handles. She also heard Grievants use abusive language when speaking to other officers, calling them names such as "stupid" and "dumbass."

10. RJA Correctional Officer 2 Aaron Day is an employee at SRJ. He observed Grievants playing with the broom handles. Mr. Day found a broom handle for his own use and wrote "Mustache Eraser" on it, and he would then participate in the broom handle horseplay, hitting Grievants with his broom handle during work hours. This horseplay went on over a period of a couple of months, and would be about 10 minutes at a time. Those engaging in the horseplay would tap each other on the arm. He knew that horseplay during work hours was wrong, but he was following his supervisors' lead. Mr. Day received a written reprimand for his behavior.

11. RJA Correctional Officer 2 Zachary Robinson is an employee at SRJ. He found a broom handle for his own use and wrote "Mr. Clean Shine" on it. He participated in the horseplay with the broom handles with Grievants for about a month, during work hours when they were not busy. Mr. Robinson did not see this as a problem and believed Grievants were great supervisors.

12. The decision that Grievants should be demoted was made by the RJA mitigation panel, comprised of RJA Chief of Operations J.T. Binion, RJA Deputy Director

Lori Lynch, Ms. Darnell, and RJA counsel Leah Macia. The mitigation panel considered various penalties, including suspension or dismissal. Ms. Darnell did not consult with RJA Executive Director David Farmer regarding the discipline to be imposed. The record does not reflect whether any other member of the mitigation panel consulted with, advised, or obtained the approval of Mr. Farmer regarding the demotion of Grievants, but he has taken no action to overturn the demotion.[2]

13. Neither Grievant had ever been disciplined prior to this incident. The mitigation panel reviewed Grievants' personnel files when considering the punishment to be imposed, considering their years of service and work history.

14. There had been numerous incidents reported involving supervisors at SRJ behaving inappropriately. Some supervisors were dismissed from their employment at SRJ, and the RJA was trying to clean up the issues at SRJ.

15. Mr. Binion did not want to see Grievants dismissed, as they have otherwise been good employees, but he believes that supervisors are to behave in a professional manner at all times, that horseplay is never appropriate when on duty, and that Grievants

[2] Grievants' Proposed Findings of Fact and Conclusions of Law state, "Ms. Darnell testified that the Administrator of the West Virginia Regional Jail Authority, David Farmer, was not apprised of the punitive action taken against the Grievants; further, Ms. Darnell testified that Mr. Farmer was not even consulted regarding the Grievants' punishment." This summary misrepresents the testimony of Ms. Darnell. Ms. Darnell was very clear in her testimony that SHE did not speak to Mr. Farmer about the penalty decided on by the mitigation panel. A few minutes after her initial testimony on this issue, however, the following exchange occurred. Ms. Darnell: "I'm sure the Executive Director would have the final say on discipline." Mr. Kuenzel: "He wasn't consulted regarding this?" Ms. Darnell: "I do not know the conversation between him and the Deputy Director." Mr. Kuenzel: "But earlier you said he was not consulted." Ms. Darnell: "No, I said I did not consult him." Level three hearing recording. The record does not reflect that it was Ms. Darnell's role to discuss this with Mr. Farmer.

should not be supervisors. He pointed out that officers need to be alert at all times due to the inherent dangers in supervising an inmate population, and that if Grievants offended even one employee with their inappropriate behavior, that was one too many.

16. Ms. Darnell believes that supervisors are to set an example for other employees and serve as mentors, and that Grievants' behavior was not professional and not acceptable. She pointed out that supervisors are to enforce the Code of Conduct with their subordinates, and believed that common sense would have dictated to Grievants that their behavior was inappropriate.

17. Supervisors at SRJ receive annual 40-hour in-service training, which includes training on workplace harassment and talking to and dealing with subordinates, and they are trained as supervisors on the job by another supervisor.[3]

18. Grievant Napier was provided by the RJA with a copy of the RJA Equal Employment Opportunity and Sexual Harassment Policy, and acknowledged its receipt on March 19, 2013, and that he had read it and had an understanding of it. Grievant Napier acknowledged receiving a copy of the RJA Code of Conduct, reading it and understanding it, on June 10, 2013.

19. Grievant Hileman was provided by the RJA with a copy of the RJA Equal Employment Opportunity and Sexual Harassment Policy, and acknowledged its receipt on March 19, 2013, and that he had read it and had an understanding of it. Grievant Hileman

[3] Grievants in their written argument asserted that they received **no** supervisory training. Grievants did not testify as to what type of training they received, and this summary does not accurately reflect the testimony. Ms. Darnell pointed out that any adult should have known the horseplay engaged in by Grievants was inappropriate.

acknowledged receiving a copy of the RJA Code of Conduct on May 12, 2012, and that he understood it was his responsibility to read and understand the Code of Conduct.

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*.

Grievants do not dispute that they engaged in horseplay using broom handles while on duty. Grievants' argument is that the punishment imposed is too severe for the infraction. Nonetheless, the evidence presented by both Respondent and Grievants demonstrated that Grievants not only engaged in horseplay using broom handles themselves while on duty, but allowed their subordinates to do the same. In fact, Mr. Day followed his supervisors' lead, finding his own broom handle to engage in the horseplay while on duty after observing his supervisors' behavior, and writing on it as his supervisors had done. Respondent also demonstrated that Grievants called subordinates inappropriate names, which was in violation of the Code of Conduct. While inappropriate behavior, particularly for a supervisor, the evidence was insufficient to support a finding

that Grievants' name-calling was so pervasive as to rise to the level of workplace harassment.

Grievants also asserted that Grievants' supervisors talk down to others, although the only testimony elicited on this topic was in regard to the assertion that Mr. Binion had been rude to Grievants and their counsel during the pre-determination hearing. Grievants were accused of calling their subordinates inappropriate names in front of other employees. This is not comparable to Mr. Binion allegedly talking down to Grievants and their counsel in a closed meeting regarding their inappropriate behavior; nor did Grievants demonstrate that any comments made by Mr. Binion were inappropriate. Further, this argument is akin to a child arguing he should be allowed to do something or not be punished for doing something he knows is wrong because everyone else does it. Just because someone else engages in inappropriate behavior does not make Grievants' behavior appropriate.

The next issue to be addressed is whether a new argument can be raised by Grievants in the post-hearing written argument. Grievant's counsel was given the opportunity to make an opening statement at the beginning of the level three hearing, and did so. His opening statement focused on the argument that Respondent provides no outlet for the stress experienced by employees at the SRJ, and that horseplay is not uncommon and relieves stress, and that the sanction imposed was extreme. Never once did he suggest that the demotion was not properly carried out by the appointing authority, although he did ask questions of Ms. Darnell at the level three hearing regarding whether Mr. Farmer was consulted by her. More than once, the representatives referenced the discussions which had occurred prior to the hearing between counsel for the parties, and

it is apparent that the issue of whether Ms. Darnell had the authority to sign the demotion letters was never raised. However, in his post-hearing written argument, Grievant's counsel for the first time articulated the argument that the demotion letters were invalid because Ms. Darnell had no authority to issue the discipline, as she is not the appointing authority. The undersigned would note, initially, that the regulation cited by Grievants in support of this argument specifically allows the head of the agency to delegate his or her authority to act to other employees.

The Grievance Board, and specifically the undersigned, does not generally allow parties to raise an argument for the first time in its post-hearing written argument, as the responding party had not been placed on notice that it needed to put evidence into the record to address the issue, nor has that party been provided the opportunity to respond. In this case, Grievants' counsel cited to legal authority which he concluded allowed just such an act. Further, one could argue that it was Respondent's burden to show that the person or persons taking action had the authority to do so, although Grievants did not suggest this. For these reasons, the undersigned provided Respondent with the opportunity to respond to this argument, rather than dismissing it out of hand in this case.

The case cited by Grievants' counsel, *Floyd v. Floyd*, 148 W. Va. 183, 133 S.E.2d 726 (1963), by his own analysis, does not stand for the proposition that a party may raise an argument for the first time in its post-hearing written argument. The quote relied on by Grievants' counsel states, "'even if the issue was not raised by the pleading but was tried as was done in this case by consent of the parties, it would be treated in all respects as if it had been raised in the pleading and the failure to amend would not affect the verdict.'" There was no requirements that Grievants detail all their legal arguments in the

"pleadings," or statement of grievance, but a pleading is what begins the process. The argument made by counsel at the level three hearing is not a pleading, but is counsel setting out the legal arguments he intends to address. Further, as Respondent pointed out, Respondent did not consent to this ambush, as it wasn't even aware of it. Asking a few questions of Ms. Darnell regarding whether she had discussed the issue with Mr. Farmer was not sufficient to place Respondent on notice of this argument, particularly given Grievants' counsel's lengthy opening statement. The undersigned concludes that Grievants may not raise this new issue this late in this proceeding.

Were the undersigned to address this issue, it is quite clear that the mitigation panel did not materialize of its own accord, and that the members did not appoint themselves. The panel and its membership do not meet secretly so that Mr. Farmer is unaware of the panel. The panel and its members have most certainly been approved by Mr. Farmer and delegated with the responsibility for determining the discipline which is appropriate. Whether formally done or not, Mr. Farmer delegated his authority to the panel, and Ms. Darnell has been tasked with advising employees of the disciplinary decision. Likewise, there is no indication that Ms. Darnell took steps to keep the demotions secret from Mr. Farmer, and he would most certainly have been aware of the grievance and could have stepped in at any time to reverse the disciplinary action, but did not do so.

"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).

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.*

"As a supervisor, Grievant may be held to a higher standard of conduct, because he is properly expected to set an example for those employees under his supervision, and to enforce the employer's proper rules and regulations, as well as implement the directives of his supervisors." *Wiley v. W. Va. Div. of Natural Resources, Parks and Recreation*,

Docket No. 96-DNR-515 (Mar. 26, 1988). "Unfortunately, most horseplay is intended to be innocent until someone gets hurt. Respondent has the right to expect a higher level of performance from their supervisors. *See Cobb v. Dep't of Admin./General Services Div.*, Docket No. 97-Admin-404/455 (May 26, 1999)." *Snedegar v. W. Va. Div. of Corr./Anthony Correctional Center*, Docket No. 2008-1889-MAPS (Jan. 15, 2009)(24-hour suspension upheld of supervisor who threw a cup of water at a subordinate on one occasion.)

In support of their argument that the penalty imposed was too severe, Grievants pointed out that there are only 13 officers assigned to each shift, and that Respondent provides no stress relief options to its employees, arguing that horseplay while on duty is an acceptable means of stress relief and bonding. Grievants also pointed out that there was no evidence that any work was not being done on Grievants' shift, or that there was any concern that work was not being done. Respondent does not deny that Grievants work in a stressful environment, but pointed out that it is because the SRJ is a dangerous environment housing criminals that employees must be alert at all times, and there is no room for horseplay during work hours, and that this is clear in the Code of Conduct. Grievants asserted that the Code of Conduct does not state that horseplay is prohibited. The Code of Conduct states clearly, "[a]ll employees shall remain alert, observant, and *occupied with facility business during their tour of duty*." (Emphasis added.) While it does not use the words "horseplay is strictly prohibited," it is hard to see how Grievants could have interpreted this language to mean that as long as the work is getting done, engaging in horseplay which takes your attention and that of everyone around you off the inmates is allowed. Respondent also pointed out that Grievants were supposed to be setting an

example for other employees as supervisors, and that the example they set was a bad one. Indeed, Grievants' argument that this is a stressful job as there are only 13 officers per 500 inmates reinforces Respondent's point that the limited number of employees who are on duty need to be alert and doing their jobs at all times, not goofing off and acting like juveniles.

Grievants cited in support of their argument a North Dakota case which involved a workers' compensation claim, *Mitchell v. Sanborn*, 536 N.W.2d 678 (Aug. 29, 1995), which set forth a four-part test for determining whether the horseplay engaged in was a substantial deviation from employment. Grievants, however, did not indicate that, despite the large number of workers' compensation cases heard by the Supreme Court of Appeals of West Virginia, that it has ever adopted this four-part test, or anything similar to it. Nor does the undersigned find this analysis to have any bearing on the issue of the application of Respondent's adopted Code of Conduct for appropriate behavior by officers or mitigation.

Grievants also cited to a District Court case from Michigan, *Vermett v. Hough*, 627 F. Supp. 587 (W. D. Mich. 1986), in which the Court stated that "[i]t is not seriously disputed that in a high pressure job such as that of a police officer, horseplay and joking are necessary means to stress relief." The undersigned likewise finds this case inapplicable to the situation here. This case is over 30 years old, and not only have times changed, but Grievants did not indicate that this case or its theories on horseplay have been cited by any West Virginia court in these 30 years. Further, Respondent does dispute that in its jail setting, horseplay while on duty is a necessary means to stress relief.

To the contrary, Respondent believes it is essential that the limited number of officers on duty be alert and attentive to the situation at the jail at all times in order to avoid disaster, and has placed this requirement in its Code of Conduct to re-enforce this belief.

Grievants knew what was expected of them as officers and supervisors, but failed to take their professional responsibilities seriously, engaging in behavior which distracted not only themselves from their duties, but their subordinates. Grievants did not demonstrate that the penalty imposed was clearly excessive or an abuse of discretion.

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. Respondent proved Grievants engaged in horseplay during work hours, and did not act in a professional manner or set a good example as supervisors. Respondent did not demonstrate that Grievants engaged in workplace harassment, although they did engage in inappropriate name-calling.

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). This 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 v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

5. Grievants did not demonstrate that the penalty imposed was clearly excessive or an abuse of discretion.

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).

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BRENDA L. GOULD
Deputy Chief Administrative Law Judge

Date: March 26, 2018