THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

THOMAS SPENCE,

Grievant,

v. **Docket No. 2019-0670-DOC**

DIVISION OF NATURAL RESOURCES,

Respondent.

DECISION

Grievant, Thomas Spence, is employed by Respondent, Division of Natural Resources. On December 10, 2018, Grievant filed this grievance against Respondent stating, "Suspension without good cause". For relief, Grievant seeks "[t]o be made whole in every way including back pay with interest and benefits restored".

This 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 April 10, 2019, before the undersigned at the Grievance Board's Westover, West Virginia office. Grievant appeared in person and through representative Gordon Simmons, Steward, UE Local 170, West Virginia Public Workers Union. Respondent appeared by counsel, Jane Charnock, Assistant Attorney General. This matter became mature for decision on May 17, 2019, upon final receipt of each party's written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant has been employed by Respondent as a Natural Resources Police Officer for over twenty years. During the past few years, Respondent has issued Grievant warnings and reprimands for various infractions. Grievant's most recent infraction entailed failing to properly administer field sobriety tests to a subject for boating under the

influence and failing to do the incident report after being ordered to do so, resulting in a three-day suspension and six-month improvement plan. Respondent proved that this most recent discipline was warranted as part of progressive discipline. 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 has been employed as a Natural Resources Police (NRP) Officer by Respondent, Division of Natural Resources (DNR), since March 2, 1998.

2. During the relevant period, Grievant was a Corporal assigned to duty in Hancock County, West Virginia, in District One.

3. Grievant's immediate supervisors are Captain (Cpt) Stephen J. Antolini, Lieutenant (Lt) Brad McDougal, and Sergeant (Sgt) Steven L. Himmelrick.

4. On November 26, 2018, Respondent sent Grievant a letter suspending him for three days without pay and placing him on a six-month performance improvement plan as part of progressive discipline. (Respondent's Exhibit 6)

5. The letter stated as the general reason for discipline Grievant's "continued unacceptable conduct and performance, particularly your continued lack of sound judgement, poor job performance, and inefficiency in your capacity as a Natural Resources Police Officer." "Your repeated conduct of failing to follow directives undermined the employee-employer relationship and eliminated any likelihood that a lesser penalty would cause you to change your conduct and behavior." (Respondent's Exhibit 6)

6. The letter further stated that it would "serve as notice that any further misconduct will be viewed as unwillingness, rather than inability, to comply with reasonable expectations, and shall result in your dismissal." (Respondent's Exhibit 6)

7. The letter outlined the incidents leading to Grievant's discipline as follows:

> September 5, 2016: You and NRP Corporal Nicholas Frangos had a disagreement regarding the issuance of a citation to an individual who had exposed himself on the river and fleeing the scene after the officer sounded his vehicle siren.
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> October 21, 2016: You contact (sic) NRP Officer Stephen Haines that you had received a complaint regarding a possible boating accident on the Ohio River. NRP Officer Stephen Haines retrieved the DNR patrol boat from Brooke County, several miles away, to assist you with the roadway, you did not see the vessel, and you were going home. You left NRP Officer Stephen Haines on the patrol boat, alone, in dangerous weather and river conditions.
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> October 21, 2016: You received an email from NRP Lieutenant Brad McDougal to contact Josh Allison, DNR Wildlife Manager, regarding people shooting and leaving debris at the Hillcrest Wildlife Management Area Shooting Range, and to document your actions on your weekly report.
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> October 23, 2016: You advised NRP Sergeant Clyde "David" Shrine, retired, via email that everything had been cleaned up at the Hillcrest Wildlife Management Area Shooting Range and Josh Allison, DNR, Wildlife Manager, had everything he needed to deal with the issue.
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> October 24, 2016: NRP Sergeant Clyde "David" Shriner, retired, advised you via email to contact Josh Allison, DNR Wildlife Manager, and coordinate efforts to solve the violations and complaints regarding the Hillcrest Wildlife Management Area Shooting Range. You responded by stating you would run it by Josh Allison, DNR Wildlife Manager, and try to set it up where he could make decisions and write citations if he chose to do so; that the Hillcrest Wildlife Management Area Shooting Range was his shooting range and he needed practice with writing citations.

October 24, 2016: NRP Sergeant Clyde “David” Shriner, retired, advised you to run the detail, you were more trained.

October 28, 2016: You advised NRP Sergeant Clyde “David” Shriner via email that you were working with Josh Allison, DNR Wildlife Manager, this afternoon and you would be making the contacts and issuing citations.

February 7, 2017: A meeting with NRP Captain Stephen J. Antolini at the District One Law Enforcement Office was held on this date at 2:30 p.m. to discuss the results of a Professional Standards Unit (PSU) complaint filed against you.

NRP Captain Stephen J. Antolini advised you that the complaint was “sustained”. You were also advised that Colonel Jerry B. Jenkins, Chief, ordered you be issued a verbal warning and corrective counseling.

February 7, 2017: A meeting to discuss your job performance was held at the District One Law Enforcement office was held (sic) on this date at 2:45 p.m. Present at this meeting were NRP Captain Stephen J. Antolini, NRP Lieutenant Brad McDougal, NRP Sergeant Steven Himmelrick and yourself.

> Incident 1: Detail to detect and apprehend violators Management Area Shooting Range. Good police tactics would have been to conceal yourself and your assigned marked vehicle from individuals entering the Hillcrest Wildlife Management Area Shooting Range; however, you and your vehicle were in plain view for anyone to see you when they entered the Range.
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> NRP Captain Stephen J. Antolini advised you that your job performance during this incident was insufficient.
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> Incident 2: Issuance of citation to subject who exposed himself and fled from the scene after the officer sounded his siren.
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> NRP Captain Stephen J. Antolini advised you that your job performance as outlined in this incident was unacceptable. You were issued a

verbal warning and counseling session regarding this incident.

Incident 3: Failure to assist NRP Officer Stephen Haines search for a possible boating accident in the Ohio River.

It was determined your EPA-2, dated February 21, 2017, will serve as a written reprimand/warning for your unacceptable job performance during the past months. You were directed to immediately take corrective action toward these discrepancies.

July 28, 2018: You worked in Wheeling area with NRP Officer Steven Haines on this date. On your return trip to Hancock County, you received a call from NRP Officer Steven Haines to return to Heritage Port to meet with an Ohio County sheriff deputy and the U.S. Coast Guard. The Ohio County sheriff deputy advised you that he had administered two field sobriety tests to the suspect before your arrival and determined he may be impaired. However, since he was not familiar with the Boating Under the Influence laws and had never arrested anyone for this charge, he wanted the assistance of a DNR officer.

You administered two additional field sobriety tests and determined the subject was not legally under the influence. You also stated the subject refused the PBT[1] and the evidentiary breath test.

September 17, 2018: NRP Captain Stephen J. Antolini held another meeting at the District One Law Enforcement office at 3:00 p.m., to request you explain your actions regarding the possible Boating Under the Influence violation that occurred on July 28, 2018. NRP Lieutenant Brad McDougal, and NRP Sergeant Steven Himmelrick were also at this meeting.

NRP Captain Stephen J. Antolini advised your failure to administer the complete battery of field sobriety tests was not acceptable under the circumstances. You were also advised that you could face suspension for your most recent unacceptable job performance.

[1]Preliminary breath test.

September 30, 2018: NRP Captain Stephen J. Antolini requested you, NRP Lieutenant Brad McDougal, and NRP Sergeant Steven Himmelrick meet at the District One Law Enforcement office in Farmington WV. You admitted at this meeting that the subject consented to a breath test after being advised you had made the decision you were not going to arrest him. The subject was released even though he blew a .09 BAC.

October 29, 2018: A pre-determination hearing was held with you, NRP Sergeant Steven Himmelrick, NRP Lt. Colonel David W. Trader, and NRP Colonel Jerry B. Jenkins present. You admitted during this meeting that you did not complete the entire Seated Battery Field Sobriety test on the subject as you were trained. Ohio County Sheriff Deputy Wetzel advised you that the subject failed the Horizontal Gaze Nystagmus and the Finger-to-Nose test. These tests have a much higher indication of intoxication that (sic) the two tests you conducted on the subject.

You advised you had the subject blow on the PBT after you released him and that he had belched prior to the test. Belching before the PBT rendered the results invalid. It made no sense for you to conduct the PBT without waiting the required time after he belched or conducting it after you released him. The results of the PBT test you administered revealed the subject was, in fact, legally under the influence. You released the subject to leave in a public area.

Your failure to complete a complaint form on this incident as directed by NRP Sergeant Steven Himmelrick was also discussed. You advised you forgot to complete the form. It was discussed you had completed 113 complaint forms during the last fiscal year without being told to do so. You advised NRP Officer Stephen Haines should have completed the complaint form since he received the complaint. You were told there is a space on the complaint form for the person's name who referred the complaint to you and that you should have completed the compliance form since you investigated it.

There was nothing discussed in this meeting that justified your actions in this matter.

Employees are expected to adhere to the directives of their supervisors. The refusal of an employee to perform any lawful

> directive by their supervisors is cause for severe disciplinary action. An employee is expected to respect authority and does not have the unfettered discretion to disobey or ignore clear instructions. Insubordination encompasses more than an explicit order and subsequent refusal to carry it out. It also involves a flagrant or willful disregard for implied directions of an employer. I find that your repeated and willful refusal to obey lawful directives is an act of insubordination.

(Respondent's Exhibit 6)

8. Grievant's current discipline arose in part from events surrounding an incident on July 28, 2018, and in part from prior disciplinary incidents. (Respondent's Exhibit 6)

9. Grievant's prior incidents include failure to issue a citation to a suspect who exposed himself, failure to conceal his vehicle while waiting for perpetrators at Hillcrest Wildlife Management Area Shooting Range, and failure to assist a fellow officer. (Respondent's Exhibit 6)

10. The prior incidents resulted in discipline, including verbal warnings, a verbal reprimand, and written reprimands.

11. The Grievance Board had, on October 21, 2016, upheld the written reprimand issued Grievant for failure to assist. (Respondent's Exhibit 7)

12. On July 28, 2018, Grievant was called by NRP Officer Steven Haines to Heritage Port on the Ohio River in Wheeling to assist Ohio County Sheriff Deputy Jim Wetzel with field sobriety tests on a subject detained for boating under the influence (BUI) because Deputy Wetzel was not familiar with BUI laws and had never processed a BUI. (Grievant's testimony)

13. Deputy Wetzel informed Grievant he had determined that the subject might be impaired based on the subject's performance during two field sobriety tests

administered before Grievant's arrival. Deputy Wetzel told Grievant that the subject had failed the Horizontal Gaze Nystagmus and the Finger-to-Nose tests. (Respondent's Exhibit 6 & Grievant's testimony)

14. Deputy Wetzel had jurisdictional authority to arrest the subject, but had informed Grievant that he was not going to do so. (Grievant's testimony)

15. Respondent's protocol mandates that six BUI field sobriety tests be administered in an established order and that the administering officer observe and/or administer all six tests. (Captain Antolini's testimony)

16. Grievant administered two of the six BUI field sobriety tests: the Palm Pat test and the Hand Coordination test. (Respondent's Exhibit 4)

17. Grievant concluded that the subject passed these two field sobriety tests.

18. Based on the results of these two tests, Grievant determined the subject was not legally under the influence and decided not to charge him. (Grievant's testimony)

19. NPR officers must determine the existence of probable cause before administering a preliminary breath test (PBT) or an evidentiary breathalyzer test. (Captain Antolini's testimony)

20. Unlike an evidentiary breathalyzer test, a PBT cannot be used as evidence of intoxication.

21. The subject initially refused a PBT and an evidentiary breathalyzer test, acquiescing to a PBT after Grievant assured him that he would not charge or arrest him. (Grievant's testimony and Respondent's Exhibit 6)

22. When the subject belched before taking the PBT, Grievant determined that the PBT reading would be inaccurately high. Nevertheless, Grievant chose to administer

the PBT in order to deter the subject from consuming alcohol while boating by giving him the high reading. (Grievant's testimony)

23. The PBT revealed the subject had a blood alcohol content (BAC) of .09, which is higher than the statutory percentage for BUI. (Respondent's Exhibit 6)

24. Grievant reached out to Sgt. Himmelrick by phone during the incident. Sgt. Himmelrick advised Grievant not to rely on Deputy Wetzel's assessment of the subject's sobriety and to make his own assessment before arresting and charging the subject with BUI. Sgt. Himmelrick did not deter Grievant from redoing any of the field sobriety tests that had been administered by Deputy Wetzel prior to his arrival. (Sgt. Himmelrick's testimony)

25. Sgt. Himmelrick told Grievant to release the subject if he was sober. (Sgt. Himmelrick's testimony)

26. Grievant released the subject without filing charges against or arresting him. (Grievant's testimony)

27. DNR officers must document every call they get on a Complaint Incident Form (also known as an incident report), which is due on a weekly basis. (Cpt. Antolini's testimony)

28. An incident report for July 28, 2018, would have been due on August 3, 2018. (Cpt. Antolini's testimony)

29. On August 3, 2018, Sergeant Himmelrick directed Grievant to prepare the incident report for July 28, 2018. (Cpt. Antolini & Grievant's testimony)

30. Grievant had prepared 113 incident reports for the same fiscal year, without being reminded to do any of them. (Respondent's Exhibit 6)

31. Respondent first noticed that Grievant had not prepared the incident report when it received a FOIA request for the report on August 14, 2018. (Cpt. Antolini's testimony)

32. Cpt. Antolini sent an email on August 30, 2018, to Sgt. Himmelrick directing that Grievant provide him written details of the July 28, 2019, incident and "all the actions he took with the suspect including what field sobriety tests he administered and the result of each test administered." (Respondent's Exhibit 3)

33. Grievant replied by letter on September 8, 2018. While Grievant's letter mentioned that the subject had refused to submit to either a PBT or an evidentiary breath test, it failed to reveal that Grievant had administered a PBT on the subject. (Respondent's Exhibit 4)

34. Grievant's letter further explained that his failure to administer the full battery of tests resulted from Sgt. Himmelrick's concern that it would be double jeopardy if both NRP and the Coast Guard pursued a BUI on the subject. However, Grievant went on to state that Sgt. Himmelrick had concluded after talking to the Coast Guard that they could both process a BUI on a subject. (Respondent's Exhibit 4)

35. Respondent's General Order 4 provides that disciplinary or personnel action may be taken for many reasons, including, but not limited to, incompetent or inefficient performance, insubordination, and mental or physical unfitness. General Order 4.2.1.1, 4.2.1.2, 4.2.1.3.

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 contends that it had cause to suspend Grievant for three days and place him on a six-month improvement plan, as part of progressive discipline and Grievant's repeated unacceptable conduct and performance. Respondent contends that Grievant's most recent misconduct involved his handling of a BUI incident on July 28, 2018, where he failed to properly administer all six BUI field sobriety tests, released the subject without charging or subjecting him to further testing after subject blew above the legal BAC limit on a PBT, and failed to prepare an incident report after supervisors ordered him to do so.

Grievant counters that his supervisors messed up as badly as he did in not reminding him to do the incident report. Grievant asserts he was justified in not redoing the PBT, even though subject's burp nullified the results, because he had originally induced the subject to submit to the PBT by telling him he was being released without charge and did not have probable cause to do a PBT or evidentiary breathalyzer. Grievant further argues that he reasonably relied on Sgt. Himmelrick's assertion that double jeopardy barred him from redoing any of the field sobriety tests that had been performed prior to Grievant's arrival and that Himmelrick ordered Grievant to make a charging decision based on the two tests he had administered. Grievant implies that because Deputy Wetzel had jurisdiction to arrest the subject and had originally detained

him, he should have arrested the subject if he thought the subject was inebriated. Grievant avers that, even though NRP procedure requires that all six BUI field sobriety tests be administered in a predetermined order, Grievant was justified in only administering the two remaining tests to avoid the possibility of contradicting Deputy Wetzel in court. Grievant further contends that he was only permitted to administer field sobriety tests within two hours of the subject's detention and did not know how long the subject had been detained. Grievant avers that the subject's performance on the two field sobriety tests administered by Grievant did not provide probable cause to perform a PBT or evidentiary breathalyzer test. Lastly, he contends that, as the referring officer, Officer Haines was obligated to prepare the incident report.

Respondent counterargues that Sgt. Himmelrick did not dissuade Grievant from redoing any field sobriety test. Sgt. Himmelrick only raised the issue of double jeopardy to question whether multiple agencies could charge the subject with BUI. Sgt. Himmelrick determined that the Coast Guard and NRP had concurrent jurisdiction in federal and state courts, respectively.

Some of Grievant's arguments can be summarily dismissed. Grievant did not provide any authority for the following propositions: that supervisors have a duty to remind employees to prepare incident reports; that an officer is obligated to release a subject when the officer tells the subject he is going to release him; that any evidence obtained by an officer through pretense is unactionable; that Grievant was required to administer BUI testing within two hours of the subject's detention; that officers are prohibited from redoing field sobriety tests; and that referring officers are responsible for preparing incident reports. Regardless of Officer Haines' obligation to complete the incident report,

Grievant did not provide justification for ignoring orders from his supervisors that he prepare the report. Deputy Wetzel opting not to arrest the subject did not excuse Grievant from properly processing the subject for BUI.

The following factual determinations remain: whether Grievant simply forgot to prepare the incident report, whether Sgt. Himmelrick instructed Grievant to forego redoing any field tests conducted before his arrival, and whether Himmelrick directed Grievant to rely on only the two field tests he had administered. 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); *Young v. Div. of Natural Res.*, Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). 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).

The witnesses relevant to these determinations are Sgt. Himmelrick and Grievant. In assessing Grievant's credibility, the undersigned was struck by Grievant's frustration

in being ordered to prepare a report he felt should have been prepared by Officer Haines. An analysis of Grievant's credibility is anchored by Grievant's attitude towards this directive. Grievant's mindset was one of deflecting responsibility, as seen by his statement that his supervisors were just as blameworthy because they failed to remind him to do the report. Grievant had prepared 113 reports for the fiscal year without being reminded to complete any of them. Grievant infers that the report he was upset about being assigned was the one report that slipped his mind.

The evidence shows that Grievant was upset that the Coast Guard, Deputy Wetzel, and Officer Haines were each passing him their responsibilities, and he voiced his displeasure. Grievant testified that Deputy Wetzel should have arrested the subject if he deemed him inebriated, because Wetzel had detained him, and that Officer Haines should have done the incident report, because he took the referral before calling Grievant for assistance. Rather than overtly refuse to comply with orders, Grievant accomplished the same through passive-aggressively blaming his failure to prepare the report on his forgetfulness.

While it is natural to periodically forget, it is unlikely that Grievant forgot, given his annoyance at being handed responsibilities he felt belonged to other individuals. Grievant's testimony intimated as much through its inconsistency and implausibility. While he blamed his supervisors for not reminding him, Grievant admitted that Sgt. Himmelrick told him to do the report. The evidence shows that Grievant was obligated to submit the report by August 3, 2018, which was just days after the incident. Whether being ordered to prepare the report counts as a reminder or an initial order is mere

semantics that obfuscates the fact that Grievant was told within days of his deadline that he had to prepare the report.

Grievant made other inconsistent statements that reflect on his credibility. These include his testimony that he did not remember the subject's BAC from the PBT, in spite of telling the subject it was .09 BAC. Further, in his September 8, 2018, written response, after being directed by Cpt. Antolini to provide written detail of "all the actions he took with the suspect including what field sobriety tests he administered and the result of each test administered", Grievant failed to mention that he had administered the PBT, even though he noted that the subject had refused it. Grievant's words and actions conveyed that he did not want a record of the PBT.

While Sgt. Himmelrick could have had motive to cover for an uninformed directive if he had advised Grievant against redoing any of the BUI tests out of a concern for double jeopardy, such a misinterpretation of double jeopardy by Himmelrick seems implausible. Grievant obviates the merits of his own argument, along with any hint of untruthful motive from Sgt. Himmelrick, with the following statements in his September 8, 2018, letter: "The coast guard officer said they do BUI's in other states and the state will also charge BUI's on that same person. Sgt. Himmelrick agreed that we could also do a BUI on the same person." This statement not only reveals that Grievant knew that Sgt. Himmelrick's double jeopardy concern was directed towards dual BUI charges rather than dual BUI tests, but also that Sgt. Himmelrick rescinded any double jeopardy concern he voiced to Grievant.

Grievant also admitted in his September 8, 2018, letter that Sgt. Himmelrick told him to do the incident report. Grievant was inconsistent in writing that he told Lt.

McDougal that Sgt. Himmelrick did not tell him to fill out an incident report for the July 28, 2018, incident, but that he then told McDougal it must have slipped his mind. Grievant more affirmatively testified under cross examination that Sgt. Himmelrick told him to complete an incident report for said incident. Further, Grievant stated in his September 8, 2018, letter that he was in a vehicle with Sgt. Himmelrick on August 3, 2018, when Himmelrick told him that the subject was getting an attorney and that Grievant may have to testify in federal court. The evidence shows that August 3, 2018, was the report's due date. This conversation should have been sufficient to remind Grievant that the report was due that same day. Grievant's testimony indicates that Sgt. Himmelrick reminded him during their August 3rd conversation that Grievant had to submit the report. Grievant testified that Sgt. Himmelrick told him to submit the report while they were in the vehicle together. Grievant admitted in his letter that he and Sgt. Himmelrick were in a vehicle together on August 3, 2018, and thereby provides circumstantial evidence that Sgt. Himmelrick reminded Grievant to do the report on August 3, 2018.

Sgt. Himmelrick's demeanor was one of concern. His statements were consistent; in many instances by Grievant's own admission. Sgt. Himmelrick was a credible witness. Grievant's statements were at times inconsistent and implausible. Grievant also had motive to be untruthful. The undersigned concludes that Grievant did not forget to prepare the incident report by the August 3, 2018, deadline. The undersigned also concludes that Sgt. Himmelrick never instructed Grievant to forego redoing any field tests that had been administered before his arrival, or to only rely, for charging purposes, on the two field tests Grievant had administered.

Respondent suspended Grievant and placed him on a performance improvement plan due to his continued unacceptable conduct and performance, particularly "continued lack of sound judgment, poor job performance, and inefficiency" as an NRP officer between 2016 and 2018. The Division of Personnel's Administrative Rule states under "disciplinary suspension" that "[a]n appointing authority may suspend any employee without pay for a specified period of time for cause." W.VA. CODE ST. R. § 143-1-12.3.a. (2016). The West Virginia Supreme Court has found that good cause "means misconduct of a substantial nature directly affecting the rights and interest of the public …". Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin*., 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *Sloan v. Dep't of Health & Human Res*., 215 W. Va. 657, 600 S.E.2d 554 (2004) (*per curiam*). "The term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." *Graley v. Parkways Econ. Dev. & Tourism Auth*., Docket No. 91-PEDTA-225 (Dec. 23, 1991) (*citing Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) and *Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983)); *Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sep. 13, 2002); *Crites v. Dep't of Health & Human Res*., Docket No. 2011-0890-DHHR (Jan. 24, 2012).

In disciplining Grievant, Respondent also relied on its General Order 4. Respondent delineated its General Order 4 as allowing disciplinary action for many reasons, including incompetent performance, inefficient performance, and insubordination. Respondent never provided the undersigned with a copy of General

Order 4 either during or after the hearing, but did reference during the hearing, without objection, the portions it relied on in disciplining Grievant. Grievant's conduct surrounding the July 28, 2018, incident satisfies these delineated reasons, as well as the Division of Personnel's Administrative Rule.

The relevant undisputed facts are that Grievant administered only two of the six BUI field sobriety tests, that Grievant released the subject without charging or subjecting him to further testing after subject blew above the BAC limit on a PBT, and that Grievant failed to prepare an incident report even after his supervisors ordered him to do so. The undersigned has also concluded that Grievant intentionally failed to prepare the July 28, 2018, incident report and that Sgt. Himmelrick never instructed Grievant to forego redoing any field tests or to only rely on the two he had administered. Grievant's actions in not conducting proper BUI testing is misconduct. Grievant acknowledged that Deputy Wetzel told him the subject had failed the two field sobriety tests Wetzel had administered and that Wetzel told him the subject was likely intoxicated. Further, the subject registered above the legal BAC limit on the PBT administered by Grievant.

Cpt. Antolini testified that NRP protocol requires that all six field sobriety tests be performed in a set order, which would require Grievant to redo any tests that had already been done if they were not performed in proper order and to also redo tests he had not observed. In performing only two of the field sobriety tests despite having not observed any of the other tests, Grievant failed to abide by protocol. Even though Sgt. Himmelrick had directed Grievant to rely on his own testing when deciding whether to charge the subject, he did not limit the tests Grievant could perform. Grievant already had reason to believe that the subject could be intoxicated based on what Deputy Wetzel told him and

Grievant's PBT results. Further, Cpt. Antolini stated that the two field tests that Grievant administered were less indicative of intoxication than the ones that Wetzel administered. Therefore, Grievant could not reasonably rely on the results of his two field sobriety tests to determine that the subject was not intoxicated.

Grievant informed the subject he was releasing him before Grievant even administered a PBT, and then administered a PBT only as a prophylactic measure. While Grievant may have induced the subject to agree to a PBT by promising not to use the results against him, Grievant was under no obligation to keep that promise. Once the subject blew over the legal limit, even though the PBT had no evidentiary value, it was reasonable for Respondent to expect Grievant to hold the subject. The benefit of so doing would be that Grievant could absolve himself of suspicion of misconduct emanating from his subsequently releasing the subject after he provided a PBT reading over the legal limit or give himself the opportunity to properly process the subject for BUI. The evidence also shows that Grievant intentionally failed to do the incident report. Grievant exhibited a willful disregard of the employer's interest and a wanton disregard for the acceptable NRP officer standard of behavior, including ensuring public safety. Respondent was therefore justified in disciplining Grievant for the infractions surrounding the July 28, 2018, incident.

In order to prevail, Respondent does not need to have tangible proof of Grievant's misconduct. "Circumstantial evidence alone may be sufficient to meet an employer's burden to prove the charges against a disciplined employee by a preponderance of the evidence. *Galloway v. W. Va. Bd. of Trustees*, Docket No. 90-BOT-388 (Nov. 22, 1991). *See Bailey v. Logan County Bd. of Educ*., Docket No. 93-23-383 (June 23, 1994); *Kirk v. Mingo County Bd. of Educ*., Docket No. 89-29-99 (Sept. 12, 1999)." *Adkins v. Cabell*

County Brd. of Educ., Docket No. 2013-1028-CabED (Dec. 20, 2013), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-08 (May 27, 2014), *appeal dismissed*, W.Va. Sup. Ct. App. Docket No. 14-0628 (Feb. 25, 2015). The West Virginia Supreme Court of Appeals has held that circumstantial evidence "is intrinsically no different from testimonial evidence." *State v. Guthrie*, 194 W. Va. 657, 669, 461 S.E.2d 163, 175 (1995). "In both, the [trier of fact] must use its experience with people and events in weighing the probabilities." *Id*. In upholding the discipline imposed by the Respondent, the undersigned finds Respondent's rendition of facts to be highly plausible.

Grievant had been disciplined over a few-year period by Respondent for numerous infractions, which resulted in verbal and written reprimands. These infractions included failure to issue a citation (which Grievant reasoned it was his partner's duty to issue); failure to assist an officer who needed help on a patrol boat (which Grievant reasoned was avoidable because he told the officer beforehand to avoid the river due to inclement weather); and failure to discretely park his patrol car at a shooting range (in conjunction with protocol dictating he conceal himself) in order to apprehend violators. Grievant unsuccessfully grieved one of these incidents and failed to grieve the others. "If an employee does not grieve specific disciplinary incidents, he cannot place the merits of such discipline in issue in a subsequent grievance proceeding. *Jones v. W. Va. Dept. of Health & Human Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *See Stamper v. W. Va. Dept. of Health & Human Resources*, Docket No. 95-HHR-144 (Mar. 20, 1996); *Womack v. Dept. of Admin*., Docket No. 93-ADMN-430 (Mar. 30, 1994). In such cases, the information contained in prior disciplinary documentation must be accepted as true. *See Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4,

1994)." *Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997), ***aff'd***, Monongalia Cnty. Cir. Ct. Docket No. 97-C-AP-96 (Dec. 7, 1999), *appeal refused*, W.Va. Sup Ct. App. Docket No. 001096 (July 6, 2000). Respondent was therefore justified in relying on these prior incidents in issuing progressive discipline to Grievant.

Grievant implied that his three-day unpaid suspension and six-month improvement plan are disproportionate to his infraction, which he argues simply resulted from forgetfulness. "[A]n 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 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)." *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995), aff'd, Kanawha Cnty. Cir. Ct. Docket No 95-AA-66 (May 1, 1996), appeal refused, W.Va. Sup. Ct. App. (Nov. 19, 1996).

"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); *Olsen v. Kanawha County Bd. of Educ*., Docket No. 02-20-380 (May 30, 2003), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004). "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); *Cooper v. Raleigh County Bd. of Educ*., Docket No. 2014-0028-RalED (Apr. 30, 2014), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "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 was 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)." *Trimboli v. Dep't of Health and Human Res*., Docket No. 93-HHR-322 (June 27, 1997), ***aff'd*** Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

Grievant has not proven that the punishment he received was disproportionate to his infraction or that Respondent abused its discretion. In assessing the mitigation factors, the undersigned is mindful of the fact that Grievant's work history shows past problems with following orders and proper protocol. Respondent established a record of progressive discipline on Grievant. Further, Grievant acknowledged that the proper

protocol for administering field sobriety tests was to administer them in a set order. Grievant acknowledged that he had access to a list showing the correct order of testing. Yet Grievant not only failed to administer the full battery of tests, but released the subject without charging him, knowing that there was a good possibility the subject was intoxicated based on his conversation with Deputy Wetzel and his own PBT reading. Considerable deference is afforded Respondent's judgment, and the undersigned will not substitute Respondent's decision with his own where the punishment is not clearly disproportionate to the offense.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer 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. 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); *Young v. Div. of Natural Res*., Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). 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).

3. The Division of Personnel's Administrative Rule states under "disciplinary suspension" that "[a]n appointing authority may suspend any employee without pay for a specified period of time for cause." W.VA. CODE ST. R. § 143-1-12.3.a. (2016).

4. "The term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." *Graley v. Parkways Econ. Dev. & Tourism Auth*., Docket No. 91-PEDTA-225 (Dec. 23, 1991) (*citing Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) and *Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983)); *Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sep. 13, 2002); *Crites v. Dep't of Health & Human Res*., Docket No. 2011-0890-DHHR (Jan. 24, 2012).

5. "Circumstantial evidence alone may be sufficient to meet an employer's burden to prove the charges against a disciplined employee by a preponderance of the evidence. *Galloway v. W. Va. Bd. of Trustees*, Docket No. 90-BOT-388 (Nov. 22, 1991). *See Bailey v. Logan County Bd. of Educ*., Docket No. 93-23-383 (June 23, 1994); *Kirk v.*

Mingo County Bd. of Educ., Docket No. 89-29-99 (Sept. 12, 1999)." *Adkins v. Cabell County Brd. of Educ*., Docket No. 2013-1028-CabED (Dec. 20, 2013), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-08 (May 27, 2014), *appeal dismissed*, W.Va. Sup. Ct. App. Docket No. 14-0628 (Feb. 25, 2015). The West Virginia Supreme Court of Appeals has held that circumstantial evidence "is intrinsically no different from testimonial evidence." *State v. Guthrie*, 194 W. Va. 657, 669, 461 S.E.2d 163, 175 (1995). "In both, the [trier of fact] must use its experience with people and events in weighing the probabilities." *Id*.

6. "If an employee does not grieve specific disciplinary incidents, he cannot place the merits of such discipline in issue in a subsequent grievance proceeding. *Jones v. W. Va. Dept. of Health & Human Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *See Stamper v. W. Va. Dept. of Health & Human Resources*, Docket No. 95-HHR-144 (Mar. 20, 1996); *Womack v. Dept. of Admin*., Docket No. 93-ADMN-430 (Mar. 30, 1994). In such cases, the information contained in prior disciplinary documentation must be accepted as true. *See Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994)." *Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997), ***aff'd***, Monongalia Cnty. Cir. Ct. Docket No. 97-C-AP-96 (Dec. 7, 1999), *appeal refused*, W.Va. Sup Ct. App. Docket No. 001096 (July 6, 2000).

7. "[A]n 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 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)." *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No 95-AA-66 (May 1, 1996), *appeal refused*, W.Va. Sup. Ct. App. (Nov. 19, 1996). "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); *Olsen v. Kanawha County Bd. of Educ*., Docket No. 02-20-380 (May 30, 2003), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004). "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); *Cooper v. Raleigh County Bd. of Educ*., Docket No. 2014-0028-RalED (Apr. 30, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

8. An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "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 was 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)." *Trimboli v. Dep't of Health and Human Res*., Docket No. 93-HHR-322 (June 27, 1997), ***aff'd*** Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

9. Respondent proved by a preponderance of evidence that it had cause to discipline Grievant.

10. Grievant did not prove by a preponderance of evidence that mitigation of his punishment was 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: June 26, 2019

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Joshua S. Fraenkel
Administrative Law Judge