

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MELISSA L. JONES,

Grievant,

v.

Docket No. 2022-0669-DOC

WORKFORCE WEST VIRGINIA

Respondent.

DECISION

Grievant, Melissa L. Jones, filed an expedited level three grievance against her employer, Respondent, Workforce West Virginia, dated March 15, 2022, stating as follows: “[u]njustified and excessive suspension without pay for 3 days. Denied due process.”¹ As relief sought, Grievant states, “Remove suspension, receive back pay, and remove the incident from my personnel file.”

A level three hearing was held via Zoom video conferencing on May 17, 2022, before the undersigned administrative law judge who appeared from the Grievance Board’s Charleston, West Virginia, office. Grievant appeared in person and by her representative, Michael L., Hansen, UE Local 170, West Virginia Public Workers Union. Respondent appeared via Zoom by counsel, Kimberly A. Levy, Esquire, Workforce West Virginia, and Carrie Sizemore, Human Resources Director, Workforce West Virginia, served as Respondent’s representative. This ALJ and the parties appeared from separate locations. This matter became mature for decision on June 27, 2022, upon the receipt of the last of the parties’ post-hearing submissions.

¹ It is noted that Grievant did not address her due process claim in her post-hearing submissions. As such, this claim is deemed abandoned and it will not be addressed further herein.

Synopsis

Grievant is employed by Respondent as an Interviewer 2. Respondent suspended Grievant from employment without pay for three working days citing unacceptable conduct and behavior in violation of Workforce West Virginia's Administrative Directive. Grievant denies Respondent's claims and asserts that the three-day suspension was excessive, thereby warranting mitigation. Respondent proved its claims by a preponderance of the evidence and that it was justified in suspending Grievant from employment. Grievant failed to prove that the discipline imposed was excessive. Therefore, this grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is employed by Respondent as an Employment Programs Interviewer 2 stationed in Respondent's Summersville, West Virginia, office. Grievant has worked for Respondent in this capacity since November 2020.

2. At the times relevant herein, Okey Smith, Manager I, was Grievant's direct supervisor. Mr. Smith resigned from his position at Workforce West Virginia effective February 26, 2022.

3. Lori Turner is employed by Respondent as the Assistant Director of Field Operations and had been so since 2019. At the time relevant to this grievance, Assistant Director Turner was serving as both a Field Supervisor and the Assistant Director because of vacancies in the field.

4. On February 23, 2022, Grievant and Mr. Smith were working at the Workforce West Virginia office located in Summersville, West Virginia. Assistant Director Turner was visiting the office that day because Mr. Smith was leaving his position later that week. Mr. Smith asked Grievant to get him a Frappe if she went to McDonald's for lunch. Employees at the Summersville office regularly did this kind of thing for each other.

5. On that day, Grievant did not get to take her lunch when she normally would have because she had gone up to cover the front desk for another employee and had to be there longer than she had anticipated. When she returned to her office, she saw a plastic Frappe cup on her desk that was nearly empty. She took this as a message from Mr. Smith that he had already got his Frappe and there as no need to get him one.

6. Grievant took the plastic cup over to Mr. Smith's office, where Assistant Director Turner was talking to Mr. Smith, to acknowledge she got the message. Grievant got to Mr. Smith's office doorway, leaned halfway into his office, then threw the cup in Mr. Smith's direction. The cup hit the clear, protective COVID-19 screen in front of Mr. Smith's desk, splashing the liquid onto it, the floor, Mr. Smith's desk, his pants and shirt, and fell to the floor. This was unusual behavior for Grievant, who immediately apologized and started trying to clean it up.² Grievant was upset and returned to her work area and Mr. Smith finished cleaning up what he described as the "small mess" in his office.³

7. Assistant Director Turner was present in Mr. Smith's office when this incident occurred, but she did not see Grievant throw the cup or see Grievant's face when it was happening. She only saw the cup go past her face before it hit the plastic screen.

² See, testimony of Okey Smith.

³ See, testimony of Okey Smith.

8. Assistant Director Turner reported the incident to Chad Ketchum at Workforce West Virginia's Human Resources Office. Mr. Ketchum directed Assistant Director Turner and Mr. Smith to provide written statements about the incident. Assistant Director Turner was not asked to speak with Grievant. Whether it was in her written statement to Mr. Ketchum, or otherwise, Assistant Director Turner referred to the cup throwing as a violent act. Assistant Director Turner did not recommend any particular discipline for Grievant; however, she assumed that Grievant would be written-up.⁴

9. When Grievant returned to work on the next day, Mr. Smith came to speak with her at her desk. Grievant again apologized for her actions on February 23, 2022. Additionally, Mr. Smith informed Grievant that Assistant Director Turner wanted to speak with her, and that she would probably want to take some kind of action against Grievant, likely a write-up. Grievant told him that she understood and agreed that her conduct was inappropriate.⁵

10. After speaking with Mr. Smith, Grievant became very emotional and afraid. Grievant emailed Ms. Turner and, again, apologized for her actions on February 23, 2022, and stated that she did not think she could meet with her in person because she was afraid that she would break down. Grievant did not get a response to her email.⁶

11. On February 24, 2022, Assistant Director Turner hand delivered to Grievant a letter from Scott Adkins, Acting Commissioner for Workforce West Virginia, informing Grievant that a predetermination conference would be held on that day at 3:30 p.m. with Assistant Director Turner at the Summersville office. Acting Commissioner Adkins further

⁴ See, testimony of Lisa Turner.

⁵ See, testimony of Melissa Jones.

⁶ See, testimony of Melissa Jones.

explained in this letter that the purpose of the meeting was “to provide [Grievant] the opportunity to respond to the tentative conclusion that [Grievant] may be suspended for three days from [her] employment as an Employment Programs Interviewer 2 at Workforce West Virginia for misconduct.”

12. Grievant’s predetermination conference with Ms. Turner was held on February 24, 2022, as scheduled earlier that day. Attending this meeting were Assistant Director Turner, Lisa Lilly, and Grievant. During this meeting, Grievant explained that she had not intended to throw the plastic cup at Mr. Smith [before she got to his office], that she tossed it to Mr. Smith to put in the trash, but that she did not know why she threw it to begin with, and that she did not intend to throw the cup at Mr. Smith as hard as she did. Grievant also explained that it was not her normal behavior, and that she was embarrassed. Grievant also noted that she had been having medical issues recently.⁷

13. By letter dated February 25, 2022, Acting Commissioner Adkins informed Grievant that she would be suspended from employment for three days without pay for her unacceptable conduct on February 23, 2022, citing violations of Workforce West Virginia Administrative Directive 6400.01, “Conduct.” In this letter, Acting Commissioner Adkins informed Grievant that her suspension would begin on March 3, 2022, and end on March 7, 2022, and that she was expected to return to work on March 8, 2022. Grievant served her suspension as imposed.

14. Grievant had no disciplinary history at the time of the cup incident, and Mr. Smith described her as being an “exceptional” staff member.

⁷ See, testimony of Melissa Jones; testimony of Lori Turner; Grievant’s proposed Findings of Fact and Conclusions of Law, pg. 3.

15. Grievant did not hurl the cup at Mr. Smith in an aggressive manner. Grievant did not appear angry when the incident occurred. In fact, she was smiling when she tossed the plastic cup at him. Grievant was not yelling or raising her voice either.⁸ However, by her own admission, she threw the cup at Mr. Smith, and she threw it harder than she realized.

Discussion

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). “The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Respondent asserts that it properly suspended Grievant from employment without pay for three days for misconduct toward her supervisor, Okey Smith, on February 23, 2022, in that Grievant threw a cup containing some liquid at Mr. Smith, in violation of Workforce West Virginia Administrative Directive 6400.01. Respondent contends that Grievant’s conduct was violent and threatening. It is undisputed that Grievant threw the cup toward Mr. Smith, and that it hit the clear protective screen in front of his desk, splashing liquid on the screen, the floor, and Mr. Smith’s pants and shirt. Grievant denies throwing the cup in a violent manner and asserts that she had not intended to toss the cup at Mr. Smith when she got to Mr. Smith’s office, that she tossed the cup to him to put

⁸ See, testimony of Okey Smith.

in his trashcan, but that she did not know why she did that, and that she threw the cup harder than she realized. Grievant further argues that the three-day suspension without pay imposed upon her was excessive, and that the conduct was disruptive at best.

Workforce West Virginia Administrative Directive 6400.01, "Conduct," states, in part, as follows:

. . . Employees are also expected to be courteous to their co-workers and to provide prompt, efficient service to internal as well as external customers. . .

In the best interest of WFWV, its employees and the public, the following behaviors are prohibited:

Engaging in intimidating and/or threatening behavior;

Using foul or abusive language;

Engaging in sexual or racial harassment;

Making disrespectful and degrading comments to or about others;

Using, distributing, or selling illegal drugs or alcoholic beverages on the job;

Smoking inside a WFWV facility, except in an officially designated smoking area;

Gambling on the job;

Accepting gifts from companies or individuals with whom business is done, except as specifically permitted under the West Virginia Ethics Act;

Soliciting money or gifts from subordinates;

Loitering in the hallways and/or engaging in behaviors, which disrupt office operations; and

Taking photographs of individuals or creating audio or video recordings of conversations,

meeting or conferences without proper authorization and the approval of the parties being photographed or recorded.

The above list is not meant to be all-inclusive. Other behaviors are prohibited under individual policies or regulations.

It is each employee's responsibility to conduct him/herself in such a manner that will reflect a positive image of WFWV.

When necessary, the supervisor will discuss with the employee any need for a change in the employee's grooming and/or behavior. Any such discussions will be done individually, in private, and should include suggestions for improvement. . . .⁹ (Emphasis in original).

There is no dispute that Grievant threw the cup at Mr. Smith as already described herein. However, Grievant's statements about what she did and why she did are confusing, and somewhat conflicting. 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

⁹ See, Respondent's Exhibit 6, Administrative Directive 6400.01.

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).

Grievant contends that she had no intent to throw the cup at Mr. Smith while she was on the way to his office or when she got there. However, when she arrived at his office, she leaned in, smiled at him, and tossed the cup toward Mr. Smith. Grievant does not deny that she did this, and she does not assert it was an accident. Grievant has asserted that she was tossing the cup to Mr. Smith to put in his trash, but that she does not know why she threw the cup instead of just handing it to him. Grievant also testified that it was unlike her to throw anything like she did on February 23, 2022, and that she threw the cup harder than she had realized. Overall, it appears that Grievant is asserting that she did not know what came over her to make her throw the cup, and that maybe a change in her medication caused it.

It appears that Grievant is mostly credible, although confused by her own actions. However, it was only after she learned of the possibility of a three-day suspension on February 24, 2022, that she began making confusing statements about her intent, her actions, and why she threw the cup. She raised at level three that she tossed the cup “in jest,” but the evidence of the events of February 23, 2022, do not support the same, and cannot be reconciled with her statements and testimony about her intent, her actions, and her motivation to throw the cup at her supervisor. Lastly, Grievant acknowledged that her conduct was inappropriate and acknowledged that she would likely be disciplined for her conduct. She expected a write-up, but received a suspension. From the evidence presented, it appears that such may have been a motivating factor in her somewhat inconsistent statements and testimony.

The evidence presented does not establish that Grievant tried to harm Mr. Smith, or that her actions were part of some violent, or confrontational, outburst. Nonetheless, Grievant unexpectedly threw the cup at her supervisor in front of his supervisor, which startled them both, and such is unacceptable workplace conduct. Grievant threw the cup at Mr. Smith intentionally; it was not the result of an accident. The cup did not simply slip from Grievant's hand. West Virginia Division of Personnel Policy DOP-P15, "Workplace Security," states, in part, as follows: "Threatening Behavior: Conduct assessed, judged, observed, or perceived by a reasonable person to be so outrageous and extreme as to cause severe emotional distress, or to cause, or is likely to result in bodily harm."¹⁰ This policy further states that,

Threatening or assaultive behavior will not be tolerated and must be resolved immediately by managers/supervisors on a case-by-case basis. Any employee engaging in such behavior shall be subject to disciplinary action, up to and including dismissal. . . In determining whether an individual poses a threat or a danger, consideration must be given to the context on which a threat is made and to the following: the perception that a threat is real; the nature and severity of potential harm; the likelihood that harm will occur; the imminence of the potential harm; the duration of risk; and/or, the past behavior of an individual.¹¹

While it does not appear that Mr. Smith considered Grievant's actions to have been violent or threatening, Grievant actions were certainly not courteous and professional.¹² Further, Grievant's actions could certainly be perceived as violent, threatening, and/or

¹⁰ See, Respondent's Exhibit 5, WVDOP Policy DOP-P15, "Workplace Security," § II.(I).

¹¹ See, Respondent's Exhibit 5, WVDOP Policy DOP-P15, "Workplace Security," § III.(C).

¹² Carrie Sizemore, Human Resources Director, testified that Mr. Smith's written statement provided to Human Resources soon after the incident did not entirely comport with his testimony at the level three hearing. However, those written statements were not presented as evidence, and no one questioned Mr. Smith about any such discrepancies at the level three hearing.

assaultive by Assistant Director Turner who had not met Grievant before that day. Accordingly, based upon the evidence presented, Grievant's actions on February 23, 2022, violated Workforce West Virginia Administrative Directive 6400.01 and DOP Workplace Security Policy DOP-P15.

The issue now becomes, whether Respondent's decision to suspend Grievant from employment for three days without pay was arbitrary and capricious. 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 & 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 & 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).

"[T]he 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)." Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is

narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer].” *Trimboli v. Dep’t of Health & 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); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff’d* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003). Based upon the evidence presented, and as this ALJ may not substitute her judgment for that of the Respondent, this ALJ cannot find that Respondent’s decision to suspend Grievant for her misconduct was unreasonable, or otherwise arbitrary and capricious.

Grievant argues that her three-day suspension without pay was excessive. “[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 & Human Res./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).

This ALJ cannot conclude that the three-day suspension without pay is excessive. While no one was injured, Grievant intentionally threw a plastic cup containing a small amount of liquid at her supervisor in violation of Workforce West Virginia Administrative Directive 6400.01 and the DOP Policy DOP-P15, “Workplace Security.” Mr. Smith and Assistant Director Turner were not harmed, nor does it appear that Grievant intended to harm or to threaten them, but such does not matter. Grievant’s undisputed conduct is unacceptable, and Respondent may impose discipline for the same. Further, Respondent’s Administrative Directive 6400.20, “Disciplinary Actions,” “Suspension,” states that suspension may be the first disciplinary step if an employee has committed a more serious offense, and it requires that suspensions be “no less than three (3) days and no more than thirty (30) days.”¹³ Throwing a cup containing liquid at one’s direct supervisor and intermediate supervisor is a serious offense. Given the evidence

¹³ See, Respondent’s Exhibit 7, Administrative Directive 6400.20.

presented, Grievant has failed to demonstrate that her three-day suspension is so clearly disproportionate to her offense that it indicates an abuse of discretion. Therefore, this ALJ cannot conclude that the three-day suspension without pay was excessive. For the reasons set forth herein, this grievance is DENIED.

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. 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 & 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 & 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).

3. “[T]he “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).” Syl. Pt. 1, *Adkins v. W. Va. Dep’t of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). “While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer].” *Trimboli v. Dep’t of Health & 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); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff’d* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

4. “[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 & Human Res./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).

5. Respondent proved by a preponderance of the evidence that Grievant engaged in misconduct in violation of Workforce West Virginia’s Administrative Directive 6400.01 and DOP Policy DOP-P15 by intentionally throwing a plastic cup containing a small amount of liquid at her supervisor, thereby justifying Respondent’s decision to suspend Grievant for three days without pay.

6. Grievant failed to prove by a preponderance of the evidence that the discipline imposed upon her was excessive warranting mitigation of the same.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Intermediate Court of Appeals.¹⁴ Any such appeal must be filed within thirty (30) days of receipt of this decision. 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

DATE: August 9, 2022.

Carrie H. LeFevre
Administrative Law Judge

¹⁴ On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over “[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]” W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.