THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BRIAN DANIEL MYERS,

Grievant,

v. **Docket No. 2022-0068-DOT**

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant, Brian Daniel Myers, filed an expedited level three grievance dated July 27, 2021, against his employer, Respondent, Division of Highways ("DOH"), stating as follows: "Termination."[1] As relief sought, the Grievant states, "[r]einstatement of job with back pay if any."

A level three hearing was held on January 12, 2022, before the undersigned administrative law judge at the Grievance Board's Charleston, West Virginia, office.[2] Grievant appeared in person, *pro se*. Respondent appeared by counsel, Jack E. Clark, Esquire, and was represented by Kathryn Hill, Manager II, Highways Personnel Division, Employee Relations. This matter became mature for decision on February 28, 2022, upon the receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

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[1] Grievant attached to his statement of grievance a page of a letter dated July 14, 2021, from Respondent to Grievant on which Grievant made some notations, along with two handwritten pages in which he expands on his statement of grievance. These documents are included in the record of this grievance and are incorporated by reference, as if stated in verbatim.

[2] This matter was originally scheduled to be heard on October 13, 2021. However, Grievant requested a continuance of the proceeding and the same was granted. This grievance was next scheduled for hearing on January 12, 2022.

Synopsis

Grievant was employed by Respondent as a Transportation Worker 3 Crew Chief. Grievant was dismissed from employment after a GPS tracking device placed on his state vehicle revealed that he was using his state vehicle for personal use and leaving work for lengthy stretches of time without taking leave or receiving permission. Respondent asserts that its decision to dismiss Grievant was proper given the level of misconduct. Grievant admits his misconduct and does not dispute that discipline was justified. Grievant only asserts that dismissal was excessive for his offenses based upon his tenure and the agency's past practices. Respondent proved its case by a preponderance of the evidence. Grievant failed to prove that mitigation was warranted. Accordingly, this grievance is DENIED.

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

Findings of Fact

1. Grievant, Brian Daniel Myers, was employed by Respondent as a Transportation Worker 3 Crew Chief, in Respondent's District 1, Organization 0121 in North Charleston. This was a supervisory position. Grievant was employed by Respondent for approximately twenty-five years. During his tenure at DOH, Grievant has held a number of job classifications.

2. Russell Bishop is the Assistant County Highway Administrator at District 1, Organization 0121 in North Charleston. Mr. Bishop supervised Grievant.

3. Matthew Arrowood is an investigator for the DOH Legal Division. Mr. Arrowood has held this position for approximately two years. Before coming to work at DOH, Mr. Arrowood was a police officer for about twenty-eight years.

4. Kathryn Hill is employed by Respondent as a Manager II in its Personnel Division. Ms. Hill works in the Employee Relations section.

5. During a separate DOH investigation, DOH heard allegations that Grievant was committing fraud with respect to his work behavior.[3] It is unknown what the specific allegations were, who made them, or when they were made. Based upon these allegations, Respondent initiated an investigation into Grievant's comings and goings during regular working hours. Mr. Arrowood was assigned to investigate this matter. It is unknown who assigned Mr. Arrowood to this investigation.

6. During the time period at issue, Grievant worked mostly day shift at DOH. However, there were also times when he worked an evening shift from 8:00 p.m. to 8:00 a.m., and another from 12:00 a.m. to 8:00 a.m. It is noted that Grievant had permission to take his state-issued vehicle home with him after work and drive it back to work for his next shift.

7. Mr. Arrowood received an email from his supervisor instructing him to investigate Grievant. Mr. Arrowood began this investigation on December 2, 2020. On or about December 8, 2020, Mr. Arrowood's supervisor instructed him to place a GPS tracker on Grievant's DOH-provided vehicle, and he did so. It is noted that the identify of Mr. Arrowood's supervisor is unclear.

[3] *See*, testimony of Kathryn Mills.

8. Mr. Arrowood placed the GPS tracker, called "Flashback," on Grievant's vehicle without Grievant's knowledge. From this tracker, Mr. Arrowood was able to view Grievant's travel in his DOH vehicle from December 9, 2020, through December 28, 2020. However, the evidence presented at the level three hearing concerned only Grievant's activity from December 9, 2020, through December 19, 2020.

9. With the GPS tracker, Mr. Arrowood was able to view the vehicle's travel path, including stops. This tracker also kept track of how long the vehicle was stopped. Mr. Arrowood then compared the GPS tracker data with Google Maps to identify the locations where Grievant went on the dates in question.[4]

10. Based on the data collected from the GPS tracker, Grievant drove his state vehicle for his personal use, drove the vehicle to areas outside his designated work areas without permission, and took hours-long breaks during work hours, some of them being at his home, as well as other private residences.[5]

11. The GPS tracker data revealed that Grievant made many short stops each day at places such as, convenience stores, retail stores, and restaurants in his work area that were anywhere from two to seventeen minutes long. Grievant also made short stops during and after work hours in areas outside his work area.[6]

[4] *See*, Respondent's Exhibit 2, GPS Tracking Information and Mapping; testimony of Matthew Arrowood.
[5] *See*, Respondent's Exhibit 2, GPS Tracking Information and Mapping; testimony of Matthew Arrowood.
[6] *See*, Respondent's Exhibit 2, GPS Tracking Information and Mapping; testimony of Matthew Arrowood.

12. The GPS tracker data revealed that Grievant routinely made stops at his personal residence during his shifts. The duration of these stops varied.[7]

13. During his work hours on December 11, 2020, Grievant drove his state vehicle to a private residence, that of a former DOH employee (Former Employee A), who had been terminated for drug usage, and stopped there for seventeen minutes.[8]

14. On December 17, 2021, Grievant worked a twelve-hour shift, 8:00 p.m. to 8:00 a.m. During his shift, Grievant again drove his state vehicle to the residence of Former Employee A, and stayed there for three hours and fifty-five minutes. During that same shift, Grievant drove his state vehicle to a second private residence, that of another former DOH employee, who had also been terminated for drug usage (Former Employee B), in the Amandaville area and stopped there for two hours and fifty-two minutes. Amandaville is also outside Grievant's work area. During this same shift, at about 5:03 a.m., December 18, 2020, Grievant again drove his state vehicle to the residence of the (Former Employee A), and stayed there for another one hour and four minutes.[9]

15. The GPS tracker data showed that Grievant engaged in prohibited activity every day the GPS tracker was on his vehicle.

16. Mr. Arrowood concluded the investigation when he submitted his investigation report to DOH Human Resources in April 2021. No report other than the

[7] *See*, Respondent's Exhibit 2, GPS Tracking Information and Mapping; testimony of Matthew Arrowood.
[8] *See*, Respondent's Exhibit 2, GPS Tracking Information and Mapping; testimony of Matthew Arrowood.
[9] *See*, Respondent's Exhibit 2, GPS Tracking Information and Mapping; testimony of Matthew Arrowood.

GPS Tracking and Mapping Information identified as Respondent's Exhibit 2 was presented at the level three hearing.

17. On July 12, 2021, Kathleen Rushworth, Grievant's then-supervisor, delivered a FORM RL-544 "Notice to Employee" informing Grievant that his dismissal from employment was being recommended for violations of WVDOH Administrative Operating Procedures, Section II. "Standards of Work Performance and Conduct," based upon his actions from December 10, 2020, to December 18, 2020.

18. The FORM RL-544 informed Grievant that Respondent had scheduled an appointment to be held on July 14, 2021, at 10:00 a.m. for Grievant to meet with the District Manager, Arlie Matney, regarding the alleged policy violations.

19. Grievant attended the July 14, 2021, meeting with Mr. Matney as scheduled. Grievant did not deny the charges brought against him, but asserted that he should not be dismissed from employment. On a FORM RL-546, "Employee's Verification Of Disciplinary Action," in the section, "Summary of Employee's Remarks," Grievant wrote the following:

> I understand that I screwed up and deserve punishment. But after 20+ yrs, service with Highways dismissal is extreme for my first time being in trouble. As hard as it is to get good employees, wouldn't 5 or 10 days off or pay retribution (sic) be more better than take someone's livelihood. Highways is my only job I have every (sic) given my (sic) or but my heart into. I just ask please don't punish my family for my ignorance. You will never see my name come across your desk again. I think I at least deserve a 2nd chance.

20. By letter dated July 14, 2021, Grievant was dismissed from employment, effective July 29, 2021, for violating the Division of Highways standard of work performance and conduct, stating, in part, as follows:

> Through investigation, it has been determined that between December 10, 2020, and December 18, 2020, you took multiple breaks that lasted for periods of hours while you were to be working. Some of these breaks took place at the private residence of others. Additionally, you used your assigned DOH truck for personal non-work-related transportation during off hours. Some of the visits made by you in your assigned DOH truck, were to locations outside of your ORGs work area. These facts are supported by data from a GPS tracker, by time reports, and by your own admission.

21. After receiving his dismissal letter, Grievant telephoned Natasha White, Acting Director of Highways Human Resources Division, and argued again against his dismissal.

22. By letter dated July 22, 2021, Acting Director White informed Grievant that his termination would stand. In this letter, Action Director White stated, in part, as follows:

> As a follow up to our conversation on July 22, 2021, I want to let you know that I have taken your statement into consideration and evaluated the circumstances regarding your termination. Unfortunately, I must concur with the recommendation and subsequent confirmation of termination based on the facts discovered during the investigation and your own admission. . . .[10]

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. In nondisciplinary matters, the burden is on the Grievant to prove the necessary elements of his claim by a preponderance of the evidence. W.VA. CODE ST. R. § 156-1-3 (2008). "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*

[10] *See*, Respondent's Exhibit 6, letter dated July 22, 2021.

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 argues that Grievant violated the DOH standards by using his state vehicle for personal matters both during work and after work, driving his state vehicle to areas not included in his work area, and by taking long, extended breaks at his home, as well as at the private residences of former employees while he was on work time. Grievant has not denied that he engaged in this conduct. However, Grievant argues that given the past practices within his DOH organization, he should be given a second chance. Grievant also appears to assert in his post-hearing submissions that some of his travel and stops, as recorded by the GPS tracker, such as a trips to and stops on Reed Drive, pertained to work his crew was, or would be, conducting.

The DOH Standards of Work Performance and Conduct state, in part, as follows:

> 2. Regular attendance, including promptness in reporting to work and reporting availability for work, and appropriate use of leave, meal, and break time. . .
>
> 5. Compliance with working rules, policies, procedures, regulations, and laws that apply to Division of Highways employees, including but not limited to those promulgated by organizational units, the Division of Highways, the Division of Personnel, the Department of Transportation, or any other State agency. . .
>
> 7. Careful and diligent use and safeguarding of all state properties, facilities, equipment, and records, and use of the same for designated or approved uses only. . . .[11]

[11] *See*, Respondent's Exhibit 5, July 14, 2021, letter; Respondent's Exhibit 9, DOH "Standard of Work Performance and Conduct."

Permanent state employees who are in the classified service can only be dismissed "for good cause, which means misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance & 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*). *See also* W. VA. CODE ST. R. § 143-1-12.02 (2016). "Although it is true that dismissal is inappropriate when the employee's violation is found to be merely a technical one, it is also true that seriously wrongful conduct can lead to dismissal even if it is not a technical violation of any statute. . . The test is not whether the conduct breaks a specific law, but rather whether it is potentially damaging to the rights and interests of the public." *W. Va. Dep't of Corr. v. Lemasters*, 173 W. Va. 159, 162, 313 S.E.2d 436, 439 (1984). "'Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. W. Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988) (*per curiam*).

"[T]he work record of a long time civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 285, 332 S.E.2d 579, 585 (1985). *See Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983); *Serreno v. W. Va. Civil Serv. Comm'n*, 169 W. Va. 111, 285 S.E.2d 899 (1982). Supervisors "may be held to a higher standard of conduct, because [they are] properly expected to set an example for employees under their supervision, and to enforce the

employer's proper rules and regulations, as well as implement the directives of [their] supervisors." *Wiley v. Div. of Natural Res.*, Docket No. 96-DNR-515 (Mar. 26, 1988); *Linger v. Dep't of Health & Human Res.*, Docket No. 2010-1490-CONS (Dec. 5. 2012).

Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *See State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Id.* (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).

Further, the "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. *See Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). "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); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

Most of the facts in this grievance are undisputed. Grievant has not denied that he improperly used his state vehicle for personal use, such as going to the bank, retail stores, and convenience stores, before, during, and after his work shifts. Some of these stops were very minor, such as stopping at a convenience store for two minutes. However, there were so many of these stops and many were much longer. On at least one occasion, Grievant used his state vehicle to visit the residence of his girlfriend's mother for an hour and forty-six minutes well before his shift was to begin.

The evidence established that Grievant also took numerous extended breaks during his work shifts, without permission or taking leave, in violation of DOH Standards of Work Performance and Conduct. These breaks were not the usual type of breaks. From December 16, 2020, through December 18, 2020, while the GPS tracker was on his vehicle, Grievant stopped at the private homes of two former DOH employees, who had been dismissed for misconduct, in the middle of the night or in the very early hours of the morning, and stayed there for hours at a time. For example, one of these breaks was for two hours and twenty-six minutes. Another was for three hours and fifty-five minutes. A third was for two hours and fifty-two minutes. The GPS tracking information for these three days also shows that Grievant also went to his home on several occasions during his shifts. Some of those breaks were a few minutes, and others, longer.

Grievant has not denied this conduct and admits that he violated the DOH Standards of Work Performance and Conduct. He also admits that he did not report these

stops on his time sheets. As Grievant has admitted his misconduct, there is no need to analyze the policies to determine whether he violated the same.

Grievant's only argument is that his dismissal was excessive punishment for his misconduct. "[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).

Grievant was a long-term employee and he was a supervisor. This was the first time Grievant received disciplined during his twenty-five-year tenure at DOH. While Ms. Hill could not specifically recall considering Grievant's tenure when making the decision to dismiss him from employment, those making the decision were aware of his tenure with DOH. Nonetheless, Grievant improperly used his state vehicle for his personal use routinely. Grievant knew that this conduct was prohibited. It does not matter if employees in the past were allowed to do so. Moreover, Grievant skipped work for hours at a time and he reported his full shift as time worked. Grievant knew his actions violated policies. Grievant was a supervisor. As such, Respondent is allowed to hold him to a higher standard because he is to set an example for others and to enforce the agency's policies and rules. The argument that he should be given another chance because of past practices is simply invalid. It is true that Respondent was not required to dismiss Grievant from employment for his misconduct, but it had the authority to do so. Given Grievant's admitted misconduct, this ALJ cannot find that dismissal was disproportionate to his offenses, clearly excessive, or that it was arbitrary and capricious. Accordingly, 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. In nondisciplinary matters, the burden is on the Grievant to prove the necessary elements of his claim by a preponderance of the evidence. W.VA. CODE ST. R. § 156-1-3 (2008). "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. Permanent state employees who are in the classified service can only be dismissed "for good cause, which means misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance & 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*). *See also* W. VA. CODE ST. R. § 143-1-12.02 (2016).

3. Supervisors "may be held to a higher standard of conduct, because [they are] properly expected to set an example for employees under their supervision, and to enforce the employer's proper rules and regulations, as well as implement the directives of [their] supervisors." *Wiley v. Div. of Natural Res.*, Docket No. 96-DNR-515 (Mar. 26,

1988); *Linger v. Dep't of Health & Human Res.*, Docket No. 2010-1490-CONS (Dec. 5. 2012).

4. Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *See State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Id.* (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).

5. Further, the "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. *See Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). "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); *Blake v. Kanawha County Bd. of Educ*., Docket No. 01-20-470 (Oct. 29, 2001).

6. “[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).

7. “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).

8. “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).

9. Respondent proved by a preponderance of the evidence that Grievant violated the WVDOH Standards of Work Performance and Conduct thereby justifying his dismissal.

10. Grievant failed to prove by a preponderance of the evidence that mitigation of his dismissal is warranted.

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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2018).

DATE: April 11, 2022

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Carrie H. LeFevre
Administrative Law Judge