ROGER GAINS,

Grievant,

v. **Docket No. 97-DOH-203**

WEST VIRGINIA DIVISION OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

DECISION

Roger Gains, Grievant, filed this grievance against Respondent, West Virginia Division of Transportation/Division of Highways on July 17, 1996. He alleges:

> On July 9, 1996[,] I was notified I would be suspended beginning July 16, 1996[,] for 10 days and ordered to reimburse the agency $122.10 for unauthorized use of State equipment[,] and theft of materials. This disciplinary action is unwarranted and violated Division of Personnel Rules and Regulation, W[.] V[a.] Code, and Division of Highways disciplinary policy.

As relief, Grievant requests:

> Expunge my record of this disciplinary action, compensate me for lost time w[ith] interest, and reimburse $122.10 w[ith] interest[,] and any other way to be made whole.

Grievant was denied relief at the lower levels of the grievance procedure on July 30, 1996, August 20, 1996, and April 10, 1997, respectively. Grievant appealed to Level IV on April 24, 1997. After three continuances for good cause shown, a Level IV evidentiary hearing was held at the Grievance Board's office in Elkins, West Virginia, on August 26, 1997. The case became mature for decision on October 6, 1997, with receipt of the parties' proposed findings of fact and conclusions of law.

STIPULATIONS

The parties stipulated to the following findings of fact:

1. Grievant is employed by [Respondent] at its Lewis County Headquarters in

Weston as an Equipment Operator II.

2. On the day of the incident in question, Grievant was operating a tandem dump truck, ED 377-144, and hauling bituminous paving material [“grindings”] which had been milled from State highways in the Weston area.

3. Grievant and his son own property in the Shadybrook section of Weston. The property is adjacent to an undeveloped right of way owned by the City, which also serves the Weston Assembly of God [Church].

4. Grievant's property had been used by [Respondent's] Lewis County personnel on an undetermined number of occasions for the disposal of dirt, stumps and other waste resulting from ditching or other maintenance operations.

5. The waste material which was dumped on Grievant's property was wet, and the waste material and the truck traffic which occurred during the dumping operations had caused a problem with mud.

6. Grievant diverted a load of the milled material or “grindings” from the milling operation in Weston to the City right of way, adjacent to Grievant's son's property, in an attempt to dry up the muddy area where waste material had been dumped.

7. The milled material was reported on Form DOH-12, the Daily Work Report, as “no charge” material.

8. The milled material was later spread and leveled by a private contractor.

The following findings of fact were derived from the record by the undersigned.

FINDINGS OF FACT

1. On or about April 10, 1996, Grievant took a load ofgrindings without authorization.

2. While County Superintendent William Cayton was checking a job site, he thought it was strange that Grievant had not delivered a load of grindings to the site. Therefore, Mr. Cayton went to Grievant's property and saw grindings on the City right of way (mentioned in Stipulation #6). Later, Mr. Cayton took Mr. Ed Lowe, Maintenance Assistant, and Mr. Orie Heater, Crew Leader/Foreman, to the location in question to view the grindings. Mr. Cayton then informed Mr. Murphy, District Seven Engineer. Level III, Tr. at 3, 4, and 17.

3. Mr. Murphy requested an independent investigator to examine the alleged unauthorized taking of grindings by Grievant.

4. Mr. Steve Mayes, a Senior Engineering Technician with the Auditing Division, who has previously investigated cases, was assigned to perform the investigation. Mr. Mayes' investigation included statements (of Mr. Cayton, Associate County Superintendent (ACS) Heater and Grievant), photographs and a map of 420 Mid Avenue in Weston, West Virginia (the site where Grievant dumped the state material in question), and daily work reports (prepared between March 25, 1996, and April 10, 1996).

5. Mr. Mayes concluded that Respondent “has used this area before as a waste area[,] but Investigator does not believe that [Grievant] had permission to haul the [grindings] to this area.” Level III, Agency Ex. 4.

6. Mr. Mayes recommended, “The District Engineer needs to review this matter and take the appropriate disciplinary actionagainst [Grievant]”. Level III, Agency Ex. 4.

7. Grievant was issued a letter dated June 21, 1996, charging him with “unauthorized use of state owned materials and/or the vehicle used to transport.” Level III, Agency Ex. 4.

8. The load of materials Grievant took weighed 15 tons, and the per ton value of the materials was $8.14. Level III, Tr. at 42.

DISCUSSION

Although Grievant was denied relief at the lower levels of the grievance procedure, at Level III a three member panel (See footnote 1) hearing the grievance made the following **recommendation** to then Commissioner of Highways Fred VanKirk, in a written decision with findings of fact and conclusions of law:

> The disciplinary action should be reduced from a 10-day suspension to a three-day suspension, with accompanying restoration of seven days' wages, benefits and service; and Grievant should be liable for the cost of the materials which were diverted, in the original amount of $122.10.

Commissioner VanKirk did not adopt the recommendation, and denied the grievance, at Level III, in a one page letter, without

findings of fact and conclusions of law, which in pertinent part, provides:

> I have reviewed the third level grievance evaluators' recommendation on your grievance and deny the relief sought. The action taken at the district level isconsistent with decisions made in similar circumstances.

Grievant contests "the Commissioner reserving the right to modify the decision issued by [a] designee panel." However, the Code does not prohibit the practice of a panel from hearing a grievance and making a recommendation to a Commissioner. This practice is used by at least one other Commissioner. See Smith v. W. Va. Dept. of Tax and Revenue, Docket No. 97-ABCA-066 (Aug. 25, 1997).

W. Va. Code §29-6A-6, in pertinent part, provides "every decision pursuant to a hearing shall be in writing and shall be accompanied by findings of fact and conclusion of law." The Commissioner did not alter any of the findings of fact or conclusions of law decided by the panel. The Commissioner merely modified the relief section of the panel's recommended decision, and included his reason for denying the proposed relief. The undersigned cannot find that the Commissioner's modification of relief is a basis for relief at this level, or violated W. Va. Code §29-6A-6.

Pursuant to W. Va. Code §29-6A-6, "[t]he burden of proof shall rest with the employer in disciplinary matters." Kuthy v. W. Va. Div. of Highways, Docket No. 92-DOH-480 (Aug. 10, 1993). The standard of proof utilized in a grievance hearing is by a preponderance of the evidence. Holland v. W. Va. Dept. of Commerce, Docket No. 93-CLER-465 (June 13, 1994); Schmidt v. W. Va. Dept. of Highways, Docket No. DOH-88-063 (Mar. 31, 1989).

Rule 12.03, of the Administrative Rules and Regulations of theDepartment of Personnel, entitled "Suspension," provides that an employee may be suspended for cause as long as the employee's conduct has a rational nexus to the employee's performance of his/her job. In this case, Respondent suspended Grievant for taking a load of "grindings". Respondent set forth the charge against Grievant in a letter dated June 21, 1996, which, in pertinent part, provides:

> It is the position of the West Virginia Division of Highways that the rotomill grindings are the property of this agency. As such, the grindings were being used on roadways maintained by the West Virginia Division of Highways. The actions of Mr. Roger Gains violate[d] West Virginia Division of Highways policy regarding the unauthorized use of

state owned materials and/or the vehicle used to transport.

The parties stipulated, in Stipulation #6, that Grievant took a load of grindings. Therefore, the first issue to be addressed is whether Grievant had permission to take the grindings.

Grievant has maintained throughout this grievance (in written statements given to Mr. Murphy and Mr. Mayes, and in testimony at Levels III and IV) that he had permission from ACS Heater to take a load of grindings, and place it in a muddy area on his (Grievant's) son's property which had been damaged by Respondent when it used an established dumping/waste site on his property. Grievant also asserts that “the punishment for the allegations is unfair and harsh.” Grievance Statement.

In a statement Grievant wrote on June 26, 1996, he stated, in pertinent part, that ACS Heater “said to wait until [the] last load of the day because [Mr. Cayton] wouldn't like it.” During theLevel III hearing, Grievant testified that ACS Heater's response to his request was “yes[,] and take a little bit of them down there and dry that mud up in front of the house.” However, it was at Level IV that Grievant for the first time testified concerning the exact words used by ACS Heater, which were “Rog' make sure its the last load of the day. You know Bill Cayton. Bill Cayton thinks those grindings are as good as gold.”

ACS Heater has continuously denied giving Grievant permission to take the grindings, and testified that Grievant told him that he (Grievant) was going to take a load of grindings to cover the mud where Respondent had been dumping waste (dirt, stumps, etc.). ACS Heater also testified that he did not respond to Grievant (because he did not have authority to permit Grievant to take the grindings), and that he did not tell Mr. Cayton what Grievant had said.

Grievant asserts that ACS Heater is untruthful, and “lost his nerve” because he is “fearful of or intimidated” by Mr. Cayton. Grievant's Proposed Findings of Fact and Conclusions of Law, at 8. The undersigned does not agree with Grievant's assertion. It does not mesh that ACS Heater would defy Mr. Cayton (by giving Grievant grindings that Mr. Cayton thinks are as good as gold) if he is fearful of Mr. Cayton.

Moreover, Grievant never informed his crew leader (or foreman) that he was given permission to take a load of grindings instead of to the roads Respondent was working on the day in question. No oneknew when Grievant took the grindings. If he had permission, someone should have known when and where he was going. Even if the load Grievant took was the last load of the day, he should have

inquired of a superior at that time what he should do with that last load of grindings, or should have informed a superior of the situation and of the alleged permission from ACS Heater.

Grievant's taking of the grindings and use of the state owned vehicle was not authorized. Even though Respondent's normal practice is to repair property it has damaged while dumping waste materials on a landowner, does not entitle Grievant to take and use State property without proper authorization, nor does it convert Grievant's unauthorized taking to a permissible act.

Grievant asserted that the grindings were of no value because they were listed as a “no charge” item. Respondent milled the grindings from the road using its own labor, equipment, and materials. The grindings were recycled materials of Respondent, were of value to Respondent, and could have been placed on a county road in place of purchased materials, even though they were listed as a “no charge” material for internal control purposes.

When considering whether to mitigate the punishment, factors to be considered include: (1) the employee's work history and personnel evaluation, (2) the penalties imposed by the employer against other employees guilty of similar offenses, (3) the clarity with which the employee was advised of prohibitions against the conduct involved, and (4) whether the penalty is clearly disproportionate to the offense proven. See Parham v. RaleighCounty Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1991).

Concerning the first factor, Grievant's work history and personnel evaluation, his testimony that he has been a good employee, with good evaluations, was not challenged. Concerning the second factor, penalties imposed by the employer against other employees guilty of similar offenses, Grievant elicited evidence concerning a case involving the charge of excess stone being placed on a driveway, and that case is still under investigation. Level III, Tr. at 32-33. Concerning factor three, Grievant has been with Respondent for over eighteen years, and should know that state materials cannot be taken without proper authorization. Mr. Cayton also testified that he has warned his employees on several occasions that state materials cannot be taken for personal use. At Level III, Mr. Murphy testified “I think we've expressed it a number of times that materials from the DOH, no matter how useless we see or feel that they are, they cannot be taken for personal use.” Level III, Tr. at 41. At Level IV, Mr. Murphy testified “Our people know, and to my knowledge all of them know, that we do not use any kind of material from the state, even, we stress the fact that we don't even junk material that we're going to let the junk man have, we don't even allow them to have that.”

Grievant, with over eighteen years of experience, should know better than to take state property for personal use. Moreover, ACS Heater's alleged statements should have put Grievant on notice that taking a load of grindings was wrong.

Finally, whether the penalty is clearly disproportionate tothe offense proven, Grievant failed to prove, by a preponderance of the evidence, that a ten day suspension, plus a reasonable cost for the materials taken, was too harsh a penalty for the unauthorized taking and use of state property. The undersigned cannot find that the penalty was not clearly disproportionate to the offense proven. Moreover, the penalty was not arbitrary and capricious.

In addition to the foregoing findings of fact and narration, it is appropriate to make the following formal conclusions of law.

CONCLUSIONS OF LAW

1. W. Va. Code §29-6A-6 does not prohibit the Chief Administrator or his/her designee from changing or modifying a recommended decision.

2. If there is a change or modification by the Chief Administrator or his/her designee of the designee(s) appointed to hear the grievance and prepare a recommended decision, then the Chief Administrator or his/her designee must state the reasons for the changes or modifications.

3. Rule 12.03, of the Administrative Rules and Regulations of the Department of Personnel, entitled “Suspension,” provides that an employee may be suspended for cause as long as the employee's conduct has a rational nexus to the employee's performance of his/her job.

4. Pursuant to W. Va. Code §29-6A-6, “[t]he burden of proof shall rest with the employer in disciplinary matters.” Kuthy v. W. Va. Div. of Highways, Docket No. 92-DOH-480 (Aug. 10,1993). The standard of proof utilized in a grievance hearing is by a preponderance of the evidence. Holland v. W. Va. Dept. of Commerce, Docket No. 93-CLER-465 (June 13, 1994); Schmidt v. W. Va. Dept. of Highways, Docket No. DOH-88-063 (Mar. 31, 1989).

5. Respondent proved, by a preponderance of the evidence, its charges against Grievant, and did not err in determining restitution of $122.10 for the load of grindings.

6. When considering whether to mitigate the punishment, factors to be considered include: (1) the employee's work history and personnel evaluation, (2) the penalties imposed by the employer against other employees guilty of similar offenses, (3) the clarity with which the employee was advised of prohibitions against the conduct involved, and (4) whether the penalty is clearly

disproportionate to the offense proven. See Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1991). 7. Grievant failed to prove, by a preponderance of the evidence, that a ten day suspension, plus a reasonable cost for the materials taken, was too harsh a penalty for the unauthorized taking and use of state property. The penalty was not clearly disproportionate to the offense proven. Moreover, the penalty was not arbitrary and capricious.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal mustbe filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and
provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

Dated: December 12, 1997 _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

Footnote: 1

The panel consisted of three employees of Highways, two District Engineers and a member of the Traffic Engineering Division.