DANIEL WESTFALL,

Grievant,

v. **DOCKET NO. 97-DOH-349**

WEST VIRGINIA DEPARTMENT
OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant, Daniel Westfall, filed grievances at level four, pursuant to the provisions of W. Va. Code §29-6A-4(e), as a result of his suspension and subsequent demotion. The two grievances were consolidated for hearing at level four, where a hearing was conducted in this Grievance Board's office in Morgantown, West Virginia, on October 21, 1997, October 22, 1997, and November 19, 1997. This matter became mature for decision on December 22, 1997, upon receipt of the parties' post-hearing written proposals. (See footnote 1)

The following findings of fact are made from a preponderance of the credible evidence presented at the level four hearing.

Findings of Fact

1. Prior to August 1, 1997, Grievant was employed by Respondent Division of Highways ("DOH") as a Senior Engineering Technician - Construction in District Four.

2. Grievant has been employed by DOH for 33 years, and, prior to the incidents whichled to this grievance, he had received excellent performance evaluations and had not been subject to any discipline.

3. Grievant was suspended from his duties on June 19, 1997, by letter from Jeff Black, Director of Human Resources for DOH. The reason for the action was stated as follows:

> Your suspension will be for a period of thirty calendar days pending the outcome of an investigation into your participation in and condonation of alleged improprieties concerning travel time, improper use of state time and facilities, and violation of the Workplace Security Policy. At the conclusion of the investigation, further disciplinary action, up to and including dismissal, may be taken.

4. The investigation into Grievant's activities was prompted by a complaint from an employee of a contracting company which was working on the “Laurel Truss Bridge Project.” Grievant was the project supervisor for the Laurel project, meaning that he was responsible for overseeing all the work done by the contractor and ensuring that all specifications of the contract between DOH and the contractor were met.

5. An investigation conducted by the Auditing Division of the Department of Transportation revealed the following facts:

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> Ron Wright, a DOH inspector and subordinate of Grievant, kept personal belongings at the field office for the Laurel project, showered there, did his laundry, and appeared to have slept there, at least occasionally. (The field office was a rented, three-bedroom house.)

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> Among the personal belongings kept by Mr. Wright at the field office were several guns; however, no ammunition was found in the office.

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> The bed at the field office was placed there by Grievant.

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> The bedroom where Mr. Wright's personal belongings were found also contained a television and VCR.

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> Mr. Wright received pay for travel time when there was insufficientmileage on his assigned DOH vehicle to justify it. Grievant, as Mr. Wright's supervisor, signed and

approved his time sheets reflecting the travel time.

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Grievant stored, butchered and canned two deer at the field office. Canning the venison required cutting the meat into small pieces, cooking it in a pressure cooker, and placing it into glass jars.

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Grievant often kept his dog at the field office while he was working. The dog did not cause any damage or disturbance to the field office or people working there.

6. By letter dated July 21, 1997, Mr. Black informed Grievant that he was being demoted as a result of the findings of Auditing's investigation. The letter stated, in part:

> Pursuant to Section 11.04 of the State Division of Personnel's Administrative Rule, you are being demoted in title and salary with prejudice from a Senior Engineering Technician - Construction at $2822.00 per month to a[n] Engineering Technician - Construction at $2399.00 per month.
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> The reason for your demotion is that between August 1, 1996 and June 4, 1997, while assigned as project supervisor to the Laurel Truss Bridge Project in Harrison County, you were negligent in your duties by failing to provide adequate management and supervision for a subordinate who was being paid for travel time and overtime for which he was not entitled, using the field office as his domicile, and keeping firearms at the field office in violation of the Workplace Security Policy. Additionally, you kept a dog at the field office and skinned and canned a deer at the field office during state time.
>
> The effective date of your demotion will be August 1, 1997.

7. Ron Wright was terminated from employment, based upon the same facts listed in Finding of Fact 5, above, which termination was upheld by this Grievance Board in Wright v. Division of Highways, 97-DOH-285/347 (Nov. 26, 1997).

Discussion

In disciplinary matters, the employer has the burden of proving each element of the charges by a preponderance of the evidence. W. Va. Code §29-6A-6; Miller v. W. Va. Dept. of Health &Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Division of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

Suspensions of classified employees are authorized by Rule 12.03 of the Administrative Rules and Regulations of the Division of Personnel, which states, in part, that "[an employer] . . . may suspend any employee without pay for cause or to conduct an investigation regarding an employee's conduct which has a rational nexus to the employee's performance of his/her job." Rule 11.04 of the same regulations addresses demotions, providing that employees can be involuntarily demoted "for improper conduct." There is no provision explaining what types of conduct may justify demotion.

Respondent contends that Grievant's punishment was entirely appropriate in this case. In fact, Respondent's witnesses testified that dismissal was considered and discussed, and probably justified, but that Grievant's long, unblemished work record saved his job. Respondent concedes that Grievant's actions and/or failure to supervise with regard to Mr. Wright are the more serious concerns here and were the basis for the decision to demote him. The "deer canning" and having the dog at the office are less serious violations which, alone, may not have justified demotion.

Grievant argues that he should not be held responsible for the actions of his subordinate, and that, therefore, both the suspension and demotion were improper. He denies any knowledge of Mr. Wright staying in the field office or keeping firearms there and contends that he innocently authorized Mr. Wright's travel time requests, believing that Mr. Wright was entitled to payment forall the time listed.

The first issue to be decided is what Grievant knew or should have known about Mr. Wright's activities and whether it was appropriate to punish him for his subordinate's indiscretions. Grievant testified that, although he knew that Mr. Wright kept various personal belongings in the bedroom at the field office, he did not know specifically if Mr. Wright ever spent the night there. However, Grievant did not see anything wrong with Mr. Wright staying overnight after working a very long shift. In fact, Grievant says that this was the reason he brought the bed to the field office in the first place. The Laurel project was a "fast track" project where double shifts were anticipated, and Grievant

thought that having the bed there would be helpful to him personally, so that he could “grab a nap” while the contractor worked overtime.

Grievant's explanation for Mr. Wright having personal belongings in the field office was that Mr. Wright's father was in a nearby hospital at some time during the project, so Mr. Wright would shower after finishing work and drive directly to the hospital. However, Grievant did not know when or for how long Mr. Wright's father was in the hospital. Furthermore, this does not explain why Mr. Wright was doing laundry in the field office or storing his guns there. As to the guns that were found in the bedroom closet, Grievant stated that he was totally surprised by this discovery and, had he had any indication that they were there, he certainly would have told Mr. Wright they were not allowed.

There is no specific evidence in this case that Mr. Wright was actually living in the field office. No witnesses could testify that they knew, for a fact, that he stayed there overnight, and Mr. Wright did not testify in this case. However, Bill Reed, a DOH employee, testified that Mr. Wright had asked him, when he arrived at the office in the morning, to knock on the bedroom door to wakehim. Mr. Reed did so on a few occasions, but did not know whether or not Mr. Wright was actually in the bedroom, which was kept closed. Nonetheless, there are strong indications that, if not living there, Mr. Wright was at the very least frequently using the office for his own personal convenience by showering there, washing clothes, and storing personal belongings, including firearms.

Most troubling is Grievant's attitude about Mr. Wright's conduct. He testified that, when it became obvious that Mr. Wright was bringing personal belongings to the office and showering there, he “didn't question him about it” and “it was of no concern” to him (Grievant). As Respondent has properly pointed out, Mr. Wright's actions are obviously violative of the West Virginia Ethics Act. Specifically, W. Va. Code §6B-2-5 prohibits public employees from knowingly using their positions for personal gain, and various sanctions may be imposed for such conduct, including public reprimands and fines. Grievant claimed no knowledge of any prohibition regarding use of state facilities for one's personal benefit, both with regard to Mr. Wright's and his own actions. In fact, he attempted to make a comparison of reading the Bible while on a work break to the situation here. This is hardly a valid comparison and need not even be discussed.

The West Virginia Supreme Court of Appeals has recognized that public employees are not ordinarily chargeable with the acts of their subordinates unless they participate in such acts or otherwise sanction them. Oakes v. W. Va. Dept. of Fin. & Admin., 164 W. Va. 384, 264 S.E.2d 151

(1980). However, the Oakes Court also noted that employees can be held responsible for subordinates' actions if they have been negligent in supervising such subordinates. Further, and most important to the instant case, Oakes recognized that a public employee cannot escape responsibility for a subordinate's misfeasance by simply ignoring it. Id. at 387.

The undersigned has no reason to disbelieve Grievant's claims that he did not know if Mr.Wright was actually using the office as his domicile or what he was keeping in the room he used. However, even Grievant's lack of knowledge of Mr. Wright's activities, as a supervisor, warranted discipline. Taking Grievant's testimony as true, his lack of attention to a subordinate under his direct supervision assisted that subordinate in committing ethical violations and engaging in inappropriate activities. Most egregious of Mr. Wright's transgressions, perhaps, was the storage of weapons in a DOH field office. Although no ammunition was stored with them, and they were not loaded, there is no dispute that their presence in the office was a violation of the Division of Personnel's Workplace Security Policy, applicable to all classified employees. (See footnote 2) To make matters worse, Grievant testified that Mr. Wright showed him a gun he was carrying in his personal vehicle while they were working on the Laurel project, which is also a violation of the policy. If Grievant had exercised his supervisory responsibility and warned Mr. Wright that guns should not be brought to the workplace, perhaps Mr. Wright would not have felt so comfortable in storing guns at the field office. Grievant's lack of proper attention and supervision allowed a subordinate to commit blatant and serious violations of laws and policies; therefore, discipline was appropriate under the standards set forth in Oakes, supra.

A second factual issue which must be resolved concerns Mr. Wright's charging of travel time while apparently using his personal vehicle. The payment of travel time is authorized by the Department of Transportation's “Commissioner's Policy Memorandum--Assignment and Use of Transportation Vehicles” (Respondent's Exhibit 7). As outlined in the policy memorandum, employees who are assigned to work on projects which are a long distance from their homes areallowed to use a state vehicle, which is to be parked at the closest “pooling location” within 20 miles of the employee's domicile. The employee then drives to the pooling location each morning, picks up the state vehicle and drives it to the work site. The policy provides that the employee should be paid for reasonable travel time between the pooling site and work location, as follows:

> All . . . personnel assigned a state vehicle which are approved to pool at a location other than the employee's domicile . . . will be paid actual travel time for all time from

> that pool location to and from the work site. Written approval by Division Director or District Engineer is required prior to payment and should be for the most expedient route between the project and the pooling location.

(Emphasis added.)

In the instant case, the auditors' investigation revealed approximately 80 instances where Mr. Wright claimed 1.5 hours of travel time, but the mileage on his assigned state vehicle for that particular day was insufficient to justify the driving time. According to Respondent's witnesses, Mr. Wright claimed that he did drive on those days, but in his personal vehicle. Grievant argues that, because there is no policy specifically prohibiting payment for travel time in one's personal vehicle, Mr. Wright did nothing wrong. Grievant produced numerous witnesses who stated that they had no knowledge of any prohibition of receiving travel time pay for personal vehicle use.

While Grievant is correct that there is no specific prohibition against travel time for one's personal vehicle, the policy memorandum clearly only authorizes travel time for state vehicle use, which is necessitated by assigning employees to remote locations. Harry Carr, District Engineer for District Four, testified on behalf of Respondent, and he approves all vehicle requests. Mr. Carr testified that the policy memorandum means exactly what it says, and travel time is only authorized for state vehicles. He further stated that, at the very least, Mr. Wright should have asked permission to use his own car in place of a state vehicle and receive travel time pay. The same policy memorandum goes on to state that it is a violation of West Virginia statutes (§§ 12-3-13 and 61-3-22) for employees to receive pay to which they are not entitled, making it “imperative that pooling locations and travel times be monitored closely by management.” To defend his actions, Grievant also testified, and offered other witnesses who testified similarly, that it is common practice for supervisors to just “sign off” on employees' time sheets, trusting the employees to be honest about their hours. However, this does not excuse Grievant from being familiar with and enforcing DOH policies. By signing Mr. Wright's time sheets, Grievant gave his approval of Mr. Wright's requests for pay to which he was not entitled. He again assisted his subordinate in violating set policies, for which he needed to be disciplined.

As to Grievant's own conduct, he maintains that he butchered and canned the deer meat on his own time, and that the dog did not cause any problems at the office. The undersigned agrees with Grievant that it was probably harmless to have the dog at the field office. The evidence shows that

the dog was usually tied up outside, caused no damage or problems, and that no one minded having him there. However, insofar as the deer is concerned, it is simply not plausible that Grievant skinned, butchered and canned two fully grown deer only during his half-hour lunch period each work day. Moreover, Grievant's use of the field office to store the deer carcasses, butcher and can them also constitutes use of state facilities for his own private gain in violation of the Ethics Act.

Accordingly, the undersigned finds that it was, in fact, appropriate for DOH to discipline Grievant for all of the activities described above, both his own and Mr. Wright's. The remaining issue is whether the penalty imposed upon Grievant was appropriate. Respondent has argued that it could have dismissed Grievant for his conduct, but kept him on in view of his long and unblemished work record. Our Supreme Court has held that the work record of a long-time civilservice employee is a factor to be considered when deciding whether the employee has been appropriately punished. Buskirk v. Civil Service Comm'n, 175 W. Va. 279, 332 S.E.2d 569 (1985). This Grievance Board has, in the past, determined that an employer's punishment was disproportionate to the charges proven. See Hunt v. W. Va. Bureau of Employment Programs, Docket No. 97-BEP-412 (Dec. 31, 1997).

There is no specific law, policy or regulation dictating the appropriate punishment for the offenses in this case. As stated above, suspensions are authorized while an investigation is being conducted. Due to the nature of Grievant's and Mr. Wright's misuse of state facilities and other misconduct, it was not improper for DOH to utilize this provision to suspend Grievant without pay for thirty days. However, the only specific provision addressing demotions is the Division of Personnel rule cited above, which only states that it can be utilized against an employee for “improper conduct.” Chapter 12 of DOH's Administrative Operating Procedures is entitled “Disciplinary Action, Suspension and Dismissal” and discusses procedures to be followed in disciplining employees, but it does not prescribe specific discipline for specific conduct. It merely provides examples of “minor infractions” and “possible first offense dismissals,” and does not discuss in what types of cases demotion may be used. However, one example of a first offense dismissal is “unauthorized use of state vehicles and/or materials.” Certainly, if an employee can be dismissed for unauthorized use of state materials, it would logically follow that demotion would not be an excessive punishment for personal use of state facilities and allowing a subordinate to commit various violations of law and policy. This Grievance Board has held that suspension and demotion were appropriate when “Grievant's misconduct was of a substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or

official duty without wrongfulintention." Thomas v. W. Va. Dept. of Health and Human Resources/ Hopemont Hospital, Docket No. 96-HHR-378 at 11 (June 12, 1997) (citations omitted). This principle certainly applies in the instant case.

"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. W. Va. Dept. of Health and Human Resources/Welch Emergency Hospital, Docket No. 96-HHR-183 at 7 (Oct. 3, 1996) [citing Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1991)]. The undersigned finds that there was no abuse of discretion in this case, given the serious nature of Grievant's conduct. A more severe punishment could have been implemented, but was not, and there is no basis for reducing the penalty of demotion.

In addition to the foregoing findings and discussion, the following conclusions of law are appropriate.

Conclusions of Law

1. In disciplinary matters, the employer has the burden of proving each element of the charges by a preponderance of the evidence. W. Va. Code § 29-6A-6; Miller v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Division of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992).

2. Respondent proved all charges against Grievant by a preponderance of the evidence, including negligent supervision of a subordinate who violated DOH policies and state law andGrievant's use of state facilities for his own private benefit.

3. Grievant's misconduct was of a substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention. Respondent proved by a preponderance of the evidence that good cause existed to take the disciplinary action implemented against Grievant. Thomas v. W. Va. Dept. of Health and Human Resources/Hopemont Hospital, Docket No. 96-HHR-378 (June 12, 1997); See Oakes v. W. Va. Dept. of Fin. & Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980).

4. "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. W. Va. Dept. of Health and Human Resources/Welch Emergency Hospital, Docket No. 96-HHR-183 at 7 (Oct. 3, 1996) [citing Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1991)].

5. Respondent's disciplinary action against Grievant was not disproportionate or excessive to the offenses he committed, and Respondent did not abuse its discretion in implementing the discipline it selected.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the circuit court of the county in which the grievance occurred, and such appeal must be 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.

Date: January 16, 1998 _____

V. DENISE MANNING

Administrative Law Judge

Footnote: 1

Pursuant to Grievance Board policy, this disciplinary action has been placed in a priority position on the decision docket.

Footnote: 2

Both Grievant and Mr. Wright signed an "Employee Acknowledgement Form" pertaining to the Workplace Security Policy, its provisions and penalties for violations, on April 29, 1995 (Exhibit 9 of Respondent's Exhibit 1).