RONALD G. YEATER,

Grievant,

v. **Docket No. 00-HHR-224**

**WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES/
MILDRED MITCHELL-BATEMAN HOSPITAL,**

Respondent.

DECISION

Ronald G. Yeater (Grievant) was employed by the West Virginia Department of Health and Human Resources (DHHR) at Mildred Mitchell-Bateman Hospital (MMBH) as a Psychologist I (Therapist) until his dismissal on July 13, 2000. This grievance was filed directly at Level IV the next day.

A Level IV hearing was held on December 8, 2000, before the undersigned Administrative Law Judge, at the Grievance Board's Charleston office. DHHR was represented by Assistant Attorney General Anthony Eates, II, and Grievant represented himself. The parties were given until January 9, 2001, to submit proposed findings of fact and conclusions of law, both parties did so,[1] and this grievance became mature for

1 Grievant's proposals were submitted late, but were accepted by the undersigned in the interest of fairness.

decision on that date.[2] The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievant was employed by DHHR as a Psychologist I on the Mentally Ill/Chemically Addicted Team at MMBH.

2. On or about May 1, 2000, Grievant received an e-mail from a former lover, asking him for help with an alcohol problem. This e-mail contained an attachment: a partially nude photograph of the sender.

3. MMBH Policy MMBHC035, entitled Use of E-mail and Licensed Proprietary Software, was not in effect at the time of this incident

4. The photograph shows a frontal view of a standing woman, with her left breast exposed. It is not pornographic or obscene.

5. Grievant printed the e-mail and attachment.

6. The computer Grievant used was in the admissions area of MMBH, in an area partially visible to the public.

7. MMBH Admissions Clerk Leigh Hale saw the photograph and was offended.

8. On May 16, 2000, Grievant's supervisor Robert Nida (Nida) met with him, told him that printing photographs of nude women was not appropriate behavior at MMBH, and told him to stay out of the admissions area.

9. Grievant's duties include placing a daily census report in the admissions area every day. Nida did not relieve Grievant of this duty.

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2 Consistent with this Grievance Board's policy, this dismissal grievance has been advanced upon the docket for an expedited decision.

10. Someone saw Grievant leaving the Admissions area on May 22, 2000.

11. On August 24, 1998, Grievant received a written reprimand for taking a broken chair from MMBH.

12. On May 12, 1999, Grievant received a one day suspension without pay for using inappropriate language with a patient.[3]

13. Grievant was dismissed on July 13, 2000, for insubordination and inappropriate and non-professional conduct.

DISCUSSION

In disciplinary matters, the employer has the burden of proving the charges by a preponderance of the evidence. W. Va. Code § 29-6A-6; Evans v. Dep't of Health & Human Resources, Docket No. 97-HHR-280 (Nov. 12, 1997), Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

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3 This suspension was affirmed in Yeater v. W. Va. Dep't of Health and Human Resources/Mildred Mitchell-Bateman Hospital, Docket No. 00-HHR-084 (Aug. 31, 2000).

The administrative rules of the West Virginia Division of Personnel provide that an employee in the classified service may be dismissed for "cause." 143 CSR § 12.2, Administrative Rule, W. Va. Div. of Personnel (July 1, 1998). The phrase "good cause" has been determined by the West Virginia Supreme Court of Appeals to apply to dismissals of employees whose misconduct was of a "substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention." Syl. Pt. 2, Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1985); Syl. Pt. 1, Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); See Hundley v. W. Va. Div. of Corrections/Mount Olive Correctional Complex, Docket No. 97-CORR-197A (May 12, 1999).

DHHR dismissed Grievant for insubordination and continued inappropriate and non-professional conduct, alleging that he was insubordinate when he returned to the admissions area after having been ordered not to go there, and that he violated MMBH's e-mail policy by printing a pornographic picture from a hospital computer.[4] Grievant argues that he should not have been dismissed, as he was given conflicting orders by MMBH and was not made aware of the MMBH e-mail policy under which he was dismissed. Grievant seeks reinstatement, lost wages, the removal of erroneous and unfair disciplinary records from his file, and two weeks leave time to recuperate prior to his return to work.

Grievant's dismissal letter stated:

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4 There was testimony by one witness at Level IV that Grievant had also viewed, but not printed, an image of Britney Spears clad only in her bra and panties. However, this was not established by a preponderance of the evidence.

> The charge for this dismissal is insubordination and continued inappropriate and non-professional conduct. The specific reason for this charge is that in late April or early May of this year you were observed viewing and printing several copies of inappropriate (sexual) images from the internet on hospital owned equipment in the Admissions Unit while on duty. Your actions were clearly prohibited by Bateman Hospital Policy MMBHC035, Use of E-mail and Licensed Proprietary Software. Your interactions with staff in Admissions were clearly inappropriate. A Bateman staff member informed you that she found this behavior offensive, yet you did not attempt to cease your activity. On May 16, 2000, you met with the MICA program Director to discuss this incident. During that meeting, you were directed to stay away from the Admissions area. You ignored that directive and were seen leaving the Admissions area on May 22, 2000.

Insubordination is the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle v. Bd. of Directors, So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). Insubordination may also be found when an employee shows a willful disregard for the implied directions of an employer. Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988), citing Weber v. Buncombe County Bd. of Educ., 266 S.E.2d 42 (N.C. 1980).

To prove insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995). An employer also has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority . . ." McKinney v. Wyoming County Bd. of

Educ., Docket No. 92-55-112 (Aug. 3, 1992)(citing In re Burton Mfg. Co., 82 L.A. 1228 (Feb. 2, 1984)).[5]

Insubordination can result in disruption of the workplace such that it amounts to misconduct of a substantial nature affecting the rights and interests of the public. Payne v. W. Va. Dep't of Transp., Docket No. 93-DOH-454 at 11-12 (Apr. 29, 1994). Acts of insubordination such as failure to obey a lawful order of a superior have been held to constitute gross misconduct justifying dismissal. Bone v. W. Va. Dep't of Corrections, 163 W.Va. 253, 255 S.E.2d 919 (1979).

There are few defenses to the charge of insubordination. The prudent employee complies with his employer's directives first, and expresses his disagreement later. Hundley v. W. Va. Div. of Corrections, Docket No. 96-CORR-399 (Oct. 27, 1997); See, e.g., Surber v. Mingo County Bd. of Educ., Docket No. 96-29-015 (Dec. 30, 1996). Essentially, what an employer must demonstrate to substantiate insubordination, is that the employee was given an order, directive, or rule, which did not entail unnecessary physical risk to himself or other employees, and the employee failed to comply. Hundley, supra.

DHHR based its decision to terminate Grievant upon provisions of its Policy Memorandum 2104 (Policy 2104), entitled Progressive Discipline; DHHR Policy 2108,

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5 See Maxey v. McDowell County Bd. of Educ., Docket No. 97-33-208 (Apr. 30, 1997) (Grievant held insubordinate for stomping on her evaluation and threatening to blow her principal's head off with a shotgun); Dilley v. Cabell County Bd. of Educ., Docket No. 97-06-164 (Sep. 19, 1997)(Grievant held insubordinate for falsifying student records); Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996)(Grievant held insubordinate for grabbing, threatening, and cursing student); Thompson v. Logan County Bd. of Educ., Docket No. 95-23-127 (July 17, 1995)(Grievant held insubordinate for refusing to meet with his supervisor and refusing to acknowledge his refusal); Arbaugh v. Putnam County Bd. of Educ., Docket No. 90-40-437 (May 22, 1991)(Grievant held insubordinate for refusing to work).

(Policy 2108) entitled Employee Conduct; MMBH Policy MMBHC015 (Policy MMBHC015), entitled Progressive Disciplinary Action, and MMBH Policy MMBHC035, entitled Use of E-mail and Licensed Proprietary Software.

Policy MMBHC015 provides for progressive discipline ranging from verbal reprimand through written reprimand, suspension, demotion, and dismissal. It provides that "[i]n most cases this system begins with a verbal reprimand, followed by a written reprimand, suspension, and ultimately dismissal. All instances of misconduct shall be investigated. . . ." Policy 2104 provides "a corrective approach that implements a level of discipline commensurate with increasingly severe discipline actions for continued unsatisfactory behavior or performance." It too provides for progressive discipline ranging from verbal reprimand through written reprimand, suspension, demotion, and dismissal, and mandates that an employee be adequately warned of the consequences of his conduct. Policy 2104 requires that an employee "be made aware of expected and acceptable levels of performance. . ." and be allowed to tell "his side of the story" before a disciplinary decision is made.

A preponderance of the credible evidence of record in this grievance convinces the undersigned that, while DHHR established a charge of insubordination against Grievant, this is a classic case of under-investigation and over-reaction.

Grievant admits returning to the Admissions area after Nida told him not to. Although his duties include placing a census report in the admissions area daily, Grievant should have complied with his employer's directives first, or at least asked for clarification, and expressed his disagreement later. Hundley, supra. Grievant's argument that he was given contradictory orders by MMBH is noted, along with the fact that MMBH Human

Resource Director Kieth Anne Worden (Worden) credibly testified that this fact might have made a difference in the decision to fire Grievant, had she known of it. No evidence was presented to show that Grievant did anything more in the admissions area than file his report. Although DHHR proved its charge of insubordination against Grievant, it failed to prove that Grievant's dismissal was appropriate, for the following reasons.

First, the photograph that Grievant printed is not pornographic or obscene. Material is pornographic when it "is of or pertaining to obscene literature; obscene; licentious. Material is pornographic or obscene if the average person, applying contemporary community standards, would find that the work taken as whole appeals to the prurient interest and if it depicts in a patently offensive way sexual conduct and if the work taken as a whole lacks serious literary, artistic, political or scientific value." Black's Law Dictionary (5th ed. 1979); citing Miller v. California, 413 U.S. 15, 24-25, 93 S.Ct. 2607, 2615, 37 L.Ed.2d 419 (1973). Prurient means a "shameful or morbid interest in nudity, sex, or excretion." Black's Law Dictionary (5th ed. 1979); citing Attorney General v. Book Named "John Cleland's Memoirs of a Woman of Pleasure," 349 Mass. 69, 206 N.E.2d 403 (1965).

The photograph that Grievant printed does not depict sexual conduct at all, let alone in a way that would offend contemporary community standards. It does not appeal to the prurient interest.

Second, MMBH's investigation into this incident was seriously flawed. Grievant's immediate supervisor, Robert Nida, credibly testified at Level IV that he learned of the photograph incident from Penny Koontz, who heard of it from Leigh Hale's mother, who heard of it from Ms. Hale. MMBH Administrator Carol Wellman credibly testified that she learned of this incident from Worden. Ms. Worden credibly testified that she learned of it

from Jack Clohan, who learned of it from Equal Opportunity Coordinator Donna Montie. MMBH Director of Quality and Risk Management Patricia Franz credibly testified that she learned of it during lunch with a former employee of MMBH, Ava Patterson, who had heard a rumor that a new employee in Admissions had seen the photograph and been made to feel uncomfortable, and that she had a duty to report this rumor to Equal Opportunity Coordinator Montie. It thus appears that Wellman learned of this incident from Worden, who learned of it from Clohan, who learned of it from Montie, who learned of it from Franz, who learned of it Patterson, from who learned of it from Hale's mother, who learned of it from Hale. It is noted that Hale never complained to MMBH authorities, or filed a sexual harassment complaint, about the offending photograph.

The record does not even contain the name of the person who saw Grievant leaving the Admissions area on May 22, 2000. Faced with this collection of rumors, seventh-hand information, and multiple hearsay, one would think that MMBH officials would have been particularly careful to get Grievant's side of the story before deciding to dismiss him, as urged by Policy 2108. However, it is uncontradicted that Grievant was not asked for his version of events until after the decision to dismiss him had been made.[6]

Third, the specific policy relied upon by MMBH in dismissing Grievant, MMBH Policy MMBHC035, entitled Use of E-mail and Licensed Proprietary Software, was unknown to him, so that he was not adequately warned of the consequences of his conduct or made aware of expected and acceptable levels of performance as required by Policy 2108. Nida

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6 After the dismissal decision had been made, but one day before his dismissal letter was issued, Grievant was given an opportunity to provide information explaining his behavior. Grievant's dismissal letter informed him of his appeal rights, but did not afford him an opportunity to tell his side of the story.

credibly testified that this policy was still being developed at the time of this incident, and that Grievant would not have been aware of it. This policy appears to have been revised on June 15, 2000, and is not on a long list of policies that Grievant acknowledges having reviewed as of July 14, 1997.

Finally, progressive discipline was not followed. Grievant's most serious previous disciplinary action was a one-day suspension. Policy MMBHC015 and Policy 2108 provide for increasingly severe discipline ranging from verbal reprimand through written reprimand, suspension, demotion, and dismissal, with Policy 2104 stating that "[p]rogressive and constructive disciplinary action will progress, if required, along a continuum from verbal warning to dismissal, with incremental steps between[.]" MMBH telescoped this list, jumping straight from the shortest suspension possible to the most severe penalty, dismissal. While both policies provide for flexibility in selecting the level of discipline to be assigned for a given offense, they also require that progressive discipline be determined by the severity of the violation.

The undersigned was not convinced by DHHR and MMBH that Grievant's insubordination rises to the level of being good cause for his dismissal. Buskirk, supra. Grievant credibly testified that he received the offending e-mail from a former lover who was seeking help with an alcohol problem, and that her partially nude photograph was an attachment to it; that the sender asked for help with Alcoholics Anonymous, which had inappropriately assigned her a male sponsor, and that he had taken the photograph back to the woman and counseled her on why it was inappropriate.

The undersigned finds it significant that Grievant did not seek out this photograph, but received it unsolicited from an acquaintance. His offense was more in the nature of

receiving a personal telephone call at work, albeit one that disturbed a co-worker. DHHR and MMBH presented no evidence to show that any member of the public was offended by the photograph or even saw it, although they produced evidence tending to prove that a patient was being admitted to MMBH when Grievant printed the offending photograph. It is questionable whether Grievant acted with wrongful intention, Buskirk, supra, or whether his misconduct was of a substantial nature affecting the rights and interests of the public. Payne, supra.

At Level IV, DHHR and MMBH introduced MMBH Policy MMBHC024, entitled Employee Use of Hospital Owned Equipment, Tools, Supplies and/or Services. This policy provides generally that employees are not to use MMBH equipment for personal use. It appears that, by printing the offending photograph, Grievant committed a de minimus violation of this policy. However, Grievant was not charged with violating this policy in his dismissal letter, and DHHR cannot rely it to support Grievant's dismissal.

Grievant bears the burden of demonstrating that the penalty imposed by MMBH, dismissal, was "clearly excessive or reflects an abuse of the agency['s] 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). "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). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997).

Mitigation of a penalty is considered on a case by case basis. McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and include consideration of an employee's long service with a history of otherwise satisfactory work performance. Pingley v. Div. of Corrections., Docket No. 95-CORR-252 (July 23, 1996). This Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996).

Applying the factors set forth in Phillips to this grievance, it is concluded that Grievant had twice before been the subject of low-level disciplinary action by MMBH. The record does not reflect how MMBH has disciplined other employees for similar offenses. The penalty employed by MCBE for this offense is disproportionate to the offense proven, particularly in these circumstances, where Grievant was charged with insubordination for failing to obey conflicting directives, for disobeying a policy of which he had not been made aware, for printing an allegedly pornographic photograph that was not, and all following a shoddy investigation. Dismissal was clearly excessive and reflects an abuse of the agency['s] discretion and an inherent disproportion between the offense and the personnel action. Martin, supra. The undersigned finds, by a preponderance of the evidence, that

mitigating circumstances exist for Grievant. These circumstances support a reduction in the excessive penalty assessed against Grievant, in the interest of fairness and objectivity. Pingley, supra. Therefore, the only issue remaining to be resolved is what remedy should be granted.

W. Va. Code § 29-6A-5(b) provides that "[h]earing examiners may provide relief as is determined fair and equitable in accordance with the provisions of this article, and take any other action to provide for the effective resolution of grievances not inconsistent with any rules or regulations of the board or the provisions of this article[.]" In construing the virtually identical language of W. Va. Code § 18-29-5, regarding the grievance procedure for education employees, the West Virginia Supreme Court of Appeals in Graf v. West Virginia University, 189 W. Va. 214, 429 S.E.2d 426 (1992), held as follows: "[c]learly the Legislature intended to give the examiners who hear the grievances the power to fashion any relief they deem necessary to remedy wrongs done to educational employees by state agencies."

Accordingly, and bearing in mind MMBH's progressive discipline policy, Grievant's dismissal will be reduced to a five day suspension without pay. Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. In disciplinary matters, the employer has the burden of proving the charges by a preponderance of the evidence. W. Va. Code § 29-6A-6; Evans v. Dep't of Health & Human Resources, Docket No. 97-HHR-280 (Nov. 12, 1997), Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992.).

2. Dismissal of an employee in the classified service must be for good cause, which means misconduct of a "substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention." Syl. Pt. 2, Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1985); Syl. Pt. 1, Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Hundley v. W. Va. Div. of Corrections/Mount Olive Correctional Complex, Docket No. 97-CORR-197A (May 12, 1999).

3. Insubordination is the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle v. Bd. of Directors, So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). Insubordination may also be found when an employee shows a willful disregard for the implied directions of an employer. Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988), citing Weber v. Buncombe County Bd. of Educ., 266 S.E.2d 42 (N.C. 1980).

4. Material is pornographic when it "is of or pertaining to obscene literature; obscene; licentious. Material is pornographic or obscene if the average person, applying contemporary community standards, would find that the work taken as whole appeals to the prurient interest and if it depicts in a patently offensive way sexual conduct and if the work taken as a whole lacks serious literary, artistic, political or scientific value." Black's Law Dictionary (5th ed. 1979); citing Miller v. California, 413 U.S. 15, 24-25, 93 S.Ct. 2607, 2615, 37 L.Ed.2d 419 (1973). Prurient means a "shameful or morbid interest in nudity, sex, or excretion." Black's Law Dictionary (5th ed. 1979); citing Attorney General v. Book Named "John Cleland's Memoirs of a Woman of Pleasure," 349 Mass. 69, 206 N.E.2d 403 (1965).

5. The photograph printed by Grievant was not pornographic or obscene.

6. DHHR and MMBH proved that Grievant was insubordinate.

7. Grievant bears the burden of demonstrating that his dismissal was "clearly excessive or reflects an abuse of the agency['s] 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). "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). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997).

8. Mitigation of a penalty is considered on a case by case basis. McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and include consideration of an employee's long service with a history of otherwise satisfactory work performance. Pingley v. Div. of Corrections., Docket No. 95-CORR-252 (July 23, 1996).

9. This Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's

assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996).

10. Mitigating circumstances exist for Grievant.

11. The penalty employed by MCBE for Grievant's offense is disproportionate to the offense proven, particularly in these circumstances, where Grievant was charged with insubordination for failing to obey conflicting directives, for disobeying a policy of which he had not been made aware, for printing an allegedly pornographic photograph that was not, and all following a shoddy investigation. Dismissal was clearly excessive and reflects an abuse of the agency['s] discretion and an inherent disproportion between the offense and the personnel action. Martin, supra.

12. W. Va. Code § 29-6A-5(b) provides that "[h]earing examiners may provide relief as is determined fair and equitable in accordance with the provisions of this article, and take any other action to provide for the effective resolution of grievances not inconsistent with any rules or regulations of the board or the provisions of this article[.]" Graf v. West Virginia University, 189 W. Va. 214, 429 S.E.2d 426 (1992).

13. In the interest of fairness and objectivity, Grievant's dismissal will be reduced to a five day suspension without pay.

Accordingly, this grievance is **GRANTED**. Grievant's dismissal will be reduced to a five day suspension without pay, and Grievant will be reinstated to his position with all back pay, including interest; leave; seniority; and all other benefits to which he would have been entitled had he not been dismissed. Record of his dismissal shall be removed from his file.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7 (1998). 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. 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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ANDREW MAIER
Administrative Law Judge

Dated: January 19, 2001