JERRY DAVIS,

Grievant,

v.

DOCKET NO. 00-HHR-344/388

WEST VIRGINIA DEPARTMENT OF HEALTH
AND HUMAN RESOURCES/BUREAU FOR
CHILDREN AND FAMILIES,

Respondent.

D E C I S I O N

Grievant, Jerry Davis, filed this grievance directly to level four on May 18, 2001, challenging a 30-day suspension without pay issued on May 14, 2001, by his employer, the West Virginia Department of Health and Human Resources/Bureau for Children and Families ("HHR"). Subsequently, Grievant filed a grievance on June 8, 2001, protesting the extension of the 30-day suspension without pay, and another grievance on July 7, 2001, protesting a corrective plan of action instituted as a result of his alleged misconduct. The parties agreed to consolidate these grievances, and a level four hearing was held in the Grievance Board's Charleston, West Virginia, office on June 28, 2001, and August 23, 2001, at which time this case became mature for decision. Grievant was represented by Jennifer D. Scragg, Esq., and HHR was represented by Jon R. Blevins, Esq., Assistant Attorney General.

SUMMARY OF EVIDENCE

HHR Exhibits

Ex. 1 -

May 23, 2001 memorandum with attachments from Patty Johnson to James Crowder.

Ex. 2 -

June 26, 2001 memorandum with attachments from Patty Johnson to James Crowder.

Ex. 3 -

August 23, 1999 sign-in sheet for information session on Common Chapters, with attached Virus Policy, Internet Acceptable Use Policy, and Information Technology Resources Acceptable Use Policy.

Ex. 4 -

May 16, 2001 written statement of Jerry W. Davis, given to James Crowder.

Ex. 5 -

May 18, 2001 letter from Thomas P. Gunnoe to Jerry Davis.

Ex. 6 -

May 23, 2001 memorandum from Jerry Davis to Joyce McCormick-Arthur re: Proposal for Rehabilitation.

Grievant's Exhibits

Ex. 1 -

Employee Handbook, Table of Contents.

Ex. 2 -

Employee Handbook, Section 11: Personal Conduct.

Ex. 3 -

Employee Performance Appraisals for Jerry Davis.

Ex. 4 -

June 7, 2001 letter from Thomas P. Gunnoe to Jerry Davis.

Ex. 5 -

July 5, 2001 letter from Thomas P. Gunnoe to Jerry Davis, with attached Corrective Plan of Action.

Ex. 6 -

Work Schedule Social Service Unit.

Ex. 7 -

July 30, 2001 e-mail from Cynthia Soto to Allen Pyles.

Testimony

HHR presented the testimony of Ed Dolly, Joyce McCormick-Arthur, Tammy Cremeans, and Cynthia Soto. Grievant testified in his own behalf, and presented the testimony of Chad Blankenship and John Johnson.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts:

1. Grievant has been employed in HHR's Putnam County office as a Child Protective Service Worker since August 28, 1998.

2. Grievant has consistently met expected performance standards at HHR. G. Ex.

3. 3. Grievant has received training on computer security, and specifically the following agency policies: Virus Policy, Internet Acceptable Use Policy, and Information Technology Resources Acceptable Use Policy. HHR Ex. 3.

4. On May 11, 2001, Tammy Cremeans, the Putnam County Office Equipment Coordinator, received a telephone call about 10:30 a.m. from Tom Barry, Management Information Services, informing her that a virus had been detected on Grievant's computer. Mr. Barry instructed Ms. Cremeans to go to Grievant's computer and remove the virus.

5. Later that day, Ms. Cremeans telephoned Joyce McCormick-Arthur, Community Services Manager for HHR's Putnam County office, at home and informed her that a virus had been detected on Grievant's computer. Ms. Cremeans told Ms. McCormick-Arthur that she had also discovered software on Grievant's computer that was not authorized by the agency.

6. Ms. McCormick-Arthur then contacted Cathy Moore, Management Information Services Supervisor. Ms. Moore confirmed there was a virus on Grievant's computer with password breaking capabilities which could pose security problems.

7. Ms. McCormick-Arthur called Ms. Cremeans and directed her to take Grievant's computer into her office for safe-keeping.

8. Ms. McCormick-Arthur also talked to James Crowder, Investigations and Fraud Management for HHR, and he informed her that Grievant should be removed from access to HHR's system until they could further investigate the security problem. Mr. Crowder suggested to her that Grievant should be suspended immediately in order to preserve the integrity of the investigation. 9. The next day, May 12, 2001, Ms. McCormick-Arthur had further discussions with Ms. Moore and Mr. Crowder, and Mr. Crowder again suggested Grievant be suspended.

10. On May 14, 2001, Ms. McCormick-Arthur talked to her supervisor, Thomas Gunnoe, as well as Phil Weikle, Director of Management Information Services, and Mike McCabe, Personnel Director for HHR. They told her to verbally suspend Grievant and to get him out of the office immediately. The verbal suspension would be followed-up with a letter.

11. Ms. McCormick-Arthur informed Grievant's immediate supervisor, Cynthia Soto, of what had transpired and the action she was going to take, and then called Grievant to meet with them.

12. Ms. McCormick-Arthur discussed with Grievant what had transpired, and the decision to suspend him immediately for thirty (30) days without pay. She advised Grievant of his appeal rights, and asked him if there “was anything else” he wanted to add to the discussion. Grievant did not respond and was escorted from the office.

13. On May 16, 2001, Grievant met with Mr. Crowder and gave a written statement. Grievant admitted putting some unauthorized software on his computer, and admitted downloading some files from the internet. Grievant was unaware of the virus on his computer, and denied putting any password breaking or “cracking” software on his computer. Grievant admitted bringing MP3 music files from home and uploading them to his computer so he could listen to music at work. Grievant denied using any software thatwould allow him to get around the “firewall” HHR built to block downloads from Napster. HHR Ex. 4.

14. On May 18, 2001, Thomas Gunnoe, Regional Director, issued Grievant a written 30-day suspension without pay letter, pending an investigation into the computer security problems involving his computer.

15. On May 23, 2001, and June 26, 2001, Management Information Services provided Mr. Crowder with an inventory of all the information stored on Grievant's computer. HHR Exs. 1, 2.

16. On May 23, 2001, Grievant wrote a memorandum to Ms. McCormick-Arthur which he characterized as a Proposal for Rehabilitation, which included a Suggestive Plan of Correction. R. Ex. 6.

17. On June 7, 2001, Mr. Gunnoe extended Grievant's suspension without pay through July 6, 2001, to allow completion of the investigation. G. Ex. 4.

18. On July 5, 2001, Mr. Gunnoe informed Grievant his suspension would end on July 8, 2001, and provided Grievant with a Corrective Plan of Action which specified conditions for his continued employment with HHR. G. Ex. 5. The Corrective Plan of Action includes, in summary, the following points of action:

a a.

Grievant is required to work from 8:30 a.m. to 4:30 p.m. Prior to his suspension, Grievant worked flexible hours.

b b.

Grievant's key to the office was taken from him.

c c.

Grievant is prohibited from using any other computer equipment in the office other than that assigned to him, and is restricted to using his computer only for agency business.

d d.

Grievant no longer has access to the internet.

e e.

Grievant's workstation was moved from the back of the unit to the front, within sight of his supervisor. f f.

The results of Grievant's “misconduct” have been placed in his administrative file, official personnel file, and will be documented on his employee evaluation ending September 2001, and also placed on his employee evaluation for the next evaluation period beginning October 2001.

g g.

Grievant will be closely monitored and evaluated by his supervisor, the Community Service Manager, and the Office of Management Information Services.

19. The Corrective Plan of Action will remain in effect for a period of at least one calendar year. At the end of the year, July 2002, Grievant will be evaluated.

20. The bullet points in Mr. Gunnoe's Corrective Plan of Action are nearly identical to the points devised by Grievant in his May 23, 2001 Corrective Plan of Action proposed to Ms. McCormick-Arthur. See Finding of Fact No. 16; R. Ex. 6.

21. Prior to Grievant's suspension, he had a caseload consisting of approximately 44 youth service cases and approximately 15 child protective service cases.

22. Upon Grievant's return to work on or about July 9, 2001, his supervisor, Cynthia Soto, assigned him a caseload consisting entirely of youth service cases, some of which he had handled prior to his suspension, and some new. Grievant has not been assigned any child protective service cases.

23. The classification of Youth Service Worker is one classification below Child Protective Service Worker, Grievant's current classification.

24. This case assignment was deemed to be in the best interests of the office, and is not considered a permanent assignment, but temporary until staffing and caseload problems in the office are corrected. 25. In an e-mail to a co-worker, Cynthia Soto referred to Grievant as a youth service worker. Grievant protested this reference, and Ms. Soto acknowledged the error, and informed the co-worker that Grievant was a Child Protective Service worker. See G. Ex. 7.

26. Grievant was suspended without pay for a total of 56 days, or 39 working days.

27. Ms. McCormick-Arthur has disciplined one other employee for internet abuse. That employee accessed pornographic material on the internet, and received a written reprimand.

DISCUSSION

In disciplinary proceedings involving state employees, W. Va. Code § 29-6A-6 places the burden of proof on the employer, and the standard of proof is by a preponderance of the evidence. E.g., Davis v. Dept. of Motor Vehicles, Docket No. 89- DMV-569 (Jan. 20, 1990). "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. W. Va. Dept. of Health and Human Resources, Docket No. 92-HHR-486
(May 17, 1993). Where the evidence equally supports both sides, the employer has not met its

burden. Id. In his May 18, 2001 suspension letter, Mr. Gunnoe informed Grievant he was being suspended

> pending the results of an investigation into the allegation of failure to follow policy in the application and use, and possible misuse, of computer equipment utilized in your activities in providing services to children and families in Putnam County. More specifically, it is alleged that software was found on your computer that would enable you to illegally obtain information,and possibly perform functions, to which you are not normally privileged through a password-cracking utility and other such illegal devices.

HHR Ex. 5.

The particular application that alerted the Management Information Services employees of a problem is called SER2K, which was found on Grievant's computer. SER2K “is used for accessing and sharing stolen or cracked serial numbers to commercially available software/shareware.” HHR Ex. 1. SER2K is not authorized for use by HHR. The virus that was attached to this application was the “WEIRD” virus, “a moderately harmful virus in that it can allow unauthorized access to your computer by opening an unlisted IP port and listening for commands like other 'backdoor' programs...”. HHR Ex. 1. Thus, there was concern that Grievant had allowed a “backdoor” to open in HHR's firewall which could allow hackers or other users to access secure information.

Some other utilities found on Grievant's computer include:

1. Revealer.zip - a password revealer that lets the operator read the password hiding behind asterisks.

2. Washngo.zip - a utility used to clean up disk space, empty temporary files, delete history files and remove unwanted files from the system.

3. Zippass.zip - a utility to crack passwords for zipped (compressed) files.

Some other software found on Grievant's computer include:

1.

Win Zip 7.0 - software used to extract compressed files (evaluation copy).

2.

Winamp 2.73 - software used as an MP3 audio player (freeware).

3.

AM Deadlink 1.2 - software that detects dead internet links and redundant links (freeware).

4.

Bookmark Converter 2.85 - software used to convert internet URL bookmarks from one browser to another (unregistered).

5.

Napster Beta - software used to connect to online Napster communities for sharing of MP3 files (freeware). Use of this software has been restricted and blocked by HHR's firewall.

6.

Napigator - software used to connect to online Napster communities for sharing of MP3 files (freeware). This is the workaround software for Napster.

7.

Sierra Streets - software used for driving/travel directions. This software was installed to run from CD.

8.

Rand McNally Route Planner - software used for driving/travel directions. (See footnote 1)

9.

> Complete Clean Up Trial - software used to delete all internet browsing history files, as well as temporary files created by a browser. This software will also delete all common system histories including run commands histories, find command histories and recent document histories.

10.

> Get Right - software used for downloading files from internet sites (shareware).

HHR Ex. 2.

HHR has three policies in place regarding use of the Internet at work: Virus Policy (1995), Internet Acceptable Use Policy (2/6/98), and Information Technology Resources Acceptable Use Policy (2/6/98). The Virus policy provides, in pertinent part, that

> It is DHHR policy that only software purchased by DHHR, or software individually approved by DHHR management for use by a specific employee, may be used or installed on a DHHR computer.
>
> It is contrary to DHHR policy for any DHHR employee to introduce, deliberately, a virus into DHHR computers, to withhold information necessary for the effective implementation of virus control procedures or to usesoftware that has not been properly scanned for viruses in DHHR computers. Such acts will result in disciplinary actions.

HHR Ex. 3.

The Internet Acceptable Use Policy provides that users accept certain responsibilities, including, but not limited to:

> 7. To adhere to all DHHR policies, guidelines and procedures including, but not limited to, proper use of Information Resources, information technology, and networks; ethical and legal use of software; and ethical and legal use of administrative data.

That policy also defines an unacceptable use as “[a]ny use which knowingly or inadvertently spreads a computer virus. (Do not import files from unknown or questionable sources.”) HHR Ex. 3.

The Information Technology Resources Acceptable Use Policy contains much of the same information and warnings as the other two policies, and also includes a section on "Warnings/Corrective Actions", which states

> The DHHR shall review complaints or instances of unacceptable use brought to its attention. Violators are subject to corrective action and discipline and may also be prosecuted under state and federal statutes.

HHR. Ex. 3.

HHR encourages its employees to use the Internet, obviously in order to find applications and uses which would be beneficial to its operations. However, as the above policies indicate, HHR also instructs its users on what is acceptable and unacceptable use of its computers at work. As indicated in Finding of Fact No. 13, Grievant admitted putting some unauthorized software on his computer, and admitted downloading some files from the Internet. Grievant testified he was unaware of the virus on his computer, and deniedputting any password breaking or "cracking" software on his computer. Grievant testified it was possible he had downloaded some programs in order to view them, and then forgot to delete them later. Grievant testified he does use a password breaking software at home because of the many different passwords required by various applications. He admitted he sometimes forgets passwords, and uses the software to reveal them. Grievant admitted bringing MP3 music files from home and uploading them to his computer so he could listen to music at work. Grievant vehemently denied using the Napigator software at work to get around the Napster firewall installed by the Department. He testified that any music files found on his computer came from MP3 files he made at home and brought to work, or from other music software providers. Grievant admitted using an application which extends the use of demo software past the usual 30-day trial period. HHR Ex. 4. Consequently, there is no dispute that Grievant engaged in unacceptable use of his work computer, mainly downloading unauthorized software, including password breaking software, inadvertently infecting his computer with a virus, and extending the trial period of certain demo software.

The evidence seems to indicate Grievant could not have used the password breaking software to break into HHR's secure files. The password cracking applications found on Grievant's computer reveal passwords covered by asterisks. HHR's computer system does not use asterisks to hide

passwords - it is merely a blank screen - presumably to avoid just such a security threat. Nevertheless, while there is no evidence Grievant used the password cracking software at HHR, it is reasonable to assume he downloaded it for some purpose, and HHR's concerns in this regard were justified. With regard to the Napster and Napigator applications, there is no proof Grievant accessed Napster using Napigator or any other program at work. All that has been proven is that Grievant had MP3 music files on his computer. The Putnam County office does not prohibit listening to music, and nearly everyone uses their computer to listen to music, using either disks, CDs or MP3 music files. Again, however, because the software was on Grievant's computer, HHR clearly could assume he had downloaded it in order to use it. The agency informed Grievant by letter dated July 5, 2001, that it had concluded its investigation and found Grievant violated agency policies concerning computer use, namely, Information Technology Authority, Use of Information Technology Resources, Software Copyright Compliance, Virus Prevention, Detection and Removal, and Employee Conduct. HHR based its conclusion in part on Grievant's own statements to Mr. Crowder on May 16, 2001, as well as the rehabilitation plan he submitted to Ms. McCormick-Arthur on May 23, 2001. G. Ex. 5.

AFFIRMATIVE DEFENSES

Grievant raises several affirmative defenses to the actions of HHR in connection with his unauthorized use of his work computer. The employee bears the burden on any defense raised to the charges. Parham v. Raleigh County Bd. of Educ., Docket No. 91-41- 131 (Nov. 7, 1995). Grievant contends his approximately 60-day suspension without pay was disproportionate to the offense, and requests this Grievance Board to mitigate his suspension. Grievant also contends the Corrective Action Plan imposed by HHR is discriminatory, retaliatory, and constitutes harassment. Grievant first argues his suspension for 56 days without pay was disproportionate to the offense. This was an extremely lengthy penalty, depriving Grievant of a property right, his income, for 56 days, and quite frankly, a penalty found only in rare instances in West Virginia grievance proceedings. Thus, not only must this issue be addressed in terms of proportion to the offense, but it must be discussed in terms of due process.

An employee has a recognized entitlement or property interest not only in the right to continued employment but also in the right to receive his or her benefits and pay. Memphis Light, Gas & Water

Division v. Craft, 436 U.S. 1, 20, 100 S. Ct. 2457, 1566, 56 L.Ed. 2d 30, ___ (1978). "[S]chool employees have a property interest in continued uninterrupted employment and due process safeguards must be provided when a county board of education seeks to deprive employees of that interest." Knauff v. Kanawha County Bd. of Educ., Docket No. 20-88-095 (Jan. 10, 1989). The West Virginia Supreme Court in Board of Education of the County of Mercer v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994), determined what due process is required to terminate a continuing contract of employment. However, the due process rights afforded an individual for less than a termination, or "a temporary deprivation of rights may not require as large a measure of procedural due process protection as a permanent deprivation." Waite v. Civil Serv. Comm'n, 161 W. Va. 154, 241 S.E.2d 164 (1978) (citing North v. Bd. of Regents, 160 W. Va. 248, 233 S.E.2d 411 (1977)). Prior to a thirty-day suspension without pay, Waite, a civil service employee, had a sufficient property interest to require notice of the charges and an opportunity to present her side of the story to the decision-maker. Waite at 170. Further, the West Virginia Supreme Court of Appeals has recognized that "due processis a flexible concept, and that the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985) (citing Clark v. W. Va. Bd. of Regents, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)).

In determining "what process is constitutionally due," the United States Supreme Court, in Gilbert v. Homar, 520 U.S. 924 (1997), enunciated three factors to be balanced:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest." Matthews v. Eldridge, 424 U.S. 319, 335 (1976). See also, e.g., [FDIC v.] Mallen, [486 U.S. 230, 242 (1988)] . . . ; Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1982).

The West Virginia Supreme Court of Appeals has found these factors to be "germane to a selection of an appropriate procedure under our [West Virginia Constitution] Due Process Clause," and applied these factors in Waite, supra. The Court also found in Waite, discussing the de minimus concept espoused in Goss v. Lopez, 419 U.S. 565 (1975), that a ten-day suspension without pay was not such a minimal deprivation that no due process procedure need be afforded.

Accordingly, a tenured employee is entitled to a pre-suspension hearing, not a full adversarial

hearing, and an opportunity to respond to the charges, when the suspension is without pay. Buskirk at Syl. Pt. 3. An employee is also entitled to written notice of the charges and an explanation of the evidence. Wirt, supra. In other words, a pre- suspension hearing, explanation of the evidence, and an opportunity to respond is all thedue process that the Board was required to provide. Id. at Syl. Pt. 3; See W. Va. Code §§18A-2-8.

However, an exception to the requirement that a pretermination hearing must be conducted has been recognized when it can be found that the government's interest at stake in ridding itself of an ineffective or untrustworthy public employee and its need for quick action outweighs that employee's private interests. See Barry v. Barchi, 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979); Hughes v. Whitmer, 714 F.2d 1407 (8th Cir. 1983), cert. denied, 465 U.S. 1023, 104 S.Ct. 1275, 79 L.Ed.2d 680 (1984). These cases dealt with pretermination suspensions without pay, and not dismissals, and these holdings have been brought into question by the Supreme Court's statement in Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed. 2d 494 (1985), that "in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay." Loudermill, p. 545.

It is not the rule that every public employee has a right to a pre-deprivation hearing in all circumstances. See, D'Acquisto v. Washington, 650 F.Supp. 594, 613 (N.D.Ill. 1986). In fact, the Supreme Court had upheld various administrative decisions depriving one of a property right without a pre-deprivation hearing prior to deciding Loudermill. See D'Acquisto, pp. 612-13, citing, Goss, supra (school may suspend dangerous or disruptive student without prior hearing); Phillips v. Commissioner, 283 U.S. 589, 51 S.Ct. 608, 75 L.Ed.2d 1289 (1931)(post-deprivation procedures for tax disputes justified by government need for revenue); Barchi, supra (horse trainer's license suspended after showing of probable cause that horse had been drugged). This line of cases establishes what canbest be called an emergency exception to the presumption that a pre-deprivation hearing must be conducted in all circumstances before a property right may be suspended or removed.

While it is clear what due process must be afforded an employee who is suspended without pay, it appears the same is not required when an employee is suspended with pay. In Loudermill, supra, the Court observed that, "in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem [of pre-deprivation due process] by

suspending with pay." See also Gilbert, supra. Thus, the Court recognizes that a suspension with pay does not implicate an employee's due process rights, because there is no deprivation of property, i.e., the employee is still receiving a salary.

In the instant case, Grievant was given an opportunity to present his side of the story, or respond to the charges, in the meeting with Ms. McCormick-Arthur and Ms. Soto, which occurred before he was removed from the work place. Subsequently, Grievant was removed from the workplace on the ground that his continued presence constituted a security threat to the integrity of the office's computer system, as well as the need for unfettered access to Grievant's workstation pending the investigation into his alleged misconduct. Grievant received written notification of the charges within a few days subsequent to his removal from the office, as well as confirmation of his 30-day suspension without pay. HHR's decision that Grievant posed a threat to the integrity of the investigation was justified in light of the evidence, and Grievant received all the due process which was required for his initial 30-day suspension without pay. With regard to the extension of the suspension, however, the undersigned finds HHR has failed to demonstrate why an additional 30_day suspension without pay was necessary or justified in this instance, when there was clearly an alternative method of ensuring the integrity of the investigation, as set forth in the Corrective Action Plan. It must be remembered that Grievant himself had offered that same Corrective Action Plan on May 23, 2001, more than a month before HHR adopted it.

“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 and 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 and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 198 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." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). " 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 a board of education. See generally, Harrison v. Ginsberg, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra. HHR presented no evidence why it needed an additional 30-days to complete its investigation, or why Grievant could not be returned to work at the end of the first 30 days. In any event, if HHR felt it was still necessary to keep Grievant out of the workplace, it could have extended the suspension, but with pay. It is clear HHR had no evidence at the end of the first 30 days that, other than downloading the afore-mentioned software, Grievant had done anything improper or illegal with that software, or done anything to compromise HHR's computer system. There simply was no articulated reason why Grievant's misconduct warranted another 30-day suspension without pay. Therefore, the undersigned concludes the extension of Grievant's suspension was arbitrary and capricious.

Grievant also asserts his suspension, as well as the Corrective Action Plan, constitute discrimination, retaliation, and harassment. W. Va. Code § 29-6A-2(d) defines “discrimination” as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(a)

that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c)

that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see

Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

With regard to the suspension, Grievant has failed to make a prima facie case of discrimination. He has not shown that he was similarly-situated to any other employee who was disciplined for the same, or similar, misconduct as he. Ms. McCormick-Arthur testified she had given a written warning to one employee who had apparently accessed a pornographic site on his or her work computer, but there was not sufficient evidence adduced at hearing to conclude Grievant was similarly-situated to this employee, or that the offenses were similar in nature.

Wtih regard to the Corrective Action Plan, Grievant points to language which states that Grievant will be held to a different standard than other employees because of his misconduct as evidence of discrimination. Grievant argues the limitations and conditions placed on him by the Corrective Action Plan serve to treat him differently from other employees. However, HHR points out that those very limitations and conditions were the same ones Grievant himself drew up in his proposed corrective action plan presented to Ms. McCormick-Arthur.

There certainly is no dispute that by placing limitations and conditions on Grievant in the workplace, HHR is treating him differently than other employees in his unit. However, those employees have not engaged in misconduct, and are therefore, not similarly situated to Grievant. In any event, there is no dispute there is a legitimate, non- discriminatory reason for any differences in treatment.

The evidence shows that some employees in the Putnam County office play games, mainly solitaire, from time to time, on their computers. Employees also listen to music on their computers, and are encouraged to use the Internet. No employee has been disciplined for listening to music, playing games, or surfing the Internet. HHR does not monitor its employees' computer use, and the only reason Grievant's computer garnered attention was because of the virus warning received by Management Information Services. He was disciplined for downloading unauthorized software, inadvertently admitting a virus into the computer system, and utilizing software to extend copyrighted demo files. HHR has articulated a legitimate, non-discriminatory reason for its different treatment of Grievant.

W. Va. Code § 29-6A-2(p) defines “reprisal” as “the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it.” A grievant claiming retaliation may establish a prima facie case of

reprisal by establishing:

(1) that he engaged in protected activity, e.g., filing a grievance;

(2) that he was subsequently treated in an adverse manner by the employer or an agent;

(3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and

(4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Fareydoon-Nezhad v. W. Va. Bd. of Trustees/Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, nonretailatory reasons for its actions. See Mace v. Pizza Hut, Inc., 180 W.Va. 469, 377 S.E.2d 461 (1988); Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 172 W. Va. 627, 309 S.E.2d 342 (1983); Webb, supra.

Grievant alleges HHR has retaliated against him for filing this grievance by taking away all of his Child Protective Service cases and assigning him only Youth Service cases. Grievant also contends his supervisor, Ms. Soto, now refers to him as a Youth Service Worker, as evidence by an e-mail she sent to a colleague, and a handwritten notation on the unit's work schedule. G. Exs. 6, 7. Grievant is classified as a Child Protective Service Worker, which is a higher classification than Youth Service Worker. Ms. Soto confirmed that, upon Grievant's return to work following his suspension, she assigned him only Youth Service Worker cases, but contends it was in the best interests of the unit, and a temporary situation until the Youth Service Worker caseload is reduced. Ms. Soto also acknowledged referring to Grievant as a Youth Service Worker in the e-mail, but testifiedthat, upon

Grievant pointing out the error to her, she immediately corrected the reference with a follow-up e-mail, which Grievant failed to produce into evidence.

Ms. Soto testified that prior to Grievant being suspended, he had a caseload consisting of approximately 44 Youth Service cases and 15 Child Protective Service cases.
During the time Grievant was suspended, the office was inundated with an unusually large number of Youth Service cases, and was not adequately staffed to handle the increase. Upon Grievant's return, she left intact the Youth Service cases he had already been working on before his suspension, and assigned him additional cases as she considers him one of the more experienced and best workers in the unit. Ms. Soto testified that, once the Youth Service caseload becomes more manageable, Grievant will resume working on Child Protective cases as well.

Ms. Soto, and therefore HHR, has articulated a legitimate, non-retaliatory explanation for the assignment of only Youth Service cases to Grievant. While Grievant understandably would prefer to work on Child Protective cases, there is no indication that the assignment of Youth Service cases to Child Protective Workers is at all an unusual or extraordinary occurrence. With respect to the e-mail reference to Grievant as a Youth Service Worker, the undersigned finds Grievant's failure to also introduce the follow-up memorandum by Ms. Soto clarifying Grievant's status somewhat disingenuous, and finds no retaliatory motive for Ms. Soto's reference to Grievant as a Youth Service Worker.

Finally, Grievant requests his suspension without pay be mitigated. This Grievance Board has determined that mitigation of the penalty imposed by an employer constitutes extraordinary relief, and is granted only when there is a showing that a particularpunishment is so clearly disproportionate to the offense committed that imposition of such a penalty involves an abuse of discretion, Hosaflook v. West Virginia Division of Corrections, Docket Nos. 98-CORR-446/447 (Jan. 20, 2000), or the penalty is so harsh under the circumstances, its imposition by the employer involves an arbitrary and capricious act. Frantz v. W. Va. Dept. of Health & Human Resources, Docket No.99-HHR-096 (Nov. 18, 1999). Lilly v. Dept. of Health & Human Resources, Docket No.00-HHR-093 (May 8, 2000). See Wilkerson v. Lincoln County Bd. of Educ., Docket No.99-22-420 (Mar. 27, 2000). Considerable deference is afforded to the employer's determination of the seriousness of the employee's conduct and the prospects for rehabilitation. Overbee v. Dept. of Health & Human Resources, Docket No. 96-HHR-183 (Oct. 3, 1996).

"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).

As noted above, the undersigned has already found Grievant's second 30-day suspension without pay to be a violation of due process. Thus, the above-cited factors will be addressed in relation to Grievant's first 30-day suspension. I find that while Grievant has been an otherwise exemplary employee in his three years at HHR, he was fullyinformed of the agency's computer use policies, and knowingly downloaded unauthorized software onto his work computer which compromised the security of the agency's computer system. HHR was justified in its need to ascertain to what, if any, extent, its system had been compromised, and to complete its investigation into Grievant's computer use at work, and therefore, the initial 30-day suspension without pay will be upheld as not arbitrary, capricious, or an abuse of discretion.

CONCLUSIONS OF LAW

1. The burden of proof in disciplinary matters rests with the employer and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992).

2. The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested facts is more likely true than not. Hammer v. W. Va. Div. of Corrections, Docket No. 94-CORR-1084 (Nov. 30, 1995); Leichliter v. W. Va. Dept. of Health and Human Serv., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met is burden of proof. Hammer, supra.

3. HHR has proven by a preponderance of the evidence that Grievant failed to follow applicable policies in the application and use, and possible misuse, of computer equipment utilized in his activities as a Child Protective Service worker. 4. An employee bears the burden of proof on

any defense raised to charges brought against him by his employer. Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1995).

5. It is not necessary for a pre-termination hearing to be a full adversarial evidentiary hearing; however, an employee is entitled to written notice of the charges, an explanation of the evidence, and an opportunity to respond prior to an agency's decision to discipline the employee. Bd. of Educ. v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994); Pauley v. Kanawha County Bd. of Educ., Docket No. 99-20-462 (Feb. 29, 2000).

6. An exception to the requirement that a pre-termination hearing must be conducted has been recognized when it can be found that the government's interest at stake in ridding itself of an ineffective or untrustworthy employee and its need for quick action outweighs that employee's private interests. See Barry v. Balchi, 443 U.S. 55, 99 S.Ct.2642, 61 L.Ed.2d 364 (1979); Hughes v. Whitmer, 714 F.2d 1407 (8th Cir. 1993), cert. denied, 465 U.S. 1023, 104 S.Ct. 1275, 79 L.Ed.2d 680 (1984). Additionally, the due process problem can be avoided by suspending an employee with pay. See Loudermill, supra; Gilbert, supra.

7. HHR demonstrated why it felt Grievant had to removed immediately from the work place while conducting its investigation. Grievant had an opportunity to respond to the charges brought against him, and was given those charges in writing. HHR did not violate Grievant's due process rights with respect to the first 30-day suspension, without pay. 8. 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 and Human Serv., 769 F.2d1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16., 1996). While a searching inquiry into the facts is required to determine if an action is arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of the board of education. See generally Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

9. HHR did not demonstrate any reason why Grievant could not return to the workplace after the first 30-day suspension, or why the extended suspension had to be without pay, especially in light of the alternatives it had at its disposal in the form of the Corrective Action Plan. Grievant's property

rights in his continued income were violated by the extended 30-day suspension without pay.

10. W. Va. Code § 29-6A-2(d) defines "discrimination" as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(a)

that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c)

that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996).

11. Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

12. Grievant has failed to establish a prima facie case of discrimination with regard to his 30-day suspension without pay, or with regard to the Corrective Action Plan instituted by HHR as a result of his misconduct.

13. W. Va. Code § 29-6A-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." A grievant claiming retaliation may establish a prima facie case of reprisal by establishing:

(a) that he engaged in protected activity, e.g., filing a grievance;

(b) that he was subsequently treated in an adverse manner by the employer or an agent;

(c) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and

(d) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Fareydoon-Nezhad v. W. Va. Bd. of Trustees/Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989).

14. If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, nonretailatory reasons for its actions. See Mace v. Pizza Hut, Inc., 377 S.E.2d 461 (W. Va. 1988); Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 309 S.E.2d 342 (W. Va. 1983); Webb, supra.

15. Grievant has established a prima facie case of retaliation with respect to his assignment of Youth Service cases, as well as his supervisor's referral to him as a Youth Service Worker.

16. HHR has articulated a legitimate reason for its assignment of Youth Service cases to Grievant, and provided a plausible explanation for his supervisor's actions.

17. Grievant has failed to establish a case of retaliation by a preponderance of the evidence.

18. The mitigation of a penalty imposed by an employer constitutes extraordinary relief, and is granted only when there is a showing that a particular punishment is so clearly disproportionate to the offense committed that imposition of such a penalty involvesan abuse of discretion, Hosaflook v. W. Va. Div. of Corrections., Docket Nos. 98-CORR- 446/447 (Jan. 20, 2000), or the penalty is so harsh under the circumstances, its imposition by the employer involves an arbitrary and capricious act. Frantz v. W. Va. Dept. of Health & Human Resources, Docket No. 99-HHR-096 (Nov. 18, 1999). Lilly v. Dept. of Health & Human Resources, Docket No. 00-HHR-093 (May 8, 2000). See Wilkerson v.

Lincoln County Bd. of Educ., Docket No.99-22-420 (Mar. 27, 2000). Considerable deference is afforded to the employer's determination of the seriousness of the employee's conduct and the prospects for rehabilitation. Overbee v. Dept. of Health & Human Resources, Docket No. 96-HHR-183 (Oct. 3, 1996).

19. "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).

20. Grievant has failed to establish that the first 30-day suspension without pay imposed by HHR was unduly harsh or disproportionate to the offense, constituted an abuse of discretion, or was arbitrary and capricious.

Accordingly, this grievance is **GRANTED IN PART** and **DENIED IN PART**. HHR is hereby **ORDERED** to compensate Grievant fully for the additional days of suspension past the initial 30-day suspension without pay.

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.

_____

MARY JO SWARTZ

Administrative Law Judge

Dated: September 4, 2001

Footnote: 1

Sierra Streets and Rand McNally are authorized by HHR to assist protective service workers in locating clients.