RODNEY SLOAN,

Grievant,

v. **DOCKET NO. 00-HHR-132**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/MEDICAL EXAMINER'S OFFICE,

Respondent.

D E C I S I O N

This grievance was submitted by Grievant Rodney Sloan directly to Level IV, pursuant to W. Va. Code § 29-6A-4(e), on April 6, 2000, after he was dismissed from his employment with Respondent Department of Health and Human Resources ("HHR") in the Medical Examiner's Office, effective April 7, 2000. The statement of grievance reads:

> I was dismissed from my job a[s] Chief Investigator by Dr. Kaplan Chief Medical Examiner. This was done three days after I recieved [sic] a reply from office on my first Grievance.

Grievant sought as relief to be "reinstated to my original position and working hours." (See footnote 1)

Grievant had previously filed a grievance on or about March 27, 2000, regarding part of his duties being reassigned to Michael Kane in January 1999, and his work hours. That grievance was denied at Level I on April 3, 2000, and proceeded through Level II of the grievance procedure. A Notice of Hearing was sent to the parties on April 5, 2000, scheduling a Level III hearing on that grievance for April 11, 2000. The Level III hearing was not held due to Grievant's dismissal. Grievant asked that the first grievance be combined with this grievance at Level IV, waiving Level III of the grievance procedure, and he argued he was fired in retaliation for filing this grievance. (See footnote 2)

Discussion

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; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988). "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. Dep't 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.

The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." House v. Civil Serv. Comm'n, 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequentialmatters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, Buskirk v. Civil Service Comm'n, [175 W. Va. 279, __,] 332 S.E.2d 579, 581 (W. Va. 1985); Oakes v. W. Va. Dept. of Finance and Admin., [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); Guine v. Civil Service Comm'n, [149 W. Va. 461,]141 S.E.2d 364 (W. Va. 1965)." Scragg v. Bd. of Directors W. Va. State College, Docket No. 93-BOD-436 (Dec. 30, 1994).

The dismissal letter, dated April 6, 2000, and signed by Henry G. Taylor, M.D., M.P.H., Commissioner, states the reasons for the dismissal as follows:

> This is to notify you of my decision to dismiss you from your position as Chief Investigator with the Office of the Chief Medical Examiner of the Bureau for Public Health, Department of Health and Human Resources, effective April 7, 2000, as a result of your improper conduct with regard to your failure to notify anyone in the office that a serious mistake had been made in regard to releasing remains in an improper and erroneous manner.
>
> On March 15, 2000, it was discovered that the refrigerated long-term storage facility contained remains of an individual (1998-263) which an OCME-16, Body Receiving and Release Record, indicated you had released to Charleston Mortuary Service on July 30, 1998. Subsequent discussion revealed you were aware of this error, and did nothing to correct it for over a year. This serious infraction is in addition to a long history of improper conduct with regard to time and attendance and investigative protocols, as prescribed by that office. Recent specific instances of this improper conduct are:

1 1.

On October 21, 1999, you were given a verbal warning with regard to sleeping on duty.

2 2.
On December 13, 1999, Larry Kennedy, Administrator, discussed time and attendance with you; specifically, coming in late, taking an extended lunch and leaving early.

3 3.
On December 27, 1999, Larry Kennedy issued a memorandum to all staff regarding work hours and the importance of adherence to established shift time.

4 4.
On December 28, 1999, Dr. Frost complained about your handling of a Northern Region (Marion County) fire death. Rather than documenting the case on the accepted OCME Investigation Form, the OCME-2, you instructed the agency reporting the death to call Dr. Frost at home. You were aware that we had no county Medical Examiner in Marion County at the time, so this action left Dr. Frost to document all information on the case. This situation was aggravated by the fact that you had completed no documentation of the case.

5 5.
On January 24, 2000, you were given a written warning regarding leaving the building while on duty. As you areaware, this office is staffed 24 hours a day, 365 days a year, to respond to calls concerning deaths in West Virginia. Many of these calls come from death scenes where county personnel need an immediate consultation with our staff. As a long-time employee of this Office, you were aware that you were not to leave until another investigator arrived to relieve you. You were specifically aware of the seriousness of this action, having told the custodian to tell any callers that you were “in the bathroom.”

6 6.
On January 24 and 29, 2000, you left your shift early, leaving an incomplete OCME 2 form on cases called in on your shift (Case #2000-154). This action forces your relief shift to start work early and to complete documents which office protocol requires you to complete to the best of your ability on your shift.

7 7.
On March 4, 2000, you left your shift, leaving no written information for the relief investigator on a case which was reported on your shift (2000-158).

The infractions cited in #'s 6 and 7 are of significance in that office protocol requires the on-duty investigator to capture information in a format which is useful to the pathologists and to subsequent investigative staff as the case progresses. When another investigator is forced to complete the initial paperwork that you should have

> completed, he invariably has to try to reconstruct information which has already been provided to this office. Also, such time passed can make it more difficult to establish time of death or to ask other questions that the pathologists may need answered in determining cause and manner of death. All the infractions cited indicate a careless attitude in routine duties and an indifference to making sure work is done completely and correctly. These infractions are particularly significant given your position as Chief Medicolegal Investigator, a subject that has been addressed with you repeatedly.
>
> . . .
>
> The State of West Virginia and its agencies have reason to expect their employees to observe a standard of conduct which will not reflect discredit on the abilities and integrity of their employees, or create suspicion with reference to their employees' capability in discharging their duties and responsibilities. I believe the nature of your misconduct is sufficient to cause me to conclude that you did not meet a reasonable standard of conduct as an employee of the Department of Health and Human Resources, thus warranting this dismissal.

Grievant was paid 15 days severance pay, instead of being allowed to work out the notice period. Grievant contested most of the allegations in the dismissal letter. (See footnote 3) He denied he had knowledge that part of the remains of case number 1998-263 were still at the office after he had released the remains to a local transport service, and had failed to disclose this information. He argued disparate treatment, and that he was discharged in retaliation for filing a grievance.

At the time of his discharge, Grievant was employed by the Medical Examiner's office as the Chief Investigator. He supervised the investigators. He had been an employee since 1985.

Larry Kennedy, the Administrator of the Medical Examiner's office since August 1998, testified that the dismissal letter had begun as a demotion letter. Mr. Kennedy had spoken with Grievant and with all the investigators more than once about completing reports prior to leaving a shift, not leaving a shift early, and not taking an extended lunch. However, Mr. Kennedy continued to receive complaints from the investigators about Grievant not doing his share of the work, and not working his entire shift, and he also observed that Grievant was gone before his shift was over. He testified that he and Dr. Kaplan had decided to demote Grievant, and before the demotion letter was completed to everyone's satisfaction, he became aware of an incident which was serious enough to warrant dismissal.

Mr. Kennedy testified as to his understanding of the events which led to Grievant's dismissal as

follows. The Medical Examiner's office maintains a “long-term” storage cooler, where human remains are stored for extended periods of time when they cannot be identified, as well as a cooler which is used for current cases. On March 15, 2000, theinvestigator on duty, Michael Kane, and morgue technician Danny Goddard were cleaning out the contents of the long-term storage cooler. Office records showed four bodies were in the cooler, but they discovered a fifth body bag, labeled 1998-263. Mr. Kane pulled the file on case number 1998-263. The file indicated that Grievant had signed a body release form releasing the remains of case number 1998-263 to Charleston Mortuary Service on July 30, 1998. Mr. Kane called Charleston Mortuary Service immediately, notifying them that additional remains of case number 1998-263 had been found. The owner of Charleston Mortuary Service, James Lowry, replied that Grievant had called him in the Spring of 1999, notifying him that these remains had been discovered, and that he would be notified when the office decided what to do.

Mr. Kennedy testified that he spoke with Grievant about this matter, and Grievant told him he was aware the remains were in the long-term cooler, but, “he got busy and forgot about it. He told me, yeah he knew about that, but he got busy and forgot about it.” Mr. Kennedy testified on cross-examination that Grievant later told him he did not know anything about it. Charles McDowelle, an investigator with the medical examiner's office, testified that he heard Grievant tell Mr. Kennedy that he was aware the remains were in the cooler.

Mr. Kennedy testified that the determination was made at that time that Grievant had known about the additional remains for at least a year, and had either concealed or ignored this fact. He stated that this destroyed their faith in Grievant's judgment, and this was the reason Grievant was dismissed. He stated the demotion letter was converted into a dismissal letter.

Case number 1998-263 is the number assigned by the Medical Examiner's office to a body found along the New River in May of 1998. (See footnote 4) William Gardner, who at the timewas a Medical Examiner for Cabell and Wayne Counties, and an instructor in the forensic science program at Marshall University, was employed by the Medical Examiner's office to go to the site and recover the remains on May 24, 1998. Mr. Gardner testified that the hyoid bone in the neck was the only missing bone, although most of the soft tissue was gone. He testified he placed the remains in a body bag, which he believes was marked with a tag, labeled “unknown,” “Fayette County,” with the date and his initials. He testified that the body was turned over to the investigator on duty at the Medical

Examiner's office. He worked on the body for several days, removing the remainder of the soft tissue and cleaning the bones, examining each bone for trauma. He testified he cleaned each piece of the body.

Mr. Gardner testified that he was able to identify the body. However, Dr. James Kaplan, Chief Medical Examiner, decided to send part of the remains to a specialist. Mr. Gardner testified he put part of the body in a cardboard box, and transported the box to Dr. Dennis Dirkmaat, at Mercyhurst College, in Erie, Pennsylvania, for forensic anthropological analysis on June 17, 1998. Mr. Gardner testified those parts of the body which were not boxed and taken to Dr. Dirkmaat were left in the body bag, on top of the tray, in the main refrigerator. He testified he did not talk to Grievant about his work on this body, or separating it to send part of it to Dr. Dirkmaat. Dr. Dirkmaat signed a form indicating he had received all parts of the remains except the left arm and left leg. However, Mr. Gardner did not know what parts of the body had been boxed and taken to Dr. Dirkmaat, noting that two later reports from Dr. Dirkmaat, dated July 14, 1998, and July 28, 1998, indicated parts of the body which were different from those noted on the form signed on June 17 when Dr. Dirkmaat first received the remains. Mr. Gardner testified that, if Dr. Dirkmaat's second report was accurate, the parts remaining at the Medical Examiner's office would have been the right upper arm, right forearm, and right leg. Dr. Dirkmaat returned the box containing the partial remains of case number 1998- 263 to the Medical Examiner's office via U.S. regular mail. There is no record of when it was received, who received the box when it was returned, what was in the box, or where it was stored.

Dr. Kaplan testified that he had asked Dr. Dirkmaat for a second report, because when he reviewed the first report, he knew it was not accurate. He testified he believed the second report from Dr. Dirkmaat was accurate, based upon his review of the case at the time. He testified that part of the torso was cleaned and sent to Dr. Dirkmaat, although he declined to state what parts of the body would have remained at the Medical Examiner's office without the benefit of a skeleton to look at for this purpose. He stated he believed one leg which had remained on site had not been defleshed. He testified that after this experience with Dr. Dirkmaat, the Medical Examiner's office no longer utilizes his services.

Dr. Irvin Sopher, the former Chief Medical Examiner before Dr. Kaplan, was asked to review Dr. Dirkmaat's reports. He concluded that the body parts remaining at the Medical Examiner's office would have been the left forearm, right arm, left foot, and right leg. He explained that the torso

appeared to have been examined by Dr. Dirkmaat in its entirety, which would include the ribs, vertebra, manubrium, sternum, and pelvic girdle.

Mr. Kane testified that in March of 2000, he and Michael Scragg, also an investigator, were taking an inventory of the bodies in the long-term cooler. They were to make sure all the necessary forensic data and evidence had been collected, and prepare them for burial. He stated he opened a body bag and the toe tag inside was labeled case number 1998-263. He could not recall if the outside of the bag was labeled. He pulled the case file and it showed the body had been released. He checked to make sure he had the correct name and number and double checked the forms in the case file. He stated he then telephoned Grievant and told him what he had found. He testified Grievant responded that he knew part of that body was back there, or something to that effect. Hestated he asked Grievant why he had not done anything about it, and Grievant told him he got busy. Mr. Kane testified he responded, “that's been over a year ago,” although he did not indicate in his testimony that Grievant had told him how long he had known part of the remains of case number 1998-263 were still at the office. He stated he then informed Dr. Kaplan of the situation, and spoke with Mr. Lowry. He testified that Mr. Lowry responded that he was aware remains were there.

Mr. Kane testified that he inventoried the body parts found in the bag, and it contained the remains of a torso, about 40 to 60% of the body. He stated he did not know what skeletal parts were present, and the torso was mummified; a condition which would occur only if the skeleton were not defleshed. He later testified he did not detail what parts were released for cremation, and he did not know if there was an arm, leg, or forearm in the body bag, and that he did not make an inventory. Dr. Kaplan testified that if Mr. Kane testified that there was a torso in the body bag found in the cooler in March 2000, he had no medical training and may have misspoken. Dr. Sopher, however, believed Mr. Kane was sufficiently knowledgeable to be able to distinguish a torso from an extremity.

Mr. Kane stated a body bag containing deer remains was supposed to be in the cooler, but was not found. He had concluded that Grievant had released the box with part of the remains of case number 1968-263, and the body bag containing the deer remains.

Mr. Kane also testified that he had nothing to do with releasing the body initially in July of 1998.

Grievant noted that Mr. Kane had been promoted to a Program Specialist, Senior, “Chief of Operations,” in May 2000, and received an approximately $12,000 increase in pay. Grievant thus believed Mr. Kane had benefitted from his dismissal, and would have reason to lie in order to get him

fired. In addition, Mr. Kane in his testimony basically blamed Grievant for all the poor record keeping with regard to case number 1998-263, stating it was Grievant's responsibility to make a record of what was sent to MercyhurstCollege, and to prepare a memorandum when the box was returned from Mercyhurst, and that as the supervisor, Grievant should have known all about this case; although there was no evidence that Grievant had any involvement with case number 1998-263, except for releasing the remains in 1998, and it was clear that no one informed Grievant that the remains were being sent to Mercyhurst or that they had been returned until well after the fact. However, shortly after his testimony in this case, Mr. Kane left the employment of the Medical Examiner's office, and he testified that everyone in the office knew he was going to leave when he finished his degree.

Mr. McDowelle testified Danny Goddard, a morgue technician, had found the body bag labeled case number 1998-263 in March of 2000, and had called Mr. Kane over. Mr. McDowelle did not view the body bag.

Mr. Baldwin testified that when he went to pick up the body in July of 1998, he knew where the remains were because he had been there the previous day, and had talked to either Mr. Kane or Mr. Scragg. Grievant's Exhibit 25, the cremation authorization form from July of 1998, has a note on it from Mr. Baldwin to Mr. Kane requesting a permit. Mr. Baldwin testified he told Grievant he knew where the remains were, and he went inside the back room where the cooler is, by himself, and put the bag and box on his cot, and brought them out into the hallway. He stated the body bag was folded in half and was underneath the box in the cooler. He testified the box was clearly marked with the decedent's name in red, but he did not check the bag at all, and did not observe Grievant doing so.

Mr. Baldwin testified that Grievant had called Charleston Mortuary Service at a later date, and told him he had found “some more bones” belonging to the deceased whom Respondent identifies as case number 1998-263. Mr. Baldwin stated he told Grievant Mr. Lowry usually handled such matters, and he handed the telephone to Mr. Lowry.

Mr. Baldwin prepared a written statement which is dated April 10, 2000. He testified he typed the letter because he was asked to do so. He did not recall who had made thisrequest. He testified he typed his statement on or about April 10, 2000, about two to three days after he was asked to provide the letter. The letter does not state that Grievant had called in 1999 stating he had found additional remains of case number 1998-263. It incorrectly states the date he picked up the remains

as July 13, 1998, rather than July 30, 1998. Mr. Baldwin at first testified he had taken the date from the cremation form; however, when that form was shown to him, and the only date on the form was July 28, 1998, he stated he thought he had some notes.

Mr. Lowry testified that sometime in the Spring of 1999, he received a telephone call from Grievant notifying him he had found some additional remains of the deceased identified as case number 1998-263. He stated Grievant told him he was not sure what they were going to do, but he thought he should inform him. Mr. Lowry testified he inquired as to the content of the remains, and Grievant replied that he thought there were only a couple of bones. Mr. Lowry stated Grievant told him he would get back with him after he talked to Dr. Kaplan. He testified he heard nothing more from Grievant and forgot about the matter. He stated he did not contact the deceased's family when Grievant called, because he did not know what remains were found or what the Medical Examiner's office was going to do at that time, and he had no proof that the remains were absolutely lost.

Mr. Lowry testified that Mr. Kane called him in April of 2000, and told him they had found remains in a body bag for the deceased referred to as case number 1998-263, and asked him to come to the office. He stated he met at the Medical Examiner's office with Mr. Kane, and then later Mr. Kennedy and Dr. Kaplan. He stated he believed Dr. Kaplan asked him to prepare a written statement on April 12, 2000, and he prepared it around April 12, 2000. The written statement is the same as his testimony given at hearing on direct examination. (See footnote 5) Grievant suggested that Mr. Lowry held a grudge against him because he had caught him scratching the corneas on a body in 1989, so that they could not be removed and donated. Dr. Sopher had then banned Mr. Lowry from the building. Grievant knew of no reason Mr. Baldwin would lie, except that he was Mr. Lowry's employee. He further suggested that Mr. Baldwin was simply not sure of himself, stating, “[h]e's not an investigator. He's just a flunky that drives a station wagon around and picks up bodies everyday for the funeral director.”

Grievant testified that Mr. Kane told him the body was ready to be released in July of 1998, and that Charleston Mortuary Service would pick it up on Grievant's shift. Grievant stated when Mr. Baldwin came to pick up the remains of case number 1998-263 in July 1998, he had gone into the cooler, and Mr. Baldwin had started to walk in also. He stated he “put my hands up, I said, '[n]o,' I said, 'back out.' I said, 'I'm brin[g]ing it out there.” He testified there was a cardboard box on top of the body bag in the cooler. He stated they took the remains into the hallway and transferred the bag and

box onto Mr. Baldwin's cot. He testified the release form and file were nowhere to be found, so he filled out a new form and had Mr. Baldwin sign it. Tr. 10/23/00, pages 47-48. Although he explained the procedure for checking a body bag for identification on direct examination, it was not until cross-examination that Grievant testified he had in fact looked at the tag on the body bag. He testified the bag was tagged with the case number, date and time of receipt, and the last name of the decedent was written in different ink on the tag. Grievant never testified that he had opened the body bag and checked inside for any identification.

Grievant further testified on direct examination that the remains had been returned from Mercyhurst College at the time he released them in July of 1998, because the box and the bag were there. He testified it looked like the box that was mailed back. He statedit had the case number written on it in big black lettering. Tr. 10/23/00, at pages 48-49. He also stated that, had he believed that there were any other remains of case number 1998-263, “anywhere at all,” he would have consulted Dr. Kaplan to verify that the remains should be released, and would have made some sort of notation on the release form. Tr. 10/23/00, at page 53.

Grievant denied that he had called Mr. Lowry and told him he had found additional remains of case number 1998-263, and he denied that he had told Mr. Kennedy he knew part of the remains were at the Medical Examiner's office, and got busy and forgot. He then explained, “I knew that part of this man's body was sent to Pennsylvania. And I had no idea when and if it had been returned to the office. But the morning that I released those remains to the funeral home, the body bag was there on the tray, had his tag on it. And there was also a cardboard box on top that body bag with bones in it, with his case number written on it.” Tr. 10/23/00, at page 54. He stated on cross-examination, “[t]he only thing that I had forgotten about was the bones that were sent to Pennsylvania, and I didn't recall when -- I had no idea when the bones returned. I knew they were gone. I knew this body was going to be ready for release sometime soon, but -- and I had made a statement to someone, and I don't even remember making it to [Mr. Kennedy], but I knew that there was part of [case number 1998-263] in that other cooler. I did make the statement to someone, but I don't recall who it was, that I remembered that those bones had been sent to Pennsylvania, and after I realized they were in Pennsylvania, I just forgot about the bones that were in Pennsylvania.” Tr. 10/23/00, at page 95.

As Grievant denies that he told anyone he was aware part of the body was in the cooler and got busy and forgot about it, and that he had called Mr. Lowry about this matter in 1999, while various

witnesses testified to the opposite, it is necessary to determine which testimony is credible. In assessing the credibility of witnesses, some factors to be considered are the witness's: 1) demeanor; 2) opportunity or capacity to perceive andcommunicate; 3) reputation for honesty; (4) attitude toward the action; and 5) admission of untruthfulness. Harold J. Asher and William C. Jackson. Representing the Agency before the United States Merit Systems Protection Board 152-153 (1984). Additionally, the Administrative Law Judge should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; (3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. Id; Rosenau v. Tucker County Bd. of Educ., Docket No. 99-47-192 (Nov. 1, 1999); Jarvis v. W. Va. Dep't of Health and Human Serv., Docket No. 97-HHR-318 (July 22, 1999); Burchell v. Bd. of Trustees, Docket No. 97-BOT-011 (Aug. 29, 1997).

It is easy to understand how the wrong body bag would be released under the circumstances described by the witnesses, even taking into account the various inconsistencies in the statements. What is more difficult to determine is who was telling the truth.

Of all the witnesses who testified, Mr. Kennedy gave the most straightforward testimony, exhibited a calm demeanor, even under fire, and by all accounts, had no reason to lie about what Grievant had said to him. Mr. Kennedy's testimony was that Grievant had admitted to him that he was aware part of the remains of case number 1998-263 were in the cooler after he had released the body, but had taken no action because he “got busy and forgot about it.”

It appears that Grievant is correct about Mr. Kane's credibility. He not only went out of his way to blame Grievant for the incomplete records related to the location of the remains of case number 1998-263, even though Grievant had no knowledge of some of the events until well after the fact, the undersigned concludes that Mr. Kane lied about his contact with the remains when they were first released in July 1998, and about what he discovered in the body bag in March of 2000. Mr. Kane stated he was not involved in releasing the remains at all in 1998, while Grievant testified it was Mr. Kane who told himthe body was ready for release, and Mr. Baldwin testified it was either Mr. Kane or Mr. Scragg who talked with him about the remains the day before he picked them up, and who apparently showed him the where the remains were, thus setting up the initial problem with releasing the wrong body bag. Grievant's Exhibit 25 is further evidence that it was, in fact, Mr. Kane who was working with Mr. Baldwin. Finally, Mr. Kane initially testified he inventoried what he found in the body

bag in March of 2000, and there was 40 to 60% of a torso. He later testified he did not inventory the remains, and did not know if there was an arm, leg or forearm. The undersigned finds none of Mr. Kane's testimony credible.

The undersigned likewise finds Grievant's testimony to be unreliable, however. Comparing Grievant's version of what transpired when Mr. Baldwin picked up the partial remains in July of 1998, to Mr. Baldwin's version, while Mr. Baldwin certainly exhibited a problem with remembering details, and it is troubling that he did not mention in his written statement that he had answered the telephone when Grievant called Charleston Mortuary Service in 1999, his testimony is still more credible than Grievant's. It is unbelievable that Grievant would remember two years later that on this particular case, he had “put up his hands” and stopped Mr. Baldwin from entering the cooler. It is believable, however, that the white box and the folded body bag would stick in Mr. Baldwin's mind and assist him in remembering the events of the day, as well as the fact that he had been to the Medical Examiner's office the day before about the same case and had been shown where the remains were. The undersigned concludes that Mr. Baldwin was allowed by Grievant to remove the remains from the cooler, and Grievant lied under oath when he said he stopped Mr. Baldwin, as employees were not to let non-employees into the cooler area.

Further, Grievant's explanation that he was referring to the remains sent to Pennsylvania when he told Mr. Kennedy he knew remains were still there, does not ring true. He first testified on direct that the box released in July 1998, was clearly the box returned from Pennsylvania, and that he would not have released the remains if he thoughtpart of them were in Pennsylvania without checking with Dr. Kaplan, and that he would have made a notation. Grievant did neither. Apparently, he knew at the time he released the remains in 1998 that the remains had been returned from Mercyhurst College, and were in the box he released.

Further, it is difficult to draw the conclusion that Mr. Kane, Mr. Lowry, and Mr. McDowelle concocted this somewhat elaborate scheme to get Grievant fired, and then got Mr. Kennedy and Mr. Baldwin to go along with it. The undersigned concludes that Respondent has proven the charges against Grievant.

Grievant alleged his termination was in reprisal for filing a grievance. Reprisal is defined in W. Va. Code § 18-29-2(p) 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." To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;

2) that he/she 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;

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

5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); See Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Gruen, supra. If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatoryreasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

Grievant established a prima facie case of reprisal. Grievant's termination, the adverse action, followed within such a period of time that retaliatory motivation can be inferred. Grievant filed a grievance in March 2000, and was terminated in April 2000. However, HHR has proven legitimate, non-retaliatory reasons for the adverse action, as discussed above.

Grievant pointed to testimony of Mr. Kennedy given on the last day of hearing, and asserted from that testimony that “a demotion letter was drafted one week before Mr. Sloan was fired on April 6. Tr. 10/23/00 p. 81. Yet at that time they knew of the alleged mistake Mr. Sloan had made in relation to the alleged mishandling of the remains of [case number 1998-263]. . . . Mr. Kennedy testified that at

some time after the week prior to April 6th, the demotion letter was turned into a dismissal letter. Tr. 10/23/00 p. 81." This recitation of the evidence is not accurate. What Mr. Kennedy testified to was that he and Dr. Kaplan had decided Grievant should be demoted, and he began to work with the Division of Personnel and HHR's Personnel office to draft a demotion letter. Tr. 7/7/00 at page 29. He stated he began drafting the letter in January or February of 2000. Tr. 7/23/00 at page 66. He testified he documented specific problems for the letter, and, "[b]efore we got the demotion letter completed to everyone's satisfaction we found out about another case that we felt was a situation where Mr. Sloan had committed an act that was serious enough to warrant dismissal." Tr. 7/7/00 at page 30. What Mr. Kennedy said in his testimony taken on October 23, 2000, was that, "the dismissal letter had been in process for I would guess approximately a week. It initially was drafted as a demotion letter that was turned into a dismissal letter." Tr. 10/23/00 at page 81. It is not clear from this testimony and the testimony immediately preceding this whether Mr. Kennedy meant that he had begun theprocess of turning the demotion letter into a dismissal letter about a week before the grievance was filed on March 27, 2000, or about a week before the dismissal actually took place, but the undersigned concludes it is more likely than not that it is the former. What is clear from Mr. Kennedy's testimony when taken in its entirety, is that he began drafting the letter as a demotion letter long before March 15, 2000. The evidence does not establish the reasons for Grievant's dismissal to be merely pretextual. Grievant was not fired in retaliation for filing a grievance over his job title and work hours.

Grievant argued that he was the victim of disparate treatment, and cited 11 examples. The Division of Personnel's Administrative Rule 12.5 requires that like penalties be imposed upon all employees for like offenses. W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, 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.

A grievant alleging discrimination must establish a prima facie case by demonstrating:

> (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.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. Grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Id.

Further, this Grievance Board has determined

> [f]or an employee to prevail on a claim of disparate treatment [in discipline], he must establish that there is no rational basis for distinguishing specific penalties for the same or substantially similar misconduct. The misconduct brought into question must be similar or more serious than that with which the grievant is charged. Clark v. Dept. of Navy, 6 MSPB 24 (1981). The grievant must also show that the other employee's disciplinary record is similar to his own. Clancy v. Dept. of Navy, 6 MSPB 173 (1981). Finally, the grievant must establish that his position is similar to that of the other employee to whom he is compared with respect to the trust and responsibility expected of his position. Rohn v. Dept. of Army, 30 MSPR 157 (1986).

McVicker v. Kanawha County Bd. of Educ., Docket No. 95-20-339 (Feb. 9, 1996).

It is important in this analysis to keep in mind that Grievant was a supervisor. "As a supervisor, Grievant may be held to a higher standard of conduct, because he is properly expected to set an example for those employees under his supervision, and to enforce the employer's proper rules and regulations, as well as implement the directives of his supervisors." Wiley v. W. Va. Div. of Natural Resources, Parks and Recreation, Docket No. 96-DNR-515 (Mar. 26, 1988).

Grievant pointed to three incidents involving Neil Policastro, three incidents involving Michael Kane, one incident involving Chuck McDowelle, and two incidents involving Michael Scragg. Grievant is not similarly situated to any of these individuals. All of them are investigators and Grievant was a supervisor. In fact, Grievant was the supervisor of each of these employees. Grievant was supposed to set an example for his employees, and Grievant was the person responsible for making sure his employees were following procedures and policies, and for disciplining those he supervised; although he was to advise Mr. Kennedy of any formal disciplinary measures he intended to take. If he chose not to discipline his subordinates for improper action, that was his decision, and he cannot now use his own inaction in this regard to allege his supervisors discriminated against him. In fact, if Grievant's

employees were not behaving appropriately, that would tend to prove the point that he was not setting a good example, nor was he performing his supervisory job duties in a satisfactory manner. As to the specific incidents, Grievant states Mr. Policastro was caught sleeping on the job and received “only” a written reprimand. The record reflects that Grievant was verbally reprimanded for sleeping on the job, a lesser penalty. Apparently, Grievant does not believe he should have been disciplined at all, because he contends he was not sleeping. However, as Grievant did not grieve the verbal reprimand at the time it was received, “the merits of [that action] cannot be placed in issue now. Jones v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); See Stamper v. W. Va. Dept. of Health & Human Resources, Docket No. 95-HHR-144 (Mar. 20, 1996); Womack v. Dept. of Admin., Docket No. 93-ADMN-430 (Mar. 30, 1994). Furthermore, all the information contained in the documentation of Grievant's prior discipline must be accepted as true. See Perdue v. Dept. of Health & Human Resources, Docket No. 93- HHR-050 (Feb. 4, 1994).” Aglinsky v. Bd. of Trustees, Docket No. 97-BOT-256 (Oct. 27, 1997).

Mr. Policastro “was spoken to” for letting his child roam freely in the office, certainly an appropriate response to this minor problem. Finally, Mr. Policastro received a verbal warning from Grievant and Mr. Kane for switching shifts and for calling in sick causing disruption in operations. Apparently at the time, Grievant believed this was not a significant concern. None of the incidents involving Mr. Policastro is similar to the act which resulted in Grievant's dismissal.

Grievant cited allegations that Mr. Scragg was receiving money from one of the body transport services. Mr. Kennedy testified that Mr. Scragg turned cash in to him on three occasions, told him the cash had been given to him by one of the services, and asked him to please talk to the proper person at the service and tell them this was not proper. Mr. Kennedy did so, although it apparently took several tries to stop these gifts. Grievant also asserted that Mr. Scragg had asked Mr. Lowry to sponsor his son's Little League team. Apparently, Grievant had knowledge of this at the time it occurred, fiveyears ago, and chose to do nothing about it. Mr. Kennedy had never heard this allegation before the Level IV hearing, and it occurred before he and Dr. Kaplan were employed at the Medical Examiner's office. Mr. Scragg believed Dr. Sopher was aware that Mr. Lowry was sponsoring the team, and was not concerned.

As to Mr. Kane, one of the cited incidents was with regard to inappropriate actions by Mr. Kane's girlfriend, not Mr. Kane, and as Dr. Kaplan aptly noted, Mr. Kane is not responsible for his girlfriend's

behavior. Another occurred at a hotel, and simply involved Mr. Kane breaking the gate at the pool, which Mr. Kane replaced; it did not involve how Mr. Kane performed his job duties. Mr. Sloan testified he reported this incident to Mr. Kennedy, and it was up to him to take action against Mr. Kane. He did not explain how he arrived at this conclusion. Nonetheless, Dr. Kaplan testified that he gave Mr. Kane “a good dressing down” once he was told of this incident. The third incident involved a judgment Mr. Kane made as to handling of a body, with which Grievant disagreed. Whether Mr. Kane made the correct judgment or not would be up to the Chief Medical Examiner. Insufficient information was introduced into the record for the undersigned to evaluate Mr. Kane's action.

Grievant cited a written warning given to Dr. Donell Cash, Chief Toxicologist, for sleeping on duty. Dr. Cash is supervised by Mr. Kennedy. Dr. Cash was counseled about sleeping on the job on November 10, 1998, and was found asleep on the job again on November 19, 1998. The record does not reflect that he was disciplined for this second offense. On May 30, 2000, Dr. Cash was found asleep at his desk at 9:30 a.m., and at 1:30 p.m., and received a written warning for this. Grievant had received a verbal warning for his first offense of sleeping on the job, which occurred in October 1999, six months after Mr. Kennedy had distributed a memorandum emphasizing to the investigators that there was to be no sleeping on the job. There is no significant difference here in the discipline. Grievant also noted that Mr. Gardner had been hired by the Medical Examiner's office even though there were complaints while he was a county coroner that he was abrasive, abusive, and unprofessional. This bears no resemblance to Grievant's action.

The only incident cited by Grievant which is even remotely similar to what Grievant did involved Mr. McDowelle, who released the wrong body to a funeral home. This occurred in 1995, before either Mr. Kennedy or Dr. Kaplan arrived at the Medical Examiner's office. The error was discovered within three hours, but the remains had already been cremated. Mr. Kennedy's understanding was that, unlike Grievant, Mr. McDowelle had immediately come forward and taken responsibility for the error, had returned to the office after his shift ended, and had assisted in investigating how the error had occurred. He did not believe any action had been taken against Mr. McDowelle, just as no action was taken against Grievant for releasing the wrong body bag. He explained that the difference between that situation and the one at hand was that Grievant had contacted Charleston Mortuary a year before the office discovered the error and disclosed the error, but had not told anyone in the Medical Examiner's office, and had concealed the information or ignored it for a year; a valid and important

distinction. Grievant's act is not like the error of Mr. McDowelle.

As a final point, Grievant is certainly correct that, due to the manner in which the Medical Examiner's office handled the remains of case number 1998-263 from start to finish, there is no way to know whether the remains found in March of 2000 were in fact those of case number 1998-263, although it seems more likely than not that they were, and Mr. Gardner was simply wrong when he testified he had defleshed all of the remains. As noted previously, the undersigned has concluded that Mr. Kane's testimony is totally unreliable, including his testimony about what he found in the body bag. This lack of attention to detail in keeping track of all of the remains of case number 1998-263, however, provides no excuse for Grievant's action. Once he discovered the additional remains, itwas his responsibility as Chief Investigator to make sure this matter was promptly addressed.

Due to the outcome of the dismissal grievance, the grievance regarding Grievant's work hours and transfer of duties to Mr. Kane is moot, and will not be addressed either procedurally, or on the merits.

The following Findings of Fact are made based upon the record developed at Level IV.

Findings of Fact

1. Grievant had been employed by HHR since 1985. At the time of his dismissal he was Chief Medicolegal Investigator, and was responsible for supervising the investigators employed at the Office of the Chief Medical Examiner for West Virginia.

2. Sometime in early to mid 1999, Grievant discovered additional remains of a body he had previously released for cremation in July 1998, case number 1998-263. Grievant called James Lowry, of Charleston Mortuary Service, and told him of this discovery, and that he would let him know what they were going to do about it after he had talked to Dr. James Kaplan, the Chief Medical Examiner. Grievant did not tell Dr. Kaplan he had found these additional remains, and took no further action on this matter.

3. On March 15, 2000, Danny Goddard, a morgue technician, discovered additional remains of case number 1998-263 in a cooler in the Medical Examiner's office.

4. When confronted with this matter, Grievant told Larry Kennedy, the Office Administrator in the Medical Examiner's office, that he knew the additional remains were in the cooler, but got busy and forgot about it.

5. Grievant was dismissed by letter dated April 6, 2000, effective April 7, 2000, for concealing or ignoring for a year, the fact that additional remains of case number 1998- 263 were in a cooler at the Medical Examiner's office. This act destroyed all faith in Grievant's judgment. 6. Mr. Kennedy began drafting the dismissal letter in January or February 2000, as a demotion letter, due to concerns with Grievant's work habits. He worked with the Division of Personnel and HHR's Personnel office in drafting the letter.

7. Grievant was responsible for administering discipline to the investigators under his supervision, Michael Kane, Chuck McDowelle, Neil Policastro, and Michael Scragg.

8. In 1995, Mr. McDowelle released the wrong body for cremation. The error was discovered within three hours, however, the body had already been cremated. Mr. McDowelle came forward immediately and admitted to the mistake, and assisted in investigating how the error occurred. This occurred while Dr. Irvin Sopher was Chief Medical Examiner, and before Mr. Kennedy was an employee. Mr. McDowelle was not disciplined.

9. Grievant received a verbal warning on October 21, 1999, for sleeping while on duty on October 20, 1999. Grievant did not grieve the verbal warning. A memorandum had been distributed to the investigators dated April 6, 1999, by Mr. Kennedy, noting, among other things, that there was to be, " **No sleeping on duty.**" This was also discussed at an Investigator-Autopsy Assistant Meeting on April 21, 1999, where it was specifically noted that "It is prohibited to sleep during the night shift."

10. Grievant received a written warning on January 24, 2000, for leaving the office on two separate occasions during his shift, on January 14 and 18, 2000, when no other investigator was on duty, and asking the custodian and maintenance worker to answer the telephone while he was gone. It was office policy that an investigator had to be on duty 24 hours a day, and an investigator could not leave during his shift unless another investigator was on duty. Grievant did not grieve the written warning.

11. Grievant filed a grievance on March 27, 2000, regarding his work hours, and some of his job duties being assigned to Mr. Kane in 1999. The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Pursuant to W. Va. Code § 29-6A-6, 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. Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988).

2. Respondent proved the charges against Grievant.

3. The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." House v. Civil Serv. Comm'n, 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, Buskirk v. Civil Service Comm'n, [175 W. Va. 279, __,] 332 S.E.2d 579, 581 (W. Va. 1985); Oakes v. W. Va. Dept. of Finance and Admin., [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); Guine v. Civil Service Comm'n, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." Scragg v. Bd. of Directors W. Va. State College, Docket No. 93-BOD-436 (Dec. 30, 1994).

4. The undersigned may mitigate the discipline imposed if the penalty assessed is clearly excessive or clearly disproportionate to the offense. Factors to be considered in this analysis include the employee's past disciplinary record, the clarity of notice to the employee of the rule violated, whether the employee was warned about the conduct, and mitigating circumstances. Stewart v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 91-ABCC-137 (Sept. 19, 1991). "[T]he work record of a long time civil serviceemployee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." Buskirk, supra.

5. Grievant was dismissed for good cause, and has not demonstrated reason for mitigation.

6. A grievant alleging discrimination must establish a prima facie case by demonstrating:

(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.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

7. Once a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. Grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Id.

8.

> For an employee to prevail on a claim of disparate treatment [in discipline], he must establish that there is no rational basis for distinguishing specific penalties for the same or substantially similar misconduct. The misconduct brought into question must be similar or more serious than that with which the grievant is charged. Clark v. Dept. of Navy, 6 MSPB 24 (1981). The grievant must also show that the other employee's disciplinary record is similar to his own. Clancy v. Dept. of Navy, 6 MSPB 173 (1981). Finally, the grievant must establish that his position is similar to that of the other employee to whom he is compared with respect to the trust and responsibility expected of his position. Rohn v. Dept. of Army, 30 MSPR 157 (1986).

McVicker v. Kanawha County Bd. of Educ., Docket No. 95-20-339 (Feb. 9, 1996).

9. "As a supervisor, Grievant may be held to a higher standard of conduct, because he is properly expected to set an example for those employees under hissupervision, and to enforce the employer's proper rules and regulations, as well as implement the directives of his supervisors." Wiley v. W. Va. Div. of Natural Resources, Parks and Recreation, Docket No. 96-DNR-515 (Mar. 26, 1988).

10. Grievant is not similarly situated to the investigators he supervised, and did not receive discipline which was different from that administered to any other similarly situated employee. Further, Grievant's act was not the same as that of Mr. McDowelle in releasing the wrong body in 1995, and Mr. McDowelle's act occurred under a different administration.

11. To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

> 1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;
>
> 2) that he/she 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;

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

5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); See Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Gruen, supra. If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra. 12. Grievant established a prima facie case of reprisal. Grievant's termination, the adverse action, followed within such a period of time that retaliatory motivation can be inferred. However, HHR has proven legitimate, non-retaliatory reasons for Grievant's termination, and Grievant did not demonstrate these reasons were merely pretextual.

Accordingly, this grievance is **DENIED**.

Any party or the Division of Personnel may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. 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. 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.

BRENDA L. GOULD

Administrative Law Judge

Dated: January 30, 2001

Footnote: 1

Grievant argued in his post-hearing written argument that he should be awarded attorney fees, because it is difficult for

state employees to hire counsel due to their low salaries, and this case required "an immense amount of legal and investigatory work." Grievant argued that the Grievance Board's determination that it has no authority to award attorney fees at Level IV is unfair and unsound from a policy perspective, and is a violation of equal protection of law. Grievant did not cite any legal authority which would confer authority upon the Grievance Board to award attorney fees, and the undersigned is not aware of any such authority. Chafin v. Boone County Health Dep't, Docket No. 95-BCHD- 362 (June 21, 1996); Smarr v. Wood County Bd. of Educ., Docket No. 54-86-062 (June 16, 1986).

Footnote: 2

Four days of hearing were held at Level IV, on July 7 and 18, August 25, and October 23, 2000. Grievant was represented by Margaret L. Workman, Esquire, and Respondent was represented by B. Allen Campbell, Esquire. This matter became mature for decision upon receipt of the last of the parties' reply briefs on December 20, 2000.

Footnote: 3

It is not necessary to address all the allegations of misconduct listed in the dismissal letter. Grievant was dismissed because he had knowledge that he had not released all the remains of case number 1998-263, but did nothing to correct this mistake and did not inform Dr. Kaplan or Mr. Kennedy of this mistake. That is the charge against Grievant which must be proven by HHR, and is the only allegation which will be addressed.

Footnote: 4

The name of decedent was used by many of the witnesses, but the body will be referred to in this decision only as case number 1998-263.

Footnote: 5

Grievant suggests that asking Mr. Baldwin and Mr. Lowry to prepare these letters after he was discharged "circumstantially proves the agency was out to get rid of Grievant." Theundersigned sees no impropriety or conspiracy in a request for a written statement from a potential witness, regardless of when it is requested.