THOMAS ROTRUCK,

Grievant,

v. **Docket No. 02-HEPC-164**

HIGHER EDUCATION POLICY COMMISSION/

POTOMAC STATE COLLEGE OF WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, Thomas Rotruck, employed by Potomac State College (PSC or Respondent) as a Farm Worker, filed a grievance directly to level four, as is permitted by W. Va. Code § 29-6A-4 (e), on June 13, 2002, following the termination of his employment. (See footnote 1) An evidentiary hearing was conducted on July 29, 2002, at which time Grievant was represented by Kevin D. Church of AFSCME, and PSC was represented by Assistant Attorney General Kristi McWhirter. The matter became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before August 20, 2002.

Background

By memorandum dated June 13, 2002, Grievant was advised of Respondent's intent to terminate his employment for the following reasons:

On April 4, 2002, you were suspended and received counseling for violating [the] Workplace Violence Policy, for aninappropriate comment that was construed as a threat to a coworker, [and] the Deadly Weapons/Destructive Devices Policy, for carrying a deadly weapon onto WVU property. . . .

On May 8, 2002, you acknowledged understanding in a signed agreement of the appropriate procedure for purchasing . . . . On June 3, 2002, you ordered parts for WVU property (Potomac State mower) and scheduled a service call for WVU property (Potomac State baler). By not following the New Farm Policies, you violated these policies.

On June 2, 2002, you altered WVU property (Potomac State Campus Farm) by mowing approximately eight (8) acres of hay without consent of the Farm Manager. . . A violation of West

Virginia University Policy WVU-HR-56, University Property Policy.

On June 11, 2002, you admitted removing WVU property (universal joint) without permission and keeping it at your private residence for over one year . . . a violation of West Virginia University Policy WVU-HR-56, University Property Policy.

Grievant's employment was terminated effective June 18, 2002.

Discussion

The following evidence was presented by the parties relating to the incidents set forth in the June 13, 2002, letter which Respondent asserts constitutes gross misconduct.

Inappropriate comment/threat

On March 21, 2002, Thomas Burwell and Derek Jackson, WVU Human Resources (HR) Representatives conducted individual meetings with PSC farm personnel regarding classification and compensation issues. Grievant had requested an upgrade in classification, and discussed other issues of concern to him. At the conclusion of the meeting, Grievant commented to the effect that he "would like to beat the hell out of"Michael Monahan, Chief Financial Officer at PSC. This comment was determined by the HR Representatives to be a threat.

Mr. Monahan testified that he did not hear the comment made by Grievant, but was concerned when he was advised of it. Mr. Monahan recalled having a meeting with Grievant earlier in March in which Grievant expressed his frustration regarding certain work-related matters, and he did not feel threatened at that time. Following his termination, Grievant advised Mr. Monahan that he was "just kidding."

Grievant testified that he believed the meeting was over when he made the comment, and never meant it to be a threat. Grievant explained that he was simply frustrated with his working situation, and that "nobody wants to help the farm," but would rather just "shut the farm down." (See footnote 2) Grievant recalled apologizing to Mr. Monahan when he next spoke with him.

The WVU Workplace Violence Policy provides in pertinent part:

Violent conduct, actions, or behavior directed to other University employees, customers, students, members of the public or University property that occurs during the course of an employee's duties or on the basis of work-related issues during off-hours is prohibited. This includes actions, both verbal and physical, that threatens, harasses, coerces, or inflicts harm.

All University employees should be treated with courtesy and respect at all times. Employees are expected to refrain from fighting, horseplay, or other conduct that may be dangerous to others.

Possession of firearm During the March 21, 2002 meeting, Grievant stated that much of the corn and alfalfa crops were being destroyed by the deer population, and that he carried a gun in his truck which he shot over their heads to scare them away. He also admitted that he shot foxes and coyotes which attack the farm animals.

At level four, Grievant admitted regularly shooting "varmints" with his 12 gauge shotgun, and shooting over the heads of deer to frighten them away. (See footnote 3) Rick Woodworth, a PSC faculty member and Farm Program Manager until a reorganization became effective in May 2002, confirmed that varmints were disposed of by supervisors with guns, and it would not be unusual for Grievant to have such a weapon for that purpose.

The WVU Deadly Weapons/Destructive Devices Policy provides:

Possession or storage of a deadly weapon, destructive device, or fireworks in any form (as defined by WV State Code) is prohibited on the West Virginia University campus in University-leased facilities and in University vehicles.

Any University faculty member, staff member, or student who has been found in violation of this policy shall be subject to disciplinary action for misconduct which may include termination or expulsion as well as criminal prosecution.

The provisions of this policy shall not apply to the following persons, while acting in their official capacity:

Individuals required to possess the items prohibited by this policy in order to participate in undertakings sanctioned by West Virginia University which include academic/research programs, historical items, the farm management programs which are approved by the Department of Natural Resources.

For these offenses, Grievant was suspended without pay for ten days. Because Grievant did not contest the suspension, there is no need to further discuss these issues. On June 3, 2002, Farm Supervisor Roger Poling sent the following electronic mail message to Douglas Wilmes and Michael

Monahan: (See footnote 4)

On 6/2/02 Tom Rotruck came in on his day off and mowed down aprox. [sic] 8 acres of hay without my consent or knowledge. This is to be chopped for haylidge. Tom also failed to consider the amount of storage space avaelable [sic] and the forecast if for rain, so it is not likely we can make the excess into dry hay without getting it wet.

On 6/3/02 Tom informed John Goeringer (Temp Supervisor) that he had ordered parts for the mower and that he called a service man to come and repair the baler on 6-10. Again Tom did this without my consent or knowledge.

This kind of behavior can not continue. I just wanted to inform you of the situation and ask for a recommendation of what type of action to take.

Mr. Poling subsequently reported that on June 11, 2002, a mower had been disabled with a broken universal joint. Grievant advised him that he had a spare part at home, where it had been for approximately one year. Grievant brought the part to work, still in its original box, and the mower was repaired.

WVU Policy 56, Use of Equipment & Resources, provides:

University programs, personnel, time, titles and property; including equipment, systems, vehicles, information, supplies, and office space; are only to be used in conducting authorized business of the University and the Board of Trustees. Use of University property for personal gain, pleasure, or benefit is prohibited.

It is a criminal offense under state law (WV Code 61-3-30) to remove University property. Employees are required to return all keys, books, office supplies, ID cards or badges, equipment, etc., upon termination of employment.

Consequences: Unauthorized use, disclosure, alteration, or destruction of University resources is subject to disciplinary action, up to and including termination and/or legal prosecution.

Mr. Poling testified that because the farm works on a tight budget he had advised Grievant and Mr. Goeringer in May that purchases were not to be made without his prior approval. (See footnote 5) In June, he learned that Grievant had ordered parts for a mower, and had scheduled a service call to have the baler repaired. Mr. Poling also stated that by mowing the hay on a Sunday, without his

knowledge or permission, Grievant disrupted the work schedule for the following week as the harvest had to be processed before it rained.

Mr. Poling's memorandum dated May 8, 2002, titled “New Farm Policies” states as follows:

Vacation: Request for leave must be presented to the farm manager five working days prior to the desired day for approval.

Purchasing: Only credit card holders will be responsible for purchasing of feed, parts, supplies, etc. Unless the farm manager grants permission, unauthorized purchasing will result in disciplinary action.

Scheduling: Farm employees will report to the farm manager each Monday at 10:00 in the morning for instruction and progress reports.

Grievant testified that he had always ordered parts and kept the machinery in working order since he was expected to get the farm work done. Grievant recalled ordering two universal joints the prior year, and having picked them up while using his personal vehicle. During hunting season he had removed the extra part from his truck and placed it in his garage until it was needed. Grievant opined that it was necessary for him to order the mower blades and have an electrical problem on the baler repaired since Mr. Polingwas difficult to locate. Grievant also recalled that he had discussed the New Farm Policy with Mr. Poling, at which time he pointed out that the vacation provision simply was not feasible. Mr. Poling had indicated they would work around it, and Grievant interpreted the comment to mean they could work around all of the provisions of the Policy.

In regard to the hay, Grievant stated that he had never been told he could not work on Sundays, and he had mowed on Sundays previously. He noted that hay production was done subject to the weather, and he had only acted in the best interest of the farm. Mr. Woodworth confirmed that under his tenure Grievant had been permitted to order parts, without his permission, up to a certain dollar amount. He found nothing unusual in Grievant inadvertently driving home with the extra part, and had done so himself. Finally, Mr. Woodworth concurred that hay must be harvested subject to the weather, but must also be processed before it is overly mature, as it will lose nutritional value.

In disciplinary matters, the employer has the burden of proving the charges against the employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; Latassa v. Bd. of Trustees/W. Va. Univ., Docket No. 96-BOT-477 (July 24, 1997). A preponderance of the evidence is generally

recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

The higher education Classified Employees' Handbook provides that administrators have the right of dismissal for "just cause," which includes conduct "of substantial actual and/or potential consequence to operations or persons, typically involving flagrant or willfulviolation of policy, law, or standards of performance or conduct . . . ." Douglas v. Bd. of Trustees/W. Va. Univ., Docket No. 99-BOT-522 (May 15, 2000).

Additionally, Respondent's Discipline Policy-9 states:

When an employee does not maintain the standards of performance or conduct as outlined by the supervisor, or, does not comply with applicable policies, procedures or laws, disciplinary action, including but not limited to written notice, demotion, suspension, or dismissal may be taken. Dependent upon the actual and potential consequences of the offense, employee misconduct may be considered minor misconduct or gross misconduct.

Minor misconduct results in the appropriate action being taken through progressive discipline. Progressive discipline requires notice of concern and expectations to the employee through letter(s) of warning, with potential suspension and/or demotion, resulting in termination, for subsequent similar offenses. Gross misconduct may result in any level of discipline up to and including immediate dismissal at the supervisor's discretion.

Pursuant to WVU Policy 56, the removal of WVU property is a criminal offense. There were no criminal charges filed in this matter. Lacking any evidence that the universal joint was taken by Grievant to his home for personal use, his explanation of why he had it at his home is accepted. Grievant's prompt retrieval of the part, still in the original box, supports a finding that any violation of the Policy was merely technical, and resulted in no harm to Respondent.

It cannot be determined that mowing the hay was in violation of the New Farm Policy. The section on scheduling simply stated that the employees would report to the Farm Manager on Mondays for instruction and progress reports. While processing the hay would reasonably be discussed at a staff meeting, the Policy does not require that the employees seek the Manager's approval prior to completing their duties. Certainly, Mr.Poling did not appreciate Grievant's initiative; however, the act

does not violate the language of the policy.

Conversely, the Policy does provide clear and direct instruction regarding the purchasing. If Mr. Poling reconsidered his policy regarding vacation time, Grievant's interpretation that he could ignore the purchasing section was incorrect, and was in violation of the New Farm Policy.

An allegation that a particular disciplinary measure is disproportionate to the offense proven or otherwise arbitrary and capricious is an affirmative defense, and Grievant bears the burden of demonstrating that the penalty was clearly excessive or reflects an abuse of agency discretion, or an inherent disproportion between the offense and the personnel action. Jones v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Thompson v. W. Va. Dept. of Health & Human Serv., Docket No. 94-HHR- 254 (Jan. 20, 1995).

Mitigation of a penalty is considered on a case by case basis. Conner v. Barbour County Bd. of Educ., Docket No. 95-01-031 (Sept. 29, 1995); McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995). Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. Pingley v. Div. of Corrections, Docket No. 95-CORR-252 (July 23, 1996). 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). However, Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned shall not substitute herjudgement for that of the employer. Tickett v. Cabell County Bd. of Educ., Docket No. 97-06-233 (Mar. 12, 1998); Huffstutler v. Cabell County Bd. of Educ., Docket No. 97-06-150 (Oct. 31, 1997).

Grievant has established a twenty year work history with PSC, and no disciplinary actions prior to the April 4, 2002 suspension were produced. Grievant had a good working relationship for twelve years with Mr. Woodworth, who testified that Grievant's willingness to work was exemplary, and that his performance evaluations had been positive. Mr. Woodworth indicated that Grievant had been allowed to purchase parts, up to a certain dollar amount, necessary to repair equipment, and had to some considerable extent, set his own schedule in completing tasks. Additionally, Grievant would bring his personal equipment to the farm when necessary to complete a task.

Also to be considered are that the cost attendant to the purchase of mower blades and the service order to repair the baler were necessary. The mower blades cost approximately forty dollars,

and while the repair bill was not disclosed, there is no indication that it was an amount which caused any harm to the budget.

Next, it is important to note that Mr. Poling has little or no experience supervising employees. Other than the New Farm Policy, there is no evidence that he made any effort to work with Grievant, who continued to function as he had for more than a decade. Mr. Poling clearly wanted to make some procedural changes, but did not effectively convey them to Grievant. The situation was compounded by the fact that the Human Resources representatives were also inexperienced in dealing with such matters and recommended dismissal when only a ten day suspension had been imposed for an alleged threat of physical violence and bringing a gun to work. The actual or possible harm done byGrievant's violation of a policy prohibiting expenditures is notably less than making threats or having a firearm at work. (See footnote 6)

In summary, it appears to the undersigned that this situation has developed from a lack of communication and cooperation between the employee and the supervisor. Mr.
Mr. Poling testified that he felt Grievant wanted to “work around” him. Meanwhile Grievant stated that he had tried to show Mr. Poling the ropes. It appears that Mr. Poling should communicate his intentions to Grievant in a more direct manner, and consider Grievant's input, given his experience on the farm. In turn, Grievant needs to cooperate with Mr. Poling in completing the work, even though Mr. Poling may want to do some things differently. In assessing the above-cited factors and considering the proper standard of review, a lesser penalty is warranted for Grievant's offense. Considering the reason for, and length of the suspension imposed in April, a twenty day suspension would be appropriate for this incident.

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

Findings of Fact

1. Grievant has been employed by PSC for approximately twenty years, and has held the classification title of Farm Worker at all times pertinent to this grievance. 2. In April 2002, Grievant was suspended for ten days for violating the Workplace Violence Policy and the Deadly Weapons/Destructive Devices Policy.

3. In May 2002, newly appointed Farm Manager Tom Poling issued a New Farm Policy which included the provision that only credit card holders would be responsible for purchasing, and that unauthorized purchases would result in disciplinary action. The Policy further provided that farm employees were to report to the manager on Monday mornings for instruction and progress reports.

4. On June 2, 2002, Grievant mowed approximately eight acres of hay without the knowledge or consent of the Farm Manager.

5. On June 3, 2002, Grievant ordered new blades for a mower and scheduled a service call to have a baler repaired. Grievant had not obtained the permission of the Farm Manager before ordering the parts and services.

6. On June11, 2002, Grievant retrieved a universal joint from his home to repair farm equipment. He had ordered the part the previous year, and after leaving it in his truck for a period of time, stored it in his garage until it was needed.

7. Under the administration of the previous Farm Manager, Grievant had been authorized to purchase items under a set amount, and had worked without direct supervision.

Conclusions of Law

1. An employer must establish the charges in a disciplinary matter by a preponderance of the evidence. W. Va. Code 18-29-6, Latassa v. Bd. of Trustees/W. Va. Univ., Docket No. 96-BOT-477 (July 24, 1997).

2. An employee can be immediately dismissed for gross misconduct, which includes conduct "of substantial actual and/or potential consequence to operations or persons, typically involving flagrant or willful violation of policy, law, or standards of performance or conduct . . . ." Douglas v. Bd. of Trustees/W. Va. Univ., Docket No. 99- BOT-522 (May 15, 2000).

3. Respondent has proven by a preponderance of the evidence that Grievant violated the New Farm Policy on June 3, 2002, when he ordered parts and services without the permission of the Farm Manager.

4. An allegation that a particular disciplinary measure is disproportionate to the offense proven or otherwise arbitrary and capricious is an affirmative defense, and Grievant bears the burden of demonstrating that the penalty was clearly excessive or reflects an abuse of agency discretion, or an

inherent disproportion between the offense and the personnel action. Jones v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Thompson v. W. Va. Dept. of Health & Human Serv., Docket No. 94-HHR-254 (Jan. 20, 1995).

5. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. Pingley v. Div. of Corrections, Docket No. 95-CORR-252 (July 23, 1996). 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). 6. Grievant has established that mitigation is appropriate in this matter considering his long employment, good performance evaluations, and that the nature of his violation was much less severe than that for which he received a suspension.

Accordingly, this grievance is **GRANTED**, and the level of discipline reduced to a twenty day suspension. Respondent is Ordered to reinstate Grievant to the position of Farm Worker with all back pay and benefits to which he would be entitled.

Any party 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 §29-5A-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: September 12, 2002 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

Potomac State College is a two-year junior college located in Keyser, and is a branch of West Virginia University (WVU). Accordingly, the employees of PSC are subject to policies and regulations of WVU.

Footnote: 2

Apparently, Respondent is considering selling the lower section of the farm.

Footnote: 3

The Department of Natural Resources had denied PSC a permit to kill the deer.

Footnote: 4

Mr. Wilmes' position is not identified in the record.

Footnote: 5

Grievant is the only Farm Worker at the PSC farm.

Footnote: 6

Grievant opined that the dismissal was actually motivated by the fact that he had been outspoken against the sale of the farm; however, there is no evidence to support that belief.