SUSANNA HALL,

Grievant,

v. **DOCKET NO. 04-ADMN-046**

DEPARTMENT OF ADMINISTRATION/INFORMATION SERVICES AND COMMUNICATIONS DIVISION,

Respondent.

DECISION

On January 20, 2004, Grievant Susanna F. Hall filed a grievance against her employer, Respondent Department of Administration(DOA), stating: “I am appealing the Department of Administration's decision to terminate my employment in its letter dated December 31, 2003 terminating my position effective January 15, 2004.” As relief, Grievant seeks, “I am asking to be reinstated to employment with benefits.”

Having been filed directly at level four, a hearing was held in the Grievance Board's Charleston office on March 19, 2004. (See footnote 1) Grievant was represented by UMWA-WVSEU Representative Fred Tucker. Respondent was represented by counsel, Heather Connolly. The matter became mature for decision April 12, 2004, the deadline for filing of the parties' proposed findings of fact and conclusions of law. (See footnote 2)

Based on a preponderance of the evidence contained in the record and adduced at the level four hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant was employed by Respondent in the Central Mail Office, or Mailroom, of the Information Services and Communications (IS&C) Division of the DOA, where she had been employed for 24 years without any disciplinary actions.

3. The IS&C Mailroom is located within the state capitol complex, and serves as the “post

office" for the complex, handling both U.S. Mail and interdepartmental mail. It receives mail from the U.S. Postal Service addressed to any office in the complex, and distributes it, and also collects mail from those offices and delivers it to the U.S. Mail. It collects, sorts and distributes interdepartmental mail as well.

4. Grievant's duties included security for the Mailroom, collecting mail, sorting mail and on occasion delivering mail.

2. On or about September 22, 2003, Mailroom Supervisor Danny Pauley approached Operations Manager Catherine McClung and told her some open mail had been found in the women's restroom. What had been found were two parking ticket envelopes that had been mailed to the department of finance, each with a check in it.

3. Ms. McClung, Mr. Pauley and IS&C Data Center Manager Martin Denison went to the Mailroom and called all staff together. They told the staff that they knew some mail had been tampered with, and asked that the guilty party come forward by 5:00 that day. The employees were told that if someone admitted to the act, that would be takeninto consideration, but that there would be consequences. The employees were not told the nature of the "tampering" that had been discovered.

4. By the end of the day, a few employees had come to discuss things they thought they could have done that constituted "tampering," but none confessed to opening parking ticket envelopes. Several mentioned concerns with handling mail that had already been opened when they got it.

5. Ms. McClung also called Gary Slater at the Commission on Special Investigations, and someone from that office came and talked to her about the problem. That person called in the Protective Services Division, which functions as the Capitol Police, who said they would investigate.

6. The next day, Protective Services Officer Bob Long began interviewing Mailroom employees. He met with Grievant and mentioned parking tickets, but not that some had been found in the women's restroom.

7. Grievant confessed to Officer Long that she had taken money from envelopes that were sent to pay parking fines on several occasions. She was immediately placed under arrest and arraigned on a charge of petit larceny in Kanawha County Magistrate Court.

8. Grievant was suspended without pay on September 24, 2003, pending the outcome of the criminal charges. She did not grieve the suspension. On December 19, 2003, Grievant pleaded guilty in Kanawha County Magistrate Court to a charge of petit larceny, was fined $5 and ordered to pay

$100 in restitution.

9. On December 31, 2003, DOA Acting Secretary Tom Susman informed Grievant by letter that she would be dismissed from employment effective January 15, 2004, for theft of government property, based on her criminal conviction. 10. Grievant began taking money from parking ticket envelopes in January 2003. She put the envelopes in her pocket and took them out to her car, where she opened them. If the envelope had a check in it, she would tape it closed and put it back in the mail. If the envelope had money, she would keep it and burn the envelope. She usually only took $5 at a time, and estimated she had taken $100 total. She did not take the envelopes that were found in the restroom.

11. Grievant had suffered a series of personal problems that contributed to her state of mind during the time frame in which she committed the thefts:

a. In November, 2002, her long-time boyfriend died of a heart attack while talking to her on the telephone;

b. In February, 2003, a niece whom Grievant had raised as a daughter was killed in a car accident;

c. In May, 2003, her sister, for whom Grievant was a primary caregiver, died after a long-suffering ordeal with cancer.

d. In August, 2003, her mother died suddenly of a heart attack; and

e. In September, 2003, her son's wife left him with three small children, and they moved in with Grievant.

12. In addition to problems with her personal life, Grievant felt harassed at work, and that some coworkers were mistreating her and being abusive. She related one incident in which a mailbag was thrown at her, and she felt she was not given sufficient instructions on her tasks. She complained to Mr. Pauley, who told her he would take care of it, but she saw no improvement in her working conditions.

13. Grievant further had trouble managing her medication for depression, and became a compulsive gambler.

DISCUSSION

The burden of proof in disciplinary matters rests with the employer, who must prove 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). In order to dismiss a tenured state employee, the employer must meet the judicial standard set out in Syllabus Point 2, of Buskirk v. Civil Service Commission, 175 W. Va. 279, 332 S.E.2d 579 (1985), which 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." *See* Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965). *See also* Scragg v. Bd. of Dir. W. Va. State College, Docket No. 93-BOD-436 (Dec. 30, 1994); Bonar v Dep't of Transp./Div. of Highways, Docket No. 99-DOH-379 (July 22, 2003).

In this case, the facts are undisputed, and Grievant has admitted to the charges for which she was terminated, so Respondent has met its burden. However, Grievant asks that the penalty for her actions be mitigated. She enumerated the extenuating circumstances that drove her to commit the acts she admitted, and points out her heretofore unblemished work record.

“Undoubtedly, theft of state property is one of the most serious offenses an employee can commit; the value of the property is of little consequence. Davis v. W. Va. Dep't of Motor Vehicles., Docket No. 89-DMV-569 (Jan. 22, 1990).” Overbee v Dep't of Health and Human Resources/Welch Emergency Hosp. Docket No. 96-HHR-183 (Oct. 3, 1996). “Larceny is a form of gross misconduct which may warrant dismissal of a stateemployee.” Brown v. W. Va. Dep't of Commerce, Labor & Envtl. Resources, Docket No. 92-T&P-473 (Apr. 8, 1993). *See* Davis v. W. Va. Dep't of Motor Vehicles, Docket No. 89- DMV-569 (Jan 22, 1990).

"In assessing whether the decision was excessive or disproportionate the undersigned must look at the totality of the circumstances. Some factors to be considered in the mitigating 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 other mitigating circumstances. *See*

Stewart v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 91-ABCC-137 (Sept. 19, 1991). As stated in [Buskirk, *supra*], 'the work record of a long-term civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct.' *See* Blake v. Civil Serv. Comm'n, 172 W. Va. 711, 310 S.E.2d 472 (1983); Serreno v. W. Va. Civil Serv. Comm'n, 169 W. Va. 111, 285 S.E.2d 899 (1982)." Hill v. Bureau of Employment Programs/Management Information Sys., Docket No. 01-BEP-513 (Sept. 11, 2002); Farley v. W. Va. Dep't of Health and Human Resources, Docket No. 02- HHR-145 (July 29, 2002).

Balancing the interests of the employer in maintaining a workplace that provides the best service possible to people of the State of West Virginia with the interests of a long- tenured State employee requires consideration of both sides of the issues. "Deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee, *supra*. "However, in [Hercules v. W. Va. Div. of Highways, Docket No. 97-DOH-006 (Apr. 17, 1997)], the Grievance Board has held that '[d]ismissal as a disciplinary measure must be reserved for circumstances when nothingelse but the removal of the employee from the work environment will do.'" Hayes v. W. Va. Div. of Juvenile Justice, Docket No. 98-DJS-220 (Dec. 14, 1998).

Grievant's position was one of trust, and the grievousness of her theft is not unsubstantial, no matter what the amount of money. Respondent could not be expected to restore her to this position of trust without some sort of overburdensome monitoring measures. However, Grievant stated she was not asking to be put back in the Mailroom with her previous duties, just to be restored to the payroll so she could continue her tenure and receive a paycheck while providing some other needed service.

Nevertheless, three significant factors militate against overriding the employer's deference and cast doubt on Grievant's prospects for rehabilitation. The first is the breach of trust, not in just thieving, but in doing so from a position trusted with the security of the mail. The irony of Grievant watching the Mailroom door to ensure its security while stealing from the mail was not lost on the undersigned, especially when Grievant stated she would have turned in anyone she saw doing the same thing. The second is that Grievant was given the opportunity to make a confession on the day her supervisors met with the Mailroom staff, with the promise that cooperation would be considered as a mitigation to the confessed act. Grievant squandered this opportunity, and did not actually confess until she thought she was already caught. Those events strongly suggest Grievant had guilt,

but little contrition. The third factor is that Grievant's misconduct was not a one-time thing; she admitted she had been stealing money since at least January, and by her own estimation had to have done so at least 20 times. Had she not been caught, she would probably still be doing so.

However, the undersigned is not unsympathetic to Grievant's situation. She had been going through some extremely stressful personal situations, and had an unpleasantand unsupportive work environment. Additionally, Grievant suffered from an obsessive- compulsive disorder, gambling addiction and depression. The combination led her to be, in her words, “unstable,” and to commit acts that for her were out of the ordinary, as evidence by her many years of faithful service. After having faced the consequences of her actions, she expressed that she was “very, very sorry.” She is trying to get help and treatment for her problems, but dismissal from her job just adds to the stress in no small way. She credibly testified that the envelopes that were found were not ones she had taken, so the apparent injustice that results from Grievant losing her job, while the thief who stole the mail that was found in the restroom keeps working, is troubling.

Unfortunately, sympathy is not a legal basis for overriding the deference to which Respondent is entitled, and does not reduce the impact of Grievant's misconduct on the operations of her employer. Given the extra information about Grievant's situation that was unknown to Mr. Susman at the time of the dismissal, it would seem humane for Respondent to assist with Grievant's rehabilitation by finding a place for her where she could continue to provide service without jeopardizing the agency's mission, but there no legal reason to compel it to do so.

The following Conclusions of Law support this decision:

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; 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.

2. In order to dismiss a tenured state employee, the employer must meet the judicial standard

set out in Syllabus Point 2 of Buskirk v. Civil Service Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985), which 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."*See* Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Serv. Commission, 149 W. Va. 461, 141 S.E.2d 364 (1965). *See also* Scragg v. Bd. of Dir. W. Va. State College, Docket No. 93-BOD-436 (Dec. 30, 1994); Bonar v Dep't of Transp./Div. of Highways, Docket No. 99-DOH-379 (July 22, 2003).

3. “Undoubtedly, theft of state property is one of the most serious offenses an employee can commit; the value of the property is of little consequence. Davis v. W. Va. Dep't of Motor Vehicles., Docket No. 89-DMV-569 (Jan. 22, 1990).” Overbee v Dep't of Health and Human Resources/Welch Emergency Hosp. Docket No. 96-HHR-183 (Oct. 3, 1996). “Larceny is a form of gross misconduct which may warrant dismissal of a state employee.” Brown v. W. Va. Dep't of Commerce, Labor & Envtl. Resources, Docket No. 92-T&P-473 (Apr. 8, 1993). *See* Davis v. W. Va. Dep't of Motor Vehicles, Docket No. 89- DMV-569 (Jan 22, 1990).

4. "In assessing whether the decision was excessive or disproportionate the undersigned must look at the totality of the circumstances. Some factors to be considered in the mitigating 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 theconduct, and other mitigating circumstances. *See* Stewart v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 91-ABCC-137 (Sept. 19, 1991). As stated in [Buskirk, *supra*], 'the work record of a long-term civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct.' *See* Blake v. Civil Serv. Comm'n, 172 W. Va. 711, 310 S.E.2d 472 (1983); Serreno v. W. Va. Civil Serv. Comm'n, 169 W. Va. 111, 285 S.E.2d 899 (1982)." Hill v. Bureau of Employment Programs/Management Information Sys., Docket No. 01-BEP-513 (Sep. 11, 2002); Farley v. W. Va. Dep't of Health and Human Resources, Docket No. 02- HHR-145 (July 29, 2002).

5. "Deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee, *supra*. "However, in [Hercules v. W. Va. Div. of Highways, Docket No. 97-DOH-006 (Apr. 17, 1997)], the Grievance Board has held that '[d]ismissal as a disciplinary measure must be reserved for circumstances when nothing else but the

removal of the employee from the work environment will do.'" Hayes v. W. Va. Div. of Juvenile Justice, Docket No. 98-DJS-220 (Dec. 14, 1998).

6. Respondent met its burden of proving Grievant committed an offense for which dismissal was appropriate, and Grievant failed to show sufficient mitigating factors to reduce the penalty.

For the foregoing reasons, this grievance is **DENIED**.

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, and 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 EmployeesGrievance 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.

Date: April 21, 2004 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Respondent made a motion to dismiss the Grievance as untimely filed, based on the fact that Grievant was notified of her termination in writing on December 31, 2003, but did not file her grievance until January 20, 2004. Respondent's motion was denied on the grounds that the grievance was filed within ten days of the effective date of the termination, that being January 15, 2004.

Footnote: 2

Respondent's brief was not filed until April 20, 2004, and was not considered.