SHARON JAGGERS-GREEN,

Grievant,

v v.

Docket No. 03-BEP-026

BUREAU OF EMPLOYMENT PROGRAMS/

UNEMPLOYMENT COMPENSATION DIVISION,

Respondent.

D E C I S I O N

Grievant, Sharon Jaggers-Green, was employed as a Delinquency Control Specialist ("DCS") by the Bureau of Employment Programs ("BEP"). Grievant was employed within the Compliance and Enforcement Unit ("CAE") in the Unemployment Compensation Division. Grievant filed a Level I grievance on January 13, 2003, about "severe allegations . . . that could result in my dismissal." After her termination on January 15, 2003, Grievant asked to consolidate the first grievance with a grievance on her termination. Respondent did not object.

A Level IV hearing was held on April 3, May 20, and December 15, 2003. (See footnote 1) **This case became mature for decision on May 24, 2004, after receipt of the parties' proposed findings of fact and conclusions of law.** (See footnote 2)

Issues and Arguments

Respondent maintains it has met its burden of proof and established Grievant's termination on January 15, 2003, for gross misconduct and poor work performance wasjustified. Grievant asserts she did not do the things she is accused of, the mistakes she made were minor, and her termination was retaliation for being a party to a lawsuit filed in September 2001 against BEP.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact. (See footnote 3)

Findings of Fact

1. Grievant was hired by BEP as a DCS on September 19, 1999. She was terminated on January 16, 2003. Prior to this employment with BEP, she had been employed by other state agencies. During the time Grievant worked at BEP, she also held several part-time positions with other employers, most notably the Kanawha County Public Library.

2. A major portion of a DCS's duties is to obtain delinquent reports and monies from employers who are doing business in the State of West Virginia. Prior to June 2002, DCS's were required to travel to the counties in their service area to obtain these materials. When DCS's traveled, they were to fill out an itinerary in advance, and complete Travel Contact Summaries ("TCS") reflecting the date, time, and results of each employer contact. DCS's were also required to complete individual Field Contacts Sheets ("FCS") for every visit they made to an employer and turn in accurate travel forms upon their return. The TCS sheets state what happened during the numerous visits, and whether the DCS wassuccessful in obtaining the materials and monies sought. Each DCS has a catchment area and is responsible for resolving all employer delinquencies within that area.

3. Before leaving on these trips, the DCS was required to check the computer to see if the needed reports or information had been received and to call employers to let them know they were coming so the materials would be ready to be picked up. Additionally, the DCS was to call in every morning while they were away to check for information that may have been received in his/her absence. Grievant did not adequately check for this information resulting in making trips that were not required. Resp. No. 16. 4. In July 2001, Grievant and co-workers Peggy Imbler and Donna Skaff notified BEP they would be filing a lawsuit on the issues of sexual harassment and discrimination. On September 19, 2001, they filed a lawsuit with the Kanawha County Circuit. (See footnote 4) **Grievant joined this action because she had not received the merit increases she believed she was due. She did not assert she had been sexually harassed.**

5. In September 2002, Grievant received an evaluation that rated her as "Good; Meets

Expectations." Contrary to Grievant's assertions, she was not rated as "Exceeds Expectations" in any of the 23 categories, but was rated as "Meets Expectations" in all categories. Grt. No. 1. Test. Grievant.

6. In 2002, Respondent received a complaint that Grievant was working elsewhere when she was scheduled to work at BEP, but had taken sick leave.

7. Robert Smith, Commissioner, directed Alice McVey, an Employment Programs Manager in charge of Internal Security, to investigate this allegation. Ms. McVeyhad Grievant's time sheets from the Kanawha County Public Library, and Grievant had signed each of them above a statement reading, "FALSIFYING TIME RECORDS IS GROUNDS FOR DISCIPLINARY ACTION, INCLUDING POSSIBLE TERMINATION." Grievant frequently signed her time sheets for the Kanawha County Public Library before she had completed the work week. For example, Grievant would be scheduled to work July 23, 24, and 25, 2001 at the Kanawha County Public Library, but would sign for them entire week on July 23, 2001. Resp. No. 12.

8. Grievant took sick leave numerous times and worked elsewhere either that evening or the following days. For example, Grievant took two full days of sick leave on January 24 and January 25, 2001, and worked both evenings at the Kanawha County Public Library (January 24 from 5:15 p.m. to 9:15 p.m., and January 25 from 6:15 p.m. to 9:00 p.m.). Additionally, for example, Grievant took sick leave from BEP on Friday, January 25, 2002, and Monday, January 28, 2002, and worked 8:00 a.m. to 2:00 p.m. Saturday and Sunday, January 26 and 27, 2002, at Prime Care Medical, and Monday, January 28, 2002, 5:00 p.m. to 9:00 p.m. at the Kanawha County Public Library. **(See footnote 5)** **Resp. Nos. 12, 14, & 25.**

9. On June 7, 2001, Grievant also indicated she did not return home until 6:30 p.m., but signed her time sheet at the Kanawha County Public Library as beginning work at 6:15 p.m. This small change in arrival time resulted in Grievant claiming full meals from BEP for the day. Resp. Nos. 9 & 12. 10. On May 21, 2002, Ms. McVey sent her report to Commissioner Robert Smith on Grievant's sick leave abuse and travel reimbursement. Resp. Nos. 3 & 12. Ms. McVey discussed this sick leave abuse with Grievant in early June 2002. Grievant informed Ms. McVey that she had not engaged in any leave abuse, and Grievant believed the issue was resolved. Resp. No. 5; Test. Grievant.

11. This report caused Commissioner Smith, through Dan Light, Director of the

Unemployment Compensation Division, to order an in-depth investigation of Grievant and all other DCS's.

12. Mr. Light directed Jonathan Reynolds, an Investigator II, to investigate all employees in the CAE, and if he found any type of "negativity" he was to dig deeper. If he did not find any problems with an employee, he was to go on to the next one and try to resolve the investigation as quickly as possible.

13. One of the issues Mr. Reynolds was directed to investigate was the out-of- office travel and reports of all DCS's. He started with Grievant as she had the most travel time. Test. Reynolds.

14. Many counties in West Virginia were designated by BEP as overnight stays because of the travel time involved in reaching these locations. There were two basic reasons for the required overnight stays: 1) DCS's safety; and 2) more time in the field for employer visits. Grievant worked in several counties that required her to stay overnight. Resp. No. 1.

15. Grievant frequently would work in an overnight county, incorrectly report her ending time, and then return to Kanawha County to work at the Public Library by either 5:00 p.m. or 6:15 p.m. Resp. Nos. 12 & 14. It was impossible for Grievant to cease workat the time reported on her TCS, and to be back in Kanawha County in time to report to work at the library. For example, on December 12 and 13, 2001, Grievant stated she saw her last employers at 4:10 p.m. and 4:20 p.m., respectively, and she was to stay overnight within Randolph County, but she worked at the Kanawha County Public Library from 5:00 p.m. to 9:00 p.m. both days. See Resp. Nos. 4, 5, 6, 7, 8, 9, 12, 14, & 15 for additional examples.

16. On the days that Grievant returned to work at the library, she still charged full meals to BEP, as if she had remained in the county. (See footnote 6) (See footnote 7) **See Resp. Nos. 4, 5, 6, 7, 8, 9, 12, 14, & 15 for additional examples.**

17. Contrary to Grievant's testimony, it was not the practice of DCS's to set their watches ahead before they traveled to distant counties. (See footnote 8) **Grievant was not required to work outside her work hours of 8:00 a.m. to 4:30 p.m.** (See footnote 9) **Numerous documents indicate eitherGrievant did not set her watch ahead, or if she did, visited employers when they would not open. See Resp. Nos. 4, 5, 6, 7, 8, 9, 14, & 15 for additional examples.**

18. On her TCS's, Grievant frequently listed employer account numbers that did not exist. (See footnote 10) Resp. No. 10. In at least one instance during an overnight trip to Randolph County, Grievant recorded three non-viable numbers at the end of the day, June 13, 2001, (3:30, 4:00, and 4:30 p.m.), and Grievant then returned from this area in time to report to work at the Kanawha County Public Library by 6:15 p.m. Resp. Nos. 4 & 10.

19. Grievant did not visit at least some of the employers she reported as having visited. Resp. Nos. 13 & 20; Test. Rutherford and Reynolds.

20. Grievant frequently reported she visited employers for reports and money when the employer had already submitted these materials. She subsequently reported that she had obtained these documents when in fact they were already entered into the system. Additionally, there were frequently conflicting documents within the data that Grievant had placed on the system. Resp. No. 16.

21. At times, Grievant reported unrealistic travel times and numbers of employers visited. Resp. Nos. 4, 14, & 21. Test. Reynolds. 22. Many of the documents Grievant completed were required to be imaged for the permanent files. At times, Grievant did not submit these forms for imaging. (See footnote 11) Resp. Nos. 16, 18, 22, 23, & 24; Test. Reynolds, Shannon, & Phillips.

23. On January 3, 2003, while Grievant was on annual leave, Grievant's supervisor, Kathy Phillips, found numerous documents, approximately ninety, that needed to be imaged in Grievant's shred bin. She called Mr. Reynolds to observe what she had found. He checked to see if these documents had been imaged, and they had not been. He took the documents to Imaging and then returned the documents to Grievant's shred bin. Grievant placed these documents in the shredder when she returned to work. (See footnote 12) Resp. No. 22, 23, & 24. Test. Reynolds, Shannon, & Phillips.

24. On January 7, 2003, Grievant received a letter from Donald Pardue, Deputy Commissioner of BEP, stating there were multiple questions and concerns about her expense accounts, record keeping, working at another job while BEP's records indicate Grievant was in another county, trips to employers when reports had already been received, unrealistic travel times, conflicts in Grievant's reports and data within the BEP system, reports from employers that Grievant had not made visits when Grievant had recorded that she had,

missing Field Contact Sheets, and the recording of accountnumbers that did not exist. Grievant was informed that the allegations against her were: 1) receiving federal funds fraudulently by filing false expense reports; 2) causing false reports to be sent to the Department of Labor; 3) knowingly filing incorrect Travel Contact Summary sheets; 4) knowingly failing to file Travel Contact Summary sheets; 5) and working evening hours at the Kanawha County Public Library after using sick leave at BEP that same day. Grievant was given ten days in which to submit a written response. The letter also informed Grievant if she had any questions about the letter she was to ask. Grt. No. 2.

25. On January 10, 2003, Grievant responded to the January 7, 2003 letter basically stating she had done nothing wrong, her reports were accurate, sometimes the reports were not listed in the computer before she left, she either visited or left a card with every business she visited, she had submitted all her reports, she had a propensity to make typographical errors, and she had used her sick leave for illness, as well as doctor visits and family sick leave. Grt. No. 4.

26. On January 15, 2003, Grievant received her termination letter outlining the same charges, but with additional specifics. Grievant was terminated for gross misconduct and poor work performance. Grt. No. 3.

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 ismore likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

State employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, Oakes v. W. Va. Dep't of Finance

& 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 Section 12.2 and .3, Administrative Rules, W. Va. Div. of Personnel (June 1, 1995).

I. Credibility

The first issue to address is one of credibility, as Grievant testified she did not do the things of which she was accused, and the testimony of others is incorrect.

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Res., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health & Human Res./Huntington State Hosp., Docket No. 93- HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3)reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. 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. (See footnote 13) **See Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.**

Respondent presented the testimony of many witnesses and placed multiple documents into the record to support its assertions that Grievant was guilty of gross misconduct and had demonstrated poor work performance. The testimony of Respondent's witnesses was credible. Their statements were believable and clear, consistent with each others' and with the written documents, and internally consistent. Additionally, there was no demonstration of bias. Especially convincing was the extensive documentation of Grievant's misconduct and poor work performance. While it is true Grievant demonstrated there were three or four errors in these numerous reports, the large majority of the documentation was unrebutted and is found to be accurate.

On the other hand, some of Grievant's testimony was contradictory and contradicted the forms she completed and submitted during the course of her employment. These factors called the credibility of Grievant into question. For example, Grievant stated DCS's frequently set their watches up, but no other DCS testified they engaged in this practice, and the forms Grievant submitted revealed this testimony could not be true. Grievant usedthis "setting up of her watch" to explain her work time at the Kanawha County Public Library. For example, on the second and third day of a multi-county trip to Elkins, Grievant reported seeing the first employer at 8:00 and 8:10 a.m. If Grievant had indeed set her watch up, she would be visiting these employers, on the second day, at the actual time of approximately 5:30 a.m. and 5:40 a.m., when most employers would not be open. If indeed she did not set up her watch, she arrived on time to the Kanawha County Public Library by leaving her work site early and completing her TCS's and travel reports falsely. Grievant's testimony about the numerous missing documents is also not convincing. She reported she was missing many FCS's and other documents she submitted to Imaging, but many FCS's were found in her shred bin, and they had never been sent to Imaging. Grievant's co-party in the lawsuit, Ms. Imbler, stated she had six documents missing from Imaging in two to three years, but none of the other DCS's reported this same problem. Accordingly, Grievant's testimony in this area is judged as untruthful.

Further, the undersigned Administrative Law Judge did not believe Grievant when she stated she would often feel sick when it was time to go to work at BEP because it was so stressful there, but by the time she was to report to the library, an hour or so later, she felt fine. Grievant was also not convincing and found to be untruthful when she stated she would be sick on Friday and Monday, but felt well enough to work the two full days of Saturday and Sunday and Monday night. Grievant was also not believed when she testified that it was her supervisor's fault if her account numbers were wrong.

II. Gross misconduct A charge against Grievant is gross misconduct, as Respondent asserts Grievant: 1) filed false expense reports; 2) filed incorrect Travel Contact Summary sheets; 3) failed to file FCS sheets; 4) worked evening hours at the Kanawha County Public Library after using sick leave at BEP; and 5) reported she had visited employers when she had not. The "term gross misconduct as used in the context of an employer-employee

relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991) (citing Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985)). See Evans v. Tax & Revenue/Ins. Comm'n, Docket No. 02-INS-108 (Sept. 13, 2002). The issue before the undersigned Administrative Law Judge is whether Respondent met its burden of proof and demonstrated by a preponderance of evidence that Grievant is guilty of the allegations.

Respondent has met its burden of proof. Grievant reported she was sick and received sick pay, when she was working elsewhere the same or next day. Grievant reported she visited employers when she did not, incorrectly reported the hours she worked, submitted incorrect Travel Contact Sheets, and did not submit FCS's for imaging. Grievant's failure to report her visits properly could result in problems for the agency with the federal government, as BEP is required to submit this data to the federal government, and it must be accurate.

III. Unsatisfactory work performance **Respondent has demonstrated Grievant failed to perform the required duties of the position to which she was assigned. Although it is true Grievant successfully completed some of the duties of the position, this is insufficient. The duties of reporting, completing paperwork, and documenting are key to the position of a DCS. Grievant either did not visit employers she said she visited or incorrectly reported their account numbers. She failed to have key documents imaged, and this is an essential portion of her job duties. Grievant inaccurately reported her travel times and did not follow directions or her advance itinerary to stay overnight in distant counties. Further, Grievant submitted an abundance of conflicting data on the various documents she completed.**

Accordingly, Respondent has proven the charges against Grievant.

IV. Retaliation

Reprisal is defined in W. Va. Code § 29-6A-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.

See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); 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 v. Bd. of Directors/Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997).

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.

Grievant has failed to establish a prima facie case of retaliation. While it is true Grievant filed a lawsuit, this was done in September of 2001, and her termination occurred in January of 2003. In the interim, because BEP was unaware of Grievant's wrongful actions and unsatisfactory performance, she received a good evaluation. Additionally, all employees of Grievant's unit were investigated, and she was not singled out for this examination. Additionally, Grievant's complaints of reprisal that occurred before her termination were quite nebulous. She stated there were people whispering and laughing, she could not hear what they were saying, but she knew these actions were designed to intimidate her. She said her desk was moved to harass her, but other people's desks were moved as well. She asserted someone went through her desk at night, but other people had the same problem. As frequently stated by the Grievance Board, "[m]ere allegationsalone without substantiating

facts are insufficient to prove a grievance." Baker v. Bd. of Directors/W. Va. Univ. at Parkersburg, Docket No. 97-BOT-359 (Apr. 30, 1998); See Harrison v. W. Va. Bd. of Directors/Bluefield State College, Docket No. 93-BOD-400 (Apr. 11, 1995). Here, Grievant has not presented sufficient evidence to establish retaliation.

If a prima facie case is found, it is clear Respondent demonstrated a "legitimate, non-retaliatory reasons for the adverse action." Grievant's termination occurred because of the numerous findings of wrongdoing and failure to satisfactorily complete the duties of her position.

V. Mitigation/Severity of Penalty

The argument that Grievant's termination is excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

"When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997). Mitigation of a penalty is considered on a case by case basis. 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). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and 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). This Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense

that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute her judgement 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).

Given the depth and breath of the charges proven against Grievant, the penalty of dismissal is not "clearly excessive" and does not evidence "an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." Martin, supra.

The above-discussion will be supplemented by the following Conclusions of Law.

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). "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 & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

2. State employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, 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 Section 12.02 and 03, Administrative Rules, W. Va. Div. of Personnel (June 1, 1995).

3. "The term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of

standards of behavior which the employer has a right to expect of its employees." Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

4. Respondent has met its burden of proof and demonstrated Grievant committed gross misconduct and had unsatisfactory work performance. Grievant was terminated for misconduct of a substantial nature directly affecting rights and interests of the public. Oakes, supra. 5. Reprisal is defined in W. Va. Code § 29-6A-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."

6. 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.

See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); 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 v. Bd. of Directors/Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997).

7. 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 thenestablish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

8. Grievant did not establish a prima facie case of retaliation.

9. The argument that termination is excessive is an affirmative defense, and a grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

10. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997). Mitigation of a penalty is considered on a case by case basis. 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).

11. This Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects forrehabilitation." Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute her judgement 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).

12. Grievant has failed to establish her dismissal was "clearly excessive" or "reflect[ed] an abuse of the agency['s] discretion." Martin, supra.

Accordingly, 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." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: July 30, 2004

Footnote: 1

The extended length of time for the completion of the Level IV hearing was caused by the illness and subsequent death of BEP's attorney, Patricia Shipman.

Footnote: 2

Grievant was represented by Todd Twyman, Esq. and Respondent was represented during day one and two by Ms. Shipman and on day three by Christie Utt, Esq., Deputy Attorney General. By agreement, the parties extended the time frame for filing proposals several times.

Footnote: 3

The reports, documents and testimony in this grievance were extensive. Accordingly, the undersigned Administrative Law Judge did not discuss in detail every single, separate issue raised by the parties. Frequently, examples are given to explain the findings with directions to review the testimony of witnesses and additional documents for further examples.

Footnote: 4

Ms. Skaff is no longer employed by BEP.

Footnote: 5

See Respondent's Exhibit Numbers 12 & 14 and the testimony of Mr. Reynolds and Ms. McVey for many further examples of using sick leave and working elsewhere in 2001 and 2002.

Footnote: 6

Grievant asserted that after work at the library, she then returned to the assigned county, her ex-husband drove her, and they stayed in a friend's cabin.

Footnote: 7

State employees are only allowed to charge a full day's meals if they are out of the office overnight. See West Virginia Travel Management Regulations at 6.2 and 6.5.

Footnote: 8

Grievant asserted that if she left Charleston for a county three hours away, she set her watch three hours ahead and left it on this advanced time until her return to Charleston at the end of her travel time. She would then record these advanced times on her work sheets for the entire time. For example, if Grievant left Charleston at 5:00 a.m. to travel three hours, she set her watch at 8:00 a.m., and she would stop work when her watch said 4:30 p.m. This practice on the remaining days of her travels would create many problems as Grievant would be visiting places of business at 5:00 a.m., before they were open. If Grievant did not actually set her watch ahead, the second or third days of her overnight stays, she would not be able to return to work at the Kanawha County Public Library at her assigned time. For example, on December 13, 2001, Grievant could not leave Elkins at the actual time of 4:20 p.m. and arrive to work at the Kanawha County Public Library by 5:00 p.m.

Footnote: 9

At one time, DCS's did work outside those hours but this practice was stopped.

Footnote: 10

Grievant asserted she frequently reversed her numbers, her supervisor was aware of this, and it was her supervisor's responsibility to check all her numbers on every form to assure they were correct. No evidence was submitted to confirm Grievant's belief. In fact, her supervisor stated she does not have the time to check all the forms of all her supervisees, and the expectation is the form will be correct as submitted.

Footnote: 11

Grievant reported that numerous FCS's and other documents she had placed in the imaging bin had not been imaged, and this was a common occurrence within CAE. Only one other DCS, Ms. Imbler, reported missing documents. She stated she had missing documents six times in two to three years.

Footnote: 12

Grievant asserted this evidence should not be allowed as Grievant had not been placed on notice of this problem in her termination letter. See Findings of Fact 25 and 27, infra, and Grt. Nos. 2 and 3, which informed Grievant that a problem was missing FCS's.

Footnote: 13

The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984).