THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

JO COSGROVE,

Grievant,

Docket No. 07-TD-082

STATE TAX DEPARTMENT,

Employer.

D E C I S I O N

Grievant Jo Cosgrove, a Data Entry Operator II in the Revenue Division of the State Tax Department, filed two grievances on September 28, 2006, one alleging disability-based discrimination, the other challenging a suspension. When they were appealed to Level Four, (See footnote 1) the grievances were assigned Docket Numbers 07-TD-082 and 07-TD-100. By Order entered April 19, 2007, the cases were consolidated under Docket No. 07-TD-082.

In the grievance initially assigned Docket Number 07-TD-082, (See footnote 2) Grievant grieved:

> **the decision and revised work schedule that was implemented and effective on September 25, 2006 per written letter dated September 25, 2006 from Dorothy Childress, Acting Director of the Revenue Division due to the discrimination against me due to disability, which violates the Americans with Disabilities Act.**

A revised work schedule had been implemented in an effort to accommodate the Grievant's

rheumatoid arthritis. Grievant sought "a break and lunch period schedule afforded to all staff within my unit." At the Level Three hearing, Grievant contended that the revised work schedule separated her from her co-workers more than was necessary to accommodate her disability, and that this amounted to disability-based discrimination.

In the grievance initially assigned Docket Number 07-TD-100, (See footnote 3) Grievant grieved:

> **the (5) five day suspension without pay received for September 8, 2006 through and including September 22, 2006 due to the severity of the punishment not being in accordance with Administrative Rule - Progressive Discipline Guidelines. I am also grieving that the Division is discriminating against me due to disability that requires workplace modifications and is retaliating against me in violation of the WV Whistle Blower Law W. Va. Code § 6C-1-1 where I have complained about the Nepotism in the department and the Title 158, Legislative Rule - West Virginia Ethics Commission Series 6 which prohibits use of subordinate employees or government property for private gain. (See footnote 4)**

On this grievance, Grievant sought "reinstatement" of the days for which she was suspended, the wages and other benefits attributable to the suspension, "legal fees," (See footnote 5) and removal of suspension-related documents from her personnel file. She also sought to be treated "without discrimination [or] retaliation," fairly and equitably, commensurate with others' treatment in the office, "with established attendance, disciplinary and evaluation procedures, policies and guidelines." The grievances were denied at Levels One and Two, and the Grievant appealed to Level Three. Respondent conducted separate but consecutive Level Three hearings on the two grievances on January 16, 2007. In decisions issued March 5, 2007, the Level Three Grievance Evaluator denied both grievances. Grievant appealed both adverse decisions to this Board at Level Four on March 13, 2007, after which they were consolidated. The undersigned, to whom the case was reassigned on September 6, 2007, convened a Level Four hearing at the Board's offices in Charleston on October 30, 2007. Grievant was represented by Fred Tucker, UMWA-WVSEU Representative; Respondent was represented by Assistant Attorney General L. Wayne Williams. At the Level Four hearing, the parties elected to submit the case on the lower level record, supplemented by Grievant's Exhibits 1 through 11 (documents not offered below), to whose admission the parties stipulated. The case became mature for decision on January 11, 2008, with the submission of both parties' proposed findings of fact and conclusions of law.

Summary

In this case, to accommodate the Grievant's rheumatoid arthritis, the Respondent altered her work schedule in a manner which the Grievant claimed was unnecessarily rigid, and made it impossible for her to take lunch with her co-workers. The Grievant grieves the work schedule as discriminatory. The Respondent also suspended the Grievant for five days (her first suspension) for excessive tardiness, poor work performance (machine time and keystrokes), and improper (personal) use of the employer's email system. Grievant challenges the suspension as unjustified and overly harsh. Different standards of proof apply to the disciplinary and non-disciplinary parts of the case, and to the excessive discipline claim. This Decision concludes that the employer's methods of accommodation of Grievant's disability were not discriminatory. On the suspension, it concludes that the Respondent failed adequately to consider the possible impact of Grievant's disability on her work performance; it concludes that the documentary record of Grievant's performance did not adequately support the length of the suspension imposed; and it concludes that the employer failed to prove its written tardiness policy, although it claimed to have relied on the policy, and on Grievant's knowledge of the policy, in disciplining her. Grievance granted in part and denied in part. Suspension reduced to three days; Grievant to be made whole and Grievant's disciplinary record to be modified consistent with Decision.

After thorough review of the record, the undersigned finds the following facts:

Findings of Fact

1 1. Grievant began her employment with the State Tax Department as a Data Entry Operator on September 8, 2001.

2 2. In May of 2001 (before joining the Tax Department) she had been diagnosed with rheumatoid arthritis.

3 3. On February 1, 2005, Grievant was promoted to Data Entry Operator 2.

4 4. The Tax Department's data entry operation is a highly structured work environment. A data entry operator is monitored for the number of minutes she is operating her machine, and for the number of keystrokes she produces per hour. Her performance is

evaluated against criteria in both of these categories, among others.

5 5. Over a period of time leading up to August 31, 2006, Respondent compiled statistics on the Grievant's "machine time" and keystroke numbers, and on the frequency of her late arrivals at the workplace, among other items. 6 6. Exhibit S-5, Docket Number 07-TD-100 (Tax Dept. Docket No. 06-G-105), the September 8, 2006, letter suspending the Grievant (see below), at p. 2, detailed her keystroke and machine time statistics as follows:

10-10-01 _ Keystrokes 7,496: Machine time 92.89%

02-01-02 _ Keystrokes 7,752; Machine time 92.65%

06-21-02 _ Keystrokes 8,518; Machine time 89.76%

07-24-02 _ Keystrokes 8,480; Machine time 88.71%

01-16-03 _ Keystrokes 8,248; Machine time 89.98%

05-21-03 _ Keystrokes 7,685; Machine time 85.58%

07-10-03 _ Keystrokes 8,514; Machine time 90.14%

01-20-04 _ Keystrokes 8,548; Machine time 94.09%

04-29-05 _ Keystrokes 10,717; Machine time 92.49%

07-27-05 _ Keystrokes 11,232; Machine time 94.20%

12-21-05 _ Keystrokes 9,933; machine time 92.94%

01-09-06 _ Keystrokes 10,628; Machine time 94.16%

7 7. Grievant had a history of arriving late for work dating back to 2001. From 2002 to 2006, she was counseled, reprimanded, warned, and written up on several occasions. Exhibit S-5, Docket Number 07-TD-100 (Tax Dept. Docket No. 06-G-105 _ 9/8/06 [suspension letter]. *See* next paragraph).

8 8. The suspension letter (at p. 3) recites that Grievant was given a copy of "Policy 3.8 (attached) regarding tardiness" on December 21, 2005. Presumably Policy 3.8 is a Tax Department policy. However, the copy of the suspension letter placed in the record as Exhibit S-5 has no attachments, nor is "Policy 3.8" present elsewhere in the record.

9 9. The suspension letter (also at p. 3) recites numerous instances of Grievant's use of email contrary to the employer's policy, which restricted such use to lunch and breaktime. This evidence was unrefuted and is found to be factual.

10 10. In April 2005, the Grievant was given the first of what were to be three warnings

regarding her use of email. She was told that after three warnings, her access to office email would be revoked. The record reflects neither a third warning, nor a revocation of email access. Instead it reflects the imposition of the suspension which is the subject of this grievance.

11 11. On August 31, 2006, the employer called the Grievant to a pre-disposition meeting, at which the employer told her it proposed to suspend her. The employer's reasons for the suspension, which were discussed with the Grievant, were excessive tardiness, poor work performance (machine time and keystrokes), and improper (personal) use of the employer's email system.

12 12. The Grievant was given three days to provide information bearing on the proposed suspension. She did not do so explicitly, *but see* Finding of Fact No. 14.

13 13. At least one supervisor, and the Grievant's co-workers, had some knowledge of her rheumatoid arthritis prior to August 31, 2006, but before that date the Grievant had not submitted a medical practitioner's statement nor requested specific accommodations for her condition.

14 14. At the August 31, 2006, pre-disposition meeting, Ms. Cosgrove requested hourly breaks to alleviate her arthritis, the first explicit request for an accommodation of her condition which the record reflects.

15 15. On September 8, 2006, Deputy Tax Commissioner Christopher Morris notified the Grievant that she would be suspended for five days, from September 18, 2006, to September 22, 2006, for poor performance, tardiness, and unacceptable use of office email. 16 16. Apparently shortly after it was signed by her doctor on September 8, 2006, and before her suspension took effect, Grievant gave Respondent a Form DOP-L3, "Physician's/Practitioner's Statement," signed by Thomas W. Howard, M.D., in which the doctor recommended five-minute breaks every hour to permit the Grievant to rest her joints. **(See footnote 6)**

17 17. The following exhibits, Grievant's performance appraisals, the admission of which was stipulated to at Level 4, establish that the Grievant achieved the following percentage of "machine time" for the years listed, 95% being the stated expectation:

Level 4	**Machine**
<u>Exhibit</u>	**<u>Time</u>**

G-5

[2001] 93.89 %

G-6

[2002 - 1st half]
89.98 %

G-7

[2002 - full yr.]
89.98 %

G-8

[2003 - 1st half]
94.09 %

G-9

[2003 - full yr.]
94.09 %

G-10

[2005 1st 4 mos.] 92.49 %

G-11

[2005 - full yr.]
94.16 % (See footnote 7)

18 18. Without exception, Grievant's partial-year appraisals rated her "Fair, butNeeds Improvement," while each of her full-year appraisals rated her "Meets Expectations." Exhibits G-5 through G-11.

19 19. In response to the Form DOP-L3 doctor's statement, the Tax Department revised Ms. Cosgrove's work schedule to give her six five-minute breaks per day, and a 42_minute lunch break, for a total of 72 minutes, matching the total break and lunch time of her co-workers.

20 20. On September 26, 2006, the Respondent reduced data entry operators' break time to 60 minutes a day, including lunch and work breaks. The Grievant's supervisor then adjusted the Grievant's work schedule similarly, to a 30-minute lunch break, and six 5-minute

breaks (one each hour), with no additional 12-minute break, maintaining the equality of Grievant's total break time to that of her co-workers, at 60 minutes.

21 21. The September 26 work schedule adjustment required Grievant to take her lunch break at a time which does not coincide with that of her co-workers. The reason for this is not apparent from the record.

Discussion

Burdens of Proof

Because this case involves both disciplinary and non-disciplinary issues, three different burdens of proof apply to different aspects of the case, as follows:

First, on the non-disciplinary issues in this grievance (the disability-related discrimination claims), the Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2007); *Howell v. W. Va. Dep't of Health & Human Res.*,Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988); recognized in *State v. Miller*; 194 W. Va. 3, 459 S.E.2d 114 (1995) (*see* Section II of opinion).

Second, on the disciplinary issues (relating to the Grievant's suspension), the burden of proof rests with the employer, who must meet that burden by proving the charges against the employee by a preponderance of the evidence. W. Va. Code § 29-6A-6 (2006); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). Where the evidence supports both sides equally, the employer has not met its burden. *Id.* "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).

Third, the Grievant's claim that suspension is an excessive punishment for her conduct is an affirmative defense. It is therefore the Grievant's burden to demonstrate that the penalty for proven conduct was clearly excessive, that it was an abuse of agency discretion, or that there is an inherent disproportion between the offense and the disciplinary action taken. *Jones v.*

***W. Va. Dep't of Health & Human Resources*, Docket No. 96-HHR- 371 (Oct. 30, 1996); *Thompson v. W. Va. Dep't of Health & Human Serv*., Docket No. 94- HHR-254 (Jan. 20, 1995). *See Martin v. W. Va. State Fire Comm'n*, Docket No. 89-SFC- 145 (Aug. 8, 1989); *Schmidt v. W. Va. Dep't of Highways*, Docket No. DOH-88-063 (Mar. 31, 1989). *See Parham v. Raleigh County Bd, of Educ.,* 192 W. Va. 540, 453 S.E.2d 374, 379 (1994). The Grievance Board has authority to reduce a penalty, but "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995) (citations omitted). (See footnote 8) The 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).**

Discrimination Claim

"'Discrimination' means 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." W. Va. Code § 29-6A-2(d) (2006). "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W. Va. Code § 29-6A-2(h) (2006). The West Virginia Supreme Court of Appeals has recently clarified that the elements of claims ofdiscrimination and favoritism under the grievance statutes are essentially identical, as this Board has long held. To establish either type of claim, an employee must prove:

> **(a) that he or she has been treated differently from one or more similarly-situated employee(s);**

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

***Frymier v. Higher Education Policy Comm*., Nos. 32163 and 33296 (W.Va., Oct. 12, 2007) (per curiam); *Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004). *See Chaddock v. Div. of Corr*., Docket No. 04-CORR-278 (2005). *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004); *Kincaid v. Div. of Corr.*, Docket No. 98-CORR-144 (Nov. 23, 1998); *Prince v. Wayne County Bd. of Educ*., Docket No. 90-50-281 (Jan. 28, 1990).**

The fact that a grievance may also state a claim under the West Virginia Human Rights Act (in this case, for disability-based discrimination) does not deprive the Grievance Board of jurisdiction. *See Vest v. Board of Education of County of Nicholas*, 193 W. Va. 222, 455 S.E.2d 781 (1995). For the Grievance Board to possess jurisdiction, however, the grievance must state a claim under the grievance statutes, in this case W. Va. Code §§ 29- 6A-1 to 29-6A-12 (2006). It is beyond this Board's power to determine an employer's liability under the Human Rights Act, Syllabus Point 1, *Vest, supra*, even when the grievance alleges discrimination of the sort the Human Rights Act prohibits. (See footnote 9) **The Grievant claims that the employer's requirement that she rest her hands on a fixed schedule of five minutes every hour overly formalizes the accommodation her physician requested and unnecessarily reduces her lunch break time. She also complains that the fixed schedule implemented for her lunch break, which requires her to take lunch apart from the rest of her work unit, discriminates against her. Curiously, after the Grievant made these claims at her Level Three hearings, the Respondent did not rebut them, or explain on the record why it structured the disability accommodation break schedule as it did. The Employer apparently maintains, however, that it has fulfilled its responsibility to make "reasonable accommodation," as defined in West Virginia and federal law and regulations.** (See footnote 10)

Discrimination under the grievance statutes "means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees . . . ." W. Va. Code § 29-6A-2(d) (2006). When the Grievant requested an

accommodation of her disability, the employer was obligated to devise a "reasonable" accommodation. (See footnote 11) In other words, the employer's duty to accommodate was not absolute. The question presented by this record is whether the Grievant has been discriminated against compared with non-disabled workers. (See footnote 12) Obviously, the Grievant's work schedule is now different from that of her co-workers. However, differences in the treatment of employees which result from the implementation of reasonable measures to accommodate a disability do not amount to discrimination within the meaning of the grievance statutes because such differences are, in that fashion, "related to the actual job responsibilities of the employees." *Id*. On the facts presented here, the work schedules devised by the employer do not constitute discrimination of the sort prohibited by W. Va. Code §§ 29-6A-1 through 29-6A-12 (2006).

The Grievant contends, in effect, that what she views as rigidly scheduled five-minute breaks, and being required to take lunch separate from her co-workers, were not reasonable accommodations. Whether these accommodations are subject to challenge under state and federal disability law is beyond the scope of this decision. It is not the role of a Grievance Board administrative law judge to decide whether the disability laws have been violated, nor to substitute his judgment of what is a reasonable accommodation for the employer's, but instead to decide whether prohibited discrimination has occurred. Based on the record which the Grievant made below in these cases, it cannot be concludedthat the employer's accommodations constitute discrimination under the grievance statutes.

Challenge to Suspension

Although the evidence on work performance is conflicting, the employer successfully proved the Grievant's violation of the email policy, and her tardiness in arriving for work. As a result, the suspension will stand unless the Grievant demonstrates that the penalty was clearly excessive, that it was an abuse of agency discretion, or that there is an inherent disproportion between the offense and the disciplinary action taken. For purposes of evaluating whether the Grievant has met that burden, the three bases for the challenged suspension _ unacceptable use of office email, tardiness, and poor performance, will be considered in turn.

Use of Email

The Grievant's use of email on multiple occasions during work hours violated the employer's policy and subjected her to discipline. The Grievant offered no evidence to undermine the Respondent's itemization of her email violations, nor did she offer evidence of mitigating circumstances on this point. Her submission of an email of a personal nature apparently sent by a supervisor is insufficient to raise an issue of mitigation or discrimination.

Tardiness

With respect to the tardiness charge, the suspension letter (Exhibit S-5) references a "Policy 3.8" which is not present in the record; Policy 3.8 is apparently the employer's policy on tardiness. Although there is no requirement that a public employer have a written policy on tardiness, in this case the employer apparently elected to adopt such a policy. In its suspension letter, the employer relied (in part) on the policy, and on having presentedit to the Grievant, in disciplining her. Yet the record the Respondent made below, and before this Board, does not permit the undersigned to review the Grievant's pattern of tardiness against the written policy on which the agency relies. Commenting on the absence of an employer's written discipline policy, the predecessor to this Board has held:

> **Without any policy showing how an employer sets its penalties, this Board will examine if the penalty is clearly excessive or reflects 'an abuse of agency discretion or...an inherent disproportion between the offense and the personnel action.' *See Douglas v. Veterans Administration*, 5 MSPR 280 (1981).**

***Schmidt v. W. Va. Dep't of Highways*, Docket No. DOH-88-063 (Mar. 31, 1989).**

Implicit in the principle announced in *Schmidt* is that, when an employer has a written policy and uses it to make a disciplinary decision, this Board will determine the appropriateness of a penalty in light of the policy. A public employer is under no obligation to have a written policy on tardiness (and public employees may nonetheless be required to arrive at work on time). However, when an employer chooses to promulgate and rely on a written tardiness policy, as this employer has, the employer, who has the burden of proof in a disciplinary case, must prove what that policy is. *Brown v. Cabell County Board of Education,*

Docket No. 90-06-441 (November 22, 1991); *see Parham v. Raleigh County Bd. of Educ*., Docket No. 91-41-131 (Nov. 7, 1991), *aff'd*, 192 W. Va. 540, 453 S.E.2d 374 (1994). Respondent's failure to do so makes it impossible to adjudicate whether the penalty imposed comports with the policy.

In this case, the Grievant's pattern of tardiness is well established in the record; it would be unreasonable to disregard entirely the evidence of tardiness merely because Respondent failed to prove the policy on which it relied. However, the absence of proof ofthe written policy, will be taken into consideration for purposes of mitigation. *Brown, supra*.

Work Performance

The Respondent's work performance criteria (machine time and keystrokes), on the other hand, are well documented in the record. The record also demonstrates both that the Grievant did not meet the minimum expectations on these criteria, and that management discussed her shortcomings with her.

In addition to the missing tardiness policy discussed above, three factors (which bear on both work performance and tardiness) raise the possibility of mitigation of the penalty imposed:

- **First, the Grievant's disability accommodation request made at the August 31, 2006, pre-disposition meeting;**

- **Second, her delivery to the employer, apparently before her suspension took effect, of the September 8, 2006, Form DOP-L3 from her physician; and**

- **Third, the discrepancy between the Grievant's demonstrated performance shortcomings and her year-end performance evaluations, which uniformly rated her "Meets Expectations."**

It is not apparent from the record why _ after receiving the first and second items described above _ the Respondent proceeded to impose the suspension without taking time further to evaluate the Grievant's accommodation request, or her physician's statement. There

can be little doubt that an employer is entitled to require an employee to report to work on time. However, these two developments put the Respondent on notice that there might be mitigating circumstances, that the Grievant's below-standard work performance might not be entirely deliberate, or _ more to the point _ that work schedule and other accommodations might conceivably ameliorate both the performance and tardiness issues, without resort to discipline. Similarly troubling is the discrepancy between the work performance documentation Respondent assembled as the basis for the suspension, and the Grievant's partial-year evaluations (which showed she failed to meet expectations), on the one hand; and on the other, the Grievant's full-year evaluations, which declared without exception that she met expectations. In addition, the performance data cited in Grievant's suspension letter can be interpreted as indicating a general upward trend in both her machine time and her keystrokes over the period of time reflected. One of the purposes of progressive discipline is to put the employee on notice of what is expected of her. The justification for a suspension based on poor performance is obviously weaker when the message on expectations has been mixed rather than clear.

Mitigation

The Grievant has claimed that her punishment was not warranted by the facts.

> **Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis.**

***McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995) (citations omitted). Of the three categories on which the Grievant's suspension was based (unacceptable use of office email, tardiness, and poor performance), only the email issue is free of mitigating circumstances. In the case of tardiness, the employer failed to prove the policy which it claimed to have applied. In the case of performance, the employer gave mixed signals by consistently rating the Grievant's annual performance satisfactory. And in the case of both tardiness and poor performance, the employer failed in this record to demonstrate how, or even whether, it considered the potentially mitigating factor ofGrievant's disability in deciding to proceed with the proposed suspension.**

In assessing the employer's exercise of its discretion, the undersigned considers the ambiguous nature of Grievant's performance record, the employer's failure to prove its tardiness policy, and the employer's failure to demonstrate that it imposed the suspension after due consideration of the Grievant's disability _ particularly the disclosures and accommodation requests she made immediately before the suspension was imposed. Under all of these circumstances, the undersigned must conclude that there is ". . . an inherent disproportion between the offense and the personnel action" taken in this case, and that the employer abused its discretion. *Schmidt v. W. Va. Dep't of Highways*, Docket No. DOH-88-063 (Mar. 31, 1989).

This conclusion is based as well on the undersigned's authority under W. Va. Code § 29-6A-5(b) (2006) to "provide relief as is determined fair and equitable . . ." and to " provide appropriate remedies . . . ." *See Graf v. W. Va. Univ.,* 189 W. Va. 214, 429 S.E.2d 426 (1992); *Wilkerson v. Lincoln County Bd. of Educ*., Docket No. 99-22-420 (March 27, 2000).

Because the Grievant abused the Respondent's email policy, had instances of tardiness, and failed to at least some extent to perform up to expectations, but also because it is not clear from the record to what extent additional _ or different _ accommodation of her disability might have addressed the issues other than email, the five-day suspension imposed will be reduced to a three-day suspension, with the Grievant to be made whole in all respects as if the suspension had in fact been only three days.

The undersigned expresses the hope that the parties will make a concerted effort fully to evaluate the impact of Grievant's rheumatoid arthritis on her tardiness andperformance issues, and that they will design accommodations of her disability to reduce its effect on her job performance as much as possible, recognizing the employer's right to have the Grievant get to work on time, and to have her perform up to expectations. In the unfortunate event of a future disciplinary action or grievance, such efforts will at least permit the Grievant's conduct to be evaluated with her disability removed from the equation to the greatest extent possible.

Conclusions of Law

1 1. On the non-disciplinary issues in this grievance (the disability-related discrimination claims), the Grievant has the burden of proving her case by a preponderance of

the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2007); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988); recognized in *State v. Miller*; 194 W. Va. 3, 459 S.E.2d 114 (1995) (*see* Section II of opinion).

2 2. On the disciplinary issues (relating to the Grievant's suspension), the burden of proof rests with the employer, who must meet that burden by proving the charges against the employee by a preponderance of the evidence. W. Va. Code § 29-6A-6 (2006); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). Where the evidence supports both sides equally, the employer has not met its burden. *Id.* "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 & HumanRes.*, Docket No. 92-HHR-486 (May 17, 1993).

3 3. An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense. It is the Grievant's burden to demonstrate that the penalty was clearly excessive, that it was an abuse of agency discretion, or that there is an inherent disproportion between the offense and the disciplinary action taken. *Jones v. W. Va. Dep't of Health & Human Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Thompson v. W. Va. Dep't of Health & Human Serv.*, Docket No. 94-HHR-254 (Jan. 20, 1995). *See Martin v. W. Va. State Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989); *Schmidt v. W. Va. Dep't of Highways*, Docket No. DOH-88-063 (Mar. 31, 1989). *See Parham v. Raleigh County Bd, of Educ.,* 192 W. Va. 540, 453 S.E.2d 374, 379 (1994).

4 4. In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95- 54-041 (May 18, 1995) (citations omitted). The 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./WelchEmergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

5 5. "'Discrimination' means 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." W. Va. Code § 29-6A-2(d) (2006). "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W. Va. Code § 29-6A-2(h) (2006). The West Virginia Supreme Court of Appeals has recently clarified that the elements of claims of discrimination and favoritism under the grievance statutes are essentially identical, as this Board has long held. To establish either type of claim, an employee must prove:

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***Frymier v. Higher Education Policy Comm*., Nos. 32163 and 33296 (W.Va., Oct. 12, 2007) (per curiam); *Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004). *See Chaddock v. Div. of Corr*., Docket No. 04-CORR-278 (2005). *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004); *Kincaid v. Div. of Corr.*, Docket No. 98-CORR-144 (Nov. 23, 1998); *Prince v. Wayne County Bd. of Educ*., Docket No. 90-50-281 (Jan. 28, 1990).**

6 6. The fact that a grievance may also state a claim under the West Virginia Human Rights Act (in this case, for disability-based discrimination) does not deprive the Grievance Board of jurisdiction. *See Vest v. Board of Education of County of Nicholas*, 193W. Va. 222, 455 S.E.2d 781 (1995). For the Grievance Board to possess jurisdiction, however, the grievance must state a claim under the grievance statutes, in this case W. Va. Code §§ 29-6A-1

to 29-6A-12 (2006). It is beyond this Board's power to determine an employer's liability under the Human Rights Act, Syllabus Point 1, *Vest, supra*, even when the grievance alleges discrimination of the sort the Human Rights Act prohibits.

7 7. Differences in the treatment of employees which result from the implementation of reasonable measures to accommodate a disability do not amount to discrimination under the grievance statutes because such differences are, in that fashion, "related to the actual job responsibilities of the employees." W. Va. Code § 29-6A-2(d) (2006). On the facts presented here, the work schedules devised by the employer do not constitute prohibited discrimination.

8 8. "Without any policy showing how an employer sets its penalties, this Board will examine if the penalty is clearly excessive or reflects 'an abuse of agency discretion or...an inherent disproportion between the offense and the personnel action.' *See Douglas v. Veterans Administration*, 5 MSPR 280 (1981)." *Schmidt v. W. Va. Dep't of Highways*, Docket No. DOH-88-063 (Mar. 31, 1989).

9 9. When an employer chooses to promulgate and rely on a written tardiness policy, the employer, who has the burden of proof in a disciplinary case, must prove what that policy is. *Brown v. Cabell County Board of Education,* Docket No. 90-06-441 (November 22, 1991); *see Parham v. Raleigh County Bd. of Educ*., Docket No. 91-41-131 (Nov. 7, 1991), *aff'd*, 192 W. Va. 540, 453 S.E.2d 374 (1994). Respondent's failure to do so makes it impossible to adjudicate whether the penalty imposed comports with the policy. In this case, the Grievant's pattern of tardiness is well established in the record; it would be unreasonable to disregard entirely the evidence of tardiness merely because Respondent failed to prove the policy on which it relied. However, the absence of proof of the written policy will be taken into consideration for purposes of mitigation. *Brown, supra*.

10 10. With no proof that, before imposing the suspension, the employer gave due consideration to the Grievant's disability, especially the disclosures and accommodation requests she made immediately before the suspension was imposed, the undersigned concludes that there is ". . . an inherent disproportion between the offense and the personnel action" taken in this case, and that the employer abused its discretion. *Schmidt v. W. Va. Dep't of Highways*, Docket No. DOH-88-063 (Mar. 31, 1989).

11 11. An administrative law judge of the Public Employees Grievance Board has authority under W. Va. Code § 29-6A-5(b) (2006) to "provide relief as is determined fair and equitable . . ." and to " provide appropriate remedies . . . ." *See Graf v. W. Va. Univ.,* 189 W. Va. 214, 429 S.E.2d 426 (1992); *Wilkerson v. Lincoln County Bd. of Educ*., Docket No. 99-22-420 (March 27, 2000).

Accordingly, the grievance is GRANTED in part and DENIED in part. The five-day suspension imposed is reduced to a three-day suspension. The Respondent is DIRECTED to make the Grievant whole in all respects, as if the suspension had in fact been only three days, and to revise the record of Grievant's discipline accordingly.

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 (2006) (repealed,*see* fn. 1 above). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and they should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) (2006) 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.

_____

Thomas J. Gillooly

Administrative Law Judge

Date: April 9, 2008

Footnote: 1

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.

Footnote: 2

Tax Dept. Docket No. 06-G-104 at Level Three.

Footnote: 3

Tax Dept. Docket No. 06-G-105 at Level Three.

Footnote: 4

The Grievant's claims of whistle-blower retaliation and "nepotism" are too inadequately addressed or supported in the record to require consideration in this Decision. Arguably, they were abandoned in the Grievant's proposed findings and conclusions. They will not be addressed further.

Footnote: 5

Only the courts may award legal fees, W. Va. Code § 29-6A-10 (2006), and no evidence of such fees appears to have been presented in any event.

Footnote: 6

The doctor's statement also limited the Grievant's lifting to five pounds and recommended that she use the elevator rather than the stairs. In a subsequent letter, dated December 1, 2006, Dr. Howard elaborated, describing the Grievant's condition as progressive, explaining that the five minutes per hour he recommended did not require "formal break periods," just an opportunity for her to rest her hands, and explaining that the Grievant was particularly susceptible to stiffness and pain after rising in the morning, which could interfere with her arriving at work punctually.

Footnote: 7

In its proposed findings and conclusions submitted to the undersigned, the Respondent presented the chart set forth above in the text [minus the bracketed material] as support for the disciplinary action taken.

Footnote: 8

The citations omitted above in the text are: Rovello v. Lewis County Bd. of Educ., 381 S.E.2d 237 (W.Va. 1989); Grooms v. Raleigh County Bd. of Educ., Docket No. 91-41-224 (July 13, 1993); Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1991); Stewart v. W.Va. Alcohol Beverage Control Comm., Docket No. 91-ABCC-137 (Sept. 19, 1991).

Footnote: 9

Provisions of the grievance statutes other than those prohibiting discrimination and retaliation have also been interpreted in the past to support a disability-based grievance. See, e.g., Belcher v. Department of Transportation, Docket No. 94-DOH-341(April 27, 1995) (although it deals with the Fair Labor Standards Act) and Rodak v. Department of Tax and Revenue, Docket No. 96-T&R-536 (June 23, 1997); but see, e.g., Ruckle v. Department of Health and Human Resources, Docket No. 04-HHR-367 (June 23, 1997) (interpreting Vest to permit

consideration of Human Rights Act-based grievances only on discrimination grounds). Because the Grievant in this case based the non- disciplinary part of her case on a claim of discrimination, legal theories not presented by the record will not be considered.

Footnote: 10

W. Va. Code §§ 5-11-1 to 5-11-21 (2007); C. S. R. §§ 77-1-4.4 to 77-1- 4.6 (1994); 42 U.S.C. § 12101 - 12213 (2008); 29 C.F.R. § 1630.2(o) (Lexis current through March 6, 2008).

Footnote: 11

The reasonableness requirement protects the employer from having to implement an accommodation which would cause it undue hardship. See the authority cited infootnote 10. The reasonableness requirement assures that the work will continue to get done while adjustments are made for an employee's disability. To accommodate, the employer must devise means for the employee to carry out her "job responsibilities," in the words of the grievance statutes, by eliminating _ as much as possible _ the adverse impact of normal work requirements on her disability, e.g., aggravation of her symptoms.

Footnote: 12

Cases such as this can also raise the question whether one employee with a disability has been discriminated against when compared with other workers with disabilities. No such evidence was presented in this case, however, and that analysis is not called for here.