THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

RICK COSNER,

Grievant,

v.

DOCKET NO. 2008-0633-DOT

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

This grievance was filed by Grievant, Rick Cosner, at level three of the grievance procedure, on October 10, 2007, contesting a one day suspension without pay. The statement of grievance also alleged that Grievant had been subjected to discrimination and harassment, and specifically alleged discrimination by Grievant's supervisors because of Grievant's handicap. Grievant's counsel clarified at the level three hearing that the claims of discrimination, harassment, and the added claim of retaliation all related to the penalty imposed upon Grievant. The relief sought by Grievant is:

> I want the suspension lifted and all pay, seniority and benefits I lost as a result of the suspension reinstated. I also want the discrimination and harassment against me to stop. I also want to be treated fairly when it comes to job assignments and to be paid

for the money I lost due to the unfair treatment on job assignments I have suffered in the past. (See footnote 1)

Two days of hearing were held at level three before the undersigned Administrative Law Judge, on February 7, 2008, and August 19, 2008, in Elkins, West Virginia. Grievant was represented by Robert Q. Sayre, Jr., Esquire, and Respondent was represented by Robert Miller, Esquire, Legal Division. This matter became mature for decision upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law on November 5, 2008.

Synopsis

Grievant was suspended for one day without pay for three incidents which occurred within a few days of each other. Respondent did not prove one of the charges. The remaining two charges were proven. However, the second charge was that Grievant became loud and disruptive during a meeting conducted by his supervisor, something which other employees had also done in the past. No other employee had been disciplined in any way for becoming loud during a meeting, or otherwise confronting his supervisor in the presence of other employees. Grievant could not be treated differently from other employees.

The remaining charge was that Grievant had dumped his prescription medication, consisting of approximately 20 pills, on his supervisor's desk, and left; and then later, after the pills were returned to Grievant, he brought them back to his supervisor and demanded that he guarantee they had not been tampered with. Grievant's behavior was inappropriate, created unnecessary concerns and risks for his supervisor, and wascertainly deserving of some punishment. Grievant did not demonstrate that the penalty imposed was clearly excessive or clearly disproportionate to the offense. This grievance is denied.

The following Findings of Fact are made based upon the record developed at level three.

Findings of Fact

1. Grievant is employed by the Division of Highways ("DOH") as a Transportation Worker 3/Equipment Operator in Grant County, District 5. He has been a DOH employee for about 21 years.

2. Grievant has various medical conditions, which require him to take several different prescription medications, some of which are for pain control. DOH is aware of Grievant's various medical conditions, and his need to take medication.

3. On March 16, 2007, Grievant opened the restroom door at the crew room, intending to use the facilities. Upon opening the door, he detected a strong odor, and did not enter the restroom. He shut the door and located the room deodorizer/disinfectant spray supplied by DOH for use in the restroom, and opened the door enough to spray the product into the restroom. He sprayed for a couple of seconds. A co-worker, Alfred Moyers, was in one of the restroom stalls, and called out. Mr. Moyers has been diagnosed as allergic to many different things, including room deodorizers. Grievant was not aware that Mr. Moyers was allergic to this product, nor was he aware that Mr. Moyers was in the restroom when he sprayed this product. Further, DOH had not told employees not to spray this product in Mr. Moyers' vicinity. This deodorizer is still supplied by DOH for use in the crew room restroom. Grievant's supervisor, Asa Kisamore, Grant County Administrator,was made aware of this incident shortly after it occurred, but chose not to investigate it or speak with Grievant regarding his behavior.

4. On March 21, 2007, Mr. Kisamore was conducting a meeting of all the Grant County employees. At the end of the meeting he asked for questions. Grievant asked about the overtime policy. There was some discussion between Grievant and Mr. Kisamore about Grievant's ability to work overtime at night, because of the medications Grievant had to take in the evening. Mr. Kisamore's comments offended Grievant. Grievant became upset and loud, and rolled up his shirt sleeves to show Mr. Kisamore the pain patches he wore. As the meeting concluded, Grievant left the room, letting the door slam open as he went.

5. Grievant went to his truck and retrieved his prescription medication, and then went to Mr. Kisamore's office. Mr. Kisamore was on the telephone, talking to the District Engineer for District 5, Robert Amtower. Grievant dumped his medication, consisting of about 20 pills, on Mr. Kisamore's desk, made a statement that those were the pills he had to take, and left, as Mr. Kisamore came to the door and shut it. Some of the pills rolled onto the floor.

6. Mr. Kisamore was concerned about what he may have been exposed to, and about an illegal substance being found in his office, so he called the Grant County Sheriff and reported what had occurred. The Sheriff and Deputy Tony Cooper came to the office, and Deputy Cooper talked to Grievant about his medications. Deputy Cooper assured Mr. Kisamore that there was no need to be concerned about the pills, and he returned the pills to Grievant. 7. After the pills had been returned to Grievant, he took them back to Mr. Kisamore and told Mr. Kisamore he wanted him to

guarantee that the pills had not been tampered with.

8. By letter dated April 18, 2007, Grievant was advised by Mr. Amtower that he concurred in Mr. Kisamore's recommendation that Grievant be suspended for one day without pay. The letter described Grievant's conduct as “insubordinate and disruptive behavior along with failure to work harmoniously with fellow employees.” The letter specifically described Grievant's behavior as follows:

> On Friday, March 16, 2007, you sprayed an aerosol can in the Grant County men's restroom while Alfred Moyers was present, with the expected knowledge that Mr. Moyers is allergic to aerosol sprays. This follows complaining that you have made comments of an intimidating and harassing nature to Mr. Moyers concerning his health. (See footnote 2) On Wednesday morning, March 21, 2007, during a meeting with Grant County Maintenance employees concerning DOH Policy conducted by your Supervisor, Asa Kisamore, you became disruptive. In particular, while discussing the work schedule and Prohibited Harassment Policy, you jumped up, and became loud and boisterous. You then went outside and returned, throwing approximately 30 pills of different types on the computer desk and floor in Mr. Kisamore's office. At approximately 11:30 AM you returned demanding your pills. Mr. Kisamore told you he had called the Grant County Sheriff to identify the medication. At approximately 2:00 PM, following the return of your medication by the Sheriff, you approached Mr. Kisamore again, demanding that he guarantee the pills had not been tampered with. This conduct is insubordinate, harassing in nature and shows a pattern of disruptive behavior and failure to work harmoniously with fellow employees.

The letter advised Grievant that he could reply in writing to the charges to Jeff Black, Director of DOH's Human Resources Division, or meet personally with Mr. Black, within eight calendar days. Grievant called Mr. Black to discuss the allegations.

9. Mr. Black evaluated the charges against Grievant, and the punishment recommended by Mr. Amtower, and agreed that a one day suspension without pay was the appropriate penalty. By letter dated September 21, 2007, Grievant was notified by Mr. Black that he would be suspended for one day without pay for the reasons stated in the April 18, 2007 letter. (See footnote 3)

10. There have been other occasions when DOH employees in Grant County have engaged in loud, somewhat heated discussions with co-workers or supervisory personnel in the presence of other employees. Grant County DOH employee Don Pyle admitted he had raised his voice in a discussion with Mr. Amtower, in the presence of other employees, and he was not disciplined. Employee Chad Vance admitted he had gotten into a loud discussion with co-worker Kendall Burgess at a meeting, which had been attended by Administrative Services Manager for District 5, Leslie Staggers, and was not disciplined. Mr. Vance apologized to Ms. Staggers and Mr. Burgess, and Mr. Kisamore talked to him about the behavior. Sometime during the winter of 2006-2007, Foreman Zyndall Thorn and employee Lee Ours engaged in a heated discussion in the presence of

other employees, including Mr. Kisamore and Ms. Staggers. Mr. Ours stood up and took a step toward Mr. Thorn. Employee Greg Haight told both of them to calm down, and Mr. Kisamore told them that was enough. Mr. Ours was not disciplined. 11. Grievant had never been disciplined before this, and has always received favorable ratings on his performance evaluations.

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. *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 Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

Grievant was charged with insubordination, disruptive behavior, harassment, and failure to get along with co-workers. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(*per curiam*). *See Riddle v. Bd. of Directors, So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and c) the order (or rule or regulation) must be reasonable and valid." *Butts, supra.* In other words, there must be not only a refusal to obey a reasonable and valid order, but the refusal must be wilful. *Id.* "[F]or a refusal to obey to be 'wilful,' the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order." *Id.*

Certainly, there was no directive here which Grievant disobeyed. However, "[e]mployees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't,* Docket No. 90-H-128 (Aug. 8, 1990). An employer has the right to expect subordinate personnel "to not manifest disrespect toward

supervisory personnel which undermines their status, prestige, and authority . . .". *McKinney v. Wyoming County Bd. of Educ.,* Docket No. 92-55-112 (Aug. 3, 1992) (citing *In re Burton Mfg. Co.*, 82 L.A. 1228 (Feb. 2, 1984)).

Respondent did not prove the first charge against Grievant. Grievant sprayed room deodorizer/disinfectant into the restroom because of the odor, which is the purpose of having the deodorizer on hand. There was a significant amount of testimony regarding the configuration of the restroom stalls, in an effort to somehow prove that Grievant knew Mr. Moyers was in the restroom, and intentionally sprayed room deodorizer to harass Mr. Moyers. No one could testify, however, that Grievant was aware that Mr. Moyers was allergic to room deodorizer, or that Grievant could have known it was Mr. Moyers who was in the restroom. Grievant testified he did not enter the restroom because he was repelled by the odor. This same room deodorizer is still supplied by DOH for use in the restroom, and no one has told the employees not to spray the deodorizer in Mr. Moyers' presence. Grievant needed to use the restroom, and used the room deodorizer/disinfectant for its intended purpose, and in the proper manner. The remainder of the charges against Grievant have been proven. It is clear that Grievant was loud and confrontational toward Mr. Kisamore in the presence of other employees. The fact that other employees of DOH in Grant County have on other occasions confronted supervisory personnel in the presence of other employees in an inappropriate, loud manner, does not make Grievant's behavior appropriate. Employees should not show disrespect toward supervisory personnel, particularly in the presence of other employees. Grievant became loud during the employee meeting, and his loud remarks were directed toward Mr. Kisamore. This was disrespectful, disruptive behavior.

However, other DOH employees working in Grant County who have exhibited such behavior have not been disciplined. Grievant alleged discrimination in the penalty imposed. Discrimination is defined in the grievance procedure as “any differences in the treatment of similarly situated employees, unless such differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.” W. Va. Code § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, 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., 655 S.E.2d 52, 221 W. Va. 306 (2007); *See Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005). Grievant cannot be treated differently from his co-workers. If DOH believes it needs to stop this type of behavior, as well it should, *all* employees exhibiting such behavior must be disciplined for this type of behavior, not just Grievant. There was some testimony about whether Grievant was louder than other employees had been in other instances. The undersigned is not going to evaluate whether Grievant was louder. It is clear that the behavior of other employees toward supervisory personnel was just as disrespectful as that exhibited by Grievant. The appropriate response by DOH is to advise all employees it will not tolerate this type of disrespectful behavior, that it will impose appropriate sanctions upon all employees for such behavior, and then undertake appropriate steps to put a stop to the behavior by all.

The final act for which Grievant was suspended was the dumping of the prescription medications in Mr. Kisamore's office. There was some dispute about whether Grievant threw the container of pills on the table, where they spilled out, or dumped them. Either would be a serious concern for a number of reasons. Grievant takes several prescription medications, and should be well aware of the need to keep them secure so that they are not available to others. He put Mr. Kisamore at risk that he might be accused of possession of the medications without a prescription, and he made them available to others in the office. Grievant himself refused to accept the medications, unless Mr. Kisamore could guarantee to him that they had not been tampered with. This in itself was inappropriate behavior. This demonstrates a lack of respect for Grievant's supervisor, and an unwillingness by Grievant to take responsibility for his own actions. Grievant created this problem, not Mr. Kisamore. It is obvious that Grievant did not think about what he was doing, or consider the consequences. He simply reacted. Grievant believed that Mr. Kisamore overreacted to the dumping of the pills, and indeed he did. Mr. Kisamore refused to return the pills to Grievant, and called the county sheriff to come and look at the pills to make sure he had not been exposed to anything. This escalated the situation. It is

unclear to the undersigned how Mr. Kisamore could have been exposed to anything, or why Mr. Kisamore could not have simply told Grievant to calm down and put the pills back in the container. Despite the fact that Mr. Kisamore's reaction seems unnecessarily dramatic, Grievant's behavior was over the top as well, and certainly deserving of some punishment.

Grievant pointed to DOH's standard operating procedures related to disciplinary action, effective April 15, 2007, which provides “guidelines for managers and supervisors in exercising their responsibilities in recommending and administering disciplinary action.” Respondent's Exhibit 8. Jeff Black, Director of DOH's Human Resources Division, testified that while the disciplinary action was initiated under the old disciplinary procedures, because the actions for which Grievant was disciplined occurred in March of 2007, it was completed by his office using this new procedure. The new procedure provides examples of the types of behavior “that may warrant oral reprimand.” Relevant examples given are insubordination, and inability to work harmoniously with fellow employees. Relevant examples of the types of misconduct “that may warrant written reprimand in response to a single . . . instance of misconduct” are safety violations, horseplay, and insulting, abusive, threatening, offensive, defamatory, harassing, or discriminatory conduct or language. Examples of misconduct “that may warrant suspension in response to a single performance issue or instance of misconduct” include the types of misconduct listed under the examples given for imposition of a lesser penalty, conduct related to accessing,viewing, distributing, or transmitting certain types of materials, and purchasing card violations.

Grievant argued that he should have not have received a one day suspension for a first offense under the new disciplinary procedure, particularly when Grievant was a 21 year employee with good evaluations. He argued the suspension was not warranted, and constituted harassment and retaliation against him for filing complaints with the Equal Employment Opportunity Commission. He also pointed out that Mr. Amtower had determined the penalty before there had been an investigation of the allegations.

West Virginia Code § 6C-2-2(l) defines “harassment” as “repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession.” What constitutes harassment varies based upon the factual situation in each individual grievance. *Sellers v. Wetzel County Bd. of Educ*., Docket No. 97-52-183 (Sept. 30, 1997). "Harassment has been found in cases in which a supervisor has constantly criticized an employee's

work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. *See Moreland v. Bd. of Trustees*, Docket No. 96-BOT-462 (Aug. 29, 1997)." *Pauley v. Lincoln County Bd. of Educ*., Docket No. 98-22-495 (Jan. 29, 1999). A single incident does not constitute harassment. *Johnson v. Dep't of Health and Human Res*., Docket No. 98-HHR- 302 (Mar. 18, 1999); *Metz v. Wood County Bd. of Educ*., Docket No. 97-54-463 (July 6, 1998). The punishment imposed upon Grievant for his inappropriate behavior does not constitute harassment. West Virginia Code § 6C-2-2(o) defines reprisal as “the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it.” Grievant is not alleging retaliation for filing a previous grievance. To the extent that Grievant may claim retaliation for filing a complaint with the Equal Employment Opportunity Commission, Respondent has demonstrated that it had good cause for imposing discipline upon Grievant.

“The argument a disciplinary action was 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).” *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

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 theprospects 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 shall 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)." *Meadows, supra.*

DOH's disciplinary procedure provides that an employee may be suspended for a first offense of sufficient magnitude. Mr. Amtower testified that he considered all three charges when deciding what penalty he should recommend to Mr. Black. He viewed the three incidents, occurring at approximately the same time, as a pattern of disruptive behavior. He stated that if the first act were removed from the sequence, he would have to reevaluate whether to recommend a suspension. Mr. Black likewise had all of the events laid out before him when evaluating whether the recommended penalty was consistent with that imposed upon other employees. Grievant, however, has demonstrated that only one of the charges should have been considered in determining the appropriate penalty.

Nonetheless, the undersigned concludes that Grievant did not meet his burden of demonstrating that the penalty imposed was clearly excessive or clearly disproportionate to the offense. Grievant never grasped that his behavior was completely inappropriate. While Mr. Kisamore may not have behaved appropriately either, this does not justify Grievant's response to his supervisor. An employee of 21 years should have known better.

The following Conclusions of Law support the decision reached.

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

2. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(*per curiam*). *See Riddle v. Bd. of Directors, So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and c) the order (or rule or regulation) must be reasonable and valid." *Butts, supra*. In other words, there must be not only a refusal to obey a

reasonable and valid order, but the refusal must be wilful. *Id.*

3. "[F]or a refusal to obey to be 'wilful,' the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order." *Id*.

4. "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990). An employee's belief that management's decisions are incorrect, absent a threat to the employee's health and safety, does notconfer upon him the right to ignore or disregard the order, rule, or directive. *Vickers v. Bd. of Directors/W. Va. State College*, Docket No. 97-BOD-122B (Aug. 7, 1998). *See Parker v. W. Va. Dep't of Health and Human Res.*, Docket No. 97-HHR-042B (Sept. 30, 1997). Additionally, an employer has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority . . .". *McKinney v. Wyoming County Bd. of Educ.*, Docket No. 92-55-112 (Aug. 3, 1992) (citing *In re Burton Mfg. Co.*, 82 L.A. 1228 (Feb. 2, 1984)).

5. Respondent did not demonstrate that Grievant used the room deodorizer/disinfectant provided by Respondent in an inappropriate or malicious manner.

6. Grievant was disrespectful toward his supervisor during the meeting on March 21, 2007, in the presence of other employees, when he became loud.

7. In order to establish a discrimination claim asserted under the grievance statutes, 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., 655 S.E.2d 52, 221 W. Va. 306 (2007); *See Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-

278 (2005).

8. Grievant demonstrated that other DOH employees in Grant County have been disrespectful toward supervisory personnel during recent meetings, in the presenceof other employees, by becoming loud and argumentative; and that no other employees have been disciplined for this type of behavior.

9. Respondent demonstrated that Grievant exhibited disrespectful behavior toward his supervisor when he poured his medication onto his supervisor's desk, and left it. Grievant exhibited very poor judgement in leaving his prescription medication where anyone could access it, and it was appropriate for Respondent to impose some punishment upon Grievant for this act.

10. “The argument a disciplinary action was 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).” *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

11. 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 theemployee'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).

12. Grievant did not demonstrate that the penalty imposed was clearly excessive or clearly disproportionate to the offense.

Accordingly, this grievance is **DENIED.**

Any party or the Division of Personnel may appeal this Decision to the Circuit Court of Kanawha

County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. Va. Code § 6C-2-5. Neither the West Virginia Public 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 certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

_____

BRENDA L. GOULD

Administrative Law Judge

Date: December 23, 2008

Footnote: 1

In his post-hearing brief, Grievant sought only to have "the disciplinary action against him . . . dismissed and he should have all penalties imposed upon him rescinded, he should receive back the day off from work he was penalized, back pay for that day of work as well as his costs and attorney fees expended in pursuing this action." It is well established that the Grievance Board does not have the authority to award attorney fees. Brown-Stobbe/Riggs v. Dep't of Health and Human Resources, Docket No. 06-HHR-313 (Nov. 30, 2006); Chafin v. Boone County Health Dep't, Docket No. 95-BCHD-362R (June21, 1996). New West Virginia Code § 6C-2-6 is entitled, "Allocation of expenses and attorney's fees." It specifically states: "(a) Any expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expense."

Footnote: 2

Mr. Moyers testified that he had never complained about Grievant's behavior toward him before the incident with the deodorizer, and had no complaint with Grievant. He stated that some of his co-workers, including Grievant, had laughed at his allergies, and commented that it was all in his head. Mr. Moyers' wife had called DOH Foreman Zyndall Thorn around this time to complain that Grievant had been teasing Mr. Moyers. No one investigated Mrs. Moyers' complaint.

Footnote: 3

Grievant was absent from work on a medical leave of absence from sometime in April 2007, until July 23, 2007.