THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LESTER WILLIAM SHANKLIN,
Grievant,

v. **Docket No. 2012-1168-DOA**

GENERAL SERVICES DIVISION,
Respondent.

DECISION

Grievant, Lester William Shanklin, is employed by Respondent, General Services Division. On April 19, 2012, Grievant filed this grievance against Respondent stating:

> I am filing an appeal to the suspension and letter of April 3rd regarding equipment surplusing and equipment use by state employees. I did what I was told to do, thinking I was following normal procedures to accomplish the work and duties of the [Gr]ounds Division on the [C]apitol [C]omplex. I was trying to resolve problems with surplusing of equipment and repairs by our staff in the [G]rounds [D]ivision. I will submit my answers to the board at the hearing.

For relief, grievant seeks the removal of the suspension with back pay.

The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held on December 3, 2012, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union, Respondent was represented by counsel, Stacy L. Nowicki, Assistant Attorney General. This matter became mature for decision on January 11, 2013, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was suspended for three days from his position as Grounds Manager for four incidents of alleged misconduct. Respondent was not justified in imposing

discipline for two of the incidents. Respondent did prove misconduct in the other two incidents by a preponderance of the evidence. However, reduction in the level of discipline is warranted in the interest of fairness and Grievant's history of satisfactory work performance. Accordingly, the grievance is granted.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant has been employed by Respondent, West Virginia General Services Division, as the Capitol Grounds Manager since July 16, 2008.

2. Prior to employment with Respondent, Grievant had run his own landscaping business for thirty-five years, and then had worked for the City of Charleston for five years, including two and one half years as Assistant Director for Public Grounds.

3. Grievant's tenure as Capitol Grounds Manager has been difficult. There appears to have been serious deficiencies in the equipage of Grounds staff. When Grievant took over as Grounds Manager, most of the equipment necessary to maintain the grounds was not functional and the grounds were in disrepair. Grievant felt he was under pressure from the previous Secretary to get the job done, "whatever it takes." To that end, Grievant utilized his own personal equipment to maintain the grounds. Grievant and grounds staff continued to use Grievant's personal equipment to maintain the grounds for three and a half years, until early in 2012 when General Services Division Director David Oliverio ordered the equipment be removed. Grievant approached his job with a very practical, no-nonsense attitude. He does not

demonstrate a good understanding of the very different requirements of a manger in the State service, including the strict adherence to rules and regulations. This is attributed both to Grievant's personality and attitude, as well as lack of training and oversight from his own management.

4. On April 3, 2012, following a pre-determination conference on the same date, Grievant was issued a three-day suspension for "violation of standards of behavior against the public's best interest." The suspension letter cites the following as the reasons for the suspension:

> • Your failure to follow proper procedures and regulations related to the disposal of surplus property. Specifically, on or around February 28, 2011, you instructed Moore's Tractor Sales and Service in Ripley, WV, to dispose of two mowers owned by the State of West Virginia. You gave this instruction despite the requirement that all state property be disposed of through the Surplus Property Division of the West Virginia Purchasing Division. You gave this instruction without authority to do so. Your disregard for clearly established purchasing law gives the appearance of theft, or other improper conversion of this equipment.
> • You attended the West Virginia State Purchasing Conference in Canaan Valley, WV, in both 2009 and 2010. There, and in other instances, you received extensive training on the proper disposal of property owned by the State of West Virginia. As a manager, you have used the correct method for disposal of State property on other occasions. There is no acceptable reason why you ignored this training and intentionally circumvented surplus property rules with these mowers at Moore's Tractor Sales and Service.
> • Your admission to using public resources for private gain as stated in your March 27, 2012 letter . . . . Specifically, you admitted to directing a contract employee to work on your personal landscaping equipment while that contract employee was being paid by the state for other services. Further, you allowed a state owned "weed eater" to be used by state employees for their own personal use. These acts violated ethics rules prohibiting the use of subordinates for personal gain. The "Supervisor's Guide to

> Employee Conduct," also prohibits using subordinates in this manner.
>
> • Your statement in your March 27, 2012 letter that you had State employees cut down trees on your personal property for two days as part of a "training exercise." Conducting this training exercise on your personal property was not appropriate. This is an example of the use of your public position for private gain. You gained the benefit of having your "scrub" trees removed at the State's expense. Your actions exposed the State to unnecessary liability. Further, the work to your land violates State ethics rules and DOP policy.

5. This disciplinary action appears to have been precipitated by the March 27, 2012 letter Grievant wrote to Director Oliverio that was referenced several times in the suspension letter. In his letter, Grievant states he is writing regarding "accusations of using equipment and tools to work off campus on private jobs." Neither party provided explanation regarding these accusations, and the accusations did not appear to be the basis of the ensuing discipline. In the letter, Grievant details some of the difficulties he had faced as Grounds Manager, provides examples where he had used his own equipment to get the grounds "back in shape" and provided flowers from his own farm, and explains allowing the borrow of the weed eaters and the work of the contract employee. In addition, Grievant alleges instances where former Secretary Ferguson and former Governor Manchin hired Grounds staff for personal work. Grievant states, "I have never stolen anything from the City or State while working[.] I was taught to work and share . . . . I admit I am a little naïve and gullible and should ask for information if in doubt. But Sec. Ferguson said to do whatever it takes, but the perceptions [sic] around here is you're a thief and burglar if you step out of the mold to help or assist someone."

6. In response to the suspension letter, Grievant wrote Director Oliverio a second letter, dated April 10, 2012. In the letter, Grievant addresses the incidents discussed in the pre-determination conference. Grievant asserts that Business Unit Manager Sue Chapman had previously allowed Grievant to transport State property to obtain an estimate for repairs because it was necessary to know what was wrong with the equipment in order to bid it out for repair. Grievant explains that the push mowers were disassembled by the General Services Mechanic, and that the mowers were missing parts. Grievant lists a large amount of equipment that is not usable due to the mechanic's habit of disassembling machinery. He further asserts that while some equipment had been turned over to Surplus Property, most of it remained due to insufficient documentation. He explains that he took the mowers to Moore's because he did not have a single running push mower and it had been ten to twelve months since he had received parts for repairs. Grievant details the conversation with the owner of Moore's who informed him it would be too expensive to repair the mowers. Grievant does not specifically address Respondent's allegation that he told Moore's to dispose of the mowers, he simply then describes conversations with Surplus about disassembled machinery and the institution of the program for recyclable trash that Grievant began. Grievant also offered further explanation regarding the tree cutting class, his difficulties with his own supervisor, and beneficial changes that Grievant instituted as Grounds Manager.

7. The history of events leading up to the tree cutting class clearly shows Grievant had no intent to derive personal gain from the cutting of the trees on his property. Sometime in 2008, General Services' Safety and Health Coordinator, George

Arthur, III, arranged for himself, Grievant, and some others to take a tree cutting class. Mr. Arthur found the class by contacting the Department of Natural Resources and was put in touch with a retired DNR employee, Ed Murriner, who provided hands-on training in tree cutting and chainsaw safety. The class was held on the private property of one of the members of the class, and each member of the class cut down a tree. The class was very beneficial. Both Mr. Arthur and Grievant believed that Grounds staff who would use chainsaws would also need this training. Mr. Arthur requested another class through the Business Unit for Grounds staff. The Business Unit staff found someone else to do the second class. The second class was not beneficial because it provided no hands-on training.

8. Grievant requested a third class, specifying that it needed to be from Mr. Murriner to get the hands-on training. The property used in the first class was not available, so Grievant offered the use of his farm for the third class. Mr. Murriner inspected and approved the location, and he chose the trees to be cut based on size, height, and the direction the tree was leaning. The purpose was to learn to fell a tree to land in a specific place. The class was held on October 13, 2009 and October 15, 2009. One day was spent on Grievant's farm where each person cut down a tree. The other day was spent on the grounds. During the class, six pine trees were felled. The trees were not cut up, and were left lying where they were felled.

9. Sometime during the summer of 2010, Grievant allowed two employees to borrow State-owned weed eaters. Grievant allowed this because this practice was allowed when he worked for the City of Charleston. Within days of the incident,

Grievant was informed his action was improper, he admitted to the mistake, and has not allowed anyone else to borrow State-owned property.

10. On February 27, 2011, Grievant transported two broken push mowers to Moore's Tractor Sales & Service ("Moore's") in Ripley to obtain an estimate on the cost of repair. Grievant did this on his own time using his personal vehicle. Grievant had previously taken equipment for an estimate in this way and believed this was allowed to do so because Ms. Chapman was aware of it and had not said anything about it being improper.

11. The mowers could not be repaired for less than what it would cost to replace them. On March 9, 2011, Ed, a Moore's employee, noted on the job invoice: "Released by phone Mr. Shanklin."

12. Moore's did not dispose of the mowers and the mowers remained at Moore's for the rest of the year.

13. Meanwhile, the Business Unit conducted an audit and discovered that the two mowers were missing. Sometime thereafter, someone from Moore's called the Business Unit to ask what to do with the mowers and provided a copy of the job invoice. The copy of the job invoice was received by the Business Unit on December 19, 2011. The mowers were then retrieved by the Business Unit, were turned over to Surplus Property, and were disposed of by Surplus Property.

14. State law requires a specific process be followed to dispose of State property. Grievant did not follow the prescribed process and did not have the authority to remove the mowers from State property, to solicit an estimate for repair, or to allow Moore's to keep the lawn mowers for disposal.

15. In the fall of 2011, Grievant instructed a Goodwill employee[1] to perform a small repair on Grievant's personal leaf blower.

16. Prior to the instant three-day suspension, Grievant had received no previous discipline or counseling by Respondent, and Grievant had met expectations on all of his employee performance appraisals.

17. The only investigation Director Oliverio performed regarding the instances for which Grievant was disciplined was to speak with Mr. Arthur regarding the tree cutting class. He believed no investigation was necessary due to Grievant's letter admitting to wrongdoing. However, Director Oliverio was mistaken as to what Grievant had actually admitted to in his letter. Director Oliverio asserted that Grievant admitted in his letter to having a State part used to fix the blower, and the letter in no way admits this.

Discussion

The burden of proof in disciplinary matters rests with the employer to prove that the action taken was justified, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. *See* W. VA. CODE ST. R. § 156-1-3 (2008); *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,

[1] The Goodwill employee was a contract employee there for the benefit of the State and should have been performing work for the State at the time Grievant instructed him to perform work on Grievant's personal equipment.

1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

There are four instances for which Grievant was disciplined: disposal of mowers, loan of weed eaters, tree cutting, and ordering work on his personal blower. There is no dispute of the underlying facts regarding the tree cutting or the loan of the weed eaters, but there is dispute of the facts of the disposal of mowers and ordering work on the personal blower. As some of the underlying facts of this grievance are in dispute, the undersigned must make credibility determinations. In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Harold J. Asher & William C. Jackson, *Representing the Agency before the United States Merit Systems Protection Board* 152-153 (1984). Additionally, the ALJ 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. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Both Ken Frye, former Manager of the Agency for Surplus Property ("Surplus"), and Ms. Chapman testified for Respondent regarding disputed facts. Mr. Frye testified by telephone, as he is now retired. Due to his retirement, it would seem Mr. Frye would have no motive to lie in his testimony. Mr. Frye exhibited no bias against Grievant. Mr. Frye appeared to have a good recollection of the circumstances, and his attitude towards the proceedings was appropriate. His information was plausible and there was

no inconsistency in his statements. Mr. Frye's testimony that he did not tell Grievant that the mowers could be disposed of or were otherwise worthless is credible. Ms. Chapman had an appropriate demeanor and had an appropriate attitude towards the proceeding. While she does not appear to have a motive to lie, she may have some bias towards Grievant due to his frequent complaining about her department. Ms. Chapman's recollection regarding her conversation with the Moore's Tractor employee was good, her testimony on that issue was plausible, and it was supported by additional evidence in the form of the invoice. However, Ms. Chapman showed significant confusion in her testimony regarding the laws, rules, procedures, and processes surrounding surplus property. Therefore, it is plausible that some misinformation was given to Grievant on that issue.

Grievant painted himself a very sympathetic figure. His demeanor was appropriate. His testimony was detailed and he was careful to provide background information for his answers. He displayed a genuine and common-sense attitude. His testimony regarding the chaos he inherited as Grounds Manger was convincing. He was obviously frustrated and placed in a difficult position. However, the information in Grievant's letters and his testimony regarding the lawn mowers and the blower was not consistent. Regarding the mowers, there were several points that were inconsistent. Grievant denied in his testimony that he gave permission for Moore's to dispose of the mowers. He testified that he told Moore's to keep the mowers and that Grievant would get back with them on what to do with the mowers. However, in his April 10, 2012 letter, Grievant, in explaining the mowers, said that Mr. Frye told him that Surplus was unable to handle disassembled machinery. Grievant testified that his conversation with

Mr. Frye is why he believed that the mowers had no value. Further, Grievant testified at length regarding a recycling program he initiated so that the State could recoup profit from recyclable metals that were otherwise being disposed of in the trash. So, Grievant's justification that the mowers were worthless is inconsistent with his own testimony regarding recycling scrap metal. Also, Grievant's testimony that he did not intend to leave the mowers there is inconstant with the fact that the mowers were left for over a year. In addition, there was other evidence that Grievant told Moore's to dispose of the mowers: the job invoice and the testimony of Ms. Chapman regarding her conversation with the Moore's employee. While both the job invoice and the hearsay testimony have limited weight, that evidence in addition to Grievant's own inconsistences is enough evidence to conclude Grievant did tell Moore's to dispose of the mowers. However, it does not appear that Grievant had any nefarious purpose in soliciting the estimate for repair or in inappropriately instructing Moore's to dispose of the mowers. It is important to note that these mowers were not repairable and that Surplus did dispose of them. The mowers had value only to the limited extent of a negligible value as scrap. Grievant was not attempting to convert valuable property.

There was further inconsistency in Grievant's explanations regarding ordering the Goodwill employee to work on his personal blower. In his March 27, 2012 letter to Director Oliverio, Grievant states, "One day last fall I asked Tommy of [G]oodwill to tighten the pull rope on my blower, he was not working on anything and Ken was not working at all on anything, I was told he was a good mechanic, so I just thought, show me your talents." Grievant's testimony on this issue was different, insisting that he had given the blower to the employee only as a test to see if he was any good, specifically

not telling the employee what was wrong with the blower. Grievant's story on this issue clearly changed and is not credible. However, Grievant admitted nowhere to the use of a State-owned part to fix the blower. Although Respondent asserts that a State-owned part was used to fix the blower, Respondent did not appear to investigate the incident prior to the discipline and did not present any testimony on this issue. As its proof that Grievant actually caused a State-owned part to be used to repair Grievant's personal blower, Respondent submitted an email, purportedly from Grievant's supervisor, Charles Farley. The email is dated August 2, 2012, which is four months after the suspension. Also, it appears that Farley's version of events was based on what was reported to him by yet another person, and offers no explanation of how Farley himself received the information. Farley was not a witness to the incident. Therefore, the email is afforded no weight. It is determined that Grievant's version of events, as admitted in the March 27, 2012 letter, before he was subject to disciplinary action for the incident, is more credible than his testimony. Further, since Respondent chose to take action based only on Grievant's admission in the March 27, 2012 letter, rather than any independent investigation, review of Respondent's chosen disciplinary action should be confined to the evidence Respondent used to make its decision. Therefore, Grievant did instruct a Goodwill employee to perform a simple repair on Grievant's personal blower, but did not cause a State-owned part to be used in the repair.

The facts having been established, evaluation then turns to whether Respondent was justified in suspending Grievant for his behavior. Respondent was not justified in including the loan of State-owned weed eaters or the tree cutting in Grievant's discipline. The loan of the State-owned weed eaters occurred two years prior to the

suspension. Grievant's supervisor was aware of the incident when it happened and no disciplinary action was levied at that time. Further, though Grievant's action was clearly wrong, he offered a plausible reason for why he made the mistake in good faith, immediately admitted his wrongdoing, and there is no allegation that it ever happened again. There is no justifiable reason for Respondent to have included this remote-in-time instance in the suspension.

The issue of the tree cutting is much more interesting. There is no dispute of the facts of what happened, but whether what Grievant did was wrong or merited discipline. Respondent asserts that Grievant derived a clear personal gain from the cutting of trees on his property. The undersigned finds there is no clear personal gain to Grievant for his behavior. Yet again, Grievant was attempting to take a practical approach to his job to get it done "whatever it takes." It made sense to him to offer his property for this essential training. His employees needed trees to cut for training and he had plenty. There is no evidence that having these six trees cut down benefited Grievant in any way. The evidence presented is that the trees were chosen by the instructor based on the lessons he wished to teach the class. While a legal argument can be made that a benefit was gained, it is not a transparent one. Respondent also asserted concerns regarding liability. Those are valid concerns, but Grievant cannot be held accountable for those concerns in discipline when the same concerns were present in the first training session arranged by Mr. Arthur and Director Oliverio avers that Mr. Arthur did nothing wrong in organizing the first training. While Respondent does have valid concerns regarding Grievant hosting the training on his personal property for which Respondent would have been justified in counseling Grievant, suspending him for that

issue was not justified. Furthermore, again, it happened years before the suspension and Grievant's superiors were aware of it and took no action at the time.

Respondent was justified in imposing some discipline on Grievant for his actions regarding the lawn mowers and the Goodwill employee. Grievant did improperly transport the lawn mowers to Moore's for an estimate and Grievant did give permission to Moore's to dispose of the lawn mowers when he had no authority to do so. Grievant also improperly instructed the Goodwill employee to perform a small repair on Grievant's personal blower. However, further examination of those two incidents as well as other factors combine to make it clear that imposition of a three day suspension was not justified.

"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 Resources/Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996). "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 22, 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).

There are several elements of Respondent's choice of discipline that are troubling. Both Director Oliverio and Ms. Chapman testified at the level three hearing that Grievant had a pattern of disregarding the rules, and that testimony is specious. Although Grievant was not a long-term state employee, his performance evaluations since the inception of his employment in 2008 were all good. He had never been disciplined by Respondent prior to this suspension. If it was true that Grievant had a history of rule-breaking, there should have been a clear progressive discipline path showing this behavior and Respondent's proper response to it. There is none: no counseling, no lesser discipline, no indication through failure to meet expectations on an EPA. There is only an unrelated collection of behaviors spread out over a period a years that were lumped together in this suspension in order to make Grievant look as bad as possible.

It is clear from Director Oliverio's testimony that he failed to consider Grievant's work record or Grievant's assertions regarding his difficulties in obtaining proper equipment and staff and lack of training. Ms. Chapman was clearly confused about the

proper procedure in obtaining an estimate and Respondent did not provide any evidence to dispute Grievant's account that he had previously transported property for estimate with Ms. Chapman's knowledge. While the law provides Grievant no authority for the removal of State property, his honest attempt to simply get some working equipment as quickly as possible coupled with the involvement of Ms. Chapman should have been taken into account in imposing discipline. Director Oliverio also attempted to impose discipline against Grievant due to liability issues for holding the training on his personal property when Mr. Arthur had also organized a training that was held on personal property and Director Oliverio stated that Mr. Arthur had done nothing wrong. If holding the training on personal property is a safety and liability issue for Respondent, then Mr. Arthur, as the Safety and Health Coordinator, is much more culpable for allowing the first training to occur on private property. As discussed above, the tree cutting and weed eater instances should not have been considered at all in this disciplinary action. Therefore, it is clear that the process Respondent used in disciplining Grievant was flawed.

Grievant's failure to follow the rules, in the long view, appears more a symptom of the mess into which he was dropped and his management's failure to address his valid concerns. While this does not negate the wrongness of Grievant's own actions, it certainly does justify mitigation of the penalty. There were clear deficiencies in Grievant's behavior that needed to be addressed, but it was unfair of Respondent to make up for its own failure to address these issues in a timely manner by lumping together three-years-worth of fairly unrelated issues into one disciplinary action.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove that the action taken was justified, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. *See* W. VA. CODE ST. R. § 156-1-3 (2008); *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). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. Respondent proved by a preponderance of the evidence that Grievant improperly transported two disassembled lawn mowers to a vendor for a repair estimate, improperly gave permission to the vendor to dispose of the lawn mowers, and improperly instructed a contract employee to perform a small repair on Grievant's personal blower. Respondent was justified in imposing some discipline upon Grievant for these instances.

3. Respondent was not justified in imposing discipline for loaning two State-owned weed eaters when Grievant offered a plausible reason for why he made the mistake in good faith, immediately admitted his wrongdoing, never did so again, and this instance occurred two years prior to the suspension. Respondent was also not justified in imposing discipline for Grievant hosting a tree-cutting training on his personal property which involved employees felling six trees that were selected by the instructor, which instance occurred three years prior to the suspension. Respondent did not prove

that Grievant derived personal gain and did not discipline Respondent's Safety and Health Coordinator for allowing a previous class to be held on personal property.

4. "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 Resources/Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996).

5. "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 22, 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).

6. 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).

7. Reduction in the level of discipline is warranted in the interest of fairness and Grievant's history of satisfactory work performance.

Accordingly, the grievance is GRANTED**.** The suspension shall be removed from Grievant's record and replaced with a written reprimand. Respondent is also ORDERED to pay Grievant three days of back pay, with interest, and to restore all other benefits that Grievant lost as a result of the suspension, including leave, seniority, and retirement benefits.

Any party 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: April 26, 2013

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Billie Thacker Catlett
Administrative Law Judge