WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JOHN PAUL ROWE,
Grievant,

v. **Docket No. 2012-0999-DOC**

DIVISION OF FORESTRY,
Respondent.

D E C I S I O N

John Paul Rowe, Grievant, filed this grievance against his employer, the West Virginia Division of Forestry ("DOF"), Respondent, on March 23, 2012, protesting a disciplinary action taken against him. The grievance states:

> The unsigned letter presented to me on March 12, 2012 was unjust, undeserved and incorrectly presented to me.

The relief sought:

> I want my record completely made whole and I want the said March 12, 2012 letter removed.

A conference was held at level one on March 23, 2012, and the grievance was denied at that level on March 30, 2012. Grievant appealed to level two on April 11, 2012. A mediation session was held on October 18, 2012. Grievant appealed to level three on October 31, 2012. A level three hearing was held before the undersigned Administrative Law Judge on April 24, 2013, at the Grievance Board's Charleston office. Grievant appeared in person and with representative Fred Tucker, UMWA. Respondent was represented by William R. Valentino, Assistant Attorney General. Both parties submitted Proposed Findings of Fact and Conclusions of Law and this matter became mature for decision on May 22, 2013, on receipt of the last of these proposals.

Synopsis

Grievant is employed by the West Virginia Division of Forestry ("DOF"), Respondent, and is currently assigned as the manager of the DOF Forest Legacy Program. Grievant is not a low-level employee, with his chain of command being a direct supervisor who is directly supervised by the Division's Director. Grievant's duties include coordinating with the United States Forest Service (USFS) and timely submitting materials to USFS for funding projects. Grievant was reprimanded by his immediate supervisor and provided a three month 'improvement plan.' Grievant was reprimanded for alleged disregard for the chain of authority and disrespectful conduct. Grievant grieves the basis of the reprimand, in fact and spirit. Grievant challenges the merits of Respondent's actions against him. Grievant avers the reprimand was unwarranted and unjust.

Respondent has the burden of proof in disciplinary grievances. Grievant is unequivocally on notice that his immediate supervisor finds his demeanor and conduct to be objectionable. Nevertheless, in the circumstances of this grievance, it was not established by a preponderance of the evidence that Grievant was in violation of an agency directive, rule or regulation. Respondent has not met its burden in the facts of this matter. This grievance is GRANTED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is a fifteen-year employee whose job title at the time of the instant events was Forest Legacy Forester. Grievant's duties included managing various aspects of the Forest Legacy Program, which include protecting forest lands via conservation easements. Grievant's level of participation with regard to this activity is extensive and complex, mandating compliance with numerous federal and state procedures and regulations. Grievant's duties include coordinating Agency activity with the United States Forest Service.

2. Assistant State Forester Robert Radspinner is Grievant's direct supervisor.

3. Chief State Forester/DOF Director C. Randy Dye assigned Mr. Radspinner as Grievant's supervisor. Supervisor Radspinner reports to Director Dye.

4. The Forest Legacy Program has gone through some developmental changes over the years, Grievant's role and his direct supervisor has not always been the same. There was a time when Grievant answered directly to Director Dye.

5. Supervisor Radspinner is of the opinion that Grievant does not properly conduct himself in accordance with the recognized chain of authority. Supervisor Radspinner is of the opinion that Grievant improperly communicates with others about issues or decisions that are within the purview of Mr. Radspinner's authority.

6. Grievant's attitude toward his duties were impeccable. However, Supervisor Radspinner is of the opinion that Grievant does not demonstrate sufficient respect to him as his supervisor. It is recognized that Grievant projects an air of arrogance, perceived by Radspinner as a disrespectful attitude. Radspinner had concerns regarding Grievant's so-called disrespectful attitude.

7. On February 24 and 29, 2012, meetings were arranged with Chief Forester/DOF Director C. Randy Dye, Department of Commerce Human Resources Manager Diana Spence, Grievant's direct supervisor, Robert Radspinner and Grievant.

8. Allegedly the purpose of the meetings were to create a dialogue between Grievant and his supervisor to prevent future issues. Nevertheless, the tone of the meetings tended to be accusatory. Respondent's agent highlighted with emphasis that Administration had concerns regarding Grievant's attitude, his conduct with fellow employees and his ability to follow directions. At the February 24, 2012, meeting it was noted with conspicuous emphasis that Grievant could be suspended and/or terminated. Respondent's agents expressed to Grievant if he would admit he had a problem they could help him.

9. Grievant's participation in the discussion was guarded. Grievant indicated he was not prepared to respond to the allegations presented.

10. Grievant was not convinced the tone of the meetings was supportive and/or designed to facilitate teamwork, but perceived the events as an attack. From Grievant's perspective, the tone of the meetings tended to be accusatory. Grievant's participation in the discussion(s) was understandably guarded. Grievant had no comment in response to the allegations Respondent had about his attitude and alleged abrasive personality.

11. Director Dye had assigned Radspinner as Grievant's supervisor on or about September 9, 2010. Director Dye was of the opinion that this was a fresh start for Grievant. Supervisor Radspinner is of the opinion that Grievant takes the liberty to report information to Director Dye himself, not withstanding that he [Radspinner] is now Grievant's direct supervisor.

12. Assistant Director Darlene Parsons works with DOF accounting, grants and payroll issues. In that capacity, she had occasion to witness an incident between Grievant and his interaction with an accounting employee. A meeting took place on December 8, 2011, with Grievant, Ms. Parson and Scott Fairchild, a DOF accountant/auditor. Parsons was of the opinion that Grievant was overtly aggressive and facilitated an incident which was exacerbated by Grievant's refusal to disengage.

13. Administrators were not pleased with Grievant following the February 24 and 29, 2012, meetings. Administrators were of the opinion that Grievant's lack of capitulation was problematic.

14. On or around March 12, 2012, Grievant received a written reprimand from Supervisor Radspinner. Specifically, Grievant was reprimanded for disregard of the chain of authority and disrespectful conduct toward a member of the DOF accounting department. Grievant was also provided a three-month "improvement plan" which was specifically tailored to address Respondent's concerns over Grievant's behavior. By all accounts, the improvement plan was successful, and had the desired effect of prompting Grievant to conform his behavior to a standard not objected to by Respondent.[1]

15. The March 12, 2012, three page Written Reprimand to Grievant stated in part that:

> This letter is a reprimand for your unsatisfactory performance over the past few months and a follow-up to a conference on this performance held February 24 and an additional meeting held on February 29.

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[1]Director Dye testified that the meetings, and ultimately the reprimand and improvement plan, were devised in an effort to assist Grievant in learning to cooperate with other employees, and overcoming his abrasive nature when he deals with others.

> Management is concerned that your verbal actions and e-mails demonstrate a disregard for the authority of your supervisor. Furthermore, your disrespectful attitude towards the accounting department has been brought to the attention of management.
>
> Beginning in late November 2011, you went directly to the State Forester instead of your supervisor to undo joint decisions made and agreed to in an e-mail dated September 23rd to submit a 2013 FLP project for funding. You continued this action through e-mails sent to the State Forester on December 1 and December 2 questioning the actions of the supervisor in submitting the project.
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> On January 31st you addressed a concern regarding an e-mail correspondence where actions was taken involving accounting of the Forest Legacy grant. Since there was a questions by the USFS on funds, accounting was asked to contact them directly. Again it was inappropriate for you to question decisions made by your supervisor through an e-mail sent to the director.

R. Ex. 1.

16. Supervisor Radspinner's reprimanding of Grievant for disregard of the chain of authority was, in part, based upon an event that transpired as a result of a set of circumstances and/or a situation that transpired between the Legacy Program and the United States Forest Service in the fall of 2011.

17. Grievant and Supervisor Radspinner meet on a regular basis to discuss issues and review various aspects of the Forest Legacy Program. The first meeting transpired in September 2010, numerous conversations occurred throughout the next 15 months and the last meeting was prior to the instant disciplinary action being in November 2012.

18. There are several components to the Forest Legacy Program, Grievant and Supervisor Radspinner met on a regular basis to discuss issues, map out prospective actions and to report on the progression of the Program.

19. An aspect of the endeavors discussed between the two included coordinating with the United States Forest Service (USFS) and timely submission of materials to USFS for funding projects. There are various stages and numerous prerequisites specified to be in compliance with the United States Forest Service.

20. Supervisor Radspinner and Grievant did not necessarily agree at all the phases of a given stage of various activities of the Forest Legacy Program. Supervisor Radspinner is of the opinion that Grievant is insubordinate.

21. Grievant expressed his concerns and opinion to Supervisor Radspinner regarding certain actions by the Forest Legacy Program being positive, negative and/or concern for due diligence by the Agency. Grievant voiced his opinion both verbally and in written format.

22. Supervisor Radspinner was of the opinion that the Agency's submission to United States Forest Service was proceeding according to a predetermined timeline.

23. On December 1, 2011, Grievant contacted Director Dye at the request and/or instruction of Supervisor Radspinner. See R. Ex. 3. Grievant indicated that there were deficiencies and/or shortcomings with regard to the Agency's submission with a particular project.

24. Grievant and Supervisor Radspinner did not agree with regard to the status of the Forest Legacy Program's grant proposal.

25. As a result of deficiencies, with regard to a Forest Legacy Program submission to the United States Forest Service, Supervisor Radspinner was motivated to withdraw the Agency's submission of a grant package. Withdrawal of Respondent's grant package was embarrassing to the program, and Supervisor Radspinner.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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, a party has not met its burden of proof. *Id.*

Grievant was issued a written reprimanded for alleged disregard for the chain of authority and disrespectful conduct. Respondent contends that the reprimand issued to Grievant was justified. Further, Respondent alludes that Grievant's conduct constituted insubordination. 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.*

Grievant grieves the basis of the reprimand, in fact and spirit. Grievant challenges the merits of Respondent's actions against him.

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

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or

nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

Having observed the speech, mannerisms, expressions, demeanor and body language of the witnesses, it is clear to the undersigned Administrative Law Judge that it is prudent to discuss the testimony of Grievant and Assistant State Forester Robert Radspinner (Grievant's immediate supervisor).

Having directly observed the demeanor of Assistant State Forester Radspinner, the undersigned ALJ notes that his testimony was both candid, and convoluted. His statements were obviously not rehearsed. In responding to questions about his interaction with Grievant, Supervisor Radspinner expressed strong opinion regarding Grievant and Grievant's attitude. This witness had reach some fairly specific conclusions regarding Grievant. However, his conclusions are not necessarily established by evidence of record. The testimony of Respondent's witness, Robert Radspinner, was short on specific details. Said testimony was not found, by this ALJ, to be extremely informative. The witness expressed his opinion freely, but was not very successful in identifying sufficient details or facts that readily justified his conclusions. It is clear the witness truly believes Grievant to be insubordinate; however, Supervisor Radspinner's justification for this conclusion is more opinion than factually specific.

Respondent held two meetings with Grievant in February. The details of the meetings were not explained as fully as the undersigned would have liked. Supervisor Radspinner had concerns regarding Grievant's demeanor. However, Grievant's reluctance to provide Respondent with additional material to construct a gallows for his own demise

was understandable. An important factor for consideration in determining the credibility of a witnesses is the plausibility of the witnesses' statements. Supervisor Radspinner contradicted himself several times and offered mutually exclusive facts. It is acknowledged that the two met regularly. Grievant and Supervisor Radspinner discussed time lines and plans of action all summer (2011) preparing for a fall submission to USFS. Grievant expressed concerns regarding some of the Agency's actions. It is hard to balance this information with Radspinner's representation that Grievant did not inform him regarding perceived deficient actions of the Forest Legacy Program. Thus, while Supervisor Radspinner readily expected all issues to be resolved as he had determined the Program would proceed, it is disingenuous for Assistant State Forester Radspinner to represent he was unaware of Grievant's reservation for some of his decisions.

Withdrawal of Respondent's grant package was embarrassing to Supervisor Radspinner. It is more probable than not that Supervisor Radspinner holds Grievant chiefly responsible for this short-coming. Some of the allegations of Supervisor Radspinner are ambiguous and less credible because it is unclear whether the allegation is intended to allege separate offenses, or simply inserted to provide additional weight to support the contention that Grievant was belligerent and resistant to authority.

Having directly observed the demeanor of Grievant, the undersigned Administrative Law Judge notes that Grievant's testimony was candid, straightforward and consistent. His statements did not appear to be insincere. He was direct and straightforward in responding to questions about his conduct. Grievant understood the importance of the information he was conveying. Grievant's attitude during his testimony tended to indicate honesty and fostered reliance. Nevertheless, having observed the speech, mannerisms, expressions,

demeanor and body language of Grievant, it is noted that Grievant does have an air about him that could be viewed as lordliness, arrogance or self-confidencs. This sense of being that Grievant projects is not necessarily directed at anyone, or a display of direct arrogance, but it seems to be Grievant's nature and not a display of dismissive attitude. It is more likely than not that this personification of Grievant's chaffs his direct supervisor. This is regrettable, The more difficult question is whether the situation constitutes a legitimate disciplinary cause of action. Grievant's testimony is found to be credible. Grievant was direct and straightforward in responding to questions about his actions and opinion.

It is apparent that Supervisor Radspinner came to perceive Grievant's attitude as dismissive toward his supervisory authority. It is not difficult to understand how Supervisor Radspinner might grow tired of Grievant's mannerism. Nevertheless, it is not established that Grievant was, in fact, insubordinate. While Supervisor Radspinner's testimony was generally credible, the information presented is not sufficiently reliable to establish controverted facts. It is determined that Assistant State Forester Radspinner's perception of Grievant's demeanor does not establish, fact certain, allegations of the disciplinary document.

Supervisor Radspinner is of strong opinion that Grievant disregarded his authority as his supervisor and on multiple occasions addressed issues of Grievant's own concern to the Chief Forester, Director C. Randy Dye (violating the duly recognized chain of command). Radspinner testified this was without his permission or authority, and it specifically occurred after several decisions about a Forest Legacy project funding submission were sent to USFS. This opinion was not substantiated by the evidence of

record. In review of the two examples exalted as prime definitive illustrations, this ALJ finds at least one, if not both, examples tend to demonstrate just the converse. Grievant and Supervisor Radspinner met on a regular basis and there were soft and hard deadlines to submit projects to USFS with numerous prerequisites thoughout the various stages of the process. Grievant indicated concerns regarding certain aspects of the project. However, Supervisor Radspinner readily expected all issues to be successfully resolved as he had determined the Program would proceed. This did not happen. It is not established that Grievant remained silent until the twelfth hour and then reported his supervisor directly to Director Dye indicating problems with the submission.[2] In fact, Grievant shared his opinion and suggested courses of action more readily than Supervisor Radspinner desired, referencing weekly comments, see e.g., R. Ex. 4. As a result, Supervisor Radspinner likely discounted Grievant's opinion as a malcontent and gave Grievant's opinion and suggestions less than due consideration. Ultimately, as a result of deficiencies with regard to the Forest Legacy Program submission, Supervisor Radspinner was motivated to withdraw the Agency's submission of a grant package to the United States Forest Service.[3] Radspinner further referenced an e-mail, R Ex. 2, where Grievant communicates with the DOF Grants Manager making sure that the DOF would receive the

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[2] See R. Ex 3. Grievant sent Director Dye an e-mail on December 1, 2011, pursuant to Supervisor Radspinner's verbal instructions. This communication contained information enumerating requirements that tended to indicate that proceeding with the submission was ill-advised. Grievant testified, uncontroverted, that Supervisor Radspinner instructed him to forward the project submission letter directly to the State Forester. Grievant further testified that he feared that if the Director signed off on the project submission letter that Director Dye would be making a false statement to USFS.

[3] This meant waiting another year to apply for a Forest Legacy grant.

annual administrative grant request from the USFS. Supervisor Radspinner is of the opinion that Grievant's cumulative actions constitute insubordination.

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 has the right to expect a higher level of performance from their supervisors. See *Cobb v. Dep't of Admin. General Services Div.*, Docket No. 97-Admin-404/455 (May 26, 1999). However, the critical question is whether Respondent has established by a preponderance of the evidence that Grievant's conduct reasonably constituted a need for a disciplinary measure. Intent and facts are extremely relevant. Mere allegation, without substantiating facts is insufficient to sustain a disciplinary action. Grievant's actions in seeking clarification regarding an issue in discussion is not necessarily subversive conduct.

Correctly identifying prohibitory rules or regulations in opposition to a supervisor's determination is not necessarily insubordination. A supervisor with good-faith intention would most likely appreciate an astute employee who prudently identifies relevant obstacles to contemplated courses of action prior to the implementation, especially if foreseeable obstacles will hinder the success of the project. It might be interpreted as due diligence. Insubordination is defined as the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *Riddle v. Bd. of Directors/So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994). Respondent has not established Grievant's behavior to be insubordination.

It is recognized, by all accounts, that the improvement plan imposed was successful and had the desired effect of prompting Grievant to conform his behavior to a standard not objected to by Respondent. This is fortuitous. Considerable deference is afforded to employers in disciplinary grievances. *See Lynn v. Monongalia County Health Dep't*, Docket No. 2009-0425-MonCH (Mar. 27, 2009). Respondent has wide discretion in managing its personnel in the performance of their duties, however it cannot exercise its discretion in an arbitrary or capricious manner.[4] In the circumstances of this matter, Respondent identified a situation in need of being addressed, but did not establish Grievant's culpability for the allegations specified in the March 12, 2012 Reprimand Letter. It is not established by the facts that Grievant violated any known rule or regulation justifying disciplinary action. As noted earlier, Grievant does project an air of confidence in himself; however, the undersigned is not persuaded that Grievant knowingly failed to perform work as assigned, or refused to obey superiors' directives.

The following conclusions of law are appropriate in this matter:

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[4] "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

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. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008).

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. Respondent did not establish that Grievant was insubordinate.

4. "[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*.

5. "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 not confer 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-112B (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)).

6. An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995). *See Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

7. "As a supervisor, Grievant may be held to a higher standard of conduct, because he is properly expected to set an example for those employees under his supervision, and to enforce the employer's proper rules and regulations, as well as implement the directives of his supervisors." *Wiley v. W. Va. Div. of Natural Resources, Parks and Recreation*, Docket No. 96-DNR-515 (Mar. 26, 1988).

8. It is not established by a preponderance of the record that Grievant is culpable of disciplinary misconduct as specified in the disciplinary letter.

Accordingly, this grievance is **GRANTED**. It is acknowledged that, by all accounts, the imposed improvement plan was successful and had the desired effect of prompting Grievant to conform his behavior to a standard not objected to by Respondent. Nevertheless the written reprimand issued to Grievant on or about March 12, 2012, is **ORDERED** to be removed from Grievant's personnel file. No other relief is granted by this Order.

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* 156 C.S.R. 1 § 6.20 (2008).

Date: September 20, 2013

Landon R. Brown
Administrative Law Judge