THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

LISA SWIGER,
Grievant,

v. **DOCKET NO. 2013-1134-DVA**

DEPARTMENT OF VETERANS ASSISTANCE,
Respondent.

DECISION

This grievance was filed at level three of the grievance procedure by Grievant, Lisa Swiger, on February 6, 2013, challenging her dismissal by Respondent, the Department of Veterans Assistance. The statement of grievance reads, "[d]ismissal without good cause." The relief sought by Grievant is: "[t]o be made whole including all backpay with interest & all benefits restored."

A level three hearing was held before the undersigned Administrative Law Judge on June 26, 2013, at the Grievance Board's Westover, West Virginia office. Grievant was represented by John Thompson, UE Local 170, West Virginia Public Workers Union, and Respondent was represented by Jennifer S. Greenlief, Esquire, Assistant Attorney General. This matter became mature for decision on August 12, 2013, on receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was dismissed from her employment by Respondent for patient abuse. Respondent demonstrated that Grievant did not provide proper care for eight of the nine residents to whom she was assigned on one shift, and that this constituted good cause for

dismissal. Grievant argued that Respondent was required to advise her of her right to representation during the predetermination hearing, and that the hearing was a predetermination hearing, but did not demonstrate that there is any such requirement. Respondent advised Grievant of the allegations and made it clear that she was being given the opportunity to respond. This is all that is required. Grievant was not denied a representative at the predetermination hearing as she never requested that a representative be present.

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

Findings of Fact

1. Grievant was employed by the Department of Veterans Assistance ("DVA" or "Respondent"), as a permanent employee in the classified service, as a Health Service Worker ("HSW"), at the West Virginia Veterans Nursing Facility in Clarksburg, West Virginia. She had been employed by DVA for four years.

2. As a HSW Grievant was responsible for assuring that residents received adequate assistance with their personal and oral hygiene needs, bathing residents, and assisting them to the bathroom and in the bathroom if they required assistance. Grievant was required to check on each resident at least once every two hours, and she was aware of this requirement.

3. On January 24, 2013, Grievant worked the night shift, and was scheduled to leave work at 7:00 a.m. An employee scheduled to work the 7:00 a.m. to 3:00 p.m. shift called off work, and Grievant was required to stay and work a second shift, in accordance with DVA policy at the Veterans Nursing Facility.

4. Grievant, by her own admission, was tired, and was very upset that she was required to work over, because she did not believe it was her turn, and because her husband was waiting for her in the car in the parking lot.

5. Employees who are mandated to work a second shift are allowed first choice of which unit they will be working for the second shift. Grievant worked her second shift on January 24, 2013, on the A Hall,[1] which is a difficult unit to work because of all the residents on that unit who require two people to assist them in getting in and out of bed, to and from the bathroom, and in and out of the shower. Many of these residents also have compromised mental capacity and compromised short-term memory.

6. Several times during Grievant's second shift the Registered Nurse Supervisor, Cody Carpenter, observed Grievant sitting in the area where bird cages are hanging. Mr. Carpenter would ask Grievant if she needed help, and if she had finished her work, and Grievant would respond that she wanted to go home. Other HSW also observed Grievant sitting in the bird cage area during this shift several times.

7. Sometime between 1:30 and 2:00 p.m., April Westfall, a HSW employed at the Veterans Nursing Facility through JK Staffing, took over the remainder of Grievant's shift so that Grievant could go home. Ms. Westfall had begun work at 7:00 a.m., and had been assigned to do appointments. She had told Grievant she would take over for her when she completed this assignment. Ms. Westfall began checking on the nine residents who had been under Grievant's care since 7:00 a.m., and found them in need of immediate

---

[1] Grievant testified that she was mandated to work A Hall, but other employees testified that when they are required to work a second shift, the rule is that they get to choose which hall they will work, and they never choose to work A Hall.

care. Ms. Westfall reported what she found to Mr. Carpenter, and he assisted her with two of the residents. Ms. Westfall had no difficulty finding two other employees to assist in getting the residents cleaned up.

8. Ms. Westfall found one resident, J.A.,[2] lying on a bed pan, and he had been in that position long enough that the bed pan had left a mark on his buttocks.

9. Grievant had left the bedpan within J.A.'s reach and had not checked on him. Bedpans are not to be left where residents can reach them.

10. Ms. Westfall found M.V. sitting in a chair in the dining room, her clothing was soiled, and she had bowel material dried on her. M.V.'s care plan required that she be put to bed after lunch. Lunch is served at the Facility between 11:30 a.m. and noon.

11. April Price, a HSW employed by DVA, at the Veterans Nursing Facility worked the 7:00 a.m. to 3:00 p.m. shift on B Hall on January 24, 2013. Grievant asked her if she would help her with M.V., as it takes two people to transfer M.V., and she helped Grievant transfer M.V. to the shower chair in the morning. Grievant did not ask Ms. Price for help with any other resident that day. Ms. Price asks for assistance from co-workers many times every day from anyone that is available. At some times during the day she had found it difficult to find someone to help her, particularly when the Facility is short-handed.

12. After Grievant showered M.V. she put her back in the same clothes. Grievant knew she should not have done so.

---

[2] Consistent with Grievance Board practice, the residents will be referred to only by their initials in order to maintain confidentiality.

13. Resident R.B. was found sitting in a chair,[3] and had dried bowel material in his brief. He was supposed to have a shower that morning, but had not been showered. One person can normally shower and move R.B. without assistance.[4]

14. Melanie Dawn White, a HSW employed at the Nursing Facility by DVA, worked the 7:00 a.m. to 3:00 p.m. shift on A Hall on January 24, 2013. She helped take R.B. to the restroom for Grievant once during her shift.

15. Resident J.W. had not been put to bed after lunch and his brief was saturated and had dried bowel material in it. One person can normally get J.W. up and change him without assistance.

16. Resident A.M. had not been put to bed after lunch, his bed linens were not changed, he had not been showered as was scheduled for the morning, and he was wet. Normally it takes two people to move A.M., but one person can change his brief without assistance.

17. Resident W.T. was found still in a wheelchair instead of being placed in bed after lunch, and he had dried bowel material on him, he was very soiled, he had a saturated brief, and his clothes were dirty. W.T. is a two-person assist when transferring him to and from a wheelchair, and showering him, but one person can change his brief without assistance.

---

[3] It appears from the testimony that the practice is to put the residents in bed after lunch, but the record does not reflect that it was required that any resident other than M.V. be placed in bed after lunch.

[4] Grievant testified that R.B. told her he did not want a shower, and that she reported this to Mr. Carpenter. Grievant, however, did not record this in the Activities of Daily Living Book (See Finding of Fact Number 22).

18. Resident B.C. was found sitting in a chair rather than having been placed in bed after lunch. One person can transfer B.C. to and from a chair without assistance.

19. Ms. White got razors for Grievant while Grievant was showering B.C., and she stripped and made his bed. Grievant did not ask her for assistance with any residents other than B.C. and R.B.

20. Resident L.W. had not been placed in bed after lunch, and had dried bowel material on him. L.W. can usually move from the bed to the chair and back without assistance, but if he needs assistance, he is a one-person assist. Grievant asked L.W. at some point after lunch if he was ready to lay down in his bed and he told her no.

21. Only one of the nine residents assigned to Grievant during the shift was found in good condition.

22. Employees of DVA at the Veterans Nursing Facility are required to record information regarding each resident in the Activities of Daily Living book. They record information regarding whether the resident has been showered, urine output, bowel movements, and whether the resident has eaten snacks or meals, so that those caring for the residents know what has occurred the previous shift, and it helps to ensure that proper care is being provided. As with other nursing records, if an employee does not record something in this book, then it is not considered to have occurred. Grievant was aware that she was required to complete the entries before she left. Grievant left the facility on January 24, 2013, without recording any information in the Activities of Daily Living book regarding the residents under her care from 7:00 a.m. to 2:00 p.m.

23. After Grievant left the Facility on January 24, 2013, Grievant was contacted at her home by an employee of DVA and advised that she had been placed on suspension

pending an investigation. Grievant contacted her representative and was advised that she needed to file a grievance. He also advised her that there might be a pre-determination hearing, and that she had the right to representation at that hearing.

24. By letter dated January 25, 2013, Grievant was advised in writing that she was being suspended without pay "for a period not to exceed thirty (30) calendar days. . . . pending the results of an investigation into an allegation of resident neglect and/or poor customer service."

25. Glenna Lorrell Kisamore, Quality Assurance Nurse at the Veterans Nursing Facility, was assigned to conduct an investigation into Grievant's conduct. Ms. Kisamore completed the paperwork necessary to report the allegations of patient abuse to Adult Protective Services, to the Office of Facilities Licensure and Certification, and to the Regional Omsbudsman.[5] She also took statements from the HSW's who were working on January 24, 2013, and from Mr. Carpenter.

26. Jeffrey K. Drost, Protective Services Worker, and his supervisor investigated the allegations of abuse and/or neglect for Adult Protective Services, Department of Health and Human Services ("HHR"). Mr. Drost substantiated all the allegations against Grievant, but he could not substantiate that Grievant had neglected or abused residents, as those terms are defined by the statute applicable to investigations conducted by HHR. In order to substantiate abuse and/or neglect, Mr. Drost would have to be able to demonstrate in Court that the person had been left unattended for a substantial period of time. Mr. Drost

[5] The record does not reflect the outcome of the reports to the Office of Facilities Licensure and Certification or the Regional Omsbudsman.

did not interview any of the employees who had attended the residents after Grievant left the Facility on January 24, 2013.

27. Grievant was contacted by a secretary employed at the Veterans Nursing Facility, Wilma Haddix, and told that Dr. Kevin Crickard, Administrator at the Veterans Nursing Facility, wanted her to come to the Facility on January 30, 2013, to give her side of what happened on January 24, 2013. Ms. Haddix did not refer to this as a predetermination meeting, nor did she advise Grievant that she could bring a representative with her, and Grievant did not ask her if she could do so. Grievant did not contact her representative to advise him that she was to go to the Veterans Nursing Facility for a meeting with Dr. Crickard.

28. On January 30, 2013, a predetermination hearing was convened. Present for the hearing were Dr. Crickard, Grievant, Ms. Kisamore, and Mary Ann Boylard, Dr. Crickard's secretary. Grievant did not request that her representative be allowed to attend either before or at any time during the hearing. Grievant was advised by Dr. Crickard that the hearing was being recorded, and that this was her "opportunity to talk about the day in question to defend yourself to give me your sort of point of view." Dr. Crickard also advised Grievant at the beginning of the hearing that the allegations against her related to the care of residents when she was mandated to work a second shift on January 24, 2013, and that "there were a number of residents it was alleged that you did not care for. What would you like to talk about that[?]"

29. Grievant stated during the January 30, 2013 predetermination hearing that she changed the nine residents for whom she was responsible shortly after breakfast, and did not change them again before she left around 2:00 p.m., "because I was trying to get

some help." Grievant also stated with regard to M.V. that she put her back in the same clothes she had on, and "I should have changed them I know that I should have done that."[6]

30. By letter dated February 4, 2013, Grievant was advised by Dr. Crickard that she was being dismissed from her employment with DVA, "due to gross neglect and/or poor customer service." The letter stated that Grievant had the opportunity "to respond to the matters of this letter provided you do so by close of business on February 19th, 2013." The letter further states that on January 24, 2013, Grievant had neglected at least eight of the nine residents for whom she was responsible during the day shift, specifically, "multiple residents were found with wet briefs 'soaked in urine' and fecal material that had 'brown ringed and dried to the resident's skin.'" The letter noted that three residents who were scheduled for showers had not been showered, and two residents "were left in their wheelchairs all day, and one resident, according to you, was placed back into soiled clothes after you alleged that you gave her a shower. You also did not complete your Activities of Daily Living (ADL) sheet for the shift. All these are neglectful behaviors with high potential for actual harm to the resident." Grievant did not submit a response to this letter.

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

[6] Grievant testified at the level three hearing that she did not put M.V. back in the same clothes after showering her. She also testified that the transcript of the predetermination hearing (Respondent's Exhibit Number 15) was inaccurate on this point, and that she never said she put M.V. back in the same clothes.

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*.

The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, [175 W. Va. 279, ___,] 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir./W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994).

The first issue to be addressed is Grievant's argument that her rights were violated because Respondent did not advise her that she could have a representative present at the January 30, 2013, predetermination hearing. WEST VIRGINIA CODE § 6C-2-3(g) addresses representation, and states:

> An employee may designate a representative who may be present at any step of the [grievance] procedure as well as at any meeting that is held with the employee for the purpose of discussing or considering disciplinary action.

This Code Section gives employees the right to representation during pre-disciplinary conferences. The Grievance Board has found that this statutory provision does not give an employee the right to representation at an investigatory meeting, except in certain instances. *Knight v. Dep't of Health and Human Res.*, Docket No. 2008-0981-DHHR (Aug. 6, 2009). "The roles/duties of an investigator must be kept separate from the roles/duties of the individual who considers whether disciplinary action should or will be taken. If the individual who conducts the investigatory interview or questioning is also the one who could decide or recommend disciplinary action, the employee has the right to representation during this conference or interview." *Id.* Grievant was entitled to have her representative present during the predetermination hearing, and Grievant was not denied this right. "In order to be denied a right, however, one must invoke the right." *Hill v. Div. of Corrections*, Docket No. 2010-0113-MAPS (Jan. 6, 2010). The statute does not state that the employer is required to advise the employee that he or she may have a representative present, nor is the undersigned aware of any such requirement which derives from any other statutory or Constitutional provision in this context. Grievant had contacted her representative as soon as she was notified by telephone of her suspension. One would have thought that they would have discussed what to expect, and that she would have contacted him again before going to any meeting. It was not Respondent's fault that Grievant made the choice not to do so.

Grievant also appears to be asserting that her due process rights were violated because she was not specifically advised that the January 30, 2013 hearing was a

predetermination hearing. "An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and an opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The Supreme Court of Appeals of West Virginia, in *Board of Education of the County of Mercer v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994), determined what due process is required to terminate a continuing contract of employment.

> It has previously been held that a full-blown hearing is generally not required before an employee may be terminated, but that employee has the minimum pre-deprivation right to at least have an opportunity to respond to the charges either orally or in writing. *Loudermill*, 470 U.S. at 542. *An employee is also entitled to written notice of the charges* and an explanation of the evidence. *Wirt*, *supra*. In other words, notice of the charges, explanation of the evidence, and an opportunity to respond is all the due process that Respondent is required to provide. *Id*. at Syl. Pt. 3.

Goldstein v. Dep't of Health and Human Res., Docket No. 2008-1061-DHHR (May 23, 2008)(emphasis added). Grievant was given written notice of the charges in the suspension letter, and an opportunity to respond to them prior to the termination of her employment. She was also given written notice of the charges in the dismissal letter and the opportunity to respond. The undersigned cannot find any requirement that an employer use the words "predetermination hearing" when advising an employee that she has the opportunity to give her side of the story.

As to the charges, Grievant offered various reasons why the residents under her care were found in the deplorable condition described by the other HSW's, including her assertion that no one would help her with the residents that required two people to move

them. Grievant's testimony differed from that of other witnesses, calling into question the credibility of Grievant and these other witnesses. 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*.

Grievant's testimony was inconsistent on several points. First, Grievant testified that she is usually mandated to stay over and work the day shift two to three times a week. She later testified, however, that it is not very often that she is required to work a second shift two to three times a week, and she does not work the day shift often enough to know how long therapy is or which residents are to be showered. When Grievant was asked on

direct examination whether she would like to have her job back she stated she would love to go back to work at the Veterans Nursing Facility, but she would not want the harassment. On cross-examination she was asked to clarify her statement and she stated she would take her job back. At the level three hearing she testified that she had changed resident M.V.'s clothes after showering her, while her recorded and transcribed statement during the predetermination hearing was not only that she had put her back in the same clothing after M.V.'s shower, but that she knew this was wrong. Grievant disputed at the level three hearing that she had made such a statement.

The undersigned concludes that Grievant was not a credible witness. Accordingly, the undersigned must conclude that Grievant's excuses given at the level three hearing for failure to properly care for the residents, that they went to therapy and that she could find no one to help her, should be disregarded. It is clear from the testimony that regardless of Grievant's previous record at the Facility of providing good care to the residents, as was stipulated by the parties, on the day in question Grievant took out her frustration by abandoning the needs of the residents under her care. While it is true that she needed assistance to care for the needs of many of these residents, some of them could be changed by Grievant alone, and she did not even do this. It is also clear that she made no genuine effort to obtain assistance for those residents who required two people to move and change them. Respondent demonstrated that Grievant's failure to perform the duties of her position during this one shift were so egregious that it constituted good cause for dismissal.

Finally, Grievant argued that the penalty imposed was too severe. "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 the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). "Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge 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.*

Grievant had been a good employee prior to the incidents of January 24, 2013. However, in this instance Grievant abandoned the needs of the residents under her care. Grievant did not demonstrate that the penalty imposed was clearly disproportionate to the offense.

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. The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, [175 W. Va. 279, ___,] 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir./W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994).

3. Respondent proved the charges against Grievant, and demonstrated good cause for her dismissal.

4. WEST VIRGINIA CODE § 6C-2-3(g) gives employees the right to representation during pre-disciplinary conferences. This statutory provision does not require that employers notify employees of this right.

5. The Supreme Court of Appeals of West Virginia, in *Board of Education of the County of Mercer v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994), determined what due process is required to terminate a continuing contract of employment.

> It has previously been held that a full-blown hearing is generally not required before an employee may be terminated, but that employee has the minimum pre-deprivation right to at least have an opportunity to respond to the charges either orally or in writing. *Loudermill*, 470 U.S. at 542. *An employee is also entitled to written notice of the charges* and an explanation of the evidence. *Wirt*, *supra*. In other words, notice of the charges, explanation of the evidence, and an opportunity to respond is all the due process that Respondent is required to provide. *Id*. at Syl. Pt. 3.

Goldstein v. Dep't of Health and Human Res., Docket No. 2008-1061-DHHR (May 23, 2008)(emphasis added).

6. Grievant was given written notice of the charges in the suspension letter, and an opportunity to respond to them prior to the termination of her employment. Respondent was not required to use the words "predetermination hearing" when advising Grievant to report for this hearing or advising Grievant of her opportunity to respond to the charges.

7. "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).

8. In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995)(citations omitted). The Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

9. Grievant did not demonstrate that the penalty imposed was clearly excessive.

Accordingly, this grievance is **DENIED.**

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 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: September 13, 2013