WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KIMBERLY SIMONS,
Grievant,

v. **Docket No. 2012-0864-DOT**

WEST VIRGINIA DIVISION OF HIGHWAYS,
Respondent.

D E C I S I O N

Grievant, Kimberly Simons, filed this grievance against Respondent, West Virginia Department of Transportation, Division of Highways ("DOH"), on February 20, 2012, protesting the administered disciplinary actions of Respondent regarding her non-compliance with DOH's uniform policy. The grievance statement provides: "Sent home from work on verbal 2/15/12." As relief, Grievant sought "[t]o be made whole including all backpay with interest & benefits restored."

As authorized by W. VA. CODE § 6C-2-4(a)(4), the grievance was filed directly to level three of the grievance process. A level three hearing was held before the undersigned Administrative Law Judge on July 18, 2012 in the Grievance Board's Charleston office. Grievant appeared in person and was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by Jonathan Storage and Krista D. Black, Legal Division, DOH. This matter became mature for decision on August 16, 2012, the deadline for the submission of the parties' proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals.

Synopsis

Respondent has implemented a uniform policy for its workers. Respondent and Grievant executed an agreement establishing an "Alternative Uniform Option" for Grievant. Grievant grieved the actions of Respondent, her employing state agency, after being sent home for violation of the duly recognized "Alternate Uniform Option" provided to her. Grievant did not consistently conform to the alternate uniform criteria or the standard uniform policy.

Considerable deference is afforded to employers in disciplinary situations. Respondents had discretionary options in the circumstances of this case. It was established by a preponderance of the evidence that Grievant failed to adhere to the alternative uniform option provided to her. It has not been demonstrated that the disciplinary measure levied was so clearly disproportionate as to constitute an abuse of discretion. Accordingly, this grievance is DENIED.

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

Findings of Fact

1. Kimberly Simons, Grievant, is classified as a Transportation Worker 2-Equipment Operator. She is currently assigned to work in District 3, Organization 0372. Grievant has been employed with Respondent for 32 years.

2. Respondent issued a Uniform Policy, effective July 1, 2009, for all employees involved in maintaining roads and bridges, and who spend the majority of their regularly scheduled work time in traffic related areas. (*See* WVDOH Uniform Policy, Resp. Ex. 2.)

3. Respondent's Uniform Policy was drafted in accordance with WV Division of Personnel's Agency Dress Code Policy. (Resp. Ex. 1.) WVDOH's Uniform Policy recognizes and states that visibility, safety, and protection are primary purposes of the policy. (WVDOH Uniform Policy, Resp. Ex. 2.)

4. Respondent received a physician's statement dated July 17, 2009, which indicated that Grievant is allergic to polyester and dark colored dye and that she would be unable to wear uniforms containing these materials. (Physician's Note, Resp. Ex. 3.)

5. Respondent has established a committee comprised of the Agency's Human Resources Director, EEO Director, ADA Coordinator, and two members of the Department of Transportation's legal counsel. This group is tasked with, among other duties, assessing, reviewing and making recommendations with regard to accommodations provided to employees of Respondent.

6. Grievant's clothing restrictions, based on both polyester and dark dye allergies, were unique to her among Respondent's employees.

7. The Department of Transportation's Reasonable Accommodation Team reviewed the information that was provided and determined that under the guidelines of the Americans with Disabilities Act ("ADA"), Grievant was not substantially limited in a "major life activity" and therefore was not considered disabled. (Resp. Ex. 4 and Ray Patrick, testimony.)

8. Respondent provided Grievant with an alternative uniform option. This option was provided despite Respondent's stated position that Grievant is not necessarily entitled to accommodations pursuant to ADA criteria.

9. By letter dated September 29, 2011, Grievant was notified that in order to be in compliance with the alternative uniform option, she was required to wear the State-issued Class 2 yellow-green vest at all times and to purchase and wear a work pant that closely resembled the standard uniform as issued in weight and tailoring. (Resp. Ex. 10.)

10. The September 29, 2011, written communication to Grievant, among other information, stated:

> The Department of Transportation has reviewed the information you provided. The information does not demonstrate that you are disabled under the Americans with Disabilities Act (ADA). Additionally, you are able to perform the essential functions of your job without any reasonable accommodation, as defined by the ADA.
>
> However, in an effort to minimize any discomfort you may experience as a result of the makeup and content of the standard uniform and alternative uniform option, as documented by your health care provider, the DOH will allow you to wear clothing, purchased and supplied by yourself, which address your documented health concerns. Although you have been approved to wear clothing that does not comply with the standard uniform policy or the alternative uniform option, you will be required to wear the State-issued Class 2 yellow-green vest. Please note the following conditions apply:
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> - The State-issued Class 2 yellow-green vest must be worn at all times while working.
> - The clothing you purchase must include a work pant that closely resembles the standard uniform as issued in weight and tailoring while addressing your physician recommendations.
> - The DOH is not regarding you as disabled under the ADA. The uniform consideration is not being offered as a reasonable accommodation but in effort to help minimize the effects of the standard uniform and/or the alternative uniform option which may present a negative effect on your documented medical condition.
> - This consideration may be revoked at any time by the agency at its sole discretion, including but not limited to when the uniform contract is relet.
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> To exercise the defined uniform consideration under the current uniform contract, you must sign and date the bottom of this letter and return a copy to Ray Patrick of this Division. If you do not sign and return the agreement below, you will be required to wear the standard uniform immediately, if you already possess them.

(Resp. Ex. 10.)

11. Grievant received and signed the September 29, 2011, document at the designated place, under the underlined wording "<u>I agree to the above-listed uniform</u>

consideration" on October 11, 2011. (Resp. Ex. 10.) This understanding and agreement between these parties is referenced, in general, as the "Alternative Uniform Option."

12. Significant Occurrence forms regarding Grievant's non-compliance with the alternative uniform agreement on February 6 and again on February 7, 2012, are of record. (AH-503 forms, Resp. Exs. 15 and 16.) This is more than four months after the agency issued the Alternative Uniform Option to Grievant.

13. Brian Herdman is classified as a Transportation Crew Supervisor 2. He is assigned to work in District 3, Organization 0372.

14. Jody Browning is classified as a Transportation Crew Supervisor 1. He is assigned to work in District 3, Organization 0372 and is Grievant's direct supervisor.

15. On February 8, 2012, Jody Browning and Brian Herdman met with Grievant to discuss her non-compliance with the uniform policy and to inform her that she may be sent home if she did not comply. (Record of Significant Occurrence dated February 8, 2012, Resp. Ex. 17.)

16. On February 15, 2012, Grievant arrived at work not wearing the attire that conformed with Respondent's uniform or Grievant's alternative uniform option. Crew Supervisor Herdman offered to let Grievant go home to change into approved attire but Grievant declined. Grievant was sent home as result of the uniform violation. (RL-544, Resp. Ex. 11 and Brian Herdman, testimony.)[1]

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[1] Initially, Grievant alleged that her supervisors had never spoken with her regarding her uniform violation prior to being sent home on February 15, 2012. However, after viewing the Record of Significant Occurrence dated February 8, 2012, she recanted and said that they had met and discussed the issue. *See* Grievant L-3 testimony.

17. On February 16, 2012, the next day, Grievant returned to work wearing apparel that conformed with the approved alternative uniform option.

18. A notice of written reprimand (RL-544) was issued to Grievant on February 22, 2012 recommending that a written reprimand be imposed and that all time absent from work on February 15, 2012 be charged as Unauthorized Leave resulting in loss of pay and tenure. (Resp. Ex. 11.)

19. Grievant was issued a written reprimand and all time absent from work on February 15, 2012, was charged as Unauthorized Leave.

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.*

The West Virginia Division of Personnel ("DOP") has adopted a policy entitled "Agency Dress Codes," the purpose of which is "to communicate basic principles regarding

written standards of dress and to establish appropriate guidelines" for agencies adopting such policies. DOP's policy provides, in pertinent part:

> Generally, dress standards should address issues regarding clothing, . . . safety, public images, productivity, and be job-related. Written [dress codes] should be clear, unambiguous, consistently enforced, non-discriminatory (sex, race, or religion) and must be reasonably related to a legitimate business need such as interference with job performance, the disruption of the workplace, or workplace safety. Restrictions on dress and grooming that cannot be shown as having a direct effect on production, safety considerations, or relationships with the public, generally will not be upheld. . . . [The rationale for dress restrictions] should be based on the legitimate business necessity and obligation of maintaining a professional and safe working environment.

As discussed in previous Grievance Board decisions, the United States Supreme Court has ruled that dress codes should be judged pursuant to a rational basis analysis. In *Burdette v. W. Va. Public Service Commission*, Docket No. 93-PSC-132 (Nov. 16, 1993), it was stated that:

> Because the right to dress as one sees fit is not a fundamental right, any restrictions placed upon one's choice of dress are to be judged under a "rational basis" test to determine if the regulation can be branded as arbitrary. The Employer may defeat the challenge to its dress code by showing that it has a reasonable and rational basis for restricting Grievant's manner of dress in order to meet a legitimate end.

Id., (citing *Kelly v. Johnson*, 425 U.S. 238, 96 S.Ct. 1440, 47 L.Ed. 2d 708 (1976)).

It is established, pursuant to a preponderance of the evidence, that Respondent has, in accordance with DOP's Agency Dress Codes guidelines, established a Uniform Policy, effective July 1, 2009, for all employees involved in maintaining roads and bridges and who spend the majority of their regularly scheduled work time in traffic related areas. (*See* WVDOH Uniform Policy, Resp. Ex. 2.) Respondent has established legitimate,

rational justification for its uniform policy. Further, it is undisputed that Respondent provided Grievant with an Alternative Uniform Option.[2]

With regard to the instant grievance matter, it is Respondent's burden to establish that Grievant violated the applicable uniform policy and given the totality of the circumstances, to a rational degree, it was reasonable to discipline Grievant.

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 Resources,* 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). In the circumstances of this case, assessment of Grievant's testimony is deemed prudent.

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

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[2] This decision does not express a position regarding Grievant's rights or Respondent's obligation to Grievant under the guidelines of the Americans with Disabilities Act. Respondent provided Grievant with an alternative uniform option. This option was provided despite Respondent's stated position that Grievant was not entitled to accommodations pursuant to ADA criteria. (Resp. Ex. 4.)

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*.

On October 11, 2011, Grievant executed a document, referenced and recognized by the parties as an "Alternative Uniform Option." (Resp. Ex. 10.) This understanding and agreement between the parties is unique in terms and obligation with regard to acceptable alternative uniform. *See* Finding of Fact (FOF) 10 and 11. Periodically, thereafter Grievant failed to wear clothing or vest in compliance with the alternative uniform option.

The reliability of Grievant's testimony has bearing on more than one relevant fact/issue of this grievance matter. Grievant testified that she was unable to find any pants that would satisfy the approved uniform alternative; however, both Jody Browning and Jeff Black testified that upon doing a quick online search, they found cotton pants readily available. Further, Supervisor Browning testified that he provided the information he found to Grievant. (*See* testimony of Grievant, Jody Browning, and Director Black.)

Grievant's testimony regarding her fruitless efforts to locate 100% cotton pants was not persuasive. While she submitted a document purporting to represent the persistence of her efforts, the content of the document did not establish the scarcity of 100% cotton khaki pants, to the degree Grievant would have others believe. (G. Ex. 3.) Respondent argues that Grievant's assertion that several national chain stores did not have light-colored, cotton pants available is implausible and flies in the face of common sense. Further, given the readily accessability of the internet, the undersigned is inclined to concur with Respondent.

Grievant was aware that her recollection of facts was relevant. Her demeanor tended to indicate an attitude of gamesmanship. Grievant's attitude did not generate a sense of trustworthiness. It is recognized that the accuracy of Grievant's memory is sporadic with regard her recollection of events. Grievant's testimony was inconsistent, denying several times that her supervisors had spoken with her directly about her uniform violations, then admitting that they had when confronted with documentary evidence of the same. Grievant demonstrated vested resolve which might be perceived, by some, as a disgruntled attitude with regard to Respondent's attempts to dictate her wardrobe. Grievant's attitude and ever changing explanation regarding her meeting(s) with her supervisor did not generate a sense of reliability. Grievant's explanation of her actions over the due course of events was not convincing.

In review of the above stated criteria, this trier of fact finds Grievant's testimony was disingenuous to the point of misleading. Grievant's testimony regarding her inability to find 100% cotton khaki pants was deemed contrived. Grievant was aware of the intent of the alternative uniform option and the wording of the agreement.[3] (*See* FOF 9, 10, and Resp. Ex. 10.) Grievant acknowledged she wore scrub pants repeatedly to work. There is a difference between a good faith attempt to conform to applicable regulations and defiance. Grievant's explanation of her inability to launder her one and only pair of khaki pants was not persuasive. A substantial portion of Grievant's testimony is determined to be implausible, unreliable and less than credible.

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[3] "The clothing you purchase must include a work pant that closely resemble the standard uniform as issued in weight and tailoring while addressing your physician recommendations."(*See* Resp. Ex. 10 or FOF 10.) Sweat pants and hospital scrub like pants are not pants that closely resembles the standard uniform as issued in weight and tailoring.

The portion of the ADA that defines “disability” provides that it is a “physical or mental impairment that substantially limits one or more of the major life activities of such individual.” 29 C.F.R. § 1630.2. Grievant presented no evidence that her polyester and dark dye “allergies” substantially limited her in any major life activity or prevented her from performing the essential functions of her job. It is an employee's burden to prove that her medical conditions rise to the level of a disability. *Myers v. W. Va. Dep’t of Transp.,* Docket No. 96-DMV-304 (Feb. 10, 1997). It is not established that Grievant is prevented from performing the essential functions of her job as a result of a duly recognized disability.

It is well-settled that the “Grievance Board does not have jurisdiction to determine whether the ADA has been violated, based upon the West Virginia Supreme Court of Appeal's holding in *Vest v. Board of Education of County of Nicholas*, 193 W. Va. 222, 455 S.E.2d 781 (1995). *Adkins v. Dep't of Labor*, Docket No. 04-DOL-071 (Jan. 25, 2005); *Teel v. Bureau of Employment Programs Workers' Compensation Div.,* Docket No. 01-BEP-466 (June 10, 2002). *See Prince v. Bd. of Trustees/W. Va. Univ.*, Docket No. 7-BOT-276 (Nov. 5, 1997); *Keatley v. Mingo County Bd. of Educ.*, Docket No. 95-29-257 (Sept. 25, 1995).” *Ruckle v. Dep’t of Health and Human Res.*, Docket No. 04-HHR-367 (Dec. 22, 2005).

Nevertheless, the Grievance Board's authority to provide relief to employees for "discrimination" as that term is defined in W. VA. CODE § 6C-2-2(d) includes jurisdiction to remedy discrimination that would also violate the ADA. In other words, the Grievance Board does have subject matter jurisdiction over handicap-based discrimination claims. *Smith v. W. Va. Bureau of Employment Programs*, Docket No. 94-BEP-099 (Dec. 18, 1996). *See Vest, supra.* For purposes of the grievance procedure, discrimination is

defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008). Grievant's clothing restrictions, based on both polyester and dark dye allergies, were unique to her among Respondent's employees. Further, while an identified, minute number of employees had, from time to time, failed to adhere to the uniform policy applicable to their position, each identified example corrected their individual conduct with minimum effort and cooperative behavior. Grievant presented little, if any, persuasive evidence that any other DOH employee had ever engaged in behavior similar to Grievant's and been treated differently. Other employees' isolated incidents were corrected immediately or at the first available opportunity. Grievant did not present sufficient evidence to support a finding that the disciplinary action taken occurred under circumstances that raise a reasonable inference of unlawful discrimination. Grievant has not met the burden of establishing a *prima facie* case of discrimination.

Respondent demonstrated by a preponderance of the evidence that Grievant knowingly engaged in a pattern of violating the alternative uniform option provided to her.

The argument that discipline is 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 agency 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).

Grievant failed to demonstrate that, under the totality of the circumstances, being sent home without pay and receiving a written reprimand were clearly excessive disciplinary actions or reflected an abuse of Respondent's discretion.

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). It has not been demonstrated that the disciplinary measure levied was disproportionate to Grievant's offense nor that the corrective action taken constituted an abuse of discretion. The day after Grievant was sent home, Grievant returned to work wearing apparel that conformed with the approved "Alternative Uniform Option" and reportedly has not violated the uniform policy since. Respondent's corrective action is deemed rational and reasonable.

The facts of this matter depict an unfortunate and unique set of circumstances, but the undersigned cannot find that the disciplinary action taken was too severe a penalty. Given the considerable deference afforded to employers in disciplinary situations, the

undersigned does not find sufficient justification to rule that the discipline imposed was excessive. Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge can not substitute his judgment 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). Grievant failed to offer sufficient evidence in support of mitigating the disciplinary action levied. Further, Grievant did not establish that Respondent's conduct with regard to the instant disciplinary action, was a discriminatory action. Respondent established by a preponderance of the evidence that Grievant knowingly and repeatedly violated the Alternative Uniform Option provided to her.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. 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).

2. "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). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. *Day v. Morgan Co. Health Dep't*, Docket No. 07-CHD-121 (Dec. 14, 2007). Generally, an employee may not disregard a direct order or the directions of a supervisor based upon his belief that the order is unreasonable or without merit.

3. "[F]or a refusal to obey to be 'wilful,' the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order." *Id*. When one acts with willfulness there is purpose or design, actual or constructive. *Kelly v. Checker White Cab*, 131 W. Va. 816, 823, 50 S.E.2d 888, 893 (1948). Willfulness is not mere inattention or heedlessness. *Id*.

4. Grievant knowingly failed to wear clothing in compliance with the "Alternative Uniform Option" made available to her by Respondent. Grievant violated her employer's applicable uniform policy.

5. It is well-settled that the "Grievance Board does not have jurisdiction to determine whether the ADA has been violated, based upon the West Virginia Supreme Court of Appeal's holding in *Vest v. Board of Education of County of Nicholas*, 193 W. Va. 222, 455 S.E.2d 781 (1995). *Adkins v. Dep't of Labor*, Docket No. 04-DOL-071 (Jan. 25, 2005); *Teel v. Bureau of Employment Programs Workers' Compensation Div.,* Docket No. 01-BEP-466 (June 10, 2002). *See Prince v. Bd. of Trustees/W. Va. Univ.*, Docket No. 7-BOT-276 (Nov. 5, 1997); *Keatley v. Mingo County Bd. of Educ.*, Docket No. 95-29-257 (Sept. 25, 1995)." *Ruckle v. Dep't of Health and Human Res.*, Docket No. 04-HHR-367 (Dec. 22, 2005).

6. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

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

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

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

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

7. Grievant did not establish that any other DOH employee had ever engaged in behavior similar to Grievant's and been treated differently. Respondent offered Grievant an opportunity to rectify her non-compliance with the applicable uniform policy. Grievant has not established a *prima facie* case of discrimination.

8. The argument that discipline is 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 agency 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).

9. 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 Corr.*, Docket No. 95-CORR-252 (July 23, 1996).

10. 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).

11. Grievant did not meet her burden of proof with respect to mitigation.

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 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: January 31, 2013

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Landon R. Brown
Administrative Law Judge