THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

S. W.,

Grievant,

v. **Docket No. 2021-1999-DOA**

PUBLIC EMPLOYEES INSURANCE AGENCY,

Respondent.

DECISION

Grievant, S. W.,[1] filed an expedited level three grievance dated December 15, 2020, against her employer, Respondent, Public Employees Insurance Agency ("PEIA"), stating as follows: "I am filing a grievance due to being dismissed from my position. In the beginning of employment with PEIA, there was lack of consistent training. Expectations of knowing of specified job duties such as terminology, data analysis, attribution process, PEIA computer system were not clearly explained. The basic groundwork was not considered in the first few months employed that would provide a basic understanding of the expectations. This position is a detailed, complex, multi faceted position and requires to have (sic) a step-by-step training. Situational training as questions are brought up by members and providers does not provide a clear description of the job." As relief sought, Grievant asks "[t]o not be dismissed from state employment. And to provide a transfer to another state position with my current compensation."

A level three hearing was conducted via Zoom video conferencing on March 26, 2021, before the undersigned administrative law judge. The parties and this ALJ

[1]Grievant has requested to be identified only by initials. This ALJ granted Grievant's request. Grievant will be identified herein by "Grievant" or "S. W."

appeared from different locations. This ALJ appeared from the Grievance Board's Charleston, West Virginia, office. Grievant appeared *pro se*. Respondent appeared by its Director, Ted Cheatam, and by counsel, William B. Hicks, Esquire, General Counsel. This matter became mature for decision on May 10, 2021, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as the PEIA Provider Relations Manager. Respondent dismissed Grievant from employment for unsatisfactory work performance and argues that the dismissal was proper and justified as Grievant's unsatisfactory performance had been addressed multiple times, and such had not improved. Grievant denies Respondent's claims and argues that she should not have been dismissed and that the training she received was inadequate. Respondent proved its claims of unsatisfactory work performance by a preponderance of the evidence, and that Grievant's dismissal was justified. Grievant failed to prove that mitigation of her dismissal was warranted. Therefore, the grievance is DENIED.

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

Findings of Fact

1. Grievant was employed by Respondent as PEIA Provider Relations Manager.

2. The Provider Relations Manager position was posted on September 29, 2017. This posting contained a job description for the position. Grievant applied for the position by application dated March 30, 2018.

3. Grievant was the successful candidate and began working as the Provider Relations Manager in or about August 2018.

4. On October 18, 2018, Felice Joseph, PEIA Pharmacy Director, gave Grievant an initial employee performance appraisal (EPA-1) which set out the "responsibilities: essential duties and responsibilities as identified in the functional job description", as well as, the "performance standards and expectations: [o]bjectives to be accomplished during this rating period."

5. On the EPA-1, "responsibilities: essential duties and responsibilities as identified in the functional job description" section states as follows:

- Management of the Comprehensive Care Partnership (CCP) Program, including not limited to, provider outreach, education, communications, recruitment, analysis of data, etc.
- Learn and use PEIA systems (CRM, BAS, TPA systems) and benefits with a focus on medical, disease state management, wellness and prescriptions programs.
- Update and maintain the CCP contracts, users' access, and systems records, etc.
- Review medical trends such as out of state (OOS) utilization in order to make contact with appropriate providers, if necessary, etc.
- Regular provider outreach and communications.
- Responsible for projects you and the Clinical Unit are identified with in the PEIA 2019 Strategic Plan.
- Work with the TPA to clean up the Provider Directory and ongoing maintenance.
- Assist in any new Clinical Unit programs' research, development, and implementation, such as Wellness programs, Disease Management Programs, Opioid program, etc.
- Research, development, and implementation for additional programs, such as SBHC, telemedicine, WV Pain Management Network, Opioid programs, paramedicine, etc.
- Represent the Agency at various workgroups, as identified by the Agency.
- Work with the Medical Director on the HTOM billing and outreach to the providers.
- Presentations at various meetings, workgroups, etc.

- Ensure all forms of communication are in compliance with the Health Insurance Portability and Accountability Act of 1996 (HIPPA).[2]

6. On the EPA-1, Grievant's "Performance Standards and Expectations: Objectives to be accomplished during this rating period" were listed as follows:

- Respond to telephonic, written, and verbal inquiries within the corresponding limits of the Agency and Clinical Unit: phone calls within 24 hours for initial contact, follow up phone calls within 7 days, and written correspondence within 30 days. This includes proof reading all correspondence and ensuring accuracy.
- Review CCP files under Christine (and if any remain under Gloria) and maintain neat, accurate, well organized files for CCP as well as other Provider Relations Manager projects and responsibilities.
- It is imperative all employees follow a timely reporting of all leave requests and approvals.
- Maintain HIPAA compliance with all forms of communication.
- Responsible for the research, recommendations, management, etc. of the duties, tasks, and programs listed above.
- Work with the Agency on the items assigned to this position and the Clinical Unit in the PEIA 2019 Strategic Plan, including writing Policies and Procedures.[3]

7. On December 12, 2018, Felice Joseph placed Grievant on a Performance Improvement Plan for her "unacceptable level of job performance." Ms. Joseph met with Grievant that day and provided her with a letter of explanation and her written improvement plan. This detailed letter identified the areas in which Grievant was to improve, and attached to it was a four-page list, entitled "Specifics," which set forth

[2] *See*, Respondent's Exhibit 3, EPA-1, signed October 18, 2018.
[3] *See*, Respondent's Exhibit 3, EPA-1, signed October 18, 2018.

specific examples of work that was considered "unacceptable per PEIA expectations of a mastered level position, such as the PEIA Provider Relations Manager."[4]

8. On February 26, 2019, Ms. Joseph issued Grievant a written reprimand for "unacceptable performance," and placed her on a Corrective Action Plan. In the reprimand, Ms. Joseph stated, in part, as follows:

> This letter should serve as a formal written reprimand and is to confirm in writing our discussion of February 15 and 26, 2019[,] concerning your unacceptable performance and to establish my expectations which I have outlined in a second consecutive Corrective Action Plan to be commenced immediately. Further, you are hereby warned of additional disciplinary action if your performance does not improve. I have developed this corrective measure to assist you in bringing your work as to the PEIA Provider Relations Manager to an acceptable standard as defined in your enclosed Employee Performance Appraisal.
>
> During the past sixty days, I have shared with you concern about your performance and understanding of this position. While I want to emphasize that some of the deficiencies would not constitute unsatisfactory performance when viewed singularly, the cumulative effect demonstrates your inability or unwillingness to conform to expected standards of work of a management position within the Public Employees Insurance Agency (PEIA). I believe it is necessary to initiate this Corrective Action Plan to cause you to understand that not only are your deficiencies unacceptable, but also that we are at a point where such performance of this position can no longer be tolerated. I cannot continue to remind you to follow up on outstanding issues, tell you what your next steps should be, clarify your answers to others as you often repeat what you have heard but cannot substantiate the idea or concept of what you are explaining, etc.
>
> You have been verbally counseled on numerous occasions concerning your work and understanding of the concepts required for the management of the programs and duties of this position . . . .[5]

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[4] *See*, Respondent's Exhibit 4, December 12, 2018, letter.

[5] *See*, Respondent's Exhibit 5, February 26, 2019, letter.

9. On May 23, 2019, Ms. Joseph gave Grievant an Employee Performance Appraisal (EPA-2) in which she rated Grievant was "fair, but needs improvement."[6]

10. On August 29, 2019, Ms. Joseph sent Grievant a letter informing her that she had scheduled a predetermination conference to be held on September 3, 2019, stating, in part, as follows:

> This meeting will be held to provide you with the opportunity to respond to the tentative conclusion that you should be subject to disciplinary action to include, suspension, demotion, or dismissal from your employment as the PEIA Provider Relations Manager . . . for poor performance and low productivity. Specifically, it has been determined that despite one on one training this past year you have not been able to learn and assume the duties associated with this level of position within the Agency. . . .[7]

11. By letter dated September 4, 2019, Ms. Joseph informed Grievant that she was being suspended without pay for three working days for "unacceptable performance, despite management intervention." In this four-page letter, Ms. Joseph detailed Grievant's performance deficiencies, managements prior attempts to address those performance deficiencies, and set forth a list of specific instances of Grievant's poor performance.[8]

12. Grievant served her suspension without pay from September 9, 2019, through September 11, 2019. She returned to work on September 12, 2019.

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[6] *See*, Respondent's Exhibit 6, May 23, 2019, EPA-2.
[7] *See*, Respondent's Exhibit 7, August 29, 2019, letter.
[8] *See*, Respondent's Exhibit 8, September 4, 2019, letter. This letter was later revised on October 16, 2019, to remove a paragraph stating that Grievant had engaged in acts of insubordination. *See*, Respondent's Exhibit 9, revised September 4, 2019, letter.

13. On October 28, 2019, Ms. Joseph went over with Grievant her EPA-1 for the October 2019 to September 2020 rating period. In the EPA-1, Ms. Joseph listed Grievant's essential duties, responsibilities, performance standards, expectations, and objectives to be accomplished during the rating period. Grievant signed this document on October 28, 2019.[9]

14. Also on October 28, 2019, Ms. Joseph, reviewed with Grievant her yearly evaluation, the EPA-3, for the rating period October 2018 to September 2019. At that time, Grievant had been working in the position for 14 months. Ms. Joseph rated Grievant's performance as 1.48 as the overall, numeric score, which equates to "Needs Improvement."[10]

15. Grievant did not grieve the written reprimand, her suspension, any of her EPA evaluation ratings, the imposition of an improvement plan, or the corrective action plan imposed upon her.

16. On June 18, 2020, Ms. Joseph completed and reviewed with Grievant her interim performance evaluation, EPA-2. Ms. Joseph rated Grievant as "Fair, But Needs Improvement." In the "Performance Development Needs" section, Ms. Joseph wrote the following:

> You need to own your projects and follow them through from start to finish. A large part of this is understanding the concept so that if it does not follow the exact same steps as a previous project, you know what needs to be done. This includes following up on questions that go unanswered. You need to learn to think of all the different ways any change you authorize will impact many moving parts with PEIA and the specific task and provide direction to all parties. You need to ask and provide clearer questions and answers, respectively,

[9] *See*, Respondent's Exhibit 10, EPA-1 signed on October 28, 2019.
[10] *See*, Respondent's Exhibit 11, EPA-3, signed on October 28, 2019.

> as often there are responses that the recipient needs more clarification. This is a direct reflection of you understanding the issue rather than copying and pasting something sent to you. You need to be mindful of your audience (internal vs external) and the terms you use or the detail you provide. You need to send near final documents for review rather than initial drafts for comments. You need to continue to copy me on all emails. You need to learn the UMR system so you can research claim questions.[11]

17. On November 30, 2020, Ms. Joseph emailed Grievant and informed her that a predetermination conference would be held on December 2, 2020, "to provide [Grievant] the opportunity to respond to the tentative conclusion that PEIA has determined you will either be placed on a suspension of up to ten days or terminated for failure to meet the expectations of the position of the PEIA Provider Relations Manager."[12]

18. Following the predetermination conference on December 2, 2020, by letter dated December 4, 2020, Ms. Joseph informed Grievant that she was dismissed from employment for unsatisfactory performance. The dismissal letter is very detailed and lists specific examples of such unsatisfactory performance. Further, Ms. Joseph stated, in part, as follows:

> While any one issue would not necessarily constitute failure to meet expectations when viewed singularly, the cumulative effect is, however, one of continued unacceptable performance. Unfortunately, you have demonstrated no significant success in improving your work performance despite supplemental training and extraordinary assistance from your coworkers and myself; therefore, I have no reason to believe that additional management intervention would bring your performance to an acceptable standard. . . I believe the nature of your continued unacceptable performance is sufficient to cause me to conclude that you did not meet an

[11] *See*, Respondent's Exhibit 12, EPA-2 signed June 18, 2020.
[12] *See*, Respondent's Exhibit 13, November 30, 2020, email.

> acceptable standard of performance . . . thus warranting your dismissal.[13]

19. Grievant called no witnesses other than herself and she presented no exhibits at the level three hearing. Additionally, Grievant chose not to ask Ms. Joseph any questions when Ms. Joseph testified as a witness at the level three hearing.

Discussion

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Respondent argues that it properly dismissed Grievant from employment due to her continued unsatisfactory performance, despite several management interventions. Grievant asserts that she should not have been dismissed because she did not receive adequate training, Respondent was aware she had no health insurance experience, Respondent did not clearly explain the work or the work expectations to her, and that she was not given the chance to manage the program because Ms. Joseph would not turn it over to her. Grievant further claims that she performed parts of her job well, but Respondent has only focused on the negative.

[13] *See*, Respondent's Exhibit 14, December 4, 2020.

Permanent state employees who are in the classified service can only be dismissed "for good cause, which means misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004) (*per curiam*). *See also* W. VA. CODE ST. R. § 143-1-12.2.a. (2016).

There has been discussion in this grievance about the imposition of prior discipline and/or corrective actions against Grievant. However, the merits of those actions are not at issue in the instant grievance because Grievant did not grieve any of those disciplinary actions. *See Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997); *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996). Further, all such information contained in the documentation of Grievant's prior discipline must be accepted as true. *See Id. See also Womack v. Dep't of Admin.*, Docket No. 93-ADMN-430 (Mar. 30, 1994); *Perdue v. Dep't of Health & Human Res.*, Docket No. 93-HHR-050 (Feb. 4, 1994). Consistent with this principle, the prior disciplinary actions discussed in this grievance must be accepted as factually accurate. Grievant cannot now challenge them.

An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "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), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998). "'[T]he "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res.,* Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff'd* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

The evidence establishes that Grievant's work performance had been an issue since 2018, and that Ms. Joseph began taking steps at that time to attempt to rectify the situation. Grievant worked in the position of Provider Relations Manager for over two years before she was dismissed. Grievant received on-the-job training at PEIA.

Apparently, no manual or formal training, such as in a classroom setting, existed for the Provider Relations Manager position. Ms. Joseph discussed the unsatisfactory performance with Grievant verbally, in written evaluations, a written reprimand, a performance improvement plan, a suspension, and a second corrective action before ultimately dismissing Grievant. Prior to dismissing Grievant, Ms. Joseph also met with Grievant weekly in an effort to help improve Grievant's performance. Respondent did not simply dismiss Grievant when performance problems arose. Efforts were made over the course of two years to rectify Grievant's performance issues. Despite this, Grievant did not demonstrate that she could perform all the duties of her position in a satisfactory matter. Accordingly, this ALJ cannot conclude that Respondent's decision to dismiss Grievant was unreasonable, or arbitrary and capricious. Respondent was not required to dismiss Grievant from employment and Respondent presented no policies or procedures that suggest otherwise. Nonetheless, it was within Respondent's discretion to dismiss Grievant for unsatisfactory performance, and its decision was reasonable and is supported by substantial evidence. Further, this ALJ cannot simply substitute her judgment for that of the employer.

While Grievant does not explicitly argue that the discipline imposed on her was excessive, it is suggested. In her statement of grievance, Grievant asks that her dismissal be overturned, and that she be transferred to another state government position. Grievant is not seeking reinstatement into her former position at PEIA. Grievant had been a state employee for fifteen years before she was dismissed from employment. Grievant has indicated that because she was dismissed from state government employment, she is not

eligible to work in state government again. This ALJ construes Grievant's relief sought a request for mitigation of her dismissal.

"[A]n 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 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)." *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No 95-AA-66 (May 1, 1996), *appeal refused*, W.Va. Sup. Ct. App. (Nov. 19, 1996). "Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996); *Olsen v. Kanawha County Bd. of Educ.*, Docket No. 02-20-380 (May 30, 2003), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County*

Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994); *Cooper v. Raleigh County Bd. of Educ.*, Docket No. 2014-0028-RalED (Apr. 30, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

Grievant has failed to present sufficient evidence to demonstrate that Respondent's decision to dismiss her for unsatisfactory performance was clearly excessive, an abuse of discretion, or that there is an inherent disproportion between the offense and the personnel action. Respondent's decisions as to personnel actions such as dismissal are afforded considerable deference. Grievant was a long-time state employee before working at PEIA. Grievant asserts that she had always received good evaluations and had no disciplinary history. While that may be true, Respondent proved by a preponderance of the evidence that Grievant's work performance was unsatisfactory during the time she was employed at PEIA and that Ms. Joseph made efforts to help Grievant to improve her performance to no avail. Respondent had the discretion to dismiss Grievant for unsatisfactory performance and dismissal was justified. Therefore, this grievance is DENIED.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May

17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. Permanent state employees who are in the classified service can only be dismissed "for good cause, which means misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004) (*per curiam*). *See also* W. VA. CODE ST. R. § 143-1-12.2.a. (2016).

3. An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "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), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

4. "'[T]he "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision

is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res.,* Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff'd* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

5. "[A]n 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 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)." *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No 95-AA-66 (May 1, 1996), *appeal refused*, W.Va. Sup. Ct. App. (Nov. 19, 1996).

6. "Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v.*

Dep't of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996); *Olsen v. Kanawha County Bd. of Educ.*, Docket No. 02-20-380 (May 30, 2003), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004).

7. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994); *Cooper v. Raleigh County Bd. of Educ.*, Docket No. 2014-0028-RalED (Apr. 30, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

8. Respondent proved by a preponderance of the evidence it was justified in dismissing Grievant for her continued unsatisfactory work performance.

9. Grievant failed to demonstrate that mitigation of her dismissal was warranted.

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 (eff. July 7, 2018).

DATE: June 24, 2021.

Carrie H. LeFevre
Administrative Law Judge