KIMBERLY DAWN REESE, .

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Grievant, .

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v. . Docket No. 93-BOT-533

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WEST VIRGINIA BOARD OF TRUSTEES .

at MARSHALL UNIVERSITY, .

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Employer. .

D E C I S I O N

I.

Procedural History

Kimberly Reese (hereinafter Grievant) filed this grievance pursuant to W.Va. Code §18-29-1 et seq., after having been terminated from her employment as an Area Coordinator within the Department of Housing and Resident Services at Marshall University (hereinafter Marshall). (See footnote 1) Grievant was notified on November 24,1993, by letter dated November 22, 1993, that it had been recommended her employment be terminated. After a pre-termination hearing, Grievant was advised on December 8, 1993 that she was no longer employed by Marshall. A level two grievance hearing was held on December 16 and 17, 1993, and a decision upholding the dismissal was issued December 21, 1993. Level four grievance hearings were held on April 21, May 16 and 18, 1994, at

Marshall. After the parties' submitted their respective post-hearing briefs, the case became mature for decision on July 22, 1994. The foregoing dicussion of the material facts of the case are in addition to the undersigned's Findings of Fact which follow.

II.

Facts

A. Probationary Evaluations

Grievant was hired by Marshall as "extra help" on August 5, 1992. On August 17, 1992, she was assigned to the permanent position of Area Coordinator, the position for which she initially interviewed. The position of Area Coordinator (hereinafter AC) was a newly-created position at Marshall which was formally recognized in May 1992. The position was actually a reclassification of the former position of Assistant Director of Resident Life. At the time Grievant was hired her supervisor was Marcia Bourgeois, Assistant Director of Resident Services.

The Department of Housing and Resident Services was created from a merger of the two Departments of Resident Life and Housing; therefore, many of the responsibilities and duties of the AC position were to be developed and/or redefined after the position was filled. Two AC positions were advertised and filled, one by Grievant and the other by Mr. Charles Boone. At that time, a substantially complete job description for the position of AC was drafted and presented to the incumbents. It was understood that a more comprehensive and job-related description would be adopted by Marshall at some later date after the positions had been filled and it had been determined what changes were needed in said description. The job description presented to Grievant at the time she entered into her duties as an AC reads as follows:

AREA COORDINATOR

MARSHALL UNIVERSITY

The Area Coordinator at Marshall University is responsible for administering a comprehensive program conducive to staff, student, and community development which complements the mission of Marshall University. The Area Coordinator is a member of the Resident Services Staff and is responsible to the Director of Resident Services.

Requirements: Master's Degree in student personnel, counseling or related field preferred. Prior residence hall staff experience is required. Applicants should possess strong supervisory, interpersonal, and administrative abilities along with a commitment to personal and professional growth.

Duties and Responsibilities:

Staff Supervision and Development

Responsible for the supervision of a staff of three Resident Directors, 27-30 Resident Advisors, and 4-8 desk workers within an area of residence halls. The areacoordinator is responsible for the selection, training, on-going development and evaluation of this staff.

Plans, facilitates and evaluates staff meetings, inservices and developments for this area. Conducts informal staff socials to develop a unified staff.

Assists in the development and implementation of RA class, along with fall, spring and mid-year resident advisor training.

Supervises staff during break housing. Requires residency during break holiday periods.

Articulates clear and concise job expectations for staff and provide timely and consistent feedback.

Administration

Responsible for maintaining all office records essential to working with students, staff and the Department of Resident Services.

Supervises the accuracy and timeliness of administrative tasks delegated to residence hall staff within the area.

Prepares and administers evaluation tool for residence hall living and staff (to be completed by residents).

Responsible for campus-wide on call duty as assigned.

Assists with room and roommate assignments along with room changes.

Maintains regularly scheduled office hours.

Serve on or chair special committees, or perform special duties as assigned, (i.e. publication, retention, orientation, training).

Performs special duties during the summer as assigned (i.e. summer conferences, assignments, orientation, etc.).

Facilities

Reports damages, work requests and other maintenance needs to appropriate individuals. Ensures follow up of work requests.

Recommends physical improvements for area.

Administers system of inspection and the assessment of all damages of all student rooms and public areas in thearea prior to and following occupancy of the residence halls or room changes during academic year.

Oversees the daily activities of housekeeping and maintenance staff by providing valuative information through the Assistant Director of Resident Services for Physical Environment.

Establishes and maintains effective relationships with Housekeeping, Maintenance and Public Safety Offices.

Opens and closes the buildings in area at the beginning of each semester and during break periods.

Programming/Student Development/Advising

Assists in the development of educational, cultural, recreational and social activities consistent with the philosophy of residence hall living and the needs of each individual unit.

Administers area funds for programming, hall advisory councils, etc.

Assumes active role in the on-going developmental process of the individual resident to assure maximum growth.

Responsible for area security, appropriate safety precautions and training of staff and students for emergencies.

Responsible for advising, and the development of leadership within the Inter-Hall Government Councils for each building within area. Prepares training of Inter-Hall Government Council leaders throughout the semester. Acts as approval agent for all activities. Attends IGC meetings.

Provides counseling and crisis intervention for students when needed.

Consults regularly with staff concerning the psychological climate and student concerns within building. Regularly communicates these concerns to Director or Assistant Director of Resident Services. Participates in the development of program strategies to eliminate student concerns.

Sets clear guidelines and expectations for staff concerning the confidentiality and reporting of psychological concerns, dilemmas and crisis. Facilitates and makes referrals to the Student Development Center.

Judicial

Articulates and supervises the implementation of University and Resident Hall policies.

Assumes appropriate judicial role in the referral process of the University. Initiates educational or disciplinary actions as required according to procedures outlined in the Student Code of Conduct, Student Handbook, Resident Hall Guidebook or individual residence hall floor contracts, (i.e. quiet study, non-tobacco).

Provides direction to student staff in the implementation of a community which actively enforces a community standard of living. Sets clear guidelines and expectations for resident hall staff concerning disciplinary procedures within each resident hall.

Grievant's position was an exempt position under the Board of Trustee's classification plan which means that she was not eligible for overtime pay consistent with the provisions of the state and/or federal wage and hour laws. Further, Grievant was required to work through a probationary period for at least the first six months of her employment. Pursuant to Marshall's Classified Staff Handbook (hereinafter Handbook), Grievant's supervisor was required to evaluate her performance after the second, fourth and sixth months of her probationary period. As a part of Grievant's employment benefits, she was given housing in one of the residence halls, Twin Towers West, an office which was physically part of her living quarters, and a computer.

The performance evaluations given to Marshall employees are completed on a common form where the following categories of performance are rated: quantity of work; quality of work; initiative; communication skills; job knowledge; job comprehension; attitude; dependability; personal habits; problem solving; workingrelationships and organizational ability. In each of these categories, the employee is rated using the following code:

A Consistently exceeds expectations

B Frequently exceeds expectations

C Meets expectations

D Occasionally below expectations

E Consistently below expectations

Grievant received her first probationary performance evaluation from Ms. Bourgeois on November 1, 1992. On this performance evaluation, Grievant received a "D" rating in job knowledge, personal habits and working relationships. She received a "C" rating in each of the other categories except quality of work, dependability and organizational ability wherein she received a "B" rating. With each rating, Ms. Bourgeois provided explanations for the scores. Finally, Ms. Bourgeois concluded that she would recommend Grievant for further employment but also that she needed to show improvement. On January 21, 1993, Marshall's Human Resources Department notified Ms. Bourgeois that she needed to create a follow-up improvement plan for Grievant so that her performance could improve.

On January 22, 1993, Ms. Bourgeois sent Grievant a letter which was called a written warning for performance below expectations. In this letter, Ms. Bourgeois outlined the problem areas in Grievant's performance and also referred to an incident in which Grievant improperly exited a building through a fire door in front of students and parents, prompting alarms to sound. Ms. Bourgeois concluded by stating that Grievant's unsatisfactory performance seemed to be evidence of a developing pattern. Shewent on to state that she believed Grievant should decide if the position of AC was the proper position for her.

Grievant received her second probationary performance evaluation on January 28, 1993. In this

evaluation, Grievant was given the rating of "D" in seven of the twelve categories and "C" in the other five categories. In the category of "quality of work", Ms. Bourgeois stated that Grievant had an attitude that "if she want[s] to do it she does a good job but if she doesn't want to do it she does a poor job. . .." Ms. Bourgeois stated in explaining other category ratings that Grievant did not delegate daily tasks, did not have professional agendas, did not prepare adequately at times, put things off, did not take criticism well, and was defensive. Overall, Ms. Bourgeois did not recommend that Grievant be given continued employment.

By letter dated February 11, 1993, Ms. Bourgeois notified Grievant that an "action plan" had been created to help Grievant improve her performance. Within this two and one-half page letter, Ms. Bourgeois gave Grievant various recommendations for improving her performance in six of the areas evaluated in the two previous performance evaluations. The letter concluded by stating that Ms. Bourgeois and Grievant would have one-on-one meetings to monitor Grievant's progress.

Ms. Bourgeois had sent Grievant a memorandum back in October 1992, regarding the scheduling of a training session for Desk Coordinators. On February 12, 1993, Grievant attempted to schedule and prepare such a training session by sending a copy of Ms.Bourgeois' memo to her to one of the desk coordinators with a note written across the top indicating that such training would be forthcoming. By interoffice memorandum on February 12, 1993, Ms. Bourgeois notified Grievant that this type of notification was inappropriate under the circumstances, and also, that it was too late in the semester to have the type of training discussed. Ms. Bourgeois noted that this was just the type of improper and unprofessional behavior which had been brought to Grievant's attention during a recent meeting with her.

On March 12, 1993, Mr. Ray Welty, Associate Vice-President for Administration, Ms. Bourgeois and Grievant met to discuss Grievant's performance. After this meeting, Ms. Bourgeois wrote Grievant a letter dated March 23, 1993, outlining Grievant's improvement in seven of the performance areas. She stated at the end of this letter that Grievant had "put forth a great deal of effort in the areas we discussed." Sometime in late March or early April, Grievant was involved in planning and carrying out a Drug Free Kids Night; it was brought to Ms. Bourgeois' attention that Grievant had not prepared the proper paperwork for the Purchasing Office for this project.

On April 7, 1993, Grievant received her third probationary performance evaluation from Ms. Bourgeois. Grievant improved according to this evaluation as she was rated "D" in only the two

categories of communication skills and personal habits. She received a rating of "C+," "C" or "C-" in nine of the remaining twelve categories and a "B" rating in the initiative category. Ms.Bourgeois concluded that Grievant met expectations but still needed improvement and should have a follow-up evaluation at the end of May when her probationary period was to end.

By letter dated June 2, 1993, Ms. Bourgeois issued Grievant a follow-up to the April 7 performance evaluation in which she again rated Grievant in the twelve areas covered by said earlier evaluation. At this point, Grievant received all "Bs" and "Cs." Ms. Bourgeois concluded by stating that she was recommending that Grievant be taken off of probation and considered a full-time, permanent employee. Ms. Bourgeois' recommendation to this effect had already been discussed with Mr. Welty and approved by him.

Winston Baker was hired by Marshall as Director of Resident Services and began his duties on June 30, 1993. At this point, he became Ms. Bourgeois' and Grievant's supervisor. In July 1993, one of Mr. Baker's first actions was to remove from Ms. Bourgeois her responsibility for supervising Grievant. Mr. Baker eventually recommended that Grievant's employment be terminated by letter dated November 22, 1993, which was given to Grievant on November 24, 1993.

The dismissal letter reads as follows:

> This letter is to inform you that based upon your history of unacceptable performance as Area Coordinator, I am recommending that your employment be terminated. My recommendation is based upon many documented instances of poor performance which include, but is not limited to the T-shirt altercation in which you incited the students and encouraged a confrontation, which could have endangered the lives of students. Your history of inappropriate decision making; failure to follow-through on assigned tasks; failure to maintain professional relationships with students/staff; and failure to provide adequate leadership as Area Coordinator, provide further evidenceof your poor performance. Each incident and the lack of long term improvement are documented in your work experience at Marshall University. The chronology is attached.
>
> According to the Marshall University Classified Handbook, page 78, you are entitled to a pre-termination hearing. You have three working days to request this through the Department of Human Resources.

Attached to the dismissal letter was a three-page chronology of over twenty-five incidents and actions taken relating to Grievant's employment at Marshall. Grievant did request and was provided a pre-termination hearing. After said meeting, Mr. Baker's recommendation was accepted and Grievant

was dismissed from employment.

B. "Secret File"

Marshall's Classified Handbook contains a section titled **Personnel Files**. This section states that official employee personnel files are to be maintained by the Department of Affirmative Action and Human Resources. It is noted that these files are to maintain confidential records concerning an employee's personal history, previous experience, and complete history of employment at the University. It was also established by testimony that personnel files are also kept within the employees' own departments and there is reference made to such files elsewhere in the Handbook.

The Handbook contains a section setting forth Marshall's progressive discipline policy. With regard to the issuance of oral or written reprimands, this section reads as follows:

> Whenever an employee commits an offense warranting disciplinary action, his or her supervisor may begindisciplinary action through any of the steps listed below, depending upon the nature of the offense committed:
>
> 1. Oral Warning - For minor offenses, the employee should be given an oral warning documented on the "oral warning" form (available in Affirmative Action & Human Resources). If this does not correct the situation within a reasonable length of time, the supervisor should then use the second step of these procedures. Oral Warning forms remain in the employee's departmental personnel file and are not sent to the Department of Affirmative Action & Human resources.
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> 2. Written Warning - The employee may be given a written warning following an oral warning and repeated infraction of a minor offense or for the first offense of a more serious nature. Written warnings should be documented on the "Written Warning" form. . . . The Written Warning form is sent to the Department of Affirmative Action & Human Resources to be included in the employee's official personnel file for a specified period.

[Emphasis added]. The language of this section is consistent with the testimony of Marshall's Director of Human Resources, Queen Foreman, when she stated that there are often two files kept on each employee at Marshall, one in the employee's department and one at Human Resources. Further, Ms. Foreman testified that supervisors are not required to use the Oral Warning or Written Warning forms discussed in the section of the Handbook reproduced above.

Marshall introduced three memoranda and two letters into the record, over the objection of

counsel for Grievant, which had been maintained in Grievant's departmental personnel file. Exhibit twelve is a memorandum from Stephanie Sprague to Ms. Bourgeois dated January 14, 1993. In this memorandum, Ms. Sprague informedMs. Bourgeois that on December 15, 1993, Grievant inappropriately exited a building through a fire door causing an alarm to sound.

Exhibit twenty-one is a memorandum from Stephanie Smith who works in Marshall's Purchasing Office to Lola Stratton, Accounting Assistant within the Department of Resident Services. In this memorandum, Ms. Stratton indicated to Ms. Smith that Grievant had prepared a requisition form after-the-fact in conjunction with a reception she had planned and conducted. Ms. Bourgeois had already been made aware of this fact.

Exhibit thirty is a memorandum from Neil Bailey, Special Assistant to the President, to Mr. Baker dated September 16, 1993. In this memorandum, Ms. Bailey recalled that a few weeks prior to the date of the memo she had called Grievant's office and was asked to hold by the person who answered the phone. She stated that as she waited for Grievant to come to the phone she heard her use what she considered to be inappropriate and unprofessional language.

Exhibit twenty-four is a letter from Ken Bailey, a Resident Director who had been supervised by Grievant, to Mr. Baker dated August 31, 1993. In this letter, Mr. Bailey chronicled what he felt was inappropriate and unprofessional behavior on behalf of Grievant. The substance of his complaints had to do with Grievant's use of Resident Services' staff to babysit, Grievant's "partying" with members of the Huntington Cubs professional baseball team and other students and staff, and Grievant's alleged serving of alcoholic beverages to a student under twenty-one yearsof age. He also concluded by stating that he was concerned with Grievant's performance as a supervisor.

Finally, exhibit twenty-five is a letter from Melinda Harwood, ASC Case Manager, to Mr. Baker dated December 3, 1993. Ms. Harwood described in her letter that Grievant had asked her to babysit for her and that it became a problem with her personal life and job because Grievant was often late picking up her daughter or, on certain occasions, did not ask if she was available to babysit before she delivered her child. She also related that she was aware Grievant had socialized with members of the Huntington Cubs team and that such practice was in violation of certain terms of a contract which existed between the Huntington Cubs (farm club) and the Chicago Cubs (parent club). (See footnote 2) Further, Ms. Harwood explained what she believed had transpired the night of the party Grievant held which was the subject of Mr. Bailey's letter.

Grievant's attorney objected to Marshall's use of these exhibits. She contends that Marshall may not rely upon their existence to prove that Grievant had acted inappropriately because Grievant was never made aware of the the existence of these documents and/or the allegations contained at the time they wereplaced in her personnel file. Grievant's counsel referred to these documents as "secret files" and argues that the practice of keeping such files is both illegal and unfair. Grievant's counsel cites to the case of Kanawha Valley Regional Transportation Authority v. W. Va. Human Rights Comm'n and Betty Hatcher, 383 S.E.2d 895 (W.Va. 1989) and the federal district court case of Stoller v. Marsh, 682 F.2d 971 (D.C. 1982) in support of her argument that Marshall should not be allowed to maintain such files on its employees.

In neither case relied upon by Grievant was there a holding that the keeping of "secret files" was per se, illegal. In both cases, the existence of a "secret file" was only considered in light of determining whether the employer had engaged in a discriminatory act. The employers' practice of keeping a "secret file," in and of itself, was not declared to be an improper act. In the instant case, the Handbook specifically allows for more than one personnel file to exist. The fact that Mr. Baker kept this information on Grievant may be evidence which would be relevant to Grievant's claim of disparate treatment but it cannot act as a general defense to Grievant's termination. It could be considered as evidence to show that Grievant was not provided the constitutional due process rights which she was entitled, however, no such argument has been presented and it is doubtful given the facts that such a claim could be established.

With regard to the substantive issues brought to light in each of these documents, the chronology attached to the dismissal letter referred to the events as "performance incidents." Marshall hasattempted to support Grievant's dismissal on the basis of her actions as described in these exhibits. However, the undersigned is not willing to accept the statements made in these documents as proof of the fact that Grievant acted or performed as described therein. However, with regard to Grievant's exiting of a building through a fire door, she does not deny that said event occurred and Ms. Bourgeois testified that she spoke to Grievant about the appropriateness of such conduct. The evidence also demonstrates that Grievant was given the ability to discuss and explain the other incidents prior to her dismissal at a pre-termination hearing. It must be noted that the majority of the incidents in question are not sufficient to justify Grievant's dismissal on their own but simply provide examples of how she performed in her position over a period of time. Finally, none of the documents

themselves were ever considered to be reprimands which Grievant had a right to challenge according to the Handbook and the progressive disciplinary policy contained therein. The documents themselves are entitled to little or no weight in determining whether Marshall has established the facts upon which Grievant's dismissal was based. The substantive issues raised within these documents have properly been relied upon by Marshall as supported by other means.

C. Disciplinary Record and Work History

As stated earlier, Marshall follows a progressive disciplinary policy which is outlined in the Handbook. A summary of this policy is outlined below:

> Marshall University uses a system of progressive discipline for corrective disciplinary purposes. Disciplinary actions should be reasonable, timely, and related in severity to the seriousness of the offense. It is generally required that the employee be warned that his/her behavior is unacceptable and advised regarding acceptable behavior. The normal process for progressive discipline includes an oral warning, written warnings, suspensions, and/or termination. Severity of the offense is a determining factor in the type of action required. . . .

In the chronology attached to the dismissal letter, Mr. Baker referred to various warnings given to Grievant; however, the evidence reveals that there were only four documented warnings contained in Grievant's departmental personnel file at the time of her dismissal. Two of these four warnings relate to her performance which was evaluated during her probationary period as previously discussed. Also, Ms. Bourgeois did testify to various counseling sessions she had had with Grievant concerning her performance and decision-making. Evidence of these counselings is relevant for purposes of this decision as one or more of the grounds for Grievant's dismissal relate to her alleged inappropriate decision-making.

Shortly after Grievant was hired, it was brought to Ms. Bourgeois' attention that she kept a pet in her living quarters which is against Marshall's policy. Grievant was made aware of this policy and she took steps to have the pet relocated. Further, because Grievant is the single parent of a young child, she often solicited and utilized staff whom she directly or indirectly supervised to babysit. This conduct caused some dissention among the staff and Grievant was asked by Ms. Bourgeois not to use staff whom she directly supervised to babysit. Finally, at one pointshortly after Grievant was hired, it was believed that she was acting inappropriately by spending too much time with students and staff at various "night clubs" which served alcoholic beverages. It was impressed upon Grievant

by Ms. Bourgeois that she needed to act as a role model with regard to attending bars and dance clubs with students and subordinate staff because of the nature of the position which she held. All of these situations were addressed or considered by Ms. Bourgeois when she conducted Grievant's performance evaluations during her probationary period and Mr. Baker simply included these "incidents" in the chronology in order to present the "whole picture."

As already discussed, in January 1993, Grievant inappropriately exited a dorm room via a fire door which caused an emergency alarm to sound. This incident was also discussed between Grievant and Ms. Bourgeois.

The first two actual written warnings which were put in Grievant's personnel file were the January 22 and February 11, 1993, warnings from Ms. Bourgeois prepared in conjunction with the performance evaluation scores given to Grievant.

Mr. Baker was informed through the letter sent to him by Mr. Bailey that Grievant (while off duty) allowed a student under the legal drinking age of twenty-one to consume beer at her living quarters during a party she had held. As a result of this information, Mr. Baker verified that this did happen during the summer of 1993. Grievant does not deny that a student under the legal drinking age consumed beer in her living quarters. OnSeptember 8, 1993, Mr. Welty, Mr. Baker, Linda Rowe, Assistant Director of Resident Services and Grievant had a meeting to discuss this allegation and other concerns. (See footnote 3) As a result of this meeting, Grievant was issued a follow-up letter from Mr. Baker placing her on probation for a period of three months for having allowed an underage student to drink beer in her apartment. It was stated that her employment status would be evaluated on December 15, 1993.

Based upon a division of responsibilities between Grievant and the other AC, Grievant was responsible for organizing and publishing a monthly Resident Advisor newsletter and a monthly Resident Services newsletter. The format and distribution dates for these newsletters were established in the fall of 1993 and the staff were asked to make submissions to the text of the newsletters. After it became apparent that there was not going to be enough material to support a monthly departmental newsletter, Ms. Baker agreed that it could be published once a semester but the RA newsletter was still to be published monthly. Grievant only published two RA newsletters, one in the summer of 1993 and one in the fall. Grievant was counseled by Mr. Baker about the fact that the monthly newsletters were not published according to schedule, and also, with regard to the one

which was published in the fall, that he did not get a chance to approve it before it went into circulation.

Grievant was also given the responsibility of chairing the Department's Roommate Committee in July 1993. Mr. Baker felt that he was not kept apprised of the progress of this committee and he let Grievant know of this concern by memoranda in November 1993. Grievant then responded to Mr. Baker by interoffice memoranda dated November 16, 1993. Earlier, Grievant had sent Mr. Baker a similar memorandum dated September 13, 1993. Mr. Baker had not seen some of the other correspondence Grievant had sent to other interested staff members relating to the work of this committee. Overall, Mr. Baker did not think that Grievant had put forth the necessary effort with regard to this project. The evidence establishes that Grievant did work hard with this committee but that she did not keep Mr. Baker apprised of the efforts either she or the committee were taking.

Finally, the events which directly led to Grievant's termination occurred on and around the first of November, 1993. Grievant was responsible for supervising the Resident Services staff who directly supervised a group of male students on the 7th floor of a dormitory called Twin Towers, East. The students on this floor arranged to have a floor T-shirt made for intramural football which turned out to be very controversial. (See footnote 4) The students designed graphics for a shirt consistent with the commonly recognized "Co-Ed Naked" theme used by colleges and universities today. The graphics for this shirt depicted a man having sex with a woman who was bent over in a position similar to that of afootball center while underneath the picture was the phrase "It's In, It's Out, It's Over."

The Resident Assistant was not directly involved in the designing or purchasing of this T-shirt but had some idea as to the nature of the graphics which were to be printed on the shirt. On November 8, 1993, the RA of the 7th floor boys showed Grievant one of these T-shirts. Grievant immediately became angry and went to her office. Shortly thereafter, she made the comment to another staff person that she did not want to speak to the 7th floor RA because she believed he had knowledge of the nature of the graphics on the shirt prior to it being printed and she was angry at him for allowing such an article to be created. After much communication and stir as a result of numerous individuals seeing or being told about this T-shirt, Grievant put a sign on the outside of her office door for the 7th floor boys to read. This sign stated as follows:

TO THE 7TH FLOOR BOYS

I have one question:

Who's sister, mother, or girlfriend

posed for your shirt??

If you demean, degrade, or humiliate one,

you do the same to all women

After someone read this sign, the words "It surely wasn't you!" was written on the sign in pencil. Grievant took this as an inappropriate response and posted a second sign outside of her office which read

OK BOYS - KIDS

WE DIDN'T HAVE TO GO THERE -

(PERSONAL INSULTS AGAINST ME ONLY

MAKE YOU LOOK MORE LIKE THE

IMMATURE BOYS THAT YOU ARE)

BUT SINCE WE DID GO THERE . . .

I'LL DRIVE THE TRUCK

THE SURGE HAS BEGUN . . .

Once Mr. Baker became aware of the existence of these signs, he demanded that Grievant take them down and she did remove them. One of Grievant's suggestions to fellow staff members was for the female staff and students to participate in a protest in the Twin Towers, East dormitory which she called a "sit down for dignity." This suggestion did not meet with overwhelming support and, ultimately, did not occur.

By letter dated November 22, 1993, Mr. Baker issued Grievant a letter of reprimand for having acted inappropriately with regard to the "T-shirt incident." Mr. Baker felt that Grievant acted in a manner which served to incite the students as opposed to educate them. He also stated that Grievant acted unprofessionally when she refused to discuss the matter with the RA of the 7th floor. He further stated that her encouragement of students to have a sit-in could have created a confrontational atmosphere which was evidence of poor judgment. On November 24, 1993, Grievant was told By Mr. Baker that he was recommending she be fired. On December 2, 1993, a pre-termination hearing was held, and thereafter, Grievant was informed by letter dated December 8, 1993, that her termination would be effective at the end of her shift that day. The record indicates that the final act upon which Grievant's termination was based was her conduct in the "T-shirt incident."

D. Electronic Mail

After Grievant was terminated from employment, she requested and was granted the opportunity to retrieve various files from Marshall's computer system. As a prerequisite to obtaining access to the system, Grievant was required to sign a "Memorandum" which reads as follows:

> I have been allowed access to retrieve my resume and personal correspondence from the computer. Any additional information left on the computer is the property of Marshall University.

When Grievant retrieved her resume from the computer system, she left other personal files or documents on the system.

One of Grievant's arguments is that she was too busy to perform some of the tasks she was assigned by Mr. Baker. Grievant contends that she was never provided with an official job description and, after Ms. Bourgeois was no longer supervising her she was left to "flounder" with little or no supervision or guidance as to what was expected of her. Grievant specifically makes this argument

with relation to the production of the newsletter. On the other hand, Marshall contends that Grievant did not make good use of her time. One way it tried to establish this is by introducing into the record copies of electronic mail messages (E-mail) prepared by Grievant and sent to other staff members along with the responses of other employees. Marshall asserts that Grievant was wasting time on personal matters and playing games with her computer at times when she should have been working. Grievant counters that these E-mail messages should not have been obtained by Marshall in the first place because to do sowas an invasion of her privacy; therefore, they should not be given any weight in this proceeding. She also avers that she was forced to sign the "Memorandum" which she equates to an adhesion contract that should be declared void by the undersigned.

The evidence establishes that Grievant did not always have a steady office or work schedule but she was required to be in the office for at least twenty hours per week. When Grievant maintained "normal office hours" those hours were 8:30 a.m. to 3:30 p.m., Monday through Friday, with the flexibility to vary the starting time depending upon whether she had been required to work in the evening or attend meetings at specific times. At all times, either Grievant or Mr. Boone were required to be on-call after normal office hours.

Only seven of the E-mail messages were prepared by Grievant prior to the date of her termination; therefore, only these documents could be used to rebut Grievant's assertion that she did not have enough time to perform her work. Given the nature of Grievant's job and the lack of specific testimony presented as to Grievant's actual time spent on any or all of the tasks she performed (which are too many to mention), it is impossible to conclude that her participation in any intra-office, personal communication via computer was the reason why she was not able to complete her assigned tasks. The time it would have taken Grievant to type seven E-mail messages is negligible in relation to the time she spent performing the functions of her job over the fourteen months or more tenure of her employment. Therefore, it isdetermined that these E-mail messages are entitled to little or no weight with regard to the issue of whether Grievant performed her assigned tasks diligently. The legal issues raised as to the appropriateness of Marshall's extraction of these E-mail messages from its own computer system or the validity of the release signed by Grievant do not need to be addressed at this time.

III

Discussion

A. Parties Arguments

Marshall contends that it had just cause to dismiss Grievant based upon her actions in relation to the "T-shirt incident", her having allowed an underage student to drink alcoholic beverages in her living quarters, her failure to perform her required duties and demonstrated use of bad judgment. It specifically denies that Grievant was terminated for reasons unrelated to the performance of her duties as an AC, i.e. parenting or housekeeping skills. Marshall asserts that Grievant's entire work history is relevant to show a pattern of unacceptable behavior and decision-making.

Grievant avers that she was fired in retaliation for having testified in a grievance hearing on behalf of Ms. Bourgeois wherein she (Ms. Bourgeois) was contending that Mr. Baker should not have been awarded the position of Director of Resident Services. She makes a claim of disparate treatment in that she was punished more severely for her actions than were other staff members who had engaged in similar misconduct. This argument is mostly based upon the contention that underage drinking is common and accepted by theadministration at Marshall; therefore, she should not have been reprimanded for serving alcohol to a student under the age of twenty-one. (See footnote 5) Grievant alleges that she was improperly placed on probationary status on September 14, 1993, by Mr. Baker in contravention of the policies established in the Handbook. Finally, Grievant maintains that she was not given the benefit of Marshall's progressive disciplinary policy because Marshall has mischaracterized the nature of her actions and Ms. Bourgeois' actions during her period of supervision over Grievant. She insists that her performance in the position of AC at Marshall, while not always exemplary, was not poor enough to warrant her dismissal.

B. Second Alleged Probationary Status

Grievant was removed from her status as a probationary employee at Marshall on or about June 2, 1993. Mr. Baker's letter of September 14, 1993, could not have resurrected this status pursuant to Marshall's own policy. Mr. Baker testified that it was not his intention to place Grievant on probation as that term is generally used but that he intended to give Grievant a warning thather job performance had been unacceptable and further disciplinary action could be taken if it did not improve.

In any event, Grievant was not terminated from employment at the end of a typical probationary period after a decision had been made that she could not fulfill the duties and responsibilities of the job based upon her performance during the probationary period. Instead, Grievant was dismissed for alleged acts of wrongdoing which, when considered in conjunction with her performance history, justified her termination. Mr. Baker's poor choice of words used in his written warning letter of September 14, 1993, did not operate to remove any rights Grievant had obtained in continued employment at that time. Grievant's termination cannot be overturned on the basis of Mr. Baker's incorrect use of terms. Marshall still bears the burden of proving by a preponderance of the evidence that Grievant's termination was for good cause. See generally, Noggy v. W. Va. Civil Serv. Comm'n., 391 S.E.2d 100 (W. Va. 1990).

C. Employer's Burden of Proof

The handbook's progressive discipline section which speaks to the dismissal of an employee states, in pertinent part,

> Discharge-Dismissal - Employees may be discharged in the following cases:
>
> a. No improvement in job performance or work habit is shown within a reasonable time after the supervisor has properly trained and/or appropriately disciplined the employee (by use of oral and written warnings).
>
> b. A repeat of gross violations for which the employee has recently been suspended.
>
> c. The first gross violation involving significant rules, willful misconduct, dishonesty, or endangerment of life orproperty (no previous oral or written warning is necessary).
>
> Immediate dismissal may be appropriate in cases of flagrant or willful violations of rules, regulations, standards of accepted behavior or performance, or for actions where an investigation proves the employee was in clear violation of policy.

Marshall must prove the charges cited to support Grievant's termination by a preponderance of the evidence. Litchfield v. W.Va. Dept. of HHR, Docket No. 92-HHR-127 (Sept. 30, 1992). Also, this Grievance Board has previously recognized that "[T]he work record of a long-time civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." Stewart v. W.Va. Alcohol and Beverage Control Commission, Docket No. 91-ABCC-137 (Sept. 19, 1991), citing Buskirk v. Civil Service Comm'n, 332 S.E.2d 579, 585 (W.Va. 1985) (citing two previous decisions). Although Grievant probably cannot be considered a long-time employee, it was still reasonable for Marshall to have considered her limited work record prior to deciding on the proper disciplinary action to impose.

Grievant is correct in asserting that not all of the incidents referred to in the chronology of events attached to Mr. Baker's letter related to disciplinary actions. However, most of these events do demonstrate that either Ms. Bourgeois or Mr. Baker felt that Grievant had not acted professionally or had not performed her job adequately on various occasions. The undersigned agrees that some of these "performance incidents" would not support Grievant's termination in and of themselves, i.e. Grievant's failure to attenda retreat because she could not find a babysitter or her failure to prepare a requisition for materials used in a program she implemented. Further, some of the infractions Grievant admits to having made were already used as a basis for the evaluation scores she received during her probation, i.e., having a pet in her residence and exiting through a fire door causing an alarm to sound.

However, the record is also clear that Grievant did engage in acts for which she was both verbally counseled and formally warned. Her personnel file contained four actual warnings which she was given. With regard to the facts surrounding the incidents for which Grievant was dismissed, the only facts she disputes relate to her work with the Roommate Committee. Grievant does not deny that she allowed an underage student to drink beer in her apartment, failed to have monthly newsletters published, or failed to speak with the 7th floor RA about the T-shirts which formed the controversy ultimately leading to her dismissal. Instead, Grievant either tries to justify why she took the actions she took or argues why her actions should not have been held against her, i.e., she was not provided direct supervision, she did not have a specific job description, or that she was justified in being angry at the 7th floor RA and the 7th floor boys for the fact that they had a controversial T-shirts printed.

Grievant made reference at hearing more than once to the fact that there is no specific provision contained in her job description or in any other document which mandated that she act asa role model for the students and her subordinate staff, even though she testified that she believed she was a good role model. This position is simply not persuasive. The essence of Grievant's position and the other similar positions within the Department of Resident Services is that they must all act as role models given the educational setting in which they perform their functions. One must never lose sight of the fact that Grievant worked in an environment where the minds and characters of young adults from all backgrounds are being shaped everyday based upon the experiences of college life. Further, the job description Grievant was given at the time she entered into the position of AC states that an AC must be "responsible for administering a comprehensive program conducive to staff, student, and community development which complements the mission of Marshall University" and also "[A]ssumes [an] active role in the on-going development process of the individual resident to assure maximum growth." Finally, the job description states that an AC should "[P]rovide[s] counseling and crisis intervention for students when needed." An individual cannot carry out these functions effectively without being recognized as a role model. Grievant had to have been aware of the nature and sensitivity of this position when she accepted it.

Grievant acted inappropriately with regard to having served alcohol to a student under the legal drinking age and she also acted extremely unprofessionally when she refused to interact in a meaningful way with the 7th floor RA after she was shown the T-shirt. Grievant herself testified that she had a militant attitudewhen she was first confronted with the T-shirt. Her assertion is that she acted professionally by staying away from the situation because she was too angry to effectively deal with the problem. This is not the type of professionalism that was expected of a supervisor of subordinate RAs and RDs once a problem is encountered.

Tellingly, after Grievant had a chance to calm down and approach the problem in a rational manner, she resorted to placing signs outside her office for all of the campus to see. The tone of these signs was as equally offensive to the students who had purchased the shirt as was the shirt to Grievant. Meanwhile, Grievant was attempting to coax other staff and students into participating in a demonstration. Regardless that the sit-in Grievant proposed was to be peaceful or that said demonstration did not occur, Grievant's judgment and decision-making could have resulted in an incident which "endanger[ed] life or property." There is no question as to whether the graphics on the

T-shirt are in bad taste (from the perspective of some members of either sex), but Grievant's reactions were as equally offensive given the collegial atmosphere which spawned the shirt. Her actions could have been classified as a willful violation of the accepted standard of behavior for her position and could have been grounds for her immediate dismissal alone.

Marshall has not established that Grievant had been disciplined as many times as the chronology suggests but it has established that she engaged in misconduct which warranteddisciplinary action on more than one occasion. Even though each and every allegation contained in Mr. Baker's recommended dismissal letter may not have been established by the evidence, given Grievant's record which includes numerous counselings and at least two reprimands unrelated to her probationary period, it is determined that Marshall has established good cause for her termination by a preponderance of the evidence.

D. Retaliation

The next step is to address Grievant's affirmative defenses. Grievant claims that she was fired in retaliation for having testified in Ms. Bourgeois' grievance hearing held in August 1993. "Reprisal" is defined in W.Va. Code §18-29-3(p) as "the retaliation of an employer or agent toward a grievant or other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." In order to establish that an action which has been taken can be classified as reprisal, a grievant must show the following:

1) He/She engaged in a protected activity.

2) He/She was subsequently treated in an adverse fashion by the employer or agent.

3) The employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity.

4) There was a causal connection (consisting of an inference of retaliatory

motive) between the protected activity and the adverse treatment.

5) The protected activity was a significant factor in the employer's decision.

If the grievant meets the above burden, the employer may still prevail if it can demonstrate that it would have taken the same action had the protected conduct not occurred. See, Gerlach v.Federal Trade Commission, 8 MSPB 599 (1981), citing, Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 247 (1977). Further, the grievant may still prevail if the proffered reason for the adverse action is determined to be pretextual. In most cases, reprisal must be proven by circumstantial evidence and inferences drawn therefrom.

Grievant participated in the protected activity of testifying on behalf of another employee at a grievance hearing in mid-August 1993 and the staff of the Department of Resident Services was aware of this fact. The recommendation that Grievant be dismissed from employment was made by Mr. Baker on November 22, 1993. The question becomes whether inferences drawn from this circumstantial evidence allows one to conclude that Grievant's termination was substantially based upon the fact that she testified for Ms. Bourgeois.

If the date of Grievant's testimony is placed in the chronology attached to the dismissal letter, it would fall after the August 31 letter from Ken Bailey to Mr. Baker concerning Grievant's use of staff to babysit and her having allowed an underage student to drink beer in her apartment. Grievant testified for Ms. Bourgeois on either September 16 or 17 and was given a warning for the drinking episode on September 14. Grievant would have the undersigned believe that she was considered to be a competent employee as a result of being taken off of probation but that Marshall then chose to "pad the record" in order to get rid of her after she testified and also tried to intimidate her so thatshe would not testify. Grievant has established a prima facie case of reprisal.

The problem with Grievant's theory is that she has never denied the facts surrounding the incidents for which she received various warnings and counseling. Grievant does she deny that she allowed an underage student to drink nor does not deny that, at times, she used staff to babysit and caused problems with scheduling. Grievant does not deny that she had a militant attitude after having seen the T-shirts for the first time and she cannot deny that she posted the signs in issue outside of

her office. Even if Mr. Baker had wanted to fire Grievant for testifying for Ms. Bourgeois, he did not need to base his decision on that fact because he had other misconduct upon which to rely. His motivation for firing Grievant is not necessarily relevant given that she had exhibited inappropriate behavior. It is therefore determined that Grievant's choice to testify on behalf of Ms. Bourgeois was not the substantially motivating factor behind her termination.

E. Disparate Treatment

Grievant contends that she was "singled out" for certain acts of misconduct and that her actions at issue were not any more inappropriate than other employees at Marshall who have not been fired or even disciplined. Her main argument in support of this defense is that Mr. Boone was only counseled by Mr. Baker after it was determined he was at the party where an underage student drank beer while he was on-duty. Grievant contends that his conduct wasactually more egregious than hers because it was established that he drank beer while on-duty in violation of Marshall's policy which would have been grounds for immediate dismissal. She also contends that Mr. Bailey had also served alcohol to minors in the past but was not disciplined.

A claim of disparate treatment is similar to a claim of discrimination. An employee may establish that the adverse action taken against him/her was taken as a result of discrimination if the evidence establishes that said employee was similarly situated to another employee; engaged in the same conduct of another employee; the administration knew of the conduct of the other employee; both employees had substantially similar employment histories; and the employee challenging the adverse action received a greater punishment. In this case, Grievant has failed to establish sufficient evidence to warrant such a finding for the simple fact that she was not dismissed for the one incident she refers to but for other actions as well. The "straw that broke the camel's back" was her behavior in relation to the "T-shirt incident" and not the underage drinking incident.

However, even if Grievant's comparison is considered, she cannot establish disparate treatment. With regard to comparing Grievant to Mr. Boone, the evidence does not demonstrate that Mr. Boone's employment record at Marshall is in any way similar to Grievant's; therefore, she cannot establish that she was similarly situated to him with regard to the punishment meted out by Mr. Baker. Secondly, Grievant was disciplined not only because anunderage student drank but because this occurred at her apartment and at a party which she hosted. The proper inference from the

testimony with regard to who bought the beer and how the party was planned leads to the conclusion that Grievant was aware that this student was going to consume beer at her apartment and she simply acquiesced to that act. Mr. Boone was not responsible for planning the party or determining who the guests were to be.

In reference to the allegation that Mr. Bailey was also treated differently than Grievant, the evidence does not demonstrate that he was ever responsible for underage drinking or that the Director of Resident Services was aware of such a fact at the time it is alleged to have occurred. Further, assuming arguendo that Mr. Bailey had permitted an underage student to drink alcoholic beverages while in his company, (See footnote 6) there is also no evidence that his employment history is similar to Grievant's. Therefore, Grievant has failed to establish that Marshall discriminated against her in deciding to terminate her employment. Grievant has not established her affirmative defenses by a preponderence of the evidence.

The following findings of fact have been properly deduced from the evidentiary record developed in the case.

Findings of Fact

1. Grievant was hired by Marshall as an Area Coordinator in August 1992.

2. During Grievant's first eleven months of employment, she was on probation. She was periodically evaluated by her immediate supervisor and generally received unfavorable ratings leading to her being given various periods for improvement. At the beginning of June 1993, Grievant had improved her performance to the point where she was removed from probation.

3. During the period of Grievant's probationary status, she received numerous counselings from her supervisor. She had also received two written warnings based upon her performance and her evaluations were typically in the range of "meets expectations or "occasionally below expectations."

4. Grievant was issued a written warning on September 14, 1993, for having allowed an underage student to drink beer during a party that she had hosted and also for her recurring use of bad judgment.

5. The other Area Coordinator employed by Marshall at that time was counseled by Mr. Baker due to the fact that he was present at the party and consumed beer while on-call.

6. Grievant was responsible for the publication of a monthly RA Newsletter. Grievant failed to have said publication timely produced during her tenure or to keep her supervisor apprised of the progress she was making toward having the newsletter published.

7. Grievant was given a letter of reprimand for inappropriate and unprofessional behavior as a result of being notified that a group of male students had a T-shirt printed which was in questionable taste due to its sexually explicit graphics.

8. During the "T-shirt" incident, Grievant never officially spoke to her subordinate employee whom she felt was responsible for the T-shirts having been designed and purchased. Also, Grievant compounded the problem by posting antagonistic signs outside of her office directed at the 7th floor boys. Further, she attempted to organize among various female staff and students, a demonstration as a means of protesting the boys' purchase and design of the shirt.

9. Based upon Grievant's work record, she was terminated from employment effective December 8, 1993. Prior to that date, she was given a pre-termination hearing wherein all of the events referred to in the recommended dismissal letter were discussed.

10. Between August 31, 1993 and September 16, 1993, Mr. Baker received various written complaints from staff within the Department of Resident Services detailing complaints that they had with Grievant's work and professionalism. These letters were unsolicited by Mr. Baker. Mr. Baker kept these letters in Grievant's departmental personnel file.

The foregoing discussion of the case is hereby supplemented by the following appropriately made conclusions of law.

Conclusions of Law

1. Marshall must establish good cause for Grievant's termination. In general, an employer may establish good cause for terminating an employee by proving by a preponderence of the evidence the facts supporting a sufficient number of the claim(s)upon which said employee's termination is based which would justify that employee's termination.

2. Marshall has meet its burden of proof in this matter.

3. Grievant has failed to met her burden of proving the affirmative defenses of reprisal and disparate treatment by a preponderance of the evidence.

Therefore, this grievance is hereby **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

ALBERT C. DUNN, JR.

Administrative Law Judge

October 17, 1994

Footnote: 1 *Initially, Grievant filed a grievance on September 30, 1993, protesting her placement on probation and an alleged "raid on her apartment" by agents of Marshall. This grievance was denied at level one but no level two hearing was held as Grievant was subsequently terminated and Marshall viewed the issues as moot. Grievant's claim regarding a violation of any landlord-tenant rights she may have had during her employment has been compromised but the issue regarding her placement on probation has been considered within this Decision.*

Footnote: 2 *Ms. Harwood's letter stated that she was hired in 1992 as a Resident Director for one of Marshall's dormitories and that she was supervised by Grievant. She further stated that she, as Conference Manager, was responsible for monitoring the Huntington Cubs' players, according to various policies. In the letter at issue, Ms. Harwood stated that a copy of the contract executed between the Huntington Cubs and Chicago Cubs was sent to Resident Services "as an information sheet for staff and summer students." There was no other more enlightening testimony concerning Ms. Harwood's relationship to the Huntington Cubs or to the relationship of the Huntington Cubs to Marshall.*

Footnote: 3 *At this meeting, it was brought to Grievant's attention that some concerns had been expressed about her supervision of her child and of the condition of her campus apartment. It was specifically stated that these issues were not considered as appropriate concerns for which Grievant could be disciplined.*

Footnote: 4 *An actual T-shirt is included as a real exhibit in the case.*

Footnote: 5 *The undersigned refuses to address the argument presented at the level four hearing in this matter that Grievant did not violate the statutory prohibition against serving alcohol to minors because the underage student retrieved the beer from Grievant's refrigerator as opposed to Grievant having "forced the beer upon her." Such an argument is wholly unsupported by any reasonable interpretation of W.Va. Code §60-3A-24. Also, any argument that Code §60-3A-24*

is not violated because alcohol is consumed by someone under twenty-one but in a personal residence is likewise insupportable under the law.

Footnote: 6The undersigned is quite aware that underage drinking is a common problem at most all institutions of higher learning.