MELANIE VICKERS,

Grievant,

v. **Docket No. 97-BOD-112B**

BOARD OF DIRECTORS/

WEST VIRGINIA STATE COLLEGE,

Respondent.

D E C I S I O N

Grievant Melanie Vickers received a letter dismissing her from employment with the Department of Public Safety ("DPS" or "Department") at West Virginia State College ("WVSC") on December 23, 1996. She grieves this termination and makes multiple charges and allegations as they relate to her dismissal. (See footnote 1)

The parties agreed to waive the Level I hearing and to proceed directly to Level II. There were numerous hearings at Level II. The Level II Grievance Evaluator found Grievant was properly terminated, and that no procedural violations occurred; thus, this grievance was denied at Level II. Grievant appealed to Level IV, and a hearing was held on April 23, 1997. The original due date for the parties' proposed findings of fact and conclusions of law was in late August 1997. This date was changed at the request of Grievant's counsel, Ms. Ellen Golden. The parties were to set a new due date. After many months without response from the parties, the undersigned Administrative LawJudge wrote the parties asking if they still intended to submit additional arguments, and if so, a date certain should be set for these proposals. Eventually, this case became mature for decision on May 28, 1998, the deadline for the parties' final proposed findings of fact and conclusions of law. (See footnote 2)

Grievant makes the following specific allegations and requests the following specific relief in her Statement of Grievance. (These issues were numbered by the undersigned Administrative Law Judge for ease of subsequent referral): (See footnote 3)

1. Grievant was deprived of a pre-termination hearing and was not given sufficient notice contrary to practice and procedure and in violation of West Virginia Constitution article III, Section 10.

2. Grievant was not given timely notice of a pre-termination hearing contrary to West Virginia Constitution article III, Section 10.

3. Grievant was not given the specifics of all allegations against her nor the nature of the alleged evidence contrary to West Virginia Constitution article III, Section 10.

4. Grievant's liberty interests were violated by acts including but not limited to her wrongful discharge, the lack of a pre-termination hearing and the spread of rumors about Grievant which damaged her standing in her community and places a disability in obtaining future employment as a police officer.

5. Grievant's property interests in continuing her employment were violated by acts including but not limited to her wrongful discharge.

6. Grievant was not paid all compensation due her within 72 hours of being dismissed contrary to West Virginia Code 21-5-4(b). (See footnote 4)

7. Grievant was not paid holiday pay as is usual and customary for election day, Thanksgiving Day and the day following Thanksgiving in violation of West Virginia Code 21-5-4(d). (See footnote 5)

8. For the proceeding two paragraphs Grievant requests wages pursuant to West Virginia Code 21-5-4(e) and attorney fees for obtaining her wages pursuant to West

Virginia Code 21-5-12(b).

9. Grievant's discharge was retaliatory based upon her previous grievance with the Human Rights Commission and/or her previous grievance filed November 18, 1996.

10. Melanie Vickers has been treated disparately because of her sex, . . . [in that] [s]he was disciplined more severely because of her sex. (See footnote 6)

11. Melanie Vickers has been discriminated against based upon her sex in violation of West Virginia Code §[§] 5-11-1, et seq[.], by those acts listed in the preceding paragraph, but not limited to those acts. See West Virginia Code [§]§ 5-11- 2, 5-11-3(h), and 5-11-9(1). (See footnote 7)

. . .

12. Melanie Vickers was disciplined and discharged contrary to the implied contract based upon West Virginia State College Staff Handbook.

13. Melanie Vickers was disciplined and discharged contrary to the policies and procedures of the West Virginia State College Staff Handbook, contrary to West Virginia Code § 18-29-2(a).

14. Melanie Vickers grieves the following acts and omissions which are contrary to West Virginia Code § 18-29-2: (See footnote 8)

. . .

e.

The harassment as evidenced by the overly extensive investigation in this matter and other acts;

f.

The discrimination against her, including but not limited to, the investigation by Chief Flores and her discharge;

g.

The reprisal for previously filing a grievance in this matter, and a grievance within the Human Rights Commission; and,

h.

Chief Flores' use of West Virginia State College resources and time for matters not related to West Virginia State College business. (See footnote 9)

Relief sought:

Melanie Vickers seeks relief pursuant to West Virginia Code § 21-5-4(b), (d), and 21-5-12(b) (as previously stated), reimbursement for the items listed, reinstatement to Sergeant with full opportunity for promotion, back pay, compensation for medical insurance payments, and other costs related and due to her wrongful discharge, pre-judgement and post-judgement interest, attorney fees and costs, general damages and a clear personnel file. (See footnote 10) In order to assist the reader's understanding of this grievance, a brief review of the procedural history will be discussed first.

Procedural History

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On October 16, 1996, Grievant was asked to respond to certain allegations about her behavior on October 12, 1996, in relation to a physical altercation with another employee. On October 18, 1996, Grievant asked to be allowed to take annual leave

rather than being placed on administrative leave while an investigation was conducted. (See footnote 11) Grievant was asked to come to WVSC on October 23, 1996, to discuss the results of the initial investigation. Once at WVSC, Grievant, on the advice of her attorney, refused to discuss the situation or to answer any questions. Grievant was placed on paid administrative leave. On November 21, 1996, when Grievant and her attorney were on Campus for another matter, Director Flores asked to speak to Grievant about the investigation, but she again refused.

On December 13, 1996, WVSC sent the following letter to Grievant:

DUE PROCESS CONFERENCE

Investigation into the original allegations of misconduct on your part, to wit: Altercation of 12 October 96 involving physical force (battery) against Joyce Burdette and a verbal threat to Eual Sigman while you were on duty as the Shift Supervisor, subsequently disclosed that you have grossly and flagrantly violated State of West Virginia, College and Department of Public Safety policies and procedures, rules, regulations and standards of conduct. Through your actions, you have violated the founding cornerstone of this or any other law enforcement organization, the public's trust and confidence. Your position, as a Sergeant and Supervisor, demands and requires that your behavior, on and off duty, be above question or reproach at all times. However, for the past 8-9 months, you have repeatedly demonstrated a willful and flagrant disregard for the Officers Oath, the Code of Ethics and rules, regulations andstandards of conduct, by allowing an apparent personal situation to cloud your judgement and inhibit control over her (sic) emotions to the point that you have engaged in activities, that totally violates (sic) these standards, which are the backbone of any law enforcement organization. Your activities have seriously undermined the prestige, image and reputation of her (sic) fellow officers, the Department and the College in the eyes of the faculty, staff, students an[d] administrators; public relations oriented outside

organizations and with local community personnel, as well as with outside law enforcement agencies. You have vividly demonstrated the following:

a)

A willingness to violate policies, rules and regulations which you are sworn to uphold

(See Attachment 1). (See footnote 12)

b)

A willingness to resort to physical violence to resolve personal issues.

1) On 12 October 96, while on official duty as the Shift Supervisor, you became involved in a physical altercation with Joyce Burdette.

2) On 12 October 96, you did use physical contact and force, to wit: grabbed Burdette by the shoulders and hair, and until forced to do so, would not release her.

NOTE: In reference to the 12 October 96 incident, there is no evidence that Burdette committed any infraction/violation of rules, policies, procedures or regulations nor did she behave in a manner that constituted a danger or threat of personal harm to you that would legally justify her being approached by you, much less, your use of force against her.

c) A willingness to threaten, intimidate, and coerce College employees/contracted personnel

1) On/about 13-21 April 95[,] you threatened Security America, Inc. Guard Katrina Brown's job and to bash her face in, which resulted in her quitting her job on 25 April 96.

2) In March 96 you, while off duty, you [sic] threatened to shoot Burdette and yourself during a confrontation in the Administrative Lot.

3) On 12 October 96 you attempted to intimidate Eual Sigman by threatening to mail “pictures and video tapes” to his home.

d) A willingness to use your position, rank and authority to involve, manipulate and deceive contracted personnel, College employees and officials, and a local law enforcement agency.

1) Through subterfuge involved Security America, Inc., Guard John McGraw and Physical Facilities employee Angela Porterfield in tracking the on campus location of Eual Sigman's private vehicle.

2) During your frequent visits to the campus, by claiming you were conducting an official investigation and requesting not to be logged in by the on duty officers, in essence, you caused the officers to disregard established policies and procedures.

3) While off duty and without legal justification or proper authority you followed and/or conducted unauthorized surveillance on Charles Bledsoe and Eual Sigman on 4 October 96, Eual Sigman and Greg Edens in July 96 and routinely on Joyce Burdette.

4) Your failure to immediately document and/or report your involvement in the 12 October 96 altercation and by

maintaining your silence until confronted with the allegations on 16 October 96, is indicative of your attempt to deceive your fellow officers, the director and College officials. This also caused a falsification of official documents.

5) On 30 August 96 you obtained the assistance of the Nitro Police, Nitro, WV., in locating Joyce Burdette. This activity apparently was strictly for your own personal benefit, since there was no legal, official law enforcement or College reason for this action.

These activities are totally inappropriate, particularly from a person who by virtue of the authoritative position held, should inspire confidence and trust, integrity, virtue, respect and honest[y]. Most importantly, you have demonstrated an obvious inability to control your emotions and that your lack of control has diminished to the point that your activities have escalated from intimidation, coercion, harassment, and threats to the use of physical force on 12 October 96.

This type of behavior cannot and will not be condoned or tolerated. [Neither] [t]he Department of Public Safety nor the College can justify the continued employment of an individual, in a highly visible and sensitive position, that demonstrates a willful and flagrant disregard for policies, procedures and standards, and that for purely personal reasons, elects to misuse the power and authority vested in the position of a sworn and certified law enforcement officer.

A pretermination hearing was set for December 17, 1996. Grievant, her attorney, Director Flores, Grievant's supervisor, and Mr. Nick Wounaris, Vice-President for Administrative Affairs, Director of Support Services, and Director Flores' supervisor met for this hearing. (See footnote 13) The pretermination hearing was not conducted as Grievant insisted on having the proceedings transcribed by a court reporter. Mr. Wounaris contacted WVSC's counsel and was told there was no statutory requirement

for a pretermination hearing to be transcribed. Without this statutory requirement, WVSC did not have to allow the proceedings to be recorded, and WVSC's counsel recommended against recording. Grievant and her attorney refused to meet unless the proceedings were recorded, and as a result of this impasse, Grievant did not address the issues in the letter of December 13, 1996, and no pretermination hearing was held.

On December 20, 1996, Grievant was sent the following letter:

Termination of Employment

Investigative activity into allegations of misconduct on your part was concluded on 4 December 96. You were originally interviewed on 16 October 96, at which time you denied that a physical altercation occurred between you and Joyce Burdette. While admitting to having “pictures and video tapes” of Eual Sigman, you denied having threatened to send them to his home during the confrontation on 12 October 96.

Subsequent investigative activity brought to light a pattern of additional inappropriate activities on your part. On 22 November 96, (See footnote 14) efforts to interview you and solicit a response and/or rebuttal reference to the additional inappropriate activities was negated when, through your attorney, you declined to be interviewed. On 17December 96, another effort to extend due process to you to offer yet another opportunity to respond to the allegations substantiated by the investigation, again was negated, when through your attorney the College's administrative process was impeded by her persistence to have the process recorded, over the College's objections.

This investigation has revealed that you have grossly and flagrantly violated State of West Virginia, College and Department of Public Safety policies and procedures, rules, regulations and standards of conduct (See Attachment 1). Through your actions, you have violated the founding cornerstone of this or any other law enforcement

organization, the public's trust and confidence. Your position, as a Sergeant and Supervisor, demands and requires that your behavior, on and off duty, be above question or reproach at all times. However, for the past 8-9 months, you have repeatedly demonstrated a willful and flagrant disregard for the Officers Oath, the Code of Ethics and rules, regulations and standards of conduct, by allowing an apparent personal situation to cloud your judgement and inhibit control over [your] emotions to the point that you have engaged in activities, as enumerated in the Pattern of Behavior (See Attachment 2), that totally violates these standards, which are the backbone of any law enforcement organization. Your activities have seriously undermined the prestige, image and reputation of [your] fellow officers, the Department and the College in the eyes of the faculty, staff, students an administrators; with public relations oriented outside organizations and with local community personnel, as well as with outside law enforcement agencies. You have through your inappropriate conduct, vividly demonstrated a willingness to violate policies, rules and regulations which you are sworn to uphold; a willingness to threaten, intimidate and coerce College employees to gratify your personal needs; a willingness to use your position, rank and authority to involve other employees in tracking vehicles of certain personnel; a willingness to follow and conduct unauthorized surveillance on employees; a willingness to deceive [your] fellow officers, the director and College administrators; and a willingness to resort to physical violence to resolve personal issues. These activities are totally inappropriate, particularly from a person who by virtue of the authoritative position held, should inspire confidence and trust, integrity, virtue, respect and honest. Most importantly, you have demonstrated an obvious inability to control your emotions and that your lack of control has diminished to the point that you have escalated from intimidation, coercion, harassment and threats to the use of physical force on as October 96.

As Director of Public Safety, my primary responsibility is the safety and security of

the College community, local vicinity personnel and visiting public. I can best adhere to that commitment by ensuring that personnel in this department are committed to professionally serve those we are sworn to protect... the public. This Department nor the college can justify the employment of an individual, in a highly sensitive position, that demonstrates a pattern of willful disregard for policies and procedures, and that for purely personal reasons, elects to misuse the power and authority vested in theposition. With this in mind, I submitted a recommendation to my superiors and the President for the immediate termination of your employment with the WVSC Department of Public Safety and the College.

You are herewith notified that, with the consent, concurrence and approval of the President, your employment at West Virginia State College is terminated effective as of 5:00 PM, 20 December 96.

Based on the foregoing, you are to turn in all West Virginia State College issued keys immediately. Property and materials in your possession, i.e., uniforms and equipment belonging to West Virginia State College must be turned in to me no later than 12:00 noon Tuesday, 23 December 96. Arrangements will be made for you to remove any personal belonging from College property. Your last paycheck will be mailed to you at your home address as soon as it is issued in the normal course of business. If you have any questions or concerns about the effect of this termination of your employee benefits and/or employee leave, please contact the West Virginia State College Human Resources Office.

BEHAVIORAL PATTERN (See footnote 15)

1. The investigation into allegations of misconduct by Sgt. Melanie R. Vickers has disclosed that she has been involved in the following behavioral pattern:

a.

Vickers did on early morning of 12 October 96, while officially on duty as the Shift Supervisor, become involved in a physical altercation with WVSC employee Joyce Burdette.

b.

Vickers did on 12 October 96, use physical contact and force, to wit: grabbed Burdette by the shoulders and hair and, until forced to do so, would not release Burdette.

c.

That there is no evidence that Burdette committed any infraction/violation of rules, policies, procedures and/or regulations nor did she behave in a manner that constituted a danger or threat of personal harm to Vickers to legally justify the original approach by Vickers and/or much less the use of force against her by Vickers.

d.

Vickers did attempt to intimidate Eual Sigman by threatening to send pictures and video tapes to his residence on 12 October 96.

e.

Vickers did intimidate Katrina Brown in April 95 by threatening her job and to bash her face in. As a result of this threat and intimidation, Brown quit her job at the College on 25 April 95.

f.

Vickers did, while off duty, and having no legal justification, nor proper authorization, followed and/or conducted a surveillance on WVSC employees, Bledsoe & Sigman on 4 October 96; Edens & Sigman in July 96 and Burdette on a routine basis.

g.

Vickers did disclose sensitive information pertaining to allegations of drug dealing to the very persons allegedly involved in July, September & October 96.

h.

Vickers did, based on voice recognition, make harassing call to Eual Sigmans wife on 26 April 96. (See footnote 16)

I.

Vickers did, while off duty and on campus, threaten to shoot Burdette and herself at the Administrative Lot, WVSC on/about March 96.

j.

Vickers did, while off duty and on campus on 13 October 96, make an inappropriate remark to another WVSC employee reference to Eual Sigman which amounted to it being an indirect threat.

k.

Vickers did on 30 August 96, while off duty and on campus, utilize College telephone equipment and her position as a WVSC law enforcement officer to gain the assistance of Nitro Police Department personnel, in locating a residence in Nitro, WV where Burdette was house sitting on 30 August 96. This activity was strictly for her personal reasons and had no legal law enforcement related basis nor was it a College related matter. (See footnote 17)

l.

Vickers did on various occasion, through the use of her position and rank, to undermined (sic) the Director's authority and caused non compliances by

subordinates of policies and procedures by claiming she was conducting official investigative activity and instructing them not to log her in or say anything, when in fact she was on campus for the apparent purely personal reason of checking on Burdette.

m.

Vickers did, through the use of her position and rank and under subterfuge involve College employees Angela Proterfield (sic), and John McGraw in tracking the location of Sigman's private vehicle in September - October 96.

n.

Vickers did attempt to deceive her fellow officers, the Director and College official, by not immediately reporting and/or documenting her involvement in the 12 October 96 altercation and by maintaining her silence until she was confronted with the allegation on 16 October 96.

o.

Vickers did falsify and/or cause the falsification of official documents (Police Logs) when she failed to report and document the 12 October 96 altercation.

2. The above behavioral pattern constitutes gross misconduct, willful and flagrant violations of State, College policies, procedures, and departmental rules, regulations and standards of conduct, which are listed below:

State

1. Oath of Office

2. Law Enforcement Code of Ethics

College

1. Employee Conduct

2. Duties and Responsibilities of Security Officers

3.

General Conduct & Use of Campus Telephone, WVSC Staff Handbook, pages 22-23

4. Confidentiality of Records

Departmental

1. Law Enforcement Code of Ethics

2. Chain of Command, paragraph 2

3.

Authority and Jurisdiction of WVSC Police Officer, page 2 of 3, paragraph 2

4. Rules of Conduct

5. Command/Supervisor

6. Assault on an officer Policy and use of Force

7.

Departmental Forms, page 2 of 10, paragraph c and page 5 of 10, paragraph 18

8. Report Writing page 1 of 6 paragraph 1(a)

9. Investigations/Inquiry Constrain[t]s page 1 of 1

Issues

Respondent maintains the investigation into the allegations against Grievant was properly conducted, and Grievant's subsequent dismissal was for good cause: gross misconduct, including violation of multiple WVSC and Department rules and regulations, and violations of the Law Enforcement Code of Ethics. Grievant contests each point in her dismissal letter as well as raising several procedural errors. Additionally, Grievant alleges she was the victim of sexual discrimination and retaliation, both in the investigative process and in the

subsequent termination.

Specifically, Grievant argues she was not afforded a pretermination hearing; the allegations were insufficient to inform her of the charges against her; additional charges were raised after the aborted pretermination hearing; she did not commit the offenses she was accused of; that even if she did commit a few of these offenses, termination was too severe a penalty for a long-term employee; she was discriminated against because of her gender; and her termination was retaliatory, and the result of her filing a complaint with the Human Rights Commission in 1993 and with this Grievance Board on November 18, 1996.

After a detailed review of the record in its entirety the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed at WVSC in DPS for at least eleven years. 2. Grievant began her employment as an officer and was later promoted to Corporal and to Sergeant, in 1993. Grievant is the only woman at DPS. (See footnote 18)

3. At approximately 6:45 a.m. on Saturday, October 12, 1996, while on duty as the shift supervisor, Grievant engaged in a verbal and physical altercation with Joyce Burdette, a Building Service Worker ("BSW"), fellow employee, and friend, outside a building on WVSC's campus. (See footnote 19)

4. During this physical altercation, Grievant grabbed Ms. Burdette from behind by both shoulders, accidently pulling Ms. Burdette's long hair in the process. This restraint was not meant to seriously harm Ms. Burdette, but to detain her for further conversation.

5. Ms. Burdette slapped at Grievant and yelled at Grievant, "Let me go!" This statement was overheard, but the physical altercation was not seen by Mr.

Eual Sigman, another BSW. Written Statement and Level II and IV Test. of Mr. Sigman; Resp. Ex. 5, Attach. 5.

physical altercation. 7. Grievant did not report this incident in her log book or tell anyone of the incident. Physical altercations or confrontations of any kind should be noted in the officer's daily log book. This is especially true if the Shift Commander is the individual who was engaged in the incident, as supervisory personnel are expected to act as role models. Attachs. to Due Process Letter.

8. Ms. Burdette and Grievant have been friends since 1994. Ms. Burdette had moved in with Grievant when she left her abusive husband. Grievant had co-signed for Ms. Burdette's car. In March 1996, Ms. Burdette moved back in with her husband.

9. Grievant was known to be a "by the book" type of person and a stickler for detail. She complained frequently about the other Officers' failure to follow all the rules and regulations, both when she was an Officer and after she became a Sergeant. Grievant complained Officers were not filling in their log books in a complete fashion. Officers have been disciplined for failure to complete their log books in a detailed fashion. Level II and Level IV Test. of Director Flores, Grievant, and Level II Test. of Michael Scraggs.

10. Grievant followed Ms. Burdette into the Campus building, where Mr. Sigman attempted to intervene into a possible situation. Grievant asked to speak with Mr. Sigman outside and told him to stay out of Grievant's and Ms. Burdette's business. Grievant threatened to send Mr. Sigman's wife some photographs and video tapes ofhim if he interfered again. (See footnote 20) In his testimony and sworn statements, Mr. Sigman also related other incidents of difficulty with Grievant. In March 1996, Grievant found Mr. Sigman at work and asked him questions about his married life, and what his intentions were regarding Ms. Burdette. Grievant had forced Ms. Burdette's vehicle off the road, off Campus, on October 6, 1996, and

questioned Ms. Burdette regarding why she was with Mr. Sigman, as Ms. Burdette knew Grievant "could not stand him." A physical altercation also occurred at that time with Ms. Burdette as the aggressor. Grievant was upset when she found Mr. Sigman and Ms. Burdette watching fireworks "in the dark" on October 13, 1996. Ms. Burdette had also told Mr. Sigman that Grievant had threatened to blow her away, and was constantly harassing her at work. Written Statement and Level II and IV Test. of Mr. Sigman; Resp. Ex. 5, Attach. 5.

11. Ms. Burdette was upset about the October 12, 1996 incident and told several people that day about what had happened. She was afraid she would get in trouble for fighting as her supervisor had informed all his employees that no physical confrontations would be tolerated.

12. On October 12, 1996, Ms. Burdette told Mr. James Carter about the incident shortly after it happened. She stated Grievant and she had a confrontation, Grievant had grabbed her by the hair and Ms. Burdette had to slap Grievant's face to make her let her go. Mr. Carter convinced Ms. Burdette to talk to Corporal Ava Carterabout the incident. Mr. Carter also related that he had heard that Grievant and Ms. Burdette had been having arguments on and off campus for some time. (See footnote 21) **Verbal Statement of Mr. Carter to Director Flores on Oct. 21, 1996.; Resp 5, Investigative Report at VI. 2.**

13. On October 12, 1996, Corporal Carter talked to Ms. Burdette about the incident. Corporal Carter's account of Ms. Burdette's story is very similar to that told by Mr. Carter. It recounts Grievant grabbed Ms. Burdette, and Ms. Burdette had to strike Grievant to make her let go. Ms. Burdette went on to tell Corporal Carter about another confrontation with Grievant. Ms. Burdette stated Grievant was following her and threatened to blow her away and accused her of seeing other men, one of whom was Mr. Sigman. She also explained that one time Grievant had forced her to stop her vehicle when she had Mr. Sigman in the

vehicle. Corporal Carter recommended that Ms. Burdette tell Director Flores about this incident, but Ms. Burdette did not want to get either herself or Grievant in trouble, because Grievant had been a friend to her. Written Statement and Level II Test. of Corporal Carter Resp. Ex. 5, Attach.1.

14. Ms. Burdette also informed Dwight Salser, her shift supervisor, about the incident. Ms. Burdette stated, "I've told everyone else, so I will tell you." Ms. Burdette then recounted that Grievant had grabbed her hair, and she had to hit Grievant to make her let go. Mr. Salser directed Ms. Burdette to tell Director Flores, and Ms. Burdetterefused. Ms. Burdette had been informed that fighting on the job could cost her her position. Mr. Salser also stated he had seen Grievant earlier in the day and she appeared to have been crying. On Monday morning, October 14, 1996, Mr. Salser shared this information with his supervisor, Phil Judd. Written Statement and Level II Test. of Dwight Salser; Resp. Ex. 5, Attach 7.

15. On that same day, Mr. Judd went to Director Flores with the information he had received. Corporal Carter also went to Director Flores on October 14, 1996, about the incident.

16. Prior to the October 12, 1996 incidence, Director Flores had heard rumors of threats and possible physical violence directed toward Ms. Burdette by Grievant. He had not investigated these rumors because they were just that, and he did not think it would be appropriate to do so. He had sent word to Ms. Burdette by another officer that he would be glad to talk to her if she wanted to discuss potential problems. Ms. Burdette never came to Director Flores to talk.

17. On October 15, 1996, Director Flores interviewed Ms. Burdette. She admitted there had been a confrontation between her and Grievant on October 12,1996. She did not want to talk about it, did not want to sign a statement, and was afraid she would lose her job and be labeled. Level II and IV Test. of Ms. Burdette and Director Flores.

18. Ms. Burdette also informed Director Flores that Grievant had involved the Nitro Police in helping to locate her when she was house sitting for relatives, she was worried Grievant might harm herself at times, Grievant informed her on approximatelyOctober 9, 1996, that she had spent $1,500.00 to have her followed, that Grievant is constantly checking on her both while Grievant is on and off duty, and Grievant was angry with Ms. Burdette for watching the WVSC's fireworks with Mr. Sigman. Level II and IV Test. of Director Flores; Resp. Ex. 5 at IV. 2.

19. On October 16, 1996, Director Flores called Grievant in from annual leave to ask her about the incident. Grievant admitted there was a verbal confrontation, but denied either she or Ms. Burdette used any physical force. Grievant also denied having threatened Mr. Sigman, but admitted she had pictures and videos of him at one time. Grievant was to be placed on administrative leave with pay while an investigation was conducted (See footnote 22) **, Director Flores requested Grievant to provide a written statement of her version of the altercation, and encouraged to seek assistance from WVSC's Employee Assistance Program. Grievant did not seek this assistance nor did she provide the requested written statement. Level II and IV Test. of Director Flores.**

20. While Director Flores was investigating the October 12, 1996 incident and the other information he had received from Corporal Carter, Ms. Burdette, Mr. Sigman, and Mr. Carter, he received additional information that caused him concern about how Grievant was performing her duties.

21. On or about October 22, 1996, Director Flores discussed the status of the initial investigation with his supervisors and indicated he had found evidence ofmisconduct. They agreed a full scale investigation was warranted. Grievant was placed on administrative leave, with pay, until the completion of the investigation.

22. On October 23, 1996, Grievant and her attorney met with Director Flores and Mr. Nick Wounaris to discuss the current state of the investigation. Grievant,

on the advice of her attorney, did not wish to participate in discussions at that time. Grievant was sent a summary of this briefing by certified mail on October 25, 1996.

23. By the end of this investigation, Director Flores found Grievant had committed numerous offenses which were contrary to her assigned duty, which reflected poorly on DPS, and were equal to gross misconduct.

24. At times Grievant came to work when she was off duty and Ms. Burdette was on duty, to eat "lunch" with her. She sometimes showed up on Campus during the last hour of Ms. Burdette's shift, and followed her around while Ms. Burdette did her work. Written statement of Mr. Banks dated Dec. 4, 1996; Resp. Ex. 5, Attach. 38.

25. Grievant would come on campus and tell fellow officers she was conducting an investigation and tell these officers not to tell anyone, especially Ms. Burdette. No investigations were approved by Director Flores during the time in question. Written Statements and Level II Test. of Officer Larry Turner and former Officer Rex Angel; Resp. Ex. 5, Attachs. 18 & 15.

26. In March 1996, Grievant and Ms. Burdette were engaged in an argument on Campus. Grievant became angry with Ms. Burdette and instructed her "not to walkaway" and threatened to shoot both Ms. Burdette and herself. Written Statement of Greg Edens dated Nov. 18, 1996; (See footnote 23) Resp. Ex. 5, Attach. 31.

27. Grievant threatened to shoot Ms. Burdette at other times. Written Statements and Level II Test. of Officer Saunders and Ms. Brown; Resp. Ex. 5, Attachs. 11 and 19.

28. Sometime in mid-April, Grievant threatened Katrina Brown, a Securities America employee who worked with DPS. Grievant told Ms. Brown she would bash her face in if she had further contact with Ms. Burdette. Ms. Brown informed

Officer Larry Turner of these threats. Officer Turner confirmed this conversation. Shortly after this conversation, Ms. Brown quit the position at WVSC because of the situation with Grievant. She did not give her employer any reasons for her sudden departure. Written statements and Level II Test. of Ms. Brown and Officer Turner; Resp. Ex. 5, Attachs. 19 & 18.

29. On May 2, 1996, Grievant came to Ferrell Hall to find Ms. Burdette because she would not answer her pager. Grievant confirmed she was on campus that day, but for other reasons. Written Statement and Level II Test. of Officer Saunders; Resp. Ex. 5, Attach. 11; Test. of Grievant.

30. In September 1996, Grievant asked Officer William Porterfield, who also did investigations in his off campus time, to follow Ms. Burdette because she wasextremely concerned about her association with Mr. Sigman. Written statement and Level II Test. of Officer Porterfield; Resp. 5, Attach. 8.

31. During either late September or early October 1996, Grievant called Angela Porterfield at least four times while Ms. Porterfield was working her evening shift to ask her to check on the location of Mr. Sigman's car. Grievant did not give a reason for this information, and although she was busy, Ms. Porterfield left her work station and located Mr. Sigman' s car, and gave Grievant this information. Ms. Porterfield assumed Grievant needed this information for her work with DPS, and that is why she complied with her request. Written statement of Ms. Porterfield; Resp. 5, Attach 14.

32. During this same time period, Grievant asked Mr. John McGraw, with Security America, to inform her when he saw "a small blue truck" in a certain parking lot, as she was checking on a reported crime. Mr. Sigman drives "a small blue truck". Written statement and Level II Test. of Mr. McGraw; Resp, 5, Attach. 33.

33. On October 3, 1996, Grievant informed Mr. Carl Smith that he and

Kennedy Banks were suspected of selling pot by his boss, Mr. Lee Sigman, that she was supposed to watch him, that Lee and Eual Sigman were the ones to watch, and that he was not to tell anyone who had given him this information. Written statement of Mr. Smith dated October 26, 1996; Resp. Ex. 5, Attach. 32.

34. Sometime during October 1 through 5, 1996, Grievant came to Wallace Hall and asked BSW Kennedy Banks if he had seen Ms. Burdette yet. When he replied "no", Grievant informed Mr. Banks that she really wanted to talk to him aboutMr. Eual Sigman spreading lies about him. Grievant explained to Mr. Banks that Mr. Sigman had tried to set him up when he asked him the prior month about where to buy marijuana, because Mr. Banks was suspected of selling drugs on Campus. Written statement of Mr. Banks dated Dec. 4, 1996; Resp. Ex. 5, Attach. 38.

35. On October 13, 1996, Grievant told Mr. Dayton Wilson she would like to throw Mr. Sigman off the roof. Written statement dated November 11, 1996, and Level II Test. of Mr. Wilson. Resp. Ex. 5, Attach. 34. (See footnote 24)

36. Grievant made harassing phone calls to Ms. Burdette from WVSC. Written statements and Level II Deposition Test. of Mr. Angel, and Written statements and Level II Test. of Officer Saunders; Resp 5. Attachs. 11 and 15; Phone Logs, Resp. Ex. 5. Attachs. 28-30.

37. On November 18, 1996, Grievant filed a grievance alleging sexual discrimination.

38. On November 21, 1996, Director Flores asked to speak to Grievant in the presence of her attorney about the investigation. Grievant refused.

39. On December 13, 1996, a pretermination hearing was scheduled for December 17, 1996. At this hearing Grievant did not respond to any of the allegations against her.

40. On December 23, 1996, Grievant was discharged from employment with

WVSC for gross misconduct and violation of the rules, regulations, procedures, andStandards of Conduct identified by WVSC, DPS, Law Enforcement Code of Ethics, and an Officer's Oath.

41. An employee at WVSC can be discharged immediately for multiple reasons. Actions that constitute "just cause" are identified in the WVSC Staff Handbook and include: refusal to comply with or violation of WVSC rules and regulations, neglect of duty, dishonesty, wrongful injury to an employee, insubordination, and abuse of the telephone. G. Ex. 1, Level IV.

42. At hearing, Ms. Burdette's testimony about the October 12, 1996 incident, as well as other incidents, was markedly different from the information she gave at the time of the incident. She stated Grievant had never threatened her in any way at any time, nor had she followed her or made threatening phone calls. She stated she and Grievant were still friends, and Grievant had never been jealous of or controlling about her whereabouts when she lived with her. The undersigned Administrative Law Judge finds Ms. Burdette's testimony to not be credible, and specifically finds Grievant committed the acts Ms. Burdette complained about to the numerous employees cited in the above Findings of Fact.

42. Grievant denied all charges against her. In the October conference with Director Flores she stated there was no physical contact between her and Ms. Burdette on or about October 12, 1996. During the Level II hearing Grievant continued to say there had been no physical contact. At the Level IV hearing, after a period of evasive answers, Grievant admitted there had been physical contact, but stated it was not aviolent interaction. Later at the Level IV hearing, she stated she may have touched Ms. Burdette, but she did not remember.

Discussion

In disciplinary matters, the employer bears the burden of establishing the

charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989).

The first issues to address are Grievant's allegations relating to the procedural issues.

A. Failure To Provide A Pretermination Hearing

Grievant argues she had both a property and liberty interest in her employment at WVSC, and the procedural due process she received was inadequate. In Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed 2d 494 (1985), the United States Supreme Court concluded public employees who have a right to continuing uninterrupted employment, i.e., a property right, are entitled to a limited pretermination hearing as a matter of procedural due process. The purpose of such hearing is not to resolve definitively the propriety of the dismissal, but to serve as an initial check against mistaken decisions. See Garraghty v. Jordan, 830 F.2d 1295, 1302 (4th Cir. 1987).

In Wirt v. Board of Education of County of Mercer, 192 W. Va. 568, 453 S.E.2d 402 (1994), the Supreme Court of Appeals of West Virginia cited to Loudermill and held that a tenured public employee is entitled to a pre-termination hearing. See Kernv. Wayne County Bd. of Educ., Docket No. 95-50-26 (Mar. 27, 1996). The Wirt Court stated the hearing need not be:

> a full adversarial evidentiary hearing; however, an employee is entitled to a written notice of the charges, an explanation of the evidence, and an opportunity to respond prior to a Board of Education's decision to terminate the employee. Id. at 575.

A review of the above-cited holding demonstrates Grievant's allegations that Respondent failed to provide the required due process is without merit. Grievant was given all required due process protections by WVSC. She received written notice of the charges several days before the scheduled pretermination hearing,

and this notice detailed and explained the evidence that had been gathered. Although there were a few charges added to the dismissal letter that were not in the pretermination hearing letter, the added issues did not appear to be significant.

A pre-termination hearing was scheduled to give Grievant an opportunity to respond. However, Grievant refused to participate unless she was allowed to transcribe these proceedings. This refusal is certainly her right, but Grievant cannot later argue she was not given a pretermination hearing when she refused to participate. Further, the undersigned Administrative Law Judge has not found, nor has Grievant cited, any statute, rule, or regulation that requires a respondent to allow a grievant to record a pretermination hearing. Thus, Grievant's due process rights were not violated.

B. Liberty Interest

Grievant has specifically alleged Respondent spread rumors about her which affected her liberty interest. The undersigned Administrative Law Judge concludes that under the current law of this state, "a grievant must demonstrate that any reasons givenfor h[er] termination implicating h[er] liberty interests were disseminated to an extent that the accusations would be 'likely to have severe repercussions outside h[er] work world.'" Willis v. Bureau of Commerce/Office of Miner's Safety, Docket No. 97-MHST- 136 (June 9, 1997) (citing Waite, supra (emphasis in original)); See Wilhelm v. Dept. of Tax and Revenue/Lottery Comm'n, Docket No. 94-L-038 (Sept. 30, 1994) aff'd sub nom. Wilhelm v. W. Va. Lottery, 198 W. Va. 92, 479 S.E.2d 602 (1996). In particular, the United States Supreme Court's holding in Bishop v. Wood, 426 U.S. 341 (1976), is persuasive. In that case, the reasons for the plaintiff's termination were communicated to the employee, but not otherwise disseminated until after a civil action was filed. Indeed, Freeman v. Poling, 175 W. Va. 814, 338 S.E.2d 415 (1985), suggests the charges must be made

public before the individual's reputation can be significantly affected. Accord, Ratliff v. City of Milwaukee, 795 F.2d 612, 626 (7th Cir. 1986); Hogue v. Clinton, 791 F.2d 1318, 1322 (8th Cir. 1986); Wells v. Doland, 711 F.2d 670 (5th Cir. 1983). But see Guard v. Kilburn, 5 Ohio St.3d 21, 448 N.E.2d 1153, cert denied, 464 U.S. 893 (1983).

The reasons identified for Grievant's dismissal include: gross misconduct, threatening behavior, release of confidential information, and inappropriate work behavior. General dissemination of those reasons to the public would unquestionably implicate Grievant's liberty interests. However, there is no evidence WVSC made the reasons for Grievant's dismissal public. The fact that Grievant's termination and the charges were well known among the employees at DPS is insufficient to create a libertyinterest. See Willis, supra. As previously stated, Grievant received appropriate due process.

Since the issues of credibility and hearsay are important in deciding this case, they will be examined next. (See footnote 25)

C. Credibility

In order to decide whether WVSC has met its burden of proof, it is first necessary to resolve the issue of witness credibility, as Grievant's testimony contradicts the testimony of Respondent's witnesses. An Administrative Law Judge is charged with assessing the credibility of the witnesses who appear before her. Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dept. of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993). “The fact that [some of] this testimony is offered in written form does not alter this responsibility.” Browning v. Mingo County Bd. of Educ., Docket No. 96-29-154 (Sept. 30, 1996). The United States Merit System Protection Board Handbook (“MSPB Handbook”) is helpful in setting out factors to examine when assessing credibility. Harold J. Asher and William C.

Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984). Some factors to consider in assessing a witness's testimony are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Id. Additionally, the ALJ should consider 1)the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness' information. Id.

The undersigned Administrative Law Judge finds Grievant's testimony to lack credibility. Her demeanor at hearing on key questions was evasive, and at times her answers were non-responsive. Other times her responses were very carefully worded in order to skirt a question. For example, Grievant was asked at Level II if she touched Ms. Burdette. Grievant's response is, "No Sir, I did not _ and in touch, I mean by pushing shoving, hitting, whatever." Level II Trans. at 433.

At Level IV, Grievant was asked if she had touched Ms. Burdette. Grievant attempted to skirt around this question and did not clearly answer until required to do so. She then indicated she had indeed touched Ms. Burdette. Later Grievant stated she did not remember whether she touched Ms. Burdette or not. These exchanges demonstrate Grievant was repeatedly untruthful, as well as evasive, under oath. The only reason Grievant could come up with for everyone lying was that there were rumors, and Mr. Sigman did not like her. When asked whether Mr. Salser's testimony was truthful, or was he making it up, Grievant's response was, "I don't think Dwight was making anything up, but I'm not sure that Joyce went to him." Level II Trans. at 431. Grievant could not think of any other reason why so many people would lie other than they had all heard rumors.

As for the testimony of Ms. Burdette, it is clear she was very angry about being called to the Level IV hearing, she was embarrassed by the rumors about her

sexualorientation, and she "just wants it all to go away." Her demeanor and attitude toward the action was hostile, she was motivated to say whatever would stop the rumors and involvement, she never wanted to get Grievant in any trouble, and she and Grievant are still friends to the point that they talk on the phone, and Ms. Burdette still has a key to her house. Thus, her testimony at hearing is viewed as questionable, especially in light of the testimony of numerous witnesses to the contrary. Additionally, her testimony does not match what she is reported to have told numerous people.

D. Hearsay

The testimony of the numerous witnesses about what Ms. Burdette told them is obviously hearsay, but relevant hearsay is admissible in administrative hearings. Gunnells v. Logan County Bd. of Educ., Docket No. 97-23-055 (Dec. 9, 1997). See W. Va. Code §18-29-6. The key question is whether these statements are credible, and what weight, if any, to give this testimony.

In Borninkhof v. Department of Justice, 5 MSBP 150 (1981), the Merit Systems Protection Board identified several factors that affect the weight hearsay evidence should be accorded. These factors are: 1) the availability of persons with first hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements canbe found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. Id.; Sinsel v. Harrision County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996); Perdue, supra; Seddon v. W. Va. Dept. of Health/Kanawha-Charleston Health Dept.,

Docket No. 90-8-115 (June 8, 1990).

All of the written statements are signed, and many signatures follow a statement which states "I certify that the facts contained herein are true and correct." Some are witnessed. Most of the signed statements were later affirmed during sworn testimony, and the contents were repeated and clarified under cross-examination. The content of the verbal testimony and written statements were internally consistent as well as consistent with the statements of others. Grievant could offer no reason why the witnesses would lie or make up stories about her. (See footnote 26) The witnesses viewed by the Administrative Law Judge did not appear untruthful or hostile toward Grievant, nor was any evidence of hostility or untruthfulness apparent from the Level II Transcript. Accordingly, given the above discussion, the undersigned Administrative Law Judge finds the hearsay testimony to be credible.

E. Merits of the Charges

The next step is to discuss the merits of the charges against Grievant, and to decide whether WVSC has met its burden of proving the charges against Grievant. "Disciplinary action, including suspension or dismissal, may be taken immediately whenever an employee's conduct interferes with the orderly operation of his/her unit oris contrary to WVSC policies, Board policies, or state, federal or local laws." G. Ex. 1, Level IV, WVSC Staff Handbook at 31. Immediate disciplinary action is taken "whenever the conduct of the staff member interferes with the operation of the staff member's unit or brings discredit to the College." Id. at 32. The employees supervisor has the right to recommend discipline for "just cause." Id.

Grievant was basically charged with gross misconduct and failure to follow numerous Department rules and regulations. Gross misconduct can be broken down into a number of specific charges. See Graley v. W. Va. Parkways Economic Dev. and Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991). The "term

gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." Id. at 41,(citing Buskirk v. Civil Serv. Comm'n, 175 W.Va. 279, 332 S.E.2d 579 (1985)); Blake v. Civil Service Comm'n, 172 S.E.2d 711, 310 S.E.2d 472 (1983). The charges against Grievant fall into a variety of categories of gross misconduct which include: insubordination, threatening behavior, dishonesty, and failure to follow the expected behavior of a supervisory officer.

1. Insubordination

This Grievance Board has previously recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It also involves a flagrant or willful disregard for implied directions of an employer." Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988), citing Weber v.Buncombe County Bd. of Educ., 266 S.E.2d 42 (N.C. 1980). In Sexton, the Administrative Law Judge noted that insubordination had been shown through an employee's "blatant disregard for the authority" of his second-level supervisor. Sexton, supra at 10.

An employee's belief that management's decisions are incorrect or the result of incompetence, absent a threat to the employee's health and safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. See Parker v. W. Va. Dept. of Health and Human Resources, Docket No. 97-HHR-042B (Sept. 30, 1997). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990) (citing Meads v. Veterans' Admin., 36 M.S.P.R. 374 (1988)). Additionally, an employer has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and

authority . . .". McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992) (citing In re Burton Mfg. Co., 82 L.A. 1228 (Feb. 2, 1984)). There are few defenses to the charge of insubordination. Hundley v. W. Va. Div. of Corrections, Docket No. 96-CORR-399 (Oct. 27, 1997); See, e.g., Surber v. Mingo County Bd. of Educ., Docket No. 96-29-015 (Dec. 30, 1996). Essentially, what an employer must demonstrate to substantiate the insubordination, is that the employee was given an order, directive, or rule, which did not entailunnecessary physical risk to himself or other employees, and the employee failed to comply. Hundley, supra. (See footnote 27)

Grievant knew that physical altercations between employees were not allowed. Indeed, as a member of DPS, she could be called to break up such a fight or confrontation. Her job was to protect the rights of the people on Campus. Grievant was to conduct herself as a professional at all times, and to not allow personal feelings to affect her performance on the job.

Grievant also knew that all incidents of physical altercations were to be reported or "written up" in her daily log. The purpose of the daily log was to record all of her shift activities. Unfortunately for Grievant, this reporting of significant incidents would include the physical altercation between herself and Ms. Burdette. Failure to record and report this incident was against the rules. See Attachs. to Due Process and Termination Letters. Other officers had received disciplinary action for this behavior. Grievant's failure to follow these well-known rules and regulations constitutes insubordination.

2. Threatening behavior

Threatening behavior toward supervisors and co-workers is unacceptable in the work place. See Kessler v. W. Va. Dept. of Transp., Docket No. 94-DOH-490 (June 30, 1997); Grueser v. W. Va. State Bd. of Rehabilitation, Docket No. 95-RS-084 (June 29, 1995); Payne v. W. Va. Dept. of Transp., Docket No. 93-DOH-454

(Apr. 29, 1994). Threats may be covert or overt and include remarks threatening physical, mental, and reputational damage. Profane and threatening statements are seen to constitute insubordination and "tend to undermine the authority of a supervisor [when] made in apparent defiance of prior directives . . .". Grueser, supra.

Grievant threatened, on campus, to shoot Ms. Burdette, bash Ms. Brown's face in, and to send pictures and video-tapes of a damaging nature to Mr. Sigman's wife. She indicated to another employee while on Campus that she would like to throw Mr. Sigman off a tall building. Additionally, Grievant called Ms. Burdette repeatedly from Campus, and Ms. Burdette described these call as harassing. By her actions, Grievant covered all the forms of threatening behavior listed above, in that she threatened mental, physical, and reputational harm.

3. Dishonesty and Fraud

WVSC also charged Grievant with dishonesty and fraud in her failure to report the October 12, 1996 incident, and her failure to admit the incident when it was brought to her attention. Clearly, an employer has the right to expect an employee to perform his duties in an honest and forthright manner. See Coster v. Div. Of Corrections, Docket No. 94-CORR-600 (Aug. 12, 1996). An employer can expect its employees to interact with their co-workers and supervisors in a truthful manner. Alaeddini v. Div. Of Envtl. Protection/Office of Air Quality, Docket Nos. 95-DEP-450/580 (Jan. 28, 1998). Grievant was dishonest when she did not document the October 12, 1996 incident , and when she later described the incident to Director Flores.

4. Failure to follow behavior expected for an officer and supervisor One of the clearest examples of gross misconduct by Grievant is her informing the individuals suspected of drug dealing that they were under investigation. This behavior certainly indicates "a willful disregard of the employer's interest or a

wanton disregard of standards of behavior which the employer has a right to expect of its employees." Buskirk, supra.

Additionally, according to the rules and regulations for DPS, an officer is expected to preserve the peace, protect liberty and property, and protect the civil and constitutional rights of all. Force is only to be used when necessary, and a supervisory officer is to set the example for the rest of the department to follow. See Attachments to Termination and Due Process letters. Clearly, Grievant did not follow these rules and regulations.

Grievant has raised several affirmative defenses to her termination. She alleges retaliation and sexual discrimination.

F. Retaliation

Grievant has alleged the lengthy investigation and her subsequent termination were the result of reprisal or retaliation for filing her previous Human Rights Commission complaint in 1993, as well as her grievance filed on November 18, 1996.

Reprisal is defined in W. Va. Code § 18-29-2(o) as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;

2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

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

4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989) and Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Gruen v. Bd. of Directors/Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997). If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra. (See footnote 28)

Grievant has failed to establish a prima facie case of reprisal on the issue of filing a Human Rights Complaint. Although Grievant met the first three prongs of thetest, in that she filed a complaint, her employer knew about it, and she was later treated in an adverse manner, she has failed to meet the last two prongs of the test.

Grievant filed and withdrew this complaint in 1993, as resolved, three years before her termination. See Vickers I. Grievant's termination, "the adverse action" did not follow "within such a period of time that retaliatory motivation can be inferred." Between the time of the filing of this complaint and the discharge, no disciplinary action was taken against Grievant.

As to the grievance, this question is a closer call. Grievant did not file her

grievance on sexual discrimination until mid-November 1996. This filing was after the time in October 21-22, 1996, when Director Flores discussed the situation with his supervisor, told him he had sufficient information to prove misconduct, and received permission to conduct a full scale investigation. This action was also after Grievant's discussions with Director Flores on October 16, and 23, 1996. At the October 23, 1996 meeting she was informed of the initial charges surrounding the altercation with Ms. Burdette and her threats toward Mr. Sigman. However, this filing was before her termination, and Grievant's termination followed shortly after her filing. Given this state of affairs, the undersigned Administrative Law Judge finds Grievant has established a prima facie case of reprisal, and the burden shifts to Respondent to rebut the presumption of retaliation.

Respondent has proven legitimate, non-retaliatory reasons for the adverse action. It has proven the charges against Grievant and demonstrated she was guilty ofgross misconduct, and behavior unbecoming of an officer. Grievant did not demonstrate these reasons were pretextual.

G. Discrimination

Grievant alleges discrimination saying she was treated differently because of her gender. W. Va. Code §18-29-2(m) defines discrimination as "differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing."

To prove discrimination a grievant must establish a prima facie case which consists of demonstrating:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated [to] actual job responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

If a grievant establishes a prima facie case, a presumption of discrimination exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, a grievant may still prevail if she can demonstrate the reason given by the respondent was pretextual. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievant has failed to establishes a prima facie case of discrimination and demonstrate she was treated differently than other similarly situated employees. Although she gave numerous examples of the shortcomings of other officers, and demonstrated they received a lesser penalty than she, she did not demonstrate that they were supervisors, or that their behavior was as egregious and as continuous as hers. A previous Sergeant was dismissed for threatening a student, another officer was terminated for accepting a challenge to fight a student, and another officer was dismissed for sleeping on the job. (See footnote 29)

H. Appropriateness of the penalty

Grievant, while not accepting that she did anything wrong, questioned the severity of the penalty if she was found guilty of any or all of the charges against her. The appropriateness of a penalty is not a mere factual determination. Douglass v. Veterans Administration, 5 M.S.P.B. 280 (1981) Such a decision "involves not only an ascertainment of the factual circumstances surrounding the violations but also the application of administrative judgment and discretion." Id., (citing Kulkin v. Bergland, 626 F.2d 181, 185 (1st. Cir. 1980); Beall Const. Co. v.

OSHRC, 507 F.2d 1041, 1046 (8th Cir. 1974)); See Overbee v. W.Va. Dept. of Health and Human Resources, 96- HHR-183 (Oct. 3, 1996). Because the imposition of a penalty results from an employer's administrative exercise of discretion, the action could be the result of arbitrary and capricious decision-making, an abuse of discretion. See, Thompson v. U.S. Postal Service, 596 F. Supp. 628 (D.C. Va. 1984). Grievant was charged with gross misconduct, and WVSC proved Grievant's behavior was egregious and constituted gross misconduct. Grievant threatened multiple individuals, failed to follow known orders, informed alleged drug dealers they were being investigated, and engaged in a physical confrontation with a fellow employee while she was on duty and the shift supervisor. Grievant was the third ranking officer, and as such, she is held to a higher standard and is to serve as a role model. Grievant's behavior showed a complete disregard for the minimal standards of performance and competency expected of those individuals employed within the field of law enforcement. Further, her actions of threatening the safety of a co-worker, revealing confidential information, and failing to follow the rules and regulations, violated the Code of Ethics adopted by the College's Security Department and also the Department's rules and regulations set forth in its operating procedures.

The question as to whether Grievant's conduct could be classified as gross misconduct is not a close one. By the very nature of Grievant's actions, she demonstrated a contempt for her position and for the authority which her position is intended to convey to those she is to serve. It is inappropriate for a law enforcement officer to threaten the safety and welfare of individuals, whom the officer is sworn to protect, because of personal problems. A detailed discussion concerning the specific policies and DPS Code Sections which Grievant is said to have violated is unnecessary for purposes of this decision. It is sufficient to find that WVSC has proven Grievant engaged in misconduct of a substantial nature

justifying her dismissal, and that its decision to dismiss her was not arbitrary or capricious. The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989).

2. "Disciplinary action [at WVSC], including suspension or dismissal, may be taken immediately whenever an employee's conduct interferes with the orderly operation of his/her unit or is contrary to WVSC policies, Board policies, or state, federal or local laws." G. Ex. 1, Level IV, WVSC Staff Handbook at 31. Immediate disciplinary action is taken "whenever the conduct of the staff member interferes with the operation of the staff member's unit or brings discredit to the College." Id. at 32. The employee's supervisor has the right to recommend discipline for "just cause." Id.

3. The "term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." Graley v. W. Va. Parkways Economic Dev. and Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

4. Respondent has met its burden and established Grievant was guilty of gross misconduct when she revealed confidential information, threatened co-workers, engaged in a physical altercation with a co-worker, and failed to follow WVSC's rulesand regulations. These actions were of a sufficient nature that termination was the appropriate disciplinary action.

5. Reprisal is defined in W. Va. Code § 18-29-2(o) as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it."

6. To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;

2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

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

4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989) and Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Gruen v. Bd. of Directors/Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997). If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may thenestablish by a preponderance of the evidence that the offered

reasons are merely pretextual. Webb, supra.

7. Grievant did not establish a prima facie case of retaliation on the issue of the Human Right Commission complaint.

8. Grievant established a prima facie case of retaliation on the issue of the grievance filed on gender discrimination.

9. Respondent established a legitimate, nondiscriminatory reason for the adverse action of termination taken against Grievant. .

10. Grievant alleges discrimination saying she was treated differently because of her gender. W. Va. Code §18-29-2(m) defines discrimination as "differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing."

11. To prove discrimination a grievant must establish a prima facie case which consists of demonstrating:

> **(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);**
>
> **(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;**

and,

> **(c) that such differences were unrelated [to] actual job responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.**

If a grievant establishes a prima facie case, a presumption of discrimination exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reasonfor the action. However, a grievant may still prevail if she

can demonstrate the reason given by the respondent was pretextual. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

12. Grievant has not established a prima facie case of gender discrimination.

13. In Wirt v. Board of Education of County of Mercer, 192 W. Va. 568, 453 S.E.2d 402 (1994), the Supreme Court of Appeals of West Virginia cited to Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed. 494 (1985), and held that a tenured public employee is entitled to a pre-termination hearing. See Kern v. Wayne County Bd. of Educ., Docket No. 95-50-26 (Mar. 27, 1996).

14. This pretermination hearing need not be:

> a full adversarial evidentiary hearing; however, an employee is entitled to a written notice of the charges, an explanation of the evidence, and an opportunity to respond prior to a Board of Education's decision to terminate the employee. Waite at 575.

15. Grievant was afforded proper due process, including an attempt by WVSC to hold a pretermination hearing. Respondent did not infringe on Grievant's property and liberty interests, and her notice on the charges against her was sufficient.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha 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 shouldnot 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.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: August 7, 1998

Footnote: 1

Grievant had also filed another grievance alleging gender discrimination on November 18, 1996, prior to filing this grievance on January 9, 1997. These two grievances were heard together both at Levels II and IV at the parties' request. However, these were viewed as two separate grievances throughout the proceedings, they had different burdens of proof, and they have been ruled on separately. See Vickers v. Bd. of Directors/W. Va. State College, Docket No. 97-BOD-112A (June 25, 1998). Vickers I.

Footnote: 2

Respondent was represented by Assistant Attorney General Andrew Dimlich.

Footnote: 3

Grievant cited W. Va. Code §§ 5-11-2,3(h), & 9(1) (Statutes pertaining to the Human Rights Commission) as law relating to her grievance. Additionally, Grievant requested the relief available in W. Va. Code §§ 21-5-4(b) &12(b) (Wage and Payment Statutes). At Level IV, the undersigned Administrative Law Judge clarified that the only issues which could be dealt with in the grievance procedure were the ones which fell under this Board's statutory jurisdiction. Thus, issues of gender discrimination, wrongful termination, and due process violations could be grieved, but relief available through other agencies would not be available in the grievance procedure.

Footnote: 4

This issue was not addressed at Level IV, thus, it is deemed abandoned.

Footnote: 5

This issue was not addressed at Level IV, thus, it is deemed abandoned.

Footnote: 6

As previously stated, the grievance dealing with various other allegations of gender discrimination were discussed in Vickers I. The issue of gender discrimination as it relates to Grievant's discharge will, of course, be addressed in this Decision. See n. 1 supra.

Footnote: 7

Due to the broader definition of discrimination contained in W. Va. Code § 18-29- 2(m) it is not necessary to

analyze Grievant's claim of gender discrimination under either the Human Rights Act or Title VII, as such claims are subsumed by the W. Va. Code § 18- 29-2(m) claim. See Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995). However, it is noted these are statutes under which Grievant works as defined in the grievance procedure for education employees. W. Va. Code §18-29-2(m). See Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R- 215 (Sept. 24, 1996). See generally Belcher v. W. Va. Dept. of Transp., Docket No. 94-DOH-341 (Apr. 27, 1995).

Footnote: 8

The acts of discrimination complained of in "a-d" were dealt with in Vickers I.

Footnote: 9

Although this issue was discussed at the Level IV hearing, Grievant did not state how this issue, even if proven, would effect the outcome of her termination grievance. Thus, this area will not be discussed as it is not pertinent to the outcome of this grievance.

Footnote: 10

Grievant's attorney was informed that the only relief available in the grievance procedure is that relief specified in the grievance statutes, thus no monetary awards were typically available other than back pay with interest.

Footnote: 11

See Finding of Fact 21.

Footnote: 12

See n. 12, infra.

Footnote: 13

Nothing in the record indicates the date or time of the pretermination hearing was unacceptable to Grievant or her attorney.

Footnote: 14

The correct date was the 21st.

Footnote: 15

This list appears to be Attachment 1 referred to in both letters.

Footnote: 16

The Level II Hearing Examiner found this charge to be unproven, thus, this issue is not before the undersigned Administrative Law Judge.

Footnote: 17

The undersigned Administrative Law Judge finds this charge was not proven.

Footnote: 18

Grievant was told by several people that she would be fired when Director Flores returned to work after his surgery, because she had completed his job so ably during his absence. Director Flores returned to work in September 1996. Grievant was not the ranking officer in charge during Director Flores absence as she was the Sergeant, but she competently assumed many of the administrative and paperwork duties in his absence.

Footnote: 19

The investigative report notes that Emma Thornton, Building Service Employee, saw Grievant and Ms. Burdette arguing in her car just prior to this event. The report states Ms. Thompson made a verbal statement to Director Flores, and later signed a written statement. This written statement was not included in the Attachments.

Footnote: 20

At hearing Grievant stated she did not have these tapes, but she indicated she was aware of them. No questions were asked of Grievant if she had ever had them or where they might be at the present time.

Footnote: 21

He directed Director Flores to Howard House, a BSW, for confirmation of these arguments. Mr. House declined to comment. He indicated he was getting ready to retire, did not want to rock the boat, and noted Grievant carried a gun. Resp. 5 at VI. 3.

Footnote: 22

Grievant requested to use annual leave instead, and this request was initially granted.

Footnote: 23

Mr. Edens was unable to attend the hearing because he is seriously ill and is awaiting a bone marrow transplant.

Footnote: 24

The date in this statement of the incident is incorrectly listed as November instead on October.

Footnote: 25

As revealed in the previous Findings of Fact, the issue of credibility has been resolved against Grievant on the majority of the issues.

Footnote: 26

See the above discussion about credibility.

Footnote: 27

If an employee wishes to question the legality of an order, he must do so after compliance. See Surber, supra.

Footnote: 28

It is understood that filing a Human Rights complaint is not a grievance as defined in W.Va. Code § 18-29-2(o), but this action is covered under the test identified in Frank's Shoe Store, supra, i.e., engaging in a protected activity. See also W.Va. Code §§ 5- 11-1, et seq.

Footnote: 29

Grievant made much of the fact that the sleeping officer was returned to duty through the grievance procedure with a suspension. It must be noted that this was not DPS's choice, and even the officer testified at this hearing that Director Flores was correct to fire him.