MARK HOLMES,

Grievant,

v. **Docket No. 99-BOD-216**

BOARD OF DIRECTORS/WEST VIRGINIA

STATE COLLEGE,

Respondent.

D E C I S I O N

Grievant, Mark Holmes, alleges he was improperly terminated by West Virginia State College ("WVSC") and explains in his Statement of Grievance:

> This termination is unwarranted; The termination supersedes a request made known by grievance prior to intent of termination; Terms and reasons for termination are misapplied and misinterpreted in content and presentation. This act is unlawful by poor judgement and review.
>
> RELIEF SOUGHT: Job reinstatement or transfer w/in the institution in a position of same pay grade and duties alike.

This grievance was denied at Levels I and II, and Grievant appealed to Level IV on May 27, 1999. A Level IV hearing was held on July 20, and 29, 1999. After several delays in the submission of the parties' proposed Findings of Fact and Conclusions of Law, this case became mature for decision on October 25, 1999, after receipt of Respondent's last reply brief. (See footnote 1)

Issues and Arguments

Because the initial Statement of Grievance was somewhat lacking in clarity, Grievant's attorney clarified this Statement of Grievance at Level II with the following comments, "We also allege that the grievance violates Mr. Holmes['] due process as

wellas the fact that there was improper notification of the . . and the severity of the action taken was not warranted by the circumstances." An additional request for "all back pay, as well and any funds that are owed as a result of unemployment" was added to the Relief Sought. At Level IV, this Statement of Grievance was further clarified as stating: 1) denial of due process of law, 2) failure to follow the proper steps to terminate an employee pursuant to the WVSC Handbook, and 3) retaliation for serving subpoenas for his mother's grievance hearing. (See footnote 2) The argument concerning denial of due process stems from Respondent's alleged failure to respond to a grievance filed on December 1, 1998. Additionally, Grievant argues he received only one Letter of Warning, no Letter of Counseling, and no Improvement Plan with dates; thus, the proper steps were not taken to terminate his employment. Grievant also asserts Respondent owes him money for the time he worked with the Campus Gospel Choir.

Respondent maintains progressive discipline was followed in this case, and Grievant was terminated for continued failure to report to work and maintain consistent work habits, persistence in working on unrelated personal tasks, and failure to attend scheduled activities (See footnote 3) , as well as general poor job performance. Respondent also cited Grievant's continuing refusal to comply with rules and regulations set forth by WVSC and the Office of Student Affairs, and noted Grievant failed to maintain job performance standards, wasfrequently absent or late to work, and was disobedient when he failed to follow his supervisor's directives. Respondent maintains the evidence of Grievant's poor job performance and failure to follow orders is clear and supports the decision to terminate Grievant. Additionally, Respondent contends Grievant never was approved to be the Campus Choir Director, never had a contract to perform these duties for additional money, and that his assumption of this task was part of his 1998 goals and strategies as Program Coordinator. Respondent asserts there was no violation of Grievant's due process rights, and Grievant has been properly terminated.

Findings of Fact

1. Grievant was hired as Program Coordinator in the Office of Student Affairs in July 1996. The Program Coordinator is to plan, coordinate, and implement multiple activities for the students of WVSC. He is expected to be in attendance before the activity starts and to assist with closing the activity. This individual is expected to work well with a variety of people including professional staff, faculty, service personnel, and students.

2. On July 7, 1997, Grievant was issued a Letter of Warning by his supervisor, Joe Oden, (See footnote 4) Interim Director of Student Affairs, for engaging in a shouting match with a fellow staff member. Mr. Oden noted this was not the first time Grievant had engaged in unprofessional conduct, and he believed it was necessary to issue Grievant this written warning. Mr. Oden pointed out that the WVSC Staff Handbook stated, "Failure to maintain proper standards of conduct may lead to suspension and/or dismissal." Mr. Oden alsonoted the written warning would remain in Grievant's personnel file for six months, and that after two written warnings an employee could be discharged. This Letter of Warning was not grieved. Resp. Ex. No. 2, at Level IV.

3. Grievant received another Letter of Warning on October 9, 1997, for selling complimentary tickets to a school activity and failing to return a ticket stub to a student so he could obtain a refund. Mr. Oden noted Grievant's behavior was "inappropriate" and directed Grievant that such behavior was never to occur again. This Letter of Warning was not grieved. Resp. Ex. No. 2, at Level IV.

4. On April 21, 1998, Grievant received a Letter of Counseling from Mr. Oden. (See footnote 5) Mr. Oden made the following statements and identified the following problem areas: 1) "It is imperative that you adhere to the scheduled times that you are to be at work. . . . the consistency of you not being at work or during (sic) the understood times has become somewhat of a problem"; 2) "the need to complete assignments in a timely manner"; 3) need to review the schedule of activities for the remainder of the

semester; 4) need to develop a calendar of events; and 5) Grievant was directed not to page Mr. Oden at 1 a.m. any more, but to call before 11 p.m. or at 8:30 a.m. the following work morning. Resp. Ex. No. 29, at Level II. 5. Grievant did not grieve this Letter of Counseling, and Grievant's work habits improved for a while after he received this Letter of Counseling. (Test. Mr. Oden.)

6. On May 5, 1998, Grievant and Mr. Oden met to discuss Grievant's evaluation. Grievant was rated as "meets requirements" in all categories, but several comments were made which indicated the need for Grievant to change or modify certain behaviors. Grievant was instructed to pay closer attention to deadlines and to develop a calendar of activities. Grievant was also instructed to be more professional in his dealings with other employees and to remember "that there will always be constructive criticism." Mr. Oden noted Grievant needed to grow in the area of Student Affairs and Student Activities and needed to seek out ways for self improvement in these areas. In the section of the evaluation form outlining a plan to develop skills and approaches for problem areas, Mr. Oden indicated "[Grievant] has a problem with tardiness and maintaining consistent work habits", Mr. Oden noted Grievant had "many irons in the fire" and recommended a study of time management skills to help Grievant in this area.

7. Grievant did not grieve this evaluation, but on that same day wrote a letter to be included with this evaluation reflecting his strong disagreement. (See footnote 6) Grievant noted several areas where he believed his performance exceeded expectations, and observed what he did in his personal life was no concern of the institution, as long as he met his work expectations. Grievant also mentioned he had reduced costs, organized new activities,and related well to the students. He stated he would be available to discuss this letter at any time. Resp. Ex. No. 31, at Level II.

8. Mr. Oden did not discuss this letter with Grievant, but attached it to the 1997-1998 evaluation, as he said he would.

9. On May 7, 1998, Mr. Oden addressed a letter to his staff stating he had been

notified that a letter with a College Union/Student Activities envelope and dealing with personal matters of Gloria Holmes (Grievant's mother) was delivered to various campus offices. Mr. Oden noted Ms. Holmes was not an employee of Student Affairs, the envelopes were expensive, and the postage would be incurred by the College Union. Staff were directed to not use college property for personal use. Resp. Ex. No. 32, at Level II. 10. Apparently sometime in the Spring of 1998, there was a discussion among several administrators about starting a Campus Gospel Choir. Grievant was included in these discussions, as he had skills in this area. It was believed Grievant's expertise would be helpful in selecting a Choir Director. Grievant wanted to be the Choir Director. In his goals and strategies for the 1998-1999 school year, Grievant identified this task as one of his goals, as well as starting an African dance troupe. Grievant was given permission to research the information and process needed for the Campus Gospel Choir. (Test. Mr. Oden.)

11. On July 20, 1998, Grievant presented a proposal for a Campus Gospel Choir to Mr. Oden. In this proposal Grievant recommended the Choir Director receive a salary of $5,000.00 for directing the choir for seven months. This proposal does not indicate Grievant would be the Director, but testimony from Grievant and Mr. Oden indicatesGrievant wanted to be the Choir Director and receive the compensation. Grt. Ex. No. 19, at Level II.

12. Mr. Oden informed Grievant he could not be compensated from the Student Affairs budget for an additional contract, that this type of arrangement would cause difficulty with his Job Description, and that employees were not additionally compensated for their goals and strategies.

13. Grievant was not given a separate contract for $5,000.00 to perform the duties of the Choir Director, and there was no intention to do so. (See footnote 7)

14. On September 3, 1998, Grievant had students sign up for the Campus Gospel Choir. Although the dates for practices changed several times, the group did

practice for a while. The Choir was to sing during Black History month, but Grievant gave the students the wrong time to come, and the performance did not take place. (See footnote 8) Further, the group was to perform another time in the Spring, but this event did not take place. Thus, although the group did perform a few places off campus, the Campus Gospel Choir never performed at WVSC. Performing at various campus events was one of the main reasons campus administrators wanted the program started. Grievant was aware of this desire on the part of campus administrators.

15. Grievant was not compensated for his work with the Campus Gospel Choir. 16. On March 12, 1999, Grievant wrote Dr. Griffin stating he had placed the Campus Gospel Choir on sabbatical as of January 17, 1999, and the last practice had been December 3, 1998. He noted the choir had practiced every Friday and every other Saturday. (See footnote 9) Grievant requested payment of $1,000.00 for his work during the Fall semester, and noted that this payment was "an enormous discount" from his prior proposal.

17. Grievant did not receive this compensation.

18. Grievant, with the assistance of the Student Affairs Administrative Secretary, Belinda Fuller, (See footnote 10) and work study students, prepared the Fall 1998 calendar as directed by Mr. Oden. A review of this calendar demonstrates that there were many activities planned for September and October, but very few planned for November and the first of December. The Spring calendar demonstrates the same lack of activities for the last six weeks of the semester.

19. On September 8, 1998, a student, RH, complained to a college counselor, Wanda Cox, that he had been sexually harassed by Grievant on September 4, 1998, and afterward Grievant gave him money. This sexual harassment occurred during a scheduled activity Grievant was directing. Ms. Cox believed RH, and took him to see Ervin Griffin, Vice President for Student Affairs. Dr. Griffin directed RH to reduce his complaint to writing, which he did, and Dr. Griffin appointed Mr. Oden and Mr. Orlando

Lewis, AssistantVice President for Student Affairs, to investigate the complaint. (See footnote 11) Resp. Ex. No. 46, at Level II.

20. Grievant came as requested to Dr. Griffin's office on September 8, 1998, and was informed of the sexual harassment complaint against him, and that he was alleged to have placed his hand down the pants of RH while they were alone on the stairs after going to the Student Affairs Office. Grievant was allowed to read a copy of RH's complaint. (See footnote 12) Grievant informed the administrators in the meeting that he believed he was being "set-up" by them. He later apologized for this allegation. Grt. Ex. No. 5, at Level II; Resp. Ex. No. 47, at Level II.

21. Grievant, as directed by Dr. Griffin, submitted his response to the allegation, and also alleged a complaint against RH for "assassination and deformation (sic) of character". Grt. Ex. No. 5, at Level II; Resp. Ex. No. 47, at Level II. Grievant's response stated RH had shared his problems with his ex-girlfriend with Grievant, and Grievant had later that same evening attempted to intervene in the situation and reconcile the couple.

22. Sometime in mid-September, a student worker, Royal Jones, who was also working at the activity where the alleged sexual harassment had taken place, gave a verbalstatement to Mr. Oden and Mr. Lewis. This statement indicated Grievant had taken the keys to the Student Affairs Office at one point and had left the activity area. (See footnote 13) Ms. Jones also confirmed many of the complaints Mr. Oden had raised with Grievant during his tenure, such as not arriving on time, not returning pages and calls, and not planning in sufficient detail to assure that a planned activity would be executed correctly.

23. In their conclusions of their investigative findings, Mr. Oden and Mr. Lewis reported that Grievant did commit the act of sexual harassment, and recommended Grievant be disciplined.

24. Any individual found guilty of sexual harassment "shall be subject to severance from his/her relationship with the college." Resp. Ex. No. 54, at Level II, page

29 (WVSC Staff Handbook). 25. After a review of all the evidence, and upon advice of counsel, Dr. Griffin decided the findings would not support dismissal, as it was one person's word against another. However, the investigative team and Dr. Griffin believed something inappropriate had happened.

26. On October 23, 1998, Mr. Oden, Mr. Lewis, and Dr. Griffin met with Grievant to discuss the findings. Grievant was handed a Letter of Warning, signed by Dr. Griffin, which stated "there was certainly some 'inappropriate behavior' on the part of you in your relationship with [RH]." Dr. Griffin verbally told Grievant what the inappropriate behavior was, putting his hand down RH's pants, and offered Grievant the opportunity to attend the Employee Assistance Program for counseling. Dr. Griffin stated he had "accepted the recommendation that you be reprimanded for failure to maintain proper standards of conduct in this matter" and further stated that "if there are any further incidents of 'inappropriate behavior' you would be subject to immediate dismissal." This Letter of Warning (See footnote 14) further stated "other forms of misconduct or failure to maintain proper standards of performance also have a cumulative effect and may lead to dismissal." (See footnote 15) Resp. Ex. No. 48, at Level II. 26. Grievant did not grieve this letter, and did not seek assistance from the Employee Assistance Program.

27. Grievant's complaint against RH was never separately addressed.

28. Sometime during the early Fall, Grievant was out with illness. Before he left he forgot to tell Mr. Oden that an adult was required to ride on the Kanawha County School bus that had been hired for the activity. As a result, no adult rode with the student passengers, damage occurred, and WVSC is no longer allowed to use these buses for transportation.

29. Sometime in September 1998, Dr. Griffin sent Grievant a notice about a conference which addressed a number of issues which related to WVSC students. Dr. Griffin requested Grievant to look into attending with some students. This conference was to be held in Philadelphia, Washington, D.C., and Los Angeles. Grievant's schedule

did not fit with the timing of the two closer conferences, so he began making plans to attend the conference in Los Angeles.

30. Dr. Griffin's expectation is that when he sends something of interest to an employee he does not directly supervise, the employee will take the issue to his direct supervisor and discuss it.

31. Grievant did not discuss the conference with Mr. Oden.

32. Later, Grievant had a brief discussion with Dr. Griffin about his plans to attend the conference in Los Angeles. Dr. Griffin had questions about this.

33. On September 21, 1998, Grievant sent a memorandum to Dr. Griffin detailing the cost of travel to California, and explaining how he was able to receive a cheap airlinerate and registration that must be confirmed by October 8, 1998. This cheap airline fee required the participants to fly out of Columbus, Ohio. Resp. Ex. No. 37, Level II.

34. Dr. Griffin responded with a handwritten note at the top of this memo stating, "I cannot support California _ D.C. conference in December 3-4, 1998." Dr. Griffin also noted Grievant's assumption about the funding for this trip was "wrong". These notations were not dated. Resp. Ex. No. 37, Level II.

35. At no time did Dr. Griffin approve Grievant's attendance at the Los Angeles conference, and Grievant's testimony to the contrary is incorrect.

36. MEE, the Conference planner, asked for some documentation from Grievant about WVSC, and asked that this information be signed by an administrator.

37. On October 8, 1998, Grievant drafted a letter for Dr. Griffin's signature to MEE. This letter did <u>not</u> state which conference Grievant would be attending. Dr. Griffin made changes in the letter, and informed Grievant he needed to get Mr. Lewis to sign the letter when it was corrected. Resp. Ex. No. 39, Level II.

38. Mr. Lewis did not sign this letter, but it was faxed to MEE by Grievant on October 8, 1998. Resp. Ex. No. 39, Level II.

39. Also on October 8, 1998, Grievant sent a letter to MEE attaching a purchase

order to pay for registration. Resp. Ex. No. 38, Level II.

40. On October 9, 1998, Grievant wrote MEE thanking them for the discount in the registration and accommodations. Resp. Ex. No. 40, Level II.

41. On or about October 9, 1998, Mr. Oden found out about the California plane reservations by accident. 42. On or about October 12,1998, a Monday, Mr. Oden asked Ms. Fuller what was going on, and she told him about the California conference. Mr. Oden was unable to discuss the situation with Grievant, as Grievant did not work on Mondays.

43. Mr. Oden discussed the conference with Grievant on October 13, 1998. Grievant informed Mr. Oden that Dr. Griffin had approved the conference in California. Mr. Oden called Dr. Griffin and was informed Dr. Griffin had not done so, but wanted Grievant to attend the D. C. conference, and approval was to come from Grievant's direct supervisor, Mr. Oden. Grievant asked Mr. Oden's approval to attend the California conference, and this request was denied. Grt. Ex. No. 41, at Level II.

44. Grievant wrote Mr. Oden on October 14, 1998, asking Mr. Oden to reconsider his decision to cancel the trip. Resp. Ex. No. 41, at Level II. Mr. Oden later wrote Grievant explaining that he had not canceled the trip, but he had not authorized the trip. Resp. Ex. No. 43, at Level II.

45. Grievant's poor work performance continued. He was late with reports, requested "comp" time at the last minute, (See footnote 16) did not properly complete the forms for "set- ups," (See footnote 17) came to work late, left events early, and did not follow directions given to him by Mr.Oden. Some events had to be canceled as the result of poor planning, and some were poorly attended due to Grievant's continued failure to put up fliers, and some activities were poorly executed.

46. Mr. Oden frequently discussed problem areas with Grievant. These were not conducted as formal counseling discussions, but were short meetings when Grievant was directed to take some action or correct a problem such as fix the bulletin boards or

make sure he was at a certain function ahead of time.

47. On November 30, 1998, Mr. Oden wrote Grievant a Letter of Warning which detailed multiple problems with Grievant's performance. This Letter of Warning also included nine specific points where improvement was needed. This Letter of Warning also stated that "[f]ailure to adhere to these stated responsibilities and areas of concern may result in a recommendation for dismissal." Resp. Ex. No. 50, at Level II.

48. Specific points or bullets were attached to this Letter of Warning. These points stated: 1) "Provide Director with a copy of student assistants work schedules and contact #'s"; 2) "Conduct business not related to WVSC outside of scheduled work hours when at all possible"; 3) "Keep scheduled office hours during the entire workweek"; 4) "Plan, execute, and attend scheduled activities"; 5) "Notify office in a timely manner of any and all changes to work schedule"; 6) "Have all spending from student activities budget pre-approved by the Director of Student Activities"; 7) "Maintain assigned bulletin boards in the College Union and Ferrell Hall"; (See footnote 18) 8) "Attend all staff meetings and/or schedule aone-on-one conference with the Director of Student Activities to ensure that he know plans on a weekly basis"; and 8) "Keep pager on and operating at all times to ensure that office can contact you with pertinent information." (See footnote 19)

49. Grievant did not believe the listed areas were problems for him. (Test. Grievant - Level IV.)

50. Other employees at work occasionally arrived late to work, but Grievant was so frequently late to work that Mr. Jeff Miller, Assistant Director of the College Union and Student Affairs, gave Grievant the password of "always late " as his E-Mail name.

51. Other employees at work occasionally worked on personal material at work, but not a frequently or as consistently as Grievant. This work of the other employees had not been found by Mr. Oden to interfere with their assigned duties.

52. After this November 30, 1999 Letter of Warning, Grievant did turn in his reports more frequently, but they were usually late; thus, they were of little help to Mr.

Oden. (Test. Mr. Oden.)

53. Grievant wrote a letter to Mr. Oden indicating he was going to grieve this Letter of Warning. (See footnote 20) He gave a copy of this letter to Mr. Lewis and Dr. Griffin. 54. On December 2, 1998, Grievant went to Barbara Rowell, the Human Resources Director, and sought her advice. She advised him the first step of the grievance process was to have an informal conference with Mr. Oden. She indicated she would accompany him to this meeting, as an observer, if Grievant so desired. Grievant accepted Ms. Rowell's offer of assistance, and a meeting for December 8, 1998 was planned. (See footnote 21)

55. On December 2, 1998, when Grievant returned to the Student Affairs offices, he requested Ms. Fuller to "[b]ook Joey for a meeting on Tuesday, December 8, 1998 with myself, and Barbara Rowell. Upon finding an agreed time and suitable place, please contact Barbara Rowell with the scheduled time." Grt. Ex. No. 5, at Level II.

56. Ms. Fuller attempted to contact Ms. Rowell on December 8 and 9, 1998, but could not as she was not in her office due to illness. Ms. Fuller later wrote a short note to Grievant stating "is this the letter you have been referring to? I called Barbara on the 8th (morning) to schedule the meeting in the afternoon and she was out sick that day and if I can remember right I don't think she was there the next day either. (See footnote 22) I didn't remember until I saw this letter today." The second half of this yellow sticky note stated, "I did tell Joey about the meeting that day and he said OK with him just to let him know the time. You said you had to finish some things for the meeting and you would let me know when to reschedule - I never heard anything more about it." Grt.'s Ex. 2 at Level II. 57. Ms. Fuller testified that she did not tell Mr. Oden what the meeting was about. 58. Mr. Oden did not receive the letter from Grievant stating he was going to file a grievance.

59. Grievant never got back to Ms. Fuller to schedule an informal conference for his grievance, and thus, did not pursue his grievance.

60. In mid-February, Grievant complained to Mr. Lewis about Mr. Oden's behavior to him and stated he wanted to have a conference to work on these problems. (See footnote 23)

61. On or about March 8, 1999, Grievant took annual leave to serve subpoenas for his mother's Level IV grievance hearing. Grievant's mother had been employed by WVSC.

62. Mr. Lewis attempted to schedule a meeting with Mr. Oden and Grievant in early March, but could not as Mr. Oden was attending a school function from March 10 - 14.

63. Grievant continued to have problems in the areas previously identified. There were multiple problems associated with Black History Month, Grievant continued to conduct personal work at the office and with WVSC equipment; office hours were not maintained consistently; other activities were canceled or poorly executed; Grievant frequently failed to notify the office when he changed his work schedule; and still did notkeep his pager with him or did not keep it turned on. Grievant continued to arrive late to scheduled events or to leave early.

64. On March 16, 1999, Grievant was sent a letter notifying him of WVSC's intent to terminate him effective March 31, 1999. This letter stated that the most recent Letters of Warning and the Letter of Counseling had been given to him in an effort to "improve his work performance." The reasons given for his termination were "failure to work and maintain consistent work habits, persistence in working on unrelated personal tasks, and neglect of attendance at scheduled activities as well as general poor job performance." Grievant also failed to meet job performance standards, was continually absent from work, and disobedient. Resp. Ex. No. 21, at Level II.

65. Grievant filed a grievance on that same date, and a Level I conference was held on the same date. Resp. Ex. No. 23, at Level II.

66. By letter dated March 18, 1999, this grievance was denied. Grievant was

directed where to file his appeal. Resp. Ex. No. 23, at Level II.

67. On March 19, 1999, Mr. Oden again wrote Grievant noting the prior official notice of intent to terminate, and informing him that this letter was to serve as his final notification that his employment would be terminated on March 31, 1999.

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); Broughton v. W. Va. Div. of Highways, Docket No.92-DOH-325 (Dec. 31, 1992). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.; See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997). Thus, this grievance requires a determination of whether Respondent proved the charges upon which the dismissal was based.

In Grievant's termination letter, he was charged with "failure to work and maintain

consistent work habits, persistence in working on unrelated personal tasks, and neglect of attendance at scheduled activities as well as general poor job performance." Resp. Ex. No. 21, at Level II. Grievant also failed to meet job performance standards, was continually absent from work, and he exhibited disobedience in failing to follow his supervisors' orders. Id. Many of these charges can be seen as overlapping, and frequently the same set offacts can be applied to prove more than one charge. Given the focus of the letter, the key or main charges leveled against Grievant are the failure to follow his supervisor's directions and the failure to perform his job duties adequately.

The allegations against Grievant, and the defenses raised by him will be discussed one at a time. However, before these issues can be addressed the questions of credibility and hearsay testimony must be discussed.

A. Credibility

In order to decide whether WVSC has met its burden of proof, it is first necessary to resolve the issue of witness credibility. Where, as here, the existence or nonexistence of contested material facts hinges on witness' credibility, detailed findings of fact and explicit credibility determinations are required. Pine v. W. Va. Dep't of Health and Human Resources, Docket No. 95-HHR-066 (May 12, 1995). E.g., Davis v. Dep't of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 20, 1990).

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. Dep't 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 Systems 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 administrative law judge should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. Id.

The undersigned Administrative Law Judge had an opportunity to observe many of the witnesses and to review the written testimony of the witnesses at Level II, and found some to be more credible than others. It is noted that the majority of Grievant's testimony disagrees with the rest of the witnesses. It must also be considered that the majority of Mr. Oden's testimony was supported by the testimony of other witnesses. Almost all the witnesses confirmed some of the charges leveled at Grievant. Additionally, at times, Grievant's testimony and Respondent's witnesses' testimony appear to agree, but Grievant's perception and interpretation of the events was very different. For example, Grievant viewed the Letter of Counseling as notice of a new vice-president, not as a Letter of Counseling, and all witnesses agreed Mr. Oden's teenage niece came to Student Affairs to study outside the office, but only Grievant saw her presence as disruptive, or even noticeable. Further, some of Grievant's testimony was just not plausible or believable. Additionally, at times, Grievant's answers called his memory into question.

Grievant's responses would lead one to believe that either no problems occurred while he was the Program Director, or that any problems that occurred during his tenure were not his fault. His belief is that he offered quality programs that were well planned andexecuted, that no matter what the level of planning, things can go wrong and at times did, (See footnote 24) that the administration fired him because Mr. Oden was jealous of him because he was receiving his Master's degree while Mr. Oden had not completed

his, (See footnote 25) and because he handed out subpoenas for his mother's hearing.

Grievant's demeanor during the hearing was at times disruptive and counter-productive. See Maxey v. McDowell County Bd. of Educ., Docket No. 97-33-208 (Apr. 30, 1998); Graham v. Putnam County Bd. of Educ., Docket No. 99-40-206 (Aug. 30, 1999). The undersigned Administrative Law Judge had to direct Grievant to answer the question asked and to not speak in paragraphs and/or pages. Even his attorney frequently directed Grievant to "get to the point." Additionally, Grievant made faces at some of the witnesses when he disagreed with them, said during cross-examination he was tired, and was just not going to answer any more questions, and whispered loudly and frequently to his attorney throughout the proceedings. (See footnote 26) At times, Grievant's answers on key questions were evasive or non-responsive.

The witnesses' accounts of the incidents varied on specific points, as is typical of testimony, but the witnesses agreed on the majority of the key points of what happened in the office of Student Affairs during Grievant's tenure. Overall, the undersignedAdministrative Law Judge finds the majority of the testimony received from all witnesses to be truthful, with the exception of Grievant. The undersigned Administrative Law Judge generally finds Grievant's testimony to lack credibility.

It also should be noted that the testimony of Mr. Lewis was confusing, as he tended to confuse various dates and meetings that the parties had held. He did not appear to be untruthful, rather he appeared confused. His testimony was basically not supportive of either side. (See footnote 27) Occasionally, his testimony was very clear, and this testimony could be applied to the facts of this grievance.

B. Hearsay

The testimony of several witnesses, such as Ms. Jones and RH, 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 can be 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. Dep't of Health/Kanawha-Charleston Health Dep't, Docket No. 90-8-115 (June 8, 1990).

All of the written statements are signed. The statement of Ms. Jones confirmed many of the problems Mr. Oden had been discussing with Grievant for a long time, such as failure to arrive on time, unprofessional conduct with others, and failure to return phone calls and pages. Grievant noted Ms. Jones was biased toward him because he fired her. It should be noted this improper termination occurred after Ms. Jones gave a statement to the individuals investigating the sexual harassment complaint. It should also be noted that because of Grievant's failure to follow proper procedure, Mr. Oden did not find out about Ms. Jones' termination until much later. It would almost appear that Ms. Jones may have been terminated by Grievant as retaliation. Overall, the undersigned Administrative Law Judge finds the hearsay statement of Ms. Jones to be credible, and should be afforded some weight because it agrees with other testimony, and is in writing and signed.

As for the hearsay testimony of RH, his various statements are signed and are internally and externally consistent. His re-enactment of the events to Mr. Oden was clearand contain details that would be hard for RH to know if he had not been in the Student Affairs offices recently. This testimony is accepted as true, especially as Grievant was aware of the charge of inappropriate behavior against him contained in his Letter of Warning and did not grieve.

The next issues to address are Grievant's due process claims.

C. Due Process

1. Failure to respond to a grievance filed on December 1, 1999.

Grievant appears to raise due process issues in several ways. The first issue is whether Grievant's due process rights were violated when there was no response from Mr. Oden over the December 1, 1998 letter which informed Mr. Oden that Grievant was "forced to file a formal grievance against you" for the November 30, 1998 Letter of Warning.

The testimony on this issue could not be more contradictory. Grievant stated at Levels II and IV that he hand delivered the letter to Mr. Oden. Grievant also stated at Level I that he gave the grievance to Ms. Fuller. Grt. Ex. No. 37, at Level II. Mr. Oden testified he never saw the December 1, 1998 letter until the termination grievance was filed. Ms. Fuller stated she informed Mr. Oden of the planned meeting with Grievant, but never informed Mr. Oden it had to do with a grievance, as it was not her business to tell Mr. Oden that.

The undersigned Administrative Law Judge finds by a preponderance of the evidence that Mr. Oden did not receive the December 1, 1998 letter, and this is why he did not respond to it. It is possible that an administrator might be late in responding to a grievance, but it is seldom that a written grievance is totally ignored. Additionally, Mr.Oden's behavior in responding to Grievant's grievance on his termination is noted. Mr. Oden met with Grievant the day Grievant filed this grievance.

Another issue about this grievance must be addressed. Grievant was directed by Ms. Rowell to set up a meeting with Mr. Oden. This Grievant did not do. He assigned the task to Ms. Fuller, and when Ms. Rowell was sick and could not meet, he never followed up by scheduling another meeting. In fact, in one of Grievant's own exhibits, Ms. Fuller informed Grievant she discussed the issue of rescheduling the meeting with Grievant, and he informed her he "[h]ad to finish some things for the meeting" and "would let [Ms. Fuller] know when to reschedule." Grt. Ex. No. 2, at Level II. Grievant never did. When a grievance has been abandoned by the failure of a grievant to pursue it, it cannot be refiled or reconsidered at a later date. See Pack v. Kanawha County Bd. of Educ., Docket No. 93-20-483 (June 30, 1994); Floren v. Kanawha County Bd. of Educ., Docket No. 93-20- 327 (May 31, 1994). Thus, it is found Grievant abandoned this grievance when he failed to pursue it.

It should be noted that during the course of the grievance, the data contained in the November 30, 1998 Letter of Warning has been discussed in detail. If in the alternative, the undersigned Administrative Law Judge had not found Grievant failed to pursue this grievance, the testimony presented would have been sufficient to prove the Letter of Warning was warranted.

The next due process issue raised by Grievant will be discussed.

2. Whether the requirements of WVSC's Staff Handbook for termination were followed, and if not, was this failure violative of Grievant's due process rights.

Grievant has alleged he cannot be terminated because WVSC has failed to follow the steps outlined in the WVSC Staff Handbook in dismissing him. Respondent argues progressive discipline was properly followed and Grievant's termination should be upheld. (See footnote 28)

The portions of the WVSC Staff Handbook at issue are the ones dealing with progressive discipline and notices of termination.

At page 21 the WVSC Staff Handbook states:

> The employee's immediate supervisor will outline standards of performance and conduct for each employee. If an employee does not observe these standards, his/her supervisor will counsel him/her to try to resolve the problem. If counseling is not effective, the employee may receive a series of warning letters, then a period of suspension and finally, if the conduct does not improve, dismissal (sic).

At Page 31, the WVSC Staff Handbook states:

> Disciplinary action, including suspension or dismissal, may be taken 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.

At pages 32 and 33 the WVSC Staff Handbook states:

> Dismissal _ may be imposed for offenses after two, written warnings have been sent to the employee and have become part of his/her personnel file.
>
> . . .
>
> Just causes for disciplinary action shall include, but not be limited to the following actions. It should be noted that all of the following offenses may result in the disciplinary action of immediate dismissal:
>
> . . .
>
> 4) disobedience;
>
> 5) neglect of duty; 9) insubordination (See footnote 29)
>
> . . .
>
> Other forms of misconduct or failure to maintain proper standards of performance have a cumulative effect and may lead to dismissal.

Examples are:

1) failure to maintain performance standards;

2) habitual absence from work;

3) consistent lateness.

. . .

A supervisor will give an employee written warnings about his/her unacceptable performance or conduct. Written warnings are given to the employee with a copy placed in the employee's personnel file. A written warning must specify how long it will remain in the file. In no case can the period specified be longer than twelve months from the date the letter was written.

Discharge After Two Written Warnings:

An employee may be discharged for offenses after he/she has received. The required two written warnings also applies to transferred or promoted employees serving their probationary periods. A discharged employee will be paid for any used annual leave.

Written Warnings That Discharge Is Being Considered:

An employee being considered for discharge must be informed of the possible action by a letter of warning. The letter, to be delivered in person with a certificate of receipt, or by certified mail, specifies: The nature of the substandard or inappropriate work; corrective actions the employee take; a calendar date by which the employee's behavior must be brought back to standard; and a notification that failure to bring the work back to standard by the date specified will result in dismissal.

Clearly, there appears to be some difficulty in understanding exactly how all of these rules identified in the WVSC Staff Handbook are to be followed. Grievant's main

argument here is Respondent failed to give him a written warning that discharge was being considered, with specified behavior, corrective actions, and dates by which correction must be achieved. The requirement of the last noted section conflicts with the other sections of the WVSC Staff Handbook which state that after two written warnings an employee may be discharged. Thus, it is necessary to interpret exactly what all the portions mean when they are all viewed together, and whether WVSC substantially complied with these requirements.

The undersigned Administrative Law Judge finds Respondent substantially complied with the WVSC Staff Handbook requirements. Grievant received four Letters of Warning and one Letter of Counseling. Grievant was notified in each of these that termination would be considered if further episodes of misconduct or failure to perform his duties occurred. His supervisor repeatedly outlined the standards expected of Grievant, and he identified corrective actions to take. Additionally, in some instances the corrective action did not need to be specified as it was clearly inherent in the identified problem, such as, if late, come on time; if not staying for the entire activity, stay for the entire activity.

The failure to identify specified dates for correction is not sufficient to overturn the termination. Grievant was informed of his problem areas over a long period of time, he had enough time to correct his behavior, and, as previously stated, some of the behavior should not need dates, as the behavior can and should be corrected immediately, i.e. tardiness. Accordingly, the undersigned Administrative Law Judge finds Grievant's due process rights were not violated by the number, type and form of the Letters of Warning or the termination letters, and that the Letters of Warning sufficiently complied with the WVSC Staff Handbook requirements.

D. 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.

1. Insubordination/Disobedience

One of the charges against Grievant is disobedience. As previously, this term will be examined as being very similar to insubordination. Insubordination involves the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle v. Bd. of Directors/So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). This Grievance Board has previously recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve 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 order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995). Insubordination can be shown through an employee's "blatant disregard for the authority" of his second-level supervisor. Sexton, supra at 10.

This view of insubordination is consistent with the treatment accorded insubordination by arbitrators in the private sector. The scope of insubordination as an offense was addressed extensively in In re Burton Manufacturing Co. v. Boilermakers Local 590, 82 Lab. Arb. (BNA) 1228 (1994) (Holley, Arb.). There, Arbitrator Holley noted:

> In general, if an employee refuses to obey an order or defies the authority of Management, he is guilty of insubordination. This is a serious offense and may justify disciplinary measures, including discharge. An employee may be charged with insubordination not only if he willfully disobeys an order, but also if he . . . uses abusive, threatening, or profane language in speaking to Management; or assaults a representative of Management.

Burton, supra at 1234 (citing Trotta, Arbitration of Labor-Management Disputes 282-283 (1974)).

An employee's belief that management's decisions are incorrect, absent a threat to the employee's health or safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. Lilly v. Fayette County Bd. of Educ., Docket No. 97-10-084 (Feb. 11, 1998). See Parker v. W. Va. Dep't of Health and Human Resources, Docket No. 97-HHR-042B (Sept. 30, 1997). See generally, Meckley v. Kanawha County Bd. of Educ., 181 W. Va. 657, 383 S.E.2d 839 (1989) (per curiam). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dep't, Docket No. 90-H-128 (Aug. 8, 1990) (citing Meads v. Veterans' Admin. 36 M.S.P.R. 574 (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 Burton, supra). "Few defenses are available to the employee who disobeys a lawful directive; theprudent employee complies first[,] and expresses his disagreement later." Hundley v. W. Va. Div. of Corrections, Docket No. 96-CORR-399 (Oct. 27, 1997): See Maxey v. W. Va. Dep't of Human Resources, Docket No. 93-HHR-424 (Feb. 28, 1995). "Generally, an employee must obey a supervisor's order and then take appropriate action to challenge the validity of the supervisor's order." Reynolds, supra. "An employee may not disregard a direct order of a superior based upon the belief that the order is unreasonable." McKinney, supra. "Essentially, an employer can meet its burden [of proof] by showing that the person giving the order had the authority to do so, and that the order did not require the employee to act illegally or place himself or color-workers at unnecessary risk." Surber v. Mingo County Bd. of Educ., Docket No. 96-29-15 (Dec. 12, 1996). See Hundley, supra; Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995).

Mr. Oden was Grievant's immediate supervisor, and as such had the authority to

give Grievant reasonable orders and directions, which Grievant would be expected to obey. It is clear Grievant frequently disagreed with Mr. Oden, or did not view the same things as important. However, this does not excuse Grievant from following his supervisor's orders, as long as to do so would not impair his health or safety, and none of the orders given by Mr. Oden fall into this category. A belief that a supervisor's orders are unfair, incorrect, or unimportant does not relieve an employee of carrying out the directions. In this situation, it is evident that the students would have benefitted if Grievant had followed Mr. Oden's direction to come to work on time, plan and execute activities more carefully, place fliers on campus to give notice of up coming events, organize information on the bulletin boards, and give advance notice of schedule changes. It is clear Grievant did not see anything wrong with his performance, as he stated in his December 1, 1998 letter, "I have maintained my job responsibilities: met all deadlines which supersedes not only my expectations[,] but the expectations of the students, fellow faculty, staff, and my color-workers." (See footnote 30) Grt. Ex. No. 34, at Level II. Grievant apparently believed this statement, but how he could continue to do so in the face of four Letters of Warning, one Letter of Counseling, and frequent informal discussions with Mr. Oden is unclear.

In addition, Grievant, in basically a rather passive-aggressive manner and through his actions, "manifest[ed] disrespect toward supervisory personnel which undermine[d] their status, prestige, and authority . . . ." McKinney, supra. It is clear other people in the Student Affairs Office were aware Grievant was not following the directions given to him by Mr. Oden. It is apparent Grievant disagreed frequently with Mr. Oden, and disregarded his suggestions as not worthwhile or important. This behavior is also disobedient.

As for Grievant failure to attend activities for the entire time, failure to wear his pager, failure to report changes in his schedule, and failure to arrive to work on time, these behaviors are also examples of failure to follow specific directions. Grievant was

repeatedly informed what behavior was expected of him, and he did not comply. Thus, WVSC has established Grievant knowingly failed to comply with his supervisor's directions, and was disobedient and insubordinate.

2. Willful Neglect of Duty/Failure to Perform Expected Job Duties

Respondent must also prove a charge of willful neglect of duty by failing to perform the expected job duties by a preponderance of the evidence. Arbaugh v. Putnam County Bd. of Educ., Docket No. 90-40-437 (May 22, 1991). Although the West Virginia Supreme Court of Appeals has not formulated a precise definition of “willful neglect of duty”, it does encompass something more serious than incompetence and imports “a knowing and intentional act, as distinguished from a negligent act.” Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990). Hence, to prove willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). See Chaddock, supra.

The same reasoning stated in the insubordination discussion applies to this charge. Grievant clearly knew what behavior was expected of him. He apparently did not believe these things were important. The undersigned Administrative Law Judge finds it curious that Grievant did not correct his behavior as the same areas were cited over and over as needing change. Thus, Grievant's actions constitute knowing and intentional acts. He knew what behavior was unacceptable and did not change. WVSC has proven the offense of willful neglect of duty.

3. Unsatisfactory work performance

The next issue to examine is whether WVSC has proven Grievant exhibited poor or unsatisfactory work performance. The American Heritage Dictionary defines satisfactory as "giving satisfaction sufficient to meet a demand or regulation; adequate." (2d college ed. at 1092). Grievant, as the Program Coordinator, was expected to design, plan, and implement activities for students, and to assist the Director of Student Affairs in

performing various tasks as directed. Grt. Ex. No. 41, at Level II, page 25. Although Grievant did plan some excellent activities and appears to be a creative and talented individual, he was unable to perform his required duties on a consistent basis. It is important for an employee to arrive and leave on time. It is essential that an employee tell his employer in advance when he will be unable to perform his duties. It is crucial that an employee carefully plan and implement his assigned tasks. Grievant was unable to do these things consistently.

It should be noted that in a position such as Grievant's, things can and do happen to interfere with even the best laid plans. However, many of Grievant's difficulties were not of this nature. Grievant did not file the "set-up" forms, and frequently did not arrive until just before the activity was to start; this created problems. Grievant did not follow through on the details essential for planning and executing events; such as calling to check with DJ's and other performers or posting fliers on campus informing students of up-coming events. He did not confirm or ensure that others knew what to do or what problems to expect when he could not be present; such as notifying Mr. Oden that an adult was required to be on the Kanawha County school bus. These failures to plan, confirm, and advertise are behaviors which result in poorly executed and attended activities.

Grievant tries to paint the picture that he was fired for minor infractions or issues, such as failure to redo a bulletin board or arriving late only a few times. Such arguments are specious. Once an employee has started down the path that Grievant was on, and continues to repeat the inappropriate behaviors, one more example of those actions canbe sufficient for termination. This is why progressive discipline is used, so an employee can see the error of his ways and correct them before that next small act, which can result in termination.

However, it also must be noted that it was not just one more tardy that resulted in Grievant's termination. The Findings of Fact enumerate some of the behaviors Grievant

engaged in after the last letter of Letter of Warning. These are sufficient to support termination in this case. Grievant did not demonstrate these reasons were pretextual.

E. Payment for the Campus Gospel Choir

Grievant's directing of the Campus Gospel Choir was not a contracted service for which he can receive compensation. In fact, Grievant was told just the opposite; that he could not and would not be paid. When an employee receives this type of information, and then goes ahead to perform the service, it must be seen as volunteering and no payment is required.

F. Retaliation

Grievant has alleged the termination was reprisal for serving subpoenas for his mother's Level IV grievance hearing.

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.

Grievant has established a prima facie case of reprisal. Grievant's termination, "the adverse action" followed "within such a period of time that retaliatory motivation can be inferred." Grievant served the subpoenas on or about March 9, 1999, and he received his termination letter on March 16, 1999. Given this state of affairs, the undersignedAdministrative 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 he was guilty of disobedience, and poor work performance. While it is true, the subpoenas were served shortly before Grievant's termination, it is also clear that the problems with Grievant started long before that time, and Grievant had received notification of these difficulties and deficiencies. It is noted Grievant received his first of four Letters of Warning on July 7, 1997, and the most recent one on November 30, 1999.

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); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992).

2. Grievant abandoned his grievance filed on December 1, 1998, when he failed to pursue it. See Pack v. Kanawha County Bd. of Educ., Docket No. 93-20-483 (June 30, 1994); Floren v. Kanawha County Bd. of Educ., Docket No. 93-20-327 (May 31, 1994).

3. The regulations relating to Letters of Warning and termination as written in WVSC Handbook are conflicting. 4. No due process violation occurred in the method by which Grievant was terminated as WVSC substantially complied with the regulations identified in its Handbook. 5. WVSC has proven by a preponderance of the evidence the charges against Grievant, and thus his termination is upheld.

6. 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."

7. 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 presumptionof 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.

8. Although Grievant established a prima facie case of retaliation, Respondent was able to rebut this evidence by offering legitimate, non-retaliatory reasons for Grievant's termination.

9. Grievant is entitled to no compensation for his work with the Campus Gospel Choir.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this decision. 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: December 28, 1999

Footnote: 1

Grievant was represented by Attorney Katherine Dooley, and Respondent was represented by Kristi Rogucki, Assistant Attorney General.

Footnote: 2

In the Level IV proposals, Grievant argued he had been discriminated against. As this issue was not raised previously, it will not be addressed.

Footnote: 3

This failure encompassed not only not attending the activity, but failure to arrive on time and stay until the activity was completed.

Footnote: 4

Mr. Oden is the son of Dr. Barbara Oden, a top level academic administrator at WVSC.

Footnote: 5

Grievant's argument that this letter was only notification that a new Assistant Vice President had been hired, and this change might mean expectations could be revised within Grievant's work setting, is without merit. This letter clearly identifies problem areas relating to Grievant's work and his work habits. This letter begins,"I feel it is necessary to go over my expectations in regards to your work habits," and notes Grievant's work habits are a source of problems.

Footnote: 6

Grievant also noted in this letter that since Mr. Oden had talked with him earlier in the Spring, he had stopped discussing personal problems with students.

Footnote: 7

Grievant appeared to believe he had been hired as the Choir Director, and that he would receive compensation.

Footnote: 8

It should be noted Grievant testified about this event several times. Usually he stated the students got the dates and times mixed up. Finally, at one point in his testimony, he testified he had unintentionally given the students the wrong information.

Footnote: 9

The Fall calendar indicates practices were to be once a week on Wednesday. Grievant explained this was not a good day for students.

Footnote: 10

Ms. Fuller is also Grievant's cousin.

Footnote: 11

There are several complaints and a detailed report written by RH in the exhibits and documents received from Level II. It appears the exhibit marked as RH's original complaint was actually a typed copy of the original complaint which he signed later. The original handwritten complaint is in the documents received from Level II, but not identified as an exhibit. The parties were unclear about the status of these documents, and although reviewed by the undersigned Administrative Law Judge, they have not been utilized in this decision.

Footnote: 12

It is unclear from the testimony whether Grievant was given a copy of this complaint.

Footnote: 13

Ms. Jones also reported that during a September 12, 1998 activity, Grievant had straddled a male student's back and had "mocked riding a horse." A videotape of a portion of the event did not show this behavior, but not all the action could be seen on the tape. The undersigned Administrative Law Judge makes no finding that this action occurred, and it does not appear to be one of the charges leveled at Grievant.

Grievant had later complained to Ms. Jones that he could not believe he had let himself go like that. Ms. Jones was incorrectly terminated by Grievant on October 8, 1998, for failure to perform her duties. When Mr. Oden found out about this turn of events, he informed Ms. Jones she could return to work, but she did not accept this offer. On November 19, 1998, at Mr. Oden request, Ms. Jones wrote a letter detailing her difficulties with Grievant. Ms. Jones also stated Grievant boasted of his temperamental attitude and bragged about how he could "be a bitch". She reported he often did not tell her how he wanted an activity set up, and would arrive late to find things were not as he wanted. She noted Grievant did not return her calls when she sought clarification. She also reported Grievant gossiped, shared personal information with other students, and treated her rudely. Resp. Ex. No. 49, at Level II. Ms. Jones was not called to testify at either the Level II or Level IV hearing, thus, Grievant was not allowed the opportunity to question her. This testimony was taken as hearsay,

and the rules governing hearsay, as discussed later, will be applied.

Footnote: 14

Grievant's counsel strongly argued that this letter was not a Letter of Warning. This argument is without merit as the language of the letter states Grievant is being reprimanded and further "inappropriate behavior" conduct or failure to maintain proper standards of performance may lead to dismissal.

Footnote: 15

Grievant's statement that the only thing discussed with him in this conference was that he should not counsel students, and that this act was the "inappropriate behavior" is not found by the undersigned Administrative Law Judge to be correct.

Footnote: 16

It is unclear from the record why Grievant received "comp" time as the parties identified his position as being exempt from the Fair Labor Standards Act.

Footnote: 17

This form indicated to the service personnel all necessary information about how the event was to be set up. Grievant frequently completed a portion of the form, but usually did not completed the entire form. The other employees would then have to guess how the event should be arranged. Grievant "never" returned these pager calls or the ones left on his answering machine, and these employees stopped trying to contact him. (Test. Miller, at Level II.)

Footnote: 18

Grievant's failure to maintain the bulletin boards and to post fliers was a constant source of friction between Grievant and Mr. Oden. Grievant did not wish to follow Mr.Oden's direction in this regard because the students had a calendar, and he believed this was sufficient. Mr. Oden wanted to remind students of upcoming events.

Footnote: 19

Grievant frequently did not have his pager with him and frequently did not return calls he received on his pager.

Footnote: 20

At Level II and Level IV, Grievant testified he hand delivered a copy of this letter to Mr. Oden. At Level I, Grievant stated he gave the letter to Ms. Fuller to give to Mr. Oden. Mr. Oden testified throughout that he had never seen this letter until after Grievant was terminated.

Footnote: 21

Grievant testified Ms. Rowell called Mr. Oden, and informed him of this meeting, and he agreed to attend whenever it was set up. Ms. Rowell does not recall that she spoke to Mr. Oden.

Footnote: 22

Ms. Rowell's work logs indicate she was sick both December 8th and 9th.

Footnote: 23

Initially, Grievant stated he asked Mr. Lewis in December, January, and early February for him to schedule a meeting. He later testified he did not ask for this meeting until later in February. Mr. Lewis' testimony agrees with Grievant's that he did not contact him until mid to late February.

Footnote: 24

The undersigned Administrative Law Judge does understand that this may occasionally happen.

Footnote: 25

Mr. Oden lacks two courses to complete his Master's degree.

Footnote: 26

It should be noted that Grievant's attorney attempted to be helpful in dealing with Grievant's behavior.

Footnote: 27

Mr. Lewis' confusion was compounded by long questions, especially those containing more than one question. The attorneys were directed to ask Mr. Lewis short and clear questions, and Mr. Lewis was directed to answer the questions asked instead of answering what he thought the party was asking. The direction to ask short questions was frequently not followed.

Footnote: 28

Respondent agrees Grievant was hand-delivered his letter of Notice of Intent to Terminate, as oppose to receiving it by certified mail, and this was incorrect, but argues this small procedural violation was harmless, as Grievant obviously got his termination letter and such a violation should not overturn the dismissal.

Footnote: 29

Within the context of this decision, the undersigned Administrative Law Judge has noted the terms disobedience and insubordination are similar and overlapping in nature.

Footnote: 30

Grievant was not a member of the faculty.