JACKIE JEFFERY,

Grievant,

v. DOCKET NO. 99-HHR-163

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/HUNTINGTON HOSPITAL,

Respondent.

DECISION

Grievant Jackie Jeffery filed this grievance against Respondent, Department of Health and Human Resources ("HHR"), following his three day suspension from employment without pay, on February 1, 1999. He sought as relief, "relieved of suspension and charges removed from personnel file." (See footnote 1)

Discussion

The burden of proof in disciplinary matters rests with the employer, and theemployer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. 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.

The suspension letter, dated February 1, 1999, and signed by Desmond Byrne, the Administrator of Huntington Hospital, explains the reason for the suspension as follows:

> **The charges for this suspension are perjury, i.e. supplying false testimony during a fourth level grievance hearing, and while you were under oath, falsely**

accusing others of threatening and intimidating you to sign a statement which was untrue.

The specific reason for this charge is that on September 29, 1998, you did give sworn testimony in the hearing of Jim Worden vs. Department of Health and Human Resources/Huntington Hospital (Docket Number 98-HHR-282). This testimony, given under oath as administered by Janice [sic] Reynolds, Administrative Law Judge, was strikingly different than the sworn testament given by you on March 23, 1998, as documented by written affidavit and as witnessed by Donna Jo Montie, EEO Coordinator, and Sue Selbee, Director of Environmental Services. You also falsely testified that you were threatened (with implied dismissal) by Ms. Selbee, Mrs. Montie, Mr. Allen Campbell, Assistant Attorney General representing the Department of Health and Human Resources, and myself to testify against Mr. Worden.

. . .

The difference in your testimony and your written affidavit, along with statements from Ms. Selbee and Mrs. Montie, and your prior statements to me, as well as your demeanor during our discussions andin the hearing, lead me to believe that your original affidavit was correct and your testimony in the grievance hearing was purposely vague and often false. I do not believe you were threatened or intimidated, as you asserted under oath. Given the seriousness of this grievance hearing and the potential consequences which could result, it is unacceptable to demand anything less than the entire truth, especially when provided with a signed statement or when testimony is provided "under oath". Therefore, I believe this suspension is warranted.

Be aware, the next occurrence of failure to truthfully testify to known events shall result in dismissal.

Mr. Byrne testified Grievant was suspended as a result of his testimony at Mr. Worden's Level IV grievance hearing, and for his failure to cooperate. He stated Grievant gave testimony at Mr. Worden's Level IV hearing which differed from the statement he had given to Ms. Montie and Ms. Selbee, and he attempted to make his statements less damaging to Mr. Worden. He stated Grievant falsely accused him, HHR's attorney, and others of coercion.

Grievant denies that he lied under oath at the Level IV hearing in Mr. Worden's grievance, or that he lied in the written statement referred to as an affidavit. He also pointed out that he could not be charged with perjury, as perjury is defined by W. Va. Code § 61-5-1 as false swearing in a criminal felony case, and his testimony was given in an administrative hearing.

Grievant is a Maintenance Worker at Huntington Hospital. He has a tenth grade education. He was disciplined after he testified at a Level IV grievance hearing held on September 29, 1998, where James Worden was challenging his dismissal from Huntington Hospital. Grievant had been interviewed by Donna Jo Montie, Human Resources Assistant and EEO Counselor, and Sue Selbee, the Director ofEnvironmental Service and Grievant's supervisor, on March 17, 1999, after a female employee filed a complaint against Mr. Worden, alleging sexual harassment. All employees were told at the beginning of the interviews that they were not to discuss their interviews with other employees, and were asked to sign a "confidentiality statement." Grievant was told a statement would be prepared for him to review and sign based upon the information he provided. Grievant was not told his statement could be used at a grievance hearing, or in any type of proceeding, or that he could be called upon to testify.

During the March interview, Grievant was asked questions which had been developed by Ms. Montie and Ms. Selbee. They asked several employees these same questions. Both Ms. Montie and Ms. Selbee took notes during the interview. The interview was not recorded. Later Grievant voluntarily went to Ms. Montie's office and added to his statement.

Ms. Selbee and Ms. Montie both testified Grievant was cooperative when they interviewed him. Ms. Montie did not believe Grievant was reluctant to provide information to them, and appeared cooperative, but stated he expressed fear of Mr. Worden. Ms. Selbee testified, however, that Grievant was somewhat reluctant at first to answer their questions because of the circumstances, as were all those interviewed by Ms. Montie and her. She stated Grievant expressed at the beginning of the interview that he was afraid he would be fired.

Ms. Montie prepared a three page document styled "Affidavit" from her notes for Grievant's signature, which paraphrased what Grievant had said. Ms. Selbeereviewed the statement. Grievant was then called in. He was told to read the statement, make any necessary changes, initial the top and bottom of each page, and sign it at the end.

Ms. Montie and Ms. Selbee observed Grievant as he read the document. They testified Grievant appeared to be reading the statement without any difficulty. He did not tell them he needed glasses to read the statement, nor did he ask if he could take the statement with him to review. He asked no questions, and made no changes to the statement. He initialed the first two pages at the top and bottom, and signed the third page. He was not given a copy of the

document for his records.

Neither Ms. Montie nor Ms. Selbee explained to Grievant what an affidavit was, or that his signature represented that he was swearing to the truth of the statements in the "affidavit." Although the "affidavit" states that Grievant was "sworn," no one administered an oath to him before or after he signed the "affidavit." Nonetheless, Ms. Montie notarized the "affidavit," stating that Grievant had been sworn.

Grievant testified he was very scared and nervous when he signed his statement, and felt threatened because he "has seen how they had worked." He did not explain who "they" was, or what he meant by this. He stated he felt he should sign the statement, if he did not sign it he would be fired, and if he did sign it, it would make it easier on him. He stated he read part of the statement, but not all of it, as he felt rushed, and his vision was blurry due to his diabetes. He stated he felt threatened by Ms. Selbee, and still feels threatened by her. Although it is not entirely clear why Grievant feels this way, it appears his fear is attributable, at least in part, to the factthat she is his supervisor. He testified neither Ms. Selbee nor Ms. Montie made any threats to him.

In July 1998, Grievant went to Mr. Byrne's office and told him and Ms. Montie he would not testify at Mr. Worden's hearing, and they could not use his statement. Grievant was angry. He had also filed a sexual harassment complaint against Mr. Worden two years earlier, but nothing had resulted from it, except he had been moved so that Mr. Worden was no longer his supervisor. He expressed that he believed his complaint against Mr. Worden was not handled expeditiously because he was "a peon." He also expressed that he had worked out his differences with Mr. Worden. He did not indicate the statement he had signed was inaccurate, or that he had felt threatened when he signed it. Mr. Byrne told Grievant he could not refuse to testify, and that he expected him to tell the truth when called to testify.

Mr. Byrne agreed that Grievant had every reason to be upset with the way his own complaint with Mr. Worden was handled. However, he explained that procedures had changed since Grievant had filed his complaint, and that EEO investigations are now generally conducted promptly and in-house, whereas before, an investigator was sent in by the State EEO Office. This change resulted in action being taken in a more timely fashion in the most recent complaint, and also resulted in Huntington Hospital playing an active role in the

investigation.

Although obviously reluctant to do so, Grievant did testify at Mr. Worden's hearing. In the course of giving his testimony, he made accusations that he had been threatened. However, the only person Grievant specifically accused of threatening himwas HHR's attorney, Allen Campbell. Prior to Mr. Worden's Level IV hearing, Grievant met with Mr. Campbell. Grievant could not recall much about the conversation. He recalled that after some discussion he had asked Mr. Campbell, "well, is that saying if I don't cooperate with the state, they can dismiss me, or, let me see, they can take action against me or dismiss me, and he said, `yes, they can.' I said, is this a, is this a threat? And he just looked at me and kind of grinned, so how would you take it?" He testified this exchange is what he was referring to at Mr. Worden's Level IV hearing when he stated on page three of the transcript of his testimony that he was told if he did not testify he could be disciplined or fired. Although he used the term "they," he explained it was the lawyer who had made these statements, and he believed the lawyer was representing Mr. Byrne, Ms. Selbee, and Ms. Montie. He stated he was also referring only to Mr. Campbell when he stated at Mr. Worden's hearing that "they" said he could go to jail if he did not appear at the hearing. Mr. Campbell did not testify. (See footnote 2) **Grievant testified neither Ms. Selbee, Ms. Montie or Mr. Byrne threatened to fire him unless he testified against Mr. Worden.**

Having reviewed Grievant's testimony at Mr. Worden's Level IV hearing and Grievant's explanation of what occurred, and taking into consideration Grievant's stateof mind and level of education, the undersigned finds that Grievant accused no one except Mr. Campbell of threatening him, Grievant reasonably believed Mr. Campbell spoke for the employer and Mr. Byrne, and he took Mr. Campbell's statements as a "threat," even though Mr. Campbell probably was only trying to relay the possible consequences of Grievant's actions should he decline to testify.

As to Grievant's testimony and his written statement, Grievant testified that, to the best of his knowledge, he did not lie in his testimony at Mr. Worden's Level IV hearing. He testified he has a poor memory, and had not seen his statement prior to the time he testified at Mr. Worden's hearing. He testified he could not remember saying everything that was in his statement six months later when he was called to testify.

As Grievant began his testimony at Mr. Worden's Level IV hearing before Administrative Law Judge Janis I. Reynolds on September 29, 1998, he stated he had asked to see his statement several times and this request was refused. He stated he really did not know what was in the statement. There was then some discussion about Mr. Campbell's interview with Grievant, and then about why Grievant's "affidavit" was not provided to Mr. Worden or his counsel. It is clear from the testimony that there is then discussion about whether Grievant had to sign a release for his "affidavit" to be released, which he did not sign, while some of the parties, and ALJ Reynolds, are talking about whether the "affidavit" was signed. Grievant states he did not sign "it." Mr. Byrne pointed out Grievant lied because he then admitted toALJ Reynolds it was his signature on the "affidavit." (See footnote 3) **However, it is clear Grievant was not referring to the "affidavit," but was saying he had never signed a release for his "affidavit" to be used, which was not a lie.**

It should be noted at this point that it is not always clear from Grievant's testimony at Mr. Worden's hearing exactly what he was talking about. While the parties and ALJ Reynolds followed up on some of his statements to clarify his testimony, this was not always the case. This is not to fault the hearing participants, as it may not have seemed important to the case presentation for or against Mr. Worden to make these clarifications. However, HHR then used Grievant's often vague statements which it chose not to clarify to discipline him. The clearest example of this is the accusations Grievant made that he had been threatened.

Grievant then said he had read some of the "affidavit," and some of it was not true. He stated at that time that he had not read the entire statement before signing it. ALJ Reynolds then asked him to read the last paragraph of the "affidavit." As he was reading it into the record, it appears that he did not know what the word "revisions" was, as ALJ Reynolds said the word for him when he apparently stopped at that word. He then said he signed it because he was threatened and scared because he needed the job. He did not say who threatened him, or how he came tofeel threatened and scared; and no one asked him to clarify this. He later stated he was afraid Mr. Worden could get him fired, but he thought Ms. Selbee normally fired employees, although he really did not know. As noted earlier, Grievant testified at his own Level IV hearing that no threats were made by Ms. Selbee or Ms. Montie, but he felt threatened, and is still fearful of Ms. Selbee. While this fear may or may not have any rational basis, it was

what Grievant felt, and he truthfully expressed this feeling.

Grievant then explained that although the affidavit says Mr. Worden referred to a co-worker as a "little bitch," the word should have been "witch." He did not recall whether Mr. Worden had said the same employee had let the job go to her head as is written in his statement, but admitted he could have said that. At a later point he also could not recall a particular statement in the "affidavit," but again admitted he could have said it. He agreed with the statement where it said when a particular employee would come around, Mr. Worden would make the other workers leave, but explained this was not always the case, as they had work to do. He then added that, with regard to threats Mr. Worden had made to him as described in the statement, Mr. Worden had told him he was kidding "afterwards." Ms. Selbee testified at Grievant's Level IV hearing that Grievant had mentioned on several occasions during his interview that the workers joked around at times about various things, although the undersigned does not find this in Grievant's written statement.

Grievant added with regard to the statement that Mr. Worden called a co-worker a "faggot," Mr. Worden was joking, and that was not important. He explained the co- worker called Grievant a "sissy," and everybody joked around. Grievant thought he had told Ms. Montie and Ms. Selbee that the VCR's Mr. Worden worked on at the hospital could be his own, or they could belong to the hospital, although his statement says they were Mr. Worden's, and Mr. Worden made it look like they were the hospital's. At another point where the statement refers to Mr. Worden's comments on Ms. Selbee's ability to do her job, Grievant could not remember exactly what Mr. Worden had said, but thought he was talking about Ms. Selbee's experience, rather than her gender, as may be inferred from the written statement.

Grievant explained when his "affidavit" says Mr. Worden "made" him do a personal task for him, Mr. Worden had asked him to undertake the act, and as he was Grievant's supervisor, he thought he had to. Finally, Grievant thought he had said Mr. Worden had gone behind a dumpster or tree, not just a dumpster.

Mr. Byrne also pointed out at Grievant's hearing that Grievant testified at Mr. Worden's hearing he was afraid his testimony would affect his request to be reclassified, and that this was not accurate. He admitted, however, that if Grievant believed this to be true, he was not lying. It appears from the statements made by Grievant and ALJ Reynolds at Mr. Worden's

hearing, that Grievant was, again, afraid of Ms. Selbee in particular.

The issue of whether Grievant lied at Mr. Worden's Level IV hearing or in his prior statement has already been resolved in Grievant's favor. One of the key issues in the decision of ALJ Reynolds in Worden v. Department of Health and HumanResources, Docket No. 98-HHR-282 (January 29, 1999), (See footnote 4) was witness credibility. Judge Reynolds stated in her decision:

> **The undersigned Administrative Law Judge had an opportunity to observe the demeanor of the witnesses and to assess their words and actions during their testimony. The testimony of Mr. Jeffery, Mr. Porter, Mr. Shelton, John Marks, and Matthew Wright all confirm Grievant made remarks which implied and were intended to imply he had sexual relations with DK. Although it was clear that some of these witnesses do not care greatly for Grievant, there was nothing to suggest that their testimony was untrue. It also appears Mr. Shelton was the ring leader in bringing the complaints to a head, but this again does not indicate the statements were untrue. [Footnote omitted.] Many witnesses professed they were reluctant to report Grievant because he was their supervisor.**
>
> **The statements of these witnesses were consistent with each other, consistent with their prior statements, and internally consistent. There was no indication that any of the witnesses was untruthful, in fact several of the witnesses, including those called by Grievant, indicated they had never heard Mr. Shelton lie. The demeanor of these witnesses was straightforward, and their testimony was plausible.**

The undersigned is at a loss as to how HHR could charge Grievant with giving false testimony at a Level IV hearing when the ALJ who observed him during his testimony found the opposite, which was important to her conclusion that HHR had proven the charges against Mr. Worden. ALJ Reynolds was in a much better position to determine whether Grievant was lying than the undersigned, as she was able to observe his demeanor at the time the testimony was given, and she also heard thetestimony of HHR's other employee witnesses and Mr. Worden. (See footnote 5) HHR did not explain how it came to ignore ALJ Reynolds' findings with regard to this issue, did not indicate it had appealed her decision, or explain how the undersigned could now reach the opposite conclusion. HHR also argued Grievant either lied at the hearing or in his written statement; however, ALJ Reynolds also specifically found Grievant's testimony at Level IV to be consistent with his prior statement. HHR presented nothing new which would affect these conclusions.

The undersigned is obviously reluctant to revisit this issue, and confused as to why HHR

would want this. Certainly, if the undersigned made a finding here that Grievant had lied at Mr. Worden's Level IV grievance hearing, or that his statement placed into evidence at the hearing by HHR in support of its case against Mr. Worden was not true, it would have an impact upon the decision issued in that grievance.

Further, the undersigned finds Grievant's testimony to be entirely consistent with his written statement. Grievant essentially added some information which wasnot in the written statement which he believed was important. This does not mean the written statement was a lie. His written statement does not represent a verbatim account of what Grievant told Ms. Selbee and Ms. Montie. It is clear they left certain information out of the written statement as they saw fit, such as that Grievant had told them the employees joked around a lot. However, when Grievant stated this at Mr. Worden's hearing, Mr. Byrne saw this as an attempt on Grievant's part to make his statement less damaging to Mr. Worden. It is likewise possible that Grievant did not give Ms. Montie and Ms. Selbee all the information he had at the time in response to their questions, something had occurred since the interview which caused Grievant to view events in a different light, or he had simply forgotten to provide information.

In some instances, Grievant simply could no longer recall an event or that he had told Ms. Selbee and Ms. Montie about a particular incident, which is understandable given Grievant's state of mind and the amount of time which had elapsed. In some instances his written statement was only slightly different from what Grievant believed to be true, which could easily have been a result of the way Ms. Montie chose to paraphrase Grievant's statement, or of her not recording every word of Grievant's statement. Finally, whether Grievant used the word "bitch" or "witch" is of no consequence, as there is no significant difference in this context, and it is possible Ms. Montie simply typed the wrong letter. If Grievant did not read his entire statement, word by word, it is possible he would not have noticed these differences. Moreover, the differences are insignificant when viewing the document to determine whether it represents a true statement. It should further be pointed out that although the disciplinary letter refers to Grievant's "sworn statement," and HHR in its written argument repeatedly refers to Grievant's "sworn affidavit," Grievant never gave a "sworn" statement prior to Mr. Worden's Level IV hearing. In fact, HHR states in its written argument, "Grievant's false statement were [sic] more detrimental to the employer and the grievance process because

they were made under oath." HHR further states, "[w]hile it is difficult to say with certainty which version of Grievant's testimony is the truth, his affidavit or Level IV testimony in the Worden grievance, it is certain that he made false statement[s] under oath on one of the two occasions." Grievant's written statement cannot be considered a "sworn statement," or a "sworn affidavit," quite simply because he was never sworn to tell the truth at any time prior to signing the statement, nor did anyone explain to him that it was a sworn statement.

The following Findings of Fact are made based upon the evidence presented at Levels III and IV.

Findings of Fact

1. Grievant has been employed by HHR at Huntington Hospital for over three years. He is a Maintenance Worker. He is not a high school graduate, but completed the tenth grade.

2. Grievant was suspended for three days without pay on February 1, 1999, for "perjury, i.e. supplying false testimony during a fourth level grievance hearing, and while . . . under oath, falsely accusing others of threatening and intimidating [him] to sign a statement which was untrue." 3. On March 17, 1998, Grievant was interviewed by his supervisor, Sue Selbee, and Donna Montie, the EEO Counselor, regarding a claim of sexual harassment filed by a co-worker against Grievant's former supervisor, James Worden. The interview was not recorded. Grievant was afraid of Ms. Selbee and Mr. Worden, afraid he would lose his job, and was reluctant to be interviewed.

4. Later Grievant voluntarily went to Ms. Montie's office and told her he had forgotten to tell her something.

5. Ms. Montie typed her notes from the interview in affidavit form, Ms. Selbee reviewed them, and the statement was presented to Grievant on March 23, 1998. Ms. Montie told Grievant to read the statement. Grievant did not indicate he needed glasses in order to read the document, or that he was having trouble reading it. Grievant looked at each page for several minutes in the presence of Ms. Montie and Ms. Selbee. He indicated no corrections needed to be made, initialed the top and bottom of each page, and signed his name at the end of the statement. The last paragraph of the statement states:

> I have reviewed this statement and have been given an opportunity to note any corrections and make the necessary revisions to ensure a complete and

accurate report of my statement. This document represents a complete summary of my statement.

6. Grievant did not read the entire affidavit, and he was not given a copy of it.

7. Grievant's statement states it was "[t]aken, subscribed, and sworn to" Ms. Montie by Grievant on March 23, 1998, and is notarized by Ms. Montie. Grievantwas not told he was to swear that the statement was truthful, or what an affidavit was. He was not placed under oath by Ms. Montie, or anyone else, either before or after signing the document.

8. Mr. Worden was dismissed from his employment and filed a grievance.

9. Grievant met with Desmond Byrne, Administrator of Huntington Hospital, and Ms. Montie, and told them he was upset because his complaint against Mr. Worden had not been pursued by the hospital, and that he would not testify at Mr. Worden's grievance hearing. Mr. Byrne told Grievant he would be expected by the hospital to testify and to tell the truth.

10. Grievant met with Allen Campbell, HHR's attorney. When Grievant told Mr. Campbell he would not testify at Mr. Worden's grievance hearing, Mr. Campbell told Grievant if he did not appear and testify he could be fired or jailed. Mr. Campbell did not answer Grievant when he asked him if that was a threat, but just grinned. Grievant believed this was a threat.

11. A Level IV hearing was held on Mr. Worden's grievance on September 29, 1998, before Administrative Law Judge Janis I. Reynolds. Grievant was duly sworn and offered testimony at the hearing.

12. Grievant related at Mr. Worden's hearing that Mr. Campbell had threatened that he could be fired or put in jail if he did not testify. (See footnote 6) **13. Grievant related at Mr. Worden's hearing that he signed the written statement because he was threatened. No one threatened to take action against Grievant if he did not sign the statement, but he was afraid he could lose his job.**

14. Grievant stated at Mr. Worden's hearing that parts of his written statement were not true. However, when questioned about each sentence of his written statement, Grievant's testimony was substantially the same as the information in his written statement. Grievant added some information which was not in his written statement, made some minor changes, and could not recall some of the information which was in his written statement.

15. ALJ Reynolds found in reaching her decision in Mr. Worden's grievance that Grievant's testimony at Mr. Worden's hearing was credible, and was consistent with his

written statement.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Pursuant to W. Va. Code § 29-6A-6, the burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988).

2. Respondent did not prove Grievant lied, falsely accused hospital personnel of threatening him, or failed to cooperate.

3. Grievant did not give a sworn statement prior to Mr. Worden's hearing, as Ms. Montie did not administer an oath to him.

Accordingly, this grievance is GRANTED. Respondent is ORDERED to remove the suspension letter from Grievant's personnel file and to pay him three days' backpay, and fully restore any and all other benefits he lost as a result of the suspension. No interest will be awarded as Grievant did not specifically request it.

Any party or the Division of Personnel may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. W. Va. Code § 29-6A-7 (1998). 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

_____

BRENDA L. GOULD

Administrative Law Judge

Date: September 24, 1999

Footnote: 1

This grievance was filed by Grievant at Level III on February 10, 1999. Respondent agreed that Grievant could waive both Levels I and II, and a Level III hearing was held on April 16, 1999. A Level III decision denying the grievance was issued on April 23, 1999. Grievant appealed to Level IV on April 28, 1999. A Level IV hearing was held on July 23, 1999. Grievant was represented by James W. St Clair, Esquire, and HHR was represented by Dennise Smith, Esquire. This grievance became mature for decision on September 3, 1999, upon receipt of HHR's written argument. Grievant's counsel submitted written argument late, on September 22, 1999.

Footnote: 2

Respondent attempted to use Mr. Campbell's statements made on the record at Mr. Worden's hearing to support its argument that Mr. Campbell did not threaten Grievant. While Mr. Campbell was acting as an officer of the court, and was expected to be honest, he was not under oath, and was not subject to cross-examination, and his statements regarding his discussions with Grievant are not evidence any more than any other assertion that an attorney makes at any hearing is. However, Mr. Campbell admitted he had informed Grievant that failure to participate as a witness in the grievance process can result in discipline, when Grievant told him he would not testify.

Footnote: 3

HHR presented a transcript of Grievant's testimony at Mr. Worden's Level IV hearing, prepared by Judith L. Mullins, from HHR's Level III Grievance Unit, as its Exhibit 5 at Level III. While Grievant did not object to the accuracy of this transcript, the undersigned has noted an error at this point in the transcript, page 9, where what is clearly Grievant's testimony is cited as the statements of Mr. Worden's counsel, Mr. Compton.

Footnote: 4

HHR objected to the introduction of this decision as an exhibit at Level III, and it was not admitted into evidence. However, the undersigned will take administrative notice of that decision.

Footnote: 5

> ***In assessing the credibility of witnesses,***
>
> > ***some factors to be considered . . . 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. Harold J. Asher and William C. Jackson. Representing the Agency before the United States Merit Systems Protection Board 152-153 (1984). 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's information. Id.***

Burchell v. Bd. of Trustees, Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

Footnote: 6

It is not clear whether Grievant was subpoenaed to appear at Mr. Worden's hearing, but there is some discussion in the portion of the transcript submitted from Mr. Worden's hearing that Mr. Worden subpoenaed Grievant.