JOY BUTTS,

Grievant,

v. **Docket No. 01-HE-100**

HIGHER EDUCATION INTERIM GOVERNING

BOARD/SHEPHERD COLLEGE,

Respondent.

D E C I S I O N

Grievant, Joy Butts, Associate Professor of Developmental Mathematics in the Community and Technical College ("CTC"), filed this grievance against her employer, Shepherd College ("Shepherd"), on February 26, 2001. Her Statement of Grievance and Relief Sought reads:

> **On February 12, 2001, I received a memorandum/letter dated February 12, 2001, alleging that I have been "insubordinate" and other falsehoods of a libelous and defamatory nature and alleging to be a "direct warning" memo/"warning/letter" therein. These allegations are misrepresented, malicious, invalid, inaccurate, and unwarranted, and I hereby request as relief that this memorandum/letter be rescinded; that this document and attachment and any and all references to either be removed from my permanent employee personnel file; that such malicious, harassing, discriminatory, and retaliatory treatment toward me immediately cease and desist; and that I, in any and every other way be restored to wholeness and normal faculty employee working conditions, rights, privileges, securities, benefits, opportunities, and responsibilities as per Shepherd College Faculty Handbook and related official documents published at campus, state, and federal levels pertinent to public education and employment.**

This grievance was waived at Level I to Level II by Respondent on March 12, 2001, because Grievant's supervisors did not have the authority to resolve the grievance. In that letter, a Level II hearing was scheduled for March 29, 2001, the same day two more of Grievant's grievances were scheduled. Grievant did not object at that time. Grievant then filed a default claim, and Shepherd, upon receiving notice of a default claim in anothergrievance during a Level IV phone conference on March 19, 2001, gave verbal notice that the hearing on this grievance would be held that afternoon. This hearing would meet the statutory time frames. Grievant objected to this notice as insufficient, but did not request a continuance, nor was

there an agreement to extend the timelines. A Level II hearing was held on March 19, 2001, Grievant did not attend, and a Level II Decision was rendered on March 27, 2001. Grievant appealed to Level IV on the merits and continued her default claim. A Level IV default hearing was held on March 30, 2001. After the presentation of evidence and discussion Grievant withdrew her default claim and appealed to Level IV. (See footnote 1)

By agreement of the parties, a Level IV hearing was held on June 15, 2001, at Shepherd College in Shepherdstown, West Virginia. This case became mature for decision on September 12, 2001, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 2)

Issues and Arguments

Respondent argues the written reprimand was justified because of Grievant's insubordinate behavior and gross misconduct. Respondent alleges Grievant acted improperly in front of her students and failed to show respect and/or common courtesy to her supervisor. Respondent pointed out the written reprimand was only written after Mr. Alan Perdue, Shepherd's counsel, had conducted an investigation.

Grievant asserts she was not insubordinate, but was, in fact, treated improperly by her supervisor in front of her students. She points to the differences in her supervisor'saccount of the events and the accounts as reported by student witnesses and herself. She alleges this written reprimand is a part of a continuing pattern of retaliation for the filing of prior grievances. At one time, Grievant was terminated, and found to have been wrongfully discharged. Respondent was ordered to return Grievant to work, and after a time period did so. Since that time, Grievant believes she has been continually harassed. Grievant also notes she files approximately three to four grievances a year. Grievant also argues the information provided to Shepherd about Grievant's actions on January 24, 2001, by Ms. Ethel Cameron, Grievant's immediate supervisor, was not the same as the reasons listed in the written reprimand; thus, the written reprimand is without foundation, and this difference calls into question Ms. Cameron's credibility.

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

Findings of Fact

1. In the Spring of 2000, a family member and the Shepherd College Foundation created the Hendricks Scholarship to honor a former long-term faculty member, who is now deceased. This scholarship would be the first one ever developed for Academic Foundation ("ACFN") students, (See footnote 3) and the faculty was proud of this stipend. Discussions about this scholarship were held during faculty and department meetings.

2. This scholarship was properly created following all the necessary guidelines and regulations. 3. Grievant does not attend faculty and/or department meetings, and had little, to no, knowledge about this scholarship.

4. Shortly prior to January 24, 2001, Ms. Cameron, Coordinator of Developmental Mathematics and Grievant's immediate supervisor, informed the faculty she would be visiting classrooms to introduce herself, explain procedures for student placement, and explain the purpose of the study center. This is her routine practice at the beginning of a semester. Ms. Cameron also planned to present information about the new scholarship.

5. Ms. Cameron attended Grievant's first two morning classes on January 24, 2001, without incident. Grievant explained at Level IV that she informed the students of Ms. Cameron's misleading and inaccurate information after Ms. Cameron had left the room during the second class.

6. Ms. Cameron came to Grievant's third class of the day to make the same announcements. After these announcements, she called Grievant out into the hall to hand her a sealed envelope addressed to Grievant. Grievant refused this letter and stated it was Ms. Cameron's letter, not hers. Grievant threw the letter on the floor. Ms. Cameron picked the letter up and eventually placed the letter on the podium in the classroom. It is unclear whether Grievant ever took the letter.

7. Grievant believed Shepherd was required, pursuant to an Order of Administrative Law Judge Sue Keller, to deliver her mail to only one place and was not allowed to hand-deliver any mail. This belief is incorrect, and no such Order exists. At one time, Grievant and Shepherd had reached a tentative settlement agreement in another grievance, which would have given Grievant a mail box in the building she had requested.This agreement did not

indicate Grievant could not be given mail in any other manner or at any other place. This settlement agreement was never signed, and the grievance was eventually dismissed by Administrative Law Judge Keller, due in part, to Grievant's failure to respond to the mail from her representative, the Grievance Board, and Respondent. (See footnote 4)

8. As Ms. Cameron was leaving, Grievant told the class Ms. Cameron's information was misleading and inaccurate, and they should check their Handbooks and catalogs. (See footnote 5)

9. Ms. Cameron returned to the room and indicated Grievant was incorrect, and if the students had any questions about the scholarship they should contact Monica Lingenfelter in the Shepherd College Foundation Office. Grievant continued to indicate that Ms. Cameron was wrong and was giving the students misinformation.

10. Both Ms. Cameron and Grievant were upset and agitated during this exchange. Both raised their voices, but neither of them was screaming.

11. Ms. Cameron left the room again and Grievant continued to inform the students Ms. Cameron was incorrect in the information she had given about the scholarship. Ms. Cameron attempted to return to the room, but Grievant shut the door and locked it. Grievant did not slam the door. 12. The students were not aware that Ms. Cameron is Grievant's supervisor, and that this status gives Ms. Cameron certain responsibilities when it comes to Grievant's behavior and statements. (See footnote 6)

13. Ms. Cameron complained about Grievant's behavior to her supervisor. She was directed to write up her account of the incident.

14. Ms. Cameron's account exaggerates Grievant's negative behavior, and plays down her response. This is not to say that Ms. Cameron's account of the basic events was incorrect.

15. After receiving Ms. Cameron's account of the incident, Shepherd decided to investigate the incident, and Shepherd's counsel, Mr. Perdue, contacted several students asking opened-ended questions to find out their view of the events of January 24, 2001. (See footnote 7)

16. While varying, these student accounts agree Grievant refused to accept the letter, and that Grievant stated Ms. Cameron's information was misleading, inaccurate, or a misrepresentation. (See footnote 8) **Grievant agrees she told the students Ms. Cameron's**

information was misleading and inaccurate. 17. After reviewing the results of the investigation, Grievant's supervisors agreed action should be taken. On February 12, 2001, Grievant received a written reprimand signed by Provost Peter Checkovich and Dr. Howard Seiler, Grievant's second level supervisor. This written reprimand found Grievant had been insubordinate, and she had engaged in gross misconduct. The written reprimand stated:

> **Our first concern is that you were insubordinate toward Ms. Cameron in refusing to accept a memorandum from her that was in a sealed envelope. You demonstrated this insubordination in the presence and view of the students who were in attendance for the class, which compounds the problem because it puts the entire institution in a "bad light". This memo will serve as a direct warning that your pattern of insubordinate conduct is unacceptable, it has been repetitious in spite of repeated warnings, and a failure to eliminate your insubordinate conduct, beginning immediately, will result in termination of employment.**
>
> **This conduct was followed by an even worse episode, with which we are very greatly concerned. When Ms. Cameron attempted to describe the *Hendricks Scholarship* to the class, you argued with her, in front of the class, and then contradicted her explanations. You accused her of making misrepresentations to the class, and you advised the class that the scholarship that Ms. Cameron had described was ILLEGAL, making illusions to problems that developed with the athletics department in the past.**
>
> **Your position on this was totally incorrect. Your statements to the students were a disservice to them and put both the College and the Shepherd College Foundation in a "bad light". We consider this to be gross misconduct.**
>
> **Had you attended at least an occasional departmental meeting, you would have a clearer understanding of the Hendricks Scholarship and you would have been welcome to voice any concerns about its processes. However, in front of the students was not the place for you to initiate such a discussion. You have now impugned the integrity of not only Ms. Cameron, but also the ACFN staff and the hard-working and devoted staff and volunteer support of the Shepherd College Foundation.**
>
> **Generally, the gross extent of this gross misconduct would prompt a complete review of the propriety of continuing your employment. However, inasmuch as you are a tenured member of the Community and Technical College faculty, we are prepared to create one last opportunity for your conduct to improve.**
>
> **The confusion you have created for the students needs to be rectified. We enclose with this warning letter a memorandum from Provost Peter Checkovich to the students of the 2:10 p.m. class. On Wednesday, February 14, 2001, Dr. Seiler will attend the beginning of the class and you will read Dr. Checkovich's memorandum to the class in his presence. Should you fail to conduct class that**

day or should student attendance be unusually low, for whatever reason, this procedure will be followed and/or repeated on the following scheduled meeting of the class.

Again we emphasize that you are formally warned of the gravity of your misconduct and the full scope of action which may include termination of employment if you continue to demonstrate insubordinate conduct.

(Emphasis in the original.)

18. Grievant responded to this written reprimand with a letter dated February 13, 2001.

This letter stated:

I do not concur with the validity or the accuracy of statements published in your February 12, 2001 memorandum/letter to me. I believe independent investigation without the spin will find the contents of your February 12 memo to be sorely lacking in truth and in completeness in many instances. In fact, your joint memo presents a false and misleading slant written only with your own self-interests in mind. As you know, some minds are like concrete _ thoroughly mixed up but permanently set.

Because I am unclear as the purpose or significance of the memo in light of the manner and timing of its delivery to my classroom in Stutzman - Slonaker Hall on the morning of February 12 by Howard Seiler, the verbal threats made by the two of you in the May 5, 2000, "ambushing" incident at that building, (See footnote 9) and the numerous reported disruptions to my mathematics instructional environment over the past semesters by Cameron and Seiler, I am delivering this note directly to both of you along with a short list of business axioms to begin your joint study:

If you cannot do these little things right for Shepherd College, how then can you do the bigger things right.

It is difficult to run a large-scale business organization with small-scale minds.

Too many people given a small taste of authority immediately overeat.

If you believe a clean car runs better, you might try applying the same standard to your business conduct.

Whitewashing the pump will not purify the water.

What "decisions" are we making here? On what basis? (See footnote 10)

19. On Wednesday, February 14, 2001, Grievant read the memo from Dr. Checkovich. This memo noted Grievant had made several remarks which contradicted Ms. Cameron and were ill-considered. The memo went on to say the scholarship was proper, legal, and a benefit to students.

20. Grievant then read her written reprimand to the class. No clear explanation for this action was given. Several of the students, who testified for Grievant at the Level IV hearing, believed she was required to read this written reprimand, and they found this requirement embarrassing to Grievant.

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). "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 ofwitnesses, 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).

The issues and charges raised by the parties will be discussed one at a time.

I. Credibility and Hearsay

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR- 066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses that appear before her. See 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 United States Merit System Protection Board Handbook ("MSPB Handbook") is helpful in setting out factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984). Some factors to consider in assessing a witness'stestimony 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 testimony of Respondent's student witnesses 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 effect 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). The testimony of Grievant and Ms. Cameron differed drastically. Both said the other was rude, loud, and out of control. The undersigned Administrative Law Judge finds the truth is somewhere in the middle between these two accounts. Both people were upset and agitated, and both raised their voices. What is clear from both accounts is Grievant refused the letter, and she contradicted statements made by Ms. Cameron about the scholarship, in front of the students. It is also clear Grievant lacked knowledge about the scholarship, and did not possess sufficient data to declare that Ms. Cameron's information was misleading and inaccurate. If indeed Grievant believed the information given to the students was incorrect, the proper course of action for a supervisee and a teacher is to discuss her questions and concerns with her supervisor outside the hearing of students.

As for throwing the letter, the undersigned Administrative Law Judge finds Grievant did throw the letter. The majority of the witnesses do not remember seeing the letter until Ms. Cameron brought it into the room from out in the hall where Grievant refused it. One student reported seeing Grievant throw the letter, and it is difficult to believe a student could make up this specific story from whole cloth. Additionally, Grievant did not say she did not throw the letter, she said, "I don't remember throwing the letter."

The student witnesses presented by Grievant found Ms. Cameron to be rude and unprofessional and believed Grievant was just presenting another side of the story. It is entirely possible Ms. Cameron was not the most pleasant of people when Grievant contradicted her about a subject important to her in front of the students, especially, when she knew Grievant had little to no knowledge about the subject, and the information given to the students by Grievant could cause them not to apply for this scholarship. However,the

undersigned Administrative Law Judge does not find Ms. Cameron was "screaming" and "out of control."

The hearing testimony of one of Grievant's witnesses must be called into serious question. Kimberly Barr was one of the students interviewed on the phone by Mr. Perdue. At that time, she reported Grievant stated Ms. Cameron's information "was wrong," and Grievant accused Ms. Cameron's of "misrepresent[ing]". She reported the voices of both people were raised, and both were irritated with each other.

At the Level IV hearing, Ms. Barr stated Ms. Cameron was "really rude," and called Grievant a "liar," and Grievant acted "just fine." Ms. Barr stated Ms. Cameron was "angrier, louder, and less respectful." Interestingly, Ms. Barr also said her memory of the event was better now, six months later, than when she was interviewed by Mr. Perdue, a few days after the incident.

II. Merits of the case

A. Insubordination

The next issue to decide is whether Shepherd has proven the charge of 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)). See 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 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 theright to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority. . . ." McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992) (citing In re Burton Mfg. Co., 82 L.A. 1228 (Feb. 2, 1984)).

"Few defenses are available to the employee who disobeys a lawful directive; the prudent 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. See Surber v. Mingo County Bd. of Educ., Docket No. 96-29-15 (Dec. 12, 1996); Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995).

Grievant admits she did not accept the letter, and the undersigned Administrative Law Judge finds Grievant threw the letter her supervisor handed her. Grievant attempts to excuse this behavior by stating there was a Grievance Board Order specifying she could only receive her mail in one way. This belief was incorrect, and a review of the evidence calls into question why Grievant could have this belief.

However, even if Grievant did actually believe this false assumption, she still should have

taken the letter, and she certainly should not have thrown it. These acts constitute insubordination. As previously stated an employer has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority. . . ." McKinney, supra. Grievant's actions did just that. Further, if Grievant believed Ms. Cameron's request to take the letter was incorrect, theproper course of action was to take the letter, and then state her disagreement later through a private conference or a grievance. Hundley, supra; Maxey, supra; Reynolds, supra.

B. Gross Misconduct

Grievant was also charged with gross misconduct. The "term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." Graley v. W. Va. Parkways Economic Dev. and Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991) (citing Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985). See Blake v. Civil Serv. Comm'n, 172 W. Va. 711, 310 S.E.2d 472 (1983). The West Virginia Supreme Court of Appeals when discussing off-duty behavior has stated "[i]t is not our intention to establish any general rule which will serve to define what is or is not gross misconduct justifying discipline, suspension or dismissal. Each case must be determined upon the facts and circumstances which are peculiar to that case. We have no desire to establish any rule which would exact from State employees such perfection of conduct as to create an intolerable burden. We would protect the employee against frivolous, trivial and inconsequential charges; or charges based on conduct which has no rational nexus with the duties to be performed or the rights and interests of the public." Thurmond v. Steele, 159 W. Va. 630, 225 S.E.2d 210 (1976). See, Mindel v. United States Civil Serv. Comm'n, 312 F. Supp. 485 (N.D. Cal. 1970); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); Kidd v. W. Va. Dep't of Tax and Revenue, Docket No. 91-T-127 (Dec. 17, 1991). The Thurmond Court went further and stated, "[i]f, however, the misconduct is of a substantial nature and can be shown to affect directly the rights and interests of the public by bearing directly in a substantial manner on the duties which the employee is required to discharge, then the employing authority and the Civil Service Commission have the power and the duty, upon such a showing, to enforce such remedial steps, including a dismissal, as may be found

proper under all of the circumstances of the case." Thurmond, supra.

Grievant's action of contradicting her supervisor in front of students demonstrates "a wanton disregard of standards of behavior which the employer has a right to expect of its employees." Graley, supra. This is especially true since Grievant had little to no knowledge about the Hendricks Scholarship. Ms. Cameron's information about the scholarship was not misleading or inaccurate, and the fact that she did not go into detail about how the scholarship would interact with Financial Aid does not make Ms. Cameron's statements incorrect. Again, the proper course of action would have been to discuss these concerns with the supervisor at a time when the discussion would not affect the work of the employer, in this case, the education of students. An employee's belief that management's decisions are incorrect, absent a threat to the employee's health or safety, does not confer upon her the right to ignore or disregard the order, rule, or directive or show disrespect for the supervisor. Lilly, supra; Parker, supra.

III. Mitigation/Severity of Penalty

Grievant also argued that any misconceptions the students may have had were cured by "forcing " Grievant to read the memorandum from Provost Checkovich, and "thehumiliation she endured by having her integrity questioned was punishment enough." (Grievant's post-hearing submissions.) This argument is seen as a request for mitigation.

The argument that Grievant's written reprimand is excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

"When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997). Mitigation of a penalty is considered on a case by case basis. Conner v.

Barbour County Bd. of Educ., Docket No. 95-01-031 (Sept. 29, 1995); McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. Pingley v. Div. of Corrections, Docket No. 95-CORR-252 (July 23, 1996). This Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that aparticular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge cannot substitute her judgement for that of the employer. Jordan v. Mason County Bd. of Educ., Docket No. 99-26-8 (July 6, 1999); Tickett v. Cabell County Bd. of Educ., Docket No. 97-06-233 (Mar. 12, 1998); Huffstutler v. Cabell County Bd. of Educ., Docket No. 97-06-150 (Oct. 31, 1997).

In assessing the above-cited factors and considering the proper standard of review, the undersigned Administrative Law Judge finds Grievant's punishment of a written reprimand for her actions in this case cannot be found to be excessive. Grievant's insubordination and gross misconduct was sufficient to support the punishment received. Jordan, supra.

IV. Retaliation/Reprisal

Grievant has alleged the written reprimand was in retaliation for filing prior grievances. Grievant has the burden of proof on this allegation. 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); 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, 179 W. Va. 53, 365 S.E.2d 251 (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 testified she has filed approximately 18 to 20 grievances since her return to work in 1994, and she filed approximately three to four each year. Grievant has established a prima facie case of reprisal, as she engaged in the protected activity of filinggrievances, and was subsequently treated adversely. The adverse event is closely connected in time to the filing of her grievances.

The next step is an examination of whether Respondent has rebutted the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action, a written reprimand. Respondent has rebutted the presumption, as it has demonstrated Grievant did

engage in insubordination and gross misconduct. No basis exists for finding Respondent's actions were motivated by any retaliatory motive.

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). "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).

2. 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).

3. 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)).

4. 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. 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).

5. "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)).

6. An employer has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, andauthority. . . ." McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992) (citing In re Burton Mfg. Co. 82 L.A. 1228 (Feb. 2, 1984)).

7. "Few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later." Hundley v. W. Va. Div. of Corrections, Docket No. 96-CARR-399 (Oct. 27, 1997). See Maxey v. W. Va. Dep't of Human Resources, Docket No. 93-HHR-424 (Feb. 28, 1995).

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

9. "Each case [of gross misconduct] must be determined upon the facts and circumstances which are peculiar to that case." Thurmond v. Steele, 159 W. Va. 630, 225 S.E.2d 210 (1976). See, Mindel v. United States Civil Serv. Comm'n, 312 F. Supp. 485 (N.D. Cal. 1970); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); Kidd v. W. Va. Dep't of Tax and Revenue, Docket No. 91-T-127 (Dec. 17, 1991).

10. Respondent has demonstrated Grievant was insubordinate and engaged in gross misconduct.

11. An argument that the punishment received is excessive, is an affirmative defense, and a grievant bears the burden of demonstrating the penalty was "clearly excessive or

reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989). 12. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997).

13. Mitigation of a penalty is considered on a case by case basis. Conner v. Barbour County Bd. of Educ., Docket No. 95-01-031 (Sept. 29, 1995); McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. Pingley v. Div. of Corrections, Docket No. 95-CORR-252 (July 23, 1996).

14. “[M]itigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation.” Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge cannot substitute her judgement for thatof the employer. Jordan v. Mason County Bd. of Educ., Docket No. 99-26-8 (July 6, 1999); Tickett v. Cabell County Bd. of Educ., Docket No. 97-06-233 (Mar. 12, 1998); Huffstutler v. Cabell County Bd. of Educ., Docket No. 97-06-150 (Oct. 31, 1997).

15. Grievant's punishment of a written reprimand for her actions in this case cannot be found to be excessive. Grievant's insubordination and gross misconduct was sufficient to

support the punishment received, a written reprimand. Jordan, supra.

16. 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."

17. 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, 179 W. Va. 53, 365 S.E.2d 251(W. Va. 1986); Gruen v. Bd. of Directors/Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997).

18. 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.

19. Grievant established a prima facie case of retaliation or reprisal.

20. Respondent successfully rebutted the prima facie case of retaliation when it

demonstrated the action taken against Grievant was not related to the filing of a grievance, but was related to the proven insubordination and gross misconduct.

Accordingly, This grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of the Jefferson 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 partyto 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: October 31, 2001

Footnote: 1

Respondent filed a Motion to Dismiss arguing Grievant had abandoned this grievance. This Motion was denied at the Level IV hearing.

Footnote: 2

Grievant was represented by Attorney Larry Schultz, and Respondent was represented by Assistant Attorney General Kristi McWhirter.

Footnote: 3

ACFN students take remedial or developmental courses to prepare them for college courses.

Footnote: 4

Grievant testified she did not have copies of any of this correspondence and the tentative settlement agreement. It is unclear what happened to these documents as Grievant was sent multiple copies of this information.

Footnote: 5

Grievant had called a couple of faculty members after the first class, and they told her it was unusual for scholarship announcements to be made during instructional time. Later, on January 25, 2001, Grievant called Financial Aid, and was told it was incorrect to make scholarship announcements during class time. These individuals were not call to testify.

Footnote: 6

Grievant testified she had several discussions with students both after class and in her office following this incident. Multiple issues were discussed.

Footnote: 7

Mr. Perdue testified about the responses of the students, and his contemporaneous notes were admitted into evidence.

Footnote: 8

Many students, both those interviewed by Mr. Perdue and those testifying at the Level IV hearing, did not see the letter. This may very well be because a portion of this exchange took place in the hallway outside the classroom.

Footnote: 9

This statement was not explained.

Footnote: 10

These statements were not explained.