DEANA STANLEY,

Grievant,

v. **Docket No. 01-HEPC-503D**

HIGHER EDUCATION POLICY COMMISSION/

WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, Deana Stanley, employed by West Virginia University (WVU or Respondent) as a Food Service Assistant, filed a level one grievance on August 13, 2001, following the termination of her employment. Grievant claimed a default occurred when WVU failed to schedule a level two conference within the statutory time lines. Following a hearing at level four, Grievant's claim for default was granted on December 20, 2001. A subsequent hearing was conducted on April 16, 2002, to determine whether the relief requested, reinstatement with back pay and benefits, is contrary to law or clearly wrong. Grievant was represented by Mary Linn Snelson of WVEA, and James Zimarowski, Esq., and WVU was represented by Assistant Attorney General Samuel R. Spatafore. The matter became mature for decision on May 16, 2002, the due date for proposed findings of fact and conclusions of law.

The following findings of fact are made based upon the evidence presented at level four.

Findings of Fact

1. Grievant was employed by WVU as a Food Service Assistant I assigned to Stalnaker Hall at all times pertinent to this grievance.

2. Grievant was suspended for five days in March 2000, for inappropriate behavior consisting primarily of arguing with her supervisors and co-workers. 3. On April 13, 2000, Grievant engaged in an argument with the Lead Worker over when she could take a break. This incident was memorialized in a memorandum dated April 17, 2000, to Grievant, from Kathy Curtin, Food Service Manager. Ms. Curtin reminded Grievant that it was this type of behavior which had resulted in prior disciplinary measures, and that she could not continue to argue with her supervisor when given reasonable instructions.

4. On October 24, 2000, Grievant questioned another employee about which serving utensils were to be put out on the serving line. After several inquiries, the voices of both employees became so loud that they were clearly heard in the office and throughout the kitchen. Grievant was issued a letter of counseling for unprofessional conduct by David Master, Assistant Director of Dining Services, on October 25, 2000, in which he advised her that she was expected to follow instructions given by Lead Workers and supervisors.

5. On November 28, 2000, Grievant became involved in an argument with her Lead Worker concerning the time she was to take her dinner break. Grievant had not wanted to take her break when directed, but was instructed to do so before the dining hall became busy. Her voice became so loud that students in the dining hall turned to see what was going on. As a result of this incident, Mr. Master issued Grievant a first letter of warning dated December 5, 2000.

6. A second letter of warning was issued on June 11, 2001, by Amy Anderson, Food Service Supervisor, following incidents on June 9, 10, and 11, 2001. Ms. Anderson stated that on June 9, she directed Grievant to assist other employees with getting silverware ready for dinner, and Grievant stated that she did not want to work with thoseemployees. When asked again, Grievant began to argue, but did assist after the supervisor raised her own voice directing her, “Deana, go.” During the same shift, another employee reported that Grievant yelled at her in front of customers because she was splashing gravy all over. At the end of the shift, Grievant declined a Lead Worker's request to help in the dish room because it was too hot and she would pass out. She was then directed to put the dishes away, which she did, with some assistance.

On June 10, 2001, a Lead Worker interrupted Grievant who was “yelling”at another employee. The Lead Worker advised Grievant that the other employee was just doing her job. Grievant tried to engage the Lead Worker in an argument, but Ms. Anderson entered and directed Grievant to put the dishes away, and mop her area.

On June 11, 2001, a Lead Worker directed Grievant at least twice to go back to work and stop talking to other employees.

7. Grievant did not contest the letter of counseling, or the first or second letters of warning.

8. By memorandum dated July 26, 2001, Ms. Curtin provided Grievant a “Notice of Intent to Terminate Employment” following instances of arguing with Ms. Anderson and a Lead Worker after being repeatedly directed to perform her duties, directed to return from an unauthorized extended

meal break, and to stop talking with other workers interrupting the work flow.

9. Ms. Curtin notified Grievant by letter dated August 7, 2001, that her employment with WVU was terminated effective August 2, 2001.

Discussion

Because Grievant is presumed to have prevailed by default, the burden of proof is upon Respondent to prove by clear and convincing evidence that the relief requested by Grievant is clearly wrong or contrary to law. This standard requires the party with the burden of proof to produce evidence substantially more than a preponderance of the evidence, but less than that required to prove the matter beyond a reasonable doubt. Farley v. Dep't of Health & Human Resources/Pinecrest Hosp., Docket No. 02-HHR-088D (May 8, 2002); Lohr v. Div. of Corrections, Docket No. 99-CORR-157D (Nov. 15, 1999).

Respondent argued it would be clearly wrong to grant the relief requested because the termination of Grievant's employment was based upon its progressive discipline policy (WVU-HR-9) which provides in part:

When an employee does not maintain the standards of performance or conduct as outlined by the supervisor, or, does not comply with applicable policies, procedures or law, disciplinary action, including but not limited to written notice, demotion, suspension, or dismissal may be taken. Dependent upon the actual and potential consequences of the offense, employee misconduct may be considered minor misconduct or gross misconduct.

Minor misconduct results in the appropriate action being taken through progressive discipline. Progressive discipline requires notice of concern and expectations to the employee through letter(s) of warning, with potential suspension and/or demotion, resulting in termination, for subsequent similar offenses . . . .

Respondent demonstrated by clear and convincing evidence that Grievant engaged in unacceptable conduct which interfered with her work and the work of co-employees. Grievant had been counseled, both verbally and in writing, and given two letters of warning regarding her behavior. She was advised that further episodes would result in advanced discipline. Further, Grievant was given a five day suspension in March 2000, afterreceiving two letters of counseling and a letter of warning for the same behavior. (See footnote 1) In consideration of the well-documented history of

Grievant's behavior, and Respondent's attempts to correct it, reinstatement would be clearly wrong.

In an attempt to rebut WVU's argument, Grievant asserted that her behavior was provoked by her co-workers who teased her about being slow. Grievant did not testify, or offer any other evidence of this teasing at hearing. Ms. Curtin testified that Grievant had not reported any teasing to her, and she had not witnessed any such behavior.

The following conclusions of law support the decision reached.

Conclusions of Law

1. Respondent defaulted at level two of the grievance procedure when a conference was not held within the statutory time period set forth in W. Va. Code § 29-6A- 3.

2. When determining whether the remedy requested is contrary to law or clearly wrong, it is presumed that the grievant prevailed on the merits of the grievance. W. Va. Code § 29-6A-3.

3. The burden of proof is upon Respondent to prove by clear and convincing evidence that the relief requested by Grievant is clearly wrong or contrary to law. This standard requires the party with the burden of proof to produce evidence substantially more than a preponderance of the evidence, but less than that required to prove the matter beyond a reasonable doubt. Farley v. Dep't of Health & Human Resources/PinecrestHosp., Docket No. 02-HHR-088D (May 8, 2002); Lohr v. Div. of Corrections, Docket No. 99-CORR-157D (Nov. 15, 1999).

4. Respondent rebutted the presumption created in W. Va. Code §29-6A-3(a)(2), that Grievant prevailed on the merits, by presenting clear and convincing evidence that the basic facts underlying the asserted presumption are not true, and that the relief requested would be clearly wrong as the termination of Grievant's employment was processed in compliance with its progressive disciplinary policy. See Lohr v. Div. of Corrections, Docket No. 99-CORR-157D (Nov. 15, 1999).

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. 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 itsAdministrative Law Judges is a party to such appeal, and should not be so named. However, the appealing party is required by W. Va. Code §29-5A-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.

Date: May 24, 2002 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

Stanley v. Board of Trustees/W. Va. University, Docket No. 00-BOT-153, has been appealed to the Circuit Court of Kanawha County where it remains pending.