**JOHN GORBY,**

**Grievant,**

**v v.**

**Docket No. 02-HEPC-157**

**HIGHER EDUCATION POLICY COMMISSION/**

**WEST VIRGINIA SCHOOL OF OSTEOPATHIC**

**MEDICINE,**

**Respondent.**

## D E C I S I O N

Grievant, John Gorby, was employed as the Director of Admissions/Registrar by the West Virginia School of Osteopathic Medicine ("WVSOM" or "School"). He filed two grievances. The grievance dated March 26, 2002, relates to his suspension and demotion, and the grievance dated May 9, 2002, deals with his dismissal.

The suspension and demotion grievance was advanced to Level III, but before the Level III hearing was held, Grievant was dismissed. The parties agreed to consolidate these two grievances at Level IV. A Level IV hearing was held on October 23, 24, and 25, 2002, in the Grievance Board's Beckley office. This case became mature for decision on January 22, 2003, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

### Issues and Arguments

Respondent asserts it properly suspended, demoted, and dismissed Grievant for unsatisfactory performance, insubordination, and dishonesty, after multiple attempts to assist Grievant to improve. (See footnote 2)

Grievant asserts all actions against him were improper, and he was subjected to harassment and disciplinary action because his supervisor, Dr. Carolyn Thompson, did not approve of his actions with a friend of hers. Grievant argues the changes his supervisor demanded he make were not required and were a micro-management of his work that was not needed. Grievant also avers he has been the

victim of discrimination and favoritism. Further, he maintains the acts for which he was dismissed were insignificant in nature, and the discipline received was too harsh. (See footnote 3) (See footnote 4)

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

## Findings of Fact

1. Grievant was employed as the Director of Admissions/Registrar at WVSOM. He had been in this position for approximately fifteen years.

2. Grievant received a suspension in 1996. The reason for this action was not discussed at hearing other than this action was disciplinary.

3. Dr. Carolyn Thompson had been Grievant's supervisor for most of Grievant's fifteen years. Throughout that time, Dr. Thompson has evaluated Grievant on a yearly basis. From 1987-1999, Grievant received thirteen satisfactory evaluations and two exceeds expectation evaluations. Grt. Nos. 3 -13.

4. Dr. Thompson's positive comments in these evaluations found Grievant: 1) dedicated to WVSOM; 2) worked well with applicants and students; 3) reviewed files extensively; and 4) had an excellent knowledge base. Grt. Nos. 3 -13.

5. While Grievant received satisfactory evaluations, Dr. Thompson consistently pointed out problems in Grievant's work performance without any resulting change in Grievant's actions. The repeated behaviors that Dr. Thompson noted in Grievant's evaluations needing correction were: 1) failure to master Registrar's computer applications after repeated directions to do so; 2) resistance to supervisor's directions and constructive criticisms; 3) difficulty with time management; 4) problems with communication with staff and others; 5) difficulty meeting deadlines and following through with a project to completion; 6) problems with planning, prioritizing, and organizing work; and 7) propensity to give vague, misleading, and/or, at times, incorrect information. Grt. Nos. 3 -13.

6. In March 2000, around the time of Grievant's evaluation, Dr. Thompson became tired and frustrated by the lack of response from Grievant about his negativebehaviors. Dr. Thompson talked to John Mooney, Director of Human Relations, about what actions she could take to correct Grievant's behavior. Mr. Mooney suggested a variety of methods to deal with the problem, including frequent

written memos to clarify the changes Dr. Thompson expected, specific instructions, and time periods for the completion of each task. Dr. Thompson was to offer assistance to Grievant in meeting his responsibilities.

7. Dr. Thompson decided to follow Mr. Mooney's advice, and she started writing memos and e-mails to Grievant. She also began documenting Grievant's actions and inactions to place in his next performance evaluation as a wake-up call.

8. Previously, Grievant had complained because the faculty who interviewed the applicants were not asking these candidates the questions the Admissions Committee wanted answered. On March 17, 2000, Dr. Thompson requested Grievant to provide her with a list of these questions so the faculty would be prepared in the event of Grievant's absence. Resp. No. 2.

9. Grievant did not respond to this request. On May 5, 2000, Dr. Thompson again asked for these questions and inquired why Grievant had not responded. Resp. No. 2.

10. Grievant still did not respond. On May 17, 2000, Dr. Thompson sent her third request for this information. Grievant responded on May 18, 2000, with a list of three questions. At that time, he offered no excuse for his lateness in answering. At hearing, Grievant testified he did not respond sooner because it was not interview time, and there was no need for Dr. Thompson to have the information when she requested it. Resp. No. 2. 11. On June 15, 2000, Sherry Phillips (See footnote 5) e-mailed Grievant noting it had been over a week since his last progress report on the Admissions section of WVSOM's web page. She requested a status report, and copied Dr. Thompson on this request. Dr. Thompson then e-mailed Grievant to ask the status as well. Grievant responded explaining he was rewriting the first three paragraphs of the Admissions web page, he was almost done, and he would be finished by the end of the next week. Resp. No. 3.

12. Ms. Phillips e-mailed Grievant again on July 10, 2000, asking the status of his web page update. Dr. Thompson asked Grievant about the status of these paragraphs on July 18, 2000. Grievant did not respond to either individual, and Ms. Phillips again wrote Grievant on July 20, 2000, requesting an update, noting Grievant had told her it would be completed by June 23, 2000. Dr. Thompson again e-mailed Grievant for a response on July 31, 2000, as she had not heard from him. Resp. No. 3.

13. The project was not completed until August 8, 2000, and this timing interfered with the last-minute efforts to fill the entering class. Grievant ended up completing the web page, while Dr.

Thompson was required to call twenty-six applicants on the waiting list to offer them a spot in the class. These calls would normally have been made by Grievant.

14. These two examples reflect Grievant's typical response to requests for information and his frequent failure to respond. Multiple requests were usually needed to get an reply from Grievant, especially if he did not agree with the need for or the timing of the request. Frequently, Grievant's co-workers informed Dr. Thompson of the need for certain information so they could be sure they would receive it on time. 15. Grievant dated an acquaintance/friend of Dr. Thompson's, D. M, for several years. (See footnote 6) Grievant, D. M., and Dr. Thompson all attend the same church and had all worked with the youth. In late July, Grievant met Cindy, his current wife. In late August, Grievant took D.M. to dinner for her birthday, and he spent the evening discussing his new girlfriend and how much she meant to him. D. M. cried, and Grievant later told Dr. Thompson of these events.

16. In September, Dr. Thompson, at work, but after work hours, told Grievant she believed he had treated D. M. badly. This type of conversation was not an unusual occurrence, as personal issues were frequently discussed within their small group.

17. Dr. Thompson also told several other employees she believed Grievant had treated D. M. badly. Dr. Thompson believed Grievant had used D. M., and did not believe they were "right for each other."

18. Carol Berger, a thirteen-year employee, transferred to the Admissions Office in 1998, as a Records Officer. Grievant directed her to do much of the work of another employee, Angela Rees, a Records Assistant III, as Ms. Rees made too many mistakes. Ms. Rees was supposed to be Grievant's secretary. Grievant also gave Ms. Berger Ms. Rees's work to correct. As a consequence of these directions, Ms. Rees had less to do and Ms. Berger was overworked. When Ms. Berger started in Admissions, she was also informed by Ms. Rees and Vicki Glover, Records Officer, that they must present a united front against Grievant because he was abusive and would give them "nonsense work" todo. Ms. Berger complained to Dr. Thompson about this work situation. Test. Berger, Level IV Hearing Tr., at 225 - 228.

19. Both Ms. Rees and Ms. Glover believed Grievant was easier to work with the last two years. Test. Rees and Glover, Level IV Hearing. Ms. Rees and Ms. Glover would yell at Grievant and refuse to do what he asked if they did not want to do it. Test. Berger, Level IV Hearing.

20. In late July 2000, Ms. Berger became seriously ill. Grievant was offered help from another

section, but refused most of it.

21. In early September 2000, Dr. Thompson asked Grievant if the rejection letters to applicants on the waiting list had gone out, and he replied yes. On September 13, 2000, Dr. Thompson found the secretary sending out rejection letters, and sent a memo to Grievant about this issue, directing Grievant to explain in writing by September 19, 2000. Resp. No. 5. Grievant's response explained **these** rejection letters were being sent to applicants who had already rejected WVSOM, not the ones on the waiting list. Dr. Thompson was displeased to find out WVSOM was sending rejection letters to applicants whom WVSOM would have accepted, but who had rejected WVSOM. Grievant's explanation was this letter was needed to close out the file, he had always done it this way, and he saw no problem with it. He did agree he had been negligent in refusing offered help. Resp. No. 5.

22. Grievant's normal work hours were 8:00 a.m. to 4:30 p.m., but these hours were not usually mandatory. Grievant usually arrived between 8:45 a.m. to 9:00 a.m. Grievant often stayed at work after 4:30 p.m. 23. On October 4, 2000, Dr. Wager, Chairperson of the AdmissionsCommittee, informed Dr. Thompson she was quite angry about Grievant's failure to attend the Admissions Committee meetings on time. She noted the committee was composed of six faculty members, and they were wasting their time waiting for Grievant, as they could not begin their work until he arrived with the files. She noted Grievant was usually ten minutes late for the 8:00 a.m. meeting; the Admissions Committee had changed the start time to 8:10 a.m.; and Grievant then arrived around 8:20 a.m. Grievant admitted he was at times late for the meetings.

24. Dr. Thompson met with Grievant that same day, and Grievant was unable to offer any excuses for his behavior. Dr. Thompson followed that meeting with a memo dated October 16, 2000, which directed Grievant to be in the meeting room at 7:50 a.m., with the files. Dr. Thompson informed Grievant this was a written reprimand, and failure to comply immediately could result in further disciplinary action including suspension and dismissal. This written reprimand was not grieved. Resp. No. 6.

25. On October 5, 2000, Dr. Thompson found out Grievant had arrived late for Admissions Interviews, without notifying anyone in the office. In a memo dated October 16, 2000, Dr. Thompson directed Grievant to be in his office promptly at 8:00 a.m. on the mornings that Admissions Interviews were scheduled, and to notify the office by 8:15 a.m. if he were ill. These directives were identified as part of a performance Improvement Plan. Dr. Thompson noted his lack of communication with his

staff had been a problem in the past, and she had discussed this issue with Grievant before. Dr. Thompson informed Grievant this was a written reprimand, and failure to comply immediately could result infurther disciplinary action including suspension and dismissal. This written reprimand was not grieved. Resp. No. 7.

26. On October 17, 2000, Grievant and Dr. Thompson received an e-mail about updating the testing and grading handbook. Dr. Thompson e-mailed Grievant twice on November 15, and 30, 2000, asking Grievant if there was some action his Department needed to take as a result of this updating. She received no response; so on December 6, 2000, she e-mailed Grievant directing him to make an appointment with her to discuss these issues. Resp. No. 8.

27. Sometime in October 2000, Grievant decided to marry Cindy. Dr. Thompson was not aware of this decision until later, and when she became aware is unclear.

28. Grievant and Dr. Thompson met on November 16, 2000. Dr. Thompson followed this meeting with another memo to Grievant detailing recent problems with his work performance. Grievant had failed to supervise a new employee properly; he had not fulfilled his duties with recent Admissions Interviews; and he had failed to complete, or even respond to a letter and subsequent phone calls from Sharon Morrissey, who was conducting a research project for the U.S. Department of Education. Ms. Morrissey's request for information was originally made on September 12, 2000. Additionally, Grievant had failed to secure the files of problem students; instead he left them on the floor in a cardboard box. Dr. Thompson noted that Grievant's recent failure to attend Admissions Interviews was a drastic change from his past performance. The memo noted this letter was a counseling memo and would remain in his file. Resp. No. 9.

29. Grievant's response to the file issue was he had been working on the files for a report he completed seven months ago. Dr. Thompson directed Grievant to secure thefiles immediately, and Grievant said he would. Dr. Thompson returned to Grievant's office later that day after Grievant had left, and she found the files still on the floor. She took them to a secure location. Grievant never asked about these files, and Dr. Thompson returned them to Grievant on December 8, 2000, with a memo indicating her concerns. The memo also noted this was a counseling memo and would remain in his file. Resp. Nos. 9 & 12.

30. On December 4, 2000, Dr. Thompson received another call from Ms, Morrissey. Grievant had not yet responded to her request, and she was very frustrated. Dr. Thompson wrote to Grievant

about this matter on December 5, 2000, noting Grievant had stated in November that he would "take care of it." The memo noted this letter was a counseling memo and would remain in his file. Resp. No. 10.

31. On December 6, 2000, Dr. Thompson sent Grievant an e-mail noting he was not following the directive to be at work at 8:00 a.m. on the day of Admissions Interviews, and indeed he had not yet arrived as of 8:35 a.m., the date of the memo. Dr. Thompson reminded Grievant this directive was part of an Improvement Plan. Resp. No. 11.

32. On December 21, 2000, Dr. Thompson followed up a conference from the prior day with a memo reviewing what had been discussed about Grievant's continued lateness. Grievant was directed to correct this behavior immediately. The memo noted this letter was a counseling memo and would remain in his file. Resp. No. 13.

33. Grievant married Cindy the end of December 2000.

34. During approximately the first two weeks of January, Grievant was on sick leave. Later in January, he also attended an out of town conference. Shortly after his return to work, Grievant requested time off in February and the first of March for a churchmission trip and a honeymoon. During Grievant's January absences, Dr. Thompson had others filling in for him. As this was a busy time of the year and Grievant had been gone so much, Dr. Thompson asked Grievant if these trips could be postponed. Grievant informed her they could not, and he was allowed to take leave. Grievant was very upset that Dr. Thompson would ask him to change his plans, especially his honeymoon.

35. While Grievant was out of the office, Dr. Thompson discovered several problems. Grievant had not completed an Air Force expense payment from August to November and caused the student dire financial problems. Additionally, an applicant who had expected some response in September 2000 about whether he could receive in-state status, had still not received a response. Grievant was aware that if he was unsure how to deal with issues such as these, he was to seek guidance form his supervisor, not just ignore it. Dr. Thompson also believed she had found a more efficient and quicker way to deal with files right after an Admissions Committee meeting. Grievant did not want to change his method of handling these files. Resp. Nos. 14 & 15.

36. Dr. Thompson also discovered Grievant had taken applicant files out of the office, not only to his home, but to a conference in Arizona. Although in the past Grievant had taken files home,

Grievant and Dr. Thompson had discussed this was now not a good idea because of privacy issues. These files contained students' and applicants' Social Security Numbers, as well as other confidential information. Dr. Thompson also noted she had directed Grievant to return these files through a co-worker who lived near Grievant on January 22, 2001. Grievant had not done so, but had instead waited to return the files until he came back to work on January 31, 2001. He gave no reason for his failure to follow Dr. Thompson's directive. 37. On March 14, 2001, Dr. Thompson wrote Grievant noting these problems and other areas in need of improvement, such as failure to communicate with other staff and faculty, failure to obtain needed interviewers before he left on vacation, and failure to complete requested work, some of which dated from December 2000. In this letter she informed Grievant that no applicant or student files were to leave the building unless directed by her, higher level administrators, or the courts. She noted this memo was a written reprimand, and it was not grieved. Resp. No. 15.

38. Dr. Thompson also issued Grievant another written reprimand on March 14, 2001, detailing disrespect and lying that had occurred on February 21 and 22, 2001. Dr. Thompson noted that failure to adhere to the directives contained in this written reprimand could result in additional disciplinary action. This written reprimand was not grieved. Resp. No. 16.

39. Dr. Thompson discussed these problems with Mr. Mooney, and she decided it was time to implement a detailed Improvement Plan which would clearly identify the behaviors expected from Grievant. Test. Mooney and Thompson, Level IV Hearing.

40. On March 23, 2001, Grievant and Dr. Thompson met and discussed the Improvement Plan which outlined the required performance changes Grievant was expected to make. The duration of this plan was to be eight months. Grievant was to receive his performance evaluation the following week, and some changes could be instituted as a result of this evaluation. Resp. No. 17.

41. The directives of this Improvement Plan reiterated the arrival times for Admissions Committee meetings and Admissions Interviews; and that Grievant was to hold weekly staff meetings, deal with files immediately after the Admissions Committee, and tocomplete all military reimbursement forms within one week of their receipt. Dr. Thompson and Grievant would meet weekly to assess Grievant's progress. The day and time of this meeting would be scheduled after Grievant arranged his weekly staff meetings. Resp. No.17, at Level IV.

42. Grievant received his 2000 performance evaluation on March 30, 2001. (See footnote 7)

Grievant's performance was rated as unacceptable, and problem areas were failure to obtain the required computer training, lack of commitment to the goals of WVSOM, resistance to supervisor's directives, failure to meet deadlines, and difficulty with time management, communication with staff, honesty, and promotion of team work. Grievant did not grieve this evaluation. Resp. No.18.

43. On March 23, 2001, Dr. Thompson sent a memo to Grievant noting his failure to turn in Ms. Glover's leave sheets. This had been discussed with Grievant on three prior occasions. Resp. No. 20.

44. On April 12, 2001, Sharon Howard, Director of Financial Aid, complained to Dr. Thompson about Grievant's disrespect. Resp. No. 21.

45. On May 5, 2001, Grievant's Improvement Plan was amended to included the repeatedly requested computer training. Additionally, Grievant was directed to improve communication with staff, faculty, and his supervisor; demonstrate a concern for students and applicants; and correct negative work performance of his staff through memos and a cessation of complaining and blaming without correction. The duration of the Improvement Plan was to be eight months from this date. Resp. No. 19. 46. On June 15, 2001, Dr. Thompson wrote Grievant noting they had met once a month regarding his Improvement Plan. (See footnote 8) Dr. Thompson noted Grievant still had not done his staff evaluations which had been due March 21, 2001. She also noted Grievant was not holding weekly staff meetings as directed and had held only one since the implementation of the Improvement Plan. She also informed Grievant his communication with her was "sorely lacking," and he had not shared needed information with her. Resp. No. 22.

47. In June 2001, Grievant and Dr. Thompson were to attend a conference in New York. There were problems with filling the 2001 - 2002 class, and Grievant offered to stay behind. Shortly thereafter, Grievant informed Dr. Thompson his mother had fallen, was in "bad shape," and he really needed to take leave on Monday and Tuesday to help her. Dr. Thompson then decided to stay at WVSOM to solve the class problem. Grievant left Dr. Thompson his cell and family's phone numbers where he was to be until Tuesday, in case he was needed. A problem arose on Monday, and Dr. Thompson tried to call Grievant on his cell phone without success. She then called Grievant's father, and he informed Dr. Thompson Grievant had never arrived, and he was with his wife at Lakeview Resort. Dr. Thompson attempted to contact Grievant at the hotel, but could not find him until she asked the resort to check for a listing under Grievant's wife's maiden name. She asked Grievant how

his mother was, and Grievant lied and said he had spent a long time with her Sunday. When confronted Grievant said he was not lying, and then asked why Dr. Thompson would question him. Test. Thompson, Level IV Hearing, at Tr. 394 - 396. 48. On June 29, 2001, Grievant received a two-month written update on his Improvement Plan. Dr. Thompson noted the staff evaluations were still not done, weekly staff meetings were still not being held, communication of information Dr. Thompson needed was not being given to her, a disciplinary issue with one of his staff was still not dealt with, and needed work on Admissions and graduation had not been completed. Grievant was commended for the work he had done with the Director of Counseling. Grievant was reminded his computer training plan was due July 2, 2001. Resp. No. 23.

49. On July 11, 2001, Ms. Berger returned from catastrophic leave. Grievant asked her prognosis, and she told Grievant this cancer was almost always fatal. Grievant was not pleased that Ms. Berger was on light duty restrictions. Shortly after Ms. Berger's return to work, Grievant was discussing his personal and work problems with her. He told Ms. Berger that while he may be having a rough time, at least he was not "terminal." He repeated this statement to another friend within Ms. Berger's hearing shortly thereafter, in response to a question about how he was doing. Ms. Berger was very hurt and angered by this remark. Additionally, Grievant directed Ms. Berger to prepare a breakfast and said he would be there to help her. Grievant did not appear until later, and this left Ms. Berger to do lifting and work outside of her restrictions. Test. Berger, Level IV Hearing.

50. On August 28, 2001, Grievant and Dr. Thompson met to discuss his Improvement Plan. This meeting did not go well as Grievant disputed Dr. Thompson's information that Grievant, as a salaried employee, was not allowed comp time, and if he was late to work he needed to complete leave slips. (See footnote 9) Dr. Thompson noted staffevaluations due March 2001, were still not done, weekly staff meetings were still not being held, and Grievant had not yet completed the computer plan Dr. Thompson had returned to him on July 18, 2001, for an increase in specificity. Resp. No. 24.

51. Grievant completed staff evaluations in September 2001 for two of his three staff members. Resp. No. 26.

52. Grievant completed the computer plan on September 10, 2001. In this plan he noted what action he had taken thus far, and that he would meet with Ms. Glover twice weekly to practice. Grievant did not practice this frequently. Resp. No. 25.

53. Several times during this period, Grievant discussed his situation with Mr. Mooney. Grievant told Mr. Mooney he could not and would not work with Dr. Thompson. Mr. Mooney told Grievant the directives from Dr. Thompson were reasonable, she was his supervisor, and Grievant was required to follow these instructions. Grievant believed Dr. Thompson was micro-managing his work and giving him unnecessary orders.

54. On February 15, 2002, Grievant demonstrated his ability to perform essential computer skills needed by the Registrar's office. He was able to complete most of these tasks, but was unaware the password had changed. Resp. No. 26.

55. On March 4, 2002, Dr. Thompson reviewed in written form the progress Grievant had made in his Improvement Plan. She noted the difficulties with the evaluations, failure to hold weekly staff meetings, failure to communicate with her, failure to follow the directive to complete the Admissions files on the day of the meeting, failure to arrive at 7:50 a.m. on days the Admissions Committee met, failure to arrive at 8:00 a.m. on Interview Days, difficulty completing the required computer skills, and difficulty in interacting with staff. Dr. Thompson noted Grievant continued to blame others fordifficulties and negative work performance, but Grievant had not followed the directive to write disciplinary memos to his staff. Dr. Thompson also noted Grievant's continued tendency to lie or give inaccurate information when pressed. Grievant's performance on the Improvement Plan was rated as a failure. Resp. No. 26.

56. In this same report, Dr. Thompson informed Grievant she would recommend a two-week suspension, removal of the Registrar's duties, a five percent reduction in salary, a ninety-day probationary period, and another Improvement Plan when he returned to work. Resp. No. 26.

57. Dr. Thompson met with Grievant on March 4, 2002, to discuss this recommendation. This meeting did not go well. Grievant asserted he could refute the statements in the report, he didn't care, Dr. Thompson could not suspend him, Dr. Thompson had "killed everything in him that wanted to work," he had given everything to the school, he didn't want to work with Dr. Thompson, and Dr. Thompson had been out to get him ever since he had met Cindy. (See footnote 10) Grievant also questioned how he could have good evaluations for fifteen years and then change. He refused to take the evaluation with him saying he "didn't give a shit what [Dr. Thompson] did." Test. Thompson, Level IV Hearing. 58. Grievant was given a pre-suspension meeting with Mr. Mooney the following day. Resp. No. 26, at Level IV.

59. Grievant prepared a six-page memo for his meeting with Mr. Mooney the next day, which discussed the areas addressed by Dr. Thompson. This memo stated: 1) Grievant had difficulty at work because he was short-staffed and had been ill; 2) Grievant'smanagement style had been acceptable for fourteen years, there was no need for weekly staff meetings because he knew what his staff was doing, no one else was required to have weekly meetings, and Dr. Thompson was micro-managing him; 3) Dr. Thompson had not met her own directive of holding weekly meetings with Grievant; 4) the way Dr. Thompson wanted Grievant to prepare the files after Admissions Committee meetings would not work; 5) Grievant had not arrived at 7:50 a.m. for Admissions Committee meetings because there was no need to do so, as he was already prepared, and when he was late it was due to circumstances beyond his control; (See footnote 11) 6) he did not arrive at 8:00 a.m. for Interviews because this was an unnecessary, unworkable change from the way things had been done in the past, and the old way was effective; 7) Grievant was able to perform the computer functions Dr. Thompson required, but Grievant was unable to function as smoothly as Dr. Thompson wanted because she had waited too long to check him, and Ms. Glover had changed her password without telling him; 8) Grievant's self management skills were not a problem, and he did not withhold information; 9) Grievant's staff management skills were not a problem, and he was well aware of what his staff is doing and does evaluate work loads; 10) Grievant did not lie and Dr. Thompson misunderstood the information given to her; and 11) Grievant admitted he was late in getting the performance evaluations done. In summation, Grievant stated two of his staff had told him he was easier to work with now than he had been in the past, noted things he saw as well done, and asked to be reassigned to the Vice President for Academic Affairs. Resp. No. 28. 60. After reading Grievant's response, Dr. Thompson wrote Mr. Mooney noting Grievant had received help from Ms. Howard, and this was one of the reasons the work was up to date in Admissions. Grievant had initially refused this help, but Ms. Berger asked for this help and Grievant agreed. Resp. No. 29.

61. By letter dated March 12, 2002, Grievant was informed by Mr. Mooney that he had reviewed the documentation and recommended Grievant be suspended and demoted. (See footnote 12) Mr. Mooney believed this demotion would help Grievant in the completion of his duties as he would only have the one area on which to focus. Resp. No. 31.

62. By letter dated March 13, 2002, Grievant was informed by President Olen Jones that he was suspended, demoted, and would be placed on an Improvement Plan upon his return to work.

The reasons given for this action were "lack of satisfactory performance, and insubordinate actions." Dr. Jones noted insubordination would not be tolerated, and further behaviors of this type "will result in additional administrative action, up to and including dismissal." Resp. No. 32.

63. Grievant filed a grievance over these disciplinary actions.

64. Grievant was on suspension the last two weeks in March 2002. On April 4, 2002, after he returned to work, he was given a memo outlining performance compliance standards (Improvement Plan) and noting he was on a 90-day probation period. Many of the expectations in this memo were the same as those listed in his prior Improvement Plan. With the transition in his office, the Job Description of his supervisees had changed. Grievant was expected to assist with the smooth transition of the Registrar's Office to Ms.Howard, and assist his staff in learning their changed roles. Grievant was also directed to write a plan outlining how he planned to fill the incoming class to avoid the last minute phone calls of the past two years, continue his work with the college catalog, and prepare a handout for the Admissions Committee and Interviewers regarding appropriate interview questions, etc. Resp. No. 33.

65. Upon Grievant's return to work, Dr. Thompson asked Ms. Berger if she would maintain a record of Grievant's arrival time. Ms. Berger agreed to do this. Grievant's arrival time varied greatly, from before 7:45 a.m. to 1:30 p.m. Grt. No. 2.

66. On April 4, 2002, Dr. Thompson e-mailed Grievant noting he had arrived late on the three Interview days of that week. Resp. No. 34.

67. Dr. Thompson met with Grievant on April 8, 2002, and noted he had missed some days of work since his return, and he needed to fill out leave slips. Dr. Thompson also reviewed again the manner in which she wanted him to deal with the files after the Admissions Committee met, but Grievant asked if he could deal with the files in a different manner after they were reviewed by the Admissions Committee. Dr. Thompson promised to review this request. Resp. No. 36, at Level IV.

68. On April 12, 2002, Dr. Thompson wrote Grievant noting that during the switch in the Registrar's duties, she had discovered he had not been following the proper standards for the filing and storage of student records, as well as other issues. Grievant had no explanation for his inaction other than he had tried to resolve the issue two years ago without success. This statement was incorrect as the files had not been properly stored for six years. Dr. Thompson also noted other long standing problems that Grievanthad not dealt with, nor had he informed her there were problems that

needed resolution. Resp. No. 37.

69. On April 12, 2002, Dr. Thompson noted Grievant had failed to review an applicant's science credit in a timely manner. Resp. No. 38.

70. On April 12, 2002, Grievant responded in writing to his second Improvement Plan. Grievant noted he had always worked with his supervisor and colleagues in a respectful manner, and he would continue to do so. Grievant also indicated he would follow all the directions listed in his Improvement Plan. Resp. No. 39.

71. On April 12, 2002, Dr. Thompson responded to Grievant's request to deviate from her directions for reviewing the files after the Admissions Committee meeting, and denied this request with a detailed explanation focusing on the amount of time the new method would save. Resp. No. 40.

72. On April 15, 2002, Grievant received his performance evaluation for 2001. He was rated as "performance at an unacceptable level," and the problems identified in the previous Findings of Fact were listed as the areas in need of improvement. Grievant disagreed with this evaluation and stated many of the assessments were unfounded. Grievant did not grieve this evaluation. Resp. No. 41.

73. On April 16, 2002, Dr. Thompson informed Grievant the transfer of Registrar material should be completed by April 19, 2002. This date was later changed to April 22, 2002. Resp. No. 42.

74. Grievant was less than forthcoming with the information and files Ms. Howard would need to perform her new duties. He frequently did not respond to Ms. Howard'srequests for information, and Ms. Howard asked Dr. Thompson for her intervention. Resp. No. 44. Test. Thompson and Howard, Level IV Hearing.

75. Grievant held two Admissions Committee meetings off campus without prior discussion with or approval from Dr. Thompson. When Grievant noticed Ms. Berger had completed a required form with this data, he directed her to change the place of the meeting to "on campus" so there would be no "red flags" for Dr. Thompson because he wanted to stay out of trouble. Test. Berger, Level IV Hearing.

76. On April 18, 2002, Dr. Thompson wrote Grievant noting he had failed to follow through with a letter to the Admissions Committee informing them that he would be in the conference room at 7:50 a.m., and he had already had two meetings. Grievant had indicated in his memo of April 12, 2002, he would accomplish this task by April 15, 2002. Additionally, Dr. Thompson noted Grievant had

conducted an Admissions Committee meeting, off campus, taking the files with him without her permission, as prohibited by the March 14, 2001 memo. Grievant did not receive disciplinary action for this behavior, but Dr. Thompson reminded Grievant this was a violation of her prior directive. Resp. No. 45.

77. Grievant did send the memo to the Admissions Committee, but backdated it so it would appear to have been sent on April 15, 2002. Chairperson Tom Steele indicated Grievant's timeliness had improved in the past few months. Resp. No. 45.

78. On April 15, 2002, Grievant gave Dr. Thompson the plan for Admissions for the next class, but it was returned to him as he did not have the right number of students. New negotiated deadlines for this material were reached. Resp. No. 48. This new plan was submitted on deadline. Resp. No. 49. 79. On April 19, 2002, Dr. Thompson met with Grievant to review his progress on his Improvement Plan. Areas of improvement were noted, as well as problems. Dr. Thompson again directed Grievant to cooperate with Ms. Howard. Grievant was still missing some work, not filling out his leave slips, and then working late some nights without permission, to make up some of the missed time. The taking of files off campus was again discussed. Grievant told Dr. Thompson he had taken the files off campus twice, not just once, without permission, and Dr. Thompson stressed this could not occur again. (See footnote 13) Resp. No. 47.

80. On April 23, 2002, Dr. Thompson met with Grievant and Ms. Berger to discuss the written complaint Ms. Berger had recently filed about the way Grievant was treating her. Dr. Thompson followed this meeting with a memo of her findings dated April 25, 2002. Resp. No. 50. Ms. Berger noted if Grievant had a difficult meeting with Dr. Thompson he would then take out his anger on her. Dr. Thompson reminded Grievant Ms. Glover had made similar complaints about Grievant. Grievant also quizzed Ms. Berger about how Dr. Thompson would know about the off-campus Admissions Committee meeting, and asked Ms. Berger if she had told Dr. Thompson. At the end of the meeting, Dr. Thompson directed them to deal respectfully with each other.

81. On April 25, 2002, Dr. Thompson responded to Grievant's memo of April 15, 2002, about the Improvement Plan as she had said she would. She disagreed with some of Grievant's remarks about the quality of his performance and pointed to incidents to support her beliefs. She noted Grievant had still not given Ms. Howard all the informationshe needed, nor had he responded to her requests. Dr. Thompson gave Grievant details on this failure. Dr. Thompson also noted Grievant had

been at work per the directives the last several weeks. Resp. No. 51.

82. On April 29, 2002, Dr. Thompson wrote Grievant about the events that had occurred that day. Ms. Berger had noticed some files were missing and reported this to Dr. Thompson. Dr. Thompson called Grievant at home. Initially, Grievant lied and stated the files were at the office, but when a search failed to reveal these files, Dr. Thompson asked Grievant again if he had taken them home, and he said yes. The number of files Grievant had taken home was twenty-six. Dr. Thompson considered this an act of insubordination and gross misconduct. Resp. No. 52.

83. In a subsequent phone call on April 29, 2002, Grievant admitted he had taken files home on other occasions, but stated it was Dr. Thompson's fault because he felt like he had to take the files home to get his work done. Resp. No. 53.

84. On that same day, Dr. Thompson wrote to Mr. Mooney detailing Grievant's behavior and recommending Grievant's termination for insubordination, dishonesty, and gross misconduct. Resp. No. 54.

85. By letter dated May 6, 2002, Mr. Mooney notified Grievant of Dr. Thompson's recommendation. He reviewed Grievant's behavior and problems over the last year, noted Grievant continued to refuse to follow the reasonable directives of his supervisor, his performance was not satisfactory, and he was recommending Grievant be dismissed for dishonesty, insubordination, and failure to maintain performance standards. Grievant wasgiven until May 8, 2002, to respond to the allegations and recommendations. (See footnote 14) Resp. No. 55.

86. By letter dated May 8, 2002, Grievant was notified by President Jones that he was being dismissed for dishonesty, insubordination, and failure to maintain performance standards. Resp. No. 56.

87. At times, throughout Dr. Thompson's supervision of Grievant, Dr. Thompson raised her voice to Grievant. This happened when Grievant had failed to so something in a timely manner, and/or when he would not listen to what she was telling him to do. Frequently, if people really needed something Grievant had not yet provided, they would notify Dr. Thompson of the request so she could make sure it was provided. Grievant did not raise his voice to Dr. Thompson.

88. Grievant filed a grievance about his termination on May 9, 2002.

## Discussion

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. 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. Id.

Many issues have been raised in this grievance, and they will be discussed one at a time.

**I. Credibility**

The first issue to address is one of credibility, as Grievant and Dr. Thompson disagreed as to the reasons for Grievant's disciplinary actions and Grievant's behaviors. 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. 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 Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. 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'sinformation. (See footnote 15) See Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.

Grievant asserts Dr. Thompson took the actions she did, not because there was anything wrong with his work performance, but because she believed he had treated her friend badly. He contends Dr. Thompson's hostile and micro-managing behavior started in September or October 2000. Dr. Thompson states Grievant's treatment of D. M. had nothing to do with her decision to try and correct Grievant's continuing problems, but with the fact that she was frustrated by his lack of response to

her prior directives and suggestions. Further, WVSOM notes these corrective actions started as early as March 2000. Additionally, the evidence reveals quite a few of Dr. Thompson's directives were the result of complaints from other people; such as the Admissions Committee chairperson, Ms. Morrissey, and staff, parents, applicants, or students. Many of the charges are not denied by Grievant and did not factor into the credibility assessment.

The undersigned Administrative Law Judge finds Grievant to lack credibility. In reaching this conclusion, the undersigned Administrative Law Judge notes Grievant's repeated untruthfulness, especially when in difficult situations. These actions and behavior are noted in the Findings of Fact. Further, the evidence demonstrates Dr. Thompson began to document Grievant's behaviors and to request change even before Grievant met Cindy. Additionally, it is noted Grievant has difficulty in assessing and understanding the effect his behavior has on others, taking responsibility for his own actions, andcommunicating effectively. The undersigned Administrative Law Judge finds Dr. Thompson's actions were not the result of Grievant's treatment of D. M., but were the result of Grievant's failure to follow the policies and directives of his supervisor and WVSOM.

**II. Merits**

The reasons for Grievant's suspension and demotion were unsatisfactory performance and insubordination. The reasons for Grievant's dismissal were failure to maintain established performance standards, insubordination, and dishonesty.

**A. Unsatisfactory performance/performance standards**

The next issue to examine is whether WVSOM 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). Holmes v. Bd. of Director/W. Va. State College, Docket No. 99-BOD-216 (Dec. 28, 1999).

Grievant, as the Director of Admissions and the Registrar was expected to perform many high level tasks in a professional manner. The evidence presented by Respondent demonstrates Grievant did not satisfactorily fulfill the duties of his positions, prior to his suspension and demotion, and he did not follow the directives of his supervisor that were designed to assist him in meeting the expectations of his position. Further, Grievant did not avail himself of the frequent offers of help from Dr. Thompson.

Grievant did not respond to repeated requests for information and/or action from a variety of

people; did not follow policy and protect the confidentially of the files of applicants, students, and former students; did not plan and complete his assigned tasks;and was frequently late in meeting deadlines and in attending activities. He treated the staff within his office differently, and allowed inequity in work assignments to continue. These are not the behaviors are expected of an employee, especially one who is in upper level administrative/management position. See Holmes, supra; Markley v. W. Va. Div. of Rehabilitation Serv., Docket No. 01-RS-087 (Sept. 24, 2001). Grievant was aware of his responsibilities and duties, and the need to perform these tasks was emphasized by his placement on an Improvement Plan and numerous memos. Further, Grievant admits he did not carry out many of the required or requested duties as he felt they were unnecessary. Respondent has established the allegation of unsatisfactory performance stated in the suspension/demotion letter.

As to Grievant's failure to maintain established performance standards, Respondent has also proven this charge. While Grievant did appear to improve in this area from the time he returned from suspension, up to the time of his termination, there were still problems. Grievant was frequently late coming to work and attending meetings; he did not cooperate effectively with Ms. Howard during the transition period despite frequent reminders from Dr. Thompson to do so; failed to report to Dr. Thompson the Admissions Committee's request for meetings off campus which would require violating a directive from Dr. Thompson; and did not respond to requests for action or information from students, applicants, Dr. Thompson, and Ms. Howard. During this time Grievant was frequently absent and failed to follow WVSOM's policy on the submission of leave slips. Also during this month, Dr. Thompson received a complaint from Ms. Berger about Grievant's harassing form of communicating with her when he was upset. Grievant tries to paint the picture that he was dismissed for minor infractions or issues, such as arriving late a few times or failing to perform duties that were unnecessary. 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 can be sufficient for termination. See Holmes, supra; Markley, supra. This is why progressive discipline is used, to enable an employee to see the error of his ways and correct them before that next act occurs, which can result in termination. While these things are not overwhelming in scope or in nature, they occurred within a one month period after a suspension, while under an Improvement Plan, and while on probation. Given this set of circumstances, Respondent has demonstrated Grievant failed to perform satisfactorily his duties during this time period.

**B. Insubordination**

Grievant was suspended, demoted, and dismissed for insubordination. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued by . . . an administrative superior." Butts v. Higher Education Interim Governing Board/Shepherd College, 569 S.E.2d 456 (W. Va. 2002)(per curiam). "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." Id. In other words, there must be not only a refusal to obey a reasonable and valid order, but the refusal must be wilful. Id. If an employer's policy forbids certain conduct, an order which directs an employee to engage in the banned conduct, is an unreasonable and/or invalid order. Id. "[F]or a refusal to obey to be 'wilful,' the motivation for thedisobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order." Id. Failure to act must be based on "a good faith belief." Id. In Butts, the West Virginia Supreme Court of Appeals found refusal to obey a supervisor's order, based on a good faith belief that the order violated a law, regulation, or policy, was not a wilful refusal to obey and was not insubordination. Id. See 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).

Additionally, 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). "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. Veteran Admin., 36 M.S.P.R. 574 (1988). See also Daniel v. U. S. Postal Serv., 16 M.S.P.R. 486 (1983); Davis v. Smithsonian Inst., 13 M.S.P.R. 77 (1983). An employee's belief that management's decisions are incorrect or the result of incompetence, absent a threat to the employee's health and safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. Vickers v. Bd. of Directors/W. Va. State College, Docket No. 97-BOD-122B (Aug. 7, 1998). See Parker v. W. Va. Dep't of Health and Human

Resources, Docket No. 97-HHR-042B (Sept. 30, 1997). Dr. Thompson 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 Dr. Thompson, or did not view the same things as important. However, this does not excuse Grievant from following his supervisor's orders, as long as these directives would not impair his health or safety, or these orders were not unreasonable. None of the orders or directives given by Dr. Thompson falls into these categories. A belief that a supervisor's orders are unfair, incorrect, or unimportant does not relieve an employee of carrying out the directions. Holmes, supra; Parker, supra.

In this situation it is evident that everyone, including Grievant, would have benefitted if he had followed Dr. Thompson's directions to come to work on time, restructure his staff for a more equitable and efficient work product, and protect the confidentially of applicant and student files.

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. Grievant was aware he was not following the directions given to him by Dr. Thompson, and he stated to Mr. Mooney he would not follow these orders. Grievant disagreed frequently with Dr. Thompson, and he disregarded her suggestions and directives as not worthwhile or important. This behavior is insubordinate.

In terms of his suspension and demotion, Respondent has clearly established Grievant was insubordinate; Grievant was wilfully disobedient and refused to obey the reasonable orders issued by his superior. Grievant admits he did not do some of thethings he was told to do, and that he did things he was told not to do. He attempts to explain his actions by saying Dr. Thompson and others did not need the information at the time requested, or the changes Dr. Thompson directed were not needed, or his method of doing things had worked well for many years.

While Grievant may have disagreed with his supervisor about the way things needed to be done, Dr. Thompson gave Grievant these directives because of the problems she saw. For example, she told Grievant to arrive at 7:50 a.m. on the days Admissions Committee meetings were scheduled because she had received a valid complaint. Grievant was repeatedly late for these meetings and wasting the time of many important faculty members. To be perfectly honest, Dr. Thompson thought if she told Grievant to arrive at 7:50 a.m., there was a good chance Grievant would be there by 8:00 a.m.

Further, Grievant was not cooperating with people both within and outside WVSOM. To have to tell Grievant to deal with these individuals in a timely and clear manner is a direction that should not even have to be made to a high level administrator, but it was necessary in Grievant's case. Additionally, Grievant was directed to secure student and applicant files. There was a policy in place directing Grievant to protect these files. Grievant chose to ignore Dr. Thompson's directive and the policy, and instead he left files on his floor, took files home, and did not place files in fireproof cabinets or make sure they were microfilmed in a timely manner. It is noted Ms. Howard made good headway on this task within the first month she was placed in the Registrar's position. Clearly, Grievant was insubordinate prior to his suspension and demotion. Grievant's belief that Dr. Thompson's directives were incorrect did not confer upon him the right to ignore or disregard her orders and directives, as there was no threat to his health and/or safety. Vickers, supra. The answer to the question of whether Grievant was insubordinate after his return from his suspension is clearly yes. Grievant was well aware of the directive of March 14, 2001, stating that applicants' files were not to be taken out of the office. Upon his return to work he choose to ignore this order three times, the last time taking twenty-six files home just after he had been told that this behavior could not occur again.

Grievant defends his behavior by asserting he was required to follow the wishes of the Admissions Committee, and claiming he had to take the files off campus. Certainly it would be important to maintain good relations with the Admissions Committee, but Grievant did not even try to resolve the problem. He did not inform the Chairperson, or any member of the committee, of the problems associated with removing the files from campus, or of the directive he had been given. Grievant also did not seek Dr. Thompson's assistance, and either request special permission to take the files or ask her to intervene into the situation. Grievant was insubordinate in taking the files to the Admissions Committee meeting, and was clearly insubordinate when he took the twenty-six files home, shortly after being reminded of the March 14, 2001 directive.

Additionally, Grievant still had trouble meeting his designated arrival times, and was not cooperative with the transfer of the Registrar's material despite being told to do so.

**C. Dishonesty**

WVSOM also charged Grievant with dishonesty in his dismissal letter. "Clearly, an employer has the right to expect an employee to perform his duties in an honest and forthright manner." Vickers,

supra. See Coster v. Div. of Corrections, Docket No. 94- CORR-600 (Aug. 12, 1996). An employer can expect its employees to interact with their co-workers and supervisors in a truthful manner. Alaeddini v. Div. of Envtl.Protection/Office of Air Quality, Docket Nos. 95-DEP-450/580 (Jan. 28, 1998). Grievant was dishonest when he said he had not taken the files home. It was also dishonest for Grievant to take the files out of the office for the two Admissions Committee's meetings, after he had been informed multiple times that these files were not to leave the office and why. It is also clear Grievant knew this behavior was incorrect, as he attempted to "sneak around" when he directed Ms. Berger to change the reported location of the meeting. **III. Harassment**

Grievant argues Dr. Thompson's treatment of him constituted a pattern of harassment. W. Va. Code §29-6A-2(p) defines "harassment" as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession." What constitutes harassment varies based upon the factual situation in each individual grievance. Sellers v. Wetzel County Bd. of Educ., Docket No. 97-52-183 (Sept. 30, 1997).

"Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. See Moreland v. Bd. of Trustees, Docket No. 96-BOT-462 (Aug. 29, 1997)." Pauley v. Lincoln County Bd. of Educ., Docket No. 98-22-495 (Jan. 29, 1999). Similarly, repeated comments of a sexual nature by a supervisor have been found to constitute harassment. Hall v. W. Va. Dep't of Transp., Docket No. 96-DOH-433 (Sept. 12, 1997). See Tibbs v. Hancock County Bd. of Educ., Docket No. 98-15-016 (June 16, 1998). A single incident does not constitute harassment. Id; Metz v. Wood County Bd. of Educ., Docket No. 97-54-463 (July 6, 1998). Grievant has not demonstrated he has been subjected to harassment. While it is true that he received written reprimands, memos, and two Improvement Plans informing him of various problem areas, and conferences had been held to discuss, explain, and resolve various problems; this fact alone does not constitute harassment. Employers are expected to inform employees about their problems in the work area, and employees are entitled to receive fair and honest feedback and evaluations. This feedback may not always be positive. Just because Grievant did not like the information he received, does not mean it was inappropriate or constituted harassment. Rider v. Bd. of Trustees/Marshall Univ., Docket No. 99-BOT-348 (Apr. 7, 2000). The information and corrections Grievant received were proper and warranted, and Grievant has not

demonstrated he was subjected to harassment.

**IV. Discrimination and favoritism**

Grievant has also asserted he has been subjected to discrimination and favoritism. Discrimination is defined in W. Va. Code § 29-6A-2(d), as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." This Grievance Board has determined that a grievant, seeking to establish a prima facie case (See footnote 16) of discrimination and favoritism under W. Va. Code §§ 29-6A-2(d) & (h), must demonstrate the following:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;
>
> and,
>
> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

Once a grievant establishes a prima facie case of discrimination or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

Grievant has not met his burden of proof and established a prima facie case of discrimination or favoritism. Grievant, as the Director of Admissions/Registrar, was not similarly situated to any other

employees at WVSOM. The other Directors under Dr.Thompson's supervision only had one employee, and she did not require them to have staff meetings because of this. Additionally, Grievant had not distributed the work load of his employees fairly, and Dr. Thompson hoped Grievant would realize this if he had meetings to discuss the work each individual was doing. (See footnote 17) Further, contrary to Grievant's assertions, any differences in the way Grievant was treated were directly related to his "actual job responsibilities" as the Director of Admission/Registrar.

**V. Mitigation/Severity of Penalty**

The argument that Grievant's termination 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 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 will not substitute her judgement for that of the employer. 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).

The discipline of suspension and demotion was not disproportionate to Grievant's offenses, especially after the number of counseling memos and written reprimands Grievant had received. Further, Respondent proved the charges in the dismissal letter, and again the undersigned Administrative Law Judge cannot find WVSOM abused its substantial discretion in designating the penalty in question.

The above-discussion will be supplemented by the following Conclusions of Law.

## Conclusions of Law

1. 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. 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. Id.

2. When an employee fails to perform the majority of the duties of his position in a timely and acceptable manner his performance is unsatisfactory. Markley v. W. Va. Div. of Rehabilitation Serv., Docket No. 01-RS-087 (Sept. 24, 2001); Holmes v. Bd. of Director/W. Va. State College, Docket No. 99-BOD-216 (Dec. 28, 1999).

3. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued by . . . an administrative superior." Butts v. Higher Educ. Interim Governing Bd./Shepherd College, 569 S.E.2d 456 (W. Va. 2002)(per curiam).

4. "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." Id. In other words, there must be not only a refusal to obey a reasonable and valid order, but the refusal must be wilful. Id. 5. "[F]or a refusal to obey

to be 'wilful,' the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order." Id. Failure to act must be based on "a good faith belief." Id.

6. 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).

7. Respondent has demonstrated Grievant was insubordinate in his failure to follow the reasonable directions of his supervisor.

8. "Clearly, an employer has the right to expect an employee to perform his duties in an honest and forthright manner." Vickers v. Bd. of Directors/ W. Va. State College, Docket No. 97-BOD-112B (Aug. 7, 1998). See Coster v. Div. of Corrections, Docket No. 94-CORR-600 (Aug. 12, 1996). An employer can expect its employees to interact with their co-workers and supervisors in a truthful manner. Alaeddini v. Div. of Envtl. Protection/Office of Air Quality, Docket Nos. 95-DEP-450/580 (Jan. 28, 1998).

9. WVSOM has established Grievant acted in a dishonest manner.

10. “Harassment” is defined under W. Va. Code § 18-29-2(n) as “repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy, and professionalism.” 11. Grievant has failed to prove by a preponderance of the evidence that he has been subjected to harassment. See Pauley v. Lincoln County Bd. of Educ., Docket No. 98- 22-495 (Jan. 29, 1999).

12. Discrimination is defined in W. Va. Code § 29-6A-2(d), as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

13. W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

14. This Grievance Board has determined that a grievant, seeking to establish a prima facie case (See footnote 18) of discrimination and favoritism under W. Va. Code §§ 29-6A-2(d) & (h), must

demonstrate the following:

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

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

and,

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

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992). 15. Once a grievant establishes a prima facie case of discrimination or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

16. Grievant has not established a prima facie case of discrimination or favoritism, as he was not similarly situated to other individuals to which he compared himself, and the instructions given to him were directly related to his actual job respon sibilities.

17. An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. Conner v. Barbour County Bd. of Educ., Docket No. 94- 01-394 (Jan. 31, 1995). See Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

18. "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. SummersCounty 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).

19. "Mitigation 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).

20. Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute her judgement for that of the employer. 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).

21. Given the charges proven against Grievant, the penalties of suspension, demotion, and dismissal were not disproportionate or excessive, nor were the penalties arbitrary and capricious. See Overbee, supra; Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994); Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991).

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 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 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: March 11, 2003**

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*Footnote: 1*

*Grievant was represented by Attorney Bill Turner, and WVSOM was represented by Jenndonnae Houdyschell, Assistant Attorney General.*

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*Footnote: 2*

*Respondent's Motion to Dismiss the termination grievance as untimely filed was denied at the start of the Level IV hearing.*

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*Footnote: 3*

*Other claims were made in Grievant's Statements of Grievance, but as evidence on these issues was not presented at hearing they will not be considered.*

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*Footnote: 4*

*A correction in a past Grievance Board's decision must be noted. Hercules v. West Virginia Division of Highways, Docket No. 97-DOH-006 (April 17, 1997), cited to Oakes v. West Virginia Department of Finance and Administration, 164 W. Va. 384, 264 S.E.2d 151 (1980) and stated it stood the proposition that "[d]ismissal as a disciplinary measure must be reserved for circumstances when nothing else but the removal of the employee from the work environment will do." This statement is incorrect. The holding of the case is articulated in Syllabus Point One, "W. Va. Code § 29-6-15 requires that the dismissal of a civil servant be for good cause, which is of a substantial nature directly effecting the rights and interests of the public, rather than upon trivial or inconsequential matters, or a mere technical violation of statute or official duty without wrongful intention." Accordingly, this statement in Hercules, supra, is not good law. Additionally, Grievant's attorney asserted Oakes, supra, applied to this case. It does not, as Oakes dealt with a civil service, state employee.*

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*Footnote: 5*

*Ms. Phillips' title was not given.*

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*Footnote: 6*

*This relationship between Dr. Thompson and D. M. was described as a friendship, but not a close one as it mainly consisted of some church related activities. The undersigned Administrative Law Judge saw no need to identify this individual by name in this Decision. Test. Dr. Thompson, Level IV Hearing Tr., at 398.*

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*Footnote: 7*

*Before performance evaluations are given to WVSOM's employees, they are reviewed and approved by the Associate Dean.*

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*Footnote: 8*

*Grievant and Dr. Thompson also met informally for brief periods during this time.*

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Footnote: 9

*Grievant was staying late at work and then not coming in on time in the morning.*

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Footnote: 10

*This was the first time Grievant had indicated to Dr. Thompson his belief that her actions were motivated by his personal decisions.*

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Footnote: 11

*Grievant noted he now lived over an hour away. The record reflects this problem was in existence before Grievant moved.*

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Footnote: 12

*The removal of the Registrar's duties had previously been discussed in 1999.*

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Footnote: 13

*Grievant had not informed the Admissions Committee of the policy of not taking files off campus.*

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Footnote: 14

*Mr. Mooney noted Grievant's Level III hearing on his suspension was scheduled for that day, and Grievant might want to combine his suspension grievance with a termination grievance.*

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Footnote: 15

*The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as 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).*

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Footnote: 16

*A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th ed. 1968).*

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Footnote: 17

*Dr. Thompson had attempted to explain this issue to Grievant without success.*

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Footnote: 18

*A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th ed. 1968).*