**IRA ALLEN THOMPSON,**

**Grievant,**

**v.** **DOCKET NO. 03-BEP-086**

**BUREAU OF EMPLOYMENT PROGRAMS/**

**WORKERS' COMPENSATION DIVISION,**

**Respondent.**

## DECISION

On March 26, 2003, Grievant filed this grievance directly at level four contesting his dismissal from employment on March 4, 2003, and seeking reinstatement to his position. A level four hearing was held on May 29, 2003, at which time Grievant was represented by his Guardian, David Jones, of the W. Va. Department of Health and Human Resources (DHHR) and Respondent was represented by Patricia Shipman, Esq. The parties agreed to submit their proposed findings of fact and conclusions of law by August 30, 2003, whereupon the matter became mature for decision.

The following facts have been proven by a preponderance of the evidence:

### FINDINGS OF FACT

1. Grievant had been employed by Respondent for approximately 13 years, and at the time of his termination was classified as an Office Assistant I assigned to the mail room, where he had been working for about two years. His direct supervisor was Stephen W. Styles, Supervisor III. 2. On September 27, 2002, the Circuit Court of Kanawha County found and determined that Grievant was a "protected person" under W. Va. Code § 44A-1-4, and appointed the W. Va. Department of Health and Human Resources, Adult Protective Service (DHHR) as his Guardian.

3. Grievant's Guardianship was based on a Petition and psychologist's report filed by DHHR stating Grievant "is unable to independently meet requirements for his health, safety, habitation needs. [Grievant] is unable to manage his financial affairs. [Grievant] lacks judgement, knowledge, and motivation to make such decisions on almost any level. [Grievant] appears to be mentally

retarded with significant limitations in vocabulary and understanding." The psychologist noted, " . . . [M]arked attention deficits and distractibility are important features of the clinical picture. He displays evidence of anger (slamming objects on the table), but denied anger and did not express it otherwise. Impulsive responding, and deficits in social communication skills were observed . . ."

4. Respondent was aware of the circumstances surrounding Grievant's guardianship.

5. Grievant's job was primarily to gather all the recyclable paper in the building and take it to the shredder. He also did some copying and envelope stuffing.

6. On February 27, 2003, Grievant went to the office of Gary Shamblin to pick up the recycle bin. When he came back, he seemed upset and threw the bin at Mr. Shamblin, striking him. The bin is very light and did not hurt Mr. Shamblin. Mr. Shamblin nevertheless got upset, and threw the bin back at Grievant.

7. Mr. Shamblin, who had had no prior disciplinary problems, was suspended from work without pay for five days. 8. On March 4, 2003, Bureau of Employment Programs Commissioner Robert J. Smith informed Grievant by letter of his decision to dismiss Grievant from employment, effective March 19, 2003. He stated, "the specific reason for your termination is aggressive and violent behavior directed toward a fellow employee." Mr. Smith cited the February 27, 2003, incident and six prior occasions when Grievant had outbursts requiring management intervention or discipline. Respondent's Exhibit No. 8.

9. On April 29, 2002, Grievant's supervisor saw him pounding his fists on his desk, after being given an assignment he did not want to do.

10. On April 30, 2002, upon being asked to go to his supervisor's office by a coworker, Grievant slammed the copier lid. Grievant's supervisor explained to him that slamming the copier lid, kicking trashcans, pounding his desk and slamming recycle carts against the wall were unacceptable behaviors and would result in a written warning the next time they occurred.

11. On May 1, 2002, Grievant kicked open the mailroom door, startling two coworkers. He was given a verbal warning by his supervisor.

12. The next day, May 2, 2002, Grievant kicked a recycle buggy in the mailroom, again startling a coworker. Grievant's supervisor gave him a written warning for this incident.

13. When being warned by Mr. Styles that his behavior was unacceptable, Grievant claimed the employees who complained of these incidents were making them up. Respondent's Exhibit No.

11.

14. On May 4, 2002, Mr. Styles received a written statement from one of Grievant's coworkers relating that during the previous week, Grievant had thrown arecycling tub at her, although it missed. He did this after spilling its contents on the floor and while the coworker was helping him pick the paper up. Respondent's Exhibit No. 12.

15. On May 7, 2002, Grievant's supervisor gave him a Special Employee Evaluation incorporating future performance standards and expectations. The evaluation expressly noted that aggressive and violent behavior was of concern, specifically pounding desks, throwing mail tubs, kicking doors and similar behavior. The Evaluation contained a written warning.

16. Along with the written warning and evaluation, Grievant was given information on the Employee Referral Program, a service for all state employees provided by the WVDHHR, to help with problems that affect work and personal lives.

17. On June 27, 2002, after Grievant had completed an assignment in the batch storage area, he refused to return to his work station at the direction of lead worker William Arnett. When instructed to do so by Mr. Styles, he again refused but eventually went back. Mr. Styles then heard him pounding on his desk, and instructed him to stop. When Mr. Styles went to check on him shortly thereafter, Grievant had left his workstation again and was sitting at another unoccupied station.

18. On July 15, 2002, Grievant was suspended without pay for three days, for “violent and aggressive behavior.” The suspension letter cited the April 29 and 30 incidents, the May 1, 2 and 7 incidents and the June 27 incident described above.

19. BEP Administrative Directive 6400.01 states, in part, “Employees are also expected to be courteous to their fellow workers and to provide prompt, efficient service to internal as well as external customers.” The Directive expressly prohibits “Engaging in intimidating and/or threatening behavior,” and further states, “Should deviant andunacceptable behavior continue, appropriate disciplinary procedures will be initiated in accordance with the Bureau's Disciplinary Actions Policy.” Respondent's Exhibit No. 1.

20. In May 2002, Mr. Styles spoke with Cindy Kitchen of the W. Va. Department of Rehabilitation Services, who had met with Grievant and his sister. Ms. Kitchen informed Mr. Styles of the possibility of getting a job coach for Grievant to help him with his work behavior.

21. A job coach was arranged through Goodwill Industries. A job coach's function is to come to

work with an employee, and assist him in understanding the duties and responsibilities of his job and appropriate workplace behavior, and to help the employee solve work performance problems.

22. The job coach was authorized for 90 hours. At the conclusion of the job coaching, Lawrence G. Stamper, Goodwill Placement Coordinator, provided a summary of the experience to Ms. Kitchen. Although Mr. Stamper testified that neither he nor the job coach witnessed any violence, his summary is consistent with the other evidence adduced at the level four hearing. He stated in part:

> Allen was consistent the entire time Goodwill coached him. Allen continued to miss work without good cause, leave work early without good cause, have unnecessary outbursts and behaviors, and work below capacity. Allen did have good days during our coaching with him, but never could put more than two good days together in the entire time we spent with him. Though Goodwill repeatedly addressed the absenteeism and conduct concerns expressed by his immediate supervisor, Allen did not implement any of the corrective action measures provided. Allen is not a good employee or coworker, and his employment difficulties dominate every moment of his time in the workplace. Goodwill did not receive ***any*** indication from Allen or his employer that conditions were going to change or expected to change.

(Emphasis in original.) Respondent's Exhibit No. 26.

23. Grievant required constant monitoring and direction throughout the workday. Although he understands and is entirely capable of performing his work assignments, he often refused directions to do so. If he did not want to do an assignment, he would get upset, pound on his desk, and on occasion throw his nameplate.

24. Grievant frequently left his workstation for no reason, and would go to visit with his uncle (who worked in another area of the building) or to the "vault" to sleep or hide.

25. Cheryl Pringle, one of Grievant's coworkers, witnessed Grievant hiding or sleeping in the vault. When she needed Grievant to go on a recycling run, she would frequently have to go find him. She saw him frequently beat on his desk, toss recycling bins around carelessly, and slam the copier lid. She noticed that Grievant's productivity was increased when his job coach was there. Ms. Pringle was made uncomfortable enough by Grievant that she asked her supervisor not to be assigned to be alone with him.

26. Another coworker, Joyce Beard, saw Grievant sleeping in the vault. On one occasion, Grievant slammed a door in her face, so hard that the trim around the door was broken and came off.

27. Kathy Johnson worked with Grievant in the mail room, and saw that when he got frustrated,

he would beat tubs in the counter or pitch them around, making her nervous. When Grievant was assigned to stuff envelopes and he did not want to do the work, he would remove the address page from groups of documents and throw them away.

28. Although he did not witness them himself, Mr. Styles received reports about Grievant that he had had a "fit" in the lobby, was slamming carts in the elevator, and spilled things on the floor of the executive offices.

29. Grievant met performance expectations for the majority of his years of employment with Respondent, but his behavior and work habits declined sharply in the lasttwo years. His coworkers note the beginning of the decline coincided with Grievant's mother's death, after which he "gave up" or "did not care anymore."

## 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 West Virginia Supreme Court of Appeals has determined that classified employees may be dismissed for misconduct which is of a 'substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention.'” Syl. Pt. 1, Oakes v. W. Va. Dep't of Fin. and Adm., 164 W. Va. 384, 264 S.E.2d 151 (1980).

Grievant was dismissed for gross misconduct, the most recent example of which was throwing a recycling bin at another employee. “Faced with defining 'gross misconduct' justifying discipline or dismissal, the Court in Thurmond v. Steel, 159 W. Va. 630, 225 S.E.2d 210 (1976) declined, deciding that the severity of the employee's misconduct should be evaluated and considered in the context of the circumstances of each case.” Hayes v. W. Va. Div. of Juvenile Justice, Docket No. 98-DJS-220 (Dec. 14, 1998). It is important to note Grievant was not fired simply for throwing a recycling bin at another employee, but for the range of behaviors and work habits he has exhibited over the last two years. Although Grievant argues Respondent did not do all it could to accommodate Grievant's protected person status and diagnosed mental deficits, the evidence belies that assertion. Respondent met its burden of proving Grievant engaged in workplace behaviors that were sufficiently substantial and consequential as to constitute gross misconduct. “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 his judgement for that of the employer. Jordan v. Mason County Bd. of Educ., Docket No. 99-26-8 (July 6, 1999). Grievant understood his work, and was capable of performing it with sufficient adequacy to retain his job. However, he refused to do so and resisted all efforts to assist or discipline him. Respondent repeatedly counseled Grievant, progressed through several levels of discipline, referred him to its employee assistance program, and worked with his counselor and job coaches to improve Grievant's workplace performance and demeanor. Grievant did not improve, and showed no indication that he would in the future.

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). "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). "Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is ashowing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion." Overbee, *supra.* Again, although termination may be a disproportionate response to Grievant's throwing a recycling bin at a coworker, Grievant did not meet his burden of proving it is an overzealous response to Grievant's workplace behavior over the past two years. Grievant repeatedly violated Respondent's Administrative Directive on employee conduct. Respondent, while attempting to provide Grievant with a good job, nevertheless has a responsibility to its other employees to provide a safe workplace, and to its customers to provide efficient service. Its ability to meet either goal would be greatly hindered by Grievant's continued employment.

Grievant presented no evidence to rebut any of the claims of Respondent. He testified that he wants his job back, and that he is now taking medication. However, he gave no indication that his behaviors and productivity would change. His representative argued Grievant had been off his medication for some time prior to the bin-throwing incident, and that his behavior should improve under medication. However, no assurance was given Grievant would comply with his medication requirements in the future.

Grievant also argues his position is protected by the Americans with Disabilities Act. (ADA), Public Law 101-336. Even if Respondent could do something more to accommodate Grievant's behavior and were required to do so under that act, "[i]t has previously been held that this Grievance Board does not have jurisdiction to determine whether the ADA has been violated, based upon the West Virginia Supreme Court of Appeal's holding in Vest v. Board of Education of County of Nicholas, 193 W. Va. 222, 455 S.E.2d 781 (1995). *See* Prince v. Bd. of Trustees/W. Va. Univ., Docket No. 7-BOT-276 (Nov. 5, 1997); Keatley v. Mingo County Bd. of Educ., Docket No. 95-29-257 (Sept. 25,1995)." Teel v. Bureau of Employment Programs/Workers' Compensation Division, Docket No. 01-BEP-466 (June 10, 2002).

The following conclusions of law support this decision:

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).

2. “The West Virginia Supreme Court of Appeals has determined that classified employees may be dismissed for misconduct which is of a 'substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention.'” Syl. Pt. 1, Oakes v. W. Va. Dep't of Fin. and Adm., 164 W. Va. 384, 264 S.E.2d 151 (1980).

3. “Faced with defining 'gross misconduct' justifying discipline or dismissal, the Court in Thurmond v. Steel, 159 W. Va. 630, 225 S.E.2d 210 (1976) declined, deciding that the severity of the employee's misconduct should be evaluated and considered in the context of the circumstances of each case.” Hayes v. W. Va. Div. of Juvenile Justice, Docket No. 98-DJS-220 (Dec. 14, 1998).

4. Respondent met its burden of proving gross misconduct by Grievant.

5. “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 hisjudgement for that of the employer. Jordan v. Mason County Bd. of Educ., Docket No. 99- 26-8 (July 6, 1999).

6. "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). “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.” Overbee, *supra*

7. Grievant did not establish that termination was a disproportionate consequence of Grievant's misconduct.

8. "[T]his Grievance Board does not have jurisdiction to determine whether the ADA has been violated, based upon the West Virginia Supreme Court of Appeal's holding in Vest v. Board of Education of County of Nicholas, 193 W. Va. 222, 455 S.E.2d 781 (1995). *See* Prince v. Bd. of Trustees/W. Va. Univ., Docket No. 7-BOT-276 (Nov. 5, 1997); Keatley v. Mingo County Bd. of Educ., Docket No. 95-29-257 (Sept. 25, 1995)." Teel v. Bureau of Employment Programs/Workers' Compensation Division, Docket No. 01-BEP- 466 (June 10, 2002).

Accordingly, this grievance should be and it is hereby **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7 (1998). Neither the West VirginiaEducation 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.

**Date: September 15, 2003** _____

**M. Paul Marteney**

**Administrative Law Judge**