M. SHARON MALCOLM,

Grievant,

v. DOCKET NO. 04-WCC-291

WORKERS' COMPENSATION

OFFICE OF JUDGES,

Respondent.

DECISION

On July 27, 2004, Grievant filed two grievances against her employer, the Workers' Compensation Office of Judges (OOJ) alleging her termination was unjust, and alleging the termination was reprisal for prior grievances. As relief, Grievant seeks reinstatement, “to be made whole,” and an order enjoining future acts of reprisal.

This matter was filed directly at level four, and was heard in the Grievance Board's Charleston office on October 6 and 21, 2004. Grievant was represented by counsel, Katherine L. Dooley. Respondent (See footnote 1) was represented by counsel, Kelli D. Talbott. The matter became mature for decision on December 6, 2004, the deadline for submission of the parties' proposed findings of fact and conclusions of law.

Based on a preponderance of the evidence adduced at the level four hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant was employed by Respondent as a Supervisor 1 in its Hearings Unit, supervised by Lisa Hager, then a Supervisor 3. Ms. Hager was supervised by Nancy Workman, who reports to Patricia Fink, who reports to Chief Administrative Law Judge Timothy Leach.

2. In May or June, 2002, Grievant filed a sexual harassment and discrimination complaint with the Bureau of Employment Programs' (BEP) Equal Employment Opportunity (EEO) office, (See footnote 2) alleging harassment by Vance Hill, who at the time was her supervisor.

3. Grievant also filed several grievances in 2002, 2003 and 2004 alleging, among other things, harassment by Mr. Hill and harassment and favoritism by Ms. Workman. Grievant has also filed a civil suit against Respondent, Mr. Hill and Ms. Workman.

4. Grievant's EEO complaint was unsubstantiated and she has not prevailed in any of her grievances.

5. Grievant was reassigned by Judge Leach to the supervision of Ms. Hager.

6. Grievant and Mr. Hill were ordered, in an email dated October 17, 2002, to “avoid each other, and to not do anything that might provoke the other. Neither of you are to mention the other to any co-workers. Discussions with anyone at work about the other person is [sic] completely out of line.”

7. In 1996, another employee, Linda Moore, filed an EEO sexual harassment complaint against Mr. Hill, and the allegations contained in that complaint were also found to be unsubstantiated. 8. Grievant ultimately appealed two of her previous grievances to level four, where they were consolidated under the style *Malcolm v. Workers' Compensation Commission/Office of Judges*, Docket No. 04-WCC-060. (See footnote 3)

9. In preparing for the level four hearing on 04-WCC-060, Grievant requested thirty-one subpoenas. When she served at least ten of those subpoenas, she attached to them a letter and several documents.

10. The letter attached by Grievant stated,

> Dear Witness:
>
> In regards to my Level IV grievance hearing scheduled for July 22, 2004, first let me say that I realize that some of you are hostile witnesses, but so am I! I pick up this banner for me, of course, but also for those before me, and those that will follow me. If we don't help put a stop to this abuse it will never end.
>
> I am sorry about asking you to reopen old hurts, embarrassments, and shames, but remember that the policy states that even if you only observed wrongdoings and you failed to report them, you are liable. Actually, you are just as guilty as the person committing the wrongful deed. Let's stand together and hold the liable actually liable.

> Whether you have received a subpoena because you yourself have been a victim, or you have witnessed others being abused by the abuse of power, I believe that the attached documents will enlighten you and better prepare you for your testimony at hearing.
>
> Attached are copies of documents that have been made a part of this grievance matter by the State and may be discussed at hearing. You may be asked to answer questions that pertain to these documents. That means simply that the State introduced these documents at the Level III grievance hearing for Malcolm versus Workers' Compensation Commission/Office of Judges, Vance Hill and Nancy Workman. Please do not share these documents as they are of a persona [sic] nature and they have been entrusted to you to review in relation to the testimony you will give at the July 22, 2004, hearing.
>
> Sincerely,
>
> M. Sharon Lewis, Malcolm
>
> /s/

Respondent's Exhibit No. 2.

11. Attached to the letter were parts of Ms. Moore's 1996 EEO complaint and documents related to the investigation of that complaint, a June 18, 2003, Statement of Brenda Elkins relating to her complaints about Mr. Hill and others in the OOJ, an email from Grievant to Ms. Workman accusing her of harassment and favoritism, and parts of some witness statements attached to the investigative report regarding Grievant's EEO complaint. In this latter document, Grievant had redacted information of a negative nature about herself, (See footnote 4) and emphasized other information supporting her grievance allegations. (See footnote 5) All of these documents were part of the August, 2003 Investigative Report discussed below in Findings of Fact 19 and 20.

12. On July 21, 2004, Judge Leach called Grievant into his office and presented her with a termination letter. This letter stated, in part:

> The information supplied to the witnesses is of the highest degree of personal sensitivity and should not have been released to any person other than the parties involved in the grievance. The confidentiality rights of not just the respondents to your grievances, but also of non-involved third parties, have been violated by your action. You, and all other persons interviewed during the EEO investigations, were assured by the investigators that all testimony would remain confidential.
>
> Additionally, your unauthorized attachments to a subpoena issued by the Education and State Employee Grievance Board's Administrative Law Judgecreated the

> appearance that these documents were transmitted from that agency under its statutory authority. A Grievance Board's Administrative Law Judge has already informed you of the serious inappropriateness of attaching documents to her subpoena.
>
> . . .
>
> I find that your conduct has detrimentally harmed this office to the extreme. Your actions have caused disruption of the work of this office. Employees who received the material have been very upset by the nature of it. Employees and non-employees discussed in that material had a right to confidentiality that has been grossly violated. Furthermore, you actions have, perhaps permanently, harmed the reputation and privacy of non- involved individuals.
>
> I find that your conduct is in direct violation of the instructions of the hearing evaluator and the conditions under which the information was supplied to you . . . I find your conduct to be extreme insubordination in deliberately ignoring my express instructions to not discuss the details of your allegations. . . . I find that you have circumvented due process of law by submitting evidence to potential witnesses before this agency had the opportunity to examine and object to such evidence. . . . Finally, as a supervisor you are held to a higher level of conduct than are non-supervisory employees. You are supposed to set an example for non-supervisory employees of correct behavior, civility, and the following of rules.
>
> . . .
>
> All of the aforementioned, when viewed both singularly and collectively, demonstrate unacceptable conduct warranting disciplinary action. The cumulative effect of your unprofessional conduct is one of inability or unwillingness to effectively perform the functions of your position as a supervisor in a professional manner, and to adjust to the goals of the Workers' Compensation Office of Judges.

Respondent's Exhibit No. 1.

13. When Grievant began employment with Respondent on April 17, 2000, she signed an acknowledgment form indicating she had read and understood the Division of Personnel (DOP) Sexual Harassment Policy. (See footnote 6) That policy includes the statement, “SexualHarassment Complaints shall be handled in accordance with the following procedures. **All information shall be held in strictest confidence and shall be disclosed only to appropriate individuals on a need-to-know basis to investigate and resolve the matter.**” (Emphasis in original.) Respondent's Exhibit No. 17.

14. On June 4, 2002, BEP Commissioner Robert Smith sent Grievant a letter acknowledging her EEO complaint against Mr. Hill, and informing her an investigation would be conducted. This letter stated, “It is very important to maintain confidentiality; therefore, you are strongly advised not to discuss your charges or the particulars of your case with agency employees.” Respondent's Exhibit No. 4.

15. At the conclusion of the investigation, Commissioner Smith again wrote to Grievant on July 23, 2002, informing her that her allegations were unsubstantiated by the investigation. This letter stated, “You are advised that this matter is still confidential and should not be discussed with Bureau employees. In order to facilitate a productive work environment I would ask that you maintain a professional working relationship with the respondent.” Respondent's Exhibit No. 5.

16. Grievant signed an Affirmation Statement on May 23, 2002 relating to her EEO complaint. This Statement indicated her understanding that, “confidentiality is a requirement in this process and, by order of the Commissioner, I am not to discuss the questions posed, my responses, or any other information pertinent to the investigation. I further agree to refrain from discussing the investigation with other employees or persons outside the Bureau of Employment Programs. I understand that breaching confidentialityviolates Bureau and State of West Virginia policy and regulations and can be the basis for disciplinary action, including suspension and termination.” Respondent's Exhibit No. 8.

17. Grievant also signed two Receipts of Statements, on October 4, 2002, and November 15, 2002, indicating she had received copies of her statements to EEO complaint investigators. These Receipts both stated, “I understand that confidentiality is a requirement in this administrative process and that by order of Commissioner Robert Smith, I am not to discuss or otherwise share the questions posed, my responses, or any other particulars of this investigation.” Respondent's Exhibits No. 6 and 7.

18. On October 17, 2002, Judge Leach sent an email to Grievant regarding some issues that had arisen in her pending grievances. This email stated, in pertinent part,

> I am distressed by the continued problems with you and Vance. Furthermore, I think that too many other employees are becoming involved in this ongoing problem. I believe that further discussions of the issues or the personalities are disrupting and dividing the workforce. Therefore, I am **ORDERING** both you and Vance to avoid each other, to have no spoken communications with each other, and to not do anything at all that might provoke the other. Neither of you are to mention the other to any co-workers. Discussions with anyone at work about the other person is [sic] completely out-of-line. I have given this command to Vance along with repeating my earlier instructions that he is to avoid you if at all possible.

Respondent's Exhibit No. 16 (emphasis in original).

19. In September, 2003, Grievant's counsel (See footnote 7) and T.J. Obrokta, BEP's General Counsel, entered into a Stipulated Protective Agreement regarding the production and use of an August 5, 2003 investigatory report (Respondent's Exhibit No. 10) that covered “a series of complaints, including an Equal Employment Opportunity (EEO) complaint andnumerous grievances” filed by Grievant. The Stipulated Protective Agreement provided that the report is confidential and “shall only be used, shown or disclosed by Ms. Malcolm and her counsel as provided in this Agreement.” The Agreement stated the report “shall only be disclosed to 'Qualified Persons.'” The term “Qualified Persons” was defined as counsel of record and their clerical staff or other persons employed in the preparation of litigation, and the parties' experts and consultants.” Under the Agreement, the report could also be used at trial or depositions “with appropriate safeguards.” Respondent's Exhibits No. 14 and 15.

20. The August 5, 2003 report contained numerous exhibits, including Grievant's EEO complaint and attached sworn statement, an investigation report on that complaint, Grievant's prior grievances, witness statements taken by the EEO investigators, and the 1996 EEO Complaint of Ms. Moore.

21. In a level three grievance hearing held December 2, 2003, before Grievance Evaluator Jack McClung, the documents Grievant attached to her subpoenas were placed in evidence, and Respondent requested a protective order to ensure their continued confidentiality. At the end of the hearing, Mr. McClung, over Grievant's objection, entered a protective order through the following dialogue:

> EVALUATOR McCLUNG: Well, as far as I'm concerned and with whatever authority I have with respect to this, the protective agreement which would prevent this from being distributed to the public at large, I find to be in the best interest not only of the Department, but probably the State of West Virginia and probably also you.
>
> MS. MALCOLM: Well, that _ will that order also carry over if I should choose to go to Level 4?

EVALUATOR McCLUNG: That will have to be addressed at Level 4, but I would imagine that they would adopt the same _ I mean, that's my _

MS. MALCOLM: Well, if it's all so truthful, I wonder why they don't want it out.

EVALUATOR McCLUNG: Well, that's the thing _ it would be my opinion that the reason they don't want it out because there's so much stuff in there that may not be truthful and has the potential of harming somebody's reputation, character, you know, unnecessarily. Because it's just a, from what I could gather, it's a compilation of statements taken from people who were not under oath at the time.

MS. MALCOLM: Oh, they were all under oath.

EVALUATOR McCLUNG: Just like --

MS. MALCOLM: Yeah, we were all under oath.

MS. TALBOTT: I mean --

EVALUATOR McCLUNG: I don't know --

MS. TALBOTT: _ it pertains to personnel matters which are typically confidential and I just _ I would reiterate what Mr. McClung says, I think it's not only in the Bureau's best interests, but in yours that the document not be passed out in the hallway. And that's what I'm asking. You can certainly confer with your attorney about it. I don't think the _ the extent that we want to adopt the terms and conditions of the agreement that basically it says that you can consult your attorney or experts that you retain in litigation, or you know, family members or what have you, that's fine. But I _ I don't want to see this handed out to your employees or other folks over you at the Office of Judges or to any other member of the public. And that's what I'm, asking, basically.

MS. MALCOLM: And if you do it, and accuse me of doing it, how am I going to prove I didn't do it?

MS TALBOTT: I am an officer of the Court, I have a law license, and I will not discuss this with anyone other than my own client and the attorneys that I work with in this matter.

EVALUATOR McCLUNG: I understand, and think it's a wise thing to do and to abide by. . . .

Grievant's Exhibit No. 1. 22. Tammy Frazie is one subpoenaed witness who received the letter and documents. She had no prior knowledge of any of them, and had no idea why they were given to her. She could not have testified as to any of the matters contained in the attachments.

23. Ms. Hager, Grievant's supervisor, likewise received the documents and had no knowledge of the material or why they were given to her.

24. Alice McVey, EEO Officer for BEP, was one of the subpoenaed witnesses who received the extra documents. She wrote to Judge Reynolds, who had issued the subpoenas addressing her concerns with the documents and her consternation at having received them. She stated, in part, “I feel that Ms. Malcolm has not only violated the EO [sic] process confidentiality policy she has compromised the EO [sic] process by releasing statements provided by witnesses interviewed during the course of an investigation.” She added, “In addition, I also did not appreciate the threatening tone of the 'Dear Witness' letter from Ms. Malcolm that was included in the packet I received.” Respondent's Exhibit No. 9.

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). In this case, there is no dispute as to whether Grievant perpetrated the conduct of which she is accused. The real issue is whether the conduct can be characterized with the egregiousness to which Respondent assigns it, orwhether it merely provided a pretext for Respondent to retaliate against Grievant for her past complaints against her employer.

To demonstrate a *prima facie* case of reprisal as defined by W. Va. Code § 29-6A- 2(p), a grievant must establish by a preponderance of the evidence the following elements:

that he engaged in a protected activity, e.g., filing or participating in a grievance;

> that he was subsequently treated in an adverse manner by the employer or an agent;
>
> that the employer's official or agent had actual or constructive knowledge that the grievant engaged in the protected activity;
>
> that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and
>
> that the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

Jordan v. Dep't of Trans./Div. of Highways, Docket No. 03-DOH-057 (Sept. 15, 2003). “If a grievant establishes a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. *Webb v. Mason County Bd. of Educ.,* Docket No. 89-26-56 (Sept. 29, 1989).

There is no dispute Grievant was engaged in protected activities, specifically her ongoing grievances and her civil suit. She was terminated by her employer, an adverse action. Her employer had actual knowledge of her protected activities, and took its adverse action during the pendency of those proceedings. The causal connection between her prior grievance activity and the adverse treatment is made by the fact that Grievant wasterminated for actions she took to prosecute her grievance, specifically, attaching a letter and certain documents to subpoenas she served for a level four grievance hearing. At the beginning of the hearing, the undersigned ruled (over Respondent's objection) that, based on the grievance allegations and the record of prior grievances, including the one then pending at level four, a *prima facie* inference of reprisal could be made, and Respondent would bear the burden of proving “legitimate, non-retaliatory reasons for the adverse action.”

Whether Respondent's reasons for terminating Grievant were legitimate is inextricably intertwined with whether Grievant's actions were, as Respondent framed them, insubordinate, subversive of due process, and unprofessional.

Whether Grievant's actions were insubordinate necessarily turns on the question of whether she was clearly instructed not to share the information contained in the documents with anyone. The evidence shows Grievant clearly knew the documents to be confidential. Although she contends she was never told not to share Ms. Moore's 1996 EEO complaint with anyone, this contention ignores the facts that she had filed her own EEO complaint and so knew all EEO complaints were confidential, she had signed a policy receipt saying she understood such matters were confidential, and the documents themselves were attached to and made a part of the August investigative report, the whole of which she knew to be confidential.

A second issue raised by Grievant is the fact that her attorney had decided the stipulated protective agreement was null and void, because it had been signed by Grievant's predecessor employer, BEP. However, whether or not that contract continued in force, all it did was set the terms by which Grievant would be permitted to distribute theconfidential information. It did not, by itself, make the already confidential documents protected, so if it were, as Grievant claims, null, then she had *no* authority on which she would be permitted to disclose the information. In addition, Grievance Evaluator McClung incorporated the protective agreement in his protective order at the end of the level three grievance hearing, and Grievant was bound by that order. While Grievant now contends no order was entered at the time, the transcript of the hearing shows undisputably that, at the time, Grievant knew it to be an order and expressly identified it as such.

There is no uncertainty as to the fact that Grievant had actual and constructive knowledge that she was not permitted to distribute the confidential information she attached to her subpoenas. She did so in violation of her employer's policies, her own signed agreements, and her superior's direct order. This, as Judge Leach stated, was insubordinate. “[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. *Butts v. Higher Educ. Governing Board/Shepherd College,* 212 W. Va. 209, 569 S.E.2d 456 (2002). Although the cases are not clear as to what constitutes "wilfulness," the cases seem to suggest that for 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. *Butts, supra*. There is also no doubt Grievant had a high level of contempt for the authority of her superiors to prevent her from distributing this information, or that her

defiance of her express directives was willful. Permanent state employees who are in the classified service can only be dismissed for “good cause,” meaning “misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.” Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980). “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).

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). Judge Leach testified that he gave Grievant the opportunity to respond to his letter of termination, and that he told her it was not a final decision because he would listen to her if she had suggestions as to a lesser punishment that would ensure future deference to the directives of her superiors and harmony in the workplace. Grievant's reply was to demand $1,000,000 if she were to accept separation of employment, or $500,000 if shewere to return. She herself was unable to suggest a lesser penalty that would serve to deter her from future misconduct.

Grievant's misconduct was “of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.” Grievant, feeling unfairly restricted by the orders to protect the confidentiality of information she wanted distributed around her office, handed out that information to people who had no business seeing it. She did so in an obvious and blatant attempt to subvert the due process rights of Respondent in her upcoming grievance hearing, by deliberately prejudicing the witnesses she intended to call. Her act of redacting statements that cast her in a negative light is a

beacon illuminating her nefarious intent.

Respondent has amply met its burden of proving Grievant was insubordinate and deliberately disruptive in the workplace, and that she had no prospects for rehabilitation and would continue to defy authority under the color of being protected by the proscription on retaliation for protected activities. Respondent has rebutted the presumption that its actions were taken in retaliation for her grievance and litigation activity, which had been ongoing for several years.

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). "The preponderance standard generally requiresproof 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 & Human Res.*, Docket No. 92- HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. To demonstrate a prima facie case of reprisal as defined by W. Va. Code § 29-6A-2(p), a grievant must establish by a preponderance of the evidence the following elements:

that he engaged in a protected activity, e.g., filing or participating in a grievance;

that he was subsequently treated in an adverse manner by the employer or an agent;

that the employer's official or agent had actual or constructive knowledge that the grievant engaged in the protected activity;

that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and

> that the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

Jordan v. Dep't of Trans./Div. of Highways, Docket No. 03-DOH-057 (Sep. 15, 2003). *See W. Va. Dep't of Natural Resources v. Myers*, 443 S.E.2d 229 (W. Va. 1994); *Conner v. Barbour County Bd. of Educ.,* Docket Nos. 93-01-543/544 (Jan. 31, 1995); *Webb v. Mason County Bd. of Educ.,* Docket No. 89-26-56 (Sept. 29, 1989). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n,* 179 W. Va. 53, 365 S.E.2d 251 (1986); *Gruen v. Bd. of Directors/Concord College,* Docket No. 95-BOD-281 (Mar. 6, 1997).

3. "If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for theadverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. *Webb*, *supra*." *Rainey v. Dep't of Admin./Pub. Employees Ins. Agency*, Docket No. 04-ADMN-174 (Sep. 3, 2004).

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. *Butts v. Higher Educ. Governing Bd./Shepherd College,* 212 W. Va. 209*,* 569 S.E.2d 456 (2002).

5. Although the cases are not clear as to what constitutes "wilfulness," the cases seem to suggest that for 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. *See* Annotation, Dismissal of Teacher - "Insubordination", 73 A.L.R.3d § 3 (1977). *Butts, supra*.

6. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* Sections 12.02 and 03, Administrative Rules, W. Va. Div. of Personnel (June 1, 1998).

7. 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 judgment for that of the employer. *Jordan v. Mason County Bd. of Educ.*, Docket No. 99- 26-8 (July 6, 1999); *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997).

8. Respondent met its burden or proving it had terminated Grievant for misconduct of a significant nature, and not in retaliation or reprisal for any protected activity.

9. 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).

10. Grievant did not meet her burden of showing the penalty for her particular misconduct was excessive.

For the foregoing reasons, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred, and 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.

PROTECTIVE ORDER

The parties are hereby **ORDERED** to maintain the confidentiality of the exhibits entered as evidence in this matter, including any and all EEO complaints and statements or investigative reports

related thereto. These materials may only be disclosed to parties, their counsel, and experts as needed to prepare for trial or hearing in this or related matters, both civil and administrative. The documents may also be disclosed to sworn witnesses at any deposition taken to prepare for such trials or hearings. The parties may also enter into a mutual agreement to further elaborate on the extent of such disclosures.

Date: January 25, 2005 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

As used in this Decision, "Respondent" refers to the OOJ and its predecessor organizational names, including the Bureau of Employment Programs, Workers' Compensation Division and Workers' Compensation Commission, as the case may be at the relevant time.

Footnote: 2

At the time, the Office of Judges (OOJ) was a part of the Workers' Compensation Commission, which was a part of the Bureau of Employment Programs. The OOJ is now a stand- alone agency.

Footnote: 3

That grievance is currently being held in abeyance pending the outcome of this grievance.

Footnote: 4

The information redacted by Grievant included statements implying she had been hostile to coworkers and had made negative racial statements. Grievant is white, and Mr. Hill is black.

Footnote: 5

The original versions of these statements are contained in Exhibit 4 of Respondent's Exhibit No. 10.

Footnote: 6

Grievant signed this document using the name Sharon Lewis, her former name.

Footnote: 7

Grievant was represented by counsel in her civil actions, but was still representing herself or was represented by her Union in the grievance matters. The Stipulated Agreement was to allow use of the report in discovery for the civil matters.