WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

JOHN WHITMORE

Grievant,

v. **Docket No. 07-HE-414**

MARSHALL UNIVERSITY,

Respondent.

D E C I S I O N

This grievance was filed on April 20, 2007, by Grievant, John Whitmore, contesting his April 16, 2007, dismissal from employment as a Campus Service Worker by his employer, Marshall University, Respondent. Grievant argues that his termination was "not based on factual information, was not for just cause, was not appropriate for the offense, and was arbitrary and capricious." (See footnote 1) He seeks to be reinstated and granted applicable lost benefits and compensation.

A level one conference was held on May 7, and Grievant's supervisor denied the grievance on May 14, 2007. Level two was bypassed. A level three decision issued December 17, 2007, by Hearing Examiner Kemp Winfree denied the grievance at that level following a hearing held on December 6, 2007. A level four hearing was convened in the Grievance Board's Charleston office on April 23, 2008. Grievant was represented by Christine Barr, AFT-West Virginia/AFL-CIO, and Respondent was represented by itscounsel, Jendonnae L Houdyschell, Senior Assistant Attorney General. This case became mature for decision on May 22, 2008, the deadline for the submission of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant was employed by Respondent as a Campus Service Worker. Grievant was given both oral and written warnings about his assigned area not being cleaned; unauthorized use of computers; unauthorized use of cell phones; dress code violations; and calling off work without proper notification to supervisors. Respondent also issued a memo to Grievant stating that failure to comply with his supervisors' requests would be considered insubordination. Additionally, Respondent transferred Grievant several times in an attempt to find an area where Grievant could successfully perform his job.

Grievant was terminated after a telephone argument with his supervisor which violated applicable University Policy and a specific warning given in a prior disciplinary action. Grievant argues that his termination was “not based on factual information, was not for just cause, was not appropriate for the offense, and was arbitrary and capricious.” He seeks to be reinstated to his position and compensated retroactive to the date of discharge.

The evidence shows that Grievant had a long history of insubordinate and confrontational behavior with his supervisors, poor work habits, and poor attitude. Despite warnings and work-site transfers, Grievant's behavior continued, with displays of aggressive threatening behavior. Respondent terminated Grievant's employment after less severe disciplinary action failed to improve his conduct. Respondent's decision toterminate Grievant's employment was not arbitrary or capricious, and there was no evidence presented that justifies mitigating the disciplinary action.

Grievance DENIED.

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

Findings of Fact

1 1. Grievant was employed by Marshall University as a Campus Service Worker from July 2003 to April 2007 (approximately four years).

2 2. On October 11, 2006, Terry Blake, Manager of the Physical Plant, Custodial Service Department, met with Grievant regarding Grievant's work performance of the previous day. (See footnote 2) While discussing the issue, Grievant became verbally and physically threatening. Grievant raised his voice, pounded on Mr. Blake's desk, and invaded Mr. Blake's personal space. Grievant

was orally warned that his behavior was unacceptable, and Mr. Blake sent Grievant home.

3 3. On October 19, 2006, Grievant was issued a written warning letter. (Resp. Ex. 8) The disciplinary letter specified that Grievant had been interacting with supervisors and associates in an angry and rude manner, including use of profane language and physical gestures. Further, the letter stated that if Grievant refused his supervisor's orders, or approached supervisors or fellow employees in a threatening manner, it would be considered insubordination pursuant to Board of Governors Policy No. HR-10, Employee Infractions, paragraph 2.5.2. (Resp. Ex. 1) 4 4. The October 19, 2006, warning letter specifically identified and provided examples of the type of behavior which would induce a recommendation for immediate termination.

5 5. On October 23, 2006, Grievant was temporarily transferred from the Henderson Center under Jack Blake's supervision to the Science Building under the supervision of Luetta McCallister . After being there less than one hour, Grievant contacted Manager Terry Blake requesting to transfer for personal reasons involving supervisor McCallister and her husband. Grievant was then transferred to Corbly Hall under the supervision of Brenda Flemings.

6 6. After the transfer to Corbly Hall, Grievant's job performance and attitude led to additional disciplinary actions and Grievant was issued further written and oral warnings.

7 7. On December 13, 2006, Grievant was issued a Performance Counseling Statement, which constituted a written warning from Supervisor Flemings, for his assigned area not being cleaned. Grievant had previously been given oral warnings, but no improvement had been made.

8 8. On January 9, 2007, after she witnessed Grievant in the computer room with the lights off, Ms. Flemings gave Grievant an oral warning stating that he must follow Physical Plant's Policy regarding computer use. (See footnote 3) 9 9. On February 16, 2007, Grievant was talking on his cell phone during working hours in violation of policy, and Supervisor Flemings issued an oral warning. A Performance Counseling Statement stating that an oral warning had been issued was signed by supervisors Brenda Flemings and Terry Blake. (Resp. Ex. 16)

10 10. On March 1, 2007, Grievant was given an oral warning by Ms. Flemings regarding his cell phone use, violations of the dress code, and insubordinate behavior. This was documented by a March 2, 2007, Performance Counseling Statement signed by supervisors Brenda Flemings and Terry Blake. (Resp. Ex. 17)

11 11. On March 1, 2007, when Ms. Flemings asked Grievant to cease talking on his cell

phone, Grievant became loud, used foul language, and stated several times that he would continue talking on the cell phone. (See footnote 4)

12 12. On March 8, 2007, Grievant was given an oral warning by Ms. Flemings after Grievant called off work without giving a return date, and failed to notify his supervisor (Ms. Flemings) upon returning to work. A Performance Counseling Statement stating that anoral warning was given regarding Grievant's absences on March 5, 2007, March 6, 2007, and March 7, 2007, is of record. (Resp. Ex. 18)

13 13. Grievant reported off work to his immediate supervisor, Ms. Flemings, on March 5, 2007, hand-delivered a doctor's excuse to the main office on 20th Street on March 6, 2007, and reported off work to the main office on March 7, 2007. Ms. Flemings did not know how many days the doctor's excuse covered, but took issue with Grievant not reporting directly to her on March 6 and March 7.

14 14. On March 28, 2007, Ms. Flemings telephoned Grievant to discuss a room that had not been cleaned. During this conversation Grievant raised his voice and repeatedly stated that he didn't want to hear about the room because he had previously told Ms. Flemings that he did not have the key to the room. Ms. Flemings ended the phone call, and when she called him back a few moments later, Grievant declared that he was going home.

15 15. Ms. Flemings filed a Performance Counseling Statement regarding the events of March 28, 2007, and further recommended that Grievant be terminated. (Resp. Ex. 19)

16 16. Employees are not required to sign a Performance Counseling Statement which documents an oral warning, nor are they necessarily given a copy. (Testimony of Manager Blake and Supervisor Flemings).

17 17. On April 9, 2007, a telephone call between Grievant and a substitute supervisor Jeanne Adkins transpired.

18 18. Grievant notified substitute supervisor Adkins on April 9, 2007, that he was sick and going home. Grievant became rude and disrespectful after Ms. Adkins inquired into the nature of his ailment. Ms. Adkins informed Grievant that they were short of help. She further informed him that he would need to bring in a doctor's excuse. Grievant hung up on Ms. Adkins after telling her he would be off all week.

19 19. On April 16, 2007, Grievant was terminated from Marshall University for unacceptable

behavior. Mark Cutlip, Director of the Physical Plant, issued a termination letter (Resp. Ex. 10) to Grievant citing his lack of adherence to the October 19, 2006, letter (Resp. Ex. 8), his abusive phone call with Ms. Flemings on March 28, 2007, and the April 9, 2007, altercation with substitute supervisor Adkins.

Discussion

In disciplinary matters, the employer bears the burden of proving the charges by a preponderance of the evidence. *Stanley v. Bd. of Trustees/W. Va. Univ.*, Docket No. 00- BOT-153 (Aug. 31, 2000), *citing*, W. Va. Code § 18-29-6 (See footnote 5) ; *Olmsted v. Bd. of Directors /Bluefield State College*, Docket No. 98-BOD-108 (Oct. 21, 1998); *Hoover v. Lewis County Bd. of Educ.*, Docket No. 93-21-427 (Feb. 24, 1994); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought tobe proved is more probable than not." *Black's Law Dictionary* (6th ed. 1991), *Leichliter v. W. Va. Dep't of Health and 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.*

The issues presented by this case are whether Respondent proved the facts on which the dismissal was based and whether said facts were a sufficient basis for terminating Grievant's employment. The evidence presented by Respondent was persuasive, clear, and convincing. Grievant clashed with several of his supervisors and at times refused to follow their reasonable orders. Grievant's work area was regularly not cleaned, he had dress code violations and used auxiliary equipment at inappropriate times. More importantly, when supervisors attempted to discuss work-related problems with Grievant, Grievant would often raise his voice and enter the personal space of his supervisors. (See footnote 6) He proved unwilling to listen to their comments and his work conduct did not improve despite several job transfers and multiple written and oral warnings. Respondent met its burden of proof and established misconduct of a substantial nature. Over the majority of his employment, Grievant consistently displayed confrontational behavior with his supervisors, poor work habits, and poor attitude.

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.*, 212 W. Va. 209, 569 S.E.2d 456(2002)(per curiam). *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). "[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*, *supra*.

Applicable Marshall University Board of Governors Policy HR-10 2.5.2. defines gross insubordination as "including willful and flagrant disregard of a legitimate order, threatening or striking a supervisor." Insubordination has been defined by this Grievance Board as "a deliberate, willful or intentional refusal or failure to comply with a reasonable order of a supervisor." *Bierer v. Jefferson County Bd. of Educ.,* Docket No. 95-29-558 (April 8, 1996); *Reynolds v. Kanawha-Charleston Health Dep't,* Docket No. 90-H-128 (Aug. 8, 1990); *Gill v. W. Va. Dep't of Commerce,* Docket No. COMM-88-031 (Dec. 23, 1988); *See Thompson v. Logan County Bd. of Educ.,* Docket No. 95-23-127 (July 17, 1995). It has also been stated that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall University,* Docket No. BOR2-88- 029-4 (May 25, 1988), *aff'd* 182 W. Va. 294, 387 S.E.2d 529 (1989). Furthermore, in order to establish insubordination, the employer must demonstrate that the employee's failure to comply with a directive was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Stover v. Mason County Bd. of Educ.,* Docket No. 95-26-078 (Sept. 25, 1995); *Conner v. Barbour County Bd. of Educ.,* Docket No. 94-01-394 (Jan. 31, 1995). Grievant was terminated subsequent to inappropriate work place conduct after being warned that offensive and threatening behavior was unacceptable and would be interpreted as insubordination. The October 19, 2006, warning letter (Resp. Ex. 8) was unambiguous;

> Your manner of interacting with your supervisors and associates is at times unacceptable. You have displayed anger, rudeness, profane language, and physical gestures in your communications . . . . You should take steps to avoid the kind of behavior set forth below in order to prevent any disciplinary action being recommended against you.
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> * * *

Board of Governors Policy No. HR-10, Employee Infractions, paragraph 2.5.2. *"Gross*

> *Insubordination, including willful and flagrant disregard of a legitimate order, threatening or striking a supervisor."*
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> * * *
>
> Anytime from the date of your receipt of this writing, if you interact with me or other supervisors, and use profanity, get into our personal space, raise your voice, make a fist, and/or pound on the table, etc., it will also be interpreted as a violation of [Board of Governors Policy No. HR-10, Employee Infractions, paragraph 2.5.2.] and will be regarded as threatening the supervisor. Likewise immediate termination of your employment will be recommended.

The April 16, 2007, termination letter, after citing the October 19, 2006, letter with selective quotes, provided in part;

> On Wednesday, March 28, 2007, you had a serious altercation over the telephone with your supervisor. You were both present for work but at separate physical locations. You did not conduct yourself properly in this interaction. It involved a reasonable supervisory direction, but you shouted at your supervisor. It was necessary for your supervisor to get off the phone and allow you some time to cool off. When your supervisor resumed the telephone call, you went straight back to a shouting, abusive way of communicating. . . . The language you chose and the manner in which you communicated are unacceptable and will not be tolerated.
>
> Again, on Monday, April 9, 2007, you had another altercation with the substitute supervisor. You were clearly aware that his person was acting as supervisor on this date in the absence of your regular supervisor. Thesubstitute supervisor has documented this incident. Again, the way in which you related to your supervisor was offensive and threatening in nature. It will not be tolerated.

Grievant contends his termination was not for just cause and was not an appropriate response to his offense. In assessing whether the disciplinary action was excessive or disproportionate, the undersigned must look at the totality of the circumstances. Threatening behavior toward supervisors and co-workers is unacceptable in the work place. *See Kessler v. W. Va. Dept. of Transp.*, Docket No. 94-DOH-490 (June 30, 1997); *Grueser v. W. Va. State Bd. of Rehabilitation*, Docket No. 95-RS-084 (June 29, 1995); *Payne v. W. Va. Dept. of Transp.*, Docket No. 93-DOH-454 (Apr. 29, 1994). Threats may be covert or overt and include remarks threatening physical, mental, and reputational damage. Profane and threatening statements are seen to constitute insubordination and "tend to

undermine the authority of a supervisor [when] made in apparent defiance of prior directives . . .". *Grueser, supra.* There is no doubt that Grievant committed the acts which resulted in his dismissal. Testimony of Terry Blake, Jack Blake, Brenda Flemings, Jeanne Adkins, and Resp. Exs 1, 2, & 8 - 19. Nevertheless, Grievant in essence argues that the determination to discharge him was arbitrary and capricious, and seeks mitigation.

"Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Healthand Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

In the instant case, Respondent's decision to terminate Grievant's employment is far from arbitrary and capricious. Respondent established Grievant's inappropriate conduct via direct testimony and numerous documents. Further, Respondent established by a preponderance of the evidence that Grievant was, and should have been, on notice that such behavior would be interpreted as insubordination, subjecting him to the possibility of immediate termination.

The argument that discipline 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). The 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 theemployee's conduct and

the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). "Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances," all of which must be determined on a case by case basis. *McVay v. Wood County Bd. of Educ.,* Docket No. 95-54-041 (May 18, 1995). Grievant's argument does not withstand scrutiny.

While the March 1, 2007, cell phone incident may be of limited applicability and there is no conclusive evidence that Grievant was in fact using the computer on January 9, 2007, this concession does not drastically undermine Respondent's case. When an employee does not maintain the standards of performance or conduct as outlined by the supervisor or does not comply with applicable policies, procedures, or law, disciplinary action including, but not limited to, demotion, suspension, or dismissal may be taken. An employee's job is to perform the duties of his position, not to convert his job into a continuing confrontation with management. *Casto v. W. Va. Dep't of Educ.,* Docket No. 00-DOE-143 (Aug. 28, 2000); *See, Nagel v. Dep't. Health & Human Services*, 707 F.2d 1384 (10th Cir. 1983); *Stanley v. Bd. of Trustees/W. Va. Univ.,* Docket No. 00-BOT-153 (Aug. 31, 2000). Grievant failed to meet his burden of demonstrating the penalty was clearly excessive or reflects an inherent disproportion between the offense and the personnel action. Grievant tries to paint the picture that he was fired for a minor infraction or an inaccurate account of the facts. This argument is 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. This is why progressive discipline is often used, so an employee can see the error of his ways and correct them before that next act, which can result in termination.

However, it also should be noted that it was not just one isolated event that ultimately resulted in Grievant's termination. The Findings of Fact enumerate some of the behaviors Grievant engaged in subsequent to the October 19, 2006, warning letter. Before Grievant was terminated, Respondent issued several oral and written warnings regarding his work and poor attitude. Respondent specifically issued a letter to Grievant stating that failure to comply with his supervisors' requests would be considered insubordination and warned against inappropriate interaction with supervisors, citing Marshall University Board of Governors Policy HR-10 in 2.5.2. Grievant was made aware that

termination was an option. Additionally, Respondent transferred Grievant several times in an attempt to find an area where Grievant could successfully perform his job. Yet, even after the warnings and transfers, Grievant continued to exhibit disruptive behavior, failing to cease and desist from inappropriate work place behavior. Respondent terminated Grievant's employment only after less severe disciplinary action failed to sufficiently alter his conduct.

If the most recent offense had been a first offense and if there had not been a number of other incidents, a warning or suspension may have been in order. However, when combined with previous incidents, termination is not a disproportionate response when the facts are viewed *in toto*. Grievant's actions were willful and intentional. It has notbeen demonstrated that this final disciplinary measure was clearly disproportionate to the employee's offense. Respondent's decision to discharge Grievant was not an arbitrary or capricious action and there was no evidence presented that justify mitigating the punishment.

The above discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. In disciplinary matters, the employer has the burden of proving the charges by a preponderance of the evidence. *Stanley v. Bd. of Trustees/W. Va. Univ.,* Docket No. 00-BOT-153 (Aug. 31, 2000), *citing*, W. Va. Code § 18-29-6; *Hoover v. Lewis County Bd. of Educ.,* Docket No. 93-21-427 (Feb. 24, 1994); *Landy v. Raleigh County Bd. of Educ.,* Docket No. 89-41-232 (Dec. 14, 1989). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96- 20-380 (Mar. 18, 1997).

2. 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.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). *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). "[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*, *supra*. 3. Insubordination has been defined by this Grievance

Board as “a deliberate, willful or intentional refusal or failure to comply with a reasonable order of a supervisor.” *Bierer v. Jefferson County Bd. of Educ.*, Docket No. 95-29-558 (April 8, 1996); *Reynolds v. Kanawha-Charleston Health Dept.*, Docket No. 90-H-128 (Aug. 8, 1990); *Gill v. W. Va. Dep't of Commerce*, Docket No. COMM-88-031 (Dec. 23, 1988). Also *See, Thompson v. Logan County Bd. of Educ.*, Docket No. 95-23-127 (July 17, 1995). It has also been stated that insubordination 'encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer.' *Sexton v. Marshall University*, Docket No. BOR2-88-029-4 (May 25, 1988), *aff'd* 182 W. Va. 294, 387 S.E.2d 529 (1989).

4. In order to establish insubordination, the employer must demonstrate that the employee's failure to comply with a directive was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Stover v. Mason County Bd. of Educ.*, Docket No. 95-26-078 (Sept. 25, 1995); *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995).

5. An employee's job is to perform the duties of his position, not to convert his job into a continuing confrontation with management. *Casto v. W. Va. Dep't of Educ.*, Docket No. 00-DOE-143 (Aug. 28, 2000); *See, Nagel v. Dep't Health & Human Services*, 707 F.2d 1384 (10th Cir. 1983); *Stanley v. Bd. of Trustees/W. Va. Univ.*, Docket No. 00- BOT-153 (Aug. 31, 2000).

6. Respondent has met its burden of proof by a preponderance of the evidence, and proven the charges against Grievant that led to his dismissal. 7. The argument that discipline 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). In assessing whether the disciplinary action was excessive or disproportionate the undersigned must look at the totality of the circumstances.

8. The 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 Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

9. "Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances," all of which must be determined on a case by case basis. *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995). Grievant failed to meet his burden of demonstrating the penalty was clearly excessive or reflects an inherent disproportion between the offense and the disciplinary action.

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. *See* W. Va. Code § 29-6A-7 (*See* footnote 5). Neither the West Public 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: July 8, 2008

_____

Landon R. Brown

Administrative Law Judge

Footnote: 1

The instant grievance as filed on April 20, 2007, also alleged that Grievant was denied due process because he was not notified of an optional termination conference until after the the scheduled level one conference. However, prior to the level one grievance conference, a termination conference was held with Grievant and his representative. Thus, the grievance was amended at level one to exclude the claim that Grievant was denied due process. Accordingly, this issue will not be further discussed.

Footnote: 2

Grievant could not be located in his assigned cleaning area, and his assigned area had not been properly cleaned.

Footnote: 3

There is no evidence that Grievant was in fact using the computer. Ms. Flemings testified that Grievant was sitting in

the computer lab with the lights off, and when she entered and turned on the lights, Grievant indicated he had been sleeping (Grievant stated "you woke me up."). Ms. Flemings stated that it appeared Grievant was using the computer, but concedes he may have actually been sleeping. "Unfortunately for Grievant, since he did not grieve any of the prior discipline he received before his termination, the merits of those actions cannot be placed in issue now. Jones v. W. Va. Dept. of Health & Human Resources, Docket No. 96- HHR-371 (Oct. 30, 1996); See Stamper v. W. Va. Dept. of Health & Human Resources, Docket No. 95-HHR-144 (Mar. 20, 1996); Womack v. Dept. of Admin., Docket No. 93-ADMN-430 (Mar.30, 1994). Furthermore, all the information contained in the documentation of Grievant's prior discipline must be accepted as true. See Perdue v. Dept. of Health & Human Resources, Docket No. 93-HHR-050 (Feb. 4, 1994)." Aglinsky v. Bd. of Trustees, Docket No. 97-BOT-256 (Oct. 27, 1997).

Footnote: 4

Ms. Flemings testified that employees were not to use their cell phones during working hours unless it was an emergency and was reported to supervisors. Ms. Flemings testified that when she addressed Grievant on his cell phone, he said he was talking to his nephew because his sister was in the hospital, and that he became loud, used foul language, got in her personal space, and kept repeating himself over and over. Ms. Flemings testified that she would consider a family member in the hospital an emergency. Given the totality of situation, Ms. Flemings decided to write the Performance Counseling Statement. Grievant's behavior and inappropriate interaction with his supervisor on March 1 is relevant and significant. Grievant's phone usage may have been permissible; however, his subsequent behavior is not acceptable in the work place.

Footnote: 5

In 2007, the Legislature abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.

Footnote: 6

Manager Terry Blake initially testified in detail that he was in supervisor Flemings' office and present for a March 28, 2007 telephone conversation, but later testified during cross examination that he was not sure if it was a conversation between Ms. Flemings and Grievant, or substitute supervisor Jeanne Adkins and Grievant that he overheard. Nevertheless, both conversations exemplify Grievant's inappropriate behavior.