THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CARL WAYNE YOUNG,
Grievant,

v. **Docket No. 2009-0540-DOC**

DIVISION OF NATURAL RESOURCES,
Respondent.

DECISION

Grievant, Carl Wayne Young, filed a grievance against his employer, Division of Natural Resources, on October 23, 2008. The statement of grievance reads:

> On October 10, 2008, my employment with the Division of Natural Resources as a Conservation Officer was terminated as a result of a falsified complaint made by Sonya O'Dell to DNR's Professional Standards Unit.
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> My termination from employment was wrongful and was:
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> 1. Based upon false information;
> 2. The result of an inadequate investigation;
> 3. Based upon an investigation which was not conducted in accordance with General Order No. VII;
> 4. Decided prior to any pre-termination meeting or hearing at which time I was provided with a written statement of charges;
> 5. Announced during a meeting wherein I was prohibited from having a representative present;
> 6. Arbitrary and capricious;
> 7. In violation of my due process rights;
> 8. Not supported by a preponderance of the evidence;
> 9. Not supported by good cause;
> 10. Excessive disciplinary action;
> 11. In violation of other reasons which may be supported by the evidence in this matter as discovery has not yet been conducted.

For relief, Grievant seeks "reinstatement to my job, with all seniority, back pay and benefits restored; order requiring DNR to permit a conservation officer to be accompanied by a representative of his or her choosing to any disciplinary meeting;

pre-judgement interest; attorneys' fees and costs[1]; removal from personnel file of any reference to the O'Dell complaint and investigation as well as employment termination."

A level three hearing was held on May 7, 2009, June 15, 2009, June 16, 2009, and July 14, 2009. The first three days of hearing were held at the Grievance Board's Charleston office. For scheduling purposes, the last day of hearing was held at the Grievance Board's Beckley office. Grievant was represented by Kay Bayliss, Esquire, and Respondent was represented by William R. Valentino, Assistant Attorney General. This case became mature on August 10, 2009, upon receipt of the parties' Findings of Fact and Conclusions of Law.

Synopsis

Grievant was terminated from his position as a Conservation Officer for DNR on October 10, 2008. Respondent asserts Grievant was terminated for both stalking his intimate partner and providing false information in an internal investigation.

Grievant argues he was terminated without good cause and the disciplinary action was excessive. Grievant also asserts he was denied due process.

Respondent avers the disciplinary action was not excessive, as Grievant had received a written reprimand in 2005 for lying during a separate internal investigation. Respondent proved Grievant intentionally provided false information

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[1]W. VA. CODE §6C-2-6(a) states, "Any expenses incurred relative to the grievance procedure at levels one, two, and three shall be borne by the party incurring expenses." This requested relief is unavailable at this level.

during an internal investigation and has met its burden in this case. Therefore, this grievance is denied.

Findings of Fact

1. Grievant was employed by the Division of Natural Resources ("DNR") as a Conservation Officer. Grievant has worked as a Conservation Officer for approximately 19 years.

2. For approximately the last four years, Grievant has engaged in an extramarital affair with Sonya O'Dell. This relationship was tumultuous, resulting in several break-ups and reconciliations.

3. On July 11, 2008, Ms. O'Dell contacted the DNR Law Enforcement Section ("LES") to complain Grievant was continually contacting her, despite her request to be left alone. Ms. O'Dell then filed a Professional Standards Unit ("PSU") written complaint.

4. DNR Conservation Officers are required to adhere to the DNR/LES General Orders. General Order No. VII governs internal investigations.

5. Pursuant to General Order No. VII, Lt. Michael Waugh was assigned to investigate the allegations in the PSU complaint.

6. Lt. Waugh informed Grievant that a complaint had been filed by Ms. O'Dell.

7. Lt. Waugh conducted interviews with Ms. O'Dell, as well as numerous individuals believed to have information about the allegations levied against Grievant.

8. Prior to contacting DNR, Ms. O'Dell spoke with Jay Nowak, Chief of Police at Summersville, during April 2008, to report Grievant bothering her. Then on June 24, 2008, several weeks before contacting DNR, Ms. O'Dell contacted the Nicholas County Sheriff's Department accusing Grievant of stalking her. Ms. O'Dell provided this information to Lt. Waugh.

9. At some point, Ms. O'Dell's allegations were referred to the Nicholas County Prosecuting Attorney's Office.

10. When being interviewed by Lt. Waugh, Ms. O'Dell explained her lengthy extramarital affair with Grievant and accused Grievant of continually bothering her and her family after being told repeatedly to leave her alone.

11. Ms. O'Dell indicated that, during the lengthy portion of the relationship where she was an active participant, Grievant took her on patrol with him. She also accused Grievant of coming by her residence while he was on duty for the purpose of sexual intercourse.

12. Grievant is not to have unauthorized persons in his state vehicle.

13. Ms. O'Dell provided Lt. Waugh with a video tape of a phone call from Grievant suggesting that Ms. O'Dell and Grievant "get naked and screw each other's brains out." Lt. Waugh determined this call came from a DNR telephone number, as was evidenced by the caller id at Ms. O'Dell's residence.

14. Also on that video tape was footage of Ms. O'Dell on a pontoon boat with Grievant during a photographic shoot for a HealthNet calendar. The pontoon

boat was not a DNR boat, but was borrowed by Grievant in his official capacity as a DNR officer and was used for official DNR purposes.

15. On at least one occasion, Grievant took Ms. O'Dell on routine patrol into Fayette County. On that patrol, Grievant stopped an individual[2] near Sunday Road and issued a citation to him for having an underage person on an ATV without a helmet.

16. Ms. O'Dell described this event to Lt. Waugh, explaining the location where it occurred and how long it took Grievant to find his ticket book in the back of his state vehicle. She went on to describe the disorganization of his vehicle as the reason for the delay in writing the ticket.

17. Based solely on Ms. O'Dell's description of the stop, Lt. Waugh went through the citations issued by Grievant and was able to identify William Shuff as the individual who was stopped by Grievant.

18. Mr. Shuff confirmed being stopped by Grievant and indicated there was another individual in the Grievant's state car.

19. Mr. Shuff's description of the stop matched Ms. O'Dell's description.

20. Grievant's state car was at Ms. O'Dell's residence on numerous occasions. 21. Officer Timothy White took Grievant to Ms. O'Dell's residence for a brief visit in a state car while on duty.

22. Sometime early in 2008, Grievant and Ms. O'Dell ceased contact, with Grievant changing his cell phone number unbeknownst to Ms. O'Dell.

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[2]Ms. O'Dell did not know the name of the gentleman who received the citation, but she was able to provide specific details of the stop.

23. Early in 2008, Ms. O'Dell began a relationship with another man.

24. From an unspecified date early in 2008 until the middle of June 2008, Grievant and Ms. O'Dell did not have contact.

25. On June 21, 2008, Ms. O'Dell and her boyfriend had an argument whereby he moved out of her house. Upset, Ms. O'Dell called Grievant.

26. Ms. O'Dell asked Grievant to stay at her house, and Grievant declined.

27. On June 22, 2008, Ms. O'Dell called Grievant from her boyfriend's cell phone requesting that Grievant leave her alone, as she and her boyfriend had reconciled.

28. The Nicholas County Prosecutor's Office declined to pursue stalking charges against Grievant.[3]

29. During the DNR investigation, Lt. Waugh interviewed Grievant. This interview was conducted on August 18, 2008, and recorded.

30. Grievant did not request to have an attorney or a representative present at this interview.

31. Grievant was advised that, pursuant to General Orders, he was required to tell the truth.

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[3]Ms. O'Dell testified that the Prosecutor declined to prosecute because she contacted Grievant on June 21st and again on June 22nd. However, the undersigned is in no way suggesting this was the only factor that went into making the decision not to pursue charges against Grievant. Because the Prosecutor did not testify, all the considerations behind the decision are unknown.

32. During the interview, Grievant was asked if he had ever used state facilities to arrange sex with Ms. O'Dell. Grievant responded he may have called her from the state phone, but not for the purposes of soliciting sex.

33. During the interview, Grievant was asked if he had ever taken Ms. O'Dell on routine patrol in his state assigned vehicle. He denied the same.

34. Grievant admitted to having Ms. O'Dell in his state assigned vehicle only once to transport her to the hospital due to a migraine headache.

35. Lt. Waugh specifically asked Grievant if Ms. O'Dell was with him when he stopped an ATV rider on Sunday Road in Fayette County. Grievant responded he did not recall, and he believed he would have recalled it.

36. Grievant was confronted with Mr. Shuff's account of a female being in Grievant's state vehicle when he was stopped. Grievant continued to persist that he did not recall Ms. O'Dell being with him.

37. When asked by Lt. Waugh whether Ms. O'Dell was on the pontoon boat during the HealthNet photo shoot, Grievant confirmed she was. None of Grievant's superiors gave permission for her to be on the boat.

38. Lt. Waugh questioned Grievant about whether he drove his state vehicle to Ms. O'Dell's residence for personal activities. Grievant denied the same.

39. Grievant was confronted with witnesses' statements saying his state vehicle had been seen there, and Grievant conceded that he would meet Ms. O'Dell there for lunch. He also admitted he would stop by her residence at the end of his shift.

40. Various witnesses throughout the community who were interviewed by Lt. Waugh gave taped statements that they had seen Grievant's state vehicle at Ms. O'Dell's residence for lengthy periods of time.

41. Lt. Waugh asked Grievant if Officer Tim White had ever provided Grievant with transportation to or from Ms. O'Dell's residence. Grievant denied the same.

42. Grievant was intentionally untruthful during the investigation.

43. Grievant had discussed Ms. O'Dell's complaint with various individuals in law enforcement from the Nicholas County Sheriff's Department prior to the interview with Lt. Waugh.

44. Lt. Waugh completed his report and submitted it to Frank Jezioro, Director of DNR.

45. A predetermination conference was held with Grievant on September 4, 2008. Present at that meeting was Will Valentino, Esq., Col. Dave Murphy, and Director Jezioro.

46. During the meeting, Director Jezioro completed a form labeled "Predetermination Conference Notes." On the second page of this form were typed allegations against Grievant all of which Respondent determined to be upheld by Lt. Waugh's investigation. The allegations listed are as follows:

1. Stalking/repeatedly harassing Sonya O'Dell
2. Bringing Discredit to Agency by having open extramarital affair
3. Transportation of unauthorized person in assigned vehicle

4. Personal use of assigned equipment by stalking, harassing, following and/or visiting Sonya O'Dell

5. Engaging in sexual conduct with Sonya O'Dell while on duty

6. Making false statements in connection with an internal investigation

7. Insubordination to general orders for all of the above

47. Director Jezioro made notes by each allegation concerning Grievant's responses to each during the meeting.

48. On October 10, 2008, Director Jezioro drafted a termination letter to Grievant.

49. Grievant was terminated for stalking Ms. O'Dell in violation of W. Va. Code §61-2-9a and Section 5-5 of General Order I, which demands strict obedience to all federal, state and municipal laws and for being untruthful during the course of the internal investigation.

50. Previously Grievant was reprimanded for providing false information in an internal investigation involving an incident into Grievant's relationship with a different female.

51. Conservation Officers may be subpoenaed to federal court. When that occurs, federal prosecutors send a letter to DNR stating the following:

> Prosecutors are responsible for making the Court and defense aware of any materials possessed by an investigative agency that are helpful to the defense. Such materials include not only exculpatory information, but also any findings of substantiated allegations that call into question the credibility of a government witness. With respect to law enforcement officers, any past finding or substantiated allegation that the officer falsified testimony, reports, vouchers, or assisted others in doing so, would fall within the scope of this obligation.

> Further, under United States Department of Justice policy, we are required to disclose not only findings and substantiated allegations of falsified testimony or reports, but also any information that might tend to cast doubt generally on the credibility of a witness. This information must be disclosed whether it is, in our judgement, admissible as evidence or not. Likewise, the policy requires that such information must be disclosed whether or not, in our judgement, it would be likely to make a difference between a conviction or acquittal in the case.

52. DNR is required to comply with the requests of the federal prosecutors.

53. Credibility is critical for conservation officers.

54. On October 10, 2008, Grievant met with Col. Murphy and was notified in writing of his dismissal.[4]

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *Hoover v. Lewis County Board of Education*, Docket No. 93-21-427; *Landy v. Raleigh County Board of Education*, Docket No. 89-41-232. 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 to be proved is more probable than not." *Black's Law Dictionary* (6th ed. 1991); *Leichliter v. West Virginia Department of Health & Human Resources*, Docket No. 92-HHR-486. Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

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

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[4]Grievant secretly taped this meeting.

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).

Grievant was terminated for stalking and intentionally providing false information during a PSU investigation in violation of General Orders, thereby engaging in gross misconduct. "The 'term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees.' *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991) (citing *Buskirk v. Civil Serv. Comm'n*, Docket No. 02-INS-108 (Sept. 13, 2002)." *Jaggers-Green v. Bur. of Empl. Programs*, Docket No. 03-BEP-026 (July 30, 2004).

Stalking

Ms. O'Dell claims Grievant stalked and harassed her. Grievant denies the same. Therefore, this issue comes down to one of credibility. 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. Dept. of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dept. of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). The undersigned is charged with assessing the credibility of the witnesses, and where the evidence has been submitted on the record, this is an especially difficult task, as the undersigned has not had the opportunity to observe the witness' demeanor. Nevertheless, demeanor is only one of the

factors to be considered in assessing the credibility of a witness. Other factors include the witness' opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the trier of fact should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of witness' information. *See Perdue v. Dept. of Health & Human Res.*, Docket No. 93-HHR-050 (Feb. 4, 1994).

A credibility determination in this case is very difficult, as both Grievant and Ms. O'Dell have motive to be untruthful. Ms. O'Dell claims Grievant persisted in contacting her and trying to gather information about her from family members. Yet, by her own admission, they had virtually no contact in 2008 until she contacted him in June. Also, Ms. O'Dell's family members testified on Grievant's behalf, asserting the most Grievant would do is ask about Ms. O'Dell in passing. Also, all of the taped telephone conversations to Ms. O'Dell were from 2007, months before she initiated the PSU investigation.

However, Ms. O'Dell's information about contact with Grievant during work hours is verified throughout Lt. Waugh's investigation by independent witnesses, as will be discussed below.

Grievant's career is being threatened by these allegations, thus giving him motive to lie. When taking this into consideration with a prior reprimand for being untruthful during an internal investigation, Grievant is not a credible witness.

Ms. O'Dell made several comments about how Grievant promised to marry her and have children, but he never delivered. These statements seemed to indicate Ms. O'Dell had some bitterness due to failed promises, thus providing her with motive to lie. It

appears as though her perception of the stalking has been somewhat skewed by the past.

Theirs was a tumultuous relationship full of strife and complicated by the fact Grievant was married. During this lengthy relationship, there were many break-ups where it appears one or both would claim the relationship was over only to be pursued by the other and succumb, thereby igniting the relationship yet again. However, at the beginning of 2008, for whatever reason, there seemed to be a mutual agreement to end the relationship. By Ms. O'Dell's own admission, Grievant did not have contact with her until she called him in June 2008. Therefore, the undersigned is hard pressed to find that he stalked and harassed her. Where the evidence is equal, Respondent has failed to meet its burden. Therefore the stalking allegation has not been proven.

Providing False Information

General Order No. VII 7-5 states, "employees who are either subject to or questioned in connection with an internal or administrative investigation are required to answer all questions truthfully." Grievant was advised of that at the beginning of the interview. In addition, Grievant testified he was familiar with the General Orders. During the interview, Grievant denied taking Ms. O'Dell on patrol with him. He also denied having Officer White take him to Ms. O'Dell's home in the state car while on duty. Lastly, he denied being at her house on duty in the state car, except for lunch.

The testimony is contrary to Grievant's assertions. When looking at the testimony independent of Ms. O'Dell, Grievant provided false information during his interview. First, Ms. O'Dell was able to describe the traffic stop of Mr. Shuff with enough particularity that Lt. Waugh was able to find Mr. Shuff. When Lt. Waugh contacted Mr. Shuff to discuss the ticket, Mr. Shuff described the location and the fact that it took Grievant a long time to write

the ticket because he was back in his vehicle for a lengthy amount of time. This is consistent with Ms. O'Dell's recollection. Mr. Shuff also remembered someone being with Grievant when he wrote the citation. Initially, Mr. Shuff said he thought the person was male, but then unprompted said he was mistaken, the person with Mr. Shuff was a female. Grievant is the only one who appears not to remember the specifics of the stop.

Grievant denied having Officer White take him to Ms. O'Dell's residence while on duty in the state car. However, Officer White, Grievant's co-worker and friend, testified he did take Grievant to her home once or twice while on duty.

Lastly, Grievant continually asserts he only went to Ms. O'Dell's home while on duty in the state car for lunch. However, Lt. Waugh obtained independent verification that Grievant was at Ms. O'Dell's house for long periods of time. Grievant was intentionally untruthful during the PSU investigation.

Grievant asserts termination was excessive punishment. This is an affirmative defense. It is therefore the Grievant's burden to demonstrate that the penalty for proven conduct was clearly excessive, that it was an abuse of agency discretion, or that there is an inherent disproportion between the offense and the disciplinary action taken. *Jones v. W. Va. Dep't of Health & Human Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Thompson v. W. Va. Dep't of Health & Human Serv.*, Docket No. 94-HHR-254 (Jan. 20, 1995). See *Martin v. W. Va. State Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989). See *Parham v. Raleigh Count Bd. of Educ.*, 192 W. Va. 540, 453 S.E.2d 374, 379 (1994).

"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 Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and 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 cases." *Eads*, supra (citing *Arlington Hosp. v. Schweiker*, 547 F.Supp. 670 (E.D. Va. 1982).

Grievant had been reprimanded for being deceitful during a PSU investigation several years before. On May 5, 2003, he received a letter of reprimand for providing false information during a separate internal investigation. That letter advised that should Grievant provide false or misleading information during an internal investigation again more severe disciplinary action would be taken, up to and including dismissal.

During the investigation in question, Grievant was provided with numerous opportunities to be truthful about having Ms. O'Dell in a state vehicle when he gave Mr. Shuff a citation. Grievant continued to intentionally be untruthful, even when confronted with Mr. Shuff's recollection. Grievant also chose to be untruthful about having Officer White take him to Ms. O'Dell's residence.

Part of a conservation officer's job is to testify in court, if needed. Therefore, credibility is extremely important. A federal prosecutor is required to provide the defense with any exculpatory information, including any information where the witness was known

to be untruthful. Respondent has a duty to disclose the intentional dishonesty of Grievant, thereby compromising his testimony and his position in general.

Unfortunately, Grievant chose to provide false information during an internal investigation for a second time in his career. This is a tragic case because Grievant knew the possible consequences of his actions and he chose to be untruthful. Respondent was not arbitrary and capricious in terminating Grievant when faced with the overwhelming evidence that Grievant lied. Given his history, Grievant could not be rehabilitated.

Due Process

Grievant also asserts Respondent denied him due process in his termination. "An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and an opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

The West Virginia Division of Personnel sets forth the process that is due when terminating a state employee:

> An appointing authority may dismiss any employee for cause. Prior to the effective date of the dismissal, the appointing authority or his or her designee shall: meet with the employee in a predetermination conference and advise the employee of the contemplated dismissal; give the employee oral notice confirmed in writing, or written notice of the specific reason or reasons for the dismissal; and give the employee a minimum of fifteen calendar days advance notice of the dismissal to allow the employee a reasonable time to reply to the dismissal in writing, or upon request to appear personally and reply to the appointing authority or his or her designee. The appointing authority shall file the reasons for dismissal and the reply, if any, with the Director of Personnel. A predetermination conference and fifteen days notice are not required when the public interests are best served by withholding the notice or when the cause of dismissal is gross misconduct. An appointing

> authority may dismiss an employee after oral notice stating specific reasons, confirmed in writing, when the dismissed employee's action(s) constitute a threat to the safety or welfare of persons or property. W. VA. CODE R. §143-1-12.2.

On September 4, 2008, Grievant met with Director Jezioro for a predetermination conference. During that conference, the Director went through all of the specific allegations that were discovered during Lt. Waugh's investigation. Then on October 10, 2008, Grievant was provided with the termination letter reiterating the reasons for disciplinary action. Grievant had an opportunity to discuss the matter with Col. Murphy and to respond to his termination in writing. However, he did neither.

The undersigned finds it disingenuous for Grievant to say he was unaware of the allegations levied against him. Grievant was told by Lt. Waugh that Ms. O'Dell had complained of him stalking and harassing her. All Grievant had to do was answer the questions asked of him truthfully. Yet he chose not to do so.

Grievant asserts DNR should have allowed him to have a representative present during a disciplinary meeting. Yet, Grievant never requested one. Because Grievant did not ask to have a representative present with him at any stage, this issue is moot.

Grievant also argues DNR's investigation was flawed. Specifically, he asserts Lt. Waugh should have recorded statements of everyone with whom he spoke. Lt. Waugh testified there were witnesses he spoke with but did not record because they did not provide relevant information. Grievant also asserts witnesses who did not corroborate Ms. O'Dell's claims were ignored. While it may have been advisable for Lt. Waugh to record all witness statements, Lt. Waugh used his discretion, and that will not be disturbed, as there was no evidence of a biased and/or unfair investigation. As a matter of fact, after

listening to hours of interviews conducted by Lt. Waugh, it is clear it was difficult for him to question individuals in a very small community about Grievant's extramarital affair. Lt. Waugh attempted to obtain the information as discretely as possible and diligently sought the truth, regardless of what that was.

After the predetermination meeting, Grievant had an opportunity to respond to the allegations and defend himself. However, he did not. Grievant argued he was unable to obtain a copy of the report prepared by Lt. Waugh because Lt. Waugh told him the report could only be subpoenaed, yet the General Orders set forth a mechanism for obtaining the report. Grievant did not speak with Col. Murphy or review the General Orders to determine what could be done to allow him to review the report.

Respondent did not deprive Grievant of due process. Respondent has met its burden. This grievance is DENIED.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *Hoover v. Lewis County Board of Education*, Docket No. 93-21-427; *Landy v. Raleigh County Board of Education*, Docket No. 89-41-232. 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 to be proved is more probable than not." *Black's Law Dictionary* (6th ed. 1991); *Leichliter v. West Virginia Department of Health & Human Resources*, Docket No. 92-HHR-486. Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

2. 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).

3. "The 'term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees.' *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991) (citing *Buskirk v. Civil Serv. Comm'n*, Docket No. 02-INS-108 (Sept. 13, 2002)." *Jaggers-Green v. Bur. of Empl. Programs*, Docket No. 03-BEP-026 (July 30, 2004).

4. 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. Dept. of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dept. of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). The undersigned is charged with assessing the credibility of the witnesses, and where the evidence has been submitted on the record, this is an especially difficult task, as the undersigned has not had the opportunity to observe the witness' demeanor. Nevertheless, demeanor is only one of the factors to be considered in assessing the credibility of a witness. Other factors include the witness' opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action,

and admission of untruthfulness. Additionally, the trier of fact should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of witness' information. *See Perdue v. Dept. of Health & Human Res.*, Docket No. 93-HHR-050 (Feb. 4, 1994).

5. Ms. O'Dell's perception that Grievant was stalking her is not credible.

6. Grievant asserts termination was excessive punishment. This is an affirmative defense. It is therefore the Grievant's burden to demonstrate that the penalty for proven conduct was clearly excessive, that it was an abuse of agency discretion, or that there is an inherent disproportion between the offense and the disciplinary action taken. *Jones v. W. Va. Dep't of Health & Human Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Thompson v. W. Va. Dep't of Health & Human Serv.*, Docket No. 94-HHR-254 (Jan. 20, 1995). See *Martin v. W. Va. State Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989). See *Parham v. Raleigh Count Bd. of Educ.*, 192 W. Va. 540, 453 S.E.2d 374, 379 (1994).

7. "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 Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and 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 cases." *Eads*, supra (citing *Arlington Hosp. v. Schweiker*, 547 F.Supp. 670 (E.D. Va. 1982).

8. Respondent's decision to terminate Grievant for intentionally providing false information during an internal investigation is not arbitrary and capricious.

9. "An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and an opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

10. Grievant received due process.

11. Respondent has met its burden showing Grievant engaged in gross misconduct.

Accordingly, this grievance is **DENIED**.

Any party 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. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: November 13, 2009

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Wendy A. Elswick
Administrative Law Judge