WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BRIAN WAYNE WELLS,
Grievant,

v. **Docket No. 2011-0435-HRC**

WEST VIRGINIA HUMAN RIGHTS COMMISSION,
Respondent.

DECISION

This grievance was filed by Grievant, Brian Wayne Wells, on September 28, 2010, against Respondent, West Virginia Human Rights Commission. Grievant challenges his dismissal from employment effective October 8, 2010, for performance failures, misconduct, and insubordination. As relief, Grievant seeks:

> Return to work with same office, to be made whole, back pay and an accounting and return to my office of all personal items taken by management.

Because this grievance is contesting a dismissal, Grievant elected to file directly to level three of the Public Employees Grievance Procedure. *See* W.VA. CODE § 6C-2-4(a)(4). A level three hearing was held on January 13, 2011, February 9, 2011, February 24, 2011, and March 4, 2011, at the Grievance Board's Charleston office. Grievant appeared *pro se*, and Respondent was represented by Heather L. Laick, Esq., Assistant Attorney General. This matter became mature for decision on April 11, 2011 after final receipt of the parties' proposed findings of fact and conclusions of law.

Synopsis

Respondent terminated Grievant for performance failures, misconduct, and

insubordination. Respondent argues that Grievant behaved in willful and intentionally disrespectful conduct, intentionally disobeyed or ignored clear instructions, and lacked an acceptable standard of conduct. Grievant asserts he was improperly terminated and that his termination was an act of retaliation in response to a previous grievance hearing.

Respondent has met its burden in this matter. Therefore, this grievance is DENIED.

Findings of Fact

1. Grievant was employed on December 1, 2005, in an Attorney 1 classification, with the working title of General Counsel, for Respondent.

2. The Human Rights Commission is made up of nine citizens of the State of West Virginia who are appointed by the Governor with the advice and consent of the Senate. The Human Rights Commission is charged by statute with specific powers, duties and responsibilities.[1]

3. The Executive Director of the Human Rights Commission is appointed by the Governor with the advice and consent of the Senate and serves as the Secretary of the Commission. At the time this present grievance was filed, the Human Rights Commission Executive Director was Ms. Ivin B. Lee.

4. The Human Rights Commission's General Counsel is under the direct supervision of the Executive Director and he serves as the in-house legal counsel to the Commission and the Executive Director.[2]

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[1] *See* W.VA. CODE §§ 5-11-1 *et seq*.

[2] *See* Respondent's Exhibit 13, Attachment C.

5. On September 15, 2008, Grievant was given his Employee Performance Appraisal (EPA)[3] rating the previous year, ending on September 15, 2008. His overall score was 1.96, which fell into the "meets expectations" category. The EPA's summary comments stated:

> I continue to emphasize that Brian needs to improve his skills in the area of credibility and confidentiality and to focus his attention on the Rules of Practice and Procedure before the Commission, with emphasis in the area of appeals to the Commission and consulting with his supervisor. Brian has not shown any initiative in improving in this area.

6. Grievant did not sign and return the EPA to his supervisor, Ms. Ivin Lee, Executive Director for Respondent.

7. On February 24, 2009, Grievant was placed on a Performance Improvement Plan (PIP)[4] after Grievant allegedly provided legal advice to Respondent's Commissioners without researching the issue and provided the Commissioners with agency letterhead.

8. Ms. Lee issued Grievant a letter of reprimand dated March 2, 2009. The letter of reprimand stated the reprimand was due to Grievant's insubordination of Executive Director Lee's verbal and written directives regarding the use of agency letterhead.

9. Grievant filed a grievance form stating he was unfairly disciplined and placed on a PIP. This grievance was docketed number 2009-1279-HRC.

10. A level three hearing for grievance 2009-1279-HRC was held on December 10, 2009. On June 14, 2010, the grievance was granted, in part, and denied, in part. The decision ordered the March 2, 2009, written reprimand be removed from all files. Grievant

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[3]Respondent's Exhibit No. 11.

[4]*See* Respondent's Exhibit No. 13.

failed to prove his PIP was arbitrary or capricious therefore it remained in effect.

11. On August 31, 2009, Grievant received his EPA[5] rating the period from September 1, 2008 to August 31, 2009. His overall score was 1.30, which fell into the "needs improvement" category. Grievant did not sign and return the EPA to Ms. Lee.

12. On July 28, 2009, Ms. Lee sent an email[6] to staff notifying all employees that "the use of profanity will not be tolerated in this office". The email also warned that the use of profanity can be subject to disciplinary action.

13. Grievant continued to use profanity, such as "shit", "damn" and "fuck", in the office.

14. In July 2010, Respondent received five written statements[7] from employees complaining about Grievant's use of profanity in the office.[8]

15. On July 22, 2010, Executive Director Lee issued a directive[9] to all staff with instructions to contact Paul Cook, Information Systems Coordinator I, for all computer problems, except for password lock outs. Staff was directed to only contact the Office of Technology Help Desk for a password reset in order to log onto their computer.

16. On July 27, 2010, Grievant was seen looking through Ms. Lee's mailbox.[10]

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[5]Respondent's Exhibit No. 12.

[6]Respondent's Exhibit No. 4.

[7]Respondent's Exhibit No. 5.

[8]After receiving verbal complaints of Grievant's use of profanity, Ms. Lee asked the employees to write statements regarding the profanity and submit them to her.

[9]Respondent's Exhibit No. 3.

[10]Level three hearing testimony of Ms. Lee and *See* Respondent's Exhibit No. 16.

17. As a result of the accumulation of Grievant's actions, Ms. Lee issued a written warning[11] on August 6, 2010, to Grievant.

18. The August 6, 2010 warning stated:

> Your statements and behavior demonstrate a blatant disregard for the authority of the management of the Human Rights Commission.
> .....
> An employee is expected to respect authority and does not have the unfettered discretion to disobey or ignore clear instructions. Insubordination encompasses more than an explicit order and subsequent refusal to carry it out. It also involves a flagrant or willful disregard for implied directions of an employer. Your insubordinate conduct makes it difficult for management in general, and your supervisor in particular, to carry out leadership responsibilities while you are at the work place.
> .....
> I sincerely hope you will correct your inappropriate and unprofessional behavior. Please be advised that this letter is intended to serve as a final warning in that regard. I assure you it is my intention to maintain the integrity of our standard of conduct which provides the Human Rights Commission and its employees with a means to ensure its efficient and effective operation.

19. Grievant refused to sign a copy of the August 6, 2010 warning to acknowledge receipt of the warning.[12]

20. After an employee for Respondent was dismissed for downloading pornography on his work computer, Ms. Lee made a managerial decision to restrict staff's internet access.

21. On September 16, 2010, Ms. Lee held a staff meeting with all employees, including Grievant, to inform them that she would be restricting internet access. She explained that all employees would have access to the internet, but would only have

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[11]Respondent's Exhibit No. 7.

[12]*See Id.* Two witnesses signed and dated the document to attest to Grievant refusing to sign.

access to the internet sites which they needed to perform their jobs. Ms. Lee also informed staff that if they believed they needed access to other sites, they should contact their direct supervisor and a determination would be made as to whether or not the desired sites would be made available to them.

22. On September 21, 2010, Grievant contacted the Office of Technology for help with his internet access. The call ticket[13] created by the Office of Technology stated that the problem was reported by phone and described the problem as no connectivity that was only affecting Grievant.

23. Grievant did not have connectivity problems. Grievant's internet access had been restricted.

24. On September 22, 2010, at 8:09 a.m., Grievant emailed[14] the Webfiltering Service Desk of the Office of Technology, stating he was unable to access google.com, and requested site access.

25. On September 22, 2010, Ms. Lee held a predetermination meeting with Grievant.

26. Grievant called in sick on September 23 & 24, 2010.

27. A fourteen page letter of termination[15] notifying Grievant that he was dismissed from employment as an Attorney I with Respondent was issued on September 23, 2010. The reasons stated included performance failures, misconduct, and

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[13]Respondent's Exhibit No. 8.

[14]Grievant's Exhibit No. 8.

[15]Respondent's Exhibit No. 1.

insubordination.

28. The September 23, 2010 termination letter stated:

> Your dismissal is the accumulated result of your history of performance failures and misconduct. I have tried to work with you to correct your deficiencies and improve your performance. You were advised in the Final Warning Letter dated August 6, 2010, that the next occurrence of unacceptable and unprofessional conduct would result in your dismissal. Nevertheless, your performance has not improved. All of your actions, taken as a whole, are egregious enough to warrant your immediate dismissal.
> .....
> I find that your willful and intentional disrespectful conduct is an act of insubordination. Your statements demonstrate a blatant disregard for the authority of the management of the WV Human Rights Commission. Employees are expected to adhere to the directives of their supervisors. The refusal of an employee to perform any lawful directive by their supervisors is cause for severe disciplinary action. An employee is expected to respect authority and does not have the unfettered discretion to disobey or ignore clear instructions. Insubordination encompasses more than an explicit order and subsequent refusal to carry it out. It also involves a flagrant or willful disregard for implied directions of an employer. Your insubordinate conduct makes it difficult for management in general, and your supervisor in particular, to carry out leadership responsibilities while you are at the work place.
> .....
> Believing that it is not your wish to bring your conduct into compliance with acceptable levels, I feel you have left me with no choice but to dismiss you. The facts of your case cause me to conclude that you are no longer able to carry out your duties in a trustworthy fashion. In your position as General Counsel, you are held to a higher standard of conduct and to impose a lesser penalty would cause you to be ineffective in that capacity.

29. Grievant received the termination letter on September 25, 2010, according to the signed U.S. Postal Service Certified Mail Receipt.[16]

30. Following Grievant's termination, Ms. Lee, Mr. Cook, and Monia Turley, Administrative Assistant, cleaned out the office Grievant had used so the office could be

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[16]Respondent's Exhibit No. 19.

used for other purposes.[17]

31. Grievant's termination letter stated, "[y[our final paycheck will be available for you to pick up and sign for within 72 hours of the date of your dismissal letter." Grievant's final paycheck was available on September 27, 2010. Ms. Lee attempted to reach Grievant on multiple occasions to let him know that his final paycheck was in Respondent's office and available for pick up or that it could be mailed or delivered to him along with his personal possessions.

32. Grievant's personal items that were left in the office were delivered to him on October 20, 2010 by JL Johnson, a supervisor for Respondent, and Deputy Chief Randy Mayhew, a member of the Capitol Police. At that time, Grievant's final paycheck was also presented to him and the state property under his possession, such as keys, were picked up. Grievant refused to sign an acknowledgment that he received his final paycheck; therefore, the check was taken back to Respondent's office. That same afternoon, Respondent mailed Grievant's final paycheck via registered mail.

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

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[17]While cleaning out the office, they found several items that Grievant should not have had access to. Grievant had copies of Chief Administrative Law Judge Phyllis Carter's leave request forms, a former Administrative Law Judge's medical records, and documents related to a case that had been placed under seal by the Kanawha County Circuit Court. Grievant was not one of the people the Circuit Court had allowed access to the documents under seal.

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." *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.*

Respondent terminated Grievant for performance failures, misconduct, and insubordination. Respondent argues that Grievant behaved in willful and intentionally disrespectful conduct, intentionally disobeyed or ignored clear instructions, and lacked an acceptable standard of conduct. Grievant repeatedly used profanity in the office after Executive Director Lee issued a directive that the use of profanity would not be tolerated. Grievant displayed unacceptable conduct and intentionally disrespectful conduct by looking through the agency's Executive Director's mailbox. On September 21, 2010 and September 22, 2010, Grievant willfully disobeyed Executive Director Lee's directive not to directly contact the Office of Technology, except for password resets. Grievant's inappropriate behavior, if allowed to continue without consequences, would serve only to undermine the authority of his supervisor and foster an unstable working environment.

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 & 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).

Insubordination has been defined as the "willful failure or refusal to obey reasonable

orders of a superior entitled to give such order." *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). In order to establish 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. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). *See Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *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).

"Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. *See Day v. Morgan Co. Health Dep't*, Docket No. 07-CHD-121 (Dec. 14, 2007). An employer has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority . . . ." *McKinney v. Wyoming County Bd. of Educ.,*Docket No. 92-55-112 (Aug. 3, 1992) (citing *In re Burton Mfg. Co.,* 82 L.A. 1228 (Feb. 2, 1984)).

Grievant asserts that he did not contact the Office of Technology directly on September 21, 2010, against Ms. Lee's directive. Grievant claims the call ticket admitted

at the level three hearing as Respondent's Exhibit Number 8 is "a phony document"[18].

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 Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dept. of Health & Human Resources*, Docket No. 95-HHR-066 (May 12, 1995). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Harold J. Asher and William C. Jackson. *Representing the Agency before the United States Merit Systems Protection Board* 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997). As Grievant and Respondent dispute the validity of documents[19], the undersigned must make a credibility determination. The validity of the documents bears directly to Grievant's alleged insubordination to follow his supervisor's directive not to contact the Office of Technology.

Mr. Cook, Information Systems Coordinator I for Respondent, submitted a written statement to Executive Director Lee on September 22, 2010, stating Grievant asked him

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[18]Grievant argued the document was created for this litigation.

[19]Along with the September 21, 2010 call ticket, Grievant asserts that the EPA's admitted into evidence as Respondent's Exhibits No. 11 & 12 were "prepared specifically for this litigation".

why his internet access had been limited. Grievant also informed Mr. Cook that he had already telephoned the Office of Technology help desk and was issued a call ticket. Mr. Cook's testimony at the level three hearing supported his written statement. Andrew Eagle, from the Office of Technology, testified at the level three hearing that Grievant had contacted the Office of Technology the morning of September 21, 2010 claiming he did not have connectivity. Grievant asserts the call ticket was fabricated for this litigation and that he contacted the Office of Technology for a password reset, which is the one allowable reason to directly contact Office of Technology under Ms. Lee's directive. Although Grievant claims he did not directly contact the Office of Technology regarding restricted internet access, Grievant did assert during the level three hearing and in his proposed findings of fact and conclusions of law that his internet access was limited, and that he was the only employee to receive internet and intranet access restrictions as a form of retaliation against him for filing a grievance. Several witnesses, including Sally Brown, Tasha Rucker, James Slack, and Carolyn Smith, testified that their internet access was also restricted. The undersigned is not persuaded that the internet restriction was done out of retaliation toward Grievant, because the majority of Respondent's employees experienced the same restriction. In response to Grievant's claim that the September 21, 2010 call ticket was for a password reset, Grievant had emailed the Office of Technology on September 13, 2010, requesting a password reset.[20] Mr. Eagle testified, upon examining Grievant's Exhibit No. 7, that Grievant's password had been successfully reset on September 13, 2010, and that Grievant's call regarding internet access on September

[20] *See* Grievant's Exhibit No. 7.

21, 2010 was completely separate and unrelated. Mr. Cook and Mr. Eagle lack interest or motive, and they did not demonstrate any bias. Conversely, Grievant does posses motive and interest to avoid disciplinary action for willful disobedience. Grievant's claim that the document was fabricated for this litigation is not believable.

On September 21, 2010 and September 22, 2010, Grievant willfully disobeyed Executive Director Lee's directive not to directly contact the Office of Technology, except for password resets. Contacting the Office of Technology directly was not Grievant's only act of willful disobedience and blatant disregard for authority constituting insubordination. Grievant refused to sign and acknowledge the August 6, 2010 written warning or the attempted in person delivery of his final paycheck by JL Johnson and Deputy Chief Mayhew[21]. Ms. Lee and Holly Devins, Receptionist for Respondent, witnessed the Grievant rummaging through the Executive Director's mailbox on July 27, 2010[22]. Although Grievant proposed the excuse of checking to see if Ms. Lee had received her mail regarding a grievance filed by Grievant, there is no excuse for looking through the mailbox of the Executive Director of an agency who often receives confidential, legal, and/or personnel related documents.

Grievant displayed disruptive behavior and used profanity in the office despite Ms. Lee's directives. "Certainly, an employer is entitled to expect its employees to conform to

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[21]Grievant asserts he refused to sign an acknowledgment for delivery of his final paycheck and personal property packed into banker's boxes on October 20, 2010, by JL Johnson and Deputy Chief Mayhew, because he believed that doing so would have signed away any rights he had to an accounting of his personal property.

[22]*See* Respondent's Exhibit No. 9.

certain standards of civil behavior." *Redfearn v. Dep't of Labor*, 58 MSPR 307 (1993). All employees are 'expected to treat each other with a modicum of courtesy in their daily contacts.' *See Fonville v. DHHS*, 30 MSPR 351 (1986)(*citing Glover v. DHEW,* 1 MSPR 660 (1980)). Abusive language and abusive, inappropriate, and disrespectful behavior are not acceptable or conducive to a stable and effective working environment. *Hubble v.Dep't of Justice,* 6 MSPR 659, 6 MSPR 553 (1981). *See Graley v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 99-PEDTA-406 (Oct. 31, 2000)."

On July 28, 2009, Ms. Lee sent an email[23] to staff notifying all employees that "the use of profanity will not be tolerated in this office". The email also warned that the use of profanity can be subject to disciplinary action. Grievant violated Executive Director Lee's directive by using profanity in the office. In July 2010, Respondent received five written statements[24] from employees regarding Grievant's use of profanity in the office.

Grievant asserts his termination was an act of retaliation by Respondent for filing previous grievances. 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;
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> that he was subsequently treated in an adverse manner by the employer or an agent;
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> that the employer's official or agent had actual or constructive knowledge that the grievant engaged in the protected activity;

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[23]Respondent's Exhibit No. 4.

[24]Respondent's Exhibit No. 5.

> that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and
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> 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 Res. v. Myers*, 191 W. Va. 72, 443 S.E.2d 229 (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).

Although the actions addressed in Grievant's termination letter did occur after Grievant filed grievances with the WV Public Employees Grievance Board, the fact is Grievant committed the insubordinate actions. Retaliatory motive cannot be inferred when Grievant's actions were insubordinate.

Grievant asserts his due process rights were violated. The West Virginia Supreme Court of Appeals has recognized that "due process is a flexible concept, and that the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) (*citing Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)). "What is required to meet procedural due process under the Fourteenth Amendment is controlled by the circumstances of each case." *Barker v. Hardway,* 238 F. Supp. 228 (W. Va. 1968); S*ee, Buskirk, supra*; *Edwards v. Berkeley County Bd. of Educ.*, Docket No. 89-02-234 (Nov. 28,

1989). *Graham v. Putnam County Bd. of Educ.*, Docket No. 99-40-206 (Sep. 30, 1999).

DHHR Policy Memorandum 2104, "Guide to Progressive Discipline," has been construed as a permissive, discretionary policy that does not create a mandatory duty to follow a progressive disciplinary approach in every instance. *Oiler v. Dep't of Health & Human* Res., Docket No. 02-HHR-074 (Aug. 28, 2002); *Ferrell v. W. Va. Dep't of Health & Human Res.*, Docket No. 97-HHR-526 (Apr. 30, 1998); *Artrip v. W. Va. Dep't of Health and Human Serv.*, Docket No. 94-HHR-146 (Sept. 13, 1994). That policy states, in part:

> Determined by the severity of the violation, progressive discipline is the concept of increasingly severe actions taken . . . to correct or prevent an employee's initial or continuing unacceptable work behavior or performance. It is important to remember, however, that the level of discipline will be determined by the severity of the violation.

The policy leaves a significant amount of discretion to the decision maker when issuing progressive discipline. Grievant was placed on a Performance Improvement Plan and received a written warning before he was ultimately terminated. He had opportunity to correct his behavior, yet he continued to be insubordinate.

It is a well-settled principle of constitutional law, under both the State and Federal Constitutions, that an employee who possesses a recognized property right or liberty interest in his employment may not be deprived of that right without due process of law. *Buskirk*, *supra*; *Waite*, *supra*; *Clark*, *supra*. "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 question

here is whether the due process protections afforded Grievant were sufficient.

A predetermination conference was held on September 22, 2010. The pre-determination conference was held to discuss Grievant's conduct and give him an opportunity to respond. Grievant argues that Ms. Lee had mentally decided to terminate him before the end of the predetermination meeting. Grievant's contention that he was denied due process is without merit.

As part of his requested relief, Grievant seeks an accounting and return of all personal items allegedly taken by management, or compensation of $3,000.00. The items Grievant asserts are missing include framed and matted art prints, a clock, a radio, two ceramic *Phantom of the Opera* masks, Grievant's framed law school diploma, law school acceptance letter and certificate of bar passage. Grievant asserts $3,000.00 is the value of his missing personal property. Grievant's termination letter stated, "[y]ou are to clear your office and desk of all personal effects at the time you return all property belonging to the State of West Virginia." It also clearly stated that he was to return the State property "immediately or at a mutually agreed upon date, time, and location".

Grievant did not make any effort to return the State property, as instructed, or to collect his personal effects. Sally Brown, Investigator at the HRC, testified to seeing Grievant in the building on the evening of September 22, 2010, after his predetermination conference, carrying boxes out of the building. Ms. Lee testified that the items Grievant alleges are missing were not in his office at the time she boxed up his office. Upon learning that Grievant was claiming personal items to be missing, Ms. Lee suggested he contact the police to file a report. The undersigned was not informed of any police report

being filed. Ms. Lee testified that all personal items of Grievant's that were in his office at the time Respondent packed up his belongings into six boxes were returned to him on October 20, 2011, except for a coat rack which did not fit in the vehicle transporting the boxes to Grievant's residence. The coat rack is available for Grievant to retrieve. Ms. Lee testified to having no knowledge to where the allegedly missing items might be and that she has not seen any of the missing items around Respondent's offices.

The undersigned does not have sufficient evidence to make a determination on the allegedly missing personal items. Grievant should have made an effort to retrieve his personal belongings if he were concerned about their care and return. Filing this grievance with the Grievance Board does not preclude Grievant's rights to pursue other claims in another venue. This Grievance Board does not award tort like damages. *Walls v. Kanawha County Bd. of Educ.*, Docket No. 98-20-325 (Dec. 30, 1998); *Hall v. W.Va. Dep't of Transp.*, Docket No. 96-DOH-433 (Sept. 12, 1997); *Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997).

Accordingly, the undersigned concludes that Respondent did not abuse its discretion when it determined that Grievant's disciplinary history, continued insubordination and disruptive behavior, warranted termination. Grievant failed to meet the standard to establish reprisal by Respondent. Grievant's contention that he was denied due process is without merit. Therefore, this grievance is DENIED.

Conclusion 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." *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. 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 & 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. Insubordination has been defined as the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *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). In order to establish 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. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). *See Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *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).

4. "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. *See Day v. Morgan Co. Health Dep't*, Docket No. 07-CHD-121 (Dec. 14, 2007). An employer has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority . . . ." *McKinney v. Wyoming County Bd. of Educ.,*Docket No. 92-55-112 (Aug. 3, 1992) (citing *In re Burton Mfg. Co.,* 82 L.A. 1228 (Feb. 2, 1984)).

5. 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 Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dept. of Health & Human Resources*, Docket No. 95-HHR-066 (May 12, 1995).

6. In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Harold J. Asher and William C. Jackson. *Representing the Agency before the United States Merit Systems Protection Board* 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior

statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

7. Contacting the Office of Technology directly was not Grievant's only act of willful disobedience and blatant disregard for authority constituting insubordination.

8. "Certainly, an employer is entitled to expect its employees to conform to certain standards of civil behavior." *Redfearn v. Dep't of Labor*, 58 MSPR 307 (1993). All employees are 'expected to treat each other with a modicum of courtesy in their daily contacts.' *See Fonville v. DHHS*, 30 MSPR 351 (1986)(*citing Glover v. DHEW,* 1 MSPR 660 (1980)). Abusive language and abusive, inappropriate, and disrespectful behavior are not acceptable or conducive to a stable and effective working environment. *Hubble v.Dep't of Justice,* 6 MSPR 659, 6 MSPR 553 (1981). *See Graley v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 99-PEDTA-406 (Oct. 31, 2000)."

9. Grievant's intentional failure to follow clear directives constitutes insubordination.

10. 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 Res. v. Myers*, 191 W. Va. 72, 443 S.E.2d 229 (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).

11. Grievant failed to meet the standard to establish reprisal by Respondent.

12. The West Virginia Supreme Court of Appeals has recognized that "due process is a flexible concept, and that the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) (*citing Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)). "What is required to meet procedural due process under the Fourteenth Amendment is controlled by the circumstances of each case." *Barker v. Hardway,* 238 F. Supp. 228 (W. Va. 1968); S*ee, Buskirk, supra*; *Edwards v. Berkeley County Bd. of Educ.*, Docket No. 89-02-234 (Nov. 28, 1989). *Graham v. Putnam County Bd. of Educ.*, Docket No. 99-40-206 (Sep. 30, 1999).

13. It is a well-settled principle of constitutional law, under both the State and Federal Constitutions, that an employee who possesses a recognized property right or

liberty interest in his employment may not be deprived of that right without due process of law. *Buskirk*, *supra*; *Waite*, *supra*; *Clark*, *supra*. "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).

15. Grievant's contention that he was denied due process is without merit.

16. Respondent did not abuse its discretion when it determined that Grievant's disciplinary history, continued insubordination and disruptive behavior, warranted termination.

Accordingly, this grievance must be 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: June 22, 2011

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Jennifer Lea Stollings-Parr
Administrative Law Judge