WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

FRED SCOTT MASON,
Grievant,

v. **Docket No. 2010-0887-CONS**

WEST VIRGINIA DEPARTMENT OF ADMINISTRATION, DIVISION OF GENERAL SERVICES,
Respondent.

D E C I S I O N

Grievant, Fred Scott Mason, filed grievances against West Virginia Department of Administration, Division of General Services (also referenced as "Division" or "GSD"), Respondent. This matter is a consolidation of two separate grievances wherein Grievant is seeking the removal of a letter of reprimand from his personnel file, and where Grievant, following termination, is seeking reinstatement into his position, back pay and other relief as entitled to by law.

On July 17, 2009, Grievant filed a grievance alleging improper reprimand, Docket No. 2009-1465-DOA. On November 9, 2009, Grievant filed a grievance contending improper termination, Docket No. 2010-0656-DOA. These two grievances were consolidated on January 12, 2010, for decision at level three before the West Virginia Public Employees Grievance Board.

A level three hearing was held before the undersigned Administrative Law Judge on multiple dates, being May 28, June 3, July 19 and 20, and October 4, 2010 in the Grievance Board's Charleston office. Grievant appeared in person and by his legal counsel Dana Eddy, Attorney at Law. Respondent was represented by Stacy L. DeLong,

Assistant Attorney General. This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or about December 9, 2010. Both parties submitted fact/law proposals.

Synopsis

Grievant was 'acting' in a managerial capacity in the employment of Respondent. Respondent highlights that Grievant has repeatedly demonstrated a "lack of tact and professionalism" when dealing with co-workers and outside contractors. Respondent argues that after having addressed these types of situations with Grievant, the behavior, coupled with Grievant's demonstrated attitude toward his supervisor, constitutes insubordination and justifies termination of his employment. Grievant, by counsel, contends Respondent's disciplinary actions are illegitimate. Grievant avers the written reprimand and dismissal were flawed and executed inappropriately.

Grievant's behavior is not ideal employee conduct. Respondent had discretionary options in the circumstances of this case; not all viable options were given reasonable consideration. The facts, nature and timing of the disciplinary actions are unique in the circumstances of this case. Considerable deference is afforded an employer in disciplinary situations, nevertheless, such authority is not without limits. There are procedural protocols for identifying, educating, and correcting classified employees. Respondent established justified cause to issue the April Letter of Reprimand; however did not establish by a preponderance of the evidence that Grievant's action(s) in the Fall of 2009 constituted insubordination to the extent that dismissal was warranted.

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

Findings of Fact

1. On September 25, 2006, Grievant began employment with the General Services Division within the Department of Administration for the State of West Virginia. Grievant was hired into the job classification "Engineer."

2. Within a week of his hiring, Grievant was informed by Pam Dukate, Acting Deputy Director for the General Services Division and David Oliverio, Director of the General Services Division, that he would be temporarily upgraded to "Acting Manager" for the Engineering Section of the General Services Division.

3. For the period commencing in the first quarter of the year 2007 until the first quarter of the year 2009, Grievant reported directly to Dan Olthaus, who held the position of Deputy Director for the General Services Division.

4. During the time relevant to this grievance, David Oliverio was the Director of the General Services Division ("Director Oliverio") and Robert Ferguson was the Cabinet Secretary for the Department of Administration ("Secretary Ferguson").

5. Grievant is employed in a classified position. In January 2009, Grievant sought to have his job classification adjusted. Grievant began a process to have his classification formally recognized as Senior Engineer. Grievant had never received an increase in compensation as a direct consequence of managerial duties he was performing. Respondent participated in the process for reallocation of Grievant's position.

6. Position description documents pertaining to Grievant's job duties were filed with the Department of Personnel (DOP), the agency empowered to make the definitive determination regarding classification determinations.[1]

7. Grievant's initial Position Description Form[2] was submitted to the Division of Personnel on or about January 23, 2009. Resp. Ex. 8. The document was signed by Grievant on January 11, 2009 and by his supervisor, Director Oliverio, with an attachment on January 21, 2009.

8. DOP declined to reallocate Grievant's job classification.[3] DOP's explanation for its refusal to reallocate Grievant's classification included, but is not limited to, the fact that a number of the duties Grievant was performing as "Acting Engineering Manager" were temporary assigned duties.

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[1] The DOP is the State Agency charged with classifying positions in the West Virginia Classified Service. W. VA. CODE § 29-6-1 *et seq*. Specifically, W. VA. CODE § 29-6-10 authorizes the DOP to establish and maintain a position classification plan for all positions in the classified service.

[2] The Position Description Form is a document which describes the officially assigned duties, responsibilities, supervisory relationships and other pertinent information relative to a position. This document is the basic source of official information utilized by the Division of Personnel (DOP) to allocate the position to the proper classification. *See* 143 C.S.R. 1 § 3.70.

[3] DOP Legislative Rule defines "Reallocation" as "[r]eassignment by the Director of Personnel of a position from one classification to a different classification on the basis of a significant change in the kind or level of duties and responsibilities assigned to the position." 143 C.S.R. 1 § 3.75. To receive a reallocation, an employee must demonstrate "a significant change in the kind or level of duties and responsibilities." An increase in number of duties does not necessarily establish a need for reallocation. *Kuntz/Wilford v. Dep't of Health and Human Res.*, Docket No. 96-HHR-301 (Mar. 26, 1997). "The performing of a duty not previously done, but identified within the class specification also does not require reallocation." *Id*. *Also see* DOP Temporary Classification Upgrade Policy (DOP-13) and DOP Rule 4.7.

9. As the "Acting Engineering Manager," Grievant's job responsibilities were described as follows:

> Oversees engineering section including one architect and four staff memebers [sic]. Performs highly complex engineering in the areas of mechanical and/or technical work managing large, ongoing construction and renovation projects for major building infrastructure systems. Work involves research, analysis and evaluation of emerging technologies as applied to the design, construction, maintenance, operations and use of the building infrastructure. Responsible for management of all phases of multiple projects. Determines the engineering and technical services needed and assures all technical reviews are completed.

Position Description Form, Section 24, Resp. Ex. 8.

10. Respondent readily admitted that Grievant was only serving as the Acting Engineering Manager. The Engineering Manager position had not been filled and Respondent did intend to post and fill the position. Cover letter and attachment to Position Description Form, signed by Director Oliverio, Resp. Ex. 8.

11. Respondent's position regarding whether Grievant was entitled to a specific job classification and whether Grievant was entitled to additional compensation for the duties he was performing was not consistent throughout the entire analysis process.

12. Initially, Director Oliverio supported the requested reallocation of Grievant to the classification of "Senior Engineer." On April 3, 2009, Director Oliverio amended his portion of the Position Description Form. The classification of "Building and Engineering Construction Manager (GSD)," classification #9787 was discussed. The pay range for this classification was lower than the amount of compensation Grievant was already receiving. Ultimately, Grievant's job classification was not reallocated.

13. Grievant filed a grievance regarding his job classification on August 10, 2009, contending among other allegations, that he was working out of classification.

14. During a time period identified as prior to April 2009, Grievant's supervisor, Director Oliverio, verbally addressed with Grievant his usage of a State issued cell phone. Grievant was not carrying, or readily responding to his State issued cell phone while working. Director Oliverio verbally directed and warned Grievant regarding the expectation that Grievant carry and answer his State issued cell phone.

15. From the date of his hire on September 25, 2006, until mid 2009, Grievant did not receive a formal Employee Performance Appraisal from a supervisor. *See* 143 C.S.R. 1 §§15, 10.2(a) and DOP-P17.

16. As Grievant's supervisor, Director Oliverio discussed with Grievant the manner with which Grievant dealt with co-workers and outside contractors. On or about April 10, 2009, Grievant received correspondence from Director Oliverio which constituted a reprimand. Resp. Ex. 1.

17. The letter of reprimand covered the period of Grievant's employment with the Division; that is, the letter of reprimand covered actions and conduct of Grievant from the date of September 25, 2006, until the date of April 10, 2009, which is a period of thirty-one (31) months.

18. The April 10, 2009, reprimand letter stated that Director Oliverio was "extremely displeased with the manner in which Grievant conducted his day-to-day contacts with colleagues and co-workers in the Department of Administration, particularly within the General Services Division, and also with various vendors and contractors." Resp. Ex. 1.

19. The letter of reprimand did not find fault with Grievant's competency as an "Engineer" or performance of the duties of an engineer.[4]

20. Dan Olthaus, former Deputy Director for the General Services Division testified at the level three grievance hearing. He resigned from his position with the General Services Division in the first quarter of 2009. With regard to many of the instances set forth in the letter of reprimand, Mr. Olthaus was, in fact, the person to whom Grievant directly reported at the time of the event.

21. Deputy Director Olthaus had investigated the matters that were identified in the letter of reprimand that occurred during his tenure as Deputy Director for the General Services Division. Deputy Director Olthaus determined and was of the opinion that Grievant had acted befittingly for the circumstances and did not take disciplinary action against Grievant. Mr. Olthaus had the authority to discipline Grievant.

22. The April 10, 2009 Letter of Reprimand was issued by Director Oliverio, but only after the departure of Mr. Olthaus and without any consultation with Deputy Director Olthaus.

23. The April 10, 2009 Letter of Reprimand issued by Director Oliverio was issued two or three years after many of the events occurred. The letter of reprimand identified five specific individuals, by name, who had conflict with Grievant and referenced a number of incidents by description. For example;[5]

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[4] The April 10, 2009 reprimand letter stated that Director Oliverio was extremely pleased with [Grievant's] engineering and technical proficiency. Resp. Ex. 1.

[5] Not all incidents referenced are set out in this finding of fact, other examples of Grievant's conduct will be discussed by additional findings of fact (FOF).

a. The letter of reprimand identified an incident with Fred Curry, job title unspecified, occurring in 2006-2007 and involved debatable electrical work performed by Mr. Curry. Grievant, without knowing that Mr. Curry had done the work, pointed out poor workmanship in front of Mr. Curry and the Governor of the State of West Virginia. Mr. Curry was not pleased with Grievant's verbal characterization of his craftsmanship and was upset by the event. Eventually Mr. Curry and Grievant developed a pleasant and mutually respectful working relationship.

b. The letter of reprimand identified a 2008 incident involving Matt Brown, Protective Services and Carolyn Hager, both state employees. Grievant interjected his chivalrous opinion into a situation where Matt Brown was in discussion with Carolyn Hager, a receptionist in the Division of General Services. Grievant took exception with Mr. Brown's demeanor and interaction with Ms. Hager. Grievant communicated with Mr. Brown and admonished him.[6] This was upsetting to Mr. Brown. Matt Brown left work the day of this event because he was disturbed by the confrontation.

c. The letter of reprimand identified an incident involving a fire sprinkler contractor. Grievant was observed by Assistant Fire Marshal Norm Fetterman in a heated argument with a sprinkler contractor in the parking garage on the Capitol Complex. Unbeknownst to Mr. Fetterman, Grievant was called to the site. One contractor had been arguing with another contractor or on-site inspector and Grievant interceded. The fire sprinkler contractor complained that Grievant had been heavy-handed. Deputy Director Olthaus was specifically made aware of this event which transpired in 2007.

d. Further, the letter of reprimand identified a 2007-2008 incident with Carol Stevens, who was a private contractor performing services under a state contract. There were mistakes regarding payment and improper subcontracting. Grievant criticized the quality of certain work that Ms. Stevens had designed.

e. Note was made regarding unauthorized communications with Purchasing Division in February of 2009. (Additional facts discussed, *supra*.)

f. An additional issue noted in the reprimand letter pertains to the Graciano Corporation's work on the refurbishing of the Capitol dome. The Graciano change orders, involving invoices totaling approximately one million dollars, had not been paid.

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[6] Ms. Hager indicated that she did not necessarily require Grievant's intervention, however, her testimony generally supported Gievant's explanation of the event.

i. The corporation's principal, David Sinclair, was increasingly frustrated by the fact that his company had not been paid for services. Mr. Sinclair made inquiries regarding payment with several persons.

ii. Director Oliverio was of the opinion that Grievant had discussions with Mr. Sinclair regarding the issue and Grievant had blamed the Division's purchasing section for "holding" the payment "arbitrarily" and for directing Mr. Sinclair to Secretary Ferguson rather than to Director Oliverio.

iii. Deputy Director Olthaus's level three testimony indicated he, in fact, informed Mr. Sinclair to contact Secretary Ferguson.

iv. Grievant discussed his belief with Mr. Sinclair of Graciano Corporation that change orders were being held up in the Business Section of the Division.

g. The letter of reprimand makes note that Grievant references a co-worker by a nickname, which was not perceived to be flattering (professional). The nickname predated Grievant and was not readily objected to by the employee.

24. At the time of the known events, Deputy Director Olthaus did not reprimand Grievant. Deputy Director Olthaus was of the opinion that Grievant's actions did not warrant disciplinary action. The record does not provide insight as to Director Oliverio's opinion regarding disciplinary action at the time of the events.

25. At all times relevant to this grievance, Director Oliverio was superior in rank to former Deputy Director Olthaus.

26. Grievant filed a written reply to Director Oliverio regarding the April 10, 2009 Letter of Reprimand and a formal grievance disputing the disciplinary action.

27. Grievant's personnel file, as maintained by the Department of Administration, did not contain any written warning or documentation of significant events regarding the incidents that were set forth in the April 10, 2009 Letter of Reprimand prior to the letter of reprimand. L3 Testimony Director Oliverio and Secretary Ferguson.

28. Susan Chapman was the Manager of the Business Unit of the General Services Division. Her unit or section of General Services Division deals with financial issues of the Division. Ms. Chapman's unit is an essential component of the Agency's processing of contracts, change orders and payment of invoices.

29. There existed tension and disdain between Ms. Chapman, her Unit and Grievant.

30. Grievant was specifically directed during Division staff meetings ("a couple of times"), to <u>not</u> go to the Purchasing section, but to deal with the Business Unit of the Division.

31. Grievant was not the only individual who took issue with how the Business section of the General Services Division operated. Other managers and agency sections found fault and levied complaints against Respondent's Business Unit procedure.

32. Grievant verbalized that Ms. Chapman and her unit/section was the cause for numerous delays and shortcomings of projects. Grievant blamed delays in procedures and timely authorization of change orders and payment of invoices on Ms. Chapman's Division. Grievant made no secret of his contention.

33. Ms. Chapman felt threatened by Grievant. Grievant made statements which generated anxiety, discomfort and concern on the part of Ms. Chapman. Grievant's actions motivated Ms. Chapman to the point that she reported Grievant's behavior, and her fears of him, to the Department of Protective Services.

34. Ms. Chapman was sensitive to Grievant's mode of communication. Ms. Chapman's ability to provide examples of incidents that transpired between Grievant and herself, which actually represents personal threats to her person, is dubious. *Citing* May

28, 2010 L3 Testimony. Ms. Chapman admitted that Grievant never made any threatening gestures and never made any direct verbal threats; instead, she stated that it was Grievant's body language that was threatening or intimidating, "Stories he told."

35. Grievant's actions and statements heard by Ms. Chapman were not of a humorous nature. Grievant was fond of stating, "he could or should place his size nine foot up someone's ass." He also referenced the use of concrete to make a problem disappear and noted an encounter in his past where he lit a document on fire at a former co-worker's desk.

36. Grievant was frustrated with Ms. Chapman in that, in his opinion, her section was not properly supporting his section and was obstructing the timely completion of various state projects by failing to properly and timely process invoices that were submitted by contractors on state projects.

37. Grievant was not the only individual Ms. Chapman alleged was guilty of harassment or aggressive action with regard to her and her section.[7] Conflict also existed between Ms. Chapman, her section and personnel who worked in other sections of the General Services Division.[8]

38. Grievant was specifically aware of the directive to not directly contact Purchasing, and that explicit permission was necessary to do so. Director Oliverio or

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[7] Ms. Chapman's objection with Grievant's actions are not necessarily unfounded, but her degree of sensibility is not established to be that of a reasonably prudent person.

[8] The testimony of managers of the other sections, including Dave Parsons, Jonathan Trout, and James F. Hawley. Deputy Director Olthaus attributed his departure from state government, in part, to the palpable conflict that existed in the General Services Division between Ms. Chapman and the other sections and to his inability to have the issues with Ms. Chapman meaningfully addressed by Director Oliverio.

Susan Chapman could provide permission. Grievant did not obtain permission to go to Purchasing or communicate with them regarding payment of change orders.[9] In February 2009, Grievant by-passed the security measures at the Purchasing Division building by going through the back door at the purchasing building, and confronted the buyer about change orders that had not been approved.[10]

39. Grievant was instructed to not inform outside individuals of problems, real or perceived, within the Division.

40. Grievant, did in fact, discuss with Mr. Sinclair of Graciano Corporation, that change orders were being held up in the Business Section of the Division.

41. The Graciano change orders which involved invoices totaling approximately one million dollars, had not been paid. These invoices had been brought to the attention of the Office of the Governor and added to the tension between units of the General Services Division.

42. Issues or points of dissension between the Maintenance, Architectural Engineering, and Business sections of Respondent existed. Such is the nature of the unit which is perceived to be the root of all fiscal or procedural delays. Numerous individuals took issue with the manner in which the Business section of the GSD operated.

43. Secretary Ferguson had occasion to communicate with Grievant regarding the business section of the GSD. Secretary Ferguson directed Grievant to not concentrate on the problems of the business unit, to "let it fail." Secretary Ferguson characterized this as "he had mediated multiple times with [Grievant] telling him that [Grievant] needed to

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[9] Grievant professed placid authorization citing February 19, 2009 Emails. Gr. Ex. 5.

[10] This event was referenced in the April 10, 2009 Letter of Reprimand. Resp. Ex. 1.

modify his behavior."

44. Policy of the Division of Personnel for the State of West Virginia indicates that employee performance appraisals are to be done on an annual basis. *See* 143 C.S.R. 1 §§15, 10.2(a) and DOP-P17. DOP policy indicates that a performance rating period shall not exceed 12 consecutive months in length. *See* Employee Performance Appraisal Policy (DOP-17).

45. The Employee Performance Appraisal (EPA) of 2009 completed with regard to Grievant, evaluated Grievant's job performance with an overall score of 1.92. This score represents the alpha score of "Meets Expectations." Gr. Ex. 8.

46. Grievant's EPA of 2009 specified on the document a rating time period spanning thirty-one months, September 25, 2006 - April 30, 2009.

47. Grievant's EPA was completed by his then supervisor, Director Oliverio. The document was signed by Director Oliverio on June 4, 2009 rating the time period of Grievant's hire on September 25, 2006, until the date of April 30, 2009. Gr. Ex. 8.

48. Grievant initially declined to sign his performance review when urged to by Director Oliverio. Grievant provided a written reply in rebuttal to the EPA. *See* Gr. Ex. 8.

49. Grievant's written rebuttal to Director Oliverio dated June 16, 2009, disputed several of Director Oliverio's contentions and specifically addressed a so-called standard being referenced.

50. Grievant's two-page written response to the June 2009 EPA among other points of contention stated;

> . . . Well, Mr. Oliverio what is the standard in question? One could point to your early October interaction with two GSD personnel, where you cursed and belittled them publicly in the Capitol Café because of a rag in a tree and

> the way the trees had been trimmed. I could mention the cursing, by you, toward a Christian coworker during a staff meeting in the presence of many. If I am to meet the standard set by my supervisor, I "Exceed Expectations" in every way. Realistically there is no one that is liked by everyone and I do not expect every one to like me. With this explanation as my response I do think that your point is very off base.

Gr. Ex. 8.

51. Eventually, Grievant signed the evaluation after being directed to do so by Secretary Ferguson.

52. In June of 2009, while at a business conference held in Florida, Grievant was aware that attendance at a particular vendor sponsored dinner was compulsory. Grievant acknowledges that Director Oliverio told him it was mandatory. Grievant's arrival at the event was tardy; he ate dinner with someone else. There was no evidence presented that Grievant was reprimanded for this conduct.

53. On June 17, 2009, at the Orlando Airport, Director Oliverio asked Grievant to place a phone call. Initially, Grievant declined to make the phone call and outlined to the Director why he should not make the call. Grievant testified that he was trying to buy time to get the issue resolved, and that he was afraid that Director Oliverio would "over-rule" Grievant's decision. Director Oliverio "insisted" that Grievant make the phone call. Grievant still did not make the call. Grievant stated that he did not have his phone with him, then stated that he did not have the phone number. When Director Oliverio offered to have Grievant use his phone, Grievant declined.

54. When Director Oliverio began to yell because of Grievant's behavior, Grievant said to Director Oliverio, "speak up, I don't think everyone can hear you."

55. Director Oliverio used curse words toward Grievant during the Orlando Airport

incident. This is not the first or only time Director Oliverio used curse words in communicating with a state employee.[11]

56. Grievant filed a grievance with regard to Director Oliverio's conduct at the Orlando Airport. June 26, 2009 Grievance Form with attached statement, Gr. Ex. 7. Director Oliverio was disciplined for his conduct by Secretary Ferguson, Cabinet Secretary for the Department of Administration.

57. Secretary Ferguson was of the opinion that Grievant provoked Director Oliverio and that Grievant "acted in an insubordinate manner by failing to comply with Mr. Oliverio's directive." Agency's July 14, 2009 L1 Decision, Resp. Ex. 5.

58. As a result of the grievance filed by Grievant on June 26, 2009 against his supervisor, the Director was disciplined. Director Oliverio was reprimanded and entered in an anger management program. *See* Agency's L1 Decision, Resp. Ex. 5.

59. No disciplinary action was taken with regard to Grievant for his conduct at the Orlando Airport.

60. Director Oliverio's recollection of information was not always consistent with known facts. Director Oliverio was disciplined as a consequence of Grievant's grievance, further he was aware of the grievance.[12] *See* July 14, 2009 L1 Decision, Resp. Ex. 5.

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[11] Citing a conference on October 30, 2008, at the Coonskin Park Lodge in Charleston, West Virginia, which was described as a "Leadership Meeting." Director Oliverio cursed and informed the attendees that issues with Ms. Chapman were not to be discussed. And further, Director Oliverio informed a significant number of the attendees that "he could get rid of them anytime." L3 testimony of Oliverio, James Hawley, and Grievant.

[12] There may well be other contributing factors which aided Secretary Ferguson to reach his ultimate determination to discipline Director Oliverio, but corrective action was taken as a direct consequence of Grievant's grievance. Director Oliverio's testimony is hesitant to acknowledge the connection of these facts.

Director Oliverio's recollection of this information was less than optimum.

61. On July 2, 2009, Secretary Ferguson met with the management team for the General Services Division to discuss inappropriate conduct of the group. The members were advised and directed to comply with Secretary Ferguson's expectations and resolve issues of friction within the group.

62. The Purchasing Division "at the behest of the Cabinet Secretary of the Department of Administration . . . studied the purchasing processes and procedures of the General Services Division." (July 8, 2009 through July 13, 2009), Gr. Ex. 3. As a result of this study, Secretary Ferguson again met with the management team for the General Services Division, including Grievant and Director Oliverio, to discuss the outcome of the purchasing audit.

63. On July 20, 2009, Secretary Ferguson again met with the members of the GSD management team.

64. The July 20, 2009, meeting has been represented by Respondent to be a predetermination conference for the purpose of contemplating disciplinary action due to the group's misconduct and unprofessional behavior. Joint Ex. 1. Grievant was excused from this meeting after it commenced because "He had been a perfect gentleman." L3 testimony, Grievant and Secretary Ferguson.

65. On on about July 23, 2009, the Division of Personnel issued a ruling regarding reallocation of Grievant's position. The determination did not provide or insure that Grievant's compensation was likely to increase. DOP's determination provided that the duties Grievant was performing were duties which could be attributable to a different classification, but to an older classification which had a lower pay grade.

66. Grievant signed the disputed 2009 EPA on July 24, 2009.

67. On or about August 10, 2009, Grievant filed a grievance regarding his position and the alleged breach of promise by Director Oliverio that Grievant would be permanently moved from the temporary position of "Acting Manager" after a period of time.

68. At this point in time, Grievant had filed three grievances relating to Director Oliverio, *i.e.*, a grievance contending that Director Oliverio's letter of reprimand was inappropriate and retaliatory; a grievance regarding Director Oliverio's cursing and screaming at Grievant in a public airport; and a grievance litigating Grievant's job classification. Grievant's EPA had been in dispute for approximately a month.

69. There was a Purchasing Division Conference held at Canaan Valley State Park, September 29, 2009 through October 2, 2009. Attendees were predominantly state employees who had dealings with state purchasing procedures and contracts.

70. Several employees of Respondent testified concerning the 2009 State Purchasing Conference that numerous GSD and other State employees attended. Five employees of Respondent were asked to leave the conference. This was done at the request of David Tincher, Director of Purchasing, in that the identified GSD's employees' conduct, individually and/or collectively, was deemed inappropriate and disruptive behavior.

71. David Tincher, Director of Purchasing, contacted management personnel of Respondent. Director Oliverio contacted specific employees, individually, and instructed them to leave the Purchasing Division Conference. Said employees departed the conference prior to its conclusion scheduled to be October 2, 2009.

72. The five employees asked to leave the conference are identified as James Hawley III, David Parsons, Roger Wine, Jonathan Trout and Grievant. Director Oliverio did

not provide any information to Grievant or the other managers about why they were being asked to leave the conference.

73. As to whether these individuals, in fact, did or did not violate generally acceptable rules of conduct while in attendance of the purchasing conference, became a point of contention.

74. Grievant's attendance at the State of West Virginia's Annual Purchasing Conference was set forth in his June 2009 Employee Performance Appraisal.

75. Grievant and the four other employees of Respondent, who had been instructed to leave the Purchasing Conference filed a grievance statement on Monday, October 5, 2009, at around 10:00 a.m. with the Public Employees Grievance Board. Resp. Ex. 6.

76. The grievance alleged that Director Tincher had "engaged in demeaning, degrading and humiliating comments without basis in a continued pattern of harassment of General Services Division employees" and an apology from Director Tincher was requested.[13]

77. The morning of Tuesday, October 6, 2009, following the Purchasing Conference, Grievant went to Director Oliverio's office and, with a smile on his face, referred to the conference, and asked Director Oliverio, "did we do good?" Director Oliverio "had a change of expression." Director Oliverio reported this comment to Secretary Ferguson as inappropriate.

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[13] The grievance was denied by Secretary Ferguson. The Secretary indicated that Director Tincher of Purchasing was not the Grievants' Supervisor, thus they were without standing to file a grievance against him. Gr. Ex. 13.

78. Secretary Ferguson sought to determine what transpired at the Purchasing Conference. He investigated the issue. Secretary Ferguson spoke with several individuals regarding the events, and comments surrounding the 2009 Purchasing Division Conference.

79. Among other inquiries, in discussion with Secretary Ferguson, Grievant was asked if he had made the reported 'sarcastic' comment to Director Oliverio.

80. James Holley and David Parsons both testified as to letters that were written to them by Secretary Ferguson following the conference. The letters written to these two individuals were different. The letter to Mr. Holley absolved him of any wrongdoing, while the letter to Mr. Parsons was a reprimand, which was later removed from Mr. Parson's personnel file. This letter was produced by Mr. Parsons during his testimony in this matter. Joint Ex. 1.

81. The October 16, 2009 Predetermination notice letter to Grievant stated among other information that,

> "Specifically it has been determined that, during the 2009 Purchasing Conference, you behaved in an inappropriate and disruptive manner toward instructors and other conference attendees. This behavior follows previous incidents where you have demonstrated an unprofessional attitude toward colleagues within the Department of Administration as well as vendors and contractors."

Gr. Ex. 11.

82. At the June 3, 2009, Level Three Grievance Hearing, Secretary Ferguson clarified and specifically testified that Grievant was not terminated from his employment because of the 2009 Purchasing Conference or his behavior at the Purchasing

Conference.[14]

83. The only events noted with reference to Grievant's conduct of a significant nature subsequent to the June 2009 EPA, was the Orlando trip, the Purchasing Conference, Grievant's comment to Director Oliverio and Grievant's statements to Secretary Ferguson about comments to Director Oliverio.

84. Grievant was questioned by Secretary Ferguson regarding Grievant's reported comment to Director Oliverio referring to GSD employee behavior, and subsequent dismissal from the Purchasing Conference. Grievant's situation was compounded when he denied making sarcastic comments, then, when specifically questioned by Secretary Ferguson on the issue, added the comment "Are we in fourth grade?"[15]

85. Grievant and Secretary Ferguson met on October 19, 2009 for a predetermination conference regarding the tentative conclusion that Grievant should be suspended or dismissed from employment for insubordination, unacceptable conduct, and failure to meet the expectation of reasonable behavior.

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[14] An issue of this grievance is the justification for dismissal. This finding of fact is that Secretary Ferguson specifically spoke to this contentious issue stating that Grievant's behavior at the Purchasing Conference was not the rationale for his determination to dismiss Grievant. Secretary Ferguson cited as a motivating factor, that he found Grievant's pattern of behavior as managerial level personnel to be unacceptable (insubordination).

[15] Grievant stated words to the effect "How did we do?" or "Did we do good?" to Director Oliverio, the morning of Tuesday, October 6, 2009, following the Purchasing Conference. Grievant testified that he was taking exception with the characterization attributed to his words (insubordinate and/or sarcastic). Grievant asserts his denial was directed toward the question as framed, not to the accuracy of the comment. This distinction was not made known to Secretary Ferguson at the time of his blanket denial to Secretary Ferguson's inquiry.

86. Director Oliverio recommended the dismissal of Grievant to Secretary Ferguson.

87. Secretary Ferguson made the decision to terminate Grievant. Secretary Ferguson opined that the only recourse he saw as appropriate was termination. It was Secretary Ferguson's opinion that as managerial personnel, Grievant's lack of respectful behavior towards his supervisors, both Director Oliverio and himself, was unacceptable.

88. The October 22, 2009 Discharge letter signed by Secretary Ferguson dismissed Grievant from "employment as an Engineer with the General Services Division of the Department of Administration effective November 3, 2009." Secretary Ferguson found that Grievant's "ongoing willful and intentional disrespect and threatening conduct constituted gross insubordination." Resp. Ex. 2.

89. In relevant part, the three page October 22, 2009 Discharge letter provided;

> I find that your ongoing willful and intentional disrespectful and threatening conduct constitutes gross insubordination. Your statements and actions demonstrate a blatant disregard for the authority of the management of the General Services Division and the Department of Administration. The State of West Virginia and its agencies have reason to expect their employees to observe a standard of conduct which will not reflect discredit on the abilities and integrity of their employees, or create suspicion with reference to their employees' capability in the fulfillment of their duties and responsibilities. I believe the nature of your disrespectful, confrontational and insubordinate conduct is sufficient to cause me to conclude that you did not meet an acceptable standard of conduct as an employee of the Department of Administration, thus warranting your dismissal.

Resp. Ex. 2.

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence 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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Respondent maintains that Grievant was terminated because of his insubordinate behavior, and his outward lack of respect for his supervisors. Counsel insists the record reveals that Respondent had good cause to both reprimand and eventually terminate Grievant. Respondent highlighted Grievant continuously exhibited problems in working with others in the Division, and with outside contractors. In the vein of progressive discipline, Respondent's argument highlights and encompasses the warnings of prior communications. Ultimately, it is understood that Secretary Ferguson informed Grievant that the "nature of your disrespectful, confrontational and insubordinate conduct is sufficient to cause me to conclude that you did not meet an acceptable standard of conduct

as an employee of the Department of Administration, thus warranting your dismissal." October 22, 2009, Dismissal Letter, Resp. Ex. 2.

Grievant maintains the letter of reprimand issued two or three years after many of the events occurred is not only unorthodox, but improper and unjustified.[16] Further, Grievant, by counsel, contends the termination was excessive and unwarranted averring that the motivation for the disciplinary actions, in mass, were retaliatory in nature.

Issues of this grievance include whether the disciplinary actions taken were properly administered and whether the conduct of Grievant justifies the disciplinary action taken by Respondent.

STANDARD FOR DISCIPLINARY ACTION

In West Virginia, it is recognized that a classified civil service employee has a sufficient interest in his continued, uninterrupted employment to warrant the application of due process procedural safeguards to protect the employee against arbitrary discharge. Article III, Section 10 of the W.Va. Constitution. *Waite v. Civil Service Commission*, 161 W.Va. 154, 241 S.E.2d 164 (1977); Syl. Pt 3 *Fraley v. Civil Service Commission*, 177 W.Va. 729, 356 S.E.2d 483 (1987).

Grievant Mason was hired into the position of "Engineer," but it is uncontested that from nearly the onset of his employment he served as the "Acting Manager" for the Engineering Section of the General Services Division. Both positions are titles of a classified position covered by the West Virginia Division of Personnel. Grievant was not

[16]"Ancient timber," evidence of Director Oliverio's disdain for Grievant, manufactured simply to shore-up Respondent's bias asseverations.

employed in an at-will-position. The latter position, however, does function as a managerial personnel. "'As a supervisor, grievant may be held to a higher standard of conduct, because he is properly expected to set an example for those employees under [his] supervision, and to enforce the employer's proper rules and regulations, as well as implement the directives of [his] supervisors.' *Wiley v. W. Va. Div. of Natural Resources, Parks and Recreation*, Docket No. 96-DNR-515 (Mar. 26, 1988)." *Lilly v. Dep't of Transp.*, Docket No. 07-DOH-387 (June 30, 2008).

The administrative rules of the West Virginia Division of Personnel provide that an employee in the classified service may be dismissed for "cause." 143 C.S.R. § 12.2, Administrative Rule, W. Va. Div. of Personnel. The phrase "good cause" has been determined by the West Virginia Supreme Court of Appeals to apply to the dismissal of employees whose misconduct was of a "substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention." *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980). *See Syl. Pt. 1, Serreno v. W. Va. Civil Serv. Comm'n*, 169 W. Va. 111, 285 S.E.2d 899 (1982); *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965). This grievance involves related but separate disciplinary actions, a written reprimand and termination. Termination is a severe disciplinary action.[17] Accordingly, the undersigned Administrative Law Judge

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[17] 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 *Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)). 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

will utilize the standard outlined above in assessing the reasonableness of the actions taken by Respondent in this case.

CREDIBILITY

There were several individuals called upon to testify during the course of the level three grievance proceedings, which transpired over the course of several months. Not all witnesses' testimony was significant with regard to crucial issues. Some testimony was offered to assist with convoluted, or complex fact patterns. Many facts of this case are not disputed by the parties as to their existence; however, this does not translate that the facts are uniformly perceived. The parties disagree regarding the relevance, motivation, circumstance and appropriateness of several events and their relationship to the disciplinary actions in discussion. In assessing the testimony presented, the undersigned Administrative Law Judge (ALJ) will use the accepted standards of assessment, but will also note there is not one broad stroke but several intermingled determinations to be made in the circumstances of this grievance.

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. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May

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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).

12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1993). In the circumstances of this case, it is deemed prudent to address the credibility of Grievant's and Director Oliverio's testimony. Both individuals testified to numerous facts, alleged factors and connotations perceived during various events of this case. The trustworthiness of testimony is a balancing of information, motivation and verification. More times than readily acknowledged, reliability and reasonableness are flexible commodities and not constant factors.

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge 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. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

Director Oliverio's recollection of information was not always consistent with known facts. Director Oliverio's recollection and candor with regard to the facts at the Orlando Airport and his behavior was extremely noble. It is his inability to acknowledge the rational connection of facts which gives the undersigned pause --- tending to lend more credibility than not to Grievant's allegations of tangential motivations. Director Oliverio's testimony

was inclined to get cloudy or disconnected with subject matter or facts that were not favorable to his posture, on a given issue.[18] For example, he was disciplined as a consequence of Grievant's actions, further he was aware of the grievance. *See* July 14, 2009 L1 Decision, Resp. Ex. 5. Director Oliverio's testimony on this issue was not plausible. There may well be other contributing factors which aided Secretary Ferguson to reach his ultimate determination to discipline Director Oliverio, but corrective action was taken as a consequence of Grievant's grievance. To what degree, if any, this event further effected Director Oliverio's opinion of Grievant is not known.

There existed friction in the relationship between Director Oliverio and Grievant. This is evident throughout the calendar year of 2009, the last year of Grievant's employment with Respondent. What event or circumstance triggered the deterioration of the relationship between the two is not identified. Director Oliverio is a noble, hard working, honorable man with several years of employment with the State. The Director's testimony regarding the three grievances filed by Grievant didn't demonstrate Director Oliverio perceived Grievant's actions as personal. Nevertheless, he is human, and it is hard to fathom that his demeanor was not affected by some of Grievant's actions. It is established that Grievant was a source of frustration for Director Oliverio on several occasions.

Director Oliverio could easily be biased against Grievant. At the time of the Purchasing Conference, Fall 2009, he may have been primed to accept the representation of Director Tincher that Grievant acted disruptive, annoying, and unreceptive to answers

[18] This finding is not limited to the Orlando Airport incident.

given by presenters.[19] Director Oliverio, more than many, has had the opportunity of communicating with and experiencing Grievant's nature. Director Oliverio was very direct when he said he realized that Grievant "just doesn't get it." For Director Oliverio, Grievant had generated personal and agency embarrassment. The Director reported that Grievant's actions in his office after the purchasing conference, to him, was the last straw ("the straw that broke the camel's back"). This is credible testimony. Director Oliverio recommended the dismissal of Grievant to Secretary Ferguson. Whether Director Oliverio's objectivity with regard to Grievant has been totally destroyed is not known.[20]

Grievant's behavior is an issue.[21] Grievant acknowledges the facts of problematic conduct but draws provocative comparison with his actions to that of his supervisor, Director Oliverio. *See* FOF 50. Grievant eludes to an inequitable standard. Grievant's demeanor is perplexing. Grievant demonstrated the ability to state cutting, opinionated and inflammatory comment.[22] This is not necessarily sarcasm. Respondent is of the opinion

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[19] Director Oliverio had instructed Grievant to attend the State of West Virginia's Annual Purchasing Conference in Grievant's disputed 2009 EPA. David Tincher, Director of Purchasing, testified that Grievant and the other managers from the GSD were not the typical attendees at the conference. It has been represented that the other GSD managers had also been ordered in their performance appraisals to attend the Division of Purchasing's annual conference.

[20] Whether Director Oliverio and Grievant could productively work together, if Grievant was employed with GSD in a non-managerial position, is of concern.

[21] Notably, several individuals who managed other sections of the General Divisions testified on behalf of Grievant. David Parsons, manager of the operations and maintenance section, James F. Hawley, manager of the custodial section, Jonathan Trout, manager of the environmental health and safety section, and Mr. Olthaus, former Deputy Director, testified that Grievant always conducted himself professionally and cordially and that Grievant had never intimidated, threatened, or harassed anyone in their experience. This testimony is interesting, but limited in application.

[22] Grievant verbalized a demeaning speculative opinion regarding Director Oliverio during the level three hearing. Grievant's statement was designed to effectively further the

that Grievant's conduct is insubordination, discussion *infra*. It is unwise and disrespectful. Grievant demonstrated first-hand his ability to state offensive comment then explain it away, after reflective thought. Incidents of this nature do not bolster Grievant's posture in a convoluted situation.

Grievant's manifestation of his attitude toward authority is of issue in this case. It is a crucial element of this grievance.

Grievant's demeanor is subjective, not definitive. He was motivated to explain his behavior as plausibly as possible. The explanations tend to be a convenient blend of known facts, situational rationale and conjecture, without admission of culpability. Grievant's testimony regarding existence or nonexistence of material fact is generally consistent but conveniently fluid. The credibility of Grievant's testimony is not easily discerned. Grievant's testimony is extremely strategic, opportunistic and expedient, but not always candid. As Director Oliverio credibly testified, Grievant knows how to turn it on and off.

Grievant admitted that he did not act appropriately at the Orlando Airport when Director Oliverio asked him to place a phone call. When Director Oliverio offered to have Grievant use his phone, Grievant skillfully attempted to decline without directly refusing. When Director Oliverio began to yell, it is an undisputed fact that Grievant said to Director Oliverio "Speak up, I don't think everyone can hear you." Grievant testified that in retrospect "This comment wasn't the best choice of words." Grievant was aware of his actions. Ironically, Grievant filed a grievance and was instrumental in having his supervisor

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proceeding, but did serve to demonstrate an example of Grievant's proclivity.

disciplined subsequent to this episode. Grievant's disposition is manipulative. The credibility of Grievant's testimony is problematic but more credible than not.

UNSATISFACTORY PERFORMANCE AND PROGRESSIVE DISCIPLINE

Director Oliverio purported disappointment with Grievant's day-to-day conflicts with co-workers and colleagues. It is the policy of the State of West Virginia to inform employees what is expected of them in the performance of their job duties. Further, employees will be provided feedback regarding how well they are performing. In opposition to one or more of the official actions taken by Respondent, finding fault with Grievant's workplace conduct, Grievant appears to raise a number of defenses, e.g., improper, inappropriate, unwarranted, and timeliness. Specifically, Grievant disagreed with the April 10, 2009 Letter of Reprimand and the June 2009 EPA, issued to him, authored by Director Oliverio. Each was a mechanism utilized by Respondent, which conveyed information to Grievant relevant to this grievance.[23]

On June 4, 2009, Director Oliverio completed an Employee Performance Appraisal regarding Grievant. Gr. Ex. 8. This was the first performance appraisal completed for Grievant since Grievant Mason commenced employment with Respondent. The EPA evaluated Grievant's job performance with a score representative of "meets expectations."

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[23] Employee Performance Appraisals are not disciplinary in nature. In a performance appraisal/evaluation, an organization identifies, measures, and evaluates employee's job-related behaviors and accomplishments during a specific period of time and compares those to previously established performance standards. Based on these comparisons, judgments are made regarding an employee's strengths and weaknesses, and what can be done to enable the employee to perform more effectively. West Virginia Division of Personnel, Employee Performance Appraisal Policy (DOP-17).

This 2009 EPA covered the period commencing on September 25, 2006, and ending on April 30, 2009, a thirty-one (31) month period of time.

W. VA. CODE R. § 143-1-15 is the West Virginia Division of Personnel rule that addresses performance appraisals, the regulation states in part;

> Insofar as practicable the system of performance evaluation in the classified service shall be standardized. **The appointing authority shall prepare and record evaluations for all permanent employees at regular intervals not to exceed twelve months. The appointing authority shall consider performance evaluations as well as other recorded indicators of performance in determining salary advancements and in making promotions, demotions, and dismissals.** Emphasis added.

DOP regulations indicate EPA's are to be done on an annual basis for a 12 month period. *See* Employee Performance Appraisal Policy (DOP-17). Grievant's 2009 EPA was administered improperly. This is a fact. On its face, the document identifies an examination period in excess of twelve consecutive months. Grievant objected to the propriety of this EPA. Grievant provided written rebuttal dated June 16, 2009, disputing several of Director Oliverio's contentions and specifically addressed the so-called standard of conduct being referenced. Attachment to Gr. Ex. 8. *See* FOF 50. Grievant's 2009 EPA is not protested via the instant grievance. Grievant signed the disputed EPA on July 24, 2009 after being directed to do so by Secretary Ferguson.

The April 10, 2009 written reprimand preceded the June 2009 EPA. Both documents addressed Grievant's workplace conduct. Employers are expected to inform employees about their problems in the work area, and employees are entitled to receive fair and honest feedback. The April 10, 2009 written reprimand was timely grieved and is of issue in this consolidated grievance.

The written reprimand stated that Director Oliverio was "extremely displeased with the manner in which Grievant conducted his day-to-day contacts with colleagues and co-workers in the Department of Administration, particularly within the General Services Division, and also with various vendors and contractors." Resp. Ex. 1. The letter of reprimand did not find fault with Grievant's competency as an "Engineer" or performance of the duties of an engineer. Director Oliverio highlighted a number of events and actions of Grievant in the reprimand to exemplify the type of conduct and situation he believed Grievant should strive to correct and avert.

Grievant maintains many of the noted incidents occurred during the tenure of his former supervisor, Deputy Director Olthaus. Grievant purports it is simply not proper for the letter of reprimand to reference subject material two or three years after many of the events occurred. To some degree Grievant is correct, but not totally. Grievant questions why a letter of reprimand would be issued for conduct that occurred over a thirty-one (31) month period of time and for conduct that had been investigated by a former supervisor (Deputy Director), and deemed unfitting of disciplinary action.[24] Grievant argues Respondent is constructing a case of misconduct predicated upon ancient timber. Grievant maintains the written reprimand was untimely, improper and unwarranted.

A performance evaluation and a reprimand letter are distinct actions. One being by design intended to provide "feedback to employees concerning achievement of

[24] Grievant asserts Director Oliverio issued the letter of reprimand in reaction to two issues. The first revolving around complaints by Susan Chapman regarding Grievant. The second a reaction to the Graciano, Inc. change orders, which had garnered the attention of the Governor's Office.

performance standards; identifying means to help employees function more effectively; and providing information to be used in making personnel decisions on matters such as salary advancements, promotions, demotions, transfer, and training." Employee Performance Appraisal Policy (DOP-17). The other being disciplinary in nature, implemented "when employees do not perform at the acceptable standard or when conduct is an interference, embarrassment, or detriment to the operation of the agency, supervisors are responsible for implementing corrective measures." Division of Personnel's Supervisor's Guide to Discipline, Resp. Ex. 4.

The April 2009 Reprimand Letter and the June 2009 EPA are separate and distinct actions of Respondent. Both, however, are documents which provided Grievant notice that a difference of opinion exists between him and Respondent regarding appropriate managerial conduct. Respondent was of the opinion that Grievant needed to adjust his workplace conduct to minimize workplace turmoil.

It is appropriate for an employee to be aware of performance standards prior to disciplinary action. The working relationship between Grievant and Director Oliverio is not the same as the one that had existed between Grievant and former supervisor, Deputy Olthaus. Deputy Director Olthaus was aware, and had previously investigated, several of the incidents. Deputy Director Olthaus was of the opinion that Grievant had acted befittingly for the circumstances and did not take disciplinary action against Grievant. If Respondent, via Director Oliverio, had a different measure of acceptable conduct Grievant is entitled to notice.

Director Oliverio indicated he had verbally discussed his concerns with Grievant

previously. This point was not disputed. There was an acknowledged period of improvement. The dispute arises with regard to the nature of the April 10, 2009 reprimand. Grievant perceives the document as disciplinary action for previously determined acceptable conduct, while Respondent's characterization is more akin to formal action to adequately note and provide notice of current unacceptable conduct with examples of prior incidents to illustrate the longstanding issue. Grievant was aware of the performance standard Respondent was professing. The written reprimand was not administered in the best manner. It did, defacto, retroactively find Grievant culpable of misdeeds, which previously had been determined to not warrant disciplinary action. However, the document does effectively separate and identify the type of then current conduct and situations that gave Director Oliverio concern. This is the information of which Grievant is entitled to be made aware.

The undersigned is not persuaded the letter of reprimand was unwarranted. The reprimand specifically identified the type of current conduct and situations that gave Respondent concern and provided a plan for professional growth. Respondent made it clear that Grievant's actions were not limited to one isolated event, "[t]he behavior you exhibit conflicts with so many individuals that the efficient operation of the Division is negatively affected." Resp. Ex. 1. It is established that Grievant's conduct warranted attention. The three-page document went to great length to memorialize Respondent's interpretation and expectation with regard to Grievant's conduct. This was reasonable. Respondent advised, and was instrumental regarding Grievant's anticipated participation in a Department of Personnel's training class entitled "Business Etiquette and

Professionalism." Director Oliverio further indicated that he was willing to consider any suggestions Grievant might have that would assist Grievant in complying with the expected standards of conduct. The April 10, 2009 Written Reprimand as provided to Grievant Mason was a progressive step to clarify the standard of acceptable job performance Respondent expected of Grievant after verbal counseling had failed to implement lasting improvement. Grievant was on notice as to what Respondent expected of its managerial personnel.

In this case, Grievant has alleged that the written reprimand was administered for retaliatory purposes. WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a *prima facie* case of reprisal the Grievant must establish by a preponderance of the evidence the following elements:

> (1) that he engaged in protected activity (i.e., filing a grievance);
> (2) that he was subsequently treated in an adverse manner by the employer or an agent;
> (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). "[T]he

critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a 'significant,' 'substantial' or 'motivating' factor in the adverse personnel action." *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994).

It is apparent that the relationship between Grievant and Director Oliverio was experiencing strain, but the reprimand happened prior to the disputed EPA, prior to Orlando, prior to Director Oliverio's sanctioning and prior to the filing of any of Grievant Mason's grievances. It has not been demonstrated that the April 2009 reprimand was a consequence of retaliatory motives by Respondent. It is just as likely, as not, that the reprimand motivated Grievant to act out and escalate discord among other employees, and with vendors.

INSUBORDINATION

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).

"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*, 175 W. Va. 279, 332 S.E.2d 579 (1985)). *See Evans v. Tax & Revenue/Ins. 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).

Respondent is of the opinion that Grievant was insubordinate on numerous occasions. The undersigned tends to agree; however, Respondent didn't discharge or attempt to discharge Grievant on one of these theoretical occasions. Respondent determined Grievant to be culpable of "gross insubordination," as a result of communicating the words, "How did we do?" coupled with, "Are we in the fourth grade?" or words to that effect. It is understood that Respondent requires members of its managerial level personnel to adhere to a standard of conduct. In fact, it is readily apparent that due respect and obedience is required of all managerial personnel of the General Services Division. 'As a supervisor, grievant may be held to a higher standard of conduct, because he is properly expected to set an example for those employees under supervision, and to enforce the employer's proper rules and regulations, as well as implement the directives of supervisors.' *Wiley v. W. Va. Div. of Natural Resources, Parks and Recreation*, Docket No. 96-DNR-515 (Mar. 26, 1988). *Lilly v. Dep't of Transp.*, Docket

No. 07-DOH-387 (June 30, 2008).

Grievant has the ability to adapt his demeanor.[25] Secretary Ferguson, the chief administrative officer of the Department of Administration, and the Division, testified that he had “mediated” multiple times with the Grievant telling him that he needed to modify his behavior. "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 is aware of inconsistencies in workplace behavior standards. Further, he is well aware of his actions. Nevertheless, insubordinate and disrespectful are not synonymous terms. An individual can fail to show the proper amount of respect due and still be short of insubordination. At issue is identifying a discernable line for disrespect and that of insubordination in the circumstances of this grievance. Respondent, without hesitation, tends to identify disrespectful attitude as insubordination. Blatant disrespect may manifest itself as insubordination, but this must be demonstrated.

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[25] Evident in the review of the entire record. Testified to by Director Oliverio, and specifically, witnessed by the undersigned during the L3 Grievance Hearing.

Refusal to sign an improper EPA, which the employee has registered written opposition to regarding the merits is not, per se, insubordination. The only events noted with reference to Grievant's conduct of a significant nature subsequent to the June 2009 EPA was the Orlando trip, the Purchasing Conference, Grievant's comment to Director Oliverio and Grievant's statements to Secretary Ferguson about comments to Director Oliverio.

Grievant was not disciplined for his conduct in Florida. Secretary Ferguson was of the belief that Director Oliverio was baited, but it was the Director who was disciplined, not Grievant.[26] After the Purchasing Conference, Grievant communicated with Director Oliverio and asked "How did we do?"[27] Director Oliverio testified that, at this point, he knew that Grievant "simply did not get it." Grievant had arguably been a source of frustration for Director Oliverio for sometime. The October 22, 2009 Termination Letter signed by Secretary Ferguson, stated that

> "[i]t has been determined that, during the 2009 Purchasing Conference, you behaved in an inappropriate and disruptive manner toward instructors and other conference attendees. This behavior follows previous incidents where you have demonstrated an unprofessional attitude towards colleagues within the Department of Administration, as well as vendors and contractors. You were verbally warned by me regarding this behavior in meetings on July 2 and 20, 2009."

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[26]Secretary Ferguson was of the opinion that Grievant provoked Director Oliverio and that Grievant "acted in an insubordinate manner by failing to comply with Mr. Oliverio's directive." Agency's July 14, 2009 L1 Decision, Resp. Ex. 5.

[27]Director Tincher had never informed Grievant or the other managers that they were being disruptive and never warned Grievant or the other managers that they needed to conform their behavior in some manner. Whether generally acceptable rules of conduct were, in fact, violated by the GSD managers in attendance of the purchasing conference is a debated point of contention.

It was established that these July 2009 meetings as referenced, are not due as much weight as Respondent would desire.

The July 20, 2009 meeting was for all GSD managers. As a result of the purchasing processes and procedures study (Gr. Ex. 3) Secretary Ferguson met with the management team for the General Services Division, in mass, to discuss the outcome of the purchasing audit. This has been represented to be a predetermination conference for the purpose of contemplating disciplinary action due to the group's misconduct and unprofessional behavior. Yet, Grievant testified, and Secretary Ferguson confirmed, that Grievant had been excused from this meeting after it commenced because "He had been a perfect gentleman."

At the June 3, 2011, Level Three Grievance Hearing, Secretary Ferguson specifically clarified that Grievant was not terminated from employment because of behavior at the 2009 Purchasing Conference. Given this admission, the undersigned notes there are only a limited number of tangible events of record to predicate Grievant's dismissal.

It is strongly alluded to that Grievant failed to follow explicit instructions given by an authority empowered to direct Grievant's action, citing conflict events in reference to the business unit, and the prohibition barring contact with purchasing, both examples more historical than current. Nevertheless, it is not argued that Grievant was dismissed for failing to follow an explicit directive. Respondent articulated Grievant to be culpable of "gross insubordination." The West Virginia Supreme Court of Appeals has held that "[g]ood cause must exist for the dismissal of an employee in the classified service. Not

only shall good cause be alleged in the dismissal of such employee but it must be proven in the event of appeal from the dismissal. *Yates v. Civil Serv. Comm'n,* 154 W. Va. 696, 178 S.E.2d 798, 1971 W.Va. LEXIS 230 (1971). The words, "How did we do?" coupled with "Are we in the fourth grade?" or words to that effect do not constitute gross insubordination. These words spoken in the context of this case were disrespectful and extremely unwise, but not conduct of a "substantial nature" or spoken with the intent to constitute insubordination. It is more likely, than not, Grievant was dismissed for his attitude, than for a specific deed.

MITIGATION

It is recognized that Respondent had discretion in the circumstance of this case. Ultimately, Respondent chose to discharge Grievant. Respondent maintained this decision was rational, proper and not motivated by undue (improper) factors. Among other objections, Grievant contends that termination was excessive. "An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action." *Miller*, citing *Conner v. Barbour County Bd, of Educ*. Docket No 94-01-394 (Jan 31, 1995).

Pursuant to Director Oliverio, in his mind, suspension was not an appropriate sanction for a manager. "It tends to undermine the effectiveness of the individuals leadership." Director Oliverio testified that suspension of Grievant was strongly considered,

but ultimately it was decided that Respondent would terminate Grievant's employment. Demotion was not considered as a sanction for Grievant's conduct.[28] Secretary Ferguson testified he was of the opinion that suspension of managerial personnel was inappropriate. The undersigned is not persuaded.

Grievant was performing in an "acting" capacity. Why Respondent did not consider demotion of Grievant, relieving Grievant of managerial responsibility was not explained to the undersigned's satisfaction, if at all. Director Oliverio specifically informed DOP that Respondent intended to post the position Grievant was filling. *See* Resp. Ex. 8. It was uncontested and presented without opposition that Grievant's work as an Engineer was first rate, "excellent." Citing both Resp. and Gr. witnesses. No fault was found or even alluded with regard to Grievant's skills and performance as an Engineer.

This 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).

Mitigation of a penalty is considered on a case-by-case basis. *Conner v. Barbour County Bd. of Educ.*, Docket No. 95-01-031 (Sept. 29, 1995); *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be

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[28] *Citing* Director Oliverio, May 28, 2010, L3 Testimony.

imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also includes consideration of an employee's long service with a history of otherwise satisfactory work performance. *Pingley v. Div. of Corr.*, Docket No. 95-CORR-252 (July 23, 1996).

The decision to terminate an employee rather than to impose a lesser disciplinary measure is a choice largely left to the discretion of the management, but that discretion must be tempered by the substantial interest an employee has in his right to continued employment. Here, several factors cast doubt on termination as the appropriate level of punishment. First, there were incidents of Grievant's conduct which readily needed to be addressed by Respondent yet, a dubious record of prior corrective actions. There is a proper manner to proceed with rehabilitation and disciplinary action.[29] Second, there is no evidence in the record that the employer gave any consideration to Grievant's work performance separate from his managerial tasks. Grievant is counterproductive as managerial personnel but an excellent engineer. If Grievant could not perform the duties

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[29] Intermittently, Respondent has asserted the principles of progressive discipline. Policy Memorandum 2104 sets out the Progressive Discipline Policy. The policy states, in pertinent part, that Progressive Discipline is:

> [d]etermined by the severity of the violation, progressive discipline is the concept of increasingly severe actions taken by supervisors and managers to correct or prevent an employee's initial or continuing behavior or performance . . . progressive and constructive disciplinary action will progress, if required, along a continuum from verbal warning to dismissal, with incremental steps between . . . 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. It is not necessary to institute discipline at the first step if the severity of the behavior warrants stronger action. It is not established that the current established conduct of Grievant was severe.

of the position he was temporarily filling, then it would be appropriate to remove the employee from the position. Removal does not necessarily mandate termination of employment. Transfer, returning to prior position and demotion are viable options available to an employer. Respondent failed to seriously consider any other corrective measure with regard to Grievant, other than termination. This is unreasonable.

It is established that Grievant's conduct warranted attention, it has not been proven the conduct exhibited was so severe as to warrant termination of Grievant's employment as an engineer with GSD. Respondent is of the opinion that Grievant's conduct demonstrated a pattern of insubordinate behavior. Grievant's conduct was unwise, disrespectful and problematic. However, Grievant is not employed in an at-will-position. State employees who are in the classified service can only be dismissed for "good cause," not trivial or inconsequential, or mere technical.

"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)." *Corley, et al., supra.* Director Oliverio had a tendency to curse at employees, one on one, at meetings and in public. He was sent for additional training as a result of behavior

unbecoming of a manager. Grievant was sarcastic, readily perceived and articulated as disrespectful. Grievant knew what he was doing, and he did it at the wrong time with both Director Oliverio and Secretary Ferguson. Grievant did not adequately assess his predicament. The question is whether discharge is reasonable, permissible or excessive in the circumstance(s) of this case.

Grievant's behavior is not ideal employee conduct. However, Respondent is not empowered to discipline an employee indiscriminately. The undersigned is of the opinion that there tends to exist an inequitable disproportion between the offense Grievant committed and the actionable cause Grievant was ultimately determined to have 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 *Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)). Grievant misrepresented a material fact to Secretary Ferguson, this was disturbing, extremely. *See* FOF 84.[30]

The issue(s) presented by this grievance are intertwined with acknowledged facts, reasonable suspicion and unproven conjecture. The undersigned is persuaded that

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[30] If intentional, this action could serve as justification for a heightened disciplinary penalty. Grievant was questioned by Secretary Ferguson regarding Grievant's reported comment to Director Oliverio referring to GSD employee behavior, and subsequent dismissal from the Purchasing Conference. Grievant denied making the 'sarcastic' comments. Grievant asserts his denial was directed toward the question as framed, not to the accuracy of the comment. This distinction was not made known to Secretary Ferguson at the time of his blanket denial to Secretary Ferguson's inquiry.

discharge is excessive in the circumstance(s) of this case. Whether Director Oliverio and Grievant could productively work together, if Grievant was employed with GSD in a non-managerial position, is of concern. However the words, “How did we do?” coupled with “Are we in the fourth grade?” or words to that effect do not constitute a dismissible offense for a classified employee. Termination of Grievant’s employment is deemed excessive as a disciplinary action for the established conduct of Grievant.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008)

2. "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); *Maxey v. W. Va. Dep't of Human Resources*, Docket No. 93-HHR-424 (Feb. 28, 1995). 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)).

3. Respondent established just cause for the April 2009 Disciplinary action taken regarding Grievant. Respondent proved by a preponderance of the evidence proper cause to issue a written reprimand to Grievant for then current employee conduct.

4. To demonstrate a *prima facie* case of reprisal, Grievant must establish by a preponderance of the evidence the following elements:

> (1) that he engaged in protected activity (i.e., filing a grievance);
> (2) that he was subsequently treated in an adverse manner by the employer or an agent;
> (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

5. It was not established that Grievant's protected activity was a 'significant,' 'substantial' or 'motivating' factor in the issuance of the April written reprimand. *See Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994).

6. It was not established that the written reprimand was issued as a result of retaliation or other improper motivation.

7. Administrative rules of the West Virginia Division of Personnel provide that an employee in the classified service may be dismissed for "cause." 143 C.S.R. § 12.2, Administrative Rule, W. Va. Div. of Personnel. The phrase "good cause" has been

determined by the West Virginia Supreme Court of Appeals to apply to the dismissal of employees whose misconduct was of a "substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention." *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980). *See Syl. Pt. 1, Serreno v. W. Va. Civil Serv. Comm'n*, 169 W. Va. 111, 285 S.E.2d 899 (1982); *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965).

8. 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." *Mullens v. Dept. of Environmental Protection*, Docket No. 03-DEP-233 (Oct. 6, 2004); 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).

9. 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).

10. "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*, 175 W. Va. 279, 332 S.E.2d 579 (1985)). *See Evans v. Tax & Revenue/Ins. 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).

11. 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).

12. The West Virginia Supreme Court of Appeals has held that "[g]ood cause must exist for the dismissal of an employee in the classified service. Not only shall good cause be alleged in the dismissal of such employee but it must be proven in the event of appeal from the dismissal. *Yates v. Civil Serv. Comm'n,* 154 W. Va. 696, 178 S.E.2d 798, 1971 W.Va. LEXIS 230 (1971).

13. It is not established by a preponderance of the evidence that this classified Grievant was terminated for good cause.

14. It is not established by a preponderance of the evidence that Grievant is

culpable of an action which is of a substantial nature, and not trivial or inconsequential, or a mere technical violation.

15. Mitigation of a penalty is considered on a case-by-case basis. *Conner v. Barbour County Bd. of Educ.*, Docket No. 95-01-031 (Sept. 29, 1995); *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also includes consideration of an employee's long service with a history of otherwise satisfactory work performance. *Pingley v. Div. of Corr.*, Docket No. 95-CORR-252 (July 23, 1996). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994). *See Austin v. Kanawha County Bd. of Educ.*, Docket No. 97-20-089 (May 5, 1997).

16. It is not established by a preponderance of the evidence that Grievant's established conduct demonstrated gross misconduct warranting termination of employment of a classified employee.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to reinstate Grievant to full-time employment in the job classification of "Engineer" with back pay and

benefits back to the date he was dismissed.[31] Any wages Grievant earned between the time he was initially dismissed and the time he is reinstated shall be deducted from the back pay award.

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: July 22, 2011

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Landon R. Brown
Administrative Law Judge

[31] It is the intent of the undersigned Administrative Law Judge to specify the job classification of "Engineer," not that of the temporary position of "Acting Manager" for the Engineering Section of the General Services Division.

Attachment
List of Exhibits

RESPONDENT'S EXHIBITS

1. April 10, 2009 Reprimand Letter from David Oliverio to Scott Mason
2. October 22, 2009 Dismissal Letter from Secretary Ferguson to Scott Mason
3. Transcript of January 28, 2010 - Mason v. WVDOA/Unemployment
4. Division of Personnel Supervisor's Guide to Discipline
5. July 14, 2009 Level 1 Grievance Decision
6. October 5, 2009 Grievance Re: Purchasing Conference Treatment
7. Photocopy of Post Office Return Receipt Card dated October 29, 2009
8. Position Description Form - identified date of January 2009, w/attachments
9. DOP Class Specs 8227, "Engineer"

JOINT EXHIBITS

1. Nov. 6, 2009 Correspondence to David Parsons from Cabinet Sec. Ferguson (w/attachment)

GRIEVANT'S EXHIBITS

1. N/A
2. P Card Inspection Report, March 12, 2009
3. Discovery Produced from AG Re: Purchasing Inspection
4. Excerpts of Supervisor's Guide to Employment
5. February 19, 2009 Emails
6. February 2009 Email from Mason to Secretary
7. Grievance against Oliverio – June 26, 2009
8. Appraisal Performance Evaluation – June 2009
9. April 16, 2009 Response of Grievant Mason to Reprimand
10. February 13, 2009 Memo from K. Ferrell to Kilpatrick
11. October 16, 2009 Notice of Predetermination Meeting October 19, 2009
12. December 3, 2008 Memo from Tincher, Director Purchasing Division to David Oliverio, Director GSD Re: Change Orders
13. October 20, 2009 Level 1 Decision by Sec. Ferguson to Grievant Mason re: October 5, 2009 Grievance
14. September 22, 2009 Level 1 Decision by Sec. Ferguson to Grievant Mason re: August 10, 2009 Grievant (allegations of working out of classification).