WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JAMES WORKMAN,
Grievant,

v. **Docket No. 2011-1889-CONS**

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

D E C I S I O N

Grievant, James Workman, 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 which included a five (5) day suspension with back pay for the suspension, and where Grievant, following termination, is seeking reinstatement into his position, back pay and other relief as entitled to by law. On June 17, 2011, Grievant filed a grievance, Docket No. 2011-1798-DOA, providing that he had been suspended for five days without pay. Grievant requested to have all charges fully investigated and to face his accusers. On October 26, 2011, Grievant filed a grievance contending improper termination, Docket No. 2012-0464-DOA. The two grievances were consolidated on November 7, 2011, 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 December 28 and 29, 2011, in the Grievance Board's Charleston office. Grievant appeared in person and by his representative, Gordon Simmons, steward, UE Local 170, West Virginia Public Workers Union. 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 February 1, 2012. Both parties submitted fact/law proposals.

Synopsis

This matter is a consolidated grievance wherein Grievant protests a five (5) day suspension, and his subsequent discharge from employment. Grievant maintains that Respondent improperly disciplined him. Respondent was presented with a myriad of allegations and events which are characterized as a violation of the applicable Workplace Security Policy prohibiting workplace harassment and contrary to recognized standard(s) of employee conduct. Respondent identified behavior of Grievant which justified corrective actions. Respondent established a nexus between Grievant's conduct and adverse affects to the workplace/force. Respondent demonstrated good cause for disciplinary action. This grievance is DENIED.

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

Findings of Fact

1. Grievant was employed with the West Virginia General Services Division (Respondent) as a Trades Specialist from August 6, 2007 to October 26, 2011, and was assigned to perform work duties at the Capitol Complex.

2. Complaints regarding Grievant's conduct were communicated to managerial personnel of Respondent. David Oliverio, General Services Division Director, was made

aware of information which lead Respondent to further inquire as to Grievant's behavior and interaction with co-workers.

3. Respondent investigated allegations of misconduct, by Grievant, which were characterized as intimidating and aggessive behavior towards co-workers. Reportedly, Grievant's conduct created a hostile work environment for Grievant's co-workers.

4. A number of co-workers communicated to responsible agents of Respondent a desire not to work with Grievant. More than one co-worker communicated that Grievant's actions and/or demeanor were hostile and threatening.

5. Prior to June 13, 2012, information was communicated to Respondent that Grievant repeatedly intimidated, threatened and/or was involved in events with co-workers which were having an impact on operations of the unit. Examples of events and actions of Grievant were relayed to Respondent by Grievant's co-workers.

6. Grievant made verbal and non-verbal threats toward Steve Phillips.[1]

7. Steve Phillips, a former co-worker of Grievant's, is of the opinion that Grievant's demeanor and actions had been deliberate attempts to bully, intimidate and harass him. Phillips expressed to managerial personnel of Respondent that he would prefer not working with Grievant. Worker Phillips provided facts of interactions between Grievant and himself, e.g.;

a. Steve Phillips moved a chair in the break-room, in which Grievant would often sit, and was known as Grievant's chair, so that Phillips was able to get his cart full of tools past the chair. Grievant was not in the room at the time. Immediately following Phillips moving the chair, Grievant came into the room, and yelled and cussed at Phillips, making Phillips feel threatened.

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[1] Kenneth Lucas was a witness to acts of aggression by Grievant directed toward Steve Phillips. *See* Lucas testimony.

b. Grievant had occasions to travel on the interstate in the same direction as Phillips after work on the way to their respective homes. Grievant intentionally drove aggressively with regard to Phillips and his position of his car on the highway on more than one occasion. Grievant repeatedly drove closely behind worker Phillips and tailgated him so close that he felt unable to slow or stop without causing an accident. Grievant would also get in front and slow down to impede Phillips.

c. Grievant made aggressive sounds and uttered derogatory words directed toward Phillips in conjunction with Phillips arrival and/or departure from the break-room on a notable basis.

d. As a result of Grievant's attitude, demeanor and conduct as demonstrated toward him, Steve Phillips did not like working with Grievant. Further, worker Phillips had occasion to refuse to work with Grievant.

8. The behavior after work hours on the highway, and in the break-room caused supervisors to adjust work schedules and assignments so that Grievant did not work with Steve Phillips.

9. Former co-worker, Kenneth Lucas is fearful of Grievant. This fear stems from events that transpired at work and outside the workplace.

10. Lucas and Grievant had previously been friends. An event transpired during the holiday season, December 2010, at Lucas's home between the two and their respective family members which terminated their friendship.

11. Kenneth Lucas spoke to management personnel regarding the December 2010, off campus incident. However, after Lucas was informed it was more likely that he rather than Grievant would be transferred, Lucas assured management he could maintain a professional working environment. Grievant and Lucas continued to work on the maintenance unit, but there was no longer any off-site friendship.[2]

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[2] Kenny Lucas is fearful of Grievant. Further, he feels remorse that he did not do more to defend his wife during and/or subsequent to the December encounter.

12. The December 2010, “off campus incident” was looked into by the Capitol Police and the Charleston Police Department. No formal charges were brought against Grievant. Nevertheless, the event was a point of contention and ripe for subsequent conflict between Lucas and Grievant.

13. On April 22, 2011, Lucas' wife was in the process of picking her husband up at the Capitol when she received a cell phone call from Grievant at approximately 2:55 p.m. After being reproached by Lucas’ wife for calling her, Grievant sent a text message to Mr. Lucas approximately three minutes past clock out time. In this message, Grievant stated he had mistakenly dialed Lucas’ wife, that he would erase her number, but further said, “you tell that bitch I will get even.” Respondent Exhibit (R. Ex.) 7.

14. No testimony was offered that Grievant, in any way, acted improperly toward either Lucas or his wife after the mis-dial or made any explicit threat of violent assault as implied in the suspension letter.

15. Don Saunders, Grievant’s former supervisor, complained about the Grievant to the Director of the Division, relating an after-hours incident where the parties were involved in an altercation. Saunders asked that he not work with the Grievant any longer. Both Grievant and Saunders were counseled by Director Oliverio to not bring issues to work with them. Respondent adjusted work schedules to minimize any contact and/or common work projects, between these workers.

16. Grievant’s demeanor to co-workers was perceived as hostile by co-workers.

17. Complaints were communicated to managing personnel that Grievant was parking his vehicle too close to other employees so that those other employees were not

able to get in and out of their vehicles. This action was witnessed by more than one co-worker. Grievant's actions of protest regarding others' use of a free parking space was intentional and deliberate. *See* Lucas testimony.

18. Grievant, with purpose and intent, un-did work that other employees were authorized and instructed to perform. Without permission, Grievant repeatedly removed caution reflective tape that had been placed on a loading dock by other employees with approval and direction of a supervisor. *See* Phil Kingery testimony.

19. In addition to the foregoing facts, an Equal Employment Opportunity (EEO) Complaint had been filed pertaining to Grievant. The issues addressed in the complaint pertained to harassment, bullying and workplace environment. Co-workers gave statements protected, in part, as confidential. Statements given were from a substantial number of employees and supervisors of Respondent who worked with Grievant. A copy of the complaint filed was not presented at the level three grievance hearing of this consolidated grievance. Nevertheless, reportedly, employees did not want to work with Grievant for things that had happened in the past.

20. Grievant was aware of the EEO Complaint and that co-workers had given statements. Grievant was never supplied access to a complete copy of the statements. Grievant was made aware of the allegations presented in the statement.

21. Christopher Klingler, the Deputy Director of General Services, conducted an investigation into these matters, which included the sworn statements taken. Klingler's investigation consisted of more than just a cursory review of allegations. Klingler reviewed Grievant's work history and further researched the allegations that Grievant was cursing, threatening co-workers and generally creating a hostile work environment.

22. There was a predetermination conference with Grievant on June 7, 2011. Grievant was made aware of the nature of the allegations presented to Respondent. Respondent's concerns with regard to Grievant's conduct were discussed with Grievant. It was shared with Grievant that suspension was being considered as part of a corrective action.

23. Present at that meeting with Grievant was Deputy Director Klingler, Linda Coleman, Human Resources Coordinator for the Department of Administration and David Oliverio, Director of General Services Division.

24. Grievant presented a response to Respondent during the predetermination conference. Respondent followed-up on some of the information and confirmation request presented by Grievant. Deputy Director Klingler contacted a number of co-workers which Grievant believed would support his behavior and/or conduct on the job.

25. After consulting with Deputy Director Klingler and Joe Thomas of the West Virginia Division of Personnel, Director Oliverio made the decision that Grievant should be reprimanded, and suspended without pay for a period of five (5) days.

26. The Division of Personnel's Workplace Security Policy discusses "Threatening/Violent Behavior" and defines it as "[c]onduct assessed, judged, observed, or perceived by a reasonable person to be so outrageous and extreme as to cause severe emotional distress[,] or cause, or is likely to result in, bodily harm." §II.C., Workplace Security Policy. The purpose of the Policy is "to protect the health, safety, and well-being of employees. . . ." This Policy clearly states that threatening and/or violent behavior is unacceptable in the workplace and will not be tolerated.

27. Respondent concluded Grievant's conduct was unacceptable. Respondent was of the opinion that Grievant violated a recognized standard of conduct an employer can reasonably require of an employee, referencing Workplace Security Policy and the Prohibited Workplace Harassment Interpretive Bulletin. *See* R. Exs. 5 and 6.

28. Grievant was suspended five days without pay, June 17 through June 24, 2011. Further, Grievant was placed on an improvement period. In conjunction with the improvement period, Grievant was required to complete training on workplace behavior.

29. Among the reasons provided for Grievant's suspension were twenty-six comments offered by co-workers, ostensibly in statements gathered during the course of an inconclusive EEO investigation. The twenty-six comments are documented in the June 13, 2011, Suspension Letter. However, Respondent did not establish with clarity, what statements individual co-workers provided. Examples of statements provided include:

> "Mr. Workman is a bully, troublemaker; he makes me nervous to be around him. He tries to boss me around. He gives me evil looks like he wants to tear my head off. He has played games with me, such as, when I park on the contractor's parking lot he will pull a State vehicle so close to me that I cannot get into the driver's side door even if the lot is empty. He intentionally does this and has done it on a number of occasions".
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> "Jim has created a hostile work environment for me and I am on pins and needles and very apprehensive to speak around him"
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> "Jim Workman has no people skills. I've seen him jut his chest out talk shit about everyone, get in Kenny Lucas' stuff and make gestures behind Steve Phillips".
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> "I refuse to work with him".
>
> "I think Jim is capable of hurting someone. I've never seen a polite side of him".
>
> "I believe Jim Workman creates a hostile work environment".

June 13, 2011, Suspension Letter, R. Ex. 1.

30. Additional statements not present here, were given by supervisors and co-workers alike regarding Grievant's conduct and demeanor. The statements were in accord with each another, in that Grievant's conduct created what co-workers and Respondent characterized as threatening, confrontational, and/or aggressive behavior.[3]

31. The Suspension Letter of June 13, 2011, signed by Director David Oliverio informed Grievant that "Insubordination encompasses more than an explicit order and subsequent refusal to carry it out. It also involves a flagrant or willful disregard for implied directions of an employer. I find that your continued aggressive and threatening conduct, despite my direction to cease such behavior, is blatant insubordination." Grievant was informed that "any further unacceptable conduct will be viewed as unwilling rather than inability to comply with reasonable expectations and will result in [Grievant's] dismissal from employment." R. Ex. 1.

32. The June 13, 2011 Suspension Letter, a seven page document, explicitly stated that:

> [T]he Division of Personnel *Workplace Security* Policy (DOP-P15) which states, in pertinent part: *"Threatening or assaultive behavior will not be tolerated and must be resolved by managers/supervisors on a case-by-case basis. Any employee engaging in such behavior shall be subject to disciplinary action, up to and including dismissal."* On November 24, 2008, you signed the Workplace Security Policy - Employee Acknowledgment Form. By affixing your signature you certified that "*...exhibiting violent behavior, issuing threats...are a violation of this policy may result in disciplinary action up to and including dismissal."*
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> As a public employer, it is not only our responsibility to provide a working environment which ensures the health, safety, and welfare of the

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[3] The number of co-workers who supplied sworn statements related to Grievant's behavior was referenced as ten separate employees. *See* Deputy Director Klingler testimony.

> public, but to provide a safe working environment for our employees as well to ensure fair and professional communication and services to our clients. An employer has the basic responsibility for maintaining order and protecting employees from risk of physical injury; or continual psychological abuse. Your behavior has disrupted our operations and good labor relations. Not only has your behavior been destructive to the morale of the employees working in your vicinity, but it has created a hostile working environment as well, making it difficult for supervisory staff to exert leadership while you are present at work.
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> In an effort to assist you in meeting a standard of performance consistent with my expectations, I am establishing a sixty (60) calendar day improvement period, beginning June 23, 2011 through August 23, 2011 to allow you to bring your conduct to acceptable standards. . . . So there is no misunderstanding, the following are my expectations of you in your position as a Trades Specialist:
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> ●Communicate respectfully with others regardless of their status.
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> ●Ensure zero validated complaints about conduct/ communications from customers and/or co-workers.
>
> ●Inform all section co-workers on business matters in a timely and professional manner, maintaining confidentiality as required.
>
> ●Handle provocation and difficult situations in ways that de-escalate conflicts.
>
> * * *

June 13, 2011, Suspension Letter, R. Ex. 1.

33. Further, Grievant was required to participate in and complete training classes regarding conflict management and workplace conduct.

34. Grievant met with Assistant Administrator Christopher Klingler. Grievant alleged that a lot of the information Respondent had relied upon were lies.

35. In an effort to address the concerns of all parties, upon Grievant's return from suspension, Grievant was transferred to another section. Respondent provided this was done so that Grievant could have a "clean slate" with co-workers and a different supervisor.

36. Roger Wines became Grievant's supervisor after Grievant's return from suspension on June 24, 2011, and remained his supervisor until the October 26, 2011, dismissal.

37. Following the suspension additional complaints were received concerning Grievant's conduct, e.g., David Lawrence and Thomas Bailey. Former co-worker Lawrence expressed a desire not to work with Grievant. Further, Lawrence filed a grievance.

38. During the Fall of every calendar year, in anticipation of the coming cold weather, Respondent performs a procedure identified as "boiler startup" of the steam plant. It is acknowledged that the startup process is a dangerous operation. The building that the boiler is housed in is designed so that the roof will blow off in case of explosion as a precautionary measure to limit damage.

39. "Boiler startup" is a process which compels workers across campus to be in direct radio contact with one another at all times so that the system can be monitored and injury, and/or death, can be avoided.

40. During the boiler startup process of 2011, on October 18, 2011, during a portion of the startup procedure, Supervisor Wines was attempting to contact another employee about the start up. After transmitting from his own radio to another employee, Supervisor Wines observed Grievant reach on his body to a place where a radio is generally located. **Wines saw Grievant put his hand on his radio. (**Emphisis added.**)** At that moment, there was a "hot mic" situation, wherein no one was able to speak across the radios because someone else was holding their transmit button down. When Supervisor Wines saw Grievant remove his hand from his radio, the "hot mic" situation ended. Wines personally observed this several more times, each occurring the exact same way.

41. Phillips, a technician and boiler operator in Building 5, was the intended recipient and responding employee of the radio calls interrupted by the 'hot mic' situations reported by Wines.

42. Supervisor Wines documented his observation of Grievant contemporaneous to the event. R. Ex. 9. When asked to report what he observed on October 18, 2011, Supervisor Wines confirmed that when he tried to communicate with Phillips, he witnessed Grievant's hand go up to his radio and a 'hot mic' situation would transpire. This happened as Phillips tried to communicate back to Supervisor Wines. This happened repeatedly, approximately four times. Wines Testimony L-3.

43. Supervisor Wines went to his supervisor, Manager David Parsons, and explained the situation, and demonstrated the problem. When Supervisor Wines used his radio to communicate, immediately following his transmission, another "hot mic" situation occurred. Parsons witnessed this phenomenon occur twice.

44. Supervisor Wines called Grievant into his office to speak to him about what had been observed. Grievant was not receptive to the allegation presented by Supervisor Wines. The situation escalated rather quickly, Grievant became confrontational, and cussed during the conversation with his supervisor.

45. Grievant indicated to Supervisor Wines that he could not prove a thing. Grievant verbally provided that Supervisor Wines was "full of shit and had no proof," and that he was "tired of all you fuckers trying to pin things on him." Soon after stating he was "tired of all the bullshit," Grievant left the office. R. Ex. 9.

46. Supervisor Wines reported all of this information to David Parsons, Building Operations Maintenance Manager.

47. Grievant acknowledges that he met with Supervisor Wines on October 18, 2011, in Wines' office where Wines first accused Grievant of keying his radio mic, but Grievant denies he cursed or was confrontational.

48. Grievant was loud and argumentative with Supervisor Wines.

49. On October 19, 2011, Supervisor Wines verbally communicated with Grievant regarding a job assignment and resolution of outstanding issues. R. Exs. 10 and 11. In response to Wines' instructions and other supervisory decisions, Grievant made statements to Wines designed to intimidate and/or put Supervisor Wines on notice.

50. Statements made by Grievant were not benign responses to a Supervisor's decision. Grievant made statements which can be reasonably interpreted as threats.

51. The tone and mannerism of Grievant's conduct, coupled with the words used by Grievant, lead Wines to conclude Grievant was intentionally disrespectful of him and his position as Grievant's supervisor. Supervisor Wines was of the opinion that Grievant threatened him.

52. Grievant acknowledges verbal communication with Supervisor Wines on October 19, 2011, but disputes he expressed any threatening language or intent.

53. David Williams, a general service employee, overheard some of the communication between Grievant and Supervisor Wines on October 19, 2011.

54. David Williams confirmed language spoken by Grievant on October 19, 2011 to Supervisor Wines akin to the language reported by Supervisor Wines.

55. Deputy Director Klingler was made aware of the October 18 and October 19, events. He inquired into these matters and consulted with Director Oliverio, who was out of town, and Joe Thomas, at the West Virginia Division of Personnel (DOP).

56. Joe Thomas, Assistant Director for Employee Relations, of the West Virginia Division of Personnel, was consulted on both the reprimand with suspension, and the termination action. Assistant Director Thomas' duties at DOP include providing information and advice regarding personnel matters.

57. Assistant Director Thomas is familiar with, and has knowledge regarding DOP's Workplace Security Policy and the Prohibited Workplace Harassment Interpretive Bulletin. R. Exs. 5 and 6.

58. It was Assistant Director Thomas' opinion that because the off work incidents had a nexus with the working environment, i.e. that the workings of the Division were disrupted due to Grievant's behaviors because of the need to reassign work schedules, that discipline and written reprimand with a five (5) day unpaid suspension for those incidents was appropriate.

59. Further, it was Assistant Director Thomas' opinion that because of the danger that Grievant placed other individuals in during the boiler start up, and because of the blatant disrespect, cursing and threatening his supervisor that followed the boiler incident, that discipline and termination in that situation was appropriate.

60. The tasks performed by the maintenance unit generally requires team effort. Employees work as a team, because the nature of the work requires such.

61. Initially, during the early onset of events in discussion, Respondent made arrangements to separate Grievant from a limited number of co-workers. The number of employees that could not, and others, who did not want to work with Grievant grew to a noticeable degree.

62. Responsible managerial personnel of Respondent are of the opinion that the maintenance unit is not a duty section where an employee can work by himself regularly. It is not feasible that Grievant could perform his duties without interacting with other members of the unit.

63. David Parsons, the Manager of the section in which Grievant was employed, informed his own superior, Director Oliverio, that he could not "stick his neck out" for Grievant any longer, that too many things had happened, and the workplace was being disrupted by other employees refusing to work with Grievant because of Grievant's threatening, harassing, and intimidating behaviors.

64. A predetermination conference transpired on October 25, 2011. Present at that meeting was Deputy Director Klingler, Maintenance Manager, David Parson, and Grievant.

65. David Oliverio, General Services Division Director, was not in attendance at the October 25, 2011, predetermination conference, in that he was in the midst of his scheduled vacation. Director Oliverio authorized Deputy Director Klingler to administer agency action in his absence.

66. Deputy Director Klingler determined that Grievant's employment with Respondent would be terminated.

67. The October 26, 2011 Dismissal Letter, provides that Respondent finds that Grievant's willful and intentional disrespectful conduct is an act of insubordination.

68. The October 26, 2011 Dismissal Letter, signed by Deputy Director Klingler, among other information, stated Grievant's misconduct impairs the efficient operation of the division. The decision provided that;

> The State of West Virginia and its agencies have reason to expect their employees to observe a standard of conduct that will not reflect discredit on the abilities and integrity of their employees, or create suspicion with reference to their employees, capability in discharging their duties and responsibilities. I believe the nature of your misconduct is sufficient to cause me to conclude that you did not meet a reasonable standard of conduct as an employee of the GSD thus warranting this dismissal. Such conduct cannot and will not be tolerated.
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> . . . As a public employer, it is not only our responsibility to provide a working environment which ensures the health, safety, and welfare of the public, but also to provide a safe working environment for our employees. No employer is expected to suffer the employment of an individual whose behavior is such that it prevents a safe and harmonious atmosphere.

October 26, 2011 Dismissal Letter, R. Ex. 2.

. **Discussion**

This grievance involves disciplinary actions; the burden of proof in disciplinary matters rests with the employer. 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. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." *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.*

The June 13, 2011, Suspension Letter and October 26, 2011 Dismissal Correspondence provide insight into the rationale of Respondent's disciplinary actions as taken with regard to Grievant. *See* Respondent Exhibits 1 and 2. *Also See* Finding of Fact (FOF) 24 - 33 and 58 - 68. Grievant maintains the disciplinary actions taken are inappropriate and unlawful because:

> 1. A significant number of the cited events or alleged wrongful actions were concerned with allegations of off-campus incidents not occurring during working hours.
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> 2. Information used was untrue. It is contended that Respondent's investigation was faulty and the evidence was improper.
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> a. Grievant contends that a series of unattributed quotations do not rise above the level of anonymous hearsay and, in some examples, double-hearsay.
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> b. Alleged violation of due process.
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> 3. Respondent did not demonstrate any nexus between the alleged off-campus incidents cited as reasons for disciplinary action and Grievant's ability to perform his assigned work.
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> 4. Respondent failed to produce a single act of workplace violence attributed to Grievant.[4]

Respondent highlights that Grievant was warned about his behavior in the workplace, counseled, and yet he continued to exhibit aggressive, negative, counter-productive behavior culminating in an explosive episode with his supervisor. Respondent contends its disciplinary actions were reasonable, prudent, and lawful.

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[4] Grievant highlights that no overt act of violence is attributed to Grievant. In essence, Grievant avers that he cannot be held responsible for what others might think he is capable of doing, he is only responsible for his direct actions.

Credibility

In reaching a decision in one or more of the issues associated with the parties, herein, certain facts in dispute must be addressed, including a determination of conduct and reasonable effect of misconduct, if established, in the circumstances of this case.

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dept. of Health & Human Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dept. of Health & Human Resources*, Docket No. 95-HHR-066 (May 12, 1995). 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. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994). In the circumstances of this case, it is necessary to assess the credibility of Grievant's testimony regarding events in discussion. It is also deemed prudent to address the specific testimony of witnesses Kenny Lucas and Supervisor Wines.[5]

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 the following: 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.*

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[5] Testimony of other co-workers will be discussed in context of the issue.

The undersigned had an opportunity to observe the demeanor of the witnesses and to assess their words and actions during their testimony. Credibility assessments were made from direct observations as well as review of the record. The majority of the statements by the witnesses called to testify were consistent with each other, consistent with their prior statements, internally consistent, and consistent with the documentary evidence. The demeanor of the majority of the witnesses was straightforward, and their testimony was plausible. The same cannot be said for Grievant.

Grievant's testimony was not reassuring or packed with enlightening information. Several witnesses testified as to Grievant's demeanor, mannerism and conduct. At the onset of events, Grievant indicated to Respondent that he had no problems with any employee at work, and that no one had any problems with him that he was aware of. This information is not deemed credible. The record of this matter is inundated with information attesting to Grievant's propensity to have confrontations with supervisors and co-workers. Evidence presented included both first-hand testimony of events and limited hearsay information. Several of Grievant's co-workers were uncomfortable with the prospect of having to work with Grievant. Co-workers' attitudes with regard to Grievant are not adequately depicted by saying he was not popular. Adult men took care to avoid interaction with Grievant (co-workers were fearful of Grievant). Grievant cannot truthfully testify he was unaware of this phenomenon. Co-workers actively expressed a desire not to work with Grievant. This is fact. For Grievant to testify that he had no knowledge of his co-workers' perception of him is not trustworthy. This is misdirection designed to undermine a good faith search for truth.

Grievant's level three testimony did very little to establish the image he would have others believe is a correct depiction of his character. Grievant failed to present a coherent statement of the facts. Grievant relies heavily on his denial of key facts to undermine Respondent's justification for disciplinary actions. Grievant has the obvious bias and motive to be untruthful in this matter because he wishes to escape punishment. Grievant's denials of alleged events are not readily plausible. If Grievant's assertion was to be accepted, he is misunderstood and everyone got the facts wrong but him. This is difficult to believe. Grievant attempts to discredit his co-workers, individually and/or collectively fall short of effective. Co-workers' perception of Grievant's conduct was persuasive. At the very least, Grievant's testimony was disingenuous. Grievant's denial of events was not persuasive or consistent with the characteristics demonstrated by Grievant.

It is true that former co-worker Kenny Lucas is no longer a friend of Grievant's. Nevertheless, during the course of Lucas' testimony he demonstrated a very candid expression of events and relayed the conflict he had endured. Mr. Lucas displayed a reasonable respect for truthfulness. He acknowledged conflicting concerns with regard to his employment and his uneasiness with Grievant. Lucas had the opportunity to observe Grievant's demeanor and conduct over an extended period. His descriptions of Grievant's body gestures and comments toward others was persuasive. Lucas verifies Grievant tormented Steve Phillips. See FOF 7. Lucas offered first hand observation of Grievant's intimidating actions. This witness provided a unique insight into the work place environment under Grievant's influence. Lucas was not proud of his inaction with regard to Grievant and a very personal event. Lucas admitted he was fearful of Grievant. Kenny

Lucas explained his actions and his explanations were plausible in the context of the circumstances, both on and off the job site.

It is believed that Kenny Lucas presented honorable, trustworthy testimony. This co-worker provided first hand observation of Grievant's demeanor and conduct. Lucas' testimony was credible and informative. This testimony is found to be reliable with regard to establishing Grievant's threats and acts of intimidation toward co-workers in the workplace.

The demeanor of Supervisor Roger Wines at the grievance hearing was level headed and he seemed to make a bona fide effort to respond honestly to inquiries regarding his interaction with Grievant. Wines testified with what was conveyed as proper attitude and respect toward the proceedings. His mannerisms and demeanor were professional. He explained with clarity what he witnessed. Wines witnessed Grievant's hand go up to his radio and a 'hot mic' situation would transpire. He saw and experienced this phenomenon four times. Even when Grievant's representative attempted to make an issue of whether Wines actually viewed Grievant touch a particular button, he responded with poise and a rational explanation. Supervisor Wines presented information with regard to his interaction with Grievant in a well-balanced manner. The actions described were the reasonable conduct of a supervisor attempting to perform his assigned duties. The witness's behavior was consistent with the information presented. Verbal testimony concurred with his written notes made at the time of events. The plausibility of the information, as presented, was credible. No bias or nefarious agenda was evident. The witness did not offer unsolicited partiality or irrational conjecture.

Supervisor Roger Wines' credibility is a critical element of this matter. The facts pertaining to events on October 18 and October 19, 2011, are crucial to Respondent's dismissal of Grievant. Supervisor Wines presented facts pertaining to acts of insubordination by Grievant. Supervisor Wines' testimony was not evasive or convoluted. Roger Wines' testimony is found to be credible. While Grievant denies he cursed or was confrontational with his supervisor, the statements made by Grievant were not benign responses to a supervisor's inquiry. Grievant demonstrated evasive and convenient to his purpose recollections with regard to a number of facts. When questioned about events and conversations, Grievant's rendition of material facts was not found to be reliable. Supervisor Wines presented his observations and recollections of conversation in a literal manner designed to provide accurate facts.

Supervisor Wines' testimony and reported observations are deemed reliable. Grievant's statement that the "hot mike" incident was a coincidence (four times) is not likely. Grievant's account of this event requires suspension of intelligence and seriously challenges the principles of probability. It is more likely than not that Grievant is being untruthful.

In support of the conclusion that statements by Grievant regarding events are not reliable, the undersigned acknowledges that certainly in any conversation the individuals at times hear what they want to hear, and may misinterpret what is being said. Nevertheless, it is noted that Grievant's statements of facts and interpretation of transpiring events seem to ***always*** be at odds with others. His recollections of information and explanations of events regularly differs from that of others. When questioned about events and conversations, Grievant only acknowledges benign facts and relies heavily on his

blanket denial of actionable conduct. Grievant testified, during cross examination, that he did not have a history of aggressive behavior in the workplace, that he had never been terminated from any other state employment for aggressive behavior. Grievant was then presented with a letter of termination from the Division of Juvenile Services. *See* R. Ex. 3. This letter states that Grievant was terminated for physically abusing and using excessive force against a juvenile resident. Grievant contends that the information was not true, even though page two, paragraph 1 of the letter states that he had acknowledged this information to Juvenile Services. Upon being confronted with this information, Grievant offers that he had not been terminated, that he had in fact resigned (DJS was going to fire him) and the letter of dismissal was submitted after his resignation. Grievant has demonstrated evasive and convenient recollections with regard to a number of facts important to the issues currently being grieved. Grievant's behavior does not illicit a sense of trustworthiness. Grievant's statements of fact and interpretations of transpiring events are at odds with virtually every witness regarding actionable conduct. Grievant's version of material fact is not reliable.

Merits

This grievance involves related but separate disciplinary actions, a five (5) day suspension without pay and a subsequent termination. The due process rights afforded an individual for less than a termination, or "a temporary deprivation of rights may not require as large a measure of procedural due process protection as a permanent deprivation." *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 241 S.E.2d 164 (1978) (citing *North v. Bd. of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977)). "What is required to

meet procedural due process under the Fourteenth Amendment is controlled by the circumstances of each case." *Barker v. Hardway*, 283 F.Supp. 228 (S.D. W. Va. 1968); *see Buskirk*, *supra*; *Edwards v. Berkeley County Bd. of Educ.*, Docket No. 89-02-234 (Nov. 28, 1989). Termination is a severe disciplinary action.[6] Further, it is recognized that an employer must demonstrate that misconduct which forms the basis for the dismissal of a classified state employee is of a substantial nature. Accordingly, the undersigned Administrative Law Judge (ALJ) will utilize the standards outlined in assessing the reasonableness of the actions taken by Respondent in this case. The fundamental issue is whether Respondent's disciplining of Grievant was proper and lawful.

Hostile Work Environment

It is the policy of the State of West Virginia to take reasonable measures to ensure the health, safety, and welfare of State employees and the general public they serve. Pursuant to the June 13, 2011 Suspension letter, Grievant was suspended five days without pay, and required to attend training classes for conduct deemed to be in violation of behavior standards which an employer has a right to expect of its employees, referencing the State of West Virginia's Workplace Security Policy and the Prohibited Workplace Harassment Interpretive Bulletin. See R. Exs. 1, 5, and 6.

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[6] 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 or liberty interest in his employment may not be deprived of that right without due process of law. *Buskirk*, *supra*; *Waite*, *supra*; *Clark*, *supra*. "An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and an opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

The West Virginia Division of Personnel Workplace Security Policy (DOP-P15) states, in pertinent part: “Threatening or assaultive behavior will not be tolerated and must be resolved by managers/supervisors on a case-by-case basis. Any employee engaging in such behavior shall be subject to disciplinary action, up to and including dismissal.” DOP’s Workplace Security Policy discusses "Threatening/Violent Behavior" and defines it as "[c]onduct assessed, judged, observed, or perceived by a reasonable person to be so outrageous and extreme as to cause severe emotional distress[,] or cause, or is likely to result in, bodily harm." §II.C., Workplace Security Policy. This Policy clearly states that threatening and/or violent behavior is unacceptable in the workplace and will not be tolerated. An employer has the right to expect an employee to abide by these rules, and by the societal norms of behavior.[7]

Co-workers had issues with Grievant’s attitude and demeanor. The rationale for such by employees stemmed from events that transpired both on and off the job site. This information was made known to Respondent. Respondent, did and should have, investigated the allegations. See Prohibited Workplace Harassment Interpretive Bulletin, R. Ex 5. Grievant was made aware of the context of the alleged misconduct. He was provided the nature and details of co-workers’ allegations. Grievant was provided opportunity to respond to the allegations, and other concerns of Respondent’s regarding his conduct. The fact that Respondent did not correlate for Grievant each statement to a particular co-worker who provided a sworn statement, is noted.[8] But this fact is not

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[7] Grievant signed the Workplace Security Policy - Employee Acknowledgment Form on November 24, 2008.

[8] Grievant contends that Respondent’s failure to provide him with copies of each co-worker’s statement is a violation of due process.

established, in the fact pattern of this case, to be a violation of Grievant's due process rights. Respondent's action was a conscious attempt to protect the interest of all participants of the process, not an oversight or omission, or nefarious concealment of the issue(s) in discussion. Grievant was aware that suspension was being considered as part of a corrective action. Respondent's disclosure of the information provided by co-workers while failing to provide copies of documents, collected by a third party protected by confidentiality provisions, in the circumstance of this case is not found to be a violation of Grievant's due process. Grievant was provided ample opportunity to respond to the allegations of misconduct armed with information of sufficient specificity to identify the facts and charges being levied. Due process is a flexible concept and the specific procedural safeguards to be accorded an individual 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)).

Co-workers were more than hesitant to work with Grievant. Grown men were concerned for their individual safety. A growing number of employees, could not and others, did not want to work with Grievant. Respondent investigated. Grievant's five-day suspension was **not** based solely upon unsubstantiated sworn statements of co-workers, there were additional factors that were evaluated. Grievant made verbal and non-verbal threats toward co-workers, e.g., Grievant ridiculed and berated Steve Phillips. *See* FOF 6, 7, 7a, and 7c. Grievant with purpose and intent un-did work performed by other employees. FOF 18. Grievant protested co-worker(s) use of a free parking space by

deliberately parking in a manner designed to impede one or more co-workers use of the parking space. FOF 17. Christopher Klingler, Deputy Director of General Services, reviewed Grievant's work history and further researched Grievant's behavior by contacting a number of co-workers who Grievant indicated would support his behavior on the job. Grievant's proficient performance of duties on a routine basis, is not contested. Grievant's cursing, threatening and disruptive behavior demonstrated toward others in the work place was an issue. Abusive language and abusive, inappropriate and disrespectful behavior are not acceptable or conducive to a stable and effective working environment. *Graley v. W. Va. Parkways and Economic Development Auth*., Docket No. 99-PEDTA-406 (Oct. 31, 2000); *Hubble v. Dep't of Justice*, 6 MSPR 553 (1981).

Kenny Lucas' testimony confirms and establishes examples of Grievant's threats and acts of intimidation toward co-workers in the workplace. Lucas provided first-hand knowledge of Grievant's demeanor and conduct. Lucas testified to actions by Grievant of an intentional nature. Grievant was aware and took advantage of his notoriety. Further, it is not likely that all of Grievant's actions toward co-workers were presented at the level three hearing. Nevertheless, sufficient examples were provided to exemplify what co-workers of Grievant were forced to endure.

Grievant demonstrated a willingness to be divisive. Grievant engaged in behavior at the workplace which was inappropriate, disruptive and misconduct of an unreasonable nature. Grievant bullied others. *See* testimony of Steve Phillips, Christopher Klingler, Kenny Lucas and Phil Kingery. Management personnel had occasion to speak with Grievant regarding workplace conduct prior to the June 2011 disciplinary action. *See*

Director David Oliverio testimony. Respondent established that Grievant's behavior, at the workplace, was sufficiently hostile to warrant disciplinary action.

On a number of occasions the West Virginia Supreme Court of Appeals has addressed the issue of when a public employer may discipline an employee for conduct away from work. Generally, what a State employee does away from work is beyond the employer's realm of influence. However, "if a State employee's activities outside the job reflect upon his ability to perform the job or impair the efficient operation of the employing authority and bear a substantial relationship to the effective performance of the employee's duties, disciplinary action is justified. . ." *Thurmond v. Steele*, 159 W.Va. 630 at 634, 225 S.E.2d 210 at 212 (1976). Simply stated, "In order to dismiss a [public] employee for acts performed at a time and place separate from employment, the [employer] must demonstrate a "rational nexus" between the conduct performed outside of the job and the duties the employee is to perform. *Syl. Pt.2*, *Golden v. Board of Educ. of Harrison County,* 169 W.Va. 63, 285 S.E.2d 665 (1981).

Grievant has had occasion to be involved in confrontations with co-workers and supervisor(s) alike outside of the traditional business day and worksite. Initially, Respondent made arrangements to separate Grievant from a limited number of co-workers. This was reasonable. Nevertheless, the maintenance unit is not a duty section where an employee can work by himself, regularly. The number of employees that could not, and others, who did not want to work with Grievant grew to a noticeable degree.

Respondent argues that Grievant's conduct away from work, coupled with his established demeanor, reached a level which can be recognized, as rationally having a negative impact on the efficiency of the agency's operation. The undersigned is

persuaded, in the circumstance of this case, there is nexus between Grievant's off work conflicts with co-workers and his employment. Grievant's behavior unreasonably interfered with the agency's operations. Simply stated, it is not feasible that Grievant could perform his duties without interacting with other members of the unit. Individual work schedules of other employees are impacted by Grievant's presence at the work site and/or scheduling of work assignment. Grievant's behavior has been destructive to the morale of employees working in his vicinity. It is recognized that it would be difficult for employees to operate as a cohesive team if they fear a disagreement could lead to reprisal or hostility from Grievant. There is a rational nexus between Grievant's conduct toward co-workers away from work and his ability to perform his job as a team member. Further, Grievant's behavior has the effect of interfering with others ability to perform their duties. Respondent established a rational nexus exists, in the circumstance of this case, between the efficiency of the agency's operation and Grievant's conduct.

An administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. *Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (Mar. 11, 2010); *Warner v. Dep't of Health and Human Resources*, Docket No. 07-HHR-409 (Nov. 18, 2008)*; Miller v. W. Va. Dep't of Health and Human Resources*, Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ.*, Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996).

The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4)

whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. *Gunnells v. Logan County Bd. of Educ.*, Docket No. 97-23-055 (1997); *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-8-115 (June 8, 1990).

It is determined that co-workers' subjective feelings of intimidation were not without provocation. Grievant demonstrated behavior toward his co-workers which reasonably warranted concern. Grievant's actions of interfering with others individuals' work performance or creating an intimidating, hostile, or offensive working environment is not conjecture or hearsay information. It was a readily apparent state of being for Grievant's co-workers. Grievant ridiculed, berated and on occasion humiliated co-workers. The fact that co-workers were not individually aware of every event or incident of a dubious nature performed by Grievant, does not diminish the relevance of the cumulative effect. The sworn statements of co-workers were a catalyst for Respondent's further investigation into Grievant's conduct; however, rumor and gossip was not the justification for Respondent's subsequent disciplinary actions. Grievant's five-day suspension, along with mandatory training seminars, was deemed appropriate as a result of Grievant's established conduct. Deputy Director Klingler's investigation consisted of more than just a cursory review of allegations. Respondent established facts and conduct of Grievant sufficient to justify disciplinary action. Grievant was in violation of West Virginia Workplace Security Policy.

Dismissal

Grievant was employed as a classified employee. Applicable 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). "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 91-PEDTA-225 (Dec 31, 1991) (citing *Buskirk v. Civil Serv. Comm'n*. 175 W.Va. 279, 332 S.E.2d 579 (1985)). The Grievance Board has also "previously noted that insubordination encompasses more than an explicit order and subsequent refusal to carry it out." *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988.).

Accordingly, it is necessary to determine whether Respondent has good cause to dismiss Grievant.

Supervisor Wines' statements and contemporaneous notation of events are found to be credible and reliable. Roger Wines' allegation that Grievant repeatedly keyed a radio creating a hot mic event, is not corroborated by independent verification but Supervisor Wines' testimony is deemed credible. *See* discussion, *supra.* The timing of this behavior, during the boiler startup procedure, makes Grievant's actions a significant event. *See* FOF 38-42. The "boiler startup" process is a complex procedure which necessitates radio contact to prevent occupational incident. It is strongly inferred that Grievant's action did and/or could have placed the safety of others in jeopardy. On October 18, 2011, Supervisor Wines tried to communicate with Grievant regarding the event but the conversation escalated rather quickly. Grievant cursed during the conversation with his supervisor and indicated to Supervisor Wines that he was "full of shit and had no proof." Further, on October 19, 2011, Supervisor Wines verbally communicated with Grievant regarding a job assignment and resolution of outstanding issues. R. Exs. 10 and 11. In response to Wines' instructions and other supervisory decisions, Grievant made statements to Wines designed to intimidate and put Supervisor Wines on notice. Grievant was loud and argumentative with Supervisor Wines. Statements made by Grievant to Supervisor Wines were not benign responses to a Supervisor's decision. The tone and mannerism of Grievant's conduct, coupled with the words used by Grievant, lead Wines to conclude Grievant was intentionally disrespecting him and his position as Grievant's supervisor.[9] Grievant threatened Supervisor Wines. The Grievance Board has long held

[9] David Williams, a general service employee, who overheard some of the communication between Grievant and Supervisor Wines on October 19, 2011, confirmed language spoken by Grievant on October 19, 2011, to Supervisor Wines akin to the language reported by Supervisor Wines.

that threatening behavior toward supervisors is unacceptable in the work place. *Kessler v. W. Va. Dept. of Transp.*, Docket No. 94-DOH-490 (June 30, 1997); *Payne v. W.Va. Dept. of Transp.*, Docket No. 93-DOH-454 (Apr. 29, 1994).

The Suspension letter of June 13, 2011, signed by Director David Oliverio informed Grievant that insubordination encompasses more than an explicit order and subsequent refusal to carry out such order. Grievant was warned that any further unacceptable conduct would be viewed as unwilling, rather than inability, to comply with reasonable expectations and would result in Grievant's dismissal from employment. R. Ex. 1. Grievant has created a hostile working environment as well as making it difficult for supervisory staff to exert leadership while he is present at work. The October 26, 2011 Dismissal Letter, provides that Respondent finds that Grievant's willful and intentional disrespectful conduct is an act of insubordination. This Board has found that uttering abusive language to a supervisor may constitute insubordination. *Payne v. W.Va. Dep't Transp*., Docket No. 93-DOH-454 (Apr. 29, 1994); *Speedy v. Div. of Culture and History*, Docket No. 2011-0313-DEA (Aug. 24, 2011). Grievant did more than utter a colorful word or two toward his supervisor in a general discussion. Grievant has repeatedly exhibited threatening, intimidating and harassing behaviors towards his co-workers and supervisor(s). Grievant's testimony was not credible. Grievant exhibited a substantial level of lack of respect for his superiors, by cursing and threatening Supervisor Wines. Such action in the circumstances of this case justifies disciplinary action. Grievant was terminated for cause. Specifically, Grievant was terminated because of his insubordinate behavior, and his outward lack of respect for his supervisors.

In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Rainey v. Dept. of Administration*, Docket No. 04–ADMN-174 (Sept. 3, 2004); *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995). Grievant has repeatedly exhibited threatening, intimidating and harassing behaviors towards his co-workers and supervisor. All of these behaviors were prohibited by policies and directives in place during the term of Grievant's employment. The behaviors that Grievant continually exhibited fall under the definition of "Threatening Behavior" in the Workplace Security Policy Established on May 1, 1995, with the latest revision of July 1, 2002. The Prohibited Workplace Harassment Interpretive Bulletin, established on May 1, 1993, with the latest revision of December 1, 2006, specifically prohibits this type of behavior under the definition of "Nondiscriminatory-Hostile Workplace Harassment." Grievant was on notice that this type of behavior was and is unacceptable, and would not be tolerated. Respondent established that Grievant's employment was terminated for good cause.

Mitigation

Grievant did not contend that the punishment was too severe, or that he should have been disciplined in some lesser manner, he contends that he should not have been disciplined at all. "An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and 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). Grievant did not meet this burden.

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. The undersigned is not persuaded such a situation exists in the circumstances of the instant grievance. 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).

Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation. *Overbee v. Dept of Health and Human Res./Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct 3, 1996). Furthermore, "[r]espondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge cannot substitute his judgment for that of the employer." *Miller v. Higher Ed. Policy Comm'n/Marshall University,* Docket No. 03-HEPC-340 (Jan 21, 2004) citing *Jordan v. Mason County Bd. Of Educ*., Docket No. 99-26-8 (July 6, 1999); *Tickett v. Cabell County Bd. Of Educ*., Docket No. 97-06-233 (March 12, 1998); *Huffstutler v. Cabell County Bd. Of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997).

Respondent maintains that because of the severity of the incident during the boiler start up, Grievant's behavior towards Supervisor Wines following the incident, and because the other methods of discipline that had been employed in the past by the Division against Grievant, apparently to no avail, its termination of Grievant's employment is appropriate and should be upheld. *See* Deputy Director Klingler testimony. *Also see* Assistant Director for Employee Relations, DOP, Joe Thomas testimony. This ALJ is persuaded.

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*

Respondent established Grievant engaged in unacceptable intimidating, threatening, and harassing behavior. Respondent has demonstrated a pattern of behavior. Respondent established by a preponderance of the evidence reasonable rationale for disciplinary measures. Respondent attempted rehabilitation measures. Grievant did not sufficiently change his behavior, and continued to exhibit threatening and disruptive behavior. Respondent has a duty to provide its employees a safe environment in which to work, and Grievant's behavior did not allow the Division to accomplish that with Grievant

as an employee. Co-workers and supervisors had issues with Grievant's attitude and demeanor. While the rationale for such stemmed from events that transpired both on and off the job site, Respondent established a rational nexus between Grievant's conduct and the efficiency of the agency's operation.

Respondent demonstrated good cause for implementing disciplinary actions against Grievant. Respondent established that Grievant engaged in behavior which was inappropriate, disruptive and violation of West Virginia Workplace Security Policy. Further, Grievant was insubordinate. Respondent has met its burden in this matter both on the issue of the five (5) day unpaid suspension, with mandatory behavior seminar training and the ultimate termination of Grievant from employment.

The following conclusions of law are appropriate in this matter:

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. The West Virginia Division of Personnel *Workplace Security* Policy (DOP-P15) provides that; *"Threatening or assaultive behavior will not be tolerated and must be resolved by managers/supervisors on a case-by-case basis. Any employee engaging in such behavior shall be subject to disciplinary action, up to and including dismissal."*

3. The Division of Personnel's Workplace Security Policy defines "Threatening/Violent Behavior" as "[c]onduct assessed, judged, observed, or perceived by

a reasonable person to be so outrageous and extreme as to cause severe emotional distress[,] or cause, or is likely to result in, bodily harm." §II.C., Workplace Security Policy. The Policy clearly states that threatening and/or violent behavior is unacceptable in the workplace and will not be tolerated.

4. By a preponderance of the evidence Respondent established Grievant's workplace conduct demonstrated misconduct warranting disciplinary action. Respondent has met its burden and established Grievant engaged in disruptive and threatening behavior.

5. 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).

6. "In order to dismiss a [public] employee for acts performed at a time and place separate from employment, the [employer] must demonstrate a "rational nexus" between the conduct performed outside of the job and the duties the employee is to perform. *Syl. Pt.2*, *Golden v. Board of Educ. of Harrison County,* 169 W.Va. 63, 285

S.E.2d 665 (1981). *See also*, *Powell v. Paine,* 221 W. Va. 458, 655 S.E.2d 204 (2007); *Rogliano v. Fayette County Board of Education*, 176 W. Va. 700, 347 S.E.2d 220 (1986); *Thurmond v. Steele*, 159 W.Va. 630 at 634, 225 S.E.2d 210 at 212 (1976); *Cottrill v. Gilmer County Bd. of Educ.,* Docket No. 2010-0898-GilED (April 14, 2010); *Williams v. Alcohol Beverage Control Admin.,* Docket No. 2009-1684-DOR (Nov. 25, 2009); *Boehm v. Dep't of Health & Human Res.*, Docket No. 05-HHR-441 (May 18, 2006); and *Hensley v. Dep't of Health & Human Res.*, Docket No. 04-HHR-375 (Jan. 28, 2004).

7. Grievant violated applicable State of West Virginia's Workplace Security Policy and associated Prohibited Workplace Harassment Interpretive Bulletin.

8. Respondent established by a preponderance of the evidence that Grievant is culpable for actions which are of a substantial nature, and not trivial or inconsequential, or a mere technical violation. Respondent choose to terminate the employment of this classified Grievant.

9. 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).

10. 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).

11. Mitigation is not found to be appropriate in the circumstance of this case. "[W]ith regard to terminations for cause, and workplace security violations specifically, employers have substantial discretion regarding employment decisions." *Burkhammer v. Dep't of Health and Human Res.*, Docket No. 03-HHR-276 (Nov. 12, 2003). Respondent has substantial discretion to determine a penalty, and the undersigned Administrative Law Judge will not substitute his judgement for that of the employer. *See also Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996); *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989); *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

12. Given the charges proven against Grievant, their level of seriousness, and their long-term continuation, the penalties levied are not disproportionate or excessive, nor are the penalties arbitrary and capricious.

13. Respondent, by a preponderance of the evidence, established that Grievant was in violation of applicable standards of behavior which an employer has a right to expect of its employees.

14. Respondent demonstrated good cause for dismissal of Grievant from employment.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: July 27, 2012

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Landon R. Brown
Administrative Law Judge