THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BARBARA KOBLINSKY,

Grievant,

v. **DOCKET NO. 2011-1772-CONS**

PUTNAM COUNTY HEALTH DEPARTMENT,

Respondent.

DECISION

Grievant, Barbara Koblinsky, was employed by Respondent, Putnam County Health Department ("PCHD"), as a Registered Sanitarian. On May 12, 2011, she filed a grievance challenging her "functional demotion" in which she asked to be "restored to performing inspections with county vehicle provided." This grievance was assigned Docket Number 2011-1650-PutCH. On May 24, 2011, Grievant filed a second grievance challenging her employer's order that she undergo a "functional assessment" by a therapist. This grievance was assigned Docket Number 2011-1717-PutCH.

On May 27, 2011, Grievant filed a third grievance challenging a "reprimand" that she was issued by Respondent. PCHD styled this document as a "written disciplinary warning" regarding her refusal to sign a document acknowledging that she was being given time off to conduct grievance preparation with her union representative, and for rude, belligerent and uncooperative behavior in the workplace on May 25, 2011. This grievance was assigned Docket Number 2011-1731-PutCH. On May 31, 2011, Grievant filed a fourth grievance challenging another "reprimand" she received from Respondent. Again, this involved a document labeled by PCHD as a "written

disciplinary warning." This warning was related to Grievant's allegedly inappropriate and disruptive conduct on May 27, 2011, at a meeting where her supervisor attempted to issue another written disciplinary warning. This grievance was assigned Docket Number 2011-1735-PutCH. On June 2, 2011, Grievant filed a fifth grievance challenging yet another reprimand she was issued by Respondent. This involved a "written disciplinary warning" Grievant received for allegedly leaving the building without permission on the afternoon of May 31, 2011, and being away from her workstation without permission on the morning of June 1, 2011. This grievance was assigned Docket Number 2011-1770-PutCH.

On June 3, 2011, Grievant filed a sixth grievance challenging another written reprimand and an indefinite suspension. Grievant had been issued a "written disciplinary warning" on June 3, 2011, for refusing to sign the previous written warning she was issued on June 2 and for refusing to answer any questions about the events surrounding the warning. In addition, Grievant was asked to answer written questions related to an "internal personnel investigation," and suspended indefinitely for refusing to answer the questions. This grievance was assigned Docket Number 2011-1771-PutCH. On June 10, 2011, these six grievances were consolidated and assigned Docket Number 2011-1772-CONS.

On July 12, 2011, Respondent filed a "Partial Motion to Dismiss" the grievance concerning the functional assessment requirement because PCHD had withdrawn that request. By Order dated July 20, 2011, Administrative Law Judge Jennifer Lea

Stollings-Parr granted Respondent's motion and dismissed that portion of the consolidated grievance previously styled Docket Number 2011-1717-PutCH as moot.

On July 15, 2011, Grievant filed another grievance challenging her termination from employment by PCHD. This grievance was assigned Docket Number 2012-0061-PutCH. Grievant simultaneously filed a Motion to Consolidate this grievance with the other pending grievances in Docket No. 2011-1772-CONS, and this motion was granted on July 26, 2011 by Administrative Law Judge Jennifer L. Stollings-Parr.

On April 1, 2011, Grievant filed a grievance alleging that PCHD had placed her on leave restriction without good cause. This grievance was assigned Docket Number 2011-1415-PutCH. On May 2, 2011, Grievant submitted a Motion for Default Judgment. A hearing was held on June 24, 2011, for the limited purpose of taking evidence on whether a default had occurred. On December 8, 2011, Administrative Law Judge Carrie H. LeFevre issued an Order denying the request for a default judgment. In that same Order, ALJ LeFevre granted Respondent's motion to consolidate the grievance regarding her leave restriction with the grievances previously consolidated under Docket Number 2011-1772-CONS.

The first four days of hearing on this consolidated grievance were held in the Charleston office of the West Virginia Public Employees Grievance Board before Administrative Law Judge Jennifer L. Stollings-Parr on July 21, December 13, December 14, and December 15, 2011. This matter was subsequently reassigned, for administrative reasons, to the undersigned Administrative Law Judge. A fifth and final day of hearing was held on July 26, 2012, by the undersigned Administrative Law

Judge. Before rendering this decision, the undersigned Administrative Law Judge listened to the recordings of the prior hearings and reviewed all exhibits. Throughout these proceedings, Grievant was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union, while Respondent was represented by Karen Miller and Robert A. Hogue, with the law firm of Miller, Weiler & Walters. This matter became mature for decision on September 10, 2012, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

This consolidated matter involves seven separate grievances which Grievant filed against PCHD, starting with a challenge to a leave restriction she was given, followed by an objection to a change in duties which she contends amounted to a "functional demotion," thereafter proceeding through three written disciplinary warnings or reprimands, followed by a combined reprimand and indefinite suspension, ultimately culminating with termination of her employment. These grievances represent the most recent developments in an ongoing dispute between Grievant and her employer which previously generated three decisions by this Grievance Board, including a ruling which overturned a previous termination of Grievant, based upon a finding that PCHD violated her rights under the grievance statute for public employees, W. Va. Code § 6C-2-1, *et seq*.

The most recent disciplinary actions Grievant is contesting generally involve charges of insubordination, or failure to comply with orders and directives in some manner. However, her termination included a charge that she abandoned her job.

Grievant adamantly disputes most of these charges, asserting that various facts are inaccurate, exaggerated or fabricated, while strenuously contending that this entire pattern of adverse actions resulted from her supervisors' systematic retaliation against her for exercising her First Amendment rights of speech and association, more particularly engaging in protected speech pertaining to animal rights and associating with a labor union, and for exercising her statutory right to submit grievances using the public employees grievance procedure established in W. Va. Code § 6C-2-1, *et seq*.

Some of Grievant's claims are unfounded and meritless while others are on point and persuasive. For reasons more fully set out below, this grievance is denied, in part, and granted, in part.

The following Findings of Fact are made based upon the record developed at the level three hearing.

Findings of Fact

1. Grievant was employed by the Putnam County Health Department ("PCHD") as a Registered Sanitarian. Grievant was previously employed as a Registered Sanitarian in Jefferson and Berkeley Counties, West Virginia, and Loudon County, Virginia.

2. Grievant has a four-year degree in environmental health. She served 12 years in the United States Air Force as an Aircraft Armament Technician, attaining the rank of Staff Sergeant.

3. Carey Eden is employed by PCHD as a Sanitarian Supervisor and served as Grievant's immediate supervisor.

4. Jacqueline Fleshman is employed by PCHD as its Administrator. In that capacity, she served as Grievant's second level supervisor.

5. On March 16, 2009, Ms. Eden issued a written reprimand to Grievant for "insubordination" based upon Grievant's failure to attend a mandatory meeting as scheduled. Ms. Eden stated the following in the reprimand: "I feel that this was an innocent oversight by you and that you did <u>not</u> intentionally miss the meeting . . . ." R Ex 13 (emphasis in original).

6. On August 13, 2009, Ms. Fleshman issued a written reprimand to Grievant for insubordination relating to not following directives concerning an animal quarantine matter, as well as for deficient time management and continually questioning authority. R Ex 14.

7. On December 9, 2009, Grievant was suspended without pay for three days based upon her alleged failure to follow the PCHD Rabies Surveillance, Management and Control Policy ("PCHD Rabies Control Policy"). R Ex 11.

8. Grievant filed a timely grievance of the disciplinary action described in Finding of Fact Number 7, above, and, following a level three hearing, Administrative Law Judge William B. McGinley denied her grievance, rejecting Grievant's contentions that the adoption of the policy by PCHD was somehow flawed and that she was excused from following the policy because it was not valid and enforceable. *Koblinsky v. Putnam County Health Dep't*, Docket No. 2010-0824-PutCH (May 4, 2010) ("*Koblinsky I*"). R Ex 12.

9. On January 26, 2010, Ms. Eden issued a reprimand to Grievant for insubordination by breaking the chain of command and contacting Linda Whaley by e-mail with questions concerning the food code. R Ex 10.

10. On February 4, 2010, Ms. Eden issued a "written notice of required behavior modification" to Grievant based upon Grievant's failure to answer her cell phone while in the field, refusing to make copies of documents that were dark enough to be read, failing to revise a complaint form as instructed by Ms. Eden, and for violating the chain of command policy by contacting the State Food Program Manager before consulting with Ms. Eden. R Ex 9.

11. On February 25, 2010, Grievant was suspended without pay for allegedly refusing to meet with her supervisor, Ms. Fleshman, to discuss an alleged altercation between Grievant and a co-worker earlier that day. On March 2, 2010, Grievant was notified by Ms. Fleshman in writing that her previous suspension had become a termination from employment. R Ex 8.

12. On or about October 21, 2010, after Grievant was terminated from her employment with PCHD, Grievant placed a printed flyer on the windshields of numerous private vehicles parked in the vicinity of the Teays Valley Cinemas in Putnam County. The flyers contained the following statements:

Do you live in Putam (*sic*.) County?[1]

Do you own a pet??

> Please ask Commissioner Joe Haynes to abolish the "Putnam County Health Dept. Rabies Policy" that he approved during the Board of Health

[1] In addition to noting spelling and obvious grammatical errors, the original emphasis in this document is retained to the extent possible, given that a variety of font sizes were used.

Meeting on August 25, 2009 to be forced on the pet owners of Putnam County. (Board of health minutes are open public documents)

What does this policy demand?? (Policy was recorded at Courthouse in Nov 2009)

- **It demands that all stray animals involved in a biting incident be "Euthanized Immediately" without <u>any waiting</u> <u>period</u> for the owner to find their pet. This could be your lost frightened pet!**

- **It demands that your pet be <u>removed from your home</u> during the 10-Day confinement and placed at your veterinarians or The Animal Shelter at your expense.**

- **It demands that this confinement takes place <u>within 1 hour</u> Or the Health Dept. will issue an order for Animal Control Officers to remove your pet from your home to be confined at the shelter.**

- **No other county in WV forces such a policy on its citizens. They Follow the State Rabies Manual that allows people to keep their pets at home and allows stray animals to be kept for the 10-day observation and then adopted to caring homes.**

Have you been hurt by the actions of this Health Department? Have you been forced to surrender you (*sic*.) pet? Have you been forced to have your pet euthanized under this Administrator or the previous Administrator Bob Peck who also developed his own policy and took many house pets and had them euthanized because they didn't have current rabies vaccinations? This is wrong and someone needs to answer for what you were forced to do. Tell me your story at (**http://mystory-mypet.blogspot.com**). Stand up with me to fight this Goliath and let your voice be heard.

The Health Department Administrator, **Jackie Fleshman**, wrote this policy in July 2009, not the Health Officer. She forced it on the citizens of Putnam County (you) months before the Board of Health ever reviewed it. She doesn't own a pet and she doesn't care about your pet. The policy never went out for public comment prior to being approved therefore it is illegal. It was approved in a closed meeting <u>after</u> the Board Went into Executive Session. There were no citizens at this meeting because no one was told!!

I confronted Commissioner Joe Haynes about this illegal policy, During the Candidate Forum meeting on October 12, 2010 held at the Sleepy Hollow Club, and I ask (*sic*.) him why he had approved a separate Rabies

Policy For the Health Dept. He stated that he didn't have any knowledge of the policy. When I continued to question him he stated that the Health Department doesn't have the time. TIME?? Do Animal Control Officers have more TIME then (*sic*.) the Health Department? Does the shelter have the room and resources to confine pets for 10 days and the TIME to care for them? Is the shelter not over crowded (*sic*.) already? What does it cost the taxpayers to test an animal's head for rabies at the State Lab? How much does it cost to have an animal euthanized? What about your rights? Are not your tax dollars paid to keep the programs properly running at the Health Department? Every other Health Dept. seems to have the **TIME** to follow the State Rabies Manual to help citizens keep their pets in their homes. Why are health dept. employees told by Ms. Fleshman that they are "exempt employees" that can go home whenever they want to as long as they did what they needed to do for the day. Their work can be done at their "own convenience" says Carey Eden the Sanitarian Supervisor. Explain this to the citizens of Putnam County Ms. Fleshman???

Did you know: there has never been a case of terrestrial rabies in Putnam County? So why develop such a harsh policy to force on pet owners? It doesn't matter if your pet is up to date on its Rabies Vaccinations or not, according to the State Rabies Manual it must be observed for 10 days from the incident, but in Putnam Co. only must your pet leave your home.

Many of the incidents received by the Health Dept. involve people being bitten by their own pets; by accident or when pet owners are playing with or teasing their pet, or the pet was provoked and frightened. Some have involved older/ill animals. One owner ask (sic.) If he put dog down (*sic*.) because he feared it would suffer and not make it through the quarantine period, or the case of an older Dalmatian that had a stroke and couldn't walk yet the owner was forced to remove her dog from her care and was told she had one hour to do this or Animal Control would be called to take her pet from her. Some were even forced to be euthanized, as in the case of a little English Bulldog (Frank), where the owners were threatened by **Carey Eden, Sanitarian Supervisor**, to have the sheriff sent to their home if they didn't euthanized (*sic*.) their little dog the next morning. There was absolutely no reason to have demanded this little dog be euthanized. Could the reason be because she had challenged Mr. (*sic*.) Eden's authority? This woman has resigned from her job, sold her home and left WV. Could this be why???? Shame on Ms. Eden.

R Ex 7.

13. Grievant filed a timely grievance of her suspension/termination as described in Finding of Fact Number 11 and, following a level three hearing, Administrative Law Judge William B. McGinley granted her grievance, finding that PCHD had improperly denied Grievant her right to have a representative at an investigative interview as provided in W. Va. Code § 6C-2-3(g)(1). The legal basis for that ruling is summarized in the following excerpt:

> Grievant had a statutory right to have a representative at the meeting with her supervisor. Since the supervisor did not have authority to require Grievant to waive that right, Respondent failed to prove that Grievant willfully refused to follow a valid directive. Consequently, Respondent failed to prove Grievant was guilty of insubordination.

Koblinsky v. Putnam County Health Dep't, Docket No. 2010-1306-CONS (Nov. 8, 2010) ("*Koblinsky II*"). R Ex 8A.

14. PCHD was ordered to reinstate Grievant and to allow her to have a representative present at any subsequent meeting regarding her alleged misconduct on February 25, 2010. *Koblinsky II*.

15. As directed by this Grievance Board in *Koblinsky II*, PCHD reinstated Grievant to her position from the date of her termination with full back pay and benefits. Grievant returned to work on December 13, 2010. *See* G Ex 10.

16. On an unspecified date in December 2010, before Grievant returned to work, Grievant attended a public event where she obtained signatures on a petition seeking rescission of the PCHD Rabies Control Policy. The handout/flyer was ordinarily attached to such petitions, and these documents had been posted in public places around the county, including Post Offices and grocery stores, for citizens to sign.

17. On an unspecified date in or around early December 2010, Trina Smith, a PCHD employee who was working in Environmental Health at the time, participated in a conversation with Ms. Eden regarding Grievant's upcoming return to work. During that conversation, Ms. Eden stated that Grievant would not be there for long because she would be assigned to do nothing other than animal bites, and when Grievant did not do the job correctly, she would be fired, or words to that effect.

18. Another PCHD employee, Rebecca Harless, overheard part of a similar conversation between Ms. Eden and Ms. Fleshman before Grievant was reinstated from her termination wherein it was stated that they would find a way to fire Grievant when she came back to work, or words to that effect.

19. Following her reinstatement in accordance with *Koblinsky II*, Grievant met with Ms. Fleshman, accompanied by her representative, Gordon Simmons, on December 13, 2010, and presented her version of events regarding the incident with a co-worker that had transpired on the morning of February 25, 2010. *See* G Ex 10. Shortly after this meeting concluded, Grievant was suspended pending further investigation. R Ex 32.

20. Trudy Totten, PCHD's Personnel Director, conducted an investigation into the events of February 25, 2010, providing a written report to Ms. Fleshman on or about December 17, 2010. R Ex 33.

21. On January 4, 2011, PCHD suspended Grievant for 30 days, retroactive to December 13, 2010, when she was suspended pending investigation. This

disciplinary action did not include any reference to Grievant's actions in distributing the handout/flyer described in Finding of Fact Number 12, above.

22. Grievant filed a timely grievance challenging her suspension. Grievant also filed a separate grievance challenging the directives accompanying her suspension that she refrain from discussing the ongoing investigation with the news media and other outside agencies. These grievances were consolidated for hearing by this Grievance Board.

23. Following a level three hearing on March 31, 2011, Administrative Law Judge Landon R. Brown issued a decision denying the consolidated grievance described in Finding of Fact Number 22, above, thereby upholding Grievant's 30-day suspension. *Koblinsky v. Putnam County Health Dep't*, Docket No. 2011-0892-CONS (Sept. 14, 2011) ("*Koblinsky III*"). R Ex 34.

24. On January 25, 2011, Grievant, and other PCHD employees on the Environmental Staff, were advised in writing not to give interviews to the press without prior approval from Ms. Eden or Ms. Fleshman. This guidance also stated "do not have casual conversations with the Press about any subject we regulate because nothing is officially off the record." R Ex 52.

25. On March 7, 2011, Ms. Fleshman responded to questions from Grievant requesting clarification of the quarantine policy, providing additional guidance on the quarantine requirement in the PCHD Rabies Control Policy, as applied by the Administrative Law Judge in *Koblinsky I*. R Ex 24.

26. On March 7, 2011, Grievant wrote a letter to Ms. Fleshman, replying to the letter described in Finding of Fact Number 25, above. R Ex 25. Ms. Fleshman believed that Grievant was unduly argumentative and continued to feign ignorance of a policy that was clear and understandable.

27. On March 31, 2011, Carey Eden, Sanitarian Supervisor, issued a letter to Grievant regarding her attendance. The letter noted that Grievant took 33.5 hours of sick leave and 12 hours of annual leave between January 12 and January 31, working only three full work days out of 13 possible work days during that time period. The letter went on to state that Grievant took 34.5 hours of sick leave and 12 hours of annual leave between February 1 and February 28, working only eight full work days out of 19 possible work days. Further, the letter observed that Grievant took 46 hours of sick leave and 34.5 hours of annual leave between March 1 and March 31, working only five full work days out of 22 possible work days. R Ex 6.

28. The letter described in Finding of Fact Number 27 went on to explain that the frequency of Grievant's use of sick leave, without either a claim or evidence of serious medical necessity, demonstrated that Grievant was undependable. Accordingly, Ms. Eden required Grievant to present a physician's certificate for each absence due to personal illness, or the illness of a family member, within two days of her return to work. R Ex 6.

29. In addition, the letter described in Findings of Fact Numbers 27 and 28 instructed Grievant to request annual leave at least 48 hours in advance of when it was to be taken. The letter went on to explain the procedures Grievant should follow in

case of an emergency, and for reporting any unscheduled absence or tardiness. R Ex 6.

30. The Administrative Rule of the West Virginia Division of Personnel authorizes an agency to request appropriate substantiation of an employee's claim for sick leave, such as verification of an illness of less than three days when "an employee appears to have a pattern of leave use" that is inconsistent with the normal reasons for taking sick leave, "including such frequent use of sick leave as to render the employee's services undependable." W. Va. Division of Personnel Administrative Rule, 143 C.S.R. 1 § 14.5.

31. The Administrative Rule of the West Virginia Division of Personnel provides that annual leave "shall be granted at those times that will not materially affect the agency's efficient operation." W. Va. Division of Personnel Administrative Rule, 143 C.S.R. 1 § 14.3(c).

32. During April and May 2011, Grievant was no longer assigned to field duties as a Sanitarian, in accordance with orders from Ms. Fleshman. Grievant was limited almost exclusively to working in the office. As a consequence, other than an occasional animal bite inquiry and some routine clerical duties, Grievant was not kept busy performing the full range of duties for a Registered Sanitarian. Other Sanitarians employed by PCHD performed the vast majority of the field duties, such as inspecting restaurants and septic systems.

33. When Grievant questioned Ms. Eden about why she was not being assigned any significant duties, Ms. Eden responded by stating that it did not matter because the taxpayers were still paying Grievant.

34. On May 16, 2011, Grievant spoke with a citizen regarding a reported dog bite incident. Grievant was using an agency-subsidized cellular telephone to speak with the citizen. Although PCHD does not have a standard policy prohibiting employees from using their cell phones while working in its offices, Ms. Eden had instructed Grievant to conduct all her business using a land line at her workstation. Grievant approached Ms. Eden in the course of this conversation, stating, "I will not threaten this woman." Ms. Eden had never directed or suggested to Grievant that she threaten the citizen in any manner. It was not established that the citizen overheard this statement by Grievant.

35. On May 18, 2011, Julie Randolph, who was then employed by PCHD as an Accounting Technician, overheard part of a conversation involving Ms. Eden and Ms. Fleshman, wherein Ms. Fleshman stated that they were tired of dealing with Grievant's grievances, and they wanted to figure out a way to get her out of the Health Department, or fire her, or words to that effect. *See* G Ex 12. Ms. Fleshman admitted stating to one or more co-workers that she was "tired of this process because it took away from the daily work."

36. Grievant was scheduled to attend a training conference at Glade Springs Resort on May 19, 2011. PCHD provided a county vehicle for the employees attending

the conference, including Grievant, to travel together. The employees were notified to meet at PCHD at 5:30 a.m. on May 19, 2011, to travel to the training. *See* R Ex 4.

37. Grievant called Ms. Eden shortly before 5:30 a.m. on May 19, 2011, to advise that she was driving to the training in her own vehicle, and that she understood that she would not be reimbursed for her travel expenses. Grievant proceeded to the training at her own expense. *See* R Ex 4.

38. Grievant was able to attend the training and review a memo the other employees were given before they left PCHD. Grievant was not told about the memo when she was told about the travel arrangements. At the time Ms. Eden made the travel arrangements, she had not yet seen the agenda for the training, and only decided to prepare a memo after noting that the state rabies policy was included. The memo instructed all PCHD employees to refrain from discussing the rabies policy. *See* G Ex 3. There was no evidence that Grievant made any effort to violate this directive.

39. In May 2011, Ms. Fleshman and Ms. Eden suspected that Grievant was copying files and various PCHD records on the office copy machine after normal work hours. As a result, the entire staff in the Environmental Department was directed to leave the office at 4:00 p.m., unless they first obtained permission from a supervisor.

40. Subsequent to Ms. Fleshman's directive that all Environmental Department staff leave the building, an unnamed PCHD employee on an unspecified date told Ms. Fleshman that she had seen Grievant in the office around 4:40 p.m. Ms. Eden called Grievant on her cell phone to determine why she had not left the

building. Grievant was at home in her driveway when that call was received around 4:40 p.m.

41. When some PCHD "task notes" pertaining to animal bite incidents were later published in an online article pertaining to Grievant's employment situation, Ms. Fleshman concluded that Grievant was copying those documents on the day she was seen in the office after 4:00 p.m. There was no evidence to contradict Grievant's testimony that she went to the bathroom and left the building around 4:05 p.m. on the only day she was in the office after 4:00 p.m. following Ms. Fleshman's edict on departure times.

42. On May 28, 2011, Grievant was issued a "written disciplinary warning" by Jacqueline Fleshman, alleging a "continuing refusal to abide by the directives of your superiors, your continuing insubordinate behavior, and your continuing refusal to abide by the policies and practices for this organization." R Ex 1.[2] More specifically, on May 27, 2011, Grievant was alleged to have refused to sign the memorandum prepared by Ms. Fleshman which reflected the fact that Grievant was being allowed to take requested time off for grievance preparation without first speaking to her union representative. Further, on May 25, 2011, Grievant allegedly refused to speak with Ms. Fleshman or Ms. Eden. At that same time, Grievant allegedly raised her voice, and refused to follow the directives of her superiors to leave the premises, all of which culminated in Grievant's suspension with pay. R Ex 1.

[2] Although this document is dated May 26, 2011, Ms. Fleshman testified without contradiction that this was a typographical error and the actual date was May 28, 2011.

43. In addition to alleging Grievant's most recent misconduct, the written disciplinary warning described in Finding of Fact Number 42, above, recited a litany of previous acts of misconduct, including the following:

> a. On January 26, 2010, you received another written warning for insubordination. In this instance, you once again violated the chain of command. Specifically, in direct violation of policy, you contacted Linda Whaley by e-mail on January 21, 2009, regarding issues with the food code. You were once again reminded that further misconduct would result in additional action.
>
> b. On February 4, 2010, you were issued another written warning regarding instances of inappropriate and unacceptable behavior. First, despite being directed to do so, you continued to refuse to answer your phone while in the field. As a result of your refusal to abide by this directive, you missed a directive not to inspect another restaurant facility and made and (*sic*.) unnecessary trip to that facility. Second, despite a directive from your superiors, you continued to refuse to make copies of documents that were dark enough to be read. While you claimed that clerks should be performing this duty, the fact remains that you failed to disregard (*sic*.) a directive of your supervisor.
>
> c. On February 25, 2010, you were involved in another incident involving unacceptable behavior in the workplace. You inappropriately engaged in an argument with a fellow coworker, raised your voice, made inappropriate statements, and caused this worker to fear for her safety. You also failed to comply with directives to return to your office and refrain from additional verbal confrontations. You even accused coworkers of talking about you while once again yelling and acting inappropriately, especially since the coworker were (*sic*.) engaged in a conversation about a business matter. You ultimately received a 30 day suspension for this incident.
>
> d. On October 21, 2010, you once again engaged in inappropriate actions by inappropriately placing flyers critical of this agency and specific employees on vehicles located at the Teays Valley Cinemas. Such behavior is unacceptable and inappropriate.
>
> e. On March 31, 2011, you were issued additional written discipline regarding your attendance record. You were notified that your record of frequent absences between January 12, 2011 and March 30, 2011, was placing an undue hardship on your department. You were notified that you would need to provide a physicians' (*sic*.) certificate [for]

any absence due to personal illness or family member illness. This was based on your suspected abuse of the sick leave made available to you. You were also reminded that annual leave must be requested in advance. Finally, you were reminded that you were to report any deviation from your normal schedule, including tardiness, to your supervisor.

f. Recently, on May 16, 2011, you were involved in yet another incident of inappropriate behavior. On that day, you were speaking to an individual regarding a dog bite incident. You had contacted this person on your cell phone; you followed your supervisor into the testing room. You told her about the situation. Then, speaking loudly enough to be heard over the phone, you said, “Carey I will not threaten this woman” or words to that effect. This was inappropriate workplace behavior and cannot be tolerated.

g. On April 15, 2011 you were complaining to a restaurant manager while on office business that this organization is doing everything possible to have you fired.

h. On April 15, 2011 you were discussing the health issues of your immediate supervisor with the same restaurant manager while you were there on official business.

i. On May 19, 2011 you disregarded directives from your supervisors, including disobeying a directive to be at the office at 5:30 AM to travel as a group to training. You called your supervisor at 5:27 AM and stated that you would leave from your house and drive yourself.

j. Disregarding a directive that you are to leave the office by 4:00 pm and then not leaving until 4:40 pm.

k. On March 16, 2009, you received a written disciplinary warning for insubordination. This written warning was issued to you for failure to attend a mandatory meeting on March 13, 2009. You refused to attend this meeting despite being instructed beforehand that attendance was mandatory. This written warning included a reminder that you must be diligent in following directives and policies.

l. On August 13, 2009, you received a written warning regarding your handling of an animal encounter and about your performance in general. Specifically you failed to complete your job assignment regarding this animal encounter by not conducting follow-up investigation regarding whether the animal was living in Kanawha County. You failed to follow a directive from your superiors when you did not have the animal immediately picked up on July 29, 2009. Instead, you not only

failed to obey a directive from your supervisor to contact the owner immediately, you also violated chain of command policy by calling me to discuss the situation rather than calling the animal's owner.

m. In this same August 13, 2009, warning you were also warned that you need to better manage your time and increase the pace of your work. You were told that you were not to continuously question the policies of the agency and that your failure to abide by directive (*sic*.) Of your superiors, failure to follow policy and other type of inappropriate workplace behavior would result in further disciplinary action.

n. On December 9, 2009, you were suspended for three (3) working days without pay for your failure to follow the Putnam County Health Department Rabies Surveillance, and (*sic*.) Management, and Control Policy. This incident in question involved a stray cat that bit a teen girl. In your work on this matter, you refused to follow the Rabies Policy and thereby provide (*sic.*) the child's mother with incorrect information about the quarantine policy. Such an act was deemed insubordination. You were noticed that any attitude and conduct toward your superior and fellow workers cannot and will not be tolerated. We have made exhaustive efforts to work with you and to give you every opportunity to correct your insubordinate, inappropriate, and unacceptable behavior and work performance, however despite these efforts, you continue to refuse to act in the appropriate manner.

o. Your inappropriate conduct has impacted the morale and efficiency of this office. Many of you (*sic*.) co-workers have expressed concerns about working with you. They have expressed concerns about being alone with you because you will accuse them of things. They have experienced you yelling at co-workers on multiple occasions and are uncomfortable with your angry behavior. They have expressed concern that your actions limit the ability of the agency to work as (*sic*.) cohesive unit. They have expressed concerns that your actions create a tense, stressful working environment. This agency cannot tolerate further inappropriate behavior and action on your part.

p. You are once again warned that you cannot continue to engage in inappropriate behavior and workplace conduct. You cannot continue to refuse to obey the directors of your superiors. You cannot continue to disregard policy and practices implemented by this agency. You cannot continue to be disrespectful and intimidating toward your superiors and fellow workers. Such behavior cannot be tolerated. Therefore, please be advised that any additional inappropriate actions of

> any kind or nature will result in additional disciplinary action, up to and including termination.

R Ex 1.

44. On May 27, 2011, Grievant refused to sign a memorandum prepared by Ms. Fleshman which reflected that Grievant was being granted four hours of work time for preparation of an unspecified grievance. The memorandum included the following statement:

> However, I would like to note that you had previously been approved to take time off on Wednesday, May 25, 2011 for grievance preparation on this same grievance. However, you were sent home that day for other inappropriate conduct. You were also off on Thursday, May 26, 2011. Finally, it seems unusual that you would ask to take time off today to prepare for a grievance which has just been filed and for which no hearing or other activity has been set. Nonetheless, you are being granted the four (4) hours of time requested to prepare for this grievance.

R Ex 2.

45. Ms. Fleshman wrote a handwritten note on the bottom of the memorandum described in Finding of Fact Number 44, above, as follows: "States she has to talk to Gordon first. She reads this as discipline." R Ex 2.

46. On May 25, 2011, Ms. Eden attempted to communicate with Grievant regarding her pending grievances. Grievant refused to have any discussion with Ms. Eden without a Union representative present. When Ms. Eden insisted on relaying some instructions from Ms. Fleshman to Grievant, Grievant persisted in her insistence that her supervisor could not speak to her without a representative present. Ms. Eden ultimately directed Grievant to leave the premises. *See* R Ex 3. Grievant did not immediately comply with this directive, although she eventually left the PCHD offices.

47. Grievant and her Union representative, Mr. Simmons, met with Ms. Fleshman on May 27, 2011, to discuss Grievant's most recent alleged infractions. During that meeting, Grievant said to Mr. Simmons, "I must be a bully magnet" and, "if we were on the playground, she would pull my pigtails," or words to that effect. Ms. Fleshman took offense at these comments which she believed were directed toward her.

48. On May 31, 2011, Ms. Fleshman issued a written disciplinary warning to Grievant as follows:

> This written disciplinary warning is being issued to you as a result of your inappropriate conduct during a meeting in this office on May 27, 2011. I met with you and your representative to issue you a written disciplinary warning due to your refusal to abide by the directives of your superiors, your refusal to abide by the policies and procedures of this office, and your continuing refusal to act in a manner appropriate for the workplace. Unfortunately, during that meeting you continued to act in an inappropriate and insubordinate manner.
>
> During our meeting you were rude and disrespectful. You made inappropriate comments, such as "I must be a bully magnet" or words to that effect. You refused to sign the written disciplinary warning that was provided to you. You were directed to do so merely to acknowledge that you had read the disciplinary warning. Such a refusal is yet another act of insubordination on your part. Such inappropriate behavior cannot and will not be tolerated.
>
> Additionally, you have on several occasions commented that you want to lose your grievances so that you will be fired. Your continuing refusal to perform your job duties as directed by your superiors, your refusal to abide by office policies, your continuing inappropriate behavior, and your comments that you would like to lose your grievances and be fired all make it obvious that you do not wish to continue working for this agency. In that case, you are free to resign your employment at any time. However, if you are going to continue to work for this agency, you will be expected to act in an appropriate manner.
>
> Once again, your inappropriate workplace behavior cannot and will not be tolerated. Your refusal to sign an acknowledgment that you

> received a disciplinary warning is insubordination. Additional acts of insubordination, breach of agency policy or other instances of inappropriate behavior will result in additional disciplinary action, up to and including termination from employment.

R Ex 15.

49. Grievant signed the written warning described in Finding of Fact Number 48, above, with the written proviso: "I do not agree with these actions or these statements." R Ex 15.

50. On June 2, 2011, Ms. Fleshman issued Grievant another written disciplinary warning as follows:

> On May 27, 2011, and May 31, 2011, this office issued you written disciplinary warnings due to your inappropriate workplace conduct. These written disciplinary warnings were just the latest effort to work with you so that you would perform your job assignments in an appropriate and acceptable manner. Unfortunately, despite these written warnings and our previous attempts to work with you on your behavior, you continue to refuse to carry out your assigned duties in an acceptable manner.
>
> Specifically, on May 31, 2011, you left the building without permission and without notifying your supervisor or me that you were leaving. The incident occurred at approximately 2:15 p.m. At that time, I began to look for you only to discover that you had left the building without permission and without notification to your supervisor or me. Closely after that incident, you were gone again, for approximately twenty minutes, as during this time we were able to move your desk out and replace it with another within the time frame you were gone as you could not be located. Such actions are unacceptable. You know that you are to be in the office available to work. You are to be at your workstation.
>
> On June 1, 2011, your supervisor tried on at least two separate occasions to locate you in order to inquire as to your whereabouts due to the fact she had an assignment to give to you, however the assignment was delayed, as you were not at your workstation and could not be found. In the past you did notify us as to when you left your workstation so your acts are obviously intentional. As you are aware, you are required to be at your work station (*sic*.) during work time. Further, you are to obtain permission before leaving the building. However, you continue to refuse to abide by these policies.

> Despite our best efforts to work with you to improve your workplace behavior, you continue to engage in unacceptable conduct. You continue to refuse to follow the directives of your superiors and continue to refuse to abide by the policies and procedures of this office. Therefore, you are being issued this written disciplinary warning. You cannot continue to refuse to abide by agency policy.
>
> Further, you are advised once again that you are not to leave your workstation during work time. Further, you are not to leave the building during work time with out (*sic*.) permission. Finally, if you have to leave work due to an emergency, you are to notify the receptionist, if you (*sic*.) supervisor is not available, of the time you are leaving and the emergency that requires you to leave the building. Finally, you are once again advised that any additional inappropriate workplace behavior on your part, including but not limited to insubordination, refusal to follow policies, or refusal to follow the directive of your supervisor, will result in additional disciplinary action, up to and including termination from employment. This includes any taping of conversations during work hours without first receiving permission from Jackie Fleshman.

R Ex. 16.

51. On June 2, 2011, Grievant refused to sign the written disciplinary warning described in Finding of Fact Number 50, above, despite Ms. Fleshman's explanation that Grievant was only being asked to sign the document to acknowledge that she had received and reviewed the document.

52. Grievant was issued another disciplinary warning letter on June 3, 2011, for refusing to sign the written disciplinary warning described in Finding of Fact Number 50, above, on June 2, 2011, as described in Finding of Fact Number 51, above. *See* R Ex 17.

53. On May 17, 2011, Ms. Fleshman conducted a staff meeting with PCHD employees. One of the purposes of the meeting was to convey information to PCHD employees in accordance with directions from the Board of Health. Ms. Fleshman

openly recorded the meeting, advising the employees that she intended to give the recording to the Board. This recording was made to allow Ms. Fleshman to provide the Board of Health with confirmation that she had conveyed their instructions to PCHD's employees.

54. Ms. Fleshman indicated that without reviewing a transcript of the meeting, she could not be certain whether confidential internal personnel matters were discussed during the May 17 staff meeting.

55. A recording of the May 17, 2011 staff meeting with PCHD employees was thereafter publicly posted on the Internet on the YouTube website.

56. Ms. Fleshman listened to the recording and believed that she heard Grievant verbally stating the date and time at the beginning of the audio recording.

57. On June 3, 2011, Ms. Fleshman met with Grievant and asked her to complete a written questionnaire pertaining to what she described as an "internal investigation." The questionnaire was labeled "Investigation Questions – Barbara Koblinsky, RS," and stated the following:

> The subject matter of this investigation will be kept confidential to the extent possible. You are instructed not to discuss this matter with any other employees, members of the media, clients, family of clients, family or friends. With that in mind, please respond to the following questions:
>
> 1. Did you tape record or otherwise record a staff meeting conducted by Administrator Jacqueline Fleshman on or about May 17, 2011?
>
> a. If you did record this meeting in some fashion, please state the following:
>
> 1. What type of device or method did you use to record this meeting?

2. For what purpose did you record this meeting?

3. Did you provide a copy or transcript of this recording to any other individual?

i. If so; please provide the name of that individual, whether you provided them a copy or transcript of the recording and state the date and time when you provided them with a copy of this recording.

2. Are you aware of whether anyone else recorded this staff meeting conducted by Administrator Fleshman on or about May 17, 2011?

a. If so, please state:

1. Who taped the meeting.

2. How you know that they taped the meeting.

3. Whether they provided a copy or transcript of the recording to any other individual.

i. If so: please provide the name of that individual, what type of information (copy or a transcript) was provided to that person, and state the date and time when they were provided with a copy of this recording.

3. Please state whether you were in any way involved with the posting of any recordings of any images or recordings onto the YouTube website regarding Administrator Fleshman and/or the staff meeting held on or about May 17, 2011.

a. If so, please answer the following:

1. What items did you participate in posting on the YouTube website?

2. When did you participate in posting this information?

3. Who else assisted you in the posting of this information?

b. If you were not involved in the posting of this information, please answer the following:

1. Who was responsible for the posting of this information, if you know?

2. When did they post this information?

3. How do you know these individuals were involved in the posting of this information?

4. Have you been involved in the taping or recording of any other meetings or conversations of any type involving employees of the Putnam County Health Department?

a. If so, please answer the following:

1. Which individuals and/or events did you tape or record?

2. What type of recording did you make (e..g (*sic.)* tape recording, video recording, etc.)

3. Where did you conduct this taping or recording?

4. Was anyone else involved in this taping or recording?

i. If so: Who else was involved in this taping or recording?

ii. What role did they play in the taping or recording?

5. Are you aware of any other employee of the Putnam County health Department who have (*sic.*) been involved in taping or recording of any meetings or conversations of any type involving employees of the Putnam County Health Department?

a. If so, please answer the following:

1. What employees were involved in conducting such taping or recording?

2. What type of tape or recording did they make?

3. Where did they conduct this taping or recording?

4. How do you know that these individuals were involved in the taping and recording you have described?

6. Is there anyone else you believe we should talk with as part of this investigation?

7. Is there any other information you believe it is important that we know as part of this investigation?

R Ex 18.

58. Grievant refused to answer the written questions contained in the questionnaire described in Finding of Fact Number 57, above.

59. No other employees were given a written questionnaire similar to the document described in Finding of Fact Number 57, above. No other employees were questioned with regard to recording the May 17, 2011 staff meeting.

60. As a consequence of Grievant's refusal to answer the written questionnaire, Ms. Fleshman issued a letter to Grievant on June 3, 2011, suspending her without pay as follows:

> This letter will serve as a follow-up to the meeting held today with you and your representative. At that meeting, among other things, you were asked to complete written questions regarding an internal investigation being conducted by this office. Regretfully, you refuse to participate in this investigation even after I informed you that you would be suspended without pay until such time as you agreed to participate in this investigation. Therefore, please be advised that you are suspended without pay until such time as you agree to participate in this investigation.

R Ex 18.

61. The letter described in Finding of Fact Number 60, above, went on to advise Grievant of her right to grieve this suspension under the public employees' grievance procedure. R Ex 18.

62. Ms. Fleshman described this suspension as a "definite suspension" because Grievant could determine when she wanted to answer the questions, and thereby terminate the suspension. *See* G Ex 11. Ms. Fleshman stated Grievant did not have to admit to the conduct before she could return to work; Grievant was only required to answer the questions.

63. The West Virginia Division of Personnel Supervisor's Guide to Progressive Corrective and Disciplinary Action provides, in pertinent part, the following guidance concerning suspension without pay:

> Additionally, an employee may be suspended without pay while the agency conducts an investigation. Such suspensions should be imposed in only limited circumstances and only because the agency reasonably believes that the employee's presence presents a threat of continuing danger to persons or property, or because the agency believes the employee's presence may compromise the integrity of evidence. Suspensions pending investigation should be for a period not to exceed 30 calendar days. In limited circumstances where the investigation is not completed during that time, the original suspension may be extended, with written notification to the employee.

R Ex 19.

64. On June 3, 2011, Grievant was also issued another "written disciplinary warning" by Ms. Fleshman which, in pertinent part, stated the following:

> This written disciplinary warning is being issued to you as a result of your inappropriate conduct on June 2, 2011.

> Specifically, on that date you were called to a meeting where you were presented with another written disciplinary warning. At this disciplinary meeting, you stated that you would not answer any questions or sign any documents. I explained to you once again that you were being asked to sign the written disciplinary warning to acknowledge that you have received and reviewed the document. You were not being asked to sign to evidence your agreement with its contents. Nevertheless, you continued to refuse to sign the document. You continued to refuse to answer any questions.
>
> Such behavior is not only inappropriate for the workplace; it constitutes yet another act of insubordination on your part. Thus, you are once again warned that such insubordinate behavior is inappropriate and unacceptable. Further, you are once again advised that any additional acts of insubordination, refusal to abide by company policy, or other acts of inappropriate conduct will lead to additional disciplinary action, up to and including termination of employment.
>
> Based on the fact you are continually engaging in intentional acts of inappropriate workplace behavior, it is apparent that you wish to be terminated from your employment. This agency instead wants to continue to work with you in the hope that you will improve your workplace behavior and performance. However, should you desire to seek other employment, this agency will certainly work with you in your effort to do so. Of course, should your inappropriate behavior continue, you will be subject to additional discipline, up to and including termination.

R Ex 17.

65. On June 16, 2011, Ms. Fleshman sent correspondence to Grievant which stated the following:

> We are at a loss as to whether you have resigned your employment or continue to be suspended without pay since we have yet to hear from you. However, if your position is that you have not resigned, please forward us your portion of the health insurance payment of $24.10, dental and vision $19.98 for a total of $ 44.08 due by June 30, 2011. If we do not hear from you, we will assume you have resigned.

R Ex 20.

66. On the day before this letter was sent, Grievant participated in a grievance hearing with Ms. Fleshman.

67. On June 23, 2011, Ms. Fleshman again wrote to Grievant, this time stating the following:

> On or about June 16, 2011, this office forwarded you a letter. The letter explained that we were at a loss as to whether you have resigned your employment or continued to be suspended without pay since we had still not heard from you. That same correspondence stated that if you have not resigned, you were to forward your portion of your health insurance payment of $ 44.08. We also stated that if we did not hear from you, we would assume that you have resigned your position
>
> To this date, we still have yet to hear from you on these matters. Therefore, this office will now assume that you have resigned your position and are no longer employed by the Putnam County Health Department.

R Ex 21.

68. Grievant responded to Ms. Fleshman's letter dated June 16, 2011, described in Finding of Fact Number 67, above, with a check for $44.08 with "health/dental/vision" on the memo line. This check was received by PCHD on June 27, 2011. *See* G Exs 5 & 6.

69. Ms. Fleshman returned the check to Grievant, concluding that Grievant had failed to make her intentions clear. *See* G Ex 7.

70. On July 21, 2011, Ms. Fleshman sent correspondence to Grievant entitled "Notice of Contemplated Dismissal for Cause." This document stated the following:

> Pursuant to the Administrative Rule of the West Virginia Division of Personnel, this letter will serve as Putnam County Health Department's written notice that it is contemplating dismissing you for cause.
>
> This action is taken according to Section 12.2 of the Administrative Rule of the West Virginia Division of Personnel. Further, as authorized by

W. Va. Code § 29-6-10(12), I am requiring your immediate separation from the workplace and you will be paid up to a maximum of fifteen (15) calendar days' severance pay instead of being given the opportunity to work out the fifteen (15) calendar day notice period. You do, however still have the opportunity to respond to the matters of this letter provided you do so by close of business on August 5, 2011, which would be the contemplated date of dismissal. You will also be paid any annual leave accrued and unused as of the contemplated date of dismissal.

The Putnam County Health Department is contemplating dismissal for cause in order to preserve the efficient and orderly operation of the Putnam County Health Department as you refuse to take direction from me. You refuse to communicate with me and you refuse to follow agency policy and procedures

The reasons for contemplating your dismissal are addressed below. Putnam County health department incorporates by reference all prior written disciplinary warnings and other documentation identified or referenced below and any and all other acts of insubordination, misconduct or breach of agency policy or procedure during your employment:

1. Written Disciplinary Warning dated May 26, 2011.

You were issued this written disciplinary warning because of your continuous insubordinate behavior. You continued to refuse to abide by the directives of your superiors. Also, you continued to refuse to abide by the policies and practices of the agency. You were put on notice that such behavior would not be tolerated. You were put on notice that any further acts of inappropriate workplace behavior, insubordination, or failure to follow applicable policies and procedures would result in additional disciplinary action, up to and including termination from employment.

Specifically, it was communicated to you that on May 27th, 2011, I provided you a work-related memorandum stating that you were being allowed to take time off as requested for grievance preparation. I asked you to sign the memorandum to simply have you acknowledge that you had read the memorandum. You stated that you would not sign the memorandum because you had to first speak with your union representative. I tried to explain to you that the memorandum was not disciplinary in nature, and that refusing to sign the memorandum was an act of insubordination.

The written disciplinary warning also discussed you being sent home on May 25, 2011, because of unacceptable conduct in the workplace. On this

day, you were rude, belligerent, and refused to appropriately discuss issues with your superiors. You refused to talk with me or your immediate supervisor. You stated that anything that needed to be said had to go through your union representative. You are well aware that you must communicate with your supervisor at work. You inappropriately raised your voice. You refused to follow the directives of your superiors when told to leave the premises, and you generally conducted yourself in a manner that is not appropriate for the workplace. You were disruptive.

The written disciplinary warning discussed numerous incidents that have taken place in 2009, 2010 and 2011, where you have displayed inappropriate and disruptive workplace behavior, including but not limited to the following:

On April 15, 2011, you were complaining to a restaurant manager while on office business that this organization is doing everything possible to have you fired.

On April 15, 2011 you were discussing the health issues of your immediate supervisor with the same restaurant manager while you were there on official business.

On May 19, 2011, you disregarded directives from your supervisors, including disobeying a directive to be at the office at 5:30 a.m. to travel as a group to training. You called your supervisor at 5:27 a.m. and stated that you would leave from your house and drive yourself.

You disregarded a directive to leave the office by 4:00 p.m., by leaving at 4:40 p.m.

In addition on March 16, 2009, you received a written disciplinary warning for insubordination. The written warning was issued to you for failure to attend a mandatory meeting on March 13, 2009. You refused to attend this meeting despite being instructed beforehand that attendance at the meeting was mandatory. This written warning included a reminder that you needed to be diligent in following directives and policies.

On August 13, 2009, you received a written warning regarding your handling of an animal encounter and about your work performance in general. Specifically, you failed to complete your job assignment regarding this animal encounter by not conducting a follow-up investigation concerning whether the animal was living in Kanawha County. You failed to follow a directive from your superiors when you did not have the animal immediately picked up on July 29, 2009. Instead, you not only failed to obey a directive from your supervisor to contact the owner immediately,

you also violated the chain of command policy by calling me to discuss the situation rather [than] calling the animal's owner.

In the same August 13, 2009, warning, you were warned that you needed to better manage your time and increase the pace of your work. You were told that you were not to continuously question the policies of the agency and that your failure to abide by directives of your superiors, failure to follow policy and other types of inappropriate workplace behavior would result in further disciplinary action.

On December 9, 2009, you were suspended for three (3) working days without pay for your failure to follow the Putnam County Health Department Rabies Surveillance, and Management, and Control Policy. The incident in question involved a stray cat that bit a teen girl. In your work on this matter, you refused to follow the rabies policy and thereby provided the child's mother with incorrect information about the quarantine policy. Such conduct was deemed insubordinate. You were put on notice that any repeat violation of policy, or any other infraction, would result in additional discipline up to and including discharge.

On January 26, 2010, you received another written warning for insubordination. In this instance, you violated the chain of command. Specifically in direct violation of policy, you contacted Linda Whaley by e-mail on January 21, 2009, regarding issues with the food code. You were reminded that further misconduct would result in additional disciplinary action.

On February 4, 2010, you were issued another written warning regarding instances of inappropriate and unacceptable behavior. First, despite being directed to do so, you continue to refuse to answer your phone while in the field. As a result of your refusal to abide by this directive, you missed a directive not to inspect another restaurant facility and made an unnecessary trip to that facility. Second, despite a directive from your superiors, you continue to refuse to make copies of documents that were dark enough to be read. While you claim that clerks should be performing this duty, the fact remains that you failed to follow a directive of your supervisor.

On February 25, 2010, you were involved in another incident involving unacceptable behavior in the workplace. You engaged in an argument with a fellow worker, raised your voice, made inappropriate statements, and caused this worker to fear for her safety. You also failed to comply with directives to return to your office and refrain from additional verbal confrontations. You accused co-workers of talking about you while once again yelling and acting inappropriately, especially since the co-workers

were engaged in a conversation about a business matter. You ultimately received a thirty (30) day suspension for the incident[.]

October 21, 2010, you engaged in inappropriate conduct by placing ‘flyers’ on vehicles at the Teay’s Valley Cinemas. These "flyers" were very critical of this agency and agency employees. These "flyers" showed a disregard of your duties and responsibilities to the agency and staff. Such conduct is disrupted (sic.) to the efficient and orderly operation of the agency. Also, these "flyers" damaged the personal loyalty and confidence the agency and staff had with you.

On March 31, 2011, you were issued a written disciplinary action because of your attendance issues, which placed undue hardship on your department.

In addition, on May 16, 2010, you were speaking to an individual regarding a dog bite incident. You contacted this person on your personal cell phone, which was not appropriate; you are supposed to use your desk phone to make such calls. Additionally, while speaking to this person you followed your supervisor into the testing room. You told her about the situation. Then, speaking loudly enough to be heard over the phone, you said "Carey I will not threaten this woman" or words to that effect. You were told that this was inappropriate and unacceptable. You (sic.) supervisor had made no comments nor gave you any directives that required you to threaten this individual.

The incidences described in the May 26, 2011 written disciplinary warning addressed just some of the inappropriate conduct that you have engaged in throughout your employment with this agency. You were put on notice that your refusal to obey supervisor directives, your refusal to follow stated policies, and your inappropriate attitude toward your supervisors and coworkers would not be tolerated. You were told that the agency had made exhaustive efforts to work with you and to give you every opportunity to improve your behavior and work performance. However, you continue to engage [in] inappropriate and insubordinate conduct.

You were put on notice that your conduct has impacted the morale and efficiency of this office. Many of your co-workers have expressed concerns about working with you. They have expressed concerns about being alone with you because you will accuse them of things. They have experienced you yelling at co-workers on multiple occasions and are uncomfortable with your angry behavior. They have expressed concern that your actions limit the ability of this agency to work as a cohesive unit. They have expressed concerns that your actions create a tense, stressful working environment. Thus, this agency communicated that it could not

tolerate further inappropriate behavior and action on your part.

You were warned against continuing to engage in such a (*sic*.) conduct. You were warned that if you did, you would be subjected to additional disciplinary actions, up to and including discharge.

Your harassing and intimidating behavior is highly disruptive to the workplace.

2. Written Disciplinary Warning dated May 31, 2011

This written disciplinary warning was issued because of your inappropriate and disruptive conduct during a meeting on May 27, 2011. In particular; I met with you and your representative concerning another written disciplinary warning to be issued to you. However, during the meeting you were rude and disrespectful. You made inappropriate comments, such as "I must be a bully magnet," or words to that effect. You refused to sign a written disciplinary warning that was provided to you.

Additionally, it was noted that on several occasions you commented that you wanted to lose your grievances so that you would be fired. You were told that your continuing refusal to perform your job duties, and your refusal to abide by office policies, your continuing inappropriate behavior, and your comments that you would like to lose your grievances and be fired, made it obvious that you did not want to work at the agency anymore. You were told, however, that if you were going to continue to work for this agency, you needed to act in an appropriate manner.

You were told that if you engaged in additional acts of insubordination, breach of agency policy, or other instances of inappropriate behavior, further disciplinary action would be taken, up to and including termination from employment.

3. Written Disciplinary Warning – June 2, 2011

You were issued another written disciplinary warning on June 2, 2011. It is apparent that you believe that you can do anything you please in the work place (*sic*.) without any repercussion. You believe that you do not have to listen to any supervisors. Clearly, this is not the proper attitude to have in the workplace.

Specifically, on May 31, 2011, you left the building without permission and without notifying your supervisor or me that you were leaving. The incident occurred at approximately 3:00 p.m. At that time, I began to look for you only to discover that you had left the building without permission and

without notification to your supervisor or me.

On the morning of June 1, 2011, your supervisor tried on at least two separate occasions to locate you in order to issue you a job assignment. Both times, she could not locate you. Further you are to obtain permission before leaving the building. However, you refuse.

You were advised again that you were not to leave your workstation during work time. Further, you were advised not to leave the building during work time without permission. Again, you were advised that any additional inappropriate workplace behavior on your part, including but not limited to insubordination, refusal to follow policies, or refusal to follow the directives of your superiors, would result in additional disciplinary action up to and including discharge from employment.

4. Written Disciplinary Warning-June 3, 2011

This document was issued to you as a result of your inappropriate conduct on June 2, 2011. Specifically, on this date you were called to a meeting where you were presented with a written disciplinary warning. At this meeting, you stated you would not answer any questions or sign any documents. I explained to you, once again, that you were being asked to sign the written disciplinary warning to acknowledge that you had received and reviewed the document. You were not being asked to sign to evidence your agreement with its contents. Nevertheless, you still refused to sign the document. You continued to refuse to answer any questions. Thus, you were warned that such insubordinate behavior was inappropriate and unacceptable. You were warned that engaging in further such conduct or if you continued to refuse to follow agency policy, further disciplinary action would be taken.

5. Suspension Letter-June 3, 2011

You were suspended for your refusal to participate in an internal personnel investigation. You were asked to answer some written questions, but refused. This letter put you on notice that you would be suspended until you answer the questions. Thus, the length of the suspension was left totally up to you.

6. PutnamLive Article – Koblinsky "I have been suspended."
PutnamLive Article – "Putnam Rabies Policy is Killing Animals"
Handout/Flyer – Abolish PCHD Rabies Policy

As you know, I provided you with internal investigation questions to

answer. You were specifically instructed that the subject matter of the investigation was to be kept confidential. You were instructed not to discuss this internal investigation with the media. However, you deliberately disobeyed these instructions. Instead of answering the questions, you have given the internal investigation questions to the media for publication. You have made a mockery of the process. This deliberate act of insubordination and violation of confidential information cannot be tolerated.

Contrary to what you and Mr. Hallburn at PutnamLive may believe, you as a public employee, do not have an unfettered First Amendment right to say anything you want to the media or to the public about me as your supervisor, about your job at the Putnam County Health Department, about Putnam County Health Department policies, and about Putnam County Health Department Staff and Supervisors.

Specifically, the West Virginia Supreme Court had (*sic*.) identified restrictions on a public employee's right to free speech.

First, an employee's speech, to be protected, must be spoken as a citizen on a matter of public concern... If the employee did speak as a citizen on a matter of public concern, the possibility of a first amendment claim arises and a second and a third factor are invoked. The second factor that is invoked considers statements that are made with the knowledge that they were false or with reckless disregard of whether they were false, and such statements are not protected. The third factor that is invoked considers statements made about persons with whom there are close personal contacts that would disrupt discipline or harmony among coworkers or destroy loyalty and confidence, and such statements may not be protected.

See Syl.Pt.5, Alderman v. Pocahontas County Board of Education, 675 S.E.2d 907 (W. Va. 2009). In addition, the Putnam County Health Department has an interest in maintaining the efficient and orderly operation of its affairs. See Orr v. Crowder 315 S.E.2d 593 (W. Va. 1983).

It is clear that all of your comments in the "Handout/Flyer," and all of your comments in the "I Have Been Suspended" article, and all of your comments in the "Putnam Rabies Policy is Killing Animals" letter, do not qualify as protected public employee speech.

You have made statements about the workplace and staff that are not a matter of public concern; you have made statements with the knowledge that they are false or with reckless disregard of whether they are false. Also, you have made statements about me and others that disrupt

> discipline and harmony among the staff and have destroyed any personal loyalty and confidence that the agency and employees need to have in you in order for you to carry out your job duties.
>
> In addition, you have admitted to making a copy of Putnam County Health Department internal notes and removing them from the office. You have provided these notes to PutnamLive. Theft of such documents is totally inappropriate. You state that I am not educated to participate in drafting policies for the Putnam County Health Department. You are making personal disparaging remarks against me and placing me in a false light. Your comments are false or show reckless disregard for the truth and are disruptive to the workplace. You have made reckless accusations of unlawful conduct on my part. How can I or any supervisors have any confidence in your ability to carry out your job duties as a sanitarian when you attack and disparage the staff in this manner?
>
> Putnam County Health Department has a lawful interest in maintaining an efficient and orderly operation of affairs. You have disparaged sensible Putnam County Health Department policies which you are supposed to enforce. You deliberately work against the Putnam County Health Department in its efforts to carry out its duties and responsibilities. You have breached your duty of loyalty and responsibility to your employer on a routine basis. Your statements in these articles and handouts have destroyed any confidence that I have in your ability to carry out your job duties and responsibilities. You repeatedly engage in insubordinate conduct. You continue to try to intimidate and harass me, the supervisors, and the staff. It is not possible for the Putnam County Health Department to carry out its duties and responsibilities with you on staff.
>
> **7. Section 12.2(c) - Job Abandonment**
>
> In addition, you stayed away from work instead of answering the investigation questions. Correspondence was sent to you, but you did not respond. Thus, you abandoned your job.

R Ex 41 (emphasis in original).

71. As of July 26, 2012, Grievant was taking classes as a full-time student.

Discussion

This consolidated grievance involves multiple disciplinary matters for which Respondent bears the burden of establishing each element of the charges against

Grievant by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). More specifically, the employer has the burden of proving each element of a disciplinary action by a preponderance of the evidence. *Wiley v. W. Va. Div. of Natural Res., Parks & Recreation*, Docket No. 96-DNR-515 (Mar. 26, 1998); *Morrison v. W. Va. Bureau of Commerce*, Docket No. 97-DOL-490 (Jan. 15, 1998). The generally accepted meaning of preponderance of the evidence is "more likely than not." *Riggs v. Dep't of Transp*., Docket No. 2009-0005-DOT (Aug. 4, 2009) *citing Jackson v. State Farm Mut. Ins. Co*., 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004). *See 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, the employer has not met its burden. *Leichliter, supra*.

As previously noted, there are certain aspects of this consolidated grievance where the facts are in dispute. In those situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Pine v. W. Va. Dep't of Health & Human Res*., Docket No. 95-HHR-066 (May 12, 1995). *See Harper v. Dep't of the Navy*, 33 M.S.P.R. 490 (1987). Some factors to consider in assessing the credibility of a witness include the witness's demeanor, opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the fact finder should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact

testified to by the witness, and the plausibility of the witness' information. *Massey v. W. Va. Public Serv. Comm'n*, Docket No. 99-PSC-313 (Dec. 13, 1999).

Matters That Are Not Subject To Review On Their Merits

It also needs to be noted at the outset of this analysis that the merits of any prior disciplinary actions which Grievant failed to timely grieve when they were administered are not properly at issue here. *Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997); *Jones v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-371 (Oct. 30, 1996). Indeed, all such information contained in the documentation of Grievant's prior discipline must be accepted as true. *Aglinsky, supra*. *See Womack v. Dep't of Admin*., Docket No. 93-ADMN-430 (Mar. 30, 1994); *Perdue v. Dep't of Health & Human Res*., Docket No. 93-HHR-050 (Feb. 4, 1994). Consistent with this principle, the following documented disciplinary actions are accepted as factually accurate:

(A) The written reprimand issued to Grievant on August 13, 2009 by Ms. Fleshman (R Ex 14) for insubordination relating to not following directives concerning an animal quarantine matter, as well as for deficient time management, and continually questioning authority.

(B) The written reprimand issued to Grievant on January 26, 2010 by Ms. Eden (R Ex 10) for insubordination by breaking the established chain of command policy and contacting Linda Whaley directly with questions regarding the food code.

(C) The written notice of required behavior modification issued to Grievant on February 4, 2010 by Ms. Eden (R Ex 9) for failing to answer her cellular phone while working in the field, for failing to properly revise a complaint form as instructed by Ms.

Eden, and for refusing to comply with instructions to make copies that were dark enough to be legible.

(D) The written reprimand issued to Grievant on March 16, 2009 by Ms. Eden (R Ex 13) for failing to attend a mandatory meeting as scheduled. (However, despite labeling Grievant's conduct as "insubordination" in the reprimand, assuming Ms. Eden's statements in the document were true, her comment that Grievant's failure to attend the meeting was an "innocent oversight," and that Grievant did not intentionally miss the meeting, Grievant's actions were not insubordinate as a matter of law. *See e.g.*, *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002) (*per curiam*); *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988); *Wallace v. Dep't of Health & Human Res.*, Docket No. 2011-1868-DHHR (May 24, 2012).)

Matters That Are *Res Judicata*

In a similar vein, the parties are precluded from relitigating issues that have previously been decided in grievance proceedings between them before this Grievance Board under the doctrine of *res judicata*. *See Baker v. Div. of Highways*, Docket No. 2011-1393-DOT (June 12, 2012); *Frost v. Bluefield State College*, Docket No. 2010-1564-BSC (Jan. 12, 2012). The preclusion doctrine of *res judicata* may be applied by an administrative law judge to prevent the relitigation of matters about which the parties have already had a full and fair opportunity to litigate, and which were actually litigated. *Vance v. Jefferson County Bd. of Educ.*, Docket No. 03-19-018 (May 27, 2003).

Consistent with *res judicata*, the parties are bound by the determinations of this Grievance Board in *Koblinsky I*, *supra*, *Koblinsky II*, *supra*, and *Koblinsky III*, *supra*.

Baker, *supra*; *Frost*, *supra*. Despite the efforts of the parties to adduce testimony which arguably enhanced or diminished the findings in these decisions, the disciplinary actions adjudicated therein are not subject to relitigation in this grievance proceeding. Accordingly, Grievant's 3-day suspension for failure to follow the PCHD Rabies Control Policy, as upheld in *Koblinsky I*, and Grievant's 30-day suspension for participating in an altercation with a co-worker, as upheld in *Koblinsky III*, are not subject to collateral attack by either party to this grievance. Likewise, the determination in *Koblinsky III* that Grievant was properly prohibited from discussing the pending investigation into her alleged misconduct with the media, and the finding in *Koblinsky II* that PCHD improperly terminated Grievant after wrongly denying her statutory right to representation under the public employee grievance procedure, are not subject to collateral attack by either party to this grievance. *See Baker*, *supra*; *Frost*, *supra*; *Vance*, *supra*.

Leave Restriction

Grievant has challenged the leave restriction which PCHD imposed upon her in correspondence dated March 31, 2011. The Administrative Rule of the West Virginia Division of Personnel provides specific authority for an agency to impose leave restrictions on an employee when there is a pattern of sick leave usage that renders the employee's services undependable. W. Va. Div. of Personnel Administrative Rule, 143 C.S.R. 1 § 14.5. This provision is entitled "Suspected Misuse of Leave." The Rule does not require proof that an employee is abusing her leave, only that there has been a pattern of leave use which is inconsistent with the normal reasons for taking sick leave. Likewise, the Rule does not prohibit the agency from imposing leave restrictions

when each of the absences considered as part of the pattern of suspected misuse were duly unauthorized.

PCHD imposed the leave restriction on Grievant in March 2011 based upon a pattern of absences which a reasonable supervisor would conclude rendered Grievant undependable. Grievant also had a penchant for requesting annual leave at the spur of the moment. When this circumstance is combined with her frequent sick leave usage, PCHD's decision to place her on a leave restriction before taking future sick and annual leave represents a reasonable exercise of management authority. Moreover, PCHD followed the requirements of the Rule, giving Grievant prior written notice of the requirement, as well as explaining the appropriate substantiation and notice that would henceforth be required.

Insubordination

PCHD is alleging that Grievant engaged in certain conduct which constitutes insubordination. Insubordination usually involves a deliberate, willful or intentional refusal or failure to comply with a reasonable order of a supervisor. *Gill v. W. Va. Dep't of Commerce*, Docket No. COMM-88-031 (Dec. 23, 1988). The general rule is that an employee must obey a supervisor's order when it is received and subsequently take appropriate action to challenge the validity of the supervisor's order. *See Stover v. Mason County Bd. of Educ*., Docket No. 95-26-078 (Sept. 25, 1995). Thus, employees are expected to respect authority and do not have unfettered discretion to disobey or ignore clear instructions. *See Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990). Moreover, insubordination may involve "more than an

explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ*., Docket No. BOR2-88-029-4 (May 25, 1988).

It is undisputed that on May 27, 2011, Grievant refused to sign a memorandum Ms. Fleshman prepared to document the four hours of grievance preparation time she was granting to Grievant. It was not unreasonable for PCHD to document the work time it was affording Grievant to prepare a particular grievance. Indeed, in a situation where an employee has multiple grievances pending, it would be imprudent not to track the amount of time the employer is making available for each grievance, so that the employee gets the full benefit of her entitlement to grievance preparation time authorized under W. Va. Code § 6C-2-3(p)(2), and the employer has a record to document its compliance with this statutory requirement.

Grievant stated that she wanted to consult with her representative before signing the document, asserting that she believed it had disciplinary implications. Unfortunately for Grievant, there is no right or privilege to consult with a representative before acknowledging receipt of a document in the circumstances presented. In *Thompson v. Logan County Bd. of Educ*., Docket No. 95-23-127 (July 17, 1995), this Grievance Board concluded that the right to representation under W. Va. Code § 18-29-3(f), a provision in the school law that was subsequently incorporated into the current statutory grievance procedure as W. Va. Code § 6C-2-3(g), did not arise where a supervisor is only requiring an employee to acknowledge receipt of a document.

Grievant's assertion that she thought the memo prepared by Ms. Fleshman involved discipline is both unreasonable and irrelevant. On its face, the memorandum is not a disciplinary document. Grievant's purported distrust of her supervisors on the basis that they would say one thing and do something else does not excuse her refusal to follow a reasonable directive. Because Grievant had multiple grievances pending, it was appropriate for her supervisors to document when they granted requested preparation time in compliance with the grievance statute. In any event, even if the document Grievant was asked to sign did constitute a disciplinary document, Grievant could have signed this document, as she did others, and simply state that she did not agree with its contents. *See* R Ex 15. Accordingly, in the circumstances presented, Grievant was insubordinate on May 27, 2011, when she refused to sign the memorandum regarding grievance preparation time prepared by Ms. Fleshman.

This same analysis applies to Grievant's subsequent refusal to acknowledge receipt of written disciplinary warnings on June 2 and 3, 2011. In each case, Grievant was informed that her signature was requested solely to document that she had received and reviewed the document, not that she agreed with its contents. On its face, the document simply states "employee acknowledges that she has read this report." Although the document in question, a written warning, involves a disciplinary action, this Grievance Board has determined that the same rule applies. *Simons v. Logan County Bd. of Educ*., Docket No. 95-23-399 (June 27, 1996). Contrary to Grievant's contention, it is not necessary that the employer adopt a written policy before an employee can be disciplined for refusing to sign a disciplinary document. Any such requirement would be

unduly burdensome and unprecedented. Although some agencies may have adopted such policies, in the absence of a specific written policy, supervisors retain reasonable discretion to supervise their employees. Requiring an employee to sign a document simply to acknowledge receipt[3], absent language indicating the employee agrees with the action, or accepts the discipline, is not unreasonable. *See Simons, supra*; *Thompson, supra*.

Grievant's refusal to sign the warnings in this matter is distinguishable from the situation in *Renner v. Berkeley County Health Dep't*, Docket No. 01-BCHD-552 (Apr. 29, 2002), where the employee was asked to "agree to comply to the letter and intent of the action." Likewise, *Mason v. W. Va. Dep't of Admin*., Docket No. 2010-0887-CONS (July 22, 2011), cited by Grievant, indicates that the employee did, in fact, sign a disputed performance appraisal form after the employee's second-level supervisor intervened. Grievant's refusal to acknowledge receipt by signing the written warnings constituted insubordination for which she was properly issued additional written warnings on June 3, 2011.

Grievant was not insubordinate during a disciplinary meeting with Ms. Fleshman on May 27, 2011, when she made the statement, "I must be a bully magnet." *See Sexton*, *supra*. This statement was made to her representative, who was also present during this meeting, and the remark was most likely intended to refer to Ms. Fleshman who was conducting the disciplinary meeting. This was the same meeting where Grievant refused to sign the written warning that she was being issued to acknowledge

[3] Although an employer may employ an alternative approach, as PCHD did here, and have a second supervisor witness the presentation of a disciplinary action, there is no legal requirement to follow this procedure, and Grievant is not in a position to dictate to PCHD how it conducts its personnel business.

that she had received the document. However, comments such as these are not so inherently disrespectful and inflammatory, that they reach the magnitude required to establish the offense of insubordination.

Turning to another charge, Grievant's actions in calling Ms. Eden early on the morning of May 19, 2011, and informing her that she had decided to drive herself to a required training conference at Glade Springs, West Virginia, did not involve an act of insubordination. Grievant's travel in a county vehicle with her co-workers was not mandatory, Grievant did not claim any expense for her travel, and there was no compelling reason or established policy that mandated all of the employees attending the training travel together in the same county vehicle. Grievant's last-minute change of plans may have been disconcerting to her supervisors, but it was not an act of defiance or willful refusal to obey an order. *See Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995).

Some of the allegations in the disciplinary documents are ambiguous and difficult to evaluate because it is unclear whether they are intended to allege a separate offense, or simply inserted to provide additional weight to support the contention that Grievant was generally belligerent, uncooperative and resistant to authority. For example, Ms. Fleshman described how Grievant spoke with a restaurant manager about "the health issues of [her] immediate supervisor" while on official business. R Ex 1. This refers to the fact that the manager of the restaurant Grievant was inspecting asked about Ms. Eden and Grievant indicated that she was recovering from a stroke. However, it was not explained how Ms. Eden's medical condition involved confidential

information that could not be discussed with anyone outside the agency. Ms. Eden was an employee of PCHD, not a patient of its clinic. Grievant had not looked into Ms. Eden's medical records in order to learn what was apparently common knowledge in the Health Department office. Grievant had not been previously disciplined for her conduct when this event took place, and this activity did not violate any law, rule or policy in Grievant's workplace. This charge simply boils down to an effort to manufacture a violation where nothing improper took place.

These minor infractions were brought up in a written disciplinary warning that was issued over a month after the alleged events took place. The notice to Grievant does not identify what violation took place, and the undersigned is not persuaded that these actions involved insubordinate conduct.

Functional Demotion

Grievant also asserts that she suffered a "functional demotion" by PCHD. This Grievance Board has recognized that a functional demotion may occur when an employee is reassigned to duties of less number and responsibility without salary reduction or other alteration, which may impact the employee's ability to obtain future job advancement. *Dickey v. Div. of Labor*, Docket No. 2008-1820-CONS (Jan. 21, 2009); *Dudley v. Bureau of Senior Serv.*, Docket No. 01-BSS-092 (July 16, 2001). *See Gillispie v. W. Va. Dep't of Corrections*, Docket No. 89-CORR-105 (Aug. 29, 1989). A "functional demotion" is not a disciplinary matter. Therefore, Grievant has the burden of proving that she received a functional demotion by a preponderance of the evidence.

Dickey, supra. *See* Procedural Rule of the W. Va. Public Employees Grievance Bd., 158 C.S.R. § 3 (2008).

The evidence of record indicates that after Grievant was reinstated by this Grievance Board, and served the 30-day suspension which she received immediately following this return to work, Grievant was initially reassigned to the same duties she had been performing as a Registered Sanitarian, including going into the field to conduct restaurant inspections. However, Ms. Fleshman subsequently directed Ms. Eden to restrict Grievant to performing duties that could be accomplished without leaving the office, requiring Grievant to sit at her desk and perform clerical work, and make phone calls. Moreover, Grievant was directed not to leave her workstation or the building without giving notice or obtaining permission, a restriction that was not generally imposed or enforced against her co-workers.

Apparently, Grievant's immediate supervisor, Ms. Eden, was on sick leave for part of this time, but Grievant was not performing any of her duties. PCHD asserts that most of these duties involved duties that could be performed by a Sanitarian, but one of the assignments given to Grievant involved calling every food establishment in the county to verify or update the address, phone number and other contact information. This was work that was purely clerical in nature. It does not require a Sanitarian to ascertain whether a business has moved or changed its phone numbers. The gist of Ms. Fleshman's justification for this change in assignments was, "we could assign her any duties that come under her job description." When coupled with credible evidence from co-workers that Ms. Eden and Ms. Fleshman were waiting for Grievant to commit

another offense so that she could be fired, Grievant demonstrated by a preponderance of the evidence that she was functionally demoted without notice or proper cause.

It appears to the undersigned Administrative Law Judge that Grievant's supervisors simply chose to address Grievant's unsatisfactory conduct by reining in her duties and restricting her to whatever work was available in the office, where her performance could be closely scrutinized, rather than deal with any further incidents resulting from Grievant's interactions with the local community while working in the field. While this may have solved one of their problems, it created others. The preponderance of the evidence indicates that Grievant was not kept busy during the majority of this time period. Grievant credibly testified to her general lack of productive assignments and this testimony was corroborated by other witnesses. The situation described represents a functional demotion, or constructive demotion, and contributes to the evidence that Grievant was being retaliated against for filing grievances and winning reinstatement from an earlier termination.

Under the grievance statute for public employees, there are no damages available to an employee who has endured a functional demotion. In the future, for such time as Grievant is employed as a Registered Sanitarian by PCHD, Grievant shall be assigned to the full range of duties required of other similarly situated Sanitarians in its employ, unless she is properly demoted to another job classification through appropriate procedures. So long as Grievant is not precluded from performing any particular duty which she is capable of performing as a result of her training and

experience, PCHD retains the full range of discretion to determine how those duties will be allocated between Grievant and her co-workers in the same classification.

Public Communications

PCHD focused nearly a page and a half of Grievant's termination notice (R Ex 41) on what were generally deemed as either prohibited or unprotected communications between Grievant and the public or media. These charges involve at least three separate communications: (1) a handout/flyer protesting the PCHD Rabies Control Policy that was distributed in Putnam County between October and mid-December 2010; (2) a letter critical of the PCHD Rabies Control Policy published online as a "letter to the editor;" and (3) information provided to an online media reporter or blogger regarding her suspension for refusing to cooperate with an internal investigation. In fact, the handout/flyer distribution is referenced in two different sections of the termination notice. *See* R Ex 41. It was also referenced in Ms. Fleshman's written disciplinary warning to Grievant dated May 28, 2011. *See* R Ex 1.

In support of its position that the communications pertaining to the PCHD Rabies Control Policy were unprotected, PCHD is essentially contending that this Grievance Board's decision in *Koblinsky I* estopped Grievant from further challenging the PCHD Rabies Control Policy in any manner. PCHD is correct in asserting that Grievant was obligated to adhere to the PCHD Rabies Control Policy while working within the scope of her duties as a Registered Sanitarian. Unless and until that decision is overruled by higher authority, it represents "the law of the case" for any future disputes between the

parties involving the same issue. *See Tressler Coal Mining Co. v. Klefeld*, 125 W. Va. 301, 24 S.E.2d 98 (1943); *Bass v. Kanawha County Bd. of Educ*., Docket No. 92-20-214 (Nov. 4, 1994). *See also Kaufman v. Catzen*, 108 W. Va. 1, 150 S.E. 371 (1929); *Pennington v. Gillaspie*, 66 W. Va. 643, 66 S.E. 1009 (1910).

Even if Grievant had filed a timely appeal of this Board's decision in *Koblinsky I*, she would have been insubordinate had she willfully or intentionally failed or refused to comply with that policy at work. There is simply no applicable exception to the general rule of "obey now, grieve later" which would allow Grievant to either fail or refuse to comply with this policy, given that her basis for refusal has already been rejected by this Grievance Board. *See Peery v. Rutledge*, 177 W. Va. 548, 355 S.E.2d 41 (1987). *Cf. Butts v. Higher Educ. Interim Governing Bd*., 212 W. Va. 209, 569 S.E.2d 456 (2002) (*per curiam*) (employee held to have acted upon "good faith belief" that directive violated employer's written policy and federal privacy limitations).

Nonetheless, PCHD is attempting to extend legal precedence to this Grievance Board's decision involving an employee's challenge to a supervisor's directive that goes well beyond any level of deference which the law requires or allows. Simply stated, the West Virginia Public Employees Grievance Board does not have jurisdiction to definitively determine whether a county health department rabies policy was adopted in accordance with the Open Meetings Law, or is inconsistent with state laws regarding rabies quarantines. This Grievance Board only has authority to decide grievances that are properly before it in accordance with the grievance procedure for public employees in W. Va. Code § 6C-2-1, *et seq*. *See Vest v. Bd. of Educ*., 193 W. Va. 222, 455

S.E.2d 781 (1995). Should a citizen file a timely action in the Circuit Court of Putnam County challenging the PCHD Rabies Policy because it was not approved at a proper open meeting as defined by the Open Meetings Act, that it was not promulgated in accordance with the written policies and procedures previously adopted by the Board of Health, that it was inconsistent with and preempted by state statutory provisions addressing rabies quarantine policy, or on other legal grounds, the Court would not be bound by this Grievance Board's ruling in an employment grievance brought by a PCHD employee. The Court would simply consider any pertinent legal issues *de novo* without giving any deference to an administrative decision from this Grievance Board.

Therefore, whether Grievant could continue to challenge and oppose the policy, and urge its rescission or revision within the local community, represents a separate and independent issue from the proposition that she must personally comply with the policy in the course of performing her job. Along these lines, Grievant asserts that she has a First Amendment constitutional right to challenge this law on various grounds. Public employees are entitled to be protected from termination or other adverse employment consequences resulting from the exercise of their free speech rights, or other First Amendment rights. *Orr v. Crowder*, 173 W. Va. 335, 343, 316 S.E.2d 593, 601 (1983). *See Pickering v. Bd. of Educ*., 391 U.S. 563 (1968); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605-06 (1967). Current law applicable to this question essentially provides that in order for Grievant's conduct to be protected by the First Amendment, it must address a matter of public concern. *Alderman v. Pocahontas County Bd. of Educ*., 223 W. Va. 431, 441, 675 S.E.2d 907, 917 (2009). *See Garcetti*

v. Ceballos, 547 U.S. 410, 418 (2006); *Pickering*, *supra*, at 568. In addition, where, as here, the focus of the discussion involves a matter related to her public employment, the employee must be speaking as a citizen, not pursuant to her official duties. *See Garcetti*, *supra*, at 419; *Foley v. Town of Randolph*, 598 F.3d 1, 5 (1st Cir. 2010).

In *Garcetti,* the United States Supreme Court determined that public employees do not speak as citizens when they speak as part of their job duties. *See McGee v. Pub. Water Supply Dist. # 2*, 471 F.3d 918, 919 (8th Cir. 2006). Thus, an employee's speech made pursuant to the employee's official duties is not protected by the First Amendment. *Garcetti, supra*, at 421; *Decotiis v. Whittemore*, 635 F.3d 22, 30 (1st Cir. 2010). In the matter presented by this grievance, it is clear that passing out flyers critical of the county's rabies control policy was not part of Grievant's official duties as a Registered Sanitarian. Further, the parking lot outside a shopping mall and theater where this activity took place represents at least a limited public forum for purposes of First Amendment analysis. Finally, Grievant's employment had been terminated at the time of these events, so she had no actual or apparent authority to speak as a public employee at that point in time. Therefore, Grievant was engaged in speech as a citizen, not as a public employee, when she engaged in this leafleting activity.

Generally, when a public employee speaks as a citizen, the issue becomes whether their public employer had adequate justification for reacting to their speech differently from any other member of the general public. *Garcetti, supra*, at 418. *See Pickering*, *supra* at 568. Answering this question initially requires a determination of whether the Putnam County Rabies Control Policy, or the manner in which it was

enacted, involved matters of public concern. "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement." *Connick v. Myers*, 461 U.S. 138, 147-48 (1983). Grievant asserted that the policy was not properly adopted by PCHD because there was no public notice, and the matter was approved on an *ad hoc* basis following a closed executive session when the public had left the meeting. As stated in the flyer Grievant distributed: "There were no citizens at this meeting because no one was told!!" R Ex 7. In other words, Grievant claims the public did not receive proper notice of the fact that PCHD was considering revising its rabies control policy at a public meeting. Such notice is required under the West Virginia Open Governmental Proceedings Act, W. Va. Code § 6-9A-1, *et seq*., commonly referred to as the "Sunshine Law." Any material failure to follow the state's open meetings law, standing alone, represents a matter of public concern under *Garcetti*. *See Lindsey v. City of Orrick*, 491 F.3d 892 (8th Cir. 2007). Indeed, speech relating to official misconduct almost always involves matters of public concern. *See, e.g*., *Charles v. Grief*, 522 F.3d 508, 514 (5th Cir. 2008); *Modica v. Taylor*, 465 F.3d 174, 180-81 (5th Cir. 2006); *Wallace v. County of Comal*, 400 F.3d 284, 289-91 (5th Cir. 2005); *Kinney v. Weaver*, 367 F.3d 337, 369 (5th Cir. 2004); *Johnson v. Multnomah County*, 48 F.3d 420, 425 (9th Cir. 1995); *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983).

In addition to allegations that the policy was not adopted in the sunshine of an open public meeting, Grievant also raised issues about the wisdom and necessity for the policy. The focus of her concerns involved the mandatory quarantine and possible

destruction of dogs and cats, including family pets. Not only do these creatures have organizations such as the Humane Society of the United States, Animal Legal Defense Fund, and the American Society for the Prevention of Cruelty to Animals representing their interests in such matters as the creation and revision of public laws, individuals routinely develop attachments to their pets which can rival the status of human family members. *See Carbasho v. Musulin*, 217 W. Va. 359, 618 S.E.2d 368 (2005). "Beyond question, many Americans love their cats, their dogs, their birds, as well as they love their children." *Id*. at 363, 372 (Starcher, J., dissenting). Therefore, Grievant's public comments criticizing the substance of the rabies control policy likewise involved matters of public concern. *See Dixon v. Kirkpatrick*, 553 F.3d 1294, 1302 (10th Cir. 2009).

"So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Garcetti, supra*, at 419. Applying this legal standard to the contents of the flyer Grievant distributed in October 2010, PCHD has not demonstrated that it would have taken action against an ordinary citizen who distributed the same information, nor has PCHD presented a viable rationale for disciplining Grievant as a public employee for an activity that took place while she was not employed by PCHD.[4] *See U.S. v. Nat'l Treasury Employees Union*, 513 U.S. 454 (1995). This absence of justification is only exacerbated by the fact that Grievant was not disciplined for this activity when she returned to work after being reinstated by this

[4] Evidence was presented at the Level Three hearing that Grievant continued to pass out these flyers during at least one event after her employment was reinstated in December 2010. However, PCHD did not include this allegation in the disciplinary notice issued to Grievant and the facts do not support this

Grievance Board. Instead, this activity was referenced in Grievant's termination notice where the contents of the "handout/flyer" were inextricably intertwined with the contents of other media activity in which Grievant was involved.

Certainly, the flyer takes some "digs" at Grievant's supervisors. However, the assertion that Ms. Fleshman does not own a pet, which Ms. Fleshman states is untrue, hardly rises to the level of the allegations in *Alderman* that his elected superiors on the school board and its appointed officers included thieves and adulterers. This assertion is one of several *ad hominem* arguments[5] which Grievant makes in her criticism of the policy, but employing flawed logic does not revoke her First Amendment right to criticize the requirement and propose a change to the policy. When read as a whole, from a disinterested perspective, the primary focus of the handout/flyer is on the proposition that the policy adopted by PCHD is unnecessary and unduly harsh, and, secondarily, the promulgation of the policy was procedurally flawed.

Ms. Fleshman appears to recognize the need to refute this argument when she states that Grievant falsely asserted in the handout that there has never been a reported case of terrestrial rabies in Putnam County. Ms. Fleshman initially testified that this statement was false because the Health Department does not pick up dead raccoons alongside of the road and, if they had picked them up and tested them, one or more of them might have been positive for rabies. Not satisfied with making this *ad ignorantiam*[6] argument, Ms. Fleshman went on to note that there was a reported case

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allegation in any event.

[5] An *argumentum ad hominem,* or argument directed at the person, is a logical fallacy involving a personal attack on the character or motives of the person proposing an idea, rather than the merits of the idea itself.

[6] An *argumentum ad ignorantiam,* or argument to ignorance, is another logical fallacy where a fact is presumed to be true because it has not been conclusively proven false.

of a rabid bat biting a kitten and, “depending on what website you go to,” bats are sometimes listed as terrestrial species. Given that bats are generally regarded as flying mammals, and the credible testimony from Grievant that rabies in bats and rabies in terrestrial animals are separate and distinct forms of rabies, this explanation falls well short of the mark for establishing that Grievant made false statements in the handout in reckless disregard for the truth. *Cf. Alderman*, *supra*. (employee’s statements alleging theft of public funds and adultery were made without consideration of the fact that they may or may not have been false). To the contrary, it suggests that Grievant’s superiors are willing to grasp at any straw to bolster their case.

Ms. Eden testified that the statement in the flyer that she had threatened to send the Sheriff if the owner of an English bulldog did not euthanize their little dog the next morning was not a truthful statement. Ms. Eden explained that she discussed the situation extensively with the pet’s owner, and the owner made the decision to have the dog euthanized, rather than for the owner and her husband to undergo the required series of painful rabies shots. A preponderance of the evidence indicates that several aspects of Grievant’s allegations about the treatment of this dog were off the mark or exaggerated. However, the testimony did not establish that Grievant then knew the information was false, or that she acted in reckless disregard of whether the statement was true or not.

Ms. Fleshman also testified that the flyer falsely stated the rabies policy at issue was “adopted in a closed meeting after the Board went into executive session” despite the ruling by the Grievance Board that the policy was adopted by the Putnam County

Board of Health at an open public meeting. This disagreement with the flyer ignores the immediately preceding statement in that document that there was no opportunity for public comment on the policy in advance of the meeting, and the statement following immediately thereafter that there was no notice that the policy would be considered at this meeting. There are no findings of fact on these claims in the Grievance Board decision, nor is there a conclusion that the policy was adopted in compliance with the Open Meetings Act, primarily because this Grievance Board had no jurisdiction to make that determination.

According to the credible evidence of record, the policy was adopted by the Board of Health during a public meeting. The Board went into executive session to discuss a particular issue. While the Board was in executive session, most people in attendance left the meeting. After returning from executive session, the Board took up the revised rabies policy and approved it. Technically, this was still a public meeting. Therefore, Grievant's statement in the flyer is not accurate. Was it made in reckless indifference to the truth? No. PCHD has not demonstrated such reckless indifference by a preponderance of the evidence. Accordingly, because the handout/flyer involves a matter of public concern, it was not issued as part of Grievant's official duties as a Registered Sanitarian, it was written and distributed while Grievant was not employed by PCHD, and despite certain inaccurate statements and claims contained therein, it was not made in reckless disregard for the truth. Therefore, this activity involved protected speech, and PCHD's disciplinary actions taken in response to this speech

were improper. *See Orr v. Crowder*, *supra*. *Accord*, *Connick v. Myers*, *supra*; *Pickering v. Board of Educ*., *supra*; *Lindsey v. City of Orrick*, 491 F.3d 892 (8th Cir. 2007).

A similar analysis applies to the letter published online by PutnamLive, which was styled a "letter to the editor" by the publisher. See R Ex 23. Grievant credibly testified that she sent this letter to the Humane Society protesting the PCHD Rabies Control Policy, providing copies to Putnam Live and Eyewitness News. *See* G Ex 13. Whether Grievant gave either of these media sources permission to publish her letter is immaterial, given that she had no reasonable expectation that they would not publish the letter when she did not affirmatively request confidentiality.

In any event, the primary focus of the letter was the same matter of public concern identified in regard to the handout/flyer, the Putnam County Rabies Control Policy. PCHD's reaction to this criticism of this policy on its merits is inseparable from its response to Grievant's comments that were critical of her employer, and which did not involve legitimate protected activity. According to their testimony, Ms. Fleshman considered virtually everything Grievant said about the policy to be unprotected and factually wrong. Therefore, Grievant established by a preponderance of the evidence that her protected activity was a motivating factor behind her employer's decision to pursue this disciplinary action.

Grievant's statements to the media regarding the investigation into recording the staff meeting and responding to a written questionnaire was not protected activity as recognized by *Garcetti*, *supra*, and *Alderman*, *supra*. However, as hereinafter discussed, PCHD violated Grievant's rights on a separate basis in the conduct of this

investigation, and is estopped from pursuing disciplinary action for Grievant's public comments protesting this activity. PCHD should not be rewarded for improperly placing Grievant in an untenable situation. In making this determination, the undersigned concludes that it makes no difference whether Grievant provided this information to the media personally, or allowed her representative to provide the information. In taking these actions, Grievant's representative acted as her agent, absent any credible evidence that Grievant made any meaningful effort to either prevent this disclosure or repudiate it.

Internal Investigation Questionnaire

PCHD conducted an "internal investigation" regarding the surreptitious recording of a staff meeting and the release of that recording to the public via an Internet website. Certainly, PCHD is free to compel responses from an employee regarding matters specifically, directly and narrowly related to the performance of official duties in a "proper proceeding" where the employee is duly advised of her options and the consequences of her choice. Part of this investigative process involves providing adequate assurance to the employee that the answers given will not be used in any criminal proceeding. *Tolley v. W. Va. Div. of Natural Res.*, Docket No. 94-DNR-629 (May 18, 1995). *See Gardner v. Broderick*, 392 U.S. 273 (1968); *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 392 U.S. 280 (1968). *See generally*, *Garrity v. New Jersey*, 385 U.S. 493 (1967). Grievant was never advised that any information she provided would be used for a limited purpose, and that those statements would not or could not be used against her in any criminal proceeding. R Ex 18. Instead, she

was advised that she would be suspended without pay until such time as she agreed to participate in the investigation. R Ex 18.

Ms. Fleshman testified that confidential information may have been discussed during this staff meeting. A public employee who improperly disseminates confidential information could be charged with violating a prohibition in the West Virginia Governmental Ethics Act concerning disclosure of confidential information obtained in the course of their public employment. W. Va. Code § 6B-2-5(e). Violation of this particular subsection may be prosecuted as a criminal misdemeanor. W. Va. Code § 6B-2-10(a). Grievant might also have faced criminal charges for unlawfully intercepting an oral communication in violation of W. Va. Code § 62-1D-3, or unlawfully disclosing or disseminating an intercepted oral communication in violation of 18 U.S.C. § 2511. It is not necessary that Grievant actually violated any of these laws in order to receive protection under *Garrity*; it is sufficient that it was not unreasonable in the circumstances for her to assert her right to silence absent a proper warning. Certainly, the questionnaire included specific questions to ferret out the means and methods used to record and disseminate the staff meeting information that responses admitting to such activity would amount to a full confession for misconduct. Grievant was never promised that her responses would not result in a criminal prosecution. She was only promised that she could return to work (at least temporarily) once she answered the questions in writing.

Clearly, any statement extracted from Grievant in response to the demands of her supervisors in these circumstances would have to be considered coerced. *See*

Lefkowitz v. Turley, 414 U.S. 70 (1973). Grievant was told that she would remain suspended without pay indefinitely until she answered the questions in the questionnaire. Ms. Fleshman's statement that the suspension was a "definite" suspension because Grievant controlled when the termination would end represents a seriously flawed perception of the choices Grievant faced. Likewise, Ms. Fleshman's suggestion that Grievant was not required to admit to any conduct, only to respond to the questions in the questionnaire, totally obfuscates the right to refrain from self-incrimination.

In these circumstances, any response Grievant provided, absent proper warnings, could not be used against her in a criminal proceeding. *See Garrity v. New Jersey*, 385 U.S. 493 (1967). More importantly, as this Grievance Board made clear in *Tolley*, *supra*, a public agency cannot take adverse action to either terminate or suspend an employee without pay for refusal to answer questions in an investigation that does not meet established constitutional standards. Thus, Grievant's suspension was improper.[7]

It is also noted that this "internal investigation" was focused exclusively on Grievant from its inception. There was no indication that other PCHD employees were asked to respond to similar written questions regarding the creation and dissemination of a recording made in some fashion during a PCHD staff meeting. Ms. Fleshman

[7] Contrary to PCHD's position, this suspension was an "indefinite" suspension that was not initiated in compliance with the language in the West Virginia Division of Personnel Supervisor's Guide to Progressive Corrective and Disciplinary Action. *See* R Ex 19. The suspension does not meet the established criteria for a suspension during an investigation. Once Grievant was suspended, PCHD's investigation, which consisted of nothing more than requiring Grievant to respond to a written questionnaire, came to a halt. Accepting Ms. Fleshman's description of this suspension as "definite" because Grievant could end the suspension by responding to the questions at any time, would nullify an otherwise clear policy that the employer is required to follow. *See* Syl. Pt. 1, *Powell v. Brown*, 160 W. Va.

believed she heard Grievant's voice on the YouTube recording, and there was no other employee who had previously expressed a First Amendment right to reveal the inner operations of the Putnam County Health Department to either traditional or social media. Thus, the focus of this investigation upon possible wrongdoing by Grievant was incontrovertible, and only serves to support Grievant's claims that she was being singled out for retaliatory treatment.

Job Abandonment

The Administrative Rule of the West Virginia Division of Personnel, 143 C.S.R. 1 § 12.2(c), provides:

> An appointing authority may dismiss an employee for job abandonment who is absent from work for more than three consecutive workdays without notice to the appointing authority of the reason for the absence as required by established agency policy. The dismissal is effective fifteen calendar days after the appointing authority notifies the employee of the dismissal. Under circumstances in which the term job abandonment becomes synonymous with the term resignation, an employee dismissed for job abandonment is not eligible for severance pay.

PCHD failed to establish by a preponderance of the evidence that Grievant abandoned her job. PCHD suspended Grievant indefinitely, and then sent Grievant a letter asking why they had not heard from her. This correspondence was nothing less than disingenuous. Subsequently, when Grievant responded to this letter by sending a check to pay her share of her insurance coverage, as requested, PCHD returned the check without explanation. Shortly thereafter, PCHD initiated Grievant's termination asserting that she had engaged in job abandonment. This situation does not represent valid job abandonment. *See Toler v. Dep't of Health & Human Res.*, Docket No. 2012-

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723, 238 S.E.2d 220 (1977).

0189-DHHR (Aug. 1, 2012); *Adkins v. Dep't of Health & Human Res.*, Docket No. 2011-1392-DHHR (Dec. 22, 2011). Indeed, PCHD's reliance on job abandonment does not present a *bona fide* basis for termination.

Retaliation Or Reprisal

W. Va. 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 for any lawful attempt to redress it." In general, a grievant alleging reprisal or retaliation in violation of W. Va. Code § 6C-2-2(o), in order to establish a *prima facie* case, must establish by a preponderance of the evidence:

(1) that she was engaged in activity protected by the statute (*e.g.*, filing a grievance);

(2) that her employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

(3) that, thereafter, an adverse employment action was taken by the employer; and

(4) that the adverse action was the result of retaliatory motivation or the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred. *See Coddington v. W. Va. Dep't of Health & Human Res.*, Docket Nos. 93-HHR-265/266/267 (May 19, 1994); *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991). *See generally Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53,

365 S.E.2d 251 (1986). Once a *prima facie* case of retaliation has been established, the inquiry shifts to determining whether the employer has shown legitimate, non-retaliatory reasons for its actions. *Graley*, *supra*. *See Mace v. Pizza Hut, Inc*., 180 W. Va. 469, 377 S.E.2d 461 (1989).

Prior to any of the events which led to the seven separate grievances encompassed by this consolidated matter, Grievant engaged in protected activity on at least three occasions which resulted in decisions by this Grievance Board, *Koblinsky I, II & III*. Grievant prevailed on one of these grievance proceedings (*Koblinsky II*), and was largely unsuccessful in obtaining relief in the other two grievance decisions. Grievant's employer was clearly aware of Grievant's protected activity, which involved challenges to personnel actions and decisions undertaken by the same supervisors who were involved in the current series of adverse personnel actions which Grievant is challenging. This series of adverse actions was initiated shortly after Grievant returned from her previous suspension which was upheld in *Koblinsky III*. Accordingly, Grievant established a *prima facie* case of prohibited retaliation in regard to these adverse actions, both individually and collectively.

Grievant complained that she was functionally demoted, and PCHD failed to establish that she was not treated adversely or that there was good cause for this treatment. Therefore, PCHD has failed to refute the inference that this functional demotion was taken in retaliation for Grievant's participation in protected grievance activity. In regard to Grievant's suspension for refusing to answer a series of written questions in an internal investigation regarding recording and dissemination of certain

conversations that took place in PCHD facilities, Respondent's proffered justification for this action was determined to be contrary to law. Therefore, PCHD failed to rebut the presumption of a retaliatory motive by establishing a legitimate basis for this adverse action. Accordingly, Grievant's suspension for refusing to answer questions about a tape recording of a staff meeting resulted from prohibited retaliation, and PCHD improperly relied upon this conduct as one of the reasons for terminating Grievant's employment.

As previously discussed, PCHD responded to Grievant's actions in distributing a handout/flyer and a letter to the editor challenging the county rabies policy by taking an adverse personnel action which violated her First Amendment right as a citizen to engage in free speech. Because PCHD acted in violation of Grievant's constitutional rights, PCHD failed to establish a legitimate basis for these actions, resulting in the conclusion that its actions were based upon prohibited retaliatory motives.

Further, in determining whether PCHD's reliance on this activity was proper and non-retaliatory, it must be noted that, despite being aware of the contents of the handout/flyer challenging the rabies policy when an employee brought a copy to Ms. Fleshman in November 2010, Grievant's employer took no action for this allegedly improper activity when she returned from her termination. Moreover, there was no evidence that PCHD was investigating this activity, or that any investigation was even contemplated. Therefore, including this activity as alleged misconduct months later involves the pursuit of "stale charges." *See Shaw v. U.S. Postal Serv*., 697 F.2d 1078 (Fed. Cir. 1983); *Heffron v. U.S.*, 405 F.2d 1307 (U.S. Ct. of Claims 1969). This

circumstance simply adds to the weight of evidence that the discipline related to Grievant's protected First Amendment activities involved retaliation prohibited by the grievance procedure statute, in addition to constituting a violation of her fundamental rights as a citizen.

As previously discussed, PCHD's assertion that Grievant engaged in job abandonment, thereby warranting her termination, was not supported by a preponderance of the evidence. To the contrary, this charge contains every indication of an adverse action taken in bad faith. Therefore, PCHD failed to rebut the presumption that this charge resulted from prohibited retaliation.

In regard to the remaining disciplinary actions which Grievant challenged, PCHD established by a preponderance of the evidence that Grievant engaged in insubordinate conduct on multiple occasions, substantially as alleged. Although Grievant established a *prima face* case of unlawful retaliation, PCHD demonstrated legitimate reasons why any employer faced with such conduct would have taken the same or similar actions. Grievant's evidence failed to show that PCHD's proffered reasons for these actions were simply a pretext for prohibited retaliation. Indeed, any employer confronting similar conduct would have responded with at least the same level of discipline.

It should also be noted that Grievant never made any meaningful effort to adjust her behavior in response to PCHD's legitimate disciplinary actions and progressive efforts to correct her actions. If anything, the record indicates that Grievant became even more hostile and uncooperative, particularly in regard to any further efforts to correct her behavior or work performance. In these circumstances, there is no basis to

support a finding of retaliation where PCHD administered these disciplinary warning letters or reprimands in a legitimate effort to correct unacceptable behavior.

Propriety Of Penalty

The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 51, 380 S.E.2d 216, 218 (1989). The judicial standard in West Virginia requires that "dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); Syl. Pt. 1, *Oakes v. W. Va. Dept. of Finance & Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980). *See Guine v. Civil Service Comm'n*, 149 W. Va. 461, 468, 141 S.E.2d 364, 368-69 (1965); *Smith v. Clay County Health Dep't*, Docket No. 2012-0451-ClaCH (Apr. 17, 2012).

Under this legal standard, the penalty imposed on a public employee should not be disproportionate to the offenses committed, considering the employee's tenure and work record. *See Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983); *Serreno v. W. Va. Civil Serv. Comm'n*, 169 W. Va. 111, 285 S.E.2d 436 (1984); *Oakes, supra*; *Guine, supra*. Had PCHD terminated Grievant solely for the additional insubordinate acts she committed toward Ms. Eden and Ms. Fleshman after her most recent suspension, given the numerous disciplinary warnings Grievant was given for

similar misconduct, her three-day suspension for failing to follow PCHD's rabies policy, and the 30-day suspension for insubordination, as well as her abysmal attendance record, Respondent's penalty would easily comply with this standard.

However, the record establishes that PCHD terminated Grievant's employment based upon "all" of the misconduct compiled in her termination letter. As a consequence, PCHD's appropriate response to Grievant's most recent insubordinate and inappropriate acts are inseparable from its unacceptable and unjustified actions in violating Grievant's rights of association, free speech and freedom from self-incrimination, a pattern of conduct that inexorably leads to the conclusion that PCHD's decision to terminate Grievant likewise resulted from prohibited retaliatory motives.

Where, as here, the employer proves some, but not all, of the charges against an employee, the Grievance Board must determine whether the penalty imposed, in this case termination of employment, is otherwise supported by the charges which were proven. Ordinarily, an employer has broad discretion in selecting an appropriate penalty to redress an employee's misconduct. *See Overbee v. Dep't of Health & Human Res.*, Docket No. 96-HHR-183 (Oct. 3, 1986). However, this termination is fatally tainted by PCHD's violations of Grievant's right to free speech as a citizen, of Grievant's right to refrain from self-incrimination, and her right to participate in the state grievance procedure for public employees. Considering both the number and magnitude of these violations, reinstating Grievant to her position as a Registered Sanitarian constitutes the most appropriate remedy in the circumstances presented.

Mitigation Of Damages

PCHD asserts that Grievant is not entitled to back pay because she was enrolled as a full-time student and was no longer seeking alternative employment. The burden of raising the issue of mitigation is on the employer. Syl. Pt. 3, *W. Va. Dep't of Natural Res. v. Myers*, 191 W. Va. 72, 443 S.E.2d 229 (1994); Syl. Pt. 2, *Mason County Bd. of Educ. v. State Supt. Of Schools*, 170 W. Va. 632, 295 S.E.2d 719 (1982).

PCHD properly contends that a terminated employee who has enrolled as a full-time student is no longer ready, willing and available for alternative employment, and this terminates any entitlement to back pay, just as when the employee accepts other employment. *Taylor v. Safeway Stores, Inc*., 524 F.2d 263, 267-68 (10th Cir. 1975). *See U.S. v. Wood, Wire & Metal Lathers Local 46*, 328 F. Supp. 429 (S.D. N.Y. 1971). During the fifth day of hearing in this matter, on July 26, 2012, in response to a question from Respondent's counsel regarding why Grievant had not yet turned in the petition she had been collecting in protest of the Putnam County Rabies Control Policy, Grievant stated: "I'm in school full time." This disclosure was not further explored. Thus, there is no evidence of when Grievant began this course of study.

Nevertheless, PCHD has established by a preponderance of the evidence that Grievant was a full-time student as of July 26, 2012, and Grievant's entitlement to back pay must terminate as of that day because she was no longer available to accept alternative employment. *See Taylor*, *supra*.

Accordingly, PCHD is hereby **ORDERED** to reinstate Grievant to her position as a Registered Sanitarian, to delete those disciplinary actions found to be improper by

this decision from her personnel files, to refrain from subjecting Grievant to a functional demotion, as previously discussed, and to refrain from further retaliatory actions against Grievant based upon her exercise of her legitimate right of free speech, her right to refrain from self-incrimination, and her right to participate in the statutory grievance procedure for public employees. PCHD is further **ORDERED** to rescind those orders and directives which resulted in Grievant's functional demotion, as previously discussed in this Decision. Grievant's reinstatement shall be retroactive to the date of her suspension on June 3, 2011, and she shall be entitled to back pay and benefits, with statutory interest, from that point forward to July 26, 2012. All other relief sought by Grievant is hereby **DENIED**.

The following Conclusions of Law support the Decision reached.

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. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. This Grievance Board has recognized that a "functional demotion" may occur when an employee is reassigned to duties of less number and responsibility without salary reduction or other alteration, which may impact the employee's ability to obtain future job advancement. *Dickey v. Div. of Labor*, Docket No. 2008-1820-CONS (Jan. 21, 2009); *Dudley v. Bureau of Senior Serv*., Docket No. 01-BSS-092 (July 16,

2001). *See Gillispie v. W. Va. Dep't of Corrections*, Docket No. 89-CORR-105 (Aug. 29, 1989).

3. A "functional demotion" is not a disciplinary matter. Therefore, Grievant has the burden of proving that she received a functional demotion by a preponderance of the evidence. *Dickey, supra*. *See* Procedural Rule of the W. Va. Public Employees Grievance Bd., 158 C.S.R. § 3 (2008).

4. Grievant established by a preponderance of the evidence that, following her return to duty from a suspension in January 2011, during April and May 2011, her duties were significantly limited to performing minimal Sanitarian work in the office and other "make-work" clerical duties, thereby subjecting her to a functional demotion.

5. If an employee does not grieve specific disciplinary incidents, she cannot place the merits of such discipline in issue in a subsequent grievance proceeding. *Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997); *Jones v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-371 (Oct. 30, 1996). *See Stamper v. W. Va. Dep't of Health & Human Res*., Docket No. 95-HHR-144 (Mar. 20, 1996); *Womack v. Dep't of Admin*., Docket No. 93-ADMN-430 (Mar. 30, 1994). In such cases, the information contained in prior disciplinary documentation must be accepted as true. *See Perdue v. Dep't of Health & Human Res*., Docket No. 93-HHR-050 (Feb. 4, 1994).

6. Under the legal doctrine of *res judicata*, the parties to a grievance are precluded from relitigating issues that have previously been decided in grievance proceedings between them before this Grievance Board. *See Baker v. Div. of Highways*, Docket No. 2011-1393-DOT (June 12, 2012); *Frost v. Bluefield State*

College, Docket No. 2010-1564-BSC (Jan. 12, 2012). The preclusion doctrine of *res judicata* may be applied by an administrative law judge to prevent the relitigation of matters about which the parties have already had a full and fair opportunity to litigate and which were in fact litigated. *Vance v. Jefferson County Bd. of Educ*., Docket No. 03-19-018 (May 27, 2003).

7. In accordance with the doctrine of *res judicata*, Grievant and Respondent are bound by the determinations of this Grievance Board on grievances adjudicated in *Koblinsky v. Putnam County Health Dep't*, Docket No. 2010-0824-PutCH (May 4, 2010), *Koblinsky v. Putnam County Health Dep't*, Docket No. 2010-1306-CONS (Nov. 8, 2010), and *Koblinsky v. Putnam County Health Dep't*, Docket No. 2011-0892-CONS (Sept. 14, 2011). *Baker v. Div. of Highways*, Docket No. 2011-1393-DOT (June 12, 2012); *Frost v. Bluefield State College*, Docket No. 2010-1564-BSC (Jan. 12, 2012).

8. Insubordination involves "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).

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

10. Generally, an employee must obey a supervisor's order and take appropriate action to challenge the validity of the supervisor's order. *Stover v. Mason County Bd. of Educ*., Docket No. 95-26-078 (Sept. 25, 1995). 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).

11. An employee cannot be disciplined for refusing to give a statement or answer questions during an internal investigation related to the performance of her official duties when she has not been informed that her statements will not be used in a subsequent criminal proceeding. *Tolley v. W. Va. Div. of Natural Res*., Docket No. 94-DNR-629 (May 18, 1995). *See Lefkowitz v. Turley*, 414 U.S. 70,84 (1973); *Garrity v. New Jersey*, 385 U.S. 493 (1967). *See also United States v. Camacho*, 739 F. Supp. 1504 (S.D. Fla. 1990).

12. PCHD improperly suspended Grievant on June 3, 2011, after requiring her to choose between answering questions and being suspended without pay, without properly advising Grievant of her options and consequences, in violation of her Fifth Amendment right not to incriminate herself. *See Tolley, supra*; *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 362 U.S. 280 (1968).

13. PCHD established by a preponderance of the evidence that Grievant was insubordinate on May 27, 2011, when she refused to sign a document prepared by Ms. Fleshman to document that Grievant was receiving four hours of preparation time in regard to an earlier grievance, despite being advised that she was simply being asked

to sign in order to document receipt of the memo. *See Thompson v. Logan County Bd. of Educ*., Docket No. 95-23-127 (July 17, 1995).

14. PCHD established by a preponderance of the evidence that Grievant was insubordinate on June 2 and 3, 2011, when she refused to sign separate written disciplinary warnings, despite being advised that she was only being asked to sign the reprimand in order to document that she had received a copy of the disciplinary action. *See Simons v. Logan County Bd. of Educ*., Docket No. 95-23-399 (June 27, 1996).

15. PCHD failed to establish by a preponderance of the evidence that Grievant was insubordinate on May 19, 2011, when she called her immediate supervisor to advise that she was driving herself to a training conference at Glade Springs Resort at her own expense, rather than ride with other PCHD employees in a county vehicle as arranged on the previous day. *See Butts v. Higher Educ. Interim Governing Bd*., 212 W. Va. 209, 569 S.E.2d 456 (2002) (*per curiam*).

16. A grievant alleging unlawful reprisal or retaliation in violation of W. Va. Code § 6C-2-2(o), in order to establish a *prima facie* case, must demonstrate by a preponderance of the evidence:

(1) that she engaged in activity protected by the statute (*e.g*., filing a grievance);

(2) that her employer was aware of such protected activity;

(3) that, thereafter, an adverse employment action was taken against her by her employer; and

(4) that the adverse action was the result of retaliatory motivation or the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

See Bennett v. W. Va. Dep't of Health & Human Res., Huntington State Hosp., Docket No. 98-HHR-378 (Apr. 27, 1999); *Coddington v. W. Va. Dep't of Health & Human Res*., Docket Nos. 93-HHR-265/266/267 (May 19, 1994).

17. If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for its actions. *Conner v. Barbour County Bd. of Educ*., 200 W. Va. 405, 489 S.E.2d 787 (1997). *See Mace v. Pizza Hut, Inc*., 180 W. Va. 469, 377 S.E.2d 461 (1989). If the employer succeeds in rebutting the presumption, the employee then has an opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for the adverse action were merely a pretext for unlawful retaliation. *See Conner, supra*; *W. Va. Dep't of Natural Res. v. Myers*, 191 W. Va. 72, 443 S.E.2d 229 (1994).

18. Grievant established by a preponderance of the evidence that she was disciplined in retaliation for exercising her statutory right to file grievances under the grievance procedure for public employees in regard to her functional demotion, her distribution of a handout/flyer and letter to the editor challenging the Putnam County Rabies Control Policy, her last-minute decision to drive herself to a training conference at Glade Springs Resort rather than travel with other PCHD employees in a county vehicle, and her refusal to respond to a written questionnaire concerning who recorded and disseminated a recording of an internal PCHD staff meeting.

19. The employer must also demonstrate that misconduct which forms the basis for dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989). *See Smith v. Clay County Health Dep't*, Docket No. 2012-0451-ClaCH (Apr. 17, 2012). Non-probationary state employees in the classified service may only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); Syl. Pt. 1, *Oakes v. W. Va. Dept. of Finance & Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980). *See Guine v. Civil Service Comm'n*, 149 W. Va. 461, 468, 141 S.E.2d 364, 368-69 (1965).

20. PCHD failed to establish by a preponderance of the evidence that the disciplinary charges which were supported by a preponderance of the evidence under applicable law were sufficiently egregious to warrant Grievant's termination, given PCHD's violation of Grievant's First Amendment right to engage in protected speech and her Fifth Amendment right to refrain from self-incrimination, as well as the multiple incidents of prohibited retaliation for exercising her rights under the grievance procedure for public employees.

21. Ordinarily, a wrongfully terminated employee has a duty to mitigate damages by accepting similar employment if it is available in the local area, and actual wages received, or the wages the employee could have received at comparable

employment where it is locally available, will be deducted from any back pay award. However, the burden of raising the issue of mitigation is on the employer. *See* Syl. Pt. 3, *W. Va. Dep't of Natural Res. v. Myers*, 191 W. Va. 72, 443 S.E.2d 229 (1994); Syl. Pt. 2, *Mason County Bd. of Educ. v. State Supt. Of Schools*, 170 W. Va. 632, 295 S.E.2d 719 (1982).

22. A wrongfully terminated employee who is enrolled as a full-time student is no longer ready, willing and available to accept alternative employment, and thereby loses any entitlement to back pay. *See Taylor v. Safeway Stores, Inc*., 524 F.2d 263, 267-68 (10th Cir. 1975); *U.S. v. Wood, Wire & Metal Lathers Local 46*, 328 F. Supp. 429 (S.D. N.Y. 1971).

23. PCHD established by a preponderance of the evidence that, as of July 26, 2012, Grievant was enrolled as a full-time student, and any entitlement to back pay terminated as of that date.

Accordingly, this grievance is **GRANTED, IN PART**, and **DENIED, IN PART**, as previously set forth in this Decision.

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 appealing party must also

provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: October 23, 2012

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LEWIS G. BREWER
Administrative Law Judge