THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ROSE KNIGHT,

Grievant,

v. **DOCKET NO. 2012-1517-CONS**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/ BUREAU FOR CHILDREN AND FAMILIES,

Respondent.

DECISION

On April 23, 2012, Rose Knight ("Grievant") filed a grievance directly at Level Three of the grievance procedure challenging her suspension by her employer, the West Virginia Department of Health and Human Resources, Bureau for Children and Families ("DHHR" or "Respondent"). This grievance was assigned Docket Number 2012-1164-DHHR. Subsequently, on May 17, 2012, Grievant filed another grievance challenging the termination of her employment by Respondent. This grievance was assigned Docket Number 2012-1303-DHHR. On October 11, 2012, in an Order issued by Acting Chief Administrative Law Judge William B. McGinley, these grievances were consolidated as Docket Number 2012-1517-CONS. Following multiple continuances for good cause shown, this matter was assigned to the undersigned Administrative Law Judge, and a Level Three hearing was held on May 23 and June 21 in Charleston, West Virginia. Grievant was represented by Gordon Simmons with UE Local 170 of the West Virginia Public Workers Union, and Respondent was represented by Assistant Attorney General Michael E. Bevers. This matter became mature for decision on August 6,

2013, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was suspended, pending investigation, and subsequently dismissed from her employment by Respondent based upon multiple alleged infractions. Much of the evidence relied upon by Respondent was obtained during a forensic examination of Grievant's state-provided personal computer. It was determined that the policies and handbook provisions of the West Virginia Office of Technology and DHHR provided adequate notice to Grievant so as to remove any reasonable expectation of privacy in such locations and electronic communications, thereby eliminating any basis to contend that her Fourth Amendment right to freedom from unreasonable search and seizure was violated by the inspection of the hard drive on her office computer. The employer also established that it acted within proper legal authority by adopting a policy prohibiting the use of audio recording devices in the work area, except under certain limited circumstances not applicable here.

Grievant asserted that all of the adverse actions taken against her by DHHR were initiated in retaliation for her participation in the grievance procedure for public employees, initially as a witness for co-workers who were challenging the promotion of one of their co-workers to a position where she served as Grievant's immediate supervisor, as well as for multiple grievances which Grievant subsequently filed on her own behalf. The Respondent established various charges against Grievant but failed to demonstrate by a preponderance of the evidence that Grievant generally misused her

office computer and the state electronic mail system to engage in communications that, in many instances, were related, directly or indirectly, to Grievant's grievance activity, as well as the charge that Grievant misrepresented information in the course of an internal agency investigation. It was determined that several of the proven allegations involved essentially technical violations of state technology policy which did not involve any particular personal gain for Grievant, or her immediate family. Because not all of the charges against Grievant were sustained, and Grievant established that certain charges constituted retaliation prohibited under the state grievance procedure for public employees, it became necessary to reassess the penalty imposed. As a result of that assessment, this grievance will be granted, in part, and Grievant will be reinstated as an Office Assistant 2, with a 30-day suspension without pay as a penalty for those allegations which were established by a preponderance of the credible evidence of record.

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 Respondent, Department of Health and Human Resources, Bureau for Children and Families, as an Office Assistant 2 in the Calhoun County DHHR Office. During her employment, Grievant's primary duties were either to perform receptionist duties at the "front desk" area of the office, or to accomplish filing, copying, and other clerical duties in the downstairs portion of the office.

2. Nancy Ritchie has worked for DHHR since February 2009. In October 2010, she was promoted from Accounting Technician 3 to the position of Operations Supervisor in the Calhoun County DHHR Office. As Operations Supervisor, Ms. Ritchie directly supervised all employees in the clerical unit working in Calhoun, Gilmer and Wirt counties, including Grievant. In addition, Ms. Ritchie's duties included serving as Secretary to the Community Services Manager.

3. Joseph T. Johnson has worked for DHHR since 1998, beginning as an Economic Service Worker. In September 2011, he was promoted to Community Services Manager ("CSM") in charge of the DHHR Offices in Calhoun, Gilmer and Wirt counties. In that capacity, he served as Ms. Ritchie's immediate supervisor, and as Grievant's second-level supervisor.

4. Samantha Cason is employed as an Economic Service Worker in the Gilmer County DHHR Office. From April 2011 to March 2012, Ms. Cason was employed in the Calhoun County DHHR Office as an Office Assistant 2, and in that capacity worked with Grievant.

5. Patricia Dawn Knight (no relation to Grievant) has been employed by DHHR for 14 years and is currently assigned to the Calhoun County DHHR Office as an Office Assistant 2. She worked with Grievant during her employment in the Calhoun County Office.

6. Loretta Smith is employed as a Child Protective Service Worker in DHHR's Calhoun County Office, and was so employed while Grievant worked in that office.

7. After Ms. Ritchie's promotion to Operations Supervisor in October 2010, two of Grievant's co-workers, who had been unsuccessful applicants for that position, filed grievances, and Grievant was called as a witness for the grieving employees in at least one of those proceedings. Neither grievance was successful.

8. Ms. Ritchie and Grievant had a cordial and friendly relationship while they were co-workers. However, once Ms. Ritchie was promoted ahead of her co-workers who had more seniority with DHHR, she observed Grievant's attitude toward her deteriorate. From Grievant's perspective, virtually all guidance, direction or criticism emanating toward her from Ms. Ritchie was perceived as retaliation for Grievant's participation in the grievance process as a witness for her co-workers.

9. On March 24, 2011, Ms. Ritchie met with Grievant to discuss Grievant's duties while serving as the office receptionist. One of the matters Ms. Ritchie discussed with Grievant was sending excessive personal e-mails. *See* DHHR Ex 1 at 1. Ms. Ritchie also discussed confidentiality with Grievant, instructing her not to discuss cases outside the office with anyone and warning her to stop the "office chatter in the front office concerning cases." *See* DHHR Ex 1 at 2. This was not intended as a disciplinary meeting. However, Grievant refused to sign a memo summarizing her discussion with Ms. Ritchie because she considered the document to be a "reprimand." *Id*.

10. Grievant filed a grievance contending that the memo/reprimand involved unwarranted disciplinary action taken in retaliation for her participation as a witness in her co-workers' grievance proceedings. This grievance was still pending at the time Grievant was terminated.

11. In April 2011, Grievant was reassigned to work downstairs in the office providing clerical assistance to the Child Protective Service Workers. Another employee served as the primary receptionist while Grievant was downstairs until November 2011, when Grievant was returned to the receptionist position as her principal function.

12. During a meeting of the Operations Staff on August 31, 2011, in which Grievant was present, Ms. Ritchie and Mr. Johnson discussed various work-related issues, reminding the employees not to send e-mail outside the state agency, unless it is business related, and to stop excess e-mailing throughout the work day. *See* DHHR Ex 1 at 5-6.

13. During this same August 31 staff meeting, Ms. Ritchie, in the presence of CSM Johnson and Grievant, also directed employees not to come in the office early or stay after normal working hours, unless they had specific permission from their supervisor. *See* DHHR Ex 1 at 6.

14. Grievant actively participated in the August 31 staff meeting, asking Ms. Ritchie if she was required to sign out for lunch when leaving the building. Grievant did not seek clarification of Ms. Ritchie's instructions concerning not being in the office outside normal working hours. *Id*.

15. On an unspecified date in 2011, when Grievant was working downstairs to assist with Child Protective Services filing, Ms. Smith observed Grievant on at least one occasion walking briskly down a parallel hallway or aisle, in an apparent effort to avoid Ms. Ritchie who had come downstairs asking "has anybody seen Rose." On another

unspecified date, Ms. Smith observed Grievant walking toward her home in the afternoon during work hours.

16. Mr. Johnson and Ms. Ritchie conducted a non-disciplinary "coaching session" with Grievant on October 3, 2011, concerning Grievant's failure to sign out before leaving the building. This discussion resulted from Ms. Ritchie observing Grievant leaving the office without signing out on one occasion, and another occasion when Grievant could not be located in the building. *See* DHHR Ex 1 at 7-8. Grievant accused Ms. Ritchie and Mr. Johnson of "watching her all the time."

17. On October 13, 2011, Grievant refused to meet with Ms. Ritchie to discuss her annual performance evaluation (EPA-3) without a representative present. No disciplinary action was taken as a result of this refusal. *See* DHHR Ex 1 at 9. Grievant's performance evaluation was subsequently discussed with her in a meeting on October 14, 2011, without a representative present. *See* DHHR Ex 1 at 10.

18. On February 14, 2012, CSM Johnson and Ms. Ritchie asked Grievant to meet with them to discuss Grievant's request for accommodation under the Americans with Disabilities Act ("ADA"), and completion of required ADA medical forms that needed to be reviewed by DHHR's Benefits Coordinator, Andy Garretson. Grievant attempted to designate her husband, Gary Knight, as her representative for this discussion, and refused to meet with her supervisors when they would not allow Mr. Knight in the meeting.

19. On December 16, 2008, Grievant signed an "Employee Acknowledgement" stating that she had access to DHHR's Employee Handbook

through the agency's web site, and that she was responsible for becoming familiar with the contents of the handbook. *See* DHHR Ex 10 at 28.

20. On March 25, 2011, Grievant signed an acknowledgement that she had read DHHR's Confidentiality Statement, and agreed to abide by the requirements in that statement. *See* DHHR Ex 13 at 4.

21. On October 25, 2011, Grievant signed a form acknowledging receipt of DHHR's Policy Memorandum 2108 entitled "Employee Conduct." DHHR Ex 9 at 4.

22. DHHR's Employee Conduct policy includes Section VII entitled "Policy and Procedures." That portion of the policy states, *inter alia*, that "Employees are expected to: . . . comply with all Division of Personnel and Department policies; . . . maintain the confidentiality of all Agency records including personnel, resident/patient/client records; use State vehicles, telephones and equipment only as authorized; . . . ." DHHR Ex 9 at 2.

23. Ms. Patricia Knight was aware of the policy in the Calhoun County DHHR Office that employees needed permission from their supervisors to work after normal office hours.

24. On some occasion during their employment, date unknown, Grievant told Ms. Patricia Knight that she had been recording staff meetings.

25. On another occasion, date unknown, Grievant asked Ms. Patricia Knight to attend a meeting with one of her supervisors as her representative. However, Grievant refused to tell Ms. Patricia Knight what the meeting was about and, as a consequence, Ms. Patricia Knight declined to act as her representative. At one time,

Ms. Patricia Knight was Vice-President of UE Local 170, and President of that same union within DHHR.

26. On or about December 15, 2012, when Ms. Ritchie spoke to Grievant about a work-related matter, Grievant stated to Ms. Ritchie; "If you insist on talking (to me) let me get my audio recorder." Grievant also stated; "I don't want to talk to you just get away." *See* DHHR Ex 1 at 12-13.

27. On an unspecified date prior to January 9, 2012, Ms. Cason observed a small electronic device partially protruding from Grievant's bra cleavage. When Ms. Cason pointed at the device, Grievant stated, "I only use that to record things I need to remember."

28. On January 9, 2012, Ms. Cason heard a beeping sound emanating from Grievant's purse at the front desk of the Calhoun County DHHR Office where Grievant was serving as the receptionist. Ms. Ritchie and CSM Johnson also heard the beeping noise and observed a tape recorder in Grievant's purse, with a red light blinking on the device. CSM Johnson identified the device as some form of audio recorder.

29. There was no evidence as to what, if anything, was recorded on Grievant's audio recording device on January 9, 2012, or whether the device was even working at that time.

30. On an unspecified date prior to January 9, 2012, Ms. Smith was in the Calhoun County DHHR Office on a Saturday and heard Mr. Johnson's voice. When Ms. Smith heard the voice a second time, and approached the front desk where Grievant was typing, she recognized that Grievant was playing a recording of Mr. Johnson while

transcribing the conversation. Ms. Smith did not know when or why the recording was made, whether Grievant was on overtime to perform official public business, or why Grievant was transcribing the recording on a weekend.

31. Ms. Cason and Ms. Patricia Knight were present with Grievant in a unit meeting on January 9, 2012 when all employees were informed that they were prohibited from making recordings at work. *See* DHHR Ex 1 at 14. Ms. Cason and Ms. Patricia Knight also received copies of the policy and signed documents acknowledging receipt.

32. On January 9, 2012, Grievant acknowledged that she received a copy of the employee conduct policy entitled "Supervisor's Guide to Employee Conduct." The form which Grievant signed went on to state:

> I agree to abide by the terms of the policy and I am aware that upon any violation of this policy, I will be subject to disciplinary action, up to and including dismissal.
>
> My signature acknowledges my receipt of the policy and my understanding of its contents. My signature does not indicate that I agree with the content of the policy.

DHHR Ex 8 at 20.

33. The Supervisor's Guide to Employee Conduct which Grievant received on January 9, 2012 contains the following provision entitled "Surveillance:"

> Employees are not permitted to create audio or video recordings of conversations, meetings or conferences without prior supervisory approval and the approval of the parties being recorded. Such restriction does not apply to open public meetings. Employees discovered making such recordings will be subject to disciplinary action, up to and including dismissal. Exceptions may be made with prior approval for employees who present medical certification of the need to use a recording device as a reasonable accommodation.

> Use of video surveillance and equipment, i.e., cameras, mobile phone cameras, personal digital assistant cameras, video recorders, etc., is strictly prohibited in areas where there is an expectation of privacy or where confidential information may be copied and/or transmitted. Cameras of any type may be prohibited by an appointing authority in restricted areas. Subjects who are photographed must give written permission in advance, unless authorized by work rule, policy or statute. Video conferencing, web conferencing, and audio conferencing equipment is to be used for business purposes only and misuse will not be tolerated.
>
> The above prohibitions do not apply to any federal, State, or local government security or law enforcement personnel, or other employee (e.g., Investigator) who, because of the nature of her or his work, is duly authorized by her or his appointing authority to utilize surveillance and recording equipment while engaged in her or his official capacity.

DHHR Ex 8 at 15.

34. The Supervisor's Guide to Employee Conduct which Grievant received on January 9, 2012 contains the following "Disclaimer" immediately following the cover page:

> This booklet is intended to be used as a reference and procedural guide to employee conduct. The general information it contains should not be construed to supersede any law, rule, or policy. In the case of any inconsistencies, the statutory and regulatory provisions shall prevail.
>
> This booklet is written with the understanding that the West Virginia Division of Personnel is not engaged in rendering legal services. If legal advice or assistance is required, the services of an attorney should be sought. Supervisors should also refer to policies, rules and regulations as well as consult with the human resources office within his or her respective agency.
>
> For technical assistance concerning specific situations, employees and employers may contact the Division of Personnel's Employee Relations Section at (304) 558-3950, extension 57209.

DHHR Ex 8 at 2.

35. The Supervisor's Guide to Employee Conduct which Grievant received on January 9, 2012, contains the following guidance under the heading of "Employee Conduct:"

> The purpose of this publication is to provide general guidance to employers regarding acceptable and unacceptable employee conduct. It may be adapted in part or whole for uses such as developing agency specific policies, an employee handbook or as a general declaration of expected employee conduct. In addition, links to other relevant Division of Personnel resources are provided.
>
> Each agency is encouraged to develop agency-specific policies based upon the general information provided within this guide. However, prior to issuance of any such agency-specific policy, a copy shall be submitted to the Director of the Division of Personnel (DOP) who will approve, amend or disapprove the policy. If approved, each employee should sign a receipt for receiving the policy; see Appendix A.
>
> Employers are obligated to communicate basic principles regarding expected standards of conduct and to ensure State government workplaces are safe, productive, and secure for State employees and the public they serve. Employees are expected to observe a standard of conduct which will not reflect discredit on the abilities and integrity of employees of the State of West Virginia, or create suspicion with reference to employees' capability in discharging their duties and responsibilities. Employees are charged to conduct their duties in a manner to ensure public confidence in the integrity and impartiality of state government.
>
> **This document is not all-inclusive and agency management has the authority and discretion to promulgate additional agency-specific policy provided such policies do not diminish the standards and appropriately addresses any unacceptable behavior not specifically mentioned herein.**

DHHR Ex 8 at 3 (emphasis in original).

36. On January 18, 2007, the West Virginia Office of Technology ("WVOT") issued Policy No. WVOT-PO1001 entitled "Information Security." This policy contains the following provision pertinent to this grievance:

> 4.4 **Employees must have no expectation of privacy while using State-provided information resources (e.g., cell phones, Internet, etc.).**

DHHR Ex 2 (emphasis in original).

37. On October 14, 2008, the West Virginia Office of Technology issued Policy No. WVOT-PO1004 relating to "Acceptable Use of Portable Devices." This policy contains the following provisions pertinent to this grievance:

> 4.1.2 Employees are only permitted to use State-issued portable devices for State business objectives.
>
> 4.1.2 Employees must not attach portable devices to the State network that are not owned by the State or authorized by the West Virginia Office of Technology (WVOT).
>
> * * *
>
> 4.2.1 All portable devices must have password functionality enabled, and encryption installed and enabled, if available.
>
> * * *
>
> 5.4.3 Employees must only use flash drives with WVOT-approved password and encryption capability to store State information.
>
> 5.4.4 Employees are prohibited from using flash drives or media that do not have adequate protection mechanisms to store or transmit sensitive data (e.g., protected health information {PHI} or personally identifiable information {PII}).
>
> 5.4.5 Employees must not connect unapproved flash drives to any State-owned computing device, or copy State data onto an unapproved flash drive.

DHHR Ex 3 at 2-4 (emphasis in original).

38. On January 29, 2009, Grievant completed an employer-provided course on Information Security. DHHR Ex 13 at 12.

39. On November 24, 2011, the West Virginia Office of Technology issued Policy No. WVOT-PO1005 relating to "E-Mail Use Standards." This policy includes the following provisions that may be pertinent to this grievance:

> 4.5 The State reserves the right to monitor and/or keep a record of all e-mail communications without prior notice. **Employees should have no expectation of privacy in anything they create, store, send, or receive on the State-provided network.**
>
> *** * ***
>
> 5.5 Only minimal personal use of State e-mail systems is permitted (e.g., 10-15 minutes during a break or lunch period). This use should not interfere with the legitimate business of the State.

DHHR Ex 4 (emphasis in original).

40. On December 16, 2008, Grievant signed an acknowledgement that she had access to DHHR's "Employee Handbook," and that she was responsible for becoming familiar with its contents. *See* DHHR Ex 10 at 28.

41. DHHR's Employee Handbook contains the following provisions that may be pertinent to this grievance:

> **ELECTRONIC MAIL AND INTERNET USE**
>
> Electronic mail (e-mail) and Internet access are components of the DHHR communication systems. They are provided by the DHHR to assist employees in the performance of their duties. These systems and their contents are the property of DHHR. As such, the DHHR reserves the right to retrieve the contents for legitimate reasons including, but not limited to, recovery of system failures, compliance with investigations of wrongful act (*sic*.), or location of lost data.
>
> The transmission of obscene, profane, harassing, or intimidating material or messages is specifically prohibited, as is the use of the DHHR communication systems in violation of any policy, rule or law. Misuse of e-mail and/or Internet access can result in disciplinary action up to and including dismissal.

> Each employee is required to read and be familiar with all Information Technology Policies. The policies related to this section are IT Policy 501 – Use of IT Resources and IT Policy 510 – Electronic Message (E-Mail) Guideline and Requirements.

DHHR Ex 10 at 12 (underlining in original).

42. In early February 2012, CSM Johnson requested assistance from the West Virginia Office of Technology ("WVOT") based upon his observation that Grievant appeared to be engaging in excessive use of electronic mail on her computer.

43. Christopher L. Avis is employed by WVOT as an Information Security Officer. One aspect of Mr. Avis' job duties involves serving as WVOT's Forensic Investigator for all agencies in the executive branch of state government.

44. In response to CSM Johnson's request for an investigation into Grievant's computer usage, WVOT sent Mr. Avis to the Calhoun County DHHR Office on February 15, 2012. As part of his investigation, Mr. Avis prepared duplicate digital (or "mirror") images of the hard drives in the two computers Grievant had been using in that office.

45. Mr. Avis returned to the Calhoun County DHHR Office on February 16, 2012, and prepared a second image of the hard drive on the "upstairs" computer that Grievant had been using at that time.

46. Mr. Avis returned to his office at WVOT and used forensic software to review and analyze the data contained on these duplicate hard drives.

47. Each state employee who is authorized access to a state-owned computer is assigned a unique identifier, and is required to create a password to gain access to that computer, creating a record of who logs on and off the state-owned computer, and when these events take place. Grievant's assigned "user name" was E005895.

48. Based upon standard logon codes employed by the Windows security system, a Forensic Investigator can determine how and when a particular user accessed a computer by logging on, and when the user terminated his or her access to that same computer. *See* DHHR Ex 5.

49. Mr. Avis' forensic examination revealed that a portable flash drive was attached to Grievant's state-provided computer while Grievant was logged in on the computer. There was no record that Grievant had been granted approval to attach such a drive to her computer. At least 20 documents were copied from the computer onto the flash drive on the evening of February 15, 2012. *See* DHHR Ex 14 at 1-24.

50. One of the documents transferred to a portable drive on February 15, 2012 involves a brief memo which states the following:

> Feb 9, 2012
>
> After 4:00
>
> Ryan Underwood brought me a hand full of paperwork for Crystal who had T___ [redacted] K____ [redacted] in an office upstairs. Ryan said can you copy this.
>
> Crystal Kendall CPS Supervisor came out and said "I'm really sorry, but I wouldn't have asked you to copy that, but Sam has already left for the day". I said "well, I don't mind".
>
> Sam Cason come (*sic*.) upstairs at 12:20 each day and stops working and prepares for her lunch at 12:30. She did this today.

DHHR Ex 14 at 10 (punctuation in original). The fact that "T. K." is a client of the agency is considered confidential information.

51. On or about October 2, 2011, Grievant recorded a "coaching session" which CSM Johnson and Ms. Ritchie held with her. Grievant subsequently transcribed

the recording of that coaching session on her state-provided computer. *See* DHHR Ex 17 at 8-13.

52. On November 30, 2011, Grievant wrote an e-mail to her husband, Gary Knight, in which she stated: "D ____ [redacted] just came to say hi and left. He looks bad like he is really into the drugs…I thought he looked bad last night.." DHHR Ex 13 at 5-6 (punctuation in original). The fact that "D" is a client of the agency is considered confidential information. *See* DHHR Ex 13 at 1-4.

53. On or about December 1, 2011, Grievant stored a resume for her son, Graham Knight, on her state-provided computer. *See* DHHR Ex 14.

54. On December 8, 2011, Grievant sent an e-mail to her husband, Gary Knight, stating the following:

> R____ B____ [redacted] just came in (R____s [redacted] mom) and she is furious with Loretta Stevens. I told her to get the city police and to go to her house. She was in Lindas (*sic*.) talking about stuff R____ [redacted] didn't do and saying that he was in her yard and different stuff and her mother in law was in the beautyshop (*sic*.) listening…. , She is ready to punch her lights out.

DHHR Ex 13 at 7 (punctuation in original). "R's" identity as a juvenile client of the agency is considered confidential information. *See* DHHR Ex 13 at 1-4.

55. On December 14, 2011, Grievant forwarded an e-mail entitled "Supervised Visits" to Gordon Simmons, her Union representative, which e-mail was originally sent by Ms. Ritchie to various recipients in the Calhoun County DHHR Office, including Grievant, which stated the following:

> Jessica Greenlief with Family Advantage called and cancelled the supervised visit for C____ B____ [redacted] that was scheduled for 12/15/11 from 3:00 to 5:00. Bio father is working out of town during the week and other arrangements will need to be made per Jessica.

DHHR Ex 13 at 8. "CB's" identity as a client of the agency is considered confidential information. *See* DHHR Ex 13 at 1-4. There was no evidence that Mr. Simmons needed to know this information in order to provide representation to Grievant in regard to a grievance.

56. On December 20, 2011, Grievant sent electronic correspondence to her husband, Gary Knight, which included the following:

> Don't forget to meet with the man this evening at 4:30 in front of the school.
>
> I would have thought you would have jumped at the chance to burn Loretta and Crystal after the trouble they have caused you and me both with this job.
>
> He just needs to know if you were aware that Charles was on our premises taking care of town business with Loretta and yes you do know that ..

DHHR Ex 16 at 9 (punctuation in original).

57. In response to electronic correspondence from Mr. Knight seeking clarification of her previous message, Grievant stated the following:

> No no….Charles was at DHHR and that Loretta was very helpful in having him meet T____ [redacted] D____ [redacted] here on more than one account and that you know something about Charles having the DEA and Weston PD here for one meeting where T____ [redacted] was supposedly going to tell on T____ [redacted] S____ [redacted].

> If you remember him telling you about Loretta shaking her legs back and forth standing over T____ [redacted] telling her that if you don't testify against T____ [redacted] S____ [redacted] she was going to take her kid. Charles saying that he tried to wave at her because he was recording it. T____ [redacted] was crying and Loretta was yelling and screaming at her.
>
> That's all he needs to know.

DHHR Ex 16 at 10. The identity of "T. D." as the subject of agency action is considered confidential information.

58. On December 23, 2011, Grievant sent an electronic message to Mr. Simmons which included the following statement:

> Also, we have a client P____ G____ [redacted] that receives benefits from our office. He is not incapacitated so China can't do much for him. Nancy an (*sic*.) Joe took it upon themselves (*sic*.) to take care of him. Nancy keeps leaving work to take P____ [redacted] places but we are not his payee. Criss [C]ross is. Nancy sent me an email last week telling me she needed to talk to him when he came in. I heard her tell him to cash this check for $$300 (*sic*.) and bring it back to her. He did. She brought me a paper to log on that said she gave him $25 spending money and was holding his water deposit of $50 so when the lady took P____ [redacted] to turn it on. [T]hen other $225 is with Nancy? [S]o when it was time to call the landlord to take P____ [redacted] she said [I] will take you cause [I] don't want to bother her. [O]n state time but [I] don't think she can be doing this, how much should [I] turn in?

DHHR Ex 13 at 11. The identity of "P. G." as a client of the agency is considered confidential information.

59. On or about December 29, 2011, Grievant prepared a memo on her state-provided computer noting that Ms. Patricia Knight was using that computer during a time when she was relieving Grievant at the front desk, and it appeared that her co-worker was able to see two grievance-related documents that she was working on at the time. There was no indication in Grievant's detailed memo that Grievant obtained

prior approval from a supervisor to work on her grievances during that time period. *See* DHHR Ex 14.

60. On February 11, 2011, Grievant prepared correspondence to a private physician asking a billing question concerning her Explanation of Benefits on her state-provided computer. *See* DHHR Ex 14.

61. On or about January 10, 2012, Grievant prepared a letter to DHHR Secretary Michael Lewis requesting his approval of the recommendation by the Level One Grievance Evaluator in a recent grievance calling for Grievant's reassignment to a different supervisor other than Ms. Ritchie. *See* DHHR Ex 14 at 6-7.

62. On December 9, 2011, Grievant sent an e-mail to her husband in which she stated that she was "not allowed in the office before or after hours." DHHR Ex 24.

63. Grievant sent various e-mails to her husband so that "he could print them out and take them home." Each of Grievant's e-mails to her husband was addressed to a Gary Knight at a "k12.wv.us" address which is a public school address. *See*, *e.g.*, DHHR Ex 24.

64. On February 15, 2012, Ms. Ritchie saw Grievant in the Calhoun County DHHR Office in the evening after normal work hours. The following morning, February 16, 2012, Ms. Ritchie and CSM Johnson asked Grievant why she was in the office the previous evening without permission from a supervisor. Grievant explained that she was "getting something off the computer." *See* DHHR Ex 1 at 16. CSM Johnson asked Grievant to hand in her keys to the building. Grievant ignored that request and called her representative, Mr. Simmons. Following a telephone conversation between

Grievant and Mr. Simmons, Grievant turned in her keys to the front and back doors of the DHHR Office. *Id*. Grievant refused to sign a form acknowledging that she had surrendered her keys. *See* DHHR Ex 1 at 16-17.

65. On February 15, 2012, Grievant connected an unidentified portable drive to her office computer and transferred at least 20 documents onto the portable drive. Grievant was never given authority to connect a portable drive to her office computer, and no portable device containing required security measures, such as data encryption, was ever approved for Grievant to use with her office computer.

66. On an unspecified date prior to January 23, 2012, Grievant installed a "Magic Jack" device in her private residence which was programmed to transmit voice mail telephone messages to her office computer as attachments to electronic mail messages sent to her state electronic mail address.

67. Between January 23 and February 2, 2012, Grievant received 18 voice mail messages from her home as attachments to electronic mail sent automatically by the Magic Jack service to her state electronic mail address on her state-provided computer. *See* DHHR Ex 7. There was no evidence that any of these messages were related to official state business.

68. On February 24, 2012, CSM Johnson issued a written reprimand to Grievant for insubordination when she refused to meet and discuss her request for accommodation under the Americans with Disabilities Act without a representative present. *See* DHHR Ex 18.

69. Prior to February 24, 2012, Grievant was not the subject of any disciplinary action. CSM Johnson explained that he did not consider any "coachings" which Grievant received from him or Ms. Ritchie to constitute discipline, and were solely for the purpose of instructing Grievant on their expectations in regard to following agency rules and policies.

70. CSM Johnson took the position that because a "coaching" was not a form of discipline, Grievant did not have a right to have a representative present during a coaching session with one of her supervisors.

71. Prior to terminating Grievant, CSM Johnson reviewed Grievant's employee evaluations and found that her performance generally met expectations.

72. On April 19, 2012, Grievant was suspended without pay, pending investigation into allegations of "breach of confidentiality, misuse of state equipment, and misrepresentation of information during the course of an internal investigation." DHHR Ex 19.

73. On May 14, 2012, DHHR Regional Director for the Bureau for Children and Families Region I, Tanagra W. O'Connell, notified Grievant of this disciplinary action as follows:

> The purpose of this letter is to inform you of my decision to dismiss you from your employment as an Office Assistant II with the West Virginia Department of Health and Human Resources with the Calhoun/Gilmer/Wirt District. This action complies with Division of Personnel Administrative Rule, Section 12.2 and provides for the required fifteen (15) calendar day notice period.

Although the dismissal will not be effective until May 29, 2012 after 30 minutes, as authorized by West Virginia Code Chapter 29-6-10 (12), I am requiring your immediate separation from the work place. Therefore, you will be paid up to a maximum of (15) calendar days severance pay instead of being given the opportunity to work out the fifteen (15) calendar day notice period. You will also be paid for all annual Leave accrued and unused as of you (*sic*.) last work day. Your final paycheck will be available for you to pick up and sign for within 72 hours of the date of your dismissal letter.

Your dismissal is the result of your history of performance failures and misconduct that include the following situations. Your most recent episode of misconduct resulted in a 30 day suspension, beginning on April 19, 2012 and was for the following violations; breach of confidentiality, misuse of state equipment and misrepresentation of information during the course of an internal investigation. During our investigation we have found incidents of misconduct on your part that include violations of office security (Common Chapters 1200) and OHRM policy 2102 (Hours of Work/Overtime), accessing the office building on January 8, 2012; January 15, 2012; and February 15, 2012 without authorization from your immediate supervisor or the Community Services Manager. Additionally, you have violated OT policy by the improper use of electronic mail and the inappropriate use of state owned computer equipment. You have used an unauthorized jump drive on DHHR computers along with having a Magic Jack installed on your home phone and had the messages sent to your state email account. Also you have been emailing individuals outside the network on multiple occasions for non work (*sic*.) related uses and sharing information with them that contained confidential client information which is a direct violation of Common Chapters 200.

Also, there were multiple e-mails that contained references to you making audio recordings of staff members which is a direct violation of Employee Conduct Policy 2108. During the course of the investigation, many documents were found on your computer that were not work related, again violating OT policy. Many of the emails were sent after your normal work schedule of 8:30am to 4:30pm or 9:00am to 5:00pm. (*sic*.) Again, this violates Employee Conduct Policy (2108). Many times over the past year, you have refused to take direction from your immediate supervisor or the CSM, resulting in a written reprimand for insubordination on February 24, 2012 (please see attached).

On March 24, 2011 a meeting was held with you and your immediate supervisor and during this meeting, excessive emailing and confidentiality were discussed. You refused to sign acknowledgment of this meeting and what content was discussed. On July 7, 2011 a coaching session was held with you to discuss the incorrect completion of expense accounts and allowing people to enter through the back door of the office without signing them in. During a Staff meeting with your unit on August 31, 2011, work hours were discussed in the policy of not coming to work early or staying late without the authorization from your immediate supervisor or the Community Services Manager and the sending of e-mails to individuals outside the state agency, as this is violation (*sic*.) of OT Policy. You refused to meet with your Immediate Supervisor on 10/13/11 to discuss your EPA-3 and then again refused to meet with your supervisor and CSM on 10/14/11 for a coaching session and to discuss your EPA-3 that you refused to sign. Another coaching session was held on 10/31/11 to discuss you harassing employees for written statements concerning a grievance that you had filed and the fact that other employees were stating that you were bullying them if they refused to write a statement for you.

On January 9, 2012 during a unit meeting with your Supervisor and CSM it was discussed that making audio recordings of other staff members was in direct violation of Employee Conduct Policy and was also potentially illegal in nature. Also during this meeting, confidentiality was discussed and the nature of how important it is to safeguard all client information within the office. You also signed the signature page for Employee Conduct on January 9, 2012. On February 14, 2012 you refused a directive given to you by the CSM concerning a meeting to discuss your ADA medical forms. As a result of this refusal to meet, a predetermination meeting was held with you and a representative on 2/17/12 to discuss impending disciplinary action and a written reprimand for insubordination was given to you on 2/24/12. During the course of an OT Investigation into your unauthorized computer use, you accessed the building after normal work hours on 2/15/12 without authorization from your Immediate Supervisor or the CSM, after learning that an Investigator from the Office of Technology had been in the building earlier that day. As a result of this action, your office keys were taken from you on 2/16/12 and again, you refused to sign a form showing that you had turned in your office keys.

> During the course of your tenure with the Dept of Health and Human Resources, you have signed the confidentiality policy on 3/25/11, Employee Conduct Policy on 12/16/08, 10/25/11 and again on 1/9/12 along with the Employee Handbook on 12/16/08 and the IT and Political Activity Policy on 4/5/12. By signing these various policies, you are fully aware of the seriousness of the policy violations that you have committed.
>
> A predetermination conference was held between you, Rose Knight, Nancy Ritchie, Operations Supervisor and Joe Johnson, Community Services Manager on May 14, 2012 concerning this matter. During the conference you were given the opportunity to respond to these issues and explain your behavior.
>
> During the meeting you responded by denying some of the allegations and stated that you were never advised of the policy pertaining to the violations that you have committed and that you were being singled out and targeted. Furthermore, you kept bringing up instances of other staff members violating various policies within the office and the fact that you were following orders given to you by a previous supervisor that retired in 2010. Also during the meeting, the various coaching sessions and staff meetings were again brought to your attention to clarify that the policies were discussed with you and that you were aware that violating Employee Conduct policy (2108), OHRM policy Hours of Work/Overtime (2102), and Common Chapters Policies 1200 (Office Security) and 200 (Confidentiality) are all serious offenses.
>
> I have considered your response and have decided that your dismissal is appropriate and I will proceed with that personnel action.
>
> * * *

DHHR Ex 20.

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural 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). 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*.

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).

Certain facts relating to the charges against Grievant were the subject of conflicting testimony. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Young v. Div. of Natural Res*., Docket No. 2009-0540-DOC (Nov. 13, 2009); *Massey v. W. Va. Public Serv. Comm’n*, Docket No. 99-

PSC-313 (Dec. 13, 1999); *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). *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). 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. *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth*., Docket No. 2009-0685-MAPS (Apr. 23, 2009); *Massey, supra*.

According to the notice Grievant received on May 14, 2012, Grievant was suspended on April 19, 2012, for three alleged offenses: (1) breach of confidentiality; (2) misuse of state equipment; and (3) misrepresentation of information during the course of an internal investigation. The termination notice goes on to explain that the agency's investigation, which was conducted while Grievant was suspended, found additional offenses, which are thereafter alleged in the notice. Grievant variously argues that she was not properly on notice that certain actions were prohibited, she was singled out and targeted for retaliation, other employees committed offenses with impunity, or certain actions violate her rights to representation or privacy. Each of the substantive charges and Grievant's applicable defenses will be discussed in detail.

Breach of Confidentiality

The charges against Grievant include an allegation that "you have been emailing individuals outside the network on multiple occasions for non work related (*sic*.) uses and sharing information with them that contained confidential client information which is a direct violation of Common Chapters 200." DHHR Ex 20. These charges stem from information contained in electronic correspondence (or "e-mail") recovered from Grievant's state-provided computers during a forensic examination by Christopher L. Avis, an Information Security Officer employed by the West Virginia Office of Technology ("WVOT") as a Forensic Investigator. Mr. Avis, at the employer's request, went to the Calhoun County DHHR Office on February 15, 2012, and returned on February 16, 2012, to make "mirror" copies of the hard drives from the computers Grievant had been using in that office, and subsequently went back to his office where he used forensic software to review and analyze the data stored on those duplicate drives, without altering any of the data or metadata contained therein.

Accordingly, a significant amount of evidence relied upon by DHHR to support the charges against Grievant was derived from an employer-directed forensic search of a computer which she used at work, thus requiring consideration of whether Grievant's freedom from unreasonable searches and seizures guaranteed by the Fourth Amendment to the United States Constitution was violated. It is well settled that individuals do not lose their Fourth Amendment rights merely because they work for the government instead of a private employer. *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987). It is likewise clear that the Fourth Amendment applies when the government

acts in its capacity as an employer. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989). Of course, the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989). *See United States v. Sharpe*, 470 U.S. 675, 682 (1985); *Schmerber v. California*, 384 U.S. 757, 768 (1966).

Determining whether a Fourth Amendment violation has occurred involves a two-step analysis. The first issue to be resolved is whether the employee has a reasonable expectation of privacy given the "operational realities of the workplace." *City of Ontario v. Quon*, 130 S.Ct. 2619, 2628 (2010), *quoting O'Connor*, *supra*, at 717. The question of whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis. *Id*. *See Dooley v. W. Va. Dep't of Transp*., Docket No. 95-DOH-214 (Jan. 23, 1996). If a legitimate expectation of privacy is determined to exist, the second determination to be made is whether the employer's intrusion on that expectation was reasonable under all the circumstances. *See Id; True v. Nebraska,* 612 F.2d 676, 680 (8th Cir. 2010).

For an expectation of privacy to be objectively reasonable, it must flow from a source outside the Fourth Amendment, either to concepts of real or personal property law, or to understandings that are recognized and permitted by society. *Minnesota v. Carter*, 525 U.S. 83, 88 (1998); *Rakas v. Illinois*, 439 U.S. 128, 143-44 (1978). *See also California v. Greenwood*, 486 U.S. 35, 39 (1988); *Smith v. Maryland*, 442 U.S. 735, 740-741 (1979). Government employees may have a legitimate expectation of privacy in their offices or in parts of their offices, such as their desks or file cabinets. However,

office practices, procedures or regulations may reduce legitimate privacy expectations. *United States v. Simons*, 206 F.3d 392, 398 (4th Cir. 2000). *See O'Connor*, *supra*, at 716-18.

WVOT's policy on Information Security, promulgated in January 2007, clearly states in § 4.4: "**Employees must have no expectation of privacy while using State-provided information resources (e.g., cell phones, Internet, etc.)**." DHHR Ex 2 (emphasis in original). Similarly, WVOT's policy on E-Mail Use Standards, issued in November 2011, provides in § 4.5: "**Employees should have no expectation of privacy in anything they create, store, send, or receive on the State-provided network**." DHHR Ex 4 (emphasis in original). That same policy also states: "The State reserves the right to monitor and/or keep a record of all e-mail communications without prior notice." *Id*. Further, the policy advises that the "content of e-mail messages properly obtained for discovery or management purposes may be disclosed without the permission of the authorized user who created the message." DHHR Ex 4 at 3. These policies are applicable across state government in all agencies, including DHHR. WVOT has statutory responsibility for developing policies covering these matters. *See* W. Va. Code § 5A-6-4a, *et seq*.

On October 25, 2011, Grievant acknowledged receipt of an "Employee Conduct" Policy Memorandum which stated that "Employees are expected to . . . use State . . . equipment only as authorized…." DHHR EX 9 at 2-4. Respondent also produced evidence that Grievant completed a course in Information Security on January 29, 2009. Grievant testified that she had no recollection of attending any such course. There is

no credible basis for concluding that DHHR made up a course that Grievant completed just to establish notice of Information Security policies. Indeed, WVOT Policy PO1001, Information Security, § 4.19, provides that "[a]ll Executive Branch employees will be required to complete mandatory online information security awareness or refresher training annually." DHHR Ex 2 at 6. It is more likely than not that Grievant did complete a course covering Information Security[1] which included, in some portion thereof, the general policy statement that employees should have no expectation of privacy when using state-provided computer equipment and communication systems. Further, given the guidance set forth in WVOT's comprehensive policies on Information Security and E-Mail Use Standards, DHHR has provided more than adequate evidence to demonstrate that any expectation of privacy Grievant might have harbored regarding her personal e-mail communications, or any documents stored on her computer, was not objectively reasonable. *See United States v. Hamilton*, 778 F.Supp.2d 651, 654 (E.D. Va. 2011). *See also Dooley*, *supra*.

Given the determination that Grievant had no reasonable expectation of privacy in the electronic mail correspondence and other personal documents she generated on her state-provided computer, it is not necessary to proceed to the second step of the analysis to determine whether her employer's inspection and gathering of that information was reasonable under the circumstances. However, it is noted that CSM Johnson personally observed Grievant doing an excessive amount of typing on her

[1] Ms. Ritchie also testified that Grievant attended a meeting on April 5, 2012 where the "Information Technology Resources policy (*sic*.) was gone over with staff" and Grievant signed an acknowledgement form related to that policy. DHHR Ex 1 at 20-21. However, these events have no bearing on the status of Grievant's expectation of privacy in February 2012, two months earlier, when her computer was effectively searched without a warrant by WVOT's Forensic Investigator.

computer keyboard that was inconsistent with her assigned duties as the office receptionist. On prior occasions, multiple employees had complained about seeing their names in documents displayed on Grievant's computer screen that did not appear to be related to her legitimate duties. Therefore, it was not unreasonable for a supervisor to have an information technology specialist examine Grievant's computer for compliance with established work rules. Accordingly, even if it were established that Grievant had some expectation of privacy regarding her personal e-mail communications or computer-generated documents, DHHR's actions were not unreasonable in the circumstances presented. *See Simons*, *supra*, at 399-401.

Grievant more specifically argues that various documents found on Grievant's state-provided computer during a forensic examination by WVOT's Forensic Investigator relate to "privileged" communications between Grievant and her union representative, and therefore may not be relied upon to support any of these charges. Grievant contends that an employee-union representative "privilege" should be recognized in certain circumstances as occurred in *Bell v. Village of Streamwood*, 806 F.Supp.2d 1052 (N.D. Ill. 2011). As Grievant suggests, *Bell* did identify an employee-union representative privilege under applicable state law. However, this decision was limited to a "testimonial privilege" under Rule 501 of the Federal Rules of Evidence wherein an employee's union representative could not be compelled to give testimony against the employee in an official investigation. Moreover, *Bell* involved application of an Illinois statute which codified a union agent-union member privilege in the following terms:

> (a) Except when required in subsection (b) of this Section, a union agent, during the agency or representative relationship or after termination of the agency or representative relationship with the bargaining unit member, shall not be compelled to disclose, in any court or to any administrative board or agency arbitration or proceeding, whether civil or criminal, any information he or she may have acquired in attending to his or her professional duties or while acting in his or her representative capacity.
>
> (b) A union agent may use or reveal information obtained during the course of fulfilling his or her professional representative duties:
>
> > (1) to the extent it appears necessary to prevent the commission of a crime that is likely to result in a clear, imminent risk of serious physical injury or death of another person;
> >
> > (2) in actions, civil or criminal, against the union agent in his or her personal or official representative capacity, or against the local union or subordinate body thereof or international Union or affiliated or subordinate body thereof or any agent thereof in their personal or official representative capacities;
> >
> > (3) when required by court order; or
> >
> > (4) when, after full disclosure has been provided, the written or oral consent of the bargaining unit member has been obtained or, if the bargaining unit member is deceased or has been adjudged incompetent by a court of competent jurisdiction, the written or oral consent of the bargaining unit member's state.

735 Ill. Comp. Stat. 5/8-803.5, *quoted in Bell*, *supra*, at 1056.

The foregoing legislation provides specific support for the District Court's recognition of a testimonial privilege for a union representative in regard to what was disclosed to him or her by an employee which he or she represents. The legislative background for recognizing such a privilege in West Virginia is much less direct.

The grievance procedure statute for public employees provides: "An employee may designate a **representative** who may be present at any step of the procedure as well as at any meeting that is held with the employee for the purpose of discussing or considering disciplinary action." W. Va. Code § 6C-2-3(g)(1) (emphasis added). The grievance statute also defines representative as "any employee organization, fellow employee, attorney or other person designated by the grievant or intervenor as his or her representative and may not include a supervisor who evaluates the grievant." W. Va. Code § 6C-2-2(n). The word "union" does not appear anywhere in W. Va. Code § 6C-2-1, *et seq*. Instead, unions are included within the definition of an "employee organization," described as "an employee advocacy organization with employee members that has filed with the board the name, address, chief officer and membership criteria of the organization." W. Va. Code § 6C-2-2(f).

The grievance statute also permits certain use of resources in regard to participating in grievance proceedings as follows:

> (1) The grievant, witnesses and an employee representative shall be granted reasonable and necessary time off during working hours to attend grievance proceedings without loss of pay and without charge to annual or compensatory leave credits.
>
> (2) In addition to actual time spent attending grievance proceedings, the grievant and an employee representative shall be granted time off during working hours, not to exceed four hours per grievance, for the preparation of the grievance without loss of pay and without charge to annual or compensatory leave credits. However, the first responsibility of any employee is the work assigned to the employee. An employee may not allow grievance preparation and representation activities to seriously affect the overall productivity of the employee.

> (3) The grievant and an employee representative shall have access to the employer's equipment for purposes of preparing grievance documents subject to the reasonable rules of the employer governing the use of the equipment for nonwork purposes.

W. Va. Code § 6C-2-3(p).

Although the record is not crystal clear, it is undisputed that at some point in time Mr. Simmons began representing Grievant in grievance proceedings which she initiated pursuant to the statutory grievance procedure for public employees. Administrative notice is taken that Mr. Simmons was not employed by DHHR or any other state agency at all times pertinent to this grievance. Administrative notice is further taken that Mr. Simmons is affiliated with a union which falls within the definition of "employee organization" in W. Va. Code § 6C-2-2(f).

However, even assuming that the employee-union representative privilege recognized in *Bell* exists in the context of West Virginia public employment, this grievance involves a different set of circumstances. DHHR has not subpoenaed Grievant's representative, Mr. Simmons, as a witness. Therefore, he is not being required to violate the employee-representative privilege recognized in *Bell*. That issue will have to be addressed in another matter where the facts presented require such a determination.

Notwithstanding the forgoing analysis, the question remains whether Grievant has a reasonable expectation that statements she makes in communications with her union representative will not be used against her by her employer. As previously discussed in analyzing Grievant's Fourth Amendment right to freedom from unreasonable searches and seizures, Grievant did not have a reasonable expectation of

privacy in regard to any communication she conducted on her state-provided computer or using her State e-mail address. The State of West Virginia and her employer retained the right to examine her computer files and electronic mail messages at any time for any legitimate purpose. Nonetheless, the legal right to review correspondence does not necessarily equate to the right to use that correspondence as evidence of wrongdoing by the author. For example, a statement to her union representative denigrating the character of her supervisor would not ordinarily provide a basis for alleging that the employee was insubordinate toward that supervisor.

Several of the communications at issue here involve disclosure of confidential agency information regarding the full names of agency clients. Certainly, situations may arise in which it might be necessary for DHHR to identify a client by name to an employee's representative in the grievance process. For example, a social worker charged with negligent performance of duty in regard to providing required services to a client would need to be placed on notice as to the identity of that client sufficiently to respond to the charges. *See Adkins v. Dep't of Health & Human Res.*, Docket No. 2013-0264-DHHR (July 19, 2013). The person representing such an employee would likewise need to know who would be a relevant witness to such alleged misconduct. However, that determination does not need to be made here because Grievant failed to demonstrate that any of the confidential information she provided to Mr. Simmons, or her husband, in his purported capacity as her alternate representative, was either necessary to process any of her pending grievances, or had been approved for release

to either of these individuals outside DHHR based upon a valid exception to the agency's confidentiality policy.

Grievant testified that she e-mailed various documents to her husband so that he could print them out at work and take them home for her. Given that Grievant was e-mailing Mr. Knight at a public school address, this testimony does not mitigate Grievant's improper conduct. Not only does this process require Mr. Knight to use the resources of his public employer to assist Grievant with her issues, the confidential information she was sharing with him electronically would inevitably be stored on another computer system at Mr. Knight's place of employment, where the data could potentially be accessed by others outside DHHR.

Accordingly, DHHR established by a preponderance of the evidence that Grievant violated the employer's strict policies regarding confidentiality by revealing the names of agency clients to persons outside the agency, in particular, Grievant's union representative and Grievant's husband, without obtaining proper authority to do so. It is noted that there is no evidence that this information was actually disseminated beyond these two individuals. It is also noted that Grievant may have reasonably believed that her communications with a union representative, or her spouse, were protected by some form of legal privilege.

As hereinafter discussed, DHHR also established by a preponderance of the evidence that Grievant improperly attached an unapproved portable drive, or "flash drive," to her state-provided computer, and transferred documents from her computer that included the name of at least one agency client, which information is considered

confidential by her employer. Such activity also represents a breach of confidentiality because that is one of the primary reasons the WVOT Information Security Policy prohibits such activity: preventing the inadvertent disclosure of confidential information stored on a state computer system. Again, it will be noted that there is no evidence that this confidential information was further disseminated, or that Grievant was necessarily aware of the fact that one of the non-work related documents she was transferring to a personal portable drive[2] contained confidential information.

Misuse of State Equipment – Magic Jack and Jump Drive Use

One of the charges in Grievant's termination notice states "you have violated OT [Office of Technology] policy by the improper use of electronic mail and the inappropriate use of state owned computer equipment. You have used an unauthorized jump drive on DHHR computers along with having a Magic Jack installed on your home phone and had the messages sent to your state email account." DHHR Ex 20 at 1.

On October 14, 2008, the West Virginia Office of Technology promulgated Policy No. WVOT-PO1004 regarding "Acceptable Use of Portable Devices" ("Acceptable Use Policy"). *See* DHHR Ex 3. This Acceptable Use Policy defines a "portable device" to include "laptops, flash drives, personal digital assistants (PDAs), SmartPhone (e.g. Blackberry, Treo, etc.), and any emerging technology containing a processor and/or memory." *Id*. Although the terms "jump drive" and "flash drive" may be used interchangeably, the Acceptable Use Policy encompasses any external device which facilitates the transfer of electronic files to or from a computer or computer network.

[2] Attaching this portable drive to her state-provided computer involves a separate allegation which will be subsequently addressed in further detail.

As part of the Acceptable Use Policy, any portable device connected to a state-owned computer must either be "owned by the State or authorized by" the Office of Technology. *Id*. at 2. In addition, employees may "not connect unapproved flash drives to any State-owned computing device, or copy State data onto an unapproved flash drive." *Id*. at 3. After regular work hours on February 15, 2012, the same day that a WVOT employee initiated a forensic examination of the state-provided computers which Grievant used at work, Ms. Ritchie observed Grievant in the otherwise closed office in the vicinity of her desk where her computer was situated. The following morning, when Ms. Ritchie and CSM Johnson asked Grievant what she was doing in the office the previous evening, Grievant responded: "getting something off the computer." *See* DHHR Ex 1 at 16.

As previously discussed in analyzing Grievant's Fourth Amendment right to freedom from unreasonable searches and seizures, under WVOT and DHHR policies in effect as of February 15 and 16, 2012, Grievant had no reasonable expectation of privacy in regard to any information which was stored on her state-provided office computer. Therefore, the evidence obtained by Mr. Avis showing the attachment of a portable storage device, such as a "flash drive" or "jump drive," to her office computer after working hours on February 15, 2012, was fully admissible in this administrative proceeding. Grievant's verbal admission against interest in response to a question from her supervisors regarding her actions in the office on the evening of February 15 that she was "getting something off my computer" is consistent with the testimony of Mr. Avis that an external drive was attached to Grievant's state-provided computer during

that same time frame, and that at least 20 documents were transferred from the computer to the external, removable drive. Accordingly, DHHR established by a preponderance of the evidence that Grievant engaged in the inappropriate use of state-owned computer equipment by attaching an external drive to her state-provided computer after normal working hours on the evening of February 15, 2012, and by downloading at least 20 documents from that computer to the external drive.

Mr. Avis' forensic examination of the hard drive from the state-provided computer Grievant used at work revealed a series of e-mail messages which were generated by the voicemail module of the "Magic Jack" device which Grievant installed in her home. As discussed above in regard to Grievant's Fourth Amendment right to freedom from unreasonable searches and seizures, the policies of WVOT and DHHR collectively establish that Grievant had no reasonable expectation of privacy in regard to information stored on her state-provided computer, or in the State's electronic mail system.

Grievant credibly testified that she registered her personal Magic Jack account using her state e-mail address, without understanding that the program included a voice mail feature. Grievant was unable to explain why she registered this device using her employment e-mail rather than her personal e-mail. Grievant only listened to one or two of the voice mail messages which were forwarded to her state-provided computer. After finding that the calls were sales solicitations, she did not open any further messages whenever she could see that the calls originated from toll-free ("800" or "888") numbers. On the other hand, there was no evidence that any of these messages to Grievant's

home phone were related to the performance of Grievant's duties as an Office Assistant 2. They simply represent use of the employer's electronic mail system and computer equipment for the employee's convenience.

Mr. Avis, who qualifies as an expert in such matters, testified that this Magic Jack connection violated WVOT policy. Accordingly, DHHR established by a preponderance of the evidence that Grievant inappropriately used state-provided computer equipment by installing a Magic Jack personal phone system in her home to forward recorded voicemail messages to her state e-mail address. If every state employee subscribed to this service in the same manner as Grievant, this would undoubtedly degrade the efficiency of the state's electronic mail system. Nonetheless, Grievant's demonstrated actions in regard to the Magic Jack system involve what is essentially a technical violation of the state technology rules, representing no more than a *de minimis* use of public resources.

Misuse of State Equipment – Electronic Mail Use

Respondent also made reference to "improper use of electronic mail" following the more general allegation of "misuse of state equipment." At no time do the allegations make reference to any specific electronic mail document. Likewise, other than Grievant's transmission of documents including confidential agency information, which has already been discussed, there is no explanation in the termination notice of how Grievant's electronic mail use violates some established law, rule or policy. Likewise, CSM Johnson alleged in his testimony that Grievant's use of electronic mail for matters that were not related to her job was "excessive," without quantifying the

parameters for making that determination. Ultimately, this is nothing more than a subjective conclusion that Grievant used her electronic mail privileges for such matters more than other employees, without any objective documentation on which to base that conclusion.

Beyond this, Grievant is alleged to have e-mailed "individuals outside the network on multiple occasions" regarding non-work-related issues. Nearly every example of the electronic correspondence introduced by DHHR to support these allegations related in some way to Grievant's pending or perceived grievances. Most of the remainder involved general grousing and complaining. Grievance-related correspondence is not inherently prohibited. Indeed, W. Va. Code § 6C-2-3(p)(3) allows "access to the employer's equipment for purposes of preparing grievance documents subject to the reasonable rules of the employer governing the use of the equipment for nonwork purposes." Nonetheless, the grievance statute does not permit an employee who has filed a grievance, or is seeking to file a grievance, or is even engaged in *bona fide* whistle-blowing activity, to unilaterally determine when they can work on their grievance or complaint, what agency equipment they can employ to work on their grievance or complaint, or to ignore general agency directives regarding entering agency premises, or transmitting confidential information outside the agency, simply because a grievance or *bona fide* whistle-blowing activity is somehow involved.

In balancing the equities represented by these competing interests, the undersigned Administrative Law Judge finds that Respondent failed to establish by a preponderance of the evidence that Grievant's use of state-provided computer

resources was generally in violation of any of the various prohibitions regarding such resources, other than as specifically addressed earlier in this decision in regard to the use of a Magic Jack voicemail service, use of a portable hard drive to transfer documents, and transmission of confidential information through the use of electronic correspondence, and transfer to an unencrypted and unapproved portable storage device. *Cf*. *Ponce v. W. Va. Dep't of Health & Human Res*., Docket No. 2012-1272-DHHR (Mar. 18, 2013) (employee used agency e-mail and Internet access to facilitate establishment of a private business endeavor).

Respondent also introduced numerous documents which were found in a search of Grievant's computer which CSM Johnson was unable to determine why they were stored on her hard drive. It is initially noted that none of these documents were referenced in the allegations set forth in Grievant's termination notice in sufficient detail to overcome due process deficiencies. Beyond that concern, Grievant was suspended to permit an investigation into various offenses, including "misuse of state equipment," and there was no evidence that anyone ever made any effort to question Grievant about these documents. During the Level Three hearing, when Grievant was asked about various documents such as copies of checks for agency clients, and travel reimbursement claims submitted by co-workers, Grievant credibly testified that there had been a scanning device attached to her state-provided computer, and other employees used this device to make copies for various purposes. Even Respondent's witnesses acknowledged that there was such a device in use during some part of the time Grievant worked as the office receptionist. Therefore, it was improper to hold

Grievant responsible for these documents stored on her hard drive. Moreover, the employer could not cite to any particular law, policy or procedure that Grievant violated by storing these documents in any event.

Similarly, there was correspondence on the hard drive which related to Grievant's medical treatment and diagnosis. There was no evidence presented to suggest that Grievant does not have medical coverage as a result of either her or her husband's public employment. Certainly, the prohibitions against personal use of state-provided computer equipment does not extend to prohibiting an employee from communicating with her physician, scheduling, cancelling, or rescheduling medical appointments, or documenting medical conditions that may relate to a need for a reasonable accommodation under the Americans with Disabilities Act or the West Virginia Human Rights Act. Therefore, even assuming these allegations were properly included in the termination notice, this allegedly improper computer use was not supported by a preponderance of the evidence.

Misrepresentation of Information During Internal Investigation

The letter from Regional Director Tanagra W. O'Connell notifying Grievant of her decision to terminate her employment includes the following statement pertinent to this allegation:

> Your dismissal is the result of your history of performance failures and misconduct that include the following situations. Your most recent episode of misconduct resulted in a 30 day suspension, beginning on April 19, 2012 and was for the following violations: . . . misrepresentation of information during the course of an internal investigation.

DHHR Ex 20 at 1.

The termination notice proceeds to set forth additional detailed allegations in support of the other charges against Grievant, and a lengthy recitation of prior disciplinary action, warnings and purported misconduct. However, there is no further explanation that relates back to this misrepresentation charge, stating what particular information Grievant provided in the course of an internal investigation, and what specific aspect of that information was incorrect or false.

As a tenured public employee, Grievant has property and liberty interests which entitle her to procedural due process in regard to termination of her employment. *Bd. of Educ. v. Wirt*, 192 W. Va. 568, 573-74, 453 S.E.2d 402, 407-08 (1994); *Adkins v. Dep't of Health & Human Res*., Docket No. 2013-0264-DHHR (July 19, 2013). *See Matthews v. Eldridge*, 424 U.S. 319 (1976). Accordingly, where an act of misconduct is asserted in a notice of dismissal, it should be identified by a date, specific or approximate, unless the characteristics are so singular that there is no reasonable doubt when it occurred. *Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981); *Snyder v. Civil Serv. Comm'n*, 160 W. Va. 762, 232 S.E.2d 842 (1977); *Adkins*, *supra*. *See Arnett v. Kennedy*, 416 U.S. 134 (174).

There was only one "internal investigation" to which this allegation could possibly relate. That was an investigation by Robert C. Lane from DHHR's Fraud Unit. The employer produced electronic correspondence that related primarily to Mr. Lane's efforts to interview Grievant's husband, Gary Knight, regarding certain matters related to the investigation. Mr. Knight's involvement in this investigation appears to have arisen

out of his part-time elected position as Mayor of Grantsville, rather than his relationship to Grievant.

Mr. Lane was not called as a witness by Respondent. Therefore, other than the limited information in Grievant's electronic correspondence with her husband and Mr. Lane, there is only hearsay evidence regarding what, if anything, she may have represented to the investigator. In this regard, CSM Johnson suggested that Grievant improperly provided her husband with more information about the investigation than Mr. Lane would have preferred. However, the offense of interfering with an internal investigation is not alleged in the termination notice so as to place any reasonable person on notice that she needs to respond to that allegation. Ultimately, there is no evidence to establish that Grievant misrepresented anything in the course of her limited participation in this internal investigation.

If Grievant interfered with Mr. Lane's official investigation, which was not properly alleged, the best evidence of such interference would necessarily come from the investigator who dealt with Grievant, and that individual did not testify. Therefore, Respondent failed to establish the allegation of misrepresentation of information during an internal investigation by a preponderance of the evidence. Moreover, Respondent failed to properly allege that Grievant interfered in an official internal investigation and, in any event, failed to establish such interference by a preponderance of the evidence.

Entering Office Building Without Authorization

When Grievant's representative asked her whether she had been instructed to stay out of the office outside her normal duty hours, Grievant was initially evasive, stating that management holds meetings handing out lots of instructions, and then breaks them or fails to enforce them as soon as the meeting is over. Indeed, Grievant's responses to several questions asked by her representative involved a stream of consciousness narrative that went far outside the scope of the question, dredging up various petty slights and disagreements that took place during Grievant's tenure at DHHR. Even when Grievant's representative was able to obtain confirmation from Grievant that she attended a meeting in August 2011 where employees were instructed not to come in the office after hours, Grievant insisted upon describing anecdotal events where an employee's husband went in the office over the weekend to pick up some papers, apparently running an errand for his wife, and where another person employed by an agency affiliated with DHHR (but not a similarly situated DHHR employee) appeared to have a key to the office which she used over the weekend when no employees were present.

CSM Johnson testified credibly that he attended a staff meeting in August 2011, before he was promoted to CSM, where Ms. Ritchie instructed the employees present, including Grievant, not to come in the office early or stay after normal working hours, without permission from a supervisor. Although DHHR's policies suggest that this is a standard rule to avoid agency liability arising out of permitting employees to engage in overtime work without specifically directing the employee to perform additional work, CSM Johnson and Ms. Ritchie explained that the directive went further to require

employees to stay out of the office, unless they were in positions where overtime was pre-authorized to respond to emergency situations, or the work was specifically authorized by a supervisor.

Grievant sent an electronic mail message to her husband on December 9, 2011, in which she stated that she was "not allowed in the office before or after hours." This statement represents the best evidence that Grievant was on notice that she was not to be in the office after hours, or on weekends, as directed by Ms. Ritchie. Grievant's acknowledgement is fully consistent with the testimony of Ms. Ritchie, CSM Johnson, and Patricia Knight.

Grievant admitted during her Level Three testimony that she went in the office on multiple occasions after normal working hours and on weekends to use her state-provided computer and e-mail service to work on grievance matters and what she described as "whistle blower activities." For example, she once wrote to the West Virginia Ethics Commission concerning an alleged improper use of public resources. However, Grievant admitted that when the Commission informed her that she needed to file a sworn complaint, she did not follow up and submit a complaint. It does not appear that her supervisors were aware of this correspondence until WVOT examined Grievant's state-provided computer.[3]

Grievant notes that she never claimed overtime for any of these after normal working hours forays into the office. However, Grievant had no basis for claiming

[3] Because Grievant failed to establish that any of the supervisors who participated in her suspension and termination were aware of her purported "whistle-blower" activity, it is not necessary to analyze whether Grievant's termination was initiated in retaliation for such activity contrary to public policy. *See Harless v. First Nat'l Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978).

overtime where she never worked on anything job-related for which her employer could pay her overtime, and she never obtained permission to work on her grievances after hours. Grievant's work on her grievance matters not only involved working on actual grievances she had filed, but extended to documenting the activities of her supervisors and co-workers for grievances that she might elect to file in the future. Contrary to Grievant's claims, this latter activity is not grievance-related under W. Va. Code § 6C-2-2(f)(2) and (3).

In addition to Grievant's admissions, Respondent produced evidence through the WVOT forensic computer examination that Grievant came in the office after normal working hours and on weekends to use her state-provided computer. There was no evidence that any of this activity related to any personal for-profit business activity or activity that was not authorized, with the exception of some incidental copying or transmitting of confidential information involving the names and activities of certain agency clients. However, it appeared that Grievant made a conscious decision to ignore the directives of her supervisors and work on her actual grievances, anticipated grievances and potential whistle-blowing activity, without obtaining authority to use state resources for these purposes. Therefore, DHHR established by a preponderance of the evidence that Grievant entered the Calhoun County DHHR Office without obtaining required permission on multiple occasions.

Improperly Making Audio Recordings

The charges against Grievant include an allegation that she improperly made audio recordings of staff members, as referenced in "multiple e-mails" (which are not otherwise specified as to date, time and place). *See* DHHR Ex 20 at 2. The allegation makes reference to a violation of Employee Conduct Policy 2108. That policy contains no specific provision addressing the use of audio recording equipment in the workplace. However, Policy 2108 provides: "Employees are expected to . . . comply with all Division of Personnel and Department policies; [and] . . . follow directives of their supervisors. . . ." DHHR Ex 9 at 2. One of these directives, the "Supervisor's Guide to Employee Conduct," was issued to Grievant as a purported "Employee Conduct Policy" in January 2012. *See* DHHR Ex 8.

Initially, Grievant argues that her employer lacked authority to adopt and enforce this particular Employee Conduct Policy prohibiting her from recording conversations in the work place. This argument suggests that there is a direct conflict between the prohibition contained in the West Virginia Division of Personnel's "Supervisor's Guide to Employee Conduct" (DHHR Ex 8) and the provisions of a criminal statute, W. Va. Code § 62-1D-3(e). This same statute was examined in *Dyer v. W. Va. Dep't of Transp*., Docket No. 2013-0548-DOT (Feb. 12, 2013). In *Dyer*, an employee had surreptitiously recorded a conversation with her supervisors using a concealed recorder, and the employer sought to exclude the evidence based on a provision in W. Va. Code § 62-1D-6 which excludes illegally intercepted communications from evidence in certain proceedings.

As explained in *Dyer*, which found the recording to be legal and admissible, this statutory provision must be applied *in para materia* with other provisions in Article 1D. W. Va. Code § 62-1D-1, *et seq*., is a criminal statute containing the West Virginia Wiretapping and Criminal Surveillance Act, which generally makes it unlawful to intercept wire, oral, or electronic communications. *See W. Va. Dep't of Health & Human Res. ex rel. Wright v. David L*., 192 W. Va. 663, 453 S.E.2d 646 (1994). *See also* Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510, *et seq*., the federal counterpart to our Code provision. The provision in W. Va. Code § 62-1D-3(e) states: "It is lawful **under this article** for a person to intercept a wire, oral or electronic communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or the constitution or laws of this state." (emphasis added) This provision merely provides an exception to the statutory criminal prohibition, establishing that a citizen who acts within certain established parameters is not guilty of a crime.[4] This is not a general statutory provision which stands alone, permitting any citizen to record any conversation at any place and any time, so long as the person making the recording is a party to the conversation.

Accordingly, contrary to Grievant's position, there is no statute, rule or legal precedent which prohibits a public employer in West Virginia from adopting a policy

[4] Ironically, if the evidence had established that Grievant left her recording device to record conversations in the reception area while she was not present to participate in those conversations, she would have been subject to criminal charges under W. Va. Code § 62-1D-3. During her Level Three testimony Grievant indicated that she recognized the difference between recording conversations where she was present, and leaving her recorder to record any conversation that might take place, which she labeled as "wiretapping."

prohibiting the use of audio and video recording devices in the workplace. However, the question remains whether DHHR properly adopted such a policy, or if that adoption process was fatally flawed. This analysis starts with the "Supervisors Guide to Employee Conduct" ("Guide") promulgated by the West Virginia Division of Personnel ("DOP").

Grievant correctly asserts that the Guide is not a numbered DOP policy establishing rules for public employees to follow, such as Policy No. DOP-P2, the Drug and Alcohol-Free Workplace. Instead, the Guide is what it purports to be, a publication which provides "general guidance to employers regarding acceptable and unacceptable conduct." DHHR Ex 8 at 3. While the guide makes reference to various policies (including the Drug and Alcohol Free Workplace Policy) and laws, such as the West Virginia Governmental Ethics Act (*See* DHHR Ex 8 at 6-7.), the Guide, standing alone, establishes no new policy that either prohibits or permits any particular conduct by a state employee.

However, the Guide also provides: "Each agency is encouraged to develop agency-specific policies based upon the general information provided within this guide." DHHR Ex 8 at 3. The Guide even states that "each employee should sign a receipt for receiving the policy . . . ." *Id*. This is the process which DHHR's Regional Director followed, adopting the Guide as an Employee Conduct Policy, presenting it to employees as a new policy governing their working conditions, and having employees (including Grievant) acknowledge receipt of a copy of the policy. *See* DHHR Ex 8 at 20. Notwithstanding the employer's efforts to implement this new policy, Grievant contends

that the policy remains flawed because of the "Disclaimer" that remained in the front of the Guide.

The Disclaimer provision at issue states:

> This booklet is intended to be used as a reference and procedural guide to employee conduct. The general information it contains should not be construed to supersede any law, rule, or policy. In the case of any inconsistencies, the statutory and regulatory provisions shall prevail.
>
> This booklet is written with the understanding that the West Virginia Division of Personnel is not engaged in rendering legal services. If legal advice or assistance is required, the services of an attorney should be sought. Supervisors should also refer to policies, rules and regulations as well as consult with the human resources office within his or her respective agency.

* * *

DHHR Ex 8 at 2.

More particularly, Grievant argues that because the Guide "should not be construed to supersede any law, rule, or policy," engaging in making an audio recording with the consent of one party to the conversation (in this case, Grievant), remains permitted by W. Va. Code § 62-1D-3(e). However, as previously discussed, Grievant's reliance on this Code provision is misplaced, and public agencies retain discretion to ban the use of recording devices whenever or wherever an employee is performing agency duties. Therefore, as of the time Grievant was notified of this policy, surveillance involving creation of audio recordings of conversations, meetings or conferences without prior supervisory approval was prohibited in the Calhoun County DHHR Office.

The surveillance policy was not implemented until the afternoon of January 9, 2012. *See* DHHR Ex 8 at 20. Thus, the recording device which was observed by Ms. Cason, Ms. Ritchie, and CSM Johnson beeping and blinking in Grievant's purse at the reception desk earlier that day could not have been in violation of the policy. Although a properly functioning recording device at that location could have recorded confidential or personally identifiable information, there was no credible evidence that the device was actually working, given that no witness ever explained what the beeping sound and blinking red LED indicated on that particular recording device. Grievant credibly denied that she had set the device to record anything on that occasion.

Although Grievant insisted that she had a legal right to continue making recordings after the January 9 meeting, DHHR's documentary evidence that Grievant thereafter recorded any further conversations in the workplace was largely ambiguous and inconclusive. CSM Johnson testified that there were transcribed conversations on Grievant's hard drive on February 15, 2012, which involved events that took place subsequent to January 9. However, there was no specific testimony identifying these events, and the dates contained in the documentation introduced into evidence required additional clarification to reach a solid conclusion on the timing of these events.

For example, in an e-mail from Grievant to her husband dated January 27, 2012, Grievant stated "I just wanted to expose them and offer people a taped version if in doubt." *See* DHHR Ex 17 at 7. It appears that Grievant was making reference to a recording, but the context of the communication does not make clear when such recording was made. Similarly, on April 9, 2012, Grievant sent an e-mail to her

husband concerning a conversation with Crystal Kendall regarding working extra hours during which Grievant stated that she "leaned down and turned on my recorder as she kept talking . . . ." *See* DHHR Ex 21. She then quotes from the recording. However, Ms. Kendall was not called to verify that any such conversation took place or, more importantly, when it occurred. The context indicates that the conversation involved some effort to reconstruct records related to an incident that took place "a few months ago." *Id*. The paragraph following this description of the recording refers to some alleged misconduct by Ms. Kendall and Ms. Smith that took place "two summers ago" leaving the timing of Grievant's actions uncertain.

DHHR also relies upon admissions that Grievant made in her claim for unemployment compensation. In the words of the WorkForce West Virginia interviewer who took in Grievant's claim, Grievant stated: "I admit that I recorded staff meetings that I attended after I was advised to do so by lawyer (*sic*.) and my union rep." DHHR Ex. 17 at 16. Thus, Grievant never denied making recordings. The only evidence that Grievant made any recordings after January 9 was Grievant's statement that on February 16, when CSM Johnson approached her to ask about being in the building the night before, she stated that she reached into her bra and turned on her tape recorder. This information was provided while answering a question by her representative, and was not even responsive to the question asked. Nonetheless, it does represent an admission that she violated the specific order to stop recording audio conversations at work. During cross-examination, Grievant proceeded to acknowledge that she recorded every conversation that she had with her supervisors after January 9, claiming that she

had previously obtained guidance from her union representative and a private attorney that she could use a tape recorder during any conversation in which she was a participant. Unfortunately, Grievant did not seek further guidance from an attorney after she signed the agency's policy prohibiting audio surveillance on January 9, 2012, relying instead on her own legal interpretation of the "disclaimer" in the policy to continue recording just as she had done before.

Although Grievant appears to have violated this policy, she did consult with her union representative and a private attorney, obtaining general guidance that recording conversations to which she was a party was not illegal in West Virginia. Further, prior to implementation of the new policy on January 9, 2012, that guidance was correct. Grievant's mistake was failing to follow up with these resources after she received the audio surveillance policy.

In addition to the foregoing, it does not appear that at the time Grievant was terminated, anyone in DHHR was aware that she had recorded the particular conversations which Grievant admitted recording at the Level Three hearing. Grievant had not announced to anyone that she would not follow the guidance in the audio surveillance policy, and there was no specific work product in her supervisor's possession that involved a recording made after January 9, 2012. Even the broad statement Grievant made to the unemployment compensation interviewer obviously took place after Grievant was terminated, so her employer could not have relied on that statement to terminate her. Therefore, although a preponderance of the evidence indicates that Grievant made one or more unauthorized recordings in her workplace

after January 9, 2012, Grievant apparently believed that she could still make these recordings to document her treatment by her supervisors. Although Grievant's belief was mistaken, and her conduct was in violation of the new policy, her explanation serves to mitigate the seriousness of this offense.

Prior Reprimand for Insubordination

Grievant was reprimanded on February 24, 2012 for refusing to meet with CSM Johnson and Ms. Ritchie to discuss her workplace accommodation and the medical forms required to support her accommodation, without a representative present. *See* DHHR Ex 18 at 1-2. Grievant filed a separate grievance challenging this discipline. That grievance had not been finally resolved at the time Grievant's employment was terminated. Grievant contends the reprimand was improper because she was denied requested representation at this meeting.

As previously noted, W. Va. Code § 6C-2-3(g)(1) allows an employee to "designate a representative who may be present . . . at any meeting that is held with the employee for the purpose of discussing or considering disciplinary action." This Grievance Board has interpreted this provision to mean that if the topic of a meeting is employee conduct that could lead to discipline, the employee has a statutory right to have a representative present, if requested. *Koblinsky v. Putnam County Health Dep't*, 2010-1306-CONS (Nov. 8, 2010); *Knight v. Dep't of Health & Human Res.*, Docket No. 2008-0981-DHHR (Aug. 6, 2009). However, a meeting to discuss the medical forms required to consider a reasonable accommodation under the Americans with Disabilities Act ("ADA") is not a meeting for the purpose of discussing or considering disciplinary

action. Even if Grievant believed that this meeting might somehow result in discipline, such belief does not allow her to invoke her right to representation, unless she can demonstrate that such expectation is reasonable. *See Koblinsky v. Putnam County Health Dep't*, Docket No. 2011-1772-CONS (Oct. 23, 2012).

Grievant offered no explanation for why she believed that she could be disciplined as a result of discussing the medical forms required to support her request for a reasonable accommodation. The ADA requires both employers and employees to engage in an "interactive process" in order to arrive at a reasonable accommodation for an employee's disability. See *Jones v. United Parcel Serv*., 214 F.3d 402, 408 (3d Cir. 2000). In this instance, Grievant failed to establish that it was reasonable to expect this meeting would lead to discipline. Indeed, Grievant subsequently met with Ms. Ritchie and CSM Johnson and discussed this matter in the presence of a paralegal representative provided by her private attorney. However, Grievant has not pointed to any provision in the ADA which gives her a right to have a representative present for a discussion such as this. Therefore, Grievant had no justification for her refusal to meet with her supervisors to discuss her ADA accommodation without a representative present.

Further, Grievant did not simply respectfully request that her husband be allowed in the meeting as her representative. When CSM Johnson told Grievant that no representative was authorized to participate in this meeting, Grievant walked out. This not only represented a refusal to meet, it demonstrated a lack of respect for her supervisors that constitutes the essence of insubordination. *See Deak v. W. Va. Div. of*

Highways, Docket No. 91-DOH-513 (Jan. 20, 1993); *Sexton v. Marshall Univ*., Docket No. BOR2-88-029-4 (May 25, 1988), *aff'd*, 182 W. Va. 294, 387 S.E.2d 529 (1989). *See generally*, *In re Burton Manufacturing Co*., 82 L.A. 1228 (Mar. 2, 1984). Accordingly, it was proper for CSM Johnson to exercise his supervisory discretion to issue a written reprimand to Grievant in these circumstances.

Retaliation

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).

Grievant asserted that she was disciplined in retaliation for testifying in behalf of her co-workers in grievances which they filed challenging Ms. Ritchie's selection as the Operations Supervisor in October 2010. Grievant testified that Ms. Ritchie's attitude toward her changed following her appearance as a witness, and Ms. Ritchie began "nit-picking" her work performance. Ms. Ritchie testified that she and Grievant were "friends" while they were co-workers, and that Grievant's attitude toward her became overtly negative when Ms. Ritchie was chosen to fill the supervisor's position over employees with more seniority in the agency.

The record is not specific as to when Grievant testified in behalf of her co-workers but it appears that the testimony was given in early 2011 in regard to Ms. Ritchie's selection for promotion in October 2010. Grievant was not disciplined until February 24, 2012, when she received her first and only reprimand. This represents a lapse of too much time to support an inference that Grievant's reprimand was issued in retaliation for her participation in the grievance process nearly a year before.

However, Grievant filed a grievance challenging that reprimand in February 2012, and she was suspended less than two months later, and then terminated while

that grievance was still pending. All of the other required elements of a *prima facie* case of retaliation were also established. Therefore, the burden shifts to Respondent to establish legitimate, non-retaliatory reasons for the adverse actions taken.

As previously discussed in regard to the allegations set forth in Grievant's termination notice, her employer failed to establish that Grievant misrepresented information during an internal agency investigation. Likewise, the Respondent failed to establish that Grievant generally used her state-provided computer improperly by using it to communicate with her representative regarding grievances or whistle-blower related matters. Accordingly, Grievant established that at least part of the charges against her were improperly included in her termination as retaliation for her engaging in activity protected by W. Va. Code § 6C-2-2(o).

On the other hand, Respondent did establish that Grievant violated agency policy on confidentiality of client information by e-mailing the names of agency clients to her husband and union representative on more than one occasion, and that she transferred at least one document containing similar confidential information to an unauthorized portable storage device which she attached to her state-provided computer. Respondent also established that Grievant entered the Calhoun County DHHR Office after hours and on weekends in violation of her supervisor's directives. In addition, Respondent established that Grievant continued to make audio recordings of conversations at work after receiving a new agency policy prohibiting such activity. Finally, Respondent established that Grievant violated established technology policies by attaching an unauthorized portable storage drive to her office computer and by

setting up a Magic Jack system in her home to forward voicemail messages to her state e-mail address. Grievant failed to demonstrate that any of these charges were merely pretextual or motivated primarily to retaliate against her for engaging in protected activity. Nonetheless, because at least two of the allegations that led to Grievant's termination were not sustained, it is necessary to examine whether the penalty imposed was nonetheless appropriate.

Propriety of Penalty

As previously noted, Respondent failed to establish that Grievant engaged in a material misrepresentation of fact during an internal investigation. Respondent also failed to establish that Grievant's use of electronic mail and computer resources was generally in violation of any established agency rule, policy, law or regulation. Respondent did demonstrate that Grievant continued to make audio recordings at work after she was placed on notice that such activity was prohibited. In addition, Respondent established that Grievant made multiple disclosures of confidential information relating to the identity of agency clients. Although these disclosures were limited to two non-employees, Grievant's spouse and Grievant's union representative, there was no established need for these non-employees to have access to this information. It is also noted that Grievant had been repeatedly notified and reminded that disclosure of confidential information was prohibited.

Respondent also established that Grievant was in the office after normal work hours on multiple occasions. Although this was related in each documented instance to working on grievances or similar correspondence regarding her working environment

and co-workers, Grievant was aware that she was not supposed to be in the office after normal working hours. Even if Grievant was engaged in grievance-related work during that time, she was not issued a key to a government office and access to a state-provided computer so that she could engage in as much grievance-focused work as she wanted at the time of her choosing.

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. *See Koblinsky v. Putnam County Health Dep't*, Docket No. 2011-1772-CONS (Oct. 23, 2012). Ordinarily, an employer has broad discretion in selecting an appropriate penalty to redress an employee's misconduct. O*verbee v. Dep't of Health & Human Res.*, Docket No. 96-HHR-183 (Oct. 3, 1986). *See Lanham v. W. Va. Dep't of Transp*., Docket No. 98-DOH-369 (Dec. 30, 1998); *Martin v. W. Va. State Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989). This determination must necessarily be made on a case-by-case basis.

Prior to being terminated, Grievant was disciplined for refusing to meet with her supervisors regarding a non-disciplinary matter without a representative present. Although Grievant had previously refused to meet with her supervisors for similar reasons on multiple occasions, the written reprimand she received was the first time Grievant was disciplined for this, or any other offense. In addition, none of the new charges contained in Grievant's termination notice involved a repetition of this offense. Therefore, prior to her termination, the only disciplinary action involving Grievant

concerned this failure to meet with her supervisors to discuss the specific medical forms required to support her requested accommodation under the ADA. Grievant's employer determined that a written reprimand was adequate to address this problem.

Grievant was not suspended for misconduct, but to investigate possible misconduct. The evidence produced by Respondent at the Level Three hearing suggests that the ensuing investigation was not as thorough as it needed to be. There was certainly no effort to interview Grievant in regard to various documents discovered on her computer. Two of the allegations against Grievant were not supported by the evidence and, therefore, represented retaliation prohibited by W. Va. Code § 6C-2-2(o). Some of Grievant's proven violations, such as the Magic Jack voicemail connection, and attaching a "flash drive" to her office computer, were not shown to be serious violations of established policy, but should be considered as technical or *de minimis* violations. *See Guine*, *supra*. Grievant's disclosure of confidential information, use of public resources after hours without first obtaining proper authority, and making unauthorized voice recordings after being advised that such activity was prohibited, were the most serious infractions established. Given that the progressive discipline previously imposed on Grievant consisted of a single written reprimand for refusing to meet with her supervisors out of a mistaken belief that she was entitled to some form of representation during the meeting, the undersigned Administrative Law Judge finds that the penalty imposed was disproportionate to the offenses proven, and therefore constitutes prohibited retaliation in violation of W. Va. Code § 6C-2-2(o). Accordingly, the penalty imposed must be reassessed. Considering Grievant's otherwise

satisfactory work performance, her limited history of prior disciplinary actions (one reprimand), and the seriousness of the offenses proven, the maximum penalty that Grievant should have received is a suspension without pay for thirty (30) days. Therefore, this Grievance will be granted, in part, to reinstate Grievant to her position as an Office Assistant 2, and the termination letter may be revised to document a 30-day suspension in conformance with this decision.

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. 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).

2. 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).

3. Where an act of misconduct is asserted in a notice of dismissal, it should be identified by a date, specific or approximate, unless the characteristics are so singular that there is no reasonable doubt when it occurred. If an act of misconduct involves persons or property, these must be identified to the extent that the employee will have no reasonable doubt as to their identity. *Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981); *Snyder v. Civil Serv. Comm'n*, 160 W. Va. 762, 232 S.E.2d 842 (1977).

4. In accordance with well-established policies of the West Virginia Office of Technology and the Department of Health and Human Resources of which Grievant was, or should have been aware, Grievant had no reasonable expectation of privacy in regard to her use of the agency's electronic mail system or any documents which were generated or stored on her state-provided computer. *See United States v. Hamilton*, 778 F.Supp.2d 651 (E.D. Va. 2011). *See generally City of Ontario v. Quon*, 130 S.Ct. 2619 (2010); *O'Conner v. Ortega*, 480 U.S. 709 (1987). *Accord*, *Dooley v. W. Va. Dep't of Transp*., Docket No. 95-DOH-214 (Jan. 23, 1996).

5. W. Va. Code § 62-1D-1, *et seq*., is a criminal statute which generally prohibits interception of wire, oral or electronic communications, thereby prohibiting audiotaping of certain conversations. *See W. Va. Dep't of Health & Human Res. ex rel. Wright v. David L*., 192 W. Va. 663, 453 S.E.2d 646 (1994). *See also* 18 U.S.C. § 2510,

et seq.; *Marano v. Holland*, 179 W. Va. 156, 366 S.E.2d 117 (1988). W. Va. Code § 62-1D-3(e) provides an exception from this criminal prohibition, allowing a person to record a conversation to which they are a party or participant. This exemption does not allow a public employee to record conversations at any time or place in the course of their employment, nor does it prohibit a public employer from implementing a policy which prohibits use of recording devices at work.

6. Respondent established by a preponderance of the evidence that Grievant was properly reprimanded in February 2012 for refusing to meet with her immediate supervisors to discuss a medical form that needed to be completed in order to document Grievant's request for a reasonable accommodation under the federal Americans with Disabilities Act. In the circumstances presented, Grievant did not have a reasonable expectation that some form of discipline might arise out of this meeting and, therefore, did not have a right to request representation at that meeting under the provisions in W. Va. Code § 6C-2-3(g)(1). *See Koblinsky v. Putnam County Health Dep't*, 2010-1306-CONS (Nov. 8, 2010); *Knight v. Dep't of Health & Human Res*., Docket No. 2008-0981-DHHR (Aug. 6, 2009).

7. 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).

8. 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).

9. 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 the allegation that she misrepresented information during an internal agency investigation, and the allegations that she generally misused her state-provided computer and electronic mail system for documenting and communicating information related to her grievances.

10. Respondent failed to establish by a preponderance of the credible evidence of record at the hearing in this matter that Grievant misrepresented information during the course of an internal investigation. Respondent also failed to establish by a preponderance of the credible evidence of record that Grievant's use of electronic mail and her state-provided computer was generally in violation of state or agency standards for such resources.

11. Respondent established by a preponderance of the credible evidence of record that Grievant breached well-established agency confidentiality rules by communicating the names of agency clients to her husband and Union representative, and that such information was not necessary for the performance of any legitimate representation activities in regard to grievances which Grievant had filed against her employer, or that dissemination of such information was otherwise consented to by her employer. Respondent also established by a preponderance of the evidence that Grievant transferred a document containing the name of an agency client to an unauthorized portable storage device which she attached to her state-provided computer. Respondent further established that Grievant's attachment of an unauthorized portable storage device to her computer, and her use of a Magic Jack device on her home phone so as to forward voicemail messages from her home to her state electronic mail address on her state-provided office computer, were violations of state technology policy. Additionally, Respondent established by a preponderance of the credible evidence of record that Grievant entered the office where she worked after normal working hours and on weekends to work on grievance-related matters contrary

to supervisory directives not to come in the office after hours without first obtaining supervisory permission. Finally, Respondent established by a preponderance of the credible evidence of record that Grievant continued to make audio recordings of conversations that took place at work after receiving a written policy which explicitly prohibited such activity.

12. "Mitigation of the punishment imposed by the employer is extraordinary relief and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health & Human Res*., Docket No. 96-HHR-183 (Oct. 3, 1996). *See Lanham v. W. Va. Dep't of Transp*., Docket No. 98-DOH-369 (Dec. 30, 1998); *Martin v. W. Va. State Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

13. Respondent failed to establish that the allegations against Grievant which were supported by a preponderance of the evidence were sufficiently egregious to support Grievant's termination, given that one or more of the charges against Grievant were found to have been initiated in retaliation for Grievant's exercising her rights under the grievance procedure for public employees, Grievant's otherwise generally satisfactory duty performance, and the only effort at progressive discipline involved a single written reprimand for an offense that was not thereafter repeated.

Accordingly, this grievance is **GRANTED, IN PART.** Respondent DHHR is hereby **ORDERED** to reinstate Grievant as an Office Assistant 2 in the Calhoun County

DHHR Office without any loss of pay, seniority, tenure, or benefits, except for a thirty (30) day suspension without pay. In addition, Grievant shall be paid statutory interest on any back pay she receives based upon her reinstatement, less the 30-day suspension. Respondent may revise and reissue the termination notice in this matter to reflect such 30-day suspension, consistent with the determinations made in this grievance decision. Otherwise, any reference to this termination must be stricken and removed from any personnel records maintained on Grievant. Further, Respondent is encouraged to consider reassigning Grievant to be supervised by another immediate supervisor, if such reassignment is feasible. All other relief requested in this grievance is hereby **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. Va. Code § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The 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: September 20, 2013

_____

LEWIS G. BREWER
Administrative Law Judge