

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

RONALD MERCER,

Grievant,

v.

Docket No. 2023-0209-WVSU

WEST VIRGINIA STATE UNIVERSITY,

Respondent.

DECISION

Grievant, Ronald Mercer, was employed by Respondent, West Virginia State University. On September 12, 2022, Grievant filed this grievance directly to level three pursuant to W. Va. Code § 6C-2-4(a)(4), stating:

Demotion to security officer from position of police officer. Given notice of suspension with pay/intent to terminate employment issued Sept. 7th after Sept. 1st, 2022 grievance level [1] hearing. * At this time – West Virginia State Univ. – has not given report from level 1 hearing.

As relief, Grievant requests:

Stop any further actions: Feel like I am being “targeted” for retaliatory reasons. After being: written up so many times, then being demoted from position of police officer (certified) to security officer. Now given notice of suspension with pay & intent to terminate (Sept. 7). Building keys taked (sic), told not to return until Sept. 24th @ 9a.m. Have all kinds of violations from ROC/WVSU-EHB Department Head has written me up repeatedly ...[indiscernible]. Need results of WVSU written decision from level one hearing dated Sept. 1, 2022.

On January 19, 2023, Grievant attempted to amend his grievance through the following email to the Grievance Board:

I am amending my Statement of Grievance –
I believe my termination was for a Disability.

That my HIPAA rights were violated by my Supervisor. That I was sent for a Psychological Evaluation (with Clayman & Associates) Report with Dr. Cody between April 26, 2022, and May 25, 2022 (March 21, 2022)

I did not get these results until July 29, 2022, when Chief Patterson called me into his Office with Captain Young as a Witness and then he disclosed those results to me, in front of Captain Young. Then, ordering me to take my weapon, Badge, and equipment off including turning over all uniforms/patches/any other University Police issued equipment which, I did. I was therefore demoted to Security Officer (during this short tenure (sic) I had no designated uniform stating I was working in that capacity until weeks later a Security Polo was given). During this stint I still using Unit Number when communicating with Metro 911.

I believe that I also, was further Discriminated against because of my Age. That furthermore, I was constantly monitored and tracted (sic) everyday since Chief Patterson became WVSUPD Chief of Police. During this time, I witnessed two Police Officers be terminated or leave the Department (Former Captain Kedion Carter and Officer Bruce).

In closing, over my 12 and a half year, I have served the Public as an Outstanding Police Officer. As a result of my service to the Public and the University in May 2020, received a plaque for 10 years of dedicated service.

A level three hearing was held remotely before the undersigned on January 20, 2023. Grievant was self-represented. Respondent was represented by Gretchen A. Murphy, Assistant Attorney General. This matter matured for decision on February 22, 2023.¹ On February 21, 2023, Grievant filed a request for an indefinite delay of this decision so the credibility of witnesses could be assessed due to alleged developments in an investigation into the honesty and integrity of the West Virginia State Police. This

¹The parties submitted an agreed request for an extension of the original February 17, 2023, mature date.

request was denied. Only Respondent submitted Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was dismissed from his employment as a campus police officer by Respondent, West Virginia State University. Grievant failed to prove this was retaliation or discrimination. Respondent proved that, despite corrective action, Grievant had ongoing performance deficiencies, constituting good cause for dismissal. Thus, claims for conditions of employment are moot. This grievance is therefore DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance.

Findings of Fact

1. Grievant, Ronald Mercer, was employed by Respondent, West Virginia State University (WVSU), as a Campus Police Officer with the West Virginia State University Police Department (WVSUPD).

2. On February 26, 2021, Grievant was issued a written reprimand by Major Porterfield of the WVSUPD. The reprimand addressed performance issues, including sleeping on duty, lack of professional attire, lack of office/cruiser cleanliness and hygiene, and wearing a uniform and driving university police vehicles while off duty. The reprimand stated that if Grievant continued sleeping on duty, disciplinary action, from suspension to termination, would be initiated. (Respondent's Exhibits 1 & 3).

3. Grievant did not grieve the written reprimand from February 26, 2021.

4. On May 29, 2021, Reginald Patterson, formerly of the West Virginia State Police, was installed as Chief of Police with the WVSUPD.

5. On August 12, 2021, Grievant attended a WVSUPD meeting on directives covering officer grooming (clean uniforms and no facial hair), a wellness program, physical fitness testing, firearm qualifications, performance evaluations, and proper completion of duties, including duty logs. (Respondent's Exhibits 1 & 4).

6. On September 14, 2021, Grievant and Chief Patterson attended a WVSUPD meeting addressing policy relating to Grievant's appearance (including facial hair and cleanliness of Grievant's person/vehicle), proper completion of duty and building logs, and communication. (Chief Patterson's testimony and Respondent's Exhibits 1 & 5).

7. On September 15, 2021, Chief Patterson conducted a Performance Review of Grievant prospectively for the period of July 1, 2021, to June 30, 2022. Grievant received an overall rating of "meets requirements" and the same rating in most individual fields, except "unsatisfactory" on "critical thinking and decision making." The review noted that Grievant was detailed and dependable but needed to work on his health, fitness, and appearance. It also stated that Grievant was told to refrain from including excessive details in his reports. (Chief Patterson's testimony and Respondent's Exhibits 1 & 6).

8. On November 10, 2021, Chief Patterson conducted a Performance Review Checkup of Grievant for the period of September 14 to November 1, 2021. This review covered topics from the meetings on August 12 and September 15, 2021. Chief Patterson addressed Grievant's failure to comply with policies and directives. This included logging too much unnecessary information, not maintaining a professional appearance, and failing to remain vigilant on duty. (Respondent's Exhibit 7)

9. During the November 10, 2021, meeting, Grievant told Chief Patterson that he was attacked while on duty, disarmed, and shot at with his own gun. Chief Patterson determined through a review of the incident report that Grievant first encountered the subject on campus earlier the same day and issued a citation for trespass; Grievant had released the subject but again encountered him on campus, whereupon Grievant chased the subject down before being disarmed and fired on with his own weapon. While this incident was not documented in the November 10, 2021, Performance Review Checkup, Chief Patterson was troubled that the oral account provided him by Grievant differed from Grievant's written report. (Chief Patterson's testimony).

10. On February 23, 2022, Grievant responded to a call at Keith Hall and arrested a resident for physically attacking his roommate. Grievant did not witness the incident but did observe physical injuries and property damage. Grievant failed to take photographs of the scene and injuries. He did take notes, but they were illegible. Grievant took over five hours to facilitate the arrest, then charged the incident as a battery rather than domestic battery. Chief Patterson determined that because the incident did not occur in the Grievant's presence, Grievant could not charge it as battery but should have charged domestic battery since it involved roommates. Chief Patterson also determined that Grievant erred in not informing the magistrate that the suspect was jailed, which unnecessarily delayed arraignment, and in not telling the prosecutor he was in court, which resulted in the case being dismissed. (Chief Patterson's testimony and Respondent's Exhibits 1, 8, & 9).

11. On March 18, 2022, Chief Patterson conducted a Performance Review Checkup on Grievant for the period of November 10, 2021, to March 18, 2022. This review covered topics from previous reviews and recent incidents. Chief Patterson documented Grievant's struggle with investigative work, personal hygiene, following department directives, and providing false information, particularly in response to whether he had completed a timesheet. Chief Patterson noted that Grievant was counseled on the significance of being accurate and truthful. (Chief Patterson's testimony and Respondent's Exhibits 1 & 9).

12. Grievant never grieved any of the Performance Review or Performance Review Checkups.

13. There was also an incident in this period, not included in the Performance Review Checkup, where Grievant falsely reported an attempt to break into a vending machine. Surveillance video showed this attempted break-in did not occur. Grievant admitted to Chief Patterson that the incident did not occur. (Chief Patterson's testimony and Respondent's Exhibit 1).

14. On March 21, 2022, Chief Patterson referred Grievant for a psychological fitness for duty evaluation due to ongoing work problems. A clinical/forensic psychologist met with Grievant on April 15, 2022, and completed a report on April 26, 2022. The report indicated that Grievant had limitations in processing vocabulary, verbal expression, comprehension of instructions, and grasping the implications of information. The psychologist reported that although these limitations were not severe enough to render Grievant incapable of managing daily adult activities, they effected Grievant's ability to carry out his duties as a police officer safely and effectively,

rendering Grievant's performance deficiencies uncorrectable. (Chief Patterson's testimony and Respondent's Exhibit 10).

15. On June 13, 2022, Grievant filed a report stating he found an unknown person that day inside a campus building mailroom, escorted him out, and gave him a trespass warning. Chief Patterson asked Grievant the name of the subject and Grievant replied he did not get the name but had seen the subject on campus in the past. Grievant had not reviewed the camera system or followed the proper reporting protocol to identify the subject. Chief Patterson reviewed the cameras to locate the subject's arrival time, correlated this to the records, and provided the record to Grievant to identify the subject. Grievant then obtained the subject's name and added it to the report. (Chief Patterson's testimony and Respondent's Exhibits 1 & 11).

16. On June 30, 2022, Grievant entered Chief Patterson's office and saw his own badge on the desk. Grievant told Chief Patterson he misplaced the badge a week prior and wanted to know who turned it in. Grievant explained that he had not reported the badge missing because he figured he misplaced it. However, Grievant also told Chief Patterson that he thought the badge could have been taken by people with whom he had issues. Chief Patterson determined it was a plainclothes badge that Grievant had no reason to have while off duty. (Chief Patterson's testimony and Respondent's Exhibits 1 & 12).

17. On July 27, 2022, Grievant was placed on a six-month improvement plan and given an alternate set of duties which entailed having no firearm, no police uniform, no police vehicle, and no arrest authority. Grievant's pay rate remained the same. (Chief Patterson's testimony and Respondent's Exhibits 1 & 13).

18. Grievant did not grieve this improvement plan.

19. From August 3 to August 20, 2022, Grievant committed a series of on duty infractions culminating with his sleeping in his work vehicle. Ms. Natasha Tyson, Executive Administrative Assistant for the Office of Business and Finance/Employee Housing Coordinator, waived at Grievant. When she received no response, she tapped on the window of the vehicle to wake Grievant but was unsuccessful. Ms. Tyson then contacted Chief Patterson who found Grievant still sleeping in the vehicle. (Testimony of Chief Patterson & Ms. Tyson and Respondent's Exhibits 1, 15, & 16).

20. Grievant provided Chief Patterson a written statement explaining that he was not asleep but had momentarily closed his eyes to reflect on his role earlier that day in notifying a student about a death in the family. (Respondent's Exhibits 1 & 17).

21. On September 7, 2022, Chief Patterson issued Grievant a letter of intent to terminate employment, effective September 15, 2022, based on a detailed history of Grievant's performance issues and each of the incidents detailed above. The letter notified Grievant that a pretermination hearing was scheduled for September 14, 2022. (Respondent's Exhibit 1).

22. This intent to terminate employment letter also stated:

This officer has noted a pattern in Officer Mercer's behavior that is not suitable for law enforcement. **Officer Mercer lacks the ability to comprehend basic rules or directions, displays poor personal hygiene habits, blames others for his mistakes or shortcomings and misrepresents the facts of certain situations.** This type of behavior is unacceptable in law enforcement. Officer Mercer's work product has to be checked and rechecked numerous times and regardless of the number of times Officer Mercer is corrected, he continues to make the same fundamental errors. Officer Mercer would text or call supervisors at 2 or 3 am in the morning to report insignificant

weather conditions, report that everything was fine or report that a vehicle was parked in a fire lane, all of these things were not of a significant nature, yet Officer Mercer felt it relevant to make contact to report, regardless of the time of day. **Officer Mercer needs constant and direct supervision** for most basic police or security matters.

Officer Mercer has at least two (2) documented sleeping on duty incidents in the past 18 months, which has been witnessed by a WVSU employee and Chief Patterson. Officer Mercer is not capable of performing duties and responsibilities of a campus police officer or security officer. Officer Mercer's ability to function as a police officer or campus security officer for WVSU has diminished to an unacceptable level. This officer has lost complete trust, confidence and faith in Officer Mercer's abilities and work ethic.

Your conduct constitutes **gross misconduct** ...

Your failure to follow the aforementioned Policies also constitutes **insubordination** and is conduct that directly and substantially impairs your fulfillment of institutional responsibilities. West Virginia State University has reason to expect their employees to observe a standard of conduct that will not reflect discredit on the abilities and integrity of their employees, or create suspicion with reference to their employees' capability in discharging their duties and responsibilities. I believe the nature of your misconduct is sufficient to conclude that you did not meet a reasonable standard of conduct ... thus warranting dismissal. [emphasis added]

23. The letter linked each incident to numerous rule violations, some of which are outlined in the WVSU Board of Governors (BOG) Policy 19.

24. WVSU BOG Policy 19 states, in relevant part:

Section 20. Disciplinary Process

20.1 The institution utilizes a progressive disciplinary procedure under which classified employees are provided with counseling and/or a series of notifications, warnings, or other administrative actions calculated to conform the employee's conduct or performance.

20.2 Normally a classified employee shall be given two written warnings before he/she is suspended or terminated. Such warnings shall include, but are not limited to: the nature of the substandard work, performance, or conduct; remedial steps the employee must take; the date the employee's work, performance, or conduct must be brought back to standard; and notification that failure to bring the work, performance, or conduct back to standard by the specified date may result in further disciplinary action.

20.3 In cases of gross misconduct by an employee, he/she may be suspended or terminated without previous counseling, warnings, or other administrative actions. Gross misconduct is conduct by the employee which presents a danger to persons or property, or to the orderly conduct of the affairs of the institution or demonstrates willful disregard of the institution's interest or a wanton disregard of standards of behavior which the institution has a right or expect of its employees.

20.4 Classified employees may be suspended without pay or terminated for "just cause," which includes, but is not limited to, the following: ...

20.4.4 Refusal to comply with rules;

20.4.5 Neglect of duty;

20.4.6 Dishonesty;

20.4.7 Sleeping on duty;

20.4.8 Failure to maintain established performance standards;

...

20.4.11 Insubordination;

20.4.12 Inappropriate or unprofessional conduct.

(Respondent's Exhibit 18).

25. On September 15, 2022, Respondent hand delivered to Grievant a letter of dismissal, dated September 14, 2022. (Respondent's Exhibit #19).

26. Grievant did not provide any testimony or evidence to support his claims. Nor did he provide any credible evidence to support his implied denial of incidents leading to his dismissal.

Discussion

The grievant bears the burden of proof in a grievance that does not involve a disciplinary matter and must prove his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). In disciplinary matters, the burden of proof rests with the employer to prove that the action taken was justified, and the employer must prove the charges against an employee by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3. “The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, *Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1* (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

Permanent state employees who are in the classified service can only be dismissed “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. 1, *Oakes v. W. Va. Dep’t of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm’n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *Sloan v. Dep’t of Health & Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004) (*per curiam*). *See also* W. VA. CODE ST. R. § 143-1-12.2.a. (2016). “‘Good cause’ for dismissal will be found when an employee’s conduct shows a gross disregard for professional responsibilities or the public safety.” *Drown v. W. Va. Civil Serv. Comm’n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988) (*per curiam*).

Respondent dismissed Grievant for gross misconduct and violations of WVSU BOG Policy 19, including insubordination. “The term gross misconduct as used in the

context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees.” *Graley v. Parkways Econ. Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991) (citing *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) and *Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983)); *Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sep. 13, 2002); *Crites v. Dep't of Health & Human Res.*, Docket No. 2011-0890-DHHR (Jan. 24, 2012). WVSU BOG Policy 19 allows dismissal for just cause, which includes refusal to comply with rules, neglect of duty, dishonesty, sleeping on duty, failure to maintain established performance standards, insubordination, and inappropriate or unprofessional conduct.

The Grievance Board has determined that “for there to be ‘insubordination,’ the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid.” *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (per curiam). It has further recognized that insubordination “encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer.” *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988), *aff'd*, *Sexton v. Marshall Univ.*, 182 W. Va. 294, 387 S.E.2d 529 (1989).

Most of the incidents used by Respondent to justify dismissal in its letter of intent to terminate were also in the written reprimand from February 26, 2021, the performance review, the performance review checkups, and the improvement plan from

July 27, 2022. These incidents entailed sleeping on duty, lack of professional attire and hygiene, excessive details in reports, not remaining vigilant while on duty, not following department directives, and providing false information. As Grievant never grieved the prior discipline, the incidents specified therein are accepted as true.

“If an employee does not grieve specific disciplinary incidents, he cannot place the merits of such discipline in issue in a subsequent grievance proceeding. *Jones v. W. Va. Dept. of Health & Human Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); See *Stamper v. W. Va. Dept. of Health & Human Resources*, Docket No. 95-HHR-144 (Mar. 20, 1996); *Womack v. Dept. of Admin.*, Docket No. 93-ADMN-430 (Mar. 30, 1994). In such cases, the information contained in prior disciplinary documentation must be accepted as true. See *Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994).” *Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997), *aff’d*, Mon. Co. Cir Ct. Docket No. 97-C-AP-96 (Dec. 7, 1999), appeal refused, W.Va. Sup Ct. App. Docket No. 001096 (July 6, 2000).

Grievant did not provide any credible evidence to support his implied denial of incidents leading to his dismissal. Respondent’s primary witnesses were Chief Patterson and Natasha Tyson. Chief Patterson testified to the incidents detailed in the letter of intent to terminate employment. Many of these were in the above-mentioned prior discipline that was never grieved. Others were not part of prior discipline. These include Grievant falsely reporting an attempted break-in of a vending machine, sleeping on duty, lying about sleeping on duty, being dishonest in providing Chief Patterson a verbal account different than his written report after being disarmed and fired upon, failing to obtain a trespasser’s name before letting him go with a warning, improperly

processing a crime scene, improperly charging a perpetrator with battery, not providing necessary notifications to the judge and prosecutor, carrying his plain clothes badge home, and failing to report the badge as missing. Ms. Tyson testified that she saw Grievant asleep in his patrol vehicle and knocked on the window but that Grievant did not react.

A credibility analysis² shows that Chief Patterson and Ms. Tyson are credible. Their demeanor was professional and self-assured. Ms. Tyson did not have motive to lie and was initially just trying to say hello to Grievant when she found him to be non-responsive. For his part, Chief Patterson either observed or talked to the Grievant about the incidents not specified in the prior disciplinary documents. Chief Patterson had no bias as seen by the overall rating of “meets requirements” he gave Grievant. He attempted to give Grievant the benefit of the doubt and gave him repeated chances, even sponsoring a psychological evaluation. Grievant did not challenge the testimony of either witness. Grievant did however provide a written statement to Chief Patterson in

²In situations where “the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required.” *Jones v. W. Va. Dep’t of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res.*, Docket No. 2009-0540-DOC (Nov. 13, 2009); See also *Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS Protection Board 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997). Not every factor is necessarily relevant to every credibility determination. In this situation, the relevant factors include demeanor, motive, opportunity to perceive, attitude toward the action, the consistency of prior statements, and plausibility.

response to the allegation that he was asleep on duty. Grievant stated therein that he had simply closed his eyes to reflect on his involvement in assisting a family in informing a student about a death. Grievant was not credible. He had motive to lie and a history of giving either false or inconsistent statements.

WVSU BOG Policy 19 prohibits employees from neglecting their duty, not complying with rules, being dishonest, sleeping on duty, failing to maintain established performance standards, insubordination, and inappropriate or unprofessional conduct. Grievant repeatedly violated each of these provisions despite being alerted to his infractions on numerous occasions. Grievant had been reprimanded multiple times about the need for honesty and consistency in his reporting, about following proper protocol in logging information, and about maintaining his appearance. He had also previously been written up for sleeping on the job. Grievant was aware of his ongoing performance deficiencies. This constitutes the willfulness necessary for insubordination and gross misconduct.

Regardless of willfulness, Grievant's repeated violations of protocol, despite ongoing guidance to the contrary, demonstrated his gross disregard for professional responsibilities and public safety. Respondent proved good cause for dismissal. This renders moot Grievant's claims related to conditions of his employment. "Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." *Burkhammer v. Dep't of Health & Human Res.*, Docket No. 03-HHR-073 (May 30, 2003) (citing *Pridemore v. Dep't of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996)).

As for his remaining claims, Grievant failed to present any evidence that his dismissal was motivated by retaliation or discrimination. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). Reprisal is defined as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." W. VA. CODE § 6C-2-2(o).

"In proving an allegation of retaliatory discharge, three phases of evidentiary investigation must be addressed. First, the employee claiming retaliation must establish a *prima facie* case." *Freeman v. Fayette Cty. Bd. of Educ.*, 215 W. Va. 272, 277, 599 S.E.2d 695, 700 (2004). In syllabus point six of *Freeman*, the West Virginia Supreme Court of Appeals specifically applied the same elements required to prove a *prima facie* case under the West Virginia Human Rights Act to a claim arising from a public employee grievance stating,

[T]he burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.

Id., Syl. Pt. 6, 215 W. Va. at 275, 599 S.E.2d at 698 (citing Syl. Pt. 4, *Frank's Shoe Store v. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); Syl. Pt. 1,

Brammer v. Human Rights Comm'n, 183 W. Va. 108, 394 S.E.2d 340 (1990); Syl. Pt. 10, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)).

“Mere allegations alone without substantiating facts are insufficient to prove a grievance.” *Baker v. Bd. of Trs./W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998) (citing *Harrison v. W. Va. Bd. of Drs./Bluefield State Coll.*, Docket No. 93-BOD-400 (Apr. 11, 1995)). Grievant did not compare himself to any other employee. Nor did he attempt to satisfy any of the elements for retaliatory discharge. He thus failed to prove either discrimination or retaliation.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The grievant bears the burden of proof in a grievance that does not involve a disciplinary matter and must prove his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). In disciplinary matters, the burden of proof rests with the employer to prove that the action taken was justified, and the employer must prove the charges against an employee by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3. “The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

2. Permanent state employees who are in the classified service can only be dismissed “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. 1, *Oakes v. W. Va. Dep’t of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm’n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *Sloan v. Dep’t of Health & Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004) (*per curiam*). See also W. VA. CODE ST. R. § 143-1-12.2.a. (2016). “‘Good cause’ for dismissal will be found when an employee’s conduct shows a gross disregard for professional responsibilities or the public safety.” *Drown v. W. Va. Civil Serv. Comm’n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988) (*per curiam*).

3. Respondent proved by a preponderance of the evidence that Grievant engaged in misconduct of a substantial nature directly affecting the rights and interest of the public and that his conduct showed a gross disregard for professional responsibilities or the public safety.

4. For purposes of the grievance procedure, discrimination is defined as “any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.” W. VA. CODE § 6C-2-2(d).

5. Reprisal is defined as “the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it.” W. VA. CODE § 6C-2-2(o).

6. Grievant failed to prove retaliation or discrimination by a preponderance of the evidence.

7. “Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not

properly cognizable [issues].” *Burkhammer v. Dep’t of Health & Human Res.*, Docket No. 03-HHR-073 (May 30, 2003) (*citing Pridemore v. Dep’t of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996)).

8. Grievant’s claims related to the conditions of his employment are moot.

Accordingly, the grievance is DENIED.

Any party may appeal this Decision to the Intermediate Court of Appeals.³ Any such appeal must be filed within thirty (30) days of receipt of this Decision. 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

DATE: March 28, 2023

Joshua S. Fraenkel
Administrative Law Judge

³On April 8, 2021, Senate Bill 275 was enacted, creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over “[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]” W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend W. VA. CODE § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.