WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

AMY L. HYMES,

Grievant,

v. **Docket No. 2023-0611-DHHR**

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

Respondent.

DECISION

Grievant, Amy Hymes, was employed as a Deputy Commissioner by Respondent when it was the Department of Health and Human Resources.[1] On February 1, 2023, Grievant filed a grievance against Respondent, alleging:

> Wrongful Termination: Discipline process and policy was not followed. Protected Civil Service Employee. Wrongful Termination: Internal Investigation Process is bias and only supports the accuser.

As relief, Grievant requests, "Reinstatement to previous or equal position within DHHR."

Grievant filed directly to level three of the grievance process as permitted by West Virginia Code § 6C-2-4(a)(4) for a termination grievance. A level three hearing was held by videoconference before the undersigned for five days in 2024, including January 29, January 30, March 25, March 29, and April 30. Grievant appeared and was represented by Wayne King, Esquire. Respondent appeared by Cammie Chapman, Deputy Secretary, and was represented by Steven R. Compton, Deputy Attorney General. This matter

[1]As of January 1, 2024, the agency formerly known as the Department of Health and Human Resources is now three separate agencies -- the Department of Health Facilities, the Department of Health, and the Department of Human Services. For purposes of this grievance, the Department of Health and Human Resources, or DHHR, shall mean the Department of Health Facilities.

matured for decision on June 17, 2024. Each party timely submitted proposed findings of fact and conclusion of law.

Synopsis

Grievant was a Deputy Commissioner when dismissed for misconduct towards subordinates. Grievant's prior discipline and supervisory role were considered. Respondent proved Grievant created a hostile work environment and that there was good cause for dismissal. Grievant did not prove mitigation or lack of due process to warrant reinstatement. Accordingly, the grievance is **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, Amy Hymes, was employed by Respondent, between 1997 and 2023, when it was the Department of Health and Human Resources (DHHR).

2. In October 2016, Grievant became Deputy Commissioner with DHHR's Bureau of Children and Families (BCF).

3. On September 8, 2017, BCF asked DHHR's Office of Human Resources Management (OHRM) to investigate allegations that Grievant created a hostile work environment, called staff "stupid," and talked down to staff. On November 7, 2017, OHRM concluded that Grievant violated Policy 2108 and that her behavior would violate the hostile work environment policy if allowed to continue. (Respondent's Exhibit 7b).

4. On December 14, 2017, Deputy Secretary, Jeremiah Samples, issued Grievant a written reprimand.

5. On December 15, 2017, Grievant emailed Samples, stating in part:

> … Upon my arrival to the position of Deputy Commissioner I have been met with no support, gossip, hostility, and undermining behavior…. I feel that some have been empowered to believe I do not belong [in] my position … Every word that I speak will be scrutinized and manipulated by those who want to find fault.… **I am requesting the discipline be reduced** … Michelle stated that this is not disciplinary, however … the Progressive Discipline Manual and closer review of the letter, both clearly state that it is a disciplinary action.… As I openly admitted to the investigators, I am expressive and loud …. [emphasis added]
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> (Respondent's Exhibit 11).

6. On January 5, 2018, Samples emailed Grievant, stating in part: "I discussed with [Michelle] about modifying the action stemming from the investigation from a written reprimand to a verbal." Grievant acknowledged this reduction to a verbal reprimand in emailing back that same day "Thank you." (Respondent's Exhibit 2).

7. On January 20, 2018, Samples documented the verbal warning as follows:

> On December 14, 2017, I issued a verbal warning to Amy Booth[2] concerning an internal hostile work environment which revealed that her misconduct and lack of professionalism in the Office violated Policy Memorandum 2108, Employee Conduct.
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> I explained that in the future she is to conduct herself professionally in the presence of fellow employees and the public, be ethical, and polite; that she is expected to be attentive to the responsibilities associated with her job as a BCF Deputy Director, and reminded her that she is responsible for enforcing policy and modeling the expected behaviors.
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> Ms. Booth was informed that subsequent incidents of misconduct could result in additional and more severe disciplinary action.
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> (Respondent's Exhibit 7a).

[2]Grievant's former name.

8. In 2021, BCF was split into the Bureau of Family Assistance (BFA) and the Bureau of Social Services (BSS). Grievant accepted a lateral move to BSS Deputy Commissioner for the northern counties, supervising 14 offices. Jeffrey Pack was appointed BSS Commissioner and became Grievant's direct supervisor. Grievant helped subordinate Jenny Chapman[3] get a part time internship with Pack.

9. As a BSS Deputy Commissioner, Grievant continued to harass and treat subordinates in an inappropriate and unprofessional manner. These subordinates included, but were not necessarily limited to, Jenny Chapman, Mala Baumgardner, Kandy Pudsell, Jessica Embrey, Jondrea Nicholson, Laurea Ellis, and Teresa Jenkins. Grievant verbally and emotionally abused subordinates and made them feel incompetent through her hostile, loud, disrespectful, bullying, belittling, berating, and condescending behavior, even in the presence of coworkers; undermined Commissioner Pack by disparaging him to subordinates, expressing distrust for anyone who got along with Pack; told subordinates that Pack was trying to get rid of her and that she herself would be treated better by management after weight loss surgery; demanded personal loyalty of subordinates; and publicly reprimanded subordinates.

10. More specifically, Grievant engaged in hostile and intimidating behavior towards subordinates Mala Baumgardner and Jenny Chapman, even when coworkers were present. Grievant also conveyed to them and others her dislike of Commissioner Pack. (Baumgardner & Chapman's testimony). Grievant vented to Jondree Nicholson about the 2017 investigation and that Pack was now trying to get rid of her. (Nicholson's testimony). Grievant attempted to sway Nicholson against Pack by telling her that Pack

[3]Unrelated to Respondent's party representative Cammie Chapman.

was calling her names. (Nicholson's testimony). Grievant also complained to Laurea Ellis about Pack directly contacting Grievant's subordinates and directed Ellis to ignore Pack and go only through Grievant. (Ellis' testimony). Grievant further undermined Pack by raising her voice at Pack within earshot of coworkers. (Ellis' testimony).

11. Grievant picked on employees who were too afraid of Grievant to stand up for themselves. (Regina Mitchell's testimony). Grievant demanded personal loyalty, especially of those she worked with regularly, such as Baumgardner and Jenny Chapman, and often attempted to instill an obligation thereof with gifts after humiliating them. (Baumgardner & Chapman's testimony). After one public humiliation, Chapman told Grievant the accusation was false; Grievant told Chapman to just go along with it when Grievant publicly confronts her, implying it was a teachable moment for coworkers at Chapman's expense. (Chapman's testimony).

12. At a 2022 regional meeting in Martinsburg, Grievant told all present that, after her weight loss surgery, "people in Charleston" (leadership) would see her differently and that you (referring to Jenny Chapman) get more from Charleston if you are skinny. (Teresa Jenkins, Kandy Pudsell, & Ms. Nicholson's testimony).

13. Grievant belittled Pack and others to Jenny Chapman on a regular basis. Grievant also accused Chapman of working with Pack to take positions from her region. Once, Grievant yelled at Chapman for taking real time notes of Grievant's harassing behavior towards her; Grievant told Chapman to call Pack in front of her if she was going to complain to him. This culminated in Grievant telling Chapman multiple times in the Fall of 2022, as sexual innuendo, to "take one for the team," based on Grievant's assumption that Commissioner Pack was attracted to Chapman. (Chapman's testimony).

14. On October 19, 2022, Jenny Chapman emailed Commissioner Pack:

> … During one of Amy and my trips out of town, … she … said … that I should "take one for the team" and try to get you to sexually harass me so "they can get rid of him." Initially, I laughed …, as I thought she was just joking. … [O]n a later trip … she brought it up again saying pretty much the same thing … [T]here was about 3 to 4 times total that she mentioned that I should do that, but after about the 2nd or 3rd time, I believed she was serious. … I did not come forward with this previously as I know she will strongly retaliate against me, but since I did talk about the other issues I have been having with her, she is already retaliating against me and continues to do so. … She continues to add … and take away duties … [S]he told me to go clean her state-issued Ford … and get the oil changed. I am a licensed social worker …. I will graduate … with a master's degree in social work … [W]ith these qualifications … there could be better use of my time …
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> (Respondent's Exhibit 1).

15. The next day, OHRM initiated an investigation after being provided Chapman's email. Grievant told investigators that Chapman was dressed provocatively with a slit in her skirt and a low-cut shirt when she jokingly told Chapman to "take one for the team" to get Commissioner Pack to like them, and that this was in response to Chapman saying Pack seemed interested in her. (Respondent's Exhibit 9 -- recording).

16. In January 2023, OHRM issued an Investigative Report. The Report enumerated nine allegations against Grievant, some of which were unrelated to Chapman or her email. OHRM interviewed 18 individuals, including Grievant. The Report substantiated six allegations under the following partial headings:

- "Amy Hymes encouraged Jenny Chapman to get Commissioner Jeff Pack to sexually harass her in order to "get rid of him.'"
- "Hymes asks employees to perform menial tasks not within their job description or are inappropriate."
- "Hymes' communication/behavior is inappropriate and unprofessional … talks poorly of others ... raises her

voice/yells, has inappropriate discussions with employees, and threatens employees."

- "Hymes retaliates against employees when they disagree or tell her no."
- "Hymes does not allow Chapman to do her job."
- "Hymes does not provide direct supervision or clear directions."

(Respondent's Exhibit 2).

17. Under each of the above headings, the Investigative Report more specifically substantiated the six allegations, to the extent herein stated, as follows:

> … that Hymes encouraged Chapman to "take one for the team" in regard to Pack's alleged attraction to Chapman. Hymes should not have been discussing such matters, even in a joking manner, with an employee. The employee perceived this suggestion as a plot to achieve the removal of Pack from his position.
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> … that Hymes asks employees to perform menial tasks outside their job descriptions. Especially noted is she asked Chapman to sign into FACTS under her sign in information. Chapman did not sign into Hymes' FACTS account, but she was inappropriately asked to do so. …
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> … that Hymes frequently communicates and behaves inappropriately and unprofessionally. It is more likely than not that she engages in inappropriate conversations about employees with other employees. She is loud in her conversations and sometimes aggressive. Although she appears to be aware of her aggressive communication style and behavior, she seems to not understand that this comes off as threatening, belittling, and bullying to her subordinates.
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> … that Hymes allows her internal feelings about a person or situation to impact her external behaviors towards others. Although she may not intend to retaliate against others, it is often clear from her communications and behavior when she is upset with someone.
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> … that Hymes has not communicated clearly what Chapman's job entails. This has left Chapman with a misunderstanding of what authority she does or does not have.

> … that Hymes does not provide direct supervision or clear directions. Having regular conversations with someone does not necessarily mean those conversations provide sufficient guidance and leadership. Investigators believe Hymes spends time discussing her disagreement with others' leadership rather than providing her own leadership which is in line with the directives she has been given. …

18. On January 19, 2023, Grievant participated in a predetermination meeting and was given an opportunity to tell her side. She denied each of the allegations substantiated by the investigation. (Respondent's Exhibit 5).

19. Commissioner Pack was not involved in the disciplinary decision.

20. On January 20, 2023, Deputy Secretary Cammie Chapman sent Grievant a letter of dismissal, stating in part:

> … Your dismissal is the result of your history of misconduct, specifically, your behavior in creating a hostile work environment as evidenced by the results of a recent investigation. This is in violation of DHHR Policy Memorandum 2108: *Employee Conduct*, and DHHR Policy Memorandum 2123: *Hostile Work Environment*.
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> More specifically, the investigation substantiated several allegations against you. One serious example of your misconduct occurred when you encouraged a subordinate to "take one for the team" in an attempt to get Commissioner Pack to sexually harass her in order to "get rid of him." Further, you communicate inappropriately and unprofessionally with your subordinates. You discuss employees with other employees. You are loud and aggressive to the point of causing others to feel threatened, belittled, and bullied. You do not communicate clearly your expectations of others. You do not provide direct supervision or clear directions to assignments. You spend your time discussing your disagreement with others' leadership rather than providing leadership and direction.

21. The letter outlined the violated policies as follows:

> DHHR Policy Memorandum 2108: *Employee Conduct* provides that employees are expected to conduct themselves

professionally in the presence of clients, fellow employees, and the public. They are expected to be ethical, polite, and attentive to the responsibilities associated with their jobs. Further, they are prohibited from harassing or intimidating clients, or fellow employees; using profane, threatening, or abusive language towards others; and engaging in direct or indirect insubordination – Indirect insubordination is the manifestation of disrespect toward supervisory personnel which undermines their status or authority.

DHHR Policy Memorandum 2123: *Hostile Work Environment* provides that as a condition of employment/service with DHHR, it is the responsibility of employees to treat others with courtesy and respect and not participate in bullying or any type of harassment at work. DHHR prohibits behaviors which contribute to the creation of a hostile work environment. The types of behaviors prohibited include, but are not limited to: intimidation, aggression, verbal abuse/insults (such as the use of derogatory remarks, insults, angry outbursts, excessive profanity), and humiliation.

22. The letter set forth other considerations as follows:

… Supervisors are held to a higher standard of conduct, because they are properly expected to set an example for the employees under their supervision, and to enforce the employer's proper rules and regulations, as well as implement the directives of their supervisors. As Deputy Commissioner, you are held to the highest standards.

… Your actions have undermined your ability to supervise and therefore have a significant impact on DHHR's mission. You have a history of being counseled about your behaviors. Despite these attempts, you have continued to create hostility and clearly have not demonstrated desirable behaviors or conduct for your employees to emulate.

After considering your continuing misconduct, previous history, and your response, it [is] clear that you have lost the confidence of your superiors and subordinates and that you can no longer perform your assigned duties in an efficient and productive manner. …

(Respondent's Exhibit 5).

23. DHHR Policy Memorandum 2108, Employee Conduct, states in relevant part:

> **VIII. POLICY**
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> **A. Expectations**
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> Employees are expected to: …
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> > 7. Conduct themselves professionally in the presence of residents, patients, clients, fellow employees, and the public; …
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> > 12. Be ethical, alert, polite, sober, and attentive to the responsibilities associated with their jobs.
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> **B. Prohibitions**
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> Employees are prohibited from: …
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> > 6. Harassing, intimidating, or physically abusing residents, patients, clients, or fellow employees.
> > 7. Engaging in direct or indirect insubordination; …
> > b. Indirect insubordination is the manifestation of disrespect toward supervisory personnel which undermines their status or authority.
> > 8. Using profane, threatening, or abusive language towards others;
> > 9. Making unwanted or inappropriate verbal or physical contacts; …

(Respondent's Exhibit 3).

24. DHHR Policy Memorandum 2123, Hostile Work Environment, states, in relevant part:

> **VI. DEFINITIONS**
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> **A. Hostile Work Environment** – A working environment in which sufficiently severe and pervasive inappropriate conduct alters the conditions of employment. In determining whether a hostile environment exists, the totality of the circumstances must be considered from the

perspective of a reasonable person's reaction to a similar environment or under like circumstances. …

VII. Policy

A. Expectations

All employees, independent contractors, and volunteers are expected to refrain from disrupting the normal operations of the Department, refrain from profane, threatening or abusive language or violent physical acts towards others. All Management Personnel are expected to affirmatively address violations of this policy.

1. DHHR prohibits behaviors which contribute to the creation of a Hostile Work Environment. The types of behaviors prohibited include, but are not limited to:

   a. Intimidation; b. Aggression; … e. Verbal abuse/insults (such as the use of derogatory remarks, insults, angry outbursts, excessive profanity); … h. Humiliation; … l. Repeatedly manipulating a person's job content; … p. Requests for sexual favors; q. Verbal, written, or physical conduct of a sexual nature; …

2. Employees engaging in prohibited behaviors shall be subject to disciplinary action, up to and including dismissal. …

C. Disciplinary Action

Any employee who is found, after appropriate investigation, to have acted in the following manner shall be subject to disciplinary action, up to and including dismissal: …

3. Created or contributed to a hostile work environment; …

(Respondent's Exhibit 4).

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 (2018). "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*.

Grievant was dismissed for misconduct in creating a hostile work environment. 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. (2022). "'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*).

DHHR Policy Memorandum 2108 prohibits employees from harassing and intimidating fellow employees, and engaging in indirect subordination which it defines as "disrespect toward supervisory personnel which undermines their status or authority." DHHR Policy Memorandum 2123 prohibits behaviors which contribute to the creation of a

hostile work environment which include but are not limited to intimidation, aggression, verbal abuse (such as derogatory remarks, insults, and angry outbursts), humiliation, and verbal conduct of a sexual nature. The policy defines hostile work environment as "[a] working environment in which sufficiently severe and pervasive inappropriate conduct alters the conditions of employment." The policy allows for the dismissal of an employee who not only creates but simply contributes to a hostile work environment.

Respondent alleges that Grievant caused a hostile work environment by behaving inappropriately and unprofessionally in belittling, bullying, harassing, and yelling at subordinates; in telling Jenny Chapman to "take one for the team;" in working subordinates out of classification by assigning menial tasks; in bad mouthing employees; in conveying to subordinates her disagreements with leadership; in retaliating when she got upset with someone; in not providing direct supervision or clear direction; and in not allowing Jenny Chapman to do her job. Grievant disputes most of these allegations but counters that she is loud and at times says things in jest. Grievant argues for mitigation of the dismissal based on what she represents as her stellar work record and a lack of due process.

As Grievant contests the allegations, a credibility assessment is necessary. In situations where "the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required." *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *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).

The fact witnesses regarding the allegations against Grievant include Jenny Chapman, Mala Baumgardner, Regina Mitchell, Kandy Pudsell, Jessica Embry, Jondrea Nicholson, Lareau Ellis, and Teresa Jenkins. Not every factor is relevant in assessing credibility. For these witnesses, the relevant factors are motive, consistency of prior statements, demeanor, plausibility, and opportunity to perceive. Chapman and Baumgardner testified that Grievant engaged in condescending behavior towards them, even when coworkers were present, and conveyed to them her dislike of Commissioner Pack. They also testified that Grievant demanded personal loyalty of them and often gave them gifts after humiliating them. Chapman testified that, after one public humiliation, Chapman told Grievant the underlying accusation was false but that Grievant told her to just go along with it when Grievant publicly confronts her in the future. Chapman also testified that Grievant belittled Pack and others to her, accused her of working with Pack to take positions from Grievant's region, yelled at her for taking notes in real time of Grievant's harassing behavior towards her, told her to call Pack in front of her if she was going to complain to him, and told her three to four times to "take one for the team."

Baumgardner and Chapman had motive to fabricate in that they purportedly were Grievant's most frequent targets. Yet, they were consistent in their allegations, from their complaints to higher ups, their rendition to investigators and coworkers, and their testimony. Their demeanor under oath was earnest and deliberate. They had the best opportunity to perceive Grievant's behavior through their close working relationship with her. Their testimony was more plausible than Grievant's testimony, not only because it was more consistent and made more contextual sense, but also due to corroboration of various elements through the testimony of coworkers.

Jondree Nicholson testified that Grievant vented to her about the 2017 investigation, told her that Pack was now trying to get rid of her, and attempted to sway Nicholson against Pack by telling her that Pack was calling her names. Laurea Ellis testified that Grievant complained to her that Pack directly contacted Grievant's subordinates, directed Ellis to ignore Pack and just go through Grievant, and heard Grievant raise her voice at Pack. Regina Mitchell testified that Grievant picked on employees who were too afraid to stand up for themselves. Teresa Jenkins, Kandy Pudsell, and Nicholson testified that at a 2022 regional meeting in Martinsburg, Grievant told all present that after her weight loss surgery leadership "people in Charleston" would see her differently and that you get more from Charleston if you are skinny, which they felt was obviously referring to Chapman. Neither Nicholson, Ellis, Jenkins, or Pudsell had apparent motive against Grievant and all directly witnessed the incidents they verified. Their testimony was consistent with statements they made to investigators and with the testimony of the others who were present during Grievant's alleged misconduct. All were thoughtful and composed and the plausibility of their testimony was apparent in its comprehensive consistency and rationale.

For Grievant, the relevant factors are demeanor, motive, plausibility, consistency, attitude towards the action, and nonexistence of a fact to which she testified. Grievant denied many allegations but crucially did admit that she told Jenny Chapman one time, after Chapman said Commissioner Pack seemed interested in her, to "take one for the team" so Pack would like them. Grievant testified that she did not mean this sexually. Yet, Grievant told investigators that Chapman was dressed provocatively with a slit in her skirt and a low-cut shirt when Grievant said it to her. Grievant also testified that she had a stellar work record, that the 2017 investigation did not result in discipline because she was told she would not be reprimanded, and that she did not even know about the verbal reprimand until this proceeding. Yet, when Deputy Commissioner Samples emailed Grievant on January 5, 2018, that her written reprimand was being reduced to a verbal reprimand, Grievant replied with a "thank you." Thus, Grievant knew about the verbal reprimand. Interestingly, Grievant exhibited the same demeanor towards similar allegations in 2017, as she does to the current allegations, in defiantly blaming others who she claims are out to get her and are misinterpreting her actions for their own ends.

Grievant has much at stake in this grievance. Grievant takes little responsibility for her conduct and blames everyone else for misinterpreting her loud demeanor and sense of humor, and for being vengeful because she holds them to high standards. Grievant presented her own witnesses, but none of them could directly corroborate Grievant's denials because they were not present at the time any of the alleged events took place. Instead, these character witnesses testified to Grievant's hard work, high standards, helpfulness, and assertive demeanor. As such, as measured against numerous fact

witnesses who corroborated each other in testifying about Grievant's routine mistreatment of subordinates, the probative value of Grievant's uncorroborated denials is nominal.

Nevertheless, Respondent did not prove by a preponderance of the evidence that Grievant worked subordinates out of classification by assigning them menial tasks; that she failed to provide direct supervision or clear direction; that she retaliated against subordinates, that she prevented Jenny Chapman from doing her job, or that she attempted to frame Commissioner Pack for sexual harassment. While the evidence showed that Grievant asked Chapman to sign into Grievant's FACTS account using Grievant's sign in information, it also showed that this was standard practice for many supervisors. Respondent failed to prove this was against accepted protocol or outside Chapman's duties. The evidence also showed that Grievant asked Chapman to clean a State vehicle after their work trip together. Apparently, employees are required to clean State vehicles after using them. Thus, Chapman had some responsibility. Even so, Respondent did not show that Chapman's time cleaning the vehicle was more than *de minimis*. Neither did Respondent prove that cleaning the vehicle they traveled in together was a better fit for Respondent's job description.

This failure has little impact on Respondent's claims of hostile work environment, as Respondent did prove Grievant's conduct was egregious enough to justify dismissal. Respondent proved by a preponderance of the evidence that Grievant improperly joked with Jenny Chapman multiple times "to take one for the team" as sexual innuendo regarding Chapman and Commissioner Pack and caused Chapman to perceive this remark as an attempt to orchestrate Pack's removal. Respondent proved that Grievant belittled, bullied, harassed, threatened, and yelled at subordinates and had inappropriate discussions, some

of which undermined Commissioner Pack, and that this conduct created a hostile work environment for subordinates.

Respondent did not consider Grievant's conduct in isolation but also looked at her prior discipline for similar conduct towards subordinates and her continuing role as a high-level supervisor. Ironically, Grievant argues that Respondent overreached in dismissing her despite a stellar record. "[T]he work record of a long time civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 285, 332 S.E.2d 579, 585 (1985). *See Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983); *Serreno v. W. Va. Civil Serv. Comm'n*, 169 W. Va. 111, 285 S.E.2d 899 (1982). This argument is confounding due to the clear evidence that Respondent issued Grievant a written reprimand in 2017.

Further, supervisors "may be held to a higher standard of conduct, because [they are] properly expected to set an example for employees under their supervision, and to enforce the employer's proper rules and regulations, as well as implement the directives of [their] supervisors." *Wiley v. Div. of Natural Res*., Docket No. 96-DNR-515 (Mar. 26, 1988); *Linger v. Dep't of Health & Human Res*., Docket No. 2010-1490-CONS (Dec. 5. 2012). Grievant was not just a supervisor but the Bureau of Social Services' Deputy Commissioner for 14 counties. Respondent proved that because Grievant had previously received a written reprimand for some of the same behaviors and was in a high position of authority, Grievant's actions were good cause for dismissal. When similar misconduct led to a verbal reprimand, Grievant had the opportunity to change her behavior but demonstrated she was either unable or unwilling to do so.

Even though she never claimed this in her grievance, Grievant now argues that because she was in the process of applying for FMLA leave and Workers' Compensation her termination was improper. Grievant does not argue this in the context of retaliation. Rather, Grievant implies that Respondent is precluded from terminating an employee at any stage of the FMLA leave or Workers' Compensation process. As this claim is not disciplinary, the burden of proof is on Grievant. "The FMLA does not prevent an employer from terminating an employee for poor performance, misconduct, or insubordinate behavior." *Vannoy v. FRB of Richmond*, 827 F.3d 296, 304-305 (4th Cir. Va. 2016). "An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment." 29 U.S.C. § 825.216. It should be noted that Grievant was never granted FMLA leave or Workers' Compensation. Grievant did not provide any authority for the proposition that she could not be terminated while applying for these benefits.

Grievant further claims that Respondent's recording of her investigative interview must be excluded because it was improperly done without her permission in violation of Respondent's protocol. The only remedy specified in Respondent's recording policy is "disciplinary action, up to and including dismissal." Grievant requests that the Grievance Board dismiss the employee who recorded Grievant during the investigation. The Grievance Board does not have jurisdiction to order discipline of non-parties. Grievant failed to offer any authority for excluding the investigative recording.

Grievant also contends that any statement she made during Respondent's investigative interview on December 19, 2022, should be excluded because her attorney was not present during the interview. "An employee may designate and shall provide the name and contact information for the individual or organization of the 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). Grievant did not claim she told Respondent she wanted her attorney or that she provided the requisite contact information. Regardless, Grievant did not provide authority for the proposition that exclusion of her interview statements would be an appropriate remedy.

Grievant claims she was denied due process. As this is not disciplinary, Grievant carries the burden of proof. Civil service employees have "a property interest arising out of the statutory entitlement to continued uninterrupted employment." Syl. Pt. 4, *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 156, 241 S.E.2d 164, 166 (1977). That property interest "warrant[s] the application of due process procedural safeguards to protect against the arbitrary discharge of such employee under Article 3, Section 10 of our constitution." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 283, 332 S.E.2d 579, 583 (1985) (*per curiam*) (*citing Waite*).

"[O]utside of the area of criminal law, due process is a flexible concept, and . . . the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case. *Clarke v. West Virginia Board of Regents*, [166 W. Va. 702, 710], 279 S.E.2d 169, 175 (1981); *Bone v. West Virginia Department of Corrections*, 163 W. Va. 253, 255 S.E.2d 919

(1979); *North v. West Virginia Board of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977)." *Buskirk*, 175 W. Va. at 283, 332 S.E.2d at 583. "The extent of due process protection affordable for a property interest requires consideration of three distinct factors: first, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of a property interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Waite* at Syl. Pt. 5.

Under this test, the WVSCA "'has traditionally shown great sensitivity toward the due process interests of the government employee by requiring substantial due process protections,' including, generally, predischarge notice and a hearing. *Major v. DeFrench*, [169 W. Va. 241, 255], 286 S.E.2d 688, 697 (1982)." *Buskirk*, 175 W. Va. At 283, 332 S.E.2d at 583. In determining the due process that is required for public employees, the WVSCA has determined "[t]he constitutional guarantee of procedural due process requires '"some kind of hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment.' *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 [84 L. Ed. 2d 494, 105 S. Ct. 1487] (1985)." Syl. Pt. 3, *Fraley v. Civil Serv. Comm'n*, 177 W. Va. 729, 730, 356 S.E.2d 483, 484 (1987).

"'Due process must generally be given before the deprivation occurs unless a compelling public policy dictates otherwise.' Syl. pt. 2 (in part), *North v. West Virginia Board of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977)." *Clarke* at Syl. Pt. 5. "The essential due process requirements, notice and an opportunity to respond, are met if the tenured civil service employee is given 'oral or written notice of the charges against him, an explanation

of the employer's evidence, and an opportunity to present his side of the story' prior to termination." *Fraley*, 177 W. Va. at 732, 356 S.E.2d at 486 (*citing Loudermill* at 546).

In this case, Grievant received due process prior to her termination. On January 19, 2023, Grievant participated in a predetermination meeting, was given an opportunity to tell her side, and denied each of the allegations. Grievant argues that the allegations were vague, and that Respondent did not respond to her attorney's attempt to provide more information. The charges against Grievant were based on the Investigative Report which outlined the six allegations it determined were substantiated. The Investigative Report was apparently issued prior to the pretermination meeting. Grievant did not argue otherwise or present evidence to the contrary. Thus, Grievant failed to prove she was denied due process.

It should be noted that even if Grievant had been denied due process, the remedy would not entail reversal of discipline unless Grievant could show that the outcome would have been different had she received due process. "Reinstatement would be appropriate only if the appellant's dismissal would have been prevented by a pretermination hearing. *See Nickerson v. City of Anacortes*, 45 Wash. App. 432, 441, 725 P.2d 1027, 1032 (1986)." Fraley, 177 W. Va. at 733, 356 S.E.2d at 487.*See Nickerson v. City of Anacortes*, 45 Wash. App. 432, 441, 725 P.2d 1027, 1032 (1986)." *Fraley*, 177 W. Va. at 733, 356 S.E.2d at 487. Grievant did not prove that the outcome would have been different.

Grievant contends that her dismissal is excessive. "[A]n allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was 'clearly excessive or reflects an abuse of agency discretion or an inherent

disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989)." *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995), aff'd, Kanawha Cnty. Cir. Ct. Docket No 95-AA-66 (May 1, 1996), appeal refused, W.Va. Sup. Ct. App. (Nov. 19, 1996).

An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv*., 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res*., Docket No. 93-HHR-322 (June 27, 1997), aff'd Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998). Respondent provided a rational basis for its decision to dismiss Grievant. Grievant did not show that Respondent acted in an arbitrary and capricious manner.

"Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996); *Olsen*

v. Kanawha County Bd. of Educ., Docket No. 02-20-380 (May 30, 2003), aff'd, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), appeal refused, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004).

"When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ*., Docket No. 93-45-105 (Mar. 31, 1994); *Cooper v. Raleigh County Bd. of Educ*., Docket No. 2014-0028-RalED (Apr. 30, 2014), aff'd, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015). Grievant could not show that she had a stellar record, that dismissal was disproportionate to her actions given her prior written reprimand and her supervisory role, that another employee in a supervisory role received a lesser penalty for a similar history and similar conduct, or that she was ignorant of the impropriety of her conduct. Grievant failed to prove that her dismissal was excessive, and that mitigation is warranted. Thus, this grievance is DENIED.

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).

3. Respondent proved by a preponderance of the evidence that Grievant created a hostile work environment and that this, along with her prior discipline and leadership position, constituted good cause for dismissal.

4. The West Virginia Supreme Court of Appeals "'has traditionally shown great sensitivity toward the due process interests of the government employee by requiring substantial due process protections,' including, generally, predischarge notice and a hearing. *Major v. DeFrench*, [169 W. Va. 241, 255], 286 S.E.2d 688, 697 (1982)." *Buskirk*, 175 W. Va. At 283, 332 S.E.2d at 583.

5. Grievant did not prove by a preponderance of the evidence that she was denied due process or that the outcome of her discipline would have been different had her procedural due process expectations played out the way she wanted.

6. "[A]n allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was 'clearly excessive or reflects an abuse of agency discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989)." *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995), aff'd, Kanawha Cnty. Cir. Ct. Docket No 95-AA-66 (May 1, 1996), appeal refused, W.Va. Sup. Ct. App. (Nov. 19, 1996).

7. Grievant did not prove by a preponderance of the evidence that her dismissal was excessive or an abuse of discretion, or that mitigation of her punishment is warranted.

Accordingly, this grievance is **DENIED**.

"The decision of the administrative law judge is final upon the parties and is enforceable in the circuit court situated in the judicial district in which the grievant is employed." W. VA. CODE § 6C-2-5(a) (2024). "An appeal of the decision of the administrative law judge shall be to the Intermediate Court of Appeals in accordance with §51-11-4(b)(4) of this code and the Rules of Appellate Procedure." W. VA. CODE § 6C-2-5(b). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such an appeal and should not be4named as a party to the appeal. However, the appealing party must serve a copy of the petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b) (2024).

Date: July 24, 2024

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Joshua S. Fraenkel
Administrative Law Judge