

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**MICHELE MARIE STURGEON,
Grievant,**

v.

Docket No. 2024-0587-CONS

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR PUBLIC HEALTH,
Respondent.**

DECISION

Grievant, Michele Marie Sturgeon, was employed by Respondent, Department of Health and Human Resources within the Bureau for Public Health. On April 18, 2023, Grievant filed a grievance, assigned docket number 2023-0789-DHHR, protesting a written reprimand Grievant received on March 28, 2023, prior disciplinary actions, EPAs, and improvement plans, alleging harassment by coworkers and her supervisor and retaliation by her supervisor. On July 27, 2023, Grievant filed a second grievance, assigned docket number 2024-0048-DHHR, protesting a functional demotion and retaliation. On April 19, 2023, Grievant filed her final grievance assigned docket number 2024-0440-DHHR, protesting the termination of her employment.¹ For relief, Grievant seeks reinstatement, removal of reprimands, restoration of duties, and for the harassment and retaliation to cease.

¹ Grievant's statements of grievance are lengthy and are incorporated herein by reference. Grievant's statements also raise issues of protected class discrimination. Despite the undersigned's direction that the Grievance Board's jurisdiction over protected class discrimination had been removed by the Legislature and such evidence could not be heard, both parties repeatedly discussed Grievant's allegations of protected class discrimination due to age and disability. No such evidence has been considered in rendering this decision.

Following the level one hearing in docket number 2023-0789-DHHR, a level one decision was rendered on November 20, 2023, denying the grievance. Grievant appealed to level two on November 20, 2023. Docket number 2024-0440-DHHR was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). The three grievances were consolidated at level three by order entered March 14, 2024.

A level three hearing was held over four days on September 13, 2024; October 7, 2024; October 8, 2024; and October 24, 2024, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant appeared in person and was self-represented. Respondent appeared by Division Director Sharon Hill and was represented by counsel, Gail V. Lipscomb, Assistant Attorney General. This matter became mature for decision on December 10, 2024, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.²

Synopsis

Grievant was employed as an Epidemiologist I by Respondent serving the Childhood Lead Poisoning Prevention Program and Newborn Hearing Screening Program within the Office of Maternal, Child, and Family Health. Grievant protests a written reprimand, functional demotion, harassment, retaliation, and ultimate termination from employment. Respondent proved it was justified in its written reprimand and termination of Grievant's employment. Grievant failed to prove functional demotion, harassment, retaliation, or that mitigation was warranted. Accordingly, the grievance is denied.

² PFFCL were originally due on November 22, 2024, but the time for submission was extended at the request of the parties.

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 began employment with Respondent on January 6, 2020, as an Epidemiologist II serving the WISEWOMAN program of the Office of Maternal, Child, and Family Health (“OMCFH”).

2. James Jeffries is the Director of the OMCFH and reports to the Commissioner for the Bureau for Public Health. The heads of various programs and divisions appear to report to him. Although epidemiologists serve the various programs of the OMCFH, they appear to ultimately report to the Director of the Division of Epidemiology, Evaluation and Population-Based Surveillance (“EEPS”), who is also referred to as the Epidemiologist IV. The heads of the programs, such as WISEWOMAN, the Childhood Lead Poisoning Prevention Program, and Newborn Hearing Screening Program seem to be interchangeably referred to as Director, Program Director, or Program/Project Manager. Other employees who serve the programs, such as data entry workers, also report to someone other than the directors of the programs or the EEPS director.

3. Initially, Grievant’s direct supervisor was Melissa Baker, the epidemiology unit supervisor, who reported to the EEPS director, Kathy Cummons.

4. Evaluation of the WISEWOMAN program was Grievant’s responsibility. Following the Center of Disease Control’s site visit in February 2020, by September 17, 2020, there had been “zero progress” on the evaluation of the program, which Director Cummons viewed as a “lack of effort.” Director Cummons also noted Grievant’s tardiness

for work and her “inappropriate [request] to ask a contracted data vendor to assist with that type of project and do [her] work.” Director Cummons detailed the deficiencies and directed Grievant to respond by noon on September 18, 2020. The next day, Grievant texted that she was sick and would be late. By 12:40 p.m. Grievant still had not arrived to work or further communicated with Director Cummons. R. Ex. 27.

5. On October 5, 2020, following prior counseling, Ms. Baker placed Grievant on an Attendance Improvement Plan (“AIP”). Ms. Baker found that Grievant had been absent from work without prior authorization twenty-four times during a fifty-one day working day period. R. Ex. 27.

6. In April 2021, Grievant took a voluntary demotion to Epidemiologist I and transferred to serve the Childhood Lead Poisoning Prevention Program (“CLPP”) and Newborn Hearing Screening Program (“NHS”). Ms. Baker remained Grievant’s supervisor. Rochelle Coleman was the Program Director of CLPP.

7. Neither party entered the classification specifications for the Epidemiologist I or II classifications, but the parties agreed that the Epidemiologist I position requires less advanced work than an Epidemiologist II.

8. As the epidemiologist for those programs, Grievant was initially responsible for data management, surveillance, analysis and evaluation components; maintaining the databases; monitoring the databases for accuracy and timeliness of data; maintaining and preparing required records, reports, grants and requested information; providing relevant data when requested in a timely manner; assisting with reporting to the federal funding agencies, as needed; and assisting with preparing grant applications, progress reports and annual reports. R. Ex. 6.

9. Laboratories and providers are required to report lead blood level testing results to CLPP, who is responsible for tracking that data, following up for children who have elevated blood levels, and reporting to the Centers for Disease Control (“CDC”). The database CLPP uses is the CDC’s Healthy Homes Lead Prevention Surveillance System (“HHPSS”). Approximately half of the data entered comes from electronic record reporting, called an HL7, and half is entered manually from physical reports. The HL7 is supposed to auto populate to create a case within HHPSS and enter the data into the case but there were often problems with the HL7 records. Many providers do not have the software necessary to create HL7 files. Records with issues are “held” and must be reviewed manually. There were many duplicate records and missing information. Test. Hill and G.

10. CLPP has a responsibility to act on lab reports within seventy-two hours, has significant reporting requirements to the CDC tied to federal funding, and must respond to requests for data throughout the year. As the epidemiologist, this reporting was Grievant’s responsibility. R. Ex. 6 and 8.

11. Initially, CLPP staff consisted of the Program Director, Rochelle Coleman, and Cori Ice, LPN, Health Education Coordinator. As a part of her duties, Grievant was responsible for data entry for the results that came in only by fax.

12. At some point in time, responsibility for data entry was transferred to Memi Grass, who was not under the supervision of either CLPP or EEPS. Also, Program Director Coleman left her position, which remained vacant for some time.

13. On September 6, 2022, Ms. Baker issued a written warning to Grievant regarding her tardiness stating that Grievant had a 10.7% absence rate when a 5%

absence rate warrants consideration of leave abuse. Grievant was given four weeks, beginning September 12, 2022, to improve her attendance.

14. By the fall of 2022, the division director position for EEPS had been vacant for approximately a year. Ms. Baker, Sharon Hill, and Steven Maley applied for the position. In October 2022, Ms. Hill was selected for the position, which she assumed on November 7, 2022.

15. After not being selected for the division director position, Ms. Baker retired effective October 31, 2022.

16. Around the same time, Dr. Matthew Christiansen was appointed as the new State Health Officer and Commissioner for the Bureau for Public Health. Both Dr. Christiansen and Director Hill were concerned with data reliability and standardization of practices.

17. On November 14, 2022, Ms. Hill verbally counseled Grievant for attendance, following up the discussion with an email. Of concern were Grievant's instances of being tardy to work or leaving work early with less than twenty-four hours of notice. R. Ex. 3.

18. On December 8, 2022, Ms. Hill issued a verbal reprimand to Grievant for failure to meet deadlines. The counseling was documented in a memorandum and email. Grievant had failed to complete two of the last two assignments. Both assignments were priority. Grievant explained that she had put one off to the next week and then missed it due to her absence from work. The other assignment she did not complete because she worked on other work that she thought was a higher priority. Grievant was to complete

the assignments that day and the next and Ms. Hill was to start meeting with Grievant on a weekly basis. R. Ex. 4.

19. Director Hill continued to work closely with Grievant but continued to experience issues with her performance. Hrg. Test. Hill.

20. On January 13, 2023, Ms. Hill met with Grievant regarding her attendance and performance and formalized the discussion by letter dated January 19, 2023, placing Grievant on an Attendance and Performance Improvement Plan (“APIP”) for six months to end July 31, 2023. R. Ex. 9.

21. Ms. Hill calculated that, of the 364 work hours for the review period, in addition to Grievant’s 20 hours of scheduled leave, Grievant had been on unscheduled leave 10% of the time. During the 45.5 days, Grievant had been absent from work without authorization 9 times, and Grievant’s sick leave was exhausted. Director Hill’s expectations for attendance improvement were similar to those imposed by Ms. Baker in 2020.

22. Director Hill listed multiple examples of Grievant’s failure to meet deadlines, failure to follow Director Hill’s directions, failure to attend multiple meetings, and failure to provide data in the requested format. Of particular concern was Grievant’s defiance of specific instructions by Director Hill on two occasions. First, despite Director Hill’s instruction not to pursue a project with Notre Dame, Grievant pursued the project. Second, Grievant reported that a birthdate was in error after Director Hill instructed her not to report it as an error because there was no paper lab result to confirm the alleged error.

23. Ms. Hill completed Grievant's EPA 3 on January 30, 2023. Ms. Hill rated Grievant as meeting expectations overall with a score of 2.8 out of 5. Ms. Hill rated Grievant as meeting expectations in Change Readiness and Adaptability, Customer Service, Professionalism and Ethics, Responsibilities, and Expectations. Ms. Hill rated Grievant as needing improvement in Dependability and Teamwork and Collaboration. Ms. Hill noted that she had only worked with Grievant for two months out of the year. R. Ex. 7.

24. Ms. Hill stated that Grievant needed to improve her "attendance to support timely completion of work and meets [sic] deadlines and completes assignments in ways that support my ability to implement projects." Ms. Hill felt Grievant needed to improve teamwork and collaboration for "her openness to feedback because I feel she tends to take feedback as criticism instead of discussion of the work. I feel she needs to work to be more accountable for her work. I think she needs to share more information on problems she is encountering so we can find solutions more quickly instead of her struggling with them on her own."

25. Grievant refused to sign the EPA 3 stating that she did not meet with her supervisor to review the evaluation and she refused to sign because "I have met all deliverables on time for the past three years as per my former supervisor." Although the evaluation was for 2022 when she worked the entire year in her role with CLPP, Grievant discussed her work for the WISEWOMAN program, which had ended in early 2021.

26. For 2023, Director Hill made some changes to Grievant's responsibilities and expectations in her EPA 1. Director Hill added the following responsibilities:

- Keeping held records queue to zero daily, pending import number

- Using paper labs to correct held records with errors
- Running data quality reports as scheduled to identify labs that did not make cases, case duplicates, non-processed electronic lab records, and any other quality reports identified by you and your supervisor.

In consideration of Grievant's difficulties with travel, Director Hill reduced the required three professional development trainings to one and reduced the requirement to submit abstracts for consideration at national conferences from two to one. In addition to required attendance of the epidemiologist unit meetings, Director Hill added that Grievant was required to attend CLPP, NHS, MIS [Management Information System], HHLPPS user group, and other program meetings. Grievant acknowledged the EPA 1 on January 31, 2023. R. Ex. 8.

27. Director Hill continued to meet and work with Grievant, along with OMCFH Director Jeffries, and Grievant improved for a short time in February. However, Director Hill experienced persistent issues with Grievant's work and behavior in March, beginning with an exchange on March 2, 2023. When Director Hill attempted to provide guidance Grievant was resistant and argumentative. R. Ex. 11 and 12; Hrg. Test. Hill; L1 Trans. Hill.

28. On March 2, 2023, Grievant forwarded directions she had received from former CLPP Program Director Rochelle Coleman in April 2021. Director Hill responded that this was a request that Director Hill had previously told Grievant to hand over to Director Hill because, at the time, Grievant had "claimed you did not know what she was requesting." Director Hill had already developed a plan to move forward with the issue herself. After several other exchanges, Grievant responded, "here is the statement from

Rochelle on my work duties” copying of portion of the original email she forwarded from Program Director Coleman. R. Ex. 12.

29. Grievant had never been supervised by the CLPP Program Director, who had no authority to assign Grievant duties; she was always under the direction of a supervising epidemiologist, not the program director. It was therefore inappropriate and argumentative for Grievant to respond to Director Hill’s current directive with the two-year-old direction of a program director who was no longer employed and was never her supervisor.

30. Director Hill responded:

Please stop...whatever work Rochelle had you doing ended when she left. You and I have met many times and this work was never brought up nor isn’t in your PIP or EPA 1. My concern is you were doing work I wasn’t aware of and when I asked about it, you said you didn’t know what it was for. Now these emails indicate differently, so I think we need to discuss this with Jim so he is aware of what data has been provided to whom and for what reasons. Thank you for the additional information, but we can discuss this shortly with him.

R. Ex. 12.

31. This email occurred in the context of ongoing discussions with Grievant in which Grievant had expressed confusion about data analysis she had been asked to do by Coleman. Director Hill was concerned that Grievant was performing data analysis that she did not understand and for which she did not know the purpose. The email occurred after multiple conversations. Hrg. Test. Hill.

32. Ms. Hill completed an EPA 2 on March 28, 2023, finding Grievant was not meeting expectations under the PIP. Director Hill stated, “Michele keeps held records queue cleared, but does not seem to prioritize this and waits to the end of the day when specifically asked to do it first. Have had several issues over the last rating period

documented such as not doing what was asked, being argumentative when asked to make corrections, not clearing work through supervisor, and disturbing others in the workplace with complaints.” R. Ex.10.

33. On March 28, 2023, Ms. Hill also issued a written reprimand, which included detailed narratives of twelve³ incidents of misconduct/deficiency that occurred during the month of March. Director Hill stated, “It has become very difficult to provide any guidance in your work due to the argumentative nature of how you approach our discussions.” She reiterated that failure to prioritize the held queue can put cases outside the 72-hour timeframe for follow up. She further stated that Grievant’s behaviors could contribute to a hostile work environment. Director Hill detailed the prior corrective actions and notified Grievant that further “neglect of duty or any other infractions” would result in further disciplinary action. R. Ex. 11. This is the first of the corrective actions that Grievant grieved.

34. To address Grievant’s concerns about data validation issues caused by data entry, Director Hill had directed Grievant to prepare an SOP for the data entry process. If errors continued after the SOP was established, then Director Hill could request corrective action for Ms. Grass, who was not under her supervision. Although Grievant had a template from the CDC user guide for the SOP, Grievant did not submit the SOP or follow up with Ms. Grass’ refusal to cooperate in drafting the SOP. Documentation of Ms. Grass’ refusal was important to show that Ms. Grass was hindering completion of the work. R. Ex. 11 at Bul. Pt. 1; L1 Trans. at 70; Hrg. Test. Hill

³ The narrative in the eleventh bullet point does not appear to state an incident of deficiency or misconduct. Bullet points for which sufficient corroborating evidence was not submitted are not listed.

35. On March 9, 2023, CLPPP Director Jessica Dale⁴ asked to whom Ms. Ice should report inconsistencies between the requisition form and the data in HHL PSS. Director Hill responded that these should be reported to Grievant so she could determine whether it was a data entry error or a problem with the electronic records. She explained that all electronic errors needed to be reported to the Management Information System (“MIS”) to determine whether the HL7 message from the provider was incorrect or whether HHL PSS was reading the file incorrectly. R. Ex. 11 at Bul. Pt. 2; R. Ex. 14

36. The discussion continued into the next day and CLPPP Director Dale requested that Grievant call the provider’s office to get a phone number for the child’s guardian. Initially, Director Hill was supportive that such contact should be the responsibility of the program and not Grievant. Director Hill asked if Grievant had the paper result that should have this information to provide to the program. However, upon further conversation with program staff, Director Hill learned that Grievant had already contacted the lab and failed to get the phone number, which lead to CLPP Director Dale’s request for Grievant to call for the number. R. Ex. 11 at Bul. Pt. 2; R. Ex. 14; Hrg. Test. Hill.

37. In her answer why she should not be responsible for obtaining numbers, Grievant complained of her workload, mentioning a project that, yet again, Grievant had failed to discuss with Director Hill as she had repeatedly been directed. Director Hill again instructed Grievant to include her on discussions relating to data that would be submitted to the CDC. Director Hill stated that Grievant’s workload could be adjusted and a project

⁴ The record is unclear when Ms. Dale became program director after Ms. Coleman’s departure.

could be removed but noted that Director Hill had not believed Grievant's workload to be excessive since "I see you hanging out at other's cubes." Another manager had also reported to Director Hill that Grievant was spending too much time with the manager's staff complaining about Director Hill and her workload. R. Ex. 11 at Bul. Pt. 2; R. Ex. 14.

38. On March 10, 2023, Grievant emailed, "There are 348 held records today. Please advise." When questioned what guidance she was seeking, Grievant responded that she probably could not clear all the records that day and that the date range appeared to overlap with a majority of records she had previously cleared. Although Grievant was well aware that issues with the database needed to be reported to MIS, Director Hill again had to instruct her to do so. Grievant's email to MIS simply stated that there were 389 held records ranging from 2/16 – 3/9 and "[c]an you let me know if this was planned?" Director Hill believed Grievant's email was accusatory and lacking. Director Hill followed up with an email to MIS requesting that they investigate what caused the excess records to be processed and offering further assistance because it appeared to her that there was a possible system or server problem. R. Ex. 11 at Bul. Pt. 3 R. Ex. 13 and 15; Hrg. Test. Hill.

39. On March 15, 2023, the SOP was still not completed and Director Hill followed up to get a draft before the meeting on the following Tuesday. Grievant responded, blaming Ms. Grass' failure to cooperate. Director Hill again reminded Grievant that she needed to take the lead and that Grievant should be telling Ms. Grass what is needed. R. Ex. 18; G. Ex. 1 at 14; L1 Test. at 32 – 34.

40. On March 16, 2023, Grievant finally submitted the draft SOP for data entry, but it was based not on the CDC manual but on a document that had been created by the

Population Based Surveillance Manager, which did not comply with Director Hill's prior instructions, and did not include current practices. Grievant was not responsive to Director Hill's direction and continued to blame Ms. Grass when Grievant had been repeatedly told to take the lead regarding data and that the SOP was necessary to pursue corrective action for Ms. Grass. Director Hill again specifically instructed Grievant to draft the SOP with Grievant's expectations of how the data was to be entered, regardless of Ms. Grass. Grievant again responded with complaints about Ms. Grass and statement about Ms. Grass' involvement in the SOP, prompting yet another directive that Grievant was supposed to take the lead and be the one to tell Ms. Grass what to do. R. Ex. 11 at Bul. Pt. 7; R. Ex. 18: L1 Test. at 34.

41. On March 16, 2023, CPPL Director Dale requested data to respond to a media inquiry that she needed "as soon as possible so I can send the response through OMCFH leadership before their deadline tomorrow." Although Grievant still had an hour in her workday, which Director Hill believed was enough time to run the data, or at least get most of it done, Grievant stated she would do it in the morning. Director Hill ran the report herself that evening. Despite Grievant's assertion that the report would take more than an hour, Director Hill disagreed. By eleven the next morning, Grievant had not provided the data, even after Jeffries had spoken to her about it. Jeffries contacted Director Hill while she was on vacation because it hadn't been done and Grievant had been helping another epidemiologist with something rather than running the data. Grievant's failure to prioritize created a rushed and chaotic situation where Director Hill was forced to work with Grievant for hours, do work herself, and created a duplication of work between Grievant and Director Hill because of Grievant's failure to communicate.

Grievant also continued to work on a narrative that Director Hill had already completed after Director Hill told her she had already done it. R. Ex. 11 at Bul. Pt. 8 and 9; R. Ex. 16 and 17; Hrg. Test. Hill, L1 Test. at 28 and 123.

42. On March 20, 2023, Grievant failed to send an email upon starting work as requested by the APIP. Director Hill sent Grievant a chat to which Grievant responded at 9:30 a.m. that she had signed in at 8:53 a.m. but did not start working until 9:33 a.m. R. Ex. 11 at Bul. Pt. 10; L1 Test. at 35.

43. While discussing Grievant's refusal to sign her EPA-3 in Director Hill's office, Grievant became argumentative and continued to get louder and louder. Grievant attempted to shut Director Hill's door but Director Hill was uncomfortable and asked her not to and Grievant shut the door anyway. Director Hill felt Grievant was behaving aggressively and was uncomfortable so thereafter asked Director Jeffries to attend any meetings with Grievant with her. R. Ex. 11 at Bul. Pt. 13; L1 Hrg. Test. at 32; Hrg. Test. Hill.

44. Director Hill and Director Jeffries conducted a meeting with Grievant and Steven Maley regarding the contemplated written reprimand. Mr. Maley felt the "atmosphere was intimidating," that Director Hill and Director Jeffries interrupted Grievant and Mr. Malley, that Director Hill "was glaring" at Grievant, and that Director Jeffries was "moving in his chair in a jerky motion."

45. Director Hill continued to have concerns with Grievant's work through the spring and early summer of 2023, although at times Grievant did perform well. Hrg. Test. Hill.

46. In May, Grievant struggled to complete a report and plan for the CDC, which resulted in Director Hill stepping in on the last day to complete the work to ensure timely submission to the CDC. Human Resources recommended suspending Grievant. Hrg. Test. Hill; R. Ex. 21.

47. After consideration, Ms. Hill did not want to cause Grievant financial hardship and did not believe suspension would improve Grievant's performance and behavior. Director Hill felt Grievant was good at data management and data quality but struggled with more abstract work. Instead, as the PIP was nearing its conclusion, Director Hill felt the issues could be addressed with a realignment of responsibilities. Hrg. Test. Hill.

48. This realignment was in conjunction with a division-wide review of all Epidemiologist Is. Director Hill did not take duties away, but, rather, realigned the duties to be completed with the collaboration of the supervising epidemiologist, who would have the ultimate responsibility for delivery of those products. For Grievant, particularly, Director Hill believed this would provide Grievant with guidance to help her complete the more advanced duties. Hrg. Test. Hill.

49. After meeting with Grievant, including discussion of the responsibility/expectation changes, and providing opportunity for feedback, Ms. Hill completed Grievant's mid-year EPA 2 in July 2023. Ms. Hill provided Grievant a draft for comment and any requested revision and Grievant did not respond. R. Ex. 22 and 23; Hrg. Test. Hill

50. In the EPA 2, Ms. Hill recognized Grievant's work in taking over the surveillance work within the HHPSS data system and identifying needed changes,

including identifying incorrect variables that had been used previously. Ms. Hil found that Grievant “still struggles to be assertive with the program. While I feel she has progressed some, I think she needs to develop her skills further to be a leader in the CLPP and NHS programs.” Ms. Hill removed responsibility for data analysis and evaluation and clarified that Grievant was responsible for entering results not sent by HL7 messaging, corresponding with labs and providers to improve reporting, validating using faxed copies, and running reports. She clarified that the other responsibilities were to be done in collaboration with Grievant’s supervisor. R. Ex. 20. At the time, Director Hill was seeking to hire an Epidemiologist II, who would serve as Grievant’s supervisor.

51. Grievant, without further discussion, refused to sign. R. Ex. 24; Hrg. Test. Hill.

52. Grievant viewed the realignment of duties as a functional demotion and filed a grievance.

53. The level one hearing in docket number 2023-0789-DHHR, regarding the March 28, 2023, written reprimand, was conducted on July 28, 2023. Grievant requested as relief that the reprimand be removed and that Grievant be removed from Director Hill’s management. L1 Trans. at 6. However, Grievant requested specifically that Stephen Maley be made the supervisor of the Epidemiology Unit. L1 Trans. at 8.

54. Although it is not completely clear from the record, it appears there was no epidemiology unit supervisor after Ms. Baker retired; but whether the position was to be filled with the incoming Epidemiologist II, or if that was an abolished position is not clear.

55. To attempt to comply with Grievant’s request from the grievance hearing, Director Jeffries and Director Hill offered Grievant another supervisor, but she declined.

56. On October 17, 2023, Director Hill had a meeting with Grievant, CLPP, and others to discuss the faxed submissions of reports to change the procedure of handling the faxes. To reduce some of the paper, the group decided that the secretary would scan in the faxes from the two biggest laboratories, LabCorp and Quest, and save them into folders on the drive. As had been her position from the beginning, Director Hill believed and relayed that the copies of the reports were important for data validation. Grievant, as she had all along, continued to argue that providers needed to report via the HL7 rather than the actual report and that faxes when there was an HL7 were duplicative. Director Hill reiterated her position that most providers did not have the software capable of generating the HL7 files. When Grievant continued to argue, Director Hill told Grievant “if she wanted to reach out to providers to ask their ability to create HL7 messages and track the information and bring it back to the group we could use it to plan forward. I did not ask her to contact LabCorp and discontinue paper labs.” Hrg. Test. Hill and G.

57. The next day, Casey Hill⁵ emailed a LabCorp representative, copying Grievant, asking if the faxed lead testing results were being submitted by LabCorp or from the providers. A LabCorp representative responded that their database was set up to provide both fax and electronic reporting and asked if it should continue. Then Grievant responded that the records are a duplicate and “I don’t see the need for you all to continue to send an additional copy.” Director Hill was not included on any of the emails. R. Ex. 25.

58. Director Hill had repeatedly instructed Grievant to copy her on any email relating to data coming into HHLPSS. Hrg. Test. Hill.

⁵Ms. Hill’s position and role were not clear from the record.

59. Director Hill was then forced to request that LabCorp resume the faxes and also send the past reports. This delayed receipt of the reports for over a month and a half and caused unnecessary work and inconvenience for LabCorp. R. Ex. 26.

60. Earlier in the summer, environmental epidemiologist Bin Schmitz, who worked for the Office of Environmental Health Services, had reached out to Director Hill to request a meeting regarding the connection between children's blood levels and environmental factors. On August 8, 2023, Ms. Schmitz met with Director Hill, Grievant and other stakeholders. Schmitz shared that an agency had received a \$20 million grant for lead pipes replacement and the team believed the CLPP data could be helpful. There is no evidence Director Hill refused the request. R. Ex. 34.

61. Sometime prior to October 5, 2023, Grievant and Steven Maley spoke to a reporter several times regarding the grant and the CLPP. Grievant gave the reporter Ms. Schmitz' personal cell phone number. Hr. Test. C. Ice; R. Ex. 29 and 34.

62. On October 5, 2023, Ms. Schmitz received a text message from the reporter stating he was "looking into a story" about the CLPP and that Grievant and Steve Maley had said he should get in contact with her. Ms. Schmitz was shocked and upset to receive such contact. She believed Grievant had shared her number because Grievant had her number and she didn't know Mr. Maley. Ms. Schmitz had not given permission for her number to be shared. She called Grievant to express her disappointment and upset for her personal information to be shared without her consent. She told Grievant that Paul Ice was the person to contact for childhood lead prevention. Hrg. Test. Schmitz; R. Ex. 34.

63. Then, on October 11, 2023, the same reporter contacted Paul Ice, stating that “a few epidemiologists at OMCFH have asked that he look into the childhood lead prevention program’s work to help facilitate lead pipe replacement in the state.” Mr. Ice was surprised and upset to be contacted on his personal cell phone. Mr. Ice had just that day heard from Ms. Schmitz about her text message from the reporter, in which he had specifically named Grievant. Because Mr. Ice’s wife, Cori Ice, worked with Grievant, he was concerned the reporter might also call her, so he notified her. Mr. Ice believed that Grievant gave the reporter his name but doubted that Grievant had his personal cell number to give. R. Ex. 33; Hrg. Test. P. Ice.

64. On the same day, after her husband texted her about the reporter, Grievant came to have lunch with Cori Ice. During lunch Grievant told Ms. Ice that Mr. Maley, who had left the agency, had been talking to the reporter and that Grievant had also talked to the reporter several times. She had talked about the grant but hadn’t given out any information that wasn’t public. She admitted she had given out Ms. Schmitz’ cell number and that Ms. Schmitz had called her furious over it. “She said if someone contacted me, Cori Ice or Paul Ice, that information didn’t come from her” R. Ex. 29; Hrg. Test. C. Ice.

65. Thereafter, the DHHR received multiple Freedom of Information Act requests from the reporter. Had the reporter been referred to the Office of Communications initially as was policy, the reporter’s inquiry could have been handled more expeditiously and with less burden to the agency than a formal FOIA request.

66. On November 14, 2023, Office Director James Jeffries conducted a predetermination conference with Grievant and her representative, Gordon Simmons. Human Resources Director Bunny Harper and Ms. Hill also attended. Grievant’s

representative engaged in a loud exchange during the conference and Grievant did not speak.

67. On November 30, 2023, Dr. Christianson dismissed Grievant from her employment for her “history of performance failures” and violation of the DHHR Employee Conduct policy, the Office of Technology’s Information Security policy, and the DHHR’s Communications Policy and Memorandum. Dr. Christianson cited the history of improvement plans, discussions, and verbal and written reprimands. He detailed Grievant’s insubordination in instructing LabCorp to stop sending faxes and her misconduct in disclosing information to the reporter without communicating the request to the Office of Communications and providing the reporter the person cell phone numbers of coworkers. R. Ex. 30.

68. Dr. Christiansen found that Grievant’s actions in stopping the LabCorp faxes violated the following employee expectations provisions of Policy Memorandum 2108, Employee Conduct section VIII.A:

- 1.⁶ Follow directives of their management personnel;
- ...
7. Conduct themselves professionally in the presence of residents, patients, clients, fellow employees, and the public;
- ...
12. Be ethical, alert, polite, sober, and attentive to the responsibilities associated with their jobs.

R. Ex. 28 and 30.

69. Dr. Christiansen also found that Grievant’s actions violated the following employee prohibition provisions of Policy Memorandum 2108, Employee Conduct section VIII.B:

⁶ This provision appears as number six in the policy, not number one.

2. Disrupting the normal operations of the Agency;
- ...
7. Engaging in direct or indirect insubordination;
 - a. Direct insubordination is the intentional refusal to comply with a reasonable and valid rule, regulation, or directive issued by an administrative superior.
 - b. Indirect insubordination is the manifestation of disrespect toward supervisory personnel which undermines their status or authority.

R. Ex. 28 and 30.

70. Dr. Christiansen found that Grievant's actions in speaking to the reporter without notifying the Office of Communications and in providing the personal cell phone numbers of other employees to the reporter was "unsatisfactory" and "prevents or hinders this agency from meeting its objectives."

71. Dr. Christiansen found Grievant's actions violated the following provisions of the DHHR Communications Policy: "1. Media inquiries are to be referred to the Office of Communications upon initial contact/request for information. 2. News releases must be approved by the Office of Communications prior to release."

72. The referenced Communications Manual further states:

Employees contacted by the media should not directly answer questions, but instead collect information from the reporter and immediately send to the Office of Communications...."

...

It is not the intent of this policy to in any way prohibit DHHR employees from speaking to the media, either as representatives of the department or as private citizens; this policy exists to address communications issues in a systematic and uniform manner.

R. Ex. 29

73. He further found her action violated the Office of Technology's Information Security policy, WVOT-PO100, as follows:

Employees will not knowingly or inadvertently commit security violations. This includes doing one or more of the following:

...
b. Copying, disclosing, transferring, examining, re-naming, or changing information or programs belonging to another user unless given express permission to do so by the user responsible for the information or **programs**.

R. Ex. 31.

74. This provision of the policy resides in the policy's appendix and relates to "Acceptable/Unacceptable Use of State-Provided Technology." R. Ex. 31 at page 11.

75. Respondent's policy, Policy Memorandum 2104 Progressive Correction and Disciplinary Action, provides for progressive discipline. Following training and coaching/counseling, discipline progresses from verbal reprimand to written reprimand to suspension to demotion to, finally, dismissal. R. Ex. 35.

76. "Separation from employment may be issued when infractions/deficiencies in performance and/or behavior continue after the employee has had adequate opportunity for correction or an employee commits a singular offense of such severity that dismissal is warranted." R. Ex. 35 at 12.

77. The Division of Personnel's Prohibited Workplace Harassment policy prohibits nondiscriminatory hostile workplace harassment as follows

[U]nreasonable or outrageous behavior that deliberately causes extreme physical and/or emotional distress. Such conduct involves the repeated unwelcome mistreatment of one or more employees often involving a combination of intimidation, humiliation, and sabotage of performance which may include, but is not limited to:

1. Unwarranted constant and destructive criticism:
2. Singling out and isolating, ignoring, ostracizing, etc.
3. Persistently demeaning, patronizing, belittling, and ridiculing: and/or
4. Threatening, shouting at, and humiliating particularly in front of others.

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," 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. 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); See also W. VA. CODE ST. R. § 143-1-12.2 (2022).

As a preliminary matter, Grievant's protest of prior disciplinary actions, EPAs, and improvement plans occurring prior to the March 28, 2023, written reprimand is untimely.⁷

Within fifteen days following the occurrence of the event upon which the grievance is based, within fifteen days of the date upon which the event became known to the employee, or

⁷ Although Respondent did not address timeliness of these claims in her PFFCL, timeliness was properly raised at level one.

within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing

W. VA. CODE § 6C-2-4(a)(1). “Days’ means working days exclusive of Saturday, Sunday, official holidays and any day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or practice.” W. VA. CODE § 6C-2-2(c).

Grievant filed her grievance protesting the March 28, 2023, written reprimand and the prior disciplinary actions, EPAs, and improvement plans on April 18, 2023. Actions that occurred prior to March 28, 2023, are beyond the fifteen day timeframe allowed by the grievance procedure. As Grievant did not timely grieve those actions, she cannot challenge them now.

“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).” *Aglinisky 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). Therefore, discussion of these

past incidents is restricted to showing the history of past poor performance and misconduct and corrective actions taken.

Grievant denies that her performance was deficient in any way, that she spoke to the reporter, or that she gave the reporter her co-workers' cell phone numbers. Grievant asserts Ms. Hill verbally approved for Grievant to direct LabCorp to cease sending faxes. Grievant asserts she was functionally demoted. Grievant asserts the disciplinary actions and demotion were harassment and retaliation by Ms. Hill for being a whistleblower. Respondent asserts it was justified in terminating Grievant's employment when her performance and conduct was deficient over an extended period of time and after significant efforts to improve Grievant's performance conduct failed, for Grievant's violation of policy for failing to refer her contact with the media to the Office of Communications, and for providing the cell phone number of her coworker to a reporter. Respondent bears the burden of proof for the written reprimand and termination. Grievant must prove the functional demotion, harassment, and whistleblower retaliation.

There are many disputed facts in this case.⁸ 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

⁸ Multiple issues should have been easily proven or disproven by written records; however, despite the numerous exhibits, a significant number of documents were not submitted. Therefore, some determinations must be solely made on the credibility of the testimony presented.

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).

Cori Ice was credible. Ms. Ice's demeanor was appropriate. She demonstrated good recall and her answers to questions were forthright with no hesitation. Her testimony regarding her conversation with Grievant regarding the reporter was consistent with her contemporaneous email. Ms. Ice does not appear to have any bias against Grievant or motivation to testify falsely. Ms. Ice and Grievant were friendly and Ms. Ice does not report to Director Hill. Particularly, Ms. Ice's testimony that Grievant admitted to her that she had spoken with the reporter several times, had discussed the grant, and had given the reporter Bin Schmitz' number, was forthright, clear, and appeared genuine.

Director Hill was credible. Her demeanor was serious and professional and she displayed an appropriate respect for the proceeding. Director Hill's natural speaking voice is of a harsher tone, she speaks bluntly, and her expressions can be very direct. This is a communication style also noted by Ms. Ice during her testimony that Director Hill is very blunt and matter-of-fact. Despite Grievant's assertion that Director Hill perjured herself, a very serious accusation, Director Hill's testimony was consistent with her level one

testimony, the unemployment hearing testimony, and the documentary evidence. Any slight differences in her testimony are of the type created by differences in the form of questioning and the passage of time. Although Grievant asserts Director Hill was biased against her and motivated to lie because Grievant is a whistleblower, the record does not support this assertion as will be discussed further below. Director Hill discussed Grievant's positive attributes in her testimony and in the documentation of her corrective actions and EPAs. Director Hill's negative statements towards Grievant's work and behavior are not biased but are appropriate documentation of Grievant's proven deficiencies. Given the passage of time, Director Hill's level of memory was appropriate. Director Hill's testimony appeared knowledgeable and plausible.

Bin Schmitz's testimony was credible. Although Ms. Schmitz' testimony was brief, she affirmed her prior witness statement and her demeanor was appropriate and forthright. Ms. Schmitz credibly testified that Grievant had her cell phone number, that she had not given permission to Grievant to disclose her cell phone number, and that the reporter stated Grievant had suggested he contact her, and that she did not know Mr. Maley. There was no evidence that Ms. Schmitz had any bias against Grievant or any interest in the matter.

Paul Ice's testimony was credible. Mr. Ice's demeanor was appropriate and his recall appeared to be good. Mr. Ice testified that he believed, based on the text message to Ms. Schmitz, his wife, from the reporter that Grievant had disclosed his name but that he did not think that either Grievant or Mr. Maley had his cell phone number. There was no evidence that Mr. Ice had any bias against Grievant or any interest in the matter.

A credibility determination for Steven Malley is difficult. Mr. Malley's demeanor, even under harsh cross examination was calm and polite. His answers were thorough but responsive, he had good recollection, and he appeared knowledgeable. However, it is true that Mr. Malley may have bias and interest because Director Hill was selected for the Director position over Mr. Malley and Mr. Malley choose to leave employment following a predetermination conference in which it was alleged he had been insubordinate to Director Hill. It appears that Mr. Malley testified truthfully about his impressions, but it is not certain his impressions were accurate and not motivated by his own negative relationship with Director Hill. The majority of Mr. Malley's testimony was regarding his own opinions about what Grievant's job responsibilities should have been and how he disagreed with Director Hill's leadership.

Melissa Baker was somewhat credible. Ms. Baker's demeanor and attitude towards the proceeding were appropriate. She appeared to have a good recollection of events. However, Ms. Baker's assertion that the only problem with Grievant had been her attendance was directly contradicted by former EEPS Director Cummons' documentation attached to the October 5, 2020, AIP. Regardless, even if true, Grievant's good performance several years prior and under a different administration and supervisor, does not disprove the poor performance and behavior alleged by Director Hill. Ms. Baker retired and was not present during the relevant time-period of this grievance.

Grievant was not credible. In general, Grievant appeared to often testify in unsupported extremes and exaggerations such as Director Hill "never" conducted the weekly meetings, when the existence of meetings is corroborated by emails, or that "everybody became very afraid to do anything" and were "extremely frustrated that things

change moment -to-moment hour-by-hour”⁹ citing Director Hill’s emails as proof when the emails reflect no such thing and Ms. Ice’s testimony contradicts it.¹⁰ She asserted Director Hill had written her up “a least probably thirty times”¹¹ when she had only been subject to one written reprimand. This catastrophizing is consistent with Director Hill’s testimony that “when I try to work with her on issues like...where I was trying to get her to troubleshoot collaboratively with me, she automatically assumes I’m telling her she’s wrong, an adjust argues it back with me instead of trying to work together to resolve whatever the issue is.”¹² It is also consistent with Grievant’s assertion that she “never” received feedback, which seems more likely that Director Hill’s attempt to provide feedback was taken as reprimand. Grievant’s contention that Director Hill was demeaning in email is, again, directly contradicted by the emails entered in the record, none of which were inappropriate.

During both her level one testimony and level three testimony Grievant repeatedly spoke about all the people and documents that would corroborate her account, but she did not present such testimony or documents in the level three hearing. Grievant’s disputes with Director Hill arose regarding CLPP and the only employee of CLPP to testify, Ms. Ice, denied her characterizations of Director Hill and denied that she had seen Director Hill treat Grievant inappropriately. Ms. Ice described Director Hill as concerned with making sure that employees “stayed in their lane” and performed the duties of their own job. She testified Director Hill was blunt and to the point and denied that she and

⁹ L1 Test. Gr. at 104 – 105.

¹⁰ These are only a few examples of the types of statements made by Grievant in her level one and level three testimony, her statements of grievance, and her PFFCL.

¹¹ L1 Test. Gr. at 13.

¹² L1. Test. Hill. at 30.

Grievant could not get clarifications from Director Hill. She believed Director Hill provided clear expectations.

Grievant testified that she did not have contact with the reporter, that he called and she said she could not speak to him. This is directly contradicted by the credible testimony of Cori Ice, who says Grievant told her she spoke to the reporter. Grievant's testimony that Ms. Hill verbally directed her to tell LabCorp to stop sending faxes was not plausible given the longstanding contention between them regarding the faxes and was contradicted by her own statements in her PFFCL where she accused Ms. Hill of wrongdoing by saying that Ms. Hill "does not want to engage in CDCs mandatory Data Modernization Effort by continuing to insist on uses [sic] a fax machine over Electronic Lead Records."

Grievant repeatedly made assertions during the proceeding that were false. For example, in her PFFCL, Grievant states that in the unemployment hearing transcript¹³, Director Hill admitted to Gwen Bryant that "she had to talk to [Grievant] in a derogatory tone because that was the only way she could get [Grievant] to "understand her." Grievant fails to cite to the specific page in the transcript but a review of the transcript reveals that Ms. Bryant did not testify and Director Hill's testimony contains no such statement. Very little of what Grievant presented or testified can be found reliable.

Although Respondent failed to prove all the charges in the written reprimand due to the lack of corroborating documentation or testimony, Respondent proved the majority of the misconduct alleged. Respondent proved multiple instances of Grievant's failure to

¹³ The unemployment hearing transcript was admitted only for purposes of impeachment. The decision of the unemployment proceedings is not relevant to the grievance procedure as different standards apply.

follow Director Hill's directives regarding creating SOPs; failure to discuss projects and workload to keep Director Hill informed of Grievant's work as was required by her PIP; failure to take the lead in establishing the SOPs, in interactions with Ms. Grass, and in resolving system data errors with MIS; and failure to respond adequately and promptly to Program Director Dale's request for date to respond to a media inquiry. Respondent proved Grievant was aware of the relevant responsibilities and expectations through her EPAs, PIP, and Director Hill's counseling. Respondent proved Grievant's conduct violated Respondent's employee conduct policy for failure to follow reasonable directives and was continued unsatisfactory performance that had persisted despite the PIP.

A written reprimand was clearly justified for the multiple violations of policy and failure to adequately perform her duties. Grievant had already been through prior counseling and a verbal reprimand and was on a detailed performance improvement plan at the time of the discipline. Grievant was aware of her duties and responsibilities and continued to resist Director Hill's supervision and ignore her directives. The incidents cited by Director Hill demonstrate Grievant's failure to take responsibility for the program's data and failure to cooperate with Director Hill to address the roadblock created by Ms. Grass's refusal to comply.

Grievant insists that there was nothing for her to improve on and that everything was turned in on time. However, it is clear from the record as a whole that Grievant did not adjust well to her voluntary demotion to Epidemiologist I. She repeatedly and at length wanted to discuss her previous work with the CDC and as an Epidemiologist II with the state. Her actions and statements show she had no respect for Director Hill and she did not believe she should be required to do the tasks Director Hill assigned to her with which

she disagreed or felt were menial. While Director Hill readily admitted that there were some duties Grievant performed well, from the beginning, if there was a task or duty Grievant disagreed with, she failed to timely or appropriately complete the same, and would simply deny that her failure was misconduct.¹⁴ While her CDC deliverables may have been submitted on time - though at least one of those was on time only because Director Hill stepped in to complete it - it was other assignments from Director Hill that she failed to complete in a timely manner.

It is that persistent resistance of Director Hill's leadership that elevated the seriousness of her insubordination regarding the LabCorp faxes. "[F]or 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*). The Grievance Board 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). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*,

¹⁴ At the level one hearing, Grievant spoke at length how Director Hill was wrong about prioritization of the held records because other states handle held records differently. L1. Test. Gr. at 89 – 90. She asserted the written reprimand was incorrect because "you do not have to release them by the end of the day." L1. Test. Gr. at 91. This completely ignores that Director Hill, as the director of the division, had decided it was important, so much so that she had placed it as an expectation in Grievant's January 19, 2023, PIP.

Docket No. 90-H-128 (Aug. 8, 1990). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. See *Day v. Morgan Co. Health Dep't*, Docket No. 07-CHD-121 (Dec. 14, 2007).” *Graham v. Wetzel County Bd. of Educ.*, Docket No. 2013-0014-WetED (Feb. 15, 2013), *aff'd*, *Graham v. Bd. of Educ. of Wetzel Cty.*, No. 13-0975, (W. Va. Sup. Ct., Apr. 28, 2014) (memorandum decision). The policy violation cited by the written reprimand for failure to follow directives is also insubordination. Grievant had been repeatedly insubordinate.

Respondent proved Grievant was again insubordinate when she instructed LabCorp to stop fax reporting in defiance of Director Hill’s directives. The issue of the faxes had been a major point of contention between the two. Grievant believed they were mandated to switch completely to electronic reporting. Director Hill recognized that many providers lacked the necessary software to participate in electronic reporting and had concerns about data reliability and accuracy in the electronic reporting. Director Hill believed that validation standards required verification of inaccuracies from the actual report. Even though Grievant, herself, acknowledged the issues with data in the database and the inaccuracies that occurred with the electronic reporting, she wanted to verify the electronic reporting through use of another database rather than the faxed copies of the actual lab reports. As the director of the division, Director Hill clearly had the authority to make that call, yet Grievant refused to accept Director Hill’s decision and directives.

It is not plausible that Director Hill approved Grievant to allow the discontinuance of LabCorp’s faxes in the meeting, as Grievant asserts, when the entire purpose of the meeting was to establish a better system to preserve the faxes so they could be used for

data validation. That Grievant failed to copy Director Hill on the email to discontinue the faxes, despite the multiple documented directives to copy her on such emails, also indicates an improper purpose. Nor did Grievant discuss this change with Director Hill after she made it. It was almost a month later before Director Hill discovered that the faxes had been discontinued. Respondent proved Grievant violated policy in failing to copy Director Hill on the email, that she was directly insubordinate in discontinuing the faxes despite Director Hill's directives, and that this was a serious escalation of her insubordinate behavior.

Respondent proved it was more likely than not that Grievant discussed the alleged failure of Director Hill to provide data to help with the EPA grant and proved Grievant failed to disclose this contact to the Office of Communications per policy. Respondent proved it was more likely than not that Grievant gave the reporter Ms. Schmitz' personal cell phone number. Grievant admitted to Ms. Ice that she gave Ms. Schmitz' number to the reporter, Ms. Schmitz testified that Grievant had her number and didn't have her permission to disclose her number, and the reporter's message indicates it came from Grievant.¹⁵

¹⁵ "Hearsay evidence is generally admissible in grievance proceedings. The issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings." *Gunnells v. Logan County Bd. of Educ.*, Docket No. 97-23-055 (Dec. 9, 1997). The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether

Although Grievant denied having talked to the reporter, Ms. Ice's credible testimony that Grievant told her she talked to the reporter about the grant, and Grievant's own inconsistent statements and arguments prove it was more likely than not that she did. While Grievant is not prohibited from speaking to the press, policy does require that she report that contact to the Office of Communications, which she failed to do. Further, Grievant's contact with the press does not appear to have been motivated by good faith regarding the issue but, rather, to further her dispute with Director Hill. Although it is not clear from the record when, exactly, Grievant spoke to the reporter, it was on or before October 5th based on the text Ms. Schmitz received. At that time, it had been less than two months since the meeting with Bin Schmitz in which it was discussed that CLPP data might be helpful for administering the grant. There is absolutely no evidence that Director Hill was attempting to block the work of the grant or refuse to provide data.

Respondent proved Grievant's contact with the reporter, without disclosure to the Office of Communications, violated the DHHR's Communications Policy and Communications Manual. However, Respondent failed to prove that the disclosure of Ms. Schmitz cell phone number was a violation of the Office of Technology's Information Security policy, WVOT-PO1001. This policy applies only to state-provided technology, not the personal cell phone numbers of the employees in this case. Unless Grievant obtained the telephone numbers from an Office of Technology system, disclosing the

collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. *Id.*; *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-H-115 (June 8, 1990).

telephone number would not be in violation of this policy. Respondent failed to prove that Grievant obtained the numbers of her coworkers from Respondent's system.

However, the disclosure of a coworker's personal information to a reporter without permission is extremely inappropriate and caused upset to Ms. Schmitz and Mr. Ice. It is more likely than not, given the timing, that Grievant also encouraged the reporter to contact Paul Ice, even if she did not provide his cell phone. Doing these things without discussing it first with Ms. Schmitz and Mr. Ice caused considerable upset and disruption. It ultimately hindered the reporter's ability to obtain information that would have been readily available to him if he had been directed to the Office of Communications as required. This would also have saved the additional burden to the reporter of making a FOIA request and to the agency to respond. Grievant violated Respondent's employee conduct policy by interfering with Respondent's operations and the violation of privacy is a failure to act in an ethical and polite manner under the policy.

Grievant asserts that progressive discipline was not followed. While Respondent's policy provides for progressive discipline, "Separation from employment may be issued when infractions/deficiencies in performance and/or behavior continue after the employee has had adequate opportunity for correction or an employee commits a singular offense of such severity that dismissal is warranted." R. Ex. 35 at 12. In this case, Grievant had ample opportunity to improve and her escalation of behavior and disruption warranted dismissal without prior suspension. Grievant also argues she was entitled to additional opportunity for improvement because her behavior was correctable, citing *Mason County Board of Education v State Superintendent of Sch.*, 165 W.Va. 732. This case is not

applicable because it is based on the application of the West Virginia Board of Education's policy and is applicable only to county board of education employees.

Grievant asserts she was harassed and subject to a hostile work environment.¹⁶ "Harassment" means repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." W. VA. CODE § 6C-2-2(I). The Division of Personnel's Prohibited Workplace Harassment policy prohibits nondiscriminatory hostile workplace harassment as follows

[U]nreasonable or outrageous behavior that deliberately causes extreme physical and/or emotional distress. Such conduct involves the repeated unwelcome mistreatment of one or more employees often involving a combination of intimidation, humiliation, and sabotage of performance which may include, but is not limited to:

1. Unwarranted constant and destructive criticism;
2. Singling out and isolating, ignoring, ostracizing, etc.
3. Persistently demeaning, patronizing, belittling, and ridiculing; and/or
4. Threatening, shouting at, and humiliating particularly in front of others.

"What constitutes harassment varies based upon the factual situation in each individual grievance." *Sellers v. Wetzel County Bd. of Educ.*, Docket No. 97-52-183 (Sept. 30, 1997). This Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment. *Beverly v. Div. of Highways*, Docket No. 2014-0461-DOT (Aug. 19, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-95 (Mar. 31, 2015); *Vance v. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2011-1705-MAPS (Feb. 22, 2012), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 12-AA-32 (Jul. 5,

¹⁶ Grievant made allegations against multiple people that are both out of time and not relevant to address as the termination of her employment is being upheld. This decision considers only the allegations against Director Hill and Bunny Harper as it relates to a defense against the disciplinary action.

2012); *Rogers v. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2009-0685-MAPS (Apr. 23, 2009), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 09-AA-92 (Dec. 8, 2010). The point at which a work environment becomes hostile or abusive does not depend on any "mathematically precise test." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22, (1993). Instead, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, 'considering all the circumstances.'" *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (citing *Harris*, 510 U.S. at 23). These circumstances "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance" but "no single factor is required." *Harris*, 510 U.S. at 23. "To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment. See *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998) (*per curiam*). "As a general rule 'more than a few isolated incidents are required' to meet the pervasive requirement of proof for a hostile work environment case. *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 573 (8th Cir. 1997)." *Fairmont Specialty Servs. v. W. Va. Human Rights Comm'n*, 206 W. Va. 86, 96, 522 S.E.2d 180, 190 n.9 (1999).

Grievant terms the corrective actions taken by Director Hill as harassment. As with her other testimony, Grievant's testimony and arguments regarding this issue are exaggerated. Grievant repeatedly referred to receiving "30 write ups in a day," which was simply the one written reprimand containing thirteen bullet points that documented multiple issues that had occurred over the course of a month. Director Hill's frequent

involvement in Grievant's work, coaching, and correction were all appropriate supervisory actions. Director Hill was complimentary of Grievant when warranted but was also diligent in documenting ongoing problems. As to certain communications Grievant found offensive, such as telling Grievant in an email to "please stop," these actions were not inappropriate and Grievant's affront is greatly overblown. Despite Grievant's characterizations of Director Hill as consistently hostile and demeaning, the emails in Grievant's own exhibits show multiple instances of Director Hill complementing Grievant's work when she completed a task or turned in good work. G. Ex. 1 at 5 and 14. Even in her testimony Director Hill was complimentary of Grievant stating that she was a "highly intelligent woman" who could do "phenomenal work" in some areas.

It does appear true that the meeting regarding the written reprimand became somewhat heated and the pre-determination conference even more so; however, those instances do not rise to the level of harassment or hostile work environment. As the working relationship deteriorated, Director Hill also had interactions with Grievant that made Director Hill uncomfortable. Grievant's description of the severity of the interactions appears to be exaggerated and more likely than not, while these two interactions were unprofessional, they did not rise to the level of harassment or abuse.

Grievant asserts Director Hill harassed her by functionally demoting her when she required her to do data entry and changed her responsibilities in her 2023 EPA2. "It has been recognized by this Grievance Board that a 'functional demotion' may occur when an employee is reassigned to duties of less number and responsibility without salary reduction or other alteration, which may impact the employee's ability to obtain future job advancement." *Dudley v. Bureau of Senior Serv.*, Docket No. 01-BSS-092, (July 16,

2001) (citing *Gillispie v. W. Va. Dep't of Corrections*, 89-CORR-105 (Aug. 29, 1989)); *Dickey v. Div. of Labor*, Docket No. 2008-1820-CONS (Jan. 21, 2009); *Koblinsky v. Putnam County Health Dep't.*, Docket No. 2011-1772-CONS (Oct. 23, 2012), *aff'd*, Kanawha Cnty. Cir. Ct., Docket No. 12-AA-131 (July 24, 2013). Data entry had been present in Grievant's job duties from the beginning. While the increase in that responsibility could be construed as a functional demotion in certain circumstances, it is not clear in this case. Grievant did not submit the job description of job classification for Epidemiologist I, but it appears some data entry would be appropriate and Grievant did not prove that data entry was her main job duty. Grievant had many other listed duties which would appear to align with the role of epidemiologist as explained in the record of this grievance. Again, without additional evidence, requiring Grievant to perform some duties under the supervision of an Epidemiologist II, does not equate to a functional demotion. Grievant failed to prove she was functionally demoted.

Grievant asserts the discipline was in retaliation for whistleblower activities. "No employer may discharge, threaten, or otherwise discriminate or retaliate against an employee by changing the employee's compensation, terms, conditions, location, or privileges of employment because the employee, acting on his or her own volition, or a person acting on behalf of or under the direction of the employee, makes a good faith report, or is about to report, verbally or in writing, to the employer or appropriate authority, an instance of wrongdoing or waste." W. VA. CODE § 6C-1-3(a). Grievant asserts she reported abuse and mismanagement to Bunny Harper and Amy Atkins in January 2023. Grievant asserts Director Hill was aware of deficiencies in lead teasing but didn't want all the children of age 72 months or less to be tested, as required by law, and that she was

refusing to share data to cover that up. She asserted Director Hill did not want to improve any OMFCH programs or to engage in the CDCs mandatory data modernization effort because of the assistance on faxes. She further asserted Director Hill had refused to share data to assist in the state's grant to replace pipes.

Grievant failed to prove she made these complaints to the human resources office at all. Grievant provided no corroborating evidence, and the meeting regarding the grant didn't occur until August 2023; so, she could not have discussed that in a meeting she had in January 2023. Even if Grievant had made such disclosures, her disclosures would not have been in good faith but would simply have been in furtherance of her dispute with Director Hill and her attempt to avoid Director's supervision and corrective action. Her testimony on these issues is not credible and she provided no evidence to corroborate her allegations against Director Hill.

Grievant essentially argues mitigation when she asserts that her prior good performance was not taken into account in her discipline. "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). An 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 the employer's discretion,

or an inherent disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995). See *Martin v. W. Va. State Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

“When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved.” *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994). See *Austin v. Kanawha County Bd. of Educ.*, Docket No. 97-20-089 (May 20, 1997).

Grievant failed to prove mitigation was warranted. Grievant was not a long-term employee and had deficiencies in attendance and performance in both of her positions. Grievant was clearly on notice of her deficiencies through the series of corrective actions and discipline used by Director Hill. There is no evidence Grievant was treated differently than any other similarly-situated employee. Nor was the penalty disproportionate given the escalation of Grievant's conflict with Director Hill and defiance of her leadership, which was impacting the work of the agency and causing disturbance with other employees.

Respondent proved Grievant's clear pattern of open and escalating defiance of Director Hill's authority. Grievant clearly believed her knowledge and opinion were superior to Director Hill and resented that she was under her supervision. When she disagreed with a directive, she simply defied it. Grievant's actions were not in good faith but appear, more likely than not, to be motivated by her disdain of Director Hill. Despite a long period of counseling, corrective action, and disciplinary action, Grievant's

misconduct escalated. Respondent proved it was justified in terminating Grievant's employment and Grievant failed to prove any defense or that mitigation was warranted. Accordingly, the grievance must be denied.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. 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. 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. *Id.*

2. Permanent state employees who are in the classified service can 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. 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); See also W. VA. CODE ST. R. § 143-1-12.2 (2022).

3. "Within fifteen days following the occurrence of the event upon which the grievance is based, within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the

chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing “W. Va. Code § 6C-2-4(a)(1).

4. “Days’ means working days exclusive of Saturday, Sunday, official holidays and any day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or practice.” W. Va. Code § 6C-2-2(c).

5. “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).

6. “[F]or 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*). The Grievance Board 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).

7. “Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions.’ *Reynolds v. Kanawha-Charleston Health Dep’t*, Docket No. 90-H-128 (Aug. 8, 1990). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. *See Day v. Morgan Co. Health Dep’t*, Docket No. 07-CHD-121 (Dec. 14, 2007).” *Graham v. Wetzel County Bd. of Educ.*, Docket No. 2013-0014-WetED (Feb. 15, 2013), *aff'd*, *Graham v. Bd. of Educ. of Wetzel Cty.*, No. 13-0975, (W. Va. Sup. Ct., Apr. 28, 2014) (memorandum decision).

8. “‘Harassment’ means repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession.” W. Va. Code § 6C-2-2(l).

9. “What constitutes harassment varies based upon the factual situation in each individual grievance.” *Sellers v. Wetzel County Bd. of Educ.*, Docket No. 97-52-183 (Sept. 30, 1997). This Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment. *Beverly v. Div. of Highways*, Docket No. 2014-0461-DOT (Aug. 19, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-95 (Mar. 31, 2015); *Vance v. Reg’l Jail & Corr. Facility Auth.*, Docket No. 2011-1705-MAPS (Feb. 22, 2012), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 12-AA-32 (Jul. 5, 2012); *Rogers v. Reg’l Jail & Corr. Facility Auth.*, Docket No. 2009-0685-MAPS (Apr. 23, 2009), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 09-AA-92 (Dec. 8, 2010).

10. “It has been recognized by this Grievance Board that a ‘functional demotion’ may occur when an employee is reassigned to duties of less number and responsibility without salary reduction or other alteration, which may impact the employee's ability to obtain future job advancement.” *Dudley v. Bureau of Senior Serv.*, Docket No. 01-BSS-092, (July 16, 2001) (citing *Gillispie v. W. Va. Dep’t of Corrections*, 89-CORR-105 (Aug. 29, 1989)); *Dickey v. Div. of Labor*, Docket No. 2008-1820-CONS (Jan. 21, 2009); *Koblinsky v. Putnam County Health Dep’t.*, Docket No. 2011-1772-CONS (Oct. 23, 2012), *aff’d*, Kanawha Cnty. Cir. Ct., Docket No. 12-AA-131 (July 24, 2013).

11. The point at which a work environment becomes hostile or abusive does not depend on any “mathematically precise test.” *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22, (1993). Instead, “the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, ‘considering all the circumstances.’” *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (citing *Harris*, 510 U.S. at 23). These circumstances “may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance” but “no single factor is required.” *Harris*, 510 U.S. at 23.

12. “To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment. See *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995).” *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998) (*per curiam*). “As a general rule ‘more than a few isolated incidents are required’ to meet the pervasive requirement of proof for a hostile work environment case. *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 573 (8th Cir.

1997).” *Fairmont Specialty Servs. v. W. Va. Human Rights Comm’n*, 206 W. Va. 86, 96, 522 S.E.2d 180, 190 n.9 (1999).

13. “No employer may discharge, threaten, or otherwise discriminate or retaliate against an employee by changing the employee’s compensation, terms, conditions, location, or privileges of employment because the employee, acting on his or her own volition, or a person acting on behalf of or under the direction of the employee, makes a good faith report, or is about to report, verbally or in writing, to the employer or appropriate authority, an instance of wrongdoing or waste.” W.Va. Code § 6C-1-3(a).

14. “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). An 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 the employer’s discretion, or an inherent disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995). See *Martin v. W. Va. State Fire Comm’n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

15. “When considering whether to mitigate the punishment, factors to be considered include the employee’s work history and personnel evaluations; whether the

penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved.” *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994). See *Austin v. Kanawha County Bd. of Educ.*, Docket No. 97-20-089 (May 20, 1997).

16. Respondent proved the charges against Grievant and proved that the written reprimand and termination of Grievant’s employment was justified.

17. Grievant failed to prove harassment, hostile work environment, functional demotion, retaliation, or that mitigation was warranted.

Accordingly, the 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 be named 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: January 28, 2025

Billie Thacker Catlett
Chief Administrative Law Judge