WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MARY LOUISE POKE,
Grievant,

v. **Docket No. 2014-1196-HRC**

HUMAN RIGHTS COMMISSION,
Respondent.

D E C I S I O N

Mary L. Poke, Grievant, filed this grievance against her employer, the West Virginia Human Rights Commission ("HRC" or "Commission"), Respondent, protesting her dismissal from employment as an Investigator II. The original grievance was filed on March 13, 2014. Grievant contends her termination was unjust and wrong. She argues that the allegations made were not based on accurate, factual information and the penalty of termination was not appropriate. Pursuant to an Amended Grievance Form, Grievant identified a number of different bases for her challenge to the dismissal, and seeks as relief "[r]emoval from personnel file [of] the Gross Misconduct Dismissal Letter," "[r]einstatement of employment as an Investigator II or employment position in another state agency," and "[r]einstatement of all benefits, salary, vacation, sick leave: HRC to pay medical benefit premiums for April-June."

As authorized by W. VA. CODE § 6C-2-4(a) (4), the grievance was filed directly to level three of the grievance process. Nevertheless, subsequent to a phone conference of the parties, transpiring on May 1, 2014, a mediation session was scheduled and held on May 19, 2014. A level three hearing convened before the undersigned Administrative Law Judge on June 18, 2014. A second and third day of hearing on this matter took

place on June 19, 2014, and on June 23, 2014, all at the Public Employee Grievance Board's Charleston office. Grievant appeared *pro se*.[1] Respondent was represented by Jennifer S. Greenlief, Assistant Attorney General. This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law documents on or about September 2, 2014, the deadline for the submissions. Both parties submitted fact/law proposals.

Synopsis

Grievant protests her dismissal from employment with Respondent. Grievant argues her termination was based upon inaccurate factual information; the disciplinary action imposed was not for just cause and was arbitrary and capricious. Grievant maintains that her discharge was unjust and wrong. Respondent maintains that the discharge of Grievant was appropriate.

Grievant was not a probationary employee at the time of dismissal and had proprietary interest in her employment. Respondent was aware that Grievant had achieved regular employee status. Respondent perceived Grievant to be a difficult employee to manage. Respondent lost faith in Grievant's ability to perform her assigned duties in a proficient and agency approved manner. Prior to the termination meeting, Respondent did not sufficiently indicate perceived performance deficiencies to Grievant or fully communicate that her performance was deemed unduly detrimental to the operations of the agency. Grievant was terminated for alleged gross misconduct.

[1] Permission was requested and granted to allow Grievant's husband, Michael Poke, to observe, and to a limited degree, assist Grievant at the level three hearing.

It is recognized that the Commission was experiencing managerial fluctuation during a period of Grievant's term of employment; nevertheless, Respondent's discharge of Grievant is problematic. A classified state employee is entitled to fundamental safeguards, and/or notice pertaining to work place performance that was not provided to Grievant. Termination of employment is a severe disciplinary action and should not be an arbitrary or capricious action. Respondent demonstrated reservation regarding select conduct of Grievant but the act of gross misconduct and/or insubordination by an employee demands an action or omission of conduct more than was established. In the circumstance of this case, Respondent did not demonstrate by a preponderance of the evidence that termination of Grievant's employment was justified. There are procedural protocols for identifying, educating, and correcting classified employees' behavior. Respondent established Grievant's behavior was not necessarily ideal employee conduct; however, did not establish by a preponderance of the evidence that Grievant's action(s) constituted gross misconduct.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is an African-American female, who began employment with Respondent on August 1, 2013. She was initially employed as an Investigator.

2. Prior to Grievant's employment with Respondent, Grievant had not worked notably in an investigatory capacity, and she had no prior experience dealing with issues arising under the West Virginia Fair Housing Act.

3. At the time Grievant was hired, she was one of three investigators that comprised the Housing Unit at the Human Rights Commission. The Investigative Unit operates on a team concept. One of those investigators, Tiffany Caldwell, was designated as the Lead Housing Investigator, but was not Grievant's direct supervisor. Grievant and all other Housing Investigators reported to Yodora Booth, Director of Operations, who in turn reported directly to Marykaye Jacquet, then the Deputy Director and now the Acting Director of the Commission.[2]

4. Grievant was a probationary employee the first six months of employment at the Human Rights Commission.

5. Early on in Grievant's initial investigative training, Director of Operations Supervisor Yodora Booth encouraged Grievant to seek direction and additional answers to her questions from Lead Housing Investigator Tiffany Caldwell.

6. Tiffany Caldwell, Lead Housing Investigator provided guidance to Grievant from time to time regarding procedure and agency practices.

7. A standard process is utilized when a housing complaint is received by the Human Rights Commission. First, a complaint is drafted by the Housing Investigators based on the tenant's complaint, and then served on the landlord. The landlord has an opportunity to file a position statement, and the tenant can reply to that. Throughout those "pleadings," both tenant and landlord have an opportunity to identify witnesses to support their positions. After these documents are reviewed, the investigator(s) may

[2] During a notable period of 2013 through January 2014, the time of former Administrative Director Phyllis Carter's illness and subsequent death, a significant amount of the operations of HRC was shared with Deputy Director Jacquet. The severity of Director Carter's illness was not readily known at HRC in 2013.

speak to the witnesses identified by the parties and may also conduct additional discovery in the form of document requests and interrogatories to the parties. Following the conclusion of the investigation, a Housing Investigator will write a written report stating whether probable cause was found with respect to the tenant's allegations.

8. The Commission, and in particular the Housing Unit, also has a close working relationship with certain attorneys in the West Virginia Attorney General's Office, who provide advice and counsel to HRC concerning the legal standards to be applied in their cases and the conduct of their investigations.

9. At the HRC the investigative process is a fact gathering process.

10. Throughout the investigative process, the substance of complaints and next steps to be taken as part of the investigation were discussed during frequent, often weekly, case review meetings. Those meetings were attended by all Housing Investigators, as well as Housing Secretary Laura Savilla, Ms. Booth, Investigator 3 James L. Johnson, and attorneys from the West Virginia Attorney General's Office.

11. During those meetings, those present would review and discuss the cases that each investigator had pending, and discuss the facts and status of the case, as well as what the investigator should do next to advance the investigation. Because the investigators were all present during the discussion of each other's cases, they were able to learn from each other's cases. These case review meetings were ostensibly a critical part of the training received by new Housing Investigators at the Commission, as on-the-job training. This process was considered an effective, way of training new investigators in the handling of Fair Housing Act complaints.

12. There are also formal training seminars and educational information provided to new investigators.

13. During both her formal and informal training, Grievant was taught about the importance of confidentiality when investigating complaints, as well as the importance of remaining neutral with respect to the merits of a complaint and the appropriate outcome.

14. There were times when the Grievant did not understand the instructions given to her and there were also times she understood but disagreed with the process being explained.[3] Grievant's questioning of an individual providing her guidance was at times a legitimate request for information; however, there were times that Grievant was putting forth resistance to the task or methodology of the process as being directed.

15. On a number of occasions, Grievant made statements that called into question whether she remained neutral during her investigation of the complaints she was tasked with handling.

16. Grievant from time to time, acted as though she did not trust the advice, guidance and counsel given to her by her supervisors and others at the Commission. She would question the information that was given to her by Ms. Booth, her direct supervisor, and allegedly challenged the suggested direction given by the attorneys from the West Virginia Attorney General's Office. On at least some occasions, she contested

[3] Throughout Grievant's employment with the Commission, she repeatedly asked questions, and would frequently ask the same question a number of different times even after receiving an answer. Some of her inquiries were perceived as an attempt to better understand the processes of the Commission. However, some of these inquiries were more combative in nature, and appeared to be driven by Grievant's dislike or disapproval of the particular answer she had received.

the information that had been given to her based on information she had found on the internet or had obtained from a source outside the Commission.

17. Grievant was frequently perceived by her supervisors and others at the Commission to be overly opinionated and not neutral with regard to investigations. It was perceived by co-workers that Grievant was acting more akin to an advocate for a complainant than as an investigator.

18. Grievant generated a sense of frustration in the minds of several of her co-workers.

19. Grievant's direct supervisor, Director of Operations Yodora Booth, completed an initial Employee Performance Appraisal, (EPA-1 form) of Grievant, on August 21, 2013, which listed in detail the "Essential duties and responsibilities as identified in the functional job description. G EX. 11 On November 21, 2013, Supervisor Booth completed a second EPA 1 identical to that of August 21, 2013, which again listed the Grievant's "Essential duties and responsibilities." G EX. 12 Grievant's November 21, 2013 Employee Performance Appraisal, does not identify or evaluate any job related behaviors that required performances planning or any improvement needed. G EX. 12

20. A probationary employee should perform the tasks, duties and responsibilities communicated to them. A supervisor shall regularly monitor, review and analyze employee performance and provide coaching, reinforcement and guidance to employees regarding their performance.

21. The standard EPA-2 has a designated area for an evaluator to identify and comment regarding the area an employee needs or should improve his or work place performance. The standard EPA-2 form should be used for probationary employees or

for special situations involving performance that fails to meet expectation. See generally, Employee Performance Appraisal, Division of Personnel Policy DOP-17.

22. Grievant, from time to time, questioned the actions of her superiors and the operating procedure of the agency. The frequency of this conduct is debatable.

23. Grievant received no written notice that her conduct was detrimental to the team concept of the agency.

24. Respondent did not provide Grievant with an EPA-2 that indicated her work performance was in need of significant adjustment.

25. Soon after Grievant commenced employment with the Commission, Judge Phyllis Carter, then the Director of the Commission, became ill. Director Carter was frequently absent from the Commission beginning in November 2013, and ultimately passed away on or about January 18, 2014. Judge Carter's illness and ultimate passing were difficult for the Commission.

26. During the period of former Administrative Director Carter's illness much of the administrative duties and executive operations of HRC were performed by then Deputy Director Marykaye Jacquet.

27. Deputy Director Jacquet became the Acting Director of the HRC after the death of Director Carter. The appointment of Deputy Director Jacque to Director was not an immediate appointment. Acting Director Jacquet, who served as the Deputy Director of the Commission under Judge Carter, was not appointed as Director until March 19, 2014.

28. Responsible administrative authorities were aware that Grievant had been employed with the agency (HRC) for more than six months. Grievant achieved full

employee status, with all the rights and protections thereof on or about February 1, 2014.[4] See 143 C.S.R. 1 § 10.2.b

29. On March 6, 2014, Deputy Attorney General J. Robert Leslie wrote a memorandum to Acting Director Jacquet summarizing a conversation that had transpired between Grievant and himself. R Ex. 3 In that memorandum and a conversation with Acting Director Jacquet, Deputy AG Leslie shared his concerns, both about the actions Grievant had taken during her investigation of the F. v. C. matter,[5] and also about the telephone conversation he had with Grievant. Intertwined in Deputy Leslie's memorandum are allegations that Grievant's actions could expose the Commission to potential allegation of soliciting claims and also provide a defense to various actions. *Id*.

30. Respondent, in the form of Acting Director Jacquet, sought the advice and expertise of Division of Personnel (DOP) with regard to permissible disciplinary action in regard to Grievant. Acting Director Jacquet communicated with Joe Thomas, Assistant Director of Employee Relations with the Division of Personnel.

31. Acting Director Jacquet was not sure regarding her degree of authority. Acting Director Jacquet sought the advice and expertise of Charlie Lorensen, Chief of Staff to Governor Tomblin, and spoke with him regarding Grievant's conduct. Mr.

4 Pursuant to relevant case law and applicable Division of Personnel's Administrative Rules, there is a low threshold to justify termination of a probationary employee. See 143 C.S.R. 1 § 10. In the event that the employing agency takes no action on the status of a probationary employee before the expiration of the probationary period, the employee is considered to have attained permanent status. 143 C.S.R. 1 § 10.2(b).

5 On or about December 6, 2013, Director of Operations Supervisor Yodora Booth assigned Grievant her eighth Complaint case which was a Sexual Harassment/Retaliation case referenced herein as "F. v. C."

Lorensen advised Acting Director Jacquet that she had the authority to make disciplinary decisions, including discharge decisions, for the Commission.

32. Acting Director Jacquet noted a number of specific instances in which she perceived that Grievant spoke out of turn and demonstrated, through her words or her attitude, disrespect for the supervisors and leadership of the Commission.[6] Among those were:

a. A conversation between Grievant and Acting Director Jacquet, in which Grievant questioned the decisions of the management not to hire additional investigators;

b. Grievant's decision to check out a Commission car to use without first seeking permission from her supervisor to leave the office;

c. Grievant going beyond the scope of her delegated authority when trying to plan and help organize the Commission's annual Fair Housing Conference;

d. Grievant questioning Acting Director Jacquet's authority during the time between Judge Phyllis Carter's death and Acting Director Jacquet's official appointment to fill the role as head of the Commission;

e. Grievant vocally disagreeing with the decision of the Commission to have an employee sit near the entrance to the Commission to make sure that Commission employees were properly reporting their arrival times at work;

f. A conversation between Grievant and Acting Director Jacquet, in which Grievant questioned a hiring decision made with respect to hiring an administrative assistant for the Commission; and

g. Grievant approaching Acting Director Jacquet, following the death of Judge Phyllis Carter, and discussing the direction of the Commission, specifically focusing on the need to improve morale.

[6] It may be of interest to note that Acting Director Jacquet as Deputy Director had recommended and assisted Grievant in securing her position with the HRC. Acting Director Jacquet's opinion of Grievant's fitness and suitability for employment with the Commission changed over time.

33. Responsible administrative authority of HRC and at least one associated agency had reservations with regard to the work place activity of Grievant. It was perceived by administrative personnel that Grievant's attitude and activity was disrespectful and leaning toward insubordination.

34. Respondent, in the form of Acting Director Jacquet, did not seriously consider any other corrective measure with regards to Grievant other than termination. Acting Director Jacquet Testimony

35. Grievant was not made aware of any allegations of not following directives, or outrage and tortuous interference with operations of the Commission.

36. Grievant was not advised regarding any particular performance deficiency issue(s) having been alleged or documented during Grievant's service history prior to her dismissal.

37. Prior to the March 11, 2014 pre-determination conference, Grievant was not informed that Respondent had interpreted her actions as intentional disrespect and/or actionable misconduct.

38. On March 11, 2014, Acting Director Jacquet met with Grievant to provide her with a letter dismissing her from the Commission for gross misconduct.

39. During that the meeting, Grievant was provided an opportunity to review and respond to the substance of the allegations in the dismissal letter. Grievant objected to a number of allegations contained therein. Acting Director Jacquet concluded that she had heard nothing to alter her decision that dismissal was appropriate.

40. At the time of dismissal, Grievant had worked for the Commission for seven months and eleven days.

41. Prior to Grievant achieving regular employee status, Respondent had not taken any active steps to separate or notify Grievant of pending termination of her employment.

Discussion

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. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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, a party has not met its burden of proof. *Id.*

Probationary Employee

The Division of Personnel's Administrative Rule discusses the probationary period of employment, describing it as "a trial work period designed to allow the appointing authority an opportunity to evaluate the ability of the employee to effectively perform the

work of his or her position and to adjust himself or herself to the organization and program of the agency." The same provision goes on to state that the employer "shall use the probationary period for the most effective adjustment of a new employee and the elimination of those employees who do not meet the required standards of work." 143 C.S.R. 1 § 10.1(a). A probationary employee may be dismissed ***at any point during the probationary period*** that the employer determines his services are unsatisfactory. 143 C.S.R. 1 § 10.5(a). (Emphasis added.) The Division of Personnel's Administrative Rules establish a low threshold to justify termination of a probationary employee. *Livingston v. Dep't of Health and Human Res.*, Docket No. 2008-0770-DHHR (Mar. 21, 2008).

> A probationary employee is not entitled to the usual protections enjoyed by a state employee. The probationary period is used by the employer to ensure that the employee will provide satisfactory service. An employer may decide to either dismiss the employee or simply not to retain the employee after the probationary period expires.

Hammond v. Div. Of Veteran's Affairs, Docket No. 2009-0161-MAPS (Jan. 7, 2009) (citing *Hackman v. W. Va. Dep't of Transp.*, Docket No. 01-DMV-582 (Feb. 20, 2002)).

Grievant was not notified that her conduct was not within an acceptable level of performance during the recognized probationary period of Grievant's employment.[7] Respondent did not provide Grievant with an EPA-2 indicating a recognized area of

[7] There is a standardized performance appraisal system for State employees that is characterized by defined performance goals and objectives with increased employee involvement. *See generally* Division of Personnel Policy DOP-17. Near the middle of a performance period supervisors/raters generally meet with a subordinate employee to conduct a formal review of the employee's performance. During this process, supervisors provide feedback to the employee concerning the employee's strengths, weaknesses (if any) and performance. The supervisor fills out a DOP Form EPA-2 identifying areas in which the employee needs improvement.

deficiency. The standard EPA-2 has a designated space to document behavior problems/concerns. Respondent did not take nor commence the necessary steps to sever Grievant's employment during her probationary employment thus, availing itself of the recognized low threshold to justify termination of a probationary employee. In the event the appointing authority takes no action on the status of a probationary employee before the expiration of the probationary period, either to retain or terminate, the employee shall be considered as having attained permanent status. Permanent status begins the first day following the expiration of the probationary period. 143 C.S.R. 1 § 10.2.b

At the time of Grievant's probationary period, it is recognized that there was a significant event transpiring that may have caused complications in the day-to-day operations of the Commission.[8] It is not much of a stretch to recognize that, absent the illness and subsequent passing of the Commission's Director during Grievant's tenure, Grievant's employment experience may very well have been different including the possibility of being terminated during her probationary period. However that is not the case at hand today. Grievant had an immediate supervisor with duties and familiarity with Grievant's conduct and there exist two or three additional layers of administrative personnel between the instant Grievant and the ultimate decision making personnel of the Commission. It is not found that the untimely demise of the agency's Director Phyllis Carter on or about January 18, 2014, is or was sufficient justification to circumvent

[8] During a period of Grievant's probationary employment, the Director of the HRC was suffering from one or more aliments, and ultimately passed away. Director Carter died on or about January 18, 2014.

Grievant's acquired property rights.[9] Grievant achieved full employee statute, with all the rights and protections thereof on or about February 1, 2014. See 143 C.S.R. 1 § 10.2.b Grievant had a property interest in her employment at the Human Rights Commission. A property interest includes not only the traditional notions of real and personal property, but also extended to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules and applicable case law.[10]

STANDARD FOR DISCIPLINARY ACTION

In West Virginia, it is recognized that a classified civil service employee has a sufficient interest in her continued, uninterrupted employment to warrant the application of due process procedural safeguards to protect the employee against arbitrary discharge. Article III, Section 10 of the W.Va. Constitution. *Waite v. Civil Service Commission*, 161 W.Va. 154, 241 S.E.2d 164 (1977); Syl. Pt 3 *Fraley v. Civil Service Commission*, 177 W.Va. 729, 356 S.E.2d 483 (1987).

The administrative rules of the West Virginia Division of Personnel provide that an employee in the classified service may be dismissed for "cause." 143 C.S.R. § 12.2, Administrative Rule, W. Va. Div. of Personnel. The phrase "good cause" has been determined by the West Virginia Supreme Court of Appeals to apply to the dismissal of employees whose misconduct was of a "substantial nature, and not trivial or

[9] The death of Director Carter may have created somewhat of a ripple in the operations of the agency; however, said event does not negate the applicable rules and regulations applicable to a classified state employee's employment status.

[10] See the *WV DOP Supervisor's Guide to Progressive Corrective and Disciplinary Action*, which distinctly states the prevailing principle that a State civil service employee has a property interest arising out of the statutory entitlement.

inconsequential, nor a mere technical violation of statute or official duty without wrongful intention." *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980). *See Syl. Pt. 1, Serreno v. W. Va. Civil Serv. Comm'n*, 169 W. Va. 111, 285 S.E.2d 899 (1982); *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965). *See also Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d, 558 (2004) (per curiam). "*Oakes v. W.Va. Dept. of Finance and Administration*, *supra*, requires that a violation sufficient to support a dismissal be of a substantial nature and that if it involves a violation of a statute or official duty it must be done with wrongful intent." *Serreno v. West Va. Civil Serv. Comm'n*, 169 W. Va. 111, 115, 285 S.E.2d 899, 902 (1982) (per curiam). Termination is a severe disciplinary action. Accordingly, the undersigned Administrative Law Judge will utilize the standard appropriate for assessing the reasonableness of the disciplinary action taken by Respondent.

Merits

An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ*., Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp*., Docket No. 93-HHR-050 (Feb. 4, 1994). This Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the administrative law judge 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.*, Also s*ee Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD- 216 (Dec. 28, 1999); *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997); *Perdue, supra*.

Accordingly, the undersigned makes credibility determinations in assessing the credibility of the testimony in the circumstances of this case. All of the witnesses demonstrated appropriate demeanors and attitudes toward this grievance action. Further, although several of Respondent's witnesses obviously had a personal opinion regarding Grievant, it is not established that their individual opinions unduly affected the reliability of testimony presented. It is not found that any witness was unduly biased or motivated to lie.[11]

The undersigned is aware of Respondent's stated rationale for wanting to discharge Grievant (discussion *infra*). Grievant has her own sense of righteousness; further, it seems her sense of evenhandedness did not ideally commingle with the agency. The allegations in the disciplinary documents are not necessarily ambiguous but are to some degree challenging to evaluate because it is unclear whether they are intended to allege separate offense(s), or simply inserted to provide additional weight to support the contention that Grievant was generally belligerent, uncooperative and resistant to authority.

Grievant was a State employee in a classified service position. "'Good cause' for

[11] There exist alternate interpretations of a fact pattern or two, but such difference is not perceived as intentional untruthfulness but a difference of opinion.

dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. West Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777(1988).

What is difficult to balance are the disjointed actions of the Commission. The six month probation period of employment is designed for the most effective adjustment of a new employee and the elimination of those employees who do not meet the agency's standards of work, *see* 143 C.S.R. 1 § 10.1(a). Respondent was to use the designated trial work period to determine if Grievant could effectively perform the work of her position and whether she and the agency were a good fit. Respondent did not document any reservation with Grievant's conduct until after her probationary period had expired. Respondent however now tends to indicate that the conduct of Grievant was an ongoing concern. This contention is at best a double-edged sword. It is safe to state the definition of good cause may vary from situation to situation; however, in the majority of cases, a dismissal is imposed only when other attempts to correct the problem and less severe forms of discipline have failed.

Grievant is a strong-willed self-affirming African-American female. There were times when the Grievant did not understand the instructions given to her and there were also times she understood, but disagreed with the process being explained. Grievant's questioning of an individual providing her guidance was at times a legitimate request for information; however, there were also numerous times that Grievant was putting forth resistance to the task or methodology of the process as being directed. Respondent perceived Grievant's actions as problematic. Respondent did not, at the time of events, inform Grievant of this contention.

The discharge letter given to Grievant details a number of instances by Grievant throughout her employment with the Commission, which Respondent now identifies as misconduct.[12] Of significance is the allegation that Grievant was frequently perceived by her supervisors and notable others[13] to be rude and verging on insubordinate. While one or more of Respondent's witnesses used the word 'insubordination,' it is not (*fait accompli*) a matter of law that asking a question of a superior is in and of itself insubordination.

Insubordination usually involves a deliberate, willful or intentional refusal or failure to comply with a reasonable order of a supervisor. *Gill v. W. Va. Dep't of Commerce*, Docket No. COMM-88-031 (Dec. 23, 1988). The general rule is that an employee must obey a supervisor's order when it is received and subsequently take appropriate action to challenge the validity of the supervisor's order. *See Stover v. Mason County Bd. of Educ*., Docket No. 95-26-078 (Sept. 25, 1995). Thus, employees are expected to respect authority and do not have unfettered discretion to disobey or ignore clear instructions. *See Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990). Moreover, insubordination may involve "more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ*., Docket No. BOR2-88-029-4 (May 25, 1988).

[12] Respondent strongly infers and tends to rely heavily on the argument that Grievant's attitude toward those explaining a process or any traditional procedure she disagrees with was problematic to the point of being disruptive to the agency's efficiency.

[13] J. Robert Leslie Deputy Attorney General, WV Attorney General's Office.

Acting Director Jacquet noted a number of specific instances in which she is of the opinion that Grievant spoke out of turn and demonstrated, through her words or her attitude, disrespect for the supervisors and leadership of the Commission. See FOF 32. The undersigned is not so persuaded. The examples provided were not, for the most part, conduct in a formal setting or for that matter a direct attack or an action of defiance. It is more likely than not that Grievant considered the conversation with Ms. Jacquet, the individual who assisted her in getting the position, a communication to a friend, at the proverbial coffee pot.[14]

The primary allegations of gross misconduct centers around Grievant's conduct during her investigation of the "F. v. C." matter,[15] and her subsequent conversations with Deputy Attorney General Leslie. Much effort was spent reviewing the circumstance and facts of this set of events at the Level 3 hearing. The F. v. C. complaint concerned an allegation of sexual harassment made by a tenant against her former landlord. During the pleadings, both Tenant F. and Landlord C. identified certain individuals. During the investigation, Grievant sent a number of interrogatories to Landlord C. One of these interrogatories asked that Landlord C. identify the names of his past and present tenants. Landlord C. provided this information to Grievant. Based on the information received

[14] There is some ambiguity regarding the location of individuals when certain communications transpired. Whether the parties were standing near the coffee pot conversing as Grievant indicates, or in the office of Acting Director Jacquet is unclear. The pivotal point being intent and context of the communication. From the information provided, it is more likely than not that Grievant expressed her opinion regarding certain agency actions, as if she had standing [knowledge] while Acting Director Jacquet, in a leadership role was shouldering the load of responsibility. Acting Director Jacquet perceived the statements as presumptuous and disrespectful.

[15] On or about December 6, 2013, Director of Operations Yodora Booth assigned Grievant her eighth Complaint case which was a Sexual Harassment/Retaliation case referenced herein as "F. v C."

from Landlord C., in response to the interrogatories, Grievant sent out a number of letters. These letters advised the tenants: "Your name was given to me as a potential witness in this case." This fact was inaccurate, because neither party had identified the current or former tenants as witnesses in the investigation. The "witness letters" were sent to approximately twenty-five former tenants of Landlord C.

The Commission frequently uses "witness letters" during its investigation, and there is standard form language available to investigators that may be modified as needed for a given purpose. Grievant asked her supervisor, Director of Operations Booth, generally for permission to send out "witness letters" in the F. v. C. matter, she never requested or received permission specifically to send so-called "witness letters" to the past and present tenants of Landlord C.[16] This miscommunication is not established to be intentional deception by Grievant. The F. v. C. was the first Housing Sexual Harassment/Retaliation discrimination Complaint Grievant had been assigned to investigate. Testimony of Grievant's supervisor Yodora Booth. After the letters were sent out, they were discussed in a case review meeting.[17] When others in the case review meeting were told about the letters, they expressed surprise and concern that the

[16] Grievant provides that she conferred with Director of Operations Supervisor Yodora Booth, Lead Housing Investigator, Tiffany Caldwell and Employment Investigator Tasha Rucker as to which witness letter was appropriate to send in the effort to get the tenants to contact the HRC office. Further, Grievant maintains that all referred her to the same witness template letter which identifies the recipients as a potential witness as the appropriate letter to use. This Trier of fact finds the testimony to be credible. Grievant rebuts that upon consistent directions, information and belief that the correct witness letter was being used, Grievant instructed the Housing Unit Secretary to send this witness letter with no changes to the template.

[17] Case Review team meetings are not disciplinary in nature; they are weekly meetings to prepare an investigative plan of action, discuss the summary and status of the Complaints, and prioritize workload. Meetings generally consist of Supervisors of the Investigative team, General Counsel, and Housing Unit Investigators.

letters had been sent out. Several individuals, including Director of Operations Booth and Assistant Attorney General Jerry Fowler, tried to explain to Grievant why it was problematic to identify someone as a potential witness when they had not been so identified by either Landlord C. or Tenant F. This discussion lasted for an extended period of time. Respondent professed that, in the end, Grievant still seemed unable, or unwilling, to acknowledge that she had done anything wrong. Grievant shared that some of the tenants had contacted the Commission. She shared with the participants in the case review meeting the type of questions she was asking of them, which included questions about whether any of those tenants had been the victim of any inappropriate contact from Landlord C. Discussion ensued, during which Grievant was advised that the manner of questioning she was utilizing was inappropriate, because it could be perceived as soliciting claims or defaming the character of Landlord C. by identifying the nature of the allegations lodged against him.

Following the case review meeting, a decision was made to send out a corrective letter to the approximately nineteen (19) individuals who received the first "witness" letter but had not yet contacted the Commission. The letter was identical in substance to the "witness" letter initially sent out, except that the phrase "potential witness" was replaced with "past or present tenant." Sending out these letters was not standard practice, but was rather done as a way to mitigate the damage the Commission perceived to have been done by Grievant's sending of the initial letter. Grievant likewise was counseled concerning the specific questions she was asking the witnesses, and a new list of questions was prepared that were more open-ended and did not advise or suggest to the past or present tenants the nature of the claims alleged against Landlord C. by tenant F.

Sometime after the case review meeting, Grievant made a telephone call to Assistant Attorney General (AAG) Jerry Fowler. At the time the phone call was made, Deputy Attorney General Leslie was in AAG Fowler's office, and he answered the call on speakerphone and spoke with Grievant.[18] Grievant asked to speak with AAG Fowler without Deputy Attorney General Leslie present. When Grievant indicated that the subject of her call was work-related, Deputy Leslie invited her to speak about her issue with him present. Grievant declined to do so. Grievant informed Deputy Leslie that it concerned a case review meeting and she would like to discuss it privately with AAG Jerry Fowler. Grievant at one point indicated that she would prefer Deputy AG Leslie to leave the room. Grievant ended the call by asking AAG Jerry Fowler to call her when he had time for a one-on-one discussion. Deputy AG Leslie was not pleased with Grievant's refusal to communicate with his subordinate regarding a business matter with him in the room.

Deputy Leslie was motivated to memorialize events. In a memorandum and conversation, Deputy Attorney General Leslie shared his concerns with Acting Director Jacquet about the actions Grievant had taken during her investigation of the F. v. C. matter, and about the telephone conversation he had with Grievant. Intertwined in Leslie's memorandum is a litany of various actions and potential consequences that Grievant's actions could induce. R EX. 5 The March 6, 2014 memorandum hung Grievant out to dry! A list of possible repercussions, not a specific violation of a directive but tentative prospective reactions to Grievant's behavior, was highlighted for Acting

[18] Deputy General, J. Robert Leslie is the supervisor of Assistant Attorney General Fowler and oversees all of the work that the Attorney General's Office does with and for the Commission.

Director Jacquet. It is not found that Grievant handled the situation prudently, it is evident that Grievant did not demonstrate the degree of discernment (respect) Respondent believed to be required by the situation. The West Virginia Attorney General's Office provides advice and counsel to HRC concerning legal standards to be applied in their cases and the conduct of their investigations. The symbiotic relationship between the agencies requires mutual respect.

It had been explained to Grievant that the witness template letter identifying the tenants as a "potential witness" could be misleading. Further, it was determined that an "Amended" letter should be sent. The "Amended" letter should be sent to identify the recipient as "past or present tenant." Grievant participated in this process. She did not disobey a directive or fail to implement the corrective measures determined appropriate by responsible administrators. It was discussed that the interview questions to the tenants previously drafted by Grievant would be rephrased. Grievant, with the assistance of Tiffany Caldwell, drafted an "Amended" set of interview questions. Grievant complied with the directions as discussed and duly provided to her. The undersigned can understand that Respondent has suffered frustration in explaining procedure(s) to Grievant and there existed potential ramification of misidentification of participants, but generating anxiety or frustration in the minds of others is not the same as insubordination.[19]

[19] Insubordination "includes, and perhaps requires, a willful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(*per curiam*). *See Riddle v. Bd. of Directors, So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989).

Respondent maintains that Grievant was generally unreceptive to feedback and unwilling to follow the direction given to her by her supervisors and more experienced colleagues in the Commission. Respondent strongly infers and tends to rely heavily on the argument that Grievant's attitude toward those explaining a process or any traditional procedure she disagrees with was problematic to the point of being disruptive to the agency.[20] The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ*., 210 W. Va. 105, 556 S.E.2d 72 (2001)(*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). Accordingly, the undersigned trier of fact, is sympathetic to the argument; however, is not convinced the conduct highlighted constituted gross misconduct. Further, it is disturbing that Grievant was not made aware of any allegations of not following a directive, or outrage and tortuous interference with business relationships prior to the March 11, 2014 employment termination meeting.

Pursuant to the March 11, 2014 Dismissal Correspondence, Grievant was guilty of "Gross Misconduct." The determination of what constitutes gross misconduct is not an arbitrary determination left solely to the discretion of an employer.[21] Grievant was a

[20] Respondent was of the opinion that the events surrounding the F. v. C. matter was not an isolated incident, and no amount of coaching or counseling would bring about a change in Grievant's attitude at the Commission. The undersigned does not share that conclusion.

[21] Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (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." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

permanent State employee in a classified service position. "The term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." *Graley v. W.Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec 23, 1991) (citing *Buskirk v. Civil Serv. Comm'n*., 175 W. Va. 279, 332 S.E.2d 579 (1985)); *See Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sept. 13, 2002); *Wilt v. W. Va. Dep't of Health and Human Res.*, Docket No. 2010-0728-CONS (Sept. 21, 2010). "'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. West Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777(1988).

Case Review team meetings are weekly meetings to prepare an investigative plan of action, discuss the summary and status of the complaints, and prioritize workload. This is the appropriate place to discuss various courses of action and the ideal place to map out how to correct any missteps by an employee or the agency in context of a particular case investigation. Respondent has not demonstrated by a preponderance of the evidence that Grievant's action was a wanton disregard of standards of behavior which the employer has a right to expect of its employees.[22] Grievant did not make friends or favorably influence others by choosing not to discuss with Deputy Leslie, the

[22] Any allegation that Grievant is too overly opinionated or claimant oriented may have some rational basis based upon isolated conduct but this predisposition, if it exists, is not evident in the final outcome of her closed complaint cases. Grievant's final conclusions in closing the seven Complaint cases she managed were: 4 cases closed as *No Probable Cause*, 2 *Conciliations* (settled) and 1 *Administrative Closure* due to unable to locate.

subject matter she had phoned AAG Fowler about. Not a prudent decision, at best naïve, at worse disrespectful. Nevertheless, attempting to call a duly recognized adviser to discuss pending case action, without some known restrictive prohibition, is not gross misconduct. No such restrictive policy, rule or regulation was identified by Respondent. Grievant may have belabored points of discussion, more relentlessly than Respondent is comfortable with, but her actions on their face did not constitute insubordination. Such relentless action is generally correctable and subsides with experience.

In most cases, a dismissal is imposed only when other attempts to correct the problem and less severe forms of discipline have failed. There is little demonstration that less severe behavior modification processes were implemented to attempt correcting Grievant's behavior. It is readily apparent that Grievant frustrated a superior or two; however, it is not demonstrated that Grievant was readily made aware that her actions were more offensive than productive.[23] Respondent has not established by a preponderance of the evidence that Grievant's behavior reached the point of gross misconduct intentional or inadvertently. As a classified employee with limited experience, Grievant enthusiastically embraced her duties, it is difficult to say what constitutes a good faith effort by Respondent to acclimate Grievant's personality traits, additional training may be in order but a classified employee truly attempting to perform

[23] "Certainly, an employer is entitled to expect its employees to conform to certain standards of civil behavior. *Redfearn v. Dep't of Labor*, 58 MSPR 307 (1993). All employees are 'expected to treat each other with a modicum of courtesy in their daily contacts.' *See Fonville v. DHHS*, 30 MSPR 351 (1986)(*citing Glover v. DHEW,* 1 MSPR 660 (1980)). Abusive language and abusive, inappropriate, and disrespectful behavior are not acceptable or conducive to a stable and effective working environment. *Hubble v. Dep't of Justice,* 6 MSPR 659, 6 MSPR 553 (1981). *See Graley v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 99-PEDTA-406 (Oct. 31, 2000)." *Corley, et al., supra.*

her duties deserves more than to be ceremoniously shown the door.[24] The undersigned ALJ is persuaded that the sanction levied by Respondent for lawful action was excessive. Grievant was not employed in an at-will-position.

This conclusion was not reached easily. There were several facts and factors considered, weighed and balanced against one another; the job duties, testimony of co-workers, testimony of supervisors, the agency mission, the conduct discussed, intent of parties, applicable rules and regulations. If Respondent had decided not to employ Grievant prior to the expiration of her probationary period, the standard for dismissal of Grievant would be substantially lower than it currently is. There are procedural protocols for identifying, educating, and correcting classified employees behavior. Respondent established Grievant's behavior is not necessarily ideal employee conduct; however, it did not establish by a preponderance of the evidence that Grievant's action(s) constituted gross misconduct. The undersigned is of the opinion that there tends to exist an inequitable disproportion between the acts Grievant committed and the actionable cause Grievant was ultimately determined to have violated. The West Virginia Supreme Court of Appeals has recognized that "due process is a flexible concept, and that the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) (citing *Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)).

[24] Pursuant to the testimony of Acting Director Jacquet, Respondent did not seriously consider any other corrective measure with regards to Grievant other than termination. Acting Director Jacquet testified that her conversation with Charlie Lorensen about Grievant was initiated solely to inquire as to whether she, in her role as Deputy Director and acting Head, had the authority to dismiss Grievant from her employment.

The following conclusions of law are appropriate in this matter:

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. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008).

2. Non-probationary state employees in the classified service may only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); Syl. Pt. 1, *Oakes v. W. Va. Dept. of Finance & Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980). *See Guine v. Civil Service Comm'n*, 149 W. Va. 461, 468, 141 S.E.2d 364, 368-69 (1965).

3. Administrative rules of the West Virginia Division of Personnel provide that an employee in the classified service may be dismissed for "cause." 143 C.S.R. § 12.2, Administrative Rule, W. Va. Div. of Personnel. The phrase "good cause" has been determined by the West Virginia Supreme Court of Appeals to apply to the dismissal of employees whose misconduct was of a "substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention." *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Serreno v. W. Va. Civil Serv. Comm'n*, 169 W. Va. 111, 285 S.E.2d 899 (1982); *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); *Guine v.*

Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965). *See also Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004) (per curiam). "'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. West Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777(1988).

4. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002) (*per curiam*). *See Riddle v. Bd. of Directors/So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). "[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, supra*.

5. It is not established by a preponderance of the evidence that Grievant's established conduct demonstrated insubordination.

6. "The term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." *Graley v. W.Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec 23, 1991) (citing *Buskirk v. Civil Serv. Comm'n*., 175 W. Va. 279, 332 S.E.2d 579 (1985)). *See Evans v. Tax & Revenue/Ins. Comm'n*, Docket No.

02-INS-108 (Sept. 13, 2002); *Wilt v. W. Va. Dep't of Health and Human Res.*, Docket No. 2010-0728-CONS (Sept. 21, 2010).

7. Respondent did not establish by a preponderance of the evidence that Grievant's actions were gross misconduct.

8. The West Virginia Supreme Court of Appeals has held that "[g]ood cause must exist for the dismissal of an employee in the classified service. Not only shall good cause be alleged in the dismissal of such employee but it must be proven in the event of appeal from the dismissal. *Yates v. Civil Serv. Comm'n,* 154 W. Va. 696, 178 S.E.2d 798, 1971 W.Va. LEXIS 230 (1971).

9. It is not established by a preponderance of the evidence that this classified Grievant was terminated for good cause.

10. It is not established by a preponderance of the evidence that Grievant's established conduct demonstrated gross misconduct warranting termination of employment of a classified employee.

Accordingly, this grievance is **GRANTED**.

Respondent is **ORDERED** to reinstate Grievant to full-time employment with back pay and benefits back to the date she was dismissed. Any and all wages[25] Grievant earned between the time she was initially dismissed, and the time she is reinstated shall be deducted from the back pay award.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA.

[25]This offset should also include any unemployment benefits Grievant may have received.

CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: March 18, 2015

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Landon R. Brown
Administrative Law Judge