THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JOHN KEARNEY,
Grievant,

v. **Docket No. 2016-0353-DEP**

DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondent.

DECISION

Grievant, John Kearney, is employed by Respondent, Department of Environmental Protection. On September 10, 2015, Grievant filed this grievance against Respondent asserting he had been suspended without good cause. For relief, Grievant seeks "[t]o be made whole in every way including backpay with interest and all benefits restored."

The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held on January 13, 2016, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by counsel, Mark S. Weiler, Assistant Attorney General. This matter became mature for decision on February 24, 2016, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as an Environmental Resource Analyst in the Office of Oil and Gas. Grievant was suspended for five days for insubordination and nondiscriminatory hostile workplace harassment for two confrontations with his supervisor in in two-day period. Grievant asserted that Respondent did not have good

cause to suspend him and that his due process rights had been violated. Respondent proved Grievant was insubordinate and inappropriate, which justified his suspension for five days, but did not prove that Grievant's conduct was nondiscriminatory hostile workplace harassment. Grievant's due process rights were not violated. Accordingly, the grievance is denied.

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

Findings of Fact

1. Grievant is employed by Respondent as an Environmental Resource Analyst ("ERA") in the Office of Oil and Gas.

2. Grievant began his employment with Respondent as a Geologist on August 24, 2009. In July 2011, Grievant became employed as an Environmental Resource Specialist 3. Grievant became employed in his current position as an ERA in November 2012.

3. As an ERA, Grievant is supervised by Thomas Bass. Grievant was previously supervised by Jeff Parsons and then Gene Smith.

4. Under his previous supervisors, Grievant was rated on his Employee Performance Appraisals ("EPA") as "Meets Expectations." Both supervisors were complimentary of Grievant in their evaluations citing Grievant's organizational skills, professionalism, dependability, and work ethic.

5. In his first interim evaluation completed by Mr. Bass, Grievant was rated as "Fair, But Needs Improvement" citing issues with time management, responsiveness, and failure to communicate. The EPA further stated that there had been numerous meetings

regarding productivity, time management, and communication, that Grievant had denied he needed any training, and that Grievant had been issued a verbal reprimand for failure to meet expectations on July 29, 2013.

6. Grievant received a written reprimand on November 19, 2013 for continued failure to meet work standards. The written reprimand listed specific examples of Grievant's failure to complete assignments, comply with deadlines, and respond to his supervisor.

7. In his first annual EPA completed by Mr. Bass in February 2014, Grievant was rated as "Meets Expectations," however, the comments state that there were continued time management problems and failure to communicate with Mr. Bass. Grievant's response on the EPA form was that his rating in "Maintain Flexibility" section should have been higher due to his assistance to his coworkers, especially his assistance to a new coworker in the rating period. Grievant also stated, "I also believe some aspects of my work performance has suffered due to a transition of new supervisor and communication issues, which I have had to work through."

8. On February 18, 2015, Grievant underwent two emergency surgeries for blockages of his heart and carotid artery.

9. Grievant returned to work on April 6, 2015, although he continued to undergo rehabilitation three times per week for an unspecified time-period.

10. On August 11, 2015, Grievant received an interim EPA, which rated his performance from January 2015 to June 2015 as "Does Not Meet Expectations." Mr. Bass states:

> During the reporting the employee has failed to meet performance expectations. The employee[']s assigned work

> has been allowed to accumulate without notifying the supervisor. This has created a cascading effect on other parts of the Oil and Gas program. Other staff have been required to complete duties that have not been performed. Therefore, I am putting you on a performance improvement plan.

11. On the same date, Grievant also received the written Performance Improvement Plan ("PIP"). The PIP was very detailed, comprising three single-spaced pages, specific examples of unsatisfactory performance, and fifteen bullet points containing specific daily/weekly performance expectations.

12. Grievant was presented with the EPA and PIP at a meeting in Mr. Bass' office on August 11, 2015, with Mr. Bass and Chad Bailey, Human Resources Manager.

13. During the meeting, Grievant became very angry and very loud. Grievant stood up during his outburst. Among the statements made to Mr. Bass, Grievant stated: "No one wants to work for you . . . Nobody likes you . . . This place is a joke . . . This is fucking ridiculous . . . I'll respond to this while I watch other people do nothing . . . I'm a scientist and not a fucking clerk . . . I'm only here because I can't get a job elsewhere." Grievant's demeanor was disparaging, belittling, uncontrolled, and volatile. Grievant's outburst was lengthy and he did not calm down or apologize during the meeting. Mr. Bass felt disrespected, humiliated, and embarrassed.

14. The same day, Grievant drafted a detailed, lengthy letter in response to the EPA insisting that the EPA be changed and asserting that all of the alleged deficiencies were due to Mr. Bass' poor management decisions, lack of leadership, and lack of understanding of Grievant's work. Although the language of the letter as a whole was not necessarily inappropriate, the tone of the letter is certainly an attack on Mr. Bass, and the criticism offered was not constructive in nature.

15. The next day, August 12, 2015, Grievant was still upset about the PIP, which had been "eating" at him since the day before. At the end of the day, Grievant confronted Mr. Bass while Mr. Bass was assisting another employee, Melanie Hankins, in her office. Grievant walked into Ms. Hankins' office, interrupting Mr. Bass as he worked with Ms. Hankins. Mr. Bass told Grievant, "No, not now" and told Grievant to make an appointment. Grievant approached close to Mr. Bass and insisted that Mr. Bass speak to him immediately, stating that Mr. Bass "never had time." Grievant was upset and loud. Mr. Bass had to tell Grievant multiple times to leave and eventually also raised his voice and told Grievant to "get out of my face." Mr. Bass left Ms. Hankins' office to go back to his own office and Grievant followed Mr. Bass down the hall continuing to insist that Mr. Bass speak to him immediately.

16. On August 13, 2015, Grievant sent an email requesting that a meeting be scheduled because he had attempted to talk to Mr. Bass and Mr. Bass "ran away." Grievant stated, "I think we need to talk about this like humans and work this out. We need to get our problems out on the table and fix them. I am tired of this work environment Tom has created." The email was addressed to Mr. Bass, Mr. Bass' supervisor, Gene C. Smith, and the Chief of the Office of Oil and Gas, James A. Martin.

17. Mr. Bailey interviewed the witnesses to the August 12, 2015 incident and determined that Grievant had engaged in insubordinate conduct.

18. Mr. Bailey discussed the two incidents with James A. Martin, the Chief of the Office of Oil and Gas. Based on the seriousness of the conduct, and the disciplinary precedent in the office with an employee who had engaged in similar conduct, Mr. Bailey recommended that Grievant be suspended.

19. A pre-determination meeting was held on September 4, 2015. Grievant was given verbal notice of the pre-determination meeting approximately thirty minutes before the start of the pre-determination meeting. Grievant met with Mr. Martin and Mr. Bailey, who informed him that Mr. Martin was considering suspending Grievant due to his misconduct. Grievant was given an opportunity to respond and said that he was apologetic for his use of profanity, that his behavior was due to his frustration with Mr. Bass' management style, and that Mr. Bass was the aggressor during the incident in Ms. Hankins' office.

20. By letter of the same date, Mr. Martin suspended Grievant for five days for "unacceptable conduct, particularly pertaining to your unprofessional and offensive behavior, including insubordinate conduct, in violation of the Division of Personnel's *Prohibited Workplace Harassment Policy* (DOP-P6)." The suspension letter provided Grievant with more than three working-days notice before the effective date of the suspension. The letter is lengthy and describes in detail Grievant's actions which Mr. Martin believed to be inappropriate and the reasons for Mr. Martin's decision.

21. The Division of Personnel prohibits nondiscriminatory hostile workplace harassment by policy number DOP-P6, Prohibited Workplace Harassment. The policy states:

> Nondiscriminatory Hostile Workplace Harassment consists of unreasonable 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:
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> 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.

22. Grievant did not file grievances on the PIP, any of the EPAs, or the written reprimand.

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. W.VA. CODE ST. R. § 156-1-3 (2008). "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*.

Grievant argues that Grievant's supervisor, Mr. Bass, and Human Resources Manager Chad Bailey bullied Grievant and abused their authority, that they are not credible witnesses, that Respondent should have considered Grievant's work record, and that Respondent did not act in good faith in scheduling the predetermination meeting. Respondent asserts that it has proven Grievant violated the Division of Personnel's Prohibited Workplace Harassment Policy, that Grievant was insubordinate, and that suspension was warranted.

Accordingly, the undersigned must make credibility determinations. In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J.

ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Mr. Bass was a credible witness. Mr. Bass' demeanor was calm, professional, and very direct. He appeared to have a good recall of events and was forthright in his answers to questions. As part of the swearing-in of witnesses prior to their testimony, the undersigned cautions all witnesses not to interrupt questions due to the nature of the recording equipment, and when Mr. Bass caught himself interrupting a question, he immediately stopped himself and apologized. Grievant testified that Mr. Bass is biased against Grievant and that he has hated Grievant from the beginning of their working relationship. However, Grievant offered no explanation for why Mr. Bass might be biased against him, and the evidence does not show bias against Grievant. Although Mr. Bass clearly views Grievant's performance unfavorably compared to Grievant's previous supervisors, this is not proof of bias without other evidence. Mr. Bass' evaluations of Grievant included examples of specific performance deficiencies in support of the rating. The language of the evaluations is professional. There is no evidence of bias other than Grievant's assertion that Mr. Bass is biased against him.

Grievant argues that Mr. Bass' testimony differs from that of Melanie Hankins, which makes Mr. Bass not a credible witness. Ms. Hankins is credible. Although Ms. Hankins was obviously uncomfortable testifying, she was forthright in her answers to

questions and her demeanor was appropriate. She testified that she could not remember most specifics of what had been said because it had been so long ago and she admitted when she did not remember something in particular. There was no allegation that Ms. Hankins was biased for or against Grievant. She testified that she liked Grievant and that he was generally polite and soft-spoken, but on that day he had interrupted, was upset and frustrated, that his voice was raised, and that Mr. Bass had to tell him multiple times, "No, not now." Mr. Bass' testimony is not inconsistent with Ms. Hankins' testimony.

Mr. Bailey was also a credible witness. Grievant offered no theory as to why Mr. Bailey would have bias against him, and there was no evidence in his testimony that Mr. Bailey does have any bias against Grievant. Mr. Bailey's demeanor was calm and appropriate. He responded appropriately to questioning and appeared to have good recall of events. Although Mr. Bailey's testimony did not necessarily match his written notes from the meeting word-for-word, it was not inconsistent from the tone of the meeting as described in the testimonies of both Mr. Bass and Mr. Bailey and the notes Mr. Bailey took.

In contrast, Grievant's demeanor was problematic. Even after being reminded several times not to do so by the undersigned, Grievant continued to interrupt while being asked questions, and appeared to be angered when corrected by the undersigned. The undersigned was also required to direct Grievant several times to answer the questions that were asked when he refused to answer questions or answered questions with a question. Grievant was evasive and sarcastic in answering some questions. Grievant was argumentative during cross examination. Grievant was reactive. For example, Grievant testified that he was offended that Mr. Bass had showed no concern when he

had to leave work due to his medical condition. However, upon return to work, Grievant had sent Mr. Bass an email saying that "it was no big deal" and "it's all better now." When Respondent's counsel questioned Grievant about the email, simply reading what Grievant himself had written, Grievant's reaction was baffling, stating, "That's very unfair and I'm insulted by it." At times Grievant raised his voice and appeared agitated. While Grievant did not curse or shout at the level three hearing, the demeanor he displayed leads the undersigned to believe it likely he reacted inappropriately in the meeting and confrontation with Mr. Bass.

Further, Grievant's assertion that he apologized to Mr. Bass and is sorry now for his behavior is not supported by the evidence. Grievant testified that he was sorry for his outburst, that he calmed down and apologized during the meeting, and that he then sought Mr. Bass out the day after the EPA meeting to apologize. The evidence shows the contrary. Both Mr. Bass and Mr. Bailey testified credibly that Grievant did not calm down during the meeting and did not apologize. Ms. Hankins testified that Grievant was upset when he interrupted her meeting with Mr. Bass the next day and she made no mention that Grievant had apologized. Mr. Bass testified that Grievant did not apologize. Further, Grievant's assertion that he was sorry and sought Mr. Bass out to apologize is not plausible under the circumstances. It would make no sense for Grievant to interrupt Ms. Hankins' meeting with Mr. Bass to apologize. Also, the email Grievant sent the day after the second confrontation is not apologetic in tone and again attacks Mr. Bass, saying that Mr. Bass "ran away." Grievant does not apologize for the conduct in the email, but instead says, "I'm tired of this work environment Tom has created." Grievant's assertion

in this grievance that he is sorry for his behavior is self-serving as he showed no indication of acceptance of responsibility at the time.

Respondent asserts that Grievant's behavior was insubordinate and that Grievant's conduct violated DOP's Prohibited Workplace Harassment Policy (DOP-P6) by engaging in nondiscriminatory hostile workplace harassment. In Section II, H, the policy defines nondiscriminatory hostile workplace harassment as:

> [a] form of harassment commonly referred to as "bullying" that involves verbal, non-verbal or physical conduct that is not discriminatory in nature but is so atrocious, intolerable, extreme and outrageous in nature that it exceeds the bounds of decency and creates fear, intimidates, ostracizes, psychologically or physically threatens, embarrasses, ridicules, or in some other way reasonably over burdens or precludes an employee from reasonably performing her or his work.

In Section III, G, the policy further describes nondiscriminatory hostile workplace harassment as consisting of:

> unreasonable 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.

This Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 97-23-088 (June 13, 1997). 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, at 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) (quoting *Harris, supra*). 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 are by no means limited to them, and "no single factor is required." *Harris, supra* at p. 23; *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2009-0685-MAPS (Apr. 23, 2009).

"'To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment.' *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998). *See Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Corley, et al., v. Workforce West Virginia*, Docket No. 06-BEP-079 (Nov. 30, 2006). "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. *Fairmont Specialty Servs., [v. W. Va. Human Rights Comm'n*, 206 W. Va. 86, 522 S.E.2d 180 (1999)], citing *Kinzey v. Wal-Mart Stores, Inc*., 107 F.3d 568, 573 (8th Cir. 1997)." *Marty v. Dep't of Admin.*, Docket No. 02-ADMN-165 (Mar. 31, 2006).

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, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). *See also 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). The Grievance Board has previously 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) (*citing Weber v. Buncombe County Bd. of Educ*., 266 S.E.2d 42 (N.C. 1980)). "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. *See Hubble v. Dep't of Justice,* 6 MSPR 659, 6 MSPR 553 (1981). *See also Graley v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 99-PEDTA-406 (Oct. 31, 2000); *Corley, et al., v. Workforce W. Va.*, Docket No. 06-BEP-079 (Nov. 30, 2006).

Grievant's behavior was clearly inappropriate and insubordinate. Grievant's behavior in the EPA meeting was uncontrolled, disrespectful, and abusive. Although Grievant testified that profanity was commonplace in the office, even if that were true, profanity used in general and profanity used in an angry tirade directed at one's supervisor are very different. Grievant then continued to escalate his inappropriate behavior the next day when he interrupted his supervisor, disregarded his supervisor's instructions to leave and make an appointment, and again became loud and aggressive.

It is not clear that Grievant's conduct constitutes nondiscriminatory hostile workplace harassment. Grievant's behavior was unreasonable, outrageous, and

deliberate, but there is no evidence it caused extreme distress. Mr. Bass did testify that he felt humiliated and disrespected, but did not testify that he was particularly distressed. As for repeated or persistent conduct, there were two instances where Grievant shouted at and attempted to humiliate Mr. Bass, an email ridiculing Mr. Bass by saying he "ran away," and the disrespectful tone of the letter protesting the EPA, all of which occurred over only a three-day period. While Grievant's behavior is clearly inappropriate, troubling, and serious, it does not appear to fit the definition of nondiscriminatory hostile workplace harassment.

Respondent proved that Grievant's behavior was insubordinate and inappropriate. Serious discipline was especially warranted due to the escalating nature of Grievant's misconduct. Further, in determining the appropriate punishment, Respondent considered Grievant's previous disciplinary written reprimand and the disciplinary precedent in the office, in which Respondent had suspended another employee previously for similar conduct. Respondent was justified in suspending Grievant for the proven conduct.

Grievant argues that his behavior should be excused because of the treatment he had received from Mr. Bass, and that any inappropriate behavior should be excused because he apologized. Grievant's proper course of action if he believed that Mr. Bass was biased against him, or that Mr. Bass' evaluations of Grievant's work were inappropriate, would have been to dispute the actions either through his employer or by filing a grievance. Grievant did not do so. Grievant only filed a grievance regarding the suspension, so the undersigned cannot now review the propriety of the EPAs and the PIP. As discussed above, Grievant failed to demonstrate that Mr. Bass was biased

against him or treated him inappropriately, and Grievant's assertion that he apologized is not credible.

Grievant also testified extensively about his health problems and Mr. Bass' lack of concern and compassion. Mr. Bass found Grievant's performance to be lacking before Grievant's health problems occurred. It also does not appear that Grievant had fully disclosed his health difficulties to Mr. Bass. The two email communications that are in the record about Grievant's health problems show that Grievant told Mr. Bass that he was "fine" once he returned to work. It is troubling that Mr. Bass would choose to rate Grievant poorly and place him on an improvement plan when he had been out-of-the office for his medical condition for almost two months out of the six-month rating period. I agree with Grievant that this lacks compassion, but as Grievant did not grieve the EPA and PIP, the undersigned cannot review that action. While Mr. Bass may not have been compassionate in his action, he was not unprofessional. Mr. Bass drafted the EPA and PIP in a factual, detailed manner. Grievant had the opportunity to respond to the EPA and PIP in a professional manner. He could have explained his deficiencies were due to his medical condition and requested accommodation. Grievant could have filed a grievance regarding the EPA and the PIP, and he did not do so. Grievant blamed all of the problems on Mr. Bass' alleged poor leadership and decision-making, shouted and cursed at Mr. Bass, and continued to engage in disrespectful and inappropriate conduct towards Mr. Bass. Even if the EPAs and PIP were not justified, it would not excuse Grievant's behavior. It is not appropriate to respond to a poor evaluation by shouting and cursing at one's supervisor.

Grievant also asserts that his due process rights have been violated. "The Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against State action which affects a liberty or property interest." Syl. Pt. 1, *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 241 S.E.2d 164 (1977). "A State civil service classified employee has a property interest arising out of the statutory entitlement to continued uninterrupted employment." *Id*. at Syl. Pt. 4.

> The essential requirements of due process . . . are notice and an opportunity to respond. The opportunity to present reasons either in person or in writing, why proposed action should not be taken is a fundamental requirement. (citation omitted) The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence and an opportunity to present his side of the story.

Cleveland Board of Education v. Loudermill, 470 U.S. 532, 546 (1985). "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)).

Grievant argues that because he was not given advance notice of the predetermination meeting, he was not provided due process. Grievant was given notice of the charges against him, explanation of the evidence, and an opportunity to respond during the predetermination meeting as required by the Due Process Clause. He was then given a detailed suspension letter more than three days in advance of the suspension. Only a short amount of time had passed since the misconduct Respondent alleged Grievant had committed, and it did not involve a particularly complicated set of

facts. Although it certainly would have been best for Respondent to give Grievant more notice of the predetermination meeting, the notice Respondent was required to provide Grievant under the Due Process Clause is notice of the charges against him, not notice of the predetermination conference itself, which Respondent did provide. Grievant's due process rights were not violated.

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 (2008). "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. 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, at 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) (quoting *Harris, supra*). 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 are by no means limited to them, and "no single factor is required."

Harris, supra at p. 23; *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2009-0685-MAPS (Apr. 23, 2009).

3. "'To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment.' *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998). *See Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Corley, et al., v. Workforce West Virginia*, Docket No. 06-BEP-079 (Nov. 30, 2006). "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. *Fairmont Specialty Servs., [v. W. Va. Human Rights Comm'n*, 206 W. Va. 86, 522 S.E.2d 180 (1999)], citing *Kinzey v. Wal-Mart Stores, Inc*., 107 F.3d 568, 573 (8th Cir. 1997)." *Marty v. Dep't of Admin.*, Docket No. 02-ADMN-165 (Mar. 31, 2006).

4. 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, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). *See also 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). The Grievance Board has previously 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) (*citing Weber v. Buncombe County Bd. of Educ*., 266 S.E.2d 42 (N.C. 1980)).

5. “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. *See Hubble v. Dep't of Justice,* 6 MSPR 659, 6 MSPR 553 (1981). *See also Graley v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 99-PEDTA-406 (Oct. 31, 2000); *Corley, et al., v. Workforce W. Va.*, Docket No. 06-BEP-079 (Nov. 30, 2006).

6. Respondent proved Grievant was insubordinate and inappropriate repeatedly over the course of several days, which justified his suspension for five days, but did not prove that Grievant’s conduct was nondiscriminatory hostile workplace harassment.

7. “The Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against State action which affects a liberty or property interest.” Syl. Pt. 1, *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 241 S.E.2d 164 (1977). “A State civil service classified employee has a property interest arising out of the statutory entitlement to continued uninterrupted employment.” *Id*. at Syl. Pt. 4.

8. “The essential requirements of due process . . . are notice and an opportunity to respond. The opportunity to present reasons either in person or in writing, why proposed action should not be taken is a fundamental requirement. (citation omitted) The tenured public employee is entitled to oral or written notice of the charges against

him, an explanation of the employer's evidence and an opportunity to present his side of the story." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985).

9. "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)).

10. Grievant's due process rights were not violated.

Accordingly, the grievance is **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: June 13, 2016

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Billie Thacker Catlett
Chief Administrative Law Judge