THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MATTHEW DAYTON EPLING,
Grievant,

v. **Docket No. 2017-0954-MAPS**

REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY/ SOUTHERN REGIONAL JAIL,
Respondent.

DECISION

Grievant, Matthew Dayton Epling, was employed by Respondent, Regional Jail and Correctional Facility Authority ("RJCFA") at Southern Regional Jail ("SRJ"). On September 6, 2016, Grievant filed this grievance against Respondent stating,

> WVRJCFA wrongfully terminated grievant in violation of the progressive discipline policy. WVRJCFA wrongfully applied policies and procedures in support of the wrongful termination. WVRJCFA retaliated against grievant because grievant complained about inappropriate use of prior disciplinary actions that had been or should have been removed from his file.

For relief, Grievant seeks "full reinstatement, full back pay and other benefits" and "any and all possible redress."

The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). Level three hearings were held on February 23, 2017, and April 11, 2017, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by counsel, Paul M. Stroebel, Stroebel & Johnson PLLC. Respondent was represented by counsel, Brooks H. Crislip, Deputy Attorney General and William R. Valentino, Assistant Attorney General. This matter became mature for decision on May 30, 2017, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law ("PFFCL").

Synopsis

Grievant was employed at Southern Regional Jail as a Correctional Officer IV with the rank of sergeant, and served as a supervisor. Grievant was dismissed from employment for violations of Respondent's code of conduct and social media policies, insubordination, and dishonesty in his predetermination conference. Grievant asserts that Respondent failed to prove the charges against Grievant as its witnesses were not credible, that Respondent's investigation was improper, that Grievant did not have a previous disciplinary history, that Grievant was not trained on the policy, that disciplinary action was not warranted under the policy, that Respondent failed to follow progressive discipline, that Respondent violated Grievant's due process rights, and that the disciplinary action was disproportional. Respondent proved it had good cause to dismiss Grievant from employment when, as a supervisor, he violated multiple policies, was insubordinate, and was dishonest and belligerent when confronted about his misconduct. Respondent proved there was a rational nexus between Grievant's employment and his social media conduct. Grievant's due process rights were not violated. Grievant failed to prove mitigation of the penalty was warranted. 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 was employed at Southern Regional Jail as a Correctional Officer IV with the rank of sergeant, and served as a supervisor.

2. On February 5, 2015, Lt. Jerald Hawkins counseled Grievant and completed a General Counseling Form. It states:

> An occurrence involving one of your subordinates and Face Book has lead [sic] to an issue within the workplace. The officer involved felt disrespected and humiliated from comments posted on the social network, along with comments by other staff members. This is not tolerated in the code of conduct Paragraph 33 which states that employees shall refrain from using abusive language and be respectful, polite and courteous to other employees. This being a prime factor in maintaining order, control and good discipline in the facility. Policy requires the highest level of conduct from all employees. You as a supervisor should take pride in mentoring subordinates by showing a good example by your actions.

As a summary of the counseling, Lt. Hawkins wrote: "Importance of maintaining proper *esprit de corps* and discipline among officers. Professionalism as a corrections officer and a supervisor. Do nothing to embarrass Regional Jail Authority (Facebook). As a supervisor – build your "Team" (shift) with respect and fairness." Grievant concurred with the accuracy of the counseling statement and wrote, "I understand the importance of keeping professionalism in the work place. The next "Generation" of social media is something to be used productively and I will begin to monitor my decisions on social media. Policy 3013 is clear on ethics as an employees [sic] of The WVRJA." As rehabilitation, Lt. Hawkins instructed Grievant to: "Redouble your efforts to improve as a supervisor" and "Be extremely sensitive of co-workers feelings and self-esteem as corrections officers."

3. In this incident, Grievant had not made the offending post, but had commented on the inappropriate post of another correctional officer.

4. On June 8, 2016, SRJ Administrator Michael Francis and Capt. Larry W. Warden counseled Grievant regarding Facebook posts about Dwayne Scarbro, a former correctional officer at SRJ who had resigned.

5. Grievant and Mr. Scarbro had worked together for a number of years. Grievant had previously supervised Mr. Scarbro before Mr. Scarbro was promoted to corporal. Grievant viewed himself as a mentor to Mr. Scarbro. Grievant and Mr. Scarbro had had a falling out over alleged conduct at work, including an accusation that Mr. Scarbro had had sexual relations with a subordinate, which led to them feuding on Facebook.

6. Mr. Francis was Facebook friends with Grievant and saw a Facebook post Grievant had made regarding Mr. Scarbro and an incident at work that appeared to violate policy. Mr. Francis counseled Grievant and told him that the Facebook post was unprofessional and that he was going to get himself into trouble. Mr. Francis told Grievant, "Knock off the Facebook postings about Scarbro. It's over. He's not in the building. It's over." Grievant was resistant to the counseling. Grievant felt justified because Scarbro was also posting on Facebook about Grievant, and that it was his private business. Capt. Warden came into the meeting at some point and counseled Grievant to stop. The meeting lasted half an hour or more. At the end, Grievant indicated he understood and would take care of it.

7. Mr. Francis noted the counseling on his Supervisor's Log stating, "Counseled Epling on FaceBook posts. Epling warned that FaceBook going to get him into trouble concerning former Officer."

8. Neither Mr. Francis nor Capt. Warden completed a General Counseling Form or wrote an incident report regarding the behavior at the time of the counseling.

9. On August 15, 2016, April M. Darnell, RJCFA Director of Human Resources, received an email from Mr. Scarbro, reporting that Grievant had made

bullying comments about him and discussed an inmate and things that had taken place at SRJ on Facebook. Ms. Darnell asked Mr. Scarbro to provide screenshots of the content, which Mr. Scarbro did, along with providing context for some of the things said on Facebook, including that his nickname at SRJ had been B2A.

10. August 20, 2016, Mr. Scarbro sent another email to Ms. Darnell stating that the posts had continued. In comments to the newest post made on August 19, 2016, Grievant, in reply to a previous commenter who referenced Mr. Scarbro, stated, "[T]he only thing [t]hat Scarbro taught was excessive drinking, wife cheating, and a bad case of habitual lying." Grievant followed up that comment with. "Btw [previous commenter's name] ask Scarbro about his losing his gun carry privaledged [sic] because of his alcoholic shaking…rotfl…as to [sic] u can see…that image is a certification, not an AAA sober certification lol."[1]

11. The screenshots show that, following a text message exchange on July 23, 2016, in which Mr. Scarbro apologized and asked to "put our past behind us," on July 24, Grievant posted the following:

> REPOST (had to edit name and number out of screenshot lol) – I need some advice… I mentored an officer. He was promoted to Corporal. I mentored him and protected him from things by literally taking responsibility for him. I go to day shift and he without me, makes several blunders. On top of that, he gets caught with his pants down… LITERALLY. Although, I kept his situation in secrecy, this guy got himself in hot water with bad decision making. I told him to get his crap together, and gave him a heads up on preparation for his problem. I leave, and the next thing that happens, is he abandons his work and blames me on facebook and then slanders me while blocked. – I am sent this screenshot from a few weeks ago, where he literally demeans me.[2]

[1] These comments were in reference to a post by Grievant.

[2] The post continues, but the screenshot cuts off the remainder of the post.

12. Thereafter, over the course of several weeks, Grievant made numerous posts and comments ridiculing Mr. Scarbro by making comments about and posting pictures with captions of a stuffed monkey called "B2A Monkey" that had the characteristics of Mr. Scarbro. The posts and comments portray the B2A Monkey as lazy, a coward, a braggart, and a heavy drinker. Grievant tagged multiple correctional officers on the posts and multiple correctional officers also made ridiculing comments on the posts. In total, twenty-two other correctional officers who were involved in commenting, or failed to report the conduct. Other than three fellow sergeants, all the involved officers were of lower rank than Grievant, and some were directly supervised by Grievant.

13. Ms. Darnell, using her own Facebook account, found Grievant's Facebook page and personally viewed the Facebook posts regarding which Mr. Scarbro had complained.

14. Believing the posts to be inappropriate, Ms. Darnell, again using her private Facebook account, sent Grievant a private message.

15. The tone of the message, although not inappropriate, was somewhat conversational in nature and not what would customarily be expected in a professional communication. For example, some excerpts are: "In case you think we are not aware to whom you are referring you so graciously informed us in your comments and a picture on your TV as well as others[‘] comments" and "I am sure we will be talking soon." The message further states, "And since you have such a following within SRJ I would strongly suggest you share my words of advice and remove all references you have made on your Facebook and you tube."

16. Ms. Darnell also called RJCFA Deputy Director Lori Lynch and Kimberly Wilson, SRJ Human Resources Manager, to discuss the posts she had observed on Grievant's Facebook page.

17. Upon receiving the message from Ms. Darnell, Grievant called Ms. Wilson. Grievant was "irate" that Ms. Darnell had sent him the private message on Facebook and read the message to Ms. Wilson. Ms. Wilson did not discuss the prior Facebook incident or the social media policy with Grievant at this time, but she instructed Grievant to remove the posts.

18. On the same day, after receiving a call from Ms. Lynch, Mr. Francis called Grievant and instructed him to take the posts down. Mr. Francis did not discuss the policy specifically with Grievant at that time, but informed him that RJCFA administration had determined that the posts were inappropriate and they needed to be removed. Grievant was "kind of defiant and kind of belligerent," and stated that it was his page and he felt he could do what he wanted with it. However, by the end of the conversation, Grievant had agreed to remove the posts.

19. On Monday, August 22, 2016, Mr. Francis received another call from administration informing him that the posts had not been removed. Mr. Francis questioned Grievant, who said he thought he had removed the posts.

20. On August 23, 2016, Ms. Darnell held a predetermination conference attended by the following: Grievant, Mr. Francis, Capt. Warden, JR Binion, RJCFA Chief of Operations, Suzanne Summers, Legal Department, Rebecca Ferrell, Administrative Services Assistant, and Ms. Wilson. Grievant did not request representation at this

conference. Grievant asserted that he thought he had removed the content and that B2A referred to himself and not Mr. Scarbro.

21. Ms. Darnell did not believe Grievant's claim that B2A referred to himself. Immediately after the predetermination conference concluded, Ms. Darnell looked through the Facebook content again. She found the post in which Grievant referred to B2A as "the greatest 416 in the history of colostomy bags." Ms. Darnell then reconvened the predetermination conference to ask who had badge number 416. Upon being told that this was a continuation of the predetermination conference, Grievant stood up from his seat and stated that he would not discuss it any further without his attorney present and that it was "ludicrous." Although Grievant had stated that he wished to have his attorney present, Ms. Darnell and Mr. Binion repeated the question and Grievant began yelling. Captain Warden confirmed that Mr. Scarbro's badge number was 416. Grievant continued to "scream" and "rant" and Mr. Binion asked Capt. Warden to escort Grievant out.

22. Also on August 23, 2016, Ms. Darnell directed Mr. Francis and Capt. Warden to prepare incident reports of the June counselling session. She typed up her own detailed notes of the events, beginning with the August 15, 2016 email from Mr. Scarbro, in a document she titled "EEO Findings." Ms. Wilson also prepared an incident report describing the events of the reconvened predetermination conference, which she submitted on August 24, 2016.

23. By letter dated August 23, 2016, Ms. Darnell dismissed Grievant from employment for violation of Respondent's social media policy and code of conduct for the

Facebook posts and comments and for refusing the direction to remove the same. The termination letter listed the following as Grievant's responses to the allegations:

> I didn't realize they were still on there and I removed comments and photos. I thought I complied. I made a full attempt to remove them. There was no attempt of obstruction or insubordination. I vaguely remember the counseling session with Mr. Francis regarding social media. I understand Policy 3010. My wife, family and friends have access to my computer while I'm not at home. B2A does not mean Mr. Scarbro, B2A is me. Those posts are puns.

In support of termination, Ms. Darnell cited the following policy provisions:

> **#3010 – Code of Conduct**
>
> - 2. No employee shall divulge, use or discuss official information, not available to the general public, other than in the line of duty.
> - 9. All employees shall promptly and faithfully execute all lawful orders/instructions of a supervisor. An employee, believing in good faith that an order is of a questionable nature, may appeal such order at a later time through the administrative structure or the grievance process. Insubordination or refusal to follow a lawful order of a supervisor shall constitute grounds for disciplinary actions. Order is of a questionable nature, may appeal such order at a later time through the administrative structure or the grievance process. Insubordination or refusal to follow a lawful order of a supervisor shall constitute grounds for disciplinary action.
> - 14. Employees have an affirmative duty to and shall promptly report, in writing to their supervisor, any information which comes to their attention indicative of an unusual incident, a violation of the law, rule, and/or regulations by either an employee or inmate.
> - 16. All employees shall remain alert, observant, and occupied with facility business during their tour of duty. All employees shall conduct themselves in a manner which will reflect positively upon the Authority and its employees.
> - 19. All employees shall conduct themselves, whether on or off duty, in a manner which earns the public trust and confidence inherent to their position. No employee

shall bring discredit to their professional responsibilities, the Authority, or public service.

#9039 – Use of Social Media

- 1. Employees need to know and adhere to all applicable Authority policy and procedure when using social media in reference to the Authority.
- 2. Employees should be aware of the effect their actions may have on their images, as well as that of the Authority. The information that employees post or publish may become public information for indefinite period of time.
- 3. Employees should be aware that Authority may observe content and information made available by employees through social media. Employees should use their best judgment in posting material that is neither inappropriate nor harmful to Authority, its employees, or customers.
- 4. Prohibited social media conduct may include, but is not limited to: posting commentary, content, or images that are defamatory, pornographic, proprietary harassing, libelous, or that can create a hostile work environment.
- 5. Employees are not to publish, post or release any information that is considered confidential or non-public. If there are questions about what is considered confidential or non-public, employees should check with the Human Resources Department and/or his or her immediate supervisor.
- 7. If employees find or encounter a situation while using social media that threatens to become antagonistic, employees should disengage from the dialogue in a polite manner and seek the advice of a supervisor.
- 8. Employees should get appropriate permission before you refer to or post images of current or former employees, member, vendors or suppliers, Additionally, employees should get appropriate permission to use a third party's copyrights, copyrighted material, trademarks, service marks or other intellectual property.
- 10. Subject to applicable law, after-hours online activity that violates Authority Code of Conduct or any other Authority policy may subject an employee to disciplinary action up to and including termination.

- 11. Subject to applicable law, no employee shall publish content after-hours that involves work or subjects associated with Authority business, or that discloses or displays any non-public or work-related material.

Ms. Darnell further explained,

> As a Sergeant, you are required to observe a higher standard of conduct as you serve as a role model for employees. It is your basic responsibility to set an example for employees as to how they are to interpret and apply WV Regional Jail Authority policies and procedures, and how to respond to problems they confront in their daily activities. The employees under your supervision rely on you for training, leadership, and direction in complying with the rules and regulations. I conclude that your behavior make[s] it difficult, if not impossible, to enforce compliance with policy by your staff. Your behavior causes you to be ineffectual in providing leadership and is not an acceptable behavior for employees to emulate.

24. The twenty-two other correctional officers who were involved in the Facebook content, or failed to report the conduct, were either counseled or given written reprimands depending upon their level of involvement, prior conduct, and rank.

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*.

Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin*., 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* W. VA. CODE ST. R. § 143-1-12.02 and 12.03 (2012).

Respondent alleges Grievant bullied a former coworker on Facebook in violation of Respondent's policies and asserts this behavior, coupled with his insubordinate refusal to remove the offending posts, and behavior in the pre-determination conference constituted good cause for Grievant's dismissal from employment due to Grievant's position as a supervisor and his previous counseling regarding similar conduct. Grievant asserts that Respondent failed to prove the charges against Grievant as its witnesses were not credible, that Respondent's investigation was improper, that Grievant did not have a previous disciplinary history, that Grievant was not trained on the policy, that disciplinary action was not warranted under the policy, that Respondent failed to follow progressive discipline, that Respondent violated Grievant's due process rights, and that the disciplinary action was disproportional.

The evidence of Grievant's conduct consists of printouts from Facebook and the testimony of witnesses, primarily Dwayne Scarbro. Grievant did not choose to testify, and no negative inference is drawn by his choice. "An employee may not be compelled to testify against himself or herself in a disciplinary grievance hearing." W.VA. CODE § 6C-2-3(g)(2). Grievant asserts the testimony of Respondent's witnesses is not credible.

Accordingly, this administrative law judge 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).

Respondent called to testify the following witnesses who were involved in the disciplinary process: April Darnell, RJCFA Director of Human Resources; Kimberly Wilson SRJ Human Resources Manager; Michael Francis, SRJ Administrator; Lt. Jerald Hawkins; and Capt. Larry W. Warden. Grievant asserts Respondent's witnesses are biased as evidenced by the instruction or creation of documentation/incident reports long after the events occurred, asserting that the incident reports were required to be done at the time of the event.

Following the predetermination conference, Ms. Darnell instructed Mr. Francis and Capt. Warden to write an incident report of their counseling Grievant regarding the use of social media in June 2016. Ms. Darnell testified that Mr. Francis and Capt. Warden should have documented the counseling session at the time by a written document in the administrative file and that a verbal counselling should be documented on a specific form. She disagreed that policy would require an incident report. She testified that she

instructed Mr. Francis and Capt. Warden to write the incident reports for documentation, since the counseling had not been documented on a form. In January 2017, Mr. Francis instructed Lt. Hawkins to write an incident report which included his recollection of a "counseling session" he had with Grievant "months earlier." There does not appear to be any evidence Ms. Wilson participated in requesting or drafting such a late incident report. The incident report Ms. Wilson authored was regarding the predetermination conference she attended and was drafted the following business day.

Grievant asserts the failure to file incident reports at the time of the event violated Respondent's policy. Incident reports are governed by Respondent's Policy and Procedure Statement 3031. The statement consists of two relevant sections: Policy and Procedure A. While the counseling sessions do not appear to require an incident report under the "Policy" section, the "Procedure A" section does require an incident report for "violations of rules of conduct." The failure to file incident reports follow the counseling sessions was in violation of Respondent's policy. However, neither section of the statement requires incident reports to be filed within a certain period of time. Multiple witnesses testified that incident reports are customarily drafted by the end of shift or the next day, but the policy does not require it.

Even though Ms. Darnell was incorrect in her assertion that the policy did not require incident reports, her explanation that she directed reports to be filed merely for documentation is logical. Likewise, Mr. Francis was also incorrect in his assertion that the policy did not require incident reports, but his explanation that he did not believe further documentation in the log was necessary because it was just a counseling session, which he thought had resolved the issue, is plausible.

While Respondent cannot be allowed to use such documentation produced after the dismissal of grievant as evidence to prove its case, as such was created remote in time to the event of the incident report, the creation of this documentation without other evidence of bias is not enough to prove the witnesses were biased because of the incident reports. There was no other evidence of bias. Ms. Darnell was not previously familiar with Grievant and Mr. Francis had a friendly relationship with Grievant prior to his dismissal.

Ms. Darnell's demeanor was appropriate. She remained calm, certain, and professional in her testimony and maintained good eye contact. She displayed a good recall of events and her testimony was consistent with her prior written statement. There was no evidence of bias against Grievant. Ms. Darnell was credible.

Mr. Francis' demeanor was appropriate. Mr. Francis was calm, his answers to questions were direct, and he maintained good eye contact. Mr. Francis' memory of the events seemed clear. There was no evidence of bias against Grievant. Mr. Francis had been friendly with Grievant and was complimentary of his on-the-job performance prior to his insubordination. Mr. Francis' disappointment and dismay at the situation appeared genuine. Mr. Francis was credible.

Capt. Warden's demeanor was appropriate. Capt. Warden answered questions in a thoughtful and deliberate manner. He appeared to have a mostly good recall of events. There was no evidence of bias against Grievant, in fact, Capt. Warden appeared sympathetic to Grievant. Capt. Warden was credible.

Lt. Hawkins' demeanor was appropriate. He was calm, respectful, and maintained good eye contact. His memory of events appeared to be good and was consistent with

the written counseling statement. There was no evidence of bias against Grievant. Lt. Hawkins was credible.

Mr. Scarbro's demeanor was appropriate. He was calm and respectful, even under difficult cross-examination. He maintained good eye contact. He was direct in his answers to questions, and readily admitted if he did not know something. Mr. Scarbro's explanation for the Facebook content was plausible in contrast to Grievant's explanation, which was not plausible, as will be discussed more fully below. Mr. Scarbro was complimentary of Grievant's job performance as a correctional officer and supervisor. However, Mr. Scarbro made one out-of-hearing statement that places his credibility at issue. In a text message to a current correctional officer, Mr. Scarbro sent a copy of an email from Respondent's counsel asking him to testify in the grievance hearing stating that Grievant had filed a grievance against Mr. Scarbro and that Grievant had filed a wrongful termination suit. Mr. Scarbro further stated, "The state wants me to be their weapon….They want me to testify on their behalf…[ ][3]…For my testimony and helping them out I[']m gonna [sic] see if the state will place me in a job lol." This statement shows a clear interest and possible motivation to lie and casts doubt on Mr. Scarbro's testimony. However, there was no evidence Mr. Scarbro was offered a job in exchange for his testimony. Mr. Scarbro did ask prior to the first day of hearing if he could apply for a job, and was told he was allowed to apply if he had left in good standing. Following his testimony, Mr. Scarbro did later apply for a job and was not selected. Further, there is nothing in Mr. Scarbro's statement that indicated he would offer untruthful testimony.

[3] Omitted "The guy said it was a typo" from the quotation. The email had referred to Grievant as Michael, not Matthew, Epling, and Mr. Scarbro was explaining that confusion.

There was no evidence Mr. Scarbro had motivation to lie when he first reported the Facebook content to Ms. Darnell in August. Mr. Scarbro had resigned from his position and there is no evidence he was trying to regain his job at that time. It was in that email in August 2016 that Mr. Scarbro told Ms. Darnell that his nickname at SRJ was B2A and that inmate Nathaniel Showalter had fractured Mr. Scarbro's eye socket, which is the same as his level three testimony, and about which other witnesses credibly testified. Although Mr. Scarbro's statement was inappropriate and troubling, it is more likely than not that his testimony regarding the Facebook content was truthful.

Respondent produced as evidence print outs of posts and comments from Grievant's Facebook page. The print outs are somewhat difficult to interpret as posts were not always presented in order with their comments, comments and replies to comments are presented on multiple pages with some repeated, and parts of posts and comments were cut off.[4] However, careful reading of the packet as a whole provides a clear pattern of conduct. Although Grievant stated in the pre-determination conference that "B2A" refers to himself and not Mr. Scarbro, a careful reading of the posts and comments show that this is untrue. In one post, Grievant forwarded a post from another account that is a picture of Barney Fife in his police uniform with the caption "Barney is writing a song, doesn't know Andy is standing behind him."[5] Grievant commented in his

[4] The tops of some posts are cut off, but these posts can still be identified as Grievant's posts due to Grievant's profile picture. Several posts and comments show the entirety of Grievant's profile picture, a picture of himself and an infant with a distinctive white and pink-spotted object in the background. In posts with Grievant's name cut off, a portion of the profile picture is still visible and identifies him as the poster.

[5] This administrative law judge takes judicial notice that this is a reference to The Andy Griffith Show in which Andy is the respected Sheriff and Barney is his incompetent, cowardly Deputy Sheriff.

repost of this picture, “When 405 sneaks up on B2A.” A comment Grievant made on August 4 states, “The B2A is scared all his two faced remarks about people he blocked, is getting out. After all he was the greatest 416 in the history of colostomy bags.” Grievant’s badge number was 405 and Mr. Scarbro’s badge number was 416. This post and comment clearly show that B2A refers to Mr. Scarbro and not Grievant. Further, Lt. Hawkins testified that Scarbro was B2A. Another post is a picture of the B2A Monkey beside a vanity West Virginia license plate saying “SGT E” with the captions B2A AINT SCARED…UH OH…GOTTA GO!” Again, the vanity plate clearly refers to Grievant, Sergeant Epling, and that B2A is afraid of Sargent Epling. Grievant is clearly not referring to himself as B2A. Grievant’s assertion that he is B2A is not plausible. The plausible explanation is that Grievant was instructed by Mr. Francis to stop the feud with Mr. Scarbro online, so Grievant created the monkey as a way to continue to bully Mr. Scarbro without using his name.

The Facebook content shows that Grievant created photographs of a stuffed monkey he referred to as “B2A Monkey” about which he created ridiculing captions and comments. Other correctional officers commented on the posts. The posts and comments began after the counseling in which Mr. Francis specifically told Grievant that Facebook posts about Mr. Scarbro were going to get him in trouble and to stop and after Grievant made the following post on July 24th which also clearly refers to Mr. Scarbro:

> REPOST (had to edit name and number out of screenshot lol) – I need some advice… I mentored an officer. He was promoted to Corporal. I mentored him and protected him from things by literally taking responsibility for him. I go to day shift and he without me, makes several blunders. On top of that, he gets caught with his pants down… LITERALLY. Although, I kept his situation in secrecy, this guy got himself in hot water with bad decision making. I told him to get his crap together,

> and gave him a heads up on preparation for his problem. I leave, and the next thing that happens, is he abandons his work and blames me on facebook and then slanders me while blocked. – I am sent this screenshot from a few weeks ago, where he literally demeans me.[6]

While the posts and comments are replete with cultural references and inside jokes, taken as a whole, even without Grievant's explanatory testimony, it is clear that they are meant to be derogatory towards Mr. Scarbro. The B2A Monkey was a stand-in for Mr. Scarbro, whose nickname was B2A. In addition, directly after Grievant's comment in which he talked about the B2A blocking people, referencing Mr. Scarbro's badge number, Grievant's next comment was: "I bet there are 2 people the Monkey did not block…" These comments directly connect Mr. Scarbro and the B2A Monkey. The posts and comments portray the B2A Monkey as lazy, a coward, a braggart, and a heavy drinker.

Including Mr. Scarbro's explanations of the content, other ridicule of Mr. Scarbro becomes clear. Mr. Scarbro wears cowboy hats and boots and is a member of a country band, Southern Rain. Mr. Scarbro was a heavy drinker. There had been a rumor that Mr. Scarbro had inappropriate sexual relations with a female subordinate behind his garage. Mr. Scarbro had marital trouble, of which Grievant was aware. Mr. Scarbro had lost his certification to carry a gun. Mr. Scarbro blocked Grievant and other correctional officers on Facebook. The posts and comments referenced these things as characteristics of the B2A Monkey. The monkey was mostly dressed in cowboy hats and boots and was often pictured with a beer can. A post with a picture of the B2A Monkey

[6] The top of the post is cut off, but enough of the picture and name remain to identify it with certainty as Grievant's post. Likewise, the bottom of the post continues, but is cut off.

with a solo cup states, “All I gotta say is…B2A does not need a family…B2A needs a recliner, and a Dikel…” “Dickel” refers to a brand of alcohol Mr. Scarbro favored. Multiple posts referred to the monkey’s band, Northern Snow, including one with a fake album cover featuring Grievant and two other officers posing shirtless with the monkey, on which Grievant commented, “Announcing the Lip Syncing Legend Band…Northern snow!!! Coming to a garage near you!” Northern Snow is an obvious spoof on the name of Mr. Scarbro’s band, Southern Rain.

In addition to the content regarding B2A and the monkey, Grievant directly demeaned Mr. Scarbro in two comments. Grievant stated, “[T]he only thing [t]hat Scarbro taught was excessive drinking, wife cheating, and a bad case of habitual lying.” Grievant followed up that comment with. “Btw [previous commenter’s name] ask Scarbro about his losing his gun carry privaledged [sic] because of his alcoholic shaking…rotfl…as to [sic] u can see…that image is a certification, not an AAA sober certification lol.”[7]

Of particular concern are the following comments in which Grievant ridiculed Mr. Scarbro naming an inmate, Nathanial Showalter, who had assaulted and fractured Mr. Scarbro’s eye socket while he was still employed as a correctional officer. In a comment on July 30 to a picture of the stuffed monkey, seemingly playing a wrestling video game, Grievant stated, “The B2A Monkey has defeated the Showalter on Easy mode, for me..[.]WWE is REEEEEEEEEL.” In another comment to the same post, Grievant states, “‘Everyone is jealous of the B2A Monkey. They dream of my successful karaoke career

[7] These comments were in reference to a post made by Grievant of a picture of a weapons certification.

and the countless punches to the face, the B2A Monkey takes from B2A Monkey Jr. – I am the greatest B2A Monkey there is.'"

In all, twenty-two employees of SRJ were involved in the posts and comments, some of which were direct supervisees of Grievant. All participants were of lower rank than Grievant, with the exception of three other sergeants who participated or failed to report the content.

Respondent asserts Grievant's Facebook behavior violated Respondent's code of conduct and social media policy. Grievant argues the investigation was improper because Mr. Scarbro was not an employee at the time and because Mr. Scarbro never made a formal complaint; that the social media policy does not contemplate discipline; and that Grievant was not trained on the policies.

It was not improper for Ms. Darnell to investigate Grievant's Facebook conduct based on Mr. Scarbro's report. Ms. Darnell had asked Mr. Scarbro to file a formal EEO complaint, but Ms. Darnell did not receive a formal EEO complaint from Mr. Scarbro. Ms. Darnell's notes regarding her investigation of Grievant are titled "EEO Findings" and dated August 23, 2016. Grievant provided no evidence that a formal complaint was required before Ms. Darnell could investigate an EEO complaint. Further, even though Ms. Darnell's notes were titled "EEO Findings," Grievant was not actually disciplined for an EEO violation. Regardless of what it was termed, Grievant's behavior as a supervisor to a former subordinate, which stemmed from events that occurred at SRJ, is relevant. In addition, Mr. Scarbro had reported that Grievant was discussing an inmate, which directly relates to Grievant's employment as a possible policy violation.

Respondent proved Grievant violated the code of conduct for multiple behaviors. The code of conduct provides, "No employee shall divulge, use or discuss official information, not available to the general public, other than in the line of duty." Grievant violated this provision when he made fun of Mr. Scarbro's assault by an inmate and when he asked for advice in his Facebook post about Mr. Scarbro and gossiped about alleged bad actions Mr. Scarbro had committed as a correctional officer. The code of conduct provides, "All employees shall promptly and faithfully execute all lawful orders/ instructions of a supervisor." Grievant violated this provision when he failed to remove the Facebook content after Mr. Francis instructed him to do so. The code of conduct provides, "Employees have an affirmative duty to and shall promptly report, in writing to their supervisor, any information which comes to their attention indicative of an unusual incident, a violation of the law, rule, and/or regulations by either an employee or inmate." Grievant admits in his July 24th post that he "protected [Scarbro] from things by literally taking responsibility for him" and that Grievant "kept [Scarbro's] situation in secrecy." The code of conduct provides, "All employees shall conduct themselves, whether on or off duty, in a manner which earns the public trust and confidence inherent to their position. No employee shall bring discredit to their professional responsibilities, the Authority, or public service." Grievant violated this provision when he admitted covering for and keeping secret the bad actions of a fellow officer, and when he ridiculed Scarbro for being attacked by an inmate. The code of conduct provides, "All employees shall conduct themselves in a manner which will reflect positively upon the Authority and its employees." Grievant violated this provision when he yelled and ranted during the reconvened predetermination conference.

Respondent proved Grievant violated some of the social media policy provisions for which he was accused. Respondent did not prove Grievant violated the first three provisions of the policy or the tenth provision. These provisions to not provide directives to employees saying only that employees "need to know" or "should be aware" and notify employees that after-hours activity in violation of the policy can subject employees to discipline up to and including termination. Respondent did prove Grievant violated the remaining provisions. The social media policy provides, "Prohibited social media conduct may include, but is not limited to: posting commentary, content, or images that are defamatory, pornographic, proprietary, harassing, libelous, or that can create a hostile work environment." Grievant's online bullying campaign against Mr. Scarbro was certainly defamatory as it was aimed to damage Mr. Scarbro's reputation. The social media policy provides, "Employees are not to publish, post or release any information that is considered confidential or non-public. If there are questions about what is considered confidential or non-public, employees should check with the Human Resources Department and/or his or her immediate supervisor" and "Subject to applicable law, no employee shall publish content after-hours that involves work or subjects associated with Authority business, or that discloses or displays any non-public or work-related material." Grievant's posts about the inmate's attack on Mr. Scarbro were non-public information. His request for "advice" in which he talks about covering up and keeping secret Grievant's supposed bad behavior at work certainly involved work. The social media policy provides, "If employees find or encounter a situation while using social media that threatens to become antagonistic, employees should disengage from the dialogue in a polite manner and seek the advice of a supervisor." Even after being specifically counselled by Mr.

Francis to stop his Facebook content regarding Mr. Scarbro, upon deciding that Mr. Scarbro had posted something that "demeans" Grievant, Grievant embarked on an elaborate campaign to bully and ridicule Mr. Scarbro. The social media policy provides, "Employees should get appropriate permission before you refer to or post images of current or former employees…" Grievant posted a screenshot of Mr. Scarbro without his permission.

Grievant asserts in his PFFCL that he was not trained on the policies and that the social media policy does not contemplate discipline. While Respondent failed to introduce records of Grievant's training on the policies, Grievant did not assert in his predetermination that he was unaware of the social media policy and he specifically admitted his understanding of the code of conduct in the predetermination and on the counseling form of the initial counseling. As a supervisor, Grievant is responsible for ensuring subordinates' compliance with policy, so he should have been familiar with the policies. Further, even if Grievant was unaware of specific provisions of the social media policy, he had been instructed by Mr. Francis to stop the Facebook posts about Mr. Scarbro.

As to the assertion that the social media policy does not contemplate discipline, Grievant argues that only three subsections of the policy discuss discipline and those sections do not apply to Grievant. An employer obviously has the right to expect employees to follow policy and to discipline them for failure to do so even if the policy does not specifically state that discipline will be issued for violation of the policy. Grievant argues that discipline can be issued only for after-hours online activity that is illegal. It is more likely than not that "subject to applicable law" as stated in the policy does not mean

that the conduct was required to have violated a law, as Grievant asserts, but that Respondent's authority to discipline an employee for after-hours online activity is subject to applicable law that would prohibit such discipline, such as conduct that does not have a rational nexus to employment.

Respondent also asserts Grievant was insubordinate. 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)).

Contrary to the termination letter and her testimony, Ms. Darnell did not direct Grievant to remove the Facebook content. Ms. Darnell's exact words were that she "would strongly suggest" Grievant remove the content. A suggestion is not an order or direction, especially in this context where Ms. Darnell made this statement in a private Facebook message.

Likewise, Grievant was not insubordinate when he refused to answer questions during the reconvened predetermination meeting. A predetermination conference is not an investigatory tool, but is for the benefit of an employee to allow the employee to

respond to the allegations. An employee is not required to answer questions during a predetermination meeting. Further, upon determining that the meeting was a continuation of the predetermination, Grievant immediately stated that he would not answer questions without the presence of his attorney. "An employee may designate a representative who may be present at any step of the procedure as well as at any meeting that is held with the employee for the purpose of discussing or considering disciplinary action." W.VA. CODE §6C-2-3(g)(1). Despite this clear assertion of his right to have a representative present, Ms. Darnell and Mr. Binion continued to ask Grievant questions and then determined that he was insubordinate when he refused to do so. This was clearly improper.

Grievant was, however, clearly insubordinate when he failed to follow Mr. Francis' and Ms. Wilson's clear instructions to remove the Facebook content. Although Grievant stated in the predetermination conference that he had attempted to remove the posts, this denial is not credible. That Grievant deliberately failed to delete the posts is more likely than not. It is not difficult to delete a Facebook post and Grievant was obviously Facebook savvy. Further, Grievant's irate discussion with Ms. Wilson, his failure to remove the posts at her instruction, his reluctance to agree to stop posting about Mr. Scarbro in the June counseling session, and his resistance when Mr. Francis contacted him to remove the posts all point to an unwillingness to acknowledge his wrongdoing and unwillingness to comply. There is no indication Grievant did not know how to remove the content, and much indication he just did not want to remove the content.

Respondent asserts it had good cause to terminate Grievant's employment due to his role as a supervisor, the previous counseling sessions regarding social media,

Grievant's untruthful responses in the predetermination meeting, and Grievant's insubordination. Grievant argues that Respondent failed to follow required progressive discipline.

"As a supervisor, Grievant may be held to a higher standard of conduct, because he [she] is properly expected to set an example for employees under his [her] supervision, and to enforce the employer's proper rules and regulations, as well as implement the directives of his [her] supervisors." *Wiley v. W. Va. Div. of Natural Resources, Parks and Recreation*, Docket No. 96-DNR-515 (Mar. 26, 1998) (citing *Hunt v. W. Va. Bureau of Emp't Programs,* Docket No. 97-BEP-412 (Dec. 31, 1997)); *Linger v. Dep't of Health & Human Res.*, Docket No. 2010-1490-CONS (Dec. 5. 2012).

Grievant asserts Respondent was required to follow progressive discipline, so termination was not inappropriate as Grievant had only been counselled previously. Respondent's relevant policy, Policy and Procedure Statement # 3008, does not require progressive discipline. It states, "[A]ny Authority employee may be dismissed, suspended, demoted, or reprimanded in varying degrees for misconduct, dependent upon the seriousness of the infraction, the status of the employee as probationary or permanent, the disciplinary history of the employee, and any other relevant or pertinent information." Grievant entered into evidence the "Supervisor's Guide to Progressive Corrective and Disciplinary Action." This document is not a rule or policy. Further, even it does not require progressive discipline, but only explains the concept and use. Regarding dismissal, it specifically states that dismissal may be issued when behavior continues after the employee has adequate opportunity to correct the behavior or when

the offense is severe. Respondent was not required to follow progressive discipline in this case.

It is particularly problematic when a supervisor is insubordinate and dishonest about his own misconduct. As Mr. Francis testified, a supervisory correctional officer occupies a crucial position and a supervisor who cannot be trusted creates a serious safety issue. Further, Grievant's actions as a supervisor in ridiculing a former correctional officer, in which he encouraged many correctional officers of lower rank to participate, fosters an environment where bullying is encouraged and rewarded in direct violation of Respondent's policies. Grievant violated multiple policies, was insubordinate, and was dishonest and belligerent when confronted about his misconduct. Respondent had good cause to dismiss Grievant.

In order to dismiss a [public] employee for acts performed at a time and place separate from employment, the [employer] must demonstrate a "rational nexus" between the conduct performed outside of the job and the duties the employee is to perform. Syl. Pt. 2, *Golden v. Bd. of Educ*., 169 W. Va. 63, 285 S.E.2d 665 (1981). A rational nexus may be shown "(1) if the conduct directly affects the performance of the occupational responsibilities of the [employee]; or (2) if, without contribution on the part of the [employer], the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the particular [employee] to discharge the responsibilities of the [employee's] position." 169 W. Va. at 69, 285 S.E.2d at 669. (Citation omitted). "[I]f a State employee's activities outside the job reflect upon his ability to perform the job or impair the efficient operation of the employing authority and bear a substantial relationship to the effective performance of the employee's duties, disciplinary

action is justified. . .” *Thurmond v. Steele*, 159 W.Va. 630 at 634, 225 S.E.2d 210 at 212 (1976).

Grievant’s online conduct clearly reflects upon his ability to perform his job as a supervisor. He publicly ridiculed a situation in which a correctional officer had been assaulted by an inmate, naming the inmate. He publicly asked for advice including information about his dealings as a mentoring officer with Mr. Scarbro. In the same communication, he admitted to taking the blame for or covering up alleged work misconduct by Mr. Scarbro. He included twenty-two other correctional officers, all but three subordinate to him, in his violations of policy. Respondent has proved there was a rational nexus for his social media misconduct.

Grievant also alleges his due process rights were violated when he was denied the opportunity to have counsel present during the second or continuing predetermination conference. “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 constitutional guarantee of procedural due process requires "'some kind of hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 [84 L. Ed. 2d 494, 105 S. Ct. 1487] (1985).” Syl. Pt. 3, *Fraley v. Civil Service Commission*, 177 W.Va. 729, 356 S.E.2d 483 (1987). “The pretermination hearing does not need to be elaborate or constitute a full evidentiary hearing. The essential due process requirements, notice

and an opportunity to respond, are met if the tenured civil service employee is given "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story" prior to termination." *Id. at 732,* 356 S.E.2d at 486. In addition to the right to some kind of hearing prior to termination, grievants also have the right to representation in disciplinary meetings, as was discussed above. Grievant did not request representation until after the predetermination conference was reconvened. At that time, Grievant had already been afforded the protections of due process. He had been given notice of the charges, presented the evidence against him, and given an opportunity to respond. Grievant fully responded to the charges, and his responses were dishonest. The meeting was simply reconvened to confirm the evidence of Grievant's dishonesty through the badge numbers named in certain posts. The reconvened meeting was unnecessary. While it was a violation of the statute for Ms. Darnell and Mr. Binion to continue to ask Grievant questions after he had asserted his right to representation there was no violation of Grievant's due process, and the violation of statute was cured by disallowing the charge of insubordination resulting from Grievant's refusal to answer questions. The violation of the statute had no impact on the charges discussed in the first predetermination meeting.

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

allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995). *See Martin v. W. Va. State Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994). *See Austin v. Kanawha County Bd. of Educ*., Docket No. 97-20-089 (May 5, 1997).

Grievant argues that the discipline was disproportionate and that Grievant had not received training on the policies. Grievant did not prove that the discipline was disproportionate. The seriousness of Grievant's misconduct was elevated by his status as a supervisor. It is particularly improper for a supervisor to willfully disregard the code of conduct and the administrator's instructions and the seriousness was further elevated when Grievant chose to lie about his conduct in the predetermination conference and then become irate and belligerent when confronted with the lie. As multiple witnesses testified, they would have expected Grievant to be suspended for the original misconduct, and he may well have only been suspended if he had not chosen to lie and act unprofessionally in the predetermination conference. Grievant did not prove that

Grievant's discipline was disproportionate to discipline issued for similar misconduct. Grievant had specifically been counseled regarding social media use, had been specifically instructed by Mr. Francis to stop the online feud with Mr. Scarbro, was the creator of the content, failed to remove the content when instructed to do so by Mr. Francis and Ms. Wilson, and then lied about the conduct in his predetermination conference. Although the other officers that had made comments on the posts received, at most, a written warning, all but three of those officers were of lower rank than Grievant. Thus, they are not similar. Of the three officers of the same rank as Grievant, two had made comments and one had not participated, but had failed to report the conduct. Grievant provided no evidence that this conduct was as serious as the numerous posts and comments Grievant made, or that these employees had been previously counseled, were insubordinate, or lied about their comments. As to Grievant's contention that he hadn't been trained on the policies, Grievant admitted both in his counseling and in the predetermination meeting that he understood the code of conduct. While Respondent did not provide specific evidence of Grievant's training on the social media policy, Grievant was a supervisor who was responsible for enforcing policy with his subordinates. As a supervisor, Grievant was expected to read and know the policy. Further, even if the social media policy violations were thrown out, the rest of Grievant's misconduct would be enough to justify his dismissal from employment. Grievant did not prove that mitigation was warranted in this case.

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. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin*., 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* W. VA. CODE ST. R. § 143-1-12.02 and 12.03 (2012).

3. 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)).

4. Respondent proved Grievant was insubordinate when he refused to remove the social media content despite the clear direction of the facility administrator.

5. "As a supervisor, Grievant may be held to a higher standard of conduct, because he [she] is properly expected to set an example for employees under his [her] supervision, and to enforce the employer's proper rules and regulations, as well as implement the directives of his [her] supervisors." *Wiley v. W. Va. Div. of Natural Resources, Parks and Recreation*, Docket No. 96-DNR-515 (Mar. 26, 1998) (citing *Hunt v. W. Va. Bureau of Emp't Programs,* Docket No. 97-BEP-412 (Dec. 31, 1997)); *Linger v. Dep't of Health & Human Res.*, Docket No. 2010-1490-CONS (Dec. 5. 2012).

6. Respondent proved it had good cause to dismiss Grievant from employment when, as a supervisor, he violated multiple policies, was insubordinate, and was dishonest and belligerent when confronted about his misconduct.

7. In order to dismiss a [public] employee for acts performed at a time and place separate from employment, the [employer] must demonstrate a "rational nexus" between the conduct performed outside of the job and the duties the employee is to perform. Syl. Pt. 2, *Golden v. Bd. of Educ*., 169 W. Va. 63, 285 S.E.2d 665 (1981). A rational nexus may be shown "(1) if the conduct directly affects the performance of the occupational responsibilities of the [employee]; or (2) if, without contribution on the part of the [employer], the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the particular [employee] to discharge the

responsibilities of the [employee's] position." 169 W. Va. at 69, 285 S.E.2d at 669. (Citation omitted). "[I]f a State employee's activities outside the job reflect upon his ability to perform the job or impair the efficient operation of the employing authority and bear a substantial relationship to the effective performance of the employee's duties, disciplinary action is justified. . ." *Thurmond v. Steele*, 159 W.Va. 630 at 634, 225 S.E.2d 210 at 212 (1976).

8. Respondent proved there was a rational nexus between Grievant's employment and his social media conduct.

9. "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 constitutional guarantee of procedural due process requires "'some kind of hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 [84 L. Ed. 2d 494, 105 S. Ct. 1487] (1985)." Syl. Pt. 3, *Fraley v. Civil Service Commission*, 177 W.Va. 729, 356 S.E.2d 483 (1987). "The pretermination hearing does not need to be elaborate or constitute a full evidentiary hearing. The essential due process requirements, notice and an opportunity to respond, are met if the tenured civil service employee is given "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story" prior to termination." *Id. at 732,* 356 S.E.2d at 486.

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

11. "Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996). An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995). *See Martin v. W. Va. State Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994). *See Austin v. Kanawha County Bd. of Educ*., Docket No. 97-20-089 (May 5, 1997).

12. Grievant failed to prove mitigation of the punishment was warranted in this case.

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: September 15, 2017

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Billie Thacker Catlett
Chief Administrative Law Judge