

# **WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**JOHN B. THACKSTON,  
Grievant,**

**v.**

**Docket No. 2016-1068-CU**

**CONCORD UNIVERSITY,  
Respondent.**

## **DECISION**

John B. Thackston, Grievant, filed a grievance against his former employer Concord University ("Concord"), Respondent, protesting his termination for alleged "gross and persistent insubordination and regular and intentional obstruction and/or disruption of University operations." The expedited grievance was filed on December 30, 2015.<sup>1</sup> Attached to the standard grievance form was a two page event statement with exhibits, providing Grievant's objection to Respondent's suspension and pending dismissal action. Grievant enumerates a number of specific relief requests, including but not limited to, reinstatement to his former position, restoration of seniority, return of office facilities, recovery of lost earnings and benefits, a letter of apology, a variety of declaratory directives and recovery of litigation expense.<sup>2</sup>

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<sup>1</sup> W. VA. CODE § 6C-2-4(a)(4), authorizes a grievance to be filed directly to level three of the grievance process when the grievant has been discharged, suspended without pay or demoted or reclassified resulting in a loss of compensation.

<sup>2</sup> W. VA. CODE § 6C-2-6 (2009) is entitled, 'Allocation of expenses and attorney's fees.' It specifically states: "(a) Any expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expense." "It is well established that the Grievance Board does not have the authority to award attorney fees. *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June 21, 1996); *Cosner v. Dep't of Transp.*, Docket No. 2008-0633-DOT (Dec. 23, 2008) also see *Long v. Kanawha County Bd. of Educ.*, Docket No. 00-20-308 (Mar. 29, 2001). Further, this Grievance Board does not award tort-like or punitive damages.

Level three hearing proceedings were held before the undersigned Administrative Law Judge on March 4, 2016, June 10, 2016, June 13, 2016, and September 13, 2016, at the Grievance Board's Beckley facilities. Grievant appeared in person and with legal counsel Michael F. Gibson. Respondent was present in the form of Human Resources Director Dan Fitzpatrick and its Deputy General Counsel Candace Kraus. There were four days of hearing. At the September 13, 2016 hearing, counsel for Grievant verbally indicated that there was an alteration in Grievant's relief request.<sup>3</sup> Parties were provided the opportunity to present written Proposed Findings of Fact and Conclusions of Law documents. Both parties submitted PFOF/COL submissions and this matter became mature for decision on or about October 3, 2016, on receipt of the last of these proposals.

### **Synopsis**

Grievant was employed by Concord University as an Admissions Counselor. Grievant was terminated from his position for persistent insubordination, regular and intentional obstruction and/or disruption of University operations. The scope of Grievant's employment is of dispute; nevertheless, defying the reasonable orders of his superiors, and engaging in prohibited activities is actionable conduct.

Respondent informed Grievant that his behavior was unacceptable and that failure to modify it would be interpreted as insubordination and subject him to disciplinary action

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<sup>3</sup> Grievant reiterated his alteration in relief requested by verbal testimony on September 13, 2016. Problematically, Grievant has specified several relief items that are not readily available via the Public Employees Grievance Board. This agency does not provide tort damages. It is debatable whether the relief now requested by Grievant is available by the Board. Grievant has specifically indicated he does not want his job back.

including termination. Respondent communicated reasonable expectations and Grievant was aware of Respondent's expectations. Respondent established grounds for disciplinary action. Grievant repeatedly circumvented and disrupted the anticipated operations of Respondent. Respondent choose to terminate Grievant's employment, considering the totality of the circumstances, termination was not necessarily excessive and mitigation of the disciplinary action taken is not required. This grievance is DENIED.

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

### **Findings of Fact**

1. John B. Thackston, Grievant, was employed by Concord University as an Admissions Counselor. Grievant commenced working at Concord at the Beckley center in June 2007.

2. Grievant is an older gentleman, who resides in Beckley, West Virginia. His collegiate background includes a bachelor's degree with a double major in history and political science and a law degree from West Virginia University. His private sector job experience includes executive positions in management and human resources. For approximately the past eight and half years, he has been employed by Concord University (June 2007- December 2015).

3. A Position Information Questionnaire ("PIQ") dated and signed by Grievant on 2/21/14, states: "*The Admissions Counselor will recruit potential students and assist*

*them and their family in the areas of admissions, financial aid, scholarship and registration.”*<sup>4</sup> Respondent’s Exhibit (R Ex) 61.

4. A Position Information Questionnaire (PIQ) – is a primary data collection instrument designed to gather information about the specifics and characteristics of a single position. A PIQ provides information akin to a job description, but it is not the official position description statement. An identified list/description of duties provided by, or in, a PIQ does not denote that the duties listed are the only duties to be performed by the position.

5. Grievant’s 2014 PIQ provides that Grievant’s Admissions Counselor’s Duties and Responsibilities include and are recognized as:<sup>5</sup>

*Travel within an assigned geographic territory . . . for the primary purpose of the recruitment of freshmen, transfers, readmits and non-traditional students. Duties will involve the collection of contact and academic information, disbursement of recruitment material as well as establishing a dialogue with and answering potential student’s questions concerning the transfer and readmit process. Information to be disbursed will include but not limited to admission requirements and procedures, financial aid, scholarships, campus visitations, student services for special needs, housing requirements and procedures, educational programs, campus events, registration process and arrange for contact with faculty and staff as needed”. . . . other duties as assigned by the Director of Admissions . . . . Recommend changes to the Director for Enrollment that will maintain Concord University in a competitive position including taking advantage of new opportunities that present themselves, and/or making adjustments in the application of limited recruiting resources to improve effectively and efficiency.*

R Ex 61

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<sup>4</sup> The prescribed job duties and the scope of Grievant’s position is of concern in this matter and may be a lynchpin issue. An official job summary or explicit higher education job description of an Admissions Counselor’s job duties at Concord University was NOT made a part of the level three record.

<sup>5</sup> This finding of fact (FOF) is not envisioned or intended to be an all-inclusive or exclusive list of Grievant’s job duties.

6. A Position Information Questionnaire (PIQ) is not necessarily synonymous with an official position statement. While both documents will provide information pertaining to function and duties of a particular position, the two documents are not necessarily synonymous or interchangeable items. One is generally filled out by the individual occupying the position while the other is normally drafted by the employer providing a job description and in some ways identifying those functions that the employer believes to be important in accomplishing the purpose of the job.

7. During the course of Grievant's years of employment with Concord University, he had three job performance evaluations. Pursuant to testimony by Dan Fitzpatrick, Human Resources Director at Concord University, Grievant's work was rated "outstanding" on all three evaluations. The evaluations were not entered into evidence.

8. The date of Grievant's job performance evaluations was not clarified.

9. Jacqueline Nottingham, then Chief Enrollment Management Officer, Concord University (Grievant's supervisor), in a June 7, 2013 e-mail (R Ex 54) to Grievant clearly reiterated some information that was verbally conversed with Grievant, in relevant part:

You are a caring and passionate person who solely acts to serve each student you come in to contact with. Without fail, you want to make sure they are guided through the process and are taken care of. I understand that you've played many different roles at CU and that there may be times in which you've received mixed messages in regard to what you can/can't or should/shouldn't do as you interact with prospective students, applicants, and admitted students. R Ex 54

10. Further, in the June 7, 2013 e-mail to Grievant, Ms. Nottingham specifically instructed Grievant to work within the confines of the Admissions Counselor role:

Our role is NOT that of an academic advisor. The responsibility of academic advising, scheduling, transfer course approval, and course registration is handled (ideally) by the Dean's office and the individual academic divisions, faculty, and departments. It is vital that each student participates in a systematic process of being advised and provided with other supportive information toward their future enrollment and CU (Advisor assignments, My CU and Blackboard computer tour, Picture ID, Offices and Campus tour).

I want you to understand the difference between these roles and, moving forward, act solely as an admissions counselor.

R Ex 54

11. There were specific actions that Grievant was instructed/informed and/or warned not to participate; ***Please do not attempt to build tentative schedules for students, nor get them registered for courses – here or at the Beckley campus.***”

(emphasis added) Further, in recognition of Grievant's opposition, Grievant was provided direction, “If you feel that students are not being served, you have discovered an error, or you have other concerns, speak directly with Kent or myself and we will then share that feedback with the appropriate personnel”. R Ex 54

12. Respondent was displeased with several aspects of Grievant's attitude and conduct. Respondent communicated with Grievant attempting to harness Grievant's zealous behavior and more efficiently direct his actions. Grievant's methods of aiding and assisting students were not always pursuant to the procedure(s) sanctioned by his supervisors.

13. Respondent communicated with Grievant on numerous occasions, both verbally and in writing, regarding his activities with regard to student advising, scheduling,

registration, and transfer course evaluation. An illustrative example transpired in August 2014.

14. There was an in-person meeting with Grievant on August 7, 2014. Respondent indicated several adjustments they would like to see with regard to Grievant's conduct and suggested specific courses of action.

15. Grievant questioned whether the meeting was or was not a non-disciplinary meeting. Grievant wrote; "Just to set the record straight – a skunk by any other name is still a skunk. I do not- in the normal course of events, require an 'understanding' with the Director of Human Resources for any reason other than disciplinary."

16. In response to the August 7, 2014 meeting, Grievant supplied Chief Enrollment Manager, Jacqueline Nottingham with a four-page written memorandum (R Ex 51) detailing his opinion and intended course of action. Grievant cc'd Human Resources Director Dan Fitzpatrick and Kent Gamble, Director of Admissions.

17. Among his various responses to issues in discussion, within the August 8, 2014 memorandum, Grievant provided:

"Yesterday was – to put it mildly, a significant learning experience and not that I learned anything new but that I was able to affirm what I already suspected and/or had strong evidence of. I do not apologize for my vocal response to the charges placed against me yesterday. I am passionate about addressing the educational needs of the people in West Virginia and the part I am qualified to play in meeting that need [.] Yesterday constituted an open attack on my integrity, my ethical standards, my intelligence, and my contribution to Concord University and – most importantly, to the potential students we are committed to serve. I was and I remain angry at the patronizing reference to the contrary made as a prelude to a meeting which had no other purpose than to publicly put me on notice – as a defense for intended future action, to muffle me or remove me from the scene."

....

“I am vocal and I am well informed. These are two major handicaps when operating in higher education. Add to these weaknesses an aversion and lack of sensitivity to the political realities of the environment and I immediately become a runaway freight train that requires derailment. Consider your job well done. I have one other talent and that is knowing how to cover my tail.”

R Ex 51

18. Grievant, from time to time, would advise potential or prospective students to not pay or delay the payment of a \$25 application processing fee to Concord University.

19. Among other items, Grievant was advised to cease advising individuals to “not” pay their application fee.

20. Grievant voiced his opposition and opinion to the request; nevertheless, he stated he understood and would comply.

21. Grievant was informed his action was unacceptable with regard to advising students to not pay or delay payment of application fees. The application process was separate and apart from the advising and registration process. Grievant was not to complicate the process and create discord.

22. An August 18, 2014 letter, (R Ex 48) to Grievant from Kent Gamble, Director of Enrollment, provided Grievant with follow-up information about Respondent’s expectations regarding Grievant’s conduct. In relevant part:

Your letter of August 8 to Ms. Jacqueline Nottingham has been received and reviewed carefully to affirm your understanding of the expectations set out for you in a meeting of August 7, 2014. As your direct supervisor, I have been asked to respond.

Your views regarding the application fee are well known as is your persisting resistance for implementing the fee with the applications you serve.

. . .

John, you are an experienced admissions counselor with a clear defined role and duties and are expected to work within those parameters. You are again cautioned about inserting yourself into processes outside your scope of work that disrupts



the efficient and effective operation of the university such as student advising, counselling post admission, etc. You have indicated that you have ceased such activity and have not practiced beyond your scope of work for some months. Hopefully, expectations are clear in this regard and you will no longer interfere with nor disrupt operations, increase rework, or require service recovery.

**Your displeasure with the direct and sincere communication at the meeting on Thursday is noted. However, regardless of your perceptions, the intent of the meeting was to help you and the university[.]** (Emphasis added).

R Ex 48

23. Grievant was aware of Respondent's desire for him to alter various aspects of his conduct. Identified issues of discord included disruption of University Operations, duplication of duties, student advising and the tone of his communication with others (internal & external).

24. Not all of Grievant's actions are necessarily intended as troublesome, but more than not he had strong opinions that his way got results and the agency's approach was tentative direction. Grievant marched to a higher calling.

25. Grievant voiced his opposition and opinion to assorted requests; nevertheless, he indicated he would comply.

26. In September 2014, Grievant sent an interoffice memo to Sarah Wambe, Director of Admissions, questioning limitations placed on his use of Concord promotional materials he wanted printed to take on the road with him for prospective students and high school counselors. R Ex 13

27. Grievant had preferred documents and methods of reaching an identified group of potential students. Responsible agents of Respondent had determined a more uniformed approach would be utilized.

28. On September 17, 2014, Jacqueline Nottingham sent an email to Ted Collins, Print Shop Manager, advising him not to print anything for Grievant without her permission. R Ex 40

29. Grievant was advised to use the approved and standardized printed literature. Grievant was of the opinion his preferred literature and distribution method was superior to Ms. Wambe's approach.

30. Cheryl Barnes, Academic Associate Dean and Graduate Program Director of the Regent's Bachelor of Arts Programs, explained that the RBA Program was very different than the regular student program where students are expected to have 120 hours to graduate, as opposed to RBA students who are to finish within 60 hours with credit given for prior work experience.

31. Grievant had previously worked with RBA candidates and believed he could assist in enrolling additional students into the RBA program.

32. Grievant recruited and advised individuals regarding becoming candidates for the RBA program. Further, from time to time, Grievant would proceed to the point of actually registering individuals in the program without authorization.

33. Teresa Frey was the Advisor for the RBA Program and began work at Concord on October 2, 2011. Before that, she worked in the business office since 2001 dealing with the budget, student field placement, etc. Ms. Frey cited instances of Grievant's conduct overlapping with her job duties. Ms. Frey maintained that Grievant's counseling of students led her to have to correct inappropriate classes for students Grievant had improperly advised.

34. Previously, the RBA Program had been part of the associate dean's purview, but the program was then expanded by the State. It was Ms. Frey's opinion that after students applied for and were accepted into the RBA Program, no further contact with Grievant was necessary. She testified that Grievant was repeatedly called by and called students about the RBA Program, which was not his job after they were accepted, rather it was hers.

35. Ms. Frey conceded that while Grievant's advice to RBA students was occasionally wrong, his conduct did not adversely affect her job performance. She also noted that students called Grievant concerning difficulties in getting their transcripts to Concord when the student should have called her. The problem with this was it may cause up to a week in delaying the analyzing of the transcript.

36. With respect to the Master of Arts and Teaching program, of which Dr. Barnes was the graduate director, Dr. Barnes testified that Grievant tried to assist students in enrolling in these graduate classes. Specifically, he asked that some 26 students be looked at by Dr. Druggish and was asked by Grievant to help enroll these students. This allegedly resulted in a duplication of efforts.

37. Grievant's zealous behavior was not always the best option. Some of Grievant's actions fueled difficulties. It was Dr. Barnes' opinion that she had trouble with Grievant:

- a. Advising students incorrectly as to appropriate course work;
- b. Sending students to register for courses that were closed; and
- c. Assisting students in scheduling classes that were inappropriate for their academic goals, which later required rescheduling of student classes causing additional work to administrators, faculty and students.

38. Respondent was displeased with several aspects of Grievant's attitude and conduct. Items of discord included his tendency to specifically advise students or aid potential students with class scheduling. Respondent communicated with Grievant attempting to harness Grievant's zealous behavior and from Respondent's perspective more efficiently direct Grievant's actions toward appropriate duties for his job classification.

39. Grievant was informed more than once, repeatedly, that his attitude was inappropriate, dis-respectful and unacceptable. This message was conveyed both verbally and in writing.

40. In October 2014, Human Resources Director Fitzpatrick authored four "written warnings" to Grievant. (A series of four (4) written warning notices, R Ex 32, 33, 34 and 35.) These notice(s) articulated alleged infractions committed by Grievant, the perpetual nature of his misbehavior, the expected adjustments to his behavior, and the potential for consequences if his behavior did not change. In relevant part, the letter(s) stated:

The purpose of this **Notice of Written Warning** is to bring your attention to continuing and ongoing deficiencies in your performance and to advise you that continued failure to meet performance and/or behavioral expectations will result in further disciplinary action, which may include suspension without pay for one to fifteen days and/or dismissal. This is a serious situation that calls for you to take immediate corrective action. (R Ex 32, 33, 34 and 35)

On August 19-20, you interfered with the operation of the University by creating a disruption in the Academic Dean's office, Registrar's office, and The Division of Humanities office with regard to an applicant who had not been admitted to the university. **You have previously been warned and/or cautioned about interfering and causing disruptions in University operations.** (Emphasis added.)

- It is not within your role to seek to enroll a student in particular classes or a program.
- It is not your role to direct and demand the Registrar's staff enter an applicant's transcript.
- "It is not your role to serve as an advisor to students or, in the instant case, to misadvise a student regarding her eligibility to participate in the RBA ["Regents Bachelor of Arts"] nor to misrepresent the RBA as being closed."
- [I]t is not your role to walk a student to a Division office and demand that a student be registered for classes - NOW.

Each of these topics have been discussed with you in the past, yet you have continued the inappropriate behavior. Such behavior cannot and will not be tolerated and any further breaches will result in more stringent disciplinary action, which will likely include suspension and/or termination.

R Ex 32

41. The "Notice of Written Warnings" documents were chiefly drafted by Human Resources Director Fitzpatrick but for the signatures of Kent Gamble, Director of Admissions and Jacqueline Nottingham, Chief Enrollment Management Officer to Grievant. The written warnings provide specific warnings and highlighted a variety of actions and alleged attitudes demonstrated by Grievant:

Your belligerent and, by you[r] own admission, confrontational attitude are inappropriate, dis-respectful, and unacceptable. Your directive "to live with it" is not only disrespectful but also insubordinate.

You should note that any future act of disrespectful behavior on your part will result in more stringent disciplinary action, *which may include suspension and/or discharge*. Further, any subsequent act of insubordination will result in your immediate suspension without pay and/or discharge.

...[Y]our recent behavior has resulted in a number of warnings and, including this current warning, four warnings in the past three weeks. If you are to continue your employment with Concord University, then you must make immediate changes in your conduct and behavior.

No further actions of this nature will be tolerated.

R Ex 33

You are hereby warned that continued disruption will not be tolerated and will result in more stringent disciplinary action *which may include suspension and discharge*.

R Ex 34 and 35

42. Prior to October, 2014 Grievant was aware that Respondent was displeased with several aspects of his attitude and conduct.

43. Grievant was specifically aware of the October warning notices. For one reason or another an in-person meeting with Grievant, Human Resources Director Fitzpatrick and Grievant's Kent Gamble, Director of Admissions and Jacqueline Nottingham, Chief Enrollment Management Officer was not feasible. Grievant, aware of the warnings, requested that Human Resources Director Fitzpatrick provide him with the warning notices in written form. The documents were sent to Grievant by mail service. See Director Fitzpatrick L-3 testimony.

44. Grievant's former supervisor, Jacqueline Nottingham ceased her employment with Concord University in April 2015. Sarah Wambe became the Director of Admissions, and among her new duties she was Grievant supervisor.

45. Ms. Wambe experienced difficulty managing Grievant's activities and having an accurate accounting of his work schedule.

46. During October and November of 2015, Sarah Wambe who had been the Director of Admissions since March of 2015, reported Grievant to HR Director Fitzpatrick and Dr. Charles Becker complaining that Grievant was:

- a. Not using a "shared calendar" with his supervisor and other admission counselors, which lead to confusion. She cited an example where he went on a trip to Ohio to recruit students and found that he made a mistake and went a day too early;
- b. Had problems with attendance in that his hours were 8:00 a.m. to 4:00 p.m.;

and

c. Guilty of alleged rude behavior and “snarky” comments.

Ms. Wambe, Grievant’s then supervisor, also criticized Grievant for putting Concord promotional materials in the West Virginia Tourist Information Center in Princeton, West Virginia.

47. Dr. Stephen Rowe, began teaching at Concord as a Professor of English from 1998-2006. From 2006-2008, he was the Interim Dean of the English Department. From 2009 until his retirement in 2015, he returned to employment as a Professor of English. Dr. Rowe worked with Grievant in 2006-2007 on a “dual credit” program, which involved giving college credits to high school students with the intentions of attending Concord. Dr. Rowe asked Grievant to assist in formulating guidelines for the program and recruitment of students. Dr. Rowe testified there was a lack of support for their academic efforts from the administration. During this collaboration, Grievant did an excellent job and had no problems, including following his directions.

48. Vice-President of Business and Finance, Charles Becker, with eight years’ experience at Concord, testified he was in somewhat of a supervisory role over Grievant, in that the then president of Concord had asked him to fill in for the Admissions Counselor Supervisor for one month in November and December of 2015. Mr. Becker was present for discussions concerning Grievant with other Concord administration and was involved in the decision to terminate Grievant.

49. Grievant told some students not to pay or delay payment of a nonrefundable \$25 application fee. Grievant admitted doing this in the case of some students.

50. Grievant was informed (warned) on numerous occasions, both verbally and in writing, that he should not engage in student advising, scheduling, registration, and transfer course evaluation. (R Ex 2, 30, 32, 33, 34, 35 & 48)

51. Grievant would, from time to time, accompany students to the Registers Office and/or personally arrange the delivery of transcript documents.

52. Grievant was aware that Respondent wanted Grievant to curtail/stop his hands-on approach to assisting and/or literally accompanying students with scheduling, and registration.

53. Concord University Policy, Number 49, Disciplinary Action, 5.2., provides in pertinent part:

- 5.1.4.1 An employee may be dismissed under the following conditions:
  - Non-improvement in work performance after proper training and/or discipline by use of oral or written counseling;
  - Gross violations for which the employee has recently been suspended; and/or
  - An offense addressed in Section 5.2.

- 5.2 Some infractions may warrant immediate suspension or dismissal, such as . . .
  - (b) Gross insubordination, including willful and flagrant disregard of a legitimate order; [and]

. . .

- (g) Regular, intentional, unauthorized obstruction or disruption of teaching, research, or administration[.]

G Ex 9

54. The Staff Handbook of Concord University describes a variety of infractions for which an employee may be immediately dismissed. Identified as specifically relevant to the instant matter include: "*Gross insubordination, including willful and flagrant*



*disregard of a legitimate order” and “Regular, intentional, unauthorized obstruction or disruption of teaching, research, or administration.” G Ex 9 (b) and (g)*

55. Grievant was notified pursuant to a December 14, 2015, correspondence that he was suspended for five working days and it was being recommended that his employment be terminated for “gross and persistent insubordination and regular and intentional obstruction and/or disruption of University operations.” R Ex 2 The December 14, 2015, letter was drafted by Human Resources Director Fitzpatrick for the signature of Charles Becker, Vice President Business and Finance. Grievant denies he is guilty of these allegations.

56. Prior to Grievant’s formal dismissal from employment, there was a predetermination conference scheduled, on December 16, 2015. HR Director Fitzpatrick, Vice President Becker and Grievant met.

57. Respondent’s Human Resources Director Dan Fitzpatrick was ready, willing and prepared to discuss the rationale for the recommendation to terminate Grievant’s employment. R Ex 62

58. Grievant departed the meeting prior to its natural conclusion. Grievant was provided an opportunity to discuss the reasons for the disciplinary action(s) being considered.

59. By correspondence dated December 17, 2015, Grievant was notified that his five-day suspension was converted to discharge for gross and persistent insubordination, regular and intentional obstruction and/or disruption of University operations.

60. Grievant protests his termination.

### **Discussion**

There is much debate and dispute present in the fact pattern of this matter regarding whether Grievant committed gross and persistent insubordination by knowingly and willfully defying the direct orders of his superiors, including among other actions printing certain prohibited materials, and by habitually communicating with others in a rude, confrontational, disrespectful and unprofessional manner. As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges against Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Respondent alleges and vehemently argues that Grievant regularly and intentionally obstructed and/or disrupted operations to the detriment of the University and individual students by persistently working outside his role as Admissions Counselor not

following clear and direct orders. Respondent avers that Grievant's employment was terminated after less severe disciplinary action failed to improve his conduct. Grievant maintains that his conduct was not beyond the scope of his job classification and he was operating within what should be the accepted as acknowledged confines of his job. Grievant argues he was initially left to his own devices (*carte blanche*) as to how he would manage the recruitment process, including the development of procedures, relations with community colleges, recruitment schedules, recruiting materials, etc. Respondent avers that despite receiving repeated warnings that his behavior was unacceptable and needed to change, Grievant refused to follow the reasonable orders of his superiors and conform his behavior to appropriate and acceptable standards. Respondent highlights that Grievant's employment was terminated after less severe disciplinary action failed to improve his conduct. The general purpose of Grievant's job may be a debated issue between the parties, but it is specifically recognized that an employer is empowered to reasonably dictate and/or alter an employee's work related conduct.

## **I. Due Process**

The West Virginia Supreme Court of Appeals has recognized that "due process is a flexible concept, and that the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) (*citing Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)). "What is required to meet procedural due process under the Fourteenth Amendment is controlled by the circumstances of each case." *Barker v. Hardway*, 238 F.

Supplement 228 (W. Va. 1968); See *Buskirk, supra*; *Edwards v. Berkeley County Bd. of Educ.*, Docket No. 89-02-234 (Nov. 28, 1989).

"An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and an opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494, (1985), citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). See also West Virginia Supreme Court of Appeals case *Board of Education of the County of Mercer v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994). Within the circumstances of this case, Grievant seems to question whether the due process protections afforded him were sufficient.

It has previously been held that a full-blown hearing is generally not required before an employee may be terminated, but that employee has the minimum pre-deprivation right to at least have an opportunity to respond to the charges either orally or in writing. *Loudermill*, 470 U.S. at 542. An employee is also entitled to written notice of the charges and an explanation of the evidence. *Wirt, supra*. In other words, notice of the charges, explanation of the evidence, and an opportunity to respond is the due process that Respondent is required to provide. *Id.* at Syl. Pt. 3.

Grievant protests the termination of his employment with Respondent as an Admissions Counselor. The contention that Grievant was denied due process is without merit in the fact pattern of this case. Grievant was informed, verbally and in written format, of the allegations against him. Prior to Grievant's formal dismissal from employment there was a predetermination conference scheduled. Human Resources

Director Fitzpatrick, Vice President Becker and Grievant met on December 16, 2015. HR Director Fitzpatrick was ready, willing and prepared to discuss the rationale for the recommendation to terminate Grievant's employment. (R Ex 62) Grievant prematurely ended the meeting. Grievant was provided an opportunity to discuss the reasons for the disciplinary action(s) being considered. He choose to depart the predetermination meeting prior to its natural conclusion. This does not constitute denial of due process by Respondent. Subsequently, by correspondence dated December 17, 2015, Grievant was notified that his five-day suspension was converted to discharge for gross and persistent insubordination, regular and intentional obstruction and/or disruption of University operations. Grievant was not unlawfully deprived of due process.

## **II. CREDIBILITY**

It is deemed prudent to address the reliability and due weight that is most readily applicable to the witnesses, who testified and provided information during the course of this grievance. Certain "information/facts/events" surrounding the events which lead to Grievant's termination were the subject of conflicting testimony. Respondent's presentation of information was at times less than direct and clear. Convolved information is problematic. Both Grievant and Respondent tend to have strong views, balanced and imbalanced of past deeds, information, motivating factors and justification for actions [activities]. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Resources*,

Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). See *Harper v. Dep't of the Navy*, 33 M.S.P.R. 490 (1987). See also *Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See *Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1994).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. See *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

The record includes both credible and dubious testimony.<sup>6</sup> Respondent's witnesses, including Human Resources Director Dan Fitzpatrick, Vice President for Business and Finance Charles Becker, RBA Program Director Cheryl Barnes, RBA Program Advisor Teresa Frey, Director of Admissions Sarah Wambe, and numerous

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<sup>6</sup> Information and opinion presented by certain witnesses was presented freely with limited foundation. Some testimony is more readily verified through support documentation, or collaborating facts, than others. Uncertainty of minor items are irritating but mitigatable; further, the timeline for a concept or two is convoluted. In recognition that Respondent bears the burden in this disciplinary matter such was resolved more times than not in favor of Grievant.

documentation. Information and opinion presented by some witnesses was presented without sound foundation or supporting data evidence. Such testimony is discounted and less credible than verifiable and fact certain testimony. It is determined prudent to discuss the weight given various aspects of witness testimony and documents in this record. Grievant disputes that his conduct was outside of the scope of his employment and/or insubordinate. Grievant testified on his own behalf regarding facts, alternative interpretations, misunderstandings, his opinions, his beliefs, and Respondent's procedures. In assessing the trustworthiness of the information provided by Grievant, and various administrative personnel, the undersigned was mindful of the potential for bias, and the possibility of agency interest, while considering the consistency of statements and the plausibility of the witness's information. The undersigned Administrative Law Judge found it prudent to use the factors cited in the prior paragraph to assess witnesses' testimony and to determine the appropriate weight various testimony warranted to establish or disprove a contested fact.

Director of Admissions Sarah Wambe presented in a refreshing manner. Ms. Wambe is both a former co-worker and supervisor of Grievant's. Unlike some other witnesses, she did not attempt to provide information beyond her personal interactions. Further, she also candidly admitted the good, bad and indifferent information. The manner in which Director Wambe testified fostered a sense of trustworthiness. She presented facts, information and her opinion in a credible manner. Conversely, RBA Program Director Cheryl Barnes expressed her opinion and commented on facts well beyond her direct knowledge. She conveyed layered hearsay, repeatedly, as if she was

directly privy to specific verbal interactions between Grievant and prospective students. This undermines the weight this ALJ will accredit to some opinions/information Ms. Barnes addressed as she testified.<sup>7</sup>

Director of Admissions Sarah Wambe testified of specific events, which she had direct and relevant knowledge. Ms. Wambe provided first hand experiences and interactions with Grievant for consideration. In a position of supervision, Ms. Wambe communicated limits to Grievant's printing authorization, she did this verbally and in written form. Grievant disputes the applicable time frame of this restriction. Ms. Wambe presented in a persuasive and credible manner how and why she found it difficult to manage Grievant's work activities. She provided examples as to why Grievant's conduct created turmoil and discontent in the office (scheduling/office hours., approved brochures distribution and Grievant's demeanor). Grievant and his direct supervisor, Ms. Wambe, did not agree on the best practices method to recruit students. This created a contentious atmosphere between the two parties. It was not established that Grievant knowingly conspired to print documents in direct violation of Ms. Wambe's directions. There is some gray area, not as much as Grievant would have one believe, but some ambiguity does exist. Grievant's version of events is not found to be credible, in that he indicates verbal acquiesce was obtained (Wambe disputes). There is however less than

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<sup>7</sup> RBA Program Director Cheryl Barnes had an opinion regarding Grievant's conduct, but frequently the foundation for this opinion was not sufficiently established. Director Barnes subscribes to a very narrow construction of Grievant's duties. She attempted and many times did expound information regarding an issue she was only marginally involved. Ms. Barnes was protective of her department's designated duties. Director Barnes' direct knowledge of Grievant's PIQ (full scope of duties) is limited, if not non-existent; nevertheless, she was opposed to Grievant's hands on approach of assisting students registering for classes.



conclusive evidence that Grievant's print requests were truly after clear prohibitive direction. It is possible that one or more of Grievant's print requests were prior to the instructions to not have additional documents printed, but Respondent did not become aware of the print jobs until after the edict to distribute only standardized publications material had gone into effect. During October and November of 2015, Sarah Wambe who had been the Director of Admissions since March of 2015, reported Grievant's behavior as being disruptive, unnecessarily rebelliousness and disrespectful. This credible and reliable testimony identifies one or more of the final straws which prompted further disciplinary action by Respondent. Respondent is of the opinion that while Grievant may be passionate about his work, his actions repeatedly lead to confusion for students, duplication of agency efforts and disruption within the organization. Director Wambe's testimony is credible.

RBA Program Advisor Teresa Frey testified she did not believe that Grievant intentionally mislead students, but Grievant did in fact cause complications with regard to the enrollment of students. This point was a consistent theme echoed throughout the hearing, by several witnesses. The testimony of all witnesses was provided direct attention and assessed with the previously identified factors in consideration. In the form of various conversations and information exchanges, Grievant was aware that Respondent was desirous of more amicable conduct on his behalf. Respondent wanted conduct from Grievant which did not duplicate efforts and an alteration in his activity which promoted a more harmonious interaction with other divisions.

Grievant seems to be a dedicated self-motivated, professional interested in the enrollment of students and positive growth of Concord University. Grievant's dedication to assisting students is honorable. Grievant testified at the level three hearing and his mannerisms were observed by this trier of fact throughout the due course of the litigation. There were four days of hearing, providing the undersigned Administrative Law Judge a substantial period of time to observe Grievant's demeanor. Grievant is human, he is no saint, thus there are obvious, complex and convoluted aspects in play during the relevant time period applicable to this grievance. To characterize Grievant's demeanor as primarily problematic and disruptive is too crude and one dimensional to be wholly accurate.<sup>8</sup> The undersigned is aware and notes the presence of past positive evaluation(s) for Grievant that were testified to by Human Resources Director Dan Fitzpatrick, but not made a part of the record.

Grievant's testimony is difficult to encapsulate. Grievant's demeanor demonstrated that he was aware of the issues(s) being presented and analyzed. A substantial portion of the information that Grievant put forth were alternative facts. Grievant is ethical; however, it is also evident that Grievant, if he so desired would be difficult to supervise. Grievant's direct testimony on critical issues was dubious. While not necessarily initially

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<sup>8</sup> Jacqueline Nottingham in her June 7, 2013 memo to Grievant, refers to him as a caring, compassionate person who "acts solely to serve each student with whom he comes in contact." She states that without fail, he demonstrated that he believed that the students should be guided through the process and he undertook to take care of that process. She stated that she understood he played many roles at Concord and there may have been times which he received mixed messages as to what he could or should do to interact with prospective students, applicants and admitted students. R Ex 54

evasive, Grievant's testimony was less candid than the undersigned would have preferred. A problem is Grievant's select inability to recall lynchpin information. It does damage to his credibility to deny the recollection of certain facts. Grievant was aware that Respondent wanted him to modify his actions, his testimony denying such is specifically unreliable. More specifically it is NOT credible that Grievant was directly unaware of the numerous written and verbal instructions by no less than four distinct individuals informing him of a direct or general alteration in his work activity desired or perceived as counter-productive to University interest. Example being, Grievant was aware that Sarah Wambe had risen to the position of his supervisor and was providing him with an alternative method of operation. Grievant was of the opinion that his methods were tried and true. He chose to be uncooperative with her directions and philosophy regarding best practice methodology.

Grievant's responses to several questions were calculated deflection, he is a bright educated individual. It is his ability to push the system which has also aided to create this situation. Grievant is acutely aware of various overlapping and/or interactive functions of various agency procedure(s). Grievant was motivated to assist and aid potential and registered students. To do good for others is noble. Nevertheless, Grievant cannot have it both ways, intentionally circumventing the agency's systems of operation, repeatedly. Grievant's recollection of his understanding and the facts do not always balance thus, there is a disconnect with his testimony. Resolution of these conflicts generated some unnatural maneuvering through relevant events and applicable time lines. Grievant's testimony regarding his actions also involved a stream of

narrative(s) that went outside the scope of the question, dredging up various petty slights and agreements that took place during prior administrations. Grievant's direct witnesses presented character information regarding past conduct but limited direct testimony regarding the issues in dispute.<sup>9</sup> It is recognized that Grievant is highly motivated individual, his actions with regard to assisting and aiding others can be a compelling force. Nevertheless, Grievant's testimony regarding his actions and justification for such, at crucial points, is biased and inconsistent with verifiable events certain. This undermines the reliability of the information offered. While one or two events may be a misunderstanding, overall Grievant's explanations are not reliable and/or persuasive enough to be found proper in contrast of reasonable and clear directions. Grievant while steadfast in his convictions is not always authorized to proceed in the manner he finds most constructive.

Human Resources Director Dan Fitzpatrick testified on behalf of Respondent as well as serving as the agency representative at the level three hearing. His testimony served as the opening foundation or outlined Respondent's position. HR Director Fitzpatrick presented information regarding his actions, the agency's concerns and the various manners Respondent attempted to counsel and redirect Grievant. The

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<sup>9</sup> Dr. Stephen Rowe, began teaching at Concord as a Professor of English in 1998-2006. From 2006-2008, he was the Interim Dean of the English Department. From 2009 until his retirement in 2015, he returned to employment as a Professor of English. Dr. Rowe worked with Grievant in 2006-2007 on a "dual credit" program, which involved giving college credits to high school students with the intentions of attending Concord. Dr. Rowe asked Grievant to assist in formulating guidelines for the program and recruitment of students. Dr. Rowe testified there was a lack of support for their academic efforts from the administration. During this collaboration, Grievant did an excellent job and had no problems including following his directions.

undersigned Administrative Law Judge notes that the Human Resources Director's testimony was consistent. His statements did not appear to be rehearsed or insincere. Indeed, Mr. Fitzpatrick attempted to be straightforward in responding to questions and relevant issue(s). The testimony was factually instrumental regarding some of Respondent's actions and alleged rationale for the discipline steps taken. Grievant's posturing with regard to the information provided by HR Director Fitzpatrick is counterproductive. Grievant is acutely aware of various October 2014 written warning authored by Director Fitzpatrick but choose to participate in a bit of slight of hand, semi contending he had not timely received the 2014 October written warnings. See FOF 43. The legal ramification of this gambit is not lost on this ALJ. It is specifically determined to be a finding of fact that Grievant was aware of the 2014 objections to his behavior. This being one year prior to the formal dismissal currently in dispute. The issue of notice is not a trivial manner, or a procedural game intended to cast a shadow doubt on actual knowledge with contrived fictions. Human Resources Director Dan Fitzpatrick's testimony is deemed plausible and found to be trustworthy.

### **III. MERIT**

Respondent maintains that Grievant's actions included interfering with the operations of other employees and departments by working outside his assigned role, communicating disrespectfully with others, defying the reasonable orders of his superiors, and engaging in prohibited activities. (R Ex 2, 32, 33, 34 & 35) Hearsay evidence is generally admissible in grievance procedures. Under the statutes and procedural rules regarding the grievance process, the formal rules of evidence are not applicable in

grievance proceedings, except as to the rules of privilege recognized by law. See *W. VA. CODE* § 6C-2-4(a)(3). The issue is one of weight rather than admissibility. An administrative law judge must determine what weight, if any, that is to be accorded hearsay evidence in a disciplinary proceeding. See *Weik v. Div. of Natural Resources*, Docket No. 2011-1270-DOC (Dec. 2011); *Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (March 11, 2010), *aff'd*, Kan. Co. Cir. Ct., Civil Action No. 10-AA-73 (June 9, 2011); *Warner v. Dep't of Health and Human Resources*, Docket No. 07-HHR-409 (Nov. 18, 2008); *Miller v. W. Va. Dep't of Health and Human Resources*, Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ.*, Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996).

Hearsay evidence is admissible in the grievance procedure for public employees, but there is no requirement, statutory or otherwise, that it be afforded any particular weight. See *Seddon v. W. Va. Dept. of Health*, Docket No. 90-H-115 (June 8, 1990); *Cook v. W. Va. Div. of Corrections*, Docket No. 96-CORR-037 (Oct. 31, 1997).<sup>10</sup> Endless objection to the admissibility of hearsay information, provided in good faith, at a grievance procedure is counter-productive. A more effective objection would be to challenge the

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<sup>10</sup> The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with firsthand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. *Gunnells v. Logan County Bd. of Educ.*, Docket No. 97-23-055 (1997); *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-8-115 (June 8, 1990).

reliability and question the appropriate weight such information should receive not the admissibility of the information.

The Staff Handbook of Concord University, section 5.2, describes a variety of infractions for which an employee may be immediately dismissed. Identified as relevant to the instant matter is “*Gross insubordination, including willful and flagrant disregard of a legitimate order*” and “*Regular, intentional, unauthorized obstruction or disruption of teaching, research, or administration.*” G Ex 9 (b) and (g)

At issue is Grievant’s conduct as an Admissions Counselor, it would have been beneficial to have an official job description of the duties and authorities of a Higher Education Admissions Counselor. Respondent’s posturing that nowhere in Grievant’s job duties does it state that Grievant is to “assist” in the process of admissions, enrollment, advising, scholarships or financial aid for any of these categories of students is not persuasive. The undersigned is not convinced that Grievant’s duties are specifically limited to working with “potential” students and could not reasonably include assistance to actual enrolled students.<sup>11</sup> See for 3-5, also see R Ex 61. Nonetheless, it is also specifically recognized and acknowledged that an empowered supervisor may adjust job responsibilities based upon the operational need of the unit.

Prior to October 2014 Grievant was aware that Respondent was displeased with several aspects of his attitude and conduct. Perhaps as early as June 2013, Grievant was cautioned by Jacqueline Nottingham, Chief Enrollment Management Officer, to “act

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<sup>11</sup> An identified list/description of duties provided by or in a PIQ does not denote that the duties listed are the only duties to be performed by the position.

solely as an admissions counselor”. See FOFs 9 - 11 and R Ex 54. Grievant was asked to cease helping students register for their courses, not to assist the students on the admissions’ appeal process, not to personalize his letterhead and/or memos, and not to instruct the applicants to delay payment of the \$25 application fee. Respondent avers that Grievant’s conduct, intentionally or not, was disruptive to Concord’s operations. Respondent argues that Grievant’s conduct fostered confusion for students, and undermined established procedure when he went outside his role as Admissions Counselor and improperly advised and scheduled students. R Ex 35, 54, 64 and 65

Grievant highlights the frequent change in administration and notes lack of consistent direction for some of the uncertainty and discord among divisions. Grievant avers he governed his action within the parameters of his job classification as he believed it was most beneficial to the University, students and the purpose of his position. Respondent informed Grievant that his behavior was unacceptable and that failure to modify it would be interpreted as insubordination and subject him to discipline. This is fact, certain. In the vein of progressive discipline, Respondent’s argument highlights and encompasses the warnings of prior disciplinary communications. Respondent struggles to accurately characterize the totality of Grievant’s actions, settling for “gross and persistent insubordination by knowingly and willfully defying the direct orders of his superiors,” including among other actions, “habitually communicating with others in a rude, confrontational, disrespectful and unprofessional manner.”

“The ‘term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of



standards of behavior which the employer has a right to expect of its employees.' *Gralely v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991) (citing *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985)). See *Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sept. 13, 2002).” *Jaggers-Green v. Bur. of Empl. Programs*, Docket No. 03-BEP-026 (July 30, 2004).

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. An employee's job is to perform the duties of his position, not to convert his job into a continuing confrontation with management. *Casto v. W. Va. Dep't of Educ.*, Docket No. 00-DOE-143 (Aug. 29, 2000); See, *Nagel v. Dep't Health & Human Services*, 707 F.2d 1384 (10th Cir. 1983); *Stanley v. Bd. of Trustees/W. Va. Univ.*, Docket No. 00-BOT-153 (Aug. 31, 2000); *Whitmore v. Marshall University.*, Docket No. 07-HE-414 (Jul 8, 2008). Respondent maintains many allegations of disruptive behavior by Grievant. Grievant's direction and conduct caused confusion with students' approved schedules and admissions. Respondent contends termination of Grievant's employment is justified and lawful as a result of Grievant's recurring failure to conform his conduct as requested.

The West Virginia Supreme Court of Appeals has held that, for there to be “insubordination,” the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be willful; and (c) the order (or rule or regulation) must be reasonable and valid.” *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). The disobedience must be willful, meaning that “the motivation for the disobedience [was] contumaciousness or

a defiance of, or contempt for authority.” *Id.* at 213, 460. The general rule is that an employee must obey a supervisor’s order when it is received, and thereafter take appropriate action to challenge the validity of the supervisor’s order. See *Stover v. Mason County Bd. of Educ.*, Docket No. 95-26-078 (Sept. 25, 1995). Employees are expected to respect authority and do not have unfettered discretion to disobey or ignore clear instructions. See *Reynolds v. Kanawha-Charleston Health Dep’t*, Docket No. 90-H-128 (Aug. 8, 1990). Moreover, insubordination may involve “more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer.” *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988).

This 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)).

Grievant highlights the frequent change in administration and procedural discord for some of the uncertainty and duplication of process. Duly noted; nevertheless, it is disingenuous for Grievant to contend he was unaware of Respondent’s intent. Grievant was provided information designed to modify his behavior. Further, Grievant was aware of Respondent’s desired modifications. This is impossible to ignore.

Both the WEST VIRGINIA CONSTITUTION and UNITED STATES CONSTITUTION grant citizens certain freedoms and inalienable rights. Freedom of speech is a constitutional

right. A much cherished freedom. Nevertheless, freedom of speech is subject to numerous constraints that render it a less-than absolute right in practice. An employer's interest in the efficient and orderly operation of its affairs must be balanced with the public employees' right to free speech. *Orr v. Crowder*, 315 S.E.2d 593 (W. Va. 1983)(citing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)). Public employees enjoy the rights established by the First Amendment, U.S. Const. Amend. I, however, these rights may be overridden by the government's interest as an employer.<sup>12</sup> The West Virginia Supreme Court has held that "the burden is properly placed on the public employee to show that conduct is constitutionally protected," and it must be spoken as a citizen on a matter of public concern. *Alderman v. Pocahontas County Bd. of Educ.*, 223 W. Va. 431, 441, 675 S.E.2d 907, 917 (2009).

In the instant case, Grievant can express his opinion, this is not contested, but it is disruptive to inform and/or infer to potential students that payment of University fees could be delayed or withheld. This misunderstanding was traced back to Grievant several times. Agents of Respondent found Grievant's conduct to be frustrating. Grievant's actions included interfering with the operations of other employees and departments, communicating disrespectfully with others, defying the reasonable orders of his superiors, and engaging in prohibited activities. (R Ex 2, 32, 33, 34 & 35) Respondent communicated with Grievant. Grievant is a proud intelligent individual.<sup>13</sup> Grievant

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<sup>12</sup> Rights contained in the U.S. CONSTITUTION are applicable to the states by and through the FOURTEENTH AMENDMENT. The West Virginia Supreme Court of Appeals typically interprets the W.VA. CONSTITUTION in a manner consistent with the U.S. CONSTITUTION.

<sup>13</sup> Dr. William Randolph "Randy" Winfrey, Chairman of the Math Department at Concord,

testified that once his superiors told him that he was not to perform certain functions that were determined to be outside the scope of his employment, he debated the wisdom of certain directives, but complied with them until his dismissal on December 17, 2015. This testimony is in conflict with the facts. Grievant's testimony is NOT fortified by the facts. Grievant choose not to adjust his conduct and/or failed to alter his behavior sufficiently as envisioned/requested by Respondent. This was a major obstacle. Grievant established some doubt regarding the full function of his position but not enough to undermine Respondent's purview to redirect his work-related activities.

The argument that discipline is excessive given the facts of the situation is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." *Martin v. W. Va. [STATE] Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989). In assessing whether the disciplinary action was excessive or disproportionate the undersigned must look at the totality of the circumstances. Mitigation was strongly considered by this trier of fact. However, Grievant has indicated he does not want his position back. For relief, Grievant seeks, "to recover out of pocket expenses incurred as a result of my defense . . . including reimbursement for reasonable cost associated with required legal counsel." It is well

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testified that he had known Grievant for eight (8) years beginning in 2008. He specifically worked with him on the Region I Math Field Day in 2011, the State Math Field Day in 2012 and the Health Science Technology Program in May of 2014, all of which he described as "by-products for recruiting students or a secondary function of admissions." Dr. Winfrey stated that he asked and received permission from Kent Gamble, then Grievant's supervisor, for Grievant's help and participation. He stated that in his opinion, on the Concord campus, Grievant is well-respected, truthful, honest and innovative.

established that the Grievance Board does not have the authority to award attorney fees. *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD- 362R (June 21, 1996). West Virginia Code § 6C-2-6 specifically states: “(a) Any expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expense.”

Grievant further sought a “letter of apology from Concord University”. The Grievance Board has addressed this issue many times before, and has determined that an apology is not available as relief in the grievance process. See *Emrick v. Wood County Bd. of Educ.*, Docket No. 03-54-300 (Mar. 9, 2004); *Hall v. W. Va. Div. of Corr.*, Docket No. 89-CORR-687 (Oct. 19, 1990). Specifically this Grievance Board has held, “a letter stating that actions of certain employees were inappropriate is in the nature of a request for an apology, which is not available from this Grievance Board.” *Emrick v. Wood County Bd. of Educ.*, Docket No. 03-54-300 (Mar. 9, 2004). This remedy is not available nor proper in this grievance.

Grievant wanted his viewpoint heard, this is understandable, but more to the point Grievant seems determined to have his actions validated. This is regrettable. Grievant while allegedly motivated by altruistic motives did in fact repeatedly disregarded explicit directives implied and directly provided to him. Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions. (citation omitted) Grievant was insubordinate. And while mitigation was a potential resolution, Grievant was clear he did not want his job back.

Grievant's contention that he did not participate in prohibitive behavior post 2014 is specifically found to be unreliable. Grievant participated in conduct and prohibited communications which Respondent has determined to constitute insubordination. Termination of Grievant's employment does seem harsh but the undersigned is not persuaded that mitigation of the disciplinary action taken is appropriate. Grievant is not asking for another chance, he is seeking vindication. Considering the totality of the circumstances, termination of Grievant's employment was and is within the discretion of Respondent. Considering the totality of the circumstances of this case, termination of Grievant's employment was not excessive.

The following conclusions of law are appropriate in this matter:

### **Conclusions of Law**

1. In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof.

2. The West Virginia Supreme Court of Appeals has recognized that “due process is a flexible concept, and that the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case.” *Buskirk v. Civil Serv. Comm’n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) (citing *Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)). “What is required to meet procedural due process under the Fourteenth Amendment is controlled by the circumstances of each case.” *Barker v. Hardway*, 238 F. Supplement 228 (W. Va. 1968); See *Buskirk*, *supra*; *Edwards v. Berkeley County Bd. of Educ.*, Docket No. 89-02-234 (Nov. 28, 1989).

3. “An essential principle of due process is that a deprivation of life, liberty or property ‘be preceded by notice and an opportunity for hearing appropriate to the nature of the case.’” *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed. 2d 494, (1985), citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). See also West Virginia Supreme Court of Appeals case *Board of Education of the County of Mercer v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994).

4. The purpose of the legislative rule requiring a predetermination conference is to protect Grievant’s due process rights to be given notice of the charges against him and the right to respond to those charges before disciplinary action is taken. See, *Buskirk v. Civil Serv. Comm’n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); *Board of Education of the County of Mercer v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994); *Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, (1981).

5. In the circumstances of this matter, Grievant was not denied due process.

6. An administrative law judge must determine what weight, if any, that is to be accorded hearsay evidence in a disciplinary proceeding. See *Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (March 11, 2010), *aff'd*, Cir. Ct., of Kanawha County, Civil Action No. 10-AA-73 (June 9, 2011); *Warner v. Dep't of Health and Human Resources*, Docket No. 07-HHR-409 (Nov. 18, 2008); *Miller v. W. Va. Dep't of Health and Human Resources*, Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ.*, Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996).

7. 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). "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be willful; and c) the order (or rule or regulation) must be reasonable and valid." *Butts*, 212 W. Va. at 212, 569 S.E.2d at 459.

8. 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)).



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

10. An employer can establish insubordination by demonstrating a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995). To establish insubordination, the employer must demonstrate that the employee's failure to comply with a directive was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Stover v. Mason County Bd. of Educ.*, Docket No. 95-26-078 (Sept. 25, 1995); *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995).

11. An employee's job is to perform the duties of his position, not to convert his job into a continuing confrontation with management. *Casto v. W. Va. Dep't of Educ.*, Docket No. 00-DOE-143 (Aug. 28, 2000); See, *Nagel v. Dep't Health & Human Services*,

707 F.2d 1384 (10th Cir. 1983); *Stanley v. Bd. of Trustees/W. Va. Univ.*, Docket No. 00-BOT-153 (Aug. 31, 2000); *Whitmore v. Marshall University.*, Docket No. 07-HE-414 (July 8, 2008).

12. Respondent has demonstrated by a preponderance of the evidence that the dismissal of Grievant was for conduct which is recognized as insubordination.

13. Respondent established by a preponderance of the evidence that, in the circumstances of this case, Grievant's pattern of conduct constituted a terminable offense.

14. Respondent has demonstrated by a preponderance of the evidence that the dismissal of Grievant was for conduct which is recognized as gross misconduct.

15. The Grievance Board has held that "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 Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

16. Considering the totality of the circumstances of this case, termination of Grievant's employment was not excessive and mitigation of the disciplinary action taken is not required.

Accordingly, this 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* 156 C.S.R. 1 § 6.20 (2008).

**Date:** March 22, 2017

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**Landon R. Brown**  
**Administrative Law Judge**