

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BRUCE WILSON,
Grievant,

v.

Docket No. 2017-2172-DOR

WEST VIRGINIA TAX DEPARTMENT,
Respondent.

DECISION

Bruce Wilson, Grievant, was employed by Respondent, West Virginia Tax Department, as a Paralegal. Mr. Miller filed a form for an expedited grievance dated May 15, 2017. Grievant alleges that he was dismissed without good cause and seeks to be made whole, to be reinstated with back pay and interest, and all benefits restored.

Pursuant to WEST VIRGINIA CODE § 6C-2-4(a)(4), a level three hearing was conducted in the Charleston office of the West Virginia Public Employees Grievance Board on July 27, 2017. Grievant was present and represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by Cassandra L. Means, Assistant Attorney General. This matter became mature for decision on September 1, 2017, upon receipt of the last of the Proposed Findings of Fact and Conclusions of Law submitted by the parties.

Synopsis

Respondent terminated Grievant's employment based upon allegations of insubordination and creating a hostile work environment. Grievant argues that any insubordination was caused by frustration created when Respondent continually assigned him work outside of his classification, and that termination was out of proportion

to any misconduct Grievant may have committed. Respondent proved that Grievant was insubordinate and that mitigation was not required.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Bruce Wilson, Grievant, was employed by Respondent, Tax Department, in the Paralegal classification of Respondent's Legal Division on January 2, 2014.

2. Grievant has earned a Bachelor of Arts degree in Classics, a Masters of Arts in Education, a Masters of Arts in Library Science, and a postgraduate certificate in library science. Grievant is also certified in Paralegal studies and is certified by the National Association of Legal Assistants.

3. Prior to coming to work at the Tax Department, Grievant worked for approximately ten years as a reference librarian for the West Virginia Supreme Court of Appeals. He also served as a middle school teacher for Kanawha County Schools.

4. Danny Morgan is the Assistant Commissioner of Operations for the Tax Department.

5. Mark Morton is the Tax Department General Counsel and Director of the Legal Division.

6. The Tax Department Legal Division is comprised of three units including the litigation section, bankruptcy section, and technical section.

7. During his tenure with the Tax Department, Grievant has worked in all three Legal Division sections, as part of the Paralegal pool.

8. Grievant received his first Employee Performance Appraisal (“EPA 1”) on April 2, 2015. This document is provided to inform an employee of the essential duties and responsibilities of their position, as well as the performance standards and expectations. This document was completed by Acting Litigation Supervisor, Rebecca Rodak.¹ In the area of essential duties, Supervisor Rodak directed Grievant to the Division of Personnel classification specifications for Paralegals and wrote:

Mr. Wilson is assigned to the Technical Unit and works directly with each attorney technical writer. As a Technical Unit Paralegal, is responsible for aiding Allen Golden in tracking and maintaining civil litigation files. He tracks and drafts nexus letters for further attorney review and approval. He will complete other tasks as assigned.

In the Performance Standards and Expectations section Ms. Rodak wrote:

1. Depositing checks in a timely manner. Processing mail and other documents in a timely manner.
2. Interacting with coworkers, including supervisors and directors, litigants, and court personnel in a professional and appropriate manner.
3. Utilizing time to be efficient and productive, minimizing time spent socializing and performing personal tasks and errands during work hours, unless leave has been previously approved....
4. Meeting all assignment deadlines.

(Respondent Exhibit 10). Grievant received no other Employment Performance Evaluations throughout the course of his employment with the Tax Department.

9. Under the direction of Ellen Golden, Grievant’s duties included online legal research, drafting pleadings, reading and summarizing legal documents, processing Freedom of Information Act requests, as well as, other research and drafting duties.

¹ Ms. Rodak has since left the Tax Department.

10. In 2016, Grievant was appointed to the Legal Division's bankruptcy section. His work in that section consisted mostly of clerical tasks including opening mail, classifying mail, routing mail, alphabetizing documents for filing, and writing letters. Grievant found his new assignments to be predominantly tedious and unstimulating.

11. Grievant's direct supervisor was Steve Stockton, Supervising Attorney for the bankruptcy section. Grievant was also instructed to take direction from Lora Rutledge, another Paralegal in the bankruptcy section. Ms. Rutledge was viewed as a Lead Paralegal by General Counsel Morton, Assistant Commissioner Morgan, and Supervising Attorney Steve Stockton. However, Ms. Rutledge's position was not classified as a lead worker. Assistant Commissioner Morgan described Ms. Rutledge's position as the manager of all the paperwork that flows through the bankruptcy section.

12. The bankruptcy section has a large work load and manages a voluminous number of documents. When Grievant was assigned to the bankruptcy section, the section already had at least a 3-year backlog in alphabetizing and filing documents.

13. Documentation in the bankruptcy section is particularly important and all documents must be correctly sorted and filed. Failure to do so could cause the Tax Department to be unable to make successful Proof of Claims resulting in the failure to collect significant funds owed to the State of West Virginia.

14. By letter dated December 30, 2015, Grievant was given a written reprimand. The reasons for the reprimand were listed as follows:

- The West Virginia Office of Technology monitored Grievant's work computer for the period of November 30, 2015, through December 3, 2015. During that period, Grievant used 77.78% of his work time

downloading videos and visiting websites that were unrelated to his work;²

- Downloading pictures from other files to a Facebook hard drive on Grievant State computer; and,
- using his State email account to enter into the Publishers Clearing House.

(Respondent Exhibit 3).

15. The West Virginia Tax Department Information Technology Policy States the following:

5.1 Tax Department provided access to the Internet will be available to users to support business activities only, and only on an as needed basis to perform the essential assigned duties of their jobs and professional roles.

5.2 Excessive use of the Internet by personnel that is inconsistent with business needs is considered a misuse of resources and is subject to progressive disciplinary action.

5.3 Incidental, minimal, and superficial personal use is **not** permitted on the tax department equipment. (Emphasis in original).

16. On March 25, 2016, Grievant received an oral warning from General Counsel Mark Morton. Grievant was alleged to have made disparaging comments to Lora Rutledge and Office Assistant, Sharon Johnson, indicating that they lacked competence and ability. Grievant was told that this conduct would not be tolerated and he was directed to apologize to Ms. Rutledge and Miss Johnson. Grievant indicated that he believed the allegations resulted from a misunderstanding and apologized to Ms. Rutledge and Ms. Johnson as directed.³

² The websites included: DVD.com; Facebook.com; Amazon.com; Netflix.com; Overstock.com; VermontCountryStore.com; and GoFundMe.

³ Bankruptcy Attorney Eric Wilson initially reported the allegations to Mr. Morton. He suggested that if the allegations were true it will be best to give Grievant assignments outside of the bankruptcy section. That action might have prevented the problems which followed.

17. On December 8, 2016, Grievant received an oral warning from General Counsel Mark Morton for failing to meet required work standards. The specific reasons for the oral warning were:

- On December 5 and December 6, Grievant made a total of 68 postings to Facebook during the workday. These postings were made from Grievant's cell phone or at the public library.
- Grievant failed to sort and alphabetize bankruptcy files as instructed.
- Grievant failed to separate bankruptcy documents so that documents that belonged in multiple files ended up misfiled in single file.
- Grievant failed three times to transfer a single telephone call to General Counsel Morton.
- Grievant failed to sort materials in a case file which caused a bankruptcy attorney to lack sufficient documentation to prove a \$60,000 debt in bankruptcy court. The judge allowed the Tax Department to file an amended claim.

Grievant was directed to comply with the instructions given by Ms. Rutledge and was given a written protocol for sorting and distribution of mail and bankruptcy documents. Grievant was advised that additional problems could lead to further discipline.

18. Grievant was again assigned by Ms. Rutledge to alphabetize hundreds of bankruptcy documents to prepare them for filing. Grievant told Ms. Rutledge that the task was mind-numbing and insurmountable, and he could not do it. Ms. Rutledge spoke to Supervisor Stockton on the morning of April 26, 2017, indicating that she continued to have problems getting Grievant to perform the alphabetizing task.

19. Ms. Rutledge sent an email to Supervisor Stockton at 12:49 p.m. indicating that Grievant had only opened the mail that morning and played on his phone. She indicated that he had not touched the alphabetizing task. She concluded that she would not have asked Grievant to help with these tasks if she did not need him to do so.

20. At one point, Ms. Rutledge again instructed Grievant to work on alphabetizing the voluminous bankruptcy documents. Grievant became very angry, his body went rigid and began to shake, he gritted his teeth, and his hands were balled into fists at his side. Supervisor Stockton witnessed the incident with Grievant and Ms. Rutledge. He stated that Grievant was trying very hard to control his temper. While he did not think Grievant's behavior was appropriate, he did not view it as aggressive or threatening.⁴ Occasionally, Grievant had been previously observed by Supervisor Stockton becoming angry, speaking loudly, and slamming files.

21. Supervisor Stockton called Ms. Rutledge and Grievant to his office to discuss the alphabetizing issue. Grievant told Mr. Stockton that the task was too overwhelming and he simply could not do it. Mr. Stockton instructed Grievant to start working on the alphabetizing project. Grievant went back to his cubicle and wept. He was so upset that his sobs could be heard in the rest of the office.

22. Supervisor Stockton worked on the alphabetizing project for a few hours after work. He concluded that it was tedious and unchallenging, but not difficult to perform.

23. On the morning of April 27, 2017, Ms. Rutledge sent an email to General Counsel Morton stating the following:

Who do I need to send this to in order to have my concerns known? It's to the point where I'm almost afraid to come in every day. I'm not used to feeling this way but it seems to get worse with him daily.

24. By letter dated April 28, 2017, Grievant was suspended for a period of no more than twenty days, while an investigation was conducted into the allegations of

⁴ Testimony of Supervisor Steve Stockton.

“insubordination, misuse of government issued computer equipment, and accusations of creating a hostile and unsafe work environment.” (Respondent Exhibit 1).

25. Three minutes after receiving Ms. Rutledge’s email, General Counsel Morton sent the following email to Dale Steager, Lydia McKee, Danny Morgan, Stephen Stockton, and Richard Boyle:

This email was received by me from a Legal Division employee less than two minutes ago.

The Tax Department needs to take immediate action to address this concern.

What are my instructions?

(Emphasis in original) (Respondent Exhibit 6).

26. On May 12, 2017, Grievant was notified by hand-delivered letter that he was being dismissed from his employment for gross misconduct. The letter was written by Danny Morgan Assistant Commissioner of Operations for the Tax Department. Mr. Morgan cited the following reasons for the action:

- The December 30, 2015, written reprimand for improper computer use;
- The March 25, 2016 verbal warning relating to allegedly offensive comments made to Ms. Rutledge and Ms. Johnson;
- The December 10, 2016 verbal warning related to spending work time posting to his Facebook page, failure to alphabetize bankruptcy files, and properly sort in place documents and court files;
- Posting more than 100 posts to his Facebook page during business hours;

Assistant Commissioner Morgan also cited the following:

- On April 26, 2017, Miss Rutledge instructed you to alphabetize documents for the Bankruptcy Unit. Your response was to clutch your fists, growl, and use a tone of voice and body language that was received as threatening by Ms. Rutledge. You were subsequently

directed by Supervising Attorney Steve Stockton to complete the alphabetizing task. Your response was the task was too voluminous and you are not capable of completing this task. The task was then completed by another employee. Your response to this situation was to return to your cubicle and cry so loudly that it disrupted the work of both the Legal and Auditing divisions.

- On May 6, 2017, he shared a post on Facebook that reads as follows: "After the next mass shooting, remember... It was REPUBLICANS who voted to allow people with pre-existing mental illness to buy firearms, yet denied them health insurance to treat their pre-existing mental illness." While being investigated for workplace conduct losing your temper and scaring coworkers you posted this message which at a minimum is in poor taste, and could be viewed by a reasonable person as a veiled threat.

(Respondent Exhibit 2).

27. Grievant was suspended from employment on May 6, 2017. There was no reason for Respondent to be monitoring Grievant's Facebook account at that time. Most of Grievant's Facebook posts were re-posts supporting progressive causes and opposing actions taken by the Republican Party.

28. Grievant received an additional letter from Danny Morgan dated May 15, 2017. This letter was meant to be an addendum to the Tax Department's letter of dismissal. The purpose of the letter was to note that Grievant had denied making a disparaging remark about an attorney in the Legal Division, and that the post regarding mass shootings and healthcare was made away from the workplace, on his own time, using his cellular telephone. Mr. Morgan stated that these objections were insufficient to reconsider the decision to terminate Grievant's employment. (Respondent Exhibit 9).

29. When Grievant felt under stress at the office he would access the internet on his cellular telephone and post to his Facebook page. He found this activity was effective for stress reduction.

30. After Grievant wept in his office he realized he may be having a relapse of mood swing problems he had suffered in the past. He contacted his doctor about this issue that afternoon.

31. Grievant provided Respondent with a letter from his physician giving a diagnosis of Grievant's condition for which he was providing medication that should help control the symptoms.

Discussion

As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008).

. . . See [*Watkins v. McDowell County Bd. of Educ.*, 229 W.Va. 500, 729 S.E.2d 822] at 833 (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education*, 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). See also *Hovermale v. Berkeley Springs Moose Lodge*, 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) ("Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence."). . .

W. Va. Dep't of Trans., Div. of Highways v. Litten, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision). Where the evidence equally supports both sides,

a party has not met its burden of proof. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant was a permanent State employee with several years of service when his employment was terminated. 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).

The West Virginia Supreme Court of Appeals has stated that "the work record of a long-term civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985). *See Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983); *Serreno v. W. Va. Civil Serv. Comm'n*, 169 W. Va. 111, 285 S.E.2d 899 (1982).

Respondent terminated Grievant's employment for gross misconduct manifested by: continual excessive use of the internet for personal reasons both on the State-owned computer and on his personal cellular device; insubordination for repeatedly failing to perform assigned duties, and creating a hostile work environment by becoming angry, clinching his fists, gritting his teeth and weeping when he was required to do a particular task.

Grievant argues that he was being assigned to perform predominate duties which were not consistent with the Paralegal classification, that some of the allegations were false or over-blown, and the penalty of dismissal was disproportionate to any misconduct Grievant may have committed.

"[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002) (*per curiam*); *Goan v. W. Va. Dep't of Health and Human Res.*, 2011-0876-DHHR (Jan. 19, 2012). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990); *Cornell v. Brooke County Bd. of Educ.*, Docket No. 2013-1289-BroED (Aug. 15, 2013).

Respondent demonstrated that Grievant was spending an inordinate amount of time accessing the internet to post documents on his Facebook page during working hours. Most of the material consisted of reposts of news reports and memes prepared by others who shared Grievant's political views. There were no allegations that any of the content Grievant posted during working hours was offensive or threatening, except for one post made while Grievant was suspended. The infractions were that Grievant was using State equipment for private interests, and that he was downloading material to his personal devices when he should have been working.

Respondent issued Grievant a written reprimand in December 2015. Grievant had used the State computer provided to him for his work to download and post materials to

his Facebook page for more than 75% of his work time in a one week period. One year later Grievant received an oral warning for spending excessive work time posting to his Facebook page with his personal cellular device. During the investigation conducted while Grievant was suspended it was found that Grievant had continued to post to his Facebook page during his regular work hours. These ongoing activities not only significantly took away from Grievant's work time, but violated the Tax Department Information Technology Policy by utilizing the State provided computer equipment and/or the State provided Internet connections for personal reasons. Grievant admitted that he posted on the Internet to relieve his stress when he became frustrated with his working environment. Respondent proved by a preponderance of the evidence that Grievant was insubordinate by repeatedly violating the Information Technology Policy and specific instructions to not post to his personal Facebook account during working hours.

Respondent also alleges that Grievant was insubordinate by refusing to work on the alphabetizing project when he was instructed to do so on several occasions. Grievant argues that this task was outside of the Paralegal classification and he should not have been required to perform it as a predominate duty. The Department of Personnel classification specifications for the position of Paralegal provide the following:

Nature of Work

An employee in this class assists an attorney or administrative superior in a legal setting by conducting research of legal sources such as statutes, regulations, legal opinions and related documents necessary for the preparation of briefs, pleadings and appeals. In a regulatory setting, the incumbent may review and approve applications and reports for compliance with laws and regulations. The work may involve the preparation of case summaries and reports of pertinent facts in hearings attended. Considerable contact is maintained with attorneys and judicial personnel in the

compilation of information. The incumbent may direct an office clerical staff. Performs related work as required.

The alphabetizing of the stacks of bankruptcy documents was undoubtedly a boring and tedious task. It is also a task that could have been performed by persons in other job classifications, such as Office Assistant. However, it can be performed by a Paralegal under the duties described as “related work as required.” It was essential to the success of the Legal Division Bankruptcy section for these documents to be properly alphabetized and filed so that they could be used by the attorneys in bankruptcy claims. Therefore, while these tasks could have been performed by employees in other classifications, the duties are in furtherance of the needs of the Tax Department attorneys and are appropriate for a Paralegal. Additionally, if these duties were outside the classification of a Paralegal, Grievant had other remedies available to him to seek relief from these tasks without refusing to do them.

Grievant argues that he did not say that he “would” not do the work, but that he “could” not perform the task because its sheer volume overwhelmed him. While this distinction was certainly important to Grievant, it still amounted to a refusal to perform the task for Respondent. Whether Grievant was refusing to perform the task because he found it menial and outside of his classification, or because he found it to be oppressively overwhelming, he was willfully refusing to perform those duties after repeatedly being instructed to do so. Respondent proved by a preponderance of the evidence that Grievant was insubordinate by refusing to work on the alphabetizing project.

Respondent alleges that Grievant created a hostile work environment by disparaging Ms. Rutledge, failing to follow her instruction, getting angry and attempting to

control his anger by clenching his fist and gritting his teeth, and reposting a meme⁵ from the “Teanderthal Party” on his Facebook page stating:

At the next mass shooting, remember... It was REPUBLICANS who voted to allow people with pre-existing mental illness to buy firearms, yet deny them health insurance to treat their pre-existing mental illness.

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

Respondent’s allegation that this Facebook post created a hostile work environment is particularly troubling. This post was made while Grievant was suspended from work and there was no longer a valid reason for Respondent’s agents to be monitoring his Facebook activities. Yet, Ms. Rutledge saw this post and viewed it as an indication that Grievant might become violent and attack the bankruptcy section staff. Respondent argued that a reasonable person could construe this meme as a threat. That

⁵ In this context, a “meme” is “a cultural item in the form of an image, video, phrase, etc., that is spread via the Internet and often altered in a creative or humorous way.” *Dictionary.com Unabridged*. Random House, Inc. 1 Sep. 2017.

is not the case. When viewed in the context of Grievant's Facebook activity, this was simply another posted meme which criticized the activities of the Republican Party. Ms. Rutledge clearly overreacted to Grievant's Facebook posting.

At the hearing, Respondent's counsel gave a copy of this meme to Ms. Rutledge when she was testifying. When asked if she had previously seen this document, Ms. Rutledge testified that she had not. It is hard to imagine that this Facebook posting created a hostile work environment for a person who could not remember seeing it.

Additionally, Grievant's regular disagreement with Ms. Rutledge over work assignments was obviously frustrating to her. However, Grievant's refusal to perform these tasks were certainly not severe or pervasive enough to alter the conditions of Ms. Rutledge's employment. She could remedy these difficulties by taking the problem to her supervisors, which she successfully did.

Finally, there is the incident where Grievant became so angry about the alphabetizing project that when he was standing in front of Ms. Rutledge, his body became rigid and shook, he clinched his fists at his side, and gritted his teeth. Supervisor Stockton witnessed this incident. He has little or no interest or reason to be biased. He projected an appropriate demeanor and calmly testified that Grievant's behavior was not appropriate, but was also not threatening or aggressive. Mr. Stockton also testified that he had witnessed other times when Grievant had become angry, but certainly not to this extent. Supervisor Stockton's testimony is credible.⁶ Respondent did not provide

⁶ 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

sufficient credible evidence to prove that Grievant's conduct was sufficiently severe or pervasive to create a hostile work environment.

Gross misconduct "implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec 23, 1991) (citing *Buskirk v. Civil Serv. Comm'n.*, 175 W. Va. 279, 332 S.E.2d 579 (1985)). See *Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sept. 13, 2002); *Wilt v. W. Va. Dep't of Health and Human Res.*, Docket No. 2010-0728-CONS (Sept. 21, 2010). *Poke v. Human Rights Commission*, Docket No. 2014-1196-HRC (Mar. 18, 2015).

While Respondent did not prove that Grievant created a hostile work environment, it did prove that Grievant was insubordinate and willfully refused to comply with reasonable directives provided by his supervisors. These acts of insubordination were sufficient to constitute "gross misconduct" as that term has been applied in the grievance procedure.

Grievant argues that any misconduct in this matter was not sufficient to justify termination of his employment. He specifically notes that Respondent was provided with his doctor's explanation concerning the anger and mood problems, and that Grievant was being treated to alleviate those symptoms.

any fact testified to by the witness; and (4) the plausibility of the witness' information. *Yerrid v. Div. of Highways*, Docket No. 2009-1692-DOT (Mar. 26, 2010); *Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth.*, Docket No. 2009-1583-DOT (Dec. 1, 2009); *Elliott v. Div. of Juvenile Serv.*, Docket No. 2008-1510-MAPS (Aug. 28, 2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999).

"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." *Hudson v. Dep't of Health and Human Res./Welch Cmty. Hosp.*, Docket No. 07-HHR-311 (March 21, 2008). "Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case-by-case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995); *Crites v. Dep't of Health & Human Ser.*, Docket No. 2011-0216-DHHR (Nov. 16, 2011).

Respondent was able to prove that Grievant willfully failed to follow his supervisors' instructions to refrain from using his work Internet connections to post to his Facebook page during work hours. Grievant also refused to perform the alphabetizing assignment after being instructed to do so on more than one occasion. This misconduct is sufficient to support termination of Grievant's employment. Grievant did not provide any evidence that his misconduct was caused by illness until after he was suspended pending dismissal, even though he had been asked by General Counsel Morton if he had any physical or mental disabilities which were causing problems with his work performance. Respondent could take the information from Grievant's physician into consideration, but it was not required to do so. Mitigation of the punishment is not required under the circumstances of this case.

Accordingly, the grievance is DENIED.

Conclusions of Law

1. As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002) (*per curiam*); *Goan v. W. Va. Dep't of Health and Human Res.*, 2011-0876-DHHR (Jan. 19, 2012). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990); *Cornell v. Brooke County Bd. of Educ.*, Docket No. 2013-1289-BroED (Aug. 15, 2013).

3. Respondent proved by a preponderance of the evidence that Grievant was insubordinate by repeatedly violating the Information Technology Policy and specific instructions to not post to his personal Facebook account during working hours, and refusing to work on an alphabetizing project after being repeatedly directed to do so.

4. "'To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment.' *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998). See *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Corley, et al., v. Workforce West*

Virginia, Docket No. 06-BEP-079 (Nov. 30, 2006). "As a general rule, 'more than a few isolated incidents are required' to meet the pervasive requirement of proof for a hostile work environment case. *Fairmont Specialty Servs., [v. W. Va. Human Rights Comm'n,* 206 W. Va. 86, 522 S.E.2d 180 (1999)], citing *Kinzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 573 (8th Cir. 1997)." *Marty v. Dep't of Admin.*, Docket No. 02-ADMN-165 (Mar. 31, 2006).

5. Respondent did not provide sufficient credible evidence to prove that Grievant's conduct was sufficiently severe or pervasive to create a hostile work environment.

6. Gross misconduct "implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec 23, 1991) (citing *Buskirk v. Civil Serv. Comm'n.*, 175 W. Va. 279, 332 S.E.2d 579 (1985)). See *Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sept. 13, 2002); *Wilt v. W. Va. Dep't of Health and Human Res.*, Docket No. 2010-0728-CONS (Sept. 21, 2010). *Poke v. Human Rights Commission*, Docket No. 2014-1196-HRC (Mar. 18, 2015).

7. Grievant's acts of insubordination were sufficient to constitute "gross misconduct" as that term has been applied in the grievance procedure.

8. "Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case-by-case basis."

McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995); *Crites v. Dep't of Health & Human Ser.*, Docket No. 2011-0216-DHHR (Nov. 16, 2011).

9. Considering the circumstances of this matter as a whole, mitigation of the penalty imposed is not required.

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* 156 C.S.R. 1 § 6.20 (2008).

DATE: OCTOBER 17, 2017.

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE