WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ANGELA L. KARGUL,
Grievant,

v. **Docket No. 2018-0528-MU**

MARSHALL UNIVERSITY,
Respondent.

D E C I S I O N

Angela L. Kargul, Grievant, filed this grievance against her employer Marshall University ("Marshall"), Respondent, protesting a five-day suspension. The original grievance was filed on September 29, 2017, with the grievance statement providing: "uncalled for & harsh punishment of five day's suspension without pay and mental and physical distress leading to Doctor's appointments & medication adjustments." Grievant request the return of the full amount of pay lost for the week and an apology.[1]

As authorized by W. VA. CODE § 6C-2-4(a)(4), the grievance was filed directly to level three of the grievance process.[2] A level three hearing was held before the

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[1] The Grievance Procedure allows for fair and equitable relief, which has been interpreted by the Grievance Board to encompass such issues as back pay, travel reimbursement, and overtime, but not to include punitive or tort-like damages for pain and suffering. *Dunlap v. Dep't of Environmental Protection,* Docket No. 2008-0808-DEP (Mar. 10, 2009). *Spangler v. Cabell County Bd. of Educ.,* Docket No. 03-06-375 (Mar. 15, 2004); *Walls v. Kanawha County Bd. of Educ.*, Docket No. 98-20-325 (Dec. 30, 1998); *Hall v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-433 (Sept. 12, 1997); *Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997); This Grievance Board does not award tort-like or punitive damages. *Riedel v. W. Va. Univ.*, Docket No. 07-HE-395 (Feb. 24, 2009); *Troutman v. Dep't. of Health and Human Res./William R. Sharpe Jr. Hospital*, Docket No. 2013-0630-DHHR (April 26, 2013). An apology is not available as relief from the Grievance Board. *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).

[2] W. VA. CODE § 6C-2-4(a)(4), provides that an employee may proceed directly to level three of the grievance process upon agreement of the parties, or when the grievant has been discharged, suspended without pay, demoted or reclassified resulting in a loss of compensation or benefits.

undersigned Administrative Law Judge on February 6, 2018, at the Grievance Board's Charleston office. Grievant appeared *pro se.*[3] Respondent was represented by legal counsel Dawn E. George, Assistant Attorney General. After a requested extension for the submission of fact/law proposals this matter became mature for decision on or about March 16, 2018. Both parties submitted post-hearing documents. This grievance matter is ripe for decision.

Synopsis

Grievant protests the severity of the sanction levied for a list of alleged 'mis' and 'mal' feasance actions by Grievant. Representative agent(s) of Respondent and Grievant disagree on select courses of action with regard to Grievant's employment. Grievant provides some explanation for her actions but acknowledges the majority of the contended conduct. Respondent established grounds for disciplinary action. Respondent chose to suspend Grievant for five days without pay. Respondent maintains its actions were lawful and consistent with the principles of progressive discipline. Grievant is now readily aware of Respondent's earnestness to the correction of her workplace activity. In considering the totality of the circumstances, the undersigned is conflicted, but acknowledges suspension is not necessarily an excessive disciplinary action. This grievance is DENIED.

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

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[3] "*Pro se*" is translated from Latin as "for oneself" and in this context means one who represents oneself in a hearing without a lawyer or other representative. *Black's Law Dictionary,* 8th Edition, 2004 Thompson/West, page 1258

Findings of Fact

1. Marshall University Garden Project covers all aspects of gardening with several types of gardens located on Campus. Featuring a vegetable garden, butterfly garden, rain garden, roof top garden and greenhouse. The project offers year-round gardening with plans to include gardening education to students, faculty and staff.R Ex 1

2. Grievant is employed as a Lead Gardener, for twenty-five (25) hours a week in Respondent's Sustainability Department where she oversees the Student Garden, Rain Garden, Sustainability Greenhouse rooms, Green Roof Science Building, Monarch Waystation Garden, VIP Garden and Butterfly Oasis, conducts tours of the gardens, and supervises student workers. Grievant is also employed by the Marshall University Science Department for nine (9) hours a week in the Science Department Greenhouse rooms.

3. In July 2016 Eve Marcum-Atkinson was appointed as the Interim Sustainability Manager and became the direct supervisor of Grievant's work for the Sustainability Department. Prior to Ms. Marcum-Atkinson's promotion, she and Grievant had worked as co-workers.

4. In October 2016 Ms. Marcum-Atkinson received complaints from a student worker that Grievant was discussing her personal sexual relationships; use of inappropriate language; and making negative comments regarding religious, cultural, ethnic, race, or gender/self-identifying groups.

5. Interim Sustainability Manager Marcum-Atkinson met and communicated with Grievant in October 2016 regarding controlling and effectively maintaining aspects

of Respondent's Sustainability Department (greenhouse and garden) programs. Grievant had been instrumental in establishing and developing a variety of Respondent's Sustainability Department programs.

6. Grievant acknowledged the October 2016 meeting; however, Grievant did not view this as a disciplinary meeting due to her belief that Ms. Marcum-Atkinson was her friend before being her supervisor.

7. Grievant was instructed to take the Marshall University Human Resources Harassment Training and refrain from inappropriate discussions with the student workers.

8. On June 8, 2017, Ms. Marcum-Atkinson met with Grievant to discuss a Written Warning. The Performance Counseling Statement indicated Grievant engaged in unprofessional behaviors before the student workers, physical plant workers, and the general public when working in the garden, greenhouse and student center. The documented issues indicated that Grievant participated in inappropriate accusatory confrontations with other workers, poor management of work schedule, not working during shift hours and calling off/changing her schedule too often. R Ex 4

9. Grievant indicated that she disagreed with the June 8, 2017, Written Warning contained in the Performance Counseling Statement; however, she did not file a grievance to dispute the Written Warning.

10. Following the June 8, 2017, Performance Counseling Statement, Grievant's performance did not substantially improve and many improvement requests did not occur.

11. On July 11, 2017, Ms. Marcum-Atkinson met with Grievant in the Greenhouses to discuss pending improvements to the facility. Sustainability Manager

Marcum-Atkinson attempted to address several aspects of the working environment which included keeping produce fresh for market days, customized hoses for the greenhouse rooms, clean room for storing clean pots and equipment, adequate watering of plants in the greenhouse, shelving for storing soil off the floor and plant infestation. R EX 3 Supervisor Marcum-Atkinson completed an incident report documenting the July 11, 2017 meeting. *Id.*

12. Grievant's interpretation of the meeting(s) with Ms. Marcum-Atkinson, who is her supervisor, and Ms. Marcum-Atkinson's intent of the discussions with Grievant are not necessarily in sync. Grievant tends to interpret the meetings as planning sessions while Supervisor Marcum-Atkinson tends to depict the meetings as requests for Grievant to complete tasks in the Greenhouses.

13. During a pre-suspension hearing on July 31, 2017, with Ms. Marcum-Atkinson; Bruce Felder, Human Resources Director; and Tracy Smith, Director of Marshall Environmental Health and Safety Department, Grievant was notified that she would be suspended for five (5) days.

14. Grievant was notified that suspension was recommended and the President and/or his designee would make the final decision on review of the prior disciplinary actions and Grievant's statements made during the pre-suspension hearing.

15. Documentation relevant to Grievant's July 31, 2017 suspension provided in relevant part that:

> <u>Situation:</u>
>
> 1. Angela has continued to behave inappropriately at work, including insubordination.

2. Angela has not complied with the written warning and verbal requests to report her hours worked and tasks accomplished consistently, in writing, in a timely fashion.

3. Angela has not complied with the written warning request to fill out her time sheet with the actual hours worked.

4. Angela has continued to not provide Doctor's slips for time missed or changes in the schedule requested due to doctor's appointments.

5. Angela has not performed multiple tasks I have requested her to accomplish, both in person and in writing via email.

6. Angela has not created a regular Maintenance Plan, as requested in the written warning.

7. Angela has not provided an assessment/inventory of our stock, tools, supplies, etc., as requested in the written warning.

8. Angela has not reported to me her completion of the Linds.com courses I sent to her on June 8th at 3 pm, as requested in the written warning.

9. Angela has not reported to me her completion of the HR Harassment training video, as requested in the written warning.

Angela is to be suspended for 5 days. Continued performance issues will result in disciplinary action that includes a recommendation to terminate Angela Kargul from employment at Marshall University.

R Ex 5

16. Grievant acknowledged agreement on the Performance Counseling Statement that some of the matters were true while others were not. Grievant's perception of her role and events is not as bleak as her supervisor's. Among other contentions Grievant provides:

> I created this position, so I do question when asked to do things I believe unnecessary or could wait. I **did not** challenge my bosses request, I only respectfully questioned them as I have always done. I believe in following my supervisor's requests. I do not believe I excessively argue. At times, I may be a bit loud and that can be construed in a negative way. I do apologize for any misconception and will work to correct the issues.

Grievant is further of the opinion that:

> [t]here are certain priorities during the growing season and some of these requests could wait until winter or be assigned to one of the student workers. I was not refusing to do the tasks. My experience during the last 5 years of working this job, I know when job duties need to be done and what the students are capable of doing on their own.

17. Grievant acknowledges she was made aware of her loudness and for being head strong, but contends she is not always aware of the actions. Grievant had worked with Supervisor Marcum-Atkinson for some time and did not consider her conversations and actions to be insubordination.

18. Grievant expresses regret that her actions were taken in the wrong way.

19. Grievant believes her side of the story was not given its due weight before such a harsh punishment was levied.

Discussion

As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges against the Grievant 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).

Grievant is employed as a Head Gardener with Marshall University’s Sustainability Department with minimal supervision from the Marshall University Science Department. In the circumstance of this grievance, the employment status of being at-will verses being employed as a classified staff position has little bearing on Respondent’s burden of establishing the charges against the instant Grievant. Respondent bears the burden of establishing the disciplinary charges against Grievant by a preponderance of the evidence.

The Grievance Statement indicates she is grieving the “uncalled for and harsh punishment of five days suspension without pay and mental and physical distress leading to Doctor’s appointments & medication adjustments.” For all practical purposes, Grievant seeks to also challenge a prior October 2016 oral warning and June 8, 2017, Performance Counseling Statement Written Warning along with the five-day suspension. The propriety of a prior disciplinary action, properly documented in the employee’s record and which the employee had an opportunity to challenge, is not an appropriate matter for consideration in a grievance involving a subsequent disciplinary action. *Williams v. Kanawha Cty. Bd. of Educ.*, Docket No. 98-20-321 (Oct. 20, 1999). “[W]hile there are discussion in this grievance about the imposition of prior discipline, the merits of those disciplinary actions are not at issue in this matter because Grievant did not grieve any of

those disciplinary actions." *Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997); *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996). Consistent with this principle, the prior disciplinary actions discussed in this grievance must be accepted as factually accurate. *Crites v. Dept. of Health & Human Res.*, Docket No. 2015-0163-DHHR (Aug. 29, 2016). This legality places Grievant in an unenvious predicament, she cannot now challenge the steadfastness of events and/or the spin that may or may not have been placed on past events.

Grievant was made aware of Respondent's desire for her to alter her workplace behavior. This is fact; however, to what degree Grievant truly comprehended the fortitude that her supervisor was proceeding and prepared to go to ensue her behavior change is not clear.[4] Respondent is well aware of the principle governing progressive discipline.

In October 2016 Ms. Marcum-Atkinson received a report from a student worker that Grievant would engage in inappropriate conversations with the student. Allegedly, the student reported that she was uncomfortable with these conversations and requested that she not be assigned to work the Marshall Market with Grievant. Supervisor Marcum-Atkinson approached Grievant and requested that Grievant refrain from discussions of her personal life and further indicated that certain topics of conversation were not appropriate with student workers. Supervisor Marcum-Atkinson testified that she viewed this meeting as an oral warning. Grievant testified that she viewed Eve's (Supervisor Marcum-Atkinson) discussion as between friends without any employment consequences

[4] The undersigned ALJ is of the good faith belief that Grievant did not, and perhaps to this day, does not truly comprehend the severity of the issues in contention.

despite Ms. Marcum-Atkinson serving as Grievant's supervisor. Grievant was unaware that notation was being placed in her personnel file.

On June 8, 2017, Ms. Marcum-Atkinson met with Grievant to discuss issues with Grievant's employment. R Ex 4 It is contended that Grievant continued to engage in inappropriate discussions of her sexual relationships, religious, cultural, ethnic, race and gender/self-identifying groups. Grievant also failed to appropriately track her time worked, work weekends duties and calling off work on multiple occasions. As part of the Performance Counseling Statement, Grievant was instructed to refrain from discussing personal issues, aggressive behavior, create a regular work schedule, fill out appropriate time off request forms, contact her supervisor when calling off, refraining from conducting personal business on business time, and work with the Sustainability Director to create a maintenance schedule among other items. Grievant did not grieve this Written Warning. Following the June 8, 2017, Performance Counseling Statement, select improvement requests did not occur.

Grievant acknowledged she was possessive of the greenhouse and would question directions from Ms. Marcum-Atkinson about work inside the greenhouse. Grievant further acknowledge she needed to work on her tone of speaking and keeping a regular work schedule. Grievant did not believe the student complaints were an issue. Grievant further indicated that a "verbal warning" would have gotten her attention before the written warning. Regrettably, Grievant did not recognize her supervisor's prior conversations as verbal warnings. Eventually Grievant received the June 8, 2017, Performance Counseling Statement Written Warning. Grievant had undisputable notice

that her workplace behavior need to be adjusted to the satisfaction of her workforce superiors.

It is debatable that Grievant fully comprehended the weight of the issues and the effects of some of the prior facts. Grievant was given an opportunity to address a variety of the issues listed. Further, it is clear that Grievant is not familiar with the formality of legal matters. Grievant ultimately signed a Performance Counseling Statement document indicating she "agreed with some but not all things." R Ex 5 Grievant's presentation of events evoked sympathy for her plight, she is passionate and dedicated to her work. Nevertheless, Respondent established grounds for disciplinary action. Grievant admittedly failed to perform identified duties and further neglected to properly document or report completion of directed work place conduct. Respondent evoked the concept of progressive discipline and determined that the suspension of Grievant's employment was appropriate. It is unclear why Respondent felt obligated to suspended Grievant for five days as opposed to perhaps three days or less.

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.

The undersigned wants to reduce the five-day without pay sanction.[5] Nevertheless, Grievant, has failed to prove that mitigation is warranted due to her repeated failure to correct her misconduct and Respondent's significant discretion in these matters. "Mitigation of the punishment imposed by an employer is extraordinary relief and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). Suspension of Grievant's employment is, as Respondent repeatedly highlighted, within its discretion and not necessarily excessive in the totality of the circumstances. The undersigned reluctantly agree.

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

[5] "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994). *See Austin v. Kanawha County Bd. of Educ.*, Docket No. 97-20-089 (May 22, 1997). Mitigation of a penalty is considered on a case by case basis. *Conner v. Barbour County Bd. of Educ.,* Docket No. 95-01-031 (Sept. 29, 1995); *McVay v. Wood County Bd. of Educ.,* Docket No. 95-54-041 (May 18, 1995).

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. 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).

3. 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).

4. Respondent established that Grievant did not sufficiently perform assigned and identified duties duly appointed for her to timely perform.

5. Grievant failed to adequately adjust her performance of identified workplace activities to a reasonable degree of compliance.

6. An apology is not available as relief from this Grievance Board. *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).

7. This 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).

8. Considering the totality of the circumstances of this case, suspension of Grievant's employment was not "necessarily" excessive disciplinary action and mitigation of the disciplinary action taken is not sufficiently established.

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: May 1, 2018

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Landon R. Brown
Administrative Law Judge