

**THE WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**THOMAS KELLER,**

**Grievant,**

**v.**

**DOCKET NO. 2018-0157-DHHR**

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/  
BUREAU FOR CHILDREN AND FAMILIES,**

**Respondent.**

**DECISION**

On August 1, 2017, Thomas Keller (“Grievant”) filed this grievance directly at Level Three, challenging the decision of the Department of Health and Human Resources to indefinitely suspend him without pay pending investigation of certain alleged misconduct. Subsequently, on October 4, 2017, Grievant’s indefinite suspension was converted to a 10-day suspension without pay. Thereafter, a Level Three hearing was held before the undersigned Administrative Law Judge at the Grievance Board’s Westover, West Virginia office on December 11, 2017. Grievant was represented by John Roush, Esquire, with the American Federation of Teachers – West Virginia. Respondent was represented by Assistant Attorney General Michael Bevers. Respondent presented testimony by Anne Armstrong, Amanda Gifford, Rick Parks, and Heather Grogg. Grievant testified on his own behalf. This matter became mature for decision on January 19, 2018, upon receipt of the parties’ Proposed Findings of Fact and Conclusions of Law.

### **Synopsis**

Respondent established by a preponderance of the evidence that Grievant misrepresented the extent of his investigation into the proper placement of two minor females in an official written report, acted unprofessionally during a meeting in the hospital room of a brother and sister who had been drugged and sexually assaulted, acted unprofessionally in telling hospital security officers that their assistance might be required to “kick the mother’s ass,” and acted unprofessionally by telling the children’s mother that she would be arrested if she approached the children, and that she had only 15 minutes in which to identify a family member for alternative placement of the children before he took them into his custody. These violations established a factual and legal basis for Grievant’s 10-day suspension. Grievant failed to establish that his 10-day suspension involved a penalty which constituted an abuse of the employer’s discretion or constituted an arbitrary and capricious exercise of the employer’s disciplinary authority.

The following Findings of Fact are made based upon the record developed at the Level Three hearing.

### **Findings of Fact**

1. Thomas Keller (“Grievant”) is employed by Respondent Department of Health and Human Resources (“DHHR” or “Respondent”) as a Child Protective Service Worker (“CPSW”) in the Bureau for Children and Families.

2. Grievant has worked for Respondent for nearly two years. Prior to the events which gave rise to this disciplinary suspension, Grievant had not been disciplined by DHHR.

3. Amanda Gifford is employed by DHHR's Bureau for Children and Families in Barbour, Preston and Taylor Counties as a Child Protective Service Supervisor. Ms. Gifford has been employed by DHHR for over 10 years. Ms. Gifford was Grievant's immediate supervisor from June 2016 until his suspension.

4. Rick Parks is employed by DHHR's Bureau for Children and Families as the Interim Community Services Manager for Barbour, Preston and Taylor Counties. Mr. Parks is located in the Preston County Office. Mr. Parks has worked for DHHR a total of 23 years. He has been supervising Child Protective Service Workers for 17 years, including 2 years in his current position.

5. In his present capacity, Mr. Parks is Grievant's second-level supervisor.

6. Heather Grogg is employed by DHHR's Bureau for Children and Families as the Interim Regional Director for Region III. Ms. Grogg has worked for the Bureau for Children and Families for 9 years, and served in her present capacity for 2 years.

7. Anne Armstrong is an Assistant Prosecuting Attorney in Preston County, West Virginia, who handles abuse and neglect matters in that jurisdiction. Ms. Armstrong has more than 11 years of prosecutorial experience handling child abuse and neglect cases.

8. In the course of handling abuse and neglect matters, Ms. Armstrong works closely with DHHR's CPSWs and case managers, including Grievant.

9. DHHR policy requires that a safety check be conducted for any home before an abused or neglected child is placed in that home. Such safety check ordinarily includes a physical visit to the home where placement is being proposed.

10. In the course of his work for Respondent, on November 23, 2016, Grievant submitted a memo to the Preston County Prosecuting Attorney, which thereafter went before the Preston County Circuit Court for consideration, stating as follows:

CPSW Thomas Keller interviewed [C.D.]<sup>1</sup> on 11/03/2016, about the allegations in the referral which included truancy issues, living with her mother after her parental rights were terminated and the dynamic of the home. The child stated that her mom's parental rights were terminated due to drug use and her mom being a bad mother. The child stated that she was supposed to go and live with her father, but instead her father forced her to live with the paternal grandmother. She went on to say that they did not get along with the paternal grandmother. The paternal grandmother ultimately kicked them out of the home. She said that at this time her father refused to allow either of the daughters to live with him, so they both went to live with their mother because they had no other place to go.

The child stated that after things went poorly with the mother they went back to the grandmother's home and things were still bad. A short time later the grandmother passed away. She went on to say that when this occurred, her dad moved in to the grandmother's home. A short time later, the relationship between the father and the two daughters worsened and was unbearable so the two daughters went their separate ways. She said that she went to her sister [H's] home and [E.] went to live with her boyfriend in Bruceton Mills. [C.] stated that she is doing very well at her sister's house and she is now enrolled at Preston high school. She said that she would like to remain in her sister [H's] home because she likes it there. The child also stated that she has not talked to her father in a month and he has not attempted to contact them. To her knowledge he

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<sup>1</sup> Each of the children and family members involved in the events which led to Grievant's suspension will be identified only by their initials, consistent with this Grievance Board's practice of respecting the privacy of individuals in such circumstances. See *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995); *Edwards v. McDowell County Bd. of Educ.*, Docket No. 93-33-118 (July 13, 1994); *Bailey v. Logan County Bd. of Educ.*, Docket No. 93-23-383 (June 23, 1994).

has no idea where they are. During the visit the child was clean, appropriately dressed and was very cooperative.

CPSW Thomas Keller met with [E.] was she (*sic.*) interviewed about the allegations contained in the referral which included truancy issues, living with her mother after the parental rights were terminated and the dynamic the (*sic.*) family. [E.] stated that they did not get along with her grandmother or their father so she went to live with her boyfriend and his parents. The child was interviewed about not attending school and the child is unable to tell me when the last time she was in school, but she believes it was just a few weeks ago. The child went on to say that she understands the case has been opened and the children cannot just be floating around from home to home and not attending school. The child stated that she is enrolled in University high school and does not like Preston high school. The child indicated that she has a grandfather and an aunt that would be willing to let her live with them and indicated that she would prefer not to live with her sister [H.], because they do not get along. During the visit the child was clean, appropriately dressed and appeared to be very cooperative.

CPSW Thomas Keller met with [H.] and interviewed her about her younger sisters and the dynamic of the family. [H.] stated that the younger sisters do not belong with her father or their grandmother, which recently passed away. She went on to say that [C.] is doing very well and now was attending school and they get along great. [H.] went on to say that [E.] is very different from the other sister because she is very rebellious and does not like to attend school or follow any type of rules. [H.] advised that she would be willing to take both children instead of just [C.] if she had some assistance. She went on to say that she has allowed [E.] to live with her on several occasions, but it has never worked out because of [E's] rebellious nature.

Due to the father apparently abandoning the children and not providing for their safety and wellbeing it would be in their best interest to be placed in the custody of the WVDHHR. Initial placement of the children would be with their sister [H.] and in home services would be implemented to work on the issues that the children have been experiencing due to truancy and lack of consistency in housing. This would be the plan as long as the MDT agrees.

R Ex. 3.

11. Experienced individuals whose regular business involves placement of abused and neglected children would reasonably interpret Grievant's statement in his memorandum to the effect that he "met with [H.] and interviewed her about her younger siblings" to mean that he personally met with H., and determined that her home was a safe location for placement of the minor children. Grievant's narrative does not state that he performed a safety check in advance of recommending placement. Grievant went to the home on one occasion, but either no one was home, or no one answered the door.

12. Grievant recorded a contact with H.D. on November 23, 2016, by phone, in the employer's database for tracking such matters. See R Ex. 7.

13. On November 30, 2016, the Circuit Court of Preston County entered an Order, following an emergency hearing, placing the minor children, E.D. and C.D., with their adult sister, H.D. See R Ex. 4.

14. The placement of E.D. and C.D. with H.D. was based, at least in part, upon Grievant's written recommendation. See R Ex. 3.

15. Subsequent to the November 30, 2016 hearing, H.D. denied meeting with Grievant. In addition, the children's Guardian Ad Litem, Megan Allender, told Assistant Prosecutor Armstrong that no such meeting took place. Based upon this information, Ms. Gifford sent Roger Brown and Mark Harvath, two of Grievant's co-workers, to the home to check on the children. The co-workers subsequently reported that the adult sister, H.D., had substance abuse issues, and was going through withdrawal. See R Ex. 5.

16. On December 2, 2016, the Circuit Court of Preston County held another hearing, removing the minor children, E.D. and C.D., from H.D.'s home, and placing them in the custody of the West Virginia Department of Health and Human Resources, pending placement of the children with a suitable relative, such as R.K., a grandfather. See R Ex. 4.

17. On the evening of May 25, 2017, Grievant was sent to Ruby Memorial Hospital at West Virginia University when two minor children, a boy and girl, were hospitalized after being drugged and sexually assaulted.

18. Portions of Grievant's interactions with the children, the children's mother, the mother's boyfriend, and multiple University security officers who had been called to assist, were recorded on a bodycam video device worn by one of the officers. See R Ex. 1.

19. At some point between May 25 and June 2, 2017, Grievant told Ms. Gifford that there was a bodycam video recording evidence pertinent to this matter. A copy of the video was provided to Ms. Armstrong.

20. After seeing the video, Ms. Gifford instructed Grievant not to discuss the video with Ms. Armstrong. This same instruction was given by Mr. Parks and another supervisor, Lawrence Taylor.

21. On June 12, 2017, Grievant called Ms. Armstrong and came to her office and met with her in the parking lot outside. Grievant was concerned about the bodycam video, stating that "I was caught being myself," or words to that effect. Grievant appeared to be concerned about whether the video would be introduced as evidence,

expressing concern to Ms. Armstrong that he might lose his job over the video's contents. See R Ex. 2.

22. During the course of the conversation with Ms. Armstrong on June 12, 2017, Grievant confirmed that he was not asking Ms. Armstrong to tamper with or withhold evidence. However, Grievant asked Ms. Armstrong not to tell anyone about their conversation. See R Ex. 2.

23. Grievant subsequently called Ms. Gifford, seeking permission to meet with Ms. Armstrong. Ms. Gifford denied the request. However, Grievant was calling Ms. Gifford shortly after leaving the meeting with Ms. Armstrong. See R Ex. 5.

24. After reviewing the video of Grievant's interactions with the child victims on the bodycam video, Ms. Armstrong became concerned with Grievant's conduct.

25. The bodycam video footage was also reviewed by Ms. Gifford, Mr. Parks, and Ms. Grogg, all of whom observed that from their perspective as child welfare workers, Grievant's interactions with the children, the mother, and the police officers, was unprofessional, inappropriate and inconsistent with DHHR policy and practice in multiple aspects.

26. Grievant's initial encounter with the children, where the male victim is attempting to tell Grievant about his traumatic experience, shows Grievant being indifferent to the child's need for attention, completely ignoring the child as if he represents nothing more than background noise, while instead focusing on his cell phone, and asking one of the security officers if his car will be towed. See R Ex. 1.



27. Even if Grievant was texting Ms. Gifford, his immediate supervisor, this does not excuse his complete failure to acknowledge the young victim's attempt to tell his story.

28. Grievant told the children's mother she would be arrested, if she tried to visit the children. Ms. Gifford explained that Child Protective Service Workers do not have arrest authority, and making such a threat was unacceptable in the circumstances. Mr. Parks also observed that this threatening approach was unprofessional.

29. Grievant told the mother that she had to identify an alternate family member with whom to place the children "within the next fifteen minutes," or he would be taking them into his custody. This approach was inconsistent with the dialog DHHR expects its employees to use in an effort to resolve such matters cooperatively when possible.

30. Respondent's employees are subject to Policy Memorandum 2108, Employee Conduct, including the following provision, certain portions of which are pertinent to this grievance:

Employees are expected to: comply with all relevant Federal, State and local laws; comply with all Division of Personnel and Department policies; comply with all applicable State and Federal Regulations governing their field of employment; follow directives of their superiors; conduct themselves professionally in the presence of residents, patients, clients, fellow employees and the public; respect the property of residents/patients/clients, fellow employees and the State; be accurate when completing Agency records; maintain the confidentiality of all Agency records including personnel, resident/patient/client records; use State vehicles, telephones and equipment only as authorized; exercise standard client management techniques; avoid physical abuse, harassment, or intimidation of residents/patients/clients or fellow employees; exercise safety precautions; and be ethical, alert, polite, sober, and attentive to the responsibilities associated with their jobs.

R Ex. 19.

31. On May 17, 2016, Grievant acknowledged having received a copy of Employee Conduct Policy 2108. See R Ex. 13.

32. On June 26, 2017, Ms. Grogg, in her capacity as Interim Regional Director for Region III of the Bureau for Children and Families, notified Grievant that he was being suspended pending an investigation into “allegations that you abused your position as a state employee to threaten, harass, and intimidate clients. As well as allegations of falsifying information in court reports and requesting a Prosecuting Attorney to withhold information during a court hearing.” R Ex. 16.

33. Grievant was provided a predetermination conference on June 21, 2017. See R Ex. 14.

34. On July 17, 2017, Ms. Grogg issued another “Predetermination Conference Notice” to Grievant which stated, in pertinent part, the following:

In accordance with the West Virginia Department of Health and Human Resources, Policy 2104, and the West Virginia Division of Personnel Administrative Rule, you are scheduled to attend a predetermination conference on July 18, 2017, at 1pm, at the Taylor County DHHR, CSM’s Office.

This meeting has become necessary based on the following allegations and/or policy violations:

On June 21, 2017, a Predetermination Conference was held at the Preston County DHHR office at 9am. Those present were Thomas Keller, Kris Mallory (Union Rep), John Roush (Union Rep), Amanda Gifford (CPS Supervisor) and Rick Parks, CSM. The meeting was held to discuss employee conduct. More specifically, your actions related to a CPS investigation that occurred on May 26, 2017, and your actions following that investigation.

You informed your supervisor that a video was available that was taken by a WVU Security Officer’s body cam to use as discovery in the case

pending (*sic.*) the Preston County Circuit Court. This video was obtained and reviewed by your supervisor and found to have troubling information on it. It was determined that during your interviews with the children that you were ignoring them, texting and not making eye contact during their disclosures of sexual abuse. Further, you did not offer them any comfort or reassurance that you were listening to them, or provide them with information that a CAC would be arranged in which they could tell their entire account of the incident. It was also discovered on the video that you had made a statement to the Officer that he may need to “kick the mother’s ass” for you. This statement is unethical and unprofessional.

After the video was examined by your supervisor, she delivered it to me for review and a determination of how to proceed with the case. I observed the video and found it to be very troubling. You were placed on desk duty for a period to allow Department administrative personnel an opportunity to decide what level of progressive discipline would be appropriate to address your behavior. During the time that you were on desk duty, you asked Supervisors, Lawrence Taylor and Amanda Gifford, as well as CSM Parks if you could speak to the prosecutor’s office about the video. You were told by all three not to do so. It was later determined that you ignored the directives of all of the above and spoke to Anne Armstrong, Assistant Prosecutor about the video and what could be done about it, despite the directive. Then, you asked a co-worker to speak with Ms. Armstrong about the video as well.

During your initial Predetermination Conference, you acknowledged speaking with Assistant Prosecutor Armstrong, but denied that you made any attempt to tamper with evidence in any way, but apologized for having the conversation. You stated that the video did not show everything that had occurred that evening. You stated that you were afraid to talk to the children because you were chastised by the prosecutor in the past for interviewing kids about serious abuse without doing a CAC interview. You went on to say that you did comfort the children, but it was not caught on film.

After the conclusion of the conference, it was determined that more information would need to be obtained about the situation. On June 26, 2017, you were suspended pending an investigation. During that time, your pay was suspended as well, but you could use your vacation to cover your absence until your vacation ran out.

During the investigation, it was determined that during a previous court hearing on November 30, 2016 you provided the court falsified documentation. You wrote in your court report that you had met with a relative provider and led the Court to believe that you had completed a

safety check in the home. The provider denied ever meeting with you, or having you come to the home. When it was discovered that you had not been to the home, Supervisor Gifford directed 2 coworkers to check on the children. The workers discovered that the provider appeared to be going through withdrawal, and the provider's live in boyfriend could not pass a CIB. The children had to be removed from that placement.

In another case, you were observed acting inappropriately with a 15-year-old emotionally disturbed child by an attorney. You informed the child that he needed to stop acting crazy, or no one would believe his disclosures.

There have been other concerns noted by law enforcement and the legal community regarding your lack of professionalism and integrity. Your supervisor had also been concerned with your level of truthfulness. This is documented in several of your monthly EPA 2's.

The purpose of the predetermination meeting is to give you an opportunity to respond to the aforementioned items and provide input for our consideration. You may present any information you believe would be supportive of your position.

\* \* \*

R Ex. 17.

35. A predetermination conference was conducted with Grievant on July 18, 2017. During that meeting, Grievant stated that he went to H.D.'s home by himself and no one was home. He later returned on another day with someone from the Sheriff's office and no one was home, except for a father-in-law who was out in the yard. He claimed to have met with H.D. and her boyfriend and went through the home, but then said he may have just talked with H.D. by phone. See R Ex. 8.

36. The Preston County Sheriff's Office has a record indicating that Grievant went to H.D.'s residence on December 5, 2016. See R Ex. 6.

37. There is no record in the Sheriff's Department to indicate an earlier meeting. In addition, Grievant failed to make any entry in the employer's computer

database to memorialize any visit to the home as required by DHHR policy, only a phone call to H.D. on November 23, 2016. See R Ex. 7. The attempt to visit H.D. on December 5, 2016, reflected in the records of the Preston County Sheriff's Office, was not entered in the employer's database.

38. On September 18, 2017, Grievant was provided a final predetermination conference regarding these same charges. See R Ex. 15.

39. On October 4, 2017, Ms. Grogg issued correspondence to Grievant notifying him that he was being suspended without pay for 10 days, and he would be paid for any time missed from work beyond those 10 days, and any leave used during his suspension would be restored. See R Ex. 18.

40. In reaching her decision to issue a 10-day suspension, Ms. Grogg considered Grievant's genuine remorse for his conduct expressed during one or more of the predetermination conferences, and Grievant's positive desire to continue serving the community in his present position as a Child Protective Service Worker.

41. Following DHHR's decision to impose a 10-day suspension on Grievant, Ms. Armstrong asked that he not be assigned to work with her on any further matters. Grievant's assignments have subsequently been changed to exclude working on any Preston County cases.

### **Discussion**

This grievance involves a disciplinary matter for which Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Ramey v.*

*W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). “The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Cir. Ct. of Pleasants County, Civ. Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Certain facts relating to the charges against Grievant were the subject of conflicting testimony. 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. *Young v. Div. of Natural Res.*, Docket No. 2009-0540-DOC (Nov. 13, 2009); *Massey v. W. Va. Public Serv. Comm'n*, Docket No. 99-PSC-313 (Dec. 13, 1999); *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). Some factors to consider in assessing the credibility of a witness include the witness' demeanor, opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the fact finder should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of the witness' information. *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2009-0685-MAPS (Apr. 23, 2009); *Massey, supra*.

At least some of the events which gave rise to the charges against Grievant are depicted on a video recording made through a bodycam worn by a police officer at West Virginia University. Grievant's testimony did not directly dispute any of the actions shown or statements made on the recording. Instead, Grievant stated that his conduct did not violate any rules, it simply represented an excess of candor and desire to get the children into a more suitable situation. However, Respondent's witnesses, including a veteran Assistant Prosecuting Attorney and three supervisors, all of whom have years of experience in the legal and social work aspects of child abuse and neglect, agreed that Grievant's indifference to the children reflected in their hospital room, his remarks to the security officers that he might need them to "kick the mother's ass," and his aggressive approach to obtaining the identity of a relative from the mother to accomplish an alternative placement, and threatening her with arrest if she attempted to visit with the children, represented unprofessional and unacceptable conduct. The Assistant Prosecutor later expressed a loss of trust in Grievant's integrity and credibility, and requested that he no longer be assigned to cases in her county.

The testimony of Ms. Grogg, Mr. Parks, and Ms. Gifford was indicative of dedicated social workers whose primary interest was protecting the children who are the Bureau's legal responsibility. None of them demonstrated any animosity toward Grievant, indicating that they were focused on reforming his conduct to make him a fully productive social worker. Ms. Armstrong, who was more hostile toward Grievant, having lost confidence in his integrity, nonetheless, appeared to testify truthfully in regard to the salient facts. Despite the opportunity to do so, she never shaded her

answers to make Grievant look worse. However, if her opinion of Grievant was solicited, it was generally negative.

Some of Grievant's conduct might have been acceptable in his prior career as a police officer, but providing social services requires a more humanitarian approach. Indeed, the charges directed toward Grievant's conduct as recorded on the police officer's bodycam appear focused on Grievant's "bedside manner," or lack thereof. While it is true that Grievant occasionally displays a patent lack of empathy or sensitivity toward the individuals caught up in the situation, during the majority of the time he appears on the recording, Grievant acts like a professional who has an unenviable but necessary job to do.

Grievant's testimony was generally candid and credible on most issues. Ultimately, Grievant's opinions regarding the propriety of his actions are simply not entitled to much weight, given that he is the person with the most to lose or gain from the outcome, and his experience in such matters is generally inferior to the other witnesses who testified. While Grievant may believe his actions were acceptable, the record establishes that in certain regards, they were not. As a former police officer, Grievant came across as someone who had experience testifying on the witness stand. He also demonstrated a mature understanding of his situation sufficient to indicate that he will make the most of any opportunity to continue his public employment as a Child Protective Service Worker.

Regarding another allegation, Grievant was instructed by his superiors not to discuss the bodycam video with Assistant Prosecuting Attorney Armstrong.



Nonetheless, Grievant took the initiative to meet with Ms. Armstrong and discuss that specific subject. Although Grievant never asked Ms. Armstrong to withhold information during a court hearing, his conduct was patently insubordinate. Ordinarily, insubordination involves a deliberate, willful or intentional refusal or failure to comply with a reasonable order of a supervisor. *Gill v. W. Va. Dep't of Commerce*, Docket No. COMM-88-031 (Dec. 23, 1988). Insubordination 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), *aff'd*, 182 W. Va. 294, 387 S.E.2d 529 (1989). More particularly, 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*). In addition, *Butts* explains that the disobedience must be willful, meaning that the motivation for the disobedience was contumaciousness or a defiance of, or contempt for authority. See *Dyke v. Div. of Corrections*, Docket No. 2012-0346-MAPS (Oct. 16, 2012), *citing Butts, supra*, at 213, 460. All of these elements were present here, and totally undermine Grievant’s assertion that he was just trying to do his job to the best of his ability during this series of events.

A preponderance of the credible evidence demonstrated that Grievant’s written report stating that he met with H.D., the sister of the two minor teenagers who needed to be placed in a different home, was inaccurate and misleading to the extent it

indicated that H.D. was a suitable guardian. Grievant failed to properly document whether he made a home visit in advance of placement which represents the “safety check” expected by DHHR and the courts. Further, Grievant admits that he did not enter H.D.’s home in advance of the placement, as indicated by his entry in the employer’s database reflecting that he spoke with H.D. by phone. It is more likely than not that if Grievant met with H.D. face to face, or visited her in her home, he would have noted the same substance abuse problems discovered by his co-workers when they visited the home following the children’s placement there.

Why Grievant returned to H.D.’s home on December 5, 2016, with a Preston County Deputy Sheriff is inexplicable, given Grievant’s claim that he never took any action without coordinating his steps with his immediate supervisor, Ms. Gifford. By that date, Ms. Gifford had already sent two of Grievant’s co-workers to the home, and the Circuit Court of Preston County had rescinded its earlier order assigning the two siblings to the custody of their older sister, H.D. Once again, there was no one home on December 5, 2016, but Grievant did not document this attempt to visit the home in the agency’s database.

To the extent there were other allegations discussed regarding Grievant’s performance, it does not appear that these events represented part of the charges for which Grievant was suspended. In any event, Respondent failed to present any credible direct or circumstantial evidence to support any charges other than the matters discussed above.

Ordinarily, an employer has broad discretion in selecting an appropriate penalty to redress an employee's misconduct. *Overbee v. Dep't of Health & Human Res.*, Docket No. 96-HHR-183 (Oct. 3, 1996). See *Lanham v. W. Va. Dep't of Transp.*, Docket No. 98-DOH-369 (Dec. 30, 1998); *Martin v. W. Va. State Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989). Any determination whether the penalty imposed is excessive must necessarily be made on a case-by-case basis. Grievant's misconduct definitely warrants a disciplinary response. However, DHHR concluded that termination was not warranted. This was Grievant's first disciplinary action, and his record to this point demonstrates his potential for becoming an excellent worker in this demanding field, provided he conforms his conduct to his employer's reasonable expectations.

However, based upon the violations established, some penalty is warranted. Whether that penalty should involve a 1-day suspension or a 30-day suspension is a matter to be initially determined by the employer. In this case, the employer found that a 10-day suspension was adequate to correct the employee's behavior. Grievant failed to demonstrate that such penalty constituted an abuse of discretion or an arbitrary and capricious exercise of the authority to impose discipline. Accordingly, the undersigned Administrative Law Judge finds no basis to overturn the employer's selection of the penalty imposed.

The following Conclusions of Law support the Decision reached.

### **Conclusions of Law**

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a

preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. Insubordination involves “willful failure or refusal to obey reasonable orders of a superior entitled to give such order.” *Riddle v. Bd. of Directors, So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994), *aff'd*, Cir. Ct. of Kanawha County, Civ. Action No. 94-AA-151 (Feb. 9, 1995); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989).

3. 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*). In addition, 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.

4. Respondent established by a preponderance of the evidence that Grievant engaged in insubordinate conduct by telephoning and personally meeting with Preston County Prosecuting Attorney Anne Armstrong to discuss video evidence after being explicitly instructed by his superiors not to contact Ms. Armstrong.

5. Respondent also established by a preponderance of the evidence that Grievant engaged in unprofessional and unacceptable conduct by ignoring the child

victims he was assigned to assist at Ruby Memorial Hospital, joking with security personnel about having them assist him in his work by kicking “the mother’s ass,” and making improper threats to the mother in an effort to identify a relative for suitable alternative placement, and to prevent her from attempting to see her children.

6. Respondent established by a preponderance of the evidence that Grievant prepared and submitted a written memorandum stating that he met with H.D. to determine whether her home would provide a suitable placement for her younger siblings when, at best, he interviewed H.D. by phone, and neither met with H.D. in person nor went to inspect her home in advance of the placement, contrary to established DHHR policy and practice. By relying on Grievant’s recommendation, the Circuit Court of Preston County approved an inappropriate placement, which had to be rescinded by the Court a few days later.

7. “Mitigation of the punishment imposed by the 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 & Human Res.*, Docket No. 96-HHR-183 (Oct. 3, 1996). See *Lanham v. W. Va. Dep’t of Transp.*, Docket No. 98-DOH-369 (Dec. 30, 1998); *Martin v. W. Va. State Fire Comm’n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

8. Respondent proved the charges against Grievant, and demonstrated good cause for his 10-day suspension.

On December 26, 2017, the undersigned Administrative Law Judge issued an “Order Directing Payment of Undisputed Wages Owed” granting interim relief to Grievant by directing that any annual leave he used while suspended be restored, and that he otherwise be made whole through the payment of backpay for all unpaid days, save the ten (10) days covered by this suspension. All other relief sought by Grievant through 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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. See *also* 156 C.S.R. 1 § 6.20 (2008).

**Date: February 8, 2018**

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**LEWIS G. BREWER**  
**Administrative Law Judge**