**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**LUETTA MCCALLISTER,**
**Grievant,**

**v.** **Docket No. 2017-2046-MU**

**MARSHALL UNIVERSITY,**
**Respondent.**

## DECISION

Grievant, Luetta McCallister, was employed by Respondent, Marshall University. On April 5, 2017, Grievant filed this grievance against Respondent stating, "I have been falsely accused of managerial misconduct, favoritism, sleeping on the job, and insubordination. 3 steps of the 4 part counseling have been skipped and also retaliation due to the [sic] doing my job and enforcing policies that I had been instructed to enforce." For relief, Grievant seeks the following: "Completely reinstated to my position. [A]ny pay that I will be losing during this process, and also the two employees that have caused all this to refrain from having any contact with myself."

Following the May 8, 2017 level one hearing, a level one decision was rendered on May 15, 2017, denying the grievance. Grievant appealed the level one decision directly to level three on May 23, 2017. By *Transfer Order* entered June 9, 2017, the grievance was transferred to level two and Grievant was directed to select the method of alternative dispute resolution. Following unsuccessful mediation, Grievant appealed to level three of the grievance process on July 27, 2017. A level three hearing was conducted over the course of five days on November 7, 2017, January 31, 2018, February 5, 2018, May 31, 2018, and June 1, 2018, before the undersigned, at the Grievance Board's Charleston, West Virginia office. On June 1, 2018, a subpoenaed witness failed

to appear, and Grievant, by counsel, requested the record remain open to allow for the testimony of the witness. The matter was held in abeyance until June 19, 2018, by *Order of Abeyance* entered June 7, 2018. By letter dated June 14, 2018, Grievant, by counsel, notified the Grievance Board that she no longer intended to call the witness. Grievant is represented by counsel, James D. McQueen, Jr., McQueen Davis, PLLC. Respondent is represented by counsel, Dawn E. George, Assistant Attorney General. This matter became mature for decision on August 20, 2018, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law ("PFFCL").

**Synopsis**

Grievant, Luetta McCallister, was employed by Respondent, Marshall University, as an Assistant Supervisor. Grievant was terminated from her position for managerial misconduct, sleeping on the job, favoritism, and insubordination. Respondent proved Grievant committed serious managerial misconduct during a meeting with a subordinate employee that warranted termination. Respondent failed to prove Grievant committed favoritism or insubordination. Respondent failed to prove discipline was warranted for sleeping on the job given the circumstances. Grievant argued her punishment should be mitigated, but given the seriousness of her misconduct, Grievant's prior good performance and lack of disciplinary history does not warrant mitigation of the punishment. Grievant failed to prove her penalty was disproportionate to the penalties employed by the employer against other employees guilty of similar offenses. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

## Findings of Fact

1. Grievant, Luetta McCallister, was employed by Respondent, Marshall University, as an Assistant Supervisor.

2. Grievant began her employment with Respondent as a Campus Service Worker on March 17, 2005, and was promoted to Assistant Supervisor within a few years.

3. During the relevant timeframe, Dale Osburn was the interim and then the permanent Director of the Physical Plant and Travis Bailey was the Associate Director of the Physical Plant.

4. Grievant was an evening shift supervisor for the physical plant and had charge of two buildings, the Biotech building and the Science building, and the Campus Service Workers stationed in those buildings, approximately eleven to fourteen people during the relevant time-period. Grievant's immediate supervisor was Terry Blake, who reported directly to Mr. Bailey.

5. Bruce Felder is the Director of Human Resources and has held that position for approximately three and one-half years. From the beginning of his tenure, Mr. Felder had heard many rumors involving the operations of the physical plant and had employees come to him with issues, but he could not completely understand the underlying cause.

6. In the summer of 2016, Grievant's employee, Diana Vargas went to Director Felder to complain that she was not receiving overtime and alleging that Grievant was treating her differently from other employees by speaking to her unprofessionally and by allowing other employees to wear jeans, take longer breaks, and not do as much work. Director Felder forwarded these complaints to Mr. Osburn.

7. Between the summer of 2016 and December 2016, Ms. Vargas and another of Grievant's employees, Susan Farnsworth, met with Mr. Felder multiple times to make various complaints about Grievant. Ms. Vargas and Ms. Farnsworth did not attempt to bring their complaints to the attention of either Mr. Osburn or Mr. Bailey, the administrators of the physical plant.

8. On December 1, 2016, an anonymous email was sent to the general human resources email account, stating:

> This is a picture of Luetta MCcallister, she is the assistant supervisor of Bio Tech and Science. This was taken while she was past out in her office. She is obviously high on something. This puts herself and everyone around her in danger. This subject has been brought to the attention of Terry Blake whom is Luetta's supervisor, which I feel was ignored. This is an ongoing problem that many of the staff have noticed. Hopefully, this situation can be addressed properly so I can be resolved.[1]

The email attached a picture of what was purported to be Grievant sitting at a desk, bent over, with her head face-down on the desk.

9. Grievant believed, which was revealed in the level three testimony to be true, that Ms. Farnsworth had provided the pictures of Grievant allegedly sleeping to the human resources office. Grievant and Ms. Farnsworth had been having continual conflict since shortly after Ms. Farnsworth had become a permanent employee, and Grievant believed Ms. Farnsworth was attempting to get her fired.

10. On December 2, 2016, Mr. Felder forwarded the email and attachment, removing the email address of the sender, to Mr. Bailey and Mr. Osburn, stating that an

[1] The email is reproduced as written.

investigation would need to be conducted. Later in the day, Mr. Felder sent a second photograph, which was too blurry to see anything other than a figure sitting in a chair.

11. On December 6, 2016, Mr. Bailey sent an email to Mr. Felder stating that he and Mr. Osburn had spoken to Grievant and she stated that she had narcolepsy, that there was medical documentation on file of her condition, and that the photo was taken on her lunch break.

12. By email of the same date, Mr. Felder stated that he would look for the medical documentation and that, "we need to make sure that we have a plan in place to accommodate her illness. At the end of the day, falling asleep on the job is not acceptable."

13. By email dated December 9, 2016, Mr. Bailey notified Grievant that neither Mr. Osburn nor the human resources office could find any medical documentation of Grievant's condition in their records. Mr. Bailey instructed Grievant to resubmit the documentation so that her illness could be accommodated.

14. By email of the same date, Grievant stated it had been nine to ten years since she had submitted her paperwork regarding her illness, but that she was "quite sure" she still had it. Grievant goes on to address the history of rumors about her circulated by her subordinate employees, that had resulted in her previously being required to submit to drug testing, which was negative, and that two of her current employees had "made statements that they would do anything to get rid of me. . ."

15. On December 12, 2016, Grievant sent an email to Mr. Bailey stating she would bring in documentation "as soon as I am able to get them."

16. On January 11, 2017, Mr. Bailey sent an email to Grievant requesting the status of the documentation.

17. On January 13, 2017, Grievant responded with a lengthy email in which she asserted she had turned in the medical documentation to the human resources office two times and was concerned about the loss of this confidential information. Grievant explained that she would attempt to get the documentation the next week, but that, if the documentation is no longer available due to the length of time since the diagnosis, she would have to go through all the testing again, which she was unable to afford.

18. On the same date, Grievant called Ms. Vargas into her office ostensibly to counsel her about coming in early to work and working off-the-clock. Due to her concerns about previous interactions with Grievant, Ms. Vargas recorded this meeting without Grievant's knowledge. The initial counseling on this issue was brief, yet the meeting proceeded for forty-five minutes and became an obvious attempt for Grievant to intimidate and manipulate Ms. Vargas regarding the complaints that were being made about Grievant to administration. Although Grievant never uses her name, it is obvious that Grievant is speaking about Ms. Farnsworth throughout. Hearing the recording is quite uncomfortable and disturbing but is difficult to fully describe. Grievant's demeanor on the recording appeared erratic, manipulative, paranoid, and nearly incoherent at times. Grievant repeated herself continuously, using phrases such as, "I swear my hand to God," "on my mother's grave," and "God strike me dead." Throughout, Grievant cried loudly, raised her voice, vaguely threatened Ms. Vargas and other employees, gossiped about other employees, and attempted to pit employees against one another. Multiple times, Grievant told Ms. Vargas that she loved her and that she was only trying to help her, while

attempting to turn Ms. Vargas against Ms. Farnsworth and other employees. Throughout this ordeal, Ms. Vargas was forced to comfort her distraught supervisor. Ms. Vargas made numerous attempts to redirect Grievant to relevant concerns or to bring Grievant's rant to a close but was interrupted by Grievant every time she attempted to speak.

19. Statements of particular concern were those in which Grievant appeared to make veiled threats. Grievant stated, "I am telling you right now, and you, you, you can tell anybody you want to, I don't care. It's coming to a point where it's either going to be you or her and things are not going to be good. . .You stop and think about yourself, ok. . . what's good for YOU, because I'm going to come out smelling like a rose. I have a perfect record. I'm not letting anybody take me down. I've worked too hard, and, like I said, I just came out of Travis' office. I've been in there the last hour so…do what you will, I'm telling you, do what you will. That's your decision. You're a grown woman. You know what's best for yourself." Then, "I've got two nieces that have told me point-blank we'll stop at nothing to get you fired. And if you don't think I'm going to safeguard myself I'm going to. That's a fact. I've worked too hard." After stating that she had been in a meeting with Mr. Bailey about Ms. Vargas, Grievant stated, "And I will be in meetings and I will defend myself no matter what it takes to defend myself." Further, she stated, referring again to Ms. Farnsworth, "I made a mistake. I made a mistake by helping a person get hired that I shouldn't have done. I have to reap what I sew, and I have to deal with that, but I don't want her taking you down too." Grievant reminded Ms. Vargas that she was the person that hired Ms. Vargas, saying loudly, "I am the one!" Although she had already addressed the issue about Ms. Vargas coming in early, Grievant came back to the issue three more times during the forty-five minutes. Each time Grievant came

back to the issue, stating that Ms. Vargas would be disciplined if it happened again, was directly after complaining about the other employees and the allegations against Grievant, which reinforced the feeling that Grievant was threatening Ms. Vargas' job if Ms. Vargas continued to support Ms. Farnsworth.

20. On February 3, 2017, Mr. Bailey emailed Grievant stating that the human resources office had told him that they had not received the medical paperwork and that Grievant would need to provide the paperwork by February 17, 2017.

21. By email dated February 9, 2017, Grievant stated, "February 17th is totally fine, and will not have problem getting it, I assure you!"

22. On February 17, 2017, following a telephone conversation, Mr. Bailey emailed Grievant and extended the deadline to submit her medical documentation until her next doctor's appointment on March 17, 2017. Mr. Bailey further stated that if no document is received at that time, progressive discipline would proceed.

23. By email of the same date, Grievant confirmed her appointment was March 17, 2017, which was "just a re-evaluation to be able to get my diagnosis documentation, due to the number of years that it had been since he diagnosed me. They said that they only keep records going back 7 years, before they put them in storage, and it has been 9 years."

24. Sometime in February 2017, Mr. Felder received a copy of the recording Ms. Vargas made of the January meeting with Grievant and a copy of a recording of a staff meeting conducted by Mr. Blake. Both recordings were provided to him by Ms. Farnsworth.

25. By letter dated March 13, 2017, Mr. Felder placed Grievant on paid administrative/investigational leave to allow an investigation into allegations of "inappropriate and unprofessional behavior." The letter further states: "You are not permitted on the campus of Marshall University during this period of leave. Furthermore, you are asked not to discuss this matter or any other University business with your subordinates. In addition, you are directed not to contact any of your employees during this leave." The letter was provided to Grievant during a meeting, during which Grievant asked for specific information regarding the allegations and Mr. Felder refused to disclose the specific allegations. The letter was presented to Grievant in person on that date and Mr. Felder agreed to an exception to allow Grievant to drop off and pick up her husband on campus as he was also employed by Respondent.

26. At the same time, Mr. Felder also placed Mr. Blake on paid administrative investigational leave.

27. Mr. Felder then undertook an investigation where he was not specifically investigating Grievant or Mr. Blake, in which he drafted a written questionnaire of ten to twelve broad questions about things like sleeping on the job, drugs, and harassment. The questionnaire was distributed to all night shift employees, approximately forty people, and approximately ninety-five percent responded.

28. Although Mr. Felder stated in his testimony that he questioned every available night shift employee, Mr. Felder provided very little information about the nature of his questioning, although it appears the questioning was also broadly stated like the survey and not specifically about Grievant or Mr. Blake. Mr. Felder did not record any of

these interviews or have any employee provide written, signed statements. Mr. Felder did not interview Grievant or Mr. Blake as part of the investigation.

29. Sometime during the investigation, Mr. Felder became aware of video that had circulated among employees years before that purported to prove Grievant and Mr. Blake were having an affair. Although Mr. Felder does not state to whom he made the request, he describes that he stated, "it would be nice if that video somehow appeared on my door step." A few weeks after this statement, Mr. Felder anonymously received the video. The video only shows a vehicle parked on a street in front of a house that was taken approximately ten years ago.

30. Many allegations against Grievant stemmed from the belief of employees that Grievant and Mr. Blake had been having an affair for many years and that Mr. Blake favored and protected Grievant as a result.

31. Grievant and Mr. Blake denied they had, or were having, an affair.

32. On March 17, 2017, shortly after the investigation began, Mr. Blake retired from employment with Respondent.

33. On March 17, 2017, Grievant submitted an order for testing for her sleep disorder. Although both parties discussed this document, it was not entered into evidence.

34. On March 29, 2017, Mr. Felder received a report that Grievant was parked outside the Biotech building. Mr. Felder contacted campus police who responded.

35. Grievant was parked on Commerce Avenue, a city street, behind the Engineering building, where her son worked, to drop off food for his meal break. Grievant

then moved to a privately-owned gravel parking lot and had a brief personal discussion with her employee, Lilly Flora.

36. By memorandum dated April 4, 2017, Mr. Felder notified Grievant that "your position has been recommended for termination. Effective immediately, you are suspended without pay until a decision is rendered regarding your continued employment." The letter further notified Grievant that a pre-termination hearing was scheduled for April 6, 2017.

37. In a *Performance Counseling Statement* dated April 4, 2017, from Mr. Felder to Grievant, he lists the following as "Incident/Event/Observed Performance": Managerial Misconduct, Sleeping on the Job, Favoritism, Insubordination, and Attached Addendum. In the addendum, Mr. Felder lists six numbered paragraphs. The first paragraph details the anonymous pictures of Grievant allegedly sleeping on the job and Grievant's failure to present "a historical diagnosis of Narcolepsy." The second paragraph details the audio recording of the meeting with Grievant Ms. Vargas recorded. The third paragraph states that an investigation was begun due to the audio recording and photos and that Grievant was instructed to stay off campus and not speak with any employees, with the only exception of permission to transport her husband to and from work on the campus. The statement lists the allegations regarding insubordination, favoritism, and sleeping on the job as follows:

> Insubordination – Two weeks into the investigation Ms. McCallister showed up unannounced in Human Resources to speak with me (HR Director). She stated that it's been three weeks and that she has been very patient. She wanted an update as to when she would be allowed to return to work. I instructed her that it has taken longer than expected to interview all night shift employees and that we hope to wrap things up in another week. I received a phone call the next

night at approximately 9:20pm stating that Ms. McCallister was parked in the back of the Biotech building just sitting in her car. MUPD was called to verify her presence and reason for being there. Prior to their arrival she had moved her car to the gravel lot of the SOL's Electrician Building. After being questioned by MUPD, she drove off and was caught by the light of 3rd Ave by Smith Hall. I received a statement from three employees that she gave them the "finger" as she drove past.

Favoritism was a common response that many employees made during question[ing]. Specifically, Luetta McCallister and Terry Blake have an extremely close bond that is the origin of many of the allegations. Employees state that Terry and Luetta have been nearly inseparable and this behavior has been ongoing since before 2009. Some employees state that Luetta is never in her building and spends a large amount of time in Terry's office in the Physical Plant building. Some more tenured staff members stated that Luetta's vehicle has been seen outside of Terry's home during work hours. This leads employees to believe that there is an amorous relationship between the two. Luetta's son Patrick McCallister was hired to work in the Henderson Center and many employees who work in that building alleged that Patrick received protection from Mr. Blake and wasn't counseled for sleeping on the job or for poor performance. Patrick was eventually transferred to another building because he felt that the supervisor and employees in Henderson was [sic] harassing him. Employees don't feel they can go to Terry because he is part of the problem. They feel a sense of retaliation if they say something or report something. Especially if it involved Luetta or her buildings. Employees don't feel that they can have confidential conversations with Luetta without her telling other employees what was said.

Sleeping on the job – Multiple employees have mentioned that Luetta McCallister has been sleeping on the job and in her vehicle while on the clock. On occasions some employees stated that at the end of the shift, at quitting time, they would walk out of the building and Luetta McCallister would still be in her vehicle sleeping. They believe something is wrong but she tells everyone that she has Narcolepsy and it is on file in HR & Physical Plant.

38. On April 6, 2017, Mr. Felder held the pretermination conference with Grievant and her husband, which Mr. Felder recorded. During the conference, Grievant

submitted the following documentation: An "Office Note" from Ijaz Ahmad, M.D. of Medical Neurology, Inc., dated January 25, 2012, stating "This patient has history *quite suggestive* of narcolepsy;" a preliminary EEG Report dated November 22, 2011, stating a history of narcolepsy; and an MRI "Final Report" dated February 7, 2012, stating a history of narcolepsy.

39. Mr. Felder recommended to the President that Grievant's employment be terminated by forwarding a document entitled *Investigation NOTES/Findings*. The document listed the following "Concerns and Allegations:" "1. Pictures of Supervisor Sleeping on the job 2. Audio recording of Supervisor (Meltdown, threatening statements, instigating conflict) 3. Insubordination during the Investigation 4. Favoritism, Preferential Treatment, amorous relationship." The document discusses each numbered concern/allegation in order in the following sections: a paragraph describing the concern/allegation, "Investigational Findings," "Employee's Statement of Defense," and "Recommendations." The document adds the following accusations against Grievant that were not included in the *Performance Counseling Statement* or based on responses in the pretermination meeting: that the unproven inappropriate relationship between Grievant and Mr. Blake was "the foundation of Grievant's managerial misconduct," the video, allegations that employees were transferred because they could not get along with Grievant, and that Grievant talked to an employee while she was alleged to have been on campus.

40. It does not appear a letter terminating Grievant was issued, and it is unclear how Grievant was notified that her employment was, in fact, terminated. No document terminating Grievant's employment was entered into evidence.

41. Grievant had received no prior discipline in her twelve years of employment with Respondent.

42. Grievant did not present as evidence any employee performance evaluations, but Mr. Osburn testified that Grievant performed "rather well."

43. Mr. Blake had previously received written counseling for an incident Mr. Felder described as follows: "Terry Blake took one of the employees that falls under his supervision to, I believe it's E level in Henderson Center, and basically threatened him. There was witnesses to that almost to the point where, 'Hey, we're gonna fight right here right now if you continue to say this about me.' He was accusing another employee by the name of David Walker of spreading allegations about him and McCallister having a relationship."[2] This was the only evidence presented about this disciplinary action.

44. Employee discipline at Marshall University is governed by its *Board of Governors Policy No. HR-10, Employee Infractions* and the *Classified Staff Handbook*.[3]

45. The *Classified Staff Handbook* sets forth a discipline procedure that "consists of progressive steps taken when an employee does not meet the required performance standards and/or commits an offense contrary to the policies of the University." The disciplinary action "should be reasonable and timely and must be related to the severity of the offense." "Depending on the severity and the nature of the offense" any combination of oral counseling, written counseling, suspension, or dismissal may be taken. The *Classified Staff Handbook* also lists fifteen infractions requiring immediate

[2] For clarity, pauses, words such as "uh", and repeated words have not been included in the quotations.

[3] Although Grievant also cites Policy No. HR-5 in her PFFCL, that policy was not moved into evidence as an exhibit during the level three hearing and cannot be considered.

suspension or dismissal, including the following infractions relevant to the grievance: "2. gross insubordination, including willful and flagrant disregard of a legitimate order, threatening or striking a supervisor . . . 6. deliberate falsification of employment application or other University records such as time cards, medical records, or any other dishonest acts committed for personal gain or for malicious intent . . . 8. obstruction or disruption of teaching, research, or administration."

46. *Board of Governors Policy No. HR-10* 2.5.2 states: "If a classified or nonclassified employee of Marshall University. . .commits one or more of the employee infraction(s) set forth below and it is factually determined that he/she committed the infraction(s), he/she will be suspended from employment without pay or terminated from employment. The policy then goes forward to list the same fifteen infractions listed in the *Classified Staff Handbook*.

**Discussion**

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2008). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or

mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin*., 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* W. VA. CODE ST. R. § 143-1-12.02 and 12.03 (2012).

Respondent argues it has proven the charges against Grievant and that it was justified under its progressive discipline policy to terminate Grievant's employment. Grievant argues Respondent failed to prove the charges against her, failed to follow its progressive discipline policy, or that, in the alternative, the punishment of termination was excessive and should be mitigated considering Grievant's prior lack of discipline, good work history, and that Mr. Blake had been allowed to retire rather than face discipline.

As a preliminary matter, based on the evidence presented in this grievance, Respondent's investigation into the allegations against Grievant was wholly inadequate. While Mr. Felder testified that he interviewed employees, it appears the bulk of the "investigation" consisted of an anonymous general survey Mr. Felder circulated to all employees. Mr. Felder did not collect written, signed statements from employees. Neither Grievant nor Mr. Blake were given the opportunity to defend themselves during the investigation, nor was Grievant informed of the specific charges against her during the investigation. Grievant's only opportunity to respond to the charges was during the pre-termination meeting, which appears to have been a mere formality as Mr. Felder had already determined that Grievant should be terminated based on the investigation. Grievant's ability to adequately respond during the pre-termination meeting was also significantly hampered by the lack of specific information relayed in the allegations. Mr. Felder seems to have been swayed in his recommendation to terminate Grievant, not on

actual evidence of Grievant's wrongdoing, but on rumors and mere allegations. Although Mr. Felder stated that he could not prove Grievant and Mr. Blake had an inappropriate relationship, his actions appear motivated in part by his belief that these allegations were true.

The procedures used during the investigation and disciplinary process, while not alleged to have violated any expressed policy of Respondent, certainly do not resemble the procedures typically utilized by public employers in investigating and disciplining public employees. In addition to the irregularities in the investigation stated above, the documentation of the disciplinary process was also quite irregular. Grievant was not notified of the specific allegations against her when she was suspended pending the investigation. At the conclusion of the investigation, during which Grievant had not been interviewed, Grievant was provided a memorandum with the subject "Notice of Pre-Termination Hearing," in which Mr. Felder states, "This memo is to inform you (Luetta McCallister) that your position has been recommended for termination." The charges against Grievant were presented to her on a Performance Counseling Statement. These charges against Grievant were presented to the President in an undated document entitled "Investigation NOTES/Findings," which contained some charges that were not given to Grievant in the counseling statement. Then, bizarrely, Grievant was never provided a written termination of her employment and none was entered into evidence at the hearing, which indicates such a document might not have been drafted at all.

Although there were five days of testimony in this matter, much of the evidence presented was simply not relevant because it related to issues with which Grievant was not charged or was regarding alleged misconduct by Mr. Blake. Respondent is limited to

proof on the charges it actually levied against Grievant, as they were presented to Grievant. Because of the unusual nature of the process in this case, whereby no termination letter appears to have been issued, Respondent is limited to the charges announced to Grievant in the *Performance Counseling Statement*.

Much of the testimony lacked specificity, contained hearsay, consisted of expression of belief rather than fact, or concerned the behavior of Mr. Blake and not Grievant. Therefore, the only clear picture painted by the five days of testimony is that the evening shift of the physical plant was a hotbed of gossip, innuendo, and petty disagreements, exacerbated by the inappropriate leadership of Mr. Blake and spanning back a full decade. Allegations regarding the relationship between Grievant and Mr. Blake, based on clandestine videos made by employees following the two ten years ago, were inexplicably treated as relevant evidence by Respondent. Rumors of this relationship were presented as proof of inappropriate favoritism and the behavior of Mr. Blake seems to have been imputed to Grievant based on the allegation of an inappropriate relationship. As such, actual credible evidence of wrongdoing by Grievant on the majority of the allegations is scant.

However, despite the significant concerns with the investigation and disciplinary process and the lack of evidence on the majority of the charges, the most serious charge against Grievant cannot be disputed because there is an audio recording of the entire incident. Grievant's abuse of power, dishonesty, and instability, as revealed by the incident, are sufficient grounds to terminate Grievant's employment.

Grievant's behavior during the meeting with Ms. Vargas, and her denial of any inappropriate conduct when confronted with the allegations regarding the meeting, was

serious misconduct. Grievant turned what should have been a simple, brief counseling session into a forty-five-minute excruciating ordeal in which she sobs, yells, threatens Ms. Vargas and other employees, gossips about other employees, attempts to pit her employees against one another, and repeatedly prevents the obviously uncomfortable Ms. Vargas from leaving. Although the stated purpose of the meeting, to counsel Ms. Vargas not to work if she came to work early, was proper, the entirety of the meeting shows Grievant was retaliating against Ms. Vargas for her part in the complaints about Grievant and was attempting to intimidate and manipulate Ms. Vargas as the situation went forward.

Grievant's behavior during the meeting went beyond unprofessional into quite troubling as she was erratic, manipulative, paranoid, and nearly incoherent at times. The recording is incredibly uncomfortable to listen to and the undersigned can only imagine how difficult it would have been for Ms. Vargas to endure that conduct from her supervisor in person. Grievant's obvious intention to intimidate and manipulate her subordinate employee cannot be tolerated and her serious lack of control further impacts Grievant's trustworthiness. Adding to the seriousness of her original misconduct is that, when confronted, Grievant denied that any inappropriate conduct had occurred during the meeting. Supervisors "may be held to a higher standard of conduct, because [they are] properly expected to set an example for employees under their supervision, and to enforce the employer's proper rules and regulations, as well as implement the directives of [their] supervisors." *Wiley v. Div. of Natural Res.*, Docket No. 96-DNR-515 (Mar. 26, 1988); *Linger v. Dep't of Health & Human Res.*, Docket No. 2010-1490-CONS (Dec. 5. 2012). The example Grievant set in this meeting was intimidation and manipulation in an

attempt to circumvent her employer's proper rules and regulations. The seriousness of that conduct exhibited by a supervisor cannot be overstated, especially given denial of any wrongdoing, and Respondent was justified in terminating Grievant's employment for this incident.

As the incident with Ms. Vargas so clearly warranted termination of Grievant's employment, the undersigned will not discuss the remaining allegations in detail. In general, as to the allegations of sleeping on the job, insubordination, and favoritism, Respondent simply failed to present sufficient reliable evidence to support those charges.

Anonymous pictures of Grievant allegedly sleeping, without corroborating statements from the person who took the pictures, do not prove Grievant was actually sleeping or whether the incident had occurred within a relevant timeframe or during work time. While some testimony was offered at level three regarding who took the pictures and the alleged circumstances under which the pictures were taken, that information was not part of the termination decision and will not be considered. It is unclear from the evidence of the investigation what, if any, specific other instances were alleged by employees at the time of the investigation and decision to terminate Grievant's employment. The testimony offered by employees in the level three hearing was mostly general about the allegations of Grievant sleeping and the only witness who did provide a specific timeframe for when he asserts he found Grievant asleep on the job, testified he saw Grievant sleeping more than five years before she was terminated.

In addition, while Grievant failed to timely respond to Respondent's requests for medical documentation of her condition, it is also noted that Respondent's communications to her about what was actually needed were less than clear. Grievant

also did explain that it was difficult to obtain records that were so old and that she could not afford new testing to obtain a current diagnosis. Regardless, at the pre-termination conference, Grievant did provide documents from her doctor showing a probable diagnosis of narcolepsy. Respondent should not have moved forward with discipline on that issue without explaining Grievant's rights under the Americans with Disabilities Act and giving her an opportunity to provide information necessary to make a determination under the Americans with Disabilities Act. Respondent found Grievant's documentation insufficient partially because it was old, yet, the historical documentation was all that Respondent had previously asked Grievant to provide. Mr. Felder made no attempt to question Mr. Blake regarding Grievant's assertion that she had turned in the medical documentation to him previously, despite the fact that most long-term employees testified that they were aware Grievant had a sleeping disorder.

Respondent failed to prove Grievant was insubordinate. "[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, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). The charge of insubordination was made because Grievant "showed up unannounced to the Human Resources Office," for parking "in the back of the Biotech building," and for giving employees "the finger" while parked at the traffic light on Third Avenue. Grievant appeared at the Human Resources office to turn in some medical documentation, which she had previously been given until March 17, 2018 to do but had been suspended on March 13, 2018. While there, Grievant asked to speak to Mr. Felder. She was not told

she could not speak to Mr. Felder and there was no accusation that her behavior with the Human Resources staff or Mr. Felder while she was there was in any way inappropriate. It is completely reasonable for Grievant to believe it was appropriate to go the Human Resources office to turn in documentation that had been previously requested and when she had been told in the letter that "[a]ll communication must be directed through the Director of Human Resources."

As to the other instances, Respondent failed to prove Grievant was on campus. The evidence demonstrates Grievant was actually parked on Commerce Avenue behind the Engineering building, where her son works, to bring him food, and then in a privately-owned parking lot. There was no evidence presented that Commerce Avenue is owned by Respondent and most witnesses appeared to agree that this was a city street. Most witnesses testified Grievant was either behind the Engineering building or in the private lot and not behind the Biotech building as alleged. Likewise, although running through Respondent's campus, Third Avenue is a city street not owned by Respondent.

Although Grievant does not dispute she spoke to an employee in friendly conversation while in the private lot, this charge was not made by Respondent in the *Performance Counseling Statement and* will not be considered. As to giving employees "the finger," only one person testified about this allegation, who was not one of Grievant's employees. He named three other people who did not testify and who do not appear to be Grievant's employees. Further, although Grievant had been accused of giving employees "the finger" while driving by on Third Avenue, the witness testified this allegedly happened while Grievant was parked talking to Tim Cline, another Assistant Supervisor. It does not appear Mr. Cline was ever questioned about this allegation.

Additionally, although the allegation was that this occurred while Grievant was suspended, the testimony indicates the incident happened earlier, when Ms. Farnsworth had been transferred to Smith Hall, which was more than a month before Grievant was suspended. Regardless, even if this incident actually happened and happened while Grievant was suspended, while certainly improper, it would not be insubordination because these people were not Grievant's employees and she had only been directed not to communicate with "your employees."

"'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h). Respondent's allegations regarding Grievant do not meet the definition of favoritism. Respondent alleged Grievant and Mr. Blake had "an extremely close bond" and repeated the unfounded rumors and allegations of an affair partially based on the video made by employees clandestinely following of the two ten years before the investigation. Respondent alleged Grievant's son received protection from Mr. Blake. Respondent alleged that employees felt they could not complain about Grievant to Mr. Blake because of the alleged relationship. Respondent alleged employees felt they could not have confidential conversations with Grievant without her repeating the conversation to other employees. None of these allegations related to Grievant committing favoritism to a subordinate employee. It is inappropriate to discipline Grievant for favoritism she may have received from Mr. Blake. That is a matter of discipline for Mr. Blake.

The Investigation NOTES/Findings document may have vaguely alleged Grievant committed favoritism in other ways, but, as those allegations were not part of the charges Grievant was provided, they were not considered. Likewise, in their level three testimony, some employees made some general allegations of favoritism committed by Grievant, but, as those allegations were not part of the charges Grievant was provided, they were not considered. Even if those allegations were considered, at best, the allegations of improper behavior, such as allowing one employee to wear jeans or take longer breaks, even if proven, were minor and should have been addressed through performance improvement, not discipline.

Therefore, Respondent has proven managerial misconduct based on the incident with Ms. Vargas and that it was justified in terminating Grievant's employment for this misconduct but has failed to prove the remaining charges against Grievant. However, Grievant further argues that the punishment of termination should be mitigated.

"[A]n allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was 'clearly excessive or reflects an abuse of agency discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n,* Docket No. 89-SFC-145 (Aug. 8, 1989)." *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No 95-AA-66 (May 1, 1996), *appeal refused*, W.Va. Sup. Ct. App. (Nov. 19, 1996). "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); *Olsen v. Kanawha County Bd. of Educ.*, Docket No. 02-20-380 (May 30, 2003), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004). "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); *Cooper v. Raleigh County Bd. of Educ.*, Docket No. 2014-0028-RalED (Apr. 30, 2014), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

Grievant argues her termination was extreme, given her good prior performance, no prior disciplinary history, and that Respondent allowed Mr. Blake, who had committed much more serious offenses, to retire. Grievant asserts she should have been allowed "four-part counselling" under Respondent's policy, and that she should have been afforded the same disciplinary action as Mr. Blake, who had been allowed to retire.

Grievant demonstrated that she had never before received discipline during her employment, and, although Grievant presented no documentary evidence of employee performance appraisals, she demonstrated her performance was good through the testimony of Mr. Osburn. Grievant failed to demonstrate she was entitled to lesser

discipline under Respondent's policy. While Respondent's discipline process is progressive, consisting of oral counseling, written counseling, suspension, then dismissal, it further requires the discipline "be related to the severity of the offense" and that, "[d]epending on the severity and the nature of the offense" any combination of the steps may be taken. As explained above, Grievant's behavior during the meeting with Ms. Vargas was serious misconduct warranting termination.

Regarding the comparison to Mr. Blake, Grievant presented no evidence that Mr. Blake was allowed to retire in lieu of discipline. The record shows Mr. Blake retired mere days after the investigation began. Further Grievant does not allege that she asked to retire or resign in lieu of discipline and was denied. While Grievant only specifically argues that her discipline should be mitigated because Mr. Blake was allowed to retire, she also proposed several findings of fact in her PFFCL that Mr. Blake had only been counselled when he had threatened bodily harm against a subordinate. Only the very brief testimony of Mr. Felder was offered on this issue during the level three hearing, in which he stated, "Terry Blake took one of the employees that falls under his supervision to, I believe it's E level in Henderson Center, and basically threatened him. There was witnesses to that almost to the point where, "Hey, we're gonna fight right here right now if you continue to, to, to say this about me." He was accusing another employee by the name of David Walker of spreading allegations about him and McCallister having a relationship." While Grievant characterized this as a threat of bodily harm, this is not specifically stated in Mr. Felder's testimony. Mr. Felder's statement does not appear to be an actual quote of what Mr. Blake said to the employee. Certainly, if a credible threat of actual violence had been made for which Mr. Blake received only counseling, that

would not have been appropriate discipline under Respondent's policy. Given the limited information on the incident with Mr. Blake, that argument does not support mitigation of Grievant's punishment. Given the seriousness of her misconduct, Grievant's prior good performance and lack of disciplinary history does not warrant mitigation of the punishment.

The following Conclusions of Law support the decision reached.

**Conclusions of Law**

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2008). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

2. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin*., 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* W. VA. CODE ST. R. § 143-1-12.2.a. (2016).

3. "[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, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). The Grievance Board has further recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988), *aff'd*, *Sexton v. Marshall Univ.*, 182 W. Va. 294, 387 S.E.2d 529 (1989).

4. "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h).

5. "[A]n allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was 'clearly excessive or reflects an abuse of agency discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n,* Docket No. 89-SFC-145 (Aug. 8, 1989)." *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No 95-AA-66 (May 1, 1996), *appeal refused*, W.Va. Sup. Ct. App. (Nov. 19, 1996). "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); *Olsen v. Kanawha County Bd. of Educ.*, Docket No. 02-20-380 (May 30, 2003), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004). "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); *Cooper v. Raleigh County Bd. of Educ.*, Docket No. 2014-0028-RalED (Apr. 30, 2014), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

6. Respondent proved Grievant committed serious managerial misconduct during a meeting with a subordinate employee that warranted termination. Respondent failed to prove Grievant committed favoritism or insubordination. Respondent failed to prove discipline was warranted for sleeping on the job given the circumstances.

7. Grievant failed to prove her punishment should be mitigated for her prior lack of discipline and good work history given the seriousness of her misconduct. Grievant failed to prove her penalty was disproportionate to the penalties employed by the employer against other employees guilty of similar offenses.

Accordingly, the grievance is **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be

included so that the certified record can be properly filed with the circuit court. *See also* W. VA. CODE ST. R. § 156-1-6.20 (2018).

**DATE: October 1, 2018**

_____
**Billie Thacker Catlett**
**Chief Administrative Law Judge**