

# WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**JACK SHEFFLER,**  
Grievant,

v.

**Docket No. 2018-0955-CU**

**CONCORD UNIVERSITY,**  
Respondent.

## **DECISION**

Jack Sheffler, Grievant, filed this grievance against his former employer, Concord University (“Concord”), Respondent, protesting his termination from employment. The original grievance was filed on February 8, 2018, which provides:

The Respondent dismissed Grievant from his employment by letter dated February 6, 2018. Grievant contends:

- Respondent terminated Grievant for conduct unrelated to his employment with Respondent.
- Grievant denies any misconduct.

Grievant further asserts that he was asked as a favor by his supervisor to build a float for a parade for a local hospital. Grievant understood this to be a request and not a directive. Grievant contacted the hospital agreed to build the float and was given a check for the work. He was not asked to keep receipts for material or hours worked. He completed the float. Afterward Respondent asked him for receipts and directed [him] to return any money left over to the hospital, which would presumably send it to Respondent. Grievant contends he fulfilled his agreement with the hospital and that this agreement had no connection with and was outside of the scope of his employment with Respondent.

The relief sought states:

Grievant seeks compensation for lost wages and benefits with interest retroactive to February 6, 2018, restoration of seniority, removal of any reference to his termination from any record maintained by Respondent or its agents, and any other relief deemed necessary to make Grievant “whole”.

As authorized by W. VA. CODE ' 6C-2-4(a)(4), the grievance was filed directly to level three of the grievance process.<sup>1</sup> Level three hearing proceedings were held before the undersigned Administrative Law Judge on June 8, 2018, and September 7, 2018 at the Grievance Board=s Beckley facilities. Grievant appeared in person and with legal counsel John E. Roush, Esquire, American Federation of Teachers-WV, AFL-CIO. Respondent was present in the form of Human Resources Director Dan Fitzpatrick and its Deputy General Counsel Candace Kraus. After two days of hearing, the parties were provided the opportunity to present written Proposed Findings of Fact and Conclusions of Law documents. Both parties submitted PFOF/COL submissions and this matter became mature for decision on or about October 12, 2018, on receipt of the last of these proposals.

### **Synopsis**

Grievant was employed by Concord University as a tenured professor in the Art Department of the Institution. Respondent terminated Grievant's employment contending he is guilty of conduct which constituted dishonesty, insubordination and theft. Grievant contends the dismissal is improper. Grievant challenges Respondent's ability to lawfully terminate his employment for the rationale communicated and contends any other reason later concocted is in violation of his due process.

Respondent informed Grievant that identified behavior was unacceptable and that failure to rectify the situation would result in the termination of his employment. Grievant is

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<sup>1</sup> W. VA. CODE ' 6C-2-4(a)(4), provides that an employee may proceed directly to level three of the grievance process upon agreement of the parties, or when the grievant has been discharged, suspended without pay, demoted or reclassified resulting in a loss of compensation or benefits.

of the position that it is beyond Respondent's scope of authority to mandate the requested restitution. Respondent's notice of termination indicates a violation of professional responsibility, theft and insubordination.<sup>2</sup> Grievant denies wrongdoing and maintains his termination was for conduct outside of his employer's realm of authority. Respondent established a judicious connection between established conduct and the employment of Grievant. Respondent demonstrated by a preponderance of the evidence grounds for the termination of Grievant's employment.

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

### **Findings of Fact**

1. Jack D. Sheffler, Grievant, was employed as a tenured professor by Concord University, in the Fine Arts Department, where he taught courses in painting, print making, art history, sculpture, graphic design and drawing. Grievant was employed by Respondent for over fifteen years, from August 17, 2002, until his termination on February 6, 2018. At the time of termination, Grievant was employed by Concord University as Professor of Art and Chair of the Department of Fine Arts.

2. Concord University, Respondent, is a public institution of higher education with its primary campus in Athens, West Virginia.

3. Kendra Boggess is the President of Concord University.

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<sup>2</sup> Specifically, Grievant was informed he was being terminated for conduct in violation of Concord University Board of Governors Policy 49, Policy on Disciplinary Action ("Policy 49"), and Title 133, West Virginia Higher Education Policy Commission Legislative Rule, Series 9, Academic Freedom, Professional Responsibility, Promotion, and Tenure ("Series 9").

4. President Boggess was asked by her daughter-in-law and Princeton Community Hospital employee, Sharon Boggess, if the University could construct a City of Princeton Christmas parade float for Princeton Community Hospital (“PCH” or “Hospital”). President Boggess thought it could be arranged and responded that the University would be glad to do the project.

5. Heather Poff, PCH Director of Human Resources, indicated that PCH was of the opinion that if Concord built the float, it would be beneficial to the community and support the University. PCH is a strong supporter of Concord and its initiatives, both financial and otherwise.

6. President Boggess made some inquiries. President Boggess contacted Dr. Peter Viscusi, Concord Provost and Vice-President for Academic Affairs regarding the project.

7. On or before June 16, 2017, Rick Hypes, the Director of the Marketing Department of Princeton Community Hospital, contacted James Biggs, a professor in the Art Department of Concord University, seeking someone to construct the Hospital’s float for the 2017 Christmas parade.

8. Although initially interested in the job, Professor Biggs ultimately declined the opportunity.

9. Provost Viscusi, at the direction of Concord President Kendra Boggess, made inquiries into getting the project accomplished.

10. After Mr. Biggs declined involvement in construction of the float for the Hospital, Dr. Viscusi approached Grievant about the situation. There is no written memorialization of the discussion between Grievant and Dr. Viscusi.

11. Subsequent to the discussion between Grievant and Dr. Viscusi, Richard “Rick” Hypes, PCH Marketing Director contacted Grievant by email.

12. Richard “Rick” Hypes, PCH Marketing Director and Heather Poff, PCH Director of Human Resources were of the opinion that they were contracting with Concord University, Respondent, to construct the Hospital’s float for the 2017 Christmas parade in Princeton, West Virginia. See L-3 Testimony.

13. By email to Grievant dated July 24, 2017, Grievant was provided some specifications for the project by PCH’s Marketing Director. In the email Mr. Hypes discussed the Hospital’s eagerness to work with the Art Department, the University and students, specified equipment the University would be responsible for providing, stated the Hospital would pay \$4,250.00 to construct the float. Director Hypes also included examples in the email of photographs of previous elaborate floats constructed by other artists for Princeton Community Hospital. R Ex 2

14. Princeton Community Hospital operated with the good faith belief that it was dealing with Concord University, Respondent. Mr. Hypes offered \$4,250.00 by check payable to Grievant, the Art Department, or Respondent for construction of a non-religious Christmas themed float for the 2017 Christmas parade in Princeton, West Virginia. R Ex 2 Further, in relevant part the email provided:

The parade is November 27<sup>th</sup>. . . . If you are not interested in the art department being a part of this that will be the end of it. If you are interested, I assume that money will change hands via the concord foundation and support/permission of other administrators may be required?  
Let me know what you think.

R Ex 2

15. There was no written contract for the construction of the Princeton Community Hospital's float for the 2017 Christmas parade. There was no written contract between the Hospital and either Grievant or Respondent.

16. The Hospital presented Grievant with a check for \$4,250.00 payable to the Grievant.

17. Subsequent to Grievant's dismissal, Princeton Community Hospital issued a tax document (IRS Form 1099-MISC) to Grievant for \$4,250.00 for non-employee compensation.<sup>3</sup>

18. Grievant was assisted in constructing the float by some individuals who were students at Concord University.

19. A number of work-study students indicated that they worked on a project which they believe to be the Princeton Community Hospital's float for the 2017 Christmas parade. R Ex 15 and 16

20. The final version of the PCH 2017 Christmas float did not contain and/or was not made out of paper mache material.

21. Grievant was generous in assigning work-study tasks to help students. However, the record of the current grievance contains no written cautionary communications or reprimands issued to Grievant at any time during the Fall of 2017 concerning excessive use of student work-study time.

22. Construction of the float was completed and delivered on time for the parade which occurred the Monday/week after Thanksgiving.

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<sup>3</sup> PCH issued the document upon request from Grievant. Grievant requested a 1099 on or about February 19<sup>th</sup> – **after** his employment was terminated.

23. The float, as presented at the parade, did not impress administrative personnel of Princeton Community Hospital. Specifically, Marketing Director Hypes and PCH Director of Human Resources Poff were not pleased.

24. The float was constructed of chicken wire with white fluffing to represent snow. The emoji heads were not made of paper mache, but were printed sheets of paper glued to waffle board that were allegedly peeling off, even before the parade started. R

Ex 3

25. The float included music and lights, but was not overly impressive. It was simplistic and minimal in effect and impact.

26. On the evening of November 27, 2017, Marketing Director Hypes was underwhelmed. He was shocked at the poor quality of the float.

27. Mr. Hypes and HR Director Poff testified that the float did not at all meet the specifications discussed with Grievant and expected by PCH, including music and lights, and was not made of the materials Grievant had previously described.

28. Director Hypes informed Grievant that the Hospital was not happy with the outcome.

29. Grievant indicated that several concepts and iterations were attempted before resorting to the printed and pasted paper boards.

30. Grievant had purchased a generator for \$1,000 from Lowe's to power lights and a sound system on the float. Grievant returned the generator for a refund after the parade (generator did not work as needed).

31. Ms. Poff's husband provided the trailer and driver for the float, at no cost to Respondent.

32. Mr. Hypes had prepared a banner for the float recognizing the Concord Art Department and its students for their work on the float. However, after seeing the quality of the float refrained from displaying such a banner.

33. PCH Human Resources Director Poff called President Boggess on December 1, 2017, to voice dissatisfaction with the quality of the float Concord had provided while President Boggess was out of the office. When President Boggess returned the call on December 5, Ms. Poff expressed PCH's dissatisfaction.

34. President Boggess learned that PCH had made a check payable to Grievant in the amount of \$4,250.00, purportedly to purchase materials and supplies for the float project.

35. President Boggess apologized and purported to offer a refund to PCH. See Boggess L3 testimony.

36. President Boggess asked Dan Fitzpatrick, Concord Vice President of Human Resources, Policy and Planning, to meet with Grievant.

37. Mr. Fitzpatrick and Dr. Viscusi met with Grievant soon thereafter, regarding the Hospital's dissatisfaction and to begin reconciling the financials.

38. At this meeting, the group discussed the expenses incurred and paid for, whether and how much students were paid, that all University purchases should be accounted for in order to reconcile accounts, and that all checks must be made payable to Concord University.

39. Mr. Fitzpatrick and Dr. Viscusi requested an accounting from Grievant.



40. Grievant never provided any receipts and limited accounting of his spending. Concord Administrators were left to estimate the amount of funds that were remaining after the cost of constructing the float.

41. Respondent somehow determined that \$3,000.00 would be a reasonable amount of money to expect Grievant to return. This amount was not set in stone. Grievant had the option of discussing an amount verified by expenditure and receipts.

42. Mr. Fitzpatrick, Dr. Viscusi and President Boggess testified that over the course of the month, Grievant was directed on other occasions to return the unexpended funds and provide documentation of expenditures.

43. Dr. Viscusi testified that he, along with Concord Associate Provost Cheryl Barnes, met with Grievant for a “Dutch Uncle conversation” and encouraged Grievant to resolve the matter, or else he would be recommending his termination from employment.<sup>4</sup> Grievant responded that he did not have the money to pay, and the only way he could pay the money back was for the University to forgive three months’ rent for his University-owned housing so Grievant could use that rent money to repay PCH.

44. In December 2017, Respondent demanded receipts for materials used on the float and/or repayment of approximately \$3,000.00. Grievant declined such demands.

45. On December 21, 2017 President Boggess instructed Grievant to return \$3,000.00 to the University Foundation Office by noon on December 22 for return to PCH. Grievant did not say a word, he just “moonwalked” backwards out of the exterior office.

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<sup>4</sup>The term “Dutch Uncle” conversation was specifically used by Provost Viscusi. He explained he understood the term to mean to bring the harsh realities to someone that may not want to hear them. Provost Viscusi informed Grievant he was jeopardizing his job at the University. Dutch Uncle is defined in the Merriam-Webster dictionary as one who admonishes sternly and bluntly.

46. By email on January 3, 2018, Mr. Fitzpatrick extended the repayment deadline set by President Boggess to noon on January 5, 2018. R Ex 7 Grievant did not return any funds to PCH or Concord.

47. Respondent among other options of resolution proposed a repayment method for Grievant to have \$200 dollars, per pay period, deducted from his salary. Grievant declined to avail himself of this option. R Ex 7

48. By letter dated January 22, 2018, Grievant was notified that Concord intended to terminate his employment for theft, deceptively obtaining and misappropriating University funds, and insubordination. R Ex 6b Said document in relevant part provided:

Re: Notice of Intent to Terminate Employment

This letter is to notify you that Concord University intends to terminate your employment, effective February 2, 2018, for conduct in violation of Concord University Board of Governors Policy 49, Policy on Disciplinary Action ("Policy 49"), and Title 133, West Virginia Higher Education Policy Commission Legislative Rule, Series 9, Academic Freedom, Professional Responsibility, Promotion, and Tenure ("Series 9"). Specifically, you have engaged in conduct that violates Policy 49, §5.2(a) Theft of or malicious damage to University property; Policy 49 §5.2(b) Gross insubordination, including willful and flagrant disregard of a legitimate order; Series 9 § 12.1.1. Demonstrated incompetence or dishonesty in the performance of professional duties, including but not limited to academic misconduct; and Series 9 §12.1.3. Insubordination by refusal to abide by legitimate reasonable directions of administrators.

On behalf of Concord University, President Kendra Boggess contracted with Princeton Community Hospital ("PHC") to construct a float for the annual Christmas Parade in Princeton. On September 14, 2017, the Provost assigned the project to you for completion. You completed the project on behalf of the University as assigned in time for the parade on November 27<sup>th</sup>.

On December 5, 2017, PHC called the President to report dissatisfaction with the float, at which time the University learned that Princeton Community Hospital had made a check payable to you in the amount of \$4,250, at your request, purportedly to purchase materials and supplies for the float project.

PCH advised President Boggess of their intent to have the balance of money over expenses to be donated to Concord University. You cashed the check, but did not provide the remained money to the University.

In a meeting with Dr. Peter Viscusi and me following the Princeton Christmas Parade, you indicated that you purchased supplies for the float project. You further acknowledged using the funds to pay students casual labor in an unspecified amount, when the students should have been paid through the University. You were directed to provide receipts for the project and to provide the balance of the money to either PCH or the University. To date, you have not provided the receipt nor the money.

R Ex 6b

49. A pre-termination conference was held on February 1, 2018, at which Grievant stated that he did not believe he had done anything to deserve disciplinary action; he was asked – not directed or instructed – by Dr. Viscusi to create a float for PCH; he agreed to do the project and consulted with Mr. Hypes; the float project was not a duty that could be assigned to him; Concord did not have a written contract or agreement with PCH (and acknowledged that neither did he); PCH provided him with a check to cover expenses and had not instructed him to keep receipts; the project was between Grievant and PCH and had nothing to do with Concord; the Provost could not assign the project to him because it was not in his appointment letter nor the Faculty Handbook and had nothing to do with his job; he did not have receipts for his purchases nor cash.

50. At the pre-termination conference, Grievant did not reveal that he had specifically requested Marketing Director Hypes make the check payable to Grievant, nor that he had informed Mr. Hypes that such method would help avoid a cumbersome accounting process at Concord.

51. On February 6, 2018, Grievant's employment was terminated for cause citing Concord and West Virginia Higher Education Policy Commission ("HEPC") policies,

for theft by deceitfully obtaining and keeping money that belonged to Concord University; dishonesty for deceitfully obtaining money that belonged to Concord University and failing to properly administer the University funds; and gross insubordination for repeatedly and willfully refusing to heed the legitimate, reasonable directives of his superiors to provide receipts and repay the funds owed to the University, despite having been given numerous opportunities to comply. R Ex 6a

52. Specifically, the February 6, 2018 termination letter in relevant part provided:

Dear Mr. Sheffler:

On January 22, 2018, you were advised that Concord University intended to terminate your employment and you would be given an opportunity to request a conference to present any information you believe would influence the decision to terminate your employment. A conference was held on February 1, 2018, at your request and you testified as to why you believe you had not done anything to deserve disciplinary action. Your arguments, which were contrary to the established facts and your prior statements, were not persuasive. Following the hearing, you were advised to keep working unless you were advised otherwise. A decision has been rendered, your employment with Concord University will be recorded as having terminated this date, February 6, 2018.

Your employment is being terminated for conduct in violation of Concord University Board of Governors Policy 49, Policy on Disciplinary Action ("Policy 49"), and Title 133, West Virginia Higher Education Policy Commission Legislative Rule, Series 9, Academic Freedom, Professional Responsibility, Promotion, and Tenure ("Series 9"). Specifically, you have engaged in conduct that violates Policy 49, §5.2(a) Theft of or malicious damage to University property; Policy 49 §5.2(b) Gross insubordination, including willful and flagrant disregard of a legitimate order; Series 9 § 12.1.1. Demonstrated incompetence or dishonesty in the performance of professional duties, including but not limited to academic misconduct; and Series 9 §12.1.3. Insubordination by refusal to abide by legitimate reasonable directions of administrators.

On behalf of Concord University, President Kendra Boggess orally contracted with Princeton Community Hospital ("PCH") for the university to construct a float for the annual Christmas Parade in Princeton. On September 14, 2017, the Provost assigned the project to you for completion.

You completed the project on behalf of the University as assigned in time for the parade on November 27th.

R Ex 6a

53. Respondent identified Grievant's conduct as a violation of University and HEPC policies. Respondent contends that Grievant engaged in conduct that violated Policy 49, §5.2(a) Theft of or malicious damage to University property; Policy 49 §5.2(b) Gross insubordination, including willful and flagrant disregard of a legitimate order; Series 9 § 12.1.1. Demonstrated incompetence or dishonesty in the performance of professional duties, including but not limited to academic misconduct; and Series 9 §12.1.3. Insubordination by refusal to abide by legitimate reasonable directives of Administrators.

R Ex 9 and 14

### **Discussion**

In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 ' 3 (2018). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, A[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.@ *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Respondent's position is that in late Summer 2017, Grievant was assigned to construct a City of Princeton Christmas parade float for Princeton Community Hospital by his supervisor, Dr. Peter Viscusi, Concord Provost and Vice-President for Academic Affairs. The assignment was made at the direction of Concord President Kendra Boggess after a previous inquiry to art professor James "Jamey" Biggs to have the University construct the float had failed. Grievant contends that he had a contract to construct the float with the Hospital separate from his employment with Concord University. Thus, Respondent is without authority to discipline him because the Hospital was dissatisfied with the end product.

What is said, what is understood and what is perceived to be a mutual understanding is not always the same. Non-written agreements communicated between and through third parties is always ripe for confusion, misinterpretation and disagreement. This grievance is such an example. The more difficult determination is where to reasonably draw the line of responsibility/accountability. The parties of this grievance, both, at one time or another, give a wink and a nod to perception, unspoken understandings and/or facts. The momentum of persuasive argument in this matter tends to ebb and flow with time and subject matter. The undersigned ALJ is mindful of the alleged rationale for Respondent's termination of Grievant. Was Grievant adequately made aware of the rationale for his termination? Is disciplinary action in the circumstances of this matter a reasonable action? Was Grievant given appropriate due process? Is Grievant's termination lawful? Does Respondent justify its actions by a preponderance of the evidence? The parties of this grievance, each point a finger at one another

highlighting intent, alleged understandings, vagueness and factual evidence. This termination grievance is not without twists, factual dispute and ambiguity.

At issue is whether Respondent's action is lawful, within the bounds of its authority and/or is arbitrary and an illegitimate action. Grievant, with the assistance of legal counsel, purports that the contract for construction of the Christmas float was between Grievant and the Hospital rather than Respondent and the Hospital; Respondent had no right to the receipts for materials used in construction of the float nor the proceeds of the contract. Accordingly, Grievant's failure to provide these items does not constitute insubordination, theft, or any other type of actionable misconduct.

Respondent presented several witnesses to attest to and for its actions. The credibility of Respondent's witnesses and the reliability of the information being presented by all parties is under review. Grievant highlights that there is a difference between intent and factual certainty. The undersigned further acknowledges, it is not hard to image that if the Hospital had been pleased with the float there would have been no controversy, no demand for receipts and money and no termination of Grievant's employment.<sup>5</sup> However, those are not the facts before us. Respondent sought to recover moneys from Grievant for either itself or the Hospital, after representatives of Princeton Community Hospital indicated dissatisfaction with services believing that the services had been performed by Respondent via the Concord University Art Department. When Grievant resisted the request for accounting and restitution from Respondent, he was ultimately dismissed from employment. Respondent maintains that Grievant's actions merit disciplinary action in that Grievant engaged in conduct which constitutes theft or malicious damage to

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<sup>5</sup> Point of interest highlighted by Grievant. See L3 Hearing and submitted PFOF/COL.

University property. Insubordination including willful and flagrant disregard of a legitimate order or insubordination by refusal to abide by legitimate reasonable directives of Administrators; demonstrations of incompetence or dishonesty in the performance of professional duties, including but not limited to academic misconduct.

## II. Credibility

Certain facts surrounding the events which led to Grievant's termination were the subject of conflicting testimony. It is deemed prudent to address the reliability and due weight that is most readily applicable to the witnesses who testified and provided information during this grievance. An Administrative Law Judge is charged with assessing the credibility of the witnesses. See *Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1994). The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. See *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

In assessing the trustworthiness of the information provided by Grievant, and various administrative personnel, the undersigned was mindful of the potential for bias, and the possibility of agency interest, while considering the consistency of statements and the plausibility of the witness's information. The undersigned Administrative Law



Judge found it prudent to use the factors cited in the prior paragraph to assess witnesses' testimony and to determine the appropriate weight various testimony warranted to establish or disprove a contested fact. The undersigned had an opportunity to observe the demeanor of the witnesses, and to assess their words and actions during their testimony.<sup>6</sup>

Grievant was the next to last witness to testify at the conclusion of two days of hearing which stretched out over several months. His first-hand testimony was much anticipated. Grievant's attitude and demeanor are thought to be extremely relevant. Grievant expressed the belief that the contract<sup>7</sup> to build the float was between himself and the Hospital. This testimony conflicts with the testimony of other witnesses' belief and/or expressed intent of agency administration. Grievant was aware that his testimony was of significance and was being evaluated.

Having observed the speech, mannerisms, expressions, demeanor and body language of Grievant, the undersigned finds Grievant's testimony to be incomplete and hollow. Grievant failed to persuasively counter several aspects of Respondent's purported justification for its action(s). The undersigned is more than willing to entertain the prospect that Grievant conceived the project as a personal venture contract. Nevertheless, it was also

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<sup>6</sup> Individuals testified to numerous facts, alleged factors and connotations perceived during various events of this case. The trustworthiness of testimony is a balancing of information, motivation and verification. More times than readily acknowledged, reliability and reasonableness are flexible commodities and not a constant factor.

<sup>7</sup> The term "contract" was used by parties in both a formal and general sense of the term. There is a recognizable difference. While a contract can be either written or verbal, it is an agreement between two or more parties for deed, services or item(s). A true agreement is a meeting of the minds, regarding essential elements and terms. Who is or is not a principle party to the agreement is thought to be an essential component of a contract.

readily apparent that Grievant was aware that others perceived the arrangement to be between the University and the Hospital. R Ex 2 <sup>8</sup> It is more likely than not that Grievant took liberties with the circumstance(s) of this matter. Grievant used the ambiguity between parties to line his pockets. Grievant was inconsistent with his replies to direct and indirect questions. The configuration of mutual miscommunication is more than plausible in the fact pattern of this matter it is relied upon repeatedly. Nevertheless, the context of Grievant's testimony is more than an alternative interpretation of facts. Grievant presented reasonable explanations for some actions and reactions to events but leaves much to be desired with his overall attitude to the bigger picture. A conspicuous point of diversion is the side issue of work-study student participation in building the float. In and of itself not a keynote factor, especially if it was a University project. But tends to grow in significance if Grievant was sincerely treating the project as an independent (non-University) project.

Grievant provided that he and Richard Hypes, Marketing Director of Princeton Community Hospital, met for an approximately two hours. Grievant's L3 testimony. Aspects of the float were discussed, prospective themes, discouraged imagery, construction, materials, time lines, past floats etc. Grievant represented that pursuant to his conversation with Mr. Hypes, the project was not a Concord University project, but rather a project Grievant was performing for the hospital.<sup>9</sup> The use of paper mache as a

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<sup>8</sup> "Rick Hypes from Marketing at Princeton Community Hospital has asked if the Art Department could build a parade float to represent the hospital in the Princeton Christmas parade. The hospital will pay \$4250 for a turn key float." June 16, 2018 email to Grievant from James Biggs. R Ex 2

<sup>9</sup> Was there a meeting of the minds between Grievant and the Hospital regarding the construction of the float? Principle Hospital personnel, (Richard Hypes & Heather Poff) were of the belief they were dealing with Respondent. Grievant's utterance that this was a personal side project is reportedly unknown to all principle parties (anyone), other than himself, until

medium was at one time or another considered by Grievant for use on the prospective float. (G L3 testimony) Grievant's recollection of the float construction falls short of acknowledging the use of work-study students. This conflicts with other evidence of record. The credibility of Grievant's testimony is challenged by the factual dispute of whether work-study students were utilized to help construct a prospective float in association with the 2017 Christmas parade. With regard to the issue of whether work-study students had occasion to assist in the construction of a (preliminary) version of the float, or not, may have become more of an issue than prudent. There is a disconnect with portions of Grievant's testimony. Grievant's recollection of construction events and the time line of facts do not foster a sense of trustworthiness.

Certainly, in any conversation individuals at times hear what they want to hear and misinterpret what is being said. People frequently have different interpretations of verbal conversations and at times even of the written word. Yet overall, the context of Grievant's testimony is more than an alternative interpretation of facts. Grievant's recollection and alleged understanding of a situation tends to be at odds with everyone, sooner or later. This is regrettable. The trustworthiness of Grievant's testimony suffers from such repeated conflicts stemming from so many sources.

Dr. Peter Viscusi is the Provost and Vice President for Academic Affairs at Concord University and testified at the level three hearing of this grievance. He testified in a manner demonstrating due deference to the issues in contention and this Grievance

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communicated to Respondent, well after the parade and Grievant had been approached regarding potential corrective measures.

Board. He demonstrated the mannerism of an individual attempting to be accurate regarding the facts and the cumulative effects of the behavior of various individuals. With due acknowledgment to his role in this matter, this witness responded to queries posed and attempted to explain his analysis of this situation. Provost Viscusi testified as a result of this situation he has lost trust and confidence in Grievant. He further stated he would not be amenable to rehiring Grievant. Dr. Viscusi demonstrated the traditional decorum of a witness testifying at a Grievance Board proceeding. His testimony is viewed as trustworthy. Dr. Viscusi testified that he had encouraged Grievant to resolve the matter. He alone and with others talked to Grievant, attempting to reconcile the perception and various understandings of this matter.

Dan Fitzpatrick, Vice President Human Resources, Policy and Planning at Concord University testified on behalf of Respondent as well as serving as the agency representative at the level three hearing. He testified with confidence and clarity. Mr Fitzpatrick provided first-hand information with insight into the analysis used by Respondent in the circumstance of this matter. As administrative Human Resources personnel, Vice President Fitzpatrick was interactive with Grievant and had opportunity to communicate directly with Grievant during a pivotal period of this matter. The testimony of Vice President Fitzpatrick was instrumental in providing some of Respondent's rationale for the steps taken by Respondent's agents.

Vice President Fitzpatrick expressed the opinion that Grievant, within the circumstances of this matter, was dishonest and fraudulent. Respondent has the belief that Grievant's actions could be viewed as a variety of misdeeds as well as failing to

inform, i.e., purposely not disclosing crucial information to the University is deceptive to the point of actionable conduct. This witness testified he is of the opinion that Grievant is in violation of professional duties, (Series 9). R Ex 14 Further, Fitzpatrick cited Concord University Board of Governors Policy 49, which was listed in the dismissal letter. Vice President Fitzpatrick presented information regarding his actions, the agency's concerns and the various manners Respondent attempted to counsel and redirect Grievant. Grievant was repeatedly non-cooperative with Respondent's agents. The undersigned was interested in Respondent's distinction of "conflict of interest" vs "conflict of commitment".<sup>10</sup> Fitzpatrick's testimony is deemed plausible and found to be trustworthy.

Procedural safeguards are in place for the protection of everyone, workers, administration and the integrity of the system. A responsible employer does not abuse authority but exercises it with due diligence. Pursuant to Vice President Fitzpatrick's testimony, Respondent attempted to communicate with Grievant and reach a mutually acceptable resolution of this situation. Fitzpatrick's testimony was presented in a manner tending to be both facts revealing and tone setting. Grievant was presented with various options of providing collaborating evidence, rational explanation and/or a potential repayment plan. The precise amount of funds in dispute is debatable, ranging from One to Three Thousand Dollars. Grievant declined to provide a reliable accounting for money actually spent on expenses and related construction cost.

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<sup>10</sup> Conflict of interest: declaring a relationship with any party which may have an impact on their relationship with the University vs Conflict of commitment; use of time, ability to dedicate 100% work effort to University business. Fitzpatrick L3 testimony

The testimony of Kendra Boggess, University President was informative and also provided a foundation for alternative interpretations to events reported. With due acknowledgment to her role in this matter, this witness responded to queries posed and attempted to explain the agency's categorizing of this situation. President Boggess testimony presented facts, information, and her opinion in a credible manner. However, it also established that certain assertions of information were not necessarily established facts but good faith assumptions. There is a recognizable distinction between President Boggess's direct knowledge and her good faith belief of fact certain. Whether Dr. Viscusi ordered Grievant to construct the float or requested him to do so tends to shed light on the question of for whom Grievant was working for when he constructed the float (Respondent or the Hospital). Dr. Viscusi asserts it was an order. Grievant understood it as a request. Both President Boggess and Dr. Viscusi explained that faculty are treated professionally in the academic community such that they are not ordered to perform tasks but asked respectfully. President Boggess testified that assigning community service projects is customary at Concord as a means of establishing community connections, promoting good will among the business community, encouraging community participation in University initiatives, and enhancing recruitment efforts. There is no written memorialization of the event to aid us in determining whether it was a directive or a request.

President Boggess' testimony is deemed reliable, and the weight of her testimony provides insight into the original intent of Respondent and the Hospital but does not prove the agreement that Grievant contends was in place (between him & the hospital) is

implausible. President Boggess testimony is credible, still there is a recognizable distinction between President Boggess' direct knowledge and her good faith belief of facts certain. PCH Human Resources Director Poff called President Boggess to voice dissatisfaction with the quality of the float Concord had provided. President Boggess in good faith apologized to PCH and purported to offer a refund. President Boggess was definitely of the belief that the float in discussion was constructed by Respondent's Art Department personnel, as she had intended.

### III. Due Process

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

It is a well-settled principle of constitutional law, under both the State and Federal Constitutions, that an employee who possesses a recognized property right or liberty interest in his employment may not be deprived of that right without due process of law. *Buskirk, supra*; *Clark, supra*. "An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and an opportunity for hearing

appropriate to the nature of the case." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494, (1985), citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). See also West Virginia Supreme Court of Appeals case *Board of Education of the County of Mercer v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994). A question of concern in this matter is whether the due process protections afforded Grievant were sufficient.<sup>11</sup>

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

What is required to meet conceptual fair dealing is controlled by the circumstances of each case. Grievant protests the termination of his employment with Respondent on several grounds. The contention that Grievant was denied due process will not be overlooked. Grievant was informed, verbally and in written format of the contentions and allegations against him. He was also presented with resolutions for concluding this matter far short of termination of employment. Prior to Grievant's formal dismissal from employment there was a formal predetermination conference. The dead line for Grievant

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<sup>11</sup> Grievant by counsel has specified that the dismissal correspondence provides specific rationale for Grievant's termination and any deviation or expansion from said notification is in violation of Grievant's due process.



to cooperate with expressed wishes of Respondent's Administrative personnel was extended twice. Respondent began requesting ancillary information, as far back as December 5, 2017, two months prior to Grievant's formal dismissal.

Grievant was aware that Respondent felt obligated to reconcile the Hospital's disappointment with the University's construct of the 2017 Princeton Christmas Parade float. Grievant was presented with ample opportunity to establish this matter as an unfortunate misconstrued turn of events. Respondent did not withhold vital information known to them in an attempt to trap Grievant. It is not the quality of the float which Respondent contends establishes the grounds for the termination of Grievant's employment. Respondent had apprehension with regard to Grievant's conduct. Respondent is upset with the compromising position it found itself as a result of Grievant's conduct. Communication between Respondent and Grievant took place over a period spanning no less than two months. Vice President Fitzpatrick and Dr. Viscusi met with Grievant regarding the Hospital's dissatisfaction and requested an accounting from Grievant. Information was transmitted via person to person conversations, e-mails, and traditional correspondence. Grievant was well aware of Respondent's contentions, allegations, proposed resolution(s) and expressed ramification if an agreeable resolution could not be reached among and between the parties. Grievant didn't think Respondent would follow through on its communications to resolve this matter. L3 Testimony Grievant analysis was inaccurate with regard to Respondent's resolve.

Grievant was directed to provide receipts for the project and to provide the balance of the money to either PCH or the University. Grievant declined to provide receipts or

any excess money. Respondent identified this and other aspects of Grievant's conduct as a violation of Concord University Board of Governors Policy 49, Policy on Disciplinary Action ("Policy 49"), and Title 133, West Virginia Higher Education Policy Commission Legislative Rule, Series 9, Academic Freedom, Professional Responsibility, Promotion, and Tenure ("Series 9"). Respondent interprets Grievant's conduct as theft of or malicious damage to University property (Policy 49, §5.2(a)); gross insubordination, including willful and flagrant disregard of a legitimate order (Policy 49 §5.2(b)); demonstrated incompetence or dishonesty in the performance of professional duties, including but not limited to academic misconduct (Series 9 § 12.1.1.); and insubordination by refusal to abide by legitimate reasonable directives of Administrators (Series 9 §12.1.3.). R Ex 9 and 14

The contention that Grievant was denied due process has limited merit in the fact pattern of this case. Respondent identified the conduct for which he was to be terminated and its interpretation of Grievant's conduct. Interpretation of who the agreement was with vary (for the sake of this subset of discussion either interpretation is acceptable). It is evident that Respondent became more disturbed with the discovery of additional facts, passage of time, and the inconsistent positioning of Grievant's responses to inquiries. Not all elucidations are equal. Further, some arguments do more damage to credibility than explanation. Grievant was given notice of the allegations, explanation of the Respondent's interpretation of the situation, proposed resolution and an ample opportunity to respond. Grievant was provided an opportunity to be heard and to truly

address the facts and events of issue, prior to dismissal. It is not found that Respondent failed to provide Grievant with adequate due process.

#### IV. MERITS

Grievant contends that Respondent's disciplinary action of termination is beyond the lawful application of Respondent's scope of authority. Grievant contends that he had a contract to construct the float with the Hospital, separate and apart from his employment with Concord University. Grievant alleges the dismissal lacks lawful foundation, including, but not limited to, just cause and due process.

The undersigned acknowledges that Respondent is afforded considerable deference in assessing the seriousness of Grievant's conduct and, in the fact pattern of this matter, there exists ambiguity for a number of facts that Respondent cited as justification for termination. The question arises as to whether Grievant's conduct (and/or lack of disclosure) was of such nature as to justify the dismissal of a tenured employee under the recognized standards set out by applicable policies and codes of conduct. Respondent reasonably expects their employees to observe a standard of conduct which will not reflect discredit on the abilities and integrity of the institution or create suspicion with reference to their employees' capability in discharging their duties and responsibilities. Respondent contends that Grievant's conduct is interpreted as being in violation of applicable policies and standard of conduct:

Theft of or malicious damage to University property Policy 49, §5.2(a);

Gross insubordination, including willful and flagrant disregard of a legitimate order Policy 49 §5.2(b);

Demonstrated incompetence or dishonesty in the performance of professional duties, including but not limited to academic misconduct Series 9 § 12.1.1.;

Insubordination by refusal to abide by legitimate reasonable directives of Administrators. Series 9 §12.1.3.

R Ex 9 and 14

In the fact pattern of this case, there are communication concerns. It is interesting, but not necessarily dispositive, that theoretically, there was never a true meeting of the various minds of the parties. Whether Provost Viscusi ordered Grievant to construct the float or requested him to do so tends to shed light on the question for whom Grievant was working for when he constructed the float, Respondent or the Hospital. Nevertheless, that element in and of itself does not answer all the issues of this grievance. Whether Grievant used work-study students to help construct an earlier conceptional prototype of the float is thought provoking but again not dispositive.

At the onset of this matter, President Kendra Boggess communicated with individuals at Princeton Community Hospital regarding the construction a float for the annual Christmas parade in Princeton. The Hospital and Respondent intended to contract. President Boggess contacted individuals at the school authorizing and attempting to arrange the construction. It was understood and communicated that this would be beneficial to the community and support the University. Provost Viscusi, Grievant's superior, approached Grievant about the project (this is undisputed). The specific language of their conversation is debated. Grievant maintains he was not ordered to participate on behalf of the University.<sup>12</sup> Further, by email Grievant was

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<sup>12</sup> Both President Boggess and Provost Viscusi testified on the issue indicating/explaining that faculty are treated professionally in the academic community such that they are not ordered to perform tasks, but asked respectfully. Dr. Viscusi asserts it was an order. Grievant understood it as a request. The undersigned can understand such misperception. Conceivably, Grievant was free to decline the project but the undersigned is not convinced that Grievant was empowered to independently contract for his own financial gain.

provided some specifications for the project by PCH's Marketing Director. R Ex 2 In the email Mr. Hypes discussed the Hospital's eagerness to work with the Art Department, the University and students. Grievant was aware of Respondent's and the Hospital's intent to contract. Grievant's position is that he, as an individual, contracted to construct the hospital's float. This information came as a surprise to both Respondent and Hospital representatives. Thus, if Grievant, despite his knowledge of both parties' intent, pursuant to his testimony, took on the construction of the float as an independent project separate and distinct from his employment with the University, this does not resolve all the issues facing Grievant. At best it makes him an opportunist who took advantage of his position.

"The 'term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees.' *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991) (citing *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985)). See *Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sept. 13, 2002)." *Joliffe v. W. Va. Univ.*, Docket No. 2013-0970-WVU (June 25, 2013). Grievant's actions of misrepresenting or failing to disclose the true nature of his conduct is disturbing. Gross misconduct may result in any level of discipline up to and including immediate dismissal.

Insubordination "includes, and perhaps requires, a willful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209,

212, 569 S.E.2d 456, 459 (2002) (*per curiam*). See also *Riddle v. Bd. of Directors/ So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). “[F]or there to be ‘insubordination,’ the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be willful; and c) the order (or rule or regulation) must be reasonable and valid.” *Butts, supra*. The Grievance Board has previously recognized that insubordination “encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer.” *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988) (*citing Weber v. Buncombe County Bd. of Educ.*, 266 S.E.2d 42 (N.C. 1980)).

Grievant’s acts were deliberate. The matter came to a head when the officials of the Hospital were not satisfied with the artistic value of the float. Grievant’s actions of acquiring the float funds would have most likely remained undetected, if not for the Hospital registering a complaint with University President Boggess.<sup>13</sup> Grievant’s refusal to cooperate with an amenable resolution to the satisfaction of all is baffling. Some of Grievant’s testimony is plausible, yet the totality of Grievant’s testimony is unbalanced. Being “dishonest” involves such conduct as lying, cheating, defrauding or deceiving. *Wilson v. Bd. of Trustees*, Docket No. 99-BOT-115 (Dec. 21, 1999)

Appropriate officials at Concord University, (i.e., Dr. Viscusi and the President of the University) were aware of and approved the float construction, as a UNIVERSITY

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<sup>13</sup> It is explicitly recognized as a fact; Respondent’s disciplinary action is premised on Grievant’s conduct and not the quality of the float.

project. It is not established that Grievant was authorized to freelance the endeavor. Respondent established that Grievant is complicit in disregarding his employer's interest. While the Hospital presented a check for \$4,250.00 payable to Grievant, the funds were to purchase materials and supplies for the float project and any balance of money over expenses to be donated to Concord University. L3 testimony Fitzpatrick, Viscusi and Boggess, *see also* R Exs 2, and 6. Grievant was employed in a position of trust and authority with Concord University. He was responsible for administering the Fine Arts Department as well as its budget. It is reasonable for Concord administrators to rely on Grievant to manage University resources according to policy and in an honest, ethical manner.

Grievant was directed on numerous occasions to return any unexpended funds and provide documentation of expenditures. Grievant refused to comply. The record includes credible and consistent testimony from witnesses, including Hospital representatives, Concord administrators, and relevant documentation. There was a recognizable relationship between Respondent, the Hospital and the float being constructed. For Grievant to refuse to acknowledge some responsibility in resolving this unfortunate event, gives weight to Provost Viscusi testimony that because of this situation he has lost trust and confidence in Grievant. Giving Grievant every benefit of his argument, the undersigned is faced with the reality that Grievant intentionally and knowingly used his position for personal gain. Grievant's conduct reflected on the integrity of Respondent as an institution. Respondent established by a preponderance of the evidence sufficient nexus between Grievant's conduct and his employment to justify disciplinary action.

It is not found that all of Grievant's actions were necessarily done with nefarious intent, but that sufficient actions were committed with direct knowledge and purpose that Grievant's claims of blamelessness stretch the bounds of credibility. Grievant took liberties with the circumstance(s) of this matter.<sup>14</sup> Grievant used the ambiguity between parties to acquire money intended for Concord University, Respondent. Grievant's conduct can reasonably be perceived as dishonest. In assessing the trustworthiness of the information provided by Grievant, and various administrative personnel, the undersigned finds Grievant's testimony to be the most troublesome and unreliable. The information provided by Grievant is unbalanced, inconsistent with documented information and in direct conflict with known intent or all other parties.<sup>15</sup> Respondent's actions of attempting to rectify this situation is found to be judicious. It is also thought to be within their recognized realm of authority to discipline an employee who's conduct constituted willful behavior that reflects discredit on the integrity of the institution or created suspicion with reference to the employee's capability in discharging duties and responsibilities. Grievant was Chair of the Department, in a position of trust and authority. It was entirely reasonable for Concord administrators to rely on Grievant to manage University resources according to policy and in an honest, ethical manner.

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<sup>14</sup> Respondent attempted to establish that Grievant has displayed a pattern of dishonesty and abuse of University resources post dismissal. See G Ex 6c This alleged pattern was objected to by counsel and is not considered established or a problem under consideration at the time of Grievant's dismissal.

<sup>15</sup> Grievant acknowledges the float's final form was not the only conceptual venue, paper mache was at one time or another considered as a medium. Grievant was generous in assigning work-study tasks to help students. This is not a violation of any known regulation. The use of work-study students on some early version or conceptual prototype of the float is conceivable but not a necessary fact to establish Grievant was not forthright in the circumstance of this matter.



It is not found that Respondent [per se] tried to add additional grounds to the termination letter. Respondent established by a preponderance of the evidence grounds to sanction Grievant for his conduct. In assessing the relevant mitigation factors and considering the proper standard of review, the undersigned Administrative Law Judge does not find Grievant's punishment for his actions to be excessive. Grievant's gross misconduct and dishonesty is sufficient to support the punishment received. The ultimate sanction of termination of Grievant's employment is not found to be excessive in the circumstance of this matter.

The following conclusions of law are appropriate in this matter:

### **Conclusions of Law**

1. In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, A[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.@ *Leichliter v. W. Va. Dep=t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof.

2. A tenured employee has a property interest in continued employment. Accordingly, he or she may not be deprived of that property interest without due process. *Bd. of Educ. v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994); *Martin v. Pleasants County Bd. of Educ.*, Docket No. 2008-0197-PlEED (Jan. 31, 2008).

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

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

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

6. An administrative law judge must determine what weight, if any, that is to be accorded hearsay evidence in a disciplinary proceeding. See *Kennedy v. Dep’t of*

*Health and Human Resources*, Docket No. 2009-1443-DHHR (March 11, 2010), *aff'd*, Cir. Ct., of Kanawha County, Civil Action No. 10-AA-73 (June 9, 2011); *Warner v. Dep't of Health and Human Resources*, Docket No. 07-HHR-409 (Nov. 18, 2008); *Miller v. W. Va. Dep't of Health and Human Resources*, Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ.*, Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996).

7. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See *Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health & Human Res.*, Docket No. 93-HHR-050 (Feb. 4, 1994).

8. The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and, 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the administrative law judge should consider the following: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and, 4) the plausibility of the witness's information. See *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

9. Insubordination “includes, and perhaps requires, a willful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior.” *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). See also *Riddle v. Bd. of Directors/ So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). “[F]or there to be ‘insubordination,’ the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be willful; and c) the order (or rule or regulation) must be reasonable and valid.” *Butts, supra*. The Grievance Board has previously recognized that insubordination “encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer.” *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988) (*citing Weber v. Buncombe County Bd. of Educ.*, 266 S.E.2d 42 (N.C. 1980)).

10. Respondent established Grievant acquired an undetermined amount of funds intended for the University by failing to disclose material facts or misrepresenting information in the circumstances of this matter.

11. Respondent established Grievant’s conduct was deceptive to the point of being dishonest and reflected on the integrity of the institution.

12. Respondent established by a preponderance of the evidence that Grievant violated employee standards of conduct as specified by applicable University and West Virginia Higher Education policies.

13. Respondent established by a preponderance of the evidence conduct by Grievant in violation of applicable rules and regulations to justify the termination of Grievant's employment.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE ' 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE ' 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. See also 156 C.S.R. 1 ' 6.20 (2018).

**Date:** November 13, 2018

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