THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TAMMY SALISBURY,

Grievant,

v. **Docket No. 2019-0633-CONS**

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

Respondent.

DECISION

Grievant, Tammy Salisbury, was employed by Respondent, Department of Health and Human Resources/Bureau for Children and Families. On July 11, 2018, Grievant filed a grievance against Respondent stating, "[s]uspension without good cause." For relief, Grievant seeks "[t]o be made whole in every way including back pay with interest and benefits restored." On November 21, 2018, Grievant filed a second grievance against Respondent stating, "[d]ismissal without good cause" and requesting the same relief.

These grievances were properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). By order dated November 30, 2018, the two grievances, under docket number 2019-0068-DHHR and 2019-0632-DHHR, were consolidated into the above styled action. A level three hearing was held on March 20, 2019, before the undersigned at the Grievance Board's Westover, West Virginia office. Grievant did not appear in person, but through representative Gordon Simmons, Steward, UE Local 170, West Virginia Public Workers Union. Respondent appeared by counsel, Mindy Parsley, Assistant Attorney General. This matter became mature for decision on May 2, 2019, after final receipt of each party's written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a Secretary 1. Respondent suspended Grievant without pay after she signed a coworker's name to a document without permission. Respondent terminated Grievant for failure to cooperate in the subsequent internal investigation and for forging three coworker's signatures to documents. While Grievant concedes to signing some documents, she contends her behavior was not intentional, was not misconduct, and that Respondent denied her due process in failing to hold a predetermination meeting. While Respondent did not prove failure to cooperate or criminal forgery, Respondent proved Grievant engaged in misconduct through signing coworkers' names to documents without permission. Grievant failed to prove that mitigation of her punishment is warranted. 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 was employed by Respondent, Department of Health and Human Resources/Bureau for Children and Families (DHHR/BCF), as secretary to the Customer Services Manager (CSM) in the Marion/Monongalia district office.

2. Grievant was with DHHR for about a year by the Summer of 2018.

3. Grievant worked for the State for a few decades prior thereto.

4. Grievant's responsibilities at DHHR included conducting new employee orientations.

5. In conducting new employee orientation, DHHR deems it acceptable for Grievant to sign her name in the line reserved for "supervisor" on the employee policy acknowledgement forms. (Respondent's Exhibit 5)

6. Jondrea Nicholson is CSM for Respondent in the Marion/Monongalia district office and was Grievant's direct supervisor.

7. Cree Lemasters is Respondent's Regional Director and supervises Ms. Nicholson.

8. James Falter and Kristi Hixenbaugh were new DHHR employees in the Summer of 2018.

9. Lori Williams was a Child Protective Service (CPS) supervisor during the Summer of 2018.

10. On June 11, 2018, Mr. Falter signed a payroll direct deposit form. (Mr. Falter's testimony)

11. On June 27, 2018, Grievant sent Mr. Falter an email requesting that he give her permission to sign a new payroll direct deposit form, stating, "[a]pparently they updated their form and for you to get paid on time I need to submit the new form today and being that you are in a different county working was wondering if you would mind if I just copied your information over to new form and sign for you?" (Grievant's Exhibit 1)

12. Mr. Falter was in training and was not able to view the email from Grievant until June 29, 2018. Mr. Falter was in a panic that he would not be paid for a third consecutive pay period, so contacted superiors who checked his records and noticed that his name was in fact signed to the new payroll direct deposit form. Supervisors were

concerned when Mr. Falter told them that he had not signed the form or given anyone else permission to sign his name on the form. (Mr. Falter's testimony)

13. On July 2, 2018, Ms. Lemasters, verbally informed Grievant that she was being suspended pending investigation. Ms. Lemasters discussed with Grievant the allegations that Grievant signed an employee's name to a direct deposit form and additional allegations that she signed a new employee's name and a supervisor's name to policy acknowledgement forms. Ms. Lemasters requested and received Grievant's identification and access cards. (Ms. Lemasters' testimony and Respondent's Exhibit 2)

14. When presented with the allegations, Grievant admitted to signing new employee James Falter's name to a payroll direct deposit form and stated that two coworkers, Amber Shoemaker and Amber Ritchie, told her that she could sign other employees' names to direct deposit forms. (Ms. Lemasters' testimony and Respondent's Exhibit 2)

15. Grievant did not have permission to sign Mr. Falter's name to his payroll direct deposit form.

16. Neither Ms. Shoemaker nor Ms. Ritchie told Grievant she could sign a coworker's name on any document. (Ms. Shoemaker and Ms. Ritchie's testimony)

17. On July 3, 2018, Ms. Lemasters sent Grievant a letter confirming the verbal suspension pending investigation of allegations that Grievant signed a direct deposit form for an employee and other acknowledgement forms for supervisors. The letter further stated that Grievant's response to the allegations was that Amber Shoemaker and Nancy Ritchie had told her that she could sign the employee's name on the direct deposit form. The letter also stated that it was discovered after their conversation on July 2, 2018, that

Grievant signed employee policy acknowledgement forms on behalf of supervisors. (Ms. Lemasters' testimony and Respondent's Exhibit 2)

18. Grievant signed employee acknowledgment forms on behalf of new CPS worker Kristi Hixenbaugh and CPS supervisor Lori Williams. (Respondent's Exhibit 5)

19. Grievant did not have either Ms. Hixenbaugh or Ms. Williams' permission to sign their names to employee policy acknowledgement forms. (Ms. Lemasters, Ms. Hixenbaugh, and Ms. Williams' testimony)

20. Melissa Barr is an investigator for Respondent's Office of Inspector General (OIG).

21. On July 2, 2018, the OIG received a referral regarding the allegations against Grievant and began its investigation on July 11, 2018. (Respondent's Exhibit 5)

22. Investigator Barr sent Grievant a letter dated July 13, 2018, instructing her to meet with Barr at Respondent's Marion County office on July 23, 2018, and to bring her DHHR issued photographic identification. The letter instructed Grievant to inform Barr immediately if she could not attend and warned that failure to attend is considered grounds for dismissal. (Grievant's Exhibit 2)

23. On July 23, 2018, Grievant sent Investigator Barr an email stating that her neighbor told her that Barr was at her home that day, but that Grievant had never received notice of any meeting. Grievant informed Barr that she could not meet her at the office because "the mental and verbal abuse and bullying from J (sic) Nicholson had become too much and I am now in treatment for my PTSD and other symptoms". She went on to describe (for most of two pages) the stress caused by adverse treatment from her supervisor. She touched on the allegations against her by stating that "the suspension

letter I received from Cree had a big lie in it in stating that Amber and Nancy said I could sign a DD form for an employee, they didn't. They told me it was okay to sign supervisor's name to policy acknowledgements and put my initials and I do have this meeting recorded if u need that proven." (Respondent's Exhibit 5)

24. Grievant's July 23, 2018, email went on to state, "I am being completely honest with u when I say I don't know what I did or didn't do in last couple weeks there due to the tremendous stress of working under an unprofessional and unethical supervisor who ignores the very policies she is supposed to enforce ..." Grievant stated that "[a]s far as my signing someone's name to direct deposit form and submitting it for sure I could not tell u either way and you probably know more about my actions in my last days there than I do." (Respondent's Exhibit 5)

25. On July 30, 2018, Grievant sent Investigator Barr an email stating that she had received the July 13, 2018, letter after the date she was instructed to meet with Barr and offered that Barr could come to Grievant's home to meet because it would be detrimental to Grievant's mental health to be in the same place as her abusive supervisor. (Grievant's Exhibit 3)

26. On July 31, 2018, Investigator Barr sent Grievant a letter identical to one she had sent Grievant on July 13, 2018, except that it scheduled an appointment at Respondent's Harrison County office for August 10, 2018. (Grievant's Exhibit 4)

27. On August 9, 2018, Grievant sent Investigator Barr an email informing her that she could not attend the August 10, 2018, meeting due to health issues. She stated that "[m]y health issues are hindering your investigation unnecessarily as I know now I

won't be able to make it no matter the location although I could provide an official statement if u would like." (Grievant's Exhibit 5)

28. On August 10, 2018, Investigator Barr sent a letter to Grievant informing her that her failure to appear for an investigatory interview that day "hinders the completion of the investigation. Per your email, I will accept your statement regarding the details of the events which led to your suspension. Please submit this document to me no later than Monday, August 20, 2018. … I must remind you that as an employee of the Department of Health and Human Resources, you are expected to cooperate in this investigation. Failure to do so is considered grounds for dismissal." (Grievant's Exhibit 6)

29. On September 1, 2018, Grievant emailed Investigator Barr her official statement. She stated she was given the go ahead to sign for absent supervisors by "everyone, including Amber Shoemaker who only said it was ok to sign supervisor name with my iniatials (sic) beside it on policy acknowledgements only." (Respondent's Exhibit 5)

30. Respondent does not have a policy that allows a secretary to sign an unavailable supervisor's name. Respondent's policy only allows another supervisor to sign for an unavailable supervisor. (Respondent's Exhibit 5)

31. Investigator Barr determined that Grievant signed Mr. Falter, Ms. Hixenbaugh, and Ms. Williams' names to forms without their permission. (Ms. Barr's testimony and Respondent's Exhibit 5)

32. On November 9, 2018, Respondent, via Ms. Lemasters, sent Grievant a letter of dismissal, stating as the basis the following:

a. "You signed the names of three Department employees to documents without their consent. Of these documents falsely signed were direct deposit forms and Employee Policy Acknowledgements for several policies."

b. "This is in violation of W.Va. Code § 61-4-5 (Forgery and uttering other writing; penalty; creation of unauthorized draft)."

c. "By affixing the signatures of Department employees without their permission and without regard to policy and procedure, you are also in violation of DHHR Policy Memorandum 2108 – Employee Conduct which states: 'Employees are expected to comply with all relevant Federal, State and local laws; comply with all Division of Personnel and Department Policies; be accurate when completing Agency records; maintain the confidentiality of all Agency records.'"

d. "You also compromised the confidential information and computer systems used to administer services provided by the Department. It is unclear if Department employee, K.H., received and reviewed the policies regarding protection of confidential information and computer security as required. As a result, he may have violated unknowingly the Employee Confidentiality Statement; and OMIS policies 0512, Information Security, 0524, Workstation Security, and 0527, Security & Training Policy."

e. "You failed to cooperate with an investigation being conducted by the Office of the Inspector General."

f. “Despite your communications via email with the Office of the Inspector General, you failed to cooperate and attend an interview to discuss the allegations and review documentation. A second interview was then scheduled with OIG at a different location and you failed to attend as well.”

g. “This is in violation of W.Va. Code § 9-2-6 (Powers of Secretary) which states ‘Neither the secretary nor any employee of the department may prevent, inhibit, or prohibit the Inspector General or his or her employees from initiating, carrying out or completing any investigation, quality control review or other activity oversight of public integrity by the Office of the Inspector General.”

(Respondent’s Exhibit 4)

33. The letter summarized the situation in stating “[t]he investigation conducted by the Office of the Inspector General revealed that you failed to properly fulfill your duties as the Secretary to the CSM of the Marion/Monongalia District and as a Department employee, failing to obtain necessary signatures and to complete required paperwork. Your actions have resulted in violations of departmental policies that govern the security and confidentiality of information collected by the Department to administer services to its employees and the community. Additionally, the investigation found that you were in violation of two separate sections of West Virginia State Code thus directly affecting your ability to continue in your position of trust as the Secretary 1 in the Marion/Monongalia District office as this position requires an increased level of credibility due to the handling

of sensitive protected personal information of Department employees." (Respondent's Exhibit 4)

34. Respondent's Policy Memorandum 2102 states, "[i]t is the policy of the Department to properly compensate all employees for all hours worked, including regular hours and overtime hours, in accordance with applicable state and federal laws and regulations."

35. Respondent did not offer to take Grievant off of unpaid suspension for the purpose of attending investigatory interviews. (Ms. Lemaster's testimony)

36. Respondent did not conduct, or attempt to conduct, a formal predetermination meeting with Grievant prior to her dismissal. (Ms. Lemaster's testimony)

37. Respondent did not consider Grievant's employment record with Respondent prior to dismissing her. (Ms. Lemaster's testimony)

38. "An appointing authority may dismiss any employee for cause. Prior to the effective date of the dismissal, the appointing authority or his or her designee shall … meet with the employee in a predetermination conference and advise the employee of the contemplated dismissal". W. VA. CODE ST. R. § 143-1-12.2.a. (2012).

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 (2018). "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, which means 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); *Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004) (*per curiam*). *See also* W. VA. CODE ST. R. § 143-1-12.2.a. (2016). "'Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. W. Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988) (*per curiam*).

"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. Parkways Econ. 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) and *Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983)); *Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sep. 13, 2002); *Crites v. Dep't of Health & Human Res.*, Docket No. 2011-0890-DHHR (Jan. 24, 2012).

Respondent contends it was justified in terminating Grievant when she engaged in misconduct by forging signatures and failing to cooperate in the subsequent investigation.

Grievant counters that since her behavior was not intentional, it was not misconduct. Grievant contends that her dismissal was without good cause because she received permission before signing coworkers' names and that Respondent was improperly making her work for free by forcing her to attend investigatory meetings while on unpaid suspension. Respondent asserts it informed Grievant her failure to meet with the OIG investigator could result in her dismissal. Grievant counters that the OIG investigator scheduled two meetings with Grievant without timely informing her and without accommodating her request to change the date and location due to illness. Grievant argues that Respondent could not penalize her for failing to enter the facility for investigatory meetings when it had just barred her from entering the facility for the duration of her suspension. Grievant further asserts that, in dismissing her without conducting a predetermination conference, Respondent deprived her of due process. Respondent counters that it provided Grievant an extensive history of the allegations against her through her termination letter and that Grievant failed to offer any credible evidence disputing the allegations.

The evidence does not support Respondent's allegation that Grievant violated West Virginia Code § 9-2-6 by willfully failing to participate in the OIG investigation. Investigator Barr set two meetings with Grievant without contacting her to find mutually acceptable dates and locations. Grievant received the letter scheduling the first meeting after the date of the meeting and informed Investigator Barr by email of the late receipt and that Grievant's mental health made it impossible for her to meet at work. Grievant responded to Investigator Barr's second scheduling letter by email and again informed Barr that she could not attend the meeting due to health issues. Investigator Barr never

attempted to schedule a meeting at Grievant's home. This Board previously held that Respondent's expansive representations of the statutory authority of its OIG to be insufficient grounds for the dismissal of a tenured employee. *Thacker v. West Virginia Department of Health and Human Resources*, Docket No. 2017-1422-DHHR (September 7, 2018). As in *Thacker*, Respondent did not prove by a preponderance of the evidence that Grievant refused to participate in the OIC investigation. The undersigned therefore need not assess the merits of Grievant's other arguments on the issue, including whether Grievant could be forced to attend investigatory meetings when she was not being paid and while barred from the facility.

The remaining factual issue in dispute concerns whether Grievant had the authority to sign documents on behalf of coworkers and supervisors. Grievant conceded in her responses to Ms. Lemasters and Investigator Barr that she signed the direct deposit form on behalf of Mr. Falter and employee policy acknowledgement forms on behalf of Ms. Hixenbaugh and Ms. Williams. Each party presented conflicting testimony on whether Grievant had permission to sign for these individuals. 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); Young v. Div. of Natural Res., Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 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 ALJ 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. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

While Grievant argues that Mr. Falter gave her permission to sign his name to the direct deposit form, and that Ms. Shoemaker and Ms. Ritchie told Grievant she could sign a supervisor's name to a policy acknowledgement form, Grievant never testified at the level three hearing before the undersigned or put on any evidence to support these contentions. On the other hand, Mr. Falter testified that he did not give Grievant permission to sign a payroll direct deposit form on his behalf. Ms. Shoemaker and Ms. Ritchie testified that they never informed Grievant she could sign a coworker's name on any document. Ms. Hixenbaugh, and Ms. Williams testified that Grievant did not have permission to sign their names to any document. Ms. Lemasters testified that Grievant did not have the authority under DHHR policy to sign for other supervisors since she was not a supervisor herself.

Respondent's witnesses were credible in testifying that Grievant never received permission to sign anyone's name to any document. Their demeanor was appropriate. The primarily fact witness, Mr. Falter, was thoughtful in answering questions, appeared to have a good memory of the incident, and was firm in his certainty that he had never granted permission to Grievant. Because Ms. Shoemaker and Ms. Ritchie testified by phone, the undersigned could not observe their physical demeanor. However, they

seemed calm and their stories were consistent. While they had opportunity for bias, in that their denials would have been self-serving had they improperly informed Grievant she could sign on behalf of coworkers, Grievant did not explore this bias through cross examination or the testimony of Grievant and other witnesses. Consequently, these witnesses appeared credible.

Ms. Williams and Ms. Hixenbaugh are disinterested parties to this action. Both had serious and appropriate demeanors. Neither appeared to have any motive to be untruthful. Both appeared to have a firm recollection of the events and were certain that they had never given Grievant permission to sign their names to any document. Both are credible.

Respondent did not prove that Grievant engaged in criminal forgery as outlined in West Code § 61-4-5. However, Respondent did prove by a preponderance of evidence that Grievant intentionally signed the names of Mr. Falter, Ms. Williams, and Ms. Hixenbaugh to direct deposit and employee policy acknowledgement forms without permission. Grievant exhibited a willful disregard of Respondent's interests and a wanton disregard of standards of behavior which Respondent has a right to expect of its employees. Grievant’s behavior constitutes gross misconduct and is good cause for termination.

Grievant further argued that the penalty of termination was too harsh because her conduct was not intentional and Respondent did not take into account Grievant’s stellar performance record with the State over many years when it decided to terminate her. “[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).

Because Grievant never received approval from supervisors or permission from coworkers in signing their names, there was the element of intent in her conduct. The evidence showed that Grievant engaged in misconduct on multiple occasions. The penalty was not disproportionate given the seriousness of the conduct and was therefore not arbitrary and capricious. An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

Grievant contends that she was only in her position with DHHR for a year and did not receive proper training on signing for absent supervisors. While there was no evidence that Grievant had been advised against signing for supervisors or other employees, a prohibition against this conduct was intuitive enough that it did not require such a directive. Grievant's prior work history in other positions with the State must be tempered by the severity of Grievant's misconduct. Progressive discipline is not applicable in every instance and "is determined by the facts, circumstances, and applicable regulations." *Roberts v. Concord University*, Docket No. 2016-1284-CONS (Apr. 25, 2016). Respondent was reasonable in assessing that rehabilitation was not possible. The signing by Grievant of coworkers' names to employment documents without permission constitutes gross misconduct and warranted termination. Considerable deference is afforded Respondent's judgment, and the undersigned will not substitute Respondent's decision with his own where the punishment is not clearly disproportionate to the offense. Grievant has failed to prove mitigation of the punishment is warranted.

Lastly, Grievant contends that in dismissing her without conducting a predetermination conference, Respondent deprived her of due process. "The Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against State action which affects a liberty or property interest." Syl. Pt. 1, *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 241 S.E.2d 164 (1977), overruled in part on other grounds by *W. Va. Dep't of Educ. v. McGraw*, 239 W. Va. 192, 201, 800 S.E.2d 230, 239 (2017). "A State civil service classified employee has a property interest arising out of the statutory entitlement to continued uninterrupted employment." *Id*. at Syl. Pt. 4. "'The constitutional guarantee of procedural due process requires "'some kind of hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment.' *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 [84 L. Ed. 2d 494, 105 S. Ct. 1487] (1985)." Syl. Pt. 3, *Fraley v. Civil Service Commission*, 177 W.Va. 729, 356 S.E.2d 483 (1987). "The pretermination hearing does not need to be elaborate or constitute a full evidentiary hearing. The essential due process requirements, notice and an opportunity to respond, are met if the tenured civil service employee is given 'oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story' prior to termination." *Id*. at 732, 356 S.E.2d at 486.

The Department of Personnel's Administrative Rule requires that "[p]rior to the effective date of the dismissal, the appointing authority or his or her designee shall … meet with the employee in a predetermination conference and advise the employee of the contemplated dismissal". W. VA. CODE ST. R. § 143-1-12.2.a. (2012). In testifying on behalf of Respondent, Ms. Lemasters stated that Respondent did not conduct, or attempt

to conduct, a predetermination meeting. However, Respondent argues in its proposed findings of fact and conclusions of law that its termination letter provided Grievant an extensive history of the allegations against her and that Grievant failed to offer any credible evidence disputing the allegations. Grievant provided Investigator Barr her response to the allegations through various emails on July 23, 2018, July 31, 2018, August 9, 2018, and September 1, 2018. While these responses primarily focused on her contentious relationship with supervisor Nicholson, Grievant did touch on the allegation that she forged coworkers' signatures. While she expressed that her memory was murky, she stated she had Mr. Falter's permission to sign his name to the direct deposit form. Grievant also admitted signing Ms. Hixenbaugh and Ms. Williams' names to employee policy acknowledgment forms without their permission and explained that coworkers had told her that she was permitted as a secretary to sign supervisors' names to forms requiring their signature when they were absent. Grievant's written communications to Investigator Barr demonstrated that she understood the allegations regarding signing coworkers' names without permission and the evidence Respondent possessed thereon.

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 (2018). "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, which means 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); *Sloan v. Dep't of Health & Human Res*., 215 W. Va. 657, 600 S.E.2d 554 (2004) (*per curiam*). *See also* W. VA. CODE ST. R. § 143-1-12.2.a. (2016). "Although it is true that dismissal is inappropriate when the employee's violation is found to be merely a technical one, it is also true that seriously wrongful conduct can lead to dismissal even if it is not a technical violation of any statute. . . The test is not whether the conduct breaks a specific law, but rather whether it is potentially damaging to the rights and interests of the public." "'Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. W. Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988) (*per curiam*).

3. "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. Parkways Econ. 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) and *Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983)); *Evans*

v. Tax & Revenue/Ins. Comm'n, Docket No. 02-INS-108 (Sep. 13, 2002); *Crites v. Dep't of Health & Human Res.*, Docket No. 2011-0890-DHHR (Jan. 24, 2012).

4. "If any person forge any writing, other than such as is mentioned in the first and third sections of this article, to the prejudice of another's right, or utter or attempt to employ as true such forged writing, knowing it to be forged, he shall be guilty of a felony …" W. VA. CODE § 61-4-5(a)

5. "Neither the secretary nor any employee of the department may prevent, inhibit, or prohibit the Inspector General or his or her employees from initiating, carrying out or completing any investigation, quality control review or other activity oversight of public integrity by the Office of the Inspector General." W. VA. CODE § 9-2-6.

6. "The Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against State action which affects a liberty or property interest." Syl. Pt. 1, *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 241 S.E.2d 164 (1977), overruled in part on other grounds by *W. Va. Dep't of Educ. v. McGraw*, 239 W. Va. 192, 201, 800 S.E.2d 230, 239 (2017). "A State civil service classified employee has a property interest arising out of the statutory entitlement to continued uninterrupted employment." *Id*. at Syl. Pt. 4. "'The constitutional guarantee of procedural due process requires "'some kind of hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment.' *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 [84 L. Ed. 2d 494, 105 S. Ct. 1487] (1985)." Syl. Pt. 3, *Fraley v. Civil Service Commission*, 177 W.Va. 729, 356 S.E.2d 483 (1987). "The pretermination hearing does not need to be elaborate or constitute a full evidentiary hearing. The essential due process requirements, notice and an opportunity to respond,

are met if the tenured civil service employee is given ‘oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story’ prior to termination.” *Id*. at 732, 356 S.E.2d at 486.

7. Respondent proved by a preponderance of evidence that Grievant intentionally and without permission signed the names of Mr. Falter, Ms. Williams, and Ms. Hixenbaugh to employee documents, and that Respondent was justified in terminating Grievant’s employment for gross misconduct.

8. “[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).

9. Grievant failed to prove mitigation of the punishment is warranted.

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: May 28, 2019

Joshua S. Fraenkel
Administrative Law Judge