THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MISTI J. BROYLES,
Grievant,

v. **Docket No. 2019-0565-DHHR**

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

DECISION

Grievant, Misti J. Broyles, was employed by Respondent, Department of Health and Human Resources/Bureau for Children and Families. On November 2, 2018, Grievant filed this grievance against Respondent protesting her suspension from employment. For relief, Grievant requested removal of the suspension, restoration of leave used, and compensation for all time lost.

By *L1 Notice of Agreed Waiver* dated November 29, 2018, the grievance was waived to level three by agreement. On September 9, 2019, Grievant requested to amend her grievance to protest her indefinite suspension and subsequent termination from employment, which request was granted by order entered September 27, 2019. A level three hearing was held on February 6, 2020, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by Gordon Simmons and Peter Samosky. Respondent was represented by counsel, James "Jake" Wegman, Assistant Attorney General. This matter became mature for decision on March 18, 2020, following an agreed extension of time for filing and upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a Social Service Worker 2. Grievant was first suspended without pay pending investigation and then terminated from employment for using her state-issued work cell phone to purchase illegal drugs. Respondent proved Grievant used her state-issued work cell phone to purchase illegal drugs. Respondent violated Grievant's right to procedural due process when it terminated her employment without giving her notice and opportunity to be heard prior to terminating her employment. As a pre-deprivation hearing would not have changed the outcome, the remedy for the violation is nominal damages of one dollar. Accordingly, the grievance is granted, in part, and denied, in part.

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 as a Social Service Worker 2 stationed in the Cabell County office and had been so employed since 2002.

2. On October 15, 2018, Grievant called 911 to report that she had been assaulted and robbed. Law enforcement responded and completed a written report stating Grievant reported that at approximately 6:30 a.m. she had invited a friend, Lauren Philip Angeron, into her house for a shower and clean clothes. Grievant reported that Mr. Angeron punched her in the face and stole her purse, work cell phone, and personal cell phone. Law enforcement also took a picture of her injuries.

3. Grievant did not seek medical treatment for the attack but had been seeking treatment for infections to her face and arm in the weeks prior to the attack and

in her follow-up visit with the dermatologist on October 16, 2018, his report notes that Grievant had a lesion on her forehead that she attributed to a physical attack the day before.

4. On October 15, 2018, Grievant did not appear for work for her regular shift and did not call to report her absence.

5. At approximately 5:00 p.m. on that day, Grievant reported to work and met with her supervisor, Jeanetta Perry and Community Services Manager ("CSM") Janice McCoy. Grievant appeared confused and anxious during the meeting. Grievant also reported to Ms. Perry and CSM McCoy that her purse, work cell phone, and personal cell phone had been stolen.

6. Throughout this meeting and in relaying the story of the theft in the days thereafter, details of the theft changed significantly, which appeared suspicious to members of Respondent's administration.

7. Directly after the meeting with Ms. Perry and Ms. McCoy, Grievant went to a co-worker, Jeanna M. Slone, and also told her about the incident. Grievant continued to appear confused. Grievant then asked Ms. Slone to look up an address. CSM McCoy overheard and instructed Ms. Slone not to provide the address.

8. After that, Grievant went to her work-station and CSM McCoy witnessed Grievant having difficulty using the phone and computer.

9. The next day, October 16, 2018, Grievant reported to work late following the previously-scheduled doctor's appointment referenced above. In consideration of Grievant's continued distress, Grievant was assigned easy work that could be done

from her computer. Despite this, Grievant completed no work that day. Grievant was observed frequently away from her desk talking to co-workers.

10. On October 17, 2018, Grievant reported to work with her state-issued cell phone, stating that it had been left on her porch in a paper bag. CSM McCoy directed Grievant to give the phone to Jessica Skeans, the secretary in charge of issuing state phones for the office.

11. Ms. Skeans examined the phone. State-issued phones are required to be password protected with a personal identification number. The phone was still password protected and Ms. Skeans had to get Grievant's password to open the phone. Ms. Skeans then observed what appeared to be improper text messages on the phone. Ms. Skeans printed the messages and gave them to CSM McCoy. CSM McCoy gave them to Deputy Commissioner Tina Mitchell.

12. The text messages of concern were to two different telephone numbers, Angie and Stacie, and occurred between October 7, 2018 and October 10, 2018. In them, the texter identifies herself as "Misti" and attempts to procure heroin on multiple occasions.

13. The texts to Angie begin on Sunday, October 7, 2018, in which Grievant describes being sick and says "All I got is smoke to trade and nobody interested in dat." "Smoke" refers to marijuana. Grievant asks for help, offers to do laundry if Angie will "front her" saying that she would have cash from a travel reimbursement check on Tuesday, and says "I understand if you don't have the pack to help me out." "Front" means to give the drugs with payment to be made later. "Pack" refers to a tenth of a

gram of heroin that typically costs $20. Later, Angie says “I was going to stop by and do a line with ya,” which means to snort a line of heroin, and says she’ll bring another “pk.”

14. On Monday, October 8, 2018, Grievant asks Angie to come by again and Angie says “I’m making you a pack right now.” The texts begin again the next day, Tuesday, October 9, 2018, with Grievant saying she still feels awful and asking Angie to “front me a pack” with $5 to show “good faith.” Angie states, “You know I was going to give u a pk for doing [laundry].” On Wednesday, October 10, 2018, Grievant asks Angie to “front” another “pack” and Angie agrees that she will. After there are delays in the delivery of the “pack” Grievant says, “Please so I can work a few hours today.” Later in the day, Grievant states her father is going to give her money around 6:00 p.m. so she can pay and asks for “another pack” with payment the next morning.

15. Also on October 10, 2018, Grievant texts Stacie stating she was supposed to get a check that day and asks, “[R] u good?” “R u good?” is asking if the person has any drugs to sell. Grievant asks if Stacie will “front” her and states she will pay $100 “for half.” A “half” is a half a gram of heroin and $100 is an average price for the same.

16. The text message conversation with Angie considered in its entirety appears to be an ongoing conversation with two people who have an established relationship. Angie states at different times she is coming to the texter’s home and the texter states they will be outside. The texter also texts that they will be dropping off laundry to Angie’s house. The texts about the laundry are intertwined with the texts about getting drugs.

17. Relating specifically to Grievant, the texts refer to the texter being sick because they are not reacting to antibiotics and having a “boo boo” on their arm that is

very swollen, consistent with Grievant's medical records showing treatment for serious and persistent skin infections during the same time period. The texter refers to travel checks, which Grievant receives. The texter refers to their daughter who will be driving them to get new glasses. The texter also refers to visiting "Pete" in the hospital when Grievant's co-worker named Pete was in the hospital.

18. On October 17, 2018, Deputy Commissioner Mitchell met with Grievant regarding the text messages and allegations of use of illegal drugs on the job and orally suspended Grievant pending investigation.

19. On October 18, 2018, a criminal complaint for battery was filed regarding the October 15, 2018 incident.

20. By letter dated October 19, 2018, Deputy Commissioner Mitchell memorialized her suspension of Grievant without pay pending investigation into the allegation that Grievant "may have used illegal drugs on the job and used your state-issued cell phone to conduct illegal drug-related business." Although the suspension was without pay, the letter states Grievant would be permitted to use leave to be paid during the suspension. The letter also states Grievant could respond in writing or in person within fifteen days of the letter.

21. By undated letter, Grievant responded to the suspension letter. Grievant agreed that an investigation was warranted over the theft of the phone but disputed that she should be suspended. She stated that she had not been allowed to speak at the meeting and stated, "I don't even really know what is alleged." Grievant states that she was "deathly ill" and focuses her response on the theft of the phone, which was not an allegation listed in the suspension letter. The only statements Grievant made

responding to the allegation regarding the text messages were that "he could have used either [phone], I really did not think to check." Grievant further stated, "I cannot deny that I allowed the phone to be stolen. I may have allowed it to be used without my knowledge before that." She did not directly respond to the allegation that she had used illegal drugs on the job.

22. Deputy Commissioner Mitchell referred the matter to the Office of the Inspector General for investigation. Ellis Bryson, Criminal Investigations Supervisor, acted as lead investigator and Andrew Petitt, Front-End Fraud Investigations Supervisor, acted as secondary investigator.

23. Upon reviewing the complaint, the investigators determined that the cell phone should be examined by the State Police Crime Lab. The phone was given to the State Police Crime Lab during the first few weeks of December 2018. The lab provided the investigators with an extraction report reconstructing the phone's activity. The report matched the screen prints of the text messages that had been made by Ms. Skeans. The investigators also reviewed the terminology of the text messages with Detective Ernest Blackburn, a City of Huntington detective specializing in narcotics investigations, who confirmed that the terminology referenced illegal drugs and their purchase.

24. On February 20, 2019, Mr. Petitt sent Grievant a letter rescheduling an appointment for an interview to February 28, 2019 regarding violations of "DHHR policy 2108" and "WV Office of Technology policy 1002." The record does not contain the date of the first scheduled interview.

25. Grievant responded to the letter by email stating that she was homeless as a result of the unpaid suspension and had no transportation to attend an interview without at least two weeks advanced notice. Grievant protested that she had been suspended for four months without any information from her employer. She stated, "I am really in the dark regarding this investigation. . ." and stated that she filed a police report when the phone was stolen. She further stated that the February 22nd letter was the first mention of the policies she was alleged to have violated.

26. The investigators did conduct an interview with Grievant on an unspecified date thereafter specifically regarding the text messages and Grievant stated that the phone had been stolen by Mr. Angeron and that he had written the messages.

27. The investigators interviewed Mr. Angeron and he denied stealing the phone.

28. On August 5, 2019, Office of Inspector General Director Christopher Nelson sent a memorandum to Interim Inspector General Jolynn Marra regarding the status of the investigation. Although Director Nelson stated the final report was not completed he relayed that the investigation had concluded that Grievant was the individual who had sent the text messages and that she was attempting to purchase illicit drugs. Director Nelson concluded that Grievant had violated the *Acceptable Use of State-Issued Portable/Mobile Devices* policy, and the *Employee Conduct* policy.

29. Although Investigator Bryson testified that the memorandum was a summary of a final report, the report was not entered into evidence.

30. Upon receipt of the memorandum and review of the text messages, by letter dated August 13, 2019, Regional Director Lance Whaley terminated Grievant's

employment for gross misconduct. The termination was effective "immediately" although the letter allowed Grievant fifteen calendar days to "respond to the matters of this letter in writing or in person." The letter discussed and quoted portions of the specific texts made from Grievant's state-issued cell phone between October 7, 2018 and October 10, 2018, which occurred prior to October 15, 2018 when Grievant's state-issued cell phone was stolen. The letter stated that Grievant had violated the *Drug- and Alcohol-Free Workplace* policy, the *Acceptable Use of State-Issued Portable/Mobile Devices* policy, and the *Employee Conduct* policy.

31. The Division of Personnel's *Drug- and Alcohol-Free Workplace* policy is applicable "while . . . employees are engaged in any work/service-related activity" and prohibits "[t]he unlawful possession, use, manufacture, distribution, or dispensation of a[n] . . . illegal drug" or reporting to work under the influence or having "an illegal drug in the body system . . . *in the workplace*." (emphasis added).

32. The Office of Technology Policy WVOT-PO1002, *Acceptable Use of State-Issued Portable/Mobile Devices*, prohibits "use which violates local, state, or federal laws.

33. Respondent's *Policy Memorandum 2108 Employee Conduct* employees are expected to "comply with all relevant Federal, Sate and local laws" and "use State . . . telephones . . . only as authorized. . . ."

34. Respondent did not provide Grievant with a "predetermination conference" either before her suspension or her termination because the Division of Personnel's administrative rule did not require them to do so.

Discussion

The grievant bears the burden of proof in a grievance that does not involve a disciplinary matter and must prove her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). In disciplinary matters, the burden of proof rests with the employer to prove that the action taken was justified, and the employer must prove the charges against an employee by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3. "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), ***aff'd***, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

Grievant asserts Respondent failed to prove she sent the improper text messages from her work cell phone and failed to prove she violated the State's drug policy. Grievant also argues she is entitled to reinstatement because her suspension and termination violated her right to due process. Respondent argues that the Division of Personnel's administrative rule did not require predetermination conferences in this matter and that it proved Grievant sent the improper text messages from her work cell phone and violated the State's drug policy.

The suspension of an employee pending investigation of an allegation of misconduct is not disciplinary in nature and a grievant bears the burden of proving that such suspension was improper. *Ferrell and Marcum v. Reg'l Jail and Corr. Facility Auth./W. Reg'l Jail*, Docket No. 2013-1005-CONS (June 4, 2013). "An appointing authority may suspend any employee without pay indefinitely to perform an investigation regarding an employee's conduct which has a reasonable connection to the employee's

performance of his or her job or when the employee is the subject of an indictment or other criminal proceeding." W. VA. CODE ST. R. § 143-1-12.3.b.

Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin*., 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* W. VA. CODE ST. R. § 143-1-12.02 and 12.03 (2016).

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).

Grievant chose not to testify in this matter, as is her right, and no negative inference has been made from her choice not to testify. *See* W.VA. CODE ST § 6C-2-3(g)(2). Several written statements from Grievant were entered into evidence and those statements have been considered as Grievant's response to Respondent's allegations.

CSM McCoy oversees the Cabell County office and is Grievant's second-level supervisor. CMS McCoy's demeanor was calm and professional. There was no hesitation in her answers, she maintained good eye contact, and her memory appeared good. She is not alleged nor does she appear to have any bias or interest in this matter. Her testimony is consistent with Ms. Perry. CSM McCoy is credible.

Ms. Perry was Grievant's supervisor and testified regarding her supervision of Grievant and her interactions with Grievant on October 15th, 16th, and 17th. Ms. Perry's demeanor was calm and professional. Her answers were deliberate and she appeared to have a thorough memory of the events. She is not alleged nor does she appear to have any bias or interest in this matter. Ms. Perry's testimony is consistent with CSM McCoy. Ms. Perry is credible.

Ms. Slone was a coworker and testified regarding her interaction with Grievant on October 15, 2018. Ms. Slone's testimony was brief but her demeanor appeared to be appropriate and she appeared to have a good memory of the event. She is not alleged nor does she appear to have any bias or interest in this matter. Her observations of Grievant's confused behavior on that day are consistent with the observations of CSM McCoy and Ms. Perry. Ms. Slone is credible.

Ms. Skeans was called to testify regarding the discovery and production of the text messages. Ms. Skeans' actions regarding the cell phone were taken in the normal

course of her duties and there is no allegation she has any bias or interest in the matter. Ms. Skeans' demeanor was appropriate, she answered questions without hesitation, and appeared to have a good memory of events. Ms. Skeans was credible.

Detective Blackburn was called to testify regarding the terminology used in the texts. Detective Blackburn has been a law enforcement officer for 26 years. His focus as a detective is on narcotics investigations. His demeanor was professional and appropriate and he is not alleged nor does he appear to have any bias or interest in this matter. Therefore, Detective Blackburn is credible and his explanations of the terminology in the texts have been adopted.

Mr. Bryson was called to testify regarding his investigation. His demeanor was professional and his answers were forthright. He is not alleged nor does he appear to have any bias or interest in this matter and he is employed by an office independent from the Bureau for Children and Families. His testimony regarding the investigation is not disputed and is credible.

Respondent has proven through the credible testimony of Detective Blackburn that the texts refer to the procurement of illegal drugs and has certainly proven it is more likely than not Grievant sent the text messages. There is significant evidence that the texts are from Grievant and Grievant's assertion that Mr. Angeron set the text messages regarding drugs is not supported by the evidence. Although it does appear more likely than not that Grievant's work phone was stolen, the text messages pre-date the theft. The phone is required to be password protected and was password protected when Ms. Skeans took possession of the phone. The texter clearly identifies herself as "Misti" in both text threads. The texts with Angie are clearly an ongoing conversation in which

Angie has an established relationship with the texter. The texts regarding drugs are part of the ongoing conversation and refer to the exchange of drugs at both the texter's home and Angie's home. The texter makes other references, such as her illness, travel reimbursement, work schedule, and visit to "Pete" in the hospital that also identifies the texter as Grievant. Grievant's assertion that Mr. Angeron or some other unnamed person had used the phone to solicit drugs is unsupported by the evidence.

Respondent asserts the text messages constitute gross misconduct. "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 proved Grievant committed gross misconduct. The use of a state-issued cell phone to commit a crime is clearly gross misconduct and a violation of the *Acceptable Use of State-Issued Portable/Mobile Devices* and the *Employee Conduct* policies. Grievant's use of her state-issued cell phone to solicit the purchase of illegal drugs is a substantial violation that directly affects the rights and interest of the public and was certainly done with wrongful intention and with a willful and wanton disregard of Respondent's interests and standards of behavior. Respondent clearly had good cause to terminate Grievant's employment for this misconduct alone.

Respondent also asserts Grievant violated the *Drug- and Alcohol-Free Workplace* policy. The policy is applicable "while . . . employees are engaged in any work/service-related activity" and prohibits "[t]he unlawful possession, use, manufacture, distribution, or dispensation of a[n] . . . illegal drug" or reporting to work under the influence or having "an illegal drug in the body system . . . *in the workplace*." (emphasis added). The termination letter states, "Based on the totality of the texts and circumstances, it appears you were in possession of illegal drugs, reported to work under the influence of illegal drugs, and/or had illegal drugs in your body system while at work on Tuesday, October 9, 2018, Thursday, October 11, 2018 and/or Friday, October 12, 2018." That Grievant was in possession of illegal drugs, under the influence of illegal drugs, or had illegal drugs in her body system at work on those days is speculation. The texts show only an intent to procure illegal drugs. While it is not unreasonable to conclude that Grievant did take the illegal drugs thereafter, there is no evidence that Grievant actually had illegal drugs in her possession at work or was impaired at work during those days. While Grievant did appear confused and had some other indicators of possible impairment on October 15th and 16th, those dates were not mentioned in the letter. Further, while Grievant's behavior on the 15th and 16th coupled with the text messages certainly would have given ample cause for drug testing Grievant at that time, Respondent did not request that Grievant undergo drug testing. Therefore, Respondent failed to prove Grievant violated the *Drug- and Alcohol-Free Workplace* policy.

Grievant next argues she is entitled to reinstatement because she was not afforded procedural due process in either the suspension or termination. Civil service

employees, like Grievant, have "a property interest arising out of the statutory entitlement to continued uninterrupted employment." Syl. Pt. 4, *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 156, 241 S.E.2d 164, 166 (1977). That property interest "warrant[s] the application of due process procedural safeguards to protect against the arbitrary discharge of such employee under Article 3, Section 10 of our constitution." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 283, 332 S.E.2d 579, 583 (1985) (*per curiam*) (citing *Waite*).

The Division of Personnel also affords some procedural protections to classified state employees through its administrative rule, which provides for "predetermination conferences" in certain circumstances. In this case, the Division of Personnel's administrative rule does not appear to have required a "predetermination conference" either prior to Grievant's suspension pending investigation or her termination for gross misconduct. Under the administrative rules, Respondent was permitted to suspend Grievant "without pay indefinitely" to perform the investigation upon "oral notice confirmed in writing within three (3) working days, or written notice of the specific reason or reasons for the suspension" and without holding a predetermination conference. W. VA. CODE ST. R. § 143-1-12.3.b. While Grievant disputes she received appropriate oral notice prior to the suspension, Deputy Commissioner Mitchell's post-suspension letter gave Grievant notice of the specific reasons for her suspension, which complied with the notice requirements of the Division of Personnel's administrate rule. As for Grievant's termination from employment, although the administrative rule does require an employer meet with an employee in a "predetermination conference" prior to termination, that requirement is waived "when the cause of the dismissal is gross

misconduct." W. VA. CODE ST. R. § 143-1-12.2.a.1 As Grievant was dismissed for gross misconduct, it does not appear that the administrative rule required Respondent to hold a "predetermination conference," although it is noted that the Division of Personnel's administrative rule does not define what it considers "gross misconduct."

However, the Division of Personnel's administrative rule does not determine whether a due process pre-deprivation hearing is required under the State's constitution. As the West Virginia Supreme Court of Appeals ("WVSCA") discussed in *Barazi v. West Virginia State College*, "The fact that [the applicable administrative regulations] do not mandate that a pre-termination hearing be held is not determinative of [the employer's] obligations to utilize procedures that comport with constitutional standards of due process. In other words, exclusion of step-by-step regulatory procedures identifying in detail every component of procedural due process does not negate [the employer's] obligation to conduct its termination of tenured employees in a manner that complies with constitutionally-developed standards of due process." 201 W. Va. 527, 531, 498 S.E.2d 720, 724 (1997) (*per curiam*). Indeed, even when the legislature removed specific notice and hearing language from a statute, the West Virginia Supreme Court of Appeals found that "this Court, nevertheless, is required to protect any due process rights employees may have who are dismissed under the statute." *Bd. of Educ. v. Wirt*, 192 W. Va. 568, 573, 453 S.E.2d 402, 407 (1994). Therefore, while Respondent appears correct that it was not required to hold a "predetermination conference" under the Division of Personnel's administrative rule that does not end the inquiry into whether Grievant received procedural due process as mandated by the State's constitution.

"[O]utside of the area of criminal law, due process is a flexible concept, and . . . the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case. *Clarke v. West Virginia Board of Regents,* [166 W. Va. 702, 710], 279 S.E.2d 169, 175 (1981); *Bone v. West Virginia Department of Corrections,* 163 W. Va. 253, 255 S.E.2d 919 (1979); *North v. West Virginia Board of Regents,* 160 W. Va. 248, 233 S.E.2d 411 (1977)." *Buskirk,* 175 W. Va. at 283, 332 S.E.2d at 583. "The extent of due process protection affordable for a property interest requires consideration of three distinct factors: first, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of a property interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Waite* at Syl. Pt. 5.

Under this test, the WVSCA "'has traditionally shown great sensitivity toward the due process interests of the government employee by requiring substantial due process protections,' including, generally, predischarge notice and a hearing. *Major v. DeFrench,* [169 W. Va. 241, 255], 286 S.E.2d 688, 697 (1982)." *Buskirk*, 175 W. Va. At 283, 332 S.E.2d at 583. In determining the due process that is required for public employees the WVSCA has determined "[t]he 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 Serv. Comm'n, 177 W. Va. 729, 730, 356 S.E.2d 483, 484 (1987). "'Due process must generally be given before the deprivation occurs unless a compelling public policy dictates otherwise.' Syl. pt. 2 (in part), *North v. West Virginia Board of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977)." *Clarke* at Syl. Pt. 5. "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." *Fraley*, 177 W. Va. at 732, 356 S.E.2d at 486 (citing *Loudermill* at 546).

The WVSCA has not specifically addressed what protections are required when a civil service employee is suspended without pay pending an investigation. However, the Court has specifically determined that "a temporary deprivation of rights may not require as large a measure of procedural due process protection as a permanent deprivation." *North* at Syl. Pt. 2. The WVSCA has also determined "Under our Due Process Clause, a State civil service classified employee who is suspended for thirty days or less on charges amounting to misconduct or delinquency, is entitled, prior to suspension, to receive written notice of the reasons for suspension and an opportunity to reply either orally or in writing, unless the suspension arises in a situation where there is a continuing danger to persons or property or to the orderly conduct of the affairs of the agency, in which case an immediate suspension may be warranted; and in such case, the necessary notice and rudimentary hearing should follow as soon as practicable." *Waite* at Syl. Pt. 7. Although this syllabus point is specific to a suspension of thirty days or less based on the facts of the *Waite* case, both a disciplinary

suspension for a certain number of days and a suspension without pay pending investigation are a "temporary deprivation of rights."

Under this analysis, and under the specific facts of this case, Grievant's procedural due process rights were not violated by the failure to provide her with notice and an opportunity to be heard prior to her suspension. Respondent had credible evidence in the form of text messages on Grievant's password-protected state-issued cell phone in which the texter had identified herself by Grievant's name that Grievant had used her work cell phone to purchase illegal drugs and also had reason to believe at that time that Grievant may have reported to work while under the influence of illegal drugs. Under those circumstances, Respondent was justified in removing Grievant from the workplace immediately. Within two days of the oral suspension, Respondent then sent Grievant written notice of the allegations against her by Deputy Commissioner Mitchell's October 19, 2018 letter. Grievant was also provided the opportunity by the letter to respond to the allegations, which she did by her undated letter. Although the suspension was unpaid, Grievant was not without pay prior to her notice and opportunity to respond as was permitted to use leave to be paid while suspended and Grievant did use leave to be paid through at least October 31, 2018. Further, the suspension was for the purpose of conducting a thorough investigation into the allegation in which Grievant would be provided the opportunity to further tell her side of the story. This was sufficient to satisfy procedural due process for the temporary deprivation of Grievant's property interest for the investigatory suspension.

As to the termination of Grievant's employment, Grievant's only notice of the charges prior to the termination letter was the basic description of the allegations in the

suspension letter and whatever specific information she was told by the investigators, which was not placed on the record. Grievant's only opportunity to respond to the allegations prior to her termination was her written response to the general allegation from the suspension letter and her assertion to the investigators that the texts were from the man that stole the phone. Grievant was not apprised of the specific reasons for her termination, with reference to the dates and contents of the text messages, until the termination letter itself. Although the letter did allow a fifteen-day period after receipt of the letter within which Grievant could respond to the termination, Grievant had already been removed from payroll and the termination was clearly final as of the date of the letter.

Grievant was afforded some limited pre-deprivation notice and opportunity to be heard by the suspension letter, her response to it, and the investigation but that does not satisfy the procedural due process required to permanently deprive her of her employment. Grievant did not receive full notice and opportunity to be heard until she was already deprived of her employment and pay. "'Due process must generally be given before the deprivation occurs unless a compelling public policy dictates otherwise.' Syl. pt. 2 (in part), *North v. West Virginia Board of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977)." *Clarke* at Syl. Pt. 5. The WVSCA has found limited protections inadequate. *See Fraley* (brief oral explanation by telephone the day before written notice and opportunity to be heard after written notice received but after termination of pay); *Wirt* (brief oral explanation followed by letter with only general allegation so later opportunity to be heard was meaningless); *Barazi* (six-months prior written reprimand

detailing same conduct, termination letter giving specific detail but opportunity to be heard only after termination of pay).

There was no compelling public policy reason to terminate Grievant's employment without giving her an opportunity to be heard. Grievant had already been removed from the workplace upon her suspension and, apparently, Respondent had no urgent need to fill her position since it allowed the investigation to continue for ten months. Therefore, the administrative burden in providing Grievant pre-deprivation notice and opportunity to be heard would have been minimal. Grievant's case is most like *Clarke* and *Barazi* in which the WVSCA has found that due process was not adequate when the specific notice of allegation was only provided in a termination letter and the employee was removed from payroll prior to being given an opportunity to respond. Respondent's termination of Grievant's employment without notice or opportunity to be heard prior to the termination violated Grievant's right to procedural due process.

Grievant argues this violation entitles her to reinstatement. It does not. "Reinstatement would be appropriate only if the appellant's dismissal would have been prevented by a pretermination hearing. *See Nickerson v. City of Anacortes,* 45 Wash. App. 432, 441, 725 P.2d 1027, 1032 (1986)." *Fraley*, 177 W. Va. at 733, 356 S.E.2d at 487. As previously discussed, Respondent had good cause to terminate Grievant and a pretermination hearing that would have allowed Grievant to present her defense would not have prevented the termination given the evidence.

The WVSCA has remedied due process violations with either an award of nominal damages or a limited award of back pay. The WVSCA first addressed this

issue in *Clarke I* and then *Clarke II*, two years later. Mr. Clarke was a professor who was notified of the charges against him in his termination letter, which made his termination effective several months later at the end of the semester. Grievant requested an appeal of his termination through the Board of Regents. A hearing was scheduled with a hearings examiner but the hearing was not held until after the termination and the hearings examiner's recommendation to uphold the termination did not state which specific causes for termination were upheld or the factual basis for the decision. The president of the college adopted the recommendation and the Board of Regents affirmed. Thus, *Clarke I* presented violations of due process for both a failure to provide a predeprivation opportunity to be heard and for an inadequate post-deprivation hearing. *Clarke I* remanded the case for a determination regarding back pay. *Clarke II* clarified that the award of back pay was due to the policy of the employer requiring it to retain the employee on payroll until the dismissal process was complete and that the remedy for the due process violation itself was nominal damages of one dollar.

The WVSCA next addressed the issue of damages in *Fraley*. Although *Fraley* awarded back pay for the violation of due process, it did not address the previous holding in *Clarke II* that the proper remedy was nominal damages or explain its reasoning for the award of back pay. When confronted with the issue in the next two cases, the WVSCA would only award nominal damages. In *Barazi*, the Court explained the award of back pay in *Clarke I and II* and awarded only nominal damages according to that holding. In *White*, several years later, the Court awarded nominal damages stating, "[a]s this Court explained in *Barazi:* 'When official policy results in a person

being deprived of property or liberty without procedural due process, and such deprivation would have taken place even if a proper hearing had been held, then the person is not entitled to compensatory damages for the deprivation itself. *Carey v. Piphus*, 435 U.S. 247, 260, 98 S. Ct. 1042, 1050, 55 L. Ed. 2d 252 (1978). The person is entitled only to nominal damages for the denial of due process, unless the person demonstrates actual injury attributable to the *denial of due process* rather than to the *deprivation*.' 201 W.Va. at 533, 498 S.E.2d at 726, *(*quoting *DeSimone v. Board of Educ.*, 612 F. Supp. 1568, 1571 (E.D.N.Y.1985))." *White v. Barill*, 210 W. Va. 320, 324, 557 S.E.2d 374, 378 (2001) (*per curiam*).

The WVSCA last addressed the issue of damages in *Wines v. Jefferson Cty. Bd. of Educ.*, 213 W. Va. 379, 582 S.E.2d 826 (2003) (*per curiam*). In *Wines*, the WVSCA reversed the award of nominal damages by the lower court and awarded back pay. The employer's argument that a nominal damages award was justified under *Barazi* was addressed only in a footnote, which simply said, "We believe the facts of the instant case mandate a different result." *Wines*, 213 W. Va. at 386 n.5, 582 S.E.2d at 833. The Court does not state what specific facts it found determinative to distinguish the remedy in *Barazi*. However, the Court stated the following in finding an award of nominal damages insufficient:

> [W]e cannot condone the School Board's impertinent disregard of Appellant's right to be heard before it discharged her from its employ. As suggested above, it is not insignificant that Appellant requested a hearing before the School Board acted on the recommendation of termination, and that her request was effectively rebuffed when the School Board declined to accommodate her lawyer's schedule and held the vote in their absence. It is also meaningful that, only months earlier, the School Board

> conducted a pre-termination hearing in another disciplinary matter involving Appellant.

Wines v. Jefferson Cty. Bd. of Educ., 213 W. Va. 379, 386, 582 S.E.2d 826, 833 (2003). Thus, it appears that the award of back pay was made due to the employer's particularly hostile violation of the employee's due process rights.

Therefore, it appears that the award of nominal damages is the preferred remedy for the violation of due process rights where the injury is the deprivation of property and not the violation of rights. It appears the award of back pay in *Wines* was based on the particularly egregious violation of rights by the employer and that the *Fraley* case is simply a departure from the accepted remedy. Grievant's case is most comparable to *Barazi* in which limited pre-deprivation notice was made, specific notice was given at deprivation, a post-deprivation opportunity to be heard was given, and the employer had relied on the procedures in the applicable administrative regulations. Thus, Grievant is only entitled to nominal damages of one dollar.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The grievant bears the burden of proof in a grievance that does not involve a disciplinary matter and must prove her grievance by a preponderance of the evidence. W. Va. Code St. R. § 156-1-3 (2018). In disciplinary matters, the burden of proof rests with the employer to prove that the action taken was justified, and the employer must prove the charges against an employee by a preponderance of the evidence. W. Va. Code St. R. § 156-1-3. "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. Dep't of Health & Human Res.*, Docket No. 92-

HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

2. The suspension of an employee pending investigation of an allegation of misconduct is not disciplinary in nature and a grievant bears the burden of proving that such suspension was improper. *Ferrell and Marcum v. Reg'l Jail and Corr. Facility Auth./W. Reg'l Jail*, Docket No. 2013-1005-CONS (June 4, 2013).

3. "An appointing authority may suspend any employee without pay indefinitely to perform an investigation regarding an employee's conduct which has a reasonable connection to the employee's performance of his or her job or when the employee is the subject of an indictment or other criminal proceeding." W. VA. CODE ST. R. § 143-1-12.3.b.

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

5. "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).

6. Respondent proved Grievant committed gross misconduct when she used her state-issued cell phone to solicit the purchase of illegal drugs.

7. Respondent failed to prove Grievant violated the Division of Personnel's *Drug- and Alcohol-Free Workplace* policy because it failed to present evidence that Grievant was in possession of illegal drugs, under the influence of illegal drugs, or had illegal drugs in her body system while at work.

8. Civil service employees have "a property interest arising out of the statutory entitlement to continued uninterrupted employment." Syl. Pt. 4, *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 156, 241 S.E.2d 164, 166 (1977). That property interest "warrant[s] the application of due process procedural safeguards to protect against the arbitrary discharge of such employee under Article 3, Section 10 of our constitution." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 283, 332 S.E.2d 579, 583 (1985) (*per curiam*) (citing *Waite*).

9. Under the Division of Personnel's administrative rule, an employer is permitted to suspend an employee "without pay indefinitely" to perform an investigation upon "oral notice confirmed in writing within three (3) working days, or written notice of the specific reason or reasons for the suspension" and without holding a predetermination conference. W. VA. CODE ST. R. § 143-1-12.3.b.

10. The Division of Personnel's administrative rule requires an employer to meet with an employee in a "predetermination conference" prior to termination but that requirement is waived "when the cause of the dismissal is gross misconduct." W. VA. CODE ST. R. § 143-1-12.2.a.1.

11. "The fact that [the applicable administrative regulations] do not mandate that a pre-termination hearing be held is not determinative of [the employer's] obligations to utilize procedures that comport with constitutional standards of due process. In other words, exclusion of step-by-step regulatory procedures identifying in detail every component of procedural due process does not negate [the employer's] obligation to conduct its termination of tenured employees in a manner that complies with constitutionally-developed standards of due process." *Barazi v. West Virginia State College,* 201 W. Va. 527, 531, 498 S.E.2d 720, 724 (1997) (*per curiam*).

12. Even when the legislature removed specific notice and hearing language from a statute, the West Virginia Supreme Court of Appeals found that "this Court, nevertheless, is required to protect any due process rights employees may have who are dismissed under the statute." *Bd. of Educ. v. Wirt*, 192 W. Va. 568, 573, 453 S.E.2d 402, 407 (1994).

13. The Division of Personnel's administrative rule does not determine whether a due process pre-deprivation hearing is required under the State's constitution.

14. "[O]utside of the area of criminal law, due process is a flexible concept, and . . . the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the

particular case. *Clarke v. West Virginia Board of Regents,* [166 W. Va. 702, 710], 279 S.E.2d 169, 175 (1981); *Bone v. West Virginia Department of Corrections,* 163 W. Va. 253, 255 S.E.2d 919 (1979); *North v. West Virginia Board of Regents,* 160 W. Va. 248, 233 S.E.2d 411 (1977)." *Buskirk,* 175 W. Va. at 283, 332 S.E.2d at 583.

15. "The extent of due process protection affordable for a property interest requires consideration of three distinct factors: first, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of a property interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Waite* at Syl. Pt. 5.

16. The West Virginia Supreme Court of Appeals "'has traditionally shown great sensitivity toward the due process interests of the government employee by requiring substantial due process protections,' including, generally, predischarge notice and a hearing. *Major v. DeFrench,* [169 W. Va. 241, 255], 286 S.E.2d 688, 697 (1982)." *Buskirk*, 175 W. Va. At 283, 332 S.E.2d at 583.

17. In determining the due process that is required for public employees the West Virginia Supreme Court of Appeals has determined "[t]he 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 Serv. Comm'n*, 177 W. Va. 729, 730, 356 S.E.2d 483, 484 (1987).

18. "'Due process must generally be given before the deprivation occurs unless a compelling public policy dictates otherwise.' Syl. pt. 2 (in part), *North v. West Virginia Board of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977)." *Clarke* at Syl. Pt. 5.

19. "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." *Fraley*, 177 W. Va. at 732, 356 S.E.2d at 486 (citing *Loudermill* at 546).

20. "[A] temporary deprivation of rights may not require as large a measure of procedural due process protection as a permanent deprivation." *North* at Syl. Pt. 2.

21. "Under our Due Process Clause, a State civil service classified employee who is suspended for thirty days or less on charges amounting to misconduct or delinquency, is entitled, prior to suspension, to receive written notice of the reasons for suspension and an opportunity to reply either orally or in writing, unless the suspension arises in a situation where there is a continuing danger to persons or property or to the orderly conduct of the affairs of the agency, in which case an immediate suspension may be warranted; and in such case, the necessary notice and rudimentary hearing should follow as soon as practicable." *Waite* at Syl. Pt. 7.

22. The suspension of an employee without pay pending investigation is a temporary deprivation of the employee's property interest.

23. Respondent had cause to remove Grievant from the workplace without a pre-deprivation hearing. Respondent's provision of oral notice of the suspension, followed by written notice, with an immediately post-deprivation opportunity to be heard

was sufficient to satisfy due process for the temporary deprivation of Grievant's property interest.

24. "'Due process must generally be given before the deprivation occurs unless a compelling public policy dictates otherwise.' Syl. pt. 2 (in part), *North v. West Virginia Board of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977)." *Clarke* at Syl. Pt. 5.

25. The limited notice an opportunity to be heard provided by the suspension procedures and the investigation prior to the permanent deprivation of Grievant's property interest were not sufficient.

26. Respondent had no compelling public policy interest in terminating Grievant's employment without giving her notice and opportunity to be heard prior to her termination. The post-termination notice and opportunity to be heard were not sufficient when Grievant had already been removed from the workplace for ten months without pay.

27. "Reinstatement would be appropriate only if the appellant's dismissal would have been prevented by a pretermination hearing. *See Nickerson v. City of Anacortes,* 45 Wash. App. 432, 441, 725 P.2d 1027, 1032 (1986)." *Fraley*, 177 W. Va. at 733, 356 S.E.2d at 487.

28. Grievant is not entitled to reinstatement as her dismissal from employment would not have been prevented by a pretermination hearing.

29. "'When official policy results in a person being deprived of property or liberty without procedural due process, and such deprivation would have taken place even if a proper hearing had been held, then the person is not entitled to compensatory damages for the deprivation itself. *Carey v. Piphus*, 435 U.S. 247, 260, 98 S. Ct. 1042,

1050, 55 L. Ed. 2d 252 (1978). The person is entitled only to nominal damages for the denial of due process, unless the person demonstrates actual injury attributable to the *denial of due process* rather than to the *deprivation*.' 201 W.Va. at 533, 498 S.E.2d at 726, *(*quoting *DeSimone v. Board of Educ.*, 612 F. Supp. 1568, 1571 (E.D.N.Y.1985))." *White v. Barill*, 210 W. Va. 320, 324, 557 S.E.2d 374, 378 (2001) (*per curiam*).

30. Grievant is entitled to nominal damages of one dollar for the violation of her due process rights.

Accordingly, the grievance is **GRANTED**, in part, and **DENIED**, in part. Grievant's request to be reinstated to her position is DENIED. Grievant is awarded nominal damages of one dollar for the due process violation.

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: April 24, 2020

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Billie Thacker Catlett
Chief Administrative Law Judge