

# **WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**JOSHUA JAMES,  
Grievant,**

**v.**

**Docket No. 2020-0275-DOT**

**DIVISION OF HIGHWAYS,  
Respondent.**

## **DECISION**

Joshua James, Grievant, filed a grievance against his employer the West Virginia Department of Transportation, Division of Highways (“DOH”), Respondent on September 4, 2019, protesting disciplinary action imposed. The original statement of grievance provides: “On 08-22-19 an incident occurred at work. The subsequent investigation was performed in retaliation of the rulings of a former grievance.” The remedy requested: “I would like to do my job and go home. I would like the same opportunities for advancement as similarly situated employees who came before me.”

Subsequent to the original filing, Grievant requested leave to amend his filing. Pursuant to an order dated March 5, 2020, the Chief Administrative Law Judge of the Public Employees Grievance Board granted Grievant’s two emailed requests to amend his grievance. The amended grievance included, “suspension without good cause as the suspension arose from the allegations being investigated, [and] the relief requested to include back pay with interest and benefits [ . . . ].” The second request for amendment included, “a second retaliatory suspension issued for ‘interfering’ with the protested investigation.” The amended grievance proceeded to level three (L3) of the grievance

process.<sup>1</sup>

A level three hearing was held before the undersigned Administrative Law Judge on August 3, 2020, at the Grievance Board's Charleston office. Grievant appeared in person and was represented by Gordon Simmons. Respondent was represented by Human Resources Manager Kathleen Dempsey and counsel, Jesseca R. Church, Esquire, DOH Legal Division. At the conclusion of the level three hearing, the parties were invited to submit written proposed findings of fact and conclusions of law. Both parties submitted written proposals and this matter became mature for decision on or about September 3, 2020, on receipt of the last of these proposals.

### **Synopsis**

Grievant is employed as a Transportation Worker 1 Craft Worker with the Division of Highways at Cabell county in Respondent's District 2. Grievant alleges that cited investigation and disciplinary action(s) were improper and he was retaliated against for filing a grievance. On August 22, 2019, Respondent orally suspended Grievant for refusing an assigned job duty and threatening his crew chief. Additionally, Respondent suspended Grievant for one (1) day (served on October 1, 2019) for harassing a coworker who provided a statement for the investigation into the incident of August 22, 2019, and other attempts to interfere with Respondent's investigation.

---

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

Respondent met its burden of proof justifying disciplinary action. Grievant failed to demonstrate that the disciplinary action taken against him was inappropriate, an abuse of discretion, or excessive. Respondent established by a preponderance of the evidence that Grievant violated recognized and applicable Administrative Operating Procedures. Grievant's violation of Respondent's Standards of Work Performance and Conduct; violations of the West Virginia Division of Personnel's Workplace Security Policy and violations of DOP's Prohibited Workplace Harassment Policy justified disciplinary action. Mitigation is not warranted. This grievance is DENIED.

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

### **Findings of Fact**

1. Grievant is employed by Respondent as a Transportation Worker 1 Craft Worker (TW1CW) for Cabell county in Respondent's District 2 and has been employed with Division of Highways (DOH) since June 10, 2013.

2. Lora Witt is an Assistant Director of Human Resources for Respondent. Ms. Witt oversees the Employee Relations section of Respondent's Human Resources Division, which includes disciplinary actions and policy violation issues.

3. Kathleen Dempsey is the Human Resources Manager for Respondent's District 2. Ms. Dempsey oversees Human Resource functions in the five counties of District 2, which includes Cabell county.

4. On August 22, 2019, Grievant was on a crew that was black-topping on West Virginia Route 2 and being supervised by Crew Chief, Joe Nance.

5. Grievant engaged in an argument with Mr. Nance regarding how Crew Chief Nance had chosen to relieve and rotate crew members. R. Ex. 7; L3 testimony Grievant, and HR Manager Dempsey

6. The argument between Grievant and Crew Chief Nance was witnessed by other members of the crew.<sup>2</sup> Grievant, Crew Chief Nance, and Jason Chapman were periodically inside of a truck as the argument continued. L3 testimony; R. Ex. 7

7. Jason Chapman is a Transportation Worker 2 Equipment Operator (TW2EQOP) for Cabell county in Respondent's District 2 and has been employed with DOH for eleven and a half (11.5) years.

8. In response to Grievant's complaints, Crew Chief Nance instructed Grievant to go flag.

9. Grievant refused this job assignment.<sup>3</sup>

10. During the argument Grievant told his Crew Chief they could "go over in the weeds and settle it like real men."

11. Grievant contends that Crew Chief Nance was "shouting" at him and putting his finger in Grievant's face. See Grievant L3 testimony. Grievant is of the opinion that Crew Chief Nance continued to "antagonize me" even after Grievant got out of the truck

---

<sup>2</sup> Eg., Zack Bailey, a TW2 with 1 ½ years of employment with Respondent was working with the crew on Route 2 on August 22, 2019. Bailey testified at the level three hearing. There was an argument between Grievant and Crew Chief Nance. Both flustered with each other. You could tell they were not agreeing with each other. See L3 testimony Bailey.

<sup>3</sup> Grievant testified that Crew Chief Nance at one point said, "just go flag, Josh, I'm done with you." Grievant stated that "he [Crew Chief Nance] told me to go flag. I refused." Grievant attempted to justify his refusal of a direct order because Grievant determined that no additional flaggers were needed. See L3 testimony Grievant.

and went back to raking. *Id.*

12. Grievant is a TW1CW, a non-supervisory position. Joe Nance was the Crew Chief in charge on August 22, 2019. L3 testimony; R. Ex. 7.

13. Alan Midkiff is the Highway Administrator for Cabell county in Respondent's District 2. Mr. Midkiff oversees operations of Cabell county, including job duties and work assignments. Administrator Midkiff is Grievant's supervisor.

14. Grievant's actions and words were reported to Highway Administrator Midkiff.

15. Administrator Midkiff contacted Human Resources Manager Kathleen Dempsey to report the threatening words, refusal of a job assignment, and argument with a crew chief.

16. Ms. Dempsey contacted Lora Witt, Assistant Director of DOH Human Resources, for agreement of an immediate oral suspension due to Grievant's threat to his crew chief. Dempsey, Witt, L3 testimony; R. Ex. 1.

17. Ms. Witt agreed with Ms. Dempsey that an immediate oral suspension was appropriate under the circumstances and based upon the requirements of the DOH Disciplinary Action Policy. *Id.*

18. Supervisor Midkiff informed Grievant of his immediate oral suspension when Grievant was brought to the Cabell county office by Larry Thacker. L3 testimony, R. Ex. 7 handwritten statement from Thacker and emailed statement of Grievant.

19. DOH investigated the events that led to Grievant's immediate oral suspension. Witt, Dempsey L3 testimony

20. Administrator Midkiff collected statements on or about August 22, 2019, from employees who witnessed portions of the argument between Grievant and Crew Chief Nance.

21. HR Manager Dempsey and Assistant Director Witt reviewed the witness statements regarding the incident on August 22, 2019, and found the statements to corroborate what was initially reported to Cabell county management. The statements were consistent in reporting that Grievant engaged in an argument with Crew Chief Nance and Grievant made a threatening statement to his crew chief. Witt and Dempsey L3 testimony, also see R. Ex. 7 (written statements from five employees).

22. Grievant served a three and a half (3.5) hours suspension on August 22, 2019, for violation of the DOH's Standards of Work Performance and Conduct, specifically by refusing an assigned job duty and inviting his Crew Chief to go over in the weeds and settle it like real men. Witt L3 testimony; R. Ex. 6

23. The following day, August 23, 2019, Grievant returned to work and approached coworker Jason Chapman who had witnessed the argument and heard threatening statement which Grievant made to his Crew Chief the previous day. See L3 testimony of Jason Chapman; Grievant; and R. Ex. 7 (containing handwritten statements from Chapman).

24. Grievant communicated in an heightened manner (yelled) and cussed at his coworker Chapman as a result of the statement Transportation Worker Chapman provided for DOH's investigation into the incident on August 22, 2019. *Id.*

25. Coworker Chapman told Grievant to “leave me alone.” However, Grievant persisted in harassing Transportation Worker Chapman, acting in a verbally hostile way throughout the day, including cussing and specifically telling Mr. Chapman to “F\*\*\* off.” Chapman L3 testimony; R. Ex. 7

26. Grievant admitted on direct testimony to engaging in a conversation, which escalated into an argument involving “cursing on both sides” with his coworker Jason Chapman first thing on the morning of August 23, 2019. Further, Grievant admitted to a similar exchange with Chapman later the same day, August 23, 2019. L3 testimony

27. Grievant admitted to texting Chapman and other coworkers specifically regarding the argument between Grievant and Crew Chief Nance on August 22, 2019.

28. Transportation Worker Chapman, reported Grievant's hostile behavior to a member of management on August 23, 2019, and provided a signed handwritten statement the same day. Chapman L3 testimony; R. Ex. 7

29. The incident was reported to HR Manager Kathleen Dempsey who forwarded the information to Assistant Director Lora Witt in DOH's Human Resources Division.

30. Ms. Witt, Ms. Dempsey, and DOH Human Resources employee Kathryn Hill<sup>4</sup> reviewed the documents and information related to Grievant's conduct at work on August 23, 2019. The conclusion reached by all three Human Resources employees was that under progressive discipline a one (1) day suspension was the appropriate

---

<sup>4</sup> Ms. Hill was a new hire in the DOH Human Resources Division at the time the incidents of this grievance took place in August 2019. Ms. Hill had no previous dealings with Grievant or his employment history with DOH.

disciplinary action for Grievant's hostile behavior toward his coworker on August 23, 2019, and his attempting to interfere with a DOH investigation.

31. Grievant was given a form RL-544, which is a Notice to Employee of recommended disciplinary action, in this case a one (1) day suspension. R. Ex. 8

32. The addendum attached to the RL-544 explains in detail the reasons for Grievant's one (1) day suspension, including identification of policy that Grievant violated by his actions on August 23, 2019, toward his coworkers. R. Ex. 8

33. West Virginia Division of Highways' Administrative Operating Procedures sets out certain standards of work performance and conduct that DOH expects its employees to meet. DOH Administrative Operating Procedures, Disciplinary Action, provides the following standards for employees:

3. Maintenance of a high standard of personal conduct and courtesy in dealing with the public, fellow employees, subordinates, supervisors, and officials;

4. Compliance with accepted safe working practices;

5. Compliance with working rules, policies, procedures, regulations, and laws that apply to Division of Highways employees, including but not limited to those promulgated by organizational units, the Division of Highways, the Division of Personnel, the Department of Transportation, or any other State agency; [ . . ]

8. Performance of assigned duties in accordance with the standards and instructions given by an appropriate supervisor;

[ . . ]

10. Refusal to engage in insulting, abusive, threatening, offensive, defamatory, harassing, or discriminatory conduct or language and prompt reporting of the same to the appropriate authority;

11. Cooperation and assistance as required in agency audits and investigations, and cooperation and assistance in all aspects



of legal proceedings in which the agency is or may become involved.

Division of Highways Administrative Operating Procedures, § 3, Ch. 6, Disciplinary Action, II.A.3-8, & 10,11. R. Ex. 1 at page 2 of 9

34. There are established and readily acknowledged policies applicable to employment with a West Virginia governmental agency. Two such policies provided to employees are the West Virginia Division of Personnel's ("DOP") Workplace Security Policy and DOP's Prohibited Workplace Harassment Policy. R. Ex. 2 and 3

35. The Prohibited Workplace Harassment Policy states in pertinent part:

Employees have the right to be free from harassment while in a State government workplace, and the State has the legal obligation to ensure that such harassment does not occur and that effective means of redress are available.

Any employee found to be in violation of this policy is subject to disciplinary action up to and including dismissal. R. Ex. 3

36. Grievant acknowledged he received a copy of the WV DOP's Workplace Security Policy and that he read and understood the policy on or about July 16, 2018. R. Ex. 4

37. Grievant signed the policy acknowledgment form for the WV DOP's Prohibited Workplace Harassment Policy, which states "I understand I must abide by the terms of the policy and I am aware that with any violation of this policy, I will be subject to disciplinary action, up to and including dismissal. R. Ex. 5

38. The RL-544 dated August 30, 2019, was provided to Grievant on September 3, 2019, by Cabell County Administrator Midkiff. The two-page addendum

to the RL-544, also dated August 30, 2019, stated, in part:

Your conduct on August 22, 2019, led to an immediate oral suspension for threats made to a supervisor and for refusal to perform your assigned job duties. When you returned to work on Friday, August 23, 2019, you approached a co-worker regarding his participation in the investigation, which resulted in that suspension. He told you to leave him alone. You yelled and cussed this employee, specifically telling him to "fuck off." However, throughout the day, you continued acting in a verbally hostile manner toward him and at times continuing to yell and cuss. You also texted other crew members. You were again told by this employee to leave him alone. Your response then and a couple other times during the day was to tell this employee to "fuck off." You also texted other crew members, who also participated in the investigation, in what appeared to be an efforts to interfere with an agency investigation by attempting to get those employees to side with you and support your version of events that occurred on August 22, 2019.

R. Ex. 8

39. Grievant was given an opportunity to respond to the RL-544 (recommended one (1) day suspension) in person or in writing. An appointment was scheduled for Grievant to meet with District 2 Engineer/Manager, Scott Eplin on September 6, 2019, to respond in person. Grievant attended the meeting with Mr. Eplin and it was documented on the Form RL-546. Grievant testimony; R. Ex. 8.

40. During the September 6, 2019 predetermination meeting several issues were discussed, including Grievant's actions on August 22nd and 23rd 2019, the topics of classification, positional benefits and compensation.

41. Grievant was issued a one (1) day suspension, for violations of Respondent's Standards of Work Performance and Conduct, DOP's Workplace Security Policy and Prohibited Workplace Harassment Policy, which was served on October 1, 2019. Specifically, Grievant was suspended for his yelling, cussing, and harassing a

coworker throughout the day on August 23, 2019 and texting other crew members who participated in the investigation. Witt testimony; R. Ex. 9

42. Conduct which has the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, or offensive working environment is prohibited by applicable state policy. DOP *Prohibited Workplace Harassment* Policy, R. Ex. 3

### **Discussion**

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

Grievant, via his initial grievance and amended request, protest the validity of Respondent's disciplinary actions. Grievant contends that the disciplinary suspensions and investigation herein grieved were inappropriate and retaliatory. Respondent maintains its actions were reasonable and lawful. It is not disputed that Grievant

wholeheartedly believes Respondent does not appreciate and/or truly respect his contribution to the workforce.<sup>5</sup> See *James v. West Virginia Division of Highways*, Docket No. 2019-1353-DOT (Mar 26, 2020); also see *Clagg, et al., v. West Virginia Division of Highways*, Docket No. 2015-1631-CONS (Feb. 10, 2016). Nevertheless, Respondent maintains that the instant disciplinary actions were proper, justified and should be affirmed.

“Employees are expected to respect authority and do not have unfettered discretion to disobey or ignore clear instructions.” *Reynolds v. Kanawha-Charleston Health Dep’t.*, Docket No. 90-H-128 (August 8, 1990). An employee's belief that management's decisions are incorrect, absent a threat to the employee's health or safety, does not confer the right upon him to ignore or disregard the order, rule or directive. *Vickers v. Bd. of Directors/W. Va. State College*, Docket No. 97-BOD-112B (August 7, 1998). Grievant’s contention that he was disturbed by what he perceives to be bad crew leadership is not proper justification for his hostile conduct.

Respondent is an established and responsible governmental agency. The Division of Highways expects its employees to meet established standards of work performance and conduct regardless of the type of work or unit to which they are assigned. These standards include but are not limited to:

Refusal to engage in insulting, abusive, threatening, offensive, defamatory, harassing or discriminatory conduct or language and prompt reporting of the same to the appropriate authority.

---

<sup>5</sup> Grievant believes that equipment assignments and potential upgrades in Cabell county are not distributed fairly. Grievant is of the opinion that he is being discriminated against when it comes to equipment assignments, training, and potential upgrades.

See DOH Administrative Operating Procedures § 3, Ch. 6 Disciplinary Action, II.A.10. R.

Ex. 1. Respondent's Disciplinary Action Policy sets out identified standards of work performance and conduct that employees should meet, for example:

8. Performance of assigned duties in accordance with the standards and instructions given by an appropriate supervisor;

9. Observance of and respect for the chain of command;

Division of Highways Administrative Operating Procedures, Disciplinary Action § 3, Ch. 6, II.A.8 & 9. See R. Ex. 1. Further, Respondent's Operating Procedures, identifies some examples of poor performance or misconduct that may warrant disciplinary action, including "failure to follow major instructions;" and "leaving assigned work area without permission." The language as written is empowering. Facts, circumstances and history of the employee(s) are proper factors to consider when analyzing and determining warranted action. Disciplinary action may be taken in the form of oral reprimand, written reprimand, demotion, suspension or dismissal. *Id.*

Grievant acknowledged he received a copy of the WV DOP's Workplace Security Policy and that he read and understood the policy on or about July 16, 2018. R. Ex. 4. Grievant has been an employee of Respondent in excess of six years, it is reasonable to expect Grievant to have knowledge and be aware of proper work place conduct. Grievant's acknowledged words and deed can readily be perceived as a threat to the orderly conduct of the affairs of the Division of Highways. Respondent provided persuasive evidence to demonstrate by a preponderance of the evidence that Grievant's actions violated the West Virginia Division of Personnel Prohibited Workplace Harassment Policy. Specifically, but not limited to engaging in "Nondiscriminatory

Hostile Workplace Harassment: a form of harassment commonly referred to as ‘bullying’ that involves verbal, non-verbal or physical conduct that is not discriminatory in nature but so atrocious, intolerable, extreme and outrages in nature that it exceeds the bound of decency [. . .] psychologically or physically threatens, embarrasses, ridicules, or in some other way unreasonably over burdens or precludes an employee from reasonably performing her or his work.” See II.H; R. Ex. 3 at page 2 of 9. Further, Respondent demonstrated that Grievant violated the Prohibited Workplace Harassment Policy by retaliating or attempting to retaliate against coworkers for “participating in a complaint and/or investigation process.”

Respondent’s disciplinary policy states, “An employee may be suspended immediately, upon oral notice, if the employee’s performance or conduct constitutes a continuing danger to persons or property or if the orderly conduct of the affairs of the DOH is threatened.” It is not appropriate to disregard a direct instruction from a supervisor and/or invite said person to participate in a physical altercation. This is not new information or difficult to comprehend. An employee should not invite his boss to participate in a fist fight to settle a work related disagreement. This conduct is disruptive to the work place. Grievant’s conduct toward his Crew Chief and co-worker(s) is unacceptable.

It is within the recognized purview of an employer to maintain a reasonable standard of workplace behavior. Conduct which has the purpose or effect of unreasonably interfering with an individual’s work performance by creating an intimidating, hostile, or offensive working environment is prohibited by applicable state

policy. See DOP *Prohibited Workplace Harassment Policy* R. Ex. 3. In order to maintain an efficient and effective work environment, employers are often required to address inappropriate employee behavior and/or performance through corrective and/or disciplinary action.

Grievant testified on his own behalf regarding alleged facts, alternative interpretations, his opinion and Respondent's actions (motivation) with regard to disciplinary actions. Grievant alleges DOH retaliated against him due to a previous termination grievance in which Grievant was reinstated on or about March 7, 2016. See Grievant's L3 testimony and amended grievance statement. West Virginia Code § 6C-2-2(o) defines "reprisal" as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

- (1) that he engaged in protected activity (i.e., filing a grievance);
- (2) that he was subsequently treated in an adverse manner by the employer or an agent;
- (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
- (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

*Carper v. Clay County Health Dep't*, Docket No. 2012-0235-ClaCH (July 15, 2013); *Cook v. Div. of Natural Res.*, Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.*, Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County*

*Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also *Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

An inference can be drawn that Respondent's actions were the result of a retaliatory motive if the adverse action occurred within a short time period of the adverse action. *Warner v. Dep't of Health & Human Res.*, Docket No. 2012-0986-DHHR (Oct. 21, 2013); *Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

Grievant met the first three criteria. He filed a grievance which is a protected activity, and thereafter he received the adverse treatment of the suspension. Respondent had actual or constructive knowledge of Grievant's participation in the grievance process. Regarding the fourth element, four years have pass since the cited grievance, no inference is necessarily drawn regarding motive since the protected activity was not close in time to the adverse treatment. Grievant did not prove a causal connection between his protected activity and the adverse treatment. However, the undersigned is nevertheless willing to address the issue, *arguendo*.

If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *Id.* See *Mace v. Pizza Hut, Inc.*, 377 S.E.2d 461 (W. Va. 1988); *Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n*, 309 S.E.2d 342 (W. Va. 1983); *Webb v. Mason County Bd. of Educ.*, Docket No. 89-26-56 (Sept. 29, 1989). "Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the



employer was merely a pretext for a retaliatory motive.” *Carper v. Clay County Health Dep’t*, Docket No. 2012-0235-ClaCH (July 15, 2013); *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994). See *Sloan v. Dept. of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

Grievant wholeheartedly believes Respondent does not appreciate and/or truly respect his contribution to the workforce; nevertheless, Grievant’s beliefs alone are not sufficient proof to sustain or establish the burden of proof of a grievance.<sup>6</sup> Grievant violated Prohibited Workplace Conduct and Harassment Policies. Respondent, by a preponderance of the evidence, established that the immediate oral suspension and one (1) day suspension were the direct result of Grievant’s repeated policy violations not in retaliation for any previously filed grievances. Grievant violated the prohibited workplace harassment policy by confronting in an intimidating manner and/or attempting to retaliate against one or more coworkers for participating in a complaint and/or investigation process.

It was reasonable and appropriate to discipline Grievant for his ill-chosen behavior. Grievant did not demonstrate through any measurable means that the actions of Respondent were tainted by nefarious motive. It is well within the recognized purview of an employer to maintain a reasonable standard of workplace behavior. In order to maintain an efficient and effective work environment, employers are required to address

---

<sup>6</sup> “Mere allegations alone without substantiating facts are insufficient to prove a grievance.” *Baker v. Bd. of Trustees/W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998) (citing *Harrison v. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995)).

inappropriate employee behavior and/or performance through corrective and/or disciplinary action. Grievant had previously received a written warning on May 1, 2019 for violation of the Standards of Work Performance and Conduct and DOP's Prohibited Workplace Harassment Policy. R. Ex. 8

In assessing the penalty given, “[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis.” *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995) (citations omitted). The Grievance Board has held that “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 Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996); *Hoover v. Wirt County Bd. of Educ.*, Docket No. 2008-1482-WirED (Feb. 12, 2009).

Grievant failed to demonstrate the penalty levied was clearly excessive or reflects an inherent disproportion between the offense and the personnel action. It is not determined that Respondent abused its discretion in the circumstances of this case. The immediate oral suspension and subsequent one (1) day suspension were reasonable disciplinary actions for Grievant’s clear violation of established work place conduct.

DOH's Standards of Work Performance and Conduct and DOP's Prohibited Workplace Harassment Policy in essence mandated that corrective actions be taken. An employing State agency has a recognized duty to establishing a safe and hostile free work place environment for all its employees.

The following conclusions of law are appropriate in this matter:

### **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. West Virginia Department of Transportation, Division of Highways has established and recognized standards of workplace performance and conduct that an employer can reasonably expect its employees to meet. See Division of Highways Administrative Operating Procedures § 3, Ch. 6.

3. DOH Disciplinary Action Policy permits immediate oral suspensions for examples of poor performance or misconduct that include but are not limited to threatening bodily harm [ . . . ]." *Id.* at § 3, Ch. 6, III.B.3.d, 1.

4. West Virginia Division of Personnel Workplace Security Policy prohibits employees from exhibiting threatening, hostile, or abusive behavior, either physically or verbally” that interrupts the orderly and peaceful process of the origination. A violation of this policy allows for disciplinary action up to and including dismissal.

5. To demonstrate a *prima facie* case of reprisal, Grievant must establish by a preponderance of the evidence the following elements:

- (1) that he engaged in protected activity (i.e., filing a grievance);
- (2) that he was subsequently treated in an adverse manner by the employer or an agent;
- (3) that the employer’s official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
- (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

*Cook v. Div. of Natural Res.*, Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.*, Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also *Frank’s Shoe Store v. W. Va. Human Rights Comm’n*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

6. Respondent offered and established legitimate, non-retaliatory reasons for its actions. Grievant was not a victim of retaliatory conduct by Respondent or agents of Respondent.

7. Respondent established that there was a legitimate, non-retaliatory reason for disciplinary action and Grievant did not prove that the reason was pretextual.

8. An employer is entitled to expect its employees to conform to certain standards of civil behavior. *Redfearn v. Dep’t of Labor*, 58 MSPR 307 (1993). All

employees are expected to treat each other with a modicum of courtesy in their daily contacts. See *Fonville v. DHHS*, 30 MSPR 351 (1986) (citing *Glover v. DHEW*, 1 MSPR 660 (1980)). Abusive language and abusive, inappropriate, and disrespectful behavior are not acceptable or conducive to a stable and effective working environment. *Hubble v. Dep't of Justice*, 6 MSPR 659, 6 MSPR 553 (1981). See *Graley v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 99-PEDTA-406 (Oct. 31, 2000); *Keaton v. West Virginia Dep't. of Transportation/Division of Highways*, Docket No. 2011-0188-DOT (May 9, 2011).

9. Grievant violated West Virginia Division of Highways' Administrative Operating Procedures by refusing a job assignment and threatening his crew chief on August 22, 2020.

10. Grievant violated West Virginia Division of Highways' Administrative Operating Procedures on August 23, 2020, when he harassed and/or attempted to intimidate one or more potential witnesses participating in an agency investigation.

11. Respondent proved by a preponderance of the evidence that Grievant violated applicable West Virginia Division of Highways and Division of Personnel Work Performance and Prohibited Workplace Harassment Policy.

12. Respondent provided by a preponderance of the evidence that Grievant's actions violated the West Virginia Division of Personnel Workplace Security Policy. Grievant exhibited "threatening, hostile, or abusive behavior, either physically or verbally" that interrupts the orderly and peaceful process of the origination. A violation of this policy allows for disciplinary action up to and including dismissal.

13. Employees have the right to be free from harassment while in a State government workplace, and the State has the legal obligation to ensure that such harassment does not occur and that effective means of redress are available. West Virginia Division of Personnel's Workplace Security Policy; DOP's Prohibited Workplace Harassment Policy.

Accordingly, this grievance is **DENIED**.

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

**Date: October 1, 2020**

---

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