**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**GERALD ROBINSON,**

**Grievant,**

**v.** **Docket No. 2020-0471-DOT**

**DIVISION OF HIGHWAYS,**

**Respondent.**

## DECISION

Grievant, Gerald Robinson, is employed by Respondent, Division of Highways. On October 15, 2019, Grievant filed this grievance against Respondent stating, "Was given 5 days off. Told to dump on someone's property where they didn't want. Have letter from property owner stating always put where wanted fill." For relief, Grievant seeks, "Paid for time off. Taken off record."

Grievant filed directly to level three of the grievance process.[1] A level three hearing was held on January 8, 2020, before the undersigned at the Grievance Board's Westover, West Virginia office. Grievant appeared in person and *pro se*[2]. Respondent appeared through its representative, Mandy Crow, and its attorney, Keith Cox. Grievant verified he would not be submitting Proposed Findings of Fact and Conclusions of Law (PFFCL). Respondent submitted PFFCL. This matter became mature for decision on February 28, 2020.

Upon discovering that the level three hearing recording was inaudible, the undersigned held a phone conference on January 17, 2020. The parties were apprised

[1]West Virginia Code § 6C-2-4(a)(4) permits a grievant to proceed directly to level three of the grievance process when the grievance deals with the discharge of the grievant.
[2]For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

of their right to have a record for appeal and to unilaterally choose to redo the entire level three hearing or at least present evidence on any contested fact. Grievant opted to first review Respondent's PFFCL and then contact the Grievance Board, if necessary, to request a hearing on any contested or unaddressed fact. After Respondent submitted its PFFCL, the Grievance Board made a number of attempts to contact Grievant to determine whether he wanted to redo the level three hearing. Grievant never responded.

## Synopsis

Grievant is employed as an equipment operator for Respondent, Division of Highways. Grievant was tasked with dumping fill dirt onto private property. Grievant's supervisor ordered Grievant to stop dumping near a drainage pipe and to instead dump on a hillside. Grievant refused to comply and got into a verbal altercation with a coworker. Respondent suspended Grievant for insubordination, disrespecting the chain of command, and using offensive language with a coworker. While Grievant disputes the facts underlying the latter two allegations, he does not dispute that he refused to follow orders. Grievant defends his refusal, arguing the directive was unsafe and contrary to the landowner's wishes. Respondent proved discipline was justified. Grievant did not prove an affirmative defense to excuse his noncompliance or that mitigation was warranted. Accordingly, this grievance is Denied.

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

## Findings of Fact

1. Grievant is employed as a Transportation Worker II Equipment Operator (TW2EQOP) by West Virginia Division of Highways (DOH), out of the Brooke County

garage in District Six.[3] Grievant has been employed with DOH since June 2011.

2. Grievant operated a dump truck during the events in question.

3. DOH routinely signs agreements with landowners so it has somewhere to unload dirt from its road projects.

4. DOH had such an agreement with landowner Harry Chambers.

5. Grievant previously did some work for Mr. Chambers and knew his dumping preferences.

6. On March 9, 2019, Grievant was part of a DOH work crew tasked with dumping fill dirt onto Mr. Chamber's property.

7. Scott Bozich and Cody Raymond were also on the work crew that day.

8. Mr. Bozich reported to Crew Leader Michael Spanovich that Grievant was dumping on a drainage pipe. Mr. Spanovich called Grievant and directed him to stop dumping near the drainage pipe and to instead dump on the hillside. (Mr. Spanovich's testimony & Respondent's Exhibit 2)

9. Grievant refused to dump against Mr. Chambers' wishes and threatened to go home. Grievant stated that he was not harming the pipe and that Mr. Chambers wanted the fill dirt near the pipe and not on the hillside.

10. Even though Mr. Chambers was not present to direct the work crew, he in fact wanted the fill dirt dumped near the pipe as Grievant had done. The pipe was not damaged. (Mr. Chambers' testimony and Grievant's Exhibit 6)

11. After deciding not to abide by orders to dump on the hillside, Grievant drove his load ten miles away from the worksite to another property without DOH's approval.

[3]District Six includes the counties of Brooke, Hancock, Ohio, Marshall, Wetzel, and Tyler.

While it is unclear how many loads Grievant dumped offsite, it appears that it was one load.

12. Burl Williams, the County Administrator for Brooke County and Grievant's direct supervisor, was made aware of the situation. Mr. Williams called Grievant and directed him to stop dumping at the distant location. Grievant responded, "I will dump where I want to" and hung up. (Mr. Williams' testimony and Respondent's Exhibit 1)

13. Later that same day, Grievant and co-worker Cody Raymond engaged in a verbal altercation via the work radio. Grievant called Mr. Raymond "a piece of shit" and "a cunt." Cody Raymond quit shortly thereafter and did not testify.

14. Mr. Raymond made a written statement the day of the incident detailing the verbal insults by Grievant. Mr. Raymond's written statement did not mention any physical threat by Grievant. To the contrary, Mr. Raymond wrote that Grievant "called me a cunt, so I hopped out of my truck and I jogged over to defuse the situation and Gerry started yelling at me so I yelled back." (Respondent's Exhibit 3)

15. On March 22, 2019, Respondent issued Grievant a Form RL-544, citing Grievant for violating the Division of Highways Operating Procedures, Section II, Chapter 6, Standards of Performance and Conduct as follows:

> 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;
>
> **Mr. Robinson's failure to comply with instructions given by both the crew chief, and the highway administrator. This insubordination was a combination of not following specific orders regarding the dumping location of materials, resulting in blockage of a drainage culvert, and refusing to listen and comply with various level**

> **supervisors regarding same, as well as hanging up on a supervisor during telephone instructions, showing disrespect for the chain of command and for his supervisors.**
>
> 3. Maintenance of a high standard of personal conduct and courtesy in dealing with the public, fellow employees, subordinates, supervisors, and officials;
>
> 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.
>
> **Mr. Robinson's refusal to work harmoniously with crew members, calling Cody Raymond a "piece of shit" and a "cunt".**
>
> **Mr. Robinson's profanity, harassment, and abusive language directed to co-workers over the state radio is also unacceptable.**
>
> (Respondent's Exhibit 1 & 9)

16. Respondent went on to recommend Grievant be suspended without pay for five working days, since Grievant had previously been suspended for periods of two and three days for insubordination and not working harmoniously with coworkers. (Respondent's Exhibit 1)

17. On March 29, 2019, Grievant provided Respondent a verbal response, which Respondent reduced to writing and Grievant signed. It states:

> Employee stated he did not refuse to do assigned work, he was dumping where the landowner wanted materials dumped and had a spotter, Scott Bozich. He also stated he and [sic] was not insubordinate to either Supervisor Burl Williams or Crew Chief Mike Spanovich, and did not hang up the phone on Burl Williams. Mr. Robinson said none of the language reported on the RL-544 was spoken by him and that he did not use the state radio. He stated Mike Spanovich's radio was not working. Cody Raymond threatened him, including saying he would come to his house. Mr. Robinson stated he does

not feel he did anything wrong.

18. On August 29, 2019, Respondent sent Grievant a letter suspending him for five working days. It stated the following violations of the Division of Highways Standard of Work Performance and Conduct:

> On Saturday March 9, 2019 during a morning meeting you were giving (sic) a direction from your crew leader with specific orders regarding the dumping location of materials. You decided to ignore those instructions and dumped material in a location which was not authorized by your supervisor that was 10 miles further. When your supervisor called to explain you needed to stop dumping at the unauthorized location You [sic] stated, "I will dump where I want to", as well as hanging up on a supervisor during the telephone call.
>
> During this time, you used inappropriate language to a co-worker by calling Cody a "piece of shit" on state radio. You have been previously counseled and disciplined for similar violations.
>
> (Respondent's Exhibit 8)

19. Grievant had previously been suspended twice back in 2013 - 2014. One suspension was for insubordination after Grievant instructed summer employees to ignore a work assignment, refused a work assignment himself, raised his voice in a disruptive manner to challenge the authority of his supervisor, and permitted his son to stop by his worksite to say hello. The second suspension was for an altercation with a coworker where Grievant told the coworker to check everything on his pre-trip inspection. Grievant then revealed to the coworker that Grievant had removed a safety pin from the vehicle and trailer. After this revelation, a confrontation ensued where Grievant and the coworker bumped bellies. Grievant did not grieve either of these suspensions. (Respondent's Exhibits 5, 6, & 7)

## Discussion

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W. VA. CODE ST. R. § 156-1-3 (2018). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. 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 employer has not met its burden. *Id*.

Respondent contends that it suspended Grievant due to insubordination, disrespecting the chain of command, and using offensive language. Respondent alleges that Grievant did not follow a supervisor's order on where to dump, hung up on a supervisor, told a supervisor "I will dump where I want to", and directed profanity at coworker Cody Raymond. Respondent claims Grievant's insubordination resulted in unnecessary mileage and wasted time when he dumped his load 10 miles offsite. Respondent contends Grievant's suspension is appropriate due to Grievant's prior suspensions for similar conduct. Grievant counters that his refusal to obey orders on where to dump was justifiable because he dumped where the landowner wanted him to dump, avoided putting his safety at risk by not following orders to dump on a hillside, and dumped offsite after he decided to leave work for the day before changing his mind and returning. Grievant denies the allegations that he used abusive language with Mr. Raymond and that he talked back to and hung up on his supervisor. Grievant also implies that his affirmative defenses should result in mitigation of his suspension.

In suspending Grievant, Respondent cites him with violating the following Division of Highways Operating Procedures, Section II, Chapter 6, Standards of Performance and Conduct:

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

Respondent implies that these violations, as well as the violations that led to Grievant's suspension in 2013 - 2014, translated into good cause for suspending Grievant. Permanent state employees who are in the classified service can only be dismissed "for good cause, which means misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin*., 164 W. Va. 384, 264 S.E.2d 151 (1980*); Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *Sloan v. Dep't of Health & Human Res*., 215 W. Va. 657, 600 S.E.2d 554 (2004) (*per curiam*). *See also* W. VA. CODE ST. R. § 143-1-12.2.a. (2016). "Although it is true that dismissal is inappropriate when the employee's violation is found to be merely a technical one, it is also true that seriously wrongful conduct can lead to dismissal even if it is not a technical violation of any statute. . . The test is not whether the conduct breaks a specific law, but

rather whether it is potentially damaging to the rights and interests of the public." *W. Va. Dep't of Corr. v. Lemasters*, 173 W. Va. 159, 162, 313 S.E.2d 436, 439 (1984). "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).

"[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd*., 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). The Grievance Board has further recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ*., Docket No. BOR2-88-029-4 (May 25, 1988), *aff'd, Sexton v. Marshall Univ*., 182 W. Va. 294, 387 S.E.2d 529 (1989).

"Certainly, 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)."

As for the incidents of insubordination, Grievant admits to most of the underlying facts but asserts affirmative defenses. However, Grievant denies he disrespected the chain of command by hanging up on Mr. Williams and telling him "I will dump where I want to." Grievant also denies he used abusive language by calling a coworker names and threatening to physically harm him. Before addressing Grievant's affirmative defenses, the undersigned will determine whether Respondent proved the contested allegations at the heart of the charges that he disrespected the chain of command and used abusive language.

There was conflicting testimony on these allegations. 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).

Regarding the allegation that Grievant hung up on his supervisor, no credibility determination is required. Mr. Williams testified that Grievant hung up on him (i.e., intentionally ended the call prematurely). Frequently, phone conversations end with one party unintentionally hanging up in the mistaken belief that the conversation is over. Mr. Williams did not provide any basis for his conclusion that Grievant intentionally ended the call prematurely (e.g., Mr. Williams was in mid-sentence or it was obvious Mr. Williams had more to say). On its face, the call had played out to its natural conclusion. Mr. Williams issued his directive and Grievant stated his refusal to comply. Respondent did not prove that Grievant hung up on Mr. Williams.

Regarding the allegation that Grievant said "I will dump where I want to", both Mr. Williams and Grievant's testimony are in play. Not all factors are necessarily relevant to every credibility determination. While Grievant had an interest in the outcome, Mr. Williams did not reveal any motive to lie. Further, Mr. Williams' testimony is plausible, given Grievant's admission that he refused to dump at the location he was directed to by Mr. Williams and Mr. Spanovich. By his own admission, Grievant actually did dump at a site of his own choosing 10 miles away. Grievant's acknowledged actions are consistent with Mr. Williams' testimony. Respondent showed it was more likely than not that Grievant told Mr. Williams "I will dump where I want to."

Regarding the allegation that Grievant used offensive language towards and harassed Mr. Raymond, the relevant testimony comes from Grievant and Mr. Bozich. Grievant was inconsistent in his testimony and previously provided statements which hedged his denial of abusive language with the accusation that Mr. Raymond started their altercation. Both Grievant and Mr. Bozich had divergent interests in the outcome of the hearing and were therefore bias. Mr. Bozich's bias may be less obvious, but the animus between the two was transparent in their interplay during the level three hearing. Without attributing fault, the existence of a feud was apparent. Respondent alleged that Grievant directed his profanity and threats to Mr. Raymond via a CB radio. Grievant contends that Mr. Bozich's radio was not working. Mr. Bozich admits that his radio had connectivity issues. Nevertheless, Mr. Bozich testified that he heard Grievant calling Mr. Raymond a "piece of shit" and a "cunt." Mr. Bozich testied that Grievant threatened to meet Mr. Raymond at the bottom of the hill to fight. This testimony is dubious, given Mr. Raymond's own written statement from the day of the incident. Mr. Raymond's statement does not accuse Grievant of making any physical threats, only of calling him names, including "a piece of shit" and "a cunt." The only allusion Mr. Raymond makes to any transformation of the nature of the altercation from name calling to physical conflict is when he wrote, "he called me a cunt, so, I hopped out of my truck and I jogged over to defuse the situation and Gerry started yelling at me so I yelled back."

Interestingly, Mr. Bozich never made a written statement of the incident for Respondent's investigative file. Mr. Bozich's testimony implicitly contradicts Mr. Raymond's written statement. Additionally, had Mr. Bozich heard the altercation, he would have been the only non-party witness to the incident. As such, Respondent would

have likely taken his statement before determining what actually happened and before disciplining Grievant based only on the uncorroborated statement of Mr. Raymond. As Respondent obtained written statements from Grievant and Mr. Raymond, it appears that it was Respondent's protocol to do so in the course of an investigation. It seems unlikely that Respondent would have only taken Mr. Bozich's verbal statement as a tie-breaker to the divergent written statements of the parties to the altercation. There is scant evidence that Mr. Bozich provided an oral statement of any substance to Respondent. It is unlikely that Mr. Bozich heard any part of the altercation. The undersigned cannot find Mr. Bozich's testimony to be credible.

As for the allegation that Grievant used profanity towards Mr. Raymond, the undersigned can utilize Mr. Raymond's written statement even though it is hearsay. "Hearsay includes any statement made outside the present proceeding which is offered as evidence of the truth of the matter asserted." BLACK'S LAW DICTIONARY 722 (6th ed. 1990). "Hearsay evidence is generally admissible in grievance proceedings. The issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings." *Gunnells v. Logan County Bd. of Educ*., Docket No. 97-23-055 (Dec. 9, 1997). The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the

statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. *Id*.; *Sinsel v. Harrison County Bd. of Educ*., Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-H-115 (June 8, 1990).

Mr. Raymond apparently was not available to testify, having quit shortly after the altercation in question. Mr. Raymond's statement was written and signed, but not notarized. DOH did not notarize any of the written statements made during the course of the investigation. While Grievant disputes that he initiated the altercation, Mr. Raymond's statement seems consistent with the evidence presented. The statement also seems credible, particularly in light of its inclusion of an admission against Mr. Raymond's own interest: that the name calling by Grievant got so bad that Mr. Raymond told Grievant to shut his mouth and "he [Grievant] called me a cunt, so, I hopped out of my truck and I jogged over to defuse the situation." Regardless of who started the verbal altercation, it is apparent that Grievant kept it going and accelerated it to the point that Mr. Raymond felt compelled to confront him in person. While Mr. Raymond's decision to confront Grievant in person appears to be inexcusable, his admission to so doing lends credence to his rendition of the name calling he was subjected to by Grievant. Mr. Raymond's statement is therefore more credible than Grievant's denials thereof.

Respondent proved that Grievant willfully refused a reasonable order by a supervisor as to where to dump, dumped 10 miles offsite, told a supervisor "I will dump

where I want to," and directed abusive language towards a coworker. This constitutes insubordination, disrespects the chain of command, and violates the standards of behavior Respondent has a right to expect in its employees.

The undersigned will therefore address Grievant's affirmative defenses to insubordination. Grievant contends that he knew better than his supervisors where the landowner wanted the fill dirt, that the order to dump on a hillside put his safety at risk, and that he was on his way home when he dumped his load 10 miles away from his worksite. "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-3 (2018). Grievant does have some leeway to disobey directives that put his safety at risk. "A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with the employee's effective job performance or health and safety." *Ball v. Dep't of Transp*., Docket No. 96-DOH-141 (July 31, 1997); *Mickles v. Dep't of Envtl. Prot*., Docket No. 06-DEP-320 (Mar. 30, 2007), *aff'd*, Fayette Cnty. Cir. Ct. Docket No. 07-AA-1 (Feb. 13. 2008). "Management decisions are to be judged by the arbitrary and capricious standard." *Adams v. Reg'l Jail & Corr. Facility Auth*., Docket No. 06-RJA-147 (Sept. 29, 2006); *Miller v. Kanawha County Bd. of Educ*., Docket No. 05-20-252 (Sept. 28, 2005).

"Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v.*

*Health and Human Serv*., 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), ***aff'd*** Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

Grievant did not present any evidence to show that dumping on a hill poses a safety risk. Grievant did not provide any details as to why this particular hill was unsafe for dumping. Neither did he assert the existence of regulations to discourage dumping on inclines of a particular grade. Even if Grievant's safety concerns had been valid, they would not justify dumping 10 miles away from the worksite. Grievant contends that he left with the intention of following through on his threat to leave work. Yet, he did not present any authority for the proposition that employees can leave work at their whim. As for his final defense, Grievant proved that landowner Chambers wanted the fill dirt near his drainage pipe. Nevertheless, compliance with a property owner's wishes is not one of the above outlined grounds that justify disobeying a supervisor's orders. Grievant failed to prove that the orders he disobeyed put his safety at risk.

Further, it was not unreasonable for his supervisors to order Grievant to stop dumping near the drainage pipe out of concern it would be submerged or damaged, and to disapprove of his dumping offsite due to concerns regarding increased use of time and resources. Respondent has a right to expect employees to follow instructions and get along with one another. While a particular incident of insubordination or abusive language

might not in itself warrant suspension, repeated incidents may create good cause for suspension. Respondent proved that it had good cause to suspend Grievant as a result of his repeated insubordination, disrespect towards the chain of command, and abusive language.

Lastly, Grievant implies his discipline should be mitigated. "[A]n allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was 'clearly excessive or reflects an abuse of agency discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989)." *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No 95-AA-66 (May 1, 1996), *appeal refused*, W.Va. Sup. Ct. App. (Nov. 19, 1996). "Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996); *Olsen v. Kanawha County Bd. of Educ*., Docket No. 02-20-380 (May 30, 2003), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the

penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ*., Docket No. 93-45-105 (Mar. 31, 1994); *Cooper v. Raleigh County Bd. of Educ*., Docket No. 2014-0028-RalED (Apr. 30, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

Grievant contends that suspension is too severe a penalty because he disobeyed orders due to safety concerns, followed the landowner's wishes, and simply unloaded on his way home. Respondent counters that five-days is reasonable considering Grievant had already been suspended twice for similar conduct. Grievant takes issue with the allegations underlying his prior suspensions. However, Grievant did not grieve these suspensions. "If an employee does not grieve specific disciplinary incidents, he cannot place the merits of such discipline in issue in a subsequent grievance proceeding. *Jones v. W. Va. Dept. of Health & Human Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *See Stamper v. W. Va. Dept. of Health & Human Resources*, Docket No. 95-HHR-144 (Mar. 20, 1996); *Womack v. Dept. of Admin*., Docket No. 93-ADMN-430 (Mar. 30, 1994). In such cases, the information contained in prior disciplinary documentation must be accepted as true. *See Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994)." *Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997), *aff'd*, Monongalia Cnty. Cir. Ct. Docket No. 97-C-AP-96 (Dec. 7, 1999), *appeal refused*, W.Va. Sup Ct. App. Docket No. 001096 (July 6, 2000). Given that Grievant had been suspended twice before for two-days and three-days for similar conduct, a five-day suspension is reasonable. Grievant did not prove that the discipline imposed by Respondent was clearly excessive or an abuse of discretion. The undersigned will

therefore not substitute Respondent's judgement with his own.

The following Conclusions of Law support the decision reached.

**Conclusions of Law**

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W. VA. CODE ST. R. § 156-1-3 (2018). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. 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 employer has not met its burden. *Id*.

2. "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd*., 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). The Grievance Board has further recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ*., Docket No. BOR2-88-029-4 (May 25, 1988), aff*'d, Sexton v. Marshall Univ*., 182 W. Va. 294, 387 S.E.2d 529 (1989).

3. "Certainly, 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)."

4. Permanent state employees who are in the classified service can only be dismissed "for good cause, which means misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin*., 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *Sloan v. Dep't of Health & Human Res*., 215 W. Va. 657, 600 S.E.2d 554 (2004) (*per curiam*). *See also* W. VA. CODE ST. R. § 143-1-12.2.a. (2016).

5. "[A]n allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was 'clearly excessive or reflects an abuse of agency discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989)." *Conner v. Barbour County Bd. of Educ.,* Docket No. 94-01-394 (Jan. 31, 1995), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No 95-AA-66 (May 1, 1996), *appeal refused*, W.Va. Sup. Ct. App. (Nov. 19, 1996). "Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's

assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996); *Olsen v. Kanawha County Bd. of Educ*., Docket No. 02-20-380 (May 30, 2003), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004).

6. Respondent proved by a preponderance of evidence that Grievant was insubordinate, disregarded the chain of command, and directed abusive language towards a coworker. It proved it had good cause to suspend Grievant.

7. Grievant did not prove by a preponderance of evidence an affirmative defense that would excuse his refusal to follow orders or that mitigation of his punishment was warranted.

Accordingly, the grievance is **DENIED.**

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

**DATE: March 30, 2020**

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**Joshua S. Fraenkel**
**Administrative Law Judge**