THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CANDUS WASHINGTON,
Grievant,

v. **Docket No. 2020-0543-DHHR**

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

DECISION

Grievant, Candus Washington, was employed by Respondent, Department of Health and Human Resources within the Bureau for Children and Families. On November 4, 2019, Grievant filed this grievance against Respondent stating, "Restricted movement at workplace. Hostile environment, leading to wrongful dismissal of position, in which I previously brought to the Grievance Board attention May 15, 2019 as well as September 4, 2019 of Policy 2123 workplace violation happening." Grievant seeks as relief "restoration of wage, position, transfer to another DHHR county office, and removal of this dismissal from administrative file, personnel file, and WV Division of Personnel [file]."

The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held on February 24, 2020, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant appeared in person and *pro se*[1]. Respondent appeared by Community Services Manager Michael Hale and was represented by counsel, James "Jake" Wegman, Assistant Attorney General. This matter became mature for decision on March 23,

[1] For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

2020, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent within the Bureau of Children and Families as a Family Support Specialist. Grievant's employment was terminated for gross misconduct. Respondent proved Grievant committed gross misconduct and that it was justified in terminating Grievant's employment for the same. Grievant failed to prove retaliation or that mitigation of the punishment is warranted. Accordingly, the grievance is denied.

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

Findings of Fact

1. Grievant was employed by Respondent within the Bureau of Children and Families as a Family Support Specialist.

2. Grievant's direct supervisor was Maria Sisco-Wilson.

3. On Friday, October 11, 2019, Grievant was absent from work and another employee reported to Ms. Sisco-Wilson that Grievant's laptop computer was missing from Grievant's desk.

4. Grievant did not have approval to take her laptop computer home, so it was a concern that it was missing.

5. Ms. Sisco-Wilson reported the concern to her supervisor, Family Assistance Coordinator Mary Harris. They then unlocked Grievant's workspace and found that Grievant's computer had been locked in her desk. In addition, they found

multiple documents that had not been properly scanned into the central database and handwritten lists of social security numbers. Among the documents were also client applications that had not been processed in a timely fashion, denying clients their rightful benefits and also potentially jeopardizing federal funding of the program.

6. Ms. Harris reported their findings to her supervisor, Community Services Manager (CSM) Michael Hale.

7. CSM Hale was very concerned by these discoveries and immediately began review with his superiors of the situation to determine how to proceed. CSM Hale also ordered that Grievant's access card, which is used by an employee to enter the secured building, be deactivated.

8. The next regular business day, Monday, October 14, 2019, was a holiday. Grievant attempted to enter the building but could not gain access as her access card had been deactivated. Grievant called 911 regarding not being able to get into the building.

9. On Tuesday, October 15, 2019, Grievant reported to work. Grievant was confused and upset because her laptop computer was missing. She again called 911.

10. Later that day, CSM Hale received permission to proceed with Grievant's suspension pending investigation.

11. CSM Hale met with Grievant, Ms. Harris, and Ms. Sisco-Wilson in his office to inform Grievant that she was being suspended pending investigation.

12. Upon being informed of her suspension, Grievant became agitated and immediately took out her cell phone and called 911 insisting that CSM Hale was "illegally detaining her." CSM Hale, Ms. Harris, and Ms. Sisco-Wilson could hear the

conversation with 911. Grievant was allowed to speak to a law enforcement officer, who appeared to be familiar with Grievant's prior 911 calls. Grievant demanded the Secretary of State and the Governor be contacted. The law enforcement officer informed Grievant her employer was within its rights to suspend her and that the situation was not a criminal matter. CSM Hale asked Grievant to surrender her access card and her employee identification badge. Grievant surrendered the access card but initially refused to surrender her access badge, then demanded that it be fingerprinted once she did surrender it.

13. Grievant became increasingly irate during the meeting and at some time during the escalation a security officer came into the office. Grievant had several bags with her and the security officer asked what Grievant had in the bags and if there was any state property in the bags. The security guard did not remove any items from the bags although she may have touched the bags. Grievant became more agitated and confrontational. As the security officer then began escorting Grievant out of the office Grievant screamed at CSM Hale, Ms. Harris, and Ms. Sisco-Wilson, to "burn in hell," pointing at each one individually and repeating "burn in hell" to each. Regional Director Lance Whaley could clearly hear Grievant yelling "burn in hell" from down the hallway.

14. CSM Hale's office exits into a main hallway that exits the building approximately 150 feet away. The security officer escorted Grievant down the hallway to exit the building. As the security officer escorted Grievant past the office of Terri Mollohan and Morgan McClane, Grievant broke away from the security officer and entered the office, passing by Ms. McClane as Ms. McClane was leaving the office. She advanced on Ms. Mollohan with her hands in the air screaming something about

children. The security officer stepped between Grievant and Ms. Mollohan and directed Grievant out of the office. Grievant backed out of the office continuing to scream and gesture at Ms. Mollohan. Ms. Mollohan and Ms. McClane felt threatened.

15. Once back out in the hallway, Grievant's behavior became even more extreme. She engaged her whole body in her screaming, throwing herself up and down, flailing her arms and eventually throwing herself back against the hallway wall, sliding to the floor, wailing and continuing to scream. As the security officer continued her calm direction for Grievant to exit the building, Grievant stood back up, pushing herself against the officer in an attempt to reenter the office, all the while continuing to scream at Ms. Mollohan. Multiple employees came out of offices into the hallway to investigate the disturbance.

16. As the security officer resumed escorting Grievant down the hallway, she continued to scream and curse. As CSM Hale followed them down the hall, Grievant turned around and attempted to kick CSM Hale, throwing off her shoe in the process. The security officer grabbed Grievant by her waist, spinning her around back towards the exit, and bodily removed Grievant from the building.

17. CSM Hale was concerned enough regarding the security risk of Grievant's behavior that he called 911 during the incident, although Grievant had left the premises before law enforcement could arrive.

18. Portions of the incident were captured on Respondent's security cameras.

19. Prior to the incident, Grievant had been experiencing serious personal issues, including the removal of her children from her custody. Grievant was required to remain employed as a condition for regaining custody. Grievant's personal issues had

been affecting her at work and Respondent had previously met with Grievant and attempted to provide resources to her. Following the incident, Grievant was hospitalized.

20. By letter dated October 29, 2019, Regional Director Lance Whaley dismissed Grievant from employment for gross misconduct for the incident, stating that Grievant's behavior violated Respondent's *Hostile Work Environment* policy. Regional Director Whaley further stated that Grievant's dismissal was as a result of the October 11, 2019 incident in which Grievant became "irate and threatening," was "accusatory towards staff concerning your children," "became enraged and engaged physically" with the security officer, and "actively attempted to physically attack a Child Protective Service Case Aid and the Community Services Manager."

21. Respondent's Policy Memorandum 2123, *Hostile Work Environment*, prohibits ""[a]ny act or threat of physical violence, intimidation, or other threatening or disruptive behavior that occurs at work. It can range from threats and verbal abuse to physical assault."

22. Grievant previously filed two grievances. The first grievance was filed April 9, 2019 in which Grievant asserts she was directed to leave a training class and Grievant requested "permission and clarity of duties." The grievance was dismissed at level one by order entered May 15, 2019, stating that the grievance was a result of a misunderstanding and that Grievant had since been given permission to reschedule the training and her supervisors would clarify her duties. The second grievance was filed alleging violation of policy on August 15, 2019, which was dismissed at level one by

Grievant's request on November 4, 2019. Regional Director Whaley was copied on notices of dismissal, although he did not directly participate in either grievance.

Discussion

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

Permanent state employees who are in the classified service can only be dismissed for "good cause," 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).

"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).

Grievant asserts her employment was terminated due to "a misperception of attack" and Grievant denies she attacked anyone. Grievant asserts the touching of her bag was an "illegal search and seizure."[2] Grievant asserts the termination of her employment was retaliation for her previous grievance filings. Grievant appears to alternately assert termination of her employment was too harsh a penalty and mitigation of the punishment would be warranted. Respondent asserts that the video and witness testimony of the incident proves Grievant committed gross misconduct and termination of her employment was justified due to the extreme nature of her behavior.

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

[2] This argument will not be further addressed. Although Grievant testified that the security officer touched her bags, she did not assert the security officer took anything from the bags and the contents of Grievant's bags had nothing to do with the decision to terminate her employment.

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).

Portions of the incident were recorded by Respondent's security video. There are three recorded views: the hallway outside of Ms. Mollohan's office, the hallway next to the exit, and the outside door. The videos do not have sound but are of good video quality with the ability to clearly discern details such as facial expression and contain no stuttering of the picture. The first video shows Grievant's entry and exit into Ms. Mollohan's office, but does not show any of the incident within the office. The video from the hallway outside Ms. Mollohan's office clearly shows Grievant enraged, screaming, and acting in a threatening manner towards Ms. Mollohan. It also shows Grievant "engaging physically" with the security officer by pushing herself against the officer while screaming at Ms. Mollohan. The second video shows the end of the hallway. There appears to be a gap in the coverage of the hallway between the two cameras. The second video begins with Grievant and the security officer only partly in the frame coming towards the camera, which is stationed by the exit. The video shows Grievant facing away from the exit with her shoe off on the floor. The video shows the security officer grabbing Grievant by the waist, swinging her around back towards the exit, and propelling her the rest of the way down the hallway. Although the video does not show the attempt to kick CSM Hale, it is consistent with the testimony regarding the attempt to kick CSM Hale. The last video shows Grievant being pushed out the door, her gesturing emphatically towards the door, and then the security officer bringing Grievant's shoe out and handing it to someone off screen.

CSM Hale's demeanor was calm, forthright, and professional. He was careful to avoid hyperbole in his testimony and presented the facts simply. He appeared to have a good memory of the events and his testimony was appropriately detailed. Other than the allegation of retaliation, which will be addressed below, there was no other allegation of bias. His testimony was consistent with Ms. Harris and Ms. Sisco-Wilson. CSM Hale was credible.

Ms. Harris's demeanor was serious and direct. She appeared to have a good memory of events. Other than the allegation of retaliation, which will be addressed below, there was no other allegation of bias. Her testimony was consistent with CSM Hale and Ms. Sisco-Wilson. CSM Hale was credible.

Ms. Sisco-Wilson's demeanor was appropriate, her answers to questions were detailed, and her memory of the events appeared good. She clearly admitted when she was unsure of a detail. Other than the allegation of retaliation, which will be addressed below, there was no other allegation of bias. Her testimony was consistent with CSM Hale and Ms. Harris. CSM Hale was credible.

The testimony of Ms. Mollohan and Ms. McClane was brief but clear. Both witnesses exhibited appropriate demeanors and an appropriate serious attitude towards the proceeding. Both denied knowing Grievant prior to the incident nor did Grievant specifically allege that either had any prejudice against her. Ms. Mollohan and Ms. McClane's testimony was consistent with each other and the relevant portions of the video. Their testimony regarding feeling threatened appeared genuine. Both were credible.

Grievant's testimony regarding the events was not credible. Although Grievant's demeanor during the level three hearing was calm and appropriate, that demeanor was in stark contrast to the video of the incident, in which Grievant's behavior was undeniably out-of-control and extreme. Grievant testified that she does not recall telling CSM Hale, Ms. Harris, and Ms. Sisco-Wilson to burn in hell, falling to the floor, or how loud she was during the incident, yet she testified that she remembered the security officer touching her bag. While it may be true that Grievant was simply so overwrought that she actually does not remember certain parts of the incident, her testimony that she does not recall certain things happening does not negate the video evidence and credible witness testimony that proves those things happened. Further, her continued refusal to acknowledge the seriousness of the incident even after viewing the video during the level three hearing is troubling.

Grievant's misconduct was extreme and caused her co-workers to reasonably feel threatened for their safety. Her behavior disrupted employees all down the hallway. While Grievant's assertion that she did not actually physically attack anyone is true, that is ultimately irrelevant. Grievant was not charged with attacking co-workers; she was charged with attempting to attack co-workers and the evidence shows it is more likely than not that she was attempting to attack and was prevented from doing so by the intervention of the security officer. Regardless, even if Grievant was not attempting to attack either CSM Hale and Ms. Mollohan, her behavior was clearly threatening and extreme, which would have justified her termination alone. Grievant's behavior did show a "wanton disregard of standards of behavior which the employer has a right to expect of its employees." Therefore, Respondent has proven that Grievant's behavior

constituted gross misconduct and that it was justified in terminating Grievant's employment for the same.

Grievant asserts the termination of her employment was motivated by retaliation for filing "numerous" grievances. "No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination." W.VA. CODE § 6C-2-3(h). Reprisal is defined 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." W.VA. CODE § 6C-2-2(o).

"In proving an allegation of retaliatory discharge, three phases of evidentiary investigation must be addressed. First, the employee claiming retaliation must establish a *prima facie* case." *Freeman v. Fayette Cty. Bd. of Educ.*, 215 W. Va. 272, 277, 599 S.E.2d 695, 700 (2004). In syllabus point six of *Freeman*, the West Virginia Supreme Court of Appeals specifically applied the same elements required to prove a *prima facie* case under the West Virginia Human Rights Act to a claim arising from a public employee grievance stating,

> [T]he burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.

Id., Syl. Pt. 6, 215 W. Va. at 275, 599 S.E.2d at 698 (citing Syl. Pt. 4, *Frank's Shoe Store v. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); Syl. Pt. 1, *Brammer v. Human Rights Comm'n*, 183 W. Va. 108, 394 S.E.2d 340 (1990); Syl. Pt. 10, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)).

"An employer may rebut the presumption of retaliatory action by offering 'credible evidence of legitimate nondiscriminatory reasons for its actions . . . .' *Mace v. Pizza Hut, Inc.*, 180 W.Va. 469, 377 S.E.2d 461, 464 (1988); *see also Shepherdstown Volunteer Fire Department v. State ex rel. West Virginia Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983). Should the employer succeed in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful discrimination. *Mace*, 377 S.E.2d 461 at 464." *W. Va. Dep't of Nat. Res. v. Myers*, 191 W. Va. 72, 76, 443 S.E.2d 229, 233 (1994); *Conner v. Barbour Cty. Bd. of Educ.*, 200 W. Va. 405, 409, 489 S.E.2d 787 (1997).

There is no record of "numerous" grievance filings, as Grievant alleged, but the Grievance Board's records reflect Grievant had filed two grievances in the six months prior to her termination from employment. The filing of grievances is a protected activity under the grievance procedure and the grievances were filed within a short time prior to the termination. Although Regional Director Whaley testified he was unaware of the prior grievances, he was copied on the notices of dismissal, so it appears he was, or should have been, aware of the prior grievances. Although there is no evidence he knew of the second grievance when he made the decision to terminate Grievant's employment on October 29, 2019, as he received the dismissal notice after that date.

Therefore, it does appear Grievant made a *prima facie* case of retaliation. However, even if retaliatory motivation can be inferred, it is clear from the evidence that Grievant's termination from employment was neither a pretext to retaliate against her nor a factor in the decision to terminate her employment. As explained above, Grievant clearly committed gross misconduct with her extreme and threatening behavior and that gross misconduct was a legitimate non-discriminatory reason for Respondent's decision to terminate her employment.

Grievant also appears to argue that the penalty of termination of employment is too severe. "[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 argues she was a good employee for four years and she has enrolled in a master's degree program since the termination of her employment. She testified that she had lost custody of her children and that she had been hospitalized following the termination of her employment. It seems clear Grievant was enduring an extraordinarily difficult time at the time of the incident and she should be commended for pursuing her advanced degree at this time. However, Grievant's behavior during the incident was extreme and cannot be condoned. Grievant clearly committed gross misconduct and Respondent was clearly justified in removing her from employment to protect the safety of its other employees and the continuity of its operations. The decision to terminate Grievant's employment was not disproportionate or an abuse of discretion. Further, Grievant's refusal to acknowledge the extremity of her conduct even after watching the video during the level three hearing shows there was little prospect for rehabilitation. Mitigation is not warranted.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

2. Permanent state employees who are in the classified service can only be dismissed for "good cause," 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).

3. "The term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." *Graley v. Parkways Econ. Dev. & Tourism Auth*., Docket No. 91-PEDTA-225 (Dec. 23, 1991) *(citing Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) and *Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983));

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

4. Respondent proved Grievant committed gross misconduct and it was justified in terminating her employment for the same.

5. "No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination." W.VA. CODE § 6C-2-3(h). Reprisal is defined 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." W.VA. CODE § 6C-2-2(o).

6. "In proving an allegation of retaliatory discharge, three phases of evidentiary investigation must be addressed. First, the employee claiming retaliation must establish a *prima facie* case." *Freeman v. Fayette Cty. Bd. of Educ.*, 215 W. Va. 272, 277, 599 S.E.2d 695, 700 (2004). In syllabus point six of *Freeman*, the West Virginia Supreme Court of Appeals specifically applied the same elements required to prove a *prima facie* case under the West Virginia Human Rights Act to a claim arising from a public employee grievance stating,

> [T]he burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.

Id., Syl. Pt. 6, 215 W. Va. at 275, 599 S.E.2d at 698 (citing Syl. Pt. 4, *Frank's Shoe Store v. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); Syl. Pt. 1, *Brammer v. Human Rights Comm'n*, 183 W. Va. 108, 394 S.E.2d 340 (1990); Syl. Pt. 10, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)).

7. "An employer may rebut the presumption of retaliatory action by offering 'credible evidence of legitimate nondiscriminatory reasons for its actions . . . .' *Mace v. Pizza Hut, Inc.*, 180 W.Va. 469, 377 S.E.2d 461, 464 (1988); *see also Shepherdstown Volunteer Fire Department v. State ex rel. West Virginia Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983). Should the employer succeed in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful discrimination. *Mace*, 377 S.E.2d 461 at 464." *W. Va. Dep't of Nat. Res. v. Myers*, 191 W. Va. 72, 76, 443 S.E.2d 229, 233 (1994); *Conner v. Barbour Cty. Bd. of Educ.*, 200 W. Va. 405, 409, 489 S.E.2d 787 (1997).

8. Grievant made a *prima facie* case of retaliation but Respondent rebutted the presumption by presenting legitimate, non-discriminatory reasons for terminating Grievant's employment.

9. "[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).

10. Grievant failed to prove mitigation of the penalty is warranted.

Accordingly, the grievance is **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA.

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

DATE: May 5, 2020

Billie Thacker Catlett
Chief Administrative Law Judge