

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**BOBBIE JO WEEKLY-CHAMBERS,**

**Grievant,**

**v.**

**Docket No. 2020-0685-DHHR**

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/  
WILLIAM R. SHARPE, JR. HOSPITAL,**

**Respondent.**

**DECISION**

Grievant, Bobbie Jo Weekly-Chambers, is employed by Respondent, Department of Health and Human Resources/William R. Sharpe, Jr. Hospital. On December 8, 2019, Grievant filed this grievance against Respondent stating, "Suspension without good cause." For relief, Grievant seeks, "To otherwise be made whole, reversal of suspension, and statutory interest."

Grievant filed directly to level three of the grievance process.<sup>1</sup> A level three hearing was held before the undersigned via Zoom videoconference on July 21, 2020. Grievant appeared and was represented by Gary DeLuke, Field Organizer, UE Local 170, West Virginia Public Workers Union. Respondent appeared by Michelle Markovich, Assistant CEO of Sharpe Hospital, and was represented by Brandolyn Felton-Ernest, Assistant Attorney General. This matter became mature for decision on September 14, 2020. The parties submitted proposed findings of fact and conclusions of law (PFFCL).

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<sup>1</sup>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.

### **Synopsis**

Grievant was employed by Respondent as a Housekeeper. Respondent suspended Grievant for three days for engaging in misconduct by disobeying Lead Housekeeper Stanley Barton and throwing a bag of trash at him. Respondent contends that the suspension was warranted because Mr. Barton was her superior and supervisor and Grievant had prior corrective action. Grievant contends she was never told that Barton was in charge that day, a misunderstanding that was further confounded when Barton deferred as usual to assignments from a more senior Lead. Grievant asserts she does not remember throwing anything and that Respondent did not present sufficient evidence thereof. Respondent proved that it had cause to suspend Grievant as part of progressive discipline for disobeying, throwing an empty paper bag, and yelling at her superior. 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 had been employed as a Housekeeper at William R. Sharpe, Jr., Hospital (Sharpe), a psychiatric facility operated by the West Virginia Department of Health and Human Resources (DHHR), hereinafter "Respondent", for about three years at the time of the incident at issue.

2. Grievant has been disciplined multiple times while at Sharpe, most recently for an incident on Saturday, November 16, 2019.

3. Housekeepers are expected to follow the directives of Lead Housekeepers (Leads) even when there are multiple Leads giving orders. (See testimony of Leads Barbara McCoy and Stanley Barton)

4. Housekeeping Supervisor Ernest Lewis oversees all Housekeepers and Leads.

5. When Housekeeping Supervisor Lewis is not present, the most senior Lead acts as the supervisor, making assignments and providing directives to Housekeepers and other Leads.

6. Lead Housekeeper Barbara McCoy was the most senior Lead.

7. Housekeeping Supervisor Lewis and Lead McCoy did not typically work on weekends and were not present on Saturday, November 16, 2019.

8. Stanley Barton and Robin Weekly<sup>2</sup> were the only Leads on duty that day.

9. Robin Weekly was senior to Stanley Barton and gave the assignments and directives on weekends when she and Barton were the only Leads and no Supervisor was present.

10. On November 16, 2019, Lead Weekly made the assignments and directives as she had typically done on weekends and Barton silently complied. (Barton's testimony)

11. Lead Weekly sent Grievant and Housekeeper Clarissa Garton to work an assignment together.

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<sup>2</sup>Sister of Grievant.

12. A short time later, Lead Barton tracked down Grievant and Housekeeper Garton. He ordered Garton to a different assignment. Garton immediately complied and moved on to her new assignment. (Housekeeper Garton's testimony)

13. Lead Barton then ordered Grievant to perform a different cleaning assignment before coming back to her assignment from Weekly. Grievant refused and walked away. Barton followed Grievant and again ordered her to complete the task. Grievant threw an empty brown paper bag at Barton and left. Grievant returned with Lead Weekly to sort out the conflicting orders and they screamed at Barton. Barton again failed to speak up about being appointed supervisor for the day by Lewis. Lead Weekly ordered Barton to attend to his assignment and sent Grievant to her original assignment. Barton and Grievant complied. (See Barton and Grievant's testimony)

14. Lead Barton tracked down Housekeeper Garton and told her to stop working on the assignment he had just given her and to go back to her original assignment from Lead Weekly. (Garton's testimony)

15. Unbeknownst to any of the crew, Supervisor Lewis had instructed Lead Barton to be in charge that day, thinking Lead Weekly would be absent. (Mr. Barton's testimony)

16. On December 2, 2019, Respondent sent Grievant notice of a three-day disciplinary suspension without pay for "misconduct, specifically, your unprofessional and offensive behavior." (Respondent's Exhibit 3)

17. The notice of disciplinary suspension cited as an example of Grievant's unprofessional behavior the following:

On November 16<sup>th</sup> at 07:40 am, Stanley Barton, Lead Housekeeper, came to you on unit N-2 before cleaning had

started and explained that you needed to clean the unit pod first due to the unit did (sic) not have staff to assist you currently. You refused to do as he asked and went into the nurse station to continue to clean. Stanley Barton again went into the nurse station and asked you to please go to the pod. You then threw a bag of trash at him and exited the unit. In refusing to follow a lead housekeepers' direction [you committed] ... insubordination.

This is in violation of DHHR Policy 2108: Employee conduct which provides: "Employees are expected to: . . . follow directives of their superiors[.]"

18. The notice cited prior discipline and corrective action, stating:

You are reminded that there have been repeated attempts to correct your conduct. Prior to this, corrective action has included:

- Robert Posey who was the active Supervisor who had to coach you on being professional when you speak stemming from an altercation that occurred on a unit with the lead nurse
- On August 30, 2019, a written reprimand was issued to you for your performance and misconduct, specifically, refusing to do the task of your job. ...

After considering your conduct, previous corrective actions, and your response, it is decided that a [3]-day suspension is warranted. This action complies with the Department of Health and Human Resources (DHHR) Policy Memorandum 2014, Progressive Correction and Disciplinary Action and Section 12.3 of the West Virginia Division of Personnel, Administrative Rule W. VA. CODE R. §143-1-1 *et seq.*

(Respondent's Exhibit 3)

19. On November 21, 2019, Grievant participated in a predetermination conference with Assistant CEO of Sharpe Michelle Markovich, Supervisor Lewis, and Union Representative Jamie Beaton. (Respondent's Exhibit 3 & Markovich's testimony)

20. The notice of disciplinary suspension noted that at this predetermination conference Grievant provided the following response to the allegations: "On Saturday, 11-6-2019, I was told by two Lead Housekeepers to do two separate jobs. I do not know who was in charge. I was not told the protocol of N1. Task was completed I was told to do. That's about it." (Respondent's Exhibit 3)

21. During the predetermination conference, Grievant explained that "things got out of control" and that she was upset and acted out. (Ms. Markovich's testimony)

22. During the predetermination meeting, Assistant CEO Markovich told Grievant there was a video of Grievant throwing a bag at Lead Barton. Markovich said she watched the video but did not make it available to Grievant. (Grievant's testimony)

23. Respondent did not produce the video at the hearing because it had been recorded over. (Ms. Markovich's testimony)

24. Previously, on August 30, 2019, Respondent had sent Grievant a notice of written reprimand, stating:

On 8-29-19, Your supervisor asked you to go with him to unit N-1 so the dividers in the rooms could be laundered. You stated, 'no I am not doing it, I was just over there, and my feet hurt.' Again, your supervisor asked, and you stated that you had mowed yesterday, and you were not walking there. ...On 8-29-19, prior to issuing this disciplinary action, this matter was discussed with you ... , you stated that you had refused to do the task that was asked of you.

(Respondent's Exhibit 1)

25. The August 30, 2019, notice recapped prior corrective action against Grievant:

...there have been repeated attempts to correct your conduct. Prior to this, corrective action has included, Robert Posey who was the acting Supervisor, coached you on being

professional when you speak. This coaching derived from an altercation that occurred on a unit with the lead nurse. Despite these management interventions, you have consistently failed to meet reasonable expectations.

(Respondent's Exhibit 1)

26. Grievant did not grieve the August 30, 2019, notice of written reprimand or any of the prior corrective action.

27. DHHR Policy Memorandum 2108 on Employee Conduct states: "Employees are expected to: . . . follow directives of their superiors; conduct themselves professionally in the presence of residents/patients/clients, fellow employees and the public . . ." (Respondent's Exhibit 5)

28. DHHR Policy Memorandum 2104 on Progressive Correction and Disciplinary Action states: "Determined by the severity of the violation, progressive discipline is the concept of increasingly severe penalties taken by supervisors and managers to correct or prevent an employee's initial or continuing unacceptable work behavior or performance." "Constructive and progressive corrective and disciplinary action should progress, if required, along a continuum, with incremental steps between ..." "If after coaching/counseling expectations are not being met the following may be considered based on the frequency/weight of the offence and considering the totality of the circumstances: verbal reprimand, written reprimand, suspension, demotion, dismissal. ... A suspension may be issued when minor infractions/deficiencies continue despite the imposition of a written reprimand or when a more serious singular incident occurs." (Respondent's Exhibit 4)

29. Grievant's prior discipline included coaching and a written reprimand. Suspension was the next punishment on the list and would have been doled out for any infraction subsequently committed by Grievant. (Ms. Markovich's testimony)

30. Grievant's behavior has improved immensely since she received the December 2, 2019, notice of disciplinary suspension. Grievant was promoted to Lead Housekeeper a couple of months after the incident and continues in that role. (Ms. Markovich's testimony)

### **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 Grievant engaged in misconduct, including being insubordinate and unprofessional, when on November 16, 2019, she disobeyed Lead Barton's directive, threw an empty paper bag at him, and yelled at him. Respondent contends that a three-day suspension was warranted, as it was the next level of progressive discipline for Grievant. Grievant takes issue with her prior discipline, arguing that she was never coached and that she was on her break during the August 29, 2019 incident that led to a notice of written reprimand. Grievant asserts that during



the current incident she received contradictory orders from the two Lead Housekeepers and did not know Lead Barton was in charge.

Grievant contends she does not recall throwing anything at Barton. She claims, however, that Respondent cited potentially exculpatory video evidence to confirm that Grievant threw a bag at Barton but did not preserve the video or allow Grievant to view it. Grievant also claims that Barton provided an incident statement via email on November 18, 2019, but that it did not mention Grievant throwing anything. Grievant contends that Respondent withheld Barton's exculpatory email until the hearing. Grievant asserts that any evidence and testimony on this issue should therefore weigh in her favor and that Markovich's testimony recounting the video evidence should be excluded.

In concluding that Grievant engaged in misconduct, Respondent relies on DHHR Policy Memorandum 2108 on Employee Conduct. This policy states: "Employees are expected to: . . . follow directives of their superiors; conduct themselves professionally in the presence of residents/patients/clients, fellow employees and the public . . ." It is undisputed that at the time of the incident Grievant was a Housekeeper and that Barton outranked her as a Lead Housekeeper and was therefore her superior. Grievant attempts to distinguish between orders given by a superior versus those given by a direct supervisor. The rules and caselaw do not distinguish between the two. The evidence demonstrated that Housekeepers were expected to follow directives from all Leads.

The duty to abide by directives from a superior is implicit in the term "authority" and "valid order." "[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). “Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions.” *Reynolds v. Kanawha-Charleston Health Dep’t*, Docket No. 90-H-128 (Aug. 8, 1990). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. *See Day v. Morgan Co. Health Dep’t*, Docket No. 07-CHD-121 (Dec. 14, 2007).” *Graham v. Wetzel County Bd. of Educ.*, Docket No. 2013-0014-WetED (Feb. 15, 2013), *aff’d*, *Graham v. Bd. of Educ. of Wetzel Cty.*, No. 13-0975, (W. Va. Sup. Ct., Apr. 28, 2014) (memorandum decision).

The evidence shows that Housekeepers are told they have a duty to obey orders from any Lead even if the Lead is not technically a Housekeeper’s supervisor because all Leads have authority to issue directives. Barton and Weekly were the two Leads on duty on November 16, 2019. As such, Barton’s assignment to Grievant was valid. Grievant refused to obey Barton when she walked back to the nurses’ station and again when she walked away from Barton after he tracked her down. In doing so, her

disobedience was willful. Respondent proved that Grievant's conduct in disobeying Barton was insubordination.

Grievant counters that she could not follow orders from two Lead Housekeepers at once so deferred to the one she thought was in charge, i.e. her supervisor. This is an affirmative defense.<sup>3</sup> "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). Respondent argues that Lead Housekeeper Barton was in charge that day because Housekeeping Supervisor Lewis told him he was in charge after Lead Housekeeper Weekly had been absent for a few days. Grievant counters that Weekly was always in charge in the absence of Mr. Lewis and Ms. McCoy because Weekly was senior to Barton. As such, in their absence, Weekly gave assignments and directives to Housekeepers as well as Barton. It is undisputed that on November 16, 2019, Supervisor Lewis told Lead Barton he was in charge but that no one conveyed this to any Housekeeper or Lead Weekly that day. It is also undisputed that Weekly gave assignments and directives as usual that weekend, including assigning Barton his duties. Barton explained that he never spoke up because Lead Weekly was doing fine giving directions and assignments. But he never explained why he did not at least tell Grievant he was in charge when she defied his order.

Nevertheless, the burden is on Grievant to prove her affirmative defense that she could not follow two orders and so deferred to the more senior Lead Housekeeper, Ms. Weekly. Grievant could have followed Barton's order, just as her coworker Garton had done, and taken issue with it later. Respondent would have been hard pressed to then

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<sup>3</sup>"In pleading, matter asserted by defendant which, assuming the complaint to be true, constitutes a defense to it." BLACK'S LAW DICTIONARY 60 (6th ed. 1990).

accuse Grievant of disobeying Weekly. Even though Grievant appeared to respond reasonably in bringing the Leads together so they could resolve their conflicting orders, she was nevertheless insubordinate. The analysis of her conduct would have been different if Weekly had intervened on her own while Barton was giving the order or Grievant was in the process of complying. Grievant acted inappropriately by leaving Barton to find Lead Weekly rather than first following Barton's orders and only thereafter tracking down Weekly to resolve apparent communication problems. Grievant failed to prove that receiving two orders justified her insubordination.

As for Barton's testimony that Grievant threw a paper bag at him and screamed at him when she returned with Weekly, Grievant does not counter with her own version. Rather, Grievant claims she does not remember throwing anything and that Mr. Barton's testimony is untrustworthy. She also argues that Assistant CEO Markovich's testimony regarding the video of the incident should be disallowed because the video was never provided to her and was erased. Grievant argues that Respondent spoliated crucial evidence in not preserving the video after relying on it to discipline Grievant.

The Grievance Board has held that an adverse inference is appropriate where, upon weighing four factors, the administrative law judge concludes that spoliation has occurred. The administrative law judge must consider and weigh the following factors: (1) the party's degree of control, ownership, possession or authority over the undisclosed evidence; (2) the amount of prejudice suffered by the grievant as a result of the missing or destroyed evidence and whether such prejudice was substantial; (3) the reasonableness of anticipating that the evidence would be needed for the grievance; and (4) if the party controlled, owned, possessed or had authority over the evidence, the

party's degree of fault in failing to produce the evidence. The party requesting the adverse inference based upon spoliation of evidence has the burden of proof on each element of the four-factor test. See Syl. Pt. 2, *Tracy v. Cottrell*, 206 W. Va. 363, 524 S.E.2d 879 (1999); *Hannah v. Heeter*, 213 W. Va. 704, 584 S.E.2d 560 (2003).

Respondent had complete control over the video. Respondent relied on the video in its decision to discipline Grievant and thought the video was crucial enough to its case to raise it at the predetermination meeting and have someone who viewed it testify to its contents at level three. The destruction of this video prejudices Grievant because it robs her of the opportunity to analyze the evidence used to implicate her in misconduct. Respondent should have anticipated that the video would be needed for the grievance because it had relied on the video at the predetermination meeting with Grievant. Respondent admitted its failure to preserve the video and attempted to justify its erasure as part of the recording cycle for its video equipment. Nevertheless, Grievant established by a preponderance of the evidence the above factors, leading the undersigned to conclude that Respondent spoliated evidence. As such, the undersigned will not utilize Ms. Markovich's testimony as to the content of the video.

Grievant also contests Mr. Barton's version of the incident. She contends that in his email of November 18, 2019, Barton does not mention Grievant threw anything in his retelling of the incident. Grievant contends that Respondent withheld this exculpatory email in spite of her discovery request for all evidence related to the incident and that this should weigh in her favor. Even though neither party submitted this email into evidence, Respondent does not deny that Barton failed to mention therein that Grievant threw anything.

Though Barton went on to testify that Grievant threw an empty paper bag rather than a bag of trash, Grievant implies that this testimony is not credible because Barton failed to mention in his initial email that Grievant had thrown anything at him. Further, Markovich testified that Grievant admitted she had acted inappropriately. As for evidence of Grievant screaming at Barton, Respondent relies solely on Barton's testimony. Grievant has challenged the credibility of Barton and Markovich. Therefore, credibility determinations must be made. 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).

Not every factor is relevant to every credibility determination. In this situation, the relevant factors include the opportunity to perceive, attitude toward the action, bias,

plausibility, and consistency of prior statements. While Barton would seem biased against Grievant, given the way she allegedly treated him, Barton did not express any anger towards Grievant. Rather, he seemed more interested in accurately remembering the events than in seeing Grievant punished. Barton's demeanor was timid, which was consistent with his unassertiveness the day of the incident. He nervously began many of his answers during the hearing with "basically." This did not detract from the undersigned's perception of his credibility but simply enhanced it. While Barton's emailed statement of events failed to mention that Grievant threw anything at him, the undersigned did not see this as problematic or inconsistent with his testimony. Rather, the undersigned viewed it simply as an indication that the important aspect of the incident for Barton was that Grievant failed to follow orders. The undersigned's impression is that Barton was not accustomed to giving orders to Grievant and Grievant was not used to receiving orders from Barton. Further, it appears that Barton was under pressure to keep Grievant in line because of Grievant's history of acting out.

While Grievant was not disrespectful or inappropriate during the hearing, the undersigned got a sense that she was much more temperamental than Barton. Her disciplinary history bears this out. While Grievant was consistent in her assertion that she does not remember throwing a bag at Barton, this forgetfulness only seems plausible if Grievant is so accustomed to acting out that she has difficulty keeping track. It appears more plausible that Grievant strategically wields her forgetfulness as a hedge against the possibility of contradictory video evidence. It is probable that Grievant would have remembered whether or not she threw anything. Nevertheless, Grievant

would have been ill advised to deny throwing anything unless she could be certain there was no video evidence to the contrary. That Grievant could not be certain is telling.

As for Markovich, she testified that at the predetermination meeting she told Grievant there was video confirmation and that Grievant confirmed she had been upset, acted out, and that things had gotten out of control. In spite of Grievant's disciplinary history and the current grievance, Markovich had a surprisingly positive attitude towards Grievant, emphasizing the fact that she had greatly improved since her last disciplinary incident and pointing out that Grievant had even become a Lead Housekeeper since then. While the spoliation of the video could lead to sinister connotations towards Markovich, there was no indication that it was the result of anything other than poor organization or ineptitude. Further, if Markovich was intent on manufacturing Grievant's affirmation of blame, she could have more effectively done so by representing that Grievant said she threw a bag at Barton. However, Markovich never got that specific. In the end, Markovich's testimony supports Barton's testimony.

Ultimately, the undersigned finds the testimony of Barton and Markovich more credible than that provided by Grievant on this issue. Thus, it is more likely than not that Grievant threw an empty paper bag and screamed at Barton. Respondent proved by a preponderance of evidence that Grievant showed a willful disregard of Sharpe's interests through her actions, and a wanton disregard for its standards of behavior.

Respondent justified its suspension by showing that its progressive discipline policy, in conjunction with Grievant's prior discipline, placed Grievant at the suspension stage of punishment. Respondent showed that its progressive discipline starts with coaching (i.e. a verbal reprimand) and a notice of written reprimand before proceeding



to suspension and that Grievant had already received coaching and a notice of written reprimand. Respondent asserts that any infraction by Grievant thereafter would have resulted in suspension. Respondent presented evidence of Grievant's prior discipline through Respondent's August 30, 2019, notice of written reprimand. This notice mentioned that Grievant had been coached prior to the incident leading to the written reprimand.

Grievant now challenges the basis for her prior discipline and asserts that she was never coached. However, she never grieved any of her prior discipline even though her notice of written reprimand specifically mentions that she had been coached. She therefore knew that Respondent had issued her the notice of written reprimand as the next step of discipline after coaching. "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)." *Aginsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997), *aff'd*, Mon. Co. Cir Ct. Docket No. 97-C-AP-96 (Dec. 7, 1999), appeal refused, W.Va. Sup Ct. App. Docket No. 001096 (July 6, 2000). The undersigned will therefore not consider any arguments on the merits of prior discipline and coaching. Respondent proved by a preponderance of evidence that it had cause to suspend Grievant.

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. “‘Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions.’ *Reynolds v. Kanawha-Charleston Health Dep’t*, Docket No. 90-H-128 (Aug. 8, 1990). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee

complies first and expresses his disagreement later. See *Day v. Morgan Co. Health Dep't*, Docket No. 07-CHD-121 (Dec. 14, 2007).” *Graham v. Wetzel County Bd. of Educ.*, Docket No. 2013-0014-WetED (Feb. 15, 2013), *aff'd*, *Graham v. Bd. of Educ. of Wetzel Cty.*, No. 13-0975, (W. Va. Sup. Ct., Apr. 28, 2014) (memorandum decision).

4. “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*, *Mon. Co. Cir Ct.* Docket No. 97-C-AP-96 (Dec. 7, 1999), appeal refused, W.Va. Sup Ct. App. Docket No. 001096 (July 6, 2000).

5. The Division of Personnel’s Administrative Rule states under “disciplinary suspension” that “[a]n appointing authority may suspend any employee without pay for a specified period of time for cause.” W. VA. CODE ST. R. § 143-1-12.3.a (2016).

6. “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).

7. Respondent proved by a preponderance of evidence that Grievant engaged in misconduct.

8. Grievant failed to prove by a preponderance of evidence that conflicting orders from different Lead Housekeepers justified her failure to obey.

9. Respondent proved by a preponderance of evidence that it had cause to suspend Grievant.

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: October 9, 2020**

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