

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**MICHAEL NIXON,
Grievant,**

v.

Docket No. 2020-1489-WVU

**WEST VIRGINIA UNIVERSITY,
Respondent.**

DECISION

Grievant, Michael Nixon, was employed as a Campus Service Worker Lead when Respondent, West Virginia University (WVU), terminated his employment. Grievant filed directly to level three of the grievance process on June 1, 2020.¹ His grievance states, “Grievant has been wrongfully terminated” and “Grievant seeks immediate reinstatement along with back pay and benefits.” A level three hearing occurred with the undersigned via an online platform on March 2, 2021, and April 14, 2021. Grievant appeared and was represented by Andy Katz, Esq. Respondent appeared by Eric Bowles, Senior Employee Relations Specialist, and was represented by Samuel Spatafore, Assistant Attorney General. This matter matured for a decision on May 20, 2021. Each party submitted written Proposed Findings of Fact and Conclusions of Law (PFFCL).

Synopsis

While employed by WVU, Grievant supervised a cleaning crew. Crew members videoed themselves engaged in workplace shenanigans, some involving Grievant. One video showed a crew member sitting on Grievant’s lap. The crew posted the videos to social media. After finding the videos, WVU determined that some were detrimental to

¹West 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.

its image and dismissed Grievant. WVU proved that Grievant committed gross misconduct by engaging in some of the depicted behavior, allowing it to be filmed, and failing to take remedial action even though he knew the crew members had posted other workplace videos to social media. 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 was employed by West Virginia University (WVU) as a Campus Service Worker Lead.

2. Grievant's duties entailed supervising cleaning crew employees in various buildings on campus.

3. One cleaning crew under Grievant's supervision included campus service workers Rebecca Cumpston and Megan Morgan.²

4. On May 12, 2020, a student alerted WVU to videos posted on TikTok³ showing Grievant and subordinates Cumpston and Morgan engaging in various workplace shenanigans in their WVU uniforms. The student was offended by one of the videos he interpreted as making fun of Asians, as well as others that appeared sexually suggestive.

5. WVU investigated and discovered on Morgan's TikTok account 140 videos of Cumpston and Morgan at work in their WVU uniforms.

²Cumpston and Morgan were the subject of a separate grievance, *Cumpston and Morgan v. WVU*, Docket No. 2020-1563-CONS, which upheld their dismissal.

³TikTok is a social media platform that allows users to film videos of up to a minute long and post them online for a global audience to view and comment on.

6. Cumpston and Morgan had created and posted the videos beginning in August 2019 and ending in May 2020.

7. WVU determined that 33 of the videos showed Grievant and/or subordinates engaging in egregious workplace conduct with Grievant's knowledge while in WVU uniform.

8. WVU determined that the depicted behavior violated WVU policy due to the sexual, vulgar, and racially insensitive overtones.

9. The 33 videos depict the following conduct:

Video #1: Cumpston smacks Morgan's chest. Grievant is not in the video.

Video #2: Cumpston dances and thrusts on a "stripper" pole. Grievant is not in the video.

Video #3: Cumpston encourages Morgan to say "addicted" in call and response fashion. Cumpston calls "a drug", "an alcoholic", and "what slapped you in the face last night." Morgan's response morphs into "a dick did." Grievant laughs in the background.

Video #3.2: Grievant repeats a combination of words until they morph into "my coochie is hairy."

Video #4: Cumpston laughs into the intercom system. Grievant is not in the video.

Video #5: Cumpston stands on a WVU computer desk and almost falls. Grievant is not in the video.

Video #6: Cumpston dances behind Grievant in a sexually suggestive manner.

Video #7: Grievant holds an unlit cigarette indoors.

Video #8: Morgan and Cumpston fart and curse. Grievant is not in the video.

Video #9: Morgan throws a ball into the air repeatedly while saying something equivalent to, "This is what you do when you're waiting for your shift to end." Grievant is not in the video.

Video #10: Grievant slow dances with Cumpston.

Video #11: Cumpston humps Grievant. Grievant asks, "What are you doing, humping me?"

Video #12: Grievant beats a drum while Cumpston dances.

Video #13.1: Cumpston defecates and talks about it with Morgan. Grievant is not in the video.

Video #13.2: Again, Cumpston defecates and talks about it with Morgan. Grievant is not in the video.

Video #14: Cumpston dances in a sexually suggestive manner. Grievant is not in the video.

Video #15.1: Grievant escorts Cumpston up a set of stairs and monitors her efforts to clean them due to her apparent phobia.

Video #15.2: Cumpston mops stairs in a seated position while Morgan encourages her to overcome her apparent phobia. Grievant is not in the video.

Video #16: Cumpston operates a stand-on cleaning machine while dancing. Grievant is not in the video.

Video #17: Cumpston recites her password as she attempts to log into her WVU employee account. Grievant is not in the video.

Video #18: Morgan mentions weed and the peculiarity of the hypothetical possibility of seeing Grievant high. Cumpston says that Grievant "would be Chinese for sure."

Grievant slants his eyes with his hands and talks gibberish with an accent. Grievant says “these people” who know English start talking in their language when they are “around us.” Cumpston then talks gibberish with an accent. Cumpston begins a story about going to a Chinese nail salon where workers spoke a different language which led her to wonder what they were saying. The video ends before Cumpston finishes her story. No WVU uniform is visible in the video.

Video #19: Cumpston humps Grievant and talks in a sexual manner.

Video #20: Cumpston dances in a sexual manner. Grievant is not in the video.

Video #21: Cumpston slow dances with Grievant. No WVU uniform is visible.

Video #22.1: Grievant plays a villain pursuing his victims as Morgan forces the door closed on Grievant's arm.

Video #22.2: Morgan attempts to hold the door shut as Grievant forces his arm between the door and the frame.

Video #23: Morgan surprises a sleeping Cumpston, who curses. Grievant is not in the video.

Video #24: Cumpston plays with Grievant's head while sitting on his lap.

Video #25: Cumpston defecates in a stall and discusses it with Morgan. Grievant is not in the video.

Video #27: As they smoke cigarettes outdoors on campus, Cumpston talks about mold on her vagina and Grievant asks about mold in her ass. Cumpston mutters what sounds like, “People are coming so I gotta play it like a Jew.”

Video #28: Cumpston humps the front of a cleaning machine. Grievant is not in the video.

Video #29: Cumpston swings at a punching bag. Grievant is not in the video.

Video #30: Grievant repeats "Alpha Kenny One" over and over until it morphs into "I'll fuck anyone."

(See videos, collectively marked as Respondent's Exhibit 9.)

10. Grievant appeared in 16 of the 33 videos.

11. Even though Grievant did not appear in all 33 videos, he was aware that subordinates Cumpston and Morgan had recorded and uploaded between 20 and 30 videos to TikTok. (Grievant's testimony)

12. On May 14, 2020, Dalibor Psotka, Operations Facilities Director and Grievant's direct supervisor, held a due process meeting with Grievant.

13. Grievant admitted to Director Psotka that the videos he was in reflected his conduct and that he knew Cumpston and Morgan had danced on equipment and posted some videos to TikTok. (Mr. Psotka's testimony)

14. Grievant knew he was being filmed in the videos depicting him. (Grievant's testimony)

15. WVU did not indicate the content of the 20 to 30 videos Grievant admittedly knew subordinates Cumpston and Morgan had uploaded to TikTok.

16. Grievant never admonished subordinates Cumpston and Morgan for either their behavior or for filming it, despite being aware of their egregious conduct in the videos depicting him. Grievant did not reprimand his subordinates for posting any of the 20 to 30 videos he knew they had posted to TikTok, nor did he take remedial measures to counter their behavior or any potential damage caused thereby. (Grievant's testimony)

17. At the time he was filmed smoking on campus, Grievant knew that WVU was a smoke free campus. (Grievant's testimony)

18. WVU determined that the 33 videos of egregious conduct gave the impression that WVU condoned the conduct.

19. WVU could not ascertain how many people had seen the videos.

20. WVU concluded that Grievant had violated numerous WVU policies, including its Code of Conduct, Discipline Policy, and University Property Policy. (Respondent's Exhibits 1, 2, & 3)

21. WVU's Code of Conduct states, in pertinent part:

The success of our University is built upon the concept of our employees and officials conducting themselves in a manner that demonstrates WVU's values: Service, Curiosity, Respect, Accountability and Appreciation. . .

Service ... We will: Be an ambassador of WVU and avoid conduct that reflects adversely on the image of the University....

Respect ...⁴

Accountability ... We will: ... Conduct ourselves in a manner that promotes a safe environment. ...

(Respondent's Exhibit 1)

22. WVU HR 9 "Discipline Policy" states, in pertinent part:

When an employee does not maintain the standards of performance or conduct as outlined by the supervisor, or, does not comply with applicable policies, procedures or laws, disciplinary action, including but not limited to written notice,

⁴In its PFFCL, WVU cites to an apparent line under "Respect" which is not accounted for in Respondent's Exhibit 1 and is therefore not included herein as an FOF. This same citation, found in WVU's Intent to Terminate Employment letter, states, "Respect: We will respect the property of the University and others, whether material or intangible." This is similar to WVU's University Property Policy in FOF 23. (Respondent's Exhibit 4)

demotion, suspension, or dismissal may be taken. Gross misconduct may result in any level of discipline up to and including immediate dismissal. Behaviors considered gross misconduct and subject to immediate dismissal include, but are not limited to: "Jeopardizing the health, safety or security of persons or University property" and "Neglect of duties."

(Respondent's Exhibit 2)

23. WVU HR 56, "University Property Policy" states, in pertinent part:

WVU programs, personnel, time, titles and property; including equipment, systems, vehicles, information, supplies, and office space; are only to be used in conducting authorized business of the University and the WV Board of Trustees. Use of University property for personal gain, pleasure, or benefit is prohibited. ... Unauthorized use, disclosure, alteration, or destruction of University resources is subject to disciplinary action, up to and including termination and/ or legal prosecution.

(Respondent's Exhibit 3)

24. On May 18, 2020, WVU issued an Intent to Terminate Employment letter to Grievant, stating in part:

The Division of Talent & Culture was made aware of over 140 videos posted on the social media platform TikTok from August 26, 2019, to May 13, 2020. These videos were reviewed by Talent & Culture staff and depict you at work wearing your WVU Facilities Management uniform and engaged in repeated misconduct and policy violations.

Further, as a lead worker, you have a responsibility to address and report misconduct and policy violations for which you are aware. Your allowance of this behavior to occur on multiple occasions, along with your individual contributions, resulted in neglect of duties that willfully limited the production of others, encouraged or influenced poor behavior by failing to take action to stop it and jeopardized the safety of others by permitting unsafe work practices.

These acts of offensive misconduct and inappropriate behavior include:

- Multiple instances of allowing your employee to dance in a sexually suggestive manner and making sexually suggestive motions on University equipment such as mop handles, floor machines, and pipes
- Contributing to discussions about smoking marijuana
- Making derogatory comments/gestures about another race/ethnicity
- Allowing the misuse of University property and resources such as using A/V equipment, musical instruments, and floor machines
- Allowing unsafe work practices such as dancing on University property and in stairwells and jumping out to scare a co-worker operating a floor machine

This type of indecent behavior and inappropriate conduct has no place in the workplace. Such misconduct has the potential to create a hostile, harassing and unsafe work environment as well as an unhealthy work culture for employees; and violates WVU's standards of conduct and applicable policies.

Further, the University is committed to the expectation that its employees conduct themselves in a manner that demonstrates WVU's values. Your actions and comments are inconsistent with the University's values, are in violation of WVU's Code of Conduct and Discipline policy and represent repeated behavior that, in totality, rises to the level of gross misconduct, which is subject to immediate dismissal.

(Respondent's Exhibit 4)

25. The Intent to Terminate Employment letter gave Grievant the call-in number for a pretermination meeting and stated, "If you would like to discuss this intended termination of employment and to present any information that you feel may influence this decision, a meeting has been scheduled for May 21, 2020 at 11:00 am via conference call."

26. WVU provided the Intent to Terminate Employment letter to Grievant on May 18, 2020.

27. On May 21, 2020, WVU conducted a pretermination meeting and gave Grievant an opportunity to respond to the allegations. (Mr. Bowles' testimony)

28. On May 22, 2020, WVU issued Grievant a dismissal letter, effective that day. (Respondent's Exhibit 5)

29. During his 10 plus years of employment with WVU prior to his dismissal, Grievant had never received any poor evaluations or discipline.

30. Over the period the videos were made, Grievant and his crew worked from 10:00 p.m. to 6:00 a.m., Sunday through Thursday, and received two 10-minute breaks and a 30-minute lunch break daily. The doors were locked at 10:00 p.m. and reopened at 5:50 a.m.

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.*

WVU dismissed Grievant for gross misconduct after determining that he allowed subordinates to engage in, film, and post videos of egregious workplace conduct to social media and that he participated in some of the depicted conduct. WVU determined that 33 of the 140 videos posted to social media showed Grievant and/or subordinates engaging in sexually suggestive behavior, misusing WVU property, discussing marijuana

use, making derogatory remarks about minorities, smoking on WVU's smoke free campus, and engaging in unsafe behavior in violation of various WVU policies, including WVU's Code of Conduct.

Grievant contends he participated in some of the videos but was just having fun with subordinates in private and during breaks. He claims that neither he nor his subordinates found the conduct offensive. He asserts WVU ignored its obligation to provide him an opportunity to improve. He claims WVU failed to show that he knew egregious videos were posted online, since the 20 to 30 videos he had seen posted could have been with the 107 videos WVU deemed benign. Grievant contends WVU never trained him on policies prohibiting employees from filming during work breaks, from appearing as WVU employees on social media, and from engaging in the depicted behavior at work.

WVU's primary interest in this matter is to ensure the comfort and safety of its student body and protect its image. WVU's Code of Conduct facilitates this by prohibiting employees from engaging in "conduct that reflects adversely on the image of the University" and mandates that they conduct themselves in a manner "that promotes a safe environment." Grievant does not dispute that he was trained on WVU's Code of Conduct. The evidence shows that Grievant appeared in approximately 16 of the 33 videos deemed egregious. Grievant concedes he engaged in the depicted behavior and knew he was being filmed. While all 16 videos depict egregious conduct, the ones of particular significance show sexual behavior and racially insensitive remarks. The sexual behavior includes a subordinate grinding against Grievant and sitting on his lap. Grievant violated WVU's Code of Conduct and University Property Policy through his participation

in the egregious conduct depicted in the 16 videos and in allowing subordinates to engage in and film the behavior.

The Code of Conduct holds employees to an objective standard of behavior regardless of the views and temperament of their audience. It therefore does not matter whether the behavior offended anyone or was intended to be seen. Neither Grievant nor his audience had the authority to waive WVU policy. Nevertheless, WVU learned of Grievant's conduct and ultimately disciplined Grievant for his egregious behavior because he played to a larger audience. Grievant implies that his behavior was just meant for his two subordinates. Yet, he admitted to knowing that these subordinates posted 20 to 30 workplace videos to TikTok. WVU did not indicate the content of the posted videos seen by Grievant. Still, Grievant knew these subordinates were filming the 16 videos in which he appeared. Thus, Grievant should have recognized that it was possible, if not likely, that these subordinates would post at least some of the 16 videos to social media. As a supervisor, Grievant should have set an example for subordinates and taken remedial action for any policy violation by an employee.

Grievant asserts that his behavior was not gross misconduct because it was not willful.⁵ Grievant argues that he was unaware that it was against WVU policy to mess around or film during work breaks and that he was never trained on such prohibitions. "The term gross misconduct as used in the context of an employer-employee relationship

⁵In support thereof, Grievant provides the following citation: "Willful neglect of duty may be defined as an employee's intentional and inexcusable failure to perform a work-related responsibility." *Adkins v. Cabell County Bd. of Educ.*, Docket No. 89-06-656 (May 23, 1990). It must be noted that school board law is uniquely applicable to school board employees and therefore has no bearing on the current action involving higher education. Actions involving State universities/colleges higher and State agencies are reviewed under standards that are separate and distinct from those for school boards.

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 does not dispute that he knew WVU’s Code of Conduct required employees to be WVU ambassadors and to refrain from conduct reflecting adversely on the University. Because the negative effects to WVU’s image should have been apparent to Grievant, his violations of policy were willful. Nevertheless, willfulness is not a necessary element of gross misconduct. *Graley* supports the proposition that an employee commits gross misconduct simply by engaging in behavior in wanton disregard of the standards the employer has a right to expect. “Wanton” means either malicious or reckless. BLACK’S LAW DICTIONARY 1582 (6th ed. 1990). While malicious conduct is willful, reckless conduct can simply be “careless, inattentive, or negligent.” BLACK’S LAW DICTIONARY 958, 1270 (6th ed. 1990).

Grievant knew he and his subordinates were being filmed in at least 16 videos. The incidents therein include subordinate Cumpston sitting on Grievant’s lap, dancing with Grievant, humping Grievant, talking about her moldy vagina with Grievant, smoking with Grievant on a smoke free campus, as well as Grievant mocking Asians, repeating sexually explicit language, and asking Cumpston about her moldy ass. Grievant should have realized that this behavior could tarnish WVU’s image through the possible

dissemination of the videos. Thus, Grievant's actions were at least in reckless disregard of WVU's Code of Conduct.

Grievant claims he should have been given a chance to improve. As authority for this proposition, Grievant cites caselaw requiring school boards to first determine whether an employee's conduct is correctable.⁶ School law is generally separate and distinct from laws governing higher education and State agencies. It should also be noted that WVU's Discipline Policy does not mandate progressive discipline. Thus, WVU was not obligated to determine whether Grievant's behavior was correctible or provide him an improvement period.

Further, Grievant failed in his supervisor duties. Supervisors "may be held to a higher standard of conduct, because [they are] properly expected to set an example for employees under their supervision, and to enforce the employer's proper rules and regulations, as well as implement the directives of [their] supervisors." *Wiley v. Div. of Natural Res.*, Docket No. 96-DNR-515 (Mar. 26, 1988); *Linger v. Dep't of Health & Human Res.*, Docket No. 2010-1490-CONS (Dec. 5, 2012). Grievant not only set a poor example for his subordinates but failed to take remedial action for their egregious conduct. Thus, WVU proved by a preponderance of evidence that Grievant engaged in gross misconduct and that his dismissal was justified.

Grievant contends that WVU denied him due process. Since a denial of due process is non-disciplinary, Grievant has the burden of proving this allegation. "The constitutional guarantee of procedural due process requires 'some kind of hearing' prior

⁶ *Maxey v. McDowell County Bd. of Educ.*, 212 W. Va. 668, 575 S.E.2d 278 (2002).

to the discharge of an employee who has a constitutionally protected property interest in his employment.’ *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 [84 L. Ed. 2d 494, 105 S. Ct. 1487] (1985).” Syl. Pt. 3, *Fraley v. Civil Service Commission*, 177 W.Va. 729, 356 S.E.2d 483 (1987). “The pretermination hearing does not need to be elaborate or constitute a full evidentiary hearing. The essential due process requirements, notice and an opportunity to respond, are met if the tenured civil service employee is given ‘oral or written notice of the charges against him, an explanation of the employer’s evidence, and an opportunity to present his side of the story’ prior to termination.” *Id.* at 732, 356 S.E.2d at 486.

Grievant asserts he did not receive notice of the allegations against him until after the pretermination meeting, resulting in his being unable to prepare for the meeting. WVU counters that Grievant received notice of the allegations against him on May 18, 2020, prior to his pretermination meeting, through his Intent to Terminate Employment letter. Thus, a credibility assessment is necessary.⁷ Not every credibility factor is necessarily relevant to every credibility determination. Here, the relevant factor is plausibility.

⁷In 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 SYSTEM 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).

The Intent to Terminate Employment letter gave Grievant the call-in number for his pretermination meeting on May 21, 2020. Grievant does not claim he received the call-in information elsewhere. Grievant appeared at the pretermination meeting. Thus, it is apparent that Grievant learned of the pretermination meeting through this letter. The letter informed Grievant that videos on TikTok document policy violations and misconduct, including “multiple instances of allowing your employee to dance in a sexually suggestive manner and making sexually suggestive motions on University equipment such as mop handles, floor machines, and pipes, contributing to discussions about smoking marijuana, making derogatory comments/gestures about another race/ethnicity, allowing the misuse of University property and resources such as using A/V equipment, musical instruments, and floor machines, allowing unsafe work practices such as dancing on University property and in stairwells and jumping out to scare a co-worker operating a floor machine.” The letter described the purpose of the pretermination meeting as, “If you would like to discuss this intended termination of employment and to present any information that you feel may influence this decision, a meeting has been scheduled for May 21, 2020 at 11:00 am via conference call.” Thus, Grievant was not credible in testifying that WVU failed to provide him notice of the allegations prior to the meeting. Grievant did not prove by a preponderance of evidence that he was denied due process.

Grievant contends that his stellar record and lack of training on policy violations warrants mitigation of his dismissal. “[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 had a stellar disciplinary record and was not specifically informed of any prohibition against filming or broadcasting workplace shenanigans. Nevertheless, Grievant was familiar with WVU's Code of Conduct and its

prohibition against engaging in conduct which reflects adversely on WVU's image. WVU acted reasonably in expecting Grievant to monitor his subordinates and set a good example for them. Grievant should have known that videos of this conduct could circulate and thereby cast WVU in a negative light in violation of the Code of Conduct. Grievant failed to prove that mitigation is 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. "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).

3. Supervisors “may be held to a higher standard of conduct, because [they are] properly expected to set an example for employees under their supervision, and to enforce the employer’s proper rules and regulations, as well as implement the directives of [their] supervisors.” *Wiley v. Div. of Natural Res.*, Docket No. 96-DNR-515 (Mar. 26, 1988); *Linger v. Dep’t of Health & Human Res.*, Docket No. 2010-1490-CONS (Dec. 5, 2012).

4. WVU proved by a preponderance of evidence that Grievant engaged in gross misconduct justifying his dismissal.

5. “The constitutional guarantee of procedural due process requires “‘some kind of hearing’ prior to the discharge of an employee who has a constitutionally protected property interest in his employment.” *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 [84 L. Ed. 2d 494, 105 S. Ct. 1487] (1985).” Syl. Pt. 3, *Fraley v. Civil Service Commission*, 177 W.Va. 729, 356 S.E.2d 483 (1987). “The pretermination hearing does not need to be elaborate or constitute a full evidentiary hearing. The essential due process requirements, notice and an opportunity to respond, are met if the tenured civil service employee is given ‘oral or written notice of the charges against him, an explanation of the employer’s evidence, and an opportunity to present his side of the story’ prior to termination.” *Id.* at 732, 356 S.E.2d at 486.

6. “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).

7. Grievant did not prove by a preponderance of evidence that he was denied due process or that mitigation of his dismissal 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: June 17, 2021


Joshua S. Fraenkel
Administrative Law Judge