

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

REBECCA CUMPSTON AND MEGAN MORGAN,

Grievants,

v.

Docket No. 2020-1563-CONS

WEST VIRGINIA UNIVERSITY,

Respondent.

DECISION

Grievants, Rebecca Cumpston and Megan Morgan, were dismissed from their employment as Campus Service Workers after Respondent, West Virginia University (WVU), viewed workplace videos of them on social media.

On June 4, 2020, Grievant Cumpston filed a grievance (Docket No. 2020-1497-WVU) stating:

I was terminated on May 22, 2020. I do not feel we got a fair chance to fight for our jobs. I was too scared to say what I felt. Or even ask questions I was led to believe I had a shot at getting my job back. I believe my privacy was violated during the first conference call. I believe they did not read the disciplinary policy through. They did not take our performance reviews into consideration before coming to a decision. I also feel I was retaliated against for being involved in an incident that took place in July of 2019.¹

As relief, Grievant Cumpston wrote, "I am requesting my job back. And if this is not feasible I would like to request that my employer not fight me on unemployment."

On June 4, 2020, Grievant Morgan filed a grievance (Docket No. 2020-1498-WVU) stating:

¹As Grievant Cumpston did not pursue her claims regarding retaliation, privacy, and due process violations, these claims are deemed abandoned.

I was fired on May 22, 2020. I think I was targeted from a former employee who kept calling to try to get me fired. I believe the gentlemen Dalibor Psotka did not properly handle the first call that was made to me on May 14, 2020 in a professional manner.

As relief, Grievant Morgan requests, "I would like to get my job back, But if not possible I would request you approve me for unemployment."

Grievants filed directly to level three of the grievance process.² The two grievances were consolidated into the current action on September 17, 2020. A level three hearing occurred before the undersigned via an online platform on March 2, 2021. Grievants appeared and were self-represented. Respondent appeared by Eric Bowles, Senior Employee Relations Specialist, and was represented by Samuel Spatafore, Assistant Attorney General. This matter became mature for decision on April 7, 2021.³ Only Respondent submitted written Proposed Findings of Fact and Conclusions of Law (PFFCL).

Synopsis

While employed by WVU, Grievants filmed themselves goofing around at work and posted the videos to social media. WVU dismissed Grievants after determining this negatively effected its image. WVU proved that Grievants violated policy and committed gross misconduct in disseminating the videos, thus warranting dismissal. 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:

²West 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.

³The original mature date of April 5, 2021 was extended upon Grievants' request.

Findings of Fact

1. Grievants were employed by West Virginia University (WVU) as Campus Service Workers on the nightshift cleaning crew for Woodburn Hall at the time of their dismissal.

2. On or around May 12, 2020, a student alerted WVU to videos on TikTok⁴ of Grievants and their supervisor, Michael Nixon,⁵ engaging in various on-the-job shenanigans in their WVU uniforms. The student had seen the videos and was offended by one of the videos he interpreted as making fun of Asians, as well as others that appeared sexually suggestive. (Mr. Bowles' testimony)

3. WVU investigated and discovered 140 videos depicting Grievants at work in their WVU uniforms on Grievant Morgan's TikTok account. (Mr. Bowles' testimony)

4. WVU determined that 33 of the videos depicted conduct that violated WVU policies, including behavior that was sexual, vulgar, and racially insensitive.

5. The 33 videos depict the following conduct:

Video #1: Grievant Cumpston films her hand smacking Grievant Morgan's chest.

Video #2: Grievant Cumpston dances and thrusts on a "stripper" pole to a showtime tune.

Video #3.1: Grievant Cumpston films as she encourages Grievant Morgan to say "addicted" in response to everything Cumpston says. Cumpston says "a drug", "an

⁴TikTok is a social media platform that allows users to film videos up to a minute long and post them online for a global audience to view and comment on.

⁵Grievants' supervisor, Michael Nixon, is the subject of a separate grievance.

alcoholic”, and “what slapped you in the face last night.” Grievant Morgan responds “addicted” to each and laughs when she realizes she said, “a dick did.”

Video #3.2: Grievant Cumpston tells Supervisor Nixon to continuously repeat a combination of words until they morph into “my coochie is hairy.”

Video #4: Grievant Cumpston laughs into the intercom system.

Video #5: Grievant Cumpston stands on a WVU computer desk and almost falls.

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

Video #7: Supervisor Nixon holds a cigarette while standing indoors behind a swaying Grievant Cumpston who has been filtered to look like a devil.

Video #8: Grievant Morgan sneaks up on Grievant Cumpston to catch her reaction to a farting noise. Grievant Cumpston laughs and says, “kick your ass.”

Video #9: Grievant 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.”

Video #10: Grievant Cumpston dances in an elevator to a Christmas tune with Supervisor Nixon while Grievant Morgan films and laughs.

Video #11: Grievant Cumpston slow dances to a Christmas tune with Supervisor Nixon, who asks, “What are you doing, humping me?”

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

Video #13.1. Grievant Cumpston defecates and talks about her bathroom accident while Grievant Morgan films. Dancing and twirling turd emojis grace the bottom of the screen. Grievant Cumpston yells in surprise, “Are you videoing that?”

Video #13.2: Grievant Cumpston cleans up her bathroom accident and discusses the details while Grievant Morgan films. Turd emojis mark the four corners of the screen.

Video #14: Grievant Cumpston gyrates against a filming Grievant Morgan.

Video #15.1: Grievant Cumpston exhibits a fear of stairs/heights while Supervisor Nixon escorts her up the stairs and monitors her efforts to clean them.

Video #15.2: Grievant Cumpston mops stairs in a seated position while a laughing Grievant Morgan films and encourages her to overcome her apparent phobia.

Video #16: Grievant Cumpston operates a stand-on cleaning machine while dancing.

Video #17: Grievant Cumpston recites her password as she attempts to log into her WVU employee account. Grievant Morgan records apparently without Cumpston's knowledge.

Video #18: Someone offscreen mentions weed and the peculiarity of the hypothetical possibility of seeing Supervisor Nixon high. Grievant Cumpston says Nixon "would be Chinese for sure." Supervisor Nixon slants his eyes with his hands and talks gibberish with an accent. Nixon says that "these people" who know English start talking in their language when they are "around us." Grievant 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 talking about. The video ends before Cumpston finishes her story. No WVU uniform is visible in the video.

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

Video #20: Grievant Cumpston dances in a sexual manner.

Video #21: Grievant Cumpston slow dances with Supervisor Nixon to the tune of “That’s what friends are for.” No WVU uniform is visible.

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

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

Video #23: Grievant Morgan surprises a sleeping Grievant Cumpston, who curses.

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

Video #25: Grievant Morgan films herself talking to Grievant Cumpston about defecating while Cumpston defecates in the stall behind her.

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

Video #28: Grievant Cumpston humps the front of a cleaning machine to tune of “Ride It, Jump on It.”

Video #29: Grievant Cumpston swings at a punching bag to the tune of “Eye of the Tiger.”

Video #30: Grievant Cumpston gets Supervisor Nixon to say “Alpha Kenny One” faster and faster until it morphs into “I’ll fuck anyone.”

(Videos collectively marked as Respondent’s Exhibit 9)

6. Most of the videos were filmed by Grievant Morgan but some were filmed by Grievant Cumpston. (Respondent's Exhibit 9)

7. Dalibor Psotka was the Operations Facilities Director and Grievants' supervisor when WVU discovered the videos. He and WVU HR reps met with Grievants separately to discuss the videos.

8. Grievant Cumpston admitted to her conduct in the videos and to filming and posting some on TikTok. She said she was having fun, that she lives everyday like it is her last, and that she does not want to die with regrets.

9. Grievant Morgan admitted to her conduct in the videos and to filming and posting them on TikTok. She said she was just having fun and did not mean to offend anyone.

10. After meeting with Grievants, Mr. Psotka reviewed the matter with HR and WVU's Division of Talent and Culture. They determined the videos were sexual, vulgar, and racially insensitive. They unanimously agreed to dismiss Grievants after determining that the videos gave the impression that WVU condoned the conduct depicted in the videos.

11. WVU's investigation determined that Grievants had created and posted the videos starting in August 2019 and ending in May 2020. (Mr. Bowles' testimony)

12. WVU could not ascertain how many people had seen the videos. (Mr. Bowles' testimony)

13. WVU concluded that Grievants had violated numerous WVU policies, including WVU's Code of Conduct, WVU's Discipline Policy, WVU's Identity and Access

Management Policy, ITS 1.11.2.3, and WVU's University Property Policy. (Respondent's Exhibits 3, 4, 5, & 6)

14. 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 ...⁶

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

(Respondent's Exhibit 3)

15. 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, 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 4)

⁶In its PFFCL, Respondent cites to an apparent line under "Respect" which is not accounted for in Respondent's Exhibit 3 and is therefore not included herein as a FOF. This same citation is found in Respondent's Intent to Terminate Employment letters. (Respondent's Exhibits 1 & 2) The citation therein reads, "Respect: We will respect the property of the University and others, whether material or intangible." This is similar to WVU's University Property outlined in FOF 19.

16. WVU's Identity and Access Management Policy ITS 1.11.2.3, section 5, states:

University Account Owners will be held accountable for the actions that occur within a University Information System that has been Authenticated using their WVU Login; therefore, University Account Owners are responsible for safeguarding their WVU Login, which includes, but is not limited to: ...
Sharing their WVU Login with someone else to access a University Information System;

(Respondent's Exhibit 5)

17. 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 6)

18. On May 14, 2020, Grievant Cumpston emailed WVU rep Rebecca Harris as follows:

I'm writing to apologize for the stupid mistakes made by Megan Morgan, Michael Nixon, Kevin Phillips, and myself. I have deleted all pictures and videos pertaining to WVU. I am asking that you please consider keeping us on to prove to you that this will never happen again from us. We always take pride in our job. I am always proud to say I work for WVU and I love my job and regret whole heartedly what I have done. I appreciate your time and again I do apologize for our ignorance and stupidity.

(Grievants' Exhibit 1)

19. Grievant Morgan removed the videos from her TikTok account when asked to do so. Nevertheless, she testified that she did not think the video making fun of Asians was offensive and saw nothing wrong with posting the videos.

20. Grievant Cumpston testified that she lost her husband in 2008 and was having suicidal thoughts but after attending therapy had resolved to not take things so seriously and to have fun with what she does.

21. Grievant Cumpston further testified that her parents were from the Philippines, so she did not see her comments about Chinese as offensive.

22. Grievant Cumpston testified that the primary infraction was posting the videos.

23. Grievant Cumpston had been employed with WVU for 11 years and Grievant Morgan for 3 years. Neither had ever been disciplined. Neither of them were ever reprimanded for failure to accomplish their work and had always completed their assignments.

24. On May 18, 2020, Grievant Cumpston emailed Supervisor Dalibor Psotka as follows:

I plan on still calling but I would like to send you an email because I know I wont get to say everything I need to on the phone call because I will be nervous and rightfully so because I am in the wrong and yes I made a bunch of mistakes. I did take down all of the sites that had any WVU content with me or any of my coworkers in it. I just want to say I am sorry for what I have done and how I acted, But I am taking accountability of my actions. I can promise you that if you keep me on there will be no messing around I will go to work and do my job in the manner I should have in the first place. I have learned from this I could even take a write up and put on probation to show you I can be a responsible adult. Even do building inspections to show just how much I can do the job. I do like my job it did save me and going to work helps me in

many ways personally. I can say this is the first job I actually liked a lot I understand the position you are in, But I am asking for a second chance to prove how I have learned not to do anything but what my job duties are I am begging you for one last chance. I will not touch or mess with anything I am not supposed to. If you feel the need to terminate me because you think I can't change I'm telling you I can and I will. I will say I have no write ups or complaints from anybody on my floor I know you [illegible] don't think I did my job, But I really did work hard I do love stripping and waxing and seeing the end result when I am done. I have been called to other buildings to help out when others were off and I don't mind that. I like the hours and the days I work. I don't now how else to persuade you to keep me on at WVU except to keep saying I am sorry. You don't have to tell me you are disappointed in me because I am disappointed in myself enough. Write me up and put me on probation for a year as punishment. Thank you for considering giving us a second chance. I don't want to lose my job.

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

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. A multitude of videos were posted of you singing and dancing while you were supposed to be performing your assigned duties and responsibilities.

More acts of offensive misconduct and inappropriate behaviors were observed as outlined below:

- Multiple videos of you dancing in a sexually suggestive manner
- Making sexually suggestive motions on your lead worker
- Making sexually suggestive motions on University equipment such as mop handles, floor machines, and pipes
- Talking about smoking marijuana
- Making derogatory comments about another race/ethnicity

- Misusing University property and resources, such as using A/V equipment in a classroom while pretending to give a lecture about the “birds and bees” and mounting floor machines while making D suggestive motions
- Dancing on a bench and a floor machine, as well as dancing sideways up a stairwell
- Jumping out to scare a co-worker operating a floor machine
- Standing on a desk and almost falling
- Sharing your WVU account password while being filmed which violates University account owner responsibilities.

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.

(Respondent’s Exhibit 1)

25. On May 18, 2020, WVU issued an Intent to Terminate letter to Grievant Morgan, stating in relevant part as follows:

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. In an investigative interview with you on May 14, 2020, you acknowledged you were responsible for posting these videos which portrayed varying levels of misconduct and misuse of University time and resources.

More acts of offensive misconduct and inappropriate behaviors were observed as outlined below:

- Filming multiple videos of a co-worker dancing and acting in a sexually suggestive manner
- Filming inside a restroom facility at least three (3) times, including a video showing a co-worker on the toilet after defecating herself, with fecal matter on the floor. You also filmed your co-worker on the restroom floor wearing a sports bra and shorts, cleaning her shoes of fecal matter.
- Talking about smoking marijuana

- Making derogatory comments about another race/ethnicity
- Jumping out to scare a co-worker operating a floor machine
- Posting a video of your co-worker sharing her WVU account password, which violates University account owner responsibilities

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.

(Respondent's Exhibit 2)

26. WVU held due process meetings with each Grievant on May 21, 2020.

27. On May 22, 2020, WVU issued each Grievant a termination letter, effective immediately. (Respondent's Exhibits 7 & 8)

28. In its Intent to Terminate letters, WVU only attributed the filming and posting to Grievant Morgan. Nevertheless, some videos were obviously filmed by Grievant Cumpston. Grievant Cumpston has accepted responsibility for filming and posting the videos even though they were posted to Grievant Morgan's TikTok account. (Grievants' Exhibit 1, Respondent's Exhibits 1 & 2, and Grievants' 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. 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.*

Grievants were dismissed for gross misconduct after behaving in a sexually suggestive, vulgar, and racially insensitive manner. Additionally, Grievant Morgan was cited for filming the behavior and posting the videos on social media. WVU deemed the conduct to be a violation of WVU policies. WVU contends it could have dismissed Grievants for any single video. WVU was particularly concerned that the videos cast WVU in a negative light since Grievants were on the job and in WVU uniform when the camera captured their shenanigans. Grievants contend they were just having fun and livening up their nightshift and that they always got their work done without complaint. They claim they were not being racially offensive. They argue that they did not know they were prohibited from engaging in the behaviors depicted, that they had no prior discipline, and that they saw their primary infraction as posting the videos to social media, implying that their dismissal warrants mitigation.

“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). In the current matter, Respondent's primary interest is to ensure the comfort of its student body and protect its image. While much of the conduct depicted in the videos may have only entailed minor

violations of policy, there were a number of incidents that, when filmed and shared on social media, became gross misconduct.

Respondent proved that Grievants violated the Code of Conduct and the University Property Policy through some of these incidents. Grievants violated the Code of Conduct by engaging in “conduct that reflects adversely on the image of the University” and causing an unsafe work environment.⁷ Grievants also violated WVU’s University Property Policy when they used WVU property in an unauthorized manner. Some of the conduct depicted, such as Grievant Cumpston attempting to remember her WVU Login or using the bathroom, did not violate WVU policy. Conduct depicted in other videos, such as Cumpston dancing while operating the stand-on cleaner, even though violative of policy, did not rise to the level of gross misconduct. Other behavior, such as dancing with, humping, and sitting on the lap of a coworker, could rise to the level of gross misconduct if violative of policy. When this behavior was filmed and shared on social media, it clearly violated policy.

Some behavior only violated WVU policy because Grievants filmed and broadcasted it on social media. For instance, some of the bathroom incidents did not in and of themselves violate WVU policy. Employees are allowed to use the bathroom while in work uniform, have accidents, clean up those accidents, and, perhaps, even talk about the stench. However, the filming and sharing of these behaviors on social media violates

⁷Respondent failed to prove that Grievants violated WVU’s Identity and Access Management Policy, as it did not prove that Grievant Cumpston shared or failed to safeguard her WVU Login. The video shows Cumpston saying her password aloud in an attempt to remember it, apparently unaware that Grievant Morgan is filming her failed attempts to access her WVU account. Neither is Grievant Morgan in violation, as the policy appears to only prohibit sharing one’s own login information.

the Code of Conduct in that this behavior will likely be seen by the public and tarnish WVU's image. This also holds true with the videos of Grievants engaging in sexualized behavior while in their work uniforms. The act of filming and publicly sharing such videos is sufficient to violate the Code of Conduct.

Grievant Morgan filmed many of the videos showing Grievant Cumpston or Supervisor Nixon pole dancing, humping equipment, slow dancing, and using vulgar and racially insensitive language. In filming and sharing the videos of this egregious behavior, Grievant Morgan is just as culpable, and even more culpable in some respect, than the individuals being filmed. The Intent to Terminate letters indicate that Grievant Morgan was the one who made the videos and posted them to her TikTok account. The undersigned was initially sympathetic to Grievant Cumpston because her Intent to Terminate letter dismissed her for her role in being filmed rather than for taking and disseminating the videos. However, the evidence at level three showed that Grievant Cumpston was aware during most of the filming that she was being filmed and took responsibility for filming and posting videos to social media. Grievant Cumpston did not indicate whether she was only responsible for posting some of the videos, such as the more benign ones. The undersigned will therefore take her admission of sharing videos at face value and as an acceptance of shared responsibility with Grievant Morgan for posting all the videos on TikTok. Thus, Respondent proved by a preponderance of evidence that Grievants willfully engaged in behavior in disregard of WVU's interest or a wanton disregard of the standards of behavior WVU had a right to expect of them.

Grievants imply that their stellar disciplinary record and the murkiness of the policies they violated warrants mitigation of their punishment. "[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-RaIED (Apr. 30, 2014), *aff'd*, Kanawha Cnty. Cir. Ct.

Docket No. 14-AA-54 (Jan. 16, 2015). Grievants had a stellar disciplinary record, always completed their work assignments, and were not clearly informed of any prohibition against broadcasting their workplace shenanigans. However, it is common sense to know that the broadcasting of certain conduct is at times far worse than engaging in the underlying conduct. For instance, there is nothing wrong with using the restroom and having an accident therein during work. However, filming and broadcasting the same is gross misconduct because it casts WVU in a negative light in violation of the Code of Conduct. Grievants failed to prove that it was necessary for WVU to clearly communicate that Grievants were prohibited from filming and broadcasting images that common sense dictates should remain in the bathroom and not be publicly associated with WVU. The same is true for the vulgar comments, sexual conduct, and racially insensitive remarks. Grievants did not prove by a preponderance of evidence that dismissal was disproportionate to their offense and that mitigation of their punishment 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. Respondent proved by a preponderance of evidence that Grievants committed gross misconduct justifying dismissal.

4. “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).

5. Grievants did not prove by a preponderance of evidence that mitigation of their 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: April 20, 2021

Joshua S. Fraenkel
Administrative Law Judge