

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**ANNETTE MARIE DANIELS-WATTS,
Grievant,**

v.

Docket No. 2020-0715-MAPS

**DIVISION OF CORRECTIONS AND REHABILITATION/
WEST VIRGINIA CORRECTIONS ACADEMY,
Respondent.**

DECISION

Grievant, Annette Daniels-Watts, was employed by Respondent, the Division of Corrections and Rehabilitation (DCR), at the West Virginia Corrections Academy. On December 19, 2019, Grievant filed a grievance against Respondent stating:

On 6 December 2019 I was subjected to summary termination from the Department of Corrections and Rehabilitation. ... Mr. Patterson's summary termination of my employment was arbitrary, capricious and discriminatory... His stated 'specific reasons' justifying my summary termination are not consistent with my recollection of my actions pertaining to this alleged incident, nor are they consistent with the facts and circumstances known to me; nor do they clearly define any action on my behalf that caused a continuing danger to persons/property or the orderly conduct of the agency. He failed to provide me due process as required by subsection 12.2.a.3 of the Administrative Rule ... Mr. Patterson's supposition, - 'Your actions and inaction also violated and allowed others to violate the West Virginia Division of Personnel's Prohibited Workplace Harassment Policy...' - fails to articulate who I allegedly allowed to do what leaving me incapable of rendering a response. His failure to provide me with specifics in regards to this allegation of misconduct is in violation of subsection 12.2.a.3 of the Administrative Rule ...

For relief, Grievant seeks, "Returned to my regular employment with all back pay entitled to. Reinstatement of annual and sick leave. No loss of seniority. Personnel record to be expunged and cleared of all erroneous allegation. Reimbursement for all

bills associated with medical/mental health needs caused by this action. Reimbursement of all attorney fees as appropriated and allowed by law.”

This grievance was properly filed directly to level three pursuant W. Va. Code § 6C-2- 4(a)(4). A level three hearing was held before the undersigned on October 6, 2020, and October 21, 2020, via an online platform. Grievant appeared and was represented by Kurt E. Entsminger, Esq. Respondent appeared by Assistant Commissioner Scott Patterson and was represented by Briana J. Marino, Assistant Attorney General. This matter matured for a decision after each party submitted written Proposed Findings of Fact and Conclusions of Law (PFFCL).¹

Synopsis

Grievant was employed by the Division of Corrections and Rehabilitation (DCR) as a supervising officer at the Corrections Academy when a graduation photo was taken of Class 18 cadets performing a Nazi salute. Grievant saw the photo on the desk of a subordinate but failed to stop its dissemination. Grievant was summarily dismissed. DCR alleged but did not prove that Grievant directed the inclusion of the photo in graduation packets, that she failed to promptly report the photo in violation of the Workplace Harassment Policy, or that she was duty bound to immediately reprimand participants. DCR did prove that Grievant carelessly failed to stop the photo from being disseminated and that this was gross misconduct resulting from reckless disregard of proper standards.

¹The due date for the submission of PFFCL was established at the level three hearing as December 8, 2020. On December 7, 2020, Respondent requested a 10-day extension of this deadline. Grievant objected and submitted her PFFCL. The undersigned granted a 2-day extension under the condition that Respondent shall not view the PFFCL submitted by Grievant.

Grievant did not prove discrimination, lack of due process, or that her punishment was excessive. 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, Annette Daniels-Watts, was employed by Respondent, the Division of Corrections and Rehabilitation (DCR) and its predecessor organization, from February 2004 until December 6, 2019.

2. During this period, Grievant rose from the rank of Correctional Officer 1 to Captain/Correctional Officer 6 and received outstanding job evaluations from her supervisors.

3. Prior to her termination on December 6, 2019, Grievant was never disciplined nor was she ever counseled for Equal Employment Opportunity (EEO) concerns.

4. In August 2008, Grievant became a Correctional Trainer at the Corrections Academy. She was gradually promoted to the position of Basic Training Supervisor responsible for overseeing the training of Correctional Officers at the Academy. This was the position she held when a class photo of the Academy Class 18 cadets performing a Nazi style salute was taken, inserted into Class 18 graduation packets, disseminated, and discovered by other staff members.

5. Academy Class 18 was held at the Corrections Academy over a six-week period beginning in mid-October 2019 and culminated in a graduation ceremony on Wednesday, November 27, 2019.

6. Sergeant Karrie Byrd was a Correctional Trainer assigned to Academy Class 18 and was supervised by multiple people including Grievant.

7. A few weeks into their training, cadets in Class 18 began engaging in a Nazi salute directed at Sgt. Byrd while declaring "Hail Byrd." This continued daily over the remaining weeks as class participation grew. Correctional Trainer Byrd encouraged and reveled in this conduct and at times reciprocated the gesture.

8. Grievant had no contemporaneous knowledge that the Nazi salute or the declaration of "Hail Byrd" was occurring in Sgt. Byrd's class. Grievant did not personally observe any such conduct nor did any cadets or Academy employees report to her that this conduct was occurring.

9. On Monday, November 25, 2019, two days before the Class 18 graduation, Sgt. Byrd oversaw the taking of class photos.

10. A tradition had developed at the Academy involving the taking of informal "goofy" class photos in addition to a serious one. These "goofy" photos were frequently placed in the cadets' graduation packets.

11. The "goofy" class photo taken by Sgt. Byrd on Monday, November 25, 2019, depicted most of the cadets engaged in a Nazi salute. (Respondent's Exhibit 3)

12. Grievant had no contemporaneous knowledge that this class photo was being taken by Sgt. Byrd and it was not the normal practice for Grievant to supervise or approve the "goofy" class photo.

13. There were no Academy policies covering "goofy" class photos. Thus, no one was responsible for supervising or approving such activities and no criteria existed for determining appropriate or inappropriate content for such photos.

14. Jennifer Parsons held the position of Office Assistant at the Academy and was responsible for assembling materials and overseeing logistical aspects of cadet graduation. One of her tasks was obtaining and handling class photos after they were selected for inclusion in graduation packets. Jennifer Parsons was generally not closely supervised in carrying out these functions.

15. After Sgt. Byrd took the “goofy” class photo, she sent the photo via text message to Ms. Parsons and requested that it be included as the “goofy” photograph for Class 18.

16. Grievant had no contemporaneous knowledge that Sgt. Byrd had sent this photo to Ms. Parsons. Grievant was not notified or consulted regarding the selection of this as the “goofy” photo and was not involved in selecting this photo for further distribution.

17. After Ms. Parsons received the photograph from Sgt. Byrd, she added the caption of “Hail Byrd.”

18. Grievant reported to work on Tuesday, November 26, 2019, at 7:53 a.m. and officially worked for over 10 hours before she left the Academy at 6:00 p.m.

19. The supervisory staff at the Academy had been substantially reduced during the week of November 25, 2019, because two of the three Captains stationed there were on leave for an extended Thanksgiving holiday despite graduation being scheduled that week. This left Grievant as the only Captain at the Academy that week.

20. Grievant was busy that week addressing various Academy related issues including a cadet cheating scandal that necessitated her rewriting and readministering tests to multiple cadet classes. She was also preparing to emcee the graduation

ceremony for Class 18 scheduled for November 27, 2019. Her attention was further diverted in dealing with an underage drunk suicidal cadet.

21. Near the end of the workday on November 26, 2019, between 4:30 p.m. and 6:00 p.m., Grievant went to Ms. Parsons' office to check on the status of graduation preparations. The Academy building was nearly empty by then, with only Grievant, Ms. Parsons, and possibly Correctional Trainers Aime Lewis and Jessica Scott remaining.

22. Grievant saw the Class 18 Nazi salute photo on Ms. Parsons' desk. Ms. Parsons asked Grievant what she thought of the photo, to which Grievant responded that she thought it was "terrible." Ms. Parsons indicated to Grievant that she agreed.

23. Grievant recognized that this photo would likely be the "goofy" photo for Class 18. Ms. Parsons made no specific request that Grievant approve the photo for distribution. Grievant did not observe or direct Ms. Parsons to insert the photo into any graduation packet. The fact that Jennifer Parsons agreed with Grievant's negative assessment of the photo provided some assurance to Grievant that Parsons would not further disseminate it.

24. After their brief interaction over this "goofy" photo, Grievant went back to her office to finish her work on trainings and graduation before leaving for home at 6:00 p.m.

25. At 10:30 p.m., Grievant was contacted about an underage cadet who was drinking and possibly suicidal. Grievant drove from her home to the cadet barracks and spent 45 minutes interacting with the cadet until she was satisfied there was no danger. Grievant left the Academy at 11:30 p.m.

26. On Wednesday, November 27, 2019, the day of the Class 18 graduation, Grievant reported to work at 8:05 a.m. After reporting to work, Grievant was again involved in some pressing Academy issues which included the underage drinking incident from the night before and the ongoing corrective action over the cadet cheating scandal. Grievant served as the emcee for the graduation ceremony that morning. As it was the day before Thanksgiving and an especially busy and stressful week for Grievant, Scott Patterson, Assistant Commissioner for Training & Staff Development Bureau, told her to leave early that day. Grievant left work at 1:30 p.m. (Grievant's Exhibit 2 & Grievant's testimony)

27. At 6:36 p.m. that same day, Grievant received a text message from Ralph Terry, Chief of Training Operations at the Academy, informing her that the Class 18 Nazi salute photo had been discovered by DCR hierarchy and that a meeting with Asst. Commissioner Patterson would be held the following Monday morning to address it. As the relevant parties were off for Thanksgiving beginning the following day (Thursday, November 28) through Sunday, Terry instructed Grievant to notify the other personnel involved with disseminating the photo to be present for the meeting. (Grievant's Exhibit 5)

28. Grievant replied to Mr. Terry via text message, stating:

Jennifer had it printed and I saw that stupid picture. I said what is that? I hate it? I didn't say throw it away. I didn't talk to Karrie. I just got busy and I didn't stop. I thought about it right before I saw your text while I was driving. I thought I really screwed up and it will bite me. ... I never thought that a class picture would need to be supervised. I never thought that I couldn't trust her to [do] that.

29. Supervisor Terry texted back, “Not your fault,” “Don’t worry about it” and stated that he had “seen the pics laying and Jennifer putting them in envelopes but did not pay any attention to them.” (Grievant’s Exhibit 5)

30. On the morning of Monday, December 2, 2019, Grievant met with Asst. Commissioner Scott Patterson to address questions about the photo. Ralph Terry and James Day, Grievant’s immediate supervisor, were also present. Grievant explained that she had seen the photo on one occasion while in Jennifer Parsons’ office and had expressed her opinion that the photo was terrible. She also expressed regret in hindsight that she had not taken immediate steps to report the photo or to address it with others. In accordance with Mr. Patterson’s instructions, Grievant prepared and submitted a written memorandum reiterating the same things that she told Mr. Patterson during the interview, including “I realize now that I should have known that the intent was for this picture to be given to the students” and “I wish that I had said more to clarify that I didn’t want this picture to be included.” (Respondent’s Exhibit 2)

31. On Tuesday, December 3, 2019, Asst. Commissioner Patterson handed Grievant a letter of suspension signed by Commissioner Betsy Jividen. This letter informed Grievant she was being placed on a 60-day non-disciplinary suspension pending the results of an investigation into her knowledge of the Class 18 Nazi salute photo. (Grievant’s Exhibit 1)

32. Two days later, on the afternoon of Thursday, December 5, 2019, Asst. Commissioner Scott Patterson notified Grievant of the decision to terminate her employment.

33. On Friday, December 6, 2019, Asst. Commissioner Patterson provided Grievant a letter notifying her that he had decided to terminate her employment. In explaining the factual grounds for this termination, the letter stated in pertinent part as follows:

By your own admission, on or about 25 or 26 November 2019 on multiple occasions you saw and had possession of a photograph of the graduating Corrections Basic Class #18, in which the students displayed a discriminatory, distasteful, hurtful, highly insensitive, and completely inappropriate gesture in the form of a Nazi salute, and did nothing within your authority as a Correctional Officer 6 - which is a supervisory position – to prevent it from being distributed to the students' graduation packets. You also reportedly replied, when a coworker showed you the phone and asked about its appropriateness, something to the effect of, "That's probably going to bite us in the ass, but it's too late now, so go ahead and put it in the packets."

As a Correctional Officer 6, and as the primary supervisor of Basic Class #18 at the time, it was not only your responsibility and duty to display and model appropriate behavior to trainees and subordinates, it was also to ensure that trainees and subordinates exhibited appropriate behavior, and you have failed to do so. Your explanation that you knew the photograph was inappropriate but did not have time to address it is without merit, as each time you saw or possessed the photograph you could have directed your subordinates to dispose of or not distribute the picture, or you could have sought direction from your supervisors as to the best course of action to take with the photograph.

Your actions and inaction also violated and allowed others to violate the West Virginia Division of Personnel's Prohibited Workplace Harassment Policy (Eff. 01 May 1993). You have received training on this subject on multiple occasions throughout your career, to include most recently when you completed the West Virginia Division of Corrections and Rehabilitation's Supervisory EEO Training on 26 October 2018.

(Respondent's Exhibit 4)

34. The only policy cited in the December 6, 2019 letter of dismissal which Grievant was accused of violating was the West Virginia Division of Personnel Prohibited Workplace Harassment Policy (effective 1993). This policy, in pertinent part, states:

Illegal harassment is prohibited by the West Virginia Human Rights Act and Title VII of the Civil Rights Act of 1964 where such conduct has the purpose or effect of interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment...

Illegal harassment prohibited by the State and federal anti-discrimination laws which includes words, conduct, or action, usually repeated or persistent, directed at a specific person that annoys, alarms, or causes substantial emotional distress in that person and serves no legitimate purpose. ...

Employees have the responsibility to: ... Promptly report allegations or observations of harassment to the appropriate individuals...

(Grievant's Exhibit 3)

35. Respondent's Progressive Discipline Policy, in pertinent part, provides:

Dismissal: May be issued when infractions/deficiencies in performance and/or behavior continue after the employee has had adequate opportunity for correction **or the employee commits a singular offense of such severity that dismissal is warranted**. Elements of a dismissal are:

a. Predetermination meeting with the employee to advise him/her of contemplated disciplinary action;

b. Fifteen (15) calendar day written notice of the offense, prior to the effective date of action;

IMPORTANT: Notice is not required in cases of "gross misconduct" where there is a continuing danger to persons/property or the orderly conduct of the affairs of the agency.

(Respondent's Exhibit 12)

36. Despite the representation made by Asst. Commissioner Patterson, the decision to dismiss Grievant was in fact made by DCR Commissioner Betsy Jividen. (Ms. Jividen's testimony)

37. Prior to her termination, Grievant was not provided with an identified predetermination meeting or a 15-day notice of the offense.

38. Respondent did not provide Grievant with an identified predetermination meeting or 15-day notice because Grievant was deemed to pose a continuing danger to persons and property of the Academy. (Asst. Commissioner Patterson's testimony)

39. Steve Berthiaume, Deputy Director of Corrections Investigation Division, participated in interviewing the relevant employees. He also wrote the EEO Investigation Summary Report. The EEO Report was completed on January 16, 2020, over a month after Grievant was dismissed. The EEO Report concludes, among other things, that Grievant engaged in acts that created a hostile work environment and showed indifference when other employees brought their concerns about the photo to her.

40. The relevant interviews in the EEO Report were with Ms. Parsons, Ralph Terry, Correctional Trainer Jessica Scott, Correctional Trainer Aimee Lewis, Sgt. Byrd, and Grievant. These interviews occurred on December 3, 2019, except for Terry's interview on December 5, 2019.

41. The EEO Report describes Sgt. Byrd's interview on December 3, 2019, in relevant part, as follows:

Byrd said she was told by Parsons that Captain Watts and Miss Scott "didn't like the picture." Byrd asked her why they didn't like it was told by Parsons "don't worry about it, it's your first class, they will get over it... ." ... Byrd said Parsons and one of the cadets ... put the packets together and Parsons

showed the picture to Mr. Terry and he allowed it to go into the packet.

(Respondent's Exhibit 1)

42. The EEO Report describes Ms. Parsons' interview on December 3, 2019, in relevant part, as follows:

Parsons reported that Captain Annette Watts saw the picture while the cadet packets were being assembled. Parsons advised Watts commented, "I don't know, don't you think that's a little racist?". Parsons answered, "Well, it kind of looks that way doesn't it?". Parsons reported Watts stating, "Oh, I should just pull it, but since you have them all already printed you might as well go ahead and stuff them into the packets." Parson Stated, "Ok."

Parsons said Mr. Terry came by when they were doing the packets. She handed him a stack of the photos and asked him what he thought of the pictures. Terry took the stack of pictures. She said Terry commented on the professional picture, saying it looked nice. He put that picture behind the others. He saw the OC before and after picture and asked Parson[s] if that was from OC day. Before he got to the next picture, which was the "Hail Byrd" picture he was interrupted with a phone call or something and set the pictures down. Parsons doesn't believe he got a good look at the "Hail Byrd" picture. ...

Parsons advised that she is in charge of graduation and a nice class photo, a before and after OC picture, and the silly picture is always included in the cadet packets. Parsons went on to explain that sometimes a before and after OC and a silly photo are not always taken to be included with the cadet packet. ...

43. The EEO Report describes Grievant's interview on December 3, 2019, in relevant part, as follows:

Watts was asked if she made the comment "that's going to bite us in the ass" when she saw the picture. She said she did not make the comment at that time but driving around later she was thinking about the picture and thought to herself, if the picture goes into the packet "it's going to bite us in the ass."

Watts said she saw “the picture in question” with the packet material and asked Parsons, “what’s that?” Parsons told her it was the “funny picture” for C[]ass 18. Watts said she told Parsons she “hated the picture” and it was “terrible.” Watts said that was all she said about the photograph at the time and if she had said more about the picture, we wouldn’t need to be having this meeting. Watts said when she saw the picture, she was not aware that it was going to be included in the graduation packet.

44. The EEO Report describes Jessica Scott’s interview on December 3, 2019, in relevant part, as follows:

Scott reported that on Tuesday, November 26, 2019, as she entered Jennifer Parsons office, the photo of the 18th Basic Corrections Class was laying on the desk. Scott reported the feeling of shock and saying, “Do you not see anything wrong with this?” Scott remarked that Jennifer Parsons was present and believes Daniels-Watts was in the office but was not positive. She does remember mentioning the photo to Watts at some point. Scott does not remember what Watts’ reaction was.

45. The EEO Report describes Amie Lewis’ interview on December 3, 2019, stating in relevant part, “Ms. Lewis remarked that Watts stated, ‘Well that is going to bite us in the ass’ while viewing the picture.”

46. The EEO Report describes Ralph Terry’s interview on December 5, 2019, in relevant part, as follows:

Terry was asked if he saw any of the Class 18 pictures when they were putting the graduation packets together. He said Jennifer Parsons and a student were putting the packets together in the reception area. He was passing through the area when Parsons handed him a stack of pictures and said, “have you seen the pictures?” Terry said he took the pictures from Parsons, the formal class picture was on top of the stack. Before he could look through the pictures individually, he was approached by a student who had an issue. Terry said he set the stack of pictures down and walked away from the area with the student to have a private conversation. Terry said he

did not get back to the reception area and never saw all the Class 18 pictures. He only saw the professional picture, which was on top of the stack.

Terry said he had not seen the “Hail Byrd” picture until it was shown to him by Patterson. ... Terry added, until this situation came about, he never knew there was such a thing as a “silly picture” included in the packet, and in fact, he had never seen what goes into a graduation packet. ...

[Screen shots of the text conversation between Terry and Grievant were included in the Report behind his interview.]

47. Respondent dismissed Sgt. Byrd and Grievant at the same time. Ms. Parsons and the trainees in the 18th cadet class were dismissed after the conclusion of the EEO investigation a month later. Academy employees who first saw class photos on Tuesday November 26, 2019 and who had no direct participation in the conduct depicted or in the creation of the photograph received short suspensions or no discipline at all. These other employees included Jessica Scott and Amie Lewis.

48. Part of the Academy training focuses on the identification of security threat groups or gangs and the symbols and gestures used by the same.

49. Over her career, Grievant was in corrections facilities where security threat groups and white supremacists were active, has attended training sessions on the threat they pose, and has taught numerous security threat group trainings covering white supremacist groups. She has also attended and coordinated training sessions on Equal Employment Opportunity topics and the responsibilities supervisors have when they see evidence of offensive and discriminatory behaviors in the workplace.

50. Academy training covers the reporting of unusual incidents. Grievant taught cadets about their duty to report an incident up the chain of command and the logistics of

doing so. Grievant regularly utilized this reporting structure and the policies and procedures surrounding it.

51. Part of Academy training for cadets covers the chain of command at the Academy and at each facility where cadets work. Grievant received training on the chain of command and utilized it daily as a corrections officer. At the Academy, Grievant continued to work in a hierarchical chain of command and taught the same principles to cadets.

52. Grievant's chain of command included those who reported to her, such as Sgt. Bryd, and those to whom she reported, such as James Day (Academy Manager), Ralph Terry (Chief of Training Operations at the Academy), and Scott Patterson (Assistant Commissioner for Training & Staff Development Bureau).

53. Grievant had unfettered access to her superiors at all hours via cell phone and email.

Discussion

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

Permanent state employees who are in the classified service can only be dismissed "for good cause, which means misconduct of a substantial nature directly

affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.” Syl. Pt. 1, *Oakes v. W. Va. Dep’t of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm’n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *Sloan v. Dep’t of Health & Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004) (*per curiam*). See also W. VA. CODE ST. R. § 143-1-12.2.a. (2016). “‘Good cause’ for dismissal will be found when an employee’s conduct shows a gross disregard for professional responsibilities or the public safety.” *Drown v. W. Va. Civil Serv. Comm’n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988) (*per curiam*).

“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).

“[T]he West Virginia Supreme Court of Appeals has defined gross misconduct as

[T]he West Virginia Supreme Court of Appeals has defined gross misconduct as . . . conduct evincing such willful and wanton disregard of an employer’s interests as is found in deliberate violations or disregard of standards or behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer’s interests or of the employee’s duties and obligations to his employer. On the other hand mere

inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute.

... *Kirk v. Cole*, 169 W. Va. 520, 524, 288 S.E.2d 547, 550 (1982)." *Smith v. DVA*, Docket No. 00-VA-248 (Nov. 22, 2000)

Respondent contends that dismissal was justified by Grievant's action and inaction after seeing a photo of Class 18 cadets performing a Nazi salute. Respondent alleges that after seeing the photo on subordinate Jennifer Parson's desk Grievant engaged in gross misconduct by directing Ms. Parsons to include the photo in graduation packets and by failing to immediately reprimand those involved, to "promptly" report the photo up her chain of command, and to stop the dissemination of the photo. Respondent asserts that because Grievant had the ability to stop the photo from being disseminated and was in a supervisory position, Grievant was the individual most culpable for the nightmare that followed. Grievant denies these allegations and counters that she immediately told Ms. Parsons the photo was "terrible" so did not think Ms. Parsons would disseminate it. Grievant asserts there was still time to "promptly" report the photo but that her chain of command found out by other means within 26 hours of her seeing the photo. Grievant contends that it was unreasonable to expect her to immediately track down all participants to tell them their conduct was inappropriate. Grievant regrets not stopping the dissemination of the photo but feels that her dismissal was excessive given that the allegations in her dismissal letter are not supported by the evidence.

Respondent asserts that Grievant endangered all employees at DCR because inmates would view the Nazi salute by cadets as DCR sympathizing with rival white

supremacist gangs and would retaliate violently against all employees. Grievant counters that DCR's claims of potential violence by inmates is self-serving and distracts from the heart of the case, which is whether Grievant committed gross misconduct. The undersigned agrees that claims of potential violence are prejudicial, irrelevant, and self-serving. While Respondent did not present sufficient evidence to support these claims, even if it had, this argument is based on the unreasonable premise that dismissal of any employee is justified if it would appease inmates from violently lashing out. Using this rationale, DCR could evoke violence or the possibility of violence as justification for offering up any employee to placate inmates or the public. Thus, the undersigned will consider only allegations of actual infractions by Grievant in assessing whether she committed gross misconduct.

Grievant objects to any consideration of the EEO Report under the *after-acquired evidence rule*.² Grievant has not cited any authority showing that this rule is applicable in a matter before the Grievance Board. Rules of Evidence generally do not apply here:

Although W.VA. CODE, 6C-2-4(a)(3) [2008], states that "formal rules of evidence and procedure do not apply" to Level One grievance hearings, neither that statute nor the West Virginia Code of State Rules § 156-1-1 [2008], *et seq.*, address whether formal rules of evidence apply to Level Three hearings. However, two predecessor statutes,

²"We emphasize, though, that after-acquired evidence is not admissible to show that the employer would have had a justified reason to terminate the employee separate and apart from the allegedly discriminatory firing. Addressing this precise issue, the United States Supreme Court noted 'proving that the same decision would have been justified . . . is not the same as proving that the same decision would have been made.' *McKennon*, ___ U.S. at ___, 115 S. Ct. at 885, 130 L. Ed. 2d at 862, *quoting Price Waterhouse v. Hopkins*, 490 U.S. 228, 252, 109 S. Ct. 1775, 1791, 104 L. Ed. 2d 268, 289 (1989) (plurality opinion). (Citation omitted)." *Barlow v. Hester Industries, Inc.* 198 W.Va. 118, 479 S.E. 2d 628 (1996).

W.VA. CODE, 29-6A-6(e) [1998], concerning State employees, and W.VA. CODE, 18-29-6 [1992], concerning education employees, indicate that formal rules of evidence do not apply to grievance hearings. See syl. pt. 3, in part, *University of West Virginia Board of Trustees v. Fox*, 197 W.Va. 91, 475 S.E.2d 91 (1996) (Formal rules of evidence do not apply to grievance procedures under W.VA. CODE, 18-29-6.).

W. Va. DOT v. Litten, 231 W. Va. 217, 222, 744 S.E.2d 327, 332 n.6 (June 5, 2013).

Further, Steve Berthiaume, Deputy Director of Corrections Investigation Division, testified that he gave DCR real time updates on the interviews conducted during the EEO investigation. The interviews of individuals³ pertinent to the allegations against Grievant occurred on December 3, 2018. There is no evidence to show that Respondent made the decision to dismiss Grievant prior to these interviews. The evidence shows that Asst. Commissioner Patterson first informed Grievant on December 5, 2018, that she was being dismissed. The EEO Report, which summarizes these interviews, was finalized on January 16, 2020. Thus, the undersigned views the EEO Report as a compilation of statements used to justify Grievant's dismissal rather than the direct basis for Grievant's dismissal. Respondent failed to compel the testimony of relevant witnesses who recounted to investigators the comments they overheard Grievant make when she saw the Nazi salute photo on Ms. Parsons' desk. Their statements as document in the EEO report are therefore hearsay. "Hearsay includes any statement made outside the present proceeding which is offered as evidence of the truth of matters asserted therein." BLACK'S LAW DICTIONARY 722 (6th ed. 1990).

³These include Grievant, Jennifer Parsons, Aime Lewis, and Jessica Scott.

“Hearsay evidence is generally admissible in grievance proceedings. The issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings.” *Gunnells v. Logan County Bd. of Educ.*, Docket No. 97-23-055 (Dec. 9, 1997). The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. *Id.*; *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-H-115 (June 8, 1990).

The Respondent relied on Ms. Parsons' statement to investigators in concluding that Grievant directed Ms. Parsons to include the Class 18 Nazi salute photo in the graduation packets. Respondent quoted Ms. Parsons in its December 6, 2018 letter of dismissal to Grievant, stating, “You also reportedly replied, when a coworker showed you the photo and asked about its appropriateness, something to

the effect of, 'That's probably going to bite us in the ass, but it's too late now, so go ahead and put it in the packets.'" This is not the precise quote attributed to Ms. Parsons in the EEO Report but is similar in substance. In assessing the above hearsay factors, the undersigned notes that Ms. Parsons is the only eyewitness who alleged that Grievant directed the inclusion of the photo. It is not clear if Correctional Trainers Aime Lewis and Jessica Scott were in the room when Grievant supposedly made these remarks. However, the EEO Report implies their presence in stating they told investigators they were in Parsons' office when Grievant saw the photo. The EEO Report does not indicate that either Lewis or Scott told investigators they heard Grievant tell Parsons to include the photo in the packet. Respondent was represented by a competent attorney yet did not attempt to compel the testimony of any of these eyewitnesses.

Ms. Parsons did not sign any written rendition of her statement to investigators. While Deputy Berthiaume appears to credibility document witness statements in the EEO Report, the undersigned is concerned with the truth of Ms. Parsons' statement. Ms. Parsons was not a disinterested witness, as seen in her subsequent dismissal. She naturally would have been aware, when providing her statement to investigators, that she was facing possible discipline for including the Nazi salute photo in graduation packets. Thus, she had motive to shirk responsibility by passing blame to Grievant. Grievant consistently contradicted this alleged directive in her statement to investigators and her level three testimony. Respondent certainly knew that statements provided by Grievant and Ms. Parsons during the investigation contradicted each other.

Respondent knew that it had the burden of proof in this disciplinary matter. Nevertheless, while it no longer employs Ms. Parsons, Respondent inexplicably did not even attempt to compel her testimony. This is the type of scenario where the permissibility of hearsay needs to be tempered using the above factors. Also, it appears that Ms. Scott and Ms. Lewis were never dismissed, were employed by Respondent during the level three hearing, and could have been compelled to testify. Under these considerations, the undersigned will not deny Grievant the opportunity to challenge the credibility of anyone Respondent relied on in deciding to dismiss her. Respondent's case against Grievant relies in part on the credibility of Ms. Parsons. It would be unjust, and counter to the attribution of burden of proof to Respondent, to subject Grievant to a credibility assessment while giving Respondent a free pass on the credibility of its primary eyewitness. The undersigned will therefore not consider any hearsay statements attributed to Ms. Parsons in assessing Grievant's dismissal.

Nevertheless, there are other credibility assessments to be made, including that of Grievant, Commissioner Betsy Jividen, and Asst. Commissioner Scott Patterson. 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 necessarily relevant to every credibility determination. In this situation, the relevant factors include demeanor, motive, opportunity to perceive, the consistency of prior statements, and plausibility.

Grievant has motive to misrepresent, as she is fighting for her job. Her demeanor was appropriately subdued. As the alleged perpetrator of misconduct, Grievant had an opportunity to perceive the truth of the allegations against her. Grievant's testimony was consistent with her statements during the investigation as documented in the EEO Report, which states in relevant part:

Watts said she saw "the picture in question" with the packet material and asked Parsons, "what's that?" Parsons told her it was the "funny picture" for C[l]ass 18. Watts said she told Parsons she "hated the picture" and it was "terrible." Watts said that was all she said about the photograph at the time and if she had said more about the picture, we wouldn't need to be having this meeting. Watts said when she saw the picture, she was not aware that it was going to be included in the graduation packet.

This is similar to the substance of her text to Mr. Terry. Grievant plausibly testified that she never directed Ms. Parsons to include the photo in graduation packets and that she had a lot on her mind when she saw the photo on Ms. Parsons' desk. Grievant stated that she was writing and administering a new test after a test

taking cheating scandal by multiple classes⁴, including Class 18, and was preparing for the graduation she was emceeding the next day. Grievant testified against interest that she saw the photo when she stopped by Parsons' office to ensure she had everything she needed to complete the graduation packet. Grievant acknowledged she had a lot on her mind when she encountered Commissioner Jividen at the graduation ceremony the next day and admitted against interest that she failed to alert Jividen to the photo. Grievant was credible.

In assessing Commissioner Jividen's credibility, the undersigned notes that she agonized over this episode while testifying and lamented over the shadow it had cast on DCR's reputation. She was understandably emotional and anguished that cadets had been allowed to engage in a Nazi salute while also hinting at her family's victimization in the Holocaust. Jividen testified that DCR kept a threat log of those who said they would pick off officers when they left the facility. This is indicative of the immense pressure she must have been under as the public learned of this event. Yet, her demeanor was candid in the deliberateness she exercised in answering Grievant's questions. While she did not observe any of the alleged incidents, she admitted she made the decision to dismiss Grievant after assessing the recommendation of Asst. Commissioner Patterson. She plausibly testified against interest that bad publicity played a role in her decision and that she ultimately decided to dismiss Grievant due to her failure to supervise Byrd as well as her failure to stop the photo from being disseminated. Commissioner Jividen determined that in not

⁴The Corrections Academy facilitates multiple overlapping class trainings.

immediately acting, Grievant posed a continuing danger to DCR. Commissioner Jividen was credible.

As for Asst. Commissioner Patterson, he had no apparent motive to misrepresent. However, he is associated with some inconsistent and untrue statements. While it is undisputed that Commissioner Jividen was the one who decided to dismiss Grievant, Mr. Patterson wrote and signed the December 6, 2019 letter of dismissal to Grievant, stating, “[t]he purpose of this letter is to advise you of my decision to dismiss you ...”. Further, despite Respondent’s own evidence to the contrary that Grievant had seen the photo only once, Mr. Patterson wrote in the dismissal letter that “each time you saw or possessed the photograph you could have directed your subordinates to dispose of or not distribute the picture.” Mr. Patterson admitted at level three that he had no reason to believe Grievant had seen the photo more than once. While this factual inaccuracy by Mr. Patterson can easily be attributed to oversight, there is no apparent basis for his not knowing that he was not the one who made the decision to terminate Grievant’s employment. Thus, his misrepresentation to Grievant in this regard was willful. While this does not necessarily discredit Mr. Patterson, it does make the undersigned more cautious when considering his testimony.

In analyzing the grounds for dismissal, it is apparent that some of Respondent’s expectations of Grievant are unreasonable in the absence of the insight bestowed by hindsight. For example, Respondent implies that Grievant should have exercised more oversight of Trainer Byrd and Office Assistant Parsons. The evidence showed that neither Grievant nor any other supervisor had regularly

monitored tasks as routine as the taking and dissemination of class photos. Grievant had many responsibilities and, without the benefit of hindsight, it was reasonable at the time for Grievant to not monitor the selection of class photos.

The first basis provided by Respondent for dismissal was that Grievant directed Ms. Parsons to include the photo in graduation packets. This allegation is not supported by the evidence. Grievant was the only witness at level three with firsthand knowledge of her interactions with Ms. Parsons the day she saw the photo. The only other witness to testify on the issue was Mr. Berthiaume. As previously discussed, the undersigned believes that Mr. Berthiaume accurately documented what Ms. Parsons told him. However, the undersigned not only finds Ms. Parsons to be of dubious credibility but also that her statements to investigators should not be given any weight under the hearsay factors. As Grievant was credible, Respondent failed to prove that she issued this directive to Ms. Parsons.

Respondent further alleges that Grievant did not reprimand those involved. Respondent asserts that Grievant should have tracked down the Class 18 cadets and Sgt. Byrd the evening she saw the photo and used it as a training opportunity. This allegation fits into the unreasonable expectation category previously discussed. While Respondent showed that Grievant had an obligation to correct, it did not show this had to be done in a precise timeframe. Respondent contends that Grievant's obligation to correct subordinates meant she had to do so the same day she saw the photo even though it was the end of the workday and Grievant had no reason to believe the behavior was ongoing. Respondent asserts that Grievant should have gone to the cafeteria or barracks to talk to the cadets even though she had pressing

work obligations such as preparing for graduation, dealing with corrective measures after a cheating scandal, and dealing with a drunk underage cadet who was suicidal. Nevertheless, Grievant's texts to supervisor Ralph Terry show that Grievant felt the infraction was so egregious that she and others were already at risk of being fired. The benefit of hindsight reveals that Sgt. Byrd and many cadets were ultimately dismissed, rendering Grievant's hunch insightful.

Respondent also alleges that Grievant violated the Division of Personnel's Prohibited Workplace Harassment Policy in failing to "promptly" report the photo up her chain of command. The policy states, "Illegal harassment is prohibited by the West Virginia Human Rights Act and Title VII of the Civil Rights Act of 1964 where such conduct has the purpose or effect of interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." The policy goes on to specify that illegal harassment "includes words, conduct, or action, usually repeated or persistent, directed at a specific person that annoys, alarms, or causes substantial emotional distress in that person...."

The policy provides that "Employees have the responsibility to: ... Promptly report allegations or observations of harassment to the appropriate individuals...." The policy does not define "promptly." Respondent takes a literal approach in defining "promptly" as "immediately." Grievant counters that "promptly" means within 24 hours and that another DCR policy requires matters involving potential litigation or adverse agency publicity to be reported within a 24-hour time frame. Grievant asserts that because no more than 24.5 to 26 hours had passed before Mr. Terry informed her that Respondent was notified of the photo, the result is at most a minor

technical violation unworthy of dismissal. As Respondent failed to present any authority for its interpretation of “prompt,” it failed to prove that Grievant did not promptly report the photo.

Lastly, Respondent alleges that Grievant failed to stop the dissemination of the photo in the graduation packets. Grievant’s job responsibilities entail ensuring the smooth operation of graduation, including the logistics and pomp surrounding it. Grievant was one of three Captains assigned to the Academy. During, the week of graduation, Grievant was the only Captain at the Academy. Office Assistant Parsons was tasked with preparing the graduation packets. Grievant justifiably did not monitor the taking of class photos and the preparation of packets since it was generally seen as a routine and low risk task. However, once Grievant saw the photo of Class 18 performing the Nazi salute, she was on notice and duty bound to proactively ensure it would not be disseminated.

Grievant had a heightened responsibility due to her supervisory role.⁵ This duty to act was triggered when Grievant saw the photo and had a hunch that it could be used as the “goofy” photo for the graduation packets. Grievant admitted that she thought the photo was going to be used as the “goofy” photo in graduation packets. Grievant also revealed that she failed to proactively ensure that the photo was excluded from the packets because she thought Parsons would exclude the photo after Grievant told her the photo was “terrible.” However, the only indication thereof

⁵Supervisors “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).

that Grievant says she received from Parsons is when Parsons agreed that the photo was “terrible.” On a matter this serious, it was unreasonable for Grievant to assume that Parsons knew not to include that photo. Grievant only needed to take a couple of minutes to inquire of Parsons whether she had already included the photo in graduation packets. She should have emphatically directed her to exclude the photo. At a December 2, 2019 meeting with Asst. Commissioner Patterson which Grievant memorialized in a contemporaneous memo, Grievant stated, “I realize now that I should have known that the intent was for this picture to be given to the students” and “I wish that I had said more to clarify that I didn’t want this picture to be included.”

The undersigned is cognizant of the stress Grievant was under and of the distractions that must have been on her mind at the time she saw the photo and does not fault her for not immediately reporting the matter and not immediately correcting those involved. While these desired actions would not have changed the nightmare that followed, blocking the dissemination of the photo is the one act at that point that could have potentially made a difference. Unfortunately, when Grievant saw the photo on Parsons’ desk, Grievant seemed resigned to the oncoming doom. The undersigned does not agree with Respondent’s assessment that Grievant was the worst actor in this matter. She did not willfully engage in misconduct. Perhaps she could not see a way to undo a deed she perceived as already done. In so doing, she failed to understand that the greatest damage caused by the photo was the bad publicity it engendered, along with the accompanying erosion of public trust. In not taking a few extra minutes to follow her hunch that the photo was terrible and that it

could possibly be disseminated as the “goofy” graduation photo, she failed to prevent its dissemination.

Through her inaction, Grievant wantonly and carelessly disregarded the standards of behavior Respondent had a right to expect of her. Wanton means either malicious or reckless.⁶ Maliciousness necessitates willfulness.⁷ While reckless could entail willfulness, it could also simply mean “careless, inattentive, or negligent.”⁸ Grievant’s reckless inaction qualifies as gross misconduct. Thus, Respondent proved that its dismissal of Grievant was justified.

Grievant contends that in dismissing her without a predetermination conference or providing the required 15-day notice, Respondent deprived her of due process. “The Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against State action which affects a liberty or property interest.” Syl. Pt. 1, *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 241 S.E.2d 164 (1977), *overruled in part on other grounds by W. Va. Dep't of Educ. v. McGraw*, 239 W. Va. 192, 201, 800 S.E.2d 230, 239 (2017). “A State civil service classified employee has a property interest arising out of the statutory entitlement to continued uninterrupted employment.” *Id.* at Syl. Pt. 4. “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, *Fraleay v. Civil Service Commission*, 177 W.Va. 729, 356 S.E.2d 483 (1987). “The

⁶BLACK’S LAW DICTIONARY 1582 (6th ed. 1990).

⁷BLACK’S LAW DICTIONARY 958 (6th ed. 1990).

⁸BLACK’S LAW DICTIONARY 1270 (6th ed. 1990).

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.

Respondent’s Progressive Discipline Policy, in pertinent part, provides:

Dismissal: May be issued when infractions/deficiencies in performance and/or behavior continue after the employee has had adequate opportunity for correction or the employee commits a singular offense of such severity that dismissal is warranted. Elements of a dismissal are:

- a. Predetermination meeting with the employee to advise him/her of contemplated disciplinary action;
- b. Fifteen (15) calendar day written notice of the offense, prior to the effective date of action;

IMPORTANT: Notice is not required in cases of “gross misconduct” where there is a continuing danger to persons/property or the orderly conduct of the affairs of the agency.

Contrary to Grievant’s claim, Respondent did provide Grievant a predetermination hearing when it gave her an opportunity to discuss the incident in the December 2, 2019 meeting with Asst. Commission Patterson, three days before she was notified of her dismissal. Grievant presented Mr. Patterson with her version of events and memorialized their meeting in a signed statement. She was provided with the essential components of due process. The 15-day notice requirement is Respondent’s own policy. Respondent nevertheless has a duty to abide by its own policy. The only exception provided in the policy for non-compliance is in the case of

gross misconduct when there is a continuing threat of physical danger or the orderly conduct of affairs.

Grievant was justifiably dismissed for gross misconduct. While the undersigned finds dubious any attribution to Grievant of the possibility of violence by inmates or the public, he does find reasonable the assertion that she would pose a continuing danger to the orderly conduct of the affairs of the agency. It is clear that Grievant's infraction in failing to stop the dissemination of the photo boils down to the bad publicity it engendered and the resulting erosion of public trust in the agency. Public trust may appear to be an ethereal and fleeting concept. However, when it erodes, it has real world implications. Commissioner Jividen clearly conveyed the real effect that the erosion of public trust has had on her agency. Thus, Respondent's failure to provide a 15-day notice is excusable.

Grievant further claims her punishment outweighs her offense. "[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).

While it is undisputed that Grievant had a stellar record over the course of her 15-years with Respondent, as one of the highest-ranking officers at the Academy, Grievant is held to a higher standard than the rank-and-file employees. As a supervisor, Grievant is a stopgap for the mistakes and bad behavior of her subordinates. This was especially so when, as with the dissemination of the photo into graduation packets, Grievant saw the photo and had a hunch it would be included in the graduation packets as the “goofy” photo. Grievant compares herself to Ralph Terry, Aime Lewis, and Jessica Scott in arguing that they were not dismissed even

though they saw the photo. Ms. Lewis and Ms. Scott were Academy instructors supervised by Grievant. Respondent does not dispute that the two are still employed. The only evidence concerning their conduct was the EEO Report. The report shows that they saw the photo. It states that Scott “does remember mentioning the photo to Watts at some point” and that Lewis heard Grievant say “‘Well that is going to bite us in the ass’ while viewing the picture.” It is apparent that Lewis and Scott figured that, as Grievant was their supervisor, the chain of command knew at least as much as they did about the photo and would do what was needed to stop its dissemination.

A more apt comparison is between Grievant and her supervisor Ralph Terry. Mr. Terry was never disciplined by Respondent after having graduation photos in his hand and failing to act. Respondent determined there was no evidence that Terry saw the Nazi salute photo. Parsons was the only eyewitness to whether Terry saw the this photo. The EEO Report shows that Parsons told investigators the following:

Parsons said Mr. Terry came by when they were doing the packets. She handed him a stack of the photos and asked him what he thought of the pictures. Terry took the stack of pictures. She said Terry commented on the professional picture, saying it looked nice. He put that picture behind the others. He saw the OC before and after picture and asked Parson[s] if that was from OC day. Before he got to the next picture, which was the “Hail Byrd” picture he was interrupted with a phone call or something and set the pictures down. Parsons doesn’t believe he got a good look at the “Hail Byrd” picture. ...

Terry reiterated the same story in his level three testimony and at his investigative interview. Terry stated that he had a stack of graduation photos in his hands, but never made it past the serious ones before he left to address another matter. The only other evidence presented on the issue was the text message to

Grievant from Terry the day after Grievant saw the photo. Terry's text to Grievant reads, "Not your fault," "Don't worry about it" and that "[Terry had] seen the pics laying and Jennifer putting them in envelopes but did not pay any attention to them." The undersigned questions why Terry would tell Grievant not to worry and that he had seen the pictures unless he was trying to assure Grievant that he was in the same situation she was in. On the other hand, Terry goes on to seemingly confirm in the text the same story he and Parsons told investigators "that he did not pay any attention to [the photos]." The unsigned is left wondering whether this means Terry saw the Nazi salute photo but did not pay it any attention or that he did not see it because he did not pay it any attention. Without more evidence, the undersigned cannot conclude that Terry looked at the Nazi salute photo. Grievant has not proven that her dismissal is excessive and in need of mitigation.

Grievant also contends that she was subjected to discrimination in that Respondent did not discipline either Mr. Terry, Ms. Lewis, or Ms. Scott when they failed to act after seeing the photo that same day. Discrimination for purposes of the grievance process has a very specific definition. "Discrimination' means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statute, an employee must prove: (a) that he or she has been treated differently from one or more similarly-situated employee(s); (b) that the different treatment is not related to the actual job responsibilities of the employees; and, (c) that the difference in treatment was not

agreed to in writing by the employee. *Frymier v. Higher Education Policy Comm.*, 655 S.E.2d 52, 221 W. Va. 306 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr.*, Docket No. 04-CORR-278 (Feb. 14, 2005). As previously mentioned, Ms. Scott and Ms. Lewis were not similarly situated to Grievant because, as Correctional Trainers, they were her subordinates. As a Captain, Grievant was one of the highest-ranking officers at the Academy. As for Mr. Terry, even though he may have been similarly situated to Grievant as her supervisor, Grievant did not show by a preponderance of evidence that Terry saw the photo. Thus, Grievant failed to prove discrimination because she did not show she was treated differently from Terry.

In summary, Respondent failed to prove some of its grounds for dismissing Grievant but did prove that Grievant engaged in gross misconduct by wantonly and recklessly failing to take decisive action to prevent the dissemination of the Nazi salute photo. Grievant was not denied due process, as she received a predetermination hearing prior to her dismissal. Grievant failed to prove her punishment was excessive given Grievant's position of authority at the Academy and the opportunity she bypassed to prevent the photo from being disseminated. Grievant was not subject to discrimination, as her situation or conduct was not comparable to any other employee who saw the photo without being dismissed.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was

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

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

3. "The term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." *Graley v. Parkways Econ. Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991) (*citing Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) and *Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983)); *Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sep. 13, 2002); *Crites v. Dep't of Health & Human Res.*, Docket No. 2011-0890-DHHR (Jan. 24, 2012).

4. Respondent proved that Grievant committed gross misconduct and that it was justified in terminating her employment when she failed to take reasonable measures to prevent the dissemination of the Nazi salute photo after seeing it.

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. “‘Discrimination’ means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.” W.VA. CODE § 6C-2-2(d).

8. Grievant did not prove that Respondent engaged in discrimination, that Respondent violated his due process rights, or that mitigation of the penalty is warranted.

Accordingly, the grievance is DENIED.

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

DATE: January 27, 2021

Joshua S. Fraenkel
Administrative Law Judge