THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

THOMAS HACKNEY,
Grievant,

v. **Docket No. 2020-0917-DOA**

GENERAL SERVICES DIVISION,
Respondent.

DECISION

Grievant, Thomas Hackney, is employed by Respondent, General Services Division. On February 14, 2020, Grievant filed this grievance against Respondent protesting his disciplinary suspension and seeking removal of the discipline and payment for lost wages. By order entered April 3, 2020, Grievant was permitted to amend his greivance to file directly to level three of the greivance procedure as permitted by W. VA. CODE § 6C-2-4(a)(4) and the matter was transferred to level three of the grievance process.

A level three hearing was held over two days on August 13, 2020 and December 29, 2020, before the undersigned at the Grievance Board's Charleston, West Virginia office via video conference. Grievant appeared personally and was represented by Gary DeLuke, Field Organizer, UE Local 170. Respondent appeared by Gregory Melton and William Barry and was represented by counsel, Mark S. Weiler, Assistant Attorney General. This matter became mature for decision on February 23, 2021, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law ("PFFCL").[1]

[1] PFFCL were to be submitted by January 29, 2021, but the timeframe to submit was extended at Grievant's request without objection by Respondent.

Synopsis

Grievant is employed by Respondent as a Groundskeeper. Grievant protested a three-day suspension received for a confrontation with a coworker. Respondent proved Grievant threatened and embarrassed a coworker in violation of policy and it was justified in suspending Grievant for three days for this misconduct. Grievant failed to prove mitigation of the penalty was warranted. Accordingly, the grievance is denied.

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

Findings of Fact

1. Grievant is employed by Respondent as a Groundskeeper.

2. In late 2019, Grievant began to believe that his co-worker, Eric Pardue, was following him and watching him work, which he found to be "bizarre" and considered stalking.

3. Mr. Pardue denies the allegation that he was following Grievant.

4. Grievant did not report his concerns to any member of management or file a grievance.

5. After several months, on January 14, 2020, Grievant confronted Mr. Pardue outside of the General Services office trailer on the Capitol Complex.

6. Grievant approached Mr. Pardue, yelling and putting his finger in Mr. Pardue's face calling him a "son of a bitch" and demanding to know why Mr. Pardue had been following Grievant. When Mr. Pardue denied that he had followed Grievant, Grievant continued to confront him, becoming more upset, and the confrontation became

more heated. Grievant called Mr. Pardue a "motherfucker" and said that he was going to "fuck [him] up."

7. Capitol Complex Ground Supervisor Carles Farley was working in his office in the trailer with both his office door and the trailer door open. Grievant was so loud that Mr. Farley could hear him from inside the trailer.

8. Mr. Pardue retreated into the trailer and sat in the break room with several other employees. After a few minutes, Grievant followed Mr. Pardue and stated something to the effect, "are you some kind of pervert? I'm not going to have a pervert following me."

9. Mr. Pardue was fearful for his safety and embarrassed by Grievant's actions.

10. Mr. Farley considered Grievant's threats to be serious and immediately reported the incident to his supervisor, Capitol Complex Grounds Manager, John C. Cummings, who directed Mr. Farley and Mr. Pardue to come to the main office for a meeting.

11. Director Gregory Melton, Deputy Director William Barry, and Mr. Cummings met with Mr. Farley and Mr. Pardue.

12. Director Melton was concerned by the threat of violence and referred the matter to the Division of Protective Services ("DPS").

13. DPS Director Jack Chambers opened an investigation, cancelled Grievant's access card, and assigned an officer to be present at the trailer the next morning to maintain safety and to conduct an investigation.

14. Officer Van Armstrong responded to the trailer the next morning and upon approaching Grievant, Grievant immediately stated that he knew why Officer Armstrong was there and that he had lost his temper and would not do so again. Officer Armstrong searched Grievant and his vehicle for weapons and found none.

15. Officer Armstrong met with Mr. Farley, Mr. Pardue, and Grievant together, saying that Grievant had apologized and said it would not happen again. Mr. Farley stated that the two would remain separated and they agreed to stay away from each other.

16. Director Chambers knew Grievant from their previous employment with the State Police. Director Chambers felt the allegations were out of character for Grievant and did not want Grievant to lose his job. Director Chambers interviewed Grievant himself and Grievant said that he "knew he messed up," apologized, and said it would not happen again. Grievant did not deny his misconduct or provide additional witnesses to be interviewed.

17. Officer Armstrong conducted the remainder of the investigation and concluded that Grievant had verbally assaulted Mr. Pardue but that the matter would be best addressed through administrative action rather than a criminal charge.

18. Mr. Barry also investigated the incident by collecting written signed statements from Mr. Farley, Mr. Pardue, and two other witnesses, Andrew "Drew" Mitchell and Matt Woodell.

19. Mr. Barry held a predetermination conference with Grievant. Grievant did not deny his misconduct or provide additional witnesses who could speak in his defense but Grievant downplayed the seriousness of the incident and denied threatening Mr. Pardue.

20. By letter dated February 7, 2020, Director Melton suspended Grievant for three days for "unprofessional and offensive behavior." Director Melton found that:

> [Grievant] approached Mr. Pardue, Groundskeeper, and verbally threatened physical bodily harm to him because you felt he was stalking you, which is something you have no tolerance for people doing. Your threat, as witnessed by your supervisor, Carles Farley, Supervisor 1, was when you arrived at the Grounds shop near the end of your shift, you pulled up in your mule (work vehicle), got out, ran towards Mr. Pardue and started yelling and threating him. Your words were along the lines of "why are you following me around MF'er?" When Mr. Pardue answered he wasn't, you shouted out "if I catch you out on the street I will F'k you up boy."

Director Melton found Grievant's behavior to violate the Division of Personnel's *Prohibited Workplace Harassment* and *Workplace Security* policies.

21. The Division of Personnel's *Workplace Security* policy states, in pertinent part in Section III.C.:

> Threatening or Assaultive Behavior: Threatening or assaultive behavior will not be tolerated and must be resolved immediately by managers/supervisors on a case-by-case basis. Any employee engaging in such behavior shall be subject to disciplinary action, up to and including dismissal. Any person (e.g., client, customer, vendor/independent contractor, visitor, etc.) who exhibits threatening, hostile, or abusive behavior, either physically or verbally, or who otherwise willfully interrupts or disrupts the orderly and peaceful process of any department, division, or agency of State government, may be denied services and may be subject to arrest and criminal prosecution. In determining whether an individual poses a threat or a danger, consideration must be given to the context in which a threat is made and to the following:
>
> - the perception that a threat is real;
> - the nature and severity of potential harm;
> - the likelihood that harm will occur;
> - the imminence of the potential harm;
> - the duration of risk; and/or,
> - the past behavior of an individual.

22. The Division of Personnel's *Prohibited Workplace Harassment* policy states, in pertinent part in Section III.G.:

> Nondiscriminatory Hostile Workplace Harassment consists of unreasonable or outrageous behavior that deliberately causes extreme physical and/or emotional distress. Such conduct involves the repeated unwelcome mistreatment of one or more employees often involving a combination of intimidation, humiliation, and sabotage of performance which may include, but is not limited to:
>
> 1. Unwarranted constant and destructive criticism;
> 2. Singling out and isolating, ignoring, ostracizing, etc.;
> 3. Persistently demeaning, patronizing, belittling, and ridiculing; and/or,
> 4. Threatening, shouting at, and humiliating particularly in front of others.

23. Grievant acknowledged his receipt and understanding of both policies by his signature.

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*.

As a preliminary matter, during the hearing, both parties objected to several evidentiary rulings. The parties' objections are preserved for the record. In making such rulings the undersigned was mindful of the role of the grievance process, which is to resolve grievances "in a fair, efficient, cost-effective and consistent manner" and that the

West Virginia Rules of Evidence do not apply. W.VA. CODE §§ 6C-2-1(b), -4(3). The parties disputed that the *West Virginia Rules of Evidence* are inapplicable. In determining that the *West Virginia Rules of Evidence* do not apply, the Grievance Board has discussed as follows:

> While the current grievance procedure statue only specifically states that formal rules of evidence do not apply in level one hearings, predecessor statutes stated that formal rules of evidence did not apply to any grievance proceeding. W. VA. CODE § 6C-2-4(a)(3) (2015); W. VA. CODE § 29-6A-6(e) (repealed 2007); W. Va. Code § 18-29-6 (repealed 2007). In discussing these predecessor statutes, the West Virginia Supreme Court of Appeals stated that they "indicate that formal rules of evidence do not apply to grievance hearings." *W. Va. Div. of Transp. v. Litten*, 231 W. Va. 217, 222 744 S.E.2d 327, 332 n.6 (2013) (*per curiam*). Grievance Board decisions under the current grievance procedure have consistently stated that formal rules of evidence do not apply to level three hearings. *Kennedy v. Dep't of Health and Human Res.,* Docket No. 2009-1443-DHHR (Mar. 11, 2010), *aff'd*, Circuit Court of Kanawha County, No. 10-AA-73 (Jun. 9, 2011); *Stump v. Div. of Veterans Affairs*, Docket No. 2011-0127-MAPS (Mar. 8, 2013); *Lunsford and Kelly v. Reg'l Jail and Corr. Facility Auth.*, Docket No. 2016-1368-CONS (Sept. 28, 2016); *Mucklow v. Div. of Juvenile Serv*., Docket No. 2017-0903-MAPS (March 9, 2017).

Perry v. Dep't of Health and Human Res., Docket No. 2017-1077-DHHR (Sept. 25, 2017), *aff'd*, Circuit Court of Kanawha County, No. 17-AA-84 (Aug. 10, 2018). In controlling the orderly presentation of evidence, a Grievance Board administrative law judge must make rulings regarding evidence, which can entail utilizing principles found in the formal rules of evidence. Such rulings are not an application of the *West Virginia Rules of Evidence* to the grievance procedure.

Respondent asserts Grievant yelled and cursed at Mr. Pardue, put his finger in his face, called him a pervert, and threatened him with physical harm. Grievant admits that

he loudly confronted Mr. Pardue and that he said Mr. Pardue was following him around "like a little pervert" but denies that he cursed at or threatened Mr. Pardue.

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).

Grievant's demeanor was appropriate. He was calm, polite, and answered questions without hesitation. He admitted to Officer Armstrong and others that he had lost his temper and that his actions were not appropriate. However, as to his denial that he threatened or insulted Mr. Pardue, it appears Grievant has downplayed his actions in the confrontation. Grievant's insistence that telling Mr. Pardue he was following Grievant around "like a little pervert" was not calling Mr. Pardue a pervert illustrates this downplaying. Even if Grievant said "like a little pervert" rather than "are you some kind of

pervert? I'm not going to have a pervert following me" the intent is the same: to insult and embarrass Mr. Pardue by saying that his behavior was perverted. Although it appears Grievant's actions on the day of the confrontation were out of character from his typical behavior, that does not excuse the behavior. Grievant's assertion that he approached Mr. Pardue calmly is not plausible given Grievant's admission that he believed Mr. Pardue had been stalking him for months. Grievant's allegation that Mr. Farley is lying because of a personal relationship with Mr. Pardue is not supported by credible evidence.

Mr. Pardue's demeanor was respectful and serious. His answers to questions were thorough and certain and his memory appeared very good. Mr. Pardue's testimony is corroborated by the credible testimony of Mr. Farley. There is no indication that Mr. Pardue's testimony was untruthful. Mr. Pardue's testimony was consistent with his prior written statement.

Mr. Farley's demeanor was calm and polite. He did not hesitate in his answers to questions and his memory of the events appears good. His testimony was consistent with his prior written statement and with the credible testimony of Mr. Pardue. Mr. Farley's explanation for how he could hear the confrontation was plausible given the description of the location and that the doors were open.

Zach Paxton's demeanor was appropriate but he appeared to have little memory of the events. Although he testified that he did not remember what was specifically said he thought it was an "overreaction." He testified he "didn't recall" Grievant threatening Mr. Pardue but that Grievant was upset and loud.

Chuck Long's demeanor was poor. He repeatedly interrupted both Respondent's counsel and the undersigned. Mr. Long did not witness the confrontation. Mr. Long appeared to be motivated in his testimony by a dislike of Mr. Pardue and Mr. Farley. Mr. Long's allegation that Mr. Farley and Mr. Pardue were "tight" because Mr. Farley frequently helped Mr. Pardue and not others is not sufficient to establish that Mr. Farley would be motivated to lie on Mr. Pardue's behalf.

The credible testimony of Mr. Farley and Mr. Pardue is sufficient to prove it is more likely than not that Grievant cursed at and threatened Mr. Pardue and accused Mr. Pardue of perverted behavior. Mr. Pardue was made afraid and embarrassed by Grievant's behavior. Grievant's misconduct clearly violated the *Workplace Security* policy.[2] Further, even if Grievant had not threatened or cursed at Mr. Pardue, the misconduct to which Grievant admitted – that he lost his temper, raised his voice, and said Mr. Pardue was following him around "like a little pervert" – would be sufficient to sustain a three-day suspension.

Grievant asserts that a three-day suspension is too harsh a 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

[2] It is unclear if Grievant's misconduct also violated the *Prohibited Workplace Harassment* policy, which states, "Harassment consists of unreasonable or outrageous behavior that deliberately causes extreme physical and/or emotional distress. Such conduct involves the *repeated* unwelcome mistreatment . . ." (emphasis added). Although Grievant's misconduct was unreasonable and deliberately caused emotional distress, Grievant's misconduct was limited to one incident and not repeated as the policy appears to require. As Grievant clearly violated the *Workplace Security* policy, which is more than sufficient to sustain his suspension, it is not necessary to determine if Grievant's misconduct also violated the *Prohibited Workplace Harassment* policy.

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).

The three-day suspension was not an abuse of discretion or disproportionate to Grievant's offense. Although Grievant is a good employee with no prior record of

discipline, Director Melton already took that into account in levying a three-day suspension when Grievant's misconduct would ordinarily warrant more severe discipline. Although Grievant apologized for his misconduct, he continues to downplay its severity, which further warrants deference to Director Melton's determination of the penalty. Grievant was clearly notified of the prohibition of his behavior by the policies which he had acknowledged. Grievant presented no evidence that he was treated differently than any other employee. Mitigation is not warranted.

The following Conclusions of Law support the decision reached.

Conclusions of Law

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

2. Respondent proved Grievant threatened and embarrassed a coworker in violation of policy and it was justified in suspending Grievant for three days for this misconduct.

3. "[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).

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. "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).

6. Grievant failed to prove mitigation of the penalty was 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 2, 2021

_____

Billie Thacker Catlett
Chief Administrative Law Judge