THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

EDWIN KENT HOLLEY,
Grievant,

v. **Docket No. 2021-0249-MU**

MARSHALL UNIVERSITY,
Respondent.

DECISION

Grievant, Edwin Kent Holley, is employed as a Supervisor of Moves by Respondent, Marshall University. After being suspended for three days without pay, Grievant filed directly to level three of the grievance process on August 11, 2020.[1] The grievance states:

> Grievant received notice of disciplinary action on August 4, 2020 and began a three-day suspension on August 5. Grievant asserts the action was unwarranted and not based on facts. Grievant further asserts reprisal and harassment by administrators and actions creating a hostile and offensive work environment.
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> Grievant seeks for the disciplinary action to be rescinded and expunged from his records; to be made whole with all applicable back pay and benefits; for all retaliation and/or reprisal to cease; for any and all harassment to cease; to be treated in a professional and unbiased manner; and any other relief the grievance evaluator deems appropriate.

ALJ William McGinley presided over a level three hearing on June 2, 2021.[2] Grievant appeared and was represented by Christine Barr, a Staff Representative with AFT-West Virginia/AFL-CIO. Respondent was represented by Gretchen Murphy,

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[1]West Virginia Code § 6C-2-4(a)(4) permits a grievant to proceed directly to level three of the grievance process when suspended without pay.
[2]A level three hearing scheduled for January 11, 2021, was continued after Respondent's counsel withdrew.

Assistant Attorney General. This matter matured for a decision on July 12, 2021, when the parties submitted written Proposed Findings of Fact and Conclusions of Law (PFFCL). This matter has been transferred to ALJ Joshua Fraenkel for administrative reasons.

Synopsis

Grievant is employed as a Supervisor of Moves by Respondent, Marshall University. Respondent suspended Grievant for ignoring orders to retrieve lumber, for yelling at his supervisor, and for leaving work without notice/authorization. Grievant contends he was never directed to personally transport lumber, did not yell, and gave notice of FMLA leave. Grievant claims Respondent denied him due process by failing to interview his witnesses. He asserts retaliation for his prior grievances, and harassment. Grievant contends that a coworker who took FMLA leave without permission was not disciplined. Respondent did not prove that Grievant was required to get permission before using FMLA leave, that he failed to give notice, or that he yelled at his supervisor. Respondent proved that insubordination and prior discipline justified Grievant's suspension. Grievant did not prove reprisal, harassment, discrimination, or lack of due process. Accordingly, this grievance is DENIED.

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

Findings of Fact

1. Grievant is employed by Respondent, Marshall University (Marshall), as a Supervisor of Moves. He has been at Marshall for 34 years and supervises two movers.

2. Ronnie Hicks had been at Marshall for 42 years,[3] and was a Campus Manager and Grievant's direct supervisor.

3. Paul Carico, Associate Director of the Physical Plant, was Mr. Hicks' supervisor.

4. On July 1, 2020, Grievant was the only mover on campus and had nothing scheduled that day. (Mr. Hicks' and Mr. Carico's testimony)

5. On July 1, 2020, at 8:15 a.m., Physical Plant administrators held their daily logistics meeting. Bill Black, Renovation Alteration Support Manager, attended and requested help in transporting lumber from Lowes. (Mr. Hicks' and Mr. Carico's testimony)

6. Mr. Black requested to either receive keys for the flatbed truck or be met at Lowes with the truck. (Mr. Black's testimony)

7. Mr. Hicks checked Grievant's schedule and determined he was not scheduled for any moves that day. Work had generally been light for the movers due to the COVID-19 pandemic. (Mr. Hicks' testimony)

8. Mike Farley is a Certified Supervisor for the Grounds Department at Marshall and has served at Marshall for 29 years.

9. Before 9:00 a.m. on July 1, 2020, Mr. Hicks phoned Grievant as Grievant rode with Mr. Farley from the gas station. Grievant answered on speaker phone. Mr. Farley overheard the conversation. (Grievant's and Mr. Farley's testimony)

10. Mr. Hicks instructed Grievant to meet Mr. Black at Lowes with a flatbed truck and transport lumber back to campus after Mr. Black paid for it. Mr. Hicks issued this

[3]Mr. Hicks is now retired.

directive because Grievant was not only free, but Mr. Black was overwhelmed that day and would be going from Lowes to another site. (Mr. Hicks' testimony)

11. Grievant called Mr. Black. Mr. Black told Grievant he either needed the keys to the truck or for someone to meet him at Lowes with the truck. Grievant told Mr. Black to take the keys because he was shorthanded. (Mr. Black's testimony)

12. Mr. Hicks called Mr. Black to see if Grievant had called to set up their meeting at Lowes. Mr. Black said he received the keys. Mr. Hicks told Mr. Black that Grievant was supposed to meet him at Lowes with the truck. (Mr. Hicks' testimony)

13. Mr. Hicks called Grievant and asked why he had transferred the assignment to Mr. Black instead of heeding instructions to retrieve the lumber. Grievant replied that it does not work that way,[4] that Grievant took care of it, and that Mr. Black had a drivers' license so could drive the truck.

14. Mr. Hicks called his supervisor, Mr. Carico, for guidance on what he perceived to be Grievant's flagrant disregard of his order. Mr. Carico asked Mr. Hicks if he specifically told Grievant to drive the truck. Mr. Hicks affirmed he had. Mr. Carico advised Mr. Hicks to have a face-to-face meeting with Grievant to determine if the problem was miscommunication or refusal to obey. Mr. Carico cautioned Mr. Hicks to not escalate but to walk away if Grievant became agitated.

15. At 9:00 a.m., Grievant clocked out using TCP software and called dispatch to report he was leaving because he was not feeling well. The TCP software sends an email and text to managers when employees submit a leave request or clock out. Mr. Hicks viewed the text generated by TCP software.

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[4]Grievant contends his job description is to delegate duties. (Grievant's Exhibit 3)

16. In conjunction with the directive from Mr. Carico, Mr. Hicks went to Grievant's office and, as Grievant was leaving, asked if he was refusing to follow instructions. Grievant said no but explained, "that's not the way it works around here; you can't boss me around."

17. Mr. Hicks and Grievant continued their interaction as they left Grievant's office. Grievant was not as loud as Mr. Hicks. Grievant told Mr. Hicks he was not feeling well so was going home. (Testimony of Chris Kennedy, 30-year landscaping employee)

18. Mr. Hicks could not disapprove Grievant's request for sick leave because Grievant logged it as FMLA leave. (Mr. Hicks' testimony)

19. That same morning, Mr. Farley left work early on FMLA leave after notifying supervisor Hicks. Mr. Farley was not disciplined.

20. Mr. Hicks contacted Mr. Carico to inform him of his meeting with Grievant. Mr. Hicks did not provide a written statement. Mr. Carico did not interview either Grievant, Mr. Black, or Mr. Farley. Mr. Carico contacted both Director Travis Bailey, his supervisor, and HR Director Bruce Felder.

21. On August 19, 2020, months prior to this incident, Grievant had disregarded orders and lost his temper with Mr. Carico. Whereupon, Mr. Carico issued him an oral warning through his Performance Counseling on September 10, 2019. (Mr. Carico's testimony)

22. In September 2019, Grievant grieved the discipline. (Grievant's testimony)

23. On July 8, 2020, in consideration of this prior oral warning and the incident on July 1, 2020, Respondent recommended a three-day suspension in a Performance Counseling Statement and Addendum. This read, in part:

On July 1, 2020, Ronnie Hicks ... called Kent Holley ... and asked that he meet Bill Black ... at the local Lowes with the flatbed truck to pick up materials. A few minutes later, Bill informed Ronnie that Kent had called and advised Bill that he could have the keys to the truck and that Bill could drive the truck and subsequently provided him with the location of the keys. Ronnie then called Kent and asked why he did not do as he was asked ... and Kent responded, "it got taken care of" and that Bill had a driver's license and could drive himself. Ronnie stated that he specifically asked Kent to drive the truck and Kent responded, "that is not how it works". After speaking with me, Ronnie then had a face to face discussion with Kent to understand if he was refusing to do as he was asked to ensure the issue was not a communication issue. When Ronnie asked Kent if he was refusing, Kent said "No" and again stated that the task got taken care of. Ronnie responded yes, however that is not what I specifically asked you to do. I specifically asked you to drive the truck. Kent then visibly became agitated, tossed the papers in his hand down on a desk and turned to face Ronnie in an obvious agitated state. Kent proceeded to make statements to the effect of "you can't boss me around like that", and "that's not how this works", all the while showing increasing signs of anger in his voice and body language. ... Kent followed Ronnie for several steps continuing to banter. A few minutes later Kent punched out on the timeclock and left his workstation without obtaining prior approval from his supervisor.

Leaving the workplace without notification is conduct unbecoming of a Supervisor and gross insubordination is grounds for immediate suspension or dismissal.

Mr. Holley had a similar instance of being confrontational to the point of anger less than 12 months ago, which resulted in Mr. Holley receiving a documented Oral Warning for conduct unbecoming of a Supervisor ...

This incident combined with the Oral Warning which was issued within the past year indicates Mr. Holley's behavior is not improving.

As a result, Mr. Holley is being issued a 3-Day unpaid suspension. ...

> The behavior of Mr. Kent Holley continues to be conduct unbecoming of a Supervisor. As a Supervisor:
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> - Mr. Holley is not to be insubordinate with his Manager/Supervisor.
> - Mr. Holley should never be confrontational or elevate his voice in anger. Discussions are to be handled in a civil and professional manner.
> - Mr. Holley is expected to notify his supervisor prior to leaving the worksite unless it is a medical emergency per Physical Plant Standard Operating Procedure PP-MU-02.07 ...

(Respondent's Exhibit 1)

24. Marshall University Board of Governors Policy No. HR-10, effective June 25, 2020, reads, in relevant part, as follows:

> 2.5.2 – Gross insubordination, including willful and flagrant disregard of a legitimate order, threatening or striking a supervisor;
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> 2.5.6 – Deliberate falsification of employment application, or other University records such as timecards, medical records, or any other dishonest acts committed for personal gain or for malicious intent;
>
> 2.5.8 – Obstruction or disruption of teaching, research, or administration;

(Respondent's Exhibit 3)

25. Respondent's Leaving the Worksite Policy for the Physical Plant, also known as Physical Plant Standard Operating Procedure MU-PP-02.07, was revised on July 1, 2020. The revision states, in pertinent part, as follows:

> It is necessary for employees at times to leave their worksite for sickness or personal emergencies .... It is also important that supervisors have prior notice when their employees need to leave the worksite.... *Employees are not to leave their assigned worksite without authorization from their supervisor* .... Employees needing to leave work for their remaining scheduled shift must notify their supervisor prior to leaving.

> The employee is to fill out the required leave request and clock themselves out of the timeclock system. (emphasis added)

(Respondent Exhibit 1)

26. No evidence was presented as to the content of the Leaving the Worksite Policy before its July 1, 2020 revision or that Grievant was aware of the revision when he took FMLA leave on July 1, 2020.

27. On July 13, 2020, Grievant submitted his written response to the Performance Counseling Statement and attended a pre-suspension hearing by phone. Grievant's response stated, in part:

> Ronnie [Hicks] called back. Ronnie started talking about Bill [Black]. I interjected, "I already called Bill and gave him the key." Ronnie raised his voice stating I told you to do it. I replied, "It's taken care of[.]" Ronnie interjected, "I told you to do it!" I replied, "It doesn't work like that! (*My current job description is to delegate duties)* Bill Black did not ask or infer that a driver was needed.

(Grievant's Exhibit 3)

28. By letter dated August 4, 2020, Respondent notified Grievant of his three-day suspension. (Respondent's Exhibit 2)

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.*

Marshall suspended Grievant for ignoring an order from his supervisor, Mr. Hicks, to personally retrieve lumber from Lowes, for yelling at him, and for leaving work without notice/authorization. Grievant contends he was never directed to personally transport lumber, got the job done, did not yell, and told his supervisor he was taking FMLA leave. Grievant contends that a coworker who took FMLA leave without permission was not disciplined, implying discrimination. Grievant claims Respondent denied him due process by failing to interview witnesses and disciplined him in retaliation for his prior grievances. He alleges his supervisor yelled at him and that this constitutes harassment and hostile work environment.

Respondent contends that Grievant violated the following policies. Marshall University Board of Governors Policy No HR-10, effective June 25, 2020, reads, in pertinent part:

> 2.5.2 – Gross insubordination, including willful and flagrant disregard of a legitimate order, threatening or striking a supervisor;
>
> 2.5.6 – Deliberate falsification of employment application, or other University records such as timecards, medical records, or any other dishonest acts committed for personal gain or for malicious intent;
>
> 2.5.8 – Obstruction or disruption of teaching, research, or administration;

The July 1, 2020 revision to Respondent's Leaving the Worksite Policy for the Physical Plant, also known as Physical Plant Standard Operating Procedure MU-PP-02.07, reads, in relevant part:

> It is necessary for employees at times to leave their worksite for sickness or personal emergencies .... It is also important that supervisors have prior notice when their employees need to leave the worksite.... *Employees are not to leave their*

> *assigned worksite without authorization from their supervisor* .... Employees needing to leave work for their remaining scheduled shift must notify their supervisor prior to leaving. The employee is to fill out the required leave request and clock themselves out of the timeclock system. (emphasis added)

The primary basis for the suspension was insubordination. "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). The Grievance Board has further recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988), aff'd, *Sexton v. Marshall Univ.*, 182 W. Va. 294, 387 S.E.2d 529 (1989). Thus, insubordination includes arguing with or yelling at one's supervisor.

Respondent alleges that Grievant ignored orders to pick up lumber at Lowes and yelled at his supervisor. These are relevant to the charge of insubordination. Grievant contends he was not ordered to personally drive to Lowes and never yelled at Mr. Hicks. Mr. Hicks testified that he specifically directed Grievant to transport lumber from Lowes to campus and that Grievant yelled at him when asked why he had not followed orders. Grievant and Mr. Farley testified that Mr. Hicks did not tell Grievant to retrieve lumber. Grievant, Mr. Farley, and Mr. Kennedy testified that Grievant did not yell at Mr. Hicks. Thus, a credibility assessment is required.[5] Not every credibility factor is necessarily

[5]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.

relevant to every credibility assessment. In this situation, the relevant factors are motive, ability to perceive, consistency, and plausibility.

There were three conversations between Grievant and supervisor Hicks that are at issue. Mr. Farley supported Grievant in testifying that Mr. Hicks did not tell Grievant to pick up the lumber, only that he would get back to Grievant, and that when Mr. Hicks called back, he yelled at Grievant. Mr. Kennedy testified that he heard Mr. Hicks speaking more loudly than Grievant. While the numbers favor Grievant, a substantive analysis reveals anomalies. For instance, while he appears unbiased, Mr. Kennedy only overhead the third conversation between Mr. Hicks and Grievant and did so in passing. The essence of Mr. Kennedy's testimony was that he heard Mr. Hicks talking more loudly than Grievant and that Grievant was not yelling. Further, even though Mr. Farley testified that Mr. Hicks raised his voice and did not tell Grievant to pick up the lumber, Grievant partially nullified the benefit of this testimony through his written response to the Performance Counseling Statement. Grievant wrote, in part:

> Ronnie [Hicks] called back. Ronnie started talking about Bill. I interjected, "I already called Bill and gave him the key." Ronnie raised his voice stating I told you to do it. I replied, "It's taken care of[.]" Ronnie interjected, "I told you to do it!" I replied, "It doesn't work like that! (*My current job description*

30, 1996); *Young v. Div. of Natural Res.*, Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEM PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

is to delegate duties) Bill Black did not ask or infer that a driver was needed.

In his written rendition, Grievant did not dispute that Mr. Hicks told him to retrieve the lumber. Rather, he tacitly accepted Mr. Hicks' version in recounting that he replied, "It doesn't work like that!"[6] Grievant revealed his motive for defying Mr. Hicks' directive in his explanation that "[m]y current job description is to delegate duties" and that Black did not ask for a driver. In his zeal to show that Mr. Hicks had overstepped his authority and violated protocol, Grievant implicitly acknowledged that Mr. Hicks asked him to retrieve the lumber and that his refusal was willful. "It's taken care of," he reasoned. It is interesting that Grievant now argues that Mr. Hicks did not tell him to personally retrieve the lumber, implying that Mr. Hicks at least told him to take care of (i.e., arrange) its transportation. This is not consistent with the testimony he and Mr. Farley gave. This was that Mr. Hicks did not issue Grievant a directive but said he would get back to Grievant, presumably with a directive.

Even though he only observed in passing, Mr. Kennedy credibly testified that Mr. Hicks was louder than Grievant. Unlike Mr. Farley, Mr. Kennedy did not appear to be close with Grievant. Further, his testimony as to Mr. Hicks' disposition provides a plausible reaction by Mr. Hicks to his realization that Grievant had willfully disobeyed him. Mr. Hicks' heated reaction, while less than ideal, lends credence to his testimony that he told Grievant to transport the lumber. Thus, while Respondent proved that Grievant

[6]It is interesting that Grievant inserted an exclamation point behind both Hicks' statement, "I told you to do it!" and his own response, "It doesn't work like that!", implying that they were yelling at each other.

disobeyed Mr. Hicks' directive to transport lumber, it did not prove by a preponderance of evidence that Grievant was louder than or yelled at by Mr. Hicks.

Regarding the allegation that Grievant failed to notify and obtain authorization from his supervisor in using FMLA leave, Grievant argues that he was not aware of the revised Leaving the Worksite Policy requiring notice to and permission from his supervisor before exercising leave. Grievant testified that he clocked out using TCP software and called dispatch to report he was leaving because he was not feeling well. Mr. Hicks acknowledged he received a notification text triggered by the TCP software. Further, Mr. Kennedy credibly testified that he overheard Grievant tell Mr. Hicks that he was leaving because he was not feeling well. Respondent did not show that Grievant was aware of the revision to the Leaving the Worksite Policy that took effect on July 1, 2020, the same day he took FMLA leave. Nor did Respondent present evidence regarding the pre-revision content of the policy. Thus, Respondent failed to prove Grievant violated policy in not obtaining authorization from his supervisor and did not prove that Grievant failed to notify his supervisor.

Nevertheless, Respondent justified its suspension of Grievant. "Respondent has discretion to take disciplinary actions, but those actions must be reasonable and not arbitrary and capricious." *McDaniel v. Div. of Highways*, Docket No. 2017-1404-CONS (June 30, 2017). "Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view." *Hazelwood v. General Services Div.*, Docket No. 2017-2495-CONS (January 19, 2019).

"Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable." *State ex rel. Eads v. Duncil*, 196 W.Va. 604, 474 S.E.2d 534 (1996). "An action is recognized as arbitrary and capricious when 'it is unreasonable, without consideration, and in disregard of the facts and circumstances of the case.'" *Id.* (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982). "'[T]he "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), aff'd Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), aff'd Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), appeal refused, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

The fact that Grievant willfully disobeyed a directive to retrieve lumber was sufficient to justify his three-day suspension, considering his prior oral reprimand and role as a supervisor. As a supervisor, Grievant could be held to higher standard. Supervisors "may be held to a higher standard of conduct, because [they are] properly expected to set an example for employees under their supervision, and to enforce the employer's proper rules and regulations, as well as implement the directives of [their] supervisors."

Wiley v. Div. of Natural Res., Docket No. 96-DNR-515 (Mar. 26, 1988); *Linger v. Dep't of Health & Human Res.*, Docket No. 2010-1490-CONS (Dec. 5. 2012).

Further, Grievant's implied justification for refusing to follow orders must be rejected even if valid. "'Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions.' *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. *See Day v. Morgan Co. Health Dep't*, Docket No. 07-CHD-121 (Dec. 14, 2007)." *Graham v. Wetzel County Bd. of Educ.*, Docket No. 2013-0014-WetED (Feb. 15, 2013), *aff'd, Graham v. Bd. of Educ. of Wetzel Cty.*, No. 13-0975, (W. Va. Sup. Ct., Apr. 28, 2014) (*memorandum decision).* Thus, Respondent proved by a preponderance of evidence that its suspension of Grievant was not unreasonable.

Grievant alleges that his suspension was in retaliation for his prior grievances. "No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination." W. VA. CODE § 6C-2-3(h). Reprisal is defined as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." W. VA. CODE § 6C-2-2(o).

To demonstrate a prima facie case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

> (1) That he engaged in protected activity;
> (2) That he was subsequently treated in an adverse manner by the employer or an agent;
> (3) That the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and,
> (4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

See Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994).

Grievant filed a grievance challenging his oral warning less than a year prior to being suspended. "The filing of grievances ... is a protected activity." *Poore v. W. Va. Dep't of Health and Human Resources/Bureau for Children and Families*, Docket No. 2010-0448-DHHR (Feb. 11, 2011). His subsequent suspension qualifies as adverse treatment by his employer. Mr. Carico was involved as Respondent's agent in issuing the oral warning so likely would have known about the grievance thereof. Thus, an inference of retaliatory motive arises. "[T]he critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a 'significant,' 'substantial' or 'motivating' factor in the adverse personnel action." *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994). An inference can be drawn that Respondent's actions were the result of a retaliatory motive if the adverse action occurred within a short time period of the protected activity. *See Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); *Warner v. Dep't of Health & Human Res.*, Docket No. 2012-0986-DHHR (Oct. 21, 2013). Ten months between the grievance and subsequent

suspension is a sufficiently short period to infer that Respondent's actions were the result of a retaliatory motive.

"An employer may rebut the presumption of retaliatory action by offering 'credible evidence of legitimate nondiscriminatory reasons for its actions . . . .' *Mace v. Pizza Hut, Inc.*, 180 W.Va. 469, 377 S.E.2d 461, 464 (1988); *see also Shepherdstown Volunteer Fire Department v. State ex rel. West Virginia Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983). Respondent offered sufficient evidence of Grievant's insubordination, role as a supervisor, and prior oral warning to justify the three-day suspension.

Should the employer succeed in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful discrimination. *Mace*, 377 S.E.2d 461 at 464." *W. Va. Dep't of Nat. Res. v. Myers*, 191 W. Va. 72, 76, 443 S.E.2d 229, 233 (1994); *Conner v. Barbour Cty. Bd. of Educ.*, 200 W. Va. 405, 409, 489 S.E.2d 787 (1997). Grievant did not prove by a preponderance of evidence that the reasons provided for his suspension were pretextual. While Respondent only proved one of the three incidents, that Grievant blatantly ignored a directive from his supervisor, this was sufficient to justify a three-day suspension, considering Grievant's supervisory position and prior discipline.

As the remaining claims do not directly challenge his discipline, Grievant has the burden of proving them by a preponderance of evidence. Grievant claims he was denied due process when Respondent investigated without interviewing key witness such as himself, Mr. Farley, and Mr. Kennedy. "'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. Grievant did not allege, let alone prove by a preponderance of evidence, that any of these due process requirements were violated.

Grievant further contends that Respondent's administrators harassed him and caused a hostile work environment. As evidence, he cites his suspension, and that Mr. Hicks raised his voice at him. "'Harassment' means repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." W. VA. CODE § 6C-2-2(l). "What constitutes harassment varies based upon the factual situation in each individual grievance." *Sellers v. Wetzel County Bd. of Educ.*, Docket No. 97-52-183 (Sept. 30, 1997). This Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment. *Beverly v. Div. of Highways*, Docket No. 2014-0461-DOT (Aug. 19, 2014), aff'd, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-95 (Mar. 31, 2015); *Vance v. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2011-1705-MAPS (Feb. 22, 2012), aff'd, Kanawha Cnty. Cir. Ct. Docket No. 12-AA-32 (Jul. 5, 2012); *Rogers v. Reg'l Jail & Corr. Facility Auth.*,

Docket No. 2009-0685-MAPS (Apr. 23, 2009), aff'd, Kanawha Cnty. Cir. Ct. Docket No. 09-AA-92 (Dec. 8, 2010).

The point at which a work environment becomes hostile or abusive does not depend on any "mathematically precise test." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22, (1993). Instead, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, 'considering all the circumstances.'" *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (*citing Harris*, 510 U.S. at 23). These circumstances "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance" but "no single factor is required." *Harris*, 510 U.S. at 23. "To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment. *See Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998) (*per curiam*). "As a general rule 'more than a few isolated incidents are required' to meet the pervasive requirement of proof for a hostile work environment case. *Kimzey v. Wal-Mart Stores, Inc.,* 107 F.3d 568, 573 (8th Cir. 1997)." *Fairmont Specialty Servs. v. W. Va. Human Rights Comm'n*, 206 W. Va. 86, 96, 522 S.E.2d 180, 190 n.9 (1999).

While Grievant presented credible testimony from Mr. Kennedy that Mr. Hicks raised his voice at Grievant, this represented one incidence and was not severe. As for the suspension, it was a single event based on the Performance Counseling Statement and Addendum of July 8, 2020, citing multiple infractions. These alleged infractions were that Grievant left work in violation of Leaving the Worksite Policy and that he engaged in

insubordination by disobeying his supervisor and yelling at him. While Respondent only proved one of these three allegations, Grievant was not able to prove by a preponderance of evidence that the unproven allegations were not true. He thus failed to prove harassment or hostile work environment by a preponderance of evidence.

Grievant contends that Respondent discriminated against him when it disciplined him for violating its Leaving the Worksite Policy because a coworker, Mr. Farley, did the same without repercussion. "'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).

Respondent does not dispute that minutes before Grievant left work without authorization from his supervisor, Mr. Farley also took FMLA leave without authorization from his supervisor and was not reprimanded. Mr. Farley and Grievant are similarly-situated in that both are employed in a supervisory capacity, each is supervised by Mr. Hicks, each failed to obtain authorization from Mr. Hicks before leaving, and each notified Mr. Hicks that they were using FMLA leave. Yet, the apparent difference in treatment is

a mirage. While the revised Leaving the Worksite Policy mentions the authorization requirement, Grievant's Performance Counseling Statement only indicates that Grievant violated the Leaving the Worksite Policy by failing to notify his supervisor rather than by failing to obtain authorization. Conversely, Respondent never disputed that Mr. Farley notified his supervisor. Even though Grievant proved he notified his supervisor, this is not germane to whether Respondent treated Grievant differently from Mr. Farley. Because Respondent disputed that Grievant notified his supervisor, Respondent did not treat Grievant differently in punishing him, and not Mr. Farley, for failing to notify his supervisor. Grievant failed to prove discrimination by a preponderance of evidence.

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. "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). The Grievance Board has further recognized that insubordination

"encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988), aff'd, *Sexton v. Marshall Univ.*, 182 W. Va. 294, 387 S.E.2d 529 (1989).

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

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

5. Respondent did not prove by a preponderance of evidence that Grievant failed to notify his supervisor he was taking FMLA leave, that his failure to get approval from his supervisor for use of FMLA leave violated its pre-revision Leaving the Worksite Policy, that its revised Leaving the Worksite Policy was enforceable against Grievant on July 1, 2020, or that Grievant yelled at his supervisor. However, Respondent did prove

by a preponderance of evidence that Grievant ignored an order from his supervisor to personally retrieve lumber and that his suspension was justified.

6. To demonstrate a prima facie case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

> (1) That he engaged in protected activity;
> (2) That he was subsequently treated in an adverse manner by the employer or an agent;
> (3) That the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and,
> (4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

See Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994).

7. "An employer may rebut the presumption of retaliatory action by offering 'credible evidence of legitimate nondiscriminatory reasons for its actions . . . .' *Mace v. Pizza Hut, Inc.*, 180 W.Va. 469, 377 S.E.2d 461, 464 (1988); *see also Shepherdstown Volunteer Fire Department v. State ex rel. West Virginia Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983). Should the employer succeed in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful discrimination. *Mace*, 377 S.E.2d 461 at 464." *W. Va. Dep't of Nat. Res. v. Myers*, 191 W. Va. 72, 76, 443 S.E.2d 229, 233 (1994); *Conner v. Barbour Cty. Bd. of Educ.*, 200 W. Va. 405, 409, 489 S.E.2d 787 (1997).

8. Grievant did not prove by a preponderance of evidence that his suspension was retaliatory.

9. "'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.

10. Grievant did not prove by a preponderance of evidence that Respondent's failure to interview key witnesses was a denial of due process.

11. "'Harassment' means repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." W. VA. CODE § 6C-2-2(l). "What constitutes harassment varies based upon the factual situation in each individual grievance." *Sellers v. Wetzel County Bd. of Educ.*, Docket No. 97-52-183 (Sept. 30, 1997).

12. The point at which a work environment becomes hostile or abusive does not depend on any "mathematically precise test." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22, (1993). Instead, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, 'considering all the circumstances.'" *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (citing Harris, 510 U.S. at 23). These circumstances "may include the frequency of the

discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance" but "no single factor is required." *Harris*, 510 U.S. at 23. "To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment. *See Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998) (*per curiam*). "As a general rule 'more than a few isolated incidents are required' to meet the pervasive requirement of proof for a hostile work environment case. *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 573 (8th Cir. 1997)." *Fairmont Specialty Servs. v. W. Va. Human Rights Comm'n*, 206 W. Va. 86, 96, 522 S.E.2d 180, 190 n.9 (1999).

11. Grievant did not prove harassment or hostile work environment by a preponderance of evidence.

12. In order to establish a discrimination or favoritism claim asserted under the grievance statutes, 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'n*, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

13. Grievant did not prove by a preponderance of evidence that Respondent discriminated against him.

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: August 10, 2021

Joshua S. Fraenkel
Administrative Law Judge