

# **WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**MARK SHUFF,**  
**Grievant,**

**v.**

**Docket No. 2020-1565-CONS**

**WEST VIRGINIA STATE UNIVERSITY,**  
**Respondent.**

## **DECISION**

Mark Shuff, Grievant, filed this consolidated grievance against his employer, West Virginia State University, Respondent. This consolidated grievance protests Grievant's suspension and subsequent termination of employment. The original grievance (2020-1131-WVSU) was filed on March 30, 2020, and the grievance statement provides:

On March 30, 2020, Mark Shuff was wrongly suspended from employment, with pay, and accused of "gross misconduct." At no time in his 30 years of employment at WVSU has Mr. Shuff committed gross misconduct. Mr. Shuff inquired to his supervisor about personal protective equipment and work duties in light of Covid-19 and was wrongly accused of "gross misconduct." Mr. Shuff's supervisor Dayton Wilson fosters a hostile work environment & wrongful action being taken against Mr. Shuff due to his prior support of a prior grievance.

Thereafter on or about April 9, 2020, a second grievance (2020-1409-WVSU) was filed protesting the termination of Grievant's employment. The relevant relief request sought:

Full reinstatement, at same rate of pay and benefits, to position of Trade Specialist-Lead and all awardable back pay, front pay and related benefits and damages, as sought in the attached statement of Grievances, and an award of all other damages, including attorney fee.<sup>1</sup> Also, removal of any "gross misconduct" allegations.

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<sup>1</sup> WEST VIRGINIA CODE § 6C-2-6 (2018) is entitled, "Allocation of expenses and attorney's fees. It specifically states: (a) Any expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expense. It is well established that the Grievance Board does not have the authority to award attorney fees. *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June 21, 1996); *Cosner v. Dep't of Transp.*, Docket No. 2008-0633-DOT (Dec. 23, 2008) also see *Long v. Kanawha County*

Grievant filed a separate grievance for each action which are consolidated in the instant matter. The two grievances were consolidated by Order dated October 26, 2020.

As authorized by W. VA. CODE § 6C-2-4(a)(4), this grievance was filed directly to level three of the grievance process. A level three hearing was held via a video conference platform before the undersigned Administrative Law Judge on September 1, 2020 and October 27, 2020, at the Grievance Board's Charleston office. Grievant appeared and was represented by Miles B. Berger, Esq. of Romano & Associates, PLLC. Respondent was represented by Mary Sizemore, and by its counsel, Dawn E. George, Assistant Attorney General. At the conclusion of the level three hearing, the parties were invited to submit written proposed fact/law proposals. Both parties submitted Proposed Findings of Fact and Conclusions of Law, and this matter became mature for decision on or about December 28, 2020, on receipt of the last of these proposals.

### **Synopsis**

Grievant was employed with Respondent, West Virginia State University (WVSU), in a position recognized as an essential worker. During the time period of relevant events, the area was experiencing the onset of Covid-19. Grievant had misgivings regarding his employer's position that he and other co-workers were required to report and perform assigned duties. After not reporting to work for three days, Grievant confronted management regarding personal protection equipment and the necessity of attendance. After the confrontation, Grievant and several co-workers abandoned their

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*Bd. of Educ.*, Docket No. 00-20-308 (Mar. 29, 2001). Thus, this issue will not be addressed further in this decision.

respective job duties. Respondent maintains that Grievant's actions merit disciplinary action in that Grievant engaged in conduct which constitutes "gross misconduct" in accordance with applicable rules and regulations. Grievant disputes Respondent's determination and the sanction levied.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

### **Findings of Fact**

1. Grievant was employed as a Trade Specialist – Lead for Respondent, in the Office of Physical Facilities, beginning his position as a Trade Specialist – Lead on July 1, 2011.

2. Grievant was hired by Respondent in May, 1991 as a "General Maintenance Worker" and was employed by Respondent from the time of his hire in 1991 through the date of his termination (April 9, 2020), having been promoted on numerous occasions through the nearly three decades of his employment, from his initial position of General Maintenance Worker to Trade Specialist – Lead.

3. As a Trade Specialist Lead, Grievant was expected to perform plumbing, electrical, concrete, welding, roofing, carpentry, equipment operation, locksmith, and supervisory duties in the absence of the Supervisor/Trades Worker. *R Ex 22*

4. Grievant and several other Physical Facilities employees are designated as essential employees. Pursuant to Board of Governors Policy No. 64 essential employees are those "...required to report for duty in emergencies or other special situations as identified by the President or his/her designee." *R Ex 4, Section 2.3, p. 2.*

5. In accordance with Board of Governors Policy No. 64, Grievant and several other Physical Facilities employees received and signed an essential employees letter in December 2019. *R Exs 6 and 7*. The letter informed employees that in the event of “a University emergency, *including a public health emergency*, and during weather-related university closings, your department head has designated your position as essential and mandatory.” *Id.* (emphasis added).

6. The “Essential Staff Designation Letter” further states, “Willful failure to not perform critical functions during an emergency situation or as directed by your supervisor could result in disciplinary action.” *Id.*

7. A Governor’s Stay at Home Order<sup>2</sup> issued at a time period relevant to the instant matter, specifically exempted “state governmental employees deemed essential employees by their respective agency head.” *R Ex 5, p. 11*. Essential employees were not mandated to stay at home.

8. In March 2020, Respondent’s President determined it was necessary to close the institution with essential employees continuing to work on campus. During this time period Grievant was absent from work for three days with no notification to his supervisors.<sup>3</sup>

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<sup>2</sup> On March 23, 2020 Governor Jim Justice issued an “Executive Order” (Executive Order No. 9-20), which, *inter alia*, designated certain essential employees and directed all non-essential employees to stay home as a result of the then-beginning coronavirus pandemic. *R Ex 5*

<sup>3</sup> Grievant was absent from work for March 20, 23, and 24, 2020 with no notification to his supervisors. Normally an employee who is absent for three days “No Call, No Show” falls under the Job Abandonment provisions of Respondent’s Employee Handbook which states “[e]mployees who fail to report to work or contact their supervisor for three (3) consecutive workdays shall be considered to have abandoned the job without notice, effective at the end of their normal shift on the third day.” *R Ex 1, p. 19*. “The supervisor shall notify the Human Resources Department at the expiration of the third workday and initiate the paperwork to terminate the employee.” *Id.* Concomitant with this policy is the applicable sick leave policy for

9. Dayton Wilson, Director of Physical Facilities, consulted with Kristi Williams, Interim Vice President for Business & Finance regarding Grievant's absence from work for the prior three workdays. Ms. Williams advised Mr. Wilson to contact Grievant and another trades specialist (Randy Mallett), regarding their absences from work.

10. On or about March 24, 2020, Director Wilson spoke with Grievant. Director Wilson reported to Vice President Williams that Grievant allegedly thought for some reason that he was going to be off. Grievant expressed the opinion that there was nothing for him to do, there was no work to be done, it was dangerous for him to be there and he had contacted OSHA and the Labor Board. *Wilson Testimony*. Grievant further indicated that he would be in on March 25 to "tell to [Mr. Wilson] like it is." *Id.*

11. On the morning of March 25, 2020, Grievant along with other identifiable employees left Grievant's office area and proceeded directly to Mr. Wilson's office where Grievant had a discussion with Director Wilson and Supervisor Comb. The employees all arrive at Mr. Wilson's office through the same side hallway used by Grievant. See surveillance footage. *R Ex 14*

12. Surveillance footage (*R Ex 14*) establish that Grievant and other identifiable employees were in a workplace space recognized as Grievant's office space prior to the

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the institution. Under that policy an employee is only eligible for sick leave "when ill or injured, when a member of the immediate family is seriously ill or when death occurs in the immediate family." *Id.*, p. 30. Even under this policy an employee is "required to notify his/her supervisor immediately if ill or unable to work for any reason and to follow the institution's established procedures for absences from work." *Id.*, p. 31. Such notification "shall be given to the immediate supervisor prior to the employee's normal starting time and should include the approximate length of absence. Failure to report off from work shall be a basis for disciplinary action, which may include suspension, or discharge." *Id.* Respondent elected to register Grievant's absences as excused.

March 25, 2020 meeting with Mr. Wilson. Employees were in this workplace space and discussed going home, it is NOT clear or readily established who led the conversation. *L3 testimony, e.g. Tom Harrison.* Everyone left Grievant's office space (shop area) and walked over to Director Wilson's office area. *R Ex 14*

13. Employees arriving after Grievant at Mr. Wilson's office included Randy Mallett, Fred Williams, Richard Ruby, Mike Greenhowe, Gary Greenhowe, and Tom Harrison who stayed in the side hallway. *R Ex 14.* When the employees began exiting Grievant's work area, Grievant led the way with Mr. Mallett following and the other employees thereafter. *Id.*

14. Trades specialist, Randy Mallett acknowledged that he and Grievant had a discussion about Grievant going to ask about personal protection equipment (PPE). *Mallett Testimony.* Randy Mallett, Grievant's co-worker, aware of a pending discussion, made an audio recording on his cell phone of the meeting on the morning of March 25 between Grievant, himself, Dayton Wilson and Dale Combs. *G Ex 11*

15. Individual testimony of the employees present on March 25, 2020, vary regarding their individual participation. Some of Grievant's co-workers conveniently have trouble recalling specifics details or remembering much than coincidently being in the area.

16. Upon leaving the shop space and walking over to Director Wilson's office, the distinction of being entirely in the room, in the doorway and/or in the adjacent room, during the conversation is a dubious distinction. Individuals who departed Grievant's area (shop area) and walked over to Mr. Wilson's office area (including the adjacent office), on March 25, were reasonably able to hear the conversation transpiring. *R Ex 13*

17. On the morning of March 25, 2020, a number of WVSU employees in the Office of Physical Facilities (Gary Greenhowe, Michael Greenhowe, Richard Ruby, Fred Williams and Tom Harrison) were in the break room/clock-in area of their workspace, while Dayton Wilson, Randy Mallett, Dale Combs and Grievant were in Dayton Wilson's office, which is adjacent to the break room/clock-in area.

18. Relevant audio and surveillance recording establish several Physical Facilities employees were able to hear and/or kibitz in the March 25, 2020 discussion. *See R Exs 13 and 14; G Exs 10 and 11.* Multiple employees are heard speaking about the topic of conversation, Covid-19, personal protection equipment, sick leave and administrative directives or expectations.

19. Dale Combs, Grievant's Supervisor, is a formerly trades specialist who has been employed with Respondent for approximately eight years. Supervisor Combs was in Director Wilson's office on March 25, and verbally participated in the discussion. Mr. Combs testified that he was a primary speaker on behalf of Respondent during the March 25, 2020 discussion with Grievant.

20. While the conversation took place in Director Wilson's office, Supervisor Combs communicated with Grievant more readily than Director Wilson. This was allegedly done by design. *Comb Testimony.* Mr. Combs communicated the position that "we get directions from the people above us and this is what they are telling us." *R Ex 13, 2:30-2:41.* It was reiterated "this is the information they are giving us to give to y'all. We'll take your concerns and give them and...if that's the way they want to do it, then we'll come back and say, hey y'all were right and this is the way it's supposed to be. This is the way they're viewing it and this is the way we will conduct business." *Id., 3:30-3:48.*

21. Mr. Combs was aware the employees had concerns about safety and were also upset that they were required to be on campus working while other employees were not. *Comb Testimony*

22. Supervisor Combs communicated the position that the Office of Physical Facilities could not twist Administration's arm to make them do things the way Grievant was requesting. Mr. Combs testified the comments made during the meeting with Grievant bothered him because he was trying his best to help these guys out, trying to give them the information that they want. *Comb Testimony*

23. Director Wilson agreed with Supervisor Combs assessment of the basis for the March 25, 2020 discussion. The conversation pertained to personal protective equipment and the necessity to be on campus. Grievant expressed that he did not want to be on campus, other employees were being paid to stay at home. Grievant stated "we should side with him and go tell [Ms. Williams] and the President that we don't need to be here." *Wilson Testimony*. Further, Grievant did not want to have to use his leave to be off work.

24. Director Wilson testified Grievant used a profane word during his communication with him. Mr. Wilson opined it was the use of the word "fuck" toward a supervisor that was more an issue rather than the general use. It is not uncommon for Physical Facilities employees to use profanity; however, in this instance it "was geared toward supervision and management. It wasn't just general...type of profanity ... [and] ... was geared toward management" *Id.* With this occurring in front of the other employees "it would affect the authority I had over the Physical Facilities employees." *Wilson Testimony*



25. At the conclusion of Grievant's discussion in Director Wilson's office, Grievant and the other employees left the office area and several ultimately left work.<sup>4</sup>

26. Following the morning meeting on March 25, 2020, Grievant, Michael Greenhowe, Gary Greenhowe, Richard Ruby, Fred Williams and Randy Mallett all left work. *G Exs 1, 2, 3, 4 and 5; R Ex 14*

27. Vice President Williams consulted with President Jenkins regarding the actions to be taken against the employees. Ms. Williams initially considered and anticipated termination for all employee involved. Ultimately, after input from the Human Resource Director and President Jenkins it was determined that Grievant would be terminated and the other employees would receive written reprimands.

28. On March 30, 2020, all those who left work on the morning of March 25, 2020, following the meeting, with the exception of Grievant, were issued a "Notice of Written Reprimand" (each "Notice of Written Reprimand" issued was substantively identical, "Reprimand" or "Reprimands" hereinafter) for misconduct, identified as gathering with several of your coworkers and walking out on your job on the morning of Wednesday, March 25, 2020. *R Ex 12*

29. The Reprimands offer two bullet points regarding additional information why

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<sup>4</sup> Grievant telephoned Joseph Davenport, Respondent's Safety & Chemical Hygiene Officer, on March 25, 2020, to discuss his safety concerns with working on campus. This conversation encompassed Grievant's concerns about alleged unsafe working conditions, not having an appropriate level of personal protective equipment along with some pay questions. In addition to work during the COVID-19 Stay at Home Order, Grievant raised some issues outside of the Hygiene Officers purview, essentially some individuals getting to work from home and [Grievant] did not get to work from home. *R Ex 20*. When questioned about the discussion with Mr. Davenport, Grievant acknowledged that Mr. Davenport informed him employees were considered low risk for transfer of the virus and OSHA designated that risk category did not require additional personal protective equipment.

the Reprimands were being issued – for example, the one to Randy Mallett states “You along with coworkers: Richard Ruby, Donald [Fred] Williams, Gary Greenhowe, Mike Greenhowe, Mark Shuff and Roger Burdette, abandoned your jobs leaving maintenance tasks uncompleted. You were assigned tasks to help maintain campus and to ensure campus is ready for faculty, staff and students to return. By leaving your job, without proper advance notice to your supervisor, those assignments had to be shifted to other maintenance personnel as well as outside contractors.” *R Ex 12*

30. On March 30, 2020, Grievant was provided with an “Intent to Terminate and Suspension with Pay” notice by his supervisor, Dayton Wilson, Director of Physical Facilities of WVSU. *R Ex 11*. In relevant part the March 30, 2020, *Intent to Terminate* letter provided:

Your dismissal is the result of the following: Your language and demeanor were both inappropriate and insubordinate. Gathering several employees, bringing them to my office and proceeding to tell me “like it is” and stating that staff do not need to be here, and I need to man up and speak for myself, and upon hearing again that we are essential employees and WVSU required us to be here, you stated that I am just a F&\$king messenger. This behavior creates a hostile work environment.

*R Ex 11*

31. The *Intent to Terminate* letter further notified Grievant that Respondent had determined his actions violated Board of Governors Policy No. 19. *R Ex 11*

32. There was a predetermination meeting regarding Grievant on April 1, 2020, in Ms. Williams’ office with Vice President Williams, Director Wilson, Grievant, Grievant’s wife in attendance and Grievant’s legal counsel on the phone.

33. Grievant provided additional information for Respondent to consider at the predetermination meeting. Randy Mallett’s (Grievant’s co-worker) audio recording of the

discussion on the morning of March 25 between Grievant, Mallett, Dayton Wilson and Dale Combs (*G Ex 11*) was played and made available for Respondent to consider at the April 1, 2020 predetermination meeting for Grievant.

34. An investigation was conducted following the pre-termination meeting with Grievant.

35. As a part of the investigatory process by Respondent into the events on the morning of March 25, 2020, Director Wilson and Interim Vice President Williams interviewed Michael Greenhowe, Gary Greenhowe, Fred Williams, Richard Ruby and Roger Burdette<sup>5</sup> in early April about the events that transpired on the morning of March 25, 2020.

36. At that time, the employees all denied working in concert with Grievant about leaving work and indicated Grievant did not influence them to leave work on March 25, 2020. *R Ex 15; G Ex 9*

37. During the investigation, Mr. Wilson took steps to review the security camera footage for the building to get an idea of what happened before the meeting. *R Ex 14*. It was also investigated to determine if the employees came to Mr. Wilson's office together or the other employees just randomly happened to be in front of Mr. Wilson's office. *Id.*

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<sup>5</sup> Roger Burdette was not at work on March 25, 2020. Physical Facilities employee Burdette, testified prior to the start of the shift on March 25 he received a call from Grievant and Richard Ruby who said the employees were not working on that day. Mr. Burdette called Supervisor Combs and asked if employees were working and Mr. Combs communicated employees were supposed to be working. Mr. Burdette indicated he would be taking a vacation day. *Burdette testimony*. Grievant does not deny making the phone call to Burdette but asserted he telephoned Mr. Burdette at the request of Mr. Ruby. *Grievant Testimony*

38. Responsible administrative agents of Respondent further evaluated the information available to them and relevant applicable rules and regulations to reach a final determination regarding events and disciplinary actions for various employees.

39. Respondent provided Grievant with a notice of termination on April 9, 2020.

*R Ex 21*

40. The termination notice indicated that Grievant's actions on March 25, 2020 constituted gross misconduct and quoted WVSU Board of Governors Policy 19 § 20.3, as it relates to gross misconduct: "Gross misconduct is conduct by the employee which presents a danger to persons or property, or to the orderly conduct of the affairs of the institution, or demonstrates willful disregard of the institution's interest or a wanton disregard of standards of behavior which the institution has a right or expect of its employees." *R Ex 3*

41. The April 9, 2020 "Notice of Dismissal" referenced the reasons stated in the March 30, 2020 *Intent to Terminate* letter and further provided that Grievant's employment was being terminated "for gross misconduct, specifically, for...insubordinate behavior and unprofessional conduct on Wednesday, March 25, 2020." "[Y]our dismissal is the result of the following: Your language and demeanor were both inappropriate and insubordinate. Gathering several employees, bringing them to my office and proceeding to tell me 'like it is' and stating that staff do not need to be here...and upon hearing again that we are essential employees and WVSU required us to be here, you stated that I am just a F&\$king messenger." *R Ex 21*

42. The Notice of Dismissal was officially signed by Director Wilson but the document was a combined efforts of responsible Administrative personnel, i.e., Anthony

Jenkins, President of WVSU, Kristi Williams, Interim Vice President for Business & Finance and Respondent's Human Resource Office. It is Respondent's practice to have the relevant agency director sign the termination document.

### **Discussion**

In disciplinary matters, the employer bears the burden to prove by a preponderance of the evidence that the disciplinary action taken was justified. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018). This grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence.

. . . See [*Watkins v. McDowell County Bd. of Educ.*, 229 W.Va. 500, 729 S.E.2d 822] at 833 (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education*, 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). See also *Hovermale v. Berkeley Springs Moose Lodge*, 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) ("Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence."). . .

*W. Va. Dep't of Trans., Div. of Highways v. Litten*, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision). In other words, "[t]he 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, a party has not met its burden of proof. *Id.*

Grievant was a permanent State employee when his employment was terminated.<sup>6</sup> Grievant protests his suspension and termination of employment. Grievant maintains the charges are improper and unjust in the circumstances of this matter. Grievant contends his actions were not misconduct and the sanctions levied were disproportionate for his established conduct. Respondent maintains that Grievant's actions merit disciplinary action in that Grievant engaged in conduct which constitutes "gross misconduct" in accordance with WV BOG Policy No. 19. The parties disagree regarding the relevance, motivation, circumstance and appropriateness of several events and their relationship to the disciplinary actions in discussion. The credibility of witnesses and the reliability of the information being presented by all parties is under review.

The March 30, 2020, *Intent to Terminate* letter listed the following grounds:

Your dismissal is the result of the following: Your language and demeanor were both inappropriate and insubordinate. Gathering several employees, bringing them to my office and proceeding to tell me "like it is" and stating that staff do not need to be here, and I need to man up and speak for myself, and upon hearing again that we are essential employees and WVSU required us to be here, you stated that I am just a F&\$king messenger. This behavior creates a hostile work environment.

*R Ex 11.* Grievant was notified of the intention to terminate Grievant's employment as of April 3, 2020, due to Grievant failing to "observe a standard of conduct that will not reflect discredit on the abilities and integrity of [Grievant], or create suspicion with

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<sup>6</sup> Permanent State employees who are in the classified service can only be dismissed for "good cause," meaning "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); See also W. VA. CODE ST. R. § 143-1-12.02 and 12.03 (2012).

reference to [Grievant's] capability in discharging [his] duties and responsibilities." *Id.* Subsequently, Grievant was ultimately notified of the termination of his employment by an April 9, 2020 Notice of Termination which provides that Grievant's actions constitutes "gross misconduct" in accordance with WV Board of Governors Policy No. 19.

Certain facts surrounding the events which led to Grievant's termination were the subject of conflicting testimony. It is deemed prudent to address the reliability and due weight that is most readily applicable to the witnesses who testified and provided information during this grievance. An Administrative Law Judge is charged with assessing the credibility of the witnesses. See *Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1994). The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge 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. See *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*. The undersigned had an opportunity to observe the demeanor of the witnesses, and to assess their words and actions during their testimony.<sup>7</sup> The testimony of all witnesses was provided direct attention and assessed with the identified factors in consideration.

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<sup>7</sup> Individuals testified to numerous facts, alleged factors and connotations perceived

Grievant's testimony was presented in a direct fashion. However, his recollection of events did not persuasively counter several aspects of Respondent's purported justification for its action(s). Grievant denial of using profanity is acknowledged. However, what is also thought to be a demonstrative issue of the March 25 confrontation is overall intent and subsequent events. Grievant was aware of the issues in dispute, his direct testimony was limited and not as informative as the undersigned would have found enlightening. Grievant has a profound interest in clarifying the allegations of misconduct. The audio recording of the March 25 conversation was not complete, Grievant acknowledges material discussed that is not on the recording. It is not disputed that Grievant was displeased with Director Wilson and Mr. Combs' handling of relevant workplace and workforce conditions and activities. Grievant's testimony regarding any discussion that transpired in the "shop area" prior to going Director Wilson Office space is not consistent. Grievant and his co-worker Randy Mallet communicated, regarding their individual dissatisfaction with Administration. It is not consistently reported with any reasonable degree of specificity the degree of privacy exercise with regard to this discussion. In fact it is more than likely others worker in the "shop space" sympathize or concur with the discussion. Grievant's artful omission regarding admitting or denying others' actions was not unnoticed. Grievant is an honorable man, he however was at that time unsure regarding the threat of Covid-19. He didn't think Director Wilson and others were duly recognizing and taking sufficient precautionary steps concerning his and

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during various events of this case. The trustworthiness of testimony is a balancing of information, motivation and verification. More times than readily acknowledged, reliability and reasonableness are flexible commodities and not a constant factor.



others presence at the workplace. Nevertheless, there is a difference between requesting clarity and demanding action.

The manner and demeanor of Grievant's long standing co-worker, Randy Mallett's testimony was not consistent. The witness demonstrated a pronounced bias against Respondent and a propensity to readily provide information he believed fortified his opinion or preconceived conclusions. When confronted with irrefutable evidence of record (surveillance tape), trade specialist Mallett's recollection of events was less than forthcoming with a persuasive explanation regarding the disparity between his testimony and images evident on the surveillance footage. Mr. Mallett and Grievant communicated prior to the March 25, meeting in Wilson's office. Their acknowledgement of their conversation is not consistent, further it is ambiguous whether others in the shop could or did voice an opinion during their conversation. Their communication included mutual disagreement with Administration's handling of the pandemic crisis and their respective obligations. Mr. Mallett at times articulated strong opinion, then professed lack of knowledge regarding any detail. Mr. Mallett's actions and professed understanding of alleged misconduct is unbalanced. It is recognized that trade specialist Mallet has suffered a stroke since the March 25, event, but his recollection of information tended only to be cloudy on facts he understood to be less than favorable and well able to communicate his opinion on the short coming of Respondent. This witness noted his prospective plans to sue Respondent in the future. Mr. Mallet possessed capacity to perceive and communicate when he wanted to, but allegedly was unable to clarify his testimony with regard to the existence or nonexistence of several facts testified to by the

witness. Mr. Mallet unequivocally supported Grievant but definitely had an agenda during his testimony and on March 25, 2020. The weight of Randy Mallet's testimony must be balanced against verifiable facts of evidence; accordingly his testimony is less trustworthy than direct plausible witness information.

Dayton Wilson, Director of Physical Facilities testified on the first day of the level three hearing. His actions, testimony and opinion were reviewed with the pre-identified criteria in mind. Except for the representation that Grievant used a profane word, Director Wilson's testimony doesn't present contested fact(s). The overwhelming majority of the information presented by Director Wilson is verified by evidence of record and/or various other witnesses testimony. Director Wilson was aware that a host of employees were outside of his open door in adjacent office space during Grievant's March 25 conversation. While it is clear that Grievant and Randy Mallet do not hold Director Wilson in high regard it is not established that Director Wilson has any animosity or ill-will toward Grievant. This witness testified that as a Trade Specialist – Lead, Grievant is expected to set an example for those employees under his supervision and it is proper to hold him to a higher standard of conduct. Excluding his opinion regarding the use of profanity, this witness's testimony is deemed reliable with regard to his interpretation of relevant events and situation on March 25, 2020. Grievant was not just requesting clarification from Director Wilson and Supervisor Combs. Grievant did as he said he would, told Director Wilson like it is. Grievant knew what he was doing.

Relevant recordings (audio and surveillance) establishes various employees participated or were relevant with regard to March 25, 2020 incident conversation. Gary

Greenhowe, Michael Greenhowe, Richard Ruby, Fred Williams and Tom Harrison were in the break room/clock-in area of their workspace, while Dayton Wilson, Randy Mallett, Dale Combs and Grievant were in Dayton Wilson's office, which is adjacent to the break room/clock-in area. Some employees' testimony disclaimed any knowledge of a pre-incident discussion and/or further claim they did not hear any of the March 25, 2020 incident conversation, such testimony is misleading and/or inaccurate. Such testimony is not consistent with the evidence of record. *Citing L3 testimony; R Exs 13 and 14; G Exs 10 and 11.* At the time of the meeting other physical facilities employees were able to hear the conversation, employees can be heard commenting on the issue and subject matter in discussion. *Id.*

Surveillance footage (*R Ex 14*) establish identifiable employees left Grievant's office area (the shop area) and proceeded directly to Director Wilson's office area where Grievant had a discussion with Director Wilson and Supervisor Comb. The existence of employee outside of Mr. Wilsons office on March 25, 2020 during the incident conversation was not coincidental. The undersigned does not accept the contention, that identified employee who all arrive at Mr. Wilson's office shortly after Grievant were unaware of significance of the moment. Whether or not Grievant truly gathered and communicated with the other employees in mass in an effort to stage a walkout is debatable. The undersigned is more than willing to entertain the prospect that the various employees were not cohorts to act as they did, each individual was free to make his own decision regarding his individual actions. Any submitted affidavits stating that Grievant did not gather them together to confront management and/or stage a walkout is

not necessarily inaccurate. Staged walkout tends to indicate an organized and/or predetermined. It is not established any employee, at the time, knew what he would do or say regarding the situation. Nevertheless, it is readily apparent that “all” knew that something was happening, any testimony disclaiming such is without merit and untrustworthy. Such statements are not consistent with the audio and video evidence of record.

At the time of the instant events, people had reasonable concerns for their individual health and safety. The employees of the Physical Facilities workforce had concerns, some more legitimate than other. It is not established that Grievant was a ringleader, it is just as likely he was the most vocal or the most direct with management regarding one or more concerns shared by numerous employees. It is this directness coupled with subsequent events which legitimizes the disciplinary actions. It is factually accurate that everyone knew the discussion/meeting was happening, individuals elected to be present for the event.<sup>8</sup> Each employee is responsible for his own actions.<sup>9</sup> After the March 25, meeting, Grievant and several other employees departed the worksite. This action, even if not a staged walk out, it is a disruption of services. Employees abandoned their respective work assignments, by leaving your job, without proper

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<sup>8</sup> Maintenance worker, Tom Harrison, testified Grievant spoke because he was the most vocal and he had been there so many years and everyone else looked up to him. Mr. Harrison did not recall Grievant expressing any opinions that the other employees did not agree with. *Harrison L3 testimony.*

<sup>9</sup> A conversation between and among various employees happen it just wasn't necessarily a conversation “with Grievant as the leader,” perhaps it might be better characterized as a free flow conversation. Individuals discussed, commented and listened at a variety of levels of participation in Grievant's workspace prior to going to Director Wilson's office space. Each employee was free to come to his own conclusion.

advance notice to your supervisor, those assignments had to be shifted to other maintenance personnel as well as outside contractors. *R Ex 12*. Organized or not Respondent's characterization of relevant events as a walk out is factually accurate.

The use of profanity is an issue disputed in the facts of this grievance.<sup>10</sup> Testimony in support and against the use of profanity by Grievant is of record. Bias is evident for both sides of this contention. In truth the existence of a profane word may have become more of an issue than prudent. The undersigned has refrained from making a finding of fact regarding the usage of the word "fuck" or "fucking" by Grievant during Grievant's communication with Director Wilson and Supervisor Comb. (e.g., "nothing but messengers" vs "nothing but 'fucking' messengers").<sup>11</sup>

Under the recognized standards set out by applicable policies, codes of conduct and relevant case law, it is acknowledged that Respondent is afforded considerable deference in assessing the seriousness of Grievant's conduct. Nevertheless, in the fact pattern of this matter, there exists ambiguity for a number of facts that Respondent cited as justification for termination. The question arises as to whether Grievant's conduct

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<sup>10</sup> Lisa Reinicke, a professional West Virginia Court Reporter affiliated with Realtime Reporters, LLC, was provided an audio recording made of the March 25, 2020 incident, and produced a written transcription of the recording. *G Ex 10*. Portions of the recording are transcribed as inaudible or unintelligible. The word "fucking" does not appear in the transcription of the recording; rather, the transcription reads, in relevant portion: "Messengers. Nothing but messengers. Nothing but messengers." *Id.* The existence of this transcript is a byproduct of a "unspecific copy" of the March 25, 2020 incident. The transcript cannot be viewed as the most reliable evidence.

<sup>11</sup> Director Wilson and Supervisor Combs promise to take the employee concerns to Administration for resolution. Grievant responds "tell them your concerns. Stand up and say there's nothing here to be done." At the end of the recording Grievant states "messengers, nothing but messengers" and tells the other employees "let's get out of here, sounds like we are taking sick, comp, whatever." *G EX 10*

was of such nature as to justify the dismissal of a permanent employee. Procedural safeguards are in place for the protection of everyone, workers, administration and the integrity of the system. A responsible employer does not abuse authority but exercises it with due diligence.

Grievant went to Director Wilson's office and proceeded to tell his superiors the way that it is. Perhaps not the most prudent action. Grievant made it clear he had reservation with regard to the agency's expectation for him to be on campus, his belief that PPE was lacking, and he didn't think management was adequately assessing the overall situation. Other employees were being paid to stay at home, and he didn't think he should have to use his accrued leave time. Grievant told Mr. Wilson to "stand up and be a man and tell the administration like it is" and that Mr. Wilson was "nothing but a messenger." Grievant had a message he wanted heard.

Respondent interpreted Grievant's conduct as being in violation of applicable policies and standard of conduct. Respondent labeled Grievant's demeanor and conduct as inappropriate and insubordinate, citing WVSU Board of Governors Policy 19 § 20.3, as it relates to gross misconduct. In the circumstances of this matter the determination of gross misconduct is and should not easily be reached. Insubordination is not a catch-all for conduct not pleasing to management. Discredited testimony notwithstanding, in the final analysis Grievant was charged with conduct that objectively must be viewed as disruptive. This is with or without the use of profanity.

Grievant may have had justifiable reasons for his concerns but given his stated intent, coupled with his public communication, and departure from the workplace, his

actions can reasonable considered insubordination or willful neglect of duty. The hallmark of both allegations is intentional disobedience. The Supreme Court had stated that the disobedience must be willful, meaning that "the motivation for the disobedience [was] contumaciousness or a defiance of, or contempt for authority." *Butts v. Higher Educ. Interim Governing Bd./Shepherd Coll.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curium*). Grievant did more than just seek clarification regarding the situation, Grievant was clear, he was opposed to Administrations contentions and he thought others should voice objections. Grievant accentuated his position by going home. Grievant was serious with regard to his noncompliance. Arguably Grievant was not the official spokesperson for the other employees, standing outside Directors Wilson's doorway but he did succeed in making himself the focal point of discontent.<sup>12</sup> He literately provided the open door for others to follow his lead. Grievant's intentional and deliberate actions constituted a disturbance of the orderly affairs of the institution. No less than six employees departed work March 25, 2020, requiring Respondent to shift maintenance personnel. It is unclear, but it is represented that one or more employees did not report to work (annual or sick leave) for the remainder of the week.

WVSU Board of Governors Policy 19 § 20.3, as it relates to gross misconduct: provides; "Gross misconduct is conduct by the employee which presents a danger to persons or property, or to the orderly conduct of the affairs of the institution, or

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<sup>12</sup> The proposition that Grievant was acting independently and not as a representative is a double edge sword. If Grievant had established the position that he was the acknowledged spokesperson for the mutual concerns of the employees present, Respondent would find it harder to justify Grievant's singular discipline.

demonstrates willful disregard of the institution's interest or a wanton disregard of standards of behavior which the institution has a right or expect of its employees." *R Ex*

3. Grievant's deliberate actions constituted a disturbance of the orderly affairs of his employer on March 25, 2020. Grievant was insubordinate.<sup>13</sup> He spearheaded a workforce interruption, or rebellious actions by co-workers, with or without a prior agreement between and among each other. This is reasonable identified as gross misconduct.

It is recognized and not overlooked that not all of Respondent's alleged acts of misconduct have been proven by a preponderance of the evidence (e.g., profanity). Further, Grievant highlights the lack of uniformity or disparate treatment between him and other employees. This is true, reasonable men may differ as to the overall fairness in that Grievant was the only individual terminated but proper grounds are established for disciplinary actions with regard to Grievant's employment.

It is within the recognized purview of an employer to maintain a reasonable standard of workplace behavior. Conduct which has the purpose or effect of unreasonably interfering with work performance by creating or facilitating disruption of the working environment is generally forbidden. In order to maintain an efficient and effective work environment, employers are often required to address employee behavior

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<sup>13</sup> Grievant disagreed with the Administration decision to require him to work on campus. The disagreement specifically resulted in Grievant questioning and tantamount demanded his direct supervisors to exercise influence over Administration to get the result he was seeking and not be required to work but continue getting paid while staying at home. Unfortunately, the position Grievant held is not conducive to work from home and the absence of students on campus did not abrogate the necessity to continue maintenance work on campus in the various buildings.



and/or performance through corrective and/or disciplinary action. Facts, circumstances, and history of an employee are proper factors to consider when analyzing and determining warranted action. The record of this case offers little evidence regarding the work history of various other employees, thus it is difficult, if not impossible to compare the temperament of all.<sup>14</sup> Further, Respondent argues Grievant is distinct in that Grievant was employed as a lead worker. “As a supervisor, grievant may be held to a higher standard of conduct, because he is properly expected to set an example for those employees under [his] supervision, and to enforce the employer’s proper rules and regulations, as well as implement the directives of [his] supervisors.’ *Wiley v. W. Va. Div. of Natural Resources, Parks and Recreation*, Docket No. 96-DNR-515 (Mar. 26, 1988); *Lilly v. Dep’t of Transp.*, Docket No. 07-DOH-387 (June 30, 2008). Respondent establishes sufficient justification to suspend and/or terminate Grievant’s employment.

The argument a disciplinary action was excessive given the facts of the situation is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was clearly excessive or reflects an abuse of the agency[’s] discretion or an inherent disproportion between the offense and the personnel action.’ *Martin v. W. Va. [State] Fire Comm’n*, Docket No. 89-SFC-145 (Aug. 8, 1989).” *Meadows v. Logan County Bd. of*

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<sup>14</sup> “‘The Grievance Board is without authority, statutory or otherwise, to order that disciplinary action be taken against another employee. *Goff v. Dep’t of Transp./Div. of Highways*, Docket No. 03-DOH-048 (Apr. 7, 2003); *Coster v. W. Va. Div. of Corrections*, Docket No. 98-CORR-506 (Feb. 24, 1999); *Daugherty v. Bd. of Directors*, Docket No. 93-BOD-295 (Apr. 27, 1994). See *Daggett v. Wood County Bd. of Educ.*, Docket No. 91-54-497 (May 14, 1992).’ *Emrick v. Wood County Bd. of Educ.*, Docket No. 03-54-300 (March 9, 2004).” *Shaffer v. Kanawha County Bd. of Educ. & Pauley*, Docket No. 2013-0161-KanED (Sept. 19, 2013). Further, the Grievance Board generally lacks the authority to order adverse personnel action be taken against another employee. See *Stewart v. Div. of Corr.*, Docket No. 04-CORR-430 (May 31, 2005); *Jarrell v. Raleigh County Bd. of Educ.*, Docket No. 95-41-479 (July 8, 1996).

*Educ.*, Docket No. 00-23-202 (Jan. 31, 2001). In assessing the penalty imposed,<sup>15</sup> “[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis.” *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995) (citations omitted). The Grievance Board has held that “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 Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996); *Hoover v. Wirt County Bd. of Educ.*, Docket No. 2008-1482-WirED (Feb. 12, 2009).

Grievant’s actions were of a serious and sever nature. It is not found that all of Grievant’s actions were necessarily done with nefarious intent, but that sufficient actions were committed with direct knowledge and purpose that Grievant’s conduct is gross misconduct. Respondent in assessing the situation and the repercussion of Grievant’s actions concluded that dismissal was appropriate. Grievant failed to demonstrate the

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<sup>15</sup> Grievant was employed as a trades specialist lead at WVSU. When meting discipline to a supervisory employee it is considered appropriate and not discriminatory for a supervisor to receive a greater level of punishment than subordinate employees. Grievant’s conduct directly undermined his direct supervisors and Administration by having a conversation in which subordinate employees participated and ultimately refused to work.

penalty levied was clearly excessive action. Reasonable men may differ as to the overall fairness of the action, but proper grounds are established, by a preponderance of the evidence, for termination Grievant's employment. It is not determined that Respondent abused its discretion in the circumstances of this case.

The following conclusions of law are appropriate in this matter:

### **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. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 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. "Dismissal of an employee in the classified service must be for good cause, which means misconduct of a 'substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention." Syl. Pt. 2, *Buskirk v. Civil Serv. Comm'n*, 175 W.Va. 279, 332 S.E.2d 579 (1985).

3. "An employer has the right to expect subordinate personnel 'to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority..." *McKinney v. Wyoming Cty Bd. of Educ.*, Docket No. 92-55-112 (Aug. 3, 1992) (citing *In re Burton Mfg. Co.*, 82 L.A. 1228 (Feb. 2, 1984)). "Generally, an employee must obey a supervisor's order and take appropriate action to challenge the validity of the

supervisor's order. 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) (citations omitted). "An employer is not justified i[n] disobeying a reasonable order simply because he/she does not agree with it." *Id.*

4. The suspension of an employee pending investigation of an allegation of misconduct is not disciplinary in nature and a grievant bears the burden of proving that such suspension was improper." *Ferrell and Marcum v. Reg'l and Corr. Facility Auth./W. Reg'l Jail*, Docket No. 2013-1005-CONS (June 4, 2013). "...[I]t is clear that temporary suspensions, either with or without pay, are sanctioned by the legal system as an appropriate mechanism for protecting an employee's rights during an investigation." *Hays v. Hampshire Cty. Bd. of Educ.*, Docket No. (Jan 30, 2004). The United States Supreme Court "suggested in *Cleveland Bd. of Educ. V. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), that an employer should suspend an employee *with pay* if it believes that its best interests would be served by removing the employee from the work site without a pre-termination hearing." *Id.* (emphasis original)

5. Respondent established proper grounds to justify the suspension of Grievant employment.

6. A charge of misconduct requires that the severity of the employee's misconduct be evaluated and considered in the context of the circumstances of each case." *Thurmond v. Steel*, 159 W.Va. 630, 225 S.E.2d 151 (1980). "If however, the misconduct is of a substantial nature and can be shown to affect directly the rights and

interest of the public by bearing directly in a substantial manner on the duties which the employee is required to discharge, then the employing authority . . . have the power and the duty, upon such a showing, to enforce such remedial steps, including a dismissal, as may be found proper under all the circumstances of the case.” *Id.*

7. West Virginia State University Board of Governors Policy 19 § 20.3, as it relates to gross misconduct provides; “Gross misconduct is conduct by the employee which presents a danger to persons or property, or to the orderly conduct of the affairs of the institution, or demonstrates willful disregard of the institution’s interest or a wanton disregard of standards of behavior which the institution has a right or expect of its employees.”

8. In the circumstance of this matter, Respondent established, by a preponderance of the evidence, that Grievant’s actions constituted gross misconduct.

9. “[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).

10. "For Grievant's action to constitute gross misconduct, it must be flagrant or willful." *Grimes v. West Virginia University*, Docket No. 2011-1273-WVU (March 28, 2011). "Notwithstanding Grievant's long work history, considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct." *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). "Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge cannot substitute his judgment for that of the employer." *Miller v. Higher Education Policy Commission/Marshall University*, Docket No. 03-HEPC-340 (Jan. 21, 2004).

11. It is not established that Respondent abused its considerable discretion in terminating Grievant's employment.

Accordingly, this 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* 156 C.S.R. 1 § 6.20 (2018).

**Date:** February 9, 2021

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**Landon R. Brown**  
**Administrative Law Judge**