

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**JOSHUA VICKERS,
Grievant,**

v.

Docket No. 2020-0581-CONS

**DIVISION OF HIGHWAYS,
Respondent.**

DECISION

Joshua Vickers, Grievant filed this consolidated grievance against his employer, Division of Highways ("DOH"), Respondent. This consolidated grievance protests Grievant's suspension and subsequent termination. The original grievance (2020-0416-DOT) was filed on October 1, 2019 stating, "Unpaid suspension without good cause." Grievant sought, "[t]o be made whole in every way including back pay with interest and all benefits restored." Grievant filed a second grievance (2020-0580-DOT) on November 12, 2019, stating, "Grievant was terminated without good cause and in violation of his statutory rights. Furthermore, the termination of grievant's employment was arbitrary and the penalty of termination was disproportionate to the alleged offense. Grievant previously filed a grievance related to his suspension (#2020-0416-DOT) and consolidation may be appropriate." For relief sought, "Grievant seeks reinstatement, backpay with interest, lost benefits, and any and all remedies at law or equity that are deemed appropriate and just." The two grievances were consolidated by Order dated November 19, 2019.

Pursuant to the authorization of W. VA. CODE § 6C-2-4(a)(4) this matter was filed directly to level three of the grievance process. A level three hearing was held before the undersigned Administrative Law Judge on October 13, 2020, at the Grievance Board's

Charleston office. Grievant appeared in person and was represented by J.A. Curia III, Esquire. Respondent was represented by Lora Witt, Assistant Director Human Resources Division, and by its counsel, Jesseca R. Church, Esquire, DOH Legal Division. 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 3, 2020, on receipt of the last of these proposals.

Synopsis

Grievant was suspended during Respondent's investigation of alleged threats of violence communicated by Grievant toward agency personnel. Grievant was informed that cooperation with the investigation was a condition of his employment. Grievant was subsequently dismissed from employment. Grievant denies making threatening statements and argues Respondent violated his right to representation. Grievant further contends the penalty of termination was excessive and disproportionate for the alleged offense(s). Respondent maintains Grievant's suspension and subsequent termination were appropriate in response to Grievant's violations of DOH's Standards of Work Performance and Conduct.

Determining the proper disposition of this matter is complicated and not necessarily easily discerned. Compelling procedure and rights intermingle throughout. Both parties bear some responsibility for the status of this grievance matter. Respondent and Grievant needed to be more aware of the others concerns. Nevertheless, Respondent established by a preponderance of the evidence reasonable justification for

sanctioning Grievant. The severity of Grievant's conduct is within the recognized purview of this employing agency. Sufficient mitigating factors are not found present in the instant matter to mandate overriding the disciplinary action of Respondent. In the circumstances of this matter Grievant did not demonstrate that the penalty imposed was an abuse of discretion. This grievance is DENIED.

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 by Respondent as a Duplicating Equipment Operator 2 for DOH's Office Services Division working in Building 5 of the Capitol Complex in Charleston, WV. Grievant had been employed in this position since November of 2013.

2. At a time relevant to this grievance, Gordon Simmons was the representative for the West Virginia Public Workers' Union. In September of 2019, Grievant was a union member and Simmons filed a grievance on Grievant's behalf dated October 1, 2019, grieving then unpaid suspension. G Ex 1 Former union representative Simmons testified at the instant level three hearing.¹

3. Lora Witt is an Assistant Director of Human Resources for Respondent. Ms. Witt oversees the Employee Relations section of the DOH Human Resources

¹ Gordon Simmons retired from employment with West Virginia Public Workers Union effective November 1, 2019. Prior to his official retirement date representative Simmons used accrued vacation/leave to take time off in October 2019.

Division, which includes disciplinary actions and policy violation issues. Ms. Witt testified at the instant level three hearing.

4. John “Jay” Burkhart is an Investigator for Respondent’s Claims Section. Mr. Burkhart was one of the investigators who conducted the internal affairs investigation on behalf of Respondent DOH into the allegations made against Grievant. Mr. Burkhart co-authored Respondent’s Investigative Report dated November 2, 2019. R Ex 5 Mr. Burkhart testified at the instant level three hearing.

5. Valerie Ahart is an Administrative Secretary working for Respondent’s Office Services Division in Building 5 of the Capitol Complex. Ms. Ahart was a co-worker of Grievant. Ms. Ahart testified at the instant level three hearing.

6. Roy Thompson is an Administrative Assistant 2 in Respondent’s Office Services Division. Mr. Thompson supervises four different sections in the Office Services Division. Administrator Thompson is Grievant’s direct supervisor. Mr. Thompson testified at the instant level three hearing.

7. Matthew “Dirk” Stemple is the Chief Investigator/Section Manager for Respondent’s Claims Section. Mr. Stemple was one of the investigators tasked with investigating the allegations made against Grievant. See Investigative Report, dated November 2, 2019. R Ex 5 Mr. Stemple testified at the instant level three hearing.

8. An incident occurred on September 30, 2019, between Grievant and a fellow employee, Mike Adams, a Storekeeper in Respondent’s District 1. The incident is characterized somewhat differently by the two individuals but universally acknowledged

as a “disagreement” between them. The disagreement manifest itself as a verbal shouting exchange between the two individuals.

9. After the disagreement, Grievant entered the office of Administrative Secretary Valerie Ahart claiming that Mike Adams, was shouting and calling him strange. More specifically, Grievant maintained that during this incident, Adams (i) raised his voice at Grievant after Grievant told Adams that Grievant could not perform a copying job requested by Adams and (ii) Adams called Grievant “weird” and “strange.” Adams maintained he was only asking Grievant a question about Grievant performing a copying job. Grievant and Ahart L3 Testimony; Investigation Documents, R Ex 5, pg. 49, Statement of Mike Adams

10. Ms. Ahart began typing up an incident report while Grievant was in her office complaining about the situation. Ahart Testimony; *also see* R Ex 5

11. Roy Thompson, Grievant’s supervisor, came into Ms. Ahart’s office to find out what had happened between Grievant and Mike Adams. Grievant complained about the conduct of Adams in the presence of Administrative Secretary Ahart, and Supervisor Thompson. Ahart, Thompson L3 Testimony; *also see* R Ex 5 at pgs. 11, 44 & 47

12. Grievant’s cooperation with Administrator Thompson’s inquiries into the situation is unclear. Grievant claimed to have recorded the conversation between himself and Mr. Adams but refused to play the recording for his supervisor. *Id.*

13. Eventually, Grievant was directed to return to his office by Supervisor Thompson. Grievant complied.

14. Later, Grievant returned to Ms. Ahart's office for her to sign a leave slip on his behalf. At this point, only Grievant and Ms. Ahart were present in Ms. Ahart's office. Grievant communicated (alleged/claimed) that individuals were trying to run him "off from a job he was good at." Grievant named "Denny Corley [his previous supervisor], Roy Thompson [his current supervisor], Ameche Watson [Director of the Office Services Division], [. . .] Kelly Clagg, and Chris Gay" and stated that "a lot of innocent people were going to get hurt and that he has been planning this for a very long time." Grievant added that "being silent and doing nothing was condoning it." Ahart Testimony; R Ex 5 at pg. 46

15. Ms. Ahart did not respond to Grievant because she was afraid of him. *Id.* Ms. Ahart described Grievant as being "in a rage, and his voice was trembling from trying to control it. He was speaking in a threatening fashion but very low." After Grievant left her office, Ms. Ahart was shaking, stressed, nauseous, and near a panic attack. Ms. Ahart interpreted Grievant's statements about innocent people getting hurt and that he had been planning this for a long time as valid threats of bodily harm.² Ahart Testimony; R Ex 5 at pgs. 46 & 47

16. Valerie Ahart, was scared of Grievant and believed that he intended to hurt other people. Ms. Ahart's opinion was assisted in part by Grievant's words and past

² Because of [Grievant's] history here, I took these statements that this was going to end bad for somebody, a lot of innocent people were going to get hurt and he had been planning this for a long time as valid threats of bodily harm. After the incident with Sheila, in Microfilm, when he was in a rage and stabbed a box of files with a pair of scissors, I would never want to be alone in the building with him. I would never know if rage from another person or incident could be transferred to me. He seems paranoid to me when he groups everyone together and accused them of a conspiracy and trying to set him up or frame him. Ahart's statement, R Ex 5 at pg. 47

conduct. Ms. Ahart is of the opinion that “[p]eople should not have to be afraid to come to work and wonder what the next incident will be.” *Id.*

17. Ms. Ahart took the incident report she had begun typing while Grievant was in her office to Mr. Thompson. Administrator Thompson read Ms. Ahart’s statement and determined that it needed to be taken to Human Resources immediately. Mr. Thompson and Ms. Ahart went to Assistant Director of Human Resources Division, Lora Witt’s office in Building 5 on September 30, 2019. L3 Testimony; R Ex 5 at pgs. 11, 44- 47

18. After hearing about Grievant’s behavior and statements from Mr. Thompson and Ms. Ahart, Assistant Director Witt took the information to Julian Woods, Director of Respondent’s Human Resources Division. Witt Testimony

19. The newly reported event(s) was not the first time an incident report was received by Respondent regarding Grievant’s attitude and behavior. There are several reported complaints and events of record. R Ex 5 at pgs. 11-28

20. Assistant Director Witt and Director Woods determined that the appropriate course of action in response to the perceived threats from Grievant was to place him on a twenty (20) day suspension pending an investigation. Respondent’s Disciplinary Action Policy³ authorizes the use of unpaid suspensions pending the outcome of investigations, as well as immediate oral suspensions for threatening bodily harm. Witt Testimony; R Ex 6 at pgs. 4 & 5 of 9

³ See R Ex 6, Division of Highways’ Administrative Operating Procedures Section III, Chapter 6: Disciplinary Action.

21. On September 30, 2019, the same day of the incident, Grievant was informed of his suspension via a hand-delivered letter. The September 30, 2019, letter was delivered by Director Woods, Assistant Director Witt, and a member of the Capitol Police. Witt Testimony; R Ex 5 at pg. 1, and R Ex 1

22. Grievant was informed that (i) the DOH would conduct “an investigation into threats of violence made by you [Grievant] toward agency personnel” and (ii) Grievant was placed on a 20-day unpaid suspension “through and including October 20, 2019 or until the investigation is complete, whichever occurs sooner.” R Ex 1

23. The suspension letter dated September 30, 2019 hand-delivered to Grievant, provides Grievant with the option to use his annual leave for the suspension period, informs Grievant that the results of the investigation could lead to additional disciplinary action up to and including dismissal, and notably the letter states to Grievant **“that your cooperation in the agency’s investigation is required as a condition of your employment with the agency” [emphasis added]**. The letter also provides a contact phone number for Human Resources if Grievant should have any questions or concerns. R Ex 1

24. On September 30, 2019, Ms. Witt contacted Dirk Stemple, Chief Investigator, and tasked him with investigating the cause for Grievant’s suspension, which was identified as threats of violence made toward agency personnel. L3 Testimony Witt, Stemple and Burkhardt; R Exs 1 and 5

25. Investigators Stemple and Burkhardt, both ex-law enforcement officers and DOH Investigators, were tasked with gathering relevant information into the events of

September 30, 2019, and provide it to responsible members of Respondent's Human Resources Division.

26. Investigators Stemple and Burkhart began their investigation by speaking with Grievant's supervisor, Roy Thompson who provided them with access to Grievant's office. The investigators conducted interviews with Grievant's co-workers, which were audio recorded, and an official notarized statement was obtained upon the completion of each interview. L3 Testimony and R Ex 5

27. The interviews of DOH employees, with the exception of Grievant, were completed on October 2, 2019. Not all statements will be cited in this decision, but documents are of record. Investigation Documents, R Ex 5

28. Roy Thompson, provided a sworn statement to the investigators which among other information states:

During my time as supervisor of [Grievant] I have had many altercations with him on different occasions in the print shop . . . it became very apparent that he always had a problem with the way I handled the situation at every occasion he tried to intimidate me and my Director . . . Grievant has a problem with everyone he comes in contact with his attitude toward employees and outside people that come in to have print request made. . . . I am not afraid of Grievant but I am afraid of what he might be capable of doing because of his different mood swing. I am afraid for my employees safety. My employees are at the point that they are working behind closed locked doors which {sic} his attitude and actions that he displays.

.
This is an everyday thing he is always trying to intimidate people and bait them into an argument with him. This employee can not and will not try to get along with anyone no matter how nice you try to be to him. If you speak to him he is offended and becomes very agitated with who every comes in contact with.

R Ex 5 at pgs. 44-45

29. Shelia Scott, co-worker, provided a statement to investigators which among other information recounted an altercation, she witnessed, involving Grievant;

[Grievant] became very irate with Mr. David Currey. [Grievant] started telling Mr. David Currey in a very mean tone that he is going to give him an answer & he is going to give him an answer right now! I was so afraid that I could not move or say anything. I noticed that [Grievant] had a pair of scissors in his hand & asked Mr. David Currey was he ready to die? I'm Sure that I heard this & I remember Grievant hitting the tabletop extremely hard.

.....
The day after this happened, I have stayed out of Grievants way being that I'm afraid of him. When I'm outside he gives me the death stare & I immediately return to my office. If he is coming down the hall on the left side, I quickly move to the right. I am terrified even of his thoughts & his actions. I must work with door to my office locked & shut.

R Ex 5 at pgs. 54-55

30. As part of their investigation, Mr. Stemple and Mr. Burkhart needed to interview Grievant. Investigator Stemple attempted to contact Grievant via the only phone number he had provided to Respondent, however, there was no answer and no answering machine or voicemail. Stemple and Burkhart Testimony; R Ex 5 at pg. 3

31. Respondent offered no explanation as to why no written correspondence was sent to Grievant from September 30, 2019 to October 16, 2019 seeking to schedule an investigative interview.

32. On October 15, 2019, after being unable to reach Grievant by phone, the investigators went to Grievant's home where he resides with his parents. The investigators spoke directly with Grievant.

33. Chief Investigator Stemple informed Grievant that he was required to attend an interview on October 16, 2019, at 11:00 a.m. in Building 5. Grievant verbally confirmed the date, time, and location. Grievant indicated he would attend the interview at 11:00 a.m. on October 16, 2019.

34. Investigator Stemple gave Grievant one of his business cards with Mr. Stemple's office and state cell phone numbers on it. Stemple Testimony

35. The October 15, 2019 interaction between Grievant and Respondent's Investigators is captured on an audio recording.⁴

36. After the Investigators appeared on his doorstep Grievant contacted Gordon Simmons. During their conversation, Simmons told Grievant that (i) Grievant had the right to representation at the meeting and (ii) Grievant did not have to attend the meeting as Grievant was not taken off unpaid suspension and the DOH could not compel his attendance while he was on unpaid suspension. Simmons Testimony

37. Simmons further told Grievant that he was retiring effective November 1, 2019, but that he would be using his accrued vacation to take time off for the remainder of October 2019 and would thus not be available to assist Grievant. Furthermore, a new union representative, would not be in place until November 1, 2019. In the absence of an available union representative, Simmons referred Grievant to Attorney Mark Barney. Simmons Testimony

38. Grievant did not contact the investigators nor the Human Resources Division to let anyone know that he would not be coming to the interview. L3 Testimony Stemple, Burkhart, and Witt; *a/so* see R Ex 5 at pg. 3 Investigators Stemple and Burkhart

⁴ Grievant avers that his reference to a lawyer in the recorded conversation with Stemple on October 15, 2019, is a communicated expression of Grievant's desire to retain counsel. Grievant's reference is ambiguous, in that he states that perhaps he should get a lawyer and Investigator Stemple indicated that would be on Grievant's dime. Grievant testified he had concerns regarding criminal prosecution. Respondent's investigators were never apprized that Grievant's reluctance to speak with them was fueled by Grievant's wish to have representation present at the meeting and/or he was having difficulty securing a representative.

had believed that Grievant would be attending the interview scheduled for October 16, 2019. *Id.*

39. Grievant did not appear for the October 16, 2019, interview, but Grievant did attempt to contact Mark Barney after that date. The contacted attorney Mark Barney, however, could not meet with Grievant until October 24, 2019. Grievant Testimony

40. On October 16, 2019, Respondent sent a letter to Grievant acknowledging Grievant's failure to appear for his scheduled interview with Investigator Stemple. The letter reminded Grievant that his cooperation and participation in the investigation was a condition of his continued employment. The letter also noted that the Respondent was unsuccessful in reaching Grievant by the phone number he provided. R Ex 2

41. Grievant was directed by the October 16, 2019 letter to report to Building 5, Room 648 at 1:00 p.m. on Monday, October 21, 2019 for his interview with Mr. Stemple. the letter again provided Mr. Stemple's phone number and instructions to call if Grievant was unable to appear for this second scheduled interview. The letter was received and signed for at Grievant's address on October 18, 2019.

42. Respondent sent another letter on October 18, 2019, indicating that the investigation "has not been concluded and [Grievant's] suspension pending investigation is being extended until and through November 3, 2019." R Ex 3

43. Grievant did not attend the October 21, 2019 investigative interview.

44. At the time the investigation was being conducted, the investigators had no knowledge of a grievance being filed on behalf of Grievant. Testimony Burkhart, Witt, and Stemple

45. As of Monday, October 21, 2019, Grievant was without union representation since union representative Gordon Simmons was no longer working and was using his accrued vacation prior to his retirement and the new union representative's effective date was not until November 1, 2019.

46. As of Monday, October 21, 2019, Grievant had not formalized secured representation by Attorney Mark Barney as Grievant and Mr. Barney could not meet until October 24, 2019.

47. Grievant met with and retained Attorney Barney on October 24, 2019, and Mr. Barney subsequently sent a letter and fax dated that same day to Respondent advising them (i) that he now represented Grievant and (ii) they should contact his office to schedule an interview with Grievant. R Ex 8

48. Also on October 24, 2019, Grievant phoned Investigator Stemple and informed Respondent that he had counsel and now desired to schedule an interview. This conversation was recorded by Investigator Stemple and Grievant and was introduced into the record.

49. Investigator Stemple did not schedule another investigative interview. Mr. Stemple informed Grievant that his investigation had been concluded and directed Grievant to contact Human Resources for anything further. Stemple Testimony; *also see* recording

50. Grievant was perplexed that the investigation was complete as he was previously informed via letter that he was "suspended pending an investigation through November 3, 2019." Grievant was of the belief that he should be permitted to participate

in an investigative interview up to the conclusions of his suspension, that being extended to November 3, 2019. Grievant Testimony

51. Respondent's Human Resources division in the form of Assistant Director Witt and Director Woods began to formulate Grievant's dismissal letter on October 21, 2019, after Grievant did not attend the October 21, 2019 investigative interview and did not timely contact Respondent providing a justification for his failure to appear or requesting to reschedule. Witt Testimony A copy of the draft letter was offered as a proposed exhibit.

52. Pursuant to a letter dated October 30, 2019, Grievant was informed that the decision had been made to terminate his employment with Respondent as a Duplicating Equipment Operator 2. The letter provides the reason for his dismissal was failure to cooperate with an agency investigation and lists specific evidence of that failure. Witt Testimony; R Ex 4

53. The October 30, 2019 termination letter among other information states:
Your unwillingness to appear for the interview and your failure to communicate with the investigator has made it impossible for us to complete the investigation which led to your suspension. You are being dismissed for your failure to cooperate with the investigation.

R Ex 4

54. During the level three hearing, Respondent offered little explanation, beyond a cursory conclusion, as to why Grievant's investigative interview could not have taken place in the period from October 24, 2019 through November 2, 2019. The Investigative Report entered into evidence by Respondent is dated November 2, 2019.

55. Assistant Director of Human Resources Division, Lora Witt highlights that Respondent's investigation process is not limited to the activity of Investigators Stemple and Burkhart.

56. Grievant's work history includes contentious relationships with co-workers and supervisors. Witt Testimony; *also see* R Ex 5

57. Respondent's Investigation Report provides that a predominant number of Grievant's co-workers "appeared to be intimidated and describe [Grievant] as being paranoid, mean, abusive, threatening, bullying, and insubordinate to supervisors." R Ex 5 at pg. 4

58. Grievant's history of contentious relationships at the workplace and overwhelming contention that co-workers are disturbed by Grievant's actions and attitude toward them and various aspects of his employment was noted by Respondent's Human Resources Division. Witt Testimony

59. Assistant HR Director Witt, involved in the termination decision, testified that a lesser punishment, short of termination, was not considered when deciding the appropriate discipline for Grievant. Ms. Witt explained in her testimony, termination was authorized under DOH policy and appropriate to the specific circumstances of this case. Grievant demonstrated a lack of cooperation to the point that the decision makers within Human Resources believed a change in Grievant's behavior could not be achieved, which is the goal of progressive discipline. Witt Testimony

60. A second grievance (2020-0580-DOT) on behalf of Grievant was filed on November 12, 2019, alleging termination without good cause and termination

disproportionate to the alleged offense. This second grievance was subsequently consolidated with the original grievance (2020-0416-DOT) and issues were collectively addressed at the instant level three hearing.

61. Division of Highways' Administrative Operating Procedures sets out certain standards of work performance and conduct that DOH expects its employees to meet. DOH Administrative Operating Procedures, Disciplinary Action, provides the following standards for employees:

3. Maintenance of a high standard of personal conduct and courtesy in dealing with the public, fellow employees, subordinates, supervisors, and officials;
4. Compliance with accepted safe working practices;
5. Compliance with working rules, policies, procedures, regulations, and laws that apply to Division of Highways employees, including but not limited to those promulgated by organizational units, the Division of Highways, the Division of Personnel, the Department of Transportation, or any other State agency; [. . .]
8. Performance of assigned duties in accordance with the standards and instructions given by an appropriate supervisor;
[. . .]
10. Refusal to engage in insulting, abusive, threatening, offensive, defamatory, harassing, or discriminatory conduct or language and prompt reporting of the same to the appropriate authority;
11. Cooperation and assistance as required in agency audits and investigations, and cooperation and assistance in all aspects of legal proceedings in which the agency is or may become involved.

Division of Highways Administrative Operating Procedures, § 3, Ch. 6, Disciplinary Action, II.A.3-8, & 10,11. R Ex 6 at pg. 2 of 9

62. There are established and readily acknowledged policies applicable to employment with a West Virginia governmental agency. Two such policies provided to

employees are the West Virginia Division of Personnel's ("DOP") Workplace Security Policy and DOP's Prohibited Workplace Harassment Policy. R Ex 11 and 13

63. The Prohibited Workplace Harassment Policy states in pertinent part:

Employees have the right to be free from harassment while in a State government workplace, and the State has the legal obligation to ensure that such harassment does not occur and that effective means of redress are available.

Any employee found to be in violation of this policy is subject to disciplinary action up to and including dismissal. R Ex 13

64. Conduct which has the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, or offensive working environment is prohibited by applicable state policy. E.g., *DOP Prohibited Workplace Harassment Policy*, R Ex 13

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 opposes his suspension and ultimate termination. This grievance put several issues into discussion contending that Respondent’s actions were improper, unreasonable and excessive. Grievant testified on his own behalf regarding alleged facts, alternative interpretations, and Respondent’s actions with regard to disciplinary actions. The issues of suspension, investigation, right to representation, termination and mitigation will be discussed herein. Respondent maintains its actions were reasonable, lawful and justified. Respondent avers the instant disciplinary actions should be affirmed.

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 an individual’s work performance by creating an intimidating, hostile, or offensive working environment is prohibited by applicable state policy. See *DOP Prohibited Workplace Harassment Policy* R Ex13 In order to maintain

an efficient and effective work environment, employers are often required to address inappropriate employee behavior 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. Disciplinary action may be taken in the form of oral reprimand, written reprimand, demotion, suspension or dismissal. Division of Highways' Administrative Operating Procedures, Disciplinary Action § 3, Ch. 6, II.A. R Ex 6

On September 30, 2019, there was a reported concern purporting that Grievant had made comments after an in the office disagreement which were perceived to be hostile. Grievant made statements that were perceived as threatening and did create the anxiety of fear in one or more co-worker. Valerie Ahart, employed as an administrative secretary with Respondent, reportedly was scared of Grievant, in that, in her presence Grievant made statements shortly after a workplace disagreement which were interpreted as threatening and hostile to employees. Ms. Ahart believed that Grievant intended to hurt other people. Grievant's supervisor and Ms. Ahart reported the information to responsible members of Respondent's Human Resources Division. The newly reported event was not the first incident report received by Respondent regarding Grievant's behavior and attitude. Citing complaints and events of record. R Ex 5 at pgs. 11-28 In review of the information received, coupled with known history, which included a contentious relationship with others, the Assistant Director and Director Human Resources Division determined that the appropriate course of action in response to the perceived threats was removing Grievant from the office setting pending an investigation.

Division of Highways' Administrative Operating Procedures Section III, Chapter 6: Disciplinary Action provides: "An employee may be suspended without pay pending the outcome of an investigation into alleged offenses or conduct, which has a reasonable connection to the employee's performance of his or her job. Such suspensions must be for a definite duration." III.D.2. R Ex 6 at pg. 4 of 9. Policy further permits suspension pending investigation and immediate oral suspensions. Relevant policy language states, "An employee may be suspended immediately, upon oral notice, if the employee's performance or conduct constitutes a continuing danger to persons or property or if the orderly conduct of the affairs of the DOH is threatened." *Id.* at, § 2, Ch. 6, III.B.3.d, 1

It is not established that Respondent acted irresponsibly or improper in suspending Grievant. Grievant made statements that were perceived as threatening and hostile to the workplace. He indicated that "a lot of innocent people were going to get hurt and that he has been planning this for a very long time." Prudent assessment of the situation was proper. The September 30, 2019, suspension letter was hand-delivered delivered by Director Woods, and Assistant Director Witt. R Ex 1 Grievant was informed that Respondent would be conducting an investigation into threats of violence reportedly made by Grievant toward agency personnel. Grievant was not uninformed. Grievant was placed on a 20-day unpaid suspension "through and including October 20, 2019 or until the investigation is complete, whichever occurs sooner." *Id.* The suspension letter provides Grievant with the option to use his annual leave for the suspension period, informs Grievant that the results of the investigation could lead to additional disciplinary action up to and including dismissal, and notably the letter states to Grievant "that your

cooperation in the agency's investigation is required as a condition of your employment with the agency." R Ex 1 The letter also provides a contact phone number for Human Resources if Grievant should have any questions or concerns. *Id.*

To the extent that identified comments of Grievant were perceived as workplace threats, Respondent's actions of launching an investigation was not overreaction in view of the comments' context. Grievant's statements may have been a true threat or hyperbole expressed during an agitated state. In review of the comments, known behavior, and perceived context Respondent made a responsible decision. The collection of further information is prudent, reasonable and authorized by applicable rule, regulation and procedure. There are established and readily acknowledged policies applicable to employment with a West Virginia governmental agency. Respondent's Administrative Operating Procedures are not the only foreseeable applicable regulation to this type of situation, *also see* West Virginia Division of Personnel's ("DOP") Workplace Security Policy and DOP's Prohibited Workplace Harassment Policy. R Ex 11 and 13

In that the allegations made against Grievant was under investigation, it is relevant that, "[a]n employee may designate a representative who may be present at any step of the procedure as well as at any meeting that is held with the employee for the purpose of discussing or considering disciplinary action." W. Va. Code § 6C-2-3(g)(1). The Grievance Board has interpreted this statute to include meetings conducted for the purpose of investigation as the findings of an investigation could lead to disciplinary action. *Koblinsky v. Putnam County Health Dep't*, Docket No. 2010-1306-CONS (Nov. 8, 2010).

Grievant's contention that he was denied a right to representation during Respondent's attempt to provide him with due process is intriguing. The right of public employees to representation during investigatory meetings is not new.⁵ However, whether the instant Grievant was prohibited such representative is a pivotal touch stone of this case. Failing to properly exercise a right is not the same as being denied the right. This crux of the issue in the context of this case is whether Respondent prohibited or inexcusably curtailed Grievant from exercising his right.

Investigators were charged with determining facts related to allegation of Grievant's conduct at the workplace. Grievant choosing not to meet, and/or effectively communicate with investigators is not synonymous with Respondent denying Grievant representation at an investigative interview. Due process protection requires presentation of charges and reasonable opportunity for the employee to respond before the final imposition of discipline.⁶ Grievant's actions were less than forthcoming in response to Respondent's attempt to determine Grievant's position/explanation regarding the perceived threats.

⁵ Employees have a right to representation during investigatory meetings that are not *per se* discipline, but where discipline could result. *Knight v. West Virginia Department of Health and Human Resources*, Docket No. 2008-0981-DHHR (August 6, 2009); *Koblinsky v. Putnam County Health Department*, Docket No. 2010-1306-CONS (November 8, 2010).

⁶ It is a well-settled principle of constitutional law, under both the State and Federal Constitutions, that an employee who possesses a recognized property right or liberty interest in his employment may not be deprived of that right without due process of law. *Buskirk, supra*; *Clark, supra*. "An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and an opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494, (1985), *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). See also West Virginia Supreme Court of Appeals case *Board of Education of the County of Mercer v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994). The question is whether the due process protections afforded Grievant in the instant matter were sufficient.

Grievant was required to appear for the investigative interview as a condition of his employment regardless of being placed on unpaid suspension. Gordon Simmons, Grievant's union representative, testified that he "advised [Grievant] to not attend anything until the suspension was lifted and then to only attend with representation present." Neither Grievant nor his union representative made any inquiry with Respondent regarding payment for participating in the investigative interview. See L3 Testimony Respondent concedes, and never denied, that Grievant would have been paid for attending the investigative interview pursuant to the West Virginia Wage Payment and Collection Act. Witt Testimony Thus, if Grievant was truly concerned about being compensated for participating with the investigation, he needed only ask. Grievant might argue he was unaware that he would be paid for his time even during his suspension but this argument has limited persuasive weight. Any percentage of Grievant's failure to attend one or both of the scheduled investigative interviews attributed to Grievant's concern for proper compensation is on Grievant misgivings, not Respondent.

Grievants is and was entitled to representation during an investigatory interview conducted by a person who has the authority to impose or recommend discipline, however the undersigned does not concur with Grievant's assertion that Respondent denied him this right. Grievant was required to cooperate with the ongoing investigation or put his employment with Respondent at risk. Grievant testified that he was actively seeking to retain legal counsel during the time period of Respondent's internal investigation into Grievant's actions. However, Grievant failed to timely notify the investigators or the Human Resources Division that he needed to reschedule either of the

two scheduled interviews even though he was provided with contact phone numbers and instructions to call if he was unable to attend the second scheduled interview. Grievant's attempt to hold Respondent accountable for his own lack of candor is overreaching.

Grievant's reference of legal counsel was not denied by Respondent. Citing Recording While it is true that Respondent's agent did not recognize Grievant's reference, as Grievant now infers it to be (request for a representative), it is also true that said agent did not deny the right, he indicated that such option was on Grievant's dime. Grievant at no time during Respondent's internal investigation into Grievant's actions did Grievant clarify his rationale for failing to appear was due to him experiencing difficulties securing a representative. This was not the first time Grievant's attitude and behavior had been an issue in the work place.

If Grievant's lack of desired representation, with or without Union Representative Simmons' advice not to participate in an unpaid investigative interview, was communicated to Respondent's agents, then Respondent could be viewed as on notice. However, Grievant failed to notify the investigators or Respondent's Human Resources Division that he needed to reschedule either of the two scheduled interviews, prior to failing to attend. Respondent was attempting to secure Grievant's response to the allegations, get his recollection and interpretation of events. Respondent was complying with the principles of due process. Grievant's failure to cooperate or even make a phone call to inform agency personnel he would not be attending the scheduled interviews, was impeding the investigation.

It is not held that an employee must forfeit his right to representation because his employer has established a meeting date and time, *reasonableness must be exercised* by both sides. The denial of the right to representation does not require the employer's use of magical words explicitly forbidding the presence of a representative at an interview but an employee cannot choose to just decline to attend a meeting then retrospectively allege his absence was due to lack of representation. Grievant could have and reasonably should have timely informed a responsible agent regarding his failure to attend the investigative interviews.

It is acknowledged that it would be prudent to establish a mutually acceptable time for all parties to convene essential meetings. However, Grievant's veiled excuse that Respondent failed to send written correspondence from September 30, 2019 to October 16, 2019 seeking to schedule an investigative Interview is not persuasive. If Respondent was truly misinformed regarding Grievant's words, actions, and intent it would have behooved Grievant to clarify any misconception. Pursuant to the September 30, 2019 suspension letter Grievant was aware of an investigation into threats of violence reportedly made by him toward agency personnel. R Ex 1

Respondent was apprised that Attorney Mark Barney was Grievant's representative on October 24, 2019, this being 10 days before the conclusion of Grievant's suspension which had been extended to November 3, 2019. Grievant suggests Respondent had a duty to reschedule another interview once made aware that he was now ready and represented. This position is convenient but the argument omits the fact that Grievant had failed to inform Respondent, if true, that his earlier failure to

cooperate was because he was attempting to secure representation. Respondent could have rescheduled Grievant and provided him with a third interview date, yet it is not established that Respondent had sufficient information to compel such action. Respondent's investigators were never apprised that Grievant's prior reluctance to speak with them was fueled by Grievant's wish to have representation present at the meeting and/or he was having difficulty securing a representative.⁷ Grievant offers more than one rationale for his failure to attend scheduled investigative interviews. The facts do not establish Grievant's contention that Respondent denied him a right to representation. It is more accurate to state Grievant failed to exercise his right in an efficient and timely manner.

Grievant maintains his words are being misconstrued. He offers an alternative interpretation of his alleged comments. Grievant explained during the level three hearing that his comment referencing innocent people getting hurt was a statement about how provoking people at work (like Adams provoked Grievant) could lead to innocent people (like Grievant) being hurt with the loss of their jobs. Grievant's Testimony Grievant further testified that that the comment regarding innocent people and getting hurt was in no way intended as a threat of violence towards any employee. *Id.* Grievant's representation regarding his alleged threatening comments are interesting and a counter balance on the interpretation of hostile and threatening. Grievant's grievance hearing

⁷ Respondent also tends to purports that the termination determination and Grievant's dismissal letter was formulated shortly after Grievant did not attend the October 21, 2019 investigative interview, prior to Grievant's October 24, 2019 phone call. Witt testimony; *also see* fof 48-

explanation regarding events of September 30, 2019 was exactly the type of information Respondent's investigators were trying to get.

It is not necessary that the undersigned to determine whether one of the instant parties interpretation is more likely than another. Theoretically it could be helpful but it is not essential to the issue of Grievant's termination. Grievant was not dismissed for the policy violations listed in the internal investigative report,⁸ however it is arguable recognized these allegation were likely taken into consideration by Respondent. **Grievant was dismissed for his failure to cooperate with Respondent's investigation.**

Pursuant to a letter dated October 30, 2019, Grievant was informed that the decision had been made to terminate his employment with Respondent as a Duplicating Equipment Operator 2. The letter provides the reason for his dismissal was failure to cooperate with an agency investigation and lists specific evidence of that failure. Witt Testimony The October 30, 2019 termination letter among other information states:

Your unwillingness to appear for the interview and your failure to communicate with the investigator has made it impossible for us to complete the investigation which led to your suspension. You are being dismissed for your failure to cooperate with the investigation.

⁸ If true Grievant's actions violated the West Virginia Division of Personnel Prohibited Workplace Harassment Policy. Specifically, but not limited to engaging in "Nondiscriminatory Hostile Workplace Harassment: a form of harassment commonly referred to as 'bullying' that involves verbal, non-verbal or physical conduct that is not discriminatory in nature but so atrocious, intolerable, extreme and outrages in nature that it exceeds the bound of decency [. . .] psychologically or physically threatens, embarrasses, ridicules, or in some other way unreasonably over burdens or precludes an employee from reasonably performing her or his work." See II.H; R. Ex 13 at pg. 2 of 9.

R Ex 4 Respondent avers and cites Grievant's violation of West Virginia Division of Highways' Administrative Operating Procedures Section III, Chapter 6: Disciplinary Action as proper authorization to terminate Grievant's employment. The allegations made against Grievant were being investigated. Respondent highlights that Grievant was required to cooperate with that investigation or put his employment with the DOH at risk. The Standards of Work Performance and Conduct compels the "[c]ooperation and assistance as required in agency audits and investigations [. . .]" of all DOH employees. See Disciplinary Action, § 2, Ch. 6, II.A.3, 8, & 11 R Ex 6 at pg. 2 Respondent took Grievant's actions very seriously and after assessing all the information available to them, concluded that dismissal was appropriate.

Grievant was aware of the obligation to assist with Respondent's investigations. Grievant was reminded, verbally and written format "your cooperation in the agency's investigation is required as a condition of your employment with the agency." R Ex 1 Further, Grievant signed an Acknowledgment Form on or about April 13, 2015, confirming receipt of the Standards of Work Performance and Conduct. R Ex 7 Grievant was given multiple opportunities to cooperate and multiple warnings of the consequences if he failed to do so.

Grievant contends that termination is too severe a penalty is specifically considered by the undersigned. Permanent state employees who are in the classified service can only be dismissed "for good cause, which means misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without

wrongful intention.” Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004) (*per curiam*). See also W. VA. CODE ST. R. § 143-1-12.2.a. (2016). “Although it is true that dismissal is inappropriate when the employee's violation is found to be merely a technical one, it is also true that seriously wrongful conduct can lead to dismissal even if it is not a technical violation of any statute. . . . The test is not whether the conduct breaks a specific law, but rather whether it is potentially damaging to the rights and interests of the public.” *W. Va. Dep't of Corr. v. Lemasters*, 173 W. Va. 159, 162, 313 S.E.2d 436, 439 (1984).

Assistant HR Director Witt, testified that a lesser punishment, short of termination, was not considered when deciding the appropriate discipline for Grievant. Ms. Witt explained in her testimony, termination was authorized under DOH policy and Grievant demonstrated a lack of cooperation to the point that the decision makers within Human Resources believed a change in Grievant's behavior could not be achieved, which is the goal of progressive discipline. Witt Testimony Facts, circumstances, and history of an employee are proper factors to consider when analyzing and determining warranted action. Respondent established by a preponderance of the evidence reasonable and lawful justification for sanctioning Grievant.

In assessing the penalty given, “[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).

It is not determined that Respondent abused its discretion in the circumstances of this case. Grievant’s work history includes contentious relationships with co-workers and supervisors. A predominant number of Grievant’s co-workers appear to be intimidated and describe Grievant as being paranoid, mean, abusive, threatening, and bullying. R Ex 5 at pg. 4 Grievant did himself no favor in not explaining to Respondent the rationale for his conduct and failing to assistance as required in an agency investigation. Respondent took Grievant’s actions very seriously and after assessing relevant factors available to them, concluded that dismissal was appropriate. Grievant failed to demonstrate the penalty levied was clearly excessive action.

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. West Virginia Department of Transportation, Division of Highways has established and recognized standards of workplace performance and conduct that an employer can reasonably expect its employees to meet. Division of Highways Administrative Operating Procedures § 3, Ch. 6. Under DOH’s Disciplinary Action Policy, “An employee may be suspended without pay pending the outcome of an investigation into alleged offenses or conduct, which has a reasonable connection to the employee’s performance of his or her job. Such suspensions must be for a definite duration.” See III.D.2, at pg. 4.

3. DOH Disciplinary Action Policy permits immediate oral suspensions for examples of poor performance or misconduct that include but are not limited to threatening bodily harm [. . .].” *Id.* at § 3, Ch. 6, III.B.3.d, 1.

4. Respondent proved by a preponderance of the evidence justification to suspend Grievant’s employment to investigate allegation of misconduct which were reasonable perceived to be threatening of bodily harm.

5. Employees have the right to be free from harassment while in a State government workplace, and the State has the legal obligation to ensure that such harassment does not occur and that effective means of redress are available. West Virginia Division of Personnel's Workplace Security Policy; DOP's Prohibited Workplace Harassment Policy.

6. "An employee may designate a representative who may be present at any step of the procedure as well as at any meeting that is held with the employee for the purpose of discussing or considering disciplinary action." W. Va. Code § 6C-2-3(g)(1). The Grievance Board has interpreted this statute to include meetings conducted for the purpose of investigation as the findings of an investigation could lead to disciplinary action. *Koblinsky v. Putnam County Health Dep't*, Docket No. 2010-1306-CONS (Nov. 8, 2010).

7. It is not established that Respondent denied Grievant a right to representation. Respondent did not inexcusably prohibited Grievant from exercising his right to representation.

8. Respondent proved by a preponderance of the evidence that the suspension and subsequent termination of Grievant employment in the circumstance of the matter was for cause, and authorized under applicable Administrative Operating Procedures.

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

11. Sufficient mitigating factors are not found present in the instant matter to mandate overriding the action of Respondent. In the circumstances of this matter Grievant did not demonstrate that the penalty imposed was clearly excessive and/or an abuse of discretion.

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: January 20, 2021

Landon R. Brown
Administrative Law Judge