THOMAS AGLINSKY,

Grievant,

v. DOCKET NO. 97-BOT-256

BOARD OF TRUSTEES/

WEST VIRGINIA UNIVERSITY,

Respondent.

DECISION

Grievant, Thomas Aglinsky, initiated this proceeding pursuant to the provisions of W. Va. Code §§18-29-1 et seq., alleging that the termination of his employment was arbitrary and capricious and in violation of policies, procedures and statute. The grievance was denied by Grievant's immediate supervisor on October 15, 1996. A level two hearing was held on April 16, 1997, and May 5, 1997, followed by a written decision dated May 9, 1997, denying the grievance. Consideration at level three was waived, pursuant to W. Va. Code § 18-29-4(c). Appeal was made to level four on May 22, 1997, where a level four hearing was held in this Grievance Board's office in Morgantown, West Virginia, on August 7, 1997. This matter became mature for decision upon receipt of the parties' post-hearing written submissions on September 19, 1997.

The following findings of fact are made from a preponderance of the credible evidence of record.

Findings of Fact

1. Grievant was initially employed on a full-time basis as a custodian for West Virginia University ("WVU") in June of 1992. He began working as a Parking Attendant II in November of 1995. 2. On December 11, 1995, Grievant was given a "Letter of Counseling" by Keith Pyles, Sr., Parking Enforcement Officer and Grievant's supervisor, regarding his failure to write parking tickets for all of the areas assigned to him. He was reminded which areas he was to patrol and that he had been informed at the outset of his employment that part of his duties and responsibilities was

to write parking tickets. Mr. Pyles also warned Grievant that any future failure to perform his assigned duties would result in continued progressive discipline.

3. Grievant was absent from work on December 27, 1995, through December 28, 1995, and on January 5, 1996. He submitted leave reporting forms, claiming the time as exempt sick leave, but he did not supply a doctor's excuse for the absences, which was required.

4. On February 2, 1996, Sergeant James Enoch, Parking and Traffic Enforcement Supervisor, issued a written memorandum to Grievant, explaining to him that he needed to properly complete the two previously submitted sick leave forms. He explained to Grievant that, when claiming sick leave, he must designate it as either exempt or non-exempt, providing a doctor's excuse for exempt leave. Sergeant Enoch also enclosed a copy of the sick leave policy for the Department of Public Safety and Parking Management for Grievant's review.

5. On February 6, 1996, Mr. Pyles and Sergeant Enoch met with Grievant, again explaining the sick leave policy and how to complete the forms. Grievant stated he understood how to properly fill out the forms and would do as requested.

6. On February 7, 1996, Grievant received a “First Letter of Warning” from Mr. Pyles for his continued lack of consistency in writing tickets, which had resulted in increased complaints to the Parking Office regarding violations.

7. When Grievant had still not submitted the corrected sick leave forms, he was issueda “Letter of Counseling” dated February 12, 1996, from Sergeant Enoch. He requested a properly completed form be sent to him by February 14, 1996, or Grievant's continued failure to follow the instructions would result in progressive discipline.

8. Sergeant Enoch issued a “First Letter of Warning” to Grievant on February 15, 1996, regarding his continued failure to submit a corrected sick leave form, as requested verbally and in writing. He advised Grievant that his continued non-compliance with the request could result in suspension, demotion or termination. Sergeant Enoch also advised Grievant in the letter that significant improvement was needed in his performance.

9. Sergeant Enoch and Mr. Pyles met with Grievant on February 26, 1996, to discuss deficiencies in his performance, both with regard to his failure to consistently enforce parking violations and his failure to comply with the Department's sick leave policy.

10. On February 27, 1996, Sergeant Enoch issued a “Second Letter of Warning” to Grievant for

both areas of deficient performance, as discussed in the meeting on February 26, 1996. Grievant was advised in this letter that he would have to show immediate progress, and his progress would be evaluated again on March 15, 1996. Finally, Sergeant Enoch informed Grievant that continuation of his current performance would result in termination of his employment.

11. Also on February 27, 1996, after being counselled regarding his failure to write tickets as expected, Grievant went to one of his designated areas near the president's office, discovering that a number of cars were parked illegally. However, he was informed by Herman Moses, Dean of Student Life, that tickets should not be written for those cars, because the president was hosting a function for invited guests. In response, Grievant wrote a parking ticket, although not addressed to a particular vehicle, upon which he wrote the following commentary:

> Herman Moses said do not write any more tickets[,] they were having a party[.] I said I would get fired for not writing tickets by Jim Enoch. Moses said he would take care of it.

This ticket was turned in to the Parking Office as a parking citation.

12. After the incident involving the February 27 parking citation, Sergeant Enoch verbally counselled Grievant regarding the impropriety of his conduct. He explained to Grievant that parking citations are official documents which often end up in magistrate court, and that it is improper to write any type of personal comments or messages on them (there is, in fact, no provision on the face of the ticket for comments of any type). He further instructed Grievant that, in the future, special circumstances surrounding a ticket should be handled by attaching a separate note to the citation, or Grievant could contact Sergeant Enoch and discuss it with him verbally.

13. On February 29, 1996, Grievant was the only person working in the parking garage. He called Mr. Pyles at home to tell him that he was not feeling well and needed to go home. Mr. Pyles told Grievant to wait until a replacement arrived before leaving the garage. Grievant left, closing the garage instead of waiting for a replacement.

14. Mr. Pyles and Sergeant Enoch agreed, after meetings held on March 11 and 12, 1996, with Bob Roberts, Director of Public Safety and Parking Management, and Grievant, that Grievant should be terminated. Sergeant Enoch informed Chief Roberts of this recommendation in a memorandum dated March 13, 1996. The reasons cited for the decision were Grievant's inability to perform his job, refusal to improve his job performance, job abandonment, dishonesty concerning sick leave, job

abandonment and job performance, and unreliability.

15. Although agreeing that all of the available information would justify Grievant's termination, Chief Roberts opted to make one last effort to help Grievant improve his performance.In a March 14, 1996, “Third Letter of Warning,” Chief Roberts informed Grievant that, instead of termination, the penalty for his behavior would be a ten-day suspension without pay and a demotion to Parking Attendant I, effective that date. He was told that he must follow all instructions from his supervisors, unless illegal or immoral, and question directives at a later time, if he believed it necessary. Finally, Grievant was advised that all previous disciplinary actions would remain active in his personnel file, and that any failure to comply with directives would result in immediate termination.

16. Initially after Grievant's demotion, the majority of his duties consisted of working in a parking booth. However, after an unknown period of time, he was required to patrol parking areas and write tickets as part of his duties and responsibilities as a Parking Attendant I.

17. Grievant participated in training conducted on June 24, 1996, which included instruction regarding how to issue parking citations.

18. On July 24, 1996, while patrolling one of his assigned parking areas, Grievant observed a vehicle parked in a handicapped space without the appropriate permit. While he was ticketing the car, the owner of the vehicle watched him, applauded, and made a comment to Grievant. In response, in the area of the ticket where the vehicle owner's name, address, and license information is to be inserted, Grievant wrote the following comment: “Person clapped his hands. He said I'll pay ticket[.] What is it $1.50[?]”

19. A meeting was held on July 31, 1996, where Grievant, his representative, Sergeant Enoch, Mr. Pyles, and Captain Mathess were present, at which time Grievant was advised that, due to his continued failure to comply with oral and written instructions in execution of his duties, his employment was terminated, effective immediately. The termination was documented in a writtenmemorandum to Grievant from Sergeant Enoch on the same date, which outlined Grievant's disciplinary history and repeated failures to follow instructions, culminating with his conduct regarding the July 24, 1996, citation.

20. Grievant did not grieve the counselling letters, warning letters, verbal warnings, or the suspension and demotion he received prior to his July 31 termination.

21. Prior to being hired as a Parking Attendant in 1995, Grievant had filed a grievance because

of his non-selection as a campus police officer. That grievance was denied by this Grievance Board in January of 1996, because Grievant did not meet the qualifications of the position. Chief Roberts was the only employee of the Department who was involved in the prior grievance and the instant one.

22. Grievant also filed a grievance, prior to being hired as a Parking Attendant II in November of 1995, because he was not the initial choice for the position. When the successful candidate turned it down, Chief Roberts offered Grievant the job, and Grievant accepted. Chief Roberts had no knowledge that Grievant had grieved his initial non-selection until after Grievant had begun employment in the position. He then asked Grievant if he would drop the grievance he had filed, because it was no longer necessary, and Grievant agreed.

23. Chief Roberts was off on medical leave in the summer of 1996, and was not involved in or even aware of Grievant's termination until several weeks after it had occurred.

Discussion

An employer must establish the charges in a disciplinary matter by a preponderance of the evidence. W. Va. Code § 18-29-6. WVU's disciplinary policy provides that a non-probationary employee (one with over six consecutive months of service) may be dismissed for a disciplinaryincident after two written warnings on a related issue. Level IV, Joint Exhibit 1. The policy further specifies categories of behaviors which are subject to disciplinary action, including "disobedience and/or insubordination." Respondent contends that, not only did it fully comply with the policy in every possible respect, but it gave Grievant an unnecessary third written warning to improve his performance, after which time he again exhibited disobedient conduct, causing his termination.

Grievant has made alternative arguments to support his contention that he was improperly terminated. He alleges that he did not receive any specific written warnings regarding the incident for which he was terminated, i.e. the July 24 parking citation, which would violate WVU's policy. In addition, he claims that he was terminated in retaliation for his prior grievances. (See footnote 1) Grievant also offered quite a substantial quantity of evidence, at both levels two and four, regarding the incidents which resulted in the counselling, written warnings, suspension and demotion he received prior to his termination. He offered explanations and contrasting stories regarding those events, in an effort to demonstrate that the prior discipline was unnecessary or improper.

Unfortunately for Grievant, since he did not grieve any of the prior discipline he received before his termination, the merits of those actions cannot be placed in issue now. Jones v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); See Stamper v. W. Va. Dept. of Health & Human Resources, Docket No. 95-HHR-144 (Mar. 20, 1996); Womack v. Dept. of Admin., Docket No. 93- ADMN-430 (Mar. 30, 1994). Furthermore, all the information contained in the documentation ofGrievant's prior discipline must be accepted as true. See Perdue v. Dept. of Health & Human Resources, Docket No. 93-HHR-050 (Feb. 4, 1994). Sergeant Enoch testified that the July 24 incident in which Grievant again wrote a personal commentary on a ticket, for which he had previously been verbally reprimanded and specifically instructed not to do, was the “straw that broke the camel's back.” The undersigned finds that WVU consistently followed its disciplinary policy in this case. Although Grievant contends that he did not receive the required two written warnings regarding the specific incident for which he was terminated, his argument is without merit. The overwhelming evidence and documentation in this grievance establishes that Grievant was repeatedly disciplined for one specific problem, which was a consistent failure to follow and comply with oral and written instructions. Although Grievant's behavioral issue manifested itself in different respects- -including inconsistency in ticket writing, not completing sick leave forms, and writing comments on citations--he was on notice that his behavior was disobedient and would not be tolerated. In spite of these warnings, and his own admission that he was specifically told not to write messages on tickets, Grievant still wrote an unnecessary comment on the July 24 ticket, obviously due to his anger at the violator's conduct. Grievant testified that he did this because he did not want the ticket to be dismissed, and he stated that he did not consider this comment to be contrary to the prior directive he had received regarding writing on tickets. His explanation is not credible, and it is obvious that he disobeyed his supervisor's order not to engage in such conduct.

Grievant's remaining contention that he was retaliated against for filing grievances is also without merit. “Reprisal” is defined as “the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it.” W. Va. Code § 18-29-2(p). Grievant claimed that he only received hisposition as a Parking Attendant II because he filed a grievance over not being selected. However, Chief Roberts explained that Grievant was offered the position after the first person selected declined, after which time he discovered that a grievance had been filed. Chief Roberts testified that he went to Grievant

regarding the grievance, because he knew that only Grievant could withdraw it, and it would no longer be necessary, since Grievant had received the position. Grievant produced no evidence to refute this explanation of the sequence of events.

Furthermore, Grievant's claims of reprisal are simply not plausible, because he has contended that it was Chief Roberts who specifically retaliated against him. There is no dispute between the parties that Chief Roberts was the only employee involved in this grievance who has had any involvement in Grievant's prior grievances. As pointed out by Respondent, when given the opportunity to discharge Grievant in March of 1996 with all necessary documentation and foundation, he opted to demote Grievant and allow him another opportunity to improve. If he had an agenda to get rid of Grievant, he certainly would not have done this, as the evidence clearly shows that Grievant's termination at that time would also have been entirely proper. Moreover, when Grievant was finally terminated in July, Chief Roberts was off on an extended medical leave of absence, and there is no evidence indicating that he had any knowledge of or participation in the decision to end Grievant's employment.

Respondent has proven that Grievant had a consistent pattern of disobedience of instructions and directives, resulting in several written and oral warnings, culminating in his termination. It fully complied with the WVU disciplinary policy allowing dismissal of an employee after two written warnings regarding related incidents. Grievant has failed to show that his termination was a result of reprisal or any other violation of statute or policy applicable to his employment. However, the evidence does indicate that, as Grievant has alleged, Respondent did violate its disciplinary policy by immediately terminating Grievant. The following portions of the policy are applicable to this case:

> Except when circumstance creates a safety or security problem, or there is a case of gross misconduct, employees should be provided notice of dismissal two work weeks prior to the effective termination date.

* * * *

Gross misconduct includes, but is not limited to, the following:

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misuse, negligence or malicious destruction or theft of property of the University, its

visitors, patrons or employees;

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assault upon the person of his/her employer or any University employee;

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arson, theft, larceny, fraud, embezzlement, and/or the possession of explosives or firearms.

Clearly, Grievant's conduct does not fall within any of the above-described categories of “gross misconduct,” and Respondent has provided no evidence indicating that Grievant posed a safety or security hazard. Accordingly, Grievant was entitled to two weeks notice of his dismissal. His termination letter does not reflect that he received any severance pay, but only that he would be paid for his accrued leave time.

In addition to the foregoing findings and discussion, the following conclusions of law are appropriate in this matter.

Conclusions of Law

1. An employer must establish the charges in a disciplinary matter by a preponderance of the evidence. W. Va. Code § 18-29-6. 2. An employee of Respondent can be dismissed for disobedience after having received two written warnings regarding a related incident.

3. If an employee does not grieve specific disciplinary incidents, he cannot place the merits of such discipline in issue in a subsequent grievance proceeding. Jones v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); See Stamper v. W. Va. Dept. of Health & Human Resources, Docket No. 95-HHR-144 (Mar. 20, 1996); Womack v. Dept. of Admin., Docket No. 93-ADMN-430 (Mar. 30, 1994). In such cases, the information contained in prior disciplinary documentation must be accepted as true. See Perdue v. Dept. of Health & Human Resources, Docket No. 93-HHR-050 (Feb. 4, 1994).

4. Respondent proved by a preponderance of the evidence that Grievant repeateadly disobeyed and failed to follow instructions.

5. Respondent proved by a preponderance of the evidence that Grievant disobeyed instructions when he wrote a comment on a parking ticket on July 24, 1996, and he had previously received three written warnings regarding his failure to follow instructions.

6. Grievant was not subject to reprisal by his employer, as defined in W. Va. Code § 18- 29-2(p).

7. Grievant was entitled to two work weeks' notice prior to his termination.

Accordingly, this grievance is **GRANTED IN PART** and **DENIED IN PART**. Respondent is **ORDERED** to compensate Grievant for two weeks' salary, beginning on July 31, 1996.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the circuitcourt of the county in which the grievance occurred, and such appeal must be filed within thirty (30) days of receipt of this Decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

DATE: October 27, 1997 _____ **V. DENISE MANNING**

Administrative Law Judge

Footnote: 1

Respondent appears to have made an argument at level four that Grievant could not argue retaliation, because it was not specifically stated on his grievance form. However, Grievant merely alleged that his termination was arbitrary and capricious and in violation of policies and statute, a general allegation which could encompass retaliation. In addition, Grievant introduced evidence at level two regarding his prior grievances and possible retaliation by Chief Roberts, so Respondent was not surprised by these contentions at level four.