MICHAEL TOMPA,

Grievant,

v v.

Docket No. 02-ADMN-138

DEPARTMENT OF ADMINISTRATION/

CONSOLIDATED PUBLIC RETIREMENT

BOARD,

Respondent.

D E C I S I O N

Grievant, Michael Tompa, was employed by the Consolidated Public Retirement Board ("CPRB") within the Department of Administration. He filed this grievance on May 15, 2002. His Statement of Grievance reads:

> **Wrongful discharge from work. Statements I am accused of are false accusations. Totally hear say [sic]. Harassment in the work place. Favoritism, prejudice in the work place, lies, defamemation [sic] of character.**
>
> **Relief Sought: I want my job reinstated immediately. I want Terasa Robertson, Michael Adkins, Lori Cottril [sic], Myra Woolwine and James Hyde to stop or quit the Conspiracy (conspire) meaning lying, slander, and harassment. Jim Hyde can pick and choose his jobs, out of the office for long periods of time. He doesn't loose [sic] his job. It is okay for him but not for me.**

As the grievance was a termination, it was filed directly to Level IV. A Level IV hearing was held on July 16, 2002. (See footnote 1) This case became mature for decision on August 26, 2002, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 2)

Issues and Arguments

Respondent maintains Grievant's termination on May 10, 2002, for failure to meet work performance standards, disruptive and threatening behavior, providing false information, and insubordination was appropriate. (See footnote 3) Respondent sought to place in the record after-acquired evidence about Grievant's phone threat to Lori Cotrill, and Grievant's failure to follow a magistrate court order directing him to stay away from the Capitol grounds and the Cambridge Building in South Charleston. Grievant objected to the presentation of this evidence, as he was not on notice these allegations would be tendered at the hearing. The undersigned Administrative Law Judge allowed Respondent to place this testimony into the record, but reserved judgement on whether it would be considered. Grievant asserts he did not engage in the behaviors of which he is accused, and if he did, it was the fault of others. He also asserts he is treated differently than other employees, many people are out to get him and cause him trouble, and co-workers and supervisors are constantly telling lies about him.

At the Level IV hearing, Grievant also stated he had been diagnosed with early dementia, which was the reason he had trouble performing his work, and he has memory problems. Grievant conceded he had not informed CPRB of these memory difficulties because his doctor told him if his employer knew, he would be terminated. Grievant also indicated he had told CPRB of his physical problems, and CPRB had taken some of his work away. He thought this removal was very unfair. (See footnote 4) In his proposals, Grievant's representative noted Grievant had difficulties performing his duties and had acted inappropriately, but termination was too "cruel" a punishment given Grievant's health problems, of which CPRB was aware. He recommended Grievant receive some discipline, and the medical exam planned prior to Grievant's discharge be performed. After this exam, a decision should be made on the disposition of this long-term employee.

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 a long-term employee of CPRB, with approximately 28 years of service. He was employed as a mail runner. It is essential to the functioning of CPRB that various mail

pick-ups and deliveries be performed on a specified schedule.

2. Since 1996, Grievant has had difficulty performing the duties of his position.

3. From 1996 to 2000, Grievant received two written reprimands and poor evaluations.

4. In 2000, Grievant received a twenty-one day suspension, and an Improvement Plan for poor job performance, failure to sign in and out, and failure to perform and/or complete scheduled mail runs on time. Other behaviors which bordered on insubordination were noted.

5. Grievant grieved this prior suspension, and this disciplinary action was upheld. Tompa v. Dep't of Admin./Consolidated Pub. Retirement Bd., 00-PERB-079 (June 15, 2000)(Tompa I). 6. Because there was no improvement, Ms. Terasa Robertson, Grievant's supervisor, issued a final written reprimand in November 2000. This written reprimand stated if Grievant did not improve, he would be terminated.

7. Shortly thereafter, Grievant was assigned to a new supervisor, John Beane, who wanted to make a fresh start with Grievant.

8. Mr. Beane spent much time supervising Grievant, and for a time Grievant's performance improved.

9. On April 4, 2001, Mr. Beane performed a six month evaluation on Grievant, and he found Grievant was not adequately performing the duties of his position. Grievant was rated as not meeting expectations, and it was noted he spent too much time socializing, and did not pay enough attention to details and the manner in which his duties were to be performed. Also, Mr. Beane noted Grievant had been assigned, with his agreement at his last evaluation, to image verification duty, because he had a lot of down time in the afternoon. Grievant informed Mr. Beane at this interim evaluation that he had never once fulfilled this duty.

10. After receiving this evaluation, Grievant became very upset and acted rudely to Mr. Beane. Mr. Beane found it necessary to tell Grievant to leave his office and to return to work. Grievant returned to Mr. Beane's office within fifteen minutes, complained about a co-worker, Jim Hyde, and refused to complete certain job duties.

11. Grievant frequently complained about Mr. Hyde, and he believed he was treated differently from him.

12. Mr. Beane was on vacation from April 22 to May 3, 2002. During this time Grievant's work performance was very poor, he failed to complete many of his duties, anddid not follow

his assigned schedule. The types of behaviors were the same as those that resulted in Grievant's 21-day suspension letter. During this time, Michael Adkins, Co- Interim Executive Director, was Grievant's supervisor.

13. Grievant's first dismissal letter identifies some of the problems during that time period, as described in the Findings of Fact below, but was not meant to be all inclusive.

14. On April 22, 2002, Grievant signed off his computer at 10:13 a.m., never logged back in, left his work station at 2:00 p.m., and never returned to work. Grievant is to leave his computer on at all times and to check for messages about his duties throughout the day. **(See footnote 5)**

15. During the week of April 22-26, 2002, Grievant left work without opening the evening mail, as he is required to do each day.

16. Grievant was to make a run to the Cambridge Building at 2:00 p.m. each day. On April 23, 2002, at 11:30 p.m., Grievant was e-mailed that the checks were ready for pick up. Some of these checks were to go to the Cambridge Building. These checks were still not picked up at 1:41 p.m. A subsequent inquiry revealed Grievant had arrived at the Cambridge Building at 1:00 p.m., he was still there, he had not opened his 11:30 a.m. e- mail, and he had not delivered the other mail set out at 9:45 a.m. that morning.

17. On April 30, 2002, Grievant received an Express Mail envelope for him to open and deliver. This envelope contained a check for $24,724.00. Grievant misplaced this envelope, but told Mr. Adkins he had delivered it appropriately. A two day searchensued for this missing check, and a great deal of time of many employees was taken up with this quest. On May 2 or 3, 2002, the envelope containing the check was returned through interdepartmental mail, and Grievant had no explanation as to how or why this had happened.

18. On May 1, 2002, Grievant did not deliver the daily deposits, resulting in a shortfall for an investment transfer.

19. On May 2, 2002, the following difficulties occurred with Grievant's work performance:

a. Grievant did not time stamp the mail;

b. Grievant left the office without notifying Mr. Adkins, as required, and he could not be found to take a deposit to the Treasurer's office. Another employee was required to perform

this duty;

c. Grievant also did not inform Mr. Adkins of his return to the office as required;

d. Grievant did not pick up the loan checks for delivery;

e. Grievant left a wadded up, signed, direct deposit slip of a retiree on his desk, and did not deliver it to the proper area for processing; and

f. Grievant verbally confronted Lori Cotrill, a co-worker, in a threatening manner and caused her distress. (See footnote 6) **Other workers overheard Grievant, and their work was disrupted. Mr. Adkins was told of this behavior, and counseled Grievant to not discussthese matters with fellow workers. Grievant then went to another work section to discuss his mistreatment, and disturbed those employees' work.**

20. Because of the occurrence of numerous problems within so short a period, CPRB made an initial decision to terminate Grievant's employment, and a letter was written to that effect. This decision was made after Mr. Beane returned to work, and had an opportunity for input. Mr. Beane verified he had spent much of his time in the past six months supervising and counseling Grievant.

21. On May 10, 2002, Mr. Beane directed Grievant to come to Mr. Adkins' office immediately after he finished a phone call. Per Grievant's own testimony, he intentionally did not go to Mr. Adkins' office, but left the building ostensibly to deliver mail. He called Mr. Beane's voice mail several times shortly thereafter, leaving messages stating he had fallen down the steps at the loading dock, his back was hurt, he wouldn't be able to come to the meeting, and CPRB would be required to pay him Workers' Compensation for his back.

22. Mr. Beane went directly to the loading dock, but he could not find Grievant or any witnesses to the events Grievant had discussed.

23. Mr. Adkins then wrote another letter charging Grievant with insubordination for failure to report to his office as directed. This letter also noted that Mr. Beane had looked for Grievant but to no avail, Grievant was to place any response to his dismissal in writing, and he was not to return to the CPRB's offices. Grievant was dismissed immediately, and he would be paid for the two-week notice period instead of working during this period.

24. Both the letters were mailed to Grievant on May 10, 2002. 25. On Saturday, May 11, 2002, Grievant again called Mr. Bean's voice mail and left several rambling messages.

Grievant stated he knew he was to be at the meeting, but he had mail to deliver so he left. Grievant then went on to discuss how he was mistreated by many people at CPRB, that numerous people told lies about him, Mr. Hyde did not do his work and never got in trouble, how he had proven everyone else wrong and still no one believed him, and he wanted management to stay off his back.

26. On Monday, May 13, 2002, Grievant called Ms. Cotrill at 3:01 p.m. and left this message on her voice mail: "You're a fucking bitch woman and you better watch your ass[,] or I'll [sic] liable to kick in on the parking lot cause you better watch your step cause I'll be right behind you. You son of a bitch." (See footnote 7) **Ms. Cotrill was terribly frightened by this message.**

27. Grievant has several medical problems, and he has shared some of these with CPRB. Because of these medical problems, several of Grievant's job duties were given to Mr. Hyde, and Grievant resented this change. These medical problems were discussed in Tompa I, and it was noted Grievant had not asked for any accommodation. The administrative law judge in Tompa I found Grievant's depression, osteoarthritis, migraine headaches, and fibromyalgia did not prevent him from performing the duties ofhim position. No evidence on any of these disease processes was submitted into evidence in the instant grievance. See Tompa I.

28. Grievant has never informed CPRB of any memory problems, and the first knowledge they had that this might be a problem was Grievant's testimony at the Level IV hearing. No medical documentation was received at hearing to substantiate this memory deficit.

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988). "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 and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the

evidence equally supports both sides, the employer has not met its burden. Id.

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 Section 12.2 and .3, Administrative Rules, W. Va. Div. of Personnel (June 1, 1995).

I. Credibility The first issue to address is one of credibility, as Grievant testified he did not do many of the things of which he was accused, and if he did do them it was someone else's fault. Grievant did agree his work performance had fallen off, and this was because of all the people who constantly harassed him. Grievant also admitted he did not go to the meeting on May 10, 2002, because he had decided not to go to any more meetings with management.

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR- 066 (May 12, 1995). 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 Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993).

The United States Merit System Protection Board Handbook ("MSPB Handbook") is helpful in setting out factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984). The Grievance Board has applied these factors in many cases, and considers the following in assessing 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 bythe 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 testimony of Respondent's witnesses was credible. Their statements were believable, clear, consistent with each others, and internally consistent. Additionally, there was no demonstration of bias, only frustration. On the other hand, Grievant's testimony was implausible, conflicting, and confusing. He had a tendency to ramble, and had great difficulty staying on point. The credibility of Grievant must be called into question. "[A] [f]actor to be considered in making and explaining credibility determinations is [the] possibility that [the] witness is biased and may consciously or unconsciously shade his or her testimony for or against one of the other witnesses or parties." Chin v. Dep't of Treasury, 44 M.S.P.R. 201 (1990). Accordingly, the undersigned Administrative Law Judge finds Grievant's testimony to be distorted, influenced by his own bias, and frequently incorrect.

II. Merits

A. Job performance and falsehoods

Respondent has met its burden of proof and demonstrated Grievant continued to exhibit poor job performance, and he then told falsehoods to avoid detection. Respondent has shown Grievant resorted to falsehoods and blame avoidance when questioned about deliveries and activities he did not complete or did not complete in a timely manner. Grievant's work performance took a real "nose dive" while Mr. Beane was on vacation. It would appear that Grievant believed no one would be watching him very closely during this time, and decided he could do pretty much what he wanted. His failure to perform theduties of his job affected the smooth running of CPRB and caused multiple problems and additional work for those who depended on him.

B. Disruptive and threatening behavior

As for the threatening behavior, the Division of Personnel's Workplace Security Policy discusses "Threatening/Violent Behavior" and defines it as "[c]onduct assessed, judged, observed, or perceived by a reasonable person to be so outrageous and extreme as to cause severe emotional distress[,] or cause, or is likely to result in, bodily harm." §II. C., Workplace Security Policy. (See footnote 8) **The purpose of the Policy is "to protect the health, safety, and**

well-being of employees. . . ." This Policy clearly states that threatening and/or violent behavior is unacceptable in the workplace and will not be tolerated. An employer has the right to expect an employee to abide by these rules, and by the societal norms of behavior. As stated in Finding of Fact 26, Grievant's threats even continued after he was discharged. Grievant's threats to co-workers cannot be permitted.

C. Insubordination

The next issue to address is insubordination. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . an administrative superior." Butts v. Higher Educ. Interim Governing Bd., No. 30120 (W. Va. June 17, 2002)(per curiam). See Riddle v. Bd. of Directors, So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995). "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) citing Meads v. Veteran Admin., 36 M.S.P.R. 574 (1988). See also Daniel v. U. S. Postal Serv., 16 M.S.P.R. 486 (1983); Davis v. Smithsonian Inst., 13 M.S.P.R. 77 (1983).

Respondent has also met the burden of proof on this issue. Grievant admits he intentionally did not attend the meeting he was told to go to because he did not want to attend.

III. Mitigation/Severity of Penalty

The argument that Grievant's termination is 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. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

"When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd.of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997). Mitigation of a penalty is considered on a case by case basis. Conner v. Barbour County Bd. of Educ., Docket No. 95-01-031 (Sept. 29, 1995); McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. Pingley v. Div. of Corrections, Docket No. 95-CORR-252 (July 23, 1996). This 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 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 will not substitute her judgement for that of the employer. Tickett v. Cabell County Bd. of Educ., Docket No. 97-06-233 (Mar. 12, 1998); Huffstutler v. Cabell County Bd. of Educ., Docket No. 97-06-150 (Oct. 31, 1997).

An employer has substantial discretion to determine a penalty, and the undersigned Administrative Law Judge cannot substitute her judgement for that of Respondent. The undersigned Administrative Law Judge is unable to conclude that CPRB abused itsdiscretion in designating the penalty in question. Grievant's continuing inefficiency and inappropriate behavior is "performance of a substantial nature directly affecting the rights and interest of the public." Indeed, his threatening behavior continued even after Grievant was discharged

for similar actions. Clearly, Grievant's conduct is not going to change. Oakes, supra.

While it is a sad occurrence that a long-term, state employee must be terminated, Grievant's persistent behavior cannot be tolerated. CPRB employees have a right to be able to discharge their duties without interruption, and to feel safe in their work surroundings. An employer is not expected to tolerate wilful disobedience of clear, reasonable orders.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. Pursuant to W. Va. Code § 29-6A-6, the burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988). "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 and Human Resources, Docket No. 92-HHR-486 (May 17, 1993).

2. 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 technicalviolations 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 Section 12.02 and 03, Administrative Rules, W. Va. Div. of Personnel (June 1, 1995).

3. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . an administrative superior." Butts v. Higher Educ. Interim Governing Bd., No. 30120 (W. Va. June 17, 2002)(per curiam). See Riddle v. Bd. of Directors, So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989).

4. Respondent has met its burden and established Grievant failed to perform the duties of his position, engaged in disruptive and threatening behavior, provided false information to his supervisors, and acted in an insubordinate manner.

5. Grievant was terminated for misconduct of a substantial nature directly affecting rights and interests of the public.

6. An 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 the employer's discretion, or an inherent disproportion between the offense and the personnel action. Conner v. Barbour County Bd. of Educ., Docket No. 94- 01-394 (Jan. 31, 1995). See Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989). 7. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997).

8. "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).

9. Respondent has substantial discretion to determine a penalty, and the undersigned Administrative Law Judge will not substitute her judgement for that of the employer. Tickett v. Cabell County Bd. of Educ., Docket No. 97-06-233 (Mar. 12, 1998); Huffstutler v. Cabell County Bd. of Educ., Docket No. 97-06-150 (Oct. 31, 1997).

10. Given the charges proven against Grievant, their level of seriousness, and their long-term continuation, the penalty is not disproportionate or excessive, nor is the penalty arbitrary and capricious. See Lanehart, supra; Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994); Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991).

Accordingly, this grievance is DENIED.

Any party, or the West Virginia Division of Personnel, may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). 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. 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: September 19, 2002

Footnote: 1

At Respondent's request, a pre-hearing conference was held on the issue of safety, as Grievant had placed some threatening phone calls and had appeared at CPRB buildings after being ordered to stay away. Several witnesses were concerned for their personal safety. During the phone conference, Grievant's representative agreed an officer from the Division of Protective Services could be present at the Level IV hearing, and Grievant could be checked for weapons. This inspection occurred, no weapons were found, and the officer remained during the hearing, but his testimony was taken first.

Footnote: 2

Grievant was represented by Fred Tucker of the United Mine Workers of America, and Respondent was represented by its Attorney, Amy Haynie.

Footnote: 3

Grievant received two dismissal letters on that day. One focused on performance issues, and the other discussed insubordination.

Footnote: 4

See Tompa v. Dep't of Admin./Consolidated Pub. Retirement Bd., 00-PERB-079 (June 15, 2000)(Tompa I).

Footnote: 5

Although not exactly clear from the record, it appears Grievant's work hours were 8:00 a.m. to 4:00 p.m.

Footnote: 6

Ms. Cotrill was the co-worker who received the information about the unmade deposits, spent a great amount of time that day looking unsuccessfully for Grievant, arranged for someone else to take the deposits, and informed Mr. Adkins about the deposit problems for May 1 & 2, 2002.

Footnote: 7

The undersigned Administrative Law Judge has decided to allow this evidence into the record even though Grievant was not at work at the time, but was on his two week paid notice period. Obviously, this threatening behavior was not listed as a specific reason for Grievant's dismissal, but because it occurred so close in time with his dismissal, demonstrated a continuing pattern of behavior, and was so egregious, it has been admitted.

Footnote: 8

This Policy was not placed into evidence, but it is a Policy under which state employees work, and the undersigned Administrative Law Judge has taken administrative notice of it.