BRYANT SWAYNE,

Grievant,

v.

DOCKET NO. 04-HE-125

WEST VIRGINIA STATE UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, Bryant Swayne, filed the following Statement of Grievance on October 5, 2004, with West Virginia State University ("WVSU"), stating, "terminated from job." Relief Sought, "Reinstated at my job or moved to another department." Grievant also attached a request for additional relief including back pay, re-establishment of a "positive reputation," investigation of a hostile work environment, and removal of all negative files and reports. (See footnote 1)

This grievance was denied on the merits at all lower levels, and Grievant appealed to Level IV on March 31, 2004. A Level IV hearing was held in the Grievance Board's Charleston, West Virginia office on October 19, 2004. This matter was to become mature for decision on December 1, 2004, upon receipt of the parties' proposed findings of fact and conclusions of law, but the first two days of the Level Ill hearing and the deposition taken after the Level IV hearing were not received until December 21, 2004, and this date will now be the new mature date. (See footnote 2)

Issues and Arguments

Respondent asserts it followed progressive discipline, without Grievant correcting his unsatisfactory performance and insubordination, and terminated him on September 26, 2003, for "failure to maintain Job performance standards", "excessive absence from work and/or your work area," and "insubordinate remarks and confrontational attitude." Resp. No. 9 at Level Il.

Grievant avers there was nothing wrong with his job performance, his termination was unjustified, he was not insubordinate, Respondent did not follow its policies in terminating him, and the failure to

received the required, yearly performance evaluation prevented him from knowing there was a problem with his work performance. As Grievant did not grieve any of his prior disciplinary actions, these will not be addressed, and only the termination is at issue.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact. The issues identified by the parties will be addressed in general in Findings of Fact 1 - 8 and in a more specific fashion after that. Additionally, the parties agreed the transcript and exhibits from Grievant's unemployment hearing and the pertinent information included in the default grievance would be admitted as a part of the record.

Findings of Fact

1. Grievant had been employed by WVSU for approximately thirteen years at the time of his discharge. His initial duties were as a runner, postal worker and assistant in the Cashier's Office. Grievant also drove President Hazo Carter from time to time. Theamount of time he spent driving President Carter decreased during the last years of Grievant's employment.

2. Grievant's duties in the mail room were to receive, sort, meter, and deliver the mail in assisting Mr. Hale, who also worked in the mail room. Grievant and Mr. Hale did not get along, and Grievant did not like to work in the mail room. When directed that he must perform his duties in the mail room, Grievant informed his supervisor, Kristie Williams, Manager of Auxiliary Services, that he had back problems and could not perform these duties. Ms. Williams asked Grievant for a medical excuse to support this statement. After several requests by Ms. Williams, Grievant stated he was unable to obtain the requested excuse.

3. Ms. Williams continued to ask Grievant to perform his mail room duties and Grievant continued to refuse to do them.

4. Since the mail room work had become such "a battle," Ms. Williams informed Grievant his duties in the Cashier's Office would be increased. A student helper was hired to perform Grievant's mail room duties, and at times Ms. Williams, other members of her staff and even her supervisor, Lawrence Smith, performed mail room duties.

5. Grievant did not want to perform the majority of the Cashier's Office duties either and frequently left the office area without telling anyone where he was going, as he had been repeatedly told not to do.

6. Frequently when handed work by the supervisor in the Cashier's Office, Gwen Danford, Grievant would hand it back. When work was placed on his desk, Grievant would slide the work back to Ms. Danford and state he did not want to do it. Grievant also asked many questions about how to do the work, even though he had worked in theCashier's Office for most of his thirteen years at WVSU. Grievant spent much of his time in the Cashier's Office reading the newspaper on the computer at his desk. He did wait on students, but consistently refused to do the Financial Aid paperwork.

7. Grievant's other duties were as a runner to the bank and state house and to various vendors to pay bills. Grievant occasionally performed runner duties for other offices. For example, he would pick up materials for graduation or a check for a performance.

8. These runner duties would take Grievant at least three hours every day. When Grievant was absent from work and other people performed these duties; it took them an hour, to an hour and a half.

9. At a May 19, 1998 meeting, Grievant's negative, insubordinate attitude and his unwillingness to follow the policies were discussed. Grievant was directed to sign in and out because Ms. Williams was frequently unable to find him. Grievant became loud and abrasive during this conversation and stated he would not do this. Grievant was again directed to sign in/out.

10. Grievant's first Letter of Warning followed on June 4, 1998, after the discussion with Ms. Williams and Mr. Smith of May 19, 1998. This letter noted the discussion of Grievant's negative, insubordinate attitude and his unwillingness to follow the policies of the Department. This letter also noted Ms. Williams had adjusted Grievant's schedule to assist him without a resulting improvement, and noted his continued refusal to sign in and out. Grievant was placed on a 60-day probationary period and given a list of guidelines to follow. Grievant was told 40% of his time would be in the Cashier's Office, 40% of his time would be in the mail room, and he was Mr. Hale's backup; and 20% of histime would be as a runner. Ms. Williams stated the runner duties were taking far too long, if other Departments needed his assistance they must receive her prior approval, and he must inform Ms. Williams where he was when he was not in the office. Employer's No. 1 Grievant's Unemployment Hearing. (See footnote 3)

11. This Letter of Warning dated June 4, 1998, succinctly outlined expectations for Grievant's work performance. Grievant was to come to work on time, sign in and out, request time off within a

reasonable amount of time, requests for Grievant to run other errands must be approved in advance, and Ms. Williams would meet with Grievant on a weekly basis to discuss Grievant's progress in the identified areas. The letter further noted that loud, abrasive language and refusal to perform his assigned duties would not be tolerated and would result in further disciplinary actions up to and including dismissal. Employer's No. 2, Grievant's Unemployment Hearing.

12. On August 18, 1998, Grievant received a second Letter of Warning which placed Grievant on a second 60-day period of probation. This letter was almost an exact copy of the first letter of warning. Resp. No. 34 at Level Ill.

13. Grievant's performance improved for a time.

14. On January 27, 2000, Ms. Williams sent Grievant a memorandum recounting a meeting of that same day with Grievant, Mr. Hale, Mr. Smith, and Ms. Williams. The duties in the mail room had been discussed and divided, and Grievant and Mr. Hale had been counseled on their working relationship. Grievant was asked to provide documentation from his physician of any physical limitations that would prevent him fromperforming these duties by February 7, 2000. During this meeting, Grievant was asked several times for his comments, complaints, or suggestions, and he did not respond other than to say he did not agree with the sharing of the duties. Employer's No. 3, Grievant's Unemployment Hearing.

15. Grievant's performance evaluation was performed on March 31, 2000, and deficiencies in Grievant's performance were identified. Grievant did not have another performance evaluation during the remainder of his tenure with WVSU.

16. On August 9, 2000, Grievant received another first Letter of Warning. (See footnote 4) This Letter of Warning noted Grievant had not improved in the areas identified in his performance evaluation. These areas were: 1) negative attitude toward his responsibilities, especially those in the mail room; 2) failure to work the required hours; and 3) failure to give notice if he would be absent or late. This Letter of Warning also noted Grievant had not provided a letter from his physician, as requested in January 2000, to excuse him from his mail room duties. Accordingly, Grievant was expected to perform these tasks. Grievant was put on a thirty day improvement period, and if there was no change, further disciplinary action would be taken. Employer's No. 4, Grievant's Unemployment Hearing.

17. Shortly thereafter, Grievant was going to receive a second Letter of Warning because his

performance had not improved. At Grievant's request, Dr. Robert Parker, then the Executive Assistant to President Carter and currently the Vice President for Financial Affairs, interceded for Grievant. He asked if these issues could be worked out withoutfurther disciplinary action, and Ms. Williams and Mr. Smith agreed. Grievant's performance improved for a time.

18. On April 14, 2003, Ms. Williams and Mr. Smith discussed Grievant's duties with him and directed Grievant that he was to make only one trip a day to complete all his runner duties, and the bank and other runs would now all be performed in the afternoon barring an emergency. Employer's No. 5, Grievant's Unemployment Hearing.

19. On June 3, 2003, Grievant received another first Letter of Warning. This letter had been discussed with Grievant on June 2, 2003. Grievant had failed to pay several cell phone bills before he left for a death in the family. He had placed these checks under his basket, and since no one knew these checks were there, these bills were not paid and several administrators' phones were turned off. Additionally, on the issue of proper work hours, Ms. Williams noted the prior discussion on April 14, 2003, and reiterated Grievant was "to adhere to these [work] hours immediately, no exceptions." Ms. Williams again noted Grievant was to inform her if he had been requested to perform runner duties for other offices, and these requests must be approved in advance. (See footnote 5) Ms. Williams also noted Grievant had exceeded the minutes on his work cell phone by an extensive amount, and he would be expected to pay for any overages that resulted from personal use.

20. On June 4, 2003, Grievant received a second Letter of Warning. He had arrived to work forty minutes late and had not called to inform anyone of this delay. This Letter of Warning noted Grievant's prior Letter of Warning dated June 3, 2003, and thediscussion of this Letter of Warning on June 2, 2003. Grievant was told he must make the afternoon run in less time, approximately one and one half hours, and the ability of others to do so was pointed out. Ms. Williams noted Grievant had left on June 3, 2003, at 12:10 p.m. and did not return until 3:40 p.m., even though he had not made the required bank deposit. Ms. Williams stated, "[y]ou have left me no other choice than to take disciplinary action upon your next infraction by terminating you from your position." Employer's No. 6, Grievant's Unemployment Hearing.

21. By memo dated July 31, 2003, Grievant was suspended for five days without pay, August 4 - 8, 2003. Ms. Williams noted Grievant's habitual lateness had been discussed with Grievant several times, and the need to stop this behavior had been identified. Since Grievant's second Letter of

Warning, June 4, 2003, Grievant had taken approximately eight annual leave days and had been late by more than fifteen minutes, six additional days. Grievant continued to exceed his cell phone minutes by a large amount, and Ms. Williams attached a payment schedule to this letter of suspension. Since Grievant had noted he was having some personal medical and financial problems, Ms. Williams scheduled Grievant for a mandatory appointment with the Employee Assistance Resources Services ("EARS") on August 1, 2003. (See footnote 6) Upon his return to work, Grievant was to provide a doctor's excuse for each absence, report and leave work on time, follow the attached payment schedule for the cell phone bill, and turn in his phone at the end of each work day. If Grievant did not adhere to these conditions Ms. Williams would recommend Grievant's termination. Employer's No. 7, Grievant's Unemployment Hearing. 22. Grievant did not grieve any of the Letters of Warning or his suspension. He did attend the mandatory appointment with EARS.

23. By letter dated September 22, 2003, Grievant was informed of WVSU's intent to terminate his employment on September 26, 2003. This letter noted the two prior Letters of Warning and suspension had placed Grievant on notice of multiple work problems, and Grievant had been told to report to work on time and leave at the designated time. This letter noted Grievant continued to take at least three hours to perform his runner duties, refused to perform work assigned to him in the Cashier's Office, and repeatedly left his desk in the morning without telling anyone where he was going. The reasons given for Grievant's termination were lack of punctuality, failure to adhere to work hours, inappropriate conduct, neglect of duty, insubordination, and failure to maintain performance standards. Employer's No. 8, Grievant's Unemployment Hearing.

24. By letter dated September 24, 2003, and received September 25, 2003, Grievant submitted a response to all the disciplinary actions he had received. Grievant noted he had been experiencing chest pains since the April 14, 2003 meeting with Ms. Williams and Mr. Smith, he had been diagnosed with depression due to stress and anxiety caused by work, he did not pay the cell phone bills discussed in his first Letter of Warning because he was told they could wait, did not know he had gone over his cell phone minutes, the cell phone minutes were insufficient to "serve the College's needs," and he was not told until June of 2003 that there was a problem with his usage. He wrote he was late on June 4, 2003, because he did not have water at this house. Grievant agreed he had been late some times, but contrary to the evidence asserted he always called in to inform WVSU of this fact. Grievant also indicated he always completed his leave formsproperly. Also contrary to the

evidence, Grievant averred he always routed other offices' requests for services through Ms. Williams. Grievant also noted his runs to the Capitol took longer because he delivered the mail differently, got trapped by various trucks, and could not get out of his parking space. Grievant also stated he had not received needed directions and explanations about his work, and he was not insubordinate, but asking questions to insure he would not make any other mistakes in this hostile work environment. Grievant requested his termination be withdrawn until he was released by his doctor, and that he be transferred to other duties. (See footnote 7) Claimant's No. 1, Unemployment Hearing.

25. On September 25, 2003, Ms. Williams and Mr. Smith met with Grievant and two representatives to discuss the prior disciplinary actions and Grievant's termination. This meeting did not change WVSU's decision to terminate Grievant.

26. Grievant was terminated from his employment by letter dated September 26, 2003, and sent to Grievant by certified mail. This letter stated Grievant's termination was for "failure to maintain job performance standards, your excessive absence from work, and/or your work area, and your insubordinate remarks and confrontational attitude. . . ." Resp. No. 25 at Level Ill.

27. By letter dated October 13, 2003, Jonna Wilson from Peoplework Solutions, WVSU's EARS contractor, stated Grievant had attended three session, on August 1, 4, and 8, 2003, and returned on October 13, 2003, for an additional session. Grievant formulated a plan of action to address the issues in his Letters of Warning and suspensionletter, and planned to be more accountable for his time and to "streamline" his courier duties. Resp. No. 10 at Level Ill.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner

of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. 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 and 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.; See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

I. Credibility An issue that must be addressed is credibility, as Grievant's testimony differed from the testimony of others. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Res., 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 Res./Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. (See footnote 8) See Holmes v. Bd. of Directors/W. Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.

The testimony of Ms. Williams was key and her statements were supported by contemporaneous documentation. Additionally, her testimony at Level IV was consistent with her testimony at the unemployment hearing and the Level III hearing. Further, hertestimony was consistent with, and supported by, the testimony of Mr. Smith and Ms. Danford. The undersigned Administrative Law Judge finds the testimony of Ms. Williams credible.

Grievant called many witnesses from the Capitol. They, as a group, did not have any problems with the way Grievant performed his duties and found him to be friendly person. Indeed, one witness indicated Grievant frequently stayed in the office area to chat after his duties were completed. (See

footnote 9) While these witnesses did not have anything negative to say about Grievant, this testimony did not speak to the real issues at hand. It appeared one purpose of this testimony was to show Grievant's schedule varied from day to day, and there would be times the runner duties could not be completed in the one and half hour period set by Ms. Williams. The undersigned Administrative Law Judge agrees with this assertion. However, this assertion would not explain why Grievant routinely took three hours to perform these duties. Grievant's lengthy explanations and/or excuses of almost always being trapped in the parking space by a variety of trucks is not born out by the testimony of Ms. Williams, and is not believed by the undersigned Administrative Law Judge.

Additionally, Grievant's testimony in general was called into question by his other statements. For example, he asserted he was just asking questions and not refusing work in the Cashier's Office. This testimony is not believed. Ms. Williams, Mr. Smith, and Ms. Danford all testified Grievant refused to do the work he was asked to perform. Further,Grievant's statements that he always let Ms. Williams or Ms. Danford know when he left the office, and when he would return is not believed, and not supported by the testimony of anyone but Grievant. Additionally, Grievant's statement in his September 24, 2003, rebuttal that "the [cell phone] plan did not provide enough minutes to adequately serve the College's needs, thus [he] unknowingly went over the minute limit. . . ." is not believable or correct. A review of Grievant's cell phone bills reveal numerous, lengthy calls during off work hours, and these calls continued after Grievant was clearly notified of the problem. Ex. Nos. 8, 36 - 48 at Level III. Further, Grievant did not contest that he owed WVSU for these calls.

II. Procedural irregularities

A. Failure of WVSU to perform yearly performance evaluation

Grievant is correct that he did not receive yearly evaluations as required by the WVSU Handbook. (See footnote 10) Resp. No. 3 at Level IV at 18. The last one noted in the record occurred in March of 2000. Grievant asserts this failure to receive the yearly evaluations prevented him from being aware that his work performance was deficient.

This assertion is without merit. While WVSU did not complete the required, yearly performance evaluations, Grievant was informed clearly and repeatedly that his work performance was inadequate, and he was not following WVSU's policies and procedures. (See footnote 11) The behaviors that resulted in Grievant's termination were longstanding and had beenpointed out to him in numerous Letters of Warning. The June 3 & 4, 2003 Letters of Warning and the July 31, 2003

suspension letter identified the problems with Grievant's performance, and these problems were the same ones pointed out to Grievant in prior counseling sessions, Letters of Warning and performance evaluations. Accordingly, Grievant received adequate notice that his work performance needed to improve, and the failure to receive yearly performance evaluations in this case is harmless. "[A]n error which is not prejudicial to the complaining party is harmless and does not require reversal of the final judgment." Syl. Pt. 4, Burns v. Goff, 164 W. Va. 301, 262 S.E.2d 772 (1980). See Meredith v. Mercer, Docket No. 00-27-247 (Baker v. Hancock County Bd. of Educ., Docket No. 97-15-447 (May 5, 1998), aff'd 543 S.E.2d 378, 2000 W. Va. Lexis 62 (June 28, 2000). Additionally, this violation of WVSU's regulations does not merit the relief sought by Grievant. It would appear that even if Grievant had received these performance evaluations, the outcome would not have changed, as change did not occur as a result of the 2000 evaluation, the Letters of Warning, or the suspension. See Jarvis v. Div. of Rehab., Docket No. 01-RS-421 (Oct. 5, 2001).

B. Failure of WVSU to follow its procedures during the termination process

Although somewhat unclear, Grievant also asserts WVSU did not follow its own regulations, and thus, violated Grievant's due process rights, did not submit "proper discipline documentation," (See footnote 12) and failed to initiate an Improvement Plan. WVSU has numerous rules pertaining to disciplinary actions. At page 21 the WVSU Staff Handbook states:

> The employee's immediate supervisor will outline standards of performance and conduct for each employee. If an employee does not observe these standards, his/her supervisor will counsel him/her to try to resolve the problem. If counseling is not effective, the employee may receive a series of warning letters, then a period of suspension and finally, if the conduct does not improve, dismissal (sic).

At Page 31, the WVSU Staff Handbook states:

> Disciplinary action, including suspension or dismissal, may be taken whenever an employee's conduct interferes with the orderly operation of his/her unit or is contrary to WVSC policies, Board policies, or state, federal or local laws.

At pages 32 and 33 the WVSU Staff Handbook states:

> Dismissal _ may be imposed for offenses after two, written warnings have been sent to the employee and have become part of his/her personnel file.

Immediate dismissal - may be recommended to the President or his appointed designee when the gross misconduct, wilful and flagrant violations of College rules, regulations or standards occur.

. . .

Just causes for disciplinary action shall include, but not be limited to the following actions. It should be noted that all of the following offenses may result in the disciplinary action of immediate dismissal:

. . .

3) refusing to comply with or violating College rules and regulations;

4) disobedience;

5) neglect of duty;

. . .

9) insubordination (See footnote 13)

10) abuse of the telephone

Other forms of misconduct or failure to maintain proper standards of performance have a cumulative effect and may lead to dismissal.

Examples are:

1) failure to maintain performance standards;

2) habitual absence from work;

3) consistent lateness.

As indicted, violations of the foregoing rules and regulations may result in suspension or dismissal.

. . .

A supervisor will give an employee written warnings about his/her unacceptable performance or conduct. Written warnings are given to the employee with a copy placed in the employee's personnel file. A written warning must specify how long it will

remain in the file. In no case can the period specified be longer than twelve months from the date the letter was written.

Discharge After Two Written Warnings:

An employee may be discharged for offenses after he/she has received two (2) written warnings. The required two written warnings also appl[y] to transferred or promoted employees serving their probationary periods. A discharged employee will be paid for any unused annual leave.

Written Warnings That Discharge Is Being Considered:

An employee being considered for discharge must be informed of the possible action by a letter of warning. The letter, to be delivered in person with a certificate of receipt, or by certified mail, specifies: The nature of the substandard or inappropriate work; corrective actions the employee take; a calendar date by which the employee's behavior must be brought back to standard; and a notification that failure to bring the work back to standard by the date specified will result in dismissal.

Clearly, there is some difficulty in understanding exactly how all of these rules identified in the WVSU Staff Handbook are to be followed as there is some possible conflict in the above statements.

Grievant's main argument seemed to focus on the underlined language. Grievant argues Respondent failed to identify corrective actions and dates by which correction must be achieved. First, it must be noted Grievant did not grieve any of Respondent'sdisciplinary actions prior to the dismissal, and procedural irregularities in these disciplinary actions are moot. Additionally, Grievant's assertion is incorrect. Grievant was informed in the last paragraph in his Letters of Warning and suspension letter that discharge was being considered. Grievant received these letters and had an opportunity to discuss, "[t]he nature of the substandard or inappropriate work" and the "corrective actions [he was to] take." A calendar date by which his behavior must be brought back to standard was unnecessary. It was clear Grievant was to stop his lateness, insubordination, and poor work performance now.

The undersigned Administrative Law Judge finds Respondent substantially complied with the WVSU Staff Handbook requirements. Grievant received two Letters of Warning and a suspension.

Grievant was notified in each of these that termination would be considered if further episodes of misconduct or failure to perform his duties occurred. His supervisor repeatedly outlined the standards expected of Grievant, and she identified corrective actions to take. As stated previously, in some instances, the corrective action did not need to be specified as it was clearly inherent in the identified problem, such as, if late, come on time; if leaving without saying where you are going, do so. Grievant was informed of his problem areas over a long period of time, and he had sufficient time to correct his behavior. Accordingly, the undersigned Administrative Law Judge finds Grievant's due process rights were not violated by the disciplinary actions of WVSU, and these actions sufficiently complied with the WVSU Staff Handbook requirements.

Grievant asserted at the Level IV hearing that the 1998 and 2000 Letters of Warning should not still be in Grievant's personnel file, and there was no indication they were. Grievant's supervisor, Ms. Williams, had retained the letters in her supervisory file andpulled them out for the grievance hearing to show Grievant's problems were of long standing. These prior Letters of Warning demonstrated she had made numerous attempts to specify to Grievant what areas needed to be improved, and these letters were not used as part of the progressive discipline that resulted in Grievant's dismissal.

It is true the Letters of Warning of June 3 & 4, 2003, did not specify how long they would remain in Grievant's personnel file, and they should have. This point is moot as Grievant did not grieve these letters, and this issue cannot now be raised at the time of his termination.

Grievant also indicated WVSU did not place Grievant on an Improvement Plan, but did not present any rule or regulation to indicate this was required. According to the Handbook, an employee's immediate supervisor will outline standards of performance, and if an employee does not observe these standards, counseling of the employee is the first step. If counseling is not effective, the employee may receive a series of warning letters, then a suspension, and if there is not improvement, dismissal. Resp. No. 3 at Level IV at 21. This is what happened here.

Further, as pointed out by Respondent, Grievant could have been dismissed immediately, when his abuse of the telephone was discovered, and again when Grievant continued to abuse his cell phone privileges after he was placed on notice. Respondent instead chose to try and work with Grievant.

C. Dismissal while receiving treatment for depression and stress related illness

Grievant asserts he should not have been dismissed while he was receiving treatment. All Ms.

Williams knew about any type of treatment was Grievant's hernia repair surgery in 2003, and investigation by his doctor for the cause of Grievant's chest pain. During the discussion that preceded Grievant's suspension, Grievant informed Ms. Williams he had personal and financial problems. After checking with the Director of Personnel, Barbara Rowell, Ms. Williams made a mandatory counseling appointment for Grievant to attend before his suspension began. Grievant was very upset Ms. Williams put this limited personal information in his suspension letter. Upon Grievant's return to work, Ms. Williams asked several times how things were going for Grievant, and he responded. "I don't want to talk about it." Grievant never told Ms. Williams he was depressed and never asked for any accommodations. The first Ms. Williams was informed Grievant had been diagnosed with depression and wished accommodation was when she received Grievant's rebuttal letter on September 25, 2003, one day before Grievant's termination was to become final. (See footnote 14) The accommodation Grievant sought was to withdraw his termination until he was released by his doctor and transfer to another office.

Further, to say Grievant was "in the middle of treatment" would not be quite right. Grievant went to EARS on August 1, 4, and 8, 2003, and did not return to EARS until October 13, 2003, after his dismissal. Additionally, Grievant went for treatments for chest pain on July 8 & 22, 2003, but canceled his appointment for August 5, 2003, did not keep his appointment for August 7, 2003, and never returned for any further treatments. Grievant's appointments in 2003 with Dr. Sheth were on May 8, June 6, July 27,September 5 & 22, 2003. (See footnote 15) The diagnosis code for depression does not appear until the September 5, 2003 office visit, and it is not coded for the September 22, 2003 visit. Accordingly, it does not appear Grievant was actually receiving any "ongoing" treatment for depression and stress, and if he were, he failed to make Respondent aware of any special accommodations that would assist him in performing his job duties. An employer does not have a duty or a right to force an employee to divulge his medical problems, and by the same token, the employer is not required to read an employee's mind and divine that there is a problem. Further, Ms. Williams was clear, the behavior she observed in Grievant was the same as she had observed for many years, she is not trained in psychiatry, and she did not see any change in Grievant's behavior that would indicate he had a serious emotional problems.

III. Insubordination

Respondent asserted Grievant was insubordinate to his supervisors when he refused to follow the

directions of his supervisors. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." Butts v. Higher Educ. Interim Governing Bd., 212 W. Va. 209, 569 S.E.2d 456 (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). "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (orrule or regulation) must be reasonable and valid." Butts, supra. In other words, there must be not only a refusal to obey a reasonable and valid order, but the refusal must be wilful. Id. "[F]or a refusal to obey to be 'wilful,' the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order." Id. Insubordination involves the “willful failure or refusal to obey reasonable orders of a superior entitled to give such order.” Riddle, supra; Webb, supra.

An employer can establish insubordination by demonstrating 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).

An employee's belief that management's decisions are incorrect, absent a threat to the employee's health and safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. Vickers v. Bd. of Directors/W. Va. State College, Docket No. 97-BOD-122B (Aug. 7, 1998). See Parker v. W. Va. Dep't of Health and Human Res., Docket No. 97-HHR-042B (Sept. 30, 1997). Additionally, an employer has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority . . .". McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992) (citing In re Burton Mfg. Co., 82 L.A. 1228 (Feb. 2, 1984)). Respondent has met its burden of proof. For many years Grievant has done the work he wanted to do and refused to do work he "didn't like." He was assigned to work in the mail room and would not perform these duties. Other

employees had to assume his duties, including his supervisors. Grievant was then told he must increase the amount of time he worked in the Cashier's Office to make up for not performing the duties in the mail room. Grievant would not perform this work either. Grievant actually handed work back to Ms. Danford and would say he didn't want to do it, or he would argue with her in a loud tone. Apparently, Grievant only wanted to perform the runner duties, and he seemingly wanted to do this at his leisure. Grievant was insubordinate as he demonstrated "a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued by . . . [his] superior" and was disrespectful to his supervisors. Id.

IV. Unsatisfactory performance

Respondent has demonstrated Grievant failed to perform the required duties of the position to which he was assigned. Although it is true Grievant successfully completed a few of the duties of the position, this is insufficient. Markley v. Div. of Rehab., Docket No.01-RS-087 (Sept. 24, 2001). Grievant was expected to work in the mail room, Cashier's Office, and be a runner. He chose not to perform the Cashier's Office and mail room duties, and he took an excessive amount of time to perform the runner duties. The expectations of completing ones work efficiently and keeping a supervisor informed of your whereabouts are normal work practices and are those required of all employees. Respondent clearly demonstrated Grievant failed to perform many of the essential duties of his position. Accordingly, Respondent has demonstrated Grievant's work performance was unsatisfactory. Markley, supra. **V. Mitigation/Severity of Penalty**

Although not clearly pled, the undersigned Administrative Law Judge will address Grievant's relief sought as a request for a mitigation of this disciplinary action. The argument 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 anemployer 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). As 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).

The undersigned Administrative Law Judge does not find Respondent abused its substantial discretion to determine a penalty in this situations and will not substitute her judgement for that of the employer. Tickett, supra; Huffstutler, supra.

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

Conclusions of Law

1. 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 Res., Docket No. 92-HHR-486 (May 17, 1993). In a disciplinary grievance where the evidence equally supports both sides, the employer has not met its burden. Id. 2. No due process

violation occurred in the method by which Grievant was terminated. WVSU substantially complied with the regulations identified in its Handbook.

3. Any potential errors in the prior disciplinary actions were not grieved and are not the subject of this grievance. Perdue v. Dep't of Health and Human Res./Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993).

4. "[A]n error which is not prejudicial to the complaining party is harmless and does not require reversal of the final judgment." Syl. Pt. 4, Burns v. Goff, 164 W. Va. 301, 262 S.E.2d 772 (1980). See Baker v. Hancock County Bd. of Educ., Docket No. 97-15-447 (May 5, 1998), aff'd 543 S.E.2d 378, 2000 W. Va. Lexis 62 (June 28, 2000).

5. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." Butts v. Higher Educ. Interim Governing Bd. 569 S.E.2d 456 (W. Va. 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).

6. "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. Veterans Admin., 36 M.S.P.R. 574 (1988); Daniel v. U.S. Postal Serv., 16 M.S.P.R. 486 (1983); Davis v. Smithsonian Inc., 13 M.S.P.R. 77 (1983).

7. An employer has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, andauthority . . .". McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992) (citing In re Burton Mfg. Co., 82 L.A. 1228 (Feb. 2, 1984)).

8. WVSU has proven by a preponderance of the evidence the charges against Grievant, and his termination is upheld.

9. The expectations of completing ones work efficiently and keeping a supervisor informed of your whereabouts are normal work practices and are those required of all employees. See Markley v. Div. of Rehab., Docket No.01-RS-087 (Sept. 24, 2001).

10. Respondent demonstrated Grievant failed to perform many of the essential duties of his position.

11. 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).

12. "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). 13. "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).

14. 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).

15. Given the charges proven against Grievant, the penalty is not disproportionate or excessive, nor is the penalty arbitrary and capricious. See 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 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: January 14, 2005

Footnote: 1

Grievant had also filed a Motion for Default. This Default Motion was denied by Order dated July 6, 2004, by Administrative Law Judge Paul Marteney. See Swayne v. West Virginia State Univ., Docket No. 04-HE-125D (July 6, 2004).

Footnote: 2

Grievant was represented by Sharon M. Mullins, Esq., and Respondent was represented by Elaine L. Skorich, Assistant Attorney General.

Footnote: 3

Many of the exhibits presented at Grievant's Unemployment Hearing were also presented at Grievant's Level III hearing.

Footnote: 4

WVSU's Employee Handbook typically requires two Letters of Warning before the disciplinary action of termination. Because of the length of time since the other Letters of Warning, Ms. Williams was directed by Personnel to restart the disciplinary process.

Footnote: 5

This requirement, of course, did not apply to the President's office. In this case Grievant was only to inform Ms. Williams where he was.

Footnote: 6

This initial service is at no cost to the employee and is confidential.

Footnote: 7

Attached to this letter was a note dated June 6, 2003, from Doctor Ashish Sheth stating Grievant had been suffering from chest pains for three months, and the cause was being investigated, and a letter from Dr. Sheth dated September 22, 2003, stating Grievant had been diagnosed with depression and had recently started medication for this problem.

Footnote: 8

The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as 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).

Footnote: 9

See Grievant's sworn closing statement at Level III. This statement indicates Grievant felt it was a part of his state house duties to meet and greet with individuals while he was there.

Footnote: 10

The Handbook is still titled the West Virginia State College Classified Staff Handbook, but the parties agreed it was the one in place at the time of Grievant's termination.

Footnote: 11

It is recommended WVSU follow its Handbook in the future and insure all employees receive performance evaluations in a timely manner.

Footnote: 12

The meaning of this term was not specified.

Footnote: 13

Within the context of this decision, the undersigned Administrative Law Judge notes the terms disobedience and insubordination are similar and overlapping in nature.

Footnote: 14

At the Level II hearing, Grievant's representatives made much of the fact that Ms. Williams had not received follow-up information on Grievant's sessions with the therapist. It should be noted that while Ms. Williams had the right as a supervisor to refer Grievant for counseling, she had no right to any information about what went on in these sessions unless Grievant chose to share this information with her.

Footnote: 15

The September 22, 2003 date is when Grievant obtained the letter attached to his September 24, 2003 rebuttal.