# WEST VIRGINIA PUBLIC EMPLOYEES

# GRIEVANCE BOARD

**MARY HURT,**

**Grievant,**

**v. Docket No. 2008-0245-DEA**

**DIVISION OF REHABILITATION SERVICES,**

**Respondent.**

## D E C I S I O N

Grievant, Mary Hurt, is employed by Respondent, Division of Rehabilitation Services. Grievant filed this matter directly to Level Three on August 11, 2007, pursuant to W. Va. Code § 6C-2-4(a)(3), subsequent to a thirty-day suspension without pay for an investigation into allegations of improper work behavior. The grievance statement reads:

> Unjust suspension hand delivered by Donna Ashworth dated 7/23/07. No specific incidents, persons, dates, or times were referenced. In said letter (7/23/07) it was stated I denied charges. Upon delivery was my first notification. D. Ashworth stated I denied charges (ltr dated 7/23/07-attached) prior to my knowledge of allegations. This is a violation of my rights and due process. Donna Ashworth said she thought I would deny charges, and by stating denial, another letter would not have to be written.

Relief sought:

> I want to be reinstated as School Rehabilitation Counselor with all benefits reinstated & full reimbursement of lost wages & medical benefits as dictated w/in state policy. In addition I want ergonomic devices/accodation [sic] to perform my duties. (See footnote 1)

Grievant was informed by an August 24, 2007, letter that, subsequent to Respondent's investigation, the disciplinary sanction to be levied for her conduct was tobe a thirty-day suspension, the same period of time Grievant was suspended pending investigation. Grievant did not file an additional grievance specifically contesting the suspension determination stated in the August 24, 2007, Disciplinary Letter. A Level Three hearing was convened in the Board's Beckley Hearing facility on March 21, 2008. Grievant was represented by David Hart, Esquire, of Hayden & Hart, PLLC, and Respondent was represented by Warren N. Morford, Training and Employee Relations Coordinator, WV Division of Rehabilitation Services. It was abundantly clear at the Level Three hearing that Respondent wished to limit this grievance to the issue of the thirty-day investigative suspension. Grievant filed a grievance protesting her unpaid suspension. (See footnote 2) Grievant was of the belief that the instant grievance encompassed the final discipline suspension ruling of August 24, 2007, as well as the initial thirty-day investigative suspension of July 23, 2007. This belief was reasonable for a layperson, given the overlapping nature of the twodisciplinary actions. This case became mature for decision on April 21, 2008, the deadline for the submission of the parties' proposed findings of fact and conclusions of law.

**Synopsis**

Grievant was disciplined for improper work behavior. It is the position of Respondent that Grievant's suspension for thirty days without pay was reasonable, and in fact required disciplinary action in accordance with the state's nondiscriminatory hostile workplace harassment policy, applicable Drug- and Alcohol-Free Workplace policy, and Grievant's insubordinate behavior. Respondent can lawfully suspend an employee without pay to conduct an investigation; however, the period of suspension should not be abusive or in excess of the time period needed to collect and process pertinent information. Grievant's behavior is by no means ideal employee conduct. However, this does not empower Respondent with the ability to discipline an employee indiscriminately. In this case, Respondent's actions were extreme. Further, it is not clear that Grievant was truly aware of the allegations of misconduct levied before she was removed from the workplace. Grievance GRANTED in part and DENIED in part.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the

following Findings of Fact.

## Findings of Fact

**1 1. Grievant is employed by the Respondent as a Rehabilitation Counselor in its Beckley Branch Office. Grievant has ten years of service with the State of West Virginia. Further, there is no evidence of record that during Grievant's tenure of employment with Respondent that she has ever been disciplined for improper employee conduct. 2 2. The duties of a Rehabilitation Counselor employed by Respondent were not established by the record. The required educational qualification of a Rehabilitation Counselor encompasses a Master's degree.**

**3 3. Respondent held its State Conference at Canaan Valley Resort and Conference Center, from the afternoon of Wednesday, May 2, 2007, through Friday, May 4, 2007. The majority of Respondent's Senior Management, Branch Office Managers, District Managers, quality assurance personnel, and Counselors, were in attendance at the 2007 State Conference.**

**4 4. Assistant Director Donna Ashworth's current job responsibilities include oversight of the Field Rehabilitation Program of Respondent.**

**5 5. At the 2007 State Conference, Asst. Director Ashworth received verbal information that Grievant had the smell of alcohol coming from her upon checking in at the State Conference and that Grievant had engaged in disruptive behavior during one of the conference sessions.**

**6 6. Asst. Director Ashworth spoke to Judy Riffe, Beckley District Manager, directing her, as one of Grievant's supervisors, to meet with Grievant and address the Agency's concerns regarding Grievant's alleged behavior.**

**7 7. Early Friday morning, May 4, 2007, the last day of the conference, Judy Riffe and Nancy Cuthbert, Grievant's two immediate supervisors, met with Grievant pursuant to the directions of Asst. Director Ashworth.**

**8 8. At this meeting, Supervisor Riffe advised Grievant of reports regarding her use of alcohol during the workday, her behavior during the State Conference session(s), and the standard of conduct to which Grievant was expected to adhere. 9 9. The**

**communication between Grievant and her Supervisors did not proceed ideally. Among other questions, Grievant wanted to know when she was alleged to have been drinking while on the job. Mrs. Riffe advised Grievant that she would obtain the information requested by Grievant. After the meeting with Supervisors Riffe and Cuthbert, Grievant was upset.**

**10 10. Asst. Director Ashworth came across Grievant outside the Canaan Lodge shortly after Grievant's meeting with Supervisors Riffe and Cuthbert. Ms. Ashworth suggested to Grievant that they go to her room to talk.**

**11 11. Grievant's behavior while in Asst. Director Ashworth's room motivated Ms. Ashworth to take precautionary actions of displacing any items that she believed Grievant could use to hurt herself and/or others. Ms. Ashworth attempted to calm Grievant.**

**12 12. While in Asst. Director Ashworth's room Grievant expressed herself in a very demonstrative manner. Grievant sobbed, beat her hands on a bed and upon her own legs, blew her nose into her hands, and expressed discontent and frustration with the overall state of affairs.**

**13 13. Grievant left the conference shortly after communicating with Ms. Ashworth without participating further with conference activity.** (See footnote 3)

**14 14. No formal disciplinary action was taken against Grievant at Respondent's Beckley Branch Office during the following work week. There is no record that Grievant communicated with superiors or was further approached about the events that took place at Canaan (May 2, 2007 through May 4, 2007), prior to July 23, 2007. 15 15. For a period of time, in excess of sixty days, after the State Conference at Canaan Valley Resort and Conference Center, there were no incidents or reports that Grievant's conduct was inappropriate or in violation of any known personnel rule or regulations.**

**16 16. On or about July 12, 2007, Grievant went into a co-worker's office where Grievant engaged in an abnormally long expression of displeasure with her job, administration and other matters.**

**17 17. On Friday, July 16, 2007, Judy Riffe, District Manager, Beckley called Asst. Director Ashworth regarding Grievant's conduct in the Beckley Office on July 12, 2007.**

**18 18. Information (verbal reports) available to Asst. Director Ashworth led her to believe that there was a need to investigate whether there was hostile workplace harassment**

**in the Beckley Office.**

**19 19. At the time, Asst. Director Ashworth recommended Grievant's suspension pending an investigation, Ms. Ashworth had verbal reports from Grievant's co-workers, Judy Riffe, Kelli White, Nancy Cuthbert, and Jackie Cook regarding Grievant's behavior. These reports, combined with Ms. Ashworth's first hand recollection/knowledge regarding Grievant's Canaan activity, motivated Ms. Ashworth to act. In addition, Ms. Ashworth also received a copy of an e-mail from John Morgan, an employee in Respondent's Beckley Branch Office, wherein Morgan opines that he had noticed on several occasions alcohol on the breath of Grievant.**

**20 20. It was Asst. Director Ashworth's belief that Grievant was the source of tension and discord in the Beckley Branch Office of Respondent. 21 21. Asst. Director Ashworth sent a Memorandum to Director Deborah Lovely and Ann Kautz, Manager, Human Resources, dated July 19, 2007, Resp. Ex. 1 regarding "Nondiscriminatory Hostile Workplace Harassment in the Beckley Branch Office." Ms. Ashworth sought to have Grievant suspended for thirty days pending an investigation of possible violations by Grievant of the state's nondiscriminatory hostile workplace harassment policy.**

**22 22. Asst. Director Ashworth requested permission to meet with Grievant on Monday, July 23, 2007, to discuss allegations and, if the allegations were denied, Ms. Ashworth requested that Grievant be immediately presented with a letter of suspension. The July 19, 2007, Memorandum cited to both the West Virginia Division of Personnel (DOP), *Supervisor's Guide to Preventing Harassment in the Workplace,* A Harassment Complaint - What A Supervisor Should Do and DOP's Interpretive Bulletin, *Prohibited Workplace Harassment,* in support of suspending Grievant.**

**23 23. On July 23, 2007, Grievant was presented with a letter signed by Director Deborah Lovely informing Grievant that she was suspended for a period not to exceed thirty days, pending the results of an investigation into the allegations of improper work behavior. Grievant was informed that this personnel action was being taken in accordance with W. Va. Code r. § 143-1-12.3 (2007) and specifically, "it is alleged that you have conducted yourself in a manner which has intimidated other staff members and has been disruptive to the Beckley Office."**

**24 24. The July 23, 2007, letter was hand delivered by Asst. Director Ashworth, who informed Grievant, she was suspended without pay, at approximately 9:00 a.m. on July 23, 2007. 25 25. Grievant didn't like a number of the changes in the way Respondent mandated she do her job _ such as changes in policy and procedure. Grievant often made her displeasure or dissatisfaction known to her co-workers in a variety of ways.**

**26 26. Prior to Grievant's suspension, Office Assistant II, Jackie Cook served as Grievant's secretary for a time period, in excess of two years. Ms. Cook was the secretary for more than one Rehabilitation Counselor, simultaneously.**

**27 27. During this time period, Grievant had a tendency to communicate her opinions to and with Ms. Cook regarding office procedure, superiors and agency practices.**

**28 28. Grievant's expression of her opinion was generally done in Ms. Cook's office behind a closed door. However, Grievant's displeasure with a number of office practices/procedures was not a secret, and was known to numerous co-workers.**

**29 29. It was not an infrequent occurrence for Grievant to register her displeasure after staff meetings in Ms. Cook's office and elsewhere.**

**30 30. Ms. Cook is no longer serving as Grievant's secretary. This adjustment in work assignment transpired during the period of Grievant's suspension.**

**31 31. Ms. Cook never directly informed Grievant that she was prohibiting Ms. Cook from completing her assigned job duties when Grievant articulated her opinion regarding office procedure in Ms. Cook's office. Nor did Ms. Cook ever directly request of Grievant that she not come into Ms. Cook's work area and voice her opinion regarding office procedure.**

**32 32. Ms. Cook did sporadically place a “Do Not Disturb” sign on the door of her office.**

**33 33. Rehabilitation Counselor Kelli White also experienced Grievant coming into her office on several occasions and engaging in episodes of discontent regarding Respondent's policy, personnel or procedures.**

**34 34. On or about July 12, 2007, Grievant went into Kelli White's office and engaged in a protracted expression of opinion and displeasure with personnel and administration matters. Ms. White found the tone and substance of Grievant's communication on July 12, 2007, to be loud and threatening. Grievant's voice was so loud co-workers came to Ms. White's office and inquired as to whether she was in need of assistance.**

**35 35. Grievant admittedly speaks in a demonstrative manner.**

**36 36. Grievant believed there were some unlawful/unfair office practices being implemented by Respondent. During staff meetings Grievant is known to sigh loudly, shrug her shoulders and roll her eyes. Grievant's frustration with personnel procedures included the educational qualifications of her supervisor, which was less than that of Grievant's Master's degree.**

**37 37. Grievant frequently verbalized criticism of Respondent's policies, and procedures, singling out and isolating co-workers, especially Jackie Cook and Kelli White, and engaging in displays of often lengthy diatribes, patronizing, questioning, and ridiculing her supervisors (Nancy Cuthbert, Donna Ashworth). Grievant used derogatory names for her supervisor, Nancy Cuthbert.**

**38 38. Neither Kelli White nor Jackie Cook ever verbally asked Grievant not to enter their respective work areas. 39 39. It is not of record that either Ms. White or Ms. Cook ever directly indicated to Grievant that her behavior was prohibiting either or both, Ms. White and Ms. Cook from preforming their respective job duties. Ms. White from time to time would also place a "Do Not Disturb" sign on her office door.**

**40 40. Ms. Cook and Ms. White discussed their respective fears and concerns regarding Grievant's behavior. Ms. Cook and Ms White were intimidated.** (See footnote 4)

**41 41. None of Grievant's co-workers interrupted Ms. White's or Ms. Cook's work as did the Grievant, nor did any other co-worker conduct themselves in staff meetings in the manner that Grievant behaved.**

**42 42. The five page August 24, 2007, Disciplinary Letter, among other information, states:**

> **Based upon the recommendation of your supervisors, the results of the investigation conducted by this agency and your responses thereto, the purpose of this letter is to advise you of my decision to suspend you without pay for a period of 30 days. The period of suspension will be the 30 days that you were suspended pending investigation, July 23, 2007, to August 22, 2007.**
>
> *** * ***
>
> **A thorough investigation regarding the allegations surrounding these events has now been completed and is summarized below so you may better understand the rationale behind this disciplinary action and the results of the**

**investigation under taken by the Agency. The following areas of concern have been identified and played a role in this disciplinary action:**

**Multiple, longstanding violations of the Division of Personnel Drug and Alcohol Free Workplace Policy, as revised 10/1/2004.**

**Violations of the Prohibition Workplace Harassment Interpretive Bulletin, revised 12/1/2006.**

**Insubordinate behavior, which includes being disruptive, disrespectful and demeaning to those in authority - at meetings and elsewhere in your workplace.**

**Interruption and intrusion upon your co-workers, to the extent they cannot get their work done.**

**Failure to be honest and forthright during the course of this investigation.**

**Failure to conduct yourself in a professional and inoffensive manner.**

**Further, in discussion of relevant information, the letter sets out the following subsections:**

*** Drug- and Alcohol-Free Workplace, as revised 10/1/2004.**

*** Prohibited Workplace Harassment**

*** Insubordination**

*** Failure to Cooperate and Conduct Unbecoming to Position**

**<u>Discussion</u>.**

**In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *Ramey v. W.Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "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).**

**In this case, Respondent derives its authority to suspend Grievant before any charges are proven from the State of West Virginia's Division of Personnel (DOP) Administrative Rule, Section 12.3, which provides "[a]n appointing authority may suspend any employee without pay for cause or to conduct an investigation regarding an employee's conduct which has a reasonable connection to the employee's performance of his or her job." It is the position of Respondent that Grievant's suspension for thirty days was reasonable, and in fact required by the state's nondiscriminatory hostile workplace harassment policy, applicable Drug- and Alcohol-Free Workplace policy and Grievant's insubordinate behavior.**

**It is of issue in the instant case whether Grievant was given an opportunity to present her side of the story (respond to the charges), or was truly aware of the charges (allegations of misconduct) levied before she was removed from the work place.** (See footnote 5) **Pursuant to 143 C.S.R. 1 § 12.3 (DOP Rule 12.3), prior to the effective date of suspension a designee of the agency is to meet with the employee in a predetermination conference and advise the employee of the contemplated suspension (oral notice confirmed in writing, or written notice of the specific reason or reasons for the suspension). Subsequent to notice, an employee is ordinarily entitled to a minimum of three working days to reply prior to suspension. *Id*. Evident by language of the July 23, 2007, letter typed in advance of the meeting with Grievant, Asst. Director Ashworth had predetermined Grievant's response to the allegations of misconduct. *See also* Ashworth's July 19, 2007, request for authorization to suspend Grievant (Resp. Ex. 1). Respondent averred that not providing three day prior notice was necessary, to**

**preserve the integrity of the investigation, in that intimidation of other staff members (potential witnesses) was a component of this matter.** (See footnote 6)

**It is a well-settled principle of constitutional law, under both the State and Federal Constitutions, that an employee who possesses a recognized property right or liberty interest in his employment may not be deprived of that right without due process of law. *Buskirk*, *supra*; *Waite*, *supra*; *Clark*, *supra*. "An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and an opportunity forhearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The question here is whether the due process protections afforded Grievant were sufficient. It should be remembered that the purpose of a pre-suspension conference or opportunity to respond is to assure that there are reasonable grounds to support the suspension. *Gilbert v. Homar*, 520 U.S. 924, (1997); *Loudermill*, *supra*. Grievant is entitled to notice of the charges, explanation of the evidence, and an opportunity to respond. This is all the due process that Respondent is required to provide. *Wirt*, *supra*. at Syl. Pt. 3. In the instant case, prior to Grievant's suspension, Respondent identified the purpose of the suspension and Grievant was given an opportunity to respond to the general allegation of improper work behavior which intimidated staff and has been disruptive to the office.**

**With regard to most of the alleged conduct, excluding impairment due to use of alcohol and/or controlled substance, Grievant, with minor deviation of detail, acknowledges her behavior.** (See footnote 7) **Thus, the need for credibility determinations will be limited. After taking evidence on the reasons for the investigative suspension and the subsequent determination of Respondent, the undersigned determined that the facts giving rise to theinvestigation were virtually the same as those that Respondent relied upon to justify the final disciplinary action.** (See footnote 8)

**The issue(s) of this grievance is whether the disciplinary action taken was properly administered and whether the conduct by Grievant justifies the disciplinary action taken by Respondent.**

**Drug and Alcohol Free - Workplace Policy**

**It is the policy of West Virginia State government to ensure that its workplaces are free of alcohol, illegal drugs and controlled substances by prohibiting the use, possession, purchase, distribution, sale, or having such substances in the body system. Applicable West Virginia DOP's Drug_ and Alcohol-Free Workplace Policy (DOP-P2) prohibits the use of alcohol and/or illegal drugs in the workplace as such use may affect an employee's job performance; bring discredit upon the reputation of the State of West Virginia, as the employer, and/or threaten the safety of independent contractors, volunteers, employees,individuals entrusted to the care of the State, and the general public. *See* DOP-P2 Section I, paragraph B.**

**Grievant's conduct, demeanor, and displays of attitude as manifested numerous times, in the Beckley Branch Office and/or during work functions, established grounds and provided Respondent with the duty to enquire into the circumstances of the events. Various co-workers reported smelling, what they believe to be, an alcoholic beverage on more than one occasion on the breath of Grievant. Yet, other than at the State Conference the exact time frames of these occurrences are not established with any degree of certainty. This information is not of a nature sufficiently reliable to determine Grievant is, in fact, consuming or has such substance in her system during office hours. The number of witnesses attesting to unverified information does not demonstrate credibility or trustworthiness of the information. However, reasonable suspicion was established. Grievant's behavior is dubious, to say the least. It is well within Respondent's authority to investigate this issue (alleged drug and alcohol usage). When reasonable suspicion exists that an employee has reported to work under the influence of alcohol, illegal drugs, or is impaired due to abuse or misuse of controlled substances or prescribed medications, the individual may be subject to assessment and disciplinary action. DOP-P2 Section III, paragraph C.**

**An employee is expected to report to work and be able to perform assigned duties unimpaired. As cited by Respondent, the State of West Virginia has a stated policy to institute and maintain a drug- and alcohol-free workplace. Reportedly, Grievant offered a co-worker a Darvocet for a headache. Further, she allegedly asked for and/or was offered (testimony conflicts) by another employee a pharmaceutical controlled substance (Voltraneand Ultram). Grievant's co-workers, Cook and White share the opinion that Grievant appeared at work**

**impaired, due to abuse of controlled substances. Much of the information on this subject matter is unsubstantiated opinion, conjecture and cannon fodder for office gossip and rumors. The only established evidentiary point of record is Grievant's intense behavior. Grievant's use of alcohol while on the job, has not been proven. Further, it is not clear that Grievant's offer of her prescription medication (one pill) to a co-worker (experiencing a headache) is in violation of the intent of the Drug- and Alcohol-Free Workplace policy of the State of West Virginia.**

**Respondent's August 24, 2007, letter can be viewed as putting Grievant on notice with regard to the topic of drug and alcohol use in the workplace (not a decree of guilt but a stern warning). The citizens of the State of West Virginia have a right to expect its employees to be at work unimpaired. Grievant was advised that the policy on alcohol in the workplace is quite clear - zero tolerance. Respondent has unequivocally informed Grievant that if she is found to be under the influence of alcohol and/or illicit drugs, disciplinary action up to and including termination is contemplated. The undersigned finds that this aspect of Respondent's actions is reasonable and prudent conduct for a West Virginia State agency.**

**Workplace Harassment-Insubordination**

**The State of West Virginia has issued policy forbidding nondiscriminatory hostile workplace harassment. Respondent relies on West Virginia Division of Personnel Interpretive Bulletin 6 (DOP-B6), entitled *Prohibited Workplace Harassment* which defines Nondiscriminatory Hostile Workplace Harassment as:**

> **Verbal, non-verbal or physical conduct not discriminatory in nature that is so atrocious, intolerable, and so extreme as to exceed bounds of decency and which creates fear, intimidates, ostracizes, psychologically or physically threatens, embarrasses, ridicules, or in some other way unreasonably overburdens or precludes an employee(s) from reasonably performing her or his work.**

**DOP-B6, Section III, paragraph I,**

**Grievant from time to time didn't like changes in policy and procedure, and often made her displeasure or dissatisfaction known to her co-workers in a variety of ways. Grievant's behavior is characterized by Respondent as unprofessional, and constituting insubordination.**

**It was the opinion of Asst. Director Ashworth and various co-workers that Grievant's behavior went beyond that of an individual having a typical bad day. According to Respondent, Grievant frequently engaged in inexplicable behavioral outbursts of crying, stomping of feet, and other inappropriate behavior. Respondent maintains that Grievant kept co-workers (Cook and White) from being able to do their work when Grievant would enter their respective offices in a distraught condition, or when she engaged in one of her many inappropriate displays of dissatisfaction with Nancy Cuthbert, the Beckley Branch Office Manager.**

***Prohibited Workplace Harassment*, DOP's Interpretive Bulletin 6, provides, in pertinent part, that;**

> **Non-discriminatory hostile workplace harassment consists of unreasonable or outrageous behavior that deliberately causes extreme physical and/or emotional distress. Such conduct involves the repeated unwelcome mistreatment of one or more employees often involving a combination of intimidation, humiliation, and sabotage of performance which may include, but is not limited to:**
>
> **1. Unwarranted constant and destructive criticism;**
>
> **2. Singling out and isolating, ignoring, ostracizing, etc.;**
>
> **3. Persistently demeaning, patronizing, belittling, and ridiculing;**
>
> **4. Threatening, shouting at, and humiliating particularly in front of others; and/or**
>
> **5. Bullying.**

**DOP-B6 Section IV, paragraph E.**

**Respondent avers that Grievant has a bad attitude toward authority and procedures, and that she has frequently engaged in inappropriate behavior, including calling her supervisors names (behind their back) and on more than one occasion questioning supervisors' fitness to supervise.** **(See footnote 9)** **It is debatable to what degree that morale suffered as a result of Grievant's actions. There was discord, which Grievant regularly facilitated. Grievant's unhappiness with her employer, its policies and procedures were registered frequently to her co-workers, all of which caused her co-workers to experience some distress. However, Respondent never once issued any warning or precautionary guideline prohibiting this ill-advised behavior. It was readily known behavior, or not. The two co- workers (Cook and**

**White) who now profess Grievant was inhibiting their work performance never requested that Grievant refrain from discussing these issues in their work area. A do not disturb sign used periodically doesn't truly address the issue. Grievant didn't get the message, if a message was meant exclusively for her. By all accounts Grievant's behavior went beyond co-workers sharing a common frustration with office procedure. Respondents' evidence, however, does not establish that Grievant was aware that her communications with identified co-workers were unwelcome, objected to, or was so outrageous it constituted work place harassment. There is little doubt that Grievant's behavior need not be condoned by Respondent. An employee's job is to perform the duties of her position, not to convert her job into continuing confrontations with co-workers and management. "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)).” *English v. Div. of Corrections*, Docket No. 98-CORR-082 (June 29, 1998).**

**Grievant's conduct was undeniably unprofessional, difficult, and counter productive. Yet, is this activity insubordination? “[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 (or rule or regulation) must be reasonable and valid.” *Butts v. Higher Education Governing Board/Shepherd College* 212 W. Va. 209, 569 S.E.2d 456 (2002)(*per curiam*). This Board has ruled that 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).**

**It is uncontested that during staff meetings, Grievant is known to make her displeasure or dissatisfaction known. However, the undersigned will not find that insubordination during staff meetings is established by loud sighing, shrugging one'sshoulders and/or the rolling of an employee's eyes. This is not to say that insubordination cannot manifest itself in such behavior, but it is not insubordination, per se, to exhibit this behavior. The severity of Grievant's conduct is unacceptable in the workplace, yet the undersigned cannot determine**

**her conduct rose to the level of insubordination. Grievant should cease providing her unsolicited comments regarding agency personnel and policy in a disruptive manner. Further, Grievant should not reference her supervisors by designations other than their proper name or title.**

**The undersigned is of the opinion that there exists an inequitable disproportion between the offenses Grievant committed and the actionable causes Grievant was ultimately determined to have violated. In other words, what Grievant unequivocally did, and what Respondent classified Grievant's actions to be, are not necessarily equivalent. The undersigned finds that Respondent indirectly did what it could not do directly. Grievant was sanctioned for suspected conduct and indirect disruptive behavior, not proven violation(s) of readily known rules and regulations.**

**Respondent can legally suspend Grievant to investigate allegations of improper conduct. The need to separate an employee from the workplace during an investigation is a recognized practice. In some cases, it is necessary. Nevertheless, it has not been established that thirty days was needed to investigate the instant matter. Thirty days without pay is an extreme sanction. Grievant had never been warned or informed that her actions were in violation of a viable workplace regulation (further, Grievant's employment history with Respondent is void of related disciplinary actions). This is not to say Grievant's hands are clean. Given the record *in toto*, Grievant's behavior is not appropriate in the workplace. Grievant needed to curtail her conduct. However, the actions of Respondentwere of a punitive nature. The undersigned finds that Respondent sanctioned Grievant for expressing disrespectful opinion, not for proven violation(s) of applicable employment rules and regulations.**

**The undersigned has the authority to mitigate the punishment imposed by an employer in situations where a finding is made that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question. 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). The issue(s) presented by this grievance are intertwined with acknowledged facts, reasonable suspicion and unproven conjecture. 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 Corr*., 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 Res./Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996).**

**Respondent has failed to prove several of the charges against Grievant by a preponderance of the evidence, specifically that she was guilty of illicit drug and alcohol use, and that she knowingly interfered with and, despite objections, prohibited (harassed) co-workers from completing their assigned duties. However, Respondent's evidence does establish that Grievant has been unprofessional on many occasions, that her conduct was undermining to agency authority (short of insubordination) and created varying degrees of discord and distress in the workplace. Respondent demonstrated Grievant engaged in disruptive behavior, for which disciplinary action was warranted to make her aware that her behavior should be corrected. Therefore, under the circumstances presented, the undersigned believes that disciplinary action was appropriate but the deprivation of a month's salary is too severe a penalty for Grievant's proven actions.**

**The following Conclusions of Law support the decision reached.**

## Conclusions of Law

**43 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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).**

**44 2. The due process rights afforded an individual for less than a termination, or "a temporary deprivation of rights may not require as large a measure of procedural due process**

**protection as a permanent deprivation." *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 241 S.E.2d 164 (1978) (citing *North v. Bd. of Regents*, 160 W. Va. 248, 233 S.E.2d411 (1977)). "An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and an opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494, (1985), *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950).**

**45 3. Respondent established grounds to investigate Grievant's workplace conduct. Respondent provided Grievant with notice of the charges, explanation of the evidence, and an opportunity to respond prior to imposing the suspension. Therefore, Respondent provided Grievant with necessary due process protections.**

**46 4. Respondent established that Grievant's conduct was unprofessional and inappropriate for the workplace. Further, Respondent demonstrated Grievant engaged in disruptive behavior, for which disciplinary action was appropriate to make her aware that this behavior should be corrected.**

**47 5. Respondent did not violate progressive discipline standards in this case by imposing a suspension, prior to issuing any warnings or reprimands. A progressive discipline policy is a permissive, discretionary policy that does not create a mandatory duty to follow a progressive disciplinary approach in every instance. *Oiler v. Dep't of Health & Human* Res., Docket No. 02-HHR-074 (Aug. 28, 2002); *Ferrell v. W. Va. Dep't of Health & Human Res.*, Docket No. 97-HHR-526 (Apr. 30, 1998); *Artrip v. W. Va. Dep't of Health and Human Serv.*, Docket No. 94-HHR-146 (Sept. 13, 1994). However, in the circumstances of this case, a thirty-day suspension without pay is extreme. 48 6. Insubordination includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued. *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(*per curiam*). 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).**

**49 7. Respondent has failed to establish by a preponderance of the evidence that**

**Grievant engaged in disruptive, unprofessional conduct which constituted insubordination.**

**50 8. "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).**

**51 9. 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 forrehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).**

**52 10. Grievant has established by a preponderance of the evidence that a thirty- day suspension was too severe a penalty under the circumstances presented.**

**Accordingly, this grievance is GRANTED IN PART, and Respondent is ORDERED to reduce the thirty-day suspension to ten working days in Grievant's personnel file and reimburse her for all lost wages and benefits beyond a ten-day suspension period.**

**Any party, or Division of Personnel, may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. *See* W. Va. Code § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).**

**Date: October 24, 2008**

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**Landon R. Brown**

## Administrative Law Judge

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***Footnote: 1***

***Grievant has degenerative arthritis and seeks a dictation program be installed on her computer. This request for ergonomic accommodation is not rationally connected to the issue(s) presented by this case. Such relief has been acknowledged by Grievant as a separate and distinct action and as such will not be addressed by this decision.***

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***Footnote: 2***

***Grievant in good faith believed the grievance filed put the entirety of Respondent's action(s) (her suspension without pay) in review. Perhaps, procedurally a separate and distinct grievance should have been filed by Grievant with regard to the disciplinary determination of August 24, 2007. However, it is not clear that Grievant was aware there is a legal difference between the investigative suspension of July 23, 2007, and the final discipline suspension ruling of August 24, 2007, as the two suspensions encompass the exact same time period.***

***The West Virginia State Supreme Court has held that the legislative intent for creating grievance procedures is to provide state employees a "simple, expeditious and fair process for resolving problems." Syllabus Point 3, Spahr v. Preston County Board of Education, in part, supra. See also Syllabus Point 1, Hale v. Mingo County Board of Education, 199 W.Va. 387, 484 S.E.2d 640 (1997); Duruttya v. Board of Education of County of Mingo, 181 W.Va. 203, 205, 382 S.E.2d 40, 42 (1989). Additionally, the Court has stated that "[w]e do not believe that the legislature intended the grievance process to be a procedural quagmire where the merits of the cases are forgotten." Ewing v. Board of Education of the County of Summers, 202 W.Va. 228, 239, 503 S.E.2d 541, 552 (1998) quoting Spahr v. Preston County Board of Education, 182 W.Va. at 730, 391 S.E.2d at 743. Both disciplinary actions will be discussed by this decision.***

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***Footnote: 3***

***It is unclear whether Asst. Director Ashworth instructed Grievant that she should or could leave the conference and go home due to her mental state (one statement being an order and the other granting permission).***

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***Footnote: 4***

***It is not clear whether their subjective feelings of intimidation is warranted. In review of events that transpired at a former work site Grievant relayed information regarding a group of individuals who were keying cars and slashing tires. This instilled fear in White, intimated White and caused her to fear for the safety of her personal property. Cook and White interpreted the information that Grievant participated in the damaging of others vehicles. Grievant testified she was a victim of the group, not a participant. Nevertheless, Cook and White believed that Grievant is capable of retaliatory actions against co-workers.***

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***Footnote: 5***

***The due process rights afforded an individual for less than a termination, or "a temporary deprivation of rights may not require as large a measure of procedural due process protection as a permanent deprivation." Waite v. Civil Serv. Comm'n, 161 W. Va. 154, 241 S.E.2d 164 (1978) (citing North v. Bd. of Regents, 160 W. Va. 248, 233 S.E.2d 411 (1977)). Prior to a thirty-day suspension without pay, Waite, a civil service employee, had a sufficient property interest to require notice of the charges and an opportunity to present her side of the story to the decision-maker. Waite at 170. Further, the West Virginia Supreme Court of Appeals has recognized that "due process is a flexible concept, and that the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of theparticular case." Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985) (citing Clarke v. W. Va. Bd. of Regents, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)). "What is required to meet procedural due process under the Fourteenth Amendment is controlled by the circumstances of each case." Barker v. Hardway, 283 F.Supp. 228 (S.D. W. Va. 1968); see Buskirk, supra; Edwards v. Berkeley County Bd. of Educ., Docket No. 89-02-234 (Nov. 28, 1989).***

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***Footnote: 6***

***A predetermination conference and three working days advance notice are not required for employees in certain cases when the public interests are best served by withholding the notice. DOP Rule 12.3 Suspensions. Grievant was provided additional opportunity, during the time-period of the suspension to fully cooperate in the investigation, which Respondent contends Grievant did not do.***

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***Footnote: 7***

***This is not to say Grievant agrees with Respondent's characterization of events. Grievant and Respondent acknowledge pertinent events and to the degree their recollection of events differ, will be discussed at the appropriate time or the variation need not be resolved for proper disposition of this grievance.***

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***Footnote: 8***

***Respondent's investigation and information reported to Asst. Director Ashworth revealed that an undisclosed number of Grievant's co-workers reported smelling alcohol on her during work hours. Grievant's conduct, demeanor and appearance also caused her co-workers to suspect that Grievant was abusing or at least reporting to work under the influence of controlled substances. Grievant made a regular practice of criticizing her supervisors, Nancy Cuthbert and Donna Ashworth for "only" having a Bachelor's Degree, whereas Grievant has a Master's Degree. Grievant has called her supervisor several names of a demeaning and disrespectful nature. Further, Grievant is known to shrug her shoulders, roll her eyes, and make demeaning comments about the presenter and/or the subject matter at staff meetings. Grievant also often used a loud voice while engaged in behind closed door tirades in the presence or offices of Kelli White and Jackie Cook. Grievant's behavior with her co-workers during these incidents include crying spells; shaking of hands; and stomping her feet, along with various statements of a dubious nature regarding practices, personnel and procedure of Respondent, her employer.***

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***Footnote: 9***

***Ms. Cook testified she heard grievant use profanity while at work and periodically used derogatory names for her supervisor, Nancy Cuthbert. - troll, bitch & leprechaun.***