THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

EUAL SIGMAN, JR.,

Grievant,

v.

Docket No. 2008-0730-WVSU

WEST VIRGINIA STATE UNIVERSITY,

Respondent.

DECISION

Grievant, Eual Sigman, filed a level one grievance on June 11, 2007, following the termination of his employment. His Statement of Grievance requests a more thorough reasoning for his termination. Grievant seeks reinstatement to the position of Campus Service Worker at West Virginia State University. The grievance was denied at all lower levels, and appeal to level four was made on November 3, 2007. A level four hearing was conducted on January 30, 2008, at the Board's Charleston office. Grievant appeared pro se. Respondent was represented by Elaine L. Skorich, Assistant Attorney General. This matter became mature for decision on February 29, 2008, the deadline for filing of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Synopsis

Respondent became aware prior to the completion of the Spring 2007 semester that personal belongings of several students were missing from the dormitories. Respondent conducted an investigation into the missing items. The campus DVD security monitoring system revealed items being removed from the Respondent's storage building, and being loaded into cars during early morning hours. Respondent's investigator questioned theindividuals identified on the DVD, one of whom was Grievant. Grievant made a voluntary statement to campus security concerning his

involvement in the incident.

Grievant admitted to campus security that on March 29, 2007, he loaded bags of clothes, and two small microwave ovens from a storage room into his vehicle, and took them to his home. As a result of the investigation into the larceny of various types of student belongings, and admissions by Grievant to campus security, Grievant was terminated due to gross misconduct. Grievant violated the provisions of the Respondent's Staff Handbook for reasons resulting in immediate dismissal. Respondent proved by a preponderance of the evidence that Grievant's employment was terminated for good cause.

Based upon a detailed review of the record in its entirety, the undersigned makes the following findings of fact:

Findings of Fact

1. Grievant was employed by Respondent from the Summer of 1995 until his employment was terminated on May 31, 2007. Grievant was employed as a Building Service Worker, and most recently, as a Campus Service Worker.

2. Prior to the completion of the Spring 2007 semester, Phillip Judd, Director of Physical Facilities at West Virginia State University ("WVSU"), was informed by the Vice President for Administrative Services that students' belongings were missing from the dormitories. This complaint was also referred to Chief Joe Saunders, Director of WVSU Department of Public Safety, for investigation. 3. Chief Saunders reasoned that since the students' electronic devices, and personal possessions were missing, the Physical Facilities Department would be the logical starting point to the investigation.

4. A review of the DVD security monitoring system at the Physical Facilities Department revealed items being removed from the storage building, and being loaded into cars during early morning hours.

5. Chief Saunders questioned the individuals identified on the DVD, one of whom was Grievant. He admitted that on March 29, 2007, he removed items such as microwave ovens from a storage room, and loaded them into to his vehicle to take to his residence.

6. In years past, employees were permitted to take items home after the personnel in charge of the dormitories had deemed the items abandoned. However, the items taken by Grievant on this occasion had not been deemed abandoned. This is due in large part to the fact that the semester had

not yet ended. In addition, Grievant admitted that throughout the school year he had checked rooms that were left unlocked to remove items from those dorm rooms.

7. The larceny investigation revealed that Grievant was assisted by another physical facility employee, and a campus police officer, both of whom were terminated from their employment.

8. Following a pre-termination meeting, Grievant was terminated for gross misconduct.

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. *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 & 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 footnote 2)

Respondent's position is that Grievant's conduct, whether or not he intended to commit larceny of the dorm room items, was gross misconduct for which he should be terminated. Because no legal arguments have been filed in this grievance at any level by Grievant, the exact nature of his argument is unclear. However, it is apparent that Grievant believes, or at least asserts, that he did nothing wrong in taking the various items from the dorm rooms. Grievant reasons that since he was allowed to remove items left behind, or abandoned, by students in the past, the current conduct is somehow defensible. Grievant was dismissed for gross misconduct. Respondent relied upon the West Virginia State University Staff Handbook in terminating Grievant's employment. Conduct and Disciplinary Action provides, in pertinent part, as follows:

> Reasons for dismissal include, but are not limited to, the following circumstances:
>
> Malicious destruction or theft of property belonging to the University, its visitors, patrons or employees.
>
> Dependent upon the actual and potential consequences of the offense, employee misconduct may be considered minor misconduct or gross misconduct. Minor misconduct is that which is generally deemed by the supervisor as correctable by

> counseling and/or instruction through progressive discipline. Progressive discipline requires notice of concern and expectations to the employee through formal counseling and letter(s) of warning, with potential suspension, demotion, transfer, and termination. Gross misconduct is substantial actual and/or potential consequence to operations or persons, typically involving flagrant or willful violation of policy, law, or standards of performance or conduct. Gross misconduct may result in any level of discipline up to and including immediate dismissal at the supervisor's discretion in conjunction with Human Resources, the appropriate vice president or provost and the President.

The "term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991) (*citing Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985)). *See Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sept. 13, 2002).

Grievant was caught on the campus DVD security system taking items from WVSU which did not belong to him. The Director of Physical Facilities indicated that Grievant was allowed to take such items in years past, but only once clearance from the dormitorydirector was communicated to Grievant's supervisor. In 2007, however, Grievant's supervisor had not given him permission to enter the dormitories and take the items. A review of Grievant's admission to the campus police indicates that throughout the school year he had checked rooms that were left unlocked to remove items from those dorm rooms. This admission cannot viewed as merely cleaning out items left behind in dorm rooms by students leaving the campus for extended break.

Grievant refuses to accept responsibility for his actions, and contends he was only doing what he had done in years past. This is not a defense to his actions. The items belonging to the students were taken from their rooms well before the end of the semester. There is no evidence that Grievant was authorized to take the students' belongings as he claims.

It is clear to the undersigned that Grievant committed a criminal violation, larceny, which was confirmed on DVD and by his own admissions. If Grievant truly felt he was doing nothing wrong when placing the items in his vehicle, why do so during non-working hours in the early morning hours? Theft of property is a reason for dismissal pursuant to the WVSU Staff Handbook, and it is regarded as gross misconduct. Gross misconduct is a grounds to immediately dismiss an employee without first attempting progressive discipline. It is apparent that Respondent did not reach its decision to

terminate Grievant's employment in a manner contrary to the evidence.

Finally, a review of Grievant's due process protection is in order given the nature of this grievance. The West Virginia Supreme Court of Appeals has recognized that "due process is a flexible concept, and that the specific procedural safeguards to be accordedan individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) (*citing Clark 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*, 238 F. Supplement 228 (W. Va. 1968); *See Buskirk*, *supra*; *Edwards v. Berkeley County Bd. of Educ.*, Docket No. 89-02-234 (Nov. 28, 1989).

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 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). The question here is whether the due process protections afforded Grievant were sufficient.

It has previously been held that a full-blown hearing is generally not required before an employee may be terminated, but that employee has the minimum pre-deprivation right to at least have an opportunity to respond to the charges either orally or in writing. *Loudermill*, 470 U.S. at 542. An employee is also entitled to written notice of the charges and an explanation of the evidence. *Wirt*, *supra*. In other words, notice of the charges,explanation of the evidence, and an opportunity to respond is all the due process that WVSU is required to provide. *Id*. at Syl. Pt. 3.

Grievant was informed, in writing, of the charges against him, and WVSU identified the conduct for which he was to be terminated. Grievant was provided an opportunity to be heard on May 31, 2007, to address the charges. Grievant was provided with notice of the charges, and an opportunity to convince the administration that the incident was somehow justified, or that he was committed to change his behavior. Accordingly, Grievant was afforded due process of law by having a pre-termination meeting.

As discussed above, Grievant's actions fall within the prohibition on malicious destruction or theft of property. Respondent deemed the behavior as gross misconduct warranting immediate dismissal. Notwithstanding Grievant's long work history, considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct. *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge cannot substitute his judgement for that of the employer. *Miller v. Higher Education Policy Commission/Marshall University*, Docket No. 03-HEPC-340 (Jan. 21, 2004); *Jordan v. Mason County Bd. of Educ.,* Docket No. 99-26-8 (July 6, 1999).

The undersigned finds that WVSU has proven by a preponderance of the evidence that theft of property belonging to students was good cause for termination of Grievant's employment.

The following Conclusions of Law support the decision reached.

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. *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 & Human Res.*, Docket No. 92- HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. The "term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991) (*citing Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985)). *See Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sept. 13, 2002).

3. "Due process is a flexible concept, and . . . the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) (citing *Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)).

Prior to an unpaid suspension, an employee is entitled to notice of the charges, an explanation of the evidence, and an opportunity to respond. *Id.* at Syl Pt. 3; *Board of Education of the County of Mercer v. Wirt*, 192 W. Va. 568, 453S.E.2d 402 (1994); *See Starkey v. Jefferson County Bd. of Educ.*, Docket No. 02-19-010 (April 8, 2002).

4. Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge cannot substitute his judgement for that of the employer. *Miller v. Higher Education Policy Commission/Marshall University*, Docket No. 03-HEPC-340 (Jan. 21, 2004); *Jordan v. Mason County Bd. of Educ.,* Docket No. 99-26-8 (July 6, 1999).

5. The undersigned finds that WVSU has proven by a preponderance of the evidence that theft of property belonging to WVSU students was good cause for termination of his employment.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (2006) (repealed, *see* fn. 2 above). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and they should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) (2006) 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.

Date: April 11, 2008

_____

Ronald L. Reece

Administrative Law Judge

Footnote: 1

Grievant did not file proposals.

Footnote: 2

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va.

Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.