**THE WEST VIRGINIA PUBLIC EMPLOYEES**

**GRIEVANCE BOARD**

**RICHARD A. BACHMAN,**

**Grievant,**

**v.**

**DOCKET NO. 07-HE-198**

**POTOMAC STATE COLLEGE OF WVU,**

**Respondent.**

**DECISION**

This grievance was filed at level four of the grievance procedure by Grievant, Richard A. Bachman, on May 23, 2007, after he was dismissed from his employment as a tenured professor, by Respondent, Potomac State College of West Virginia University. His statement of grievance reads:

> Dismissal effective 4-30-07 while unable to work due to physical/mental sickness/incapacitation. I am tenured 27 yr employee who should have been granted sick leave and other benefits.

The relief sought by Grievant is "[r]eappointment, re-imbursement for lost pay, legal punitive action against administrators (if applicable)."

A level four hearing was held before the undersigned Administrative Law Judge on November 8, 2007, in the Grievance Board's Westover office. (See footnote 1) Grievant representedhimself, and

Respondent was represented by Kristi A. McWhirter, Assistant Attorney General. This matter became mature for decision upon receipt of Respondent's Proposed Findings of Fact and Conclusions of Law on December 11, 2007. Grievant did not submit written argument.

**Synopsis**

Grievant was employed by Potomac State College as an Associate Professor of Physics for 27 years, until he was dismissed from his employment with Potomac State College on April 30, 2007. Prior to his dismissal, Grievant had been told on April 12, 2007, by Campus Provost Kerry Odell that he intended to suspend him without pay from May 9 through 15, 2007, for insubordination, specifically, his failure to turn in an “alternative work assignment,” and inappropriate interaction with Potomac State College staff. Grievant had a history of making inappropriate comments to other members of the faculty and staff, and this conduct had been escalating since around the end of February. Several members of the Potomac State College faculty and staff felt threatened by the comments Grievant had made to them. After a confrontation with Grievant on March 5, 2007, Dean Douglas Wilmes told Grievant he should remain at home the rest of the week to “regain control of himself and consult with his medical advisor,” and Dean Wilmes arranged to have Grievant's classes covered. Later in the week, Dean Wilmes gave Grievant a work assignment for this period of time when he was not holding classes, but Grievant did not complete this assignment. Grievant returned to work sometime shortly after March 5th. After being informed that he would be suspended, Grievant did not report to work on April 17, 18, and 19, 2007, or anytime thereafter, and did not hold his scheduled classes. Grievant did not call anyone at Potomac State to tell them he would be absent from work. By letter dated April 20, 2007, Provost Odell informed Grievant that his absence from work for three consecutive days without proper notice or authorization amounted to abandonment of his position, which was “gross misconduct and neglect of duty.” The letter informed Grievant that it was Provost Odell's intent to terminate his employment effective April 30, 2007, but that he could meet with Provost Odell no later than April 27, 2007, to present reasons why his employment should not be terminated. Grievant did not meet with Provost Odell to discuss either the proposed suspension or termination, and by letter dated April 30, 2007, Provost Odell terminated Grievant's appointment at Potomac State College for cause, effective April 30, 2007.

The statement of grievance indicates that Grievant believed Respondent should have placed him

on sick leave rather than terminating his appointment. Grievant, however, did not request sick leave, or a leave of absence. Grievant's excuse for his failure to contact anyone at Potomac State to tell them he would not be reporting to work and that he would not be holding classes at the end of the semester, was that he was so depressed and fatigued that he was simply unable to function, and he was afraid to talk to anyone at Potomac State.

Respondent pointed out that it was Grievant's responsibility to call in to report that he would not be at work, and that it was his responsibility to request medical leave, and that he had never done so. Grievant's actions amounted to job abandonment, conduct for which Grievant could be dismissed.

The following Findings of Fact are made based upon the record developed at the level four hearing.

## Findings of Fact

1. Prior to his dismissal, Grievant had been employed by Potomac State College of West Virginia University ("Potomac State"), for 27 years as an Associate Professor of Physics. He was a tenured Professor.

2. On March 2, 2007, Douglas Wilmes, Dean for Curriculum and Instruction at Potomac State, was informed by his Administrative Assistant, Debra Wilson, that Grievant had not shown up to teach a class on that date, which was a Friday. On Monday, March 5, 2007, Dean Wilmes went to Grievant's classroom at 10:30 a.m. to see whether Grievant was present to teach his class. Grievant was not present, and the students who were waiting for Grievant stated he was usually late. Grievant showed up to teach class eight minutes late. When he saw Dean Wilmes, Grievant did not exchange greetings or ask what he could do for Dean Wilmes, rather, he stated, in front of the students, "'I will be documenting everything you people do.' 'I am going to sue you sons of bitches.' 'You need to learn about civil rights.'" Respondent's Level Four Ex. 1 (Dean Wilmes' March 6, 2007 Memorandum for the Record). Dean Wilmes asked Grievant to teach his class and left. He later asked Ms. Wilson to leave a phone message for Grievant asking him to meet with him at 1:30 p.m. that day.

3. Grievant met with Dean Wilmes at 1:30 p.m. on March 5, 2007, as requested. At Dean Wilmes' request, Harlan Shreve, Potomac State's Business Manager, also waspresent for the meeting, and a campus police officer was stationed outside the room. Dean Wilmes asked Grievant

why he had been experiencing difficulties. Grievant responded that “it had to do with the threat of heavy rain and flooding last Thursday. . . . He appeared to indicate that he was being blamed for the rain and that students had been nasty to him about it. He referred to himself as 'cursed' in that regard.

“He confirmed that he did not teach his classes on Friday, and told me that he had suffered an 'anxiety attack' because of the rain.” Dean Wilmes told Grievant he needed to notify Potomac State when he was not going to be able to teach a class, and that his comments to him that morning in front of students were inappropriate. Grievant told Dean Wilmes that “he had been followed by 'unusual vans and trucks,' which he thought might be the police,” and that the “'Social Justice' people were out to get him.” Respondent's Level Four Ex. 1.

4. At the conclusion of the meeting on March 5, 2007, Dean Wilmes told Grievant he wanted him to remain at home the rest of the week to “regain control of himself and consult with his medical advisor,” and that he should tell his medical advisor “that he was having trouble at work.” Grievant agreed to remain at home for the rest of the week. Dean Wilmes did not believe that Grievant was “in a state of mind to function as a faculty member.” Respondent's Level Four Ex. 1.

5. On March 7, 2007, Dean Wilmes sent Grievant a letter confirming that he had been relieved of his on-campus responsibilities for the rest of the week, and that his classes were being taught by other faculty members. This letter also gave Grievant an alternative work assignment. Grievant was directed to provide a written report to Dean Wilmes regarding the maximum number of physics labs that could be scheduled eachweek, a list of supplies required and any additional equipment needed if an additional section of each physics course were offered at Potomac State, any renovations he would recommend to the physics laboratories, and an analysis of student outcomes based upon his experience with PHYS 105. Respondent's Level Four Ex. 2.

6. Prior to the meeting with Grievant on March 5, 2007, and shortly thereafter, Dean Wilmes had been sent emails from various staff and faculty members at Potomac State reporting unusual comments Grievant had made to them which they felt represented a threat by Grievant, or unusual behavior by Grievant which they believed should be reported. Respondent's Level Four Ex. 8. On March 6, 2007, Mark See, a Custodian at Potomac State, reported to Campus Provost Kerry Odell that sometime within the preceding two to three weeks, Grievant had approached Mr. See while he was cleaning the room adjacent to Grievant's office, and had said, “'They are after me.' He repeated

this statement four or five times then said 'They think I am a terrorist'. He then turned and left the building." Respondent's Level Four Ex. 8.

7. By letter dated March 12, 2007, Provost Odell informed Grievant that he was to cease inappropriate interactions with other members of the Potomac State community, such as making accusations of "political correctness" and "persecution by 'Social Justice'," and threatening behavior, and to conduct all interactions with staff and faculty "with civility and respect." Provost Odell further directed Grievant to conduct all duties required of him as a faculty member, specifically directing him to "teach all of your assigned classes and if for any reason you cannot, you must inform the Dean for Curriculum and Instruction of such with as much advanced notice as possible." Grievant was advised of the services of the Staff Assistance Program, and told that the "[f]ailure to abide by these directions andany other reasonable requests made of you in your faculty role or as a member of this college community may result in disciplinary action up to and including termination of employment." Respondent's Level Four Ex. 10.

8. On March 12, 2007, Dean Wilmes instructed Grievant, in writing, that he was to resume his teaching responsibilities, and that his alternative work assignment was due by March 19, 2007. Grievant returned to his teaching duties, but he did not turn in the alternative work assignment by March 19, 2007.

9. On March 20, 2007, Dean Wilmes reminded Grievant that the alternative work assignment had been due the previous day, and gave him until March 23, 2007, to turn it in to him. Grievant did not turn the alternative work assignment in to Dean Wilmes by March 23, 2007, nor did he ever turn in the assignment.

10. By letter dated April 12, 2007, Provost Odell advised Grievant that he intended to suspend him without pay from May 9 through 15, 2007, for insubordination. The specific acts of insubordination were Grievant's failure to turn in the alternative work assignment, and his continued inappropriate interaction with Potomac State staff. The letter stated that Provost Odell would meet with Grievant to allow Grievant to present reasons why he should not be suspended, and that he should contact Karen Peer by April 26, 2007, to schedule an appointment. Provost Odell once again directed Grievant that he was to treat other Potomac State faculty and staff with civility and respect, and conduct all duties required of him as a faculty member, specifically directing him to "be present on- time to teach all of your assigned classes and if for any reason you cannot, you must inform the

Dean for Curriculum and Instruction of such with as much advanced notice as possible." Grievant was again advised that the "[c]ontinued failure to abide by thesedirections and any other reasonable requests made of you in your faculty role or as a member of this college community can result in termination of your employment for cause." Respondent's Level Four Ex. 11.

11. Grievant did not report to work on April 17, 18, and 19, 2007, (See footnote 2) and did not hold his scheduled classes those days. Grievant did not call anyone at Potomac State to tell them he would be absent those three days. Personnel at Potomac State tried to contact Grievant by telephone on each of these three days to inquire about his absence, but Grievant chose not to answer the telephone.

12. Grievant was aware that he was required to call Dean Wilmes if he was going to be absent, so that arrangements could be made for someone to teach his classes, if possible, and so the students could be notified if a class had to be cancelled.

13. Grievant did not call anyone at Potomac State to discuss his absence until after regular business hours on Monday, April 23, 2007. On that date, he called after regular business hours and attempted to leave a message explaining that he was having medical problems. He called after hours because he was feeling intimidated by his employer, and he did not want to talk to anyone at Potomac State. Grievant's message was not received by anyone at Potomac State, because he did not properly complete the call, which required him to select an option at the end of his message.

14. Grievant did not request sick leave or a medical leave of absence, or any type of accommodation for any medical condition. 15. By letter dated April 20, 2007, Provost Odell informed Grievant that his absence from work for three consecutive days without proper notice or authorization amounted to abandonment of his position, which was "gross misconduct and neglect of duty, according to West Virginia University HR Policy 53. In this context you are subject to dismissal for cause, due to insubordination by refusal to abide by legitimate reasonable direction of administrators (WVU Board of Governors Policy 2, Section 12.1.3) and due to substantial and manifest neglect of duty (WVU Board of Governors Policy 2, Section 12.1.5)." The letter informed Grievant that it was Provost Odell's intent to terminate his employment effective April 30, 2007, but that he could meet with Provost Odell no later than April 27, 2007, to present reasons why his employment should not be terminated. Respondent's Level Four Ex. 12.

16. Grievant did not meet with Provost Odell to discuss either the proposed suspension or

termination. By letter dated April 30, 2007, Provost Odell terminated Grievant's appointment at Potomac State for cause, effective April 30, 2007. Respondent's Level Four Ex. 13.

17. From as early as 2004, Grievant had been warned by Provost Odell that his confrontations with Potomac State faculty and staff, particularly in the presence of students, were not acceptable, and he was to cease these confrontations and demonstrate respect for other members of the Potomac State community.

18. In the fall semester of the 2005-2006 school year, Grievant failed to meet his first class of the semester. Dean Wilmes found Grievant asleep in his office. Grievant had been taking medication which had caused him to fall asleep.

## Discussion

In disciplinary matters, the employer bears the burden of proving the charges by a preponderance of the evidence. *Olmsted v. Bd. of Directors/Bluefield State College*, Docket No. 98-BOD-108 (Oct. 21, 1998); *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 defined as “evidence which is 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.” *Black's Law Dictionary* (6th ed. 1991), *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, a party has not met its burden of proof. *Id.*

When a termination involves a tenured faculty member, the Supreme Court of Appeals of West Virginia has determined that due process considerations are raised. “A tenured teacher has a protected property interest in his/her position, which raises constitutional due process considerations when a teacher is faced with termination of his/her employment. W. Va. Const. art. III, § 1.” Syl. Pt. 4, *Trimble v. W. Va. Bd. of Directors,* 209 W. Va. 420, 549 S.E.2d 294 (2001). “Constitutional due process principles may be used to determine whether disciplinary action taken by a public higher educational institution against a tenured teacher is too severe for the infraction occasioning such discipline. W. Va. Const. art. III, § 10." Syl. Pt. 5, *Id.* “Constitutional due process is denied when a tenured public higher education teacher, who has a previously unblemished record, is immediately terminated for an incident of insubordination that is minor in itsconsequences. Under such

circumstances, due process requires the educational institution to impose progressive disciplinary sanctions in an attempt to correct the teacher's insubordinate conduct before it may resort to termination. W. Va. Const. art. III, § 10." Syl. Pt. 6, *Id.*

Grievant was dismissed for his failure to report to work and hold classes for three days, without notice to Potomac State, which Respondent characterized as insubordination, gross misconduct, and substantial and manifest neglect of duty. Respondent relied upon West Virginia University Board of Governors Policy # 2, "Academic Freedom, Professional Responsibility, Promotion, and Tenure," in terminating Grievant's employment. Policy # 2, provides, in pertinent part, as follows:

> 12.1. Causes for Dismissal: The dismissal of a faculty member shall be effected only pursuant to the procedures provided in these policies and only for one or more of the following causes:
>
> 12.1.1. Demonstrated incompetence or dishonesty in the performance of professional duties, including but not limited to research misconduct;
>
> 12.1.2. Conduct which directly and substantially impairs the individual's fulfillment of institutional responsibilities, including but not limited to verified instances of sexual harassment, or of racial, gender-related, or other discriminatory practices;
>
> 12.1.3. Insubordination by refusal to abide by legitimate reasonable directions of administrators;
>
> 12.1.4. Physical or mental disability for which no reasonable accommodation can be made, and which makes the faculty member unable, within a reasonable degree of medical certainty and by reasonably determined medical opinion, to perform assigned duties;
>
> 12.1.5. Substantial and manifest neglect of duty; and
>
> 12.1.6. Failure to return at the end of a leave of absence.

West Virginia University's Unauthorized Absence Policy states with regard to absences:

> The University has the right to expect a reliable workforce, and employees are expected to be present and functioning at work as scheduled. Employees are to obtain proper authorization to be away from the work site for any reason. Prior to their normal start time, employees must notify their supervisor if unable to report to work for any reason. Prior to leaving the work site, employees must notify their supervisor if unable to continue work for any reason. Employees are to maintain adequate leave accruals to cover absences from the workplace, or, to provide proper notification, documentation and obtain prior authorization for a leave of absence without pay. Failure to comply with any of these expectations results in unauthorized leave.
>
> Absence from work for three consecutive workdays without proper notice, explanation and/or authorization shall be deemed gross misconduct and neglect of duty, and may result in disciplinary action up to and including the employee's termination. An unauthorized absence of any duration may result in, but is not limited to: prohibition to charge time absent to requested leave; discontinuation of benefit access; disallowed or discontinued leave of absence; or termination of employment.

Although the West Virginia Supreme Court of Appeals has not formulated a precise definition of "willful neglect of duty," it does encompass something more serious than incompetence, and imports "a knowing and intentional act, as distinguished from a negligent act." *Bd. of Educ. v. Chaddock*, 183 W. Va. 638, 398 S.E.2d 120 (1990). "Respondent's use of the adjectives "substantial" and "manifest" further connotes an intent that the charges of neglect are egregious and deliberate." *Wilson v. Bd. of Trustees*, Docket No. 99-BOT-115 (Dec. 21, 1999). "'When an employee has been repeatedly chastised for not performing specific duties, then proceeds to ignore those duties, this is clearly willful neglect of duty. Chaddock, [*supra*]; *See Jones, [v. Mingo County Bd. of Educ.*, Docket No. 95-29-151 (Aug. 24, 1995)].' *Potoczny v. Marion County Bd. of Educ.,* Docket No. 99-24-344 (June 12, 2000)." *Barker v. Boone County Board of Educ.*, Docket No. 02-03-092 (Aug. 26, 2002).

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).

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 (or rule 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).

“Employers have the right to expect employees to come to work on time and to follow orders that do not impinge on their health and safety. *Page v. W. Va. Dep't of Health and Human Res.*, Docket No. 02-HHR-049 (July 5, 2002), *internal citations omitted*.” *Brooks v. Dep't of Health and Human Res.*, Docket No. 03-HHR-182 (Nov. 14, 2003). “'Failure of [an employee] to report to work and to report the absence to the [employer] as previously directed amounts to insubordination and willful neglect of duty justifying disciplinary action.' *Carrell v. Kanawha County Bd. of Educ.*, Docket No. 20-87-036-1 (Apr. 8, 1987), citing *Kidd v. Kanawha County Bd. of Educ.*, Docket No. 20-86-096 (Apr. 23, 1986).” *Strickler v. Hampshire County Bd. of Educ.*, Docket No. 04-14-133 (Jan. 24, 2005).

Grievant's failure to report to work for three days without notice to Potomac State constituted job abandonment. Grievant's excuse for not reporting to work April 17, 18, and 19, 2007, or thereafter, and for not calling in to tell anyone at Potomac State that he was not coming in, was that he was extremely fatigued and stressed out, and was unable to report to work; and he was intimidated by his employer and was afraid to talk to anyone at Potomac State. He acknowledged that Potomac State staff had tried to contact him onApril 17, 18, and 19, but he had declined to answer the telephone. He

stated he had stopped functioning, but he thought he could go back to work in a day or two.

Grievant argued he should have been placed on leave, rather than fired. West Virginia University has a Family and Medical Leave Act (FMLA) Policy, which is applicable to Potomac State employees. That Policy allows employees up to 12 weeks of leave for conditions such as a serious personal illness. This Policy, however, requires the employee and the treatment provider “to complete the West Virginia University Medical Verification/Catastrophic Leave Form and return to Human Resources within 15 days of the beginning of the leave.” Employees are also required to provide “verbal notice with an explanation of the reason for the leave to their immediate supervisor and to Medical Management.”

Grievant did not request sick leave, or any type of medical leave within 15 days of April 17, 2007, nor has he ever completed any leave forms to request sick leave or a medical leave of absence. Grievant has provided no excuse for his failure to make such a request. Respondent cannot simply grant sick leave without a request from the employee, and a medical leave of absence is available only when the employee provides some documentation from a physician of the seriousness of the illness. See*, Barker v. Bureau of Empl. Programs*, Docket No. 01-BEP-602 (July 31, 2002). “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.” *Swayne v. W. Va. State Univ.*, Docket No. 04-HE-125 (Jan. 14, 2005).

At the level four hearing Grievant submitted as Exhibit 5 the patient notes from his visit to a doctor on April 26, 2007. These patient notes do not indicate that Grievantneeded to take some time off; nor do they indicate that Grievant was so incapacitated on that date, or on any previous dates, that he could not have picked up the telephone and contacted Dean Wilmes or someone else at Potomac State to tell them he could not come to work and carry out his faculty responsibilities. While it is clear that Grievant has been experiencing problems which require professional help, Grievant's statements alone that he was not capable of taking the actions necessary to inform his employer that he would not be coming to work are not sufficient to prove the same. *Barker v. Bureau of Empl. Programs*, Docket No. 01-BEP-602 (July 31, 2002), *citing Brannon v. Oshkosh B'Gosh, Inc.*, 897 F. Supp. 1028, 1035 (M.D. Tenn. 1995).

Grievant abandoned his position at the end of a semester, deserting his employer and the students in his classes. As a tenured faculty member, he had obligations to those students and

Potomac State, and was responsible for taking those actions which were necessary to make sure his classes were covered, and for notifying his employer of his intentions; and he was well aware of what was required of him. This was not a minor incident, nor was Grievant's record unblemished. Grievant had been warned on more than one occasion about inappropriate interactions with Potomac State faculty and staff, and had been told that he would be suspended for his continued inappropriate behavior and his failure to complete the alternative work assignment. Respondent has met its burden of proof, and Grievant's dismissal will be upheld.

The following Conclusions of Law support the Decision reached.

**Conclusions of Law**

1. In disciplinary matters, the employer bears the burden of proving the charges by a preponderance of the evidence. *Olmsted v. Bd. of Directors/Bluefield State College*, Docket No. 98-BOD-108 (Oct. 21, 1998); *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 defined as “evidence which is 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.” *Black's Law Dictionary* (6th ed. 1991), *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, a party has not met its burden of proof. *Id.*

2. “A tenured teacher has a protected property interest in his/her position, which raises constitutional due process considerations when a teacher is faced with termination of his/her employment. W. Va. Const. art. III, § 1.” Syl. Pt. 4, *Trimble v. W. Va. Bd. of Directors,* 209 W. Va. 420, 549 S.E.2d 294 (2001). “Constitutional due process principles may be used to determine whether disciplinary action taken by a public higher educational institution against a tenured teacher is too severe for the infraction occasioning such discipline. W. Va. Const. art. III, § 10." Syl. Pt. 5, *Id.* “Constitutional due process is denied when a tenured public higher education teacher, who has a previously unblemished record, is immediately terminated for an incident of insubordination that is minor in its consequences. Under such circumstances, due process requires the educational institution to impose progressive disciplinary sanctions in an attempt to correct theteacher's insubordinate conduct before it may resort to termination. W. Va. Const. art. III, § 10.” Syl. Pt. 6, *Id.*

3. Although the West Virginia Supreme Court of Appeals has not formulated a precise definition of “willful neglect of duty,” it does encompass something more serious than incompetence and imports “a knowing and intentional act, as distinguished from a negligent act.” *Bd. of Educ. v. Chaddock*, 183 W. Va. 638, 398 S.E.2d 120 (1990).

4. “'When an employee has been repeatedly chastised for not performing specific duties, then proceeds to ignore those duties, this is clearly willful neglect of duty. Chaddock, [*supra*]; *See Jones, [v. Mingo County Bd. of Educ.*, Docket No. 95-29-151 (Aug. 24, 1995)].' *Potoczny v. Marion County Bd. of Educ.,* Docket No. 99-24-344 (June 12, 2000).” *Barker v. Boone County Board of Educ.*, Docket No. 02-03-092 (Aug. 26, 2002). 5. 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).

6. 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 (or rule 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*.

7. 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).

8. "Employers have the right to expect employees to come to work on time and to follow orders that do not impinge on their health and safety. *Page v. W. Va. Dep't of Health and Human Res.*, Docket No. 02-HHR-049 (July 5, 2002), *internal citations omitted*." *Brooks v. Dep't of Health and Human Res.*, Docket No. 03-HHR-182 (Nov. 14, 2003). "'Failure of [an employee] to report to work and to report the absence to the [employer] aspreviously directed amounts to insubordination and willful neglect of duty justifying disciplinary action.' *Carrell v. Kanawha County Bd. of Educ.*, Docket No. 20-87-036-1 (Apr. 8, 1987), citing *Kidd v. Kanawha County Bd. of Educ.*, Docket No. 20-86-096 (Apr. 23, 1986)." *Strickler v. Hampshire County Bd. of Educ.*, Docket No. 04-14-133 (Jan. 24, 2005).

9. West Virginia University's Unauthorized Absence Policy provides that, "[a]bsence from work for three consecutive workdays without proper notice, explanation and/or authorization shall be deemed gross misconduct and neglect of duty, and may result in disciplinary action up to and including the employee's termination."

10. Respondent demonstrated that Grievant abandoned his position, and that this amounted to insubordination, gross misconduct and neglect of duty.

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. *See* W. Va. Code § 29-6A-7 (*repealed by* Senate Bill No. 442, March 7, 2007*)* (*but see Executive Order No. 2-07*, May 8, 2007). 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 appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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**BRENDA L. GOULD**

**Administrative Law Judge**

**Date: January 17, 2008**

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Footnote: 1

*In 2007, the Legislature in S.B. 442 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 being 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 later in this decisionare to the former statutes, which continue to control the proceedings in this case.*

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Footnote: 2

*Grievant did not report to work after April 19, 2007, either. Dean Wilmes called Grievant after the termination letter was sent, and left a message on his answering machine informing him that his classes were being covered, and he was not to return to campus.*