WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

RICHARD ALLEN WICKLINE,
Grievant,

v. **Docket No. 2013-2107-DOA**

DEPARTMENT OF ADMINISTRATION,
DIVISION OF FLEET MANAGEMENT,
Respondent.

D E C I S I O N

Richard Allen Wickline, Grievant, filed this grievance against the Department of Administration, Division of Fleet Management ("Fleet Management" or "Fleet"), Respondent, on June 14, 2013, protesting the termination of his employment. Grievant contends he was "[d]ismissed without cause." He seeks reinstatement, back pay and related litigation cost.[1] As authorized by W. VA. CODE § 6C-2-4(a)(4), the grievance was filed directly to level three of the grievance process.

A level three hearing was held before the undersigned Administrative Law Judge on October 10, 2013, at the Grievance Board's Charleston office. Grievant appeared in person and by counsel, Michael T. Clifford, Esq. Respondent was represented by Stacy L. Nowicki, Assistant Attorney General. Both parties submitted Proposed Findings of Fact and Conclusions of Law, and this matter became mature for decision on October 31, 2013, on receipt of the last of these proposals.

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[1] WEST VIRGINIA CODE § 6C-2-6 (2009) is entitled, 'Allocation of expenses and attorney's fees.' It specifically states: "(a) Any expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expense." "It is well established that the Grievance Board does not have the authority to award attorney fees. *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*,Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June 21, 1996); *Cosner v. Dep't of Transp.*, Docket No. 2008-0633-DOT (Dec. 23, 2008) also *see Long v. Kanawha County Bd. of Educ.,* Docket No. 00-20-308 (Mar. 29, 2001). Thus, this issue will not be addressed further in this decision.

Synopsis

Grievant protests the termination of his employment. Grievant argues the discharge was not warranted nor appropriately executed. Grievant, with the assistance of legal counsel, seeks reinstatement. Respondent contends Grievant knowingly disregarded a clear directive provided to him, and further violated applicable provision(s) of the Workplace Security Policy regarding Threatening and Assaultive Behavior. Respondent is of the opinion that Grievant's actions constitute gross misconduct, and is proper justification for termination in the circumstances of this matter.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant was employed with Fleet Management as an Administrative Services Assistant 1 from September 1, 2011, until May 31, 2013.

2. On July 13, 2012, during his employment at Fleet, following some incidents at Fleet, Grievant's physical workplace was transferred to General Services Division ("GSD"), another agency within the Department of Administration, to complete a special project for GSD.[2]

3. During the time period that Grievant was stationed with GSD, personnel changes transpired at Fleet Management. The director retired, and Kenny Yoakum was

[2] Grievant was re-assigned in July 2012 to General Services under the Supervision of Sue Chapman. Although re-assigned, Grievant remained employed by Fleet. It is uncontested that the purpose of the original reassignment was to separate Grievant from his former supervisor, Janice Hartman, although no blame was attributed to either Grievant or Ms. Hartman arising out of their differences.

hired as the new Director at Fleet. Two new support employees were hired, Rebecca Farmer and Amanda Parsons. Grievant's former Supervisor Janet Hartman was on a long-term medical leave of absence, her return to Fleet was not probable.[3]

4. Amanda (Mandy) Parsons is employed as an acting Administrative Service Assistant III, she commenced full-time employment with Respondent on or about April 1, 2013. Rebecca Farmer is also employed as an Administrative Service Assistant, commencing on December 17, 2012.

5. Grievant's direct supervisor during the special project was Cedric Greene, Deputy Cabinet Secretary for Department of Administration.

6. On May 29, 2013, Grievant met with Deputy Secretary Greene in the Secretary's office. During that meeting, Grievant was informed that his workspace would be moved back to the Fleet office on June 3, 2013. He was given a specific directive by Deputy Secretary Greene to not discuss prior issues that had occurred between Grievant and former employees of Fleet. Grievant was specifically informed that he would be starting with a "clean slate" and was to meet with the new personnel prior to starting back with Fleet on June 3, 2013. *Resp. Ex. 4.*

7. The move back to Fleet was not necessarily positive news for Grievant. It is uncontroverted that, while at General Services, Grievant's work production on the "Special Project" was excellent. It is perceived that Grievant was content at General Services.

8. On May 30, 2013, Grievant met with Kenny Yoakum, Director of Fleet Management.

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[3] Ultimately, Ms. Hartman retired from state employment.

9. Grievant's meeting with Director Yoakum on May 30, 2013, was the first time that Director Yoakum had ever met or spoken with Grievant. During that meeting, Grievant made statements that he had, "eyes and ears everywhere," that he knew where Director Yoakum lived, that he used to manage and run restaurants with mob connections in Florida, and that no one could make him be nice to Steve Brightwell, another employee at Fleet. Testimony Kenny Yoakum, *also see Resp. Ex. 3*.

10. Director Yoakum interpreted Grievant's comments as intimidation tactics, and the statements made him feel threatened.

11. Subsequent to their one-on-one meeting, Director Yoakum had another appointment with Grievant, and took him to meet with other employees in the office. Director Yoakum escorted Grievant to the workspace shared by Amanda Parsons and Rebecca Farmer. Director Yoakum left Grievant with these two employees.

12. This meeting was the first time that Ms. Parsons and Ms. Farmer had ever knowingly spoken with or met Grievant. Grievant made statements to Ms. Farmer and Ms. Parsons that he did not like Director Yoakum because Director Yoakum had never come to meet him while he had been at GSD. Grievant relayed information regarding his past, providing that he had connections; in the future he would bring a cannon to a gun fight; bragged about incidents when he had told the previous director to leave his office or he would knock his f__king head off; that he used to intentionally irritate his former co-workers; that he had contacts everywhere; and that someone's tires had been slashed after an argument with him. *Testimony Rebecca Farmer and Amanda Parsons*; *also see Resp. Exs. 1 and 2.*

13. After their meeting, Amanda Parsons was of the opinion that Grievant was not an individual to be taken lightly. She was apprehensive of Grievant and what might transpire if she ever took a position contrary to Grievant. *Testimony Amanda Parsons*.

14. Amanda Parsons took Grievant's comments and statements seriously, and was of the belief that Grievant's statements were revealing of Grievant's character. Ms. Parsons, in part, provided:

> [Grievant's] "angry/calm" demeanor and his use of multiple gun references made me very uncomfortable. His multiple references to "I know people" was not meaning that he had lots of friends around here but gave me more of the "movie hit man/mob" friend statement. It is hard to explain a feeling, but I feel he still has many anger issues with Fleet Management and personnel here. I am not sure that he can work effectively in this office while, in my mind, plotting a vendetta against others. I have never in my life felt this way about a person, let alone someone I have to work with.

Resp. Ex. 1.

15. Grievant returned to General Services with the belief that he would be working at Fleet Management Offices commencing on Monday, June 3, 2013.

16. Following their meeting with Grievant, Ms. Farmer and Ms. Parsons spoke to fleet employee Betsy Frame, a former girlfriend of the Grievant. Grievant and Ms. Frame are still in contact with each other, and are friends. Ms. Frame approached the two women and asked them what they thought about Grievant. Ms. Farmer and Ms. Parsons were aware of the former relationship between Ms. Frame and Grievant, and that the two maintained a friendship. Ms. Farmer and Ms. Parsons told Ms. Frame that the meeting went well.

17. Upon Director Yoakum's returned to the Fleet building, Ms. Farmer and Ms. Parsons reported to him their dealings with Grievant, and that they had felt uneasy as a

result of Grievant's comments. Each was of the opinion that Grievant was potentially explosive if crossed.

18. Ms. Farmer took Grievant's comments on May 30, 2013, seriously and was of the stated belief that Grievant was bitter because of past events. Ms. Farmer was apprehensive regarding the prospect of working with Grievant after their meeting. Grievant made Ms. Farmer nervous and scared. *Resp. Ex. 2.*

19. Director Yoakum reported the conversations to Cabinet Secretary Ross Taylor, who directed Deputy Secretary Greene to look into the matter.

20. Instructions were given to have Yoakum, Farmer and Parsons write down what had happened and to give the written statements to the Cabinet Secretary's Office. *Resp. Exs 1, 2, 3, and 6.*

21. On May 31, 2013, Deputy Secretary Greene received the statements and discussed the content of those statements with Cabinet Secretary Taylor and the Division of Personnel.

22. The Division of Personnel was specifically contacted for guidance regarding this personnel matter. Deputy Secretary Greene was advised by the Division of Personnel that discipline, up to and including dismissal, was within the discretion of Respondent under the circumstances.

23. Deputy Secretary Greene met with Grievant on May 31, 2013. Deputy Secretary Greene confronted Grievant with the statements of the three Fleet employees, and noted that Grievant had been specifically directed to not discuss past situations at Fleet.

24. Deputy Secretary Greene did not physically present the written documents provided by Yoakum, Farmer and Parsons. He addressed the issue(s) raised and gave Grievant an opportunity to respond. Grievant acknowledged his conduct of discussing previous personnel situations at Fleet.

25. Grievant acknowledges receiving the instructions and participating in conduct contrary to the directive given to him by Deputy Secretary Greene.

26. Deputy Secretary Greene did not hold a distinct predetermination conference with Grievant, although he did give Grievant an opportunity to defend his actions during their meeting on May 31, 2013.[4]

27. Deputy Secretary Greene verbally dismissed Grievant from his employment as an Administrative Services Assistant 1 on May 31, 2013, and followed this with a letter of dismissal on June 4, 2013.

28. The June 4, 2013 dismissal letter stated in relevant part:

> The purpose of this letter is to confirm in writing your verbal dismissal communicated to you on the afternoon of May 31, 2013 communicated to you by myself, to dismiss you from employment as an Administrative Service Assistant I with the Fleet Management Office in the West Virginia Department of Administration effective immediately, for gross misconduct.
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> * * *
>
> So that you may understand the specific reason for your dismissal I recount the following:
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> I met with you on May 29, 2013, to discuss your return to the Fleet Management Office ("FMO"), which was anticipated to happen on June 3, 2013. I gave you clear and specific guidelines for my expectations for the meetings we had scheduled with the FMO Director, Kenny Yoakum, and members of the FMO staff. I indicated that you had a "clean slate" with the current employees and director of FMO, and that you were to introduce

[4] West Virginia Division of Personnel does not require a predetermination conference or a fifteen day notice when the cause of the dismissal is gross misconduct.

> yourself and discuss your future role within the FMO. Rather than follow my clear and specific directions, you went to meet with the director and employees for the FMO on Thursday, May 30, 2013, and immediately began to discuss the previous "personality conflicts" between you and other FMO employees – despite my clear direction to avoid this type of discussion. On its own, this insubordinate behavior would be a problem. However, your remarks went beyond discussing previous issues you had at FMO.
>
> Rather, from statements that I have from all of the employees you spoke with at FMO on May 30, it is clear that your comments and remarks were of a disturbing and threatening nature. You indicated that you "knew where certain employees lived" and that you had connections with the "mob" from time spent "running restaurants for the mob in Florida." You related a story about the previous director of the FMO, wherein you stated that you "told him to get the fuck out of my office before I knocked his fucking head off." You talked about "bringing a cannon to a gun fight," "shooting people in the back," and repeatedly made threatening references to "knowing people."
>
> It is clear to me that during your meeting with FMO personnel on May 30, you repeatedly used profanity, threats and other entirely inappropriate means of communicating with the employees there. These actions go beyond poor behavior. Your actions that day violated West Virginia Workplace Security Policy, specifically, Section III.C. Threatening and Assaultive Behavior. This policy prohibits interrupting or molesting "the orderly and peaceful process of any department, division, or agency of State government."

Resp. Ex 7

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380

(Mar. 18, 1997). 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 & 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.*

Grievant seeks relief from the disciplinary actions of Respondent. Essentially Grievant's arguments are: Grievant contends he was improperly denied an opportunity to review the allegations against him, or to rebut the same prior to the decision to terminate his employment; Grievant proffers that the Deputy Cabinet Secretary's admonitions to not discuss prior employment dilemma(s) unnecessarily infringe upon his First Amendment privileges; and, further, Grievant argues that the alleged grounds for discharge, even if true, do not constitute "gross misconduct." Few of the principle facts are in dispute, there exist interpretation and intent differences of opinion, but the primary events are not contested subject matter. Grievant's contentions are primarily procedural and legal arguments not a dispute of factual event.

The Administrative Rule of the West Virginia Division of Personnel provides that an employee in the classified service may be dismissed for "cause." *See Division of Personnel Administrative Rule § 143-1-12.2.* The phrase "good cause" has been determined by the West Virginia Supreme Court of Appeals to apply to dismissals of employees whose misconduct was of a "substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere violations of statute or official duty with wrongful intention." Syl. pt. 1, *Oakes v. W. Va. Dept. of Finance and Admin*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Commn.*,

149 W. Va. 461, 141 S.E.2d 364 (1965). "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 31, 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); *Wilt v. W. Va. Dep't of Health and Human Res.*, Docket No. 2010-0728-CONS (Sept. 12, 2010).

Respondent's case consisted of four witnesses: Deputy Secretary Cedric Greene; Director of Fleet Management Kenny Yoakum; and employees Amanda Parsons and Rebecca Farmer and accompanying exhibits. Respondent avers Grievant's statements and comments were both insubordinate and in violation of applicable Workplace Security Policy regarding Threatening and Assaultive Behavior.[5] Respondent maintains Grievant's actions constituted a willful or wanton disregard of a standard of behavior that it had a right to expect from Grievant, i.e., gross misconduct.

Insubordination "includes, and perhaps requires, a willful 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-

[5] West Virginia Division of Personnel Workplace Security Policy established on May 1, 1995, with the latest revision July 1, 2002 and Prohibited Workplace Harassment Policy established on May 1, 1993, with the latest revision December 1, 2011.

004 (May 1, 1989). In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Rainey v. Dept. of Administration*, Docket No. 04–ADMN-174 (Sept. 3, 2004); *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995).

As previously stated, "few" of the principle facts are in dispute. Further, Grievant acknowledges receiving Respondent's instructions and participating in conduct contrary to the directive given to him by Deputy Secretary Greene. Thus, in this matter, Respondent has established Grievant's conduct, *see Findings of Fact 1, 6, 8-15, 23-26, supra.* Grievant choose not to govern his actions in accordance with his employer's explicit directive. Grievant's disingenuous citing of the First Amendment privilege is not fully applicable to the instant matter. Free speech is a sacred and cherished right; however, it does not prohibit an employer from establishing reasonable and rational working conditions.[6] "The essential question is whether the employee is speaking out as a citizen, upon matters of public concern, or as an employee, upon matters only of personal interest." *Thompson v. Monongalia County Health Dep't*, Docket No. 95-MCHD-578, (June 14, 1996) citing *Hall v. Marion Sch. Dist. No. 2* , 31 F.3d 183 (4th Cir. 1994). The

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[6]"[P]ublic employees are to be protected from firings, demotions and other adverse employment consequences resulting from the exercise of their free speech rights." *Orr v. Crowder*, 315 S.E.2d 593 (W. Va. 1983) (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)). However, this right is not absolute, and an employer's "interest in the efficient and orderly operation of its affairs must be balanced with the public employees' right to free speech . . .". *Orr* at 601. The undersigned is of the belief that an employee's frequent bickering and disagreements with his superiors and co-workers is not the kind of speech protected by the First Amendment, and it may be considered in terminating an employee. *Chitwood v. Feaster*, 468 F.2d 359 (4th Cir. 1972).

determination turns on the content, form and context of the speech, as revealed by all of the circumstances. *Connick v. Myers*, 461 U.S. 138, 147 (1983) In *Connick,* the court granted "a wide degree of deference to the employer's judgment" that the employee's speech will interfere with close working relationships. *Connick v. Myers*, 461 U.S. at 152. In the instant case, Grievant's communication had a significant potential for interfering with the working relationships of Fleet personnel. The undersigned is not persuaded that Grievant's First Amendment right was unlawfully restricted or violated in the circumstances of this matter.

"An employee's belief that management's decisions are incorrect or the result of incompetence, absent a threat to the employee's health and safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. *Vickers v. Bd. of Directors/W. Va. State College,* Docket No. 97-BOD-112B (Aug. 7, 1998). *See Parker v. W. Va. Dep't of Health and Human Resources*, Docket No. 97-HHR-042B (Sept. 30, 1997)." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003). Grievant was insubordinate.

"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). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. *Day v. Morgan Co. Health Dep't*, Docket No. 07-CHD-121 (Dec. 14, 2007); *Maxey v. W. Va. Dep't of Human Resources*, Docket No. 93-HHR-424 (Feb. 28, 1995). Additionally, an employer has the right to expect subordinate personnel

“to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority . . .” *McKinney v. Wyoming County Bd. of Educ.*, Docket No. 92-55-112 (Aug. 3, 1992) (citing *In re Burton Mfg. Co.*, 82 L.A. 1228 (Feb. 2, 1984)).

The Division of Personnel’s Prohibited Workplace Security Policy, as applicable to employees of the State of West Virginia, specifically discusses "Threatening/Violent Behavior" and defines it as "[c]onduct assessed, judged, observed, or perceived by a reasonable person to be so outrageous and extreme as to cause severe emotional distress[,] or cause, or is likely to result in, bodily harm." Section III. C., Workplace Security Policy. Applicable policy among other intended purposes is “to protect the health, safety, and well-being of employees.” Policy clearly states that threatening and/or violent behavior is unacceptable in the workplace and will not be tolerated. Threatening behavior, either physically or verbally, which willfully interrupts or disturbs the orderly and peaceful process of any department, division, or agency of State government, may subject the perpetrator to legal action. Further, any employee engaging in such behavior is subject to disciplinary action, up to and including dismissal. DOP Workplace Security Policy; see also DOP Prohibited Workplace Harassment Policy. The point at which a work environment becomes hostile or abusive does not depend on any "mathematically precise test." *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, at 22, (1993). An employer has the right to expect an employee to abide by applicable work place rules, and by the societal norms of behavior.

The context in which Grievant communicated his remarks was not accidental nor an accidental slip of the tongue. He was there to meet and get acquainted with co-workers and *vica versa*. He made sure others knew he was not to be taken lightly, he intentionally

informed others of prospective capabilities and his perspectives regarding Fleet. Grievant knowingly highlighted past conflicts, noted potential threat of future events and made it clear he harbored a grudge or two. Grievant's conduct constituted gross misconduct.

Respondent has identified, with specificity, conduct of Grievant which it interpreted as intimidating behavior. See testimony of Kenny Yoakum, Amanda Parsons, and Rebecca Farmer; *also see Findings of Fact 8-14, 18 and 28, supra*. Respondent's disciplinary action is not arbitrary and capricious conduct, there was provocation.[7] Grievant acknowledges the facts of events, but contends and may truly believe his actions were befitting and justified situational conduct. Nevertheless, the undersigned does not find that Grievant's conduct constituted protected speech, it was willful and insubordination. Grievant's explanation for his behavior is not persuasive.[8]

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[7]"Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind,* Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.,* Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil,* 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker,* 547 F. Supp. 670 (E.D. Va. 1982)).

[8] Grievant admitted to his insubordination in disobeying a straightforward, lawful directive of his supervisor, Deputy Secretary Greene, by discussing the previous situations at Fleet. No one who testified, including the Grievant, denies that he was specifically directed to not do this. Grievant denies making inappropriate comments to Director Yoakum, Ms. Farmer and Ms. Parsons, but he admits to the substance of what is in their individual statements. Grievant admits to talking about an issue with Clay Chandler, the former Director. He does not deny making comments about a GSD employee having his tires slashed. He acknowledges talking about ghost accounts, and admits that he worked in the restaurant business in South Florida. Grievant admits the conduct challenges the characterization of the conversations.

Specifically, Grievant was terminated because of his insubordinate behavior in ignoring a specific directive, and by causing fear and trepidation in his fellow employees and direct supervisor. Grievant's comments were not intended to ingratiate others. Grievant spoke of conflicts and his actions and reactions in a manner designed to send a message to his prospective co-workers. Grievant exhibited threatening, hostile, and intimidating behaviors after being explicitly directed by the Deputy Secretary to not bring up past personnel situations. Grievant sent a clear message, a message received and uniformly perceived as menacing by Fleet personnel. Grievant threatened co-workers on May 30, 2013. This behavior reasonably prompted Respondent to implement disciplinary actions.

Grievant also proffers he was improperly denied an opportunity to review the allegations against him or to rebut the same prior to the decision to terminate his employment. Grievant was called to a meeting by Deputy Cabinet Secretary Greene, on May 31, 2013, to discuss the complaints against him. Grievant takes exception with the fact that his belongings were packed and awaiting him outside Deputy Secretary Greene's office. Understandably, Grievant is of the belief that the decision had clearly been made to discharge him regardless of what information he may have or not have been able to provide. Thus, Grievant maintains he was not provided proper due process.

The allegation that Grievant was denied due process is not taken lightly. This contention was given consideration and due weight in the circumstances of this case.

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

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*; *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 is whether the due process protections afforded Grievant were sufficient.

An 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. In other words, notice of the charges, explanation of the evidence, and an opportunity to respond is all the due process that the agency is required to provide. *Id*. at Syl. Pt. 3.

Deputy Secretary Greene confronted Grievant with the allegations of the three Fleet employees statements, and noted that Grievant had been specifically directed to not discuss his past “situations” (personnel disputes) at Fleet. Deputy Secretary Greene gave

Grievant an opportunity to defend his actions during their meeting on May 31, 2013. Respondent identified the conduct for which he was to be terminated. Grievant was orally dismissed from his employment on May 31, 2013, and this was followed up with a written letter of dismissal on June 4, 2013. Grievant was informed of the charges against him, and Respondent identified the conduct for which he was to be terminated. Grievant was provided an opportunity to verbally address the issue(s) on May 31, 2013, and to further justify the events of May 30, 2013, in written format, subsequent to the written notice.[9] The June 4, 2013 dismissal letter provided to Grievant, among other pertinent information, maintained that Grievant was culpable of gross misconduct.

Accordingly, it is not established that Grievant was denied adequate due process in the circumstances of this matter.

Grievant is of the opinion that his dismissal was heavy handed, and not an appropriate disciplinary measure. "The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was 'clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989)." *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001). Grievant has not met this burden.

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[9]Respondent highlights that the Division of Personnel was specifically contacted for guidance regarding this personnel matter. Deputy Secretary Greene was advised by the Division of Personnel that discipline, up to and including dismissal, was within the discretion of Respondent under the circumstances. Further, Respondent notes that DOP Rule 12.2.a.3 provides that a predetermination conference and fifteen day notice is not required when the cause of dismissal is gross misconduct.

Grievant's actions of disobeying a clear directive to not discuss previous personnel conflicts at Fleet with the new Fleet employees, combined with his use of implied threats and statements regarding retaliation, were wholly inappropriate and it is not established that Respondent's disciplinary action in the circumstances of this matter is excessive.

In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding 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 and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995) (citations omitted). The 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 substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute his judgement for that of the employer. *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997). *Meadows, supra.* The undersigned does not find that mitigation is warranted in the circumstances of this grievance.

The following conclusions of law are appropriate in this matter:

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. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008). "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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). 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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. Administrative rules of the West Virginia Division of Personnel provide that an employee in the classified service may be dismissed for "cause." 143 C.S.R. § 12.2, Administrative Rule, W. Va. Div. of Personnel. The phrase "good cause" has been determined by the West Virginia Supreme Court of Appeals to apply to the dismissal of employees whose misconduct was of a "substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention." *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Serreno v. W. Va. Civil Serv. Comm'n*, 169 W. Va. 111, 285 S.E.2d 899 (1982); *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965). *See also Sloan v. Dep't of Health &*

Human Res., 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004) (per curiam). "'Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. West Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777(1988).

3. 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." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *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*.

4. "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990). An employee's belief that management's decisions are incorrect, absent a threat to the employee's health and safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. *Vickers v. Bd. of Directors/W. Va. State College*, Docket No. 97-BOD-112B (Aug. 7, 1998). *See Parker v. W. Va. Dep't of Health and Human Res.*, Docket No. 97-HHR-042B (Sept. 30, 1997). Additionally, an employer has the right to expect subordinate personnel "to not manifest

disrespect toward supervisory personnel which undermines their status, prestige, and authority . . .". *McKinney v. Wyoming County Bd. of Educ.*, Docket No. 92-55-112 (Aug. 3, 1992) (citing *In re Burton Mfg. Co.*, 82 L.A. 1228 (Feb. 2, 1984)).

5. In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Rainey v. Dept. of Administration*, Docket No. 04–ADMN-174 (Sept. 3, 2004); *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995).

6. Respondent demonstrated that Grievant's behavior was insubordinate.

7. "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 31, 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); *Wilt v. W. Va. Dep't of Health and Human Res.*, Docket No. 2010-0728-CONS (Sept. 12, 2010).

8. "[P]ublic employees are to be protected from firings, demotions and other adverse employment consequences resulting from the exercise of their free speech rights." However, this right is not absolute, and an employer's "interest in the efficient and orderly operation of its affairs must be balanced with the public employees' right to free speech . . . ." *Orr v. Crowder*, 315 S.E.2d 593 (W. Va. 1983)(citing *Pickering v. Bd. of Educ.*, 391

U.S. 563 (1968)). The burden of proof is on a grievant to demonstrate by a preponderance of the evidence that his conduct is constitutionally protected. *Orr* at 62 (citing *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)).

9. Whether Grievant's speech in the work place touched upon matters of public concern and was, therefore, a constitutionally protected activity, turns on the content, form and context of the speech, as revealed by all of the circumstances. *Connick v. Myers*, 461 U.S. 138 (1983).

10. Respondent established by a preponderance of the evidence that Grievant's actions were gross misconduct.

11. "An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action." *Miller*, supra, citing *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan 31, 1995).

12. "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. Dept of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct 3, 1996).

13. "Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge cannot substitute his

judgment for that of the employer." *Miller v. Higher Ed. Policy Comm'n/Marshall University*, Docket No. 03-HEPC-340 (Jan. 21, 2004), citing *Jordan v. Mason County Bd. of Educ.*, Docket No. 99-26-080 (July 6, 1999); *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-223 (March 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997).

14. Grievant failed to establish that his conduct was protected speech, that he was denied essential due process and/or that the punishment should be mitigated.

15. Respondent established by a preponderance of the evidence that the disciplinary action taken was for good cause, and not arbitrary and capricious.

16. Respondent established by a preponderance of the evidence good cause for terminating Grievant's 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. *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 (2008).

Date: December 11, 2013

Landon R. Brown
Administrative Law Judge