THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BENJAMIN ADKINS,
Grievant,

v. **DOCKET NO. 2013-0264-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
Respondent.

DECISION

On August 29, 2012, Benjamin Adkins ("Grievant") filed this grievance directly at Level Three of the grievance procedure challenging his termination by his employer, the West Virginia Department of Health and Human Resources ("DHHR" or "Respondent"). The undersigned Administrative Law Judge conducted a Level Three hearing in this matter on May 31, 2013 in the Grievance Board's office in Charleston, West Virginia. Grievant was represented by Gordon Simmons with UE Local 170 of the West Virginia Public Workers Union, and Respondent was represented by Assistant Attorney General Michael E. Bevers. This matter became mature for decision on July 5, 2013, upon receipt of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Respondent terminated Grievant's employment based upon a series of performance problems and workplace conduct issues which took place between March 16 and May 1, 2012, including failing to notify his assigned clients to appear for Judicial Reviews, failure to timely complete required face-to-face meetings with clients, cursing

in the presence of his immediate supervisor, missing one or more court hearings, and failing to follow through on addressing needs presented by various clients. Between December 2006 and December 2011, Grievant had been the subject of multiple disciplinary or remedial actions, including four written reprimands, one verbal reprimand, one three-day suspension, one five-day suspension, an employee evaluation with an overall rating of "needs improvement," and a 90-day Improvement Plan, all of which related to performance and behavior issues. Grievant's five-day suspension was based on an investigation which found that he had created a hostile work environment for his co-workers.

Although some of the allegations in Grievant's termination notice were excluded because they failed to provide sufficient notice of the date, time, place and persons involved to comply with due process standards, and some allegations were not established by a preponderance of the evidence, Respondent nonetheless established by preponderant evidence that Grievant committed multiple offenses which represented a continuation of the pattern of misconduct for which he had previously been disciplined and warned that further misbehavior would result in termination. Grievant failed to demonstrate that Respondent violated the Family Medical Leave Act ("FMLA"), Americans with Disabilities Act ("ADA"), or any other statute, rule or regulation in regard to this action, or that the punishment imposed was disproportionate to the offenses committed or an abuse of discretion. Therefore, the grievance must be denied.

The following Findings of Fact are made based upon the record developed at the Level Three hearing.

Findings of Fact

1. Grievant was employed by Respondent, Department of Health and Human Resources ("DHHR"), initially as a Child Protective Services ("CPS") Worker in 2004, and later as a Social Services Worker 3, in the Cabell County DHHR Office.

2. Julie Spence was employed by DHHR as a Child Protective Service Worker Supervisor, and in that capacity initially served as Grievant's immediate supervisor.

3. Hope Smith has been the Community Services Manager in DHHR's Wayne County Office since 2011. From 1996 to 2011, Ms. Smith worked in DHHR's Cabell County Office as the Social Service Coordinator. In that capacity, she was Ms. Spence's immediate supervisor, and indirectly supervised Grievant.

4. On December 22, 2006, Ms. Spence issued a written reprimand to Grievant for failing to meet required time frames for having face-to-face contact with children involved in an investigation. *See* R Ex 6.

5. On April 9, 2007, Ms. Spence issued a written reprimand to Grievant for failure to follow established policy relating to intake of Child Protective Service allegations. *See* R Ex 7.

6. On April 18, 2007, Ms. Spence issued a written reprimand to Grievant for failure to follow CPS policy concerning timely accomplishment of face-to-face contacts with alleged abuse victims. *See* R Ex 8.

7. In September 2007, Ms. Spence and Ms. Smith administered an Employee Performance Appraisal for Grievant which rated his overall performance at the "needs improvement" level. *See* R Ex 9.

8. On April 28, 2008, James E. Kimbler, Regional Director for DHHR's Bureau for Children and Families, Region II, suspended Grievant for three days, due to his failure to report approximately eight missed face-to-face deadlines to a supervisor. *See* R Ex 19.

9. On July 10, 2008, Ms. Spence issued a disciplinary memo concerning Grievant's failure to timely connect a family to appropriate services in response to a report of infant child abuse. *See* R Ex 10.

10. On August 27, 2008, Grievant was reallocated from the position of Child Protective Services Worker to a Social Service Worker III position, a non-disciplinary demotion requested by Grievant. *See* R Ex 11.

11. When Grievant was reallocated as a Social Service Worker III in August 2008, Keith Miller, a Social Service Supervisor, became Grievant's immediate supervisor in the Youth Services section of DHHR's Cabell County Office. Ms. Smith, as Social Service Coordinator, also served as Mr. Miller's immediate supervisor.

12. On May 28, 2009, Mr. Miller and Ms. Smith placed Grievant on a 90-day Improvement Plan relating to his inappropriate behavior, failing to follow the directives of his supervisor, missing court hearings and multi-disciplinary team (MDT) meetings, and not properly documenting his actions in FACTS, the agency's computer database. *See* R Ex 12. Edward Shoemaker, a Service Coordinator at the Potomac Center in

Romney, West Virginia, testified regarding the incident in May 2011 which led to placing Grievant on an Improvement Plan.

13. On July 15, 2011, Mr. Kimbler suspended Grievant for five days based upon an investigation which indicated that Grievant had created a hostile work environment for his co-workers. *See* R Ex 20.

14. On December 12, 2011, Mr. Miller issued a verbal reprimand to Grievant for failing to timely complete required reports, failing to timely complete face-to-face meetings, and failure to timely enter contacts in the agency's database. *See* R Ex 16.

15. Eddie Taylor, a Probation Officer working for the judicial system in Huntington, observed Grievant's failure to properly notify two or three assigned juvenile clients of their Judicial Reviews, so that the juveniles did not appear as scheduled on or about March 16, 2012. *See* R Ex 2. Grievant admitted in Mr. Taylor's presence that he was at fault because he did not send the appropriate notice. Grievant further acknowledged that he had previously been reprimanded for similar derelictions. *Id*.

16. Mr. Taylor reported receiving numerous verbal complaints from parents concerning Grievant's failure to follow through on promises to make arrangements for support services including schooling, counseling and medical appointments. *Id*.

17. By April 2012, Mr. Miller was contemplating initiating further disciplinary action against Grievant, including termination.

18. On an unspecified date sometime between April 9 and 12, 2012, Grievant approached his supervisor, Mr. Miller, and indicated that he wanted to take approximately two weeks' leave because he was "stressed." On multiple occasions,

Grievant had previously mentioned to Mr. Miller that he suffered from depression. Mr. Miller informed Grievant that he did not believe the current work load would permit Grievant to be off for that long and, in any event, the Community Services Manager, Ms. Mitchell, would need to approve a leave of that duration. Grievant did not go into detail regarding his medical issues with Mr. Miller, and he did not pursue his leave request with Ms. Mitchell.

19. On April 6, 2012, Grievant indicated to Mr. Miller that he had completed his required contacts for the month. However, Mr. Miller found that Grievant had not properly documented those contacts in the agency's computer database, so he considered Grievant's statement that the contacts were completed to be a misrepresentation. *See* R Ex 17. Grievant told Mr. Miller that he had entered his contacts but when Mr. Miller checked, these entries were still not in the system. *Id*. Later that same day, Grievant entered Mr. Miller's office "cussing and yelling" in response to a request that he discuss his failure to attend a truancy hearing with Mr. Miller. Grievant was informed by Mr. Miller that there would be further disciplinary action based upon Grievant's missing a hearing and failing to get his contacts into the computer system in a timely manner. *Id*.

20. On April 27, 2012, a staff member at the Chestnut Ridge Center, complained to John Clark, the Center's Residential Services Coordinator, about Grievant becoming "abrasive and demanding" when he was told that the Center would not be able to set up a video conference with one of his clients. *See* R Ex 4. There was no direct evidence to corroborate Mr. Clark's hearsay testimony and written

statement. Similarly, Mr. Clark's hearsay reports concerning Grievant's interaction with another staff member regarding obtaining a clothing voucher for a client was not satisfactorily corroborated by direct testimony.

21. On May 1, 2012, Grievant contacted Mr. Miller after realizing that he had a court appearance scheduled that afternoon in Lewisburg, West Virginia, and it was already too late for him to get there. Grievant also stated that even if he had found out about the hearing in time to appear, he would not be able to make another trip like that and he would not miss another Doctor's appointment. *See* R Ex 18.

22. On May 1, 2012, Grievant entered Mr. Miller's office complaining about a Probation Officer in Lewisburg, West Virginia, who had declined to cover another hearing for him. Mr. Miller heard Grievant angrily state, "F _ _ _ that B_ _ _ _, I have bent over backwards to do whatever she needs done." *See* R Ex 18. Grievant also stated to Mr. Miller, "with his anxiety level as high as it is she's cocking a loaded gun." *Id*.

23. Tina Mitchell, Community Services Manager in charge of DHHR's Cabell County Office, held a predetermination conference with Grievant on May 10, 2012. Also present at this meeting was Mr. Miller and Angela Seay, Social Services Coordinator. Ms. Mitchell informed Grievant that she was intending to recommend his termination.

24. During the predetermination conference, Grievant stated that he had been off his medications for up to eight days during the time of these incidents. *See* R Ex 21.

On the following day, Grievant requested and received FMLA leave from May 11 to August 25, 2012.

25. Prior to the predetermination conference, Grievant told Mr. Miller that he was under stress and wanted to take up to two weeks off. Mr. Miller explained that he could not approve that much leave based upon the current workload. Mr. Miller told Grievant that such leave would need to be approved by Ms. Mitchell. Grievant never submitted a leave request to Mr. Miller for either annual or FMLA leave until after the predetermination conference. Grievant likewise did not request either annual or FMLA leave from Ms. Mitchell prior to the predetermination conference.

26. While Grievant was on medical leave, Grievant's medical provider submitted additional medical documentation to Ms. Mitchell on or about July 10, 2012, which diagnosed Grievant with a Generalized Anxiety Disorder and Bipolar Disorder, further noting that Grievant's most recent Bipolar Disorder episode was "depressed, severe without psychotic features." *See* G Ex 2.

27. On August 21, 2012, Grievant's medical provider submitted additional documentation to Ms. Mitchell stating that Grievant "has continued to attend mental health counseling . . . twice per week in order to work towards the therapeutic goal of mood stabilization." *See* G Ex 3. The communication went on to explain that because Grievant's mood was stabilized and he had made progress, he would be transitioning to individual counseling one time per week for four weeks and then one time per month for four months, with periodic counseling sessions to follow. *Id*. Grievant did not request any further medical leave or accommodation for his medical condition.

28. On August 27, 2012, Mr. Kimbler issued correspondence notifying Grievant of his decision to dismiss him from employment effective that same day. This correspondence included the following allegations pertinent to this grievance:

> A predetermination conference was held between you, Keith Miller, your direct supervisor, Tina Mitchell, Community Services Manager and Angela Seay, Social Services Coordinator, on May 10, 2012 concerning this matter. During the conference you were given the opportunity to respond to these issues and explain your behavior. You stated that you did not know things had gotten this bad and the feedback you had received from the court personnel was not the same as what was indicated in our information. You also stated that during the time of these incidents you had not been on your medications, some for up to 8 days. You also stated that you had tried to do as requested and had gone to your supervisor, Angela Seay, and Tina Mitchell telling everyone you were over stressed and needed time off. You also indicated that you didn't think it was right you had done a lot of things that you had not gotten any recognition for, such as finding all the placements for the new truancy courts. At this time it was explained to you that you were not ordered to do this, you did this without the authorization or request of Keith Miller, direct supervisor, who already made arrangements for placements. You stated you did things like that because of the great relationship you have with the Judge where the Judge "picks your brain" concerning cases. Finally you stated you would be going to your doctor upon leaving the meeting.
>
> Your dismissal is the result of your history of performance failures and gross misconduct that include the following situations:
>
> We have had multiple complaints from providers and court personnel regarding your professionalism. Written statements were received from Cabell County Probation and Chestnut Ridge Hospital as well as several verbal statements from River Park Hospital, Cabell County Prosecuting Attorney's office, and Lewisburg's Probation Department. We have received statements from both providers and probation that you failed to notify families of MDT's and court hearings.
>
> Cabell County Probation, in their communication with our office, has reported that several of the children on your caseload were not brought to court or the families notified for the Judicial Reviews on March 16, 2012. We have also been notified that another child who was reviewed in error on March 16, 2012 was not on that Judge's Docket. Cabell County Probation also reports that you habitually fail to follow through with setting up services for clients and that the probation office is

always receiving complaint calls from your clients stating that you said you would do something for them, but this is not completed. One probation officer stated that you have lied to the prosecutor, defense attorney, probation, the court, and to the clients on several of your cases. On one occasion when this was brought out in a hearing you argued with the clients (*sic*.) mother to the point of becoming wild and visibly upset while ignoring the judge, prosecutor, and all others involved.

W.R., one of the probation officers in Lewisburg, was also contacted due to a recent issue that you failed to attend a hearing on 05/01/12 for one of you (*sic*.) clients, O.G. W.R. also stated that you had not submitted the standard court report updating the parties to the case as to the status of the child to the Judge as requested. Court reports are standard documents expected at each hearing for each child in your caseload. She went on to explain that she has been requesting court orders and other Cabell County Court documentation from you for several months with no response.

When your direct supervisor, Keith Miller, spoke with the Prosecuting Attorney J.S. stated that you care about the kids you work with but that you do not follow through with what you say you will do. He went on to say that you hide everything and that you become upset when questioned about it. He also stated that your story is always different than that of the provider on various cases. J.S. Reported that on one occasion, April 25, 2012, you called in and were placed on speakerphone because you were so openly hostile, R.W. with Cabell County Probation witnessed the phone call. On this date you expressed to J.S. that the Judge was making a mistake by placing one of your youth in a Florida facility and demanded that J.S. direct the Judge not to sign the order until you could speak with the Judge.

On April 27, 2012 you contacted T. B., staff at Chestnut Ridge, with regard to one of your clients, B.M., Placed at Chestnut Ridge. You were requesting that Skype be arranged so that you could meet your face-to-face requirement with the client B.M. placed in their facility. When it was explained to you that this was not something that could be arranged you became abrasive and demanding with T.B.. It was related by J.C., Residential Services Coordinator, that this was not the first incident in which you displayed unprofessional behavior when speaking with their staff. J.C. Further stated that another staff member, M.S., has attempted to obtain a clothing voucher for a youth and releases to be signed. M. S. Related that for over a month you would state that voucher was on your desk or in the mail, but it has never been received. Clothing was brought to the facility on April 28, 2012, some of which was clearly used clothing, but still the voucher was never received.

You have had several informal conferences with you (*sic*.) direct supervisor, Keith Miller, concerning completing face to face visits as well as getting you (*sic*.) contacts entered in a timely manner. It has been reported that you are still having anger outbursts slamming things around and using profanity in the office. You have also failed to attend several court hearings, three were missed in April 2012, and another was missed in May 2012.

On April 6, 2012 your direct supervisor, Keith Miller, informed you that a hearing had been missed. You proceeded to come into your direct supervisor, Keith Miller's, office yelling, and using foul language to the point your supervisor, Keith Miller, had to redirect you and ask you to leave his office.

On April 24, 2012 you were directed by your immediate supervisor, Keith Miller, to return to the office to complete a case summary for the CSM, Tina Mitchell, to be used in court. You started yelling and using foul language telling you (*sic*.) supervisor that you were not going to do this. When it was explained to you that this just needed to be a short summary you stated this was "bullshit" and this case could not be explained by a short statement. You continued to use foul language explaining how you did more work than anyone else in your unit.

On April 24, 2012 after the previous conversation you came into the office stopping at your direct supervisor, Keith Miller's, office with your client's belongings, you proceeded to throw the bags down on the ground using foul language to explain how much work you had done and how this was the last thing you would be doing for this case. You then went to your desk where you proceeded to slam things around on your desk while continuing to use foul language.

April 25, 2012 you sent a text message to you (*sic*.) supervisor, Keith Miller, to explain that a family had just contacted you concerning your missing a court hearing that morning.

May 1, 2012 you informed your supervisor, Keith Miller that you were going to miss a court hearing in Lewisburg, WV. When your supervisor questioned why you were going to miss it you stated that you didn't know about it but even if you had you would not have gone anyway.

May 1, 2012 you entered your supervisor, Keith Miller's, office upset and using foul language. You stated that you had bent over backwards to help this probation officer in Lewisburg and now she wants

to treat me this way. You made the statement that with your anxiety being as high as it was the probation officer was cocking a loaded gun.

During your employment, we have tried to work with you to correct your deficiencies and improve your performance. These efforts include:

April 2007 - a written reprimand was issued to you regarding missed face-to-face contacts.

April 2008 - you were given a 3 day suspension for failure to report missed face-[to-]face-deadlines.

2008-2009 - there were multiple issues with anger outbursts, missed hearings, and failing to notify clients of court hearings and MDT's. Specifically on February 17, 2009 your supervisor, Keith Miller, met with you regarding failing to issue notices [to] clients regarding court hearings and your failure to attend these same hearings on this day. Also on this day a discussion was held by your supervisor, Keith Miller, regarding a verbal altercation with a coworker. March 23, 2009 your supervisor, Keith Miller, met with you to go over an official complaint lodged against you for yelling and cussing at a coworker and becoming involved in a verbal altercation with the same worker. May 13, 2009 your supervisor, Keith Miller, spoke with you regarding your failure to notify parents of upcoming judicial reviews for the following day (May 14, 2009).

In May of 2009 you were given a special EPA-2 and a Performance Improvement Plan. The EPA-2 states, among other items, that you are to refrain from entering into confrontations with other workers. You were placed on a 90-day Improvement Plan for "inappropriate behavior in the workplace, i.e. yelling and slamming telephones, language, using the word G.D. numerous times, anger outbursts, etc." these behaviors were addressed toward co-workers and support personnel locally and regionally. At that time you were told that you could expect further disciplinary action, up to and including termination of employment for further behavior.

On July 15th, 2011 you were suspended without pay for five days due to your continued unacceptable conduct, particularly pertaining to you (*sic*.) creating a hostile work environment for you (*sic*.) co-workers. At that time you were told that any further neglect of duty or any other infractions would be viewed as unwillingness rather than inability to comply with reasonable expectation (*sic*.) and would result in further disciplinary action, up to and including dismissal.

> December 12th, 2011 you were issued a verbal reprimand due to your failure to complete an NYTD [National Youth in Transition Database] report on one of your case. (*sic*.) This reprimand came after multiple emails and verbal directives to have it completed within time (*sic*.) the 45 day time frame. This reprimand is current.
>
> At each point of discipline you have been offered employee assistance to deal with your issues but you always stated you would handle the matters yourself.
>
> After consideration of your predetermination conference responses I have decided to proceed with your dismissal from your employment as a Social Services Worker III with the West Virginia Department of Health and Human. (*sic*.)

R Ex 21

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. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). The generally accepted meaning of preponderance of the evidence is "more likely than not." *Riggs v. Dep't of Transp*., Docket No. 2009-0005-DOT (Aug. 4, 2009) *citing Jackson v. State Farm Mut. Ins. Co*., 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004). *See 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. *Leichliter, supra*.

The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 51, 380

S.E.2d 216, 218 (1989). The judicial standard in West Virginia requires that "dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); Syl. Pt. 1, *Oakes v. W. Va. Dept. of Finance & Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980). *See Guine v. Civil Service Comm'n*, 149 W. Va. 461, 468, 141 S.E.2d 364, 368-69 (1965); *Smith v. Clay County Health Dep't*, Docket No. 2012-0451-ClaCH (Apr. 17, 2012).

Certain facts relating to the charges against Grievant were the subject of conflicting testimony. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Young v. Div. of Natural Res*., Docket No. 2009-0540-DOC (Nov. 13, 2009); *Massey v. W. Va. Public Serv. Comm'n*, Docket No. 99-PSC-313 (Dec. 13, 1999); *Pine v. W. Va. Dep't of Health & Human Res*., Docket No. 95-HHR-066 (May 12, 1995). *See Harper v. Dep't of the Navy*, 33 M.S.P.R. 490 (1987). *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). Some factors to consider in assessing the credibility of a witness include the witness's demeanor, opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the fact finder should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by

the witness, and the plausibility of the witness' information. *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth*., Docket No. 2009-0685-MAPS (Apr. 23, 2009); *Massey, supra*.

Respondent presented documentation to demonstrate that Grievant's conduct resulted in prior disciplinary actions on several occasions. Ordinarily, the merits of any prior disciplinary actions which Grievant failed to timely grieve when they were administered are not properly at issue in a subsequent grievance. *Koblinsky v. Putnam County Health Dep't*, Docket No. 2011-1772-CONS (Oct. 23, 2012); *Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997); *Jones v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-371 (Oct. 30, 1996). Indeed, all such information contained in the documentation of Grievant's prior discipline must be accepted as true. *Koblinsky*, *supra*; *Aglinsky, supra*. *See Womack v. Dep't of Admin*., Docket No. 93-ADMN-430 (Mar. 30, 1994); *Perdue v. Dep't of Health & Human Res*., Docket No. 93-HHR-050 (Feb. 4, 1994). Consistent with these principles, Respondent established that Grievant was reprimanded on four separate occasions, was issued an employee evaluation with an overall rating of "needs improvement," was placed on an employee improvement plan (which he successfully completed), and was suspended on two separate occasions, initially for three days, and subsequently for five days. *See* R Exs 6, 7, 8, 9, 12, 16, 19, & 20.

Some of the evidence supporting the charges against Grievant consists of hearsay statements. An administrative law judge must determine what weight, if any, is to be given to hearsay evidence in a disciplinary proceeding. *Comfort v. Reg'l Jail & Corr. Facility Auth*., Docket No. 2013-1459-CONS (Apr. 18, 2013); *Hamilton v. W. Va.*

Dep't of Health & Human Res., Docket No. 2011-1785-DHHR (Sept. 6, 2012); *Miller v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ*., Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996). The Grievance Board has applied the following factors in assessing hearsay testimony: (1) the availability of persons with first-hand knowledge to testify at the hearings; (2) whether the declarant's out of court statements were in writing, signed, or in affidavit form; (3) the agency's explanation for failing to obtain signed or sworn statements; (4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; (5) the consistency of the declarant's accounts with other information, other witnesses, other statements, and the statement itself; (6) whether collaboration for these statements can be found in agency records; (7) the absence of contradictory evidence; and (8) the credibility of the declarants when they made their statements. *Simpson v. W. Va. Univ*., Docket No. 2011-1326-WVU (May 3, 2012); *Cale v. W. Va. Univ*., Docket No. 2011-1711-WVU (Mar. 22, 2012); *Sinsel v. Harrison County Bd. of Educ*., Docket No. 96-17-219 (Dec. 31, 1996).

In this regard, the testimony of John Clark, who appeared by telephone, largely involved his recitation of what he was told by two of his co-workers. Neither of these co-workers was called as a witness, nor did they submit signed, sworn statements or affidavits of their own, and there was no explanation as to why these witnesses were not called to provide direct evidence of what took place. Therefore, the testimony of Mr. Clark was essentially uncorroborated hearsay, and the undersigned finds that DHHR failed to present preponderant evidence to establish the charges relating to Grievant's

interactions with staff at Chestnut Ridge on April 27 and 28, 2012, as alleged in the notice of termination. Similarly, the only evidence regarding Grievant's alleged interactions with the Prosecuting Attorney in Cabell County came from the hearsay testimony of Mr. Miller. Neither the Prosecuting Attorney who allegedly dealt with Grievant, nor a Probation Officer who allegedly overheard this exchange, were called as witnesses, nor was any explanation provided as to their availability to appear as witnesses. Accordingly, DHHR failed to present preponderant competent evidence to support the allegations concerning Grievant's conduct in the presence of the Cabell County Prosecuting Attorney on or about April 25, 2012, as alleged in the termination letter.

The termination letter alleges that on April 24, 2012, Mr. Miller directed Grievant to return to the office after working hours to complete a case summary which Ms. Mitchell needed for a court appearance the following day. Grievant allegedly responded to this request by yelling and cursing, referring to the requirement as bull _ _ _ _. Mr. Miller did not address this specific incident in his testimony, stating that Grievant would curse in his presence on multiple occasions. This allegation was not established by a preponderance of the evidence.

The remainder of the allegations contained in the termination notice were supported by the direct and uncontradicted testimony of credible witnesses, and other admissible documentary evidence presented by DHHR. Therefore, as to the remaining allegations (with the exception of those allegations which failed to comply with due process requirements as hereinafter discussed), Respondent established by a

preponderance of the credible evidence that Grievant engaged in each act of misconduct, substantially as alleged.

Although Grievant did not admit that he actually committed each act of misconduct alleged in the termination notice, Grievant's Level Three testimony focused on DHHR's failure to grant him medical leave until after he had been notified of his proposed termination for misconduct. Grievant blamed all of these incidents in April and May of 2012 on his inability to obtain required prescription medications to treat his Bipolar Disorder and Anxiety Disorder. Grievant explained that his treating physician took a new job and he had to find a new physician who could examine him and prescribe the required medication. However, Grievant did not request leave under the Family Medical Leave Act ("FMLA") until on or about May 10, 2012, when he learned of DHHR's plans to terminate his employment. Grievant could not have provided Mr. Miller with medical evidence that he suffered from a serious health condition which would qualify him for FMLA leave given that, according to his own testimony, he did not have a treating physician after his regular physician's employment situation changed. Even the medical statements Grievant obtained after he was notified that he would be terminated do not establish that his medical conditions prevented him from performing the functions of his job in the past. *See Myers v. W. Va. Dep't of Transp.*, Docket No. 96-DMV-304 (Feb. 10, 1997).

Mr. Miller testified credibly that his conversation with Grievant about taking two weeks' leave involved only an explanation that Grievant was experiencing stress, not that he was unable to obtain required medications that he needed to function in his

position. Moreover, Grievant did not follow up by submitting a written request for any kind of leave, or elevate his concerns to Ms. Mitchell, until his termination was proposed. Indeed, Grievant's mental condition at this point in time, and his contemporaneous aberrant interactions with co-workers and colleagues in community service roles, cast doubt on his ability to accurately recollect events from that time period. Once Grievant submitted the proper documentation, it appears that his FMLA leave was immediately granted as requested from May 11 through August 25, 2012.

The FMLA permits an eligible employee to take up to 12 weeks of leave per year, if the employee has a serious health condition that renders the employee unable to perform one or more of the essential functions of his or her job. 29 U.S.C. § 2612(a); 29 CFR 825.112(a). The Act further provides that employers may not "interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the Act]." *Id*. § 2615(a)(1).

To prevail on a claim for FMLA interference, the employee must prove that: (1) he was eligible for FMLA protections; (2) his employer was covered by the FMLA; (3) he was entitled to leave under the FMLA; (4) he provided sufficient notice of his intent to take FMLA leave; and (5) his employer denied him FMLA benefits to which he was entitled. *Brown v. Auto. Components Holdings*, LLC, 662 F.3d 685, 689 (7th Cir. 2010). According to the credited testimony of Mr. Miller, Grievant never complied with the fourth element of this test in that he failed to adequately communicate his leave requirements to his employer. Once he did, DHHR immediately granted FMLA leave as requested. In these circumstances, there was no interference with or denial of FMLA

rights. *See Ervin v. Dep't of Health & Human Res*., Docket No. 2011-1794-CONS (July 24, 2012); *Myers*, *supra*.

Further Grievant failed to establish that DHHR retaliated against him for requesting and taking FMLA leave. DHHR had already initiated action to terminate Grievant's employment before he invoked the FMLA to obtain medical leave. There can be no retaliation where the protected activity follows the employer's adverse action rather than precedes it.

Grievant also complained that at least two other employees working in his classification in the Cabell County DHHR Office were assigned to positions that did not require the travel, face-to-face meetings within strict time limits, court appearances and team meetings which made his job so stressful. However, Grievant's testimony fell short of establishing how these more senior employees obtained these assignments, or that the assignments were created simply to accommodate their medical conditions or disabilities. Moreover, prior to his proposed termination, Grievant acknowledged that he never made a request for accommodation under the Americans with Disabilities Act, or the Human Rights Act. Therefore, Grievant did not establish that DHHR discriminated against him on account of any disability, or perceived disability, in violation of these statutes.

Grievant asserts that he did not receive due process in regard to his termination action. As a tenured public employee, Grievant has property and liberty interests which entitle him to procedural due process in regard to termination of his employment. *Bd. of Educ. v. Wirt*, 192 W. Va. 568, 573-74, 453 S.E.2d 402, 407-08 (1994). *See Matthews*

v. Eldridge, 424 U.S. 319 (1976). Accordingly, where an act of misconduct is asserted in a notice of dismissal, it should be identified by a date, specific or approximate, unless the characteristics are so singular that there is no reasonable doubt when it occurred. If an act of misconduct involves persons or property, these must be identified to the extent that the employee will have no reasonable doubt as to their identity. *Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981); *Snyder v. Civil Serv. Comm'n*, 160 W. Va. 762, 232 S.E.2d 842 (1977). *See Arnett v. Kennedy*, 416 U.S. 134 (174).

More specifically, Grievant complains that the written notice he received refers to certain persons, including both witnesses and clients of the employer, by their initials. Although using the full names would have provided greater specificity, there was no showing that Grievant was confused by this use of initials, or that he was unable to respond, or prepare his defense, without greater specificity as to the identity of these individuals. Moreover, such use of abbreviations is consistent with the practice of the West Virginia Supreme Court, which is to avoid using the last names of parties in cases involving sensitive facts. *Wirt*, *supra*, at 571, 405 n.2. *See State ex rel. Div. of Human Serv. by Mary C.M. v. Benjamin P.B.*, 183 W. Va. 220, 395 S.E.2d 220 (1990). Accordingly, the use of initials in the termination notice Respondent issued to Grievant in this matter did not deprive Grievant of his constitutional right to procedural due process.

The misconduct which Respondent alleges to warrant Grievant's termination is set forth in considerable detail in the termination notice, the essential provisions of

which are quoted in Finding of Fact Number 28, above. *See* R Ex 21. One of these allegations began with Grievant's failure to notify his clients to appear for Judicial Reviews in Cabell County on March 16, 2012. That allegation is sufficiently specific as to satisfy the due process notice requirements in *Snyder*, *supra*. However, this allegation subsequently proceeds to allege the following:

> One probation officer stated that you have lied to the prosecutor, defense attorney, probation, the court, and to the clients on several of your cases. On one occasion, when this was brought out in a hearing you argued with the clients (sic.) mother to the point of becoming wild and visibly upset while ignoring the judge, prosecutor, and all others involved.

R Ex 21

This allegation fails to identify the probation officer who witnessed this episode by name or initials, fails to identify the clients or family members involved by name or initials, fails to identify the judge or prosecutor involved by name or initials, and fails to indicate a date when this incident supposedly took place. This pleading simply does not pass muster under *Snyder*, *supra*, and *Clarke*, *supra*, and, therefore, does not meet the minimum notice requirement to afford Grievant procedural due process.

In a similar vein, the termination notice states:

> We have had multiple complaints from providers and court personnel regarding your professionalism. Written statements were received from Cabell County Probation and Chestnut Ridge Hospital as well as several verbal statements from River Park Hospital, Cabell County Prosecuting Attorney's office, and Lewisburg's Probation Department. We have received statements from both providers and probation that you failed to notify families of MDT's and court hearings.

R Ex 21.

Standing alone, this language does not meet the requirements of the *Snyder* and *Clarke* decisions. However, it is adequate as an introductory statement to the more specific allegations which follow, and which are reasonably specific as to date, time and place. Having reviewed the remaining allegations in the termination notice, the undersigned administrative law judge finds that such allegations are sufficiently specific as to date, time and place so as to meet the due process requirements for notice set forth in *Snyder*, *supra*, and *Clarke*, *supra*. *See Mangum v. Lambert*, 183 W. Va. 184, 394 S.E.2d 879 (1990).

In any event, an employer is not permitted to assert new grounds for discharge at a post-termination hearing that were not contained in the termination notice. *Yates v. Civil Serv. Comm'n*, 154 W. Va. 696, 178 S.E.2d 798 (1971). *Accord Dep't of Public Safety v. Rigby*, 401 So.2d 1017 (La. App. 1st Cir. 1981). *See also Wirt*, *supra,* at 576, 410 n.11. As stated in *Yates*, permitting an employer to proceed in this manner would be "repugnant to our concept of justice." *Yates*, *supra*, at 699, 800. Consistent with these well-established principles governing procedural due process, an e-mail from Cheryl Jones dated May 15, 2009, describing an alleged incident involving Grievant, was not admitted at the Level Three hearing because it was not referenced in the termination letter, nor was it the subject of a previous disciplinary action. Therefore, this alleged incident was not considered in this decision. Similarly, a memorandum from Mr. Miller dated November 23, 2009 was likewise excluded from evidence at Level Three, and was not considered in arriving at this decision. Even if properly alleged, where the employer is aware of an event and took no disciplinary action at the time, subsequently

including this allegation in another disciplinary action over two years later involves the impermissible pursuit of "stale" charges. *Koblinsky*, *supra*. *See Shaw v. U.S. Postal Serv*., 697 F.2d 1078 (Fed. Cir. 1983); *Heffron v. U.S.*, 405 F.2d 1307 (U.S. Ct. of Claims 1969).

Where, as here, the employer proves some, but not all, of the charges against an employee, the Grievance Board must determine whether the penalty imposed, in this case, termination of employment, is otherwise supported by the charges which were proven. *See Koblinsky*, *supra*. Ordinarily, an employer has broad discretion in selecting an appropriate penalty to redress an employee's misconduct. *Overbee v. Dep't of Health & Human Res.*, Docket No. 96-HHR-183 (Oct. 3, 1986). *See Lanham v. W. Va. Dep't of Transp*., Docket No. 98-DOH-369 (Dec. 30, 1998); *Martin v. W. Va. State Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

In the circumstances presented by this grievance, the charges against Grievant which were not sustained, either because they were not proven by preponderant evidence, or they failed to comport with the requirements of due process, involved conduct substantially similar to conduct which had been the subject of multiple corrective actions, including reprimands, suspensions and a performance improvement period. Moreover, none of the charges which DHHR failed to sustain involved conduct which was significantly more serious or egregious than the conduct involved in those charges which were established by preponderant evidence. Indeed, Grievant's termination culminated an extensive course of progressive discipline which provided Grievant every reasonable opportunity to conform his performance to acceptable

standards. *See Dadisman v. W. Va. Div. of Rehabilitation Serv*., Docket No. 98-RS-023/040 (Mar. 25, 1999). In these circumstances, the undersigned administrative law judge concludes that the penalty imposed was not disproportionate to the offenses proven, particularly in view of Grievant's extensive history of disciplinary actions going back nearly six years. *See Snedegar v. W. Va. Div. of Corr*., Docket No. 2008-1889-MAPS (Jan. 15, 2009). *See* generally *Witcher v. W. Va. Div. of Corrections*, Docket No. 2010-0817-MAPS (Aug. 3, 2010); *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

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

2. The employer must also demonstrate that misconduct which forms the basis for dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989). *See Smith v. Clay County Health Dep't*, Docket No. 2012-0451-ClaCH (Apr. 17, 2012). Non-probationary state employees in the classified service may only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or

inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); Syl. Pt. 1, *Oakes v. W. Va. Dept. of Finance & Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980). *See Guine v. Civil Service Comm'n*, 149 W. Va. 461, 468, 141 S.E.2d 364, 368-69 (1965).

3. If an employee does not grieve specific disciplinary incidents, he cannot place the merits of such discipline in issue in a subsequent grievance proceeding. *Koblinsky v. Putnam County Health Dep't*, Docket No. 2011-1772-CONS (Oct. 23, 2012); *Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997); *Jones v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-371 (Oct. 30, 1996). *See Stamper v. W. Va. Dep't of Health & Human Res*., Docket No. 95-HHR-144 (Mar. 20, 1996); *Womack v. Dep't of Admin*., Docket No. 93-ADMN-430 (Mar. 30, 1994). In such cases, the information contained in prior disciplinary documentation must be accepted as true. *See Perdue v. Dep't of Health & Human Res*., Docket No. 93-HHR-050 (Feb. 4, 1994).

4. Where an act of misconduct is asserted in a notice of dismissal, it should be identified by a date, specific or approximate, unless the characteristics are so singular that there is no reasonable doubt when it occurred. If an act of misconduct involves persons or property, these must be identified to the extent that the employee will have no reasonable doubt as to their identity. *Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981); *Snyder v. Civil Serv. Comm'n*, 160 W. Va. 762, 232 S.E.2d 842 (1977).

5. All of the allegations set forth in Grievant's termination notice, save one which related to statements by an unidentified "probation officer" at an unspecified time and place, provided Grievant with sufficient notice to comply with procedural due process standards. *See Clarke*, *supra*; *Snyder*, *supra*.

6. An administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. *Hamilton v. W. Va. Dep't of Health & Human Res*., Docket No. 2011-1785-DHHR (Sept. 6, 2012); *Furr v. Dep't of Health & Human Res*., Docket No. 2011-0988-CONS (Dec. 7, 2011); *Kennedy v. Dep't of Health & Human Res*., Docket No. 2009-1443-DHHR (Mar. 11, 2010). *See Warner v. Dep't of Health & Human Res*., Docket No. 07-HHR-409 (Nov. 18, 2008).

7. The Grievance Board has applied the following factors in assessing hearsay testimony: (1) the availability of persons with first-hand knowledge to testify at the hearings; (2) whether the declarant's out of court statements were in writing, signed, or in affidavit form; (3) the agency's explanation for failing to obtain signed or sworn statements; (4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; (5) the consistency of the declarant's accounts with other information, other witnesses, other statements, and the statement itself; (6) whether collaboration for these statements can be found in agency records; (7) the absence of contradictory evidence; and (8) the credibility of the declarants when they made their statements. *Simpson v. W. Va. Univ*., Docket No. 2011-1326-WVU (May 3, 2012); *Cale v. W. Va. Univ*., Docket No. 2011-1711-WVU (Mar. 22, 2012); *Sinsel v. Harrison County Bd. of Educ*., Docket No. 96-17-219 (Dec. 31, 1996).

8. Respondent failed to establish by a preponderance of the credible evidence presented at hearing that Grievant engaged in misconduct in regard to his interactions with John Clark or other staff members at Chestnut Ridge on or about April 27 and 28, 2012, as alleged. Respondent also failed to establish by a preponderance of the evidence that Grievant engaged in misconduct in the presence of the Cabell County Prosecuting Attorney on or about April 25, 2012, as alleged. Respondent likewise failed to establish by preponderant evidence that Grievant engaged in misconduct in the presence of Keith Miller on or about April 24, 2012.

9. Respondent established by a preponderance of the credible evidence of record that Grievant failed to properly notify at least two juveniles of their scheduled Judicial Reviews on or about March 16, 2012, that Grievant misrepresented to his immediate supervisor, Keith Miller, that he had completed his contacts for the month and entered them in the agency's computer database on or about April 6, 2012, that Grievant entered Mr. Miller's office on or about April 6, 2012 cursing and yelling about his own failure to attend a scheduled truancy hearing that day, that Grievant failed to appear for a court hearing in Lewisburg, West Virginia on or about April 1, 2012, and that Grievant entered Mr. Miller's office that same day cursing a Probation Officer in Lewisburg for refusing to cover his court appearance for him.

10. The federal Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, *et seq*. ("FMLA") allows eligible employees to take up to twelve weeks of unpaid leave each year for a serious health condition that makes the employee unable to perform the

functions of their position. *See Myers v. W. Va. Dep't of Transp*., Docket No. 96-DMV-304 (Feb. 10, 1997).

11. In the circumstances presented by this grievance, Grievant failed to establish by a preponderance of the evidence that his termination by Respondent violated any applicable provision of the FMLA. *See Ervin v. Dep't of Health & Human Res*., Docket No. 2011-1794-CONS (July 24, 2012).

12. "Mitigation of the punishment imposed by the 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 & Human Res*., Docket No. 96-HHR-183 (Oct. 3, 1996). *See Lanham v. W. Va. Dep't of Transp*., Docket No. 98-DOH-369 (Dec. 30, 1998); *Martin v. W. Va. State Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

13. Notwithstanding that Respondent failed to prove all of the charges against Grievant, given Grievant's prior work record, including four written reprimands, a three-day suspension, a five-day suspension, and a performance improvement period, all for similar or related acts of misconduct or unsatisfactory performance, Grievant received every reasonable opportunity to conform his conduct to acceptable standards. *See Dadisman v. W. Va. Div. of Rehabilitation Serv*., Docket No. 98-RS-023/040 (Mar. 25, 1999). In these circumstances, the penalty of termination was not disproportionate to the offenses proven, nor does it represent an arbitrary and capricious punishment or an

abuse of the agency's substantial discretion. *See Snedegar v. W. Va. Div. of Corr.*, Docket No. 2008-1889-MAPS (Jan. 15, 2009). *See* generally *Witcher v. W. Va. Div. of Corrections*, Docket No. 2010-0817-MAPS (Aug. 3, 2010); *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: July 19, 2013

_____

LEWIS G. BREWER
Administrative Law Judge