WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DEBORAH ANN TURNER,

Grievant,

v. **Docket No. 2013-0022-DHHR**

DEPARTMENT OF
HEALTH AND HUMAN RESOURCES/
MILDRED-BATEMAN HOSPITAL,

Respondent.

DECISION

Debbie Turner, Grievant, was employed by Respondent, Department of Health and Human Resources ("DHHR")/Mildred-Bateman Hospital ("Hospital") as a housekeeper. Grievant was terminated from her employment and filed a grievance against Respondent on July 12, 2012. The statement of grievance reads "Unjust termination." As relief, Grievant seeks "Job reinstated, back pay, personal [sic] files adjusted." Because the grievance concerns termination, it was filed directly to level three, pursuant to W. VA. CODE § 6C-2-4 (a) (4). A level three hearing was held in the Charleston office of the Public Employees Grievance Board on February 4, 2013, at which Grievant was represented by Mr. Gordon Simmons, UE Local 170, West Virginia Public Workers Union and Respondent was represented by Harry Bruner Jr., Assistant Attorney General. Following the hearing, the parties agreed to submit Proposed Findings of Fact and Conclusions of Law. These were received from Grievant on March 11, 2013,

and from Respondent on March 12, 2013, upon which date this matter became mature for decision.

Synopsis

Grievant was terminated for her continuing failure to adhere to the Hospital's policies and expectations of behavior toward her coworkers. Respondent proved that Grievant repeatedly violated its policies and expectations concerning appropriate conduct toward fellow employees by her aggressive and otherwise unprofessional conduct. Grievant failed to demonstrate that Respondent did not follow its progressive discipline policy in terminating Grievant. Grievant also failed to show that termination was too severe a punishment, that mitigation was warranted under the circumstances or that her due process rights were violated. Respondent gave Grievant adequate warning concerning her inappropriate conduct, instruction on how to improve it and apprised her of the potential consequences if she did not comply. She nonetheless persisted with her inappropriate conduct. Grievant's termination was justified and appropriate. Accordingly, the grievance is DENIED.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant was employed as a housekeeper at the Hospital operated by Respondent DHHR beginning in March of 2006.

2. The residents of the Hospital are a particularly vulnerable population, many of whom are acutely mentally ill and may require hospitalization for their entire lives.

3. Ms. Kieth Anne Worden was Director of Human Resources at the Hospital during Grievant's employment there. Ms. Worden has been employed by the Hospital for 23 years. Ms. Worden described Grievant as "aggressive with other employees" in the workplace. Ms. Worden testified that Grievant brought personal matters to work, which caused considerable disruption in the workplace.

4. Grievant was named "2008 Employee of the Year" through an employee election. The "Hill Topper," published by the Hospital, indicated that, "According to her co-workers, she (Grievant) is always willing to assist others. She has a good rapport with the patients and staff and is considered to be a spirited employee."

5. Grievant received a "Behavioral Expectations" memorandum from Ms. Worden, dated August 25, 2009. That memo stated that Grievant met with several managers on numerous occasions during 2009, to discuss what Grievant believed to be inappropriate behaviors of other employees of the Hospital. Grievant was directed to "cease making these consistent reports of her annoyance at coworkers, which stemmed from matters unrelated to her work at the Hospital." Grievant was specifically warned that:

> "While we do understand that domestic disputes can cause employee stress, especially if it involves coworkers with [sic] whom you must see and work with each day, we cannot allow employees' personal problems to negatively affect work performance and the attention and care given to

> our patients. This behavior disrupts the efficiency of your work, which causes a hardship on your coworkers … It causes the leadership of [the] … Hospital to take time away from operation of the Hospital to address personal issues that should be dealt with away from work. Therefore, you are directed to immediately cease to involve other … Hospital employees in your personal problems related to any domestic dispute. This means you will not react to any coworkers' minor aggravation (such as snickering, whispering, etc.) in an immature, unprofessional manner. Likewise, you will not cause any other employee irritation by immature, unprofessional actions (inappropriate laughter, rolling of the eyes, "stalking, body gestures, etc.) You will not use your personal cell phone while working to call and harass, intimidate or annoy any coworker. You are directed to treat ALL patients, visitors and employees courteously … Failure to adhere to this directive and meet these expectations will result in stern disciplinary actions."

This memorandum was referred to in Grievant's annual EPA dated September 28, 2009, as part of one of "several PIPs" given to Grievant for failure to "get along with coworkers."[1]

6. Grievant dated several employees of the Hospital, or their relatives, and some of the disruption between Grievant and her coworkers, which is referred to in the documentary evidence, concerned her relationships with these individuals.[2]

7. Ms. Rhonda Nolan, who was Grievant's direct supervisor in Housekeeping, testified via telephone conference. Ms. Nolan, now retired, worked for the Hospital for thirty-two years.

8. Ms. Nolan provided an evaluation of Grievant's work in her Employee Performance Appraisal, interim review, ("Interim EPA") for the period

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[1] Respondent's Exhibit No. 1 at 1F-G.
[2] *Id.* and Respondent's Exhibit No. 1 at 1D-E.

of September 1, 2008, through February 8, 2009. That EPA indicated that Grievant's performance was fair, but needed improvement. Specifically, it cautioned Grievant that, "When given an order, need to obey to prevent any further reprimands," and, "When there is a problem with a coworker you will refrain from saying anything directly to them and go to your supervisor."[3]

9. Ms. Nolan also evaluated Grievant's work in her "Employee Performance Appraisal - EPA 3 - Final Review of Performance Period" ("EPA 3") dated August 28, 2009, reviewing the period from September 1, 2008 through August 31, 2009, which indicated that Grievant needed improvement in:

> "Work[ing] well with others to achieve organization's goals" and "Address[ing] conflicts and problem situations with patience and tact."

Additionally, under "Quality of Work," it was indicated that Grievant needed improvement in the following areas:

> "Work output matches the expectations established," "Work results satisfy organization's goals," "Work product is thorough and complete," "Work product is free of flaws and errors," "Showers not cleaned properly (mold and mildew is a constant problem)."

Finally, under "Improvement and/or Development Plan," it was noted that: "1. Employee placed on several PIP[4] for [not] getting along with coworkers. 2. Also for shower not being cleaned."[5]

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[3] Respondent's Exhibit No. 2 at 2-E.

[4] "PIP" - Performance Improvement Plans are part of the evaluation process and are management tools to increase productivity and correct unsatisfactory performance. Evaluations and performance improvement plans are not disciplinary actions.

[5] Respondent's Exhibit No. 2 at 2A-D. Grievant's 2009 EPA was incomplete, missing the page that provided her final numerical rating.

10. Ms. Nolan explained that Grievant consistently failed to properly clean the residents' showers despite being specifically directed to do so.

11. Grievant received a written reprimand from Housekeeping Supervisor, Ms. Nolan, dated September 12, 2011, which stated in pertinent part that:

> "This reprimand has become necessary due to your continued failure to adhere to [the] Hospital's standards of behavior. Specifically, on the morning of September 8, 2011, you did join other housekeepers in the break room … Without provocation, in an angry and aggressive tone, you proceeded to accuse me of being in your "f***king" business.["] Your angry tirade startled me and embarrassed your coworkers. Your use of profanity during this exchange is inexcusable. It appears that the events that led to your angry outburst occurred on September 6, 2011. The issue involved teasing you about riding to work with a male coworker, as well as going to lunch and/or dinner with other male coworkers. While your feelings about the teasing are understandable, your decision to confront your coworkers and me in this manner demands strong action. This is not the first incident in which you have been involved in inappropriate behavior involving coworkers … "

The reprimand further stated that,

> "Obviously these less punitive messages have not convinced you to discontinue this behavior. It is important that you understand that the next event of this nature will result in your suspension or, ultimately, dismissal."

Finally, the services of the Hospital's Employee Assistance Program were offered to Grievant to assist her to overcome the problems affecting her performance.[6]

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[6] Respondent's Exhibit No. 1 at 1D-E.

12. Ms. Nolan did not actually compose the written reprimand of September 12, 2011, herself, but confirmed that its contents were accurate. She found it necessary to discipline Grievant for insubordination, disrespect and profanity directed toward her in front of co-workers.[7]

13. After initially testifying that she did not recall the September 8, 2011, incident documented in the written reprimand from Ms. Nolan, Grievant acknowledged that the details provided in the reprimand were entirely accurate.

14. The Hospital terminated Grievant's employment by letter dated July 3, 2012. The termination followed an altercation on May 18, 2012, between Grievant and temporary housekeeping employee, Ms. Stacy Fleeman. Grievant's July 3, 2012, letter of dismissal stated in pertinent part that:

> "despite all of these attempts to explain violence or threats of violence to a coworker will not be tolerated … You did instigate a verbal altercation in the hallway outside of the Housekeeping break room with a temporary Housekeeper. Believing that this employee was angry at you and trying to walk away, you insisted that the employee talk with you. She indicated that she did not want to talk with you and used the phrase "knife in my back," which resulted in your issuing profanities and attempting to engage in a physical altercation. Your attempt to go after this coworker was thwarted only because another coworker physically restrained you and took you back into the break room. Once there you entered your supervisor's office, still very angry. You were so angry, that your supervisor called the Director of Safety who stationed a guard at the Time [sic] clock to ensure no violence occurred (on anyone's part) until you both left the grounds of the Hospital."[8]

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[7] Ms. Worden drafted the September 12, 2011 reprimand. She routinely drafted these documents in the normal course of business, based upon the information provided to her by her staff.

[8] Respondent's Exhibit No. 1 at 1A-C.

15. The termination letter further stated that in her predetermination conference, Grievant responded to the issues raised by explaining that she was “dragged into this incident by a coworker.” Ms. Worden observed in the letter “your associate [Ms. Fleeman] did not lose her temper, use profanity and attempt to physically accost her coworker. Considering your past behavior in your response … your dismissal is appropriate ... "[9]

16. Before the altercation, Ms. Fleeman was asked to train another employee. Ms. Fleeman believed Grievant went to the Housekeeping Supervisor, Ms. Nolan, with a complaint that she (Ms. Fleeman) "yelled" at her trainee. Ms. Fleeman was admittedly upset about this. Therefore, when Grievant tried to speak with Ms. Fleeman later, Ms. Fleeman would not respond, except to say, “I am too busy trying to get the knife out of my back." Ms. Fleeman testified that Grievant responded by saying, "I am going to kill you." Another employee at the scene then “grabbed,” Grievant to restrain her because Grievant, "was coming after me (Ms. Fleeman) and was going to beat me up.” Based upon Grievant’s words and actions, Ms. Fleeman thought Grievant meant to do physical harm to her.[10]

17. Following the altercation, Grievant went to Ms. Nolan's office, accompanied by two housekeeping employees. In Ms. Nolan’s office, Grievant

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[9] *Id.*

[10] Ms. Fleeman’s account of the altercation and perceptions of Grievant’s demeanor conflicted in significant part with Grievant’s. This will be addressed more fully below.

was angry and upset with Ms. Fleeman and was "making comments" about her."[11]

18. Ms. Nolan dismissed Grievant from her office to continue working, but called Security to inform them of the incident and to request them to be present "when it was time to leave," because she "was not sure what was going to happen" at that time. Grievant later came and told Ms. Nolan that Security said, "they were watching her (Grievant)."[12]

19. Grievant gave a similar but less detailed account of the incident. She testified that Ms. Fleeman had been called into the office of her supervisor, Ms. Nolan, before the altercation. After Ms. Fleeman left the office, she was "saying stuff" about Grievant. Grievant tried to explain to Ms. Fleeman that she was "put in the middle of the situation," but Ms. Fleeman, "didn't want to hear from me." Grievant stated that she was leaving to go to the elevator when Ms. Fleeman said "we could take this out into the parking lot." Two employees then took Grievant to Ms. Nolan's office.

20. Grievant categorically denied threatening to "kill," hit or strike Ms. Fleeman during the altercation.

21. Grievant was not escorted from the grounds of the Hospital by Security on the day of the incident. However, Security did escort Ms. Fleeman from the Hospital to her car.

22. Several Hospital employees witnessed the altercation. Ms. Worden interviewed all of the witnesses to the incident, as well as the temporary

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[11] Level three testimony of Ms. Nolan.
[12] *Id.*

housekeeper, Ms. Fleeman, to determine what took place during the altercation and her findings were set forth in the July 3, 2012, termination letter. She did not take written statements or sworn affidavits from those witnesses and did not record their interviews.[13]

23. Ms. Fleeman was not disciplined in connection with the May 18, 2012, altercation and was hired by the Hospital following her 90-day temporary employment there.

24. Following the altercation, Ms. Fleeman continued to be intimidated by Grievant because of the “constant remarks” Grievant made about her, particularly in the employee break room. For example, Ms. Fleeman recalled that Grievant made someone exchange seats with her so that she (Grievant) would not have to look at Ms. Fleeman and remarked, "Watch what you say because we have snitches in here.” Ms. Fleeman was tense and fearful around Grievant after the incident.[14]

25. Grievant gave a letter dated June 24, 2012, to her union representative, Ms. Colleen Triska, requesting Hospital management to remove all reprimands in her personnel file issued before June 25, 2011. Ms. Triska informed Grievant that she would provide that letter to the management of the Hospital. Respondent did not demonstrate that the letter was not delivered as promised.

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[13] Ms. Worden does not have a recording device in her office.
[14] Ms. Fleeman’s perceptions of Grievant’s demeanor conflicted in significant part with Grievant’s. This will be addressed more fully below.

26. Following the altercation of May 18, 2012, between Grievant and Ms. Fleeman, Ms. Worden consulted with the CEO of the Hospital, Ms. Patricia Franz ("CEO Franz"), and they determined that Grievant should be terminated.

Discussion

The undersigned will first address some procedural matters that Grievant raised at the level three hearing. At hearing, Grievant produced a letter dated June 24, 2012, wherein she requested that any documentation in her personnel file, and in particular reprimands, dated prior to June 25, 2011, be removed.[15] Grievant gave this letter to her then representative, Ms. Colleen Triska, for delivery to Hospital management. Though there was some debate at hearing concerning whether Respondent received this letter, Respondent failed to demonstrate that Grievant's representative did not deliver it to the proper party at the Hospital. Grievant specifically asserts that, under the Hospital's disciplinary policy, she is entitled to removal of any reprimands in her personnel file that are over a year old. While this is true of verbal reprimands, under certain circumstances, it is not true of written reprimands. *See, Layne v. W. Va. DHHR and Mildred Mitchell-Bateman Hospital,* Docket No. 2009-0172-DHHR (January 8, 2009). The Hospital's "Progressive Disciplinary Action" policy has different criterion for removal of verbal reprimand and written reprimands. With respect to verbal reprimands, the policy provides that, "Documentation of a Verbal Reprimand" remains in an employee's administrative file in the supervisor's office

[15] Respondent objected to admission of this letter because it was not produced prior to the hearing. However, a review of the record showed that Respondent had not requested documents from Grievant.

for one year … If no further infractions concerning the same issue occur by the employee, the form is removed from the file." In the instant grievance, applying the criterion for removal of verbal reprimands, Grievant is entitled to removal of any such reprimands from her file.

However, Grievant is not entitled to have written reprimands removed from her file. According to Hospital policy, in the case of written reprimands, "the employee may request that employee's supervisor petition the Chief Executive Officer (CEO) to consider removing the written reprimand from the employee's personnel file." Assuming Grievant's letter requesting removal of all reprimands issued prior to June 25, 2011, was delivered to her supervisor at the Hospital, it was up to the discretion of her supervisor to petition CEO Franz to remove the written reprimands. This, apparently, was not done. Additionally, the policy does not direct that anything else must be removed from the file upon request of the employee. Therefore, the written reprimand, and everything else in Grievant's personnel file, including EPAs and PIPS, are proper for consideration.

Grievant sent timely discovery requests to Respondent on March 3, 2013, and January 25, 2013, specifically requesting, "Any and all documents used in making the decision to discipline grievant." Respondent did not respond to these requests. Grievant objected to Respondent's failure to provide those documents in advance of the hearing and asserted that her request for production mandated Respondent to produce all of her EPAs. However, Grievant's request was limited in nature, requesting only what the Respondent "used" in arriving at its decision, rather than all of Grievant's EPAs. Respondent introduced into evidence all of the

documents it used to determine that Grievant should be terminated, which did not include all of her EPAs**.** Discovery issues are handled on a case-by-case basis, considering the entirety of the facts and circumstances in each grievance. In this instance, the undersigned allowed the introduction of the Respondent's exhibits into evidence.[16]

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 Employee Grievance Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.,* Docket No. 96-20-380 (Mar. 18, 1997). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.,* Docket No. 92-HHR-486 (May 17, 1993).

Permanent state employees in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interests of the public, rather than upon trivial or

[16] Even if all of Grievant's other EPAs reflected adequate or good performance of her work, the very substantial, documented issues she had with her coworkers proved that her termination was proper. "Aside from Grievant's tendency to spend too much time in intimate conversation with certain female offenders, his work record is untarnished." *See, Cox v. Division of Corrections/Anthony Correctional Center,* Docket No. 05-CORR-165 (March 17, 2006), in which termination was justified.

inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965).

Grievant makes a number of arguments as to why her termination was improper. Firstly, Grievant argues that Respondent did not prove misconduct serious enough to warrant dismissal of Grievant. The residents of the Hospital are a particularly vulnerable population, many of whom are acutely mentally ill and will be hospitalized for their entire lives. Though Grievant did not deal directly with the residents inasmuch as she did not, for example, administer medication or physical aid to them, the housekeeping staff is an integral part of the organization of the Hospital. Respondent proved that Grievant caused frequent and continuous disruptions among personnel in Housekeeping, which were clearly documented in Grievant's personnel file. These disruptions would necessarily have a detrimental effect upon the administration of the Hospital and, ultimately, upon the environment and care of the residents of the Hospital. In fact, Respondent expressed its concern to Grievant about the effect of her behavior on administration of the Hospital in its August 25, 2009, Written Reprimand to her stating, "This behavior disrupts the efficiency of your work, which causes a hardship on your coworkers … It causes the leadership of [the] … Hospital to *take time away from the operation of the Hospital* to address personal issues that should be dealt with away from work." (*Emphasis added*.) Therefore, the Hospital

has met its burden of proving that Grievant's conduct was not merely trivial, but of a substantial nature directly affecting the rights and interests of the public.

Grievant further contends that Respondent did not establish good cause for her termination and that her conduct with coworkers conformed with Hospital policy. Grievant points to the fact that she was selected as "Employee of the Year" for 2008. While this was certainly positive, her conduct afterward clearly deteriorated. Moreover, this was an employee award and did not include the assessment of her supervisors. The record reflects that through much of Grievant's employment with the Hospital, the Hospital warned her that she was acting inappropriately with her coworkers.[17] Respondent described Grievant's behavior as, "immature," and "unprofessional," and directed Grievant to refrain from provoking her coworkers with "inappropriate laughter, rolling of the eyes, *stalking*, body gestures, etc."[18] (*Emphasis added*.) Grievant did not provide any evidence, beyond her own testimony, to refute these characterizations of her comportment/demeanor. Respondent gave Grievant very specific examples of her misconduct and direction on how to comport herself in the future. Nonetheless, she repeatedly created unnecessary disruption in the workplace, was insubordinate and behaved unprofessionally toward her superiors and coworkers. Grievant was placed on several performance improvement plans in an attempt to address the issues she was having, one for insubordination and failing to follow the legitimate directive of her supervisor. Grievant admitted to

[17] Respondent's Exhibit No. 1.
[18] Respondent's Exhibit No. 1 at 1F-G.

insubordination and the criticism in her 2008-2009 EPA that she did not clean the showers of the residents properly, despite repeated requests to do so.

Grievant's employment record also documents in some detail that Grievant made her personal relationships an issue in the workplace. Management warned Grievant that, "While we do understand that domestic disputes can cause employee stress, especially if it involves coworkers with [sic] whom you must see and work with each day, we cannot allow employees' personal problems to negatively affect work performance and the attention and care given to our patients … ," followed by a specific directive to, "immediately cease to involve other … Hospital employees in your personal problems related to any domestic dispute."[19] Grievant denied that she made her private life an issue at work and indicated, instead, that her coworkers gossiped about her. In fact, the documentary record indicates that a couple of mild remarks were made concerning Grievant's personal life by her supervisor. While Grievant may have been displeased by those remarks, she was unusually aggravated and annoyed and handled herself in a completely inappropriate manner in response. However, the record, overall, shows that Grievant allowed personal matters and "domestic disputes" to disrupt her work and the work of others.

Grievant further asserts that Ms. Fleeman's testimony is not credible to establish that she (Grievant) caused the altercation and/or threatened Ms. Fleeman in any way. Grievant's and Ms. Fleeman's testimony are at variance on this critical matter and no other witnesses to the event were called to testify at

[19] Respondent's Exhibit No. 1 at 1-F.

hearing. The conflicting accounts of the subject incident necessarily call the credibility of the witnesses into question. 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. *Jones v. W. Va. Dep't of Health & Human Resources,* Docket No. 96-HHR-37 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.,* Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ., Docket No.* 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.,* Docket No. 93-HHR-050 (Feb. 4, 1994).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness' information. *See Holmes v. Bd. of Directors/W. Va. State College, Docket No.* 99-BOD-216 (Dec. 28, 1999); *Perdue, supra.* In addition the ALJ should consider: 1) the absence of bias, interest or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's statement. *See Holmes v. Bd. of Director/W. Va. State College,* Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra.*

The undersigned had opportunity to observe the demeanor of Ms. Fleeman and Grievant and appraise their attitudes toward the action. Ms. Fleeman was obviously very tense and nervous in giving her testimony, because Grievant was present at the hearing. Notably, Grievant's personnel record cautioned her against "stalking," "harassing" and "intimidating" her coworkers. That Ms. Fleeman seemed to be genuinely intimidated by Grievant at hearing was, therefore, unsurprising. However, she seemed to be sincere and readily offered details about the altercation, without any inconsistencies. Grievant was very guarded in her testimony and did not appear forthright. Her account of the incident was extremely brief and she appeared reluctant to elaborate and provide details about it. However, her demeanor was calm.

An important factor for consideration in determining the credibility of the witnesses is the plausibility of the witnesses' statements. Significantly, Grievant categorically denied arguing with her coworkers. Yet, Grievant contradicted herself when she admitted that Housekeeping Supervisor, Ms. Nolan, an employee of the Hospital for thirty-two years, disciplined Grievant for insubordination. Grievant accused Ms. Nolan of being in her "f***king business." This language, directed at a supervisor, is shocking and highly inappropriate. Given Grievant's capacity to lash out at someone in a position of authority over her, the undersigned finds it very likely that Grievant would not hesitate to behave unprofessionally and aggressively with coworkers who exercised no authority over her, including Ms. Fleeman. In light of this admitted behavior by Grievant, Ms. Fleeman's account of the altercation seems more plausible.

Finally, the undersigned finds it telling that Grievant was, "making comments," and upset and angry with Ms. Fleeman immediately following the incident.[20] In light of this testimony, Grievant's ready display of temper toward her supervisor, and the many documented instances of her aggressive and unprofessional conduct, the undersigned finds that Grievant lost her temper with Ms. Fleeman on May 18, 2012, and lacks credibility in denying that she threatened her with physical violence during the altercation.

Grievant further contends that Respondent did not follow its progressive discipline policy when it discharged Grievant. The Hospital's policy on "Progressive Disciplinary Action" describes when verbal reprimands, written reprimands, suspensions, possible demotions and dismissals are appropriate. The policy does not require that each of the "disciplinary tools" described therein must be applied in sequential order. Therefore, the fact that Grievant was terminated, rather than suspended, does not violate policy. Rather, the policy specifically states, "Separation from employment may be issued when (1) infractions/deficiencies in performance and/or behavior continue after the employee has had adequate opportunity for correction or (2) if an employee commits a singular offense of such severity warranting dismissal." Grievant was given adequate opportunity to correct her unprofessional and disruptive behavior, but failed to do so. The Hospital showed good cause for Grievant's dismissal and provided her with a very detailed explanation of the reasons for discharge.

[20] Level three Testimony of Ms. Nolan.

Moreover, the purpose of the progressive discipline is to provide the employee with notice that she is behaving incorrectly and a chance to remedy the situation. The undersigned finds that Grievant was well informed of the problematic nature of her conduct over a period of time, and she knowingly failed to improve. Therefore, Grievant has failed to demonstrate a violation of the progressive discipline policy in this grievance.

Lastly, Grievant contends that Respondent deprived her of due process. 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.

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

Grievant was informed, in writing, of the charges against her, and the Hospital identified the conduct for which she was to be terminated. Grievant was provided an opportunity to be heard on June 15, 2012, to address the events of May 18, 2012. Numerous attempts were made during her employment to place Grievant on notice of her unprofessional conduct and directives given as to how to improve the conduct. Accordingly, Grievant's contention that she was denied due process is without merit.

Finally, though Grievant did not specifically ask for mitigation of her punishment, Grievant charged that Respondent failed to consider "the work record of a long-time tenured state employee" in determining whether good cause existed for discharging her. Therefore, the undersigned will address

whether mitigation is proper in this matter. “Whether to mitigate punishment imposed by the employer depends upon 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 first area of inquiry under *McVay, supra.,* is Grievant's work record. Grievant was subject to a prior disciplinary action in the form of a written reprimand, which involved insubordination. The record showed that Grievant “needed improvement” in areas related to her conduct on her EPAs; and had several improvement programs. Therefore, her work record as it related to conduct was unquestionably poor.

The next area of inquiry under *McVay, supra*., is to determine whether the policies and procedures which Grievant violated could be clearly understood. In this instance, there is no question that Respondent clearly and frequently explained its policies concerning proper employee conduct to Grievant and those policies plainly prohibited Grievant’s insubordination, and unprofessional and threatening conduct with her coworkers. The final area of inquiry under *McVay, supra*., is whether there were mitigating circumstances that should be considered in judging the severity of the penalty. There were no mitigating circumstances in this situation to justify a reduction in the penalty imposed.

“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 prospect of rehabilitation." *Overbee v. W. Va. Dept. of Health and Human Resources/Welch Emergency Hospital*, Docket No. 96-HHR-183 (Oct. 3, 1996). The Grievant's repeated acts of misconduct in the form of aggressive and unprofessional behavior toward her coworkers do not support mitigation of the penalty imposed. The penalty of termination was not excessive in light of the employee's past work record and there was no abuse of discretion by Respondent in discharging Grievant.

The above discussion will be supplemented by the following conclusions of law.

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 Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008).

2. 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. *Jones v. W. Va. Dep't of Health & Human Resources,* Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.,* Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the

witnesses. *See Lanehart v. Logan County Bd. of Educ.,* Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.,* Docket No. 93-HHR-050 (Feb. 4, 1994).

3. The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness' information. *See Holmes v. Bd. of Directors/W. Va. State College,* Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra.*

4. Permanent state employees who are in the classified service can 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. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965).

5. Respondent demonstrated that Grievant's misconduct which formed the basis for the dismissal was of a "substantial nature directly affecting the rights and interests of the public," and that her termination was therefore justified.

6. "Due process is a flexible concept, and . . . the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) (citing *Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)). Prior to an unpaid suspension, an employee is entitled to notice of the charges, an explanation of the evidence, and an opportunity to respond. *Id.* at Syl Pt. 3; *Board of Education of the County of Mercer v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994); *See Starkey v. Jefferson County Bd. of Educ.*, Docket No. 02-19-010 (April 8, 2002).

7. Respondent has proven by a preponderance of the evidence that Grievant's employment was terminated for good cause.

8. Respondent provided Grievant with notice of her deficiencies, and an opportunity to be heard prior to termination of her employment. As a consequence, Respondent provided Grievant with necessary due process protections.

9. The progressive discipline policy of Mildred Mitchell-Bateman Hospital was not violated in this matter.

10. Grievant bears the burden of showing that the penalty of dismissal was too severe or was an abuse of discretion. An allegation that a 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. *Conner v. Barbour County Bd. of Educ.,* Docket No. 94-01-394 (Jan. 31, 1995); *see also, Martin v. West Virginia State Fire Commission,* Docket No. 89-SFC-145 (Aug. 8, 1989).

11. Grievant failed to demonstrate that the disciplinary measure of dismissal was disproportionate to the offense, arbitrary and capricious, or an abuse of discretion by Respondent.

12. "Whether to mitigate punishment imposed by the employer depends upon 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). In assessing the penalty to be imposed, "whether to mitigate punishment imposed by the employer depends upon 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).

13. Grievant failed to prove that Respondent had any legal obligation to impose a lesser form of punishment for the charged offenses.

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 (eff. July 7, 2008).

DATE: APRIL 23, 2013 _____

SUSAN L. BASILE

ADMINISTRATIVE LAW JUDGE