WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TERESA MICHELE BENNETT,
Grievant,

v. **Docket No. 2012-1186-WVSOM**

WEST VIRGINIA SCHOOL OF OSTEOPATHIC MEDICINE,
Respondent.

DECISION

Grievant, Teresa Bennett, had been employed by Respondent, West Virginia School of Osteopathic Medicine ("College") since 1991. Grievant was employed as a Curriculum/Grade Management Coordinator in the College's Preclinical Education Department. Ms. Bennett filed a level three[1] grievance form dated April 4, 2012, contesting the termination of her employment. She attached a detailed three-page grievant statement[2] to the form which alleged that; Respondent did not have good cause to terminate her employment, Respondent's action was arbitrary and capricious, and that termination of her employment was too harsh a penalty given her years of employment. As relief, Grievant seeks: "Negotiable: Potential lost wages and any and all other benefits of employment up to age of retirement OR reinstatement to former position and compensation for lost wages and any and all other benefits of employment, Along with attorneys' fees and costs associate with the prosecution of this grievance.[3]" (Emphasis in the original).

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[1] Grievant was authorized by W .VA. CODE § 6C-2-4(a)(4) to proceed directly to level three to contest termination of her employment.
[2] Grievant's entire Statement of Grievance is incorporated into the record by reference.
[3] It has been consistently held that the Grievance Board does not have authority to award attorney fees. *See Conrad v. Dep't of Motor Vehicles & Div. of Pers.,* Docket No. 2012-0369-DOT (Mar. 18, 2013); *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006);

A level three hearing was held in Beckley, West Virginia, before Administrative Law Judge LeFevre, on five separate days: November 13, 2013; January 29 and 30, 2013; and August 27 and 28, 2013. Grievant appeared *pro se* and Respondent was represented by Kristi A. McWhirter, Assistant Attorney General. The parties submitted Proposed Findings of Fact and Conclusions of Law, both of which were received by the West Virginia Public Employees Grievance Board on October 15, 2013. This matter became mature for decision on that date. For administrative reasons the matter was transferred to the undersigned administrative law judge to write the decision.[4]

Synopsis

After numerous written and verbal warnings, an improvement plan and a suspension, Respondent terminated Grievant's employment for chronic tardiness and absenteeism. Grievant asserts that the majority of Respondent's evidence is hearsay and Respondent failed to show good cause for her dismissal. Grievant also alleges that she was subjected to discriminatory treatment and that her actions did not justify dismissal of a long-term employee.

Respondent proved the charges against Grievant by a preponderance of the evidence, and Grievant was given multiple opportunities to improve her conduct over the course of years of progressive discipline. While Grievant's co-workers were, at times, antagonistic toward her, Grievant did not prove that discrimination played a role in this disciplinary action. The Grievance is DENIED.

Chafin v. Boone County Health Dep't, Docket No. 95-BCHD-362R (June 21, 1996); *Cosner v. Dep't of Transp.*, Docket No. 2008-0633-DOT (Dec. 23, 2008).

[4] The undersigned administrative law judge has carefully listened to all five days of the hearing, reviewed all of the exhibits and thoughtfully considered all of the arguments made by the parties.

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, Teresa Bennett, was continuously employed as a Curriculum/Grade Management Coordinator for Respondent, West Virginia School of Osteopathic Medicine from 1991, until her employment was terminated in 2012. Her position was Classified and exempt from the provisions of the Fair Labor Standards Act related to hours and overtime,

2. Grievant worked in the Preclinical Education Department, where Dr. James Nemitz, Associate Dean for Preclinical Education, was her direct supervisor until May 31, 2010. Also employed in the Department at that time were Michelle Vallandingham[5] and Linda Stidom, both Administrative Secretaries Seniors.

3. Grievant was part of the Curriculum Management Committee and helped organize, schedule and implement the curriculum for the Preclinical Education program. She prepared the curriculum schedule with input from the various professors regarding their individual classes. Additionally, Grievant made changes and corrections to the curriculum schedule as necessary. The college utilizes specialized software for preparing the curriculum. For some time, Grievant was the only employee trained to operate that software. During this period, there was no backup to perform Grievant's duties if she were absent. For some time, Grievant was also responsible for grading first and second year exams utilizing a card reader, as well as other grade management functions.

[5] Michelle Vallandingham was the sister of Grievant's ex-husband and an aunt to Grievant's oldest daughter. Grievant encouraged her supervisor to employ Ms. Vallandingham.

4. During three staff meetings, held in the fall and winter of 2008, Dr. Nemitz advised all Preclinical Education employees of his office guidelines and job expectations. Specifically, Dr. Nemitz advised the employees that he expected them to report to work on time, work their scheduled work hours, report leave in advance when possible, and promptly report any leave taken unexpectedly. He reviewed with the employees that they were entitled to a one hour lunch period and two, fifteen minute breaks. Respondent's Exhibits 5, 9, &10.

5. On October 6, 2008, Dr. Nemitz sent Grievant a warning letter regarding her excessive absences. This letter followed Grievant's absence due to illness from September 26 through October 1, 2008, followed by two days of vacation taken October 2 and October 3, 2008. In the letter, Dr. Nemitz specifically enumerated the work hours and procedures for taking and reporting, leave and vacation time. Dr. Nemitz stated the following near the end of the letter:

> The intent of this warning letter is to provide you with written documentation that additional acts of excessive and/or unexcused absenteeism will result in disciplinary action up to and including an immediate recommendation for your termination.

Respondent's Exhibit 1.

6. Grievant had difficulties following the office guidelines set out by Dr. Nemitz, including arriving late to work, taking long lunches and frequently changing her schedule at the last minute. Respondent's Exhibits 4, 7, and 15.

7. On October 31, 2008, Grievant set an e-mail to Dr. Nemitz requesting an adjustment to her work schedule setting specific times for her arrival, breaks, and departures to combat the perception in the office that "I come and go as I please." Dr.

Nemitz approved the schedule and requested Grievant to inform him of any changes. Respondent's Exhibit 7.

8. As a result of Grievant's continuing punctuality and attendance issues, she was issued a written warning by Dr. Nemitz on February 16, 2009, which stated in part, the following:

> 1. [Grievant] [a]rrived late at the office today, approximately 3 hours. Excuse was she overslept and didn't realize that it was a workday. I didn't receive a message regarding this lateness, though I did receive a missed call at 10:12 AM on my cell phone from her. I told her that this was not acceptable and violated the office rules; that she must maintain a regular office schedule, when she is not able to come into work she must contact me and provide me with documentation for why she is not able to work. She must receive permission to NOT be at work as indicated by her office schedule prior to taking time off. This is a written warning that if this behavior continues I will report it to the Director of Human Resources. She is also instructed to submit a leave request for the hours not worked today.

(Emphasis in the original) Respondent's Exhibit 13.

9. Dr. Nemitz consulted with Leslie Bicksler, Director of Human Resources,[6] for assistance in dealing with Grievant's chronic tardiness and absenteeism.

10. February 19, 2009, Grievant supplied her schedule and excuses for tardiness and absences since October 2008 to Leslie Bicksler, at Ms. Bicksler's request. Grievant also asked that the same information be examined for her co-workers, to prove that Dr. Nemitz was being arbitrary and capricious in his enforcement of the flex time rules. Respondent's Exhibit 15. The information about Grievant's coworkers was

[6] Sometime during the course of the events related to this grievance Leslie Bicksler was promoted to Vice President for Human Resources. At all relevant times she was in charge of human resources at the college.

not requested because Dr. Nemitz was not having similar problems with their attendance.[7]

11. On February 25, 2009, Dr. Nemitz issued Grievant the third letter of warning related to excessive and/or unexcused absenteeism. He specifically noted that between October 6, 2008, and February 16, 2009, "there have been numerous occurrences where you did not arrive on time (9:00 AM)." Dr. Nemitz also noted that Grievant had arrived three hours late on February 16, 2009, which had resulted in a letter of warning being issued on that date. Dr. Nemitz provided Grievant with a copy of the WVSOC Classified Employees Handbook and reiterated the specific guidelines for work schedules and reporting absences that he had set out in his October 6, 2008, warning letter.[8] Once again, Dr. Nemitz warned Grievant that continued tardiness and absenteeism could result in her dismissal.

12. To address Grievant's erratic schedule and inconsistent methods of notifying Dr. Nemitz of her frequent schedule changes, Dr. Nemitz established clear leave reporting procedures for Grievant requiring her to: submit an excuse from her treatment provider when using sick leave; promptly report any unexcused leave time; report leave in advance; and, promptly report any leave time when she was not in the office and not otherwise working during the regular work hours. Dr. Nemitz further

[7] Level three testimonies of Dr. Nemitz and Leslie Bicksler.

[8] Dr. Nemitz also discussed an incident of unprofessional conduct related to Grievant and her coworkers which does not appear to be part of the specified grounds for her dismissal. Prior to this time, Grievant had reported an incident to Dr. Nemitz and Leslie Bicksler about a piece of pottery being broken in her office, and other actions that were taken to harass her. Director Bicksler conducted an investigation and was unable to substantiate Grievant's claim of harassment or identify who broke her pottery.

indicated that Grievant was not to eat her lunch at her workstation after taking a full lunch break away from the office.[9]

13. On March 2, 2009, Grievant wrote an email to Dr. Richard Rafes, President of the College, as a response to her written warning letter. In her response Grievant indicated that many of her problems were the result of actions taken against her by her coworkers. Dr. Rafes responded that these matters were being taken care of by her supervisor and it was not appropriate for him to intervene. Respondent's Exhibit 20. Grievant did not file a grievance contesting any of the warning letters given to her by Dr. Nemitz.

14. Grievant and her coworkers did have a contentious relationship. Her coworkers often attempted to report to Dr. Nemitz when Grievant was late, took an extended break, or left work early. Dr. Nemitz made it clear to Grievant's coworkers that Grievant's schedule was his responsibility and none of their business.

15. Dr. Nemitz had informal meetings with Grievant after the issuance of the warning letters to discuss his job expectations and the remediation of Grievant's attendance deficiencies. However, Grievant's attendance issues continued to be problematic.

16. Dr. Nemitz completed a 2008 – 2009 Performance Evaluation for Grievant dated October 29, 2009. All of the performance indicators were marked as "Meets or Exceeds Requirements" except for the performance indicator entitled "Punctuality". For

[9] Throughout the hearing Grievant noted that other employees were allowed to eat at their desks and argued that this prohibition for her was unfair. Respondent's issue was not that Grievant was eating at her desk, but rather that she was taking a full lunch break and then taking additional time to eat at her desk.

that performance indicator Grievant was rated as "Needs Improvement."[10] Under the heading, "Performance Improvement Plan, if applicable:" Dr. Nemitz wrote:

> Chronic lateness and weekly changes to work schedule were addressed in FY 08 – 09 in a letter to Teresa's file dated. (sic) The performance improvement plan is still in place.[11]

Respondent's Exhibit 29.

17. During the last part of 2008, Dr. Nemitz noted that Grievant's erratic schedule was having a negative effect on her performance. He had received a number of complaints from professors that the curriculum schedule was getting to them so late that they could not make appropriate corrections. Further, when they made corrections the corrections did not always appear on the final schedule. Dr. Nemitz met with Grievant on July 12, 2009, to implement a sixty-day plan of correction to address these performance issues. The plan enumerated the following conditions:

> 1) By January 15, 2010, you will present me a written plan and production timeline for the remaining 2009 – 2010 academic schedules.
> 2) We will meet weekly to review your progress and production. At each meeting, you will present written documentation of the quality and timeliness of your work. You will keep written documentation of our meeting and your corresponding submissions.
> 3) You will continue to follow the current performance improvement plan in place to address the attendance and tardiness issues. *See* fn 11.
> 4) During our weekly meeting, you would discuss any request for leave at that time. A weekly schedule for you will be set at that time for the following weeks. Changes are not to be made with the exception of emergency situations that will require my approval.

Additionally, Dr. Nemitz advised Grievant that, "Any additional acts of unexcused, unapproved, or excessive absenteeism or tardiness, failure to complete your assigned

[10] This performance indicator was described as "Arrives at the appointed time on a consistent basis; is prompt, strict observance of keeping engagements, meeting and project deadlines.
[11] Through the testimony and exhibits it became apparent that Dr. Nemitz felt that the warning letters and enumerated procedures therein, constituted a plan of improvement for Grievant, even though they were not specifically titled as such.

work in a timely and acceptable manner. . . will result in an immediate recommendation for disciplinary action up to and including dismissal. Respondent's Exhibit 31.

18. Grievant wrote a response to the letter of correction but did not file a grievance. Grievant contended that the accusations of unexcused and excessive absenteeism were unfounded. She noted that there had been personal issues sometimes requiring her absence, but that the lack of a backup for her work made her absence stand out more than her coworkers. Respondent's Exhibit 32.

19. By letter dated March 18, 2010, Dr. Nemitz informed Grievant that she had successfully completed her plan of correction, and that the quality of her work had improved significantly. Dr. Nemitz noted that the problems related to the curriculum schedule had all been corrected, but while there had been improvement in her arrival time at work and weekly changes to her work schedule, "this is an area that continues to need work." Near the close of the letter, Dr. Nemitz informed Grievant that, "Tardiness and excessive changes in your work schedule are not acceptable and if this becomes a problem again, it will result in disciplinary action up to and including suspension and dismissal." Dr. Nemitz closed the letter with the paragraph telling Grievant that he appreciated her efforts to improve her performance and hoped that they would continue into the next academic year. Respondent's Exhibit 33.

20. Dr. Nemitz completed a "2009 – 2010 Performance Evaluation" for Grievant dated October 15, 2010. As in the previous evaluation, Grievant received a rating of "Meets or Exceeds Requirements" in all performance rating areas except "Punctuality." In that rating area, Grievant again received a rating of "Needs Improvement." In the "Explanation" box, Dr. Nemitz noted "Chronic lateness was a

problem in FY 09 – 10." Dr. Nemitz also noted, "Teresa continues to be a valued member of the office. She has superior knowledge of critical software for this institution." Respondent's Exhibit 34.

21. In April 2010, the College Board of Governors appointed Dr. Michael Adelman as the new College president. The next month, Dr. Lorenzo Pence became the Vice President of Academic Affairs and Dr. John Schriefer was appointed to replace Dr. Nemitz as the Associate Dean for Preclinical Education (Grievant's direct supervisor). Dr. Nemitz and Dr. Schriefer worked together for a couple of months to provide a smooth transition of leadership for the department.[12]

22. In 2010, Dr. Schriefer reorganized the department and hired Deborah Harvey as an Office Manager.[13] Ms. Harvey was trained to be the backup for Grievant and other staff, at least in part, to address Grievant's concerns over this issue. Additionally, Grievant was relieved of the responsibility for grading exams.

23. In the months following Dr. Schiefer's appointment, Grievant's tardiness and attendance problems reemerged. Grievant called off work shortly before her start time, reported to work late, frequently changing her schedule, exhausted most of her accrued leave time, and brought her lunch back to her desk after taking a lunch break out of her office. These issues led to the rating of "Needs Improvement" by Dr. Nemitz in Grievant's 2009 – 2010 Performance Evaluation. Respondent's Exhibit 34

24. To address Grievant's attendance issues, Dr. Schriefer prepared a ninety-day plan of correction to implement with Grievant. Respondent's Exhibit 35. However,

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[12] Accordingly, Dr. Nemitz completed Grievant's evaluation for the 2009-2010 year since he had been her supervisor for the majority of the observation period.

[13] While it was not mentioned in the record, Ms. Stidom's name was not brought up in any of the testimony following this event and it is assumed that she left employment in the department around this time.

upon meeting with Grievant on June 8, 2011, Dr. Schriefer and Ms. Bicksler realized that Grievant was suffering from emotional problems related to a burglary that took place in her home. Grievant was presented with a number of leave options that she might exercise in lieu of the ninety-day plan of correction. Respondent's Exhibit 37.

25. Grievant applied for and received a two–month catastrophic leave and Respondent did not implement the improvement plan. Grievant was released to return to work with no restrictions on August 14, 2011. Respondent's Exhibit 39.

26. On August 15, 2011, Dr. Schriefer met with Grievant to review office procedures and outline his performance expectations for her. He presented Grievant with a list of seven expectations and asked her to acknowledge in writing that she understood the expectations. Those expectations were as follows:

> 1. My normal work hours are 9 AM – 5:30 PM Monday – Friday,
> 2. I may occasionally be required to work additional hours without additional compensation,
> 3. I have a one hour lunch break and two 15 minute breaks during this 9 AM – 5:30 PM time period,
> 4. When I take my one hour lunch break, I will not bring my lunch back with me to eat at my desk,
> 5. If I miss time during my workday, other than the breaks listed in three (above), I am required to submit a leave request for that time,
> 6. I will submit leave requests in advance whenever possible; if not possible they will be submitted during the next workday, and
> 7. Failure to adhere to the above requirements will result in disciplinary action, up to and including termination.

Respondent's Exhibit 40. These expectations echo the job expectations and recording and attendance requirements established by Dr. Nemitz in his previous letters of warning and improvement plan.

27. Following receipt of these written expectations, Grievant continued to have problems with absenteeism, missing work without requesting leave in advance, adjusting her schedule, staying long for breaks, and tardiness. Such incidents included but were not limited to: failing to submit a leave request for missing a day of work when her teenage son was ill (Respondent's Exhibit 51); missing 3 ½ hours because Grievant was too tired to work (Respondent's Exhibit 41 & 42); taking too long for her lunch breaks (Respondent's Exhibit 43); being late for work and not immediately requesting leave time (Respondent's Exhibit 46); missing a half day of work to attend the funeral of her son's friend (Respondent's Exhibit 48); taking a two hour lunch break followed by eating the lunch she brought to work at her desk, and in being two hours late for work (Respondent's Exhibit 49). Also during this time it was discovered that Grievant was spending an inordinate amount of time using her computer for personal issues. (Respondent's Exhibit 45).[14]

28. On October 12, 2011, Associate Vice President for Human Resources, Leslie Bicksler, presented Grievant with a letter suspending her without pay for seven workdays. The suspension was for failing to comply with the directive set out by Dr. Nemitz and Dr. Schriefer including excessive absenteeism, failure to maintain a regular work schedule, failure to report absences and request leave as required by policy, and inappropriate use of her work computer. Ms. Bicksler specifically noted WVSOM Employee Handbook Section 7.4 Absence from Work which states:

[14] After observing Grievant on personal websites when he entered her office on occasions, Dr. Schriefer arranged for an employee of the IT department to investigate her Internet usage. Grievant complained on several occasions that Dr. Schriefer needed to have a similar investigation done of her coworkers. Dr. Schriefer replied that he had never seen Grievant's coworkers on a personal website. While the computer issue was problematic, it appears that the main reason for Grievant's dismissal was her chronic attendance issues.

> An employee must notify his/her immediate supervisor and follow established procedures for absences from work. Under certain conditions disciplinary action may result when an employee provides an invalid reason for an absence.

Vice President Bicksler also cited WVSOM GA-31 which is the College's acceptable use of information technology policy, and WVSOM Employee Manual Section 10.4 related to suspension. The suspension ended with the following warning:

> **So there is no misunderstanding, any additional acts of unexcused, unapproved, or excessive absenteeism or tardiness, failure to complete your assigned work in a timely and acceptable manner, or any violation of WVSOM Institutional, Higher Education Policy Commission, State or Federal policy will result in an immediate recommendation for your termination.**

(Emphasis in original) Respondent's Exhibit 51.

29. Grievant sent a letter dated October 18, 2011, to Vice President Bicksler objecting to her suspension. Grievant noted, among other things, that she was consistently performing her job, that she had provided reasons for her absences and extended breaks, and that a number of reports related to her extended breaks were made to her supervisor by her coworkers and were therefore hearsay.[15] Grievant did not file a grievance contesting her suspension. Respondent's Exhibit 53.

30. Grievant returned to work from her suspension without pay on October 25, 2011. Vice President Bicksler and the College General Counsel, Sandy Desbrow met with Grievant on that day to review the job expectations set forth in the August 15, 2011, agreement. At that time, they advised Grievant that continued failure to adhere to the

[15] Grievant's coworkers did report when she was late in coming to work or returning to work from breaks. However, when she was confronted regarding these incidents by Dr. Schriefer, she generally confirmed them but offered excuses. Dr. Schreifer told Grievant's coworkers that monitoring Grievant's time was not their job and that they needed to stop this activity. Unfortunately, thereafter he would ask Grievant's coworkers if she arrived on time or was late returning from breaks. This inconsistent behavior contributed to the already contentious relationship between Grievant and her coworkers.

office guidelines and remediate her deficiencies would result in termination of her employment.

31. Following the suspension, Dr. Schriefer received feedback from Grievant's coworkers and faculty members regarding inaccuracies in her work schedules and problems with absenteeism. He also personally observed Grievant's problems with attendance, tardiness, and failure to appropriately report her leave as set out in the prior warning letters. Grievant frequently altered her work schedule with little advance notice and called off work shortly before her workday began. Respondent's Exhibits 55, 56, 61-68, 70-74 and 76-77[16]. Grievant provided reasons for her erratic schedule which included, but was not necessarily limited to: illness of her son, domestic problems with her daughter and grandchild, a visit from her out-of-state daughter, her father's chronic illness which confined him to a nursing facility, and her emotional trauma related to the burglary of her home.[17]

32. Dr. Schriefer and Vice President Bicksler met with Grievant on February 7, 2012, to review and reaffirm the workplace guidelines and performance expectations. Respondent's Exhibits 75 & 77. However, Grievant's attendance did not significantly improve, and she continued to have problems with tardiness, frequent changes to her schedule, and properly reporting her leave. Additionally, Grievant was untimely in submitting her portion of her annual evaluation.[18]

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[16] The specific incidents in these exhibits describe personal situations in Grievant's life and are therefore not all fully set out herein. They were admitted into the record, found to be true, and support the allegations made by Dr. Schriefer.

[17] There is no doubt that Grievant's personal life tended to be chaotic because of the problems and illnesses suffered by her immediate family members. It appears that her supervisor was generally sympathetic to Grievant's personal situation, but ultimately needed for her to consistently work a regular schedule.

[18] Part of the reason for Grievant's tardiness related to submitting her portion of the evaluation was related to her request to skip the evaluation that year. Grievant felt that the evaluation would not be an

33. On March 9, 2012, Dr. Schriefer and Vice President Bicksler, each sent letters to Dr. Pence recommending the termination of Grievant's employment for chronic poor attendance, tardiness, and performance issues. Respondent's Exhibits 92 & 93. Dr. Schriefer's letter spelled out in detail the written letters of warnings, meetings improvement plans, agreement, and suspension Grievant had previously received, as well as incidents of failure to meet the established guidelines subsequent to these corrective actions. Respondent's Exhibit 93.

34. By letter to President Adelman dated March 12, 2012, Dr. Pence stated that he had reviewed the information and letters provided to him by Dr. Schriefer and Vice President Bicksler, and he recommended that Grievant's employment be terminated immediately. Respondent's Exhibit 95.

35. By letter dated March 20, 2012, President Adelman advised Grievant that her dismissal had been recommended and scheduled a predetermination meeting with her for Friday, March 23, 2012. Grievant attended that meeting with Ellen Broudy, a former College employee. Dr. Schriefer and Vice President Bicksler also attended the meeting. On March 25, 2012, Grievant submitted a one page rebuttal letter to President Adelman. Respondent's Exhibit 103.

36. After reviewing the materials provided by Grievant's supervisor and Grievant's oral and written rebuttal, President Adelman terminated Grievant's employment for excessive absences tardiness and poor work performance. Respondent's Exhibit 104.

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accurate reflection of her performance because she had missed time due to a leave of absence. This request was denied.

37. Elaine Broudy testified that during her employment at the College, supervisors tended to allow employees to work flexible schedules to allow for their personal issues. However, Ms. Broudy had never been employed in the Preclinical Education Department.

Discussion

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008).

> . . . *See Watkins, supra, 229 W.Va. at _, 729 S.E.2d at 833* (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education,* 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). *See also Hovermale v. Berkeley Springs Moose Lodge,* 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) ("Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence."). . .

Litten v. W. Va. Dep't of Trans., Div. of Highways, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision).

Respondent dismissed Grievant for chronic absenteeism, tardiness, failure to adhere to her regular work schedule, and failure to report leave properly. Grievant argues that Respondent did not prove good cause for the termination of her employment, and Respondent improperly relied upon hearsay reports by her coworkers, rendering the decision arbitrary and capricious. Grievant also alleges that she was

subjected to discriminatory treatment and that her actions did not justify dismissal of a long-term employee.

Respondent provided substantial evidence proving that Grievant had participated in the activity with which she was charged, for a number of years. Grievant was given many opportunities to improve her attendance and maintain a regular schedule as required by Respondent. While she would occasionally improve for short periods of time, Respondent proved by a preponderance of the evidence that Grievant was chronically absent from work, tardy when she did arrive at work, and consistently failed to maintain a regular work schedule. Respondent proved that there was good cause for Grievant's dismissal.

Grievant argues that Respondent's actions were arbitrary and capricious because her supervisor relied upon reports of her tardiness and absences that he did not observe. Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv*., 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

While Dr. Schriefer, and occasionally Dr. Nemitz, relied upon reports made by Grievant's coworkers that she was late for work, took extended breaks and left early, they both personally observed these behaviors on a sufficient number of occasions to

justify the disciplinary action of dismissal. More importantly, when Grievant's coworkers would make these reports to Dr. Schriefer, he would bring them to Grievant's attention and she would confirm that they occurred, although she might disagree with the amount of time that she was alleged to be late or overextended her break.

The decision to terminate Grievant's employment was based upon a plethora of reliable evidence after ample opportunities were provided for her to improve her performance. Accordingly, the Respondent's decision was neither arbitrary nor capricious. However, it is unfortunate that Doctor Schriefer continued to ask for input regarding Grievant schedule anomalies from her coworkers after he had informed them that it was none of their business. This action certainly contributed to the contentious atmosphere in the department.

Grievant argues that she was improperly singled out for punishment for her erratic schedule. She avers that others were given flexible time without disciplinary consequences, which constitutes discrimination. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) That she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

The consistent testimony of Dr. Nemitz, Dr. Schriefer, and Vice President Bicksler was that no other employee in the Preclinical Education Department had absenteeism problems close to being as egregious as those of Grievant. While other employees were allowed to change their schedules from time to time, as was Grievant, it never became a chronic problem or habitual behavior. Grievant did not prove that she was similarly situated to other employees in her department with regard to the matters for which she was dismissed. Consequently, Grievant did not prove discrimination as defined in the grievance procedure.

Grievant clearly had very difficult issues to deal with her personal life. She had a teenage son living at home who had health issues, and a married daughter with a child who had significant domestic issues of her own. Grievant's father was suffering from dementia and Parkinson's disease which confined him to a nursing facility, and at one point during this time period, her house was burglarized. These problems naturally consumed a great deal of Grievant's personal time and remained on her mind when she was at work. She felt that her supervisors needed to be more sympathetic to her personal issues and allow her to work a flexible schedule as long as it did not affect her job performance. In Grievant's post hearing written proposal, she cited twenty-three exhibits that demonstrated her efforts to keep her supervisor apprised of the reasons for the need to alter her schedule because of these personal issues.[19]

[19] Respondent's Exhibits 44, 47, 49, 56, 57, 63, 64, 68, 73, 74, 76, 80, 81, 82, 84, 85, 86, 88, 89, 90, 91, 96, & 99. *See* Grievant's Proposed Findings of Fact and Conclusions of Law.

Unfortunately, Respondent was able to demonstrate that Grievant's failure to work a regular schedule did negatively impact her job performance, and made it difficult for the department to function normally. Sadly, the exhibits referred to by Grievant served to emphasize that she simply could not maintain her regular work hours. It was not unreasonable for Respondent to expect that she do so.

Finally, Grievant argues that the penalty of terminating her contract was too severe for the conduct she exhibited given the fact that she was a long-term employee. "Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case-by-case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995); *Crites v. Dep't of Health & Human Ser.*, Docket No. 2011-0216-DHHR (Nov. 16, 2011).

Respondent could not have made their rules and expectations more clear to Grievant. Her supervisor specifically enumerated those expectations into warning letters, plan of improvement, a return to work agreement, and in her suspension letter. Additionally, since 2008, Grievant's work record was rife with failure to meet these clear and achievable expectations. Grievant was given verbal counseling, written warnings, at least one improvement plan and a suspension, yet she chronically failed to work a regular work schedule as required by her employer. Under the circumstances of this case, termination of Grievant's employment was not excessive and mitigation is not required. Accordingly, the grievance is DENIED.

Conclusions of Law

1. As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008).

> . . . *See Watkins, supra, 229 W.Va. at _, 729 S.E.2d at 833* (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education,* 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). *See also Hovermale v. Berkeley Springs Moose Lodge,* 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) ("Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence."). . .

Litten v. W. Va. Dep't of Trans., Div. of Highways, No. 12-0287 (W. Va. Supreme Court, June 5, 2013) (memorandum decision).

2. Respondent proved by a preponderance of the evidence that there was substantial good cause for the termination of Grievant's employment notwithstanding her long employment at the College.

3. Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv*., 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996).

4. Respondent's decision to terminate Grievant's employment was based upon a plethora of reliable evidence and was neither arbitrary nor capricious.

5. Discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) That she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

6. Grievant did not prove that she was similarly situated to other employees in her department with regard to the matters for which she was dismissed. Grievant did not prove discrimination as defined in W. VA. CODE § 6C-2-2(d).

7. "Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case-by-case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995); *Crites v. Dep't of Health & Human Ser.*, Docket No. 2011-0216-DHHR (Nov. 16, 2011).

8. Considering the totality of the circumstances of this case, termination of Grievant's employment was not excessive and mitigation of the disciplinary action taken is not required.

Accordingly, the grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: NOVEMBER 20, 2013

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE