THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JOHN DALE JOLLIFFE,
Grievant,

v. **Docket No. 2013-0970-WVU**

WEST VIRGINIA UNIVERSITY,
Respondent.

DECISION

John Jolliffe, Grievant, filed this grievance against his employer, West Virginia University, on December 21, 2012, alleging that Respondent failed to prove by a preponderance of the evidence the claim of gross misconduct on the part of Grievant. This grievance was filed directly to level three. Grievant seeks to have his employment reinstated and to be made whole in every respect, including back pay of wages/benefits plus interest, attorney fees, costs, restore good reputation among co-workers, including removal of negative statements from personnel file. A level three hearing was conducted before the undersigned Administrative Law Judge on April 15, 2013, in the Grievance Board's Westover office location. Grievant appeared in person and by his representative, his wife, Mary Jolliffe. Respondent appeared by its counsel, Samuel R. Spatafore, Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on May 17, 2013.

Synopsis

Grievant was employed as a Trades Specialist II in the Facilities Management at West Virginia University. Grievant's employment was terminated for acts of gross

misconduct occurring on two separate dates. Grievant refused to adhere to repeated directives from his supervisor and made matters worse when he threatened bodily harm to his supervisor. Grievant once again committed gross misconduct a few days later when he made profane comments to a co-worker, assaulted him, and topped things off by kicking a chair across the room. Grievant's actions were in violation of Respondent's applicable policy on discipline, created a miserable work environment for co-workers, and were grounds for termination.

The following findings of fact are based upon the record developed at level three.

Findings of Fact

1. Grievant was employed as a Trade Specialist II in Facilities Management at West Virginia University.

2. On November 28, 2012, Grievant ignored directives from his supervisor, Fred Athey, and refused to get down from standing on an unprotected counter top while preparing walls for drywall.

3. Mr. Athey indicated that he had previously instructed all employees that tables and counter tops were supposed to be covered to protect from scratches. Grievant ignored Mr. Athey's requests to step down. Grievant finally responded to Mr. Athey by saying that, "he had taken down bigger boys than you." Mr. Athey walked away from Grievant without responding.

4. On December 6, 2012, employees came to Mr. Athey and informed him that Grievant had threatened to beat up a co-worker, Tom Sapp. The employees stated to Mr. Athey that the Grievant was yelling vulgar and profane comments and that he violently kicked a chair across a room.

5. The West Virginia University Police were called and after speaking to Mr. Athey, Tom Sapp, Grievant and other employees on December 6, 2012, they recommended that Mr. Athey and Mr. Sapp obtain a Protective Order. Mr. Athey and Mr. Sapp obtained Protective Orders from the local magistrate that same day.

6. Phil Yeager, Trade Specialist I, recalled witnessing the incident on November 28, 2012, between Grievant and Mr. Athey. He indicated that Mr. Athey came into a chemistry lab and handed Grievant a sealed envelope. Grievant was standing on an uncovered counter top and Mr. Athey asked him to get down. After Mr. Athey's repeated requests to Grievant were ignored, Mr. Athey asked Grievant if he wanted to go to the office to talk. Grievant told Mr. Athey that, "he had whipped bigger boys than Athey."

7. Phil Yeager, Trade Specialist, witnessed the incident that occurred on December 6, 2012. He reported that he and co-workers were in a shop located in the General Woodworking Building. Grievant came in the room and started yelling at Tom Sapp. Grievant yelled at Mr. Sapp asking him, "who's cock tasted better," Fred or another supervisor who was on medical leave at the time. Grievant asked Mr. Sapp, in a threatening manner, if he wanted to go outside. Grievant then kicked a chair and the chair flew across the room. Co-workers that were present during this episode felt Grievant had created a hostile environment.

8. Grievant indicated that his anger, vulgarity and threatening behavior was due to the fact that he was not offered enough overtime. Mr. Athey acknowledged that he assigned overtime, but, curiously enough, he offered Grievant overtime in the past and Grievant had declined.

9. Dan Batson, Director of Design and Construction at West Virginia University,

confirmed that Grievant has had anger issues for a long time. Mr. Batson recommended that Grievant attend free counseling for the anger issues, but Grievant would not agree to attend.

10. Grievant admitted that he did make the threats as described by his co-workers. Anger management classes were offered twice to the Grievant and both times Grievant declined.

11. After a pre-termination meeting on December 13, 2012, with Robert Brak, Senior Employee Relations Specialist at West Virginia University, Grievant was issued a termination letter on December 14, 2012.

12. Mr. Brak indicated that this action was taken in view of Respondent's duty to provide employees with a safe working environment. In addition, Grievant's actions on the two days in question constituted gross misconduct.

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 Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 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). In other

words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Respondent asserts that Grievant's threatening conduct was gross misconduct. West Virginia University Discipline Policy states that insubordination is considered gross misconduct and that a single act of gross misconduct can result in immediate termination.[1] The "term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991) (*citing Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985)). *See Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sept. 13, 2002).

Grievant's behavior on both November 28 and December 6, 2012, were clearly acts of gross misconduct and supported Respondent's decision to terminate his employment. The record of this grievance is basically undisputed. Grievant admitted that he did make the threats as described by his co-workers. Anger management classes were offered twice to Grievant and both times Grievant declined. To the extent that Grievant argued at his level three hearing that his behavior was just a joke, the record demonstrated that none of his co-workers interpreted Grievant's threats as jokes. Grievant's co-workers established

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[1]West Virginia University Discipline Policy HR-9 states that gross misconduct may result in immediate dismissal. The Policy defines gross misconduct, in pertinent part, as "insubordination and/or disobedience . . . jeopardizing the health, safety or security of persons or University property, verbal or physical assault . . ." Respondent's Exhibit No. 12.

that Grievant's actions made them all very nervous, and they all felt as though Grievant had created a hostile working environment.

Respondent deemed Grievant's behavior as gross misconduct warranting the termination of his employment. Notwithstanding Grievant's long work history, considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct. *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge cannot substitute his judgement for that of the employer. *Miller v. Higher Education Policy Commission/Marshall University*, Docket No. 03-HEPC-340 (Jan. 21, 2004); *Jordan v. Mason County Bd. of Educ.,* Docket No. 99-26-8 (July 6, 1999).

The undersigned finds that West Virginia University has proven by a preponderance of the evidence that Grievant's conduct did amount to gross misconduct and, therefore, was good cause for termination of Grievant's employment.

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 Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

2. Respondent has proven by a preponderance of the evidence that Grievant's conduct did amount to gross misconduct and was good cause for termination of Grievant's employment.

Accordingly, this grievance is **DENIED**.

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

Date: June 25, 2013

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Ronald L. Reece
Administrative Law Judge