KAREN MORRISON,

Grievant,

v. **DOCKET NO. 97-DOL-490**

WEST VIRGINIA BUREAU OF COMMERCE,

DIVISION OF LABOR

Respondent.

D E C I S I O N

Karen Morrison (Grievant) filed this grievance pursuant to W. Va. Code §§ 29-6A-1, et seq., on September 24, 1997, challenging a written reprimand which Respondent West Virginia Division of Labor (DOL) placed in her personnel file on September 12, 1997. Following denial of her grievance at Level I, the parties proceeded to Level III (See footnote 1) where an evidentiary hearing was conducted on October 22, 1997. Hearing Examiner Robert Miller denied the grievance at Level III on October 28, 1997. Grievant appealed to Level IV where the parties agreed that this matter could be decided on the basis of the record developed at Level III. In accordance with an Order issued by the undersigned on November 24, 1997, providing the parties an opportunity to submit written arguments in support of their respective positions, Grievant's written argument was received onDecember 17, 1997. This matter became mature for decision upon expiration of the time limit for filing written arguments on December 22, 1997.

On September 10, 1997, Steven A. Allred, Commissioner of Labor, issued the following letter to Grievant:

> I do not concur with your contention that someone else is responsible for the failure of this office to send notices of hearings in advance of a September 9, 1997, meeting of the Contractor Licensing Board.

> This responsibility has rested with you for several years and you know quite well the licensing board schedules meetings almost on a monthly basis.
>
> You contended that Parma Zamora was to give you written notification of the board's meeting date. Mrs. Zamora states no such policy was ever instituted. Be that as it may, the information you require to perform your work is readily available to you.
>
> Your immediate supervisor is Deputy Commissioner Bob Miller who coordinates contractor licensing activities in our office. He ensures our office will work closely with the Contractor Licensing Board and meet our pledge of openness and efficiency.
>
> This correspondence constitutes a letter of reprimand and will be placed in your personnel file.

J Ex 3.

Based upon a preponderance of the credible evidence contained in the record developed through Level III, the following Findings of Fact pertinent to resolution of this grievance have been determined.

FINDINGS OF FACT

1. Grievant is employed by the West Virginia Division of Labor (DOL) as an Office Assistant II.

2. Since December 1993 Grievant has had specific responsibility for timely issuing Cease and Desist Orders in advance of hearings before DOL's Contractor Licensing Board (CLB).

3. Parma Zamora, Administrative Secretary to DOL's CLB, has overall responsibility for administrative support for CLB meetings, including timely issuance of meeting notices.

4. Prior to November 1996, Grievant attended each meeting of the CLB. Before the meetings concluded, the CLB set the time and place for its next meeting, providing Grievant with direct knowledge of that event.

5. Subsequent to November 1996, Grievant usually asked Ms. Zamora, who attends all meetings of the CLB, records and transcribes the meeting minutes, and sets the meeting agenda, for the time and place of the next meeting to insert in Cease and Desist Orders.

6. There was some miscommunication between Grievant and Ms. Zamora regarding the location of the CLB meeting on July 15, 1997.

7. In late July 1997, Shirley Starcher inquired of Ms. Zamora when the next CLB meeting would be held. Ms. Zamora provided the time and place of the next meeting (September 9, 1997) to Ms. Starcher, and Ms. Starcher personally relayed the information orally to Grievant.

8. Grievant's workload increased substantially between mid-July and the end of August 1997 as a result of the annual renewal cycle for contractor licenses.

9. Cease and Desist Orders must be issued at least twenty days before the CLB meeting. Hearings on the violations contained in those Orders are included in the agendaof the CLB during its periodic meetings. DOL uses the terms "Cease and Desist Order and "hearing notice" interchangeably. Grievant failed to issue timely Cease and Desist Orders so as to allow such alleged violations to be heard during the CLB meeting scheduled for September 9, 1997.

10. On September 5, 1997, DOL Commissioner Stephen Allred inquired of Ms. Zamora regarding the number of cease and desist matters scheduled for the CLB meeting on September 9, 1997. When Ms. Zamora asked Grievant for this information, Grievant replied that she had not received written notice of the next meeting, and no notices had been issued.

11. Because timely Cease and Desist Orders were not issued, it was necessary to cancel and reschedule the CLB meeting set for September 9, 1997.

12. On September 9, 1997, Commissioner Allred called Grievant to a meeting in his office to discuss the failure to send timely notices. See J Ex 1. After discussing the matter briefly with Grievant, Commissioner Allred asked Grievant to provide a written memorandum regarding her version of the events that had transpired. At no time did Commissioner Allred advise Grievant that he was contemplating disciplinary action, or that she was entitled to representation.

DISCUSSION

In disciplinary matters, W. Va. Code § 29-6A-6 places the burden of proof on the employer. Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). More specifically, DOL has the burden of proving each element of a disciplinary action by a preponderance of the evidence. A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidencewhich is offered in opposition to it. Miller v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

The sole factual issue in dispute in this grievance is whether some intervening event transpired

which relieved Grievant of her established responsibility to issue timely Cease and Desist Orders to contractors in regard to hearings before DOL's Contractor Licensing Board (CLB) at its scheduled September 1997 meeting. It is undisputed that this task had been continuously assigned to Grievant since 1993. It is likewise undisputed that Grievant did not issue timely Orders in advance of the CLB meeting set for September 9, 1997, and the meeting had to be cancelled.

In response to an inquiry from DOL Commissioner Allred on September 9, 1997, Grievant provided a written statement indicating that, following some confusion on July 11, 1997, regarding the location for the upcoming CLB meeting on July 15, 1997, Parma Zamora, the Administrative Secretary to the CLB, told her that she would notify Grievant in writing of the time and location of future CLB meetings. Ms. Zamora agreed that there was some confusion regarding the location of the July CLB meeting, but denied telling Grievant she would convey any future meeting notices in writing. In any event, the testimony of another employee, Shirley Starcher, established that she personally provided the time and place of the next CLB meeting to Grievant in late July, after asking Ms. Zamora for the information.

To the extent Grievant claims that she failed to send out timely orders because she did not know the time and place of the meeting, a preponderance of the evidence contradicts her position. Further, even if Ms. Zamora did tell Grievant that she wouldprovide written notice of future CLB meetings to Grievant, that statement, standing alone, would not operate to relieve Grievant of her responsibility for issuing the notices. (See footnote 2) Grievant admitted in the written explanation she provided to Mr. Allred on September 9, 1997, that she "assumed" there were no Cease and Desist Orders on the September agenda. See Ex 2. This erroneous assumption is the ultimate cause for Grievant's failure to send out the notices, and Grievant's attempt to reassign the blame for this error to another party was not successful.

Grievant's claim that the responsibility for issuing Cease and Desist Orders was transferred to another employee, Justin Cox, at a meeting held on July 14, 1997, is not supported by a preponderance of the credible evidence of record. Mr. Cox, who attended the same meeting, testified that, as a Trainee, he was not expected to assume any new responsibilities until he had been properly trained on those duties. The logical person to train Mr. Cox on issuing Cease and Desist Orders was Grievant. At no time prior to September 9, 1997, did Grievant provide any training regarding such duties to Mr. Cox.

Commissioner Allred, who likewise attended the meeting on July 14, and Andy Brown, who conducted the meeting, testified that the work assignments discussed at the meeting on July 14 were tentative, subject to additional employee feedback and final management approval. Grievant's witnesses established that not all employees who attended that meeting came away with that understanding. However, Grievant made no mention of this meeting and any resulting misunderstanding in her detailed written statement to Commissioner Allred. The undersigned is persuaded that Grievant left themeeting on July 14 with the understanding that her duties regarding Cease and Desist Orders would be reassigned, once Mr. Cox had been trained on performing those duties. However, Grievant knew, or should have known, that she was still responsible for sending out the appropriate notices in advance of the next scheduled CLB meeting on September 9, 1997.

Grievant also argued that her rights were violated by the manner in which DOL investigated this matter and issued the reprimand in question. Specifically, Grievant argues that Commissioner Allred violated W. Va. Code § 18-29-3(f) by not apprising Grievant of her right to representation at an investigative meeting, as noted in the foregoing factual determinations. The first problem with this argument is that the Code Section cited by Grievant only applies to school system employees, such as employees of an institution of higher education, the West Virginia Department of Education, regional education service agencies, and the public schools governed by the various county boards of education. See W. Va. Code §§ 18-29-1, 18-29-2(c) & (e). Further, this Grievance Board has previously noted that the Weingarten right to union representation (See footnote 3) available to employees in the private sector under § 8(a)(1) of the National Labor Relations Act, has only been incorporated in a limited context in the statutory grievance procedure for state employees. (See footnote 4) Dooley v. W. Va. Dept. of Transp., Docket No. 95-DOH-214 (Jan. 23, 1996). Thus, the right to representation applicable to state employees set forth in W. Va. Code § 29-6A-3(f) does not extend to investigative meetings. Moreover, Grievant did not request representation, and DOL was not obligated to apprise her of any right to representation in the circum stances presented. See NLRB v. Weingarten, Inc., 420 U.S. 251, 257 (1975). See also Defense Criminal Investigative Serv. v. FLRA, 855 F.2d 93 (3d Cir. 1988).

In addition to the foregoing discussion, the following conclusions of law are made in this matter.

CONCLUSIONS OF LAW

1. Pursuant to W. Va. Code § 29-6A-6, 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. Wellman v. W. Va. Dept. of Health & Human Serv., Docket No. 93-HHR-079 (Oct. 18, 1993); Ramey v. W. Va. Dept. of Health, Docket No. H-88-005 (Dec. 6, 1988).

2. DOL demonstrated by a preponderance of the evidence that Grievant failed to perform her assigned job duties of issuing Cease and Desist Orders to contractors in advance of a scheduled meeting of DOL's Contractor Licensing Board.

3. Where Grievant's indirect supervisor called Grievant to a meeting to discuss her apparent failure to perform her assigned job duties in a timely manner, there was no violation of W. Va. Code § 29-6A-3(f), or any other applicable statute, policy, rule, or regulation, when Grievant was not apprised of her right to representation. See Dooley v. W. Va. Dept. of Transp., Docket No. 95-DOH-214 (Jan. 23, 1996). See also Thompson v. Logan County Bd. of Educ., Docket No. 95-23-127 (July 17, 1995).

Accordingly, this Grievance is **DENIED**.

Any party may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: January 15, 1998

Footnote: 1

Although Grievant had only appealed to Level II of the grievance procedure, the parties agreed that the hearing would encompass Level III, and any further appeal would proceed to Level IV.

Footnote: 2

It is noted that Ms. Zamora had neither real nor apparent authority to reassign Grievant's duties.

Footnote: 3

Named after the United States Supreme Court's holding in NLRB v. Weingarten, Inc., 420 U.S. 251 (1975).

Footnote: 4

"A grievant may be represented by an employee organization representative, legal counsel, or any other person, including a fellow employee, in the preparation or presentation of the grievance. At the request of the grievant, such person or persons may be present at any step of the procedure: Provided, That at level one of such grievance, as set forth in section four [§ 29-6A-4] of this article, a grievant may have only one such representative." W. Va. Code § 29-6A-3(f).