PATRICIA HUFFMAN,

Grievant,

v. Docket No. 00-COMM-128

BUREAU OF COMMERCE/DIVISION OF TOURISM,

Respondent.

DECISION

Patricia Huffman (Grievant) was employed by the Bureau of Commerce/Division of Tourism (Tourism), as a Tourist Guide Supervisor at Tourism's Huntington Welcome Center (HWC). On April 7, 2000, she filed this grievance directly at Level IV to challenge her dismissal.

A Level IV hearing was held on September 7, 2000, before the undersigned Administrative Law Judge, at the Grievance Board's Charleston office. Grievant was represented at this hearing by Neal Bouchillon, Esq., and Tourism was represented by Senior Assistant Attorney General Daynus Jividen. The parties were given until December 15, 2000, to submit proposed findings of fact and conclusions of law, both did so, and this grievance became mature for decision on that date. The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievant was employed by the Bureau of Commerce/Division of Tourism(Tourism), as a Tourist Guide Supervisor at HWC.

2. Grievant has never been disciplined nor received a less than satisfactory evaluation during her eleven years of employment with Tourism.

3. Grievant is dedicated to the development of tourism in West Virginia.

4. On September 27, 1999, Grievant was injured at work. She filed a workers compensation claim and was found to be temporarily and totally disabled.

5. While Grievant was absent from work on workers compensation, her three subordinates charged that she was guilty of numerous acts of misconduct.

6. Grievant's supervisors believed Grievant's subordinates.

7. Grievant's supervisors did not contact Grievant to get her response to the charges made by her subordinates.

8. By letter of April 3, 2000, Tourism dismissed Grievant.

9. In February, 1991, a photograph of Grievant appeared in Easyriders magazine, which caters to motorcycle enthusiasts. In this photograph, her left breast is partially visible.

DISCUSSION

In disciplinary matters, the employer has the burden of proving the charges by a preponderance of the evidence. W. Va. Code § 29-6A-6; Evans v. Dep't of Health & Human Resources, Docket No. 97-HHR-280 (Nov. 12, 1997), Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). A preponderance of the evidence is defined as “evidence which is of greater weight or more convincing than theevidence 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.” Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

The administrative rules of the West Virginia Division of Personnel provide that an employee in the classified service may be dismissed for "cause." 143 CSR § 12.2, Administrative Rule, W. Va. Div. of Personnel (July 1, 1998). The phrase "good cause" has been determined by the West Virginia Supreme Court of Appeals to apply to employees whose misconduct was of a "substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention." Syl. Pt. 2, Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1985); Syl. Pt. 1, Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); See Hundley v. W. Va. Div. of Corrections/Mount Olive Correctional Complex, Docket No. 97-CORR-197A (May 12, 1999).

By letter of April 3, 2000, Tourism dismissed Grievant, stating:

* You have created a threatening and potentially unsafe work environment for your subordinates and the general public by merging, or appearing to merge, your alleged work for law enforcement agencies with your work for the Division of Tourism at the Welcome Center.

* You have dealt with your subordinates, as well as others, in an unprofessional manner by using intimidation, profanity and abusive language. Just as importantly, your use of profanity and abusivelanguage was, on occasion, in the presence of members of the public who were visiting the Welcome Center.

* You have created a stressful work environment for your subordinates thereby distracting them from their work by bringing your outside activities into the workplace and with your negative, threatening behavior that includes, but is not limited to, taping conversations of your subordinates and telling them you record their telephone calls.

* You have removed from the workplace, without permission, or destroyed documents and records, without permission, that were the property of the West Virginia Division of Tourism, which were important to the Division's management of the Welcome Center.

* You have abused your position by regularly reporting to work late, leaving the workplace for extended periods of time and leaving work early, without your employer's permission.

* You threatened to do bodily harm to the Director of Community Relations, under whose purview management of the state's Welcome Center falls. Namely, you said, "If I had a gun, I would go shoot her in the head!"

* You have conducted yourself in an unprofessional manner that has resulted in a negative, unprofessional image for the I-64 Welcome

> Center, the West Virginia Division of Tourism, and the State of West Virginia, that includes but is not limited to, calling a male employee to your office on his first day on the job and showing him a topless photograph of yourself, and showing that same photograph to male members of the public visiting the Welcome Center.

Grievant seeks reinstatement to her former position and to be made whole.

Tourism's case against Grievant is based on the testimony of her three subordinates, LaDonna Adkins (Adkins), Brenda Bolden (Bolden), and Clifford Riley (Riley), whose complaints during Grievant's absence from work provoked her dismissal. Adkins testified that she works full-time at HWC; that she saw Grievant cut files with scissors; that Grievant tape recorded employees and their telephone calls; that Grievant received cash at HWCfrom a bookie; that fourteen years earlier, a drug bust had taken place at HWC, which endangered her life; that Grievant arrived at work late; that Grievant has showed her a police badge and Miranda rights warning card; and that after a telephone call with Grievant's supervisor, Betty Carver (Carver), Grievant had said that if she had a gun, she would shoot Carver.

Bolden testified that she works part-time at HWC; that Grievant worked at night with a drug task force, which caused her to come to work late; that Grievant recorded employees and their telephone calls; that Grievant received cash at HWC from a bookie; that Grievant cursed in front of customers and was rude to them; that Grievant left work early; that Grievant kept a magazine containing her topless photograph at HWC, which she showed to men at HWC; and that after a telephone call with Grievant's supervisor, Carver, Grievant had said that if she had a gun, she would shoot Carver.

Riley testified that he works part-time at HWC; that Grievant would be gone from HWC for hours; that Grievant cursed in front of customers; and that he was sitting alone on a bench when he heard Grievant say that if she had a gun, she would shoot Carver. Grievant's witnesses completely contradict this testimony. Accordingly, a credibility determination is required. In assessing the credibility of witnesses, some factors to be considered . . . are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Harold J. Asher and William C. Jackson. Representing the Agency before the United States Merit Systems Protection Board 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistencyof prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the

plausibility of the witness's information. Id., Burchell v. Bd. of Trustees, Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

Applying these factors to Adkins' testimony, the undersigned concludes that her demeanor was highly guarded and that she gave evasive and non-responsive answers; that she had a good opportunity to perceive the events that led to Grievant's dismissal, except as noted below; that her reputation for honesty was compromised by the testimony of Lieutenant Wendell Adkins, described below; that her attitude towards Grievant was one of open hostility; and that she made no admission of untruthfulness. Adkins had apparent bias, interest, or motive against Grievant. Adkins had made prior statements about Grievant to Tourism's management, which led to Grievant's dismissal; the existence of several facts testified to by Adkins was called into question by the credible testimony of other witnesses; and much of her testimony was implausible.

Applying these factors to Bolden's testimony, the undersigned concludes that her demeanor was normal; that she had a good opportunity to perceive the events that led to Grievant's dismissal, except as noted below; that her reputation for honesty was compromised by the testimony of Lieutenant Wendell Adkins, described below; that her attitude towards Grievant was one of hostility; and that she made no admission of untruthfulness. Bolden had apparent bias, interest, or motive against Grievant. Bolden had made prior statements about Grievant to Tourism's management, which led to Grievant's dismissal; the existence of several facts testified to by Bolden was called into question by the credible testimony of other witnesses; and much of her testimony was implausible. Applying these factors to Riley's testimony, the undersigned concludes that his demeanor was sullen and openly hostile; that he answered questions reluctantly and evasively; that he had a good opportunity to perceive the events that led to Grievant's dismissal, that his reputation for honesty was compromised when he refused to remove the rings he wore to refute Grievant's charge that he had the phrase “fuck you” tattooed on his knuckles; that his attitude towards Grievant was one of hostility; and that he made no admission of untruthfulness. Riley had apparent bias, interest, or motive against Grievant. Riley had made prior statements about Grievant to Tourism's management, which led to Grievant's dismissal; the existence of several facts testified to by him was called into question by the credible testimony of other witnesses; and much of his testimony was implausible.

The testimony of these three witnesses appeared contrived and rehearsed. It is significant that,

although Riley testified that he was the only one present when Grievant made her alleged threat against Carver, all three of these witnesses claim to have heard this threat, and recounted it nearly identically. It is highly implausible that HWC's entire staff simultaneously overheard any such remark, particularly given Grievant's credible testimony that these three employees are never at HWC simultaneously. Adkins testified that she saw Grievant shred HWC files, then changed her testimony to say that Grievant cut them with scissors, and then admitted that HWC has no shredder; that she couldn't say that whatever Grievant cut were files at all; and that no documents were found to be missing at HWC. Bolden testified that Grievant was often absent and neglected her duties, but that all work at HWC was done. The idea that Grievant would show a partially nude photograph ofherself to customers of HWC, a fact credibly denied by Grievant, is implausible, as is the speculation, by all three witnesses, that Grievant created an unsafe workplace by being a member of a drug task force at night. Accordingly, the testimony of Adkins, Bolden, and Riley is found to be not credible.

Tourism also presented the credible testimony of Carla Dunn, its Personnel Director, who testified that she did not know that any records were missing from HWC, but took Adkins' word for it; (See footnote 1) that no complaints were ever made against Grievant by HWC customers; and that she did not contact Grievant to get her “side of the story” because Grievant was off on workers compensation.

Lieutenant Wendell Adkins, a Barboursville police officer who was on the local federal drug task force for 13 years, credibly testified that Grievant did not work with the task force; that there is a lot of drug activity in HWC's parking lot; that he has done 10 “buy busts” there over the years; that Grievant is a member of the law enforcement family, as her late father was a police officer; that Grievant supports the police and has occasionally helped them; and that Adkins and Bolden were involved in drug activity.

Connie Martin, who worked at HWC for six months in 1999, credibly testified that Grievant was not involved in police activity; that Adkins and Bolden complained to her about Grievant; that Grievant ran a tight ship and did not come to work late; was not abusive or profane; that Grievant did not tape people; that she did not know of any records missing from HWC; that she didn't hear Grievant threaten to shoot Carver; that Grievant did notshow her semi-nude photograph to people; and that she witnessed Bolden smoking marijuana at HWC.

Sherry Knotts, who supervised Grievant from 1991 - 1995, credibly testified that Grievant was an

excellent employee who spent her own money and went the extra mile to promote tourism; that Grievant had never been disciplined before; that no complaints were ever made against Grievant by HWC customers; that Grievant had excellent evaluations; that Grievant did not scream or raise her voice at HWC; that Grievant often stopped at the post office on her way to work; and that welcome center managers were encouraged to support a police presence at the centers, in part by marking a parking space for a police car, because a police presence helps ensure a safe workplace.

Grievant credibly testified that she did not work for the drug task force; that she keeps her late father's badge because she is proud of him; that she never threatened to shoot Carver; that she had never been disciplined before; that she destroyed no records; that she has written several columns in local newspapers extolling West Virginia Tourism, and that her license plate says “TOURISM;” that she never took her semi-nude photograph to HWC; that her husband's friend twice brought her dog track winnings to her at HWC; that her three subordinates are never at HWC simultaneously; and that her job included making trips to do copying, to the post office, the convention and visitors bureau, and such tourist attractions as the art museum and Blenko Glass, which amounted to networking to improve West Virginia tourism. Grievant also credibly testified that Adkins, Bolden, and Riley are lying; that they are involved in drug activity; that they conspired in her absence to get her fired, and that Tourism bought their lies “hook, line, and sinker.” The undersigned is convinced that this is substantially what happened. Tourism fired Grievant in her absence, based on the reports of her three subordinates, who reported implausible behavior completely out of character for a long-term employee with fine evaluations, no customer complaints, and no disciplinary record. It is unclear whether the shoddy investigation performed by Tourism involved contacting anyone other than Grievant's three subordinates before deciding to fire her. Tourism failed to provide any proof, other than the less-than-credible testimony of Grievant's three accusers, that records were destroyed, that she was late for work, (See footnote 2) that Grievant created an unsafe workplace, that she used bad language, that she tape recorded anyone, that she threatened Carver, or that she showed her semi-nude photograph to anyone. Incredibly, Tourism failed to contact Grievant to get her version of events, so that the first time Grievant learned that Tourism had any problems with her performance was when the letter dismissing her arrived. The undersigned is aware that the policies of many state agencies urge that an employee be given the opportunity to tell her side of the story before disciplinary action is taken. See Yeater v. W. Va. Dep't of Health & Human Resources/Mildred

Mitchell-Bateman Hospital, Docket No. 00-HHR-224 (Jan. 19, 2001). An employer that fails to realize that there are two sides to every story, and take steps to learn both, risks making an indefensible disciplinary decision, as here. See Blake v. Div. of Highways, Docket No. 97-DOH-416 (May 8, 1998). Accordingly, the undersigned concludes that Tourism failed to establish, by a preponderance of the evidence, the charges against Grievant. Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. In disciplinary matters, the employer has the burden of proving the charges by a preponderance of the evidence. W. Va. Code § 29-6A-6; Evans v. Dep't of Health & Human Resources, Docket No. 97-HHR-280 (Nov. 12, 1997), Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992.).

2. Dismissal of an employee in the classified service must be for good cause, which means misconduct of a "substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention." Syl. Pt. 2, Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1985); Syl. Pt. 1, Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Hundley v. W. Va. Div. of Corrections/Mount Olive Correctional Complex, Docket No. 97-CORR-197A (May 12, 1999).

3. Respondent Division of Tourism failed to establish, by a preponderance of the evidence, the charges against Grievant.

Accordingly, this grievance is **GRANTED**. Respondent Division of Tourism is **ORDERED** to reinstate Grievant with all back pay, including interest; leave; seniority; and all other benefits to which she would have been entitled had she not been dismissed. Record of her dismissal shall be removed from all personnel files.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). 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. However, the appealing party is required by W. Va. Code § 29A- 5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

-

ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated February 7, 2001

Footnote: 1

This contradicts Adkins' Level IV testimony that no documents were missing from HWC.

Footnote: 2

It is noted that it should have been relatively simple for Tourism to check its own records to see if any were missing, to verify Grievant's attendance by her time records, to search HWC for the alleged nude photograph during her workers' compensation absence; and to check with the drug task force to determine if she was employed by it.