THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

LOLITA BENNETT,

Grievant,

v.

DOCKET NO. 06-DMV-237

DEPARTMENT OF TRANSPORTATION/

DIVISION OF MOTOR VEHICLES,

Respondent.

DECISION

This grievance was filed at Level IV of the grievance procedure by Grievant, Lolita Bennett, pursuant to *W. Va. Code* § 29-6A-4(e), (See footnote 1) on July 12, 2006, after she was dismissed from her position with the Department of Transportation/Division of Motor Vehicles, as a Customer Service Representative Lead. Her statement of grievance reads:

> The WV Division of Motor Vehicles has improperly dismissed me from my job position of Customer Service Representative Leads [sic], as per the provisions found in the DOP Disciplinary Guide. I have not obstructed or mislead anyone on an official state business investigation. Nor have I committed any of the other offenses accused of in the July 5, 2006, notice of termination. I rely on the DOP Disciplinary Guide, WV Code 29-6A-2(d), WV Code 29-6A-6, and any other Codes, Statutes, Policies, Rules, and/or Regulations that may apply.

The relief sought by Grievant is "[t]o be returned to my job position of [sic] with full restoration of

benefits and wages lost, including accumulated interest. I am also asking that this incident be expunged from my record."

Three days of hearing were held at Level IV before Administrative Law Judge M. Paul Marteney. The September 12, 2006, and December 13, 2006 hearings were held in the Grievance Board's Beckley office. The March 7, 2007 hearing was held in the Grievance Board's Charleston office. Grievant was represented by Jeffrey G. Blaydes, Esquire, and Respondent was represented by Janet E. James, Assistant Attorney General. This matter became mature for decision upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law on May 3, 2007. Administrative Law Judge Marteney resigned his employment with the Grievance Board shortly thereafter, and this matter was reassigned to the undersigned Administrative Law Judge on October 23, 2007.

Synopsis

The letter dismissing Grievant states she is being dismissed for:

> obstructing and intentionally misleading an official state business investigation. By directive of this office, Carolyn Parsons and Phil Nicholson were instructed to conduct investigations regarding the operation of the Beckley Regional Office. Director Pete Lake, on two separate occasions, advised the Beckley Regional Office employees to give full cooperation to the investigations. Both investigators have advised that you gave false or misleading information and failed to fully cooperate with the investigations. Additionally, you are a Customer Service Representative Lead. In that supervisory capacity, you gave preferential treatment to certain employees by allowing them to take longer breaks and lunches. You also created a hostile working environment for other employees if they complained to you regarding the favoritism.
>
> Your misconduct and attitude in your position of Customer Service Representative Lead is substantial and directly affects the rights andinterests of your employees and the public we serve. It is apparent from your actions that you have total disregard for the integrity of the Customer Service Representative Lead Position and state law, thus warranting your immediate dismissal.

Respondent argued the charges against Grievant were proven, and were sufficiently egregious to justify termination. Grievant argued Respondent did not prove the charges against her. She further argued that Respondent did not follow its own disciplinary policy, as it was required to do, and that if the charges are found to have been proven, just cause has not been shown for dismissal, and the punishment should be mitigated.

Having carefully reviewed the evidence presented in this case, the undersigned concludes that

the charge that Grievant obstructed and intentionally misled an investigator conducting an official investigation has been proven. The remaining charges against Grievant were not proven. The undersigned further concludes that the punishment imposed was excessive. The punishment will be reduced to a three day suspension without pay.

The following Findings of Fact are made based upon a preponderance of the evidence presented at Level IV.

Findings of Fact

1. Prior to her dismissal, Grievant was employed by the Department of Transportation/Division of Motor Vehicles ("DMV"), as a Customer Service Representative Lead ("CSR Lead"), in DMV's regional office in Beckley. She had been employed by DMV for about six years, and had been a CSR Lead since September 2003.

2. DMV Commissioner Joseph Cicchirillo dismissed Grievant from her employment with DMV by letter dated July 5, 2006. The dismissal was effective July 20,2006. The charges against Grievant, as stated in the dismissal letter, were that she obstructed and intentionally misled the investigators conducting an official state business investigation, that she gave preferential treatment to certain employees in the form of longer breaks and lunches, and that she created a hostile working environment if employees complained to her regarding the favoritism.

3. Kimberly Bryant was Grievant's supervisor. Ms. Bryant was dismissed from her employment with DMV at the same time as Grievant.

4. Natasha White, a Manager, was Ms. Bryant's supervisor. She assumed the Manager duties in the Beckley Regional Office in June 2005. Prior to that she was a CSR Lead in DMV's Morgantown office.

5. Ms. Bryant filed a grievance contesting the selection of Ms. White as Manager, as she believed she should have been selected for the position.

6. As a CSR Lead, Grievant was not a supervisor, and could not impose discipline. Grievant assisted the Customer Service Representatives ("CSRs") in the Beckley Regional Office. She was not to take on any supervisory duties unless there were no other supervisors in the office. Her role was to bring any problems with the CSR's to Ms. Bryant's attention.

7. Pete Lake, DMV's Director of Regional Offices and Call Center Service, recommended to

Commissioner Cicchirillo that Grievant be dismissed from her position. Mr. Lake did not review Grievant's evaluation or look at her personnel file prior to making this recommendation. His recommendation was based on the information he received from two investigators, Phillip Nicholson and Carolyn Parsons, that Grievant had failed to cooperate with the investigators, and she had shown favoritism toward some employees.He was also concerned about the deterioration of the work environment in the office. He did not believe a corrective action plan would have corrected Grievant's behavior.

8. Ms. Parsons has been an EEO Counselor with DMV since 1997. On March 2, 2006, she was assigned by Mr. Lake and Commissioner Cicchirillo to conduct an investigation of problems in the Beckley Regional Office.

9. Mr. Nicholson, a Transportation Service Manager I in DMV's Parkersburg Regional Office, is an investigator and manager in the CDL skills testing operations for the northern part of West Virginia. In March of 2006, he was directed by William D. Totten, Director of DMV's ISS unit, to conduct an investigation into whether the video surveillance system in the Beckley Regional Office had been tampered with. Mr. Nicholson was also to investigate what had become of some personal notes which had been reported missing by an employee in that office, CSR Charlotte Ballenger. Ms. Ballenger had been keeping these notes on a lined 8½ by 11 notepad at the office. It was Mr. Nicholson's understanding that the notes were made for Ms. Parsons to assist her with her investigation.

10. Mr. Lake went to the Beckley Regional Office twice during the course of these investigations and directed the employees in the office that they were to cooperate with the investigators.

11. While Mr. Nicholson was conducting his investigation, one page of Ms. Ballenger's missing notes was found by another employee in the copier, and was turned over to Ms. White. Employees in the office recognized some notations on the recovered page as Grievant's handwriting. 12. Mr. Nicholson asked Grievant if she had any knowledge of Ms. Ballenger's missing notepad with notes on it made for Ms. Parsons, and Grievant responded that she knew nothing about it. He repeated the inquiry, and Grievant gave the same response. He then showed Grievant the page of Ms. Ballenger's notes that had been found in the copier, and Grievant stated that she did have copies of those notes at her home, and the notes had been left on her desk in an unmarked, sealed envelope. Mr.

Nicholson asked Grievant for a copy of the notes, and Grievant, at a later date, retrieved them from her home and provided him with a copy.

13. Mr. Nicholson concluded that Grievant was untruthful and uncooperative with his investigation, and obstructed the investigation by stating she knew nothing about Ms. Ballenger's missing notepad until she was shown the recovered page with Grievant's handwriting on it. Mr. Nicholson presented this conclusion to DMV Commissioner Cicchirillo. Mr. Nicholson did not otherwise participate in the decision to discipline Grievant.

14. The pages of notes which Grievant had in her possession were not in a notepad, and she did not believe they were notes made for Ms. Parsons to assist in her investigation. The notes had been made by Ms. Ballenger and Jesse Clark, who had been an employee in the Beckley Regional Office, and she believed they would have been harmful to Mr. Clark in a grievance he had pending. She did not think Ms. Ballenger would have been providing these notes to Ms. Parsons because they would have been harmful to Mr. Clark. Grievant explained to Mr. Nicholson that she did not think he was asking if she had seen these notes because they were not on a notepad, and because she did not think they were notes for Ms. Parsons. 15. While Ms. Parsons was conducting her investigation, Grievant gave her copies of register tapes for Ms. Ballenger, and Ms. Bryant gave her copies of register tapes pertaining to Patty Honaker, also a CSR in the Beckley Regional Office. The register tapes were intended by Grievant to corroborate her claims that Ms. White allowed some employees to take longer breaks and lunches than others.

16. Ms. Parsons asked Grievant for more legible copies of the register tapes discussed in Finding of Fact Number 15. Grievant did not respond to this request for two weeks, and then she did not provide more legible copies of the register tapes, stating she could not locate the originals. After receiving Grievant's response, Ms. Parsons contacted Ms. White that same day and requested the register tapes from her. Ms. White faxed the register tapes to her that day, and told Ms. Parsons that the box containing these documents was out in the open. (See footnote 2) Ms. Parsons concluded from this that Grievant was obstructing her investigation. Ms. Parsons did not personally observe whether the register tapes were readily accessible to Grievant, nor did she later ask Grievant why she could not locate the documentation when it was in a box out in the open.

17. Grievant searched for the register tapes requested by Ms. Parsons twice, and Ms. Bryant also looked for them. Grievant looked in the location where she believed these documents were

supposed to be boxed.

18. Grievant did not report to Ms. Parsons that Michelle Gallaher, a CSR in the Beckley Regional Office, was taking longer breaks than she was allowed to take. Ms. Parsons observed Ms. Gallaher clocking in from break and then leaving her station. 19. Ms. Bryant's grievance contesting Ms. White's selection as Manager, and Ms. Bryant's disgruntlement because she was not selected created friction in the Beckley Regional Office, which was felt by the other employees in the office. As Ms. Bryant's grievance hearing dates approached, there was more tension in the office.

20. Grievant had a close working relationship with Ms. Bryant. Grievant was accused by other employees of favoritism when she was carrying out the directives given to her by Ms. Bryant and Ms. White.

21. The employees in the Beckley Regional Office did not get along, and they had not gotten along for a number of years before Ms. White arrived and Ms. Bryant filed a grievance. Mr. Lake had visited the office sometime around 2004 to investigate concerns his superiors at that time had with the office. He reported to the Commissioner at that time, and to then DMV Director Glenn Pauley, that some action needed to be taken because the situation was going to deteriorate. He did not know whether any action had been taken after he submitted his report.

22. Ms. Gallaher took extended breaks, and would punch back in after break and then leave her station to go to the bathroom. On one occasion she was 15 to 20 minutes late getting back from lunch.

23. CSRs are allowed to go to the bathroom as needed while they are working. They are not required to punch out or wait until the scheduled break time to go to the bathroom.

24. Grievant witnessed Ms. Gallaher taking extended breaks at times, and she would bring this to Ms. Bryant's attention when it occurred. She believed Ms. Bryant would then talk to Ms. Gallaher about this issue. 25. One of the incidents relied upon by Ms. Parsons in reaching the conclusion that Grievant was giving preferential treatment to certain employees occurred on June 5, 2006. Ms. Gallaher's cash drawer at the end of the day did not match her register tape, and her drawer was $12.00 short. Ms. Gallaher signed off her machine, and when she signed back on the machine a short while later, her cash drawer was no longer short. Ms. Parsons concluded that “they did a fix.” As Grievant closed that day, and signed off on the transaction report, she assumed that Grievant took the shortage off the register tape, which is contrary to policy. The record does not reflect that Ms.

Parsons has any training on the mechanics of closing out a machine at the end of the day, nor does it indicate that she asked Grievant at any time about what had occurred. Ms. Parsons observed that sometime later in June 2006, Ms. Ballenger and Ms. Honaker did not balance at the end of a day, and no one fixed their balances.

26. The shortage on June 5, 2006, was not corrected by “a fix” by Grievant. At times there was a problem with the machines when they initially were closed out, and the machines had to be brought back up and closed out again to get the correct information to show up, and that was what occurred that day. When Grievant went through what Ms. Gallaher had rung up that day, her checks, and everything else, the error was not apparent, so they brought the machine back up, closed out again, and the $12.00 then showed up correctly and Ms. Gallaher was not out of balance. This is what Grievant had been trained to do.

27. Prior to the time Ms. White became Manager, Ms. Ballenger complained to Grievant about Ms. Gallaher taking extended breaks. Grievant told her she could not do anything about it. 28. Ms. Ballenger alleged that Grievant and Ms. Bryant had changed the order in which she was to be cross-trained, so that Ms. Gallaher was cross-trained before her. Grievant had nothing to do with this decision, and the cross-training occurred before Ms. White became Manager.

29. Ms. Ballenger was stung by a bee while at work, and she is allergic to bee stings. She alleged that Grievant refused to let her leave work to go to the doctor. Ms. Ballenger asked Ms. Bryant if she could leave, and Ms. Bryant told her she would have to check the schedule, that they were short-handed. Ms. Bryant then left work without telling Ms. Ballenger whether she could leave. Ms. Ballenger went to Grievant, who told her Ms. Bryant had left, and, by Ms. Ballenger's own testimony, that Ms. Bryant said Ms. Ballenger could not leave. Ms. Ballenger then went to Ms. White, and Ms. White allowed her to leave. This incident occurred quite some time after Ms. Ballenger complained to Grievant about Ms. Gallaher taking extended breaks.

30. CSR Tracy Matheny complained to Grievant about Ms. Ballenger being 15 to 20 minutes late returning from lunch one day.

31. Sometime after he complained to Grievant about Ms. Ballenger, Mr. Matheny brought a document to Grievant to notarize, after the document had been signed by the customer. He did not bring the customer to Grievant to acknowledge the signature. Mr. Matheny had been told that the customer must sign documents which must be notarized in front of the notary. Grievant was annoyed

with Mr. Matheny and was rude to him, and Mr. Matheny became rude with Grievant. Ms. White asked Ms. Bryant to investigate the incident. Ms. Bryant reported that Grievant and Mr. Matheny had different versions of theevent, and she did not think she could discipline either of them. Grievant became upset that Mr. Matheny was not disciplined.

32. On January 5, 2006, Ms. White called in sick with a headache, but said she would probably be in by lunchtime. When she arrived at work three hours later, Mr. Matheny and CSR Rhonda McKinney followed her into her office. Mr. Matheny said he wanted a form to file a grievance. Both told her that Ms. Bryant and Grievant had refused to answer their questions. Other unidentified CSRs came into her office throughout the day and told her, “this cannot continue.” This led her to call John Haynes, Regional Operations Manager, and Mr. Lake to see how she should proceed and the investigation by Ms. Parsons was initiated.

33. Mr. Matheny is assigned to drivers' licenses. The questions both he and Ms. McKinney asked of Grievant were questions relating to drivers' licenses. Ms. Bryant was on site and was the supervisory person in charge when these questions were asked of Grievant.

34. In December 2005, Ms. White had told Grievant she was not to answer questions presented to her by any of the CSRs pertaining to drivers' licenses if either she or Ms. Bryant was in the office. Ms. White told Grievant she would tell the CSRs they were not to ask her questions pertaining to drivers' licenses, but employees continued to ask Grievant these types of questions. Grievant would decline to answer their questions relating to drivers' licenses, and send them to Ms. White or Ms. Bryant. Finally sometime in March 2006, Grievant asked CSR Pam Carter whether Ms. White had told her Grievant was not to answer these questions, and Ms. Carter told her Ms. White had not done so. 35. Grievant had never been disciplined by DMV prior to her dismissal. She had been counseled. The record does not reflect when this counseling occurred, why she was counseled, or who counseled her.

36. Grievant's most recent performance evaluation, for the period January 2005 to January 2006, was completed by Ms. Bryant. Grievant's performance was rated as “exceeds expectations”, the highest rating possible, in a number of categories. Her performance was rated as “meets expectations” in the remaining categories. Ms. Bryant commented on the evaluation that Grievant “works extremely well with supervisor and subordinates”, and “treats all employees with the utmost respect and encourages each employee to perform to the best of their ability”. The evaluation rated

Grievant's performance in the categories “builds a team that reflects high morale, clear focus, and group identity”, and “promotes equal opportunity and protects the rights of all employees”, as “meets expectations”.

37. Ms. Bryant did not allow Ms. White to review Grievant's performance evaluation prior to giving the evaluation to Grievant in early April 2006. Nonetheless, Ms. White signed Grievant's most recent performance evaluation. While Ms. White noted when she sent the evaluations to her superiors that she had not reviewed the evaluations prior to Ms. Bryant giving them to employees she supervised, and that she disagreed with Ms. Bryant's action in this regard, she did not indicate on Grievant's evaluation or elsewhere that she disagreed with the evaluation in any way, nor was Ms. Bryant disciplined for not letting Ms. White review the performance evaluation before she gave it to Grievant. 38. Ms. White never told Grievant that she was not interacting appropriately with her co-workers, nor did she ever tell her that she was unhappy with her work performance.

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. *W. Va. Code* § 29-6A-6; *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "The 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 and Human Res.*, Docket No. 92- HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, [175 W. Va. 279, ___,] 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d364 (W. Va. 1965)."

Scragg v. Bd. of Dir. W. Va. State College, Docket No. 93-BOD-436 (Dec. 30, 1994).

As pointed out repeatedly during the course of the hearing by Grievant's counsel, Grievant, as a tenured state employee, had a property interest in her employment. *Perry v. Sindermann*, 408 U.S. 593 (1972), cited in *Jones v. Nicholas County Bd. of Educ.*, Docket No. 92-34-305 (July 28, 1993), *aff'd*, Nos. 93-AA-213, 94-AA-76 (Kanawha County Cir. Ct. Apr. 5, 1995). "When an individual is deprived of this interest, certain procedural safeguards are merited. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985)." *Jones*, *supra*.

"Where an act of misconduct is asserted in a notice of dismissal, it should be identified by date, specific or approximate, unless the characteristics are so singular that there is no reasonable doubt when it occurred. If an act of misconduct involves persons or property, these must be identified to the extent that the accused employee will have no reasonable doubt as to their identity." Syl. Pt. 2, *Clarke v. W. Va. Bd. of Regents*, 279 S.E.2d 169 (W. Va. 1981), citing Syl. Pts. 4 and 5 of *Snyder v. Civil Serv. Comm'n*, 238 S.E.2d 842 (W. Va. 1977).

The charges against Grievant, as stated in the dismissal letter, were that she obstructed and intentionally misled the investigators conducting an official state business investigation, that she gave preferential treatment to certain employees in the form of longer breaks and lunches, and that she created a hostile working environment if employees complained to her regarding the favoritism. The letter fails to identify particular persons, times, or incidents. Respondent used the broad language in the dismissal letterto present testimony about events that had nothing to do with preferential treatment or employees complaining of favoritism and suffering for it. The undersigned will not address testimony which does not bear any relationship to the charges against Grievant. *Yates v. Civil Service Comm'n*, 154 W. Va. 696, 178 S.E.2d 778 (1971). *Frisenda v. Div. of Corrections*, Docket No. 97-CORR-373 (Mar. 24, 1998).

The charges against Grievant, as set forth in the dismissal letter, will be addressed in order.

1. Intentionally Misleading Investigators Conducting an Official State Business Investigation and Obstruction of the Investigation

This charge is based upon two events (which could easily have been identified more specifically in the dismissal letter). The first event was Mr. Nicholson's inquiry about Ms. Ballenger's missing notes, and Grievant's response to the inquiry. The second was Grievant's failure to provide Ms. Parsons with legible copies of certain register tapes when Ms. Parsons asked for them.

The undersigned concludes that Respondent has proven that Grievant obstructed Mr. Nicholson's investigation. When Mr. Nicholson asked Grievant if she had any knowledge of Ms. Ballenger's missing notepad, Grievant truthfully responded that she knew nothing about a notepad. Had she been trying to fully cooperate with the investigation, however, she would have added that she did have in her possession some notes Ms. Ballenger had made. Grievant declined to be forthcoming with this information.

Grievant's failure to provide Ms. Parsons with a legible copy of the register tapes she requested has not been proven to be an obstruction of an official investigation. Grievant testified that she looked for the documents and could not find them, and that theywere not where she thought they were supposed to be. The testimony of Ms. Parsons that Ms. White told her the boxes with the documents were out in the open is given no weight by the undersigned. This testimony is hearsay. The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. (See footnote 3) *Gunnells v. Logan County Bd. of Educ.,* Docket No. 97-23-055 (1997); *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-8-115 (June 8, 1990). The declarant in this instance was Ms. White. Ms. White was called to testify in this proceeding, yet no one asked her anything about how she came to locate these documents.

Even if this testimony were given weight, standing alone it does not lead the undersigned to the conclusion that it is more likely than not that Grievant should have been able to easily find the documents, nor should it have led a trained investigator to thisconclusion. Had the legible copies of the documents not shown what Grievant claimed they would show, one might be inclined to conclude that Grievant did not supply the legible copies for that reason. However, such testimony was not given. Grievant testified under oath that she looked for the documents in the location where she

thought they should have been. If they were not in that location, even if the box with the documents in it was “out in the open,” should Grievant have known to look there? No testimony was presented that she should have known to look there.

Finally, Ms. Parsons insinuated that Grievant was not responsive because it took her two weeks to respond, whereas Ms. White responded to her inquiry that same day. The record does not reflect that Ms. Parsons was physically present in the Beckley Regional Office during this two week period to observe Grievant's activities, and it appears that she was not. As CSR Lead, Grievant had to step in and act as a CSR when needed, helping customers at service windows, whereas Ms. White did not do so. If Grievant was busy during her eight hour work day performing her regular duties, she may not have had time to respond to Ms. Parsons as quickly as Ms. White did, particularly if she was searching for the documents when she had time. Ms. Parsons did not give Grievant a deadline for response, and testified that this two week lag did not impede her ability to proceed with other aspects of her investigation, which took her several months.

2. Preferential Treatment in the Form of Longer Breaks and Lunches

This charge has not been proven. The dismissal letter would lead the reader to believe that there were multiple instances where Grievant had allowed various employees to take longer breaks and lunches than was allowed. The evidence, however, was thatonly Michele Gallaher took longer than the allotted lunch break, and this occurred on one occasion.

The evidence does not support a finding that anyone other than Ms. Gallaher took longer breaks than was allowed. Ms. Gallaher apparently had a pattern of leaving her station to go to the bathroom after she clocked back in from break, which upset her co- workers. However, nothing prohibited her from doing this. It is unclear whether, in addition to this behavior Ms. Gallaher also took longer breaks than she was allowed, but it appears that this is the case.

Most importantly, however, Grievant was not Ms. Gallaher's supervisor. Grievant was not responsible for scheduling or for discipline. She did not have any authority to allow Ms. Gallaher to take a longer break or lunch than the schedule provided for her. Grievant stated she reported Ms. Gallaher's activities, and she thought Ms. Bryant had spoken with her. There was nothing more Grievant could do.

3. Creating a Hostile Work Environment When Employees Complained to Grievant About Favoritism

This charge has not been proven. Only two employees testified that they had complained to Grievant of favoritism and then allegedly suffered adverse consequences. It is clear from the record that the employees in DMV's Beckley Regional Office do not get along. It is also clear that this has been the case for many years. In fact, much of the testimony elicited by Respondent's counsel related to events which occurred several years before Grievant's dismissal. What is not so clear is that Grievant was a cause of the problems in the office. Certainly, Ms. Bryant's grievance over the selection of Ms. White to be Manager created tension in the office. It also appears that the CSRs blamed Grievant for decisions made by those above her, and were not terribly concerned about getting the facts before rushing to judgement. Part of this can be blamed on poor communication by Grievant's supervisors. For example, Mr. Matheny and Ms. McKinney complained that Grievant would not answer their questions on January 5, 2006, and Respondent elicited testimony to this effect at the hearing, even though it was clear from the testimony that the questions asked of Grievant related to drivers' licenses; Grievant had been instructed by Ms. White not to answer questions related to drivers' licenses if either Ms. Bryant or Ms. White was in the office; and Ms. Bryant was in the office at the time the questions were asked of Grievant. The problem was that Ms. White had not told the CSRs in the office not to ask Grievant these types of questions, so the employees accused Grievant on this day as well as on other days, of answering the questions of those employees they considered to be her favorites while refusing to answer their questions.

Another example was the bee sting incident. Ms. Ballenger concluded that Grievant would not let her leave, even though it is clear from Ms. Ballenger's own testimony that Grievant was following her supervisor's directive. Likewise, although Ms. Ballenger assumed that Grievant was involved in the decision to change the order of cross-training employees, so that Ms. Gallaher was cross-trained before her, Ms. Ballenger had no proof that Grievant was involved in this decision, and Grievant testified that she did not participate in this decision. Ms. Ballenger suffered no adverse consequences as a result of complaining to Grievant about Ms. Gallaher's breaks.

Respondent did not demonstrate that Mr. Matheny was treated poorly by Grievant because he complained about Ms. Gallaher's long lunch break. It appears to theundersigned that Mr. Matheny and Grievant simply did not get along, and no doubt Grievant was rude to him at times, but this had nothing to do with Mr. Matheny's complaint about Ms. Gallhaher. The only two significant conflicts testified to by Mr. Matheny were the January 5, 2006 instance when Grievant would not answer Mr.

Matheny's drivers' license questions, as she had been told not to, and the notarization incident. It is likely that Grievant was rude to Mr. Matheny at some point when he brought a document to Grievant to be notarized without bringing the customer to sign in front of Grievant, even though Mr. Matheny knew he was to bring the customer. However, Grievant's exasperation with Mr. Matheny was not related to his complaint about Ms. Gallaher, but rather his failure to do as he had been instructed.

4. Mitigation

"The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was 'clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989)." *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

In assessing the penalty imposed, "[w]hether 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 (May18, 1995) (citations omitted). This Grievance Board has held that "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 prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./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 shall not substitute her judgement for that of the employer. *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997)." *Meadows, supra.*

Grievant argued that, absent an "incident of a singular and severe nature" occurring, progressive discipline is to be applied, pursuant to the Division of Personnel's Supervisor's Guide to Discipline, and that the charges against Grievant did not fall within this category.

The Division of Personnel's Supervisor's Guide to Discipline states at the beginning that it is

intended to be used as a reference and procedural guide. DMV has its own Employee Disciplinary Action Policy which provides that while progressive discipline typically involves some combination of counseling, verbal reprimand or warning, written reprimand or warning, suspension without pay, demotion, and dismissal “when other stages of the progressive disciplinary process have failed”:

> **[i]t is important to note that the level of discipline is determined on the severity of the infraction and management reserves the right to bypass any step in the process and take appropriate action up to and including termination of employment.**

(Emphasis in original.) The Division of Personnel's Guide likewise notes that the level of discipline depends on the severity of the infraction. Grievant argued that this Guide provides that any employee may be dismissed only if one of two conditions exists, relying on the following language from the Division of Personnel's Supervisor's Guide to Discipline:

> **In most cases, a dismissal is imposed only when other attempts to correct the problem and less severe forms of discipline have failed.** (Emphasis in original.) Dismissals may be issued when (1) infractions/deficiencies in performance and/or behavior continue after the employee has had adequate opportunity for correction, or (2) the employee commits a singular offense of such severity (such as assault of a supervisor or co-worker, bringing a weapon to the workplace, patient abuse, inmate abuse, etc.) that dismissal is warranted.

The Division of Personnel's Supervisor's Guide to Discipline is merely a guide. It does not require an employer to follow the progressive discipline steps outlined in the Policy, nor does it impose limitations on when an employer may dismiss an employee. Neither this Guide nor DMV's own Disciplinary Action Policy preclude DMV from dismissing an employee in instances where the appointing authority determines that the severity of the action warrants dismissal. The question in this case is whether the disciplinary action was clearly excessive or an abuse of discretion.

Respondent proved only one of the charges against Grievant. Grievant intentionally withheld information from Mr. Nicholson during his investigation. It was reasonable for DMV to consider this to be a serious offense. However, Grievant had excellent evaluations and no prior disciplinary action had been taken against her. Weighing these factors, the undersigned concludes that the disciplinary action was clearly excessive, and that an appropriate penalty for the one proven charge is a three day suspension without pay.

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. *W. Va. Code* § 29-6A-6; *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, [175 W. Va. 279, ___,] 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir. W. Va. State College*, Docket No. 93- BOD-436 (Dec. 30, 1994).

3. Respondent proved only one of the charges against Grievant. Respondent demonstrated that Grievant intentionally misled an investigator conducting an official state investigation by withholding information, and obstructed that investigation.

4.

> "The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was 'clearly excessive or reflects an abuse of the agency['s] discretion oran inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989)." *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

5. In assessing the penalty imposed, "[w]hether 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) (citations omitted). This Grievance Board has held that "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 prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./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 shall not substitute her judgement for that of the employer. *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997).” *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

6. Grievant demonstrated that the penalty imposed was clearly excessive, given that only one of the charges was proven, and given that she had excellent evaluations and no prior disciplinary action had been taken against her. Accordingly, this grievance is **GRANTED IN PART, AND DENIED IN PART**. Respondent is **ORDERED** to reinstate Grievant to her position as a Customer Service Representative Lead in the Beckley Regional Office, and to pay her all backpay to which she is entitled, plus interest, and restore all benefits, as though she had not been dismissed, but rather had been suspended for three days without pay.

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. *See* W. Va. Code § 29-6A-7 (*repealed by* Senate Bill No. 442, March 7, 2007*)* (*but see Executive Order No. 2-07*, May 8, 2007). 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 appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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BRENDA L. GOULD

Administrative Law Judge

Date: November 21, 2007

Footnote: 1

In 2007, the Legislature abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes and rules, which continue to control the proceedings in this case.

Footnote: 2

Although Ms. White was called as a witness, she was not asked about her search for the register tapes, or where they were found.

Footnote: 3

The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing hearsay. See Borninkhof v. Department of Justice, 5 MSBP 150 (1981).