**THE WEST VIRGINIA PUBLIC EMPLOYEES**
**GRIEVANCE BOARD**

**KIMBERLY BRYANT,**
**Grievant,**

**v.** **Docket No. 06-DMV-225**

**DEPARTMENT OF TRANSPORTATION/**
**DIVISION OF MOTOR VEHICLES,**
**Respondent.**

## DECISION

This grievance was filed at level four of the grievance procedure by Grievant, Kimberly Bryant, pursuant to W. VA. CODE § 29-6A-4(e),[1] on July 6, 2006, after she was dismissed from her position with the Department of Transportation/Division of Motor Vehicles, as a Supervisor 3. Her statement of grievance alleges she was discharged without cause. Her relief sought is to have her job reinstated, back pay, and attorney's fees.

The first day of the level four hearing was held before Administrative Law Judge Wendy A. Campbell on October 18, 2006, at the Grievance Board's Beckley office. Grievant was represented by Belinda Morton, Esquire. Respondent was represented by Janet E. James, Assistant Attorney General. When Judge Campbell recessed those

---

[1]In 2007, the Legislature, 2007 Acts ch. 207, 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 CODE §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. VA.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, which continue to control the proceedings in this case.

proceedings on October 18, the Respondent was in the process of presenting its case-in-chief. Thereafter, Belinda Morton withdrew as counsel for Grievant, and a long delay in these proceedings ensued.

On April 4, 2008, Administrative Law Judge Thomas J. Gillooly convened the continuation of the level four hearing in Beckley. At the outset of the proceedings, Grievant, through her attorney, made an oral motion requesting the Respondent be precluded from pursuing misconduct charges against Grievant. In a later-filed written "Motion for Issue or Claim Preclusion," Grievant requested an order barring the Respondent from contesting the validity of the grievance, on the basis that this Board's decision in *Bennett v. Dep't of Transp./Div. of Motor Vehicles*, Docket No. 06-DMV-237 (Nov. 21, 2007), was controlling. Lolita Bennett was this Grievant's co-worker (and subordinate). Both employees were terminated simultaneously.

Judge Gillooly granted Grievant's motion to continue the level four proceedings to permit briefing and consideration of the motion. Grievant's motion to apply the doctrine of issue preclusion, barring the Respondent from seeking to uphold Grievant's termination, was denied by Judge Gillooly by Order entered on August 6, 2008. Due to Mr. Gillooly no longer being an employee of the West Virginia Public Employees Grievance Board, the case was reassigned to the undersigned Administrative Law Judge.

The undersigned reconvened the level four proceedings for two additional days of hearings conducted on October 28, 2008, and December 3, 2008, at the Board's Beckley location. Grievant appeared in person, and by her attorney, John F. Parkulo, Esquire. Respondent appeared 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 April 10, 2009.

## Synopsis

The letter dismissing Grievant states she is being dismissed for:

> allowing favoritism and creating a hostile working environment for the employees in the Beckley Regional Office. You allowed preferential treatment for some employees by allowing them to take longer breaks and lunches. You also created a hostile working environment for other employees if they complained about favoritism. An investigation concluded that your actions consistently did not support the manager or assist with the daily operations.
>
> Your misconduct and attitude as a supervisor is substantial and directly affects the rights and interest of the public we serve. It is apparent from your actions that you have total disregard for the integrity of the supervisor position and state law, thus warranting your immediate dismissal.

Respondent argued the charges against Grievant were proven, and were sufficiently egregious to justify her dismissal. Grievant argued Respondent did not prove any of the charges against her. Having carefully reviewed the evidence presented in this case, the undersigned concludes that none of the charges against Grievant were proven. Accordingly, this grievance is granted.

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

## Findings of Fact

1. Prior to her dismissal, Grievant was employed by the Department of Transportation/Division of Motor Vehicles ("DMV"), as a Supervisor 3, in DMV's regional office in Beckley. She had been employed by DMV for about six years, and had been a Supervisor 3 since 2004.

2. During her employment with DMV, Grievant was initially a Customer Service Representative ("CSR"), from 2000 through 2002. She was promoted to Customer Service Representative Lead ("CSR Lead") in 2002. She was promoted to the positions of Supervisor 2 in 2003 and to Supervisor 3 in 2004.

3. 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 allowed favoritism and created a hostile working environment for the employees in the Beckley Regional Office; that she allowed preferential treatment for some employees in allowing them to take longer breaks and lunches; that she created a hostile working environment for other employees if they complained about the favoritism; and that she consistently did not support the manager or assist with the daily operations of the agency.

4. Lolita Bennett was Grievant's immediate subordinate as "CSR Lead." Ms. Bennett was dismissed from her employment with DMV at the same time as Grievant.[2]

5. Natasha White, a Manager, was Grievant'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.

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

---

[2]As referenced earlier, Ms. Bennett also filed a grievance challenging her termination.

7. Ms. White, as Manager, and Grievant as Supervisor could impose discipline at the Beckley Regional Office. Nevertheless, Grievant was instructed she could not impose any form of discipline without first consulting with her superior, Manager White.

8. 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 evaluations or look at her personnel file prior to making this recommendation.[3] His recommendation was based on the information he received from two investigators, Phillip Nicholson and Carolyn Parsons, that Grievant and Ms. Bennett worked together in an effort to undermine the authority of Ms. White, and Grievant had shown favoritism toward some employees and created a hostile working environment. 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.

9. 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.

10. 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 conducted an investigation into whether the video surveillance system had been tampered with resulting in videotape being erased. 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.

---

[3]This was also the case in Ms. Bennett's grievance.

Ms. Ballenger had been keeping the notes on a notepad at the office. It was Mr. Nicholson's understanding that the notes were made for Ms. Parsons to assist her with her investigation.

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

12. Evidence was presented in this matter at level four concerning an investigation into personal notes, register tape records, video tapes, etc., which dealt with the allegation of interfering with the investigation; these allegations have no basis for consideration in this grievance as it was not a grounds for dismissal.

13. The employees in the Beckley Regional Office did not get along well, and they had not gotten along for a number of years before Ms. White was named Manager. Ms. Parsons reported that her investigation revealed that the environment in the office had been bad for a long time, even as far back as Susan Hubbard, the first Manager who opened the office.

14. Ms. Parsons reported that Ms. Ballenger was stung by a bee while at work, and she is allergic to bee stings. Ms. Ballenger asked Grievant if she could leave, and Grievant told her she would have to check the schedule, that they were short-handed. Grievant then left work without telling Ms. Ballenger whether she could leave. Ms. Ballenger went to Ms. White, and Ms. White allowed her to leave. Grievant indicated that she had no recollection of this incident, the date of which is not evident from the record.

15. CSR Joann Flynn reported that Michelle 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.

16. 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.

17. Grievant did refer some questions from the CSRs to Ms. White. This action was somehow viewed by Grievant's co-workers as an attempt to undermine Ms. White's authority. Grievant acknowledged that she felt it was necessary to obtain Ms. White's approval to sign off on drivers' license applications because of the strained working relationship.

18. Ms. White indicated that Grievant had refused to implement an inventory system as she was instructed to do. Ms. White counseled Grievant in April of 2006 concerning this inventory and audit process, and by May 2006, Ms. White believed the misunderstanding was rectified. That appears to be the only discipline imposed on Grievant prior to her dismissal.

19. Grievant's challenge to Ms. White's selection as Manager created friction in the Beckley Regional Office, which was already overloaded with personality conflicts. As the grievance hearing date approached and the investigation by Ms. Parsons ensued, the result was that pending grievances were put on hold and employees were prevented from filing additional complaints pending the outcome of the investigation. The resulting acrimony among co-workers reached the melting point in the Beckley Regional office.

20. The evidence presented in this matter can be traced down two distinct and separate paths, CSRs that were unfavorable to Grievant and an equal number of CSRs that were favorable to Grievant; demonstrating that there were in fact two clearly established cliques which existed at the Beckley Regional Office.

21. Grievant had been promoted by Respondent three times since 2000.

22. Grievant's most recent performance evaluation, for the period June 2005 to December 2005, was completed by Ms. White. Grievant's performance was rated as "meets expectations" in all categories. Ms. White commented on the evaluation that Grievant is "knowledgeable in motor vehicle law. She is also familiar with the division's policies and procedures. She has an excellent working knowledge of the division's computer system and our new camera system." Ms. White noted "in the coming year the management staff will work on personnel issues and employee morale." Grievant responded that "I agree we need to work on personnel issues & employee morale. Improve on management issues together."

**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. *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 & 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.*

Permanent state employees who are in the classified service can only be dismissed for “good cause,” meaning “misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.” Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965).

Grievant, as a permanent 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 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 dismissal letter goes on to allege that an investigation concluded that Grievant's actions consistently did not support Ms. White or assist with the daily operations. As in the companion case, the letter fails to identify particular persons, times, or specific incidents. Respondent used the broad language in the dismissal letter to present testimony about events that had nothing, or very little, to do with a hostile working environment, favoritism, or Grievant acting in a way that did not support the manager or assist with the daily operations of the agency. 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).

Respondent asserts that Grievant provided preferential treatment to select employees in the form of longer breaks and lunches. WEST VIRGINIA CODE § 29-6A-2(h) defines "Favoritism" as:

> [U]nfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employee.

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 that only Michele Gallaher took longer than allotted lunch breaks, and no specific number of times that this was permitted appears in the record. Moreover, Ms. Parsons' investigation revealed that violations in

longer breaks and lunches occurred among most employees and had been the case since the opening of the Beckley Regional Office.

Ms. Gallaher apparently had a pattern of leaving her station to go to the restroom after she clocked back in from break, which upset her co-workers. However, nothing prohibited her from doing this. In addition to this behavior, Ms. Gallaher also took longer breaks than she was allowed, but it appears this was the case for a long time and all members of the management were aware of this conduct. Various memos were circulated by management concerning issues of time abuse, phone abuse, and various directives concerning the chain of command. Despite such directives, the employees in the Beckley office ignored the admonitions of management. Grievant acknowledged the need to work with management concerning these personnel issues in her last performance appraisal. Before meaningful change could be made in this effort, Grievant was dismissed some three months later. This course of conduct hardly seems fair, especially in light of the fact that Respondent acknowledged that consideration was given to imposing progressive discipline on Grievant; however, this option was abandoned because of the determination that “conditions in the Office had become so egregious that the Office may not be able to stay open for even another week.” Level three hearing testimony of Pete Lake, October 28, 2008. An odd assertion since Respondent’s own investigation revealed such conditions had been in existence since 2000. In any event, the charge of favoritism has not been proven.

Respondent asserts Grievant created a hostile work environment when employees complained to Grievant about favoritism. The Grievance Board has long stated that "[t]o create a hostile work environment, inappropriate conduct must be sufficiently severe or

pervasive to alter the conditions of an employee's employment." *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998). *See Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995). Whether a working environment is hostile or abusive can be determined only by looking at all of the circumstances. *See Spencer v. Bureau of Employment Programs*, Docket No. 98-HHR- 130 (Jan. 29, 1999). Certainly, any act might be construed by someone as harassing, hostile, disruptive, or offensive. In determining whether a hostile environment exists, the totality of the circumstances must be considered from the perspective of a reasonable person's reaction to a similar environment under similar or like circumstances. *Lanehart v. Logan County Bd. of Educ.*, Docket No. 97-23-088 (June 13, 1997).

Certainly, an employer is entitled to expect its employees to conform to certain standards of civil behavior. *Redfearn v. Dep't of Labor*, 58 MSPR 307 (1993). All employees are "expected to treat each other with a modicum of courtesy in their daily contacts." *See Fonville v. DHHS*, 30 MSPR 351 (1986)(*citing Glover v. DHEW*, 1 MSPR 660 (1980)). Abusive language and abusive, inappropriate, and disrespectful behavior are not acceptable or conducive to a stable and effective working environment. *Hubble v. Dep't of Justice*, 6 MSPR 659, 6 MSPR 553 (1981). *See Graley v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 99-PEDTA-406 (Oct. 31, 2000).

Respondent’s examples to support their assertion of harassment and the creation of a hostile work environment are rather limited. Only two employees testified that they had complained to Grievant of favoritism and then allegedly suffered adverse consequences. The two employees, Mr. Matheny and Ms. McKinney, had also filed

grievances concerning the matter which were put on “hold” pending this investigation. Short circuiting the normal grievance procedure only served to increase the environment of acrimony in the office.

It is clear from the record that the employees in DMV’s Beckley Regional Office did not get along. It is also clear that this has been the case for many years. In fact, much of the evidence 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, the grievance over the selection of Ms. White to the position of manager created tension in the office, however, this grievance was litigated and the parties moved on. It also appears that the CSRs blamed Grievant for decisions made by those in management above her, and were not terribly concerned about gathering facts before rushing to judgement. This can be attributed to poor communication by Grievant’s supervisors as well as the high turnover in personnel since the opening of the office in 2000.

Furthermore, Grievant had expressed complaints to Ms. Parsons during the course of the investigation that a certain unjustified belief by co-workers was inhibiting her ability to serve as Supervisor, however, this complaint by Grievant was not considered valid. To the contrary, Mr. Matheny and other CSRs testified that they would not deal with Grievant for fear of losing their jobs. Ms. White was made aware of this misconception yet the record is silent as to addressing this matter other than assuring the CSRs that they were not correct.

Respondent did not demonstrate that Mr. Matheny was treated poorly by Grievant because he complained about Mr. Gallaher’s long lunch break. It appears to the undersigned that Mr. Matheny, Ms. McKinney and Grievant simply did not get along, and

no doubt Grievant may have been short with them at times, but this had nothing to do with their complaints.

CSR Joann Flynn described the situation in the office as the existence of a known "good clique" and a "bad clique," which she stated she was made aware of her first day of employment. She further described the "cliques" as the "managers' clique" and the "supervisor/lead's clique." Ms. Flynn further testified to a period of time during which the Grievant was off work due to illness for several months. During this period of time, Ms. Flynn was made a temporary lead. Ms. Flynn indicated that CSRs treated her poorly, and that all kinds of stuff went on in the office during this time. Ms. Flynn made it clear that Grievant never treated her badly nor created a hostile environment for her. Respondent seeks to establish this allegation by presenting sweeping, conclusive testimony consisting of representations that employees felt uncomfortable, were stressed out, and tension ran high. The lack of particulars offers the undersigned little in the way of evidence in support of the allegation. Once again, begging the question as to whether or not Grievant was the primary cause of the problems in the office. This charge has not been proven.

Finally, Respondent alleges that Grievant, by her actions, consistently did not support Ms. White or assist with the daily operations. A review of Grievant's evaluations for the years 2004 through 2006 clearly indicate that this in not true. The managers filling out the various evaluations made no such comment concerning any lack of support or assistance. While Ms. White did indicate that she was having difficulty with Grievant over some accounting mistakes, she further explained that after counseling with Grievant the matter was resolved. The record does reflect a limited incident in which Ms. White changed a license application authorization of Grievant, which caused some friction

between the two. Ms. White apologized to Grievant about the misunderstanding and the matter was resolved. Nevertheless, the communication problem created a time when Grievant was being attacked by CSRs for not answering their questions. This was a direct result of the Grievant's perception that certain questions relating to management decisions needed to go through the manager of the office. This is a reflection of the office environment, not a reflection of Grievant failing to assist with the daily operations of the agency. This charge has not been proven.

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. *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 & 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.*

2. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1,

*Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965).

3. The Grievance Board has long stated that "[t]o create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment." *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998). *See Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995). Whether a working environment is hostile or abusive can be determined only by looking at all of the circumstances. *See Spencer v. Bureau of Employment Programs*, Docket No. 98-HHR- 130 (Jan. 29, 1999). Certainly any act might be construed by someone as harassing, hostile, disruptive, or offensive. In determining whether a hostile environment exists, the totality of the circumstances must be considered from the perspective of a reasonable person's reaction to a similar environment under similar or like circumstances. *Lanehart v. Logan County Bd. of Educ.*, Docket No. 97-23-088 (June 13, 1997).

4. Respondent did not prove the allegations against Grievant by a preponderance of the evidence.

For the foregoing reasons, this grievance is hereby **GRANTED**. Respondent is **ORDERED** to reinstate Grievant to her previous position, and to compensate her for all back pay and benefits to which she is entitled, with legal interest on any back pay. Grievant's request for attorney's fees is denied.[4]

---

[4]"It is well established that the Grievance Board does not have the authority to award attorney fees. *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June 21, 1996).

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,* see footnote 1, *supra*). 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.

**Date: May 22, 2009**

_____

**Ronald L. Reece**
**Administrative Law Judge**