**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**CHARLENE HONAKER,**
**Grievant,**

**v.** **Docket No. 2008-1511-DHHR**

**WEST VIRGINIA DEPARTMENT**
**OF HEALTH AND HUMAN RESOURCES,**
**Respondent.**

## DECISION

Grievant, Charlene Honaker, filed a grievance against her employer, West Virginia Department of Health and Human Resources ("DHHR"), on April 29, 2008. The statement of grievance reads, "4/28/08 terminated without good cause."

For relief Grievant seeks, "Reverse the termination. Grievant requests to be made whole, including lost wages, tenure, benefits." A level three hearing was held on March 19, 2009, in the Grievance Board's Charleston Office. Grievant was represented by Gordon Simmons, Representative, UE Local 170, West Virginia Public Workers Union, and Respondent was represented by Allen Campbell, Senior Assistant Attorney General. This case became mature for decision on April 21, 2009, upon the parties' submission of findings of facts and conclusions of law.

## Synopsis

Grievant was suspended on April 28, 2008, for failure to maintain a current driver's license. Respondent asserts Grievant did not disclose this information to anyone, and during the time of the suspension, she was driving a state car and transporting children who were in DHHR custody.

Grievant avers she was terminated without good cause. She argues she did not know her license was suspended. She also asserts the suspension was a mistake on the part of the Department of Motor Vehicles (DMV).[1]

Respondent has met its burden of proof in this matter. This grievance is denied.

**Findings of Fact**

1. Grievant was employed by DHHR as a Health and Human Services Aide in the Cabell County office for four years. The primary duty for a Health and Human Services Aide is to transport children.

2. While Grievant worked for DHHR, she was supervised by Harper Thacker, Child Protective Services Supervisor.

3. All DHHR employees are required to complete a form verifying they have an annual vehicle inspection, current registration card, current driver's license and current insurance card. Grievant completed this document and signed it on January 7, 2008.

4. On April 8, 2008, it was brought to Ms. Thacker's attention that Grievant 's driver's license was suspended.[2]

5. Ms. Thacker immediately took this information to her supervisor, Hope Smith, Social Services Coordinator.

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[1]On April 20, 2009, the undersigned received a Motion to Admit Evidence from Grievant's representative. Attached to the Motion was a printout from the City of Huntington Municipal Court. Grievant alleges this shows her insurance ticket was dismissed. Since it was submitted after the close of evidence, it will not be considered in this decision. However, it should be noted that it does indicate her license was suspended on September 26, 2007, and remained so until April 8, 2008.

[2]From the testimony, it appears as if someone working in Child Support was verifying addresses from the Department of Motor Vehicles. The worker searched for Grievant's daughter's information and discovered Grievant's license was suspended.

6. At the time of this discovery, Grievant was transporting a child in a state car. Ms. Thacker reached Grievant on her cell phone, explained the issue and asked her to pull off the road immediately.

7. Two other workers were sent to assist Grievant, one to take the child to his destination and the other to bring Grievant back to the Cabell County office to address the driver's license issue.

8. When Grievant returned to the office, she met with Ms. Thacker and Ms. Smith.

9. Ms. Smith directed Grievant to leave for the rest of the day to deal with the situation.

10. The next day, Grievant returned to work with a copy of her driver's record from the Department of Motor Vehicles. Grievant's driver's record showed that her license had been suspended from October 5, 2007 to November 4, 2007, for Mandatory Insurance. The document also showed Grievant's license was suspended for an unpaid citation. That suspension began on October 27, 2007 and ended on April 8, 2008.

11. The driver's record also showed Grievant had received a speeding ticket in Charleston, West Virginia, on January 19, 2006. This ticket was never disclosed to Grievant's supervisors at DHHR.

12. After reviewing Grievant's driver's record, Ms. Thacker and Ms. Smith began to review both the State Car Schedule and Grievant's Sign-In/Out Log.

13. On the date of the unreported speeding ticket, January 19, 2006, Grievant was driving the state car to transport an infant to Alderson, West Virginia. She signed out of the office at 8:00 a.m. and returned at 7:30 p.m.

14. Grievant drove the state car on numerous occasions between November 1, 2007, and February 29, 2008, while her license was suspended.

15. Respondent follows the progressive discipline policy.

16. Before deciding the appropriate discipline in this case, Respondent took into consideration Grievant's tenure with DHHR. It also looked at her disciplinary record.

17. Prior to this incident, Grievant was suspended on August 18, 2005, for breach of confidentiality. Grievant had also been given a written reprimand for forwarding a chain email letter from her work computer.

18. On April 28, 2008, Grievant was terminated from her position.

**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 & 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.*

Respondent asserts Grievant has been driving the state car and transporting children without auto insurance and a valid driver's license. To prove its assertion, Respondent introduced Grievant's driver's record. Grievant asserts the alleged suspension was the result of a mistake, that she did not drive without insurance and was unaware the

DMV showed her license was suspended. Grievant introduced two insurance cards that indicate she had a valid policy during the time period in question.

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dept. of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dept. of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). The undersigned is charged with assessing the credibility of the witnesses, and where the evidence has been submitted on the record, this is an especially difficult task, as the undersigned has not had the opportunity to observe the witness' demeanor. Nevertheless, demeanor is only one of the factors to be considered in assessing the credibility of a witness. Other factors include the witness' opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the trier of fact should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of witness' information. *See Perdue v. Dept. of Health & Human Res.*, Docket No. 93-HHR-050 (Feb. 4, 1994).

Respondent introduced Grievant's driving record into evidence. That document clearly shows Grievant's license was suspended for not having insurance and for an unpaid citation. Grievant testified that she received a ticket for running a stop sign in 2007, and at that time, she was charged with not having insurance because she could not find her insurance card. She further testified that because of the hours she works, it was difficult for her to get to the courthouse to take care of the ticket. Therefore, she gave the

ticket to her husband. When faced with documentary evidence that appears to contradict each other, the undersigned must turn to the testimony. That requires a credibility determination.

Ms. Thacker and Ms. Smith both testified that Grievant admitted her insurance lapsed for a short period of time but Grievant thought her husband had taken care of the problem. According to Ms. Thacker and Ms. Smith, Grievant never indicated there had been a mistake on her driver's record. Grievant counters this testimony by introducing two insurance certificates showing continuing coverage from April 14, 2007, to April 14, 2008, and asserting, based on those certificates, there had to be a mistake at the DMV.

When questioned by Respondent, Grievant said the auto insurance was paid every three months, and upon receipt of the payment, the company then sent an insurance card. However, the insurance card covers a period of six months. This inconsistency is of great concern to the undersigned.

Grievant also testified that her husband had taken care of the ticket from the stop sign incident. When pressed on what her understanding of that meant, she was unable to provide any specific information. Yet, she did testify that the court told her she owed a fine on the stop sign ticket, which comports with the portion of her driver's record that showed Grievant's license suspended for an unpaid citation.

Lastly, Grievant continually asserted she did not remember the speeding ticket from January 19, 2006. Yet, she admitted the speeding ticket and the stop sign violation were the only driving citations she had received in her years of driving. While the time of the speeding citation was not definitively established, given that Grievant spent approximately eleven hours working that day, it is more likely than not that she received this citation while

transporting an infant in the state car. It is also something she should have disclosed to her supervisors.

Clearly Grievant has an interest in the outcome of this case, as her livelihood is at stake. However, the undersigned is given pause when looking at the inconsistency between her testimony and the documentary evidence, along with the fact that she never told her superiors that DMV had made a mistake. While the undersigned acknowledges the possibility of a mistake by DMV, she finds it highly unlikely given the testimony and the documentary evidence.

James Kimbler, Regional Director for DHHR, testified that given the other instances of Grievant's misconduct, there were serious questions about Grievant's judgement. This was compounded by the fact that a majority of her duties required her to be out in the field transporting children in the state car. Given the inconsistent testimony from Grievant, the undersigned can fully understand Mr. Kimbler's concern.

Respondent has met its burden and has proved the charges against Grievant by a preponderance of the evidence. Therefore, this grievance is denied.

**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). "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. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dept. of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dept. of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). The undersigned is charged with assessing the credibility of the witnesses, and where the evidence has been submitted on the record, this is an especially difficult task, as the undersigned has not had the opportunity to observe the witness' demeanor. Nevertheless, demeanor is only one of the factors to be considered in assessing the credibility of a witness. Other factors include the witness' opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the trier of fact should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of witness' information. *See Perdue v. Dept. of Health & Human Res.*, Docket No. 93-HHR-050 (Feb. 4, 1994).

3. Respondent has proved its allegations by a preponderance of the evidence.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of

the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

**DATE: April 30, 2009**

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**Wendy A. Campbell**
**Administrative Law Judge**