THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LISA Y. YERRID,

Grievant,

v. **Docket No: 2009-1692-DOT**

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION / DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant Lisa Yerrid is employed by the West Virginia Department of Highways ("DOH"). She is classified as an Office Assistant 2 and assigned to the Claims Section of the DOH Legal Division. Ms. Yerrid received a two-day suspension without pay for making a comment in the workplace that was allegedly intended to intimidate a coworker. The suspension took place on June 16 and 17, 2009. On June 30, 2009, Ms. Yerrid filed a grievance contesting her suspension and as relief she sought:

> Removal of suspension of June 16th & 17th 2009 and all record of disciplinary action from my personnel file. Payment of lost wages with interest and restoration of all benefits lost due to the disciplinary action.

Because this grievance was contesting a suspension without pay Grievant was able to waive levels one and two and proceed directly to level three.[1] A level three hearing was held at the Charleston office of the West Virginia Public Employees Grievance Board on November 19, 2009. Grievant appeared in person and was represented by Cindy

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[1] *See* W. VA. CODE § 6C-2-4 (a) (4).

Dougherty. Respondent was represented by Jennifer Alkire, Esquire, from the DOH Legal Division. Following the hearing, the parties agreed that they would each submit Proposed Findings of Fact and Conclusions of Law. These were both received at the Grievance Board office on December 18, 2009. The grievance became mature for decision on that date.

Synopsis

Grievant was suspended for two days for making a comment to a coworker (Anne Campbell) about cleaning her gun and going to target practice. Respondent alleged that Grievant made the comment loud enough to be overheard by a different coworker (Melissa Carte) and with the specific intent to harass and intimidate Ms. Carte. Grievant does not deny talking to Ms. Campbell about her gun but contends that this discussion was not related to or intended for Ms. Carte. There existed some animosity in the office among the staff including the relatively new supervisor. However, Respondent did not prove by a preponderance of the evidence that the comment made by Grievant was intended to intimidate Ms. Carte. Consequently, the grievance is granted.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant Lisa Yerrid is employed by the DOH in the Claims Section of the Legal Division. She is Classified as an Office Assistant 2 and has worked in the Claims Section for five years.

2. Other DOH employees in the Claims Section include: Michael Vasarhelyi, Manager; Melissa Carte, Paralegal; Annie Campbell, Office Assistant 3; and Shelby Sharps, Investigator. There are other employees who work with the Claims Section but these are the employees who are in the office on a daily basis.

3. In December 2006, Grievant's home was burglarized and shortly thereafter she purchased a handgun. Charleston Police Department Sergeant Duke Jordan instructed Grievant in the proper use of a firearm and helped her with target practice.

4. Annie Campbell is an avid hunter and is interested in firearms. She and Grievant often discuss the use of firearms and sometimes discuss handguns with investigators who were previously employed in other law enforcement departments.

5. Melissa Carte also owns a handgun for personal protection and has mentioned it to Shelby Sharpe. Discussions related to firearms are a fairly common occurrence in the DOH Claims Section.

6. On May 13, 2009, Melissa Carte and Grievant had an encounter regarding a work issue. Grievant and Ms. Campbell had both been absent on Friday, May 8, 2009. No one took care of the "verbals"[2] on that date, leaving them for Ms. Campbell to be done upon her return. Ms. Campbell and Ms. Carte were standing at the filing cabinets at the front of the Claims office when Grievant approached and asked Ms. Carte why she had not

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[2] When an accident occurs or property is damaged in a district of the DOH someone from the district calls the Claims Section. The Claims Section staff person opens a file and gives the claim a number for the district to use on all forms and documents related to the incident. This process is referred to as "verbals." The Claims Section staff had been told that keeping the verbals done was a high priority since processing of claims was dependent upon having the verbal number. The standard practice was for someone to take over this duty when other employees were absent.

done the verbals when she and Ms. Campbell were absent. After a brief exchange, Ms. Carte stated that someone in the office is always Grievant's target and asked if she was going to be Grievant's target next week.

7. After this exchange, Ms. Carte returned to her cubicle and Grievant went to Ms. Campbell's cubicle. About three minutes after the discussion with Ms. Carte, Grievant told Ms. Campbell that she was considering doing some target practice and asked about cleaning her gun. Ms. Sharps told Grievant that she had a gun and asked where she could practice. Grievant told her she went to the gun club. At that point, Ms. Carte spoke up and Grievant shouted at Ms. Carte that Grievant was not talking to her or about her.[3]

8. Melissa Carte filed a written complaint with her supervisor about the statements made by Grievant on May 13, 2009. Ms. Carte alleged that Grievant's statements about her gun and target practice were intended to intimidate her. She believed that the statements were allusions to her question about who would be Grievant's target for abuse the next week and claimed that she was in fear for her safety.

9. Upon the advice of the Director of the DOH Legal Division, Manager Vasarhelyi asked Grievant, Ms. Carte, Ms. Campbell and Ms. Sharps to give statements about the May 13, 2009 incident to Randall Blevins. Respondent's Exhibits 1, 2, & 3.

10. After reviewing the statements, Manager Vasarhelyi recommended to the Director of the DOH Legal Division, Anthony Halkias, that Grievant be suspended for three days without pay. Director Halkias passed that recommendation on to Jeff Black, the DOH Director of Human Resources.

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[3] None of the witnesses remembered what Ms. Carte said at this point but all except Ms. Carte noted that Grievant told Ms. Carte that she wasn't talking to her.

11. Director Black reviewed the statements and held a predetermination meeting with Grievant. Following the predetermination meeting he interviewed Melissa Carte and one other witness. He also received a second recommendation from Director Halkias that the suspension be reduced from three days to two.

12. On June 10, 2009, Director Black issued a letter to Grievant suspending her for two working days without pay. The reason stated for the suspension was the following:

> On May 13, 2009, after a dispute with a coworker about billing you immediately yelled to another employee asking her whether you needed to "clean your gun before target practice". You continued this inappropriate discussion about guns, the effect of which was to intimidate the coworker.

Respondent's Exhibit 7.

13. Both Ms. Sharps and Ms. Campbell testified that the discussion regarding target practice took place after the discussion between Grievant and Ms. Carte regarding the verbals. Both of these witnesses stated that the target practice discussion was unrelated to the encounter related to the verbals and was consistent with prior discussions regarding guns that had routinely taken place in the office.

14. There has been a history of frequent bickering among the employees of the Claims Section for a period of years.

15. Shortly after the incident on May 13, 2009, Ms. Carte requested to move her workplace to another Section on a different floor from Grievant and that request was granted. Ms. Carte comes to the Claims Section several times a day to conduct business and works with the employees of the Claims Section with no indication of concern or sign of trepidation.

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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence 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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant was suspended for making a comment about cleaning her gun before target practice which was alleged to have been made for the purpose of intimidating a coworker. Respondent alleges that Grievant's conduct violates the DOH Administrative Operating Procedures related to Disciplinary Action Section II related to Standards of Work Performance and Conduct. Director Black specifically referred to the following sections:

> 3. Maintenance of high standard of personal conduct and courtesy in dealing with the public, fellow employees, subordinates, supervisors, and officials;
>
> 10. Refusal to engage in insulting, abusive, threatening, offensive, defamatory, harassing, or discriminatory conduct or language and prompt reporting of the same to the appropriate authority;

Respondent's Exhibit 6, pages 2 & 3.

Director Black stated that as a practice, the DOH did not allow discussion of firearms in the workplace. He opined that employees have such strong and differing views on the subject that the discussion of guns was disturbing and disruptive and therefore discouraged. However, no specific policy or written procedure was sighted for that proposition. Director Black conceded that discussions regarding hunting and gun sports were common in the workplace and not inappropriate in the proper context. Respondent contends that Grievant's discussion of guns in this context was improper because it was intended to be threatening and abusive to Ms. Carte in violation of established standards for work conduct. *See* Respondent's Exhibit 6, *supra.*

Grievant does not deny that she had sharp words with Ms. Carte over the verbals not being completed when she and Ms. Campbell were absent. Grievant also admits that she had a discussion with Ms. Campbell regarding target practice and cleaning her gun. Grievant contends that the two conversations were totally unrelated. There is ample evidence that discussions related to the care and use of firearms was not uncommon between Grievant and Ms. Campbell. Further, Ms. Sharps and Ms. Carte sometimes joined in these conversations. The key issue is whether Grievant's gun discussion was intended to intimidate and harass Ms. Carte or merely just another of the general conversations that have taken place with some regularity. This point is demonstrated by the following portion of Director Black's testimony:

> **Question:** If others were to testify that there were two or three minutes between the dispute and the discussion about target practice and they [the witnesses] were not sure they [the discussions] were connected, would you have viewed the disciplinary action differently?
>
> **Answer:** Yes.

> **Question:** What difference would it have made?
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> **Answer:** What I was looking for was to determine whether there was a connection and interaction with Ms. Carte and this statement that she was making and whether there was a lapse of time before she made this statement. That would have been important to me. My conclusion was that they were connected.

There were four people present when these conversations took place and their accounts are essential for Respondent to prove that Grievant's comment about target practice was made with the intention of threatening Ms. Carte. The Grievance Board has applied the following factors to assess a witness's testimony: (1) demeanor; (2) opportunity or capacity to perceive and communicate; (3) reputation for honesty; (4) attitude toward the action; and (5) admission of untruthfulness. Additionally, the administrative law judge should consider (1) the presence or absence of bias, interest or motive; (2) the consistency of prior statements; (3) the existence or nonexistence of any fact testified to by the witness; and (4) the plausibility of the witness' information. *See Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth.,* Docket No. 2009-1588-DOT (Dec. 1, 2009); *Elliott v. Div. of Juvenile Serv.,* Docket No. 2008-1510-MAPS (Aug. 28, 2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD- 216 (Dec. 28, 1999).

With regard to the first set of criteria, all four witnesses testified in a generally calm and reasonable manner. It was clear that there is tension between the coworkers as well as their supervisor, but there was nothing about their demeanor that indicated deception. Additionally, no evidence established that any of the witnesses had a reputation of prevarication and all of the witnesses were in a position to observe the events that led to the disciplinary action.

The second set of criteria is more useful. Both Grievant and Ms. Carte have potential bias. Grievant obviously wishes to escape discipline. Ms. Carte's bias is more subtle. First her dislike for Grievant is apparent. Next, all three of the other coworkers believed that Ms. Carte makes a special effort to curry favor with Manager Vasarhelyi. Grievant and Manager Vasarhelyi have had disputes in the past and her coworkers speculated that Ms. Carte may have overreacted in this situation because it would be supportive of Manager Vasarhelyi. This theory is given some weight by Ms. Carte's written statement which begins by stating the incident started with a meeting the day before after which she states:

> Two employees of the Claims Section became upset and blamed Mike [Vasarhelyi] for the re-organization of the WVDOH which placed the Legal Division under the Business Manager. Lisa [Grievant] immediately began to scheme to cause t

Respondent's Exhibit 1. This was the only statement regarding the previous day's meeting made by any of the witnesses and does indicate an effort to implicate Grievant as someone trying to undermine her boss. Additionally, Ms. Carte was confronted by Grievant about a work issue prior to Grievant's statements about target practice and her hard feelings about the prior confrontation may have influenced her recollection.

Because of the apparent bias on the part of both Grievant and Ms. Carte, the accounts of the two coworkers who were not involved in the original argument are given greater weight. Ms. Campbell and Ms. Sharps gave written statements shortly after the incident. In addition to their description of the events leading to Grievant's suspension, each recounted a separate incident where she had a confrontation with Grievant. However, both coworkers testified that the incidents had happened years ago and were satisfactorily resolved between each of them and Grievant. Respondent did not consider

these prior events in the decision to suspend Grievant.[4] The testimony of Ms. Campbell and Ms. Sharps regarding the actual incident was generally consistent with their written statements.

They both indicated that the incident about the verbals occurred in the front of the office near the file cabinet. After that encounter, Ms. Carte went to her desk and Grievant went toward her own desk near Annie Campbell. Ms. Campbell said there was a time gap of about three minutes between the incident at the filing cabinet and Grievant's discussion regarding target practice. She specifically stated that Grievant was talking to her. Additionally, Grievant and Ms. Carte were no longer in close proximity.

In her testimony, Ms. Sharps was specifically asked if she thought the discussion about target practice was related to the discussion about the verbals and she responded: "[n]o, Lisa just says things from time to time." Both Ms. Sharps and Ms. Campbell state that they were not bothered by the gun discussion and were surprised that Melissa was. As Ms. Campbell put it: "[t]here was nothing threatening about Lisa's statement because we talk about this stuff all the time. I didn't think anything of it."

Ms. Carte was the only person to state that the comment regarding target practice came immediately after the Verbals discussion. This statement is inconsistent with the testimony of the other witnesses. Additionally, Ms. Carte stated that Grievant yelled the

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[4] The written statements of both Ms. Campbell and Ms. Sharps contained a much more negative tone toward Grievant than they exhibited in their sworn testimony. However, the negativity was generally related to their prior difficulties with Grievant. Further, their factual accounts of the incidents that led to the suspension were consistent in both the statements and their testimony. Sadly, none of the eye-witnesses were without some indication of bias and the credibility determination herein is more a matter of degree than a conclusion that some witnesses were credible and others were not.

target practice comment “across the room to Annie.” Yet all of the other witnesses stated in writing and in testimony that Ms. Carte had gone back to her desk and Grievant had gone over to Ms. Campbell’s area before mentioning target practice. Given these disparities, Ms. Carte’s account lacks credibility.

Ms. Carte complained that Grievant’s comments created a hostile work environment. While this is not strictly a hostile environment case, some guidance is helpful in the case law surrounding that issue. In making a determination about whether the accused conduct creates a hostile environment, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiffs position, considering all the circumstances." *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 81,118 S.Ct. 998, 140 L.Ed.2d 201 (1998). Given the testimony of the eye-witnesses to this encounter, the circumstances were not such that a reasonable person would have been threatened by Grievant’s conduct.

Respondent carries the burden of proving the reasons for the discipline by a preponderance of the evidence. Respondent suspended Grievant because her comments about target practice with her gun were inappropriate and intended to intimidate her coworker. While only Grievant knows what was in her mind when making these statements, Respondent failed to prove that it was more probable than not that those statements were abusive, threatening, or harassing to her coworkers. In fact, the statements appear to be in line with typical conversations that take place in the office. Accordingly, the grievance is GRANTED.[5]

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[5] Respondent was legitimately concerned about an atmosphere of discord among the Claims Section employees. While this particular disciplinary action is not upheld, the

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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence 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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. In grievance hearings, the following factors are applied to assess a witness's testimony: (1) demeanor; (2) opportunity or capacity to perceive and communicate; (3) reputation for honesty; (4) attitude toward the action; and (5) admission of untruthfulness. Additionally, the administrative law judge should consider (1) the presence or absence of bias, interest or motive; (2) the consistency of prior statements; (3) the existence or nonexistence of any fact testified to by the witness; and (4) the plausibility of the witness' information. *See Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth.,* Docket No. 2009-1588-DOT (Dec. 1, 2009); *Elliott v. Div. of Juvenile Serv.,* Docket No. 2008-1510-MAPS (Aug. 28, 2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD- 216 (Dec. 28, 1999).

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workers in that section would be well advised to find a way to work cooperatively and professionally with each other and their supervisor.

3. Respondent did not prove by a preponderance of the evidence that Grievant made inappropriate comments regarding target practice with the intent to intimidate, harass or abuse her coworker.

Accordingly the grievance is GRANTED. Respondent is ORDERED to remove the two-day suspension from Grievant's personnel file, to pay her for the two days she was suspended without pay, and to restore any other benefits she lost as a result of this suspension.

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: MARCH 26, 2010

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE