THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

AMY RIZER,
Grievant,

v. **Docket No. 2011-0606-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR CHILDREN AND FAMILIES,
Respondent.

DECISION

Grievant, Amy Rizer, is employed by Respondent, Department of Health and Human Resources/Bureau for Children and Families. On October 26, 2010, Grievant filed this grievance against Respondent stating, "A written reprimand/corrective action given without good cause. For relief, grievant seeks "[t]o be made whole, including withdrawal of written reprimand/corrective action."

Following the December 14, 2010 level one hearing, a level one decision was rendered on January 5, 2011, denying the grievance. Grievant appealed to level two on January 6, 2011. Grievant perfected the appeal to level three of the grievance process on August 1, 2011. The parties then agreed to waive a level three hearing and submit the case on the level one record. This matter became mature for decision on October 19, 2012, upon final receipt of Grievant's written Proposed Findings of Fact and Conclusions of Law and Respondent's exhibits.

Synopsis

Grievant, with an angry and out-of-control demeanor, made a disturbing statement to a co-worker, for which she was disciplined with a written reprimand. Respondent proved the misconduct, but incorrectly labeled the nature of the misconduct in the written reprimand. It is the conduct and not the label attached to it that is

important when determining if the discipline is proper. The written reprimand was proper, and Grievant did not prove that the level of discipline was disproportionate to the offense or otherwise arbitrary and capricious.

Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is employed by the Respondent in the Mason County office of the Bureau for Children and Families.[1]

2. On September 15, 2010 and September 30, 2010, Grievant did not receive her regularly-scheduled paycheck. Both paychecks were delayed by some days because Grievant had been excessively absent and had gone off payroll as she had run out of leave time. Grievant was on an improvement plan due to her attendance issues.

3. When Grievant did not receive her paycheck on time on September 30, she began making phone calls and inquiries regarding her missing paycheck and complained to her coworkers about the situation. This continued into the next day, October 1. Grievant "talked about her paycheck all day"[2] and "didn't get much else done"[3] either day.

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[1] Grievant's job title was not disclosed on the grievance form nor does it appear elsewhere in the record.

[2] Level One Record at 29, Pierce Testimony

[3] Level One Record at 32, Grievant Testimony

4. At the end of the second day, Friday, October 1, 2010, Grievant was in the "smoke shack[4]" with a co-worker, Teresa Pierce. Grievant was very distraught, very upset, angry, and irate. She was screaming, yelling, and waving her arms. During this tirade, Grievant told Ms. Pierce that she was "going postal,"[5] she "couldn't live like this,"[6] and that she would "give them a reason to fire her."[7] She stated she did not have the gas money to get to work or to feed her children for the weekend. Grievant was not "within herself at that moment."[8]

5. Ms. Pierce's car was parked near the smoke shack and her two teenaged children were waiting in the car for her. The children overheard Grievant's statements and were crying and scared because they were afraid the Grievant was going to harm their mother.

6. Initially, Ms. Pierce was more concerned for Grievant and understanding of why she was upset, but after witnessing her children's reaction, she realized she needed to tell Grievant's supervisor about the incident. She was concerned enough that she contacted the supervisor, Peggy Gillespie, after business hours at home to report the incident with Grievant.

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[4] The "smoke shack" is a designated smoking area outside the DHHR building, adjacent to the parking lot.

[5] Level One Record at 22, Pierce Testimony. "Going postal" is a slang term for workplace violence that arose following a string of shootings in postal installations during the 1980's and 1990's. Associated Press, *Police Look for Motive in Deadly Postal Shooting*(January 31, 2006) *available at* http://www.msnbc.msn.com/id 11107022/ns/us_news-crime_and_courts/t/police-look-motive-deadly-postal-shooting/.

[6] Level One Record at 22, Pierce Testimony

[7] Level One Record at 27, Pierce Testimony

[8] Level One Record at 23, Pierce Testimony

7. When she made the report to Ms. Gillespie, Ms. Pierce did not want to get Grievant in trouble. Ms. Pierce was concerned for Grievant, but she was also "very unsure of what was happening because [Grievant] was so upset."[9] Ms. Pierce did not know what to think and did not know if something would happen or not.

8. Ms. Gillespie then reported the incident to Barbara Taylor, Community Services Manager. Ms. Taylor contacted Regional Director, James Kimbler, and it was decided that Ms. Taylor would meet with Grievant on Grievant's next day back to work to determine her state of mind.

9. Ms. Taylor and Ms. Gillespie met with Grievant on Tuesday, October 5, 2010, her first day of work for that week. After the time away from the office, Grievant had calmed down, and during the meeting admitted that her behavior had been inappropriate.

10. On October 13, 2010, Ms. Taylor issued a written reprimand to Grievant stating that her comments of going "Postal" and that "people did not know what you were capable of doing" caused a hostile work environment.

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

[9] Level One Record at 26, Pierce Testimony

No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Respondent issued a written reprimand to Grievant "due to your comments stating you were going to come into the office and go 'Postal', and that people did not know what you were capable of doing." Grievant denies she made these specific comments, but admits that she made some inappropriate comments. The alleged comments were made to a co-worker, Teresa Pierce, and there were no other witnesses to the exchange presented. 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 Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dept. of Health & Human Resources*, 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 Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994).

Grievant admits that she was very upset, angry, and frustrated on the day in question. She further admits that she does not "really remember the phrase" she used.[10] Obviously, Grievant would have a motive to lie, but in this instance it seems that Grievant's memory of the incident is simply less clear because of her state of mind at the time. However, her blanket denial that she made the statements, while at the same time stating she does not remember the phrase she used, is not credible. Ms. Pierce does not appear to have bias, interest, or motive to lie. In fact, she consistently seemed very sympathetic to Grievant and reluctant to cause her trouble. Additionally, she was certain in her testimony that Grievant made the statement she was going to go postal, and she also was very careful to say that she did not hear Grievant make the other statement. Ms. Pierce's version of the incident is more credible than Grievant's. Therefore, based on Ms. Pierce's testimony, Respondent did not prove that Grievant made the statement that "people did not know what [she was] capable of doing," but Respondent did prove that Grievant made the statement that she was "going postal."

Respondent asserted in the both the written reprimand and at the level one hearing that Grievant's statements created a hostile work environment. In addition, Respondent asserts that Grievant's actions over the entire two-day period disrupted the normal work environment and created a hostile work environment. Respondent provided no real evidence that Grievant's behavior disrupted the work environment. Neither Ms. Taylor nor Ms. Gillespie could provide any clear testimony on how the work environment was disrupted. Therefore, the proven conduct for which the undersigned

[10] Level One Record at 32, Grievant Testimony

must determine if the discipline was proper is the statement made to Ms. Pierce that Grievant was "going postal."

Respondent cited no specific policy in the reprimand, but used the phrase "hostile work environment." "Hostile work environment" is actually covered under the DOP Prohibited Workplace Harassment, and refers specifically to sexual harassment, which is not relevant to this case. The policy also refers to "nondiscriminatory hostile workplace harassment" which covers "unreasonable or outrageous behavior," but such behavior must be both "deliberate" and "repeated," which is not the case here. Although Respondent did not cite the appropriate policy in the written reprimand, what is important is whether Respondent properly disciplined Grievant for the proven misconduct and not the label attached to the misconduct. *See Russell v. Kanawha County Bd. of Educ.,* Docket No. 90-20-415 (Jan. 24, 1991); *Gillespie v. Kanawha County Bd. of Educ.,* Docket No. 90-20-496 (June 6, 1991*; Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997); *Brown v. Mercer County Bd. of Educ.,* Docket No. 98-27-113 (July 30, 1998); *Jordan v. Mason County Bd. of Educ.,* Docket No. 99-26-080 (July 6, 1999).

Grievant's behavior did violate DOP's "Workplace Security" policy for "threatening or assaultive behavior."

> Threatening or assaultive behavior will not be tolerated and must be resolved by managers/supervisors on a case-by-case basis. Any employee engaging in such behavior shall be subject to disciplinary action, up to and including dismissal. In determining whether an individual poses a threat or a danger, consideration must be given to the context in which a threat is made and to the following: the perception that a threat is real; the nature and severity of potential harm; the likelihood that harm will occur; the

> imminence of the potential harm; the duration of risk, and/or the past behavior of an individual.

Grievant characterized Respondent's decision to issue a written reprimand as an overreaction, but the reality is that people are killed in instances of workplace violence, and the potential for catastrophic harm requires an employer to take such statements very seriously even if it is unlikely that the threat is real. Grievant was distraught, screaming, was not "within herself at that moment." Grievant's behavior was extreme and, at the time she made the statement, she was out of control. Given the serious nature of Grievant's dispute with Respondent, including the dire consequence of being unable to feed her children, coupled with her completely out-of-control demeanor, this was a statement that had to be taken seriously. Grievant's statement cannot be explained away by saying that she was just venting. While Ms. Pierce was, and the undersigned is, sympathetic to Grievant's plight regarding her paycheck, the situation gives Grievant no right to make such a disturbing and inflammatory statement.

Grievant argues that there was no credible threat and that a counseling would have been sufficient discipline in this instance. An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ.,* Docket No. 94-01-394 (Jan. 31, 1995).

Grievant has not proven that the written reprimand was disproportionate to the offense or otherwise arbitrary and capricious. Discipline up to and including termination

is allowed under the violated policy. This Board has previously upheld written reprimands for threatening behavior in the workplace. *See Devault v. Division of Highways*, Docket No. 2010-0292-DOT (October 18, 2010) (angry over an assignment, the grievant told his supervisor "we'll settle it outside the gate"), *Hamilton v. Dep't of Health and Human Resources/Bureau for Medical Services*, Docket No. 2011-1751-DHHR (December 23, 2011) (the grievant threatened to shoot herself in the head, and co-worker was not certain if the comment was joking or serious). In fact, it may appear that in this instance the discipline was not severe enough. In her level one testimony, Grievant states she learned that "even though we're told that we are allowed to vent, we shouldn't."[11] Grievant still does not seem to understand that appropriate workplace venting does not include screaming and threatening to shoot people.

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). "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.*

[11]Level One Record at 37, Grievant Testimony

2. Respondent proved that Grievant made a statement that she was “going postal” to a co-worker, and that this statement was not made as a joke or simple venting as Grievant made the statement while she was very angry, screaming, and out-of-control.

3. Respondent proved the misconduct, which was a violation of a policy not cited in the written reprimand, and which was a serious matter necessitating discipline.

4. Although Respondent did not cite the appropriate policy in the written reprimand, what is important is whether Respondent properly disciplined Grievant for the proven misconduct and not the label attached to the misconduct. *See Russell v. Kanawha County Bd. of Educ.,* Docket No. 90-20-415 (Jan. 24, 1991), *Gillespie v. Kanawha County Bd. of Educ.,* Docket No. 90-20-496 (June 6, 1991*), Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997), *Brown v. Mercer County Bd. of Educ.,* Docket No. 98-27-113 (July 30, 1998); *Jordan v. Mason County Bd. of Educ.,* Docket No. 99-26-080 (July 6, 1999).

5. An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ.,* Docket No. 94-01-394 (Jan. 31, 1995).

6. Grievant has not proven that the written reprimand was disproportionate to the offense or otherwise arbitrary and capricious.

Accordingly, the 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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: December 4, 2012

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Billie Thacker Catlett
Administrative Law Judge