THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

KIMBERLY KAYE CALE,
Grievant,

v. **DOCKET NO. 2011-1711-WVU**

WEST VIRGINIA UNIVERSITY,
Respondent.

DECISION

Grievant, Kimberly Kaye Cale, filed this grievance against her employer, West Virginia University, on June 2, 2011, after she was notified that her employment was being terminated. The statement of grievance reads:

> Letter of termination, in the letter it stated there was a complaint filed by E-mail from a student passenger who rode on my van May 2, 2011. I was not given the right to defend myself or unable to know who my accuser is. On May 19th, 2011, I had a meeting with my supervi[s]or, acting Supervi[s]or and a represe[n]tative from Human Resources on this matter and I feel that I was unjustly termin[at]ed, also discriminated against for these reasons: (1) unable to see the complaint (2) read the complaint and (3) know who sent the complaint. Therefor I was unable to defend myself against these allegations.

As relief Grievant sought to have the dismissal reversed and to be returned to her job.

A conference was held at level one on June 20, 2011, and a level one decision denying the grievance was issued on July 8, 2011. Grievant appealed to level two on July 14, 2011, and a mediation was held on September 23, 2011. Grievant appealed to level three on September 28, 2011. A level three hearing was held before the undersigned Administrative Law Judge on February 6, 2012, in the Grievance Board's Westover office. Grievant appeared *pro se*, and Respondent was represented by Samuel R. Spatafore,

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 March 7, 2012.

Synopsis

Grievant's employment was terminated by Respondent based on allegations made in an email directed to an employee in the same department as Grievant. The person sending the email was not identified or called as a witness, nor was any explanation given for the failure to call this person as a witness. The record does not reflect that any investigation into the allegations was conducted, or even that the identity of the sender of the email was verified. These email allegations amount to unreliable hearsay which will not be considered by the undersigned. Respondent failed to prove the charges against Grievant.

The following Findings of Fact are made based on the evidence presented at level three.

Findings of Fact

1. Grievant began her employment with Respondent, West Virginia University ("WVU"), as a Bus Driver 1, on March 6, 2006. She worked in the Transportation Services Motor Pool Department, and drove a van transporting students with disabilities from their residences to class and back. She also had some parking enforcement duties.

2. On May 2, 2011, someone sent an email to Betty Golden, an employee in the Transportation Services Motor Pool Department at WVU, stating that Grievant "complains frequently about other employees, particularly Val. She talks incessantly on her cell phone, although the use of the bluetooth device has improved that, it still seems unsafe. Her

driving is often erratic and too fast, especially considering that her van does not have seatbelts. . . . Her defeatist attitude and attacks against Val are inappropriate and make me uncomfortable." The email provides no further detail regarding any of the allegations. The record does not reflect the identity of the person sending this email, this person was not called as a witness, and Respondent did not offer any explanation for the failure to call this person as a witness.

3. Ms. Golden forwarded the email identified in the preceding Finding of Fact to Rebecca Berger and Grievant's supervisor, Keith Pyles, Jr.,Transportation Services Motor Pool Supervisor.

4. Ms. Golden was not called as a witness in this matter.

5. The record does not reflect that any action was taken to verify that the May 2, 2011 email originated with a passenger riding Grievant's bus. The record further does not reflect that any investigation was conducted to verify any part of the complaint.

6. Grievant was notified by letter dated May 17, 2011, that WVU intended to terminate her employment effective May 24, 2011. The letter was from Keith Pyles, Junior, and Grievant's supervisor's father, Keith Pyles, Senior, Operations Coordinator, Parking, in Transportation Services, but was signed only by Keith Pyles, Senior. The letter stated the reason for the intended termination as follows:

> On May 3, 2011, we received a complaint from a student passenger who rode on your van on May 2, 2011. The complaint stated that you frequently complain about other employees while you are driving, making this passenger uncomfortable. You were advised verbally, in early April, that you were not to talk to your passengers about other drivers. The complaint also stated that you are frequently talking on your cell phone while driving and that she was concerned about the erratic manner and speed in which you drive. I discussed these concerns with you on May 4, 2011 and you denied talking to students about other drivers. Our concern is that you have not

> provided satisfactory customer service to the student and that it was of enough concern on her part to warrant sending a written complaint to the department. This level of performance is unsatisfactory.

The record does not reflect whether it was Keith Pyles, Junior or Senior, or both, who participated in the May 4, 2011 discussion with Grievant.

7. Keith Pyles, Senior, and Dave Barnett, Grievant's supervisor's assistant, met with Grievant on May 19, 2011, to discuss the charges. Grievant's supervisor, Keith Pyles, Junior, was on vacation on May 19, 2011. By letter dated May 24, 2011, signed by both Keith Pyles, Junior and Senior, Grievant was notified that her employment was terminated, effective that day, "based upon the information that was outlined for you in the May 17, 2011 Intent to Terminate Letter and in consideration of the information that you provided at the meeting held on May 19, 2011." No testimony was offered by Mr. Pyles, Senior, or Mr. Barnett regarding the May 19, 2011 meeting with Grievant.

8. WVU's written Disciplinary Procedure states:

> When an employee does not meet the expectations set by the supervisor or other appropriate authority, counseling and/or disciplinary action may be taken to address the employee's behavior.

This Procedure provides further that:

> Minor misconduct is generally of limited actual and potential consequence and deemed by the supervisor as correctable by counseling and/or instruction *through progressive discipline* for subsequent similar behavior. Progressive discipline *requires* notice of concern and expectations to the employee through letter(s) of warning. These warning letters are provided progressively for subsequent similar offenses and may provide for suspension, demotion and ultimately termination.

(Emphasis added.)

9. Grievant was counseled on October 19, 2010, for improper use of the cell phone issued to her by WVU after hours for personal calls, and for inappropriate and

improper conduct involving intimate contact with a co-worker during work hours.[1] Prior to this, Grievant had not been disciplined in her almost five years of employment.

10. Grievant received a written warning on January 20, 2011, for unsatisfactory performance, failure to follow instructions, and misconduct, specifically, making an inappropriate comment to the driver of a vehicle being ticketed by a co-worker, and washing her vehicle in a prohibited area.

11. Grievant received a written warning on February 3, 2011, for unsatisfactory conduct and policy violations, specifically, improper personal use of her WVU issued cell phone. Grievant paid for the charges incurred for her personal use of the cell phone.[2]

12. Grievant received no further discipline after the February 3, 2011 written warning, until she was dismissed on May 24, 2011.

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

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[1] Grievant disputed the underlying facts relied on by Respondent in imposing prior discipline. As Grievant did not grieve any of the prior discipline she received, "the merits of those actions cannot be placed in issue now. *Jones v. W. Va. Dept. of Health & Human Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *See Stamper v. W. Va. Dept. of Health & Human Resources*, Docket No. 95- HHR-144 (Mar. 20, 1996); *Womack v. Dept. of Admin.,* Docket No. 93-ADMN-430 (Mar. 30, 1994). Furthermore, all the information contained in the documentation of Grievant's prior discipline must be accepted as true. *See Perdue v. Dept. of Health & Human Resources,* Docket No. 93-HHR-050 (Feb. 4, 1994)." *Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997).

[2] Respondent asserted that Grievant's employment could have been terminated at this time for being dishonest. The fact is that Mr. Pyles decided to give Grievant a written warning. If he believed at that time that more severe discipline was warranted, he had the opportunity to dispense it.

(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*.

Grievant was terminated for unsatisfactory performance. While Respondent offered into evidence that Grievant had previously received counseling and two written reprimands for improper use of her cell phone and unprofessional behavior, and seemed to rely heavily on this prior misconduct as well as what was rumored to be an inappropriate relationship with a co-worker, Grievant's termination was based on allegations set forth in an email complaint, alleged to have been sent by a student passenger, and these are the allegations which Respondent was required to prove. The only evidence offered by Respondent to support the charges against Grievant was the email sent to Betty Golden, and the testimony of Mr. Pyles, Junior, that Ms. Golden forwarded the email to him. The email is hearsay, and as such, the undersigned must determine how much weight it can be given in this proceeding.

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.[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 name of the person sending the email was blacked out prior to being introduced into evidence, and the name was never disclosed to Grievant. The email itself was not a statement given under oath, and Respondent offered no reason for the failure to call the person sending this email as a witness. Because the person making the accusation was not identified, there is no way to evaluate whether the accuser was a disinterested party or whether the statement was routinely made. The email was sent to Ms. Golden, yet Ms. Golden was not called as a witness to authenticate the email. Further, Mr. Pyles, Junior, made no representation that he, or anyone else, had undertaken any investigation whatsoever into the allegations made in the email, or even that the identity of the person sending the email had been confirmed. As Grievant pointed out, anyone could have sent the email. The undersigned has not been presented with any way to evaluate the credibility of the accuser.

> Hearsay evidence is admissible in the grievance procedures for state and education employees, but there is no requirement, statutory or otherwise, that it be afforded any particular weight. Generally, written statements, even affidavits, may be discounted or disregarded unless the offering party can

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[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).

> provide a valid reason for not presenting the testimony of the persons making them. *See, Seddon v. W.Va. Dept. of Health,* Docket No. 90-H-115 (Dec. 14, 1997).

Cook v. W. Va. Division of Corrections, Docket No. 96-CORR-037 (Oct. 31, 1997), Conclusion of Law No. 2. The email is unreliable hearsay, which cannot be considered by the undersigned in this proceeding. Respondent has not met its burden of proof. *See, Warner v. Dep't of Health and Human Res.*, Docket No. 07-HHR-409 (Nov. 18, 2008).[4]

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 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*.

2. 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

[4] Respondent argued in its post-hearing written argument that Grievant was not a credible witness. The burden of proof in this matter was on Respondent, not Grievant. Respondent offered absolutely no evidence in support of the charges set out in the dismissal letter, and Grievant did not testify regarding the allegations made in the email complaint. Whether Grievant is a credible witness is of no relevance to the determination of whether Respondent met its burden of proof.

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.[5] *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).

> 3. Hearsay evidence is admissible in the grievance procedures for state and education employees, but there is no requirement, statutory or otherwise, that it be afforded any particular weight. Generally, written statements, even affidavits, may be discounted or disregarded unless the offering party can provide a valid reason for not presenting the testimony of the persons making them. *See, Seddon v. W.Va. Dept. of Health,* Docket No. 90-H-115 (Dec. 14, 1997).

Cook v. W. Va. Division of Corrections, Docket No. 96-CORR-037 (Oct. 31, 1997), Conclusion of Law No. 2.

4. The stated charges against Grievant are supported solely by unreliable hearsay evidence. Respondent did not prove the charges against Grievant.

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[5] 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).

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to reinstate Grievant to her position as a Bus Driver 1 at West Virginia University and to pay her all backpay to which she is entitled from the date her employment was terminated until the date she is reinstated, plus interest, restore all benefits, as though she had not been dismissed from her employment, and remove all references to the dismissal, including the email relied on to support her dismissal, from all personnel records maintained at West Virginia University.

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

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BRENDA L. GOULD
Administrative Law Judge

Date: March 22, 2012