THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

J. HUDSON YATES,
Grievant,

v. **Docket No. 2011-1703-DOR**

TAX DEPARTMENT,
Respondent.

DECISION

Grievant, J. Hudson Yates, filed this grievance against his employer, the Tax Department, on May 19, 2011, challenging a written reprimand. For relief, Grievant seeks to have the reprimand expunged from his personnel file; he should not have to report directly or indirectly to Mike Coulz; a training session regarding appropriate behaviors and expectations of superiors and subordinates; and, additional training regarding fieldwork for a Revenue Agent.[1] This grievance was granted, in part, and denied, in part, at level one by Decision dated July 11, 2011. A level two mediation session was conducted on September 29, 2011. Grievant perfected his appeal to level three on November 16, 2011. A level three hearing was conducted before the undersigned Administrative Law Judge on April 27, 2012, and May 17, 2012, at the Grievance Board's Elkins office location. Grievant appeared *pro se*. Respondent appeared by its counsel, Charli Fulton, Senior Assistant

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[1]The level one evaluator granted this grievance in that he agreed with Grievant that arriving early to prepare for a show cause hearing with Respondent's counsel should not be grounds for a reprimand. In addition, Respondent conceded that it would discontinue the practice of affixing signatures by anyone other than the person identified on the signature line to any documents. Accordingly, those grounds for relief and issues need not be addressed by the undersigned.

Attorney General. This matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on June 18, 2012.

Synopsis

Grievant was issued a written reprimand for failing to bring supporting documents to a business registration revocation hearing before the West Virginia Office of Tax Appeals. In addition, he was given the reprimand for giving false or misleading testimony under oath at the hearing. Respondent met its burden of proof and demonstrated the charges against Grievant by a preponderance of the evidence.

The following findings of fact are based upon the record developed at level one and level three.

Findings of Fact

1. Grievant is employed by the State Tax Department as a Revenue Agent II. These employees are responsible for collecting delinquent taxes and work under the supervision of the Compliance Division of the State Tax Department.

2. The Tax Department has a variety of methods it may use to bring a taxpayer into compliance with the tax code. It may levy by notifying a bank or other third party holding money of the taxpayer and direct it to surrender the money up to the amount of tax owed. It may garnish wages by instructing the employer of the taxpayer to forward money to the Tax Department to be applied as payment of the tax. It may enter into a payment agreement with the taxpayer. The purpose of a payment plan is to get a taxpayer caught up on back taxes.

3. Payment agreements are required to be documented in writing to the taxpayer, and the taxpayer must sign the agreement accepting the terms and conditions in the plan. All formal signed payment agreements that the Tax Department enters into are required to be scanned and entered into Gen-Tax, the computer program in which the Respondent stores its records.

4. A taxpayer who has a payment plan and is in compliance with the plan is considered to be in good standing with the Respondent and is eligible for renewal or reinstatement of the taxpayer's business registration certificate, even though the taxpayer has not paid all the back taxes.

5. Respondent may also accept an offer in compromise. It may seek criminal prosecution for taxpayers that collect trust fund taxes and fail to remit them to the Respondent. It may also seek revocation of the taxpayer's business registration certificate.

6. The business registration certificate may be revoked if a taxpayer is not in good standing. To be in good standing, a taxpayer must have filed all required returns at the required intervals and have submitted the taxes due on the returns. One incident of failure to file or pay is ground for revocation.

7. Grievant was assigned to attend an April 28, 2011, business registration revocation hearing before the West Virginia Office of Tax Appeals.

8. Grievant's immediate supervisor, Kim Silvester, instructed Grievant to take the taxpayer's case file, including notes regarding contacts, pay plan set up, etc.,to the hearing on April 28, 2011.

9. Notes and signed copies of any payment plan kept in the Gen-Tax computer system may be exported to a Word document and printed.

10. Grievant did not bring the taxpayer's case file to the hearing.

11. At the revocation hearing, the Grievant testified that the taxpayer in question had entered into three payment plans with the Respondent and had defaulted on all three plans.

12. The administrative law judge asked the Grievant what the terms of the payment plans were, and further requested that the plans be put into evidence so that he could determine whether the taxpayer had defaulted on the plans.

13. Because the Grievant did not have the payment plans with him, the judge took a recess so that the Grievant could retrieve them from Respondent's computer.

14. The hearing was reconvened and Grievant testified that there were no written and signed payment plan agreements relating to the taxpayer's outstanding tax liabilities in the computer. There was an unsigned payment plan. The judge indicated that that plan was meaningless and not an agreement.

15. Respondent subsequently dismissed the revocation proceeding because the Grievant's testimony that there were payment plans, when there were none, reflected poorly on the Respondent's credibility.

16. The Respondent has a formal written policy that payment agreements or plans must be in writing and signed by the taxpayer.

17. Grievant received training on business revocation procedures, and was clearly instructed that a payment plan is not a plan unless it is signed by the taxpayer.

18. Following the Respondent's dismissal of the April 27, 2011, revocation proceeding, Michael Coutz, Acting Director, Compliance and Taxpayer Services, issued a written reprimand to the Grievant. The letter cited Grievant's failure to have in his

possession proper documentation regarding the account and testifying under oath as to having three signed payment agreements when none were completed in Gen-Tax or prepared manually.

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); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 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). In other words, "[t]he 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).

The record of this grievance established that Grievant testified that there were three payment plans on which the taxpayer had defaulted. However, when asked to produce those payment agreements, he was unable to do so because no such documents existed. Consequently, the Tax Department attorney felt obligated to withdraw the case against the taxpayer. Had the Grievant prepared by bringing the taxpayer file to the hearing as he had

been instructed, there would have been no question concerning the existence of payment agreements when presenting the case to the administrative law judge.

The record demonstrates that the employees of the Compliance Division, Grievant included, were given clear instruction of the Division's procedures and policies regarding the conduct of a business registration revocation hearing. Respondent has met its burden of proving, by a preponderance of the evidence, that Grievant's actions warranted a written reprimand for his failure to bring case documentation to a hearing before the Office of Tax Appeals. Grievant did not demonstrate any mitigating factors that would make the level of discipline administered by Respondent for this violation of policy disproportionate to the offense.

Finally, the Respondent demonstrated that it had a policy requiring payment agreements to be in writing and signed; Grievant was aware of that policy; and that Grievant gave incorrect or inaccurate evidence under oath at an administrative hearing when he testified to the existence of three payment agreements, when none existed. The undersigned agrees with Respondent that this is a matter of serious concern. This charge was, in essence, undisputed. It was proven by Respondent by a preponderance of the evidence. This level of discipline was clearly warranted by the gravity of the offense. Therefore, the written reprimand is upheld.

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. Procedural Rules of the W. Va. Public Employees

Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

2. Respondent proved by a preponderance of the evidence that Grievant failed to bring his case file to the revocation hearing as instructed. In addition, Respondent met its burden of proof and demonstrated that Grievant gave incorrect or inaccurate evidence under oath at an administrative hearing when he testified to the existence of three payment agreements, when none existed. The issuance of a written reprimand was proper.

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 (eff. July 7, 2008).

Date: September 24, 2012

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Ronald L. Reece
Administrative Law Judge