AGNES KESSLER,

Grievant,

v. Docket No. 96-DOH-490

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Agnes Kessler, grieves the "unwarranted disciplinary action" taken against her, and seeks as relief the "[r]emoval of disciplinary action" from her personnel file. At Level III, she sought the additional relief of 1) reimbursement of medical costs; 2) reinstatement of sick leave; and 3) reimbursement of travel by private vehicle to counseling. This additional relief was related to the requirement that she seek counseling for her hostile and angry feelings toward a co-worker.

This grievance was denied at Levels I, II, and III. A Level IV hearing was scheduled for January 15, 1997, but Grievant requested and Respondent agreed, that this grievance be submitted on the record developed below. This case became mature fordecision on February 16, 1997, the deadline for the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues

Grievant alleges her oral warning and written reprimand for threatening behavior that violated the Division of Personnel's Workplace Security Policy, is unwarranted as she did not make these threats directly to the co-worker, but to her supervisors during counseling sessions. She also argues the guidelines for disciplining employees were not followed and, if Division of Highways ("DOH") thought these threats were real, she should have been suspended immediately instead of waiting for several months.

DOH argues Grievant admited she made these threats against a co-worker, Ms. Judy Kennen, not once, but several times. As these threats were repeated and Grievant's angry outbursts did not abate, but instead escalated, DOH felt the need to take action. DOH is aware they could have suspended or dismissed Grievant for her behavior, but instead tried to work with Grievant. Realizing she had an excellent work record for sixteen years, DOH imposed less severe disciplinary actions and required counseling.

After a thorough review of the record developed below, the undersigned determines the following Findings of Fact.

Findings of Fact

1. During the time the threatening behavior occurred, Grievant was employed in the District 7 Right of Way ("ROW") office. 2. From 1994 through 1996, Grievant had a consensual affair with her supervisor, Mr. David Wilson. Mr. Micheal Murphy, District Engineer of District 7 and Mr. Wilson's supervisor, spoke to Mr. Wilson when he learned about the affair, and voiced his concerns that this relationship could cause problems or the appearance of problems in the office. Mr. Wilson and Grievant assured Mr. Murphy that no problem would result and no favoritism would be shown. Mr. Murphy continued to worry about Grievant's evaluations being performed by her lover.

3. At the time the affair started, Grievant was a secretary in the District 7, ROW office. During the course of the affair, Grievant was promoted to a Transportation Realty Agent I.

4. Ms. Judith Kennen was hired on March 18, 1995, as Grievant's replacement in the secretarial position, and Grievant was assigned the task of orienting Ms. Kennen to her duties.

5. The first month of this orientation was uneventful, but by mid-April 1995, Grievant complained Ms. Kennen was unable to perform the job duties adequately and recommended her termination to Mr. Wilson. Grievant frequently gave Ms. Kennen work directions that differed from those given by Mr. Wilson. This created problems for Ms. Kennen.

6. Among the multiple complaints Grievant made about Ms. Kennen were the following: Ms. Kennen 1) would not listen to directions; 2) turned all the office staff against Grievant; 3) used her "feminine wiles" to attract male employees; 4) dressed provocatively; 5)

inappropriately asked male employees for a ridehome when her car was being repaired; 6) did not know how to use the printer; and 7) did the exact opposite of any directions given by Grievant. Agency Exh. 2, Grievant's EEO Complaint dated August 28, 1995.

7. Grievant also stated, in the above-identified complaint, that Ms. Kennen "has gotten me to the point that it is frustrating to be around her and it gets you [sic] to the point of not being able to control your temper", "it has become almost impossible to be in the office with her do [sic] [to] the conflict she has caused", and "I feel tense knowing that every move she makes is to undermine [me]." Agency Exh. 2.

8. Ms. Kennen attempted to complain to Mr. Wilson, her direct supervisor, about Grievant's treatment of her. Mr. Wilson would not listen to her complaints and stated "the problem is not Agnes."

9. Ms. Kennen then went to the EEOC counselor and Mr. Murphy, her next level supervisor, as she was afraid she would be terminated at the end of her probationary period.

10. In August, Mr. Murphy talked to Mr. Wilson and asked him to deal with the problems in the office. The issues were not resolved, and Mr. Wilson recommended the non-retention of Ms. Kennen. 11. Mr. Murphy did not share Mr. Wilson's assessment of the situation, and recommended Ms. Kennen's employment as a permanent employee. **(See footnote 2)**

12. Mr. Murphy continued to receive multiple complaints about the hostile working environment in the District 7 ROW office caused by the relationship between Mr. Wilson and Grievant. Sometime in September, he requested the complaining employees put these problems in writing. On September 25, 1995, Mr. Murphy received letters from the three employees who worked in the ROW office: Ms. Kennen, Mr. William Ramsey, and Mr. Gary Henry. The letters noted the office was not functioning productively, the atmosphere was hostile, Grievant's outbursts were upsetting and unpredictable, and each stated they felt they were not being treated fairly.

13. In November 1995, Mr. Murphy recommended the transfer of Mr. Wilson to another office.

14. On November 28, 1995, Grievant filed a lengthy formal complaint with the EEOC detailing how Ms. Kennen was undermining the department and creating discontent. She stated Ms. Kennen had defamed her, violated her civil rights, made the office environment

unbearable, and had caused her to be "unable to function at the performance level needed to carry out my duties to the fullest extent." (See footnote 3) Agency Exh. 2. 15. Grievant also stated in her November 28, 1995 complaint that Ms. Kennen goaded her until she "lost her temper", she was unable to sleep at night, and she had "very negative thoughts towards this person." Agency Exh. 2.

16. Mr. Wilson was demoted and transferred on December 15, 1995. (See footnote 4)

17. Ms. Hazel Doss replaced Mr. Wilson as the Acting District 7 ROW Agent on December 18, 1995.

18. On January 5, 1996, Mr. Jessie Haynes, EEO Division Director for DOH, reported to Ms. Tanya White-Woods, EEO State Director, that Grievant's statements did not fall under the category of an EEO complaint. He stated the situation in the District 7 ROW office stemmed from favoritism by a supervisor to a subordinate, and disciplinary action to resolve the issue had been taken on December 15, 1995.

19. During January 1996, while on assignment outside the District office, Grievant sought counseling to deal with her negative thoughts about Ms. Kennen. She discontinued this counseling when she returned to the District 7 office.

20. On January 30, 1996, Grievant ran out of the ROW office shouting that she was being treated unfairly because she had been asked by Ms. Doss to make copies. Grievant went to Mr. Murphy's office to complain. 21. During February 1996, Grievant had several outbursts or "temper tantrums" in the ROW office.

22. Mr. Murphy had several discussions with Grievant about the situation in the ROW office. In a March 1, 1996 discussion Grievant stated, "I probably should not tell you this but Judith has had me so upset that I thought about bringing in a gun and shooting her or beating her to death. I've had to have counseling to help me overcome these thoughts." Agency Exh. 1.

23. Mr. Murphy did not take action at that time because he believed Grievant's statement confirmed she was in active counseling and was resolving her hostilities toward Ms. Kennen.

24. On March 7, 1996, Grievant asked to speak to Ms. Doss. Grievant indicated she thought Ms. Doss was a spy for Mr. Murphy. She stated it was very difficult for her to work at the ROW office because Ms. Kennen had turned everyone against her. She repeated the

statement about either shooting or beating Ms. Kennen. Ms. Doss discussed that conversation with Mr. Murphy on March 8, 1996, and also told Ms. Kennen about Grievant's threats against her.

25. On March 11, 1996, Mr. Haynes came to see Grievant at her request and reported to Ms. Doss that Grievant had threatened Ms. Kennen during this discussion.

26. On April 5, 1996, Mr. Murphy wrote to Mr. Jeff Black, DOH's Director of Personnel, and recommended Grievant's dismissal because of her threats against Ms. Kennen.

27. Mr. Murphy continued to discuss this situation with Mr. Black and the Division of Personnel, and on May 3, 1996, he wroteGrievant a written reprimand identifying Grievant's inappropriate and threatening behavior and directing her to receive "professional counseling services." Agency Exh. 6. Because Grievant had informed him before that she was in counseling when she was not, he requested confirmation of her attendance and "regular progress reports within the limitations that govern counselor-client confidentiality." Id. The letter also noted further violations of this nature would necessitate further disciplinary action. Grievant received this reprimand on May 6, 1996.

28. On May 3, 1996, Ms. Doss, who was unaware of the written reprimand at that time, wrote a Verbal Warning to place in Grievant's file. This document dealt with another incident of threatening behavior. She gave this document to Grievant on May 10, 1996. Ms. Doss's Warning referred to Grievant's outburst on May 3, 1996, and explained that Grievant's continued verbal abuse of Ms. Kennen was unacceptable behavior. Ms. Doss noted that Grievant had called Ms. Kennen "a conniving bitch" and "a complete idiot", and threatened to do everything in her power to get rid of her.

Discussion

The West Virginia Division of Personnel Workplace Security Policy became effective on May 1, 1995. "Threatening/Violent Behavior" is defined as "[c]onduct assessed, judged, observed, or perceived by a reasonable person to be so outrageous and extreme as to cause severe emotional distress[,] or cause, or is likely to result in, bodily harm." §II. C., Workplace Security Policy. Thepurpose of the Policy is "to protect the health, safety, and well- being of employees . . .". This Policy clearly states that threatening and/or violent behavior is

unacceptable in the workplace and will not be tolerated. In determining whether an individual poses a threat, the following factors are to be considered:

a. The perception that the threat was real;

b. The nature and severity of potential harm;

c. The likelihood that potential harm will occur;

d. Imminence of the potential harm;

e. Duration of risk, and/or

f. Past behavior of individual.

Apparently, at first, Mr. Murphy was unaware of the depth of Grievant's hostile feelings. She stated she had negative thoughts about Ms. Kennen and had difficulty sleeping, but did not make threatening remarks. As time went on, Grievant's remarks became more concrete and specific, and she made them to the people in authority; the people most likely to take action. It appears Grievant was afraid she might act on these threatening thoughts and wishes and made sure she told the individuals who were in a position to require her to get the help she so desperately needed. It is noted Grievant's negative feelings about Ms. Kennen escalated and became more paranoid over time. She, at first, just stated she was incompetent and refused to listen to directions. After a while, she stated Ms. Kennen told lies and defamed her; later still, she indicated she had turned every one against her and she would do whatever it took to see she was fired. By March 1996, she was threatening to either shoot Ms. Kennen or beat her todeath. These threats needed to be taken seriously, and action was required by the employer.

Confusingly, Grievant's representative argued the proper action was not taken by Respondent, and insists Grievant should have received an oral suspension. It is clear, according to DOH policies, Grievant could have been suspended for her behavior. See Richmond v. W. Va. Bureau of Employment Programs/Workers' Compensation, Docket No. 93-BEP-144 (July 30, 1993). She also could have been dismissed, but DOH decided not to impose the maximum disciplinary action, given Grievant's long tenure and quality work. Cummings v. W. Va. Dept. of Admin. Docket No. 92- ADMN-244 (Dec. 31, 1992). "The work record of a long-term civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." Stewart v. W. Va. Alcohol and

Beverage Control Comm'n, Docket No. 91-ABCC-137 (Sept. 19, 1991). See Cummings, supra. Respondent's goal was to insure Grievant got the help she needed so she could return to being a productive employee. Surely, this action cannot be seen as harmful to Grievant.

West Virginia law requires the dismissal of a classified employee be for good cause. Good cause means "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Oakes v. W. Va. Dept. of Finance and Admin., Syl. Pt. 1, in part, 164 W. Va. 384, 264 S.E.2d 151 (1980). Inthis case, although Grievant's behavior was of a substantial nature, Respondent chose to try to keep a troubled employee at work while indicating her problem was serious and must be resolved. The undersigned finds no violations of DOH's disciplinary rules in its actions.

The uncontroverted testimony is that Grievant repeatedly threatened to harm Ms. Kennen and had temper tantrums and other verbally abusive outbursts in the workplace. Respondent has met its burden of proof and demonstrated Grievant's oral warning and written reprimand were reasonable and her behavior was sufficiently hostile to warrant these disciplinary actions by the employer. Cummings, supra.

Several other issues must be addressed. Currently, Grievant is to receive counseling, but no guidelines have been established for when this counseling may cease. This issue was raised without objection at Level III. This is a valid concern on the part of Grievant. The employer also has a valid concern that Grievant no longer have the desire to do serious harm to Ms. Kennen or any other of her other co-workers. The parties are directed to meet and come to decision for concluding when counseling may cease. The undersigned does not wish to mandate a solution to this issue, as it appears one better resolved by the parties with the assistance of Grievant's counselor.

Grievant also requested, at the start of her Level III hearing, reimbursement of sick leave and medical costs, as well as transportation costs to her counselor's office. No information ofany kind was submitted on this issue. It is unknown what Grievant's cost were, what theory would support the recovery of these monies, and why DOH should be responsible for paying for Grievant's therapy for a personal problem. It is true that DOH mandated Grievant attend therapy. It also appears clear if she had not agreed to do so, DOH would have had no choice

but to release her from employment. Grievant has been able to utilize her sick leave to attend these appointments; this is appropriate. Given the evidence, the undersigned finds no monies are due Grievant in this regard.

The following Conclusions of Law are appropriate in this case.

Conclusions of Law

1. In cases dealing with disciplinary matters, the burden of proof rests with the employer to prove the charges by a preponderance of the evidence. Schmidt v. W. Va. Dept. of Highways, Docket No. DOH-88-063 (Mar. 31 1898).

2. "The work record of a long-term civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." Stewart v. W. Va. Alcohol and Beverage Control Comm'n, Docket No. 91-ABCC-137 (Sept. 19, 1991).

3. Good cause means "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Oakes v. W. Va. Dept. of Finance and Admin., Syl. Pt. 1, in part, 164 W. Va. 384, 264 S.E.2d 151 (1980).

4. Grievant's outbursts, temper tantrums, and threats of violence toward a co-worker amount to behavior sufficiently violent to support a violation of the Workplace Security Policy.

5. Respondent has met its burden of proof and demonstrated Grievant's behavior warranted the disciplinary actions she received.

Accordingly, this grievance is DENIED.

Any party or the West Virginia Division of Personnel may appeal this decision to the circuit court of the county in which the grievance occurred, and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: June 30, 1997

Footnote: 1

The parties did not submit these findings and conclusions.

Footnote: 2

The exact date Ms. Kennen received permanent status is unclear, but judging by her start date, it should have been on September 18, 1995.

Footnote: 3

Grievant attached the prior complaint referred to Finding of Fact Number 6.

Footnote: 4

Due to the sparse record, some information in this decision was clarified by the Finding of Facts made in Mr. Wilson's grievance dealing with the same circumstances. See Wilson v. Dept. of Transp./Div. of Highways, Docket No. 96-DOH-019 (May 16, 1996).