LARRY WALTERS,

Grievant,

v. Docket No. 98-DMV-309

DEPARTMENT OF TRANSPORTATION/

DIVISION OF MOTOR VEHICLES,

Respondent.

D E C I S I O N

Grievant, Larry Walters, grieves the decision of the Division of Motor Vehicles ("DMV") to issue him a written reprimand and alleges the written reprimand was "given in an arbitrary and capricious manner." Grievant filed this action on April 13, 1998, and he requested the removal of this written reprimand. (See footnote 1) The portion of this grievance relating to whether the written reprimand was properly issued for good cause was denied at all lower levels. However, the Level III Hearing Examiner agreed the reprimand should have a removal date and directed the written reprimand be removed on April 13, 2000. Grievant appealed to Level IV, and a hearing was held on September 9, 1998. This case became mature for decision on October 21, 1998, the deadline for the parties' final proposed findings of fact and conclusions of law. (See footnote 2)

Discussion of Facts

Grievant has been employed as a Hearing Examiner with DMV for six years, and he conducts administrative hearing to review whether a driver should lose his operator's license. In this position he conducts DMV hearings pursuant to a set docket and writes decisions to either revoke or return a license.

Grievant received a written reprimand from his supervisor on April 13, 1998, which stated, "You failed to appear for a docketed hearing because you could not locate a file." In this letter it was noted Grievant did not advise the parties of the need for a continuance. The letter

further explained, "[Y]ou had an obligation to appear for the hearing and advise the parties of the continuance."

Prior to sending this letter Grievant was questioned about the events leading up to the written reprimand. He informed his supervisor, Mr. J. O. Humphreys that he did not attend the hearing because he did not have the file, and he had no responsibility to locate the file. He told his second level supervisor, Ms. Jill Bisset, "I never had the file, I never had the file, I never had the file, I swear I never had the file; I had it but I gave it back." Ms. Bisset was confused by the statement as it was contradictory.

Later, Grievant testified he had the file at one time, but was told to return it to the file room and he did so. He does not recall who asked him for the file. He did not personally return the file. He also testified he had never looked at the file, but he also testified he found the file very confusing. Grievant's entire testimony was somewhat confusing, tangential, and contradictory. He maintained the belief that he had done nothing wrong, but asserted that if a Hearing Examiner did miss a hearing it would be aserious offense. He then balanced this statement with the assertion that there was no policy that directed him to attend hearings or to locate absent files.

Ms. Bisset and Mr. Humphreys testified a DMV Hearing Examiner can continue a hearing on his own motion for good cause, and the inability to locate a file so the hearing can be conducted would constitute such good cause. Grievant disagreed with Ms. Bisset and Mr. Humphreys and stated a Hearing Examiner cannot continue a hearing on his own motion when he cannot locate a file.

Ms. Sandy Cantley, a Docket Clerk, testified Grievant had the file, called her to request she reorganize it, she reorganized it, and then personally walked the file down to his office and gave it back to him. She never requested the file from Grievant. She also noted Grievant called her after the scheduled hearing time and stated he had taken care of "it". Ms. Cantley took this to mean that Grievant had continued the case on his own motion, and she subsequently rescheduled it. The file later appeared on her desk, and she did not know how it got there. It is unusual for files from Grievant to appear on her desk in this manner as he normally relies on a runner to transport his files back to the file room.

Ms. Anita Sue Campbell, a Docket Clerk, also testified. She explained she had put a note in

the file, at Grievant's request, which stated he had never had the file. She noted Grievant had also stated he had had the file.

After a detailed review of the record in its entirety the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed as a Hearing Examiner with DMV for six years, and assists in the training of new Hearing Examiners. He conducts DMV hearings pursuant to a preestablished docket.

2. On February 4, 1998, he was originally scheduled to conduct hearings on two separate cases of Mr. James Carter, file numbers 203598W ("W file") and 203598C ("C file").

3. On the docket sheet that accompanies the files for the day's hearings, the times for these two files had been reversed. In other words, the W file was listed as scheduled at 10:30 a.m. and the C file was scheduled at 11:30 a.m., when in fact the times should be reversed.

4. Additionally, the C file was actually scheduled for 10:30 a.m., but listed as scheduled for 11:30 a.m., had been crossed out as continued. This fact was also incorrect as the C file was not continued, and the W file was continued. Thus, Grievant had a hearing scheduled in the C file at 10:30 a.m., but the docket sheet appeared to say a 10:30 a.m. hearing was scheduled in the W file. The hearing notices in the files indicated the times correctly.

5. Grievant did not appear for the scheduled 10:30 hearing. Grievant was called at his office down the street and told there were people waiting for a hearing. He informed the caller that he did not have a hearing, and he did not go to the hearing room or ask to speak to the parties present to check on the matter. The parties waited until 11:15 a.m. for a hearing and then left. Grievant did not appear at the hearing site until sometime after noon. 6. When a DMV Hearing Examiner does not have a file for a scheduled hearing, it is DMV 's expectation that he will attempt to locate the file and notify the parties of the problem.

7. Grievant did not attend a scheduled hearing because he could not find the file Ms. Cantley gave him, and erroneously believed he had no duty to attempt to find the file or notify the parties of the situation.

8. Grievant has the right to continue a hearing if he cannot locate the necessary file.

9. When a previous DMV Hearing Examiner failed to appear for two scheduled hearings, he received a written reprimand.

10. At the time of the scheduled hearing, Grievant had the file in his possession. (See footnote 3)

Issues and Arguments

The key issues are whether Grievant had a duty to attend a scheduled hearing or to notify the parties of a need for a continuance when he believed he did not have the file. Also at issue is whether Grievant had a duty to attempt to find a file when he believed he did not have it. In other words, is the Hearing Examiner expected to attend or continue a scheduled hearing when it is not marked as continued, even if he does not have the file. Also at issue is the credibility of Grievant's testimony, especially since his testimony varied.

Respondent argues Grievant did not appear for a scheduled hearing, and as this is an essential portion of his duties, a written reprimand was appropriate. Respondentnotes the Grievant's failure to appear at this hearing resulted in an alleged drunken driver's license not being revoked.

Grievant's legal arguments have changed over the course of this grievance, and he makes multiple arguments detailing why Respondent's action is wrong. Essentially, Grievant contended, and indeed testified to the fact, that he did not attend the scheduled hearing because he did not have the file. He believes he had no duty to attend a hearing if he did not have a file, and he maintained he had no duty to attempt to find the file or notify the parties of the need for a continuance.

Grievant also asserted other arguments. First, he maintained there is no rule governing a Hearing Examiner's attendance at hearings, thus he should not receive any disciplinary action. Second, he stated he did nothing wrong as he was told to return the file before the hearing, and his responsibility ended when he returned the file. (See footnote 4) **Grievant believes that once he returned the file he had no responsibilities for the case even if it remained listed on his docket. Third, progressive disciplinary measures were not followed as he received the written reprimand without going through a counseling session or receiving an oral reprimand.** (See footnote 5) **Fourth, since the officer who was to present evidence did not**

show up, it made no difference that he did not attend, as the results would have been thesame, the case would have been dismissed. Fifth, and lastly, DMV frequently has scheduling conflicts, and it is common practice that the wrong files are sent to the wrong place, and it is not his responsibility to find or even check on a file if he does not have it even if it is on his docket.

Discussion of Legal Issues

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. Dept. 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. Dept. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

As revealed by the above-stated Findings of Fact, Respondent has met its burden of proof. Respondent proved, and Grievant agreed, he did not attend a scheduled hearing. Grievant's identified reason for not attending the hearing was found to be without merit, and it is clear Grievant did not perform his job duties in the expected professional manner.

Another issue to resolve is the question of witness credibility, because the testimony of the witnesses varied widely. The testimony of Grievant and the other witnesses as to what happened to the file and where it was is very confusing. It is clear that the stories told by the witnesses are contradictory.

An Administrative Law Judge is charged with assessing the credibility of the witnesses that appear before her. Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dept. of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993). "The fact that [some of] this testimony is offered in written form does not alter this responsibility." (See footnote 6) **Browning v. Mingo County Bd. of Educ., Docket No. 96-29-154 (Sept. 30, 1996). The United States Merit Systems Protection Board Handbook ("MSPB Handbook") is helpful in setting out factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the**

United States Merit Systems Protection Board 152-53 (1984). Some factors to consider in assessing a witness's testimony are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Id. 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's information. Id.

The undersigned Administrative Law Judge had an opportunity to observe the demeanor of the majority of the witnesses and to assess their words and actions during their testimony. I find Grievant's account of the events to be implausible. It is difficult to believe or understand Grievant's statement to Ms. Bisset about never having the file and then returning it. It is difficult to understand how Grievant could find a file confusing that he says he never read. These statements seriously compromised Grievant's credibility. Additionally, the undersigned Administrative Law Judge could find no reason why Ms. Cantley would fabricate the story about reorganizing and returning the file. Accordingly, the undersigned Administrative Law Judge finds Grievant failed to attend a scheduled hearing, and this action was inappropriate, unprofessional, and not the expected behavior of a DMV Hearing Examiner.

The above-discussion will be supplemented by the following Conclusions of Law.

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. Dept. 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. Dept. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

2. DMV has met this burden of proof and demonstrated Grievant failed to perform the duties expected of him when he failed to attend the scheduled hearing.

Accordingly, this grievance is DENIED.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7(1998). 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.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: November 30, 1998

Footnote: 1

Because this written reprimand was accompanied by a DMV notice of disciplinary action Grievant stated he had been given two written reprimands. These are the two written reprimands Grievant refers to in his Statement of Grievance.

Footnote: 2

Grievant appeared pro se, and DMV was represented by Jacquelyn Custer, Senior Assistant Attorney General.

Footnote: 3

It is unclear whether Grievant knew he had the file until later.

Footnote: 4

At Level I and II, Grievant stated he did not attend the hearing because he did not have the file and had no duty to look. At Level III, he stated he was told the hearing was continued, but he did not know by whom. At Level IV no mention was made that he had been told the hearing was continued. Grievant then asserted he did not attend the hearing because he did not have the file, he had no duty obtain the file, and he was not allowed to continue the hearing on his own motion.

Footnote: 5

Grievant has received oral warnings on other matters, but has not received any prior disciplinary action for his failure to attend a hearing.

Footnote: 6

Some witnesses that appeared at the lower level hearing did not appear at the Level IV hearing.