THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JENNIFER O. GRAMLICH,
Grievant,

v. **DOCKET NO. 2010-0929-DOT**

DIVISION OF MOTOR VEHICLES,
Respondent.

DECISION

This grievance was filed at level three of the grievance procedure by Grievant, Jennifer O. Gramlich, on January 21, 2010, after she was dismissed from her employment by Respondent, the Division of Motor Vehicles. The statement of grievance reads:

> Jennifer Gramlich files this grievance to dispute and contest her January 8, 2010 termination from her position Lead CSR position [sic] with the Division of Motor Vehicles as put forth in the attached January 8, 2010 termination letter from Commissioner Joe E. Miller. Jennifer Gramlich was wrongfully terminated for undertaking activities which were directed by a high ranking member of the Division of Motor Vehicles whom Ms. Gramlich reasonably believed had the authority to direct her activities. Thus, Jennifer Gramlich was terminated for obeying the orders of a superior.

The relief sought by Grievant was "[r]einstatement with full back pay and benefits. Attorney's fees, costs and expenses."[1]

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[1] "It is well established that the Grievance Board does not have the authority to award attorney fees. *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June 21, 1996). New WEST VIRGINIA CODE § 6C-2-6 is entitled, 'Allocation of expenses and attorney's fees.' It specifically states: '(a) Any expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expense.'" *Cosner v. Dep't of Transp.*, Docket No. 2008-0633-DOT (Dec. 23, 2008).

A level three hearing was held before the undersigned Administrative Law Judge on April 21, 2010, in the Grievance Board's Westover office. Grievant was represented by Nicholas A. Wininsky, Esquire, Wininsky Law Offices, and Shane M. Mallett, Esquire, and Respondent was represented by Ronald R. Brown, Assistant Attorney General. This matter became mature for decision upon receipt of Respondent's Exhibit Number 10 on April 27, 2010.[2] The parties declined to submit written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was dismissed from her employment as a Customer Service Representative Lead for adding a motorcycle endorsement to a drivers' license without proper documentation, and waiving the fees applicable to the endorsement and to the renewal of an expired drivers' license. Grievant added the motorcycle endorsement at the direction of a high ranking official. Respondent did not demonstrate that Grievant knew she could not waive the renewal fee if circumstances so warranted. Respondent demonstrated that Grievant should not have waived the fee for the motorcycle endorsement. Respondent did not demonstrate good cause for Grievant's dismissal.

The following Findings of Fact are made based upon the record developed at level three.

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[2] As agreed by the parties at the level three hearing, Respondent provided Respondent's Exhibit Number 10 after the hearing. Respondent's Exhibit Number 10 is Ordered admitted into the record.

Findings of Fact

1. Prior to her dismissal, Grievant was employed by the Division of Motor Vehicles ("DMV") as a Customer Service Representative Lead ("CSR Lead") in the Moundsville, West Virginia office. Grievant had been employed by DMV for nine years.

2. Grievant was dismissed from her employment effective January 8, 2010, for "violation of operating procedures of the West Virginia Division of Motor Vehicles." The dismissal letter goes on to explain that

> on October 28, 2009 you illegally issued a renewal of an expired driver's license, adding a motorcycle endorsement for a customer, knowing that he was not entitled to the endorsement. The processing was completed without charging the appropriate fees. You purposely logged on to the system and added the endorsement.
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> These transactions were allegedly encouraged and/or requested by someone other than your supervisory staff, who was not made aware of this by you, even after the fact. Due to these actions and a previous similar infraction for which you were suspended for a period of five days in 2004, it is apparent that you have total disregard for the integrity of the Customer Service Representative Lead position and your employment, thus warranting your immediate dismissal.

3. One day a week, on Wednesdays, three DMV employees from the Moundsville office open a satellite office to the public, located in Wheeling, West Virginia. The Wheeling office is located in the State Police Headquarters.

4. On October 26, 2009, Robert Matheny was sworn in as the new Chief of Police for the City of Wheeling. Mr. Matheny retired from the Clarksburg, West Virginia police department on October 23, 2009. Mr. Matheny's birthday is October 22, and his drivers' license expired at midnight on October 22, 2009.

5. Mr. Matheny has been friends with William Renzelli for many years. Mr. Renzelli attended the ceremony on October 26, 2009, when Mr. Matheny was sworn in.

Mr. Renzelli was at that time an employee of DMV. Mr. Renzelli had campaigned for Governor Joe Manchin III, and was placed in his position by the Governor. Mr. Renzelli was listed on DMV's internal contacts list as being in the Commissioner's Office, with his address as Capitol Complex, Building 3, Room 319, Charleston, West Virginia, and his title is shown as Assistant to the Commissioner.[3] Mr. Renzelli's listed telephone number was not a number in the Capitol Complex (not a 558 exchange), but appears to be a cell phone number (541 exchange). Mr. Renzelli did not have an office in the Capitol Complex, but worked out of his home in Bridgeport, West Virginia, nearly a two hour drive from Charleston. Mr. Renzelli is no longer employed by DMV, stating that he served at the will and pleasure of the Governor, and with budget cuts, the Governor no longer needed his services, so he retired.

6. Mr. Matheny talked to Mr. Renzelli after he was sworn in as Chief of Police. Mr. Renzelli introduced Mr. Matheny to Michael Duplaga, a retired Wheeling businessman, who became friends with Mr. Renzelli while campaigning for Governor Manchin. Mr. Duplaga is also friends with Grievant. Mr. Matheny asked Mr. Renzelli where the local DMV office was. Mr. Renzelli told him the office was in Moundsville, and Mr. Duplaga suggested he wait until Wednesday and go to the Wheeling office.

7. After leaving the ceremony, Mr. Renzelli and Mr. Duplaga went to the Moundsville DMV office together, as they often did. They talked to Grievant while they

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[3] Mr. Renzelli testified that he was a public relations man for the State of West Virginia, and that he earned $34,000.00 per year. None of the DMV employees who testified at the hearing were aware of what Mr. Renzelli's duties were, nor had he ever provided any public relations services to the Moundsville office.

were there, and told her the new Chief of Police would be coming in to get his license renewed.

8. On Wednesday, October 28, 2009, Grievant was the CSR Lead in the Wheeling DMV office. Donna West and Beth McNeil, both CSR's were also assigned to the Wheeling DMV office that day. The office is very small, and the three employees work in close proximity to one another.

9. Mr. Matheny went to the Wheeling DMV office on Wednesday, October 28, 2009, to get his license renewed. He completed the necessary form. Grievant noted on the form that Mr. Renzelli had verified Mr. Matheny's residency, and a new license was issued. He was not charged the $5.00 fee applicable to expired licenses.[4]

10. The standard practice in the Moundsville DMV office is to waive the $5.00 fee if a drivers' license expires on a Friday, Saturday, Sunday, or holiday, and the customer renews his license on the next business day. There have also been situations when a natural disaster occurred and either the DMV Commissioner or the Governor has issued a memorandum or order waiving the late fee on expired drivers' licenses for a period of time.

11. Shelia Newbrough, former Supervisor 3, retired from the Moundsville DMV office January 1, 2010. While it is not common practice, Ms. Newbrough has on occasion waived the $5.00 fee applicable to an expired drivers' license when an individual came in two or more business days after the license had expired, if the circumstances were such that she judged the fee should be waived. Ms. Newbrough would have considered waiving

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[4] Mr. Matheny was not aware that he was not charged any applicable fees, and he did not ask that any fees be waived.

the fee in Mr. Matheny's case because of the circumstances of his license expiring just as he was moving. When Grievant was acting as the CSR Lead in the Wheeling office, she had supervisory authority over the office, and was given the same authority in these matters as Ms. Newbrough.

12. There is some disagreement among DMV management regarding whether a DMV supervisor can evaluate each situation and waive the $5.00 fee applicable to expired licenses when they believe the circumstances merit that the fee be waived. John Haines, DMV Regional Office Operations Manager, felt that supervisors have some discretion to evaluate the circumstances and waive this fee. Pete Lake, Senior Director, believes that only personnel in the main DMV office in Charleston have this authority.

13. In the early 1990's a new statutory provision required that anyone operating a motorcycle pass a skills test, which would result in a motorcycle endorsement being placed on that person's drivers' license. Prior to the effective date of this statute, anyone who completed an application and paid a $5.00 fee could have the motorcycle endorsement placed on his license without passing the skills test. Mr. Matheny recalled paying the $5.00 fee sometime before the effective date of the statute, but the endorsement never appeared on his license and Mr. Matheny had never taken any action to correct this. DMV has no record that Mr. Matheny paid the $5.00 fee or that he ever had the motorcycle endorsement.

14. The Wheeling DMV office was not busy on October 28, 2009. Mr. Matheny told Grievant that his license did not show his motorcycle endorsement, and he asked about getting the endorsement placed on his license. Grievant told Mr. Matheny they could

not place the endorsement on his license. This conversation occurred in the presence of Ms. West and Ms. McNeil.

15. Mr. Matheny decided to call Mr. Renzelli and ask him if he could help him get the motorcycle endorsement placed on his license. Mr. Matheny felt he was entitled to the endorsement, and he felt that Mr. Renzelli was a highly placed individual and had the authority to listen to his complaint and to authorize that the endorsement be placed on his license. Mr. Matheny viewed Mr. Renzelli as speaking for the Governor. Mr. Matheny asked Grievant if she had Mr. Renzelli's telephone number, and she gave him the number and he called Mr. Renzelli and explained his problem.[5]

16. Mr. Renzelli told Mr. Matheny he wanted to speak to Grievant. Mr. Renzelli told Grievant to put the motorcycle endorsement on Mr. Matheny's license.[6]

17. Ms. West was on the computer assigned to issuing licenses. Grievant told Ms. West to log off the computer. Grievant logged onto the computer, in plain sight of Ms. West and Ms. McNeil, and added the motorcycle endorsement to Mr. Matheny's license. Grievant did not charge Mr. Matheny the applicable $5.00 fee for adding the motorcycle endorsement. Neither Grievant nor Mr. Matheny tried to conceal what was occurring.

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[5] Mr. Matheny acknowledged that he may have taken advantage of the situation, and he was sorry for what had occurred, although he was adamant that he was entitled to the endorsement.

[6] Mr. Renzelli testified that Mr. Matheny just called to thank him for his help, although he did not explain how he had helped Mr. Matheny, and that he asked Mr. Matheny to hand the telephone to Grievant so he could thank her. Mr. Renzelli testified that he knew nothing about a motorcycle endorsement. As will be discussed later, Mr. Renzelli's testimony is not credible.

18. Ms. McNeil was off work on October 29 and 30, 2009. When she returned to work on November 2, 2009, she reported Grievant's actions to Ms. Newbrough. Neither Ms. West nor Grievant reported what had occurred to Ms. Newbrough or to any other supervisory personnel.

19. Ms. West did not report what had occurred on October 28, 2009, to any supervisory personnel, because she believed Grievant was doing what she had been told to do by Mr. Renzelli, and she believed Mr. Renzelli had supervisory authority as Assistant to the Commissioner.

20. Administrative personnel in the main DMV office in Charleston have told personnel in the Moundsville office via the telephone to process licenses without the necessary documentation when there has been an error made, or when they had access to information which allowed them to verify that the license should be processed, and the personnel in the Moundsville office have followed these directives.

21. An investigation into the allegations made by Ms. McNeil was conducted by Phillip Nicholson, an investigator for DMV.

22. Grievant told Mr. Duplaga she was interested in a supervisor's position that was going to be open at DMV, and he told Grievant he would put in a good word for her. Subsequently, during a trip to Charleston, he talked to the Commissioner of DMV and asked him to help Grievant obtain the supervisor position.

23. Mr. Renzelli was not disciplined by DMV for his actions.

24. In 2004, Grievant was suspended for five days without pay for "failure to properly administer the motorcycle skills tests." Grievant admitted that she had not been able to properly complete the skills testing, "due to the deteriorating condition of the testing

course," and that when she reported this to her supervisor, her "supervisor responded by instructing you to continue testing and do the best you could."

25. Grievant was a good employee, and a very good lead worker.

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 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*.

The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, [175 W. Va. 279, 284,] 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d

364 (W. Va. 1965)." *Scragg v. Bd. of Dir. W. Va. State College,* Docket No. 93-BOD-436 (Dec. 30, 1994).

One of the issues in this matter which requires some discussion is whether Mr. Renzelli told Grievant to place the motorcycle endorsement on Mr. Matheny's license. Grievant did not testify, and no one else heard her telephone conversation with Mr. Renzelli. Mr. Renzelli testified that he did not discuss the motorcycle endorsement with Mr. Matheny, but that Mr. Matheny had simply called to thank him. Mr. Renzelli also testified, however, that he did not speak to Grievant at all about Mr. Matheny's license, stating that it was Mr. Duplaga who said he would call Grievant and explain the situation to her. One must wonder why Mr. Matheny would stop to call Mr. Renzelli from the DMV office, particularly right after Grievant had told him she could not place a motorcycle endorsement on his license, to thank him for his help, when he had done nothing to help Mr. Matheny. Mr. Matheny testified that the reason he called Mr. Renzelli was to ask him if he could take care of getting the motorcycle endorsement added to his license. Mr. Renzelli denied that he had told Grievant to place the motorcycle endorsement on the license, stating he just wanted to thank Grievant for being so nice to Mr. Matheny, and to show his appreciation because she is a friend. Either Mr. Matheny is lying or Mr. Renzelli is lying.

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. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29,

1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp*., Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. 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. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

Although the undersigned was not able to observe Mr. Renzelli, as he gave his testimony by telephone, the undersigned has no doubt that Mr. Renzelli did not provide an accurate account of what transpired on October 28, 2009. Mr. Renzelli advised at the beginning of his testimony that he is in the early stages of Alzheimer's disease, and that he takes a number of medications. Assuming this is true, this medical condition and his medications could have had a substantial impact on Mr. Renzelli's recollection of events. Whether they did or not, however, Mr. Renzelli's rendition of his telephone conversation with Chief Matheny and Grievant was not plausible. The undersigned has concluded from the testimony of the credible witnesses, and the manner in which the events transpired, that Mr. Renzelli told Grievant to place the motorcycle endorsement on Mr. Matheny's license.

DMV argued that Mr. Renzelli had no authority to direct Grievant's work. Respondent made much of the fact that Mr. Renzelli was not in Grievant's chain of

command, and that Mr. Renzelli was not Assistant Commissioner, but rather Assistant to the Commissioner; although no one explained what the difference was, or how an employee in Grievant's position would know there was a difference. Respondent also argued that Grievant placed the endorsement on Mr. Matheny's license, not because she was told to do so, but because she wanted Mr. Renzelli to get her a supervisory position in the office. Respondent can't have it both ways. If Respondent thinks that Mr. Renzelli had enough power that it is plausible that he could get Grievant placed in a supervisory position she wanted, then, regardless of his actual title or job duties, or whether he had any official authority over Grievant, he had enough power that when he told Grievant to place a motorcycle endorsement on Mr. Matheny's license, she felt she had better do so.

Respondent also argued that Grievant should have reported Mr. Renzelli's directive to Ms. Newbrough and asked for guidance. Respondent pointed to no policy, rule, or regulation which would have pointed Grievant in this direction. Whether she called Ms. Newbrough before acting was a matter of Grievant's judgement, and Grievant did not explain why she did not do so. Grievant may have exercised poor judgement in not calling Ms. Newbrough, but this alone cannot sustain the termination of her employment.

As to Respondent's assertion that Grievant did as Mr. Renzelli asked in exchange for his help in getting Grievant placed in a supervisory position, Respondent offered little to support this theory. Mr. Duplago freely admitted that he had specifically talked to DMV Commissioner Joe E. Miller regarding Grievant, and asked that he consider her for a supervisory position. However, the only testimony offered that Grievant had even broached this subject with Mr. Renzelli was the hearsay testimony of Thomas Johnson, the Office Manager for the Moundsville DMV. Mr. Johnson testified that Shelia Newbrough told

him that Grievant had told her Mr. Renzelli was going to help Grievant to obtain Ms. Newbrough's supervisory position when she retired. Ms. Newbrough had no recollection that Grievant had told her this.

Respondent also asserted that Grievant's actions in waiving the $5.00 late renewal fee and the $5.00 fee for the motorcycle endorsement were improper. Ms. Newbrough testified that she had waived late fees on several occasions, and that Grievant had that same authority when she was the CSR Lead in the Wheeling office. Ms. Newbrough stated that they evaluate each situation, and make a judgement as to whether special circumstances exist and the fee should be waived. She stated that this situation might qualify in her mind as an instance where the fee should be waived, as Mr. Matheny's license expired just as he was moving. Mr. Haines agreed with Ms. Newbrough that Grievant could waive this fee if the circumstances warranted it, although, he felt that it was incumbent on Mr. Matheny to have gone to the Moundsville office as soon as possible, rather than waiting to go to Wheeling on Wednesday; but, he did not know whether there were good reasons why Mr. Matheny waited until Wednesday. Mr. Lake testified that under no circumstances could anyone in a Regional office waive a late fee. Respondent seemed to concede that Grievant could not be blamed for waiving the late renewal fee in this instance. If Mr. Lake's position on this issue represents DMV's policy, DMV needs to make this clear to all of its employees. Respondent has not demonstrated that Grievant acted improperly in waiving the $5.00 fee on Mr. Matheny's expired drivers' license.

The remaining charge is that Grievant waived the $5.00 fee applicable to the motorcycle endorsement. No explanation was offered for this action. In her unsworn statement given during the DMV investigation of this matter, Grievant simply admitted that

the failure to collect this fee would have been her mistake. While if the motorcycle endorsement should not have been issued, then there was no fee to collect, the fact remains that Grievant did not collect a fee which is applicable when a motorcycle endorsement is issued. Grievant's actions were improper.

Except for her five day suspension in 2004, Grievant had been a good employee for nine years. There is no doubt that Grievant did what Mr. Renzelli told her to do. Grievant was fired for placing the motorcycle endorsement on Mr. Matheny's license, while Mr. Renzelli was not disciplined at all. Certainly, Mr. Renzelli is more culpable here than Grievant. The fact that Mr. Renzelli was not disciplined at all lends more credibility to Grievant's argument that he was a high ranking official who had the power, if not the delegated authority, to direct that a particular action be taken. Respondent did not demonstrate good cause for Grievant's dismissal.

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).

2. The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature

directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, [175 W. Va. 279, 284,] 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir. W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994).

3. Respondent proved that Grievant placed a motorcycle endorsement on a customer's drivers' license without proper documentation.

4. Grievant proved that she was following the directive of a high ranking official employed by Respondent when she placed the motorcycle endorsement on the drivers' license.

5. Respondent did not demonstrate that it had been made clear to Grievant that she could not waive the $5.00 fee applicable to the renewal of an expired drivers' license when, in her judgement, the circumstances warranted a waiver.

6. Respondent demonstrated that Grievant improperly waived the $5.00 fee applicable to the issuance of a motorcycle endorsement.

Accordingly, this grievance is **GRANTED IN PART, AND DENIED IN PART**. Respondent is **ORDERED** to reduce Grievant's dismissal to a ten day suspension without pay, and to reinstate Grievant to her position as Customer Service Representative Lead in the Moundsville office, and to pay her back pay and restore all benefits she would have

earned had her employment not been terminated, including annual leave, sick leave, and retirement, from ten days after the date of her dismissal.

Any party or the Division of Personnel 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).

BRENDA L. GOULD
Administrative Law Judge

Date: June 14, 2010