THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CYNTHIA MERCER,

Grievant,

v. **Docket No. 2010-0392-CONS**

WEST VIRGINIA BOARD OF BARBERS AND COSMETOLOGISTS,

Respondent.

DECISION

Cynthia Mercer ("Grievant") has been employed by the Board of Barbers and Cosmetologists ("BB&C" or "Board") for nine years as an Office Assistant 2. On September 14, 2009, she was suspended without pay pending Respondent's investigation into alleged wrongful acts. Ms. Mercer filed a grievance on September 15, 2009, contesting that suspension. For relief she sought "[t]o be made whole, including lost wages, benefits and tenure restored with interest." By letter dated September 22, 2009, the president of the BB&C informed Grievant that she was dismissed from employment effective October 7, 2009. Ms. Mercer filed a second grievance on September 24, 2009 contesting the termination of her employment. In the second grievance, Ms. Mercer sought "[t]o be made whole, including restoration of job, with back pay and interest, tenure and benefits."[1] The two grievances were consolidated upon a Motion to Consolidate filed by Grievant's representative simultaneously with the filing of the second grievance. Pursuant

[1] The statements of relief are quoted in this paragraph as they appeared in the grievance documents.

to the provisions of WEST VIRGINIA CODE § 6C-2-4 (a) (4), Grievant waived levels one and two of the grievance procedure and filed both grievances directly at level three where they were consolidated.

A level three hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board on January 12, 2010. Grievant participated in the hearing telephonically from her home in Maryland. Grievant was represented in the hearing by Gordon Simmons, UE Local 170 West Virginia Public Workers Union. Respondent was represented by Nicole A. Cofer, Assistant Attorney General. At the conclusion of the hearing, the parties agreed to file Proposed Findings of Fact and Conclusions of Law. Both parties submitted written fact/law proposals and the last one was received on February 16, 2010. This consolidated grievance became mature for decision on that date.

Synopsis

After conducting an investigation, Respondent discovered that Grievant had sent a number of e-mails in which she expressed her desire that her supervisor would come to an untimely end. Respondent characterized these e-mails as threatening and assaultive. Respondent dismissed Grievant based upon these e-mails as well as incidents of unprofessional conduct and gross negligence in the performance of her job. Respondent did not prove that the e-mails were threatening and assaultive or that Grievant was guilty of gross negligence. Respondent did prove that Grievant engaged in extremely inappropriate conduct and failed to meet the minimum performance expectations for her job. The grievance is denied.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant Cynthia Mercer has been employed by Respondent Board of Barbers and Cosmetologists ("BB&C") since February 1, 2000, as an Office Assistant 2. Grievant's principal job duty was to process inspection forms and shop opening applications as they came in to the Board's office. However, she also assisted with license fees and customer calls on a fairly regular basis.

2. The BB&C is created and charged by statute with the authority to license and regulate the professions of Barbering and Cosmetology in West Virginia to ensure that all such services are provided in a safe and sanitary manner. *See* W. VA. CODE § 30-27-1 et seq.

3. The BB&C Executive Director is hired by, and directly responsible to, the Board. The Executive Director supervises and assigns the staff of the Board which consists of a Secretary, two Office Assistants and four Inspectors.

4. The Secretary and the Office Assistants are in the office daily. The Inspectors are in the office sporadically due to their responsibility for inspecting shops around the state.

5. In November 2008, Larry Absten retired as Executive Director of the BB&C after serving in that position for 19 years. Adam Higginbotham was hired by the Board to replace Mr. Absten.

6. Director Higginbotham instituted changes in the software[2] and office procedures utilized by the staff of the BB&C and these changes were not well received by Grievant and her coworkers.

7. In January 2009, the annual license fee for barber shops and styling salons increased from $25 to $35. Many of the shops had already submitted their fees prior to the fee increase. In an effort to save postage fees, Director Higginbotham assigned the office staff to telephone all the shops in the state to inform them of the fee increase as well as the need to send an additional ten dollars if they had already submitted the annual fee. There are more than 10,000 shops in West Virginia. This was one of the changes that increased the resistence to Director Higginbotham's leadership among the office personnel.

8. In February 2009, Director Higginbotham started a project to shred outdated files that had been maintained in the BB&C office. This was going to require many hours of staff time to accomplish. All of the staff members were scheduled to engage in this task to get it done. Grievant was very vocal in her objection to this assignment and at one point indicated that she would not do it. However, Grievant did take part in the shredding project.

9. On April 16, 2009, Director Higginbotham sent an e-mail to all BB&C employees placing them on leave restriction. He stated that, beginning the next day, all employees would need a doctor's excuse if they missed one day of work and that all personal or annual leave would have to be approved three days in advance. Failure to

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[2] The major software change was an upgrade in Microsoft Office from the 2003 version to the 2008 version. This change took place in 2008.

follow the directive would result in a written reprimand and loss of pay. This action was taken because one of Grievant's coworkers was having absence abuse issues. Respondent's Exhibit 2.

10. Grievant sent an e-mail regarding the attendance rule to Director Higginbotham with a copy to the members of the Board. In that e-mail she asked a series of questions including the following:

- Does it make sense for someone to spend money for a doctor if they wake up sick on one day?
- Does the policy apply to the Director?
- Does the Director have the authority to override the Governor's rule on attendance?
- Does being sick really require a reprimand?
- Is this a way to try to get around civil service protection to fire certain employees?
- Did you check with the Attorney General's before making the rule?
- Does the rule apply to the inspectors?
- How will he keep track of the inspectors since they mail in their leave slips?

Grievant ended the e-mail by stating. "I hope nobody has to go to the dr. for a migraine. You need an appt. to see most drs. I really need you to reconsider this." Grievant's Exhibit 1.

11. On April 17, 2009, Grievant was issued a written reprimand by Director Higginbotham based on her e-mail questioning the absence rule. Higginbotham stated that Grievant was guilty of insubordination, breaking the chain of command, and unprofessional conduct. Additionally, he wrote the following:

> This letter serves as a written reprimand for you having exercised unprofessional conduct and insubordination on April 16th, 2009 concerning

> your e-mail will not be tolerated. Furthermore, the unprofessional content within the e-mail and the out-of line questioning will not be tolerated. [3]

Respondent's Exhibit 1.

12. There was no policy in place at the BB&C related to chain of command in registering complaints or written inquiries regarding rules, procedures, practices or orders.

13. On April 28, 2009, Grievant gave Director Higginbotham a "written response" to the reprimand stating, "I have decided that it is my best interest not to reply to the reprimand." Respondent's Exhibit 1.

14. Grievant regularly had difficulties keeping the inspection report entries up to date. Previous Director Absten periodically helped Grievant catch up with the inspection reports. This problem continued under Director Higginbotham.

15. On April 17, 2009, Director Higginbotham gave Grievant written documentation that she had been verbally notified to keep her work up to date. He also noted that Grievant had been asked to bring verification from a doctor for any accommodations she may need to perform required tasks "due to personal physical conditions." Respondent's Exhibit 1.

16. On June 17, 2009, Director Higginbotham again prepared written documentation of a discussion with Grievant regarding her failure to be up to date on inspection reports. He defined being up to date as entering the inspection reports into the computer within two weeks of receiving them. Grievant was given one month to get caught up and it was noted that this was her second written notice. Respondent's Exhibit 1.

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[3] All quotes appear as they did in the documents written by the parties and witnesses. Director Higginbotham did not identify what content in the e-mail he found to be unprofessional or which questions he believed to be "out-of-line."

17. Grievant was given a third written documentation of failure to be caught up on inspection reports on July 17, 2009. Director Higginbotham reiterated that the goal was to have inspection reports entered within two weeks after they were received. He noted that Grievant had not entered inspection reports in July that were dated for early May. August 5, 2009, was set as the date by which Grievant needed to be caught up with the entry of inspection reports. Respondent's Exhibit 1.

18. One of Grievant's coworkers resigned her position without notice. That employee had been responsible for processing complaints that were submitted to the BB&C. Director Higginbotham went through this employee's e-mails to see if there were complaints that needed to be addressed.

19. Among the e-mails of the coworker, Director Higginbotham found e-mails from Grievant that he perceived to be threats against him. He then got access to Grievant's e-mails and found more messages that disturbed him. The following are some of the comments related to Director Higginbotham found among Grievant's e-mails:

- August 25, 2009, responding to a coworker noting that an outsider wanted Director Higginbotham's cell-phone number and address: "That sounds weird. . . maybe he's going to just have him [Higginbotham] killed [smiley face]!! Just wishful thinking but it is really weird."
- August 25, 2009, e-mail to coworker: "I'd like to find one [troll doll] w/black hair, cut the hair short, buy or draw on glasses like Adam's and use it as a Voo Doo doll. Anytime one of us gets aggravated w/Adam we can stick pins in it, throw it, stomp on it, drive over top of it, etc."
- August 7, 2009, responding to a coworker who was angry with Higginbotham:

"I CAN'T STAND THAT TROLL! [*discussion of complaints*] I WANT HIM TO DIE! AND I WANT IT TO HAPPEN TODAY"[4]

"I AGREE WITH YOU GUYS THAT ADAM PROBABLY USES COCAINE THE WAY HE ACTS SOMETIMES. . . I WISH HIS MOM COULD BE A FLY ON THE WALL AND SEE WHAT HER SON IS REALLY LIKE, THE SPOILED, LIAR, TROLL!

"IS IT EASY TO OVERDOSE ON COCAINE?"

- July 22, 2009, discussing Higginbotham in an e-mail:
  ". . . He's a compulsive liar. He's a control freak. He's manipulative. He's more greedy than any person I've ever known. He has not [sic] feeling for other people. It's like he has no soul. . ."
- June 18, 2009, e-mail exchange with non-coworker:
  "I TALKED TO LARRY [*previous director]* ABOUT ADAM. HE TOLD ME TO KILL HIM WITH KINDNESS. I ASKED HIM IF I COULD ADD A LITTLE ARSENIC. HE DOESN'T THINK THAT'S A VERY GOOD IDEA.

20. Neither Grievant nor her coworkers actually gave Director Higginbotham's phone number or address to anyone.

21. Grievant was overheard in the office telling a patron, "maybe he [Higginbotham] would die soon" and "I hopes he dies a horribly painful death and I hope he died last night."

22. Grievant is fifty-five years old, heavy, short and suffers from diabetes and epilepsy. She has difficulty getting up and down stairs and requires the assistance of a cane to ambulate.

23. Director Higginbotham testified that upon finding these e-mails he became frightened for the safety of himself and his family.[5] He took the following actions:

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[4] Where Grievant's e-mails were typed in all capitol letters they are quoted that way herein.

[5] It is a fact that Director Higginbotham gave this testimony. However, as will be discussed herein, it is hard to imagine that these e-mails would actually cause a healthy

- Immediately alerted two members of the Board.
- Worked from home for several days because he did not feel safe in the office.
- Looked over his shoulder each time he heard a door slam.
- He and his wife and small children, all slept in the same room for several nights.

24. Also discovered among Grievant's e-mails was correspondence with an out-of-state cosmetologist seeking information regarding the requirements for becoming a salon inspector in West Virginia. Grievant did not give the person the information requested. Rather, Grievant responded by telling the potential applicant that Grievant had moved to West Virginia from Maryland, she was not happy because if she had stayed in her home state she would be paid twice what she makes here and that she felt stuck. Grievant advised the potential applicant that she should be sure not to make a decision that she would regret.

25. On September 14, 2009, the employees of the BB&C found a bullet hole in their window that had been shot in the early morning hours. In an e-mail to a coworker, Grievant noted that she thought it was funny that Higginbotham was nervous and that she was enjoying him being afraid.

26. Director Higginbotham expressed concern that even though Grievant was physically challenged she could hire someone to shoot him.

27. On September 14, 2009, Grievant was suspended without pay while an investigation was conducted regarding the e-mails that Director Higginbotham deemed threatening. While searching Grievant's office, Board members found six checks from

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young man to fear for his life or the safety of his family.

licensed shops in a locked drawer. One check was dated for January 2009, one for July 2009, and the remaining checks were dated for August 2009.[6]

28. The Board held a meeting on September 21, 2009, for the specific purpose of considering proposed disciplinary action against Grievant. The results of the investigation were reported to the Board by Assistant Attorney General Nicole Cofer. Grievant was allowed to address the Board and explain her side of the allegations. Following Grievant's presentation, the Board voted to dismiss Grievant; four votes for dismissal and one vote against.

29. By letter dated September 22, 2009, Grievant was informed that the investigation was concluded and that she was dismissed from employment. The reasons cited for the dismissal were that Grievant had "engaged in 'threatening and assaultive' behavior, unprofessional conduct, and gross negligence." Respondent's Exhibit 4.

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); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 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). Where the

[6] The amounts of the checks were not revealed at the hearing, but it appeared that they were likely license fees.

evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant was a permanent state employee in the classified service. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "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." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965). *See also Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004)(per curiam). "*Oakes v. W.Va. Dept. of Finance and Administration*, *supra*, requires that a violation sufficient to support a dismissal be of a substantial nature and that if it involves a violation of a statute or official duty it must be done with wrongful intent." *Serreno v. West Va. Civil Serv. Comm'n*, 169 W. Va. 111, 115, 285 S.E.2d 899, 902 (1982)(per curiam). "'Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. West Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988).

The reasons for the dismissal of Grievant were set out in the letter she received from the Respondent. The reasons were specified as: 1) threatening or assaultive behavior, 2) unprofessional conduct and 3) gross negligence. The meeting minutes for September 21, 2009, contain an additional finding from the investigation of "irreconcilable

differences."[7] Each of these reasons with the exception of "irreconcilable differences" will be discussed in turn.

Threatening or Assaultive Behavior

Respondent asserts that Grievant's e-mails related to Director Higginbotham constituted "threatening and assaultive behavior" as that phrase is defined in the Division of Personnel ("DOP") Workplace Security Policy. In the dismissal letter, after citing the policy, Respondent wrote:

> Additionally, the sheer number of threats and extreme nature of the threats contained in these emails caused such distress that the current Executive Director had to work from home and are thereby enough to be perceived by a reasonable person to be so outrageous as to cause severe emotional distress or be likely to cause bodily harm.

Respondent's Exhibit 4.

The DOP Workplace Security Policy provides some guidance for determining when alleged threats meet the definition of threatening and abusive behavior that requires remedial action by the agency. First the policy contains the following definition:

> Threatening Behavior: Conduct 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.

In section III the policy states the following:

> Threatening or assaultive behavior will not be tolerated and must be resolved by managers/supervisors on a case-by-case basis. Any employee engaging in such behavior shall be subject to disciplinary action, up to and including dismissal. . . In determining whether an individual poses a threat or a danger,

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[7] While it is clear from the record that Grievant and Director Higginbotham do not get along on a personal or professional basis, irreconcilable differences is generally grounds for the dissolution of a marriage but not the dismissal of a classified employee. *See generally, Oakes, supra.* Additionally this charge was not included in the dismissal letter and was not addressed at level three and is therefore considered abandoned.

consideration must be given to the context in which a threat is made and to the following:

- the perception that a threat is real;
- the nature and severity of potential harm;
- the likelihood that harm will occur;
- the imminence of the potential harm;
- the duration of risk, and/or;
- the past behavior of an individual.

Grievant expressed her thought about Director Higginbotham in e-mails to her coworker, friends and family. These statements included the desire that Higginbotham die and that she would like to have a voodoo doll to cause him harm. While these e-mails were undoubtedly inappropriate and mean-spirited, no recipient perceived them to pose a real threat to Higginbotham except him. Grievant never indicated that she had any intent to act on her desires, but rather seemed to indicate a hope that fate would intervene on her behalf. While the nature of these events would be extremely severe,[8] the likelihood that such harm would occur was negligible. Given Grievant's physical condition, she would not be able to carry out any of these desires and there was no proof offered that potential harm to the Director was imminent. Additionally, there is no indication that Grievant would know where to obtain and how to use arsenic or hire a hit man as was implied by Respondent. Finally while the evidence revealed that Grievant was very emotional and angry with her supervisor, there was nothing in her past behavior to lead a reasonable person to believe that she posed an actual physical threat to Mr. Higginbotham.

Director Higginbotham testified that finding these e-mails caused him to be so frightened that he worked from home and slept with his family in the same room where he could watch over them. While he may very well have followed this course of action, the

[8] Grievant stated that she hoped Higginbotham would suffer a horribly painful death.

evidence does not support that Grievant's flights of hyperbole could be "perceived by a reasonable person . . . to cause severe emotional distress." *See* DOP Workplace Security Policy.

Unprofessional Conduct:

In the *Supervisor's Guide to Employee Conduct,*[9] the Division of Personnel provides guidance regarding acceptable workplace behavior for public employees. The *Guide* specifically states the following:

> **Workplace Behavior:** While on duty, meal breaks, travel, and/or social occasions having a connection with the job, employees shall not:
>
> a) Engage in intimidating and/or threatening behavior;
> b) Engage in sexual innuendo such as sounds, expressions, gestures, etc.;
> c) Use foul or abusive language;
> d) Make disrespectful, humiliating, insulting or degrading comments to or about others;
> e) Engage in inappropriate public displays of affection;
> f) Make individuals the subject of practical jokes, pranks, gags, or ridicule; or
> g) Engage in any behavior that is disruptive to orderly operations; or
> h) Sleep while on duty unless specifically authorized by the appropriate authority.
>
> The foregoing list is by no means an all inclusive list.

Utilizing these guidelines, Grievant's e-mails and statements pertaining to her supervisor were not consistent with acceptable workplace conduct. Her descriptions of Director Higginbotham, suggestions about the voodoo troll and her desires for his untimely

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[9] Published by the West Virginia Division of Personnel (Spring, 2009) with the purpose of providing "general guidance to employers regarding acceptable and unacceptable employee conduct."

demise were disrespectful, insulting, and degrading. Additionally, they were intended to make him the subject of ridicule in the eyes of her coworkers and patrons.

Respondent additionally cites the response Grievant made to Director Higginbotham's leave restriction memorandum as unprofessional conduct. Grievant received a written reprimand for her questions about the policy for alleged insubordination, breaking the chain of command and unprofessional conduct. Respondent's Exhibit 1. In the dismissal letter Respondent described the response as "questions and accusations made in an attempt to undermine the enforcement of a legal policy." Respondent's Exhibit 4. The questions posed by Grievant in her response certainly could have been written in a more diplomatic tone but the questions were legitimate for the most part, and nothing in the e-mail rose to the type of inappropriate conduct described in the *Guide to Employees' Conduct* quoted above.

Neither did the response meet the definition of insubordination. "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(*per curiam*). Grievant never refused to comply with the leave restriction, rather, she stated, "I really need for you to reconsider this." Finding of Fact 10 *supra,* Grievant's Exhibit 1.

Finally, there was no evidence that a chain of command had been established that would discourage office personnel from taking complaints directly to Board members. In

fact, the record indicated that it was not uncommon for such exchanges to take place.[10] That practice has since been changed, but Grievant did not break a regularly established chain of command in sending a copy of her response to the Board members at that time. Grievant did not contest the written reprimand and therefore it remains in effect. However, her response to the leave restriction memorandum does not constitute unprofessional conduct in support of Grievant's dismissal.

Another incident cited as unprofessional conduct was Grievant's response to the out-of-state inquiry regarding the requirements to become a salon inspector in West Virginia. Rather than providing the requested information or forwarding the request to someone else, Grievant engaged in an extended e-mail dialogue with the potential applicant over the course of two days. In these lengthy e-mails, Grievant discussed her personal life and dissatisfaction regarding her decision to move to West Virginia, made repeated references related to her religious beliefs and discouraged the person from applying for work with the BB&C. This conduct was inappropriate and unprofessional. It placed her employer in a very unfavorable light and was disruptive to the orderly operation of the agency.

Gross Negligence:

In support of the charge of gross negligence, Respondent notes the discovery of checks from salons in a locked drawer in Grievant's office after she had been suspended.

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[10] Grievant had at least one conversation with Board Secretary Sarah Hamrick regarding her dislike and fear of Director Higginbotham as was noted in Respondent's Proposed findings of fact 50 and 51.

One of these checks was dated for January 27, 2009, at least eight months before Grievant's suspension. These checks should normally have been deposited in the BB&C's account shortly after they were received.

Additionally, Respondent pointed to Grievant's ongoing inability to record the inspection reports in a timely manner which was the main component of her job. During Grievant's suspension, unrecorded inspection slips were discovered dating back four months. The expectation was that inspection reports would be entered within two weeks. This problem existed for months prior to the discovery of e-mails that led to Grievant's suspension. Director Higginbotham first brought this issue to Grievant's attention verbally and in writing on April 17, 2009.[11] Former Director Absten testified that entry of the inspection report data had always been a major component of Grievant's job and that she was generally able to keep the reports reasonably current. Director Higginbotham noted Grievant's failure to keep the inspection reports current again in June and July, each time setting a goal for Grievant to bring the reports current within the next month. In the July 17, 2009, notice he set the goal for Grievant to have her inspection slips to be no further than two weeks behind by August 5, 2009. This goal was not met. However, while Grievant was suspended, the substitute employee who was assigned to her duties was able to bring the reports up to date within a month.

[11] It hardly seems coincidental that this is the same date that Grievant received her written reprimand for her questions regarding the leave restriction memorandum.

Gross negligence is generally defined as "[a] conscious and voluntary act or omission in disregard of a legal duty. . ." Blacks Law Dictionary, 1062 (Eighth ed. 2004).[12] This term is generally related to torts rather than employment actions. It does not appear that Grievant was reckless or made a conscious effort to stay behind in her work. However, it does appear that she did not devote sufficient time to the duties that her supervisor identified as her top priority. It was noted by Grievant's coworkers that Grievant was very good at customer service and would spend significant time in addressing customer concerns. While this is an important part of public service, Grievant had an obligation to focus the majority of her attention on completing the assignment which her supervisor identified as a priority. Grievant was not guilty of "gross negligence," but she did neglect her duties and failed to meet her supervisor's reasonable expectations after she was given ample opportunity to do so. Grievant argued that she was kept from completing her work because she was required to work on other projects such as calling the salons regarding the license fee change and shredding the old files. However, these projects were shared among the office staff and were over in a matter of a few weeks. Yet, Grievant continued to remain behind in the entry of the inspection reports for more than three months after being first cautioned in April.

In summary, Respondent failed to prove that Grievant's e-mail missives were "threatening or assaulting" as that phrase is defined by the DOP policies and rules.

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[12] In the context of criminal liability for automobile accidents, the West Virginia Supreme Court of Appeals has commented that "[t]he phrase 'reckless disregard for the safety of others' ... is synonymous with gross negligence." *Peak v. Ratliff*, 185 W.Va. 548, 552, n. 4, 408 S.E.2d 300, 304, n. 4 (1991). *State v. Green*, 220 W.Va. 300, n. 7, 647 S.E.2d 736, n. 7 (2007).

Respondent also failed to prove that Grievant's e-mail questioning of the Director's leave restriction memorandum was unprofessional even though it was the source of a prior written reprimand. Finally, Respondent did not demonstrate that Grievant's failure to meet the expectations of her job were the result of "gross negligence."

On the other hand, Respondent did prove by a preponderance of the evidence that Grievant engaged in extremely inappropriate conduct by repeatedly making disrespectful, insulting and degrading comments regarding Director Higginbotham to her coworkers, former Director Absten, and occasionally to BB&C patrons. Additionally, Grievant failed to give a potential applicant requested information and discouraged the applicant from applying by regaling her with Grievant's personal woes. Respondent also proved that Grievant continually failed to meet the minimum performance expectations for her job after being given ample opportunity to do so. Given the totality of the evidence, Respondent met its burden of proof and the grievance is denied.

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 Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 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). Where the

evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "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." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965). *See also Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004)(per curiam).

3. The e-mails authored by Grievant containing her feelings about her supervisor would not be " 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." Therefore, they did not constitute threatening or assaultive behavior as that phrase is defined by the West Virginia Division of Personnel. *See* DOP Workplace Security Policy.

4. Respondent proved by a preponderance of the evidence that Grievant engaged in unprofessional and inappropriate conduct by repeatedly making disrespectful, insulting and degrading comments regarding Director Higginbotham to her coworkers, former Director Absten, and at least one BB&C patron. Additionally, Grievant engaged in unprofessional and inappropriate conduct by failing to give a potential applicant requested information and discouraging the applicant from applying, by regaling her with Grievant's personal problems. *See* DOP Supervisor's Guide to Employee Conduct (2009).

5. Respondent proved that Grievant consistently failed to meet the minimum expectation for performance of her job even after being given a reasonable opportunity to improve.

Accordingly, the 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 (2008).

DATE: APRIL 22, 2010

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE