WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MICHELLE DYER,
Grievant,

v. **Docket No. 2010-1619-CONS**

DIVISION OF MOTOR VEHICLES,
Respondent.

D E C I S I O N

Grievant, Michelle Dyer, filed several grievances against Respondent, West Virginia Division of Motor Vehicles ("DMV") protesting issue(s) regarding her suspensions and termination from employment with Respondent. The disciplinary actions addressed by this decision relate to the July 8, 2010 Dismissal of Grievant (effective July 23, 2010); a June 15, 2010 Suspension (3 days); a May 7, 2010 Suspension (1 day); and an April 12, 2010 Suspension (1 day). This is a consolidated grievance of Docket No. 2010-1363-DOT, Docket No. 2010-1618-DOT and Docket No. 2011-0012-DOT.

On April 13, 2010, Grievant filed a grievance, Docket No. 2010-1363-DOT, alleging unpaid suspension twice without good cause, and denied representation at disciplinary meeting. The relief sought was to be made whole, including restoration of lost pay, benefits and tenure (with interest) and lifting of leave restriction.

On June 19, 2010, Grievant filed a grievance, Docket No. 2010-1618-DOT, contending unpaid suspension and termination without good cause. The relief sought was to be made whole, including restoration of job, all back pay with interest, restoration of all benefits and tenure and remedy for illegal retaliation.

In accordance with WEST VIRGINIA CODE § 6C-2-4(a)(4), Grievant waived lower level proceedings and requested her grievances be expedited to level three of the grievance process. On July 1, 2010, Respondent filed a Motion To Dismiss Grievant's June 19, 2010 grievance based on the fact that Grievant was grieving her "termination" yet at the time of filing was still an employee of DMV. Respondent also filed a Motion To Consolidate the April 13, 2010 and June 19, 2010 grievances. A telephonic conference was held on July 6, 2010.

At the time of the Motion To Dismiss and the subsequent telephone hearing, the Grievant had not been dismissed nor had Grievant received the letter, dated July 8, 2010, dismissing her effective July 23, 2010. However, Respondent conceded such action was imminent. It was ordered the two grievances be consolidated, but the undersigned declined to grant Respondent's Motion To Dismiss.[1]

A level three hearing was held before the undersigned Administrative Law Judge on August 26, 2010, in the Grievance Board's Charleston office. Grievant appeared in person and was represented by Gordon Simmons, UE Local 170, WV Public Workers Union. Respondent was represented by its counsel, Gretchen A. Murphy, Assistant Attorney General.

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[1] The undersigned ALJ consolidated Grievant's April 13, and June 19, 2010 grievances Docket No. 2010-1363-DOT and Docket No. 2010-1618-DOT, respectively on July 6, 2010 for decision at Level 3. Further, it was subsequently requested that Docket No. 2011-0012-DOT, be consolidated with the instant-styled grievance. The parties agreed an additional hearing was not necessary and concurred the relevant elements of the matter (June 18, 2010 -1 day suspension) was addressed at the August 26, 2010 Level Three Hearing. The undersigned granted the aforementioned request and Ordered that Docket No. 2011-0012-DOT be consolidated with Docket No. 2010-1619-CONS by Order dated December 7, 2010.

This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or about October 8, 2010, the deadline for the submission of the parties' proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals.

Synopsis

Respondent maintains it is lawful to terminate Grievant's employment in that Grievant failed to conduct her workplace actions in an appropriate manner. Grievant failed to adhere to properly administered leave restrictions. Grievant repeatedly failed to meet work performance standards, and displayed disruptive threatening behavior. Respondent terminated Grievant's employment after Grievant failed to meet the expectation of her job even after being counseled and given reasonable opportunity to adjust her actions. Grievant maintains it is unlawful to terminate her employment given the facts of the conduct. Respondent established by a preponderance of the evidence good cause for the termination of Grievant's employment. This grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. At the time of the disciplinary actions, in discussion, Grievant was employed as an Office Assistant III ("OA III") with DMV in the Kanawha City, West Virginia office. Grievant was initially employed as an OA III in February of 2008. Grievant was a mail runner.

2. Terri Burford, a Receiving and Processing Supervisor, was Grievant's supervisor throughout Grievant's entire employment period at DMV.

3. Ms. Burford received numerous complaints about Grievant's mail delivery. Grievant habitually delivered mail to incorrect departments on numerous occasions.

4. Grievant's job duties were eventually altered. After Grievant's probationary period, although still considered an OA III, Grievant was moved into a position of opening mail and processing vehicle renewals in the Receiving and Processing Unit.

5. There is a designated tray, container, or shred bin on each employee's desk in the processing unit designated as "trash." The items in the trash container are placed in said container to be destroyed ideally at the end of the business day. An employee's "trash" is not the proper location to store checks or renewal documentation.

6. On September 8, 2009, Ms. Burford and Transportation System Director Rick Johnston found mail with checks and other sensitive documents ripped and being improperly handled by Grievant.

7. Grievant was counseled about the importance of procedures in place to open mail and was told to henceforth tear each flap open making the envelope completely flat. Grievant referred to this method as "filleting the envelopes".

8. Further, Grievant was counseled regarding applicable (DMV) leave policy. She was made aware of proper procedure with regard to attendance and the appropriate actions when she was going to be late or absent.

9. On March 10, 2011, Grievant failed to call in and speak with a supervisor to report her absence from work. Grievant called in to the office but did not speak with a supervisor.

10. Grievant was provided an opportunity to meet with a representative of Respondent or present a written explanation concerning her attendance and reporting absences from the workplace.

11. Respondent determined that Grievant was in violation of DMV leave policy in that she would not follow the proper procedures when she was going to be late or absent. Respondent's Exhibit 1.

12. On March 12, 2010, Respondent placed Grievant on a six-month leave restriction. The effective date for this restrictive period was March 15, through September 15, 2010.

13. Grievant's leave restrictions had provisions addressing how she was to request, report and document leave time. Conditions of Grievant's leave restrictions included among other elements that "[she] must call within 2 hours of [her] scheduled start time and speak with the supervisor or designee. . . . Additionally, for any use of sick leave you are required to provide a doctor's excuse upon return to work." Respondent's Exhibit 2.

14. Grievant was aware of her leave restrictions.

15. On March 18, 2010, Supervisor Burford again found renewals, checks and registration cards torn in half and in the Grievant's trash. Respondent's Exhibit 6.

16. On or before March 22, 2010, Grievant was given an opportunity to meet with Rick Johnston regarding this incident, and the Grievant declined. Respondent's Exhibit 3.

17. Grievant received a "Notice to Employee," dated March 26, 2010, informing her that a one day suspension was recommended. Respondent's Exhibit 4.

18. The Grievant was informed in a letter, dated April 12, 2010, that she would be suspended for one day (April 22, 2010) without pay for the latest torn mail, renewals and checks incident. Respondent's Exhibit 13.

19. On April 2, 2010, Grievant called Respondent and indicated that she was running late. Grievant did not say her tardiness was caused by an illness in her family.

20. On Grievant's 'Application for Leave with Pay' completed later that day, Grievant stated "Grandfather ill and needed my care." Respondent's Exhibit 5.

21. Grievant's leave restrictions included a provision which provided Grievant was to request leave twenty-four (24) hours in advance for annual leave and any sick leave request was to be accompanied by a Physician's excuse.

22. It was Respondent's determination that Grievant did not comply with the terms of her leave restrictions. Grievant was notified on April 6, 2010, that a two day suspension was recommended. Respondent's Exhibit 8.

23. Grievant signed a disciplinary action form verifying that she did not request a meeting with Respondent regarding the disciplinary action taken. Respondent's Exhibit 7.

24. Grievant was absent on May 4, 5 and 6, 2010. Grievant provided an adequate excuse for May 4, 2010. The documentation that Grievant provided for May 5 and 6, 2010, was not signed by a physician.

25. Ms. Burford, Grievant's supervisor, consulted with Monica Price, Executive Assistant to the Commissioner and Jeff Black, Director and was told to allow Grievant until May 19, 2010, to provide a new, signed excuse for May 5 and 6, 2010. Grievant failed to provide a properly signed document for May 5 and 6, 2010.

26. Grievant on occasions, nodded off at her desk. This propensity to nod off was witnessed by other employees. On one occasion, co-worker Kelly Gill witnessed Grievant literally hit her head on her desk upon nodding off.

27. No specific documented medical condition was revealed by Grievant to her supervisors to explain this nodding conduct.

28. On May 26, 2010, Grievant received a Notice that a three day suspension was recommended. Respondent's Exhibit 10.

29. On June 7, 2010, Grievant signed a Verification of Disciplinary Action form without requesting a meeting with a supervisor to further discuss the disciplinary action taken. Respondent's Exhibit 11.

30. On June 11, 2010, both Supervisors in the Receiving and Processing Unit were absent, and Gloria Childress, an employee with the DMV for 31 years, was auditing and balancing vehicle renewals. She, and other employees found numerous renewals and checks in the Grievant's "trash". One of the checks in Grievant's trash was for over $300.00.

31. Upon Grievant's return to the office, she was notified of the items found at her work station and what was determined to be her inappropriate conduct.

32. After this notification, Grievant while holding a letter opener, demonstrated a threatening motion stated that she should or felt like "(expletive) stabbing every body." Grievant's statement was heard by co-worker Lisa Coleman.

33. This comment was similar to one overheard by fellow employee Kelly Gill approximately one year ago when a co-worker walked into the room. Grievant, while

holding a letter opener said, “The more I look at this, the more it looks like a shank to me.” Ultimately, Ms. Gill told Ms. Burford of the incident.

34. Grievant was mailed a letter, dated July 8, 2010, dismissing her as an employee, effective July 23, 2010. Respondent’s Exhibit 17.

35. The July 8, 2010 Dismissal Letter signed by Division of Motor Vehicle Commissioner Joe Miller stated, among other information, rationale for Grievant’s dismissal;

> The reason for your dismissal is for your blatant disregard of office operating procedures relating to renewal processing and for making threatening comments to your co-workers on June 11, 2010.
>
> More specifically, on Friday, June 11, 2010, in the absence of the supervisor, another employee in the Receiving and Processing section assigned to audit the vehicle renewals (process batching) found a renewal form in the bin set aside for shredding. After discovery of the initial renewal, another employee checked the bin, finding additional renewals with checks. This is the third time renewals and/or checks have been discovered in your “to-be-shredded” bin. The initial incident occurred in September 2009, for which you were counseled, and suspended for one day in April 2010 for the second occurrence of March 18, 2010.
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> Additionally, on June 11, 2010 you made threatening comments towards the employees in the office, threatening to “stab every (explicit) body.” Threats of this nature serve to disrupt the workplace and create a stressful working environment for employees that cannot be tolerated.

Respondent’s Exhibit 17.

Discussion

The related facts and issue(s) associated with disciplinary action levied against Grievant Dyer dating back to April 2010 were addressed and litigated during the August 26, 2010, Level Three hearing. The instant decision pertains to all of the various suspensions dating back to April 12, 2010 and the ultimate termination of Grievant effective

July 23, 2010. 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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

This grievance requires that Respondent establish a good cause basis upon which to substantiate the disciplinary actions taken against Grievant. 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). There are several disciplinary actions in discussion, however, the fundamental issue is whether Respondent's disciplining of Grievant was proper and lawful.

The rationale for the dismissal of Grievant as set out in the formal termination letter she received from Respondent specifically identified Grievant's disregard of office operating procedures relating to renewal processing and for making threatening comments. *See* Finding of Fact (FOF) 35. Further Respondent highlighted Grievant's repeated violation of leave policy and reporting absences from the workplace.

A. Job performance

There is an established procedure for processing vehicle renewals and handling the various documents sent for that purpose. Grievant was aware of proper procedure. Grievant was disciplined (at least three times) for improperly disposing of mail which contained vehicle renewals and checks. Grievant's explanation that her mistakes would have been rectified by going through her trash or shred pile the next day was unconvincing. Further, she offered no explanation as to why important documents such as checks and renewals were ripped and therefore irreparable. Respondent demonstrated that Grievant repeatedly failed to perform essential elements of assigned duties despite proper training

and repeated counseling about the importance of procedure. Grievant repeatedly failed to properly perform her job duties. *See* FOF's 6, 7, and 15. These proven infractions are a proper foundation upon which to discipline an employee.

B. Attendance

Grievant was aware that Respondent has an established leave policy. Grievant admittedly was aware of proper leave protocol. Grievant was specifically informed and had opportunity to defend the conduct which instigated the establishment of her leave restrictions. Grievant's supervisor Ms. Burford issued Grievant ample warnings before the decision was made to place Grievant on Leave Restriction. Grievant's leave restrictions required her to request leave at least 24 hours in advance for annual leave and sick leave needed to be accompanied with a doctor's excuse. Grievant did not telephone the office as required or provide proper medical documentation. Nor did Grievant provide adequate explanation for her failure to comply with her employer's reasonable expectations.

While it is true that Grievant provided limited physician's statements, from time to time, there were also times when Grievant failed to provide those statements as directed. Further, the evidence does not indicate that the excuses provided explained or addressed Grievant's conduct *in toto*. While Grievant may, indeed, be suffering from certain maladies, she failed to provide her employer with any specific medical substantiation of them, even after being warned that her excessive absences were a problem. Grievant's actions with regard to absences from the workplace was not in accordance with applicable leave policy and her restrictions. Respondent's progressive disciplinary sanctions of Grievant's leave

infractions were reasonable. The suspensions levied by Respondent are not found to be an abuse of authority or excessive disciplinary action.

C. Threatening and disruptive behavior

As for the allegations of Grievant's threatening behavior, the Division of Personnel's Workplace Security Policy discusses "Threatening/Violent Behavior" and defines it 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. The purpose 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. An employer has the right to expect an employee to abide by these rules, and by the societal norms of behavior.

The fact that Grievant has a gun permit was not established to be the foundation of threat. There was no testimony that Grievant ever brought a gun to work nor that she in fact owns a pistol. However, Grievant's statements overheard by co-workers Lisa Coleman and Kelly Gill were inappropriate. FOF 32 and 33. The co-workers who heard Grievant's remarks regarding her thoughts of wanting to stab co-workers perceived the statement(s) to be intimidating and threatening in nature. Further, Respondent highlights the conduct was not an isolated incident. Grievant had made similar threatening remarks. FOF 33.

Grievant's motions and statements indicating her thoughts toward stabbing others in the workplace is inappropriate. Workplace security policy and principles are designed to make it clear that an employee's threats and acts of violence toward co-workers need

not and should not be tolerated. Grievant did not provide a persuasive explanation for her conduct. Grievant's statements were perceived by co-workers to be threatening. This conclusion is reasonable in the circumstances of this case. Grievant in an agitated state, after being informed of her misconduct and pending disciplinary action, uttered threats of violence toward co-workers. This behavior need not and should not be tolerated in the workplace.

Respondent demonstrated good cause for implementing disciplinary actions against Grievant. Respondent established by a preponderance of the evidence reasonable rationale for suspending and ultimately terminating Grievant's employment. Respondent demonstrated that Grievant engaged in behavior at the workplace which was inappropriate, disruptive and misconduct of a substantial nature. Respondent established proper foundation for Grievant's dismissal. "[W]ith regard to terminations for cause, and workplace security violations specifically, employers have substantial discretion regarding employment decisions." *Burkhammer v. Dep't of Health and Human Res.*, Docket No. 03-HHR-276 (Nov. 12, 2003).

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).

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). *See also* Section 12.02 and 03, Administrative Rules, *W. Va. Div. of Personnel* (June 1, 1995).

3. Respondent proved by a preponderance of the evidence that Grievant was guilty of substantial misconduct and failed to adequately perform her duties and responsibilities after being given reasonable opportunity to improve.

4. "[W]ith regard to terminations for cause, and workplace security violations specifically, employers have substantial discretion regarding employment decisions." *Burkhammer v. Dep't of Health and Human Res.*, Docket No. 03-HHR-276 (Nov. 12, 2003).

5. Respondent has met its burden and established Grievant failed to perform the duties of her position, and engaged in disruptive and threatening behavior.

6. Respondent has substantial discretion to determine a penalty, and the undersigned Administrative Law Judge will not substitute his judgement for that of the employer. *See also Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996); *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989); *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

7. Given the charges proven against Grievant, their level of seriousness, and their long-term continuation, the penalty is not disproportionate or excessive, nor is the penalty arbitrary and capricious.

8. Respondent demonstrated good cause for dismissal of Grievant from her employment.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: March 8, 2011

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Landon R. Brown
Administrative Law Judge