THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

KIM SIMONS,

Grievant,

v. **DOCKET NO. 2013-0743-DOT**

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Kim Simons ("Grievant") filed this grievance directly at Level Three on November 1, 2012, challenging the decision of the Division of Highways ("Respondent" or "DOH") to suspend her without pay for three days. A Level Three hearing on this grievance was held in the Grievance Board's office in Charleston, West Virginia, on April 9, 2013. Grievant was represented by Gordon Simmons with UE Local 170 of the West Virginia Public Workers Union. Respondent was represented by Jason C. Workman, Esquire, with the DOH Legal Division. This matter became mature for decision on May 13, 2013, upon receipt of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was suspended from her position as a Transportation Worker 2 Equipment Operator in DOH District 3 on November 17, 2012, based upon the allegation that she kicked her immediate supervisor, Jody Browning, in response to an inappropriate comment Mr. Browning directed at her. Grievant provided multiple and somewhat inconsistent defenses to this charge, including: (1) that the kick was an

involuntary act resulting from chronic muscle spasms; (2) that she barely touched Mr. Browning's leg with her foot, and the severe bruise and swelling he later displayed could not have resulted from her actions; and (3) during the Level Three hearing, that she only made contact with the leg of the chair on which Mr. Browning was sitting. Ultimately, Respondent's witnesses were more credible than Grievant, and Respondent proved the charge by a preponderance of the evidence. Kicking a co-worker or supervisor is a serious offense for which a three-day suspension was not an excessive penalty.

The following Findings of Fact are made based upon the record developed at the Level Three hearing.

Findings of Fact

1. Grievant is employed by Respondent, Division of Highways ("DOH"), as a Transportation Worker 2 Equipment Operator in District 3. Grievant began working for DOH in 1989.

2. Brian Herdman is employed by Respondent as a Crew Supervisor in DOH District 3 at its Medina facility.

3. Jody Browning is employed by DOH as a Foreman at Medina.

4. Landon Snyder is employed as a Transportation Worker 2 at Medina.

5. On the morning of October 4, 2012, Mr. Herdman was in the "lunch room" at the beginning of the work day, making the day's job assignments to the 11 members of his crew at Medina.

6. Grievant was assigned to drive a tandem vehicle that was to be used to partially block a highway and protect a bridge crew that would be working at a particular location.

7. Grievant inquired of Mr. Herdman how she was to get to the rest room, given that the vehicle she would be driving would be required to remain in place while any workers were present.

8. Mr. Herdman explained that she could either use another DOH vehicle that was going to that location, or borrow a vehicle from the Bridge Department crew.

9. At that time, Mr. Browning, who had not been involved in the conversation, stated to Grievant that she could "go over the guard rails."

10. Immediately upon Mr. Browning making the statement about going to the rest room over the guard rail, Grievant kicked Mr. Browning in his left leg. Mr. Herdman recalled Mr. Browning saying, "Ouch, why did you do that?" Mr. Herdman further recalled Grievant replying that she did it because of the way Mr. Browning treated her, or words to that effect.

11. Mr. Snyder was passing through the meeting room to get a set of keys when he saw Grievant standing less than three feet from where Mr. Browning was sitting. Mr. Snyder observed Grievant kick her leg toward Mr. Browning. Mr. Snyder did not see or hear Grievant's foot make contact with Mr. Browning, but recalled Mr. Browning saying, "Ouch, that was my bad leg."

12. Approximately one-half hour after the incident described above in Findings of Fact Numbers 9 and 11, Mr. Herdman observed Mr. Browning limping. When Mr. Herdman asked Mr. Browning why he was limping, Mr. Browning told him that his leg was hurting.

13. Mr. Herdman observed a large bruise on Mr. Browning's left leg. Also present at that point was Neil Reed, DOH District 3 Maintenance Assistant. Mr. Herdman heard Mr. Reed tell Mr. Browning that he should go to the hospital and have his leg examined.

14. Mr. Herdman took photographs of Mr. Browning's left leg before Mr. Browning left the work area to visit the Emergency Room. *See* R Exs 1 & 2.

15. These photos, taken within an hour after the incident described above in Finding of Fact Number 9, depict a severe bruise and swelling on Mr. Browning's left leg.

16. On October 4, 2012, Grievant provided a signed, hand-written statement containing the following:

> On this morning Jody was making fun of me as I ask[ed] Brian how I could get to the rest room (since I would be driving a tandem w[ith] trailer on back. Was working for Bridge Dept., had blockage to set at Ramsey bridge N.B. [northbound]. Jody said I could go over the guard rail & I only touched his leg with the side of my foot. Jody said I was mean but it is O.K. that as a supervisor he would tell a (sic.) employee to use the rest room over the guard rail. I do believe he purposely said that to be demeaning to me. I'm constantly receiving some kind of nasty comment like this but that is O.K. for male employees & supervisors to say whatever they want to me or about me. These comments need to stop.

> Neil Reed & Brian Herdman requested this statement. Most employees @ Medina constantly says (*sic*.) the F word when I'm around & they all know this offensive to me. I have ask[ed] Supervision to stop this language. But as I have already stated it is always O.K. whatever is said to me – or about me.

R Ex 4.

17. When Grievant reported to work the following morning, October 5, 2012, she stated, "Jody, if I hurt you when I kicked you, I'm sorry."

18. After returning to work on the following day, October 5, 2012, Mr. Browning sought additional medical treatment, and was off work, receiving workers compensation, for more than two months.

19. On September 21, 2011, Grievant received a copy of the Division of Personnel's Workplace Security Policy. At that time, Grievant signed an Employee Acknowledgement Form which stated, *inter alia*, "I understand that exhibiting violent behavior, issuing threats, or other activities as indicated are a violation of this policy." R Ex 9.

20. On February 1, 2012 and, again, on September 26, 2012, Grievant received copies of the West Virginia Division of Personnel's policy on Prohibited Workplace Harassment. R Ex 11.

21. On September 26, 2012, Grievant received a copy of Respondent DOH's Standards of Work Performance and Conduct. R Ex 7.

22. On November 7, 2012, Kathleen Curtis Dempsey, DOH's Employment Manager in its Human Resources Division, issued written notice to Grievant that she

was being suspended without pay for three days. That notice contained the following statements pertinent to this disciplinary action:

> The reason for your suspension is unacceptable physically aggressive behavior toward a coworker causing bodily harm. More specifically, but not limited to:
>
> October 4, 2012, you kicked your supervisor, Jody Browning, resulting in a contusion and laceration to his left leg. This injury as a result of you kicking Mr. Browning in the leg caused other serious health issues. On at least one other occasion, January 20, 2012, you kicked your Mr. Browning (*sic*.) in the leg. This kind of behavior is completely inappropriate and will not be tolerated. Your action toward Mr. Browning directly violates several policies including the Division of Highways Standards of Work Performance and Conduct, which was very recently reviewed with you on September 26, 2012; as well as, the Division of Personnel's policies on Prohibited Workplace Harassment and Workplace Security.

R Ex 12.

Discussion

Because this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges against Grievant by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *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 & 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*.

Certain facts relating to the charges against Grievant were the subject of conflicting testimony. 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. *Young v. Div. of Natural Res*., Docket No. 2009-0540-DOC (Nov. 13, 2009); *Massey v. W. Va. Public Serv. Comm'n*, Docket No. 99-PSC-313 (Dec. 13, 1999); *Pine v. W. Va. Dep't of Health & Human Res*., Docket No. 95-HHR-066 (May 12, 1995). *See Harper v. Dep't of the Navy*, 33 M.S.P.R. 490 (1987). *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). Some factors to consider in assessing the credibility of a witness include the witness's demeanor, opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the fact finder should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of the witness' information. *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth*., Docket No. 2009-0685-MAPS (Apr. 23, 2009); *Massey, supra*.

Respondent's Crew Supervisor at its Medina Headquarters in District Three, Brian Herdman, testified credibly that Grievant kicked her Foreman, Jody Browning, in the left leg, as an immediate response to Mr. Browning's inappropriate comment about where she could go to use the rest room. Mr. Herdman's testimony was corroborated by two photos which he took of Mr. Browning's leg, which was bruised and swollen about an hour following the incident. Further, Respondent presented testimony from a co-worker, Landon Snyder, who was passing through the lunch room, just as Grievant swung her foot toward Mr. Browning in a kicking motion. Mr. Snyder did not actually

see Grievant's foot make contact with Mr. Browning's leg but he heard Mr. Browning react to the pain, saying "that's my bad leg."

On October 4, 2012, Grievant provided a signed, hand-written statement containing the following:

> On this morning Jody was making fun of me as I ask[ed] Brian how I could get to the rest room (since I would be driving a tandem w[ith] trailer on back. Was working for Bridge Dept., had blockage to set at Ramsey bridge N.B. [northbound]. Jody said I could go over the guard rail & I only touched his leg with the side of my foot. Jody said I was mean but it is O.K. that as a supervisor he would tell a (sic.) employee to use the rest room over the guard rail. I do believe he purposely said that to be demeaning to me. I'm constantly receiving some kind of nasty comment like this but that is O.K. for male employees & supervisors to say whatever they want to me or about me. These comments need to stop.
>
> Neil Reed & Brian Herdman requested this statement. Most employees @ Medina constantly says (*sic*.) the F word when I'm around & they all know this offensive to me. I have ask[ed] Supervision to stop this language. But as I have already stated it is always O.K. whatever is said to me – or about me.

R Ex 4.

On the day following the incident, Mr. Herdman heard Grievant apologize to Mr. Browning, saying "If I hurt you when I kicked you, I'm sorry." Subsequently, at the time disciplinary action was initiated, Grievant indicated that her kicking Mr. Browning was an accident. During the Level Three hearing Grievant testified that she had thought about what happened, and determined that she actually kicked the chair on which Mr. Browning was sitting. In addition, she claimed that even this contact was actually the result of a muscle spasm she experienced at the time. At the initial disciplinary meeting, in support of her claim that the physical contact with Mr. Browning was an

accident, Grievant provided a signed, unsworn statement from her chiropractor, Dr. Tammy W. Burns, dated October 24, 2012, which stated the following:

> Due in part to Ms. Simons' long history of back injuries, she has suffered with occasional muscle spasms and cramping in her legs for several years. These symptoms are accentuated when the patient is fatigued.

R Ex 3.

At the Level Three hearing, Grievant presented an almost identical signed, unsworn statement from her physician, Dr. James G. Gaal, dated November 5, 2012, which stated the following:

> Mrs. Simons' (sic.) has a long history of back injuries, she suffers with occasional muscle spasms and cramping in her legs. These symptoms are accentuated when the patient is fatigued.
>
> Should you need any further information please do not hesitate to contact my office.

G Ex 1.

Neither Dr. Gaal nor Dr. Burns appeared in person to testify at the Level Three hearing. Therefore, their statements are hearsay. An administrative law judge must determine what weight, if any, is to be given to hearsay evidence in a grievance proceeding. *Hamilton v. W. Va. Dep't of Health & Human Res*., Docket No. 2011-1785-DHHR (Sept. 6, 2012); *Miller v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ*., Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996). The Grievance Board has applied the following factors in assessing hearsay testimony: (1) the availability of persons with first-hand knowledge to testify at the hearings; (2) whether the declarant's out of court statements were in writing, signed, or in affidavit form; (3) the agency's explanation for failing to

obtain signed or sworn statements; (4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; (5) the consistency of the declarant's accounts with other information, other witnesses, other statements, and the statement itself; (6) whether collaboration for these statements can be found in agency records; (7) the absence of contradictory evidence; and (8) the credibility of the declarants when they made their statements. *Simpson v. W. Va. Univ*., Docket No. 2011-1326-WVU (May 3, 2012); *Cale v. W. Va. Univ*., Docket No. 2011-1711-WVU (Mar. 22, 2012); *Sinsel v. Harrison County Bd. of Educ*., Docket No. 96-17-219 (Dec. 31, 1996).

Apparently, Grievant has suffered from muscle spasms in one form or another for several years. However, this evidentiary inquiry is focused upon whether the kicking which allegedly injured her supervisor, Mr. Browning, was intentional, or merely the result of a coincidental involuntary reaction to a cramp or muscle spasm. Because the timing of these events appears more than coincidental, live testimony from a medical expert would have been far more illuminating than their brief, diagnostic conclusions which fail to address the critical point in this grievance, how likely is it that the kick Mr. Browning received resulted from a muscle spasm? This is particularly critical where the "kicking" action immediately followed Mr. Browning's sexist, rude and inappropriate comment to Grievant. Unfortunately, Grievant provided no explanation why neither of these medical experts were called to testify in person.

"Muscle spasms" and "leg cramps" are closely related phenomena. A "spasm" is defined as "a sudden, involuntary contraction of a muscle or group of muscles." *The*

American Heritage Dictionary 1171 (2d College Ed. 1985). A "cramp" is defined as "a sudden involuntary muscular contraction causing severe pain, often occurring in the leg or shoulder as the result of strain or chill." *The American Heritage Dictionary* 336 (2d College Ed. 1985). Although cramps and spasms are both defined as "involuntary," the medical statements Grievant provided do not address the specific situation presented here: a supposedly involuntary kicking movement of one leg by a person who was already upright and standing on both feet.[1] This is where the inability to obtain additional information, particularly from expert witnesses such as the medical personnel who treated Grievant, prohibits giving significant weight to their hearsay statements beyond concluding that Grievant's explanation that she experienced a muscle spasm is plausible.

Ultimately, Grievant's multiple exculpatory explanations for her involvement in this incident were so inconsistent that she undermined her own credibility. Comparing her testimony against the testimony of Brian Herdman and Landon Snyder, and the photographic evidence which was identified through Mr. Herdman's testimony, Grievant's claim of innocence is simply not credible. Grievant's verbal apology to Mr. Browning on the morning following this incident suggests that there was contact between Grievant's foot and Mr. Browning's leg. Grievant did not state at that point that her kicking Mr. Browning was merely accidental, or the result of an involuntary muscle spasm beyond her control. Grievant's written statement on October 4, acknowledging that she touched Mr. Browning's leg with the side of her foot, was modified in her

[1] Grievant testified that she discussed this incident with her doctor after the fact. Nonetheless, the medical statement does not discuss this specific situation.

response to the proposed disciplinary action, when she asserted her contact with Mr. Browning resulted from a muscle spasm, and was further essentially contradicted in her Level Three testimony, when she stated that she merely kicked the chair on which Mr. Browning was sitting. Moreover, Grievant provided no cogent explanation for these revisions and contradictions during her cross-examination by Respondent's counsel. Therefore, Respondent established by a preponderance of the credible evidence of record that Grievant kicked her immediate supervisor, Jody Browning, substantially as alleged.

The disciplinary notice includes reference to another incident in January 2012 where Grievant allegedly kicked Mr. Browning on a previous occasion. However, there was no documentation offered to support this allegation, nor was any evidence presented to indicate that Grievant was disciplined in any manner for this incident, thereby triggering her right to grieve an adverse action. Grievant testified that Mr. Browning actually struck her during the incident and that she never kicked him. Ordinarily, the merits of any prior disciplinary actions which Grievant failed to timely grieve when they were administered may not be contested in a subsequent proceeding challenging a separate disciplinary action. *See Koblinsky v. Putnam County Health Dep't*, Docket No. 2011-1772-CONS (Oct. 23, 2012); *Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997); *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996). However, where the matter did not result in any documented disciplinary action, there is no presumption that the event occurred. In this case, there was only hearsay evidence to contradict Grievant's version

of events surrounding that alleged incident. Grievant's testimony is more credible than the completely uncorroborated hearsay allegation in the disciplinary notice. Therefore, the undersigned Administrative Law Judge finds that the events which took place on October 4, 2012, represent the first instance of misconduct wherein Grievant assaulted a supervisor.

Grievant received a three-day suspension for this offense. Engaging in physical violence against a co-worker or supervisor is a serious offense. Ordinarily, a penalty greater than a three-day suspension would be warranted for such an offense. However, it is apparent that Mr. Browning's improper statement to Grievant instigated this incident. Respondent properly took this into consideration, taking unspecified disciplinary action against Mr. Browning, and imposing a minimal penalty against Grievant for an incident involving physical violence in the workplace. Further, disregarding the prior offense of kicking Mr. Browning which was not proven, a three-day suspension remains well under the maximum penalty Respondent could have imposed. Therefore, the penalty imposed was reasonable in the circumstances presented, and not disproportionate to the offense Grievant committed. *See Snedegar v. W. Va. Div. of Corr*., Docket No. 2008-1889-MAPS (Jan. 15, 2009).

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. Procedural Rule of the W. Va. Public Employees

Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. An administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. *Hamilton v. W. Va. Dep't of Health & Human Res*., Docket No. 2011-1785-DHHR (Sept. 6, 2012); *Furr v. Dep't of Health & Human Res*., Docket No. 2011-0988-CONS (Dec. 7, 2011); *Kennedy v. Dep't of Health & Human Res*., Docket No. 2009-1443-DHHR (Mar. 11, 2010). *See Warner v. Dep't of Health & Human Res*., Docket No. 07-HHR-409 (Nov. 18, 2008).

3. The Grievance Board has applied the following factors in assessing hearsay testimony: (1) the availability of persons with first-hand knowledge to testify at the hearings; (2) whether the declarant's out of court statements were in writing, signed, or in affidavit form; (3) the agency's explanation for failing to obtain signed or sworn statements; (4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; (5) the consistency of the declarant's accounts with other information, other witnesses, other statements, and the statement itself; (6) whether collaboration for these statements can be found in agency records; (7) the absence of contradictory evidence; and (8) the credibility of the declarants when they made their statements. *Simpson v. W. Va. Univ*., Docket No. 2011-1326-WVU (May 3, 2012); *Cale v. W. Va. Univ*., Docket No. 2011-1711-WVU (Mar. 22, 2012); *Sinsel v. Harrison County Bd. of Educ*., Docket No. 96-17-219 (Dec. 31, 1996).

4. Respondent proved the charge against Grievant by a preponderance of the evidence.

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 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).

_____

LEWIS G. BREWER
Administrative Law Judge

Date: May 22, 2013