WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TIMOTHY M. HALEN,
Grievant,

v. **Docket No. 2012-0912-DOT**

DIVISION OF MOTOR VEHICLES,
Respondent.

D E C I S I O N

Timothy M. Halen, Grievant, filed this grievance against his former employer, the West Virginia Division of Motor Vehicles (hereinafter "DMV"), Respondent, on March 6, 2012. Grievant protests the termination of his employment alleging, "unlawful discharge of a 'whistleblower'. . .retaliation?"[1] Grievant seeks the restoration of his job with DMV as Lead Customer Service Representative.

As authorized by W. VA. CODE § 6C-2-4(a)(4), the grievance was filed directly to level three of the grievance process. A level three hearing was held before the undersigned Administrative Law Judge on September 14, 2012, and March 6, 2013, at the Grievance Board's Charleston office. Grievant appeared *pro se*. Respondent was represented by counsel, Charli Fulton, Senior Assistant Attorney General at the September 14, 2012 hearing, and Gretchen A. Murphy, Assistant Attorney General, at the March 6, 2013 hearing. This matter became mature for consideration on May 16, 2013, upon

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[1] Grievant attached to his March 6, 2012, grievance form a four-page document he reportedly had planned to present to Respondent prior to his termination. Grievant admits on the document, "I was terminated immediately prior to the printing and distribution of the letter." The basis of Grievant's self entitled designation of whistle blower is not clear. The four-page document is separate and distinct from the statement of grievance; it is a portion of the record as an attachment to Grievant's grievance form.

receipt of the last of the parties' proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals.

Synopsis

Grievant's employment with the West Virginia Division of Motor Vehicles was terminated after approximately five years of employment. Respondent maintains that Grievant was terminated for cause. Respondent highlights Grievant's pattern of behavior, alleging continued intimidating and objectionable conduct despite remedial disciplinary measures. Respondent cites cumulative effect. Specifically, Grievant was terminated because of behavior Respondent deemed insubordinate. Grievant protests.

In accordance with applicable standard, Respondent established 'good cause' for termination of Grievant's employment by a preponderance of the evidence. Respondent has substantial discretion to determine the penalty in these types of situations. 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. Grievant commenced employment with Respondent on September 7, 2007, as a Customer Service Representative ("CSR"). Effective December 1, 2010, Grievant was promoted to Customer Service Representative, Lead ("Lead CSR") where he remained until his dismissal on March 5, 2012.

2. Relevant to the instant matter, Customer Service Representatives (CSRs) are responsible for assisting customers by telephone with questions and problems concerning the receipt, auditing, processing, recording and issuance of drivers' licenses, vehicle registration, vehicle titles and related documents in the call center.[2] CSRs are responsible for answering the myriad of telephone calls regarding DMV issues.

3. Grievant was employed in Respondent's Charleston call center. The call center in discussion during the course of this matter consists of a manager, supervisor, a Lead CSR and customer service representatives.[3] At the time Grievant was promoted to Lead CSR, Earl Reynolds was the manager and Kim Ziesemer was the Supervisor.

4. As Lead CSR, Grievant's duties were to assist, aid and to some limited degree, oversee/monitor the actions of the CSRs at the call center.[4]

5. DOP's Class Spec for a "Customer Service Representative, Lead" specifies among other information that a Lead CSR "assists in assigning, reviewing and approving the work of other employees; may approve leave requests, trains employees in new work methods and orientation." As an example of work, among other duties, it is identified that

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[2] Nature of Work: Under general supervision, performs full performance level clerical/public contact work involving the processing, recording and issuance of drivers' license, vehicle registration, vehicle titles, and related documents. Work is characterized by regular and recurring tasks requiring knowledge and interpretation of motor vehicle and driver registration and license laws, policies and procedures. Operates moderately complex office equipment on a regular basis. Refers unusual or hostile situations to a supervisor. Performs related work as required. See Department of Personnel (DOP) Class Spec. Customer Service Representative.

[3] Approximately twenty-five (25) Customer Service Representatives work at the call center.

[4] An issue in discussion within this matter is the limits of Grievant's authority as the Lead CSR. In dispute is the reasonableness of Grievant's actions as the Lead CSR.

a Lead CSR, "in the absence of a Supervisor will have authority as established by management: i.e., delegate job assignments, arrange work schedules, prepare daily labor reports, approve leave requests, counsel employees on current and/or new policies and procedures, and prepare correspondence and reports, etc." R. Ex. 2.

6. Grievant set a high standard of performance for himself. Not all of the CSRs' level of performance equal that of Grievant's. Grievant took his role as Lead CSR seriously. He was of the belief that some of the CSRs' performance levels, at the call center could be improved.

7. Grievant's dedication to his job and his attempts to improve the efficiency of the call center CSRs' performances created discord.

8. Conflict arose with regard to Grievant's actions as a Lead CSR. The conflicts were multifaceted.

9. Grievant collected data and analyzed information regarding individual CSR performances.[5] Grievant did some extensive review and analysis of the "Call Status" information of CSRs at the call center, eg., time spent on calls, task completion time, call ready status. Grievant took personnel work data documents home from within his section. R. Ex. 15.

10. Grievant compounded the anxiety of his fellow employees by timing their breaks and critiquing their activity during their breaks. A majority of the CSRs at the call center were female employees.

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[5] One of the assertions in the termination letter was "inappropriate use of state records." Grievant took personnel work data documents home, he discussed, shared and reviewed this data with his wife. Grievant's wife was not an employee of the State. Grievant and his wife determined that other DMV employees were not performing their duties in the most efficient manner.

11. Complaints were verbalized from co-workers to administrators regarding Grievant's conduct as Lead CSR.

12. Grievant wanted to discipline certain CSRs, but he was specifically informed that was not his responsibility.

13. Administrators communicated with Grievant regarding his conduct as Lead CSR. There were concerns with regard to Grievant's methods and intensity. Respondent attempted to clarify with Grievant his duties and their expectations for Grievant as the Lead CSR.

14. As Lead CSR, Grievant was supposed to aid and assist CSRs. Among other duties Grievant forwarded calls to CSRs. As Lead CSR, Grievant had the ability to change a CSR's status, designating status to "ready" despite the designation the individual CSR may have designated as his/her status.[6]

15. Grievant was of the belief that some CSRs were taking advantage of the system and avoiding work by not indicating their readiness in a timely fashion. Grievant sent calls to employees in the call center prior to the CSR indicating the "ready" queue. CSRs complained Grievant forwarded calls in an inappropriate manner.

16. Administrative personnel were of the belief that Grievant's conduct was overzealous and at times exceeded his authority as a Lead CSR. Respondent's

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[6] There are several calling queue positions an individual CSR may have identified as status positions such as; talking to a customer, work task, ready status, etc. "Ready" status means ready to take a call and the next available call would go to that CSR. "Work" which actually means not working. The CSR has answered the last customer, done and has not made him/her selves ready for the next call. "Work task" means that CSR is filling out paperwork, getting documents that customers want sent, or something of that nature. CSR can also be on the telephone,"On call."

expectations for Grievant's conduct as a Lead CSR were repeatedly discussed with Grievant.

17. On January 13, 2011, Grievant received a verbal warning for instances of failure to follow his supervisor's instructions and overzealous behavior relating to the work of other employees. R. Ex. 3.

18. On June 24, 2011, Grievant received a verbal warning[7] from Earl Reynolds, then call center manager for Respondent:

> [H]ad discussion with [Grievant] today on how he was doing at the Lead position. I did inform him that a few areas needed some changes, such as e-mails need to be shortened and not be accusing to the reader, he need not be argumentative to the CSR's and he needs to interact more instead of standing in the front of everyone with his arms folded. He has gotten off to a rocky start expecting all CSR's to work up to his ethics.

R. Ex. 7.

19. Grievant was counseled with regard to his usage of e-mails. He was instructed not to send any further emails without first obtaining supervisory permission.

20. Grievant had been sending emails to call center employees criticizing their work performance in what was perceived by Respondent as a derogatory manner. (Kim Ziesemer testimony.)

21. On October 19, 2011, Grievant received a verbal warning for arranging media coverage without going through the proper channels. R. Ex. 4 (Pete Lake and Natalie Harvey testimony)

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[7] Written documentation of verbal warnings can be memorialize on Form RL-R44. Notice of form is given to the employee and a copy is retained in Manager's Administrative file. Generally the form is signed by the supervising personnel and the employee. Not all verbal counseling is necessarily documented on a Form RL-R44.

22. Grievant was counseled regarding the parameters of his duties. It was specifically communicated and noted with Grievant that this was not the first instance Grievant had been warned about being overzealous and overstepping his authority. *Id*

23. On October 21, 2011, Grievant signed the "Employee's Verification of Disciplinary Action." Grievant provided:

> I have no excuse for not consulting Kim/Earl regarding the call to the Gazette. Without thinking of the possible negative consequences, I put Mr. Lake in a bad position. Putting him in the middle of the Commissioner and myself . . . This is the Final write-up for not following "chain of command . . . I thank you for your continued support of me in the call center. Things will improve. (Emphasis in original.)

R. Ex. 4.

24. Grievant's immediate supervisor and the manager of the division counseled Grievant several times reiterating Respondent's expectations for Grievant's conduct.

25. Complaints were received from co-workers indicating they were uneasy with Grievant's conduct. CSRs communicated to Earl Reynolds and Kim Ziesemer that they were afraid of working in the call center because of their fear of Grievant. (Testimony of Earl Reynolds and Kim Ziesemer) There is written evidence of record tending to support the contention that co-workers registered reservations about working with Grievant. R. Exs.11, 12, 23 and 24.[8]

26. Supervisor Ziesemer was of the opinion that co-workers' apprehension with regard to Grievant was justified.

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[8] Eg., [Grievant's] behavior is erratic . . . I do NOT want to cause problems for [Grievant] but I am afraid he may hurt us in the call center." See R. Ex. 23 " I have no desire to cause problems for [Grievant], but I do not want to see anyone get hurt. I honestly feel that he may be capable of causing harm to others if pushed too far." See R. Ex. 24. Respondent's witnesses indicate verbal and written complaints from co-workers regarding Grievant's conduct and reluctance to work with Grievant was received. Exhibits 23 and 24 were offered into the record as substantiation of written protestation.

27. Former Call Center Manager, Earl Reynolds, wrote a memorandum to Director Lake pertaining to Grievant after having two meetings with Grievant in February 2012. In pertinent part, the memorandum stated:

> I have known [Grievant] for a number of years. In the last four months, I have seen a change in his attitude, temper, and he has exhibited an intimidating manner toward female employees. I have a strong feeling that [Grievant] is not only capable of doing harm to others employees, but I feel [Grievant] may actually do so at any time.
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> [Grievant] exhibited behaviors during both meetings that seemed very confrontational. I believe that there is a legitimate concern that he may take some sort of action that may either disrupt the operation of the Call Center, or perhaps intimidate or harm one of the employees there.

R. Ex. 11.

28. Grievant had complaints initiated against him for intimidating and bullying behavior towards co-workers and others.[9]

29. Director Lake discussed with Grievant and communicated the opportunity for Grievant to transfer to a different work site. Grievant declined the transfer option.

30. Grievant was offered the opportunity to resign as Lead CSR at the Call Center, which Grievant declined by written correspondence dated October 24, 2011.

31. Alterations in Grievant's ability to send e-mails were made. Restrictions were implemented. Grievant had access to his email withdrawn because of emails Grievant sent on November 21, 2011.

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[9] Dawn Tucker, an Information Systems Assistant in the DMV's Information Section, reported several female employees of the help desk, came to Ms. Tucker in tears and upset, because of phone calls made by Grievant about IT issues. At some point, only Ms. Tucker, or another Information Assistant employee, Cindy Beane, took Grievant's calls so that the other employees would not have to be upset by the Grievant's calls. See also R. Ex. 31. Further, Roger Beane, Regional Coordinator for DMV, testified that on August 11, 2011, a man identified as Ricky Sherrod came into the office, upset, looking for an employee that was described as the Grievant. Mr. Sherrod understood Grievant was employed there and wanted to complain about Grievant's confrontation with Sherrod's girlfriend or wife at a convenience store.

32. On December 6, 2011, Grievant took medical leave.

33. Grievant returned to work on February 3, 2012, and received a written reprimand for behavior that occurred prior to his leave. Citing the prior verbal warnings, this written reprimand was for sending emails without prior approval on November 21, 2011. R. Exs. 16, 17 and 21.

34. The February 3, 2012, written reprimand given to Grievant stated, in pertinent part:

> You received verbal counseling on 1/13/2011 for failing to follow the instructions of your supervisor, 6/24/2011 for changes needed such as emails not being accusing and 10/19/2011 for not keeping the staff informed. On 11/21/2011 you sent two emails out without prior supervisory approval. The first email was recalled, the second email was derogatory and demeaning to the receiver. For those reasons, I have had your email ability revoked. Additionally, you are receiving a written reprimand and failure to show improvement will result in more stringent disciplinary actions up to and including dismissal.

R. Ex. 10.

35. Earl Reynolds, who had been the manager of the call center during Grievant's tenure of employment, was promoted to a new position, December 2011. A new manager for the call center was hired from outside the call center.

36. On March 5, 2012, a new call center manager was introduced to the Customer Service Representatives. Grievant was upset. Pete Lake, Senior Director, and Earl Reynolds, Regional Coordinator, (new position title) met with Grievant after the introduction in the office. Director Lake allowed Grievant a chance to compose himself, and again Grievant acted out.

37. Grievant was confrontational with Mr. Reynolds and Mr. Lake ranting and demonstrating his discontent with managerial decisions with regard to CSR personnel and call center procedure. Grievant was upset and disruptive.

38. Director Lake and Coordinator Reynolds were acutely aware that Grievant was upset. Grievant demonstrated this verbally and physically, first in the presence of call center staff then again in a meeting with Director Lake and Regional Coordinator Reynolds.

39. After the meeting with Grievant, Director Lake addressed the issue of Grievant's conduct with the Division of Motor Vehicles Commissioner, Joe E. Miller. Personnel of Respondent's upper management was convened and consulted. This included agency General Counsel Jill Dunn, Personnel Director Monica Price and Commissioner Miller.

40. Grievant's work history was reviewed and discussed by Respondent's upper management. Regional Coordinator Reynolds was also consulted for his opinion regarding Grievant's conduct.

41. Director Lake and Regional Coordinator Reynolds indicated that they felt Grievant posed a threat to the safety of other personnel at the call center.

42. Pursuant to the directions of the Commissioner, Director Lake proceeded with the termination of Grievant's employment.

43. On March 5, 2012, Director Lake called law enforcement and had Grievant physically removed from the DMV's office.

44. Respondent provided Grievant with a March 6, 2012, letter of dismissal signed by the Division of Motor Vehicles Commissioner, Joe E. Miller, which states in relevant part:

> The reason for your termination is your violation of the State's Workplace Security Policy. More specifically, but not limited to, perpetual insubordinate behavior by disobeying supervisor's directives, inappropriate attitude toward female co-workers, violation of DOT as well as the Office of Technology e-mail policies, inappropriate use of state records, and misrepresentation of

> the agency on several different occasions. Due to the serious nature of these offenses, your dismissal is warranted.

R. Ex. 6.

45. During the course of his employment, Grievant signed several workplace policy acknowledgment forms. Grievant signed the West Virginia Personnel's Prohibited Workplace Harassment Policy Acknowledgment Form as part of the new hire packet on September 7, 2007. The Division of Personnel revised the policy in December 2011. Grievant signed the Policy Acknowledgment Form on February 3, 2012. R. Ex. 20. Grievant is and was aware of the applicable policy prohibiting workplace harassment behavior.

46. DOP's Class Spec for a "Customer Service Representative, Lead" specifies in relevant part;

> **CUSTOMER SERVICE REPRESENTATIVE, LEAD**
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> **Nature of Work:** Under general supervision and in a lead capacity, performs and leads public contact work involving the receipt, auditing, processing, recording and issuance of drivers' license, vehicle registration, vehicle titles and related documents. Performs daily audits and prepares daily labor reports as directed. Responsible for office in the absence of the manager or supervisor. Performs voids and corrects errors in computer cash register system. Assists in assigning, reviewing and approving the work of other employees; may approve leave requests, trains employees in new work methods and orientation; handles unusual and complex driver or motor vehicle licensing and title problems. Assists public by telephone and in person in processing driver or motor vehicle license and title processing. Explains and provides assistance in requirements, fees, documents, forms, taxes and surcharges involved in registering and licensing vehicles. Reviews and processes documents, issues drivers' licenses, vehicle plates. Performs related duties as required.
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> **Examples of Work**
> Assists in planning, assigning and reviewing the work of others and trains employees in work methods.

R. Ex. 2.

47. Grievant presented no evidence of being discharged for whistle-blower activity. Grievant had not raised any identified issue or conduct by agents of Respondent or Respondent that is interpreted as whistle blowing prior to his dismissal from employment on March 5, 2012. Grievant is not recognized as a whistle blower.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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, a party has not met its burden of proof. *Id.*

The administrative rules of the West Virginia Division of Personnel provide that an employee in the classified service may be dismissed for cause. W. VA. CODE R § 143-1-12.2. "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, 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).

Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(*per curiam*). *See Riddle v. Bd. of Directors, So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). "[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, supra.* In other words, there must be not only a refusal to obey a reasonable and valid order, but the refusal must be wilful. *Id.* "[F]or a refusal to obey to be 'wilful,' the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order." *Id.* This Grievance Board has also previously noted that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out." *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988).

In this matter, Respondent has articulated that Grievant exhibited, on multiple occasions, conduct described as harassing, threatening and intimidating behavior. Respondent maintains its reasons for reprimanding and ultimately dismissing Grievant from employment was a result of cumulative inappropriate conduct and insubordinate behavior. Respondent cites its use of progressive discipline with Grievant.[10] Highlighting that Grievant's behavior failed to significantly modify, Respondent avers that Grievant's conduct

[10] Reprimands were issued following verbal warnings to Grievant by Earl Reynolds, Pete Lake and Kim Ziesemer concerning Grievant's inappropriate behavior.

rose to a level that created reasonable apprehension and employees were worried for their safety, because of Grievant's attitude and conduct. Grievant acknowledges the facts of events but avers that his actions were befitting his duties and the various situations.

Division of Personnel's Prohibited Workplace Harassment Policy, as applicable to employees of the State of West Virginia, specifically prohibits behavior defined as "Nondiscriminatory-Hostile Workplace Harassment." Applicable language of the policy states:

> Nondiscriminatory Hostile Workplace Harassment: A form of harassment commonly referred to as "bullying" that involves verbal, non-verbal or physical conduct not discriminatory in nature that is so atrocious, intolerable, and so extreme and outrageous as to exceed bounds of decency and which creates fear, intimidates, ostracizes, psychologically or physically threatens, embarrasses, ridicules, or in some other way unreasonably over burdens or precludes an employee(s) from reasonably performing her or his work.

The Public Employees Grievance Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 97-23-088 (June 13,1997). The point at which a work environment becomes hostile or abusive does not depend on any "mathematically precise test." *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, at 22, (1993). Instead, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiffs position, considering all the circumstances." *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75 (1998) (quoting *Harris, supra*). These circumstances "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance," but are by no

means limited to them, and "no single factor is required." *Harris,* supra at p.23; *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth.,* Docket No. 2009-0685-MAPS (Apr. 23, 2009). "'To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment.' *Napier v. Stratton,* 204 W. Va. 415, 513 S.E.2d 463, 467 (1998). *See Hanlon v. Chambers,* 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Corley, et al., v. Workforce West Virginia*, Docket No. 06-BEP-079 (Nov. 30, 2006). "As a general rule 'more than a few isolated incidents are required' to meet the pervasive requirement of proof for a hostile work environment case. *Fairmont Specialty Servs.,* [*v. W. Va. Human Rights Comm'n*, 206 W. Va. 86, 522 S.E.2d 180 (1999)], *citing Kinzey v. Wal-Mart Stores, Inc.,*107 F.3d 568, 573 (8th Cir. 1997)." *Marty v. Dep't of Admin.,* Docket No. 02-ADMN-165 (Mar. 30, 2006).

"Certainly, an employer is entitled to expect its employees to conform to certain standards of civil behavior. *Redfearn v. Dep't of Labor*, 58 MSPR 307 (1993). All employees are 'expected to treat each other with a modicum of courtesy in their daily contacts.' *See Fonville v. DHHS*, 30 MSPR 351 (1986)(*citing Glover v. DHEW,* 1 MSPR 660 (1980)). Abusive language and abusive, inappropriate, and disrespectful behavior are not acceptable or conducive to a stable and effective working environment. *Hubble v. Dep't of Justice,* 6 MSPR 659, 6 MSPR 553 (1981). *See Graley v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 99-PEDTA-406 (Oct. 31, 2000)." *Corley, et al., supra.*

Respondent has identified, with specificity, conduct of Grievant which it interpreted as intimidating behavior. Grievant was given indications by his supervisors that his

performance was not condoned or acceptable. Grievant was counseled about his behavior in the workplace. It is not established that Grievant was intentionally threatening co-workers. Grievant was overzealous with regard to his duties as Lead CSR. It is debatable as to whether Grievant's conduct is a true violation of the Nondiscriminatory Hostile Workplace Harassment Policy, reasonable individuals differ on this issue. Nevertheless, Grievant was instructed to modify his workplace conduct. He was counseled to be less aggressive and more accommodating with co-workers. Grievant was specifically forbidden to send e-mails without prior review and approval by his superiors. Grievant repeatedly contacted parties inside and outside of the DMV without proper authorization. Grievant exceeded his assigned and recognized duties, even after counseling. Grievant's conduct in that regard is insubordinate.

"Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. *See Day v. Morgan Co. Health Dep't*, Docket No. 07-CHD-121 (Dec. 14, 2007) An employee's belief that management's decisions are incorrect, absent a threat to the employee's health and safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. *Vickers v. Bd. of Directors/W. Va. State College*, Docket No. 97-BOD-122B (Aug. 7, 1998). *See Parker v. W. Va. Dep't of Health and Human Res.*, Docket No. 97-HHR-042B (Sept. 30, 1997). Additionally, an employer has the right to expect subordinate personnel "to not manifest disrespect toward

supervisory personnel which undermines their status, prestige, and authority . . ." *McKinney v. Wyoming County Bd. of Educ.*, Docket No. 92-55-112 (Aug. 3, 1992) (citing *In re Burton Mfg. Co.*, 82 L.A. 1228 (Feb. 2, 19984)).

Grievant was disrespectful and confrontational, on March 5, 2012, with Director Lake and Regional Coordinator Reynolds (former call center manager) ranting and demonstrating his discontent with managerial decisions in regard to CSR personnel and call center procedure. This expression of discontent by Grievant was inappropriate, disrespectful and not conducive to a stable and effective working environment. Grievant's conduct and manifestation as witnessed by co-workers and superiors was the culmination of a variety of events. Grievant was upset and disruptive. Grievant demonstrated insubordinate behavior in the presence of Director Lake and Regional Coordinator Reynolds on March 5, 2012. Respondent has met its burden in this matter both on the issue of reprimand and the ultimate termination of Grievant's employment. Respondent established pursuant to a preponderance of the evidence that despite remedial corrective measures, Grievant did not adequately change his mind-set, and continued to exhibit unacceptable behavior. Grievant was insubordinate.

"The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was 'clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action.' *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). Grievant has not met this burden. He was granted a wide range of leeway with regard to the presentation of his protest. Grievant's

intent is perceived as noble, but his marshaling of information and ability to address the pertinent issues was not truly responsive. Grievant acknowledges the facts of events, but believes his actions were befitting and justified situational conduct. The undersigned is sympathetic but not persuaded. Grievant's frustration with Respondent's system manifested as inappropriate conduct which reached the level of insubordination.

In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995) (citations omitted). The Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). "Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge shall not substitute his judgement for that of the employer. *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997)." *Meadows, supra.*

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. Procedural Rules of the 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.*

2. 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. *Buskirk v. Civil Service Comm'n*, 175 W. Va. 279, 332 S.E.2d 579, (1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Service Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965)." *Scragg v. Bd. of Dir. W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994).

3. To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment.

Napier v. Stratton, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998); *Corley v. Workforce West Virginia*, Docket No. 06-BEP-079 (Nov. 30, 2006). *See Hanlon v. Chambers*, 195 W. Va. 99, 464 SE.2d 741 (1995). "As a general rule 'more than a few isolated incidents are required' to meet the pervasive requirement of proof for a hostile work environment case. *Fairmont Specialty Servs. [v. W. Va. Human Rights Comm'n*, 206 W. Va. 86, 522 S.E.2d 180 (1999)], citing *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 573 (8th Cir. 1997)." *Marty v. Dep't of Admin./Division of Personnel*, Docket No. 02-ADMN-165 (Mar. 31, 2006).

4. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(*per curiam*). *See Riddle v. Bd. of Directors, So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). "[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, supra*. In other words, there must be not only a refusal to obey a reasonable and valid order, but the refusal must be wilful. *Id.*

5. "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990). An employee's belief that management's decisions are incorrect, absent a threat to the employee's health and safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. *Vickers v. Bd.*

of Directors/W. Va. State College, Docket No. 97-BOD-112B (Aug. 7, 1998). *See Parker v. W. Va. Dep't of Health and Human Res.*, Docket No. 97-HHR-042B (Sept. 30, 1997). Additionally, an employer has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority . . .". *McKinney v. Wyoming County Bd. of Educ.*, Docket No. 92-55-112 (Aug. 3, 1992) (citing *In re Burton Mfg. Co.*, 82 L.A. 1228 (Feb. 2, 1984)).

6. Respondent demonstrated that Grievant's behavior was insubordinate.

7. Respondent proved by a preponderance of the evidence that the disciplinary action taken was for good cause, and not arbitrary and capricious.

8. "Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge cannot substitute his judgment for that of the employer." *Miller v. Higher Ed. Policy Comm'n/Marshall University*, Docket No. 03-HEPC-340 (Jan. 21, 2004), citing *Jordan v. Mason County Bd. of Educ.*, Docket No. 99-26-080 (July 6, 1999); *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-223 (March 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997).

9. "An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action." *Miller*, *supra*, citing *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995).

10. Grievant did not demonstrate that the discipline imposed was excessive.

11. Respondent established by a preponderance of the evidence good cause for terminating Grievant's 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: July 30, 2013

Landon R. Brown
Administrative Law Judge