THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

ROBIN ADAIR GUMP,
Grievant,

v. **DOCKET NO. 2014-0032-DOT**

DIVISION OF MOTOR VEHICLES,
Respondent.

DECISION

This grievance was filed at level three of the grievance procedure by Grievant, Robin Adair Gump, on July 5, 2013, after she was suspended for ten days without pay by Respondent, the Division of Motor Vehicles. The statement of grievance reads: "I believe the 10 day suspension without pay I am receiving effective July 15, 2013, is unwarranted without just cause." The relief sought by Grievant is "to have this suspension rescinded, to receive full back pay and benefits for this period and in any other way to be made whole."

A level three hearing was held before the undersigned Administrative Law Judge on October 9, 2013, in the Grievance Board's Westover office. Grievant was represented by Kevin D. Church, and Respondent was represented by Gretchen A. Murphy, Assistant Attorney General. This matter became mature for decision on November 8, 2013, on receipt of the last of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was suspended for ten days without pay for directing a subordinate to "fraudulently" issue her a vehicle registration, for directing her to print a temporary

registration card, and for unprofessional behavior, specifically, later pulling the same subordinate toward her and telling her, "I ought to kick you in the ass," to which the subordinate responded in kind. Grievant then apologized for the entire misunderstanding. Respondent did not demonstrate that Grievant intended to commit fraud when she asked a subordinate to renew her vehicle registration when the personal property taxes had not been paid, or that she acted improperly in directing that a temporary registration card be issued. Grievant knew that the subordinate would check online to see whether her taxes had been paid, and she thought her husband had paid them. Respondent demonstrated that Grievant exhibited unprofessional conduct, and that she engaged in inappropriate touching of a co-worker. Grievant's ten-day suspension without pay is reduced to a three-day suspension without pay.

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

Findings of Fact

1. Grievant has been employed by the Division of Motor Vehicles ("DMV") for nine years, and is a Customer Service Representative Lead ("CSR Lead") in the Moundsville, West Virginia office. She has been responsible for running the Wheeling office on Wednesdays for some period of time.

2. A CSR Lead is in the chain of command for the Customer Service Representatives, but is not considered by DMV to be a supervisor.

3. Grievant was suspended from her employment for ten days without pay by letter dated June 25, 2013, for "disregard for the policies and procedures in place, and your

inappropriate behavior when dealing with a subordinate employee." The suspension letter states that:

> on May 16, 2013, you directed Beth McNeil to fraudulently issue you a vehicle registration (via instant print) without presenting your personal property tax receipt. This is a direct violation of WV Code 17-A (sic) -3-3a. When she refused to process the transaction without the proper verification of taxes, you subsequently directed her to print a temporary registration card for you. When Ms. McNeil again refused, you went to the Marshall County Sheriff's Office and paid your personal property taxes.
>
> Additionally, upon leaving the office that day, you approached Ms. McNeil stating, "I ought to kick you in the ass". This is unprofessional behavior on your part, and could be construed as an act of battery under WV Code 61-2-9c.
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> Neither of your actions are in accordance with the standards of workplace behavior expected from a Customer Service Representative Lead in a Regional Office and therefore warrant this disciplinary action.

4. On May 16, 2013, while Grievant was at work, her daughter Kendra called her on the telephone at around 3:30 p.m. Kendra was upset because she had discovered the registration on the car she was driving had expired. Grievant told her not to worry, she would take care of it.

5. Grievant's husband had recently paid the family's real property taxes, but had overlooked payment of the personal property taxes, including the taxes on the vehicle Kendra was driving. Grievant and her husband thought her husband had paid all the property taxes.

6. Grievant was aware that if she did not have her personal property tax receipt, an employee would look up her personal property tax information online to make sure that the property taxes on the car Kendra was driving were paid prior to a new registration card being issued. In fact, the prior year Grievant had asked the Supervisor in the Moundsville

office, Lori Yoders, to renew her registration for her without providing the personal property tax receipts, and Ms. Yoders had looked online to determine whether the property taxes had been paid. Ms. Yoders had told Grievant her taxes were not paid and she could not renew the registration that year until they had been paid. Grievant was embarrassed by this, and upset with her husband for not paying the taxes.

7. Sometimes customers come in to renew their registration and do not bring their personal property tax receipts with them. DMV employees may choose to assist the customer by looking up the taxes online, rather than making the customer return with the receipt.

8. After she got off the telephone with her daughter, Grievant asked the first Customer Service Representative she saw as she exited her office, Donna West, if she could take care of renewing the registration. Then she realized it was time for Ms. West to leave, so she asked her to just give her the form to fill out and she would have someone else take care of it. Ms. West went to Ms. Yoders, and asked her if she wanted her to stay and take care of Grievant's registration. Ms. Yoders told Ms. West to look up the taxes and renew the registration, and made suggestions to her regarding the name in which the taxes would be found. Ms. West could not find the property taxes for Grievant's family and returned to Ms. Yoders. Ms. Yoders told her she would look them up.

9. Grievant did not know that Ms. West was working on her registration issue, and she took the form for obtaining a new registration card to Customer Service Respresentative Beth McNeil and asked her if she would renew the registration when she had time. Ms. McNeil was assisting a customer at the time. She asked Grievant if her taxes were paid and she told her they were. Grievant then left. Because there had been

a problem with Grievant's taxes not being paid the previous year, Ms. McNeil went to Ms. Yoders' office and told her that Grievant wanted her to renew her registration. Ms. Yoders told Ms. McNeil she was looking up the taxes and to go ahead and collect the fees. Ms. McNeil did so, and she gave Grievant a decal. She did not give her a registration card.

10. Ms. Yoders' online check of Grievant's personal property taxes revealed that they had not been paid. For some reason this upset her, and she went to her supervisor, Tom Johnson, and told him, "I think she's trying to do it again." She then called the courthouse to verify her findings and was told the personal property taxes had not been paid.

11. At some point Grievant told Ms. McNeil she needed her to print her a temporary registration card, and Ms. McNeil refused. Grievant told her to print the temporary registration, which she then intended to take to Mr. Johnson with the decal. Ms. McNeil refused again, and went to Mr. Johnson's office with Grievant. Ms. McNeil told Mr. Johnson that Grievant had told her to print a temporary registration. Grievant told Mr. Johnson a temporary registration could be printed, or they could do an "error correct" to reverse the transaction, and she could leave and go pay the taxes. Mr. Johnson declined to approve the issuance of a temporary registration, and allowed Grievant to leave to pay the taxes.

12. Grievant paid the personal property taxes that day, and her vehicle registration was renewed.

13. Ms. Yoders, Mr. Johnson, Ms. McNeil and Grievant later met in Mr. Johnson's office to discuss what had occurred. Ms. Yoders concluded that Grievant was mad at Ms. McNeil because she was staring at her during the conversation in Mr. Johnson's office.

Although it is clear from Grievant's speech pattern that she has hearing impairment,[1] Ms. Yoders was not aware that Grievant reads lips due to her hearing impairment, and acknowledged that Grievant could have been staring because she was reading Ms. McNeil's lips.

14. Grievant left the office that day with Ms. McNeil. As they went down the hallway Grievant put her hand on Ms. McNeil's shoulder and pulled her into her, and told her she ought to kick her in the ass, to which Ms. McNeil responded by pulling away and stating, "[n]o, Robin, I ought to kick you in the ass." Grievant then pulled Ms. McNeil in to her again and told her she was sorry, she thought the taxes were paid, she was so mad at her husband, and she was going to kill him. Ms. McNeil felt that Grievant was trying to bully her, and Grievant's actions upset Ms. McNeil. Ms. McNeil called Ms. Yoders after she got home and told her what had happened.

15. When Grievant was asked by her supervisors the next day about her conversation with Ms. McNeil as they were leaving the office and about whether she had touched her, Grievant denied having spoken with or having touched Ms. McNeil. When Grievant was told there was a video of them in the parking lot leaving together and of Grievant talking as Ms. McNeil walked away, Grievant then said that she must have talked to her. She later said she had touched Ms. McNeil on the hand or arm in a friendly manner.

16. Grievant suffers from Fibromyalgia. One of the symptoms of the disease and a side-effect of the medication she takes for it is memory loss. Grievant has experienced

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[1] Respondent insinuated in its written proposals that Grievant was lying regarding her hearing impairment. The evidence does not support such a finding.

problems with her memory over the last year. Sometimes when she is provided with additional information regarding something that has occurred it helps her to remember.

17. Ms. McNeil was not disciplined for her inappropriate response to Grievant because she was in a defensive posture.

18. Grievant received an overall rating of "meets expectations" on her performance evaluations for 2009, 2010, 2011, and 2012. On her most recent evaluation she received ratings of "exceeds expectations" in two categories under the heading "Demonstrates Credibility." Grievant has been a good, dependable employee, who deals well with the public.

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. VA. CODE § 29-6A-6; *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

Respondent presented several charges against Grievant. As to the first charge, Respondent did not prove that Grievant "directed Beth McNeil to fraudulently issue you a vehicle registration (via instant print) without presenting your personal property tax receipt." In support of its contention that Grievant thought she could get her registration renewed

without paying her taxes, Respondent pointed to the fact that she had tried the same thing the prior year, that she waited until the end of the day when everyone was busy, and that she went to Ms. West first when she knew it was time for her to leave. First, unless Grievant was a complete idiot, the fact that Grievant's taxes had not been paid the prior year when she had tried to renew her registration and Ms. Yoders brought this to her attention actually supports Grievant's position that she thought her taxes were paid, not Respondent's conclusion that she was trying to sneak something through again. Grievant was well aware both from her nine years on the job and from the incident the prior year that whoever renewed her registration would not do so until they verified that the taxes had been paid. As to the time of day all this happened, Respondent presented no evidence to dispute that Grievant's daughter did not call until 3:30 p.m. Ms. Yoders admitted that Grievant had said something about her daughter Kendra when Grievant was in her office, but Ms. Yoders was not listening to Grievant at the time because she was too busy. Finally, Respondent's assertion that Grievant first went to Ms. West because she knew she was leaving and thought that she would not look up the taxes online is nothing more than pure speculation. The evidence supports a finding that Grievant thought that the personal property taxes had been paid when she asked Ms. West and Ms. McNeil to renew the car registration, and that she did not attempt to commit fraud. It is unclear to the undersigned why Ms. Yoders and Mr. Johnson assumed the worst about Grievant when she has been a dependable, trustworthy employee.

The second allegation is that Grievant directed Ms. McNeil to print her a temporary registration card. Grievant admitted that she asked Ms. McNeil to do so, with the intent of taking it to Mr. Johnson with the decal for approval, in order to get these items to her

daughter. In fact, Grievant and Ms. McNeil did go to Mr. Johnson and Grievant offered options as to how to proceed. Mr. Johnson directed that the temporary registration not be issued, and allowed Grievant to go pay her taxes. The undersigned finds no nefarious intent in this scenario, but it does demonstrate that Ms. McNeil, Mr. Johnson and Ms. Yoders approached this entire situation with blinders on, having decided at the very beginning that Grievant was trying to pull one over on them.

The remaining issue is what really transpired between Ms. McNeil and Grievant as they were leaving. Grievant acknowledged that she touched Ms. McNeil, but denied pulling her into her body as described by Ms. McNeil. Grievant also acknowledged that she said she was going to kick someone in the ass, but testified that she said she was going to kick her husband in the ass, not Ms. McNeil. It is clear to the undersigned that what Ms. McNeil heard was that Grievant should kick Ms. McNeil's ass.

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness.

Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

The undersigned concludes from her observations of Ms. McNeil during her testimony, and from Ms. McNeil's entire reaction to the registration renewal request, that Ms. McNeil tends to embellish the story, and was not viewing the situation objectively. Nonetheless, the undersigned does believe that the contact Grievant made with Ms. McNeil upset Ms. McNeil, and was more than simply touching her on the hand or arm. Grievant, by her own admission, does not remember things clearly. Accordingly, the undersigned finds Ms. McNeil's version of events to be somewhat more credible than Grievant's.

The undersigned cannot conclude, however, that Grievant made a serious threat to Ms. McNeil. The factors relied on in evaluating whether comments constitute a threat under the West Virginia Division of Personnel's Workplace Security Policy include whether the threat seems real, and the nature, likelihood and imminence of the potential harm. *Bowe v. Workers Compensation Comm'n*, Docket No. 04-WCC-268 (Oct. 10, 2004), (*citing Burkhammer v. Dep't of Health & Human Resources*, Docket No. 03-HHR-276 (Nov. 12, 2003)). In this instance, not only did Ms. McNeil respond in kind to Grievant, but by Ms. McNeil's own admission, Grievant immediately apologized for the entire misunderstanding. Ms. Yoders testified that while Grievant sometimes overreacts when she talks to her about work issues, and then apologizes, neither she nor Ms. McNeil have ever shown any

aggressive tendencies. Mr. Johnson agreed with this. Thus, while Grievant's comments were inappropriate, as was Ms. McNeil's response, and her touching of Ms. McNeil was inappropriate, Grievant did not threaten Ms. McNeil. Respondent has demonstrated, however, that Grievant engaged in inappropriate touching and made inappropriate comments to a co-worker.

Inasmuch as Respondent has failed to prove all the charges against Grievant, the undersigned concludes that the ten-day suspension should be reduced to a three-day suspension without pay.

Finally, Grievant asserted that none of this would have happened if Respondent's employees had followed the proper procedure, including not handing Grievant a decal. Whether that is true or not is pure speculation. What is clear, however, is that none of this would have occurred if Grievant had done what is required of everyone seeking to have their registration renewed: produced her paid tax receipt and renewed her vehicle registration in a timely manner. Her failure to do so cannot be blamed on Respondent.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. VA. CODE § 29-6A-6; *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. Respondent did not demonstrate that Grievant directed Ms. McNeil to fraudulently issue her a vehicle registration, that Grievant did anything improper when she

told Ms. McNeil to issue her a temporary registration card, or that she threatened Ms. McNeil.

3. Respondent did demonstrate that Grievant engaged in unprofessional conduct when she touched Ms. McNeil inappropriately, and that she made comments to Ms. McNeil that were inappropriate.

Accordingly, this grievance is **GRANTED IN PART, AND DENIED IN PART**. Respondent is **ORDERED** to reduce Grievant's ten-day suspension without pay to a three-day suspension without pay, and to pay her back pay and restore all benefits she would have earned had she not been suspended an additional seven days, including annual leave, sick leave, and retirement.

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

Date: December 11, 2013

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BRENDA L. GOULD
Administrative Law Judge