MARCIA ANDERSON

v. Docket No. 93-RS-486

DIVISION OF REHABILITATION SERVICES

D E C I S I O N

The Division of Rehabilitation Services ("DRS") dismissed Ms. Marcia Anderson, Grievant, from her position as a teacher for 1) false swearing and 2) involving a student "in a clandestine activity", "asking [this] student to utter falsehoods", and "plac[ing] the handicapped client, in continual emotional danger." As this is a discharge case the Grievant filed directly to the Grievance Board pursuant to W. Va. Code §29-6A-4(e). The Level IV hearing was held on January 11 and 12, 1994, and following the submission of briefs and reply briefs this case became mature for decision on February 22, 1994.

DRS avers the above-stated reasons provided good cause for the Grievant's dismissal as her behavior made her ineffective as a teacher and demonstrated disregard for her duties and responsibilities as a teacher of handicapped students. Grievant argues DRS did not meet its burden of proof and demonstrate that the Grievant was guilty of the charges. Further, the Grievantcontends DRS committed the very misconduct that it alleged the Grievant engaged in; it used the handicapped student in an attempt to prove its charges and caused the student emotional distress. Additionally, the Grievant argues the charges are merely pretext to hide the true motive which was to fire a "troublemaker" who had successfully lobbied the Legislature for a teacher pay raise against the DRS's Administration's wishes.

In a disciplinary action the burden of proof is on the employer to prove the charges by a preponderance of the evidence. W. Va. Code §29-6A-6; Schmidt v. W. Va. Dept. of Highways, Docket No. DOH-88-063 (Mar. 31, 1989). Thus, the evidence, much of which is in dispute and contradictory, will be examined to determine if the charges of false-swearing and detrimental disregard of a handicapped client's emotional welfare are supported by the evidence.

Background

The Grievant was employed by the DRS as a Developmental Education Teacher at the Vocational Rehabilitation Center ("Center") for approximately five years prior to discharge on December 6, 1993. Her job performance evaluations ranged from a 3.3 to a 3.8, with a 3.6 for the last evaluation. This rating means the Grievant's job performance fell between a 3 which indicates adequate performance and a 4 which indicates a strength. (See footnote 1) On the Grievant's last evaluation she received a 2 or weakness on "working with others". (See footnote 2)

The Center is a residential treatment center where Vocational Rehabilitation clients with a variety of handicaps, both emotional and physical, receive medical care, education, and training. For many of the clients it is the first time they are away from their families. Since the goal of the Center is to encourage autonomy and independence in the student, staff are directed not to be surrogate parents but to maintain relationships with the students on a professional basis. The guidelines for attainment of appropriate staff/student relationships are memorialized in the West Virginia Rehabilitation Center Operation Manual at 1102, "Staff/Student Relationships." The guidelines state the "primary concern" of a staff member is the "welfare of the student" and staff are directed to "make each student independent." Id. The guidelines further state that "some acts between staff and students are discouraged because of the concern a staff member may purposely or unknowingly meet his or her needs to the detriment of the student's well-being.

A list of five things staff members cannot do are included as guidelines to follow. These guidelines state:

Staff members cannot:

1 Invite students to their homes;

2 Offer rides in personal cars unless business related;

3 Lend or borrow money from students;

4 Develop emotional or sexual relationships with students;

5 Give to or accept gifts from students.

Factual Discussion

Ms. Anderson's dismissal is closely related to another breach of staff-student policy which resulted in dismissal of another staff member. In approximately mid-July, 1993, the Grievant contacted Mr. Jerry Jones, a Center Administrator, to report that her direct supervisor, Mr. Michael Levy, was involved in an inappropriate relationship with a female student at the Center. Mr. Jones indicated he would talk to Mr. Michael Smith, Chief Deputy Director of DRS, and get back to her. As of the morning of August 6, 1993 she had not heard from Mr. Jones. Apparently DRS had had other reports about Mr. Levy's involvement with a student and appointed Mr. Jerry Tribble, Deputy Administrator of DRS on August 6, 1993 to investigate the situation.

Interestingly, the events which led to Grievant's discharge began on the same day, April 6, 1993. Since the testimony of the witnesses involved in this situation differed widely, their testimony will be recounted separately.

Grievant's testimony is as follows. Around 2:30 or 3:00 p.m. on August 6, 1993 she decided to take annual leave to meet her mother, visiting from Florida, and her son, niece, and nephew at Shawnee Park. Another teacher, Ms. June Gesner, also decided to take annual leave and meet the Grievant there. While at the park Grievant and Ms. Gesner sat in a shelter also occupied by one ofGrievant's rehabilitation students, Mr. D. M. (See footnote 3) Apparently Grievant's relatives had gone somewhere else in the park to play, and Grievant had kept her mother's camera. Grievant testified that she spoke to Mr. M. and he offered her a beer which she refused. She stated the student attempted to interact with them and she told him "we are on annual leave. Please don't bother us." The student returned to the other end of the shelter.

While the Grievant and Ms. Gesner were chatting, they saw Mr. Levy, Grievant's then direct supervisor and Rehabilitation Administrator, drive into the parking lot with a Center student. She

stated she and Ms. Gesner became anxious and hid behind a pillar. Since Grievant had the camera she decided to take a picture of Mr. Levy and the female student. Grievant testified she was "frightened, truly frightened" and shaking so badly she could not take the pictures. Grievant then stated Mr. M. looked up, saw what they were looking at and said, "That's Mike Levy," and then Grievant stated "he (Mr. M.) basically took the pictures."

During the course of the hearing Grievant testified three times about the picture-taking episode, since how, why, and when the student was involved was considered a key issue. When questioned by her attorney the Grievant testified saying "I was shaking so badly I could not hold my hand still" and Mr. M. came up and said, "I can take the pictures." When her counsel asked why she didn't stop him she said, "It just happened. It happened sofast." She also stated if she had hollered to the student or went to get him, "Mike Levy would have looked up and noticed we were there and something was going on."

When cross examined by Ms. Dooley, DRS's attorney, the following exchange took place. (See footnote 4)

Ms. Dooley:

"You handed Mr. M. your camera at the park?"

Grievant:

"No.

Ms. Dooley:

"How did he get it?"

Grievant:

"He took it from my hand."

Ms. Dooley:

"And you allowed him to take the camera from your hand?"

Grievant:

"I never made extension to give him that camera."

Ms. Dooley:

"Well, answer my question."

Grievant:

"Did I allow him?"

Ms. Dooley:

"You allowed him to take the camera from your hand?"

Grievant:

"I guess I could have fought him off."

Ms. Dooley:

"But you allowed him to take the camera from your hand?"

Grievant:

"I don't like the word allowed."

Ms. Dooley:

"Well Mrs. Anderson, you have to answer my question."

(Attorney Discussion)

Grievant:

"Did I allow him?" (8 second pause) "I'm gonna say no."

Ms. Dooley:

"Well how did he get the camera out of your hand if you did not allow it to be taken out?"

Grievant:

"He took it from me."

Ms. Dooley:

"Okay."

Grievant:

(Pause) "I don't know how I'm suppose to explain that."

Later on subsequent cross-examination the following exchange about the camera incident took place:

Ms. Dooley:

"You could have declined . . . . Mr. M. in fact offered to take the camera from you, you could have stopped him or just declined to accept his offer, couldn't you?"

Grievant:

(17 second pause) "I really don't think it was an offer, I don't think it was something you could decline, I don't . . . it just happened."

Ms. Dooley:

"But, as Mr. M.'s teacher wasn't it inappropriate for him to take pictures of Mr. Levy and a student with your camera?"

Grievant:

(Pause) "I don't know. I don't know if that would be inappropriate or not."

Ms. Dooley:

"You don't know if that was inappropriate?"

Grievant:

(Pause) "I don't, you know, I don't know. If you were to borrow my camera on another date and took pictures of something that wouldn't be inappropriate."

Ms. Dooley:

"Okay."

Grievant:

"So, I'm not sure of your question."

Ms. Dooley:

"Well, I'm just asking about that . . ." (Interrupted)

Grievant:

"That incident?"

Ms. Dooley:

"That incident."

Grievant:

"Do I feel it was inappropriate? Yes, in some ways I do because I go on to say I wish I would have destroyed the pictures."

Ms. Dooley:

"Okay. So, you recognize the inappropriateness . . ." (Interrupted)

Grievant:

"Yes I do."

Ms. Dooley:

(Finishing) ". . . of having a student take the pictures?"

Grievant:

"I didn't have him take them, he took them by himself."

Ms. Dooley:

"Well, however it occurred.

Grievant:

And, that's why they were almost destroyed.

Ms. Dooley:

But, you wanted the pictures of Mike Levy with the student, didn't you?"

Grievant:

"No, not really. (Pause) If I would have wanted the pictures I would have taken them myself."

Grievant's testimony continued and she stated she and Ms. Gesner remained behind the pillar while Mr. M. took the pictures. After Mr. Levy and the student left the park Grievant testified that Mr. M. returned her camera and said, "You didn't see me here, and I didn't see you here, and I don't want to be involved in this situation." The Grievant responded, "Okay, fine," because she was "still so stunned that's all I could say."

The Grievant then left the park at 3:55 p.m. and returned to work. While there she received a message stating that John Harrison, Administrator of the W. Va. Rehabilitation Center, and Mr. Tribble wanted to see her about the Mike Levy situation.

Ms. Gesner's account of the Shawnee Park incident is somewhat similar to the Grievant's. (See footnote 5) At the hearing the Ms. Gesnertestified she took annual leave and met Grievant in the park. She remembered someone else being in the shelter, but did not remember who it was, and did not know it was a student until later in the investigation when Jim Quarles, Assistant Director of Human Resources for DRS, told her. At the park she saw Mr. Levy and a female student from one of her business courses. She did not remember Grievant having a camera, she did not remember Grievant attempting to take pictures, and she did not remember anyone else taking pictures. She wasn't sure how she later learned about the pictures, and it may or may not have been the Grievant who told her about them. This testimony basically concurs with her two prior statements about the incident taken on August 13, 1993 and December 5, 1993, with one notable exception. The August 12, 1993 statement does not mention the August 6, 1993 Shawnee Park incident at all.

Mr. M.'s testimony varies greatly from the Grievant's and Ms. Gesner's. (See footnote 6) He had been a student of Grievant's for several monthsand had made progress in her class. Mr. M. (See footnote 7) said he was in the park with his boombox and drinking beer when he saw the Grievant and her companion. They exchanged hellos. He stated he "felt uncomfortable" and "thought he was in 'trouble' because he should not be drinking." He offered them a beer and they refused. He saw the camera, as the Grievant kept going back and forth by the shelter with it in her hand. He was afraid the Grievant had taken a picture of him with the beer. (See footnote 8)

Mr. M. stated Grievant left for a while when someone told her Mr. Levy wanted to see her. The other lady remained and Grievant returned shortly. The Grievant and her companion continued to look down the hill and then Grievant said, "There it is," and she and her companion hid behind the pillar in the shelter. He stated theylooked "freaked out." The Grievant said she was too nervous to take pictures, and asked Mr. M. to walk toward the couple and their cars and take their pictures without them seeing him. He said, "Yes I will." He walked over in the direction of the couple and took four or five pictures. His thoughts at the time were "why not" because he thought he was already in trouble for drinking. In regard to the picture taking Mr. M. and Ms. Dooley had the following exchange.

Ms. Dooley:

"Now, are you saying you took the camera?"

Mr. M.:

"Yes, she handed, I took . . ." (Interrupted)

Ms. Dooley:

"Marcia handed you . . .." (Interrupted)

Mr. M.:

"Marcia Anderson handed me the camera."

When Mr. M. returned the camera to the Grievant he stated the Grievant was "jumping for joy" and was "tickled to death." And she told him it was Mr. Levy and a student. He stated Grievant and her companion said something about they were probably going to a motel in St. Albans, and there was no need to follow them because they had enough to get him fired. They then got in separate cars and left.

The next series of events revolve around DRS's investigation of Mr. Levy and various statements made at that time. During this investigation, Mr. Tribble questioned various people about their knowledge of the Mike Levy affair.

About thirty minutes after the Shawnee Park episode, Grievant met Mr. Harrison and Mr. Tribble and gave a statement. Grievant states she was "closely questioned" for fifteen or twenty minutesand Mr. Tribble admits he asked pointed questions because he was "shocked" about Mr. Levy's alleged misconduct and it was hard for him to believe what he was being told. Grievant told the questioners she was worried about retaliation from Mr. Levy. Grievant related what she had seen in the park that afternoon, but did not mention the picture-taking or that a student had been present.

Grievant reported she talked to Mr. Tribble again on Monday, August 9, 1993. Mr. Tribble told her Mr. Levy was having severe emotional problems and she could be sued for defamation and it would be wise for her to get a lawyer. Grievant still did not mention the picture-taking episode.

Mr. Tribble met with the Grievant on August 12, 1993 for the purpose of taking her written

statement. (Resp. Exh. No. 3.) This statement reflects Grievant told Mr. Tribble that after her last meeting with him she had found a roll of film in the front seat of her car with the note saying, "You should develop these." She developed these pictures and gave them to Mr. Tribble but refused to give him the negatives because she feared a "cover-up." Grievant reported Mr. Tribble told her stalking was a serious offense and whoever took the pictures would be charged with a crime. Grievant testified she did not tell who took the pictures because Mr. M. was a student, and she was told the pictures were of no use.

In this signed statement of August 12, 1993 the Grievant stated "It is very clear to all staff members about relationshipswith clients. . . . We all know what the rules are -- and Mikes' the one who drilled them into our heads." She also stated she had given a student a ride once in the pouring rain, and Mr. Levy had "given me hell." Also, Grievant stated that when she went to sign this statement Mr. Michael Smith told her if she had lied she would be fired. Also at that time Mr. Smith gave her a "pep talk", and told her that he would protect her from any retaliation by Mr. Levy. Though no specific dates were given, Grievant testified that after Mr. Levy's investigation began she was asked several times who took the pictures. She approached Mr. M. several times about releasing his name and "He refused, he refused." She also testified Mr. M. initiated conversations with her and asked her what was going on and had she heard anything. According to Grievant these conversations took place outside the classroom and in the hallway or inside the classroom when no other students were present.

Mr. Quarles testified that DRS continued to want the picture taker's name even after Mr. Levy was fired because, although the pictures did not reveal anything, they thought the person taking the pictures had probably seen some inappropriate actions. They wanted this information because Mr. Levy had threatened legal action.

Mr. M.'s testimony differs from the Grievant's. He stated a couple of days after the pictures were taken he heard two teachers talking, and a Mr. Collins said Mr. M. was Grievant's new favorite student and Grievant was going into photography and he was a starstudent. Mr. M. stated it was after this statement that he began being scared.

He agrees he and Grievant talked several times after the Shawnee Park episode about the pictures. He stated the first time was the Monday or Tuesday after it happened, and Grievant told him she was getting the pictures developed and he asked for a copy. About a week later, while he was

sitting in the classroom, Grievant asked to see him outside, and she asked if he would come forward and admit he took the pictures. He asked why would he do that, and she told him the story she had told about finding them in the car. He asked her why she told this "stupid" story and got no response. He reminded her she told him that he would not be involved and asked her why she just didn't say she took the pictures if she wanted to keep him out of it. Again he got no response.

About one week to ten days later she asked him again if he would come forward because Administration wanted to know who took the pictures. He could tell she was scared and he responded, "No way, Jose'." He said he was supposed to be out of it and for her to say she took the pictures because if he came forward he would tell the whole story, including her involvement. Grievant told him to keep quiet, and that he didn't have to come forward if he didn't want to.

The next time he discussed the pictures with Grievant she was giving a test in class and she slipped outside to speak to him as he walked by. She told him Mr. Levy was fired. Mr. M. stated Grievant had the "fear of God in her" and "scared the livingdaylights out of me" because he was afraid everything he had worked for at the Center "would be taken from me." He thought he would be blamed for Mr. Levy's discharge.

He went directly to his counselor, Mr. Ernie Vecchio, and asked to speak to him confidentially because he felt if Grievant was that scared he should be frightened too. Mr. Vecchio assured him that Mr. Levy would not be fired. A couple of days later Grievant read to her class a portion of the letter the staff received about Mr. Levy's discharge. Mr. M. stated she asked the class, "Do you think a bullet would come through that door?" and stated "If he kills me my husband will blow his brains out."

Mr. M., over objection of Grievant's counsel, testified to the impact of these events. He stated he had difficulty sleeping and concentrating, was scared, and was afraid he would be forced to leave the Center.

Mr. Vecchio, Mr. M.'s therapist, also testified. (See footnote 9) He stated Mr. M. had a characterological disorder coupled with alcohol and drug abuse and was paranoid by nature with a warped sense of right and wrong. He stated he was working with Mr. M. on values clarification. Mr. M. came from a poor family situation and had a daughter in dire straits. He further stated that with this type of client you expect them to "slip and fall several times" during the course of treatment, and that Mr. M. had improved more than any client he had had at the Center with this type of problem. Hestated Mr. M. came to see him "very anxious," "in bad shape" and thought he would be blamed for

Mr. Levy's discharge. Mr. Vecchio said that when Mr. M. had been like this before he had engaged in "self destructive behavior." He said the student was afraid and unable to sleep or concentrate. Mr. Vecchio was concerned because Mr. M. was to take the ACT test soon for possible college admission. After much discussion, Mr. Vecchio first went to Mr. Michael Smith, and then Mr. Vecchio and Mr. M. went to see Mr. Smith. Mr. M. signed his written statement on September 23, 1993. This statement correlated with verbal testimony at hearing. During cross-examination Mr. M. maintained and explained his story.

After receiving Mr. M.'s information, Mr. Smith decided discrepancies in the situation should be investigated and this investigation would be most effectively and efficiently done by a neutral person from outside the Agency. He called Mr. Joe Smith from the Division of Personnel because he had experience in investigations. Mr. Joe Smith, the Assistant Director of Employee Relations, furnishes various agencies with technical assistance.

He interviewed Grievant on October 6, 1993 and told her before this interview began that with his expertise he would be able to tell if someone was lying. Mr. J. Smith took a written statement that day which Ms. Anderson signed on October 8, 1993 after she corrected it and added an addendum. (See footnote 10) In this statement theGrievant says a student took the pictures, and that she had not revealed this information because she did not want to involve him "because he was fragile." She did not reveal Mr. M.'s name in the statement.

After the investigation and the review of all statements, Mr. Michael Smith, Mr. Quarles, Ms. Dooley, Mr. Panza, and Mr. Harrison met to discuss the matter. After much discussion the group, by a unanimous vote, decided Grievant should be dismissed for the reasons stated in the termination letter signed by Mr. John Panza, Director of DRS. (See footnote 11)

Grievant raises two major defenses to her discharge. First, she states the alleged inappropriate interaction was just a pretextto discharge her. The real reason DRS wanted her terminated was because of her active role in DRS teachers receiving a pay raise. Second, she states her involvement with the student was trivial, unintentional, and fleeting and does not support her termination.

Multiple witnesses testified to Grievant's active role in the teacher's fight to achieve pay parity with the Kanawha County Board of Education teachers. Most DRS administrators testified they were against the pay raise of $10,000 per teacher as it would create a disparity between the teachers and all other employees at the Center, thus creating detrimental effects on morale. Mr. Michael Smith

stated he disagreed with only teachers getting a raise when the rest of the employees would not. He also stated the Grievant brought up the pay parity issue in her discharge meeting with him, and he was concerned that she did so because one was not connected with the other.

Mr. Harrison stated that Grievant and Mr. Greg Denter were both very active in pay parity issue, and he saw them as equally active. He stated he disapproved of pay parity and had told everyone. Mr. Quarles stated he was against the teacher pay raise because it would create morale problems with the other employees. He noted that DRS had 800 employees and only 40 would receive this raise. Mr. Tribble stated he did not oppose the pay raise, was not involved in the issue, did not discuss it with Grievant, and was not in favor of it because of disparity.

Ms. Anderson echoed this testimony saying DRS was against pay parity and did not hide this fact from her. She also stated Mr.Levy had told her the other employees would "get her" if this pay raise went into effect.

Mr. Greg Denter, a teacher at the Center, testified about his and Grievant's active role in obtaining the pay raise. Also the Grievant submitted numerous examples of her involvement with the pay raise issue, and the lesser involvement of other teachers at the Center.

Respondent's cross-examination revealed none of the other teachers had been discharged. Mr. Denter testified he had received a reprimand and lost an annual leave day for failure to follow proper procedure during an emergency Code Blue procedure. He stated other teachers were treated differently. He did not grieve this reprimand.

Grievant also appears to argue her behavior did not warrant dismissal since she never asked Mr. M. to take the pictures and she did not reveal his name in an effort to protect him. Throughout her counsel's briefs her involvement is described as "fleeting", "unintentional", "brief", "trivial", etc. She also argued that all other staff members who had been discharged for inappropriate staff/student relationships had been involved in a romantic or sexual relationship with students. She also implied she was not completely familiar with the guidelines concerning staff/student interaction even though she stated in her August 12, 1993 statement that it was clear to all staff members.

Discussion

Resolution of this grievance requires a determination about the credibility of the witnesses. Although the majority of the testimony is very similar it differs on key aspects. It is clear Mr. M. took

the pictures with Grievant's camera, and she later asked him several times to reveal this information and he refused.

Mr. M.'s testimony is that Grievant appeared to be looking for someone at the park. Grievant's testimony is that she and Ms. Gesner were there with children and her mother taking approximately one hour of annual leave. All three testified she saw Mr. Levy appear and there were no children or Grievant's mother anywhere around. Mr. M. and Grievant testified she had a camera. Ms. Gesner testified she never saw a camera or pictures taken. Mr. M. has no bias, interest, or motive for lying, and his testimony is plausible. Grievant and Ms. Gesner's statements contradict Mr. M.'s and each others. Ms. Gesner's statement about the camera are implausible and both she and Grievant have a motive and interest for shading the story. Perdue v. Dept. of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1994).

Mr. M.'s testimony is he agreed to take the pictures after Grievant asked him and told him what pictures she wanted taken. Grievant's testimony is he offered to take the pictures and although she did not "allow" him to take the camera, she could not "decline" his taking the camera. She further implied the only way to stop him was to fight him for it. Ms. Gesner, the only othereyewitness is not helpful because she stated she never saw a camera, didn't know any pictures were taken, and didn't know a student was there. Grievant's testimony is implausible. First, it is difficult to believe Mr. M. would, in essence, take and/or forcibly remove the camera from the Grievant's hand unless she wanted him to do so. Second, how would Mr. M. know who to take pictures of unless she told him. Third, if this is not what Grievant wanted, as she testified, why did she not stop Mr. M. or at least destroy the pictures.

On the issue of the subsequent conversations both agree these occurred, and both agree Grievant attempted to have Mr. M. come forward. The only difference is Mr. M. states Grievant wanted him to keep silent on her involvement. Again Mr. M.'s story rings true. He had nothing to gain by coming forward and had repeatedly told Grievant he did not want to do so. Obviously he was feeling pressured by the Grievant. He felt the only way to protect himself was to tell all, and this the Grievant did not wish him to do, after she had repeatedly lied and signed a sworn statement about finding the pictures in her car.

Thus, Mr. M.'s testimony in all three instances is found to be credible. Further his testimony is consistent. It is clear he kept the Grievant's secret until he felt truly threatened and worried about his

future at the Center. Perdue, supra. Grievant's testimony is self-serving, inconsistent, implausible, and seeks to avoid all responsibility by playing semantics. To say she couldnot prevent her student from taking pictures with her camera is nonsensical.

W. Va. Code §29-6-10 authorizes the dismissal of a classified employee for good cause which means "misconduct of a substantial nature directly affecting the rights and interests of the public, rather than upon trivial and inconsequential matters or mere technical violations of a statute or official duty without wrongful intent." Oakes v. W. Va. Dept. of Finance and Admin., Syl. Pt. 1, in part, 164 W. Va. 384, 264 S.E.2d 151 (1980).

Here, the Grievant, whether by design or by inadvertence, involved her handicapped student in an attempt to obtain evidence of her boss's inappropriate actions. As a professional rehabilitation teacher she was aware of the guidelines regarding staff/student interaction and the reasons for their enactment and enforcement. She, as his teacher, knew he was "fragile" and in need of appropriate staff and student interaction. As clearly stated by the Operations Manual, "[t]he welfare of the student is a primary concern" and staff must be on guard to make sure they do not meet their needs to the detriment of a student's well-being. Grievant further compounded this first act by continuing to involve a student in the incident. Both Mr. M. and his therapist testified this continued pressure caused the student increased anxiety, insomnia, loss of concentration, and increased paranoia. This pressure and his increased anxiety also created the necessity of removing the student from the Grievant's class where he was doing well.

It may very well be the Grievant did not intend for her acts to create the multiple problems they did. It also may very well be that the Grievant did try somewhat to protect this "fragile" student while she was protecting herself, and did not mean to increase his already numerous problems. But, be that as it may, Grievant did knowingly and inappropriately involve a student in her attempt to gather evidence about her supervisor's affair with a Center student. She then continued to pressure Mr. M. to reveal this involvement to his detriment.

As far as the charge of false swearing, (See footnote 12) the Grievant, by her own omission, agreed she lied about the pictures under oath when she signed both of her sworn statements, thus this accusation proven.

In addition to the findings of fact and conclusions of law contained in the foregoing discussion, the following facts and conclusions are appropriate.

Findings of Fact

1. Grievant, a teacher at the Vocational Rehabilitation Center, was dismissed on November 16, 1993 for false swearing and showing disregard for her duties/responsibilities by placing a handicapped student in continual, emotional danger.

2. Grievant asked her rehabilitation student to take pictures of her boss and another student involved in inappropriate conduct.

3. After the picture-taking incident, Grievant continually asked the student to come forward and say he took the pictures without identifying her involvement.

4. Due to the stress surrounding these events the student suffered continual emotional problems in the form of increased anxiety, insomnia, difficulty concentrating, and increased paranoia.

5. Grievant lied in her first verbal and written statements to Vocational Rehabilitation Administration about where she got the pictures and omitted reference to the student.

6. Although DRS disagreed with only the teachers receiving a pay raise as opposed to the entire work force, this was not the reason for the Grievant's dismissal.

Conclusions of Law

1. In a disciplinary action the employer has the burden of proof to demonstrate by a preponderance of the evidence that the employee committed the actions charged. Schmidt, supra.

2. W. Va. Code §29-6-10, requires the dismissal of a classified employee be for good cause which means "misconduct of a substantial nature directly affecting the 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." Oakes, supra.

3. The Grievant's misconduct was of a substantial nature directly affecting the rights and interests of others and was not of a trivial or inconsequential nature.

4. The Employer demonstrated, by a preponderance of the evidence, that Grievant engaged in false swearing and involved a student in activities which were detrimental to his mental health and emotional status.

Accordingly, this grievance is **DENIED** and the Grievant's dismissal is upheld.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court

of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: July 27, 1994

Footnote: 1*Five or major strength was the highest achievable score on this ten section evaluation.*

Footnote: 2*The comment on this section indicates Grievant periodically lost control of her class and spent a large amount of time out of the classroom to the detriment of the students. The Grievant wrote a note on this evaluation on January 4, 1993 saying the comment had been added and she had never seen it. The evaluation was never grieved. The Grievant testified that she did sign the form but she did not remember what rating she received in this area.*

Footnote: 3*In keeping with the Grievance Board's normal practice the student will be identified by initials only.*

Footnote: 4*The quoted testimony was transcribed for this opinion by the undersigned. Of course, there could be minor differences in a subsequent transcript.*

Footnote: 5*Ms. Gesner received a ten-day suspension for false swearing about the Shawnee Park episode which she has grieved.*

Footnote: 6*Grievant's attorney had subpoenaed all of Mr. M's medical records for the purpose of cross-examination. Respondent was directed to bring these confidential records to the hearing. This situation was discussed on the record with Mr. M. and he decided to not seek representation in the matter but would not give his permission for the Grievant to have his records. He then decided that the Administrative Law Judge could decide what needed to be done with his records. After review of W. Va. Code §27-3-1 the undersigned informed the parties that 1) the Grievance Board did not have the authority to order disclosure of this information as it was an administrative tribunal and not a court of law and 2) in her opinion the information was not "sufficiently relevant to a proceeding before the court to outweigh the importance of maintaining the confidentiality established by this Code section." Id. at (B)(3); See, Nelson v. Ferguson, 399 S.E.2d 909 (W. Va. 1990).*

The record before the circuit court consisted of a psychiatric evaluation and mental status exam dated March 16, 1993, a psychological evaluation dated April 4, 1993, five psychological consult notes dated April 23, 1993, May 11, 1993, July 30, 1993, August 18, 1993, and November 4, 1993; and a psychological consult note to Ms. Dooley. This last note basically states that testifying might be harmful to Mr. M.

These records were sealed and placed in the file and were not considered in this decision. The Grievant was given the option of a continuance to seek a writ from the Circuit Court, but Grievant's counsel chose to continue the hearing stating that no rights were waived by this action.

Footnote: 7During Mr. M.'s testimony he appeared calm, in control of his emotions, answered the questions clearly, and gave detailed explanations. His traumatic brain injury was not readily apparent and was only evidenced by pauses to get his dates straight and the use of the word "portraits" for the word "pictures."

Footnote: 8Testimony revealed Mr. M. had a history of substance abuse problems and, depending on the student, drinking was either frowned upon or a disciplinary offense at the Center. No testimony revealed what action, if any, the Center took in Mr. M.'s case.

Footnote: 9It is interesting to note that Mr. Vecchio's testimony about his client's condition was much more negative than the medical reports not allowed into evidence.

Footnote: 10There was much discussion between the parties about page three of this statement. All other pages were admitted without objection. When the Grievant reviewed her statement prior to signing, she was directed to initial each page she corrected. There are corrections and initials on every page except page three. Page three also has a "run-on" to page four. Grievant alleged that page three had been substituted. On cross examination Grievant stated the statement in its entirety was a summarization of what she said but that she never said "I did not take pictures or did not cause any pictures to be taken." The Grievant went on to page four (one she had initialled) and said I don't remember saying "and now the honest truth about the pictures" but that she had signed that page. Grievant also signed a verification of her statement which stated "I have read this statement which consists of five pages and initialled all changes and corrections. (Emphasis added.) The undersigned, after considerable review of the testimony, finds that by a preponderance of the evidence that the document is a true copy and, thus it is admitted in its entirety.

Footnote: 11Ms. Betty Bosco, Head Nurse, testified that Grievant, at about 8:00 to 10:00 p.m. that night she was discharged, attempted to obtain one of Mr. M.'s medical records. She was not allowed to obtain this information. Ms. Bosco told Mr. Tribble about the incident and Mr. M.'s record was removed to Mr. Tribble's office and Mr. M. was removed from Grievant's class. There was additional testimony that Mr. M. had gotten into trouble prior to Grievant's discharge for drinking and she had requested an alcohol screening. As all this testimony was after the fact of the discharge it was not considered in this decision.

Footnote: 12The term false swearing is defined in W. Va. Code §61-52 and it is considered a misdemeanor for a person

to "swear falsely, under oath or affirmation lawfully administered, . . . concerning any matter or thing material or not material . . . ."