JOANNA HEIN, .

Grievant, .

.

.

.

v. . Docket Numbers: 94-HHR-1124

. 95-HHR-396

.

.

.

WEST VIRGINIA DEPARTMENT OF HEALTH .

AND HUMAN RESOURCES / .

BUREAU OF CHILDREN AND FAMILIES, .

Respondents. .

D E C I S I O N

Joanna Hein (hereinafter Grievant) was employed by the West Virginia Department of Health and Human Resources as a Protective Services Worker within its Social Services Section of the Bureau of Human Resources. By letter dated December 12, 1994, Grievant was notified that she was to be suspended, without pay, for a period of thirty days, beginning on December 21, 1994, for neglect of duty. Grievant filed a grievance pursuant to the provisions of the Grievance Procedure for State Employees, West Virginia Code §§29-6A-1, et seq., on December 19, 1994, protesting this suspension. (See footnote 1) Prior to any hearing on this grievance, (See footnote 2) Grievant was terminated from her employment, effective September 6, 1995, for failing to perform the duties associated with her position in a satisfactory manner. Grievant grieved her termination on September 7, 1995, and by Order dated September 22, 1995, the two cases were consolidated. An evidentiary hearing was held on October 25 and 26, 1995, and the case became mature for decision

at the conclusion of the second day of hearing. (See footnote 3)

The employer contends that Grievant's work performance has been unsatisfactory since approximately April 1992. It maintains that since that time, Grievant has been offered numerous improvement periods covered by established corrective action plans with which she has been unable to comply. It asserts that it has attempted to improve Grievant's work performance through both corrective action, and ultimately progressive disciplinary actions, including oral and written reprimands, and the suspension at issue herein. It asserts that Grievant's performance after her suspension failed to demonstrate she had the ability to perform the functions of her position satisfactorly; therefore, her termination was not only justified but required given the sensitive nature of her position.

Although Grievant admits that during the time in question she was not able to perform much of the work she was assigned, she contends she did not intend to ignore her duties and responsibilities. She avers that the amount of work required of her was not capable of being finished as thoroughly as required. She also argues that she was not the only Protective Services Worker within the Charleston office that continued to maintain a backlog of cases. Therefore, she argues that both her suspension and termination were unjust and unfair, given her past service with the employer.

Because this case involves the review of disciplinary action imposed upon an employee, the employer bears the burden of proving the facts supporting its case bya preponderance of the evidence. W. Va. Code §29-6A-6. The appropriateness of a penalty, while depending upon the resolution of questions of fact, is by no means a mere factual determination. Such a decision involves the application of administrative judgment. Douglas v. Veteran's Administration, 5 M.S.P.B. 280 (1981). And an action which involves the exercise of administrative judgment may be reviewed to determine if the action was the result of an abuse of discretion or was arbitrary or capricious.

Suspension

Very briefly, the employer hires Protective Services Workers for the purpose of receiving, investigating, evaluating complaints or allegations of child abuse and/or neglect and maintaining records of such activity. These Protective Services Workers workclosely with county prosecutors and investigative teams so that the safety and welfare of children are safeguarded. Often, investigations into allegations of child abuse or neglect lead to the filing of custody petitions in the circuit courts in

order to remove a child from a dangerous environment. See generally, W. Va. Code §§49-6-1, et seq.

As noted, Grievant was suspended without pay for thirty working days based upon a charge of neglect of duty. Department of Health and Human Resources Commissioner Sue Sergi wrote the letter informing Grievant that her failure to respond and pursue an investigation into a matter in one of her cases, brought to her attention by Kanawha County Assistant Prosecutor Brenda Waugh, constituted deliberate neglect of duty. Factually, Ms. Sergi recited that Ms. Waugh had sent Grievant a memorandum dated April 28, 1994, and that Grievant had apparently placed it in the file, not having read it, and therefore, she did not respond to it. The substance of this memo is as follows:

> In reviewing this file, the mother still has visitations with this child and I have some safety concerns regarding that. Please review this matter with Kathy since I think that we should do a petition against the mother to require her to take some actions in an improvement period, to restrict her visitations, and to push her to get rid of this pervert.
>
> Please look into this asap.

The employer believes that, in part, due to Grievant's neglect of duty, the child who was the subject of this memo was raped in August 1994.

Much of the remainder of the suspension letter cites to Grievant's identified "long-standing performance deficiency of record keeping and submitting reports in a timely manner" relating back to early 1992. The letter sets forth that Grievant has previously been counseled concerning her work performance, and also warned that if her performance did not improve she would be disciplined. Although the employer presented the testimony of Grievant's immediate supervisor, Kathy Hastings, Social Service Supervisor, and Myra Jarrett, Social Service Coordinator, along with numerous documents, to substantiate that Grievant's work performance was deficient from 1992 until her suspension, it is clear from a review of the suspension letter that Grievant was suspended based upon her failure to respond timely to the April 28 memorandum of Brenda Waugh. (See footnote 4) Apparently, the other facts and incidents were simply referred to in order to justify the length of the suspension. The Undersigned need not determine whetherGrievant's work performance during this lengthy period of time (April 22, 1992 through August 29, 1994) was satisfactory.

Grievant admits that she did not respond to Ms. Waugh's memorandum. She testified that she

was not aware she had been given the memorandum until long after the fact when she reviewed the file. She testified she simply has no memory of the memorandum, even though it was obviously placed in the file. She does not allege that someone else may have placed the memo in the file or that someone else had custody of the file. Grievant does contend that the assault of the child was not directly related to any failure on her part because a family law master had awarded custody of the child to the father long before she had received the memorandum. She avers that the suspension was too severe.

It is concluded from the evidence of record that Grievant did fail to respond to Ms. Waugh's April 1994 memorandum. There was also no evidence that Grievant spoke with Ms. Hastings concerning the substance of the memo. Grievant's conduct, at the least, can be described as negligent if not deliberate. Regarding the severity of the suspension, it cannot be determined that the employer abused its discretion in imposing such a severe penalty given the nature of the request, Grievant's prior knowledge of the environment to which the child at issue was exposed, the magnitude of harm which exists in cases where a Protective Services Worker fails to follow though on investigating allegations of abuse or neglect,and Grievant's history of unsatisfactory performance. Therefore, the suspension at issue is hereby sustained.

Termination

By letter dated August 23, 1995, from Thomas Gunnoe, Regional Director for the employer, Grievant was notified that her employment was to be terminated effective September 6, 1995. Grievant was dismissed for her alleged failure to complete her assigned work, much of which was associated with a corrective action plan developed for her on or about April 4, 1995, by Ms. Hastings. In the dismissal letter, Mr. Gunnoe stated the following:

> Based upon the above information, it is my conclusion that you have not met the minimum standards of performance for the job class. You cannot make decisions independent of the supervisor. You are unable to set priorities. You are not responsive to deadlines and have been given numerous opportunities to improve your performance. Your inability to function at the minimum performance level creates unsafe situations for your clients and an unfair burden on your co-workers and supervisor. I have concluded that the agency can no longer be responsible for yourinadequate performance, nor can the agency afford the continued liability.

The employer offered into evidence the testimony of Ms. Hastings and Ms. Jarrett, along with

various exhibits consisting of memoranda, Grievant's 1994 performance evaluation, a written corrective action plan and subsequent progress reports, to establish that Grievant's performance since her suspension was unsatisfactory; therefore, it had just cause to fire her. Grievant asserts that her performance was not as bad as portrayed, that she did not have enough time to complete her work assignments and that termination was too severe a penalty to be imposed. Based upon the complete evidence of record, it is held that the employer has metits burden of proof in this case and Grievant's termination is upheld.

Ms. Hastings and Grievant met and agreed upon a corrective action plan on or about April 4, 1995. This plan of assigned work and completion dates was to cover the period of April 4 through June 30, 1995. Prior to the adoption of this plan, Ms. Hastings had identified priorities for Grievant which included what cases to work on, what forms needed to be completed and how many cases she was to complete each week. At this time, Grievant had a tremendous amount of backlog which consisted of unfinished cases, treatment plans, assessments, requests and reports. Also, Grievant's filing or organization of her caseload was in disarray. The record establishes that Grievant had a very difficult time finalizing records and case notes because she could not correlate her notes or work with her cases.

During the time period in question, Grievant and Ms. Hastings met frequently so that Grievant's work could be prioritized. For a period of time, prior to Grievant's suspension, her outside-of-the-office work was limited so that she could concentrate on her backlog of cases. Without going into detail on the substance of Grievant's work, the record clearly establishes that not only did Grievant fail to comply with the corrective action plan established for her, she came close to producing no meaningful work at all. During the entire time Grievant's work was the subject of focus, she admitted that she was not producing the work she was required.

Grievant opined that she was not able to comply with the requirements set by Ms. Hastings because of unforeseen situations which would occur at the office. However, the record does not establish this as a fact. What has been shown is that Grievant was being required to produce less work than her co-workers; however, she was consistently unable to meet Ms. Hasting's expectations. It is inferred from the evidence that the major reason Grievant was unable to produce work quickly and of good quality was because of her lack of organization skills. Even the performance evaluations which she submitted into the record to establish that she had once been a productive employee

establish that she has always had trouble organizing her work and meeting deadlines on paperwork.

It is recognized that most, if not all, of the Protective Services Workers in the State have an abundant amount of work to perform, both relating to investigations, home visits and office paperwork. It is also accepted that often the finalization of paperwork should not take priority over working with the families and children who are the focus of the work. However, given the fact that many of the cases worked on by Protective Services Workers often find their way into the court system, paperwork must also be of vital importance. The evidence does not establish that Ms. Hasting's plans and goals for Grievant were unreasonable given Grievant's years of experience. Further, it is found that Grievant's productivity was far below that of her peers, at a time when she was being constantly told that her work was not satisfactory. The employer has established by a preponderance ofthe evidence that Grievant's quality and quantity of work was below the acceptable standards set for her position, and therefore, her termination was based upon just cause.

The following findings of fact have been properly deduced from the evidentiary record developed in the case.

Findings of Fact

1. On or about April 28, 1994, Grievant was presented with a memorandum from Kanawha County Assistant Prosecutor Brenda Waugh requesting that she review a matter relating to an open case she had worked on.

2. Thereafter, Grievant neither investigated the subject matter of the April 28, 1994 memorandum nor did she respond to Ms. Waugh.

3. Almost immediately after Grievant returned to work from being suspended, she and her superisor, Kathy Hastings discussed her performance evaluation for the year 1994. The focus of this discussion was upon Grievant's failure to sufficiently produce the work she had been assigned, especially the necessary paperwork to record progress on cases and to close out cases.

4. On or about April 4, 1995, Grievant and her supervisor agreed upon a corrective action plan, whereby Grievant was provided with specific objectives/tasks, steps to be taken to complete these tasks and deadlines for their completion.

5. Grievant's caseload assignment was decreased in order to allow her to decrease her substantial backlog of cases. Grievant was told to complete her cases in short, summary form. She

wasalso given a smaller number of cases to work on than customary for other workers.

6. Grievant's time outside-of-the-office was limited to allow her time to work on her backlog of cases.

7. Ms. Hastings identified for Grievant which cases were to receive priority in completion and deadlines for their completion.

8. On June 12, 1995, Grievant's progress toward completing her corrective action plan was evaluated.

9. On July 7, 1995, Grievant's performance under the corrective action plan was evaluated. It was determined that Grievant did not produce work in either a timely manner or of sufficient quality or quantity.

10. The employer maintains Case Management Performance Standards for its Protective Services Workers.

11. Even though these performance standards were somewhat flexible and other workers often had a backlog of cases to work on, Grievant's performance was far below that of her co-workers in regard to the number of cases, recordings and petitions completed.

12. In an attempt to comply with the corrective action plan, Grievant did not follow her supervisor's instructions on which forms to use to record her notes and the actions taken on her backlog of cases.

13. Grievant did not respond to at least two requests for information from Ms. Waugh.

14. For all time periods in question, Grievant's organizational skills were insufficient to allow her to perform her assigned work efficiently and effectively.

The foregoing discussion of the case is hereby supplemented by the following appropriately made conclusions of law.

Conclusions of Law

1. The employer has established by a preponderance of the evidence that Grievant's failure to respond to a memorandum from Ms. Waugh constituted neglect of duty; therefore, her suspension for thirty days without pay was justified.

2. The employer has established by a preponderance of the evidence that Grievant's work performance between the date of her suspension and her termination was unsatisfactory and far

below the acceptable standards expected of her in the position of Protective Services Worker. Her failure to satisfactorly perform the duties of her position directly impact the rights and interests of the public; therefore, the employer has established just cause for Grievant's termination from employment. See, Oakes v. West Virginia Department of Finance and Administration, 264 S.E.2d 151 (W.Va. 1980).

3. Grievant has failed to establish that either her suspension or termination was the result of an abuse of discretion or arbitrary or capricious decision-making.

Therefore, this grievance is hereby **DENIED**.

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.

_____

ALBERT C. DUNN, JR.

Administrative Law Judge

November 30, 1995

Footnote: 1This grievance was initiated at level four of the Grievance Procedure pursuant to Code §29-6A-4(e).

Footnote: 2After this grievance was filed, the parties engaged in a period of discovery. Thereafter, numerous continuances of scheduled hearings in the matter were granted for good cause shown.

Footnote: 3For the specific purpose of protecting the confidential nature of various exhibits and testimony presented herein, the record has been sealed by the Undersigned's Order.

Footnote: 4Although Grievant has not argued that her suspension was improper based upon it ng issued in an untimely fashion, a brief discussion on this point seems warranted. As the suspension letter points out, Grievant was counseled concerning her work performance for a long time. Apparently, Grievant's filing system was not readily accessible or usable by other staff. Further, Grievant was counseled concerning her timely response to requests for work. The record establishes that the employer did not discover Grievant had failed to respond to Ms. Waugh's request until sometime

around August 1994. Thereafter, Grievant was notified by memorandum dated September 20, 1994, from Ms. Hastings, she was proposing to the Division of Personnel that she (Grievant) be disciplined for failing to satisfactorily complete her casework. It is unknown what actually transpired after that point, until the suspension, except that Ms. Hastings was constantly counseling Grievant concerning her work product.