FLORENCE J. HUNT,

Grievant,

v. **Docket No. 97-BEP-412**

WEST VIRGINIA BUREAU OF

EMPLOYMENT PROGRAMS,

Respondent.

D E C I S I O N

On September 18, 1997, Florence J. Hunt (Grievant) filed a grievance at Level IV, as authorized under W. Va. Code § 29-6A-4(e), challenging her dismissal from employment by Respondent West Virginia Bureau of Employment Programs (BEP). A Level IV evidentiary hearing in this matter was conducted in this Grievance Board's office in Charleston, West Virginia, on October 23, 1997. This matter became mature for decision on November 10, 1997, following receipt of written post-hearing submissions from the parties. Consistent with W. Va. Code § 29-6A-4, and the practice of this Grievance Board, this disciplinary action has been advanced on the docket for an expedited decision.

BACKGROUND

On September 5, 1997, BEP Commissioner William F. Viewig notified Grievant that she was being dismissed from employment that day for "gross misconduct." Commissioner Viewig stated the basis for his action in the following terms:

> This letter is to notify you of disciplinary action being taken against you due to acts of collusion between you and an employee under your supervision, Joanne Stone. It is apparent that you have allowed her to leave her duty station for extended lunch breaks without charging annual leave for the extended periods over a lengthy period. You have falsely certified that her time sheets were accurate for at least the months of May, June, and July 1997.

After reviewing the facts outlined below, I have decided to terminate you from employment for gross misconduct with the Bureau of Employment Programs effective at close of business today, September 5, 1997. This action is being taken in accordance with Section 6400.20 of the Bureau's PPPM (Personnel Policies and Procedures Manual) and Section 12.02 of the Division of Personnel Administrative Rule.

The primary reason for your dismissal is the false certification of time sheets and your blatant disregard for agency policy in allowing a subordinate to take time off from work without charging appropriate leave. These are serious violations of trust as an employee of this agency. Joanne Stone's time for lunch breaks was monitored from May 1, 1997 to August 28, 1997. The following is an account of the discrepancies in the leave charged for the months of May, June, July, and August 1997 versus the actual amount she was away from her duty station.

From May 1 to May 31, 1997, 9.60 hours were taken without charging leave. From June 1 through June 30, 1997, Ms. Stone, in addition to her regular one-hour lunch period, took almost 8.09 hours for which no annual leave was charged. During the period July 1, 1997 through July 31, 1997, she had taken 9.50 hours off and did not charge annual leave. From August 1, 1997, through August 28, 1997, Ms. Stone was away from work for 9.17 hours without charging the appropriate leave time. [footnote omitted] The total documented time that Ms. Stone failed to charge annual leave is 36.36 hours. She did not apply for sick or annual leave for this time yet you approved her time sheet certifying that she only took her allotted lunch breaks, that her leave was appropriately charged, and that she had worked the hours charged to the project and function codes. Further, Ms. Stone has agreed to an adjustment of 35 hours total to reimburse the agency for time used but not charged for the months of January, February, March, and April.

When Daniel Light, Director of the Unemployment Compensation Division, and Ms. Catsonis confronted you about the allegations, you admitted that you allowed Ms. Stone to take extended lunch periods and that you saw no problem with permitting her to do so. You advised that you were allowing her to include her morning and afternoon breaks with her lunch breaks. Further, Ms. Stone advised Mr. Light and Ms. Catsonis that she had been taking time off without charging annual leave as far back as January 1997. When you were asked about this fact, you responded that you did not believe it to be that long in duration.

As a supervisor participating in this type of behavior, you have failed to provide proper supervision of subordinates and become an ineffective supervisor. You have also colluded with and certified knowingly to another employee's falsification of time sheets. In addition, you have destroyed the relationship of trust that must be maintained between a supervisor and their superiors and subordinates. Your actions in this matter violate Section 6700.01 of the Bureau's PPPM and this matter is more specifically addressed in the Bureau of Employment Programs Handbook, page 19, which reads, in part:

Breaks

> ...In any case, break periods cannot be accumulated, cannot be used to shorten a workday and cannot be used to extend a lunch period. See your supervisor for more information about break periods in your agency. (Underline added for emphasis only.)

Personnel records indicate that you did receive an Employee Handbook and that you signed an Employee Acknowledgment form certifying that you received the handbook and that you are aware of your responsibility to familiarize yourself with its contents. In addition, this action is a violation of the Bureau's Time Distribution Manual which is derived from the Federal Employment Training Handbook Number 336. Your signing the time sheets without proper leave being charged may be considered a violation of West Virginia Code §61-3-22. This Section reads, in part:

> "If any officer, clerk or agent of this State ... make, alter, or omit to make any entries ... or in any account kept by such State ... with the intent in so doing to conceal ... or to defraud the State ... or with intent to enable or assist any person to obtain money to which he is not entitled, such officer, clerk or agent shall be guilty of a felony ...[.]"

In your position as supervisor, you have a responsibility to enforce the policies, procedures and statutes established by the Bureau and the State of West Virginia. The employees under your supervision rely on you for leadership and direction in complying with the rules and statutes. It is then the subordinate's responsibility to apply your instructions in the workplace. Obviously, if there is a lack of positive supervision, employees cannot perform their duties with the confidence that their work product is in compliance with Bureau policy and/or statute. I conclude that your failure to exercise authority and to follow policy makes it difficult, if not impossible, to enforce compliance with policy by your staff. This example clearly demonstrates inadequate supervisory performance and judgement.

The State of West Virginia and the Bureau of Employment Programs expect state employees to exhibit a high level of trust and integrity. The State and its agencies have reason to expect their employees to observe a standard of conduct which will not reflect discredit upon the abilities and integrity of their employees, or create suspicion with reference to their employees' capabilities and honesty in discharging their duties and responsibilities. I believe the nature of your misconduct is sufficient to conclude that you did not meet a reasonable standard of conduct as an employee of the West Virginia Bureau of Employment Programs, thus warranting your dismissal from employment.

* * * *

J Ex 1. (See footnote 1)

There is only limited dispute between the parties regarding the facts applicable to this grievance. The crux of their dispute is whether those facts warrant the legal conclusions reached by BEP in regard to the nature and seriousness of Grievant's conduct. Accordingly, the following findings of fact are made based upon the documentary evidence presented and accredited testimony given at Level IV.

FINDINGS OF FACT

1. Grievant was a classified employee of Respondent BEP assigned to the Benefits and Technical Support Section of the Unemployment Compensation Division. Grievant was classified as a Supervisor II and was in charge of the Initial Claims Unit.

2. Grievant's immediate supervisor was Janet Catsonis, an Assistant Director in BEP's Unemployment Compensation Division. Ms. Catsonis reports to Daniel Light, Director of BEP's Unemployment Compensation Division.

3. Grievant supervised eight full-time employees in her unit, one of whom was Joanne Stone.

4. On or about June 17, 1997, two employees under Grievant's supervision approached Ms. Catsonis to complain that Ms. Stone was routinely taking lunch breaks in excess of the allotted one hour.

5. After conferring with Mr. Light, Ms. Catsonis directed another agency employee to monitor Ms. Stone's departure for lunch and return to work. This monitoring began on June 17, 1997, and continued through August 28, 1997.

6. The employee reported to Ms. Catsonis that Ms. Stone was taking at least one-half hour each day for lunch, beyond the one-hour allotted lunch period. At times, Ms. Stone took up to an additional hour off for lunch. Ms.Catsonis compared these reported observations with the time sheets prepared by Ms. Stone and approved by Grievant, noting that none of this additional time off work had been properly charged to annual or sick leave. See Ex Exs 1 & 2.

7. At some point during early August 1997, following a meeting with BEP Commissioner William Viewig, Mr. Light asked BEP's Internal Security unit to verify the information being reported by the employee monitor with regard to Ms. Stone's extendedlunch hours. Someone from Internal Security observed Ms. Stone on four occasions, reporting to Mr. Light and Ms. Catsonis that Ms. Stone was extending her lunch hour at least one-half hour each day without taking leave.

8. BEP's Employee Handbook contains the following provision regarding "breaks:"

> Employers recognize the need for employees to break for a cup of coffee, to make a personal telephone call, or attend to other personal matters. Some work situations require a formally-structured break schedule and some do not. This depends on the type of work performed.
>
> In any case, break periods cannot be accumulated, cannot be used to shorten a workday, and cannot be used to extend a lunch period. See your supervisor for more information about break periods in your agency. E Ex. 3.

9. On July 28, 1995, Grievant signed an "Employee Acknowledgement," indicating she had received a copy of BEP's Employee Handbook, and she was responsible for becoming familiar with its contents. E Ex 3.

10. As a unit supervisor, Grievant was responsible for enforcing the rules and policies set forth in BEP's Employee Handbook.

11. Consistent with the Handbook, BEP employees are authorized to take one 15-minute break in the morning and one 15-minute break in the afternoon. These breaks are normally taken at 10:00 a.m. and 3:00 p.m., although employees have discretion to take their breaks whenever their workload permits.

12. As a unit supervisor, Grievant should have known that she had no authority to permit Ms. Stone to forego her morning and afternoon breaks in exchange for extending her lunch period.

13. On August 28, 1997, Ms. Catsonis and Mr. Light met separately with Grievant and Ms. Stone, confronting them with the evidence regarding Ms. Stone's extended lunch hours.

14. Ms. Stone indicated that Grievant had given her permission, beginning as early as January 1997, to forego her morning and afternoon breaks to answer phones while other employees were on break in exchange for extending her lunch hour by one-half hour. Ms. Stone did not indicate that she had Grievant's approval to take more than an additional one-half hour for lunch without taking leave.

15. When questioned by Ms. Catsonis and Mr. Light on August 28, 1997, Grievant readily admitted she authorized Ms. Stone to take an extended lunch period to insure the phones in her unit were answered while other employees were on break. Grievant elected to approve Ms. Stone's request without consulting with her immediate supervisor, Ms. Catsonis.

16. Acting on authority from Commissioner Viewig, Mr. Light offered Grievant a 10-day

suspension, demotion to a non-supervisory position, and transfer to another unit, conditioned upon Grievant's agreement to waive any grievance or other litigation rights. Grievant was informed by Mr. Light that if she did not accept this "settlement" of the charges, she would be subject to more severe disciplinary action, up to and including dismissal. Grievant was given a few days to respond, subsequently declining to accept the proposed punishment.

17. Grievant received no personal gain from allowing Ms. Stone to take an extended lunch hour. 18. On September 5, 1997, Joanne Stone entered into a "Disciplinary Action Agreement" with BEP (See footnote 2) which stated as follows:

> Pursuant to an agreement with my supervisor, Florence J. Hunt, I have been taking one and one-half hour lunch breaks beginning approximately January 1997. This agreement was based on the premise that I would not take a morning or afternoon break, but instead increase my lunch period by thirty minutes.
>
> I now understand that this is not an allowable practice under Bureau personnel policies as outlined in the Bureau of Employment Programs Employee Handbook. Said handbook was received by me and an acknowledgement form signed by me dated July 28, 1995.
>
> I understand that according to monitoring records there were occasions when my lunch periods exceeded the one and one-half hours. Although I did apply for annual leave for some of this time, there were times that I did not apply for and was not granted annual leave and therefore my annual leave was not credited (sic) for the excess.
>
> In order to resolve this matter I agree to a ten-day suspension without pay and to a deduction of 71.36 hours annual leave from my current annual leave balance.
>
> I understand that further infractions of this nature will result in my dismissal from employment with the Bureau of Employment Programs.
>
> I have been informed of my rights under the West Virginia Education and State Employees Grievance Procedure and enter into this Disciplinary Action Agreement in lieu of exercising my rights to file a grievance in this matter. E Ex 4.

19. The dollar value of the 71.36 hours of annual leave which Ms. Stone agreed to forfeit is

approximately $826. See E Ex 8.

20. Prior to the incidents giving rise to her dismissal, Grievant had not been the subject of any previous disciplinary action. Grievant had been employed by BEP for 22 years, and her prior performance evaluations were all satisfactory or better. 21. BEP's Policy and Procedures Manual states:

> Flagrant misconduct which may result in demotion or dismissal without previous disciplinary action includes, but is not limited to, gross misconduct, theft, conviction of a felony related to the job, use of political influence to gain employment advantage, intoxication or use of unauthorized drugs on the job, insubordination, or willful destruction of State/Bureau property. E Ex 6 (emphasis in original).

22. BEP's Employee Handbook contains language substantially similar to the provision quoted in Finding of Fact Number 21, above. See E Ex 5.

DISCUSSION

In disciplinary matters, the employer has the burden of proving each element of the charges by a preponderance of the evidence. W. Va. Code § 29-6A-6; Miller v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

An allegation that a particular disciplinary measure is disproportionate to the offense proven or otherwise arbitrary and capricious is an affirmative defense, and Grievant bears the burden of demonstrating that the penalty was clearly excessive or reflects an abuse of agency discretion, or an inherent disproportion between the offense and the personnel action. Jones v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Thompson v. W. Va. Dept. of Health & Human Serv., Docket No. 94-HHR- 254 (Jan. 20, 1995). See Martin v. W. Va. State Fire Comm'n, Docket No. 89-SFC-145(Aug. 8, 1989); Schmidt v. W. Va. Dept. of Highways, Docket No. DOH-88-063 (Mar. 31, 1989).

Neither party disputes that Grievant authorized one of her employees to extend her lunch hour by one-half hour each day. It is likewise uncontested that Grievant believed she had authority to make this decision, and that she believed that this decision would benefit her employer by insuring that an employee would be available to answer telephone inquiries while other employees were taking their mid-morning and mid-afternoon breaks.

Although decisions regarding breaks and extended lunch hours might normally fall within the parameters of supervisory discretion, BEP has issued a Handbook which contains specific rules governing such matters. The language in the Handbook clearly states that the accommodation which Grievant extended to Ms. Stone is not permissible. As a supervisor, Grievant is responsible for becoming aware of such rules and reasonably enforcing those rules for those employees she has been assigned to supervise.

The incident was further aggravated by the fact that Ms. Stone was apparently exceeding Grievant's authorization, further extending her lunch hour as much as another half-hour without taking appropriate leave. Although it was indicated that Ms. Stone's work area is immediately outside Grievant's office, it was not established that Grievant was aware that Ms. Stone was further extending her lunch hours. Nonetheless, as Ms. Stone's immediate supervisor, Grievant was responsible for enforcing BEP's work rules. BEP contends that when Grievant proceeded to sign time sheets indicating that Ms. Stone was working 7.5 hours, Grievant was making a false statement that amounted to criminal fraud. However, BEP failed to establish that Grievant had the necessary intent to deceive at the time she signed the time sheets to establish this more serious offense. Grievant believed,albeit erroneously, that she was acting within the scope of her discretion as a supervisor when she approved the extended lunch hour arrangement proposed by Ms. Stone. This arrangement did not totally operate to the detriment of BEP, as there is no evidence that Ms. Stone did not work through her morning and afternoon breaks as agreed, or that the agency's phones were not properly answered.

Nonetheless, Grievant has confused her employer's willingness to permit breaks with the concept that such breaks thereby become an entitlement of the employee, to trade off for some other employment benefit or condition of employment. Further, extending such privileges to Ms. Stone, contrary to BEP's Handbook policy, constituted favoritism prohibited by W. Va. Code § 29-6A-2(h). See Swanger v. W. Va. Div. of Highways, Docket No. 95-DOH-063 (Nov. 19, 1997); Adkins v. W. Va. Div. of Highways, Docket No. 92-DOH- 146 (Sept. 3, 1992). Although Grievant's decision was negligent, representative of poor supervisory judgment, and contrary to published BEP policy, Grievant obtained no personal gain from her actions, and the requisite intent to defraud her employer was not established.

W. Va. Code § 29-6A-5(b) provides authority to the undersigned to "provide such relief as is

deemed fair and equitable" in accordance with the provisions of W. Va. Code §§ 29-6A-1, et seq. Where the employer fails to establish all of the charges which were alleged to support a particular disciplinary action, the penalty imposed must be reviewed to determine if it is excessive in the circumstances. See Walters v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-086 (Jan. 23, 1995), aff'd, Cir. Ct. of Kanawha County, No. 95-AA-23 (Dec. 18, 1996); Schmidt, supra. See generally Douglas v. Veterans Admin., 5 M.S.P.B. 313 (1981). Grievant argues in her post-hearing submission that the greatest penalty that should be imposed is the same penalty received by Ms. Stone, described as a 10-day suspension. However, Ms. Stone's penalty included not only a 10-day suspension, but an additional forfeiture of over 71 hours of annual leave equivalent to nearly $826 in pay. Thus, Ms. Stone's actual penalty, in monetary terms, was closer to a 20-day suspension without pay. Further, the employer properly considered Grievant's supervisory status and responsibility in determining an appropriate penalty for her misconduct. See Douglas, supra. Because supervisors are expected to enforce rules relating to leave and attendance, they may be held to a higher standard when they commit, condone or promote such infractions.

In West Virginia, dismissal of a civil service employee must be for good cause, which means misconduct of a substantial nature directly affecting the rights and interest of the public, rather than some trivial or inconsequential matters, or some technical violations of statute or official duty without wrongful intention. Oakes v. W. Va. Dept. of Fin. & Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980). Accord, Roach v. Regional Jail Auth., 482 S.E.2d 679 (W. Va. 1996); Noggy v. Civil Service Comm'n, 182 W. Va. 653, 391 S.E.2d 100 (1990); Buskirk v. Civil Service Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985); Blake v. Civil Service Comm'n, 172 W. Va. 711, 310 S.E.2d 472 (1983); Serreno v. W. Va. Civil Service Comm'n, 169 W. Va. 111, 285 S.E.2d 899 (1982). These standards must be applied to the charges ultimately proven in this matter to determine if the penalty of dismissal should be sustained.

Although Grievant had constructive notice of the policies contained in BEP's Handbook, the particular rule which Grievant violated by her conduct was not specifically brought to her attention. Certainly, she was not warned that she would be disciplined if sheallowed a subordinate employee to extend her lunch hour, or failed to properly monitor the employee's time sheets. See Preece v. Public Service Comm'n, Docket No. 94-PSC-246 (Apr. 25, 1997). Moreover, Grievant did not personally profit from the actions which gave rise to this termination. Further, although Grievant was

unquestionably given supervisory authority and responsibility, there is no evidence that she was given any training regarding those responsibilities, beyond being handed the same employee handbook that was issued to all BEP employees. Finally, Grievant has worked for BEP for over 22 years with an otherwise unblemished record. Considering all of these circumstances and appropriate mitigating factors, the undersigned finds that the penalty of dismissal is clearly disproportionate and excessive, and a 30-day suspension without pay is the maximum appropriate penalty for the charges sustained. Accordingly, BEP will be required to reinstate Grievant as a Supervisor II, in the same position, or an equivalent position, and to pay backpay for the amount of time in excess of 30 days that Grievant has been terminated.

Consistent with the foregoing discussion, the following conclusions of law are made in this matter.

CONCLUSIONS OF LAW

1. Pursuant to W. Va. Code § 29-6A-6, 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. Wellman v. W. Va. Dept. of Health & Human Services, Docket No. 93-HHR-079 (Oct. 18, 1993); Ramey v. W. Va. Dept. of Health, Docket No. H-88-005 (Dec. 6, 1988).

2. Dismissal of a civil service employee must be for good cause, which means misconduct of a substantial nature directly affecting the rights and interest of the public,rather than some trivial or inconsequential matters, or some technical violations of statute or official duty without wrongful intention. Oakes v. W. Va. Dept. of Fin. & Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980).

3. Respondent BEP established by a preponderance of the evidence that Grievant failed to properly perform her duties as a supervisor by allowing an employee to take time off without charge to leave. However, BEP did not establish by a preponderance of the evidence that Grievant signed the employee's time sheets knowing that the certification she was making was false in the circumstances nor that she did so with intent to defraud her employer.

4. 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 agency discretion, or an inherent disproportion between the offense and the personnel action. Jones v. W. Va. Dept. of Health

& Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Thompson v. W. Va. Dept. of Health & Human Services, Docket No. 94-HHR-254 (Jan. 20, 1995). See Martin v. W. Va. State Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989); Schmidt v. W. Va. Dept. of Highways, Docket No. DOH- 88-063 (Mar. 31, 1989).

5. W. Va. Code § 29-6A-5(b) provides authority to an administrative law judge of the West Virginia Education and State Employees Grievance Board to "provide such relief as is deemed fair and equitable in accordance with the provisions of W. Va. Code §§ 29-6A-1, et seq. Where the employer fails to establish all of the charges which were alleged to support a particular disciplinary action, the penalty imposed must be reviewedto determine if it is excessive in the circumstances. See Walters v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-086 (Jan. 23, 1995), aff'd, Cir. Ct. of Kanawha County, No. 95-AA-23 (Dec. 19, 1996); Schmidt v. W. Va. Dept. of Highways, Docket No. DOH-88-063 (Mar. 31, 1989). See generally Douglas v. Veterans Admin., 5 M.S.P.B. 313 (1981).

6. Grievant established that a dismissal was disproportionate to the charges ultimately proven in this matter. The maximum appropriate penalty given the charges actually proven and Grievant's prior work record over a period of more than 20 years as a productive employee, is a 30-day suspension without pay. See Walters, supra.

Accordingly, this Grievance is **GRANTED**, **IN PART**. Respondent West Virginia Department of Health and Human Resources is hereby **ORDERED**, consistent with this opinion, to rescind Grievant's dismissal, and mitigate such dismissal to a 30-day suspension without pay, and pay appropriate backpay to Grievant as determined earlier in this decision. All other relief is hereby **DENIED**.

Any party 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 theintent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: December 31, 1997

Footnote: 1

Exhibits admitted at the Level IV hearing will be identified as "J Ex " for Joint Exhibits, "G Ex " for Grievant's Exhibits, and "E Ex " for Employer Exhibits.

Footnote: 2

The legality of this agreement is not before this Grievance Board.