MICHELE BERRY,

Grievant,

v. Docket No. 00-HHR-187

DEPARTMENT OF HEALTH & HUMAN RESOURCES/

BUREAU FOR CHILDREN AND FAMILIES,

Respondent.

D E C I S I O N

Grievant, Michele Berry, employed by the West Virginia Department of Health & Human Resources/Bureau For Children and Families (DHHR or Respondent), as an Economic Service Worker, filed a level one grievance on November 8, 1999, after she was suspended for three days without pay. Grievant specifically asserted that the: "(1) offense does not demand suspension as the harm done was minimal, if any. (2) employer failed to follow procedure regarding suspension, ie: verbal or written reprimand. (3) Employer did not allow the employee proper appeal process or administrative remedy." For relief, Grievant requested that the suspension be reduced to a written or verbal reprimand, back pay and benefits lost for the period of the suspension.

The record does not include a level one decision; however, the grievance form indicates that it was issued on November 17, 1999, The grievance was denied at level two on February 7, 2000. An evidentiary hearing was conducted at level three, and a decision denying the matter was issued on April 12, 2000. Grievant advanced the grievance to level four, and a supplementary hearing was conducted in the Grievance Board's Morgantown office on December 14, 2000. Grievant was represented by Wayne King, Esq., and Respondent was represented by Anthony D. Eates, II, Assistant Attorney General, at those proceedings. The matter became mature for decision with thesubmission of Respondent's proposed findings of fact and conclusions of law on January 8, 2001. Grievant elected not to submit post-hearing proposals.

The following facts are derived from the record in its entirety, including the level three transcript and exhibits, and the evidence submitted at level four.

Findings of Fact

1. Grievant has been employed by DHHR since June 16, 1998, and was assigned as an

Economic Service Worker in the Marion County office at all times pertinent to this decision.

2. On September 29, 1999, Grievant's supervisor, Michelle Batiste, went to Grievant's desk for the purpose of leaving her a note. While searching for a post-it note, Ms. Batiste reached into Grievant's waste basket for a piece of scrap paper, and found several documents for client C.B., a letter from the client's employer, pay statements dated September 10 and 24, 1999, and the envelope addressed to DHHR. The original documents had been torn into four pieces.

3. Ms. Batiste checked the computer system and found that the information on the document had not been entered into C.B.'s file. She taped the documents back together, and then proceeded to ask Grievant why they had been disposed of before the information had been updated in the computer.

4. Grievant initially advised Ms. Batiste that the information had already been entered into the case record. When confronted with the record which did not include the information on the document, Grievant stated that everyone disposes of certain documentation. She later recanted that comment. In a letter to Region I Director Louis Palma, dated October 17, 1999, Grievant stated that she had evaluated the informationon the documents, and having determined that C.B.'s food stamp benefits would not change, “without thinking, threw these [documents] away.”

5. The documents were returned to Grievant with direction to enter the information into the computer system. Grievant complied with the directive on October 1, 1999.

6. The information did not change the client's Food Stamp eligibility, or otherwise cause her any harm.

7. Grievant was subsequently removed from the Corrective Action Panel, and was suspended without pay for three days. (See footnote 1)

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).

Region I Director Louis Palma advised Grievant of the suspension by letter dated October 12,

1999. He stated, in part:

The purpose of this letter is to advise you of my decision to suspend you, without pay, for a period of three (3) working days from your duties as Economic Service Worker with theWest Virginia Department of Health and Human Resources. Your suspension will begin on Wednesday, October 20, 1999 and continue through Friday, October 22, 1999. You are to report back to duty on Monday, October 25, 1999 at 8:30 A.M. This personnel action is being taken in accordance with West Virginia Division of Personnel Administrative Rule, Section 12.03.

On Thursday, October 7, 1999, Ronald Anderson, Community Services Manager, held a discussion with you regarding the nature of your misconduct. Mr. Anderson shared with you that disciplinary action in the form of a suspension was being considered. You responded to him that this was the first and only time that you had ever done anything wrong and that your performance had always been above average and that you had gone above what was expected of an employee through your participation on the Region I Corrective Action Panel. You further indicated that you did not deny the allegations of misconduct. After reviewing your response and the circumstances, I have decided that this suspension is warranted.

The specific reasons for your suspension relates to your wanton and willful destruction of Food Stamp client, C.B.'s income change verification and your failure to properly update the client's Food Stamp record.

On Wednesday, September 29, 1999, while looking for a scrap of paper on your desk in order to leave you a note, your supervisor, Michelle Batiste, noticed, torn up in your trash can, copies of two pay stubs dated September 10, 1999 and September 24, 1999, plus a signed letter dated September 8, 1999 from the client's employer relative to a change in the client's work hours effective September 5, 1999. Your supervisor recognized that she had just handed these verifications and letter to your earlier on that day. Upon questioning you about what she found in your trash can, you told her that you already had this information. When you were asked where you had it, you stated that it was in the case record and that you had taken care of it. Your supervisor then produced the case record and showed you that you did not, in fact, file the information nor did you update the case record. The record shows that the last time you had seen the client was on August 9, 1999 when you processed a Food Stamp redetermination using pay statements dated July 16, 1999 andJuly 30, 1999. The record

indicates that you did not make any change on the case nor did you update the client file based upon the information received on September 29, 1999. You made the statement that “everyone back there does it”, “or they throw the stuff on the floor without making the change and file it”. When you were further asked to whom you were referring, you declined to make further comment.

Your actions are in violation of Common Chapter 900, Preserving the Integrity of Original Documents (copy attached); DHHR Policy Memorandum 2108, Employee Conduct (copy attached), which states that the employer expects professional behavior from its employees and that the employee is to provide services to eligible individuals in protecting the basic health and welfare of its citizens; and West Virginia Income Maintenance Manual Chapter 1.2D (copy attached) which clearly defines the responsibility of the worker to ensure that client information is appropriately handled and that case recordings are made to fully document the client's situation.

During your tenure with the Department of Health and Human Resources, your supervisor has placed a great deal of trust in you by appointing you to the Region I Corrective Action Panel. You were subsequently appointed to the State Corrective Action Panel. Your actions have greatly diminished this trust and has resulted in your being removed from this Panel. Your failure to abide by the Department's policies have the potential to result in Food Stamp clients receiving incorrect benefits which can result in fiscal sanctions against the Department by the federal government. Your actions tear down the ability of the Department to develop trust between the worker and client in the consistent application of policy and trust between the public and the Department to expend tax dollars correctly.

I believe the nature of your misconduct is sufficient to conclude that you did not meet a reasonable standard of conduct, thus warranting your suspension. Any further infractions, whether they are the same as the present circumstances or different, may result in more severe disciplinary action.

The State of West Virginia and its agencies have reason to expect their employees to observe a standard of conduct which will not reflect discredit on the abilities and integrity of their employees, or create suspicion with reference to theiremployee's capability in discharging their duties and responsibilities. I believe the nature of your misconduct is sufficient to cause me to conclude that you did not meet a reasonable standard of conduct as an employee of the West Virginia Department of

Health and Human Resources, thus warranting this suspension.

Ron Anderson, Community Services Manager and Grievant's second level supervisor, and Mr. Palma testified at level two that they conferred with DHHR Director of Human Resources Mike McCabe, to determine what action to take regarding this incident. Mr. McCabe also testified at level two that this was the first incident involving the destruction of public documents he had reviewed. They first consulted DHHR Policy 2104, Guide to Progressive Discipline, for guidance and found that "like penalties shall be imposed for like offenses." Considering the potential fiscal sanctions which could have been imposed on the agency if the information had not been properly processed, and the potential criminal penalties Grievant could have faced, the DHHR administrators consulted with a Division of Personnel specialist, and concluded that a three day suspension was appropriate. Mr. McCabe stated that Grievant's good work record was considered as a mitigating factor in making the decision.

Grievant elected not to testify at level three or level four, pursuant to W. Va. Code §29-6A-6(e). (See footnote 2) However, in her October 17, 1999, letter to Mr. Palma, Grievant admits to the action, but asserts that she had evaluated the information and knew that there was no change in the client's food stamp benefit and "without thinking" threw the document away. She argues that she is a good employee, and because this was a first offense, the levelof discipline should have been an oral or written reprimand to be consistent with the DHHR progressive discipline policy.

Because Grievant does not deny the charge, only her claims that the Progressive Discipline Policy was not properly followed, and that the penalty should have been mitigated, remain to be discussed. DHHR Policy 2104, "Guide to Progressive Discipline" provides a corrective approach in changing employee behavior through increasingly severe levels of discipline imposed for unsatisfactory behavior or performance. Both the frequency and the weight of the offense is considered when imposing discipline. Thus, a verbal reprimand or warning is sufficient for an act of misconduct which is not serious or repetitious in nature, while a suspension may be issued for a first offense of a more serious nature. Although Grievant relies upon the fact that the client incurred no harm to support her claim that the destruction of the documents was not a serious matter, it was, as noted in the suspension letter, in violation of DHHR policies which address employee conduct, the processing of client information, and the preservation of original documents. Perhaps even more serious, Section 950 of DHHR's Common Chapter "Preserving the Integrity of Original Documents",

provides the following:

[f]ailure to take proper action to preserve the integrity of the Department of Human Services documents is considered a misdemeanor under West Virginia Code, §61-5-22, and upon conviction, a person may be confined to jail for one year, and fined up to one thousand dollars. That person will also forfeit his right to hold 'any office of honor, trust or profit in this State'. (See footnote 3)

Respondent has proven that Grievant destroyed official documents, an action which could have resulted in penalties to the agency, as well as criminal charges for Grievant. Considering the nature, and the potential consequences, of the action, it cannot be determined that the suspension was an improper level of discipline for a first offense under DHHR Policy 2104.

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).

Because this was a first instance in which discipline was imposed for the destruction of documents, there are no other cases available for comparison. Further, Grievant's fifteen month employment record, while considered by DHHR administrators, is not of sufficient duration to be entitled to great weight. At best, Grievant's action might be characterized as negligent. While a three day suspension is a significant measure of discipline, the evidence indicates that consideration was given to the nature of the actionand the potential harm which could have occurred. Under these circumstances, it cannot be determined that Grievant proved the suspension was clearly excessive or an abusive of agency discretion. (See footnote 4)

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. 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).

2. DHHR has proven by a preponderance of the evidence that Grievant destroyed certain client documents without entering the information they contained into the computer system. 3. DHHR's progressive discipline policy provides guidelines for progressive levels of discipline, and does not diminish the authority of supervisors to exercise discretion when issuing disciplinary action. Artrip v. Dep't of Health & Human Services, Docket No. 94-HHR-146 (Sept. 13, 1994).

4. 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).

5. Grievant failed to prove the three day suspension was clearly excessive or an abuse of agency discretion.

Accordingly, the grievance is **DENIED.**

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7 (1998). 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. 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 appealingparty must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: January 29, 2001 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

The record does not include an explanation of the Panel's purpose or function; however, Grievant does not seek reinstatement to this appointment.

Footnote: 2

W. Va. Code §29-6A-6(e) states in pertinent part that "[n]o employee may be compelled to testify against himself or herself in a grievance involving disciplinary action. The burden of proof rests with the employer in disciplinary matters."

Footnote: 3

W. Va. Code §61-5-22 specifically states,

If any clerk of a court, or other public officer, fraudulently makea false entry, or erase, alter or destroy any record in his keeping and belonging to his office, or shall wilfully secrete any such record from any person having the right to inspect the same, he shall be guilty of a misdemeanor, and, upon conviction, shall be confined in jail not more than one year and be fined not exceeding one thousand dollars; and, in addition thereto, he shall forfeit his office and be forever incapable of holding any office of honor, trust or profit in this State.

Footnote: 4

Grievant did not address the allegation that DHHR did not permit her a proper appeal process or administrative remedy at level three or level four; therefore, it is deemed abandoned.

At level four, Grievant attempted to allege that some wrongdoing had been committed by Ms. Batiste, and submitted documentation from a former employee who had made complaints about the supervisor. The record does not indicate that Ms. Batiste committed a violation of any rule, regulation, or policy, and Mr. Anderson testified that it might be entirely appropriate for her to "go through" an employee's wastebasket.