CONNIE MAXWELL,

Grievant,

v. **DOCKET NO. 02-ADMN-389**

DEPARTMENT OF ADMINISTRATION,

Respondent.

D E C I S I O N

This grievance was filed directly at Level IV by Grievant, Connie Maxwell, pursuant to W. Va. Code § 29-6A-4(e), on November 22, 2002, after she was dismissed from her employment with Respondent Department of Administration ("DOA") for unsatisfactory performance. As relief Grievant seeks "[r]einstatement, back pay with interest, all leave restored, tenure restore, all negative material concerning this issue be removed from all my files, and to be made whole completely." (See footnote 1)

The following Findings of Fact are made based upon the record developed at Level IV.

Findings of Fact

1. Grievant was an employee of the State of West Virginia for 16 years, until she was dismissed from her employment effective November 14, 2002, for unsatisfactory performance. She was employed by DOA as an Accounting Tech III in the payroll section for five years, until she was transferred to the Expenditure and Revenue Unit in August 2001.

2. Grievant was transferred from payroll in an effort to alleviate the stress she felt in payroll, as she was having serious medical issues. (See footnote 2)

3. Debbie Pierson was the supervisor of the Expenditure and Revenue Unit. Ms. Pierson evaluated Grievant's performance from August 27, 2001, through September 30, 2001. Grievant received a good evaluation for this period. Grievant was cautioned about her leave usage in the evaluation, and several times thereafter.

4. From January 1, 2002, through April 19, 2002, Grievant was absent from work 120 hours, 104 hours of which were not pre-approved. This represented an absence rate of 18%. On April 24, 2002, Grievant was placed on restrictive leave for 90 days, meaning she would be required to present a physician's certificate that she was ill each time she called in sick. In addition, Grievant was required to obtain approval at least 48 hours in advance to use annual leave.

5. Grievant is a diabetic, and Ms. Pierson was aware of this. During early 2002, Grievant was taking medication that was making her sick. While Grievant was on restrictive leave, her doctor discovered the problem was with the medication, and corrected the problem.

6. On July 30, 2002, Grievant was removed from restrictive leave status as her attendance had improved. The letter removing her from this status encouraged her “to continue adhering to leave guidelines as outlined in the Employees Handbook.” The leaveguidelines in the Employees Handbook do not require a doctor's certificate for a one day absence.

7. On August 1, 2002, Grievant called her supervisor and left a message that she would not be at work as she felt like she was coming down with a cold. Grievant was having difficulty talking, her eyes were swollen, and she had a temperature of 100 or 101 degrees. Grievant did not know if she was getting a cold or something else, but she did not believe she should go to work with a fever and expose her co-workers to whatever it was she had. She did not go to the doctor, and did not obtain a doctor's certificate that she was ill. At some point she did tell Ms. Pierson she had a fever. Ms. Pierson did not tell Grievant she could not have sick leave that day, nor did she tell her that she needed a doctor's certificate.

8. On August 2, 2002, Grievant was returned to restrictive leave status. Ms. Pierson believed that Grievant's one day absence demonstrated the same general pattern of leave abuse was reoccurring, and Grievant had the opportunity to bring in a doctor's certificate for her absence, but did not do so. The record does not reflect Grievant's attendance record after August 2, 2002.

9. One of Grievant's duties was to organize the three file cabinets containing all receipts for all state agencies for purchases using the state purchasing card, from 1997 or 1998 forward (“the P-card project”). The P-card project was assigned to Grievant in January 2002 by Gay Ellis, Ms. Pierson's supervisor. Grievant was to organize the documents into files by month for each agency. She and Ms. Ellis set a deadline of June 30, 2002, for completion of the project, although Grievant had no idea how long this project would take. In early February 2002, Ms. Pierson revised the

completion deadline to February 28, 2002. Grievant told Ms. Pierson it would be impossible for her to meet this deadline. 10. The P-card project was a “critical” project to those above Grievant on the organizational chart. Special Investigations was looking for misuse of the P-card, and legislative auditors were also “hot” to get into the files.

11. Around February 20 or 21, 2002, Grievant was assigned additional work on the P-card files. She was assigned to work on a year's worth of P-card records for one agency which was being audited. She was to put all the receipts in order behind the master account document, make sure all the receipts were present, and if a receipt was missing, she was to document this on a spreadsheet. Finally, a log was to be attached to the file, and if it was missing, she was to note this on the spreadsheet. Grievant completed this assignment by the deadline, with the assistance of another employee. The record does not reflect whether there were any errors in Grievant's work on this assignment. After Grievant completed this assignment, she returned to organizing the P-card files by month. She did not realize until sometime later that Ms. Pierson wanted her to continue to organize the receipts, make sure all receipts were present and note any missing receipts, and check for the log sheet.

12. The P-card project was not completed by the February 28, 2002 deadline, and a new deadline of March 15, 2002, was set with Grievant's input, but was not met. Also, on February 25, 2002, the “filing boxes project” was added to Grievant's duties, with a completion date of March 31, 2002. This project involved filing data related to parking fines. The P-card project completion deadline was extended to April 30, 2002, a date suggested by Grievant. On May 1, 2002, the P-card project completion deadline was revised to May 30, 2002, and the filing boxes project deadline was extended to June 30, 2002.

13. On May 9, 2002, Grievant was demoted to an Accounting Tech II position for inefficient performance, but her salary was not reduced. This position was in the classified service. Although this action was disciplinary, Andrew Fizer, Director of Finance and StateComptroller, and others, did not want this to be a punishment of any sort, they wanted to reduce her duties and workload, and were hoping the demotion would be temporary. They did not want to unduly punish her in any way. They felt that if they reduced her salary and if it seemed like a punishment, it would be impossible for Grievant to rebound from it.

14. On June 4, 2002, the P-card project and filing boxes project completion deadline was

revised to July 31, 2002. On July 21, 2002, two temporary workers were assigned to help Grievant with the P-card project and the filing boxes project, and the deadline for completion of both was set at August 12, 2002. One of the temporary workers assisted Grievant for one day, and the other temporary worker was repeatedly pulled off the P-card and filing boxes assignments and given other assignments. (See footnote 3)

15. It took Grievant approximately two hours to put one P-card file together in proper form. Ms. Pierson asked a temporary worker who had been trained by Grievant how long it took her to put one file in order, and she told her it took her 20 to 30 minutes. Ms. Pierson did not train Grievant in putting the files in order, and the record does not reflect that those who did were consulted as to how long it should take to put one file in order. The record does not reflect that Ms. Pierson ever observed Grievant putting a file in order to determine whether Grievant was completing the job in a proper and timely manner, or that Grievant was offered additional training in this area. The record further does not reflect how long it should take to put one file in order in a proper manner, or how many files there were to organize.

16. After Grievant spoke with Ms. Pierson she reviewed the work of the temporary worker and found she was not going through the files completely, which waswhy it was only taking her 30 minutes. Grievant tried to explain the process to the temporary worker again. Grievant thought she had told Ms. Pierson this, but Ms. Pierson did not recall Grievant telling her about the problem.

17. On August 2, 2002, Grievant told Ms. Pierson she did not believe she would be finished with the P-card project by the August 12, 2002 deadline Ms. Pierson had set. Ms. Pierson told Grievant the deadline would remain August 12, 2002. Neither the P-card project nor the filing boxes project was completed by August 12, 2002.

18. On September 4, 2002, received a “written reprimand and final notice of impending disciplinary action should you continue failing to meet expectations outlined herein.” The written reprimand was for unsatisfactory work performance. The letter states that a 30 calendar day improvement period is being established, and that Ms. Pierson will meet with Grievant weekly to discuss her progress and provide her with feedback. The letter outlines Grievant's duties. The record does not reflect that Ms. Pierson provided Grievant with any feedback during the improvement period. The letter states, “this serves as final warning that the very next occurrence of missed deadlines may result in a suspension without pay.”

19. Mr. Fizer testified that the written reprimand warned Grievant that if she failed to meet the deadlines she could be terminated. When questioned by the undersigned as to where this warning appeared in the letter, Mr. Fizer testified that it was supposed to be in the letter, but the person who typed it did not realize the ramifications and changed the wording, it was not reviewed properly, and no one caught this error.

20. The September 4, 2002 letter lists Grievant's duties and how much time she is expected to spend on each duty. Listed under projects is “Pcard and Filing Cleanup.” The letter states this takes 8 hours a week, or 25% of Grievant's time. Mr. Fizer testified that the P-card filing took up 90% of Grievant's time, and Grievant still thought she had too much to do. Since it took Grievant two hours to complete one file, and she was spendingonly eight hours a week on this project and the filing boxes project combined, she would only be able to complete four files a week, if she did not work on the filing boxes project at all. The record does not reflect how many P-card files existed or how extensive the filing boxes project was. The letter sets a new deadline of September 20, 2002, for completion of the P-card and filing boxes projects.

21. Grievant's other duties after September 4, 2002, as set forth in the written reprimand, were expenditures filing, front desk relief, and capitol mail runs. Capitol mail runs comprised 30% of Grievant's duties, front desk relief took another 25% of Grievant's time, and expenditures filing took 15% of Grievant's time. The record does not reflect whether Grievant satisfactorily completed these duties, except for the notations in the dismissal letter that a temporary worker had been assigned to provide assistance.

22. Grievant's final deadline, as determined by Ms. Pierson, to complete the P- card project was October 4, 2002. Ms. Pierson temporarily removed all of Grievant's other duties on October 1, 2002, in order to allow Grievant to complete the project.

23. On October 4, 2002, Grievant and a temporary worker completed the P-card project. The filing boxes project had not been completed. The P-card files were neatly organized in the file cabinets. Ms. Pierson “spot audited” three files. Ms. Pierson did not explain how she picked the three files. One of the files was correctly documented. Two of the files were not correctly documented. The record does not reflect how many files there were, or how many were not correctly documented. Ms. Pierson stated that approximately half the logs were incorrect, although this was a guess on her part. Ms. Pierson could not determine which files had been organized by Grievant and which had been

organized by the temporary workers, but determined that Grievant's performance was so deficient because of these errors that she should be fired. Ms. Pierson held Grievant responsible for the work of the temporary workers because Grievant trained them, althoughthere is no indication that Grievant was their supervisor. Ms. Pierson was not disciplined for the delay and errors in the P-card filing.

24. Grievant's performance evaluations from October 1, 1997, through September 30, 2000, rated her overall performance as meeting expectations. Grievant's performance evaluation for the period from October 1, 2000, through August 26, 2001, was not made a part of the record, after Grievant stated she was told this document would be destroyed.

Discussion

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

"The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting 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.' Syl. Pt. 2, Buskirk v. Civil Service Comm'n, [175 W. Va. 279, __,] 332 S.E.2d 579, 581 (W. Va. 1985); Oakes v. W. Va. Dept. of Finance and Admin., [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); Guine v. Civil Service Comm'n, [149 W. Va. 461,]141 S.E.2d 364 (W. Va. 1965)." Scragg v. Bd. of Directors W. Va. State College, Docket No. 93-BOD-436 (Dec. 30, 1994). “The public has a significant interest in ascertaining that employees such as Grievant perform the duties for which they are compensated in a reasonably competentand proficient manner. See Hein v. W. Va. Dep't of Health & Human Resources, Docket Nos. 94-HHR-1124 & 95-HHR-396 (Nov. 30, 1995). . . . Accordingly, if Grievant failed to perform [her] assigned duties as alleged by [Respondent], and the employer was not culpable for that failure, the employer's action must be sustained. See Deyerle v. W. Va. Div. of Rehabilitation Serv., Docket Nos. 95-RS-034 & 96-

RS-197 (Nov. 26, 1997)." Dadisman v. Div. of Rehabilitation Serv., Docket No. 98-RS-023/040 (Mar. 25, 1999).

The undersigned concludes that Respondent has not demonstrated that Grievant's performance was unsatisfactory from the time she received the written reprimand on September 4, 2002. First, Respondent's evidence that Grievant did not do what she was supposed to do on each P-card file consisted of Ms. Pierson's testimony that she found errors in two files she looked at, and her guess that approximately half the logs were incorrect. Ms. Pierson did not know how many files there were, or whether the errors were made by Grievant or the temporary workers. If there were 2000 files, and only two contained errors, this would not be significant. No evidence was presented that Grievant was told she would be accountable for the errors of the temporary workers, or that this was appropriate. Ms. Pierson was responsible for supervising Grievant, and she was not fired or otherwise disciplined because Grievant's work was determined to be faulty. It is interesting that no evidence was presented as to whether Grievant's work on the P-card assignment in February 2002, for one agency contained errors.

Second, it is apparent that there was a lot of pressure to complete the P-card project, Grievant took all the blame for missing deadlines set by Ms. Pierson to complete the project, and ultimately was held completely responsible for the delay in completing this "critical" project. Although Ms. Pierson testified that Grievant participated in setting the deadlines, there is no evidence that anyone made a reasoned effort to determine how long this project or the filing boxes project would take, until late in the P-card project. While Ms. Pierson complained that Grievant would not communicate to her when there was aproblem meeting a deadline, Grievant testified she gave Ms. Pierson weekly reports, and the written reprimand confirms that Grievant told Ms. Pierson she did not think she would meet the August 12, 2002 deadline. Ms. Pierson's response to this was to tell Grievant that was the deadline. If it took Grievant two hours to go through one P-card file, and she had less than eight hours a week to spend on the project, one would think that a realistic completion date could have been estimated after one or two months of files had been completed, based upon the number of files to be processed; and that it would have been obvious that Grievant could not complete the project by herself by the deadlines set, particularly when she was missing a lot of work early in the year. Indeed, the dismissal letter states that the final deadline of October 4, 2002, was set "based on a formula allowing 2 hours per PCard." It will be noted that while it is apparent Ms. Pierson thought it was taking

Grievant too long to go through one file, and it appears she believed the temporary worker who told her it only took her 20 to 30 minutes to complete one file over a 16 year state employee, no evidence was presented as to how long it should take to process one file, nor is there any evidence that Ms. Pierson made any effort to understand what was taking so long or to help Grievant to complete the work more quickly, even when Grievant was on an improvement plan. The dismissal letter states that Mr. Fizer, his assistant, and Ms. Pierson “verified that [two hours per file] was an overstatement of time by taking the largest Pcard and processing it according to guidelines,” but it does not state how long it took them to process this large file. Ms. Pierson testified Grievant spent a lot of time socializing, and apparently made no effort to look beyond this. Grievant, however, denied that she socialized with other employees for extensive periods of time.

The undersigned concludes that Ms. Pierson and Mr. Fizer placed unreasonable demands upon Grievant, were not clear in their instruction to Grievant, and frankly were not fair. For example, while Mr. Fizer stated the demotion was a serious disciplinary action, he stated he did not want Grievant to see it as a punishment. This is nonsense. Ms.Pierson testified Grievant's one day absence on August 1, 2002, demonstrated the same general pattern of leave abuse, and Grievant was given the opportunity to provide a doctor's certificate. A one day absence does not a pattern make, and if someone does not know they need to bring a doctor's certificate, no opportunity to provide one has been given. Further, Grievant had a fever and told Ms. Pierson this, which is sufficient to justify her use of sick leave, if a cold was not a good enough reason. As noted above, the record does not reflect that any reasonable effort was made to determine how long the P-card or filing boxes projects would take, why it was taking so long for Grievant to complete these projects, or whether Grievant needed additional instruction. Finally, the written reprimand notes the next step as a suspension. Mr. Fizer stated the written reprimand warned Grievant she could be fired. When questioned about this, Mr. Fizer testified well, the letter was supposed to say that she could be fired. The two obviously are not the same. While Jim Wells, Assistant Director of Employee Relations with the Division of Personnel, testified that a demotion is more serious than a suspension, Grievant's pay was not reduced when she was demoted, and Mr. Fizer stated they did not want it to be seen as a punishment. After the demotion, Grievant was given a written reprimand, one of the least severe disciplinary actions available to an employer. The next logical step from a written reprimand for continued unsatisfactory performance is a short suspension, not termination. However, as noted

above, Respondent failed to meet its burden of demonstrating unsatisfactory performance, and accordingly, no disciplinary action is appropriate here.

The following Conclusions of Law support the Decision reached.

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. Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988). 2. "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting 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.' Syl. Pt. 2, Buskirk v. Civil Service Comm'n, [175 W. Va. 279, __,] 332 S.E.2d 579, 581 (W. Va. 1985); Oakes v. W. Va. Dept. of Finance and Admin., [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); Guine v. Civil Service Comm'n, [149 W. Va. 461,]141 S.E.2d 364 (W. Va. 1965)." Scragg v. Bd. of Directors W. Va. State College, Docket No. 93-BOD-436 (Dec. 30, 1994). “The public has a significant interest in ascertaining that employees such as Grievant perform the duties for which they are compensated in a reasonably competent and proficient manner. See Hein v. W. Va. Dep't of Health & Human Resources, Docket Nos. 94-HHR-1124 & 95-HHR-396 (Nov. 30, 1995). . . .Accordingly, if Grievant failed to perform [her] assigned duties as alleged by [Respondent], and the employer was not culpable for that failure, the employer's action must be sustained. See Deyerle v. W. Va. Div. of Rehabilitation Serv., Docket Nos. 95-RS-034 & 96-RS-197 (Nov. 26, 1997).” Dadisman v. Div. of Rehabilitation Serv., Docket No. 98-RS- 023/040 (Mar. 25, 1999).

3. Respondent did not prove that Grievant's performance was unsatisfactory.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to reinstate Grievant to her position as an Accounting Tech II, but she is not to be placed under Ms. Pierson's supervision. Respondent is also **ORDERED** to pay Grievant back pay, plus interest, from November 14, 2002, and to restore all benefits, including annual and sick leave, retirement, and medical insurance, to that date, as though Grievant had not been dismissed from her employment, to reimburse Grievant for the employer's share of Grievant's medical insurance, if she maintained her medical insurance during

herseparation from her employment, and to remove all record of this dismissal from all files maintained on Grievant.

Any party or the Division of Personnel may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. 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 appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: February 26, 2003

Footnote: 1

A Level IV hearing was held on January 22, 2003. Grievant represented herself, and Respondent was represented by Amy Haynie, Esquire. This matter became mature for decision at the conclusion of the hearing, as the parties did not wish to submit written argument.

Footnote: 2

The May 9, 2002 demotion letter (discussed in Finding of Fact number 13) states Grievant was moved from payroll "due to backlogs, customer complaints, attendance issues, and performance problems." Andrew Fizer, Director of Finance and State Comptroller, testified Grievant felt she was doing the majority of the work in payroll, while her supervisor felt the opposite. However, he testified Grievant was having serious medical issues and was under a lot of stress, and she was moved from payroll to accommodate her, and to alleviate her stress.

Footnote: 3

Ms. Pierson testified that the two temporaries assisted Grievant for about five weeks in July and August 2002. Grievant testified she thought Ms. Pierson knew these temporaries had been used for other tasks. The undersigned will assume that Ms. Pierson did not know this. It is curious that Ms. Pierson thought two temporaries had assisted Grievant for five weeks and they could not complete the projects in this amount of time, but she still could not seem to understand why it was taking Grievant so long to complete the projects by herself.