RONALD D. SMITH,

Grievant,

v. **Docket No. 03-BEP-043**

BUREAU OF EMPLOYMENT PROGRAMS/

MARTINSBURG JOB SERVICE,

Respondent.

DECISION

Ronald D. Smith ("Grievant") filed this grievance at level four on February 13, 2003, after he was terminated from his position as an employment counselor for the Martinsburg Job Service ("MJS"). A hearing was held in the Grievance Board's office in Westover, West Virginia, on June 6, 2003, at which time Grievant appeared *pro se*, and Respondent appeared by Christie S. Utt, Assistant Attorney General. This matter became mature for consideration upon receipt of the parties' fact/law proposals on June 24, 2003.

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievant began employment with the MJS during the summer of 2002, as an Employment Counselor I ("ECI"), a 160-day temporary position.

2. When he applied for the ECI position, Grievant completed a West Virginia Division of Personnel "Application for Examination," dated February 8, 2002. This form contains a question which requests a "yes" or "no" answer, and states as follows:

> Have you been convicted of a felony within the past 7 years? A "yes" answer will not cause the removal of your name from an employment register or baryou from an employment register or bar you from all employment unless the conviction relates to the position for which you are applying.

3. Grievant answered “no” to the question regarding a felony conviction within the past seven years.

4. On February 28, 1995, Grievant was convicted of the felony offense of crime against nature (sodomy) of a male child between the ages of six and twelve.

5. Grievant's felony conviction for sodomy was within seven years of his February 8, 2002, application.

6. The duties of an EPI are to provide counseling services to dislocated workers and their families by assisting them in finding jobs which match their skills and interests, and also with developing new job skills through training and education. An EPI would have access to personal information regarding clients' families, including home addresses and information regarding minor children who live in their homes.

7. On August 7, 2002, Grievant completed another application, requesting promotion to a vacant Employment Counselor II (“EPII”) position. Grievant again checked “no” on the felony conviction question, which was accurate as of the date he completed the application.

8. Grievant received the promotion to EPII. An EPII performs similar duties to an EPI, but on a more specialized level, and are qualified to serve as youth programs specialists, which involves direct contact with minors. However, Grievant had not yet performed any work as a youth programs specialist as of the date he was terminated. 9. In early January, 2003, it came to the attention of BEP administrators that Grievant was a registered sex offender with the West Virginia State Police, and the information regarding the date and nature of his conviction was provided to them.

10. Because of Grievant's falsification of his original application for employment, along with the nature of his felony offense, he was terminated from his position with MJS on January 29, 2003. The letter of termination states, in pertinent part:

> Since your crime involved a minor and you potentially have access to minors or records regarding minors, the Bureau believes that you are unfit for the position of [EPII] in that you do not qualify to work with the public, which includes minors, with which you may come in contact, which is an essential function of the position.

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).

Thomas Rardin, Director of Personnel for Respondent, testified that, not only was Grievant's falsification of his application cause for his dismissal, but the nature of his offense would have made him unsuitable for an EP counselor position. He stated that, even if Grievant had been honest from the outset regarding his conviction, he would not have been hired for a position which would give him access to personal information regarding children living in the homes of job service clients.

Grievant has raised two arguments in his defense. First, he contends that he was denied the opportunity to go through the lower levels of the grievance procedure, which he feels was somehow unfair to him. However, even after the undersigned explained to Grievant at the level four hearing that he was entitled to an expedited grievance process pursuant to W. Va. Code § 29-6A-4(e), which is provided to give discharged employees an advantage by quickly resolving their grievances, he persisted in arguing in his post-hearing submission that the process was unfair. This argument is not supported by any evidence of record. Secondly, Grievant contends that, since he was actually employed as an EPII at the time of his dismissal, and his application for that position was accurate due to the passing of over seven years since the conviction, Respondent's termination of him for falsification of the original application was improper.

The undersigned finds that Respondent has proven by a preponderance of the evidence that

Grievant's felony conviction, along with his dishonesty regarding thatconviction, were good cause for termination of his employment. (See footnote 1) The nature of Grievant's crime would cause any rational employer to refrain from placing him in any position which could potentially involve access to information regarding minors, much less actual contact with them. Although Grievant had not yet been required to work directly with minors, the evidence clearly establishes that he had access to addresses of homes where children lived. Due to the fact that he committed a sexual offense against a child, it is quite reasonable and responsible for Respondent to declare him unfit for either EP position, and his termination was appropriate.

The following conclusions of law support the decision reached.

Conclusions of Law

1. 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).

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 withoutwrongful 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).

3. Respondent has proven by a preponderance of the evidence that Grievant's termination was for good cause.

Accordingly, this 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, and 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: July 2, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

It should also be noted that the Merit Systems Protection Board has held that termination of an employee for falsification of government documents (including employment applications) is appropriate, because such falsification raises serious doubts regarding the employee's honesty and fitness for employment. See, e.g., McCreary v. Office of Personnel Management, 27 M.S.P.R. 459, 462-63 (1985); see also Benoist v. Department of Defense, 40 M.S.P.R. 418, 426-27 (1989), aff'd, 895 F.2d 1420 (Fed. Cir.) (Table), cert. denied, 110 S. Ct. 2598 (1990); Delessio v. U.S. Postal Service, 33 M.S.P.R. 517, 521, aff'd, 837 F.2d 1096 (Fed. Cir. 1987) (Table).