TINA FRANCIS,

Grievant,

v.

DOCKET NO. 03-HHR-112

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILDREN AND FAMILIES,

Respondent.

D E C I S I O N

Grievant, Tina Francis, filed this grievance directly to level four on April 22, 2003, protesting her dismissal from the West Virginia Department of Health and Human Resources/Bureau for Children and Families ("DHHR"), effective April 30, 2003, and requesting reinstatement, back pay and interest, and removal of any reference to her dismissal from her personnel file. A level four hearing was held on July 2 and 16, 2003, and this matter became mature for decision on August 16, 2003, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented by Jane Moran, Esq., and DHHR was represented by Darlene Ratliff-Thomas, Esq., Assistant Attorney General.

SUMMARY OF EVIDENCE

Joint Exhibits

Ex. 1 -

Intake Worksheet for W. family. (See footnote 1)

Ex. 2 -

Initial Assessment and Safety Evaluation Worksheet and Conclusion for W. family.

DHHR's Exhibits

Ex. 1 -

Special Project Worksheet (blank).

Ex. 2 -

Special Project Worksheet for J. family.

Ex. 3 -

Initial Assessment and Safety Evaluation Worksheet and Conclusion for J. family.

Ex. 4 -

Intake Worksheet for J. family.

Ex. 5 -

April 14, 2003 letter from James Kimbler to Tina Francis.

Ex. 6 -

Intake Worksheet for K. family.

Ex. 7 -

Initial Assessment and Safety Evaluation Worksheet and Conclusion for K. family.

Ex. 8 -

Intake Worksheet for A. family.

Ex. 9 -

Initial Assessment and Safety Evaluation Worksheet and Conclusion for A. family.

Grievant's Exhibits

Ex. 1 -

1996 Performance Evaluation for Tina Francis.

Ex. 2 -

1998 Performance Evaluation for Tina Francis.

Ex. 3 -

1999 Performance Evaluation for Tina Francis.

Ex. 4 -

March 2000 Interim Employee Performance Appraisal for Tina Francis.

Ex. 5 -

2000 Employee Performance Appraisal for Tina Francis.

Ex. 6 -

2001 Employee Performance Appraisal for Tina Francis.

Ex. 7 -

October 15, 2001 memorandum from David L. Maynard to Tina Francis.

Ex. 8 -

2002 Employee Performance Appraisal for Tina Francis.

Ex. 9 -

April 2, 2003 transcript of interview with Mrs. J.

Ex. 10 -

January 17 and 30, 2002 Sign-In/Out Sheets.

Ex. 11 -

No Exhibit 11.

Ex. 12 -

October 21 and 30, 2002 Sign-In/Out Sheets.

Ex. 13 -

January 9, 2003 Sign-In/Out Sheet.

Testimony

DHHR presented the testimony of James Dillon, Beth Cook, David Maynard, and Jim Roach. Grievant testified in her own behalf, and presented the testimony of Ernestine Adkins.

Based upon a review of the record in its entirety, I find the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. At all times pertinent to this grievance, Grievant was employed by DHHR as a Child Protective Service Worker ("CPS") in its Wayne County office.

2. Grievant was terminated from her position effective April 30, 2003. At the time of her termination, Grievant had been employed by DHHR for seven years.

3. Grievant's evaluations during her seven-year tenure were rated as "meets" or "exceeds" expectations.

4. On or about January 2, 2003, James Dillon, a CPS Worker in Wayne County, was interviewing a child in response to an abuse referral. During that interview, Mr. Dillon learned that another CPS worker had been involved with the family a year earlier on another charge. The child indicated he had not been interviewed by that worker, but the worker had talked with his father. The parents informed Mr. Dillon that only the father had been interviewed about the previous charge.

5. Mr. Dillon looked up the initial assessment on the family for the prior charge, and found that Grievant had been the case worker. Grievant's initial assessment indicated she had talked with the child, as well as his father and mother. 6. Because of the inconsistencies between Grievant's assessment and what he had been told by the family, Mr. Dillon notified his supervisor, Jim Roach, who then told David Maynard, the Community Services Manager.

7. James Kimbler, Region Manager for Wayne County, and Margaret Waybright, Deputy Commissioner for the Bureau of Children and Families, were contacted. They instructed Rebecca "Beth" Cook, Regional Program Manager for Region II, to conduct an internal audit of Grievant's initial assessments.

8. Ms. Cook's audit was for the limited period of October 30, 2002, through February 2, 2003, and consisted of 53 referrals.

9. Part of the audit included talking with the families. Ms. Cook would tell the families she was doing a quality control check on the CPS workers, but did not identify Grievant by name.

10. Ms. Cook found three initial assessments with recorded home visits where the client had no recollection of a home visit from Grievant.

11. Mr. Roach and Ms. Pack conducted follow-up interviews with the families identified by Ms. Cook, and concluded Grievant had falsified her initial assessments regarding contacts with these individuals.

12. On April 14, 2003, Grievant was called into Mr. Maynard's office. Also present were her immediate supervisor, Jim Roach, and Sharon Pack, a co-worker. Grievant was informed that an internal audit had been conducted which revealed she hadreported contacts with clients which had not occurred, specifically with regard to the A., J., K., and W. families. (See footnote 2)

13. At this time, Grievant was provided an opportunity to respond to the allegations, and she denied making any false entries. She was excused from the office for about half an hour. She was then brought back into the office and was given her letter of termination, and instructed to turn in her credit cards and keys, and leave the building.

14. It is critical that the information provided in an initial assessment be accurate. Every person involved in a case, including co-workers and supervisors, must be able to rely on the information in order to determine how to proceed with a particular family. When this information is inaccurate or false, children may be placed at greater risk of maltreatment.

15. DHHR is responsible for the protection of at-risk children from all potential harm, including an ineffective case worker.

16. By letter dated April 14, 2003, Mr. Kimbler notified Grievant she was being dismissed from her position of Child Protective Services Worker, effective April 30, 2003.

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; Broughton v. W. Va. Div. of Highways, DocketNo. 92-DOH-325 (Dec. 31, 1992).

The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested facts is more likely true than not. Hammer v. W. Va. Div. of Corrections, Docket No. 94-CORR-1084 (Nov. 30, 1995); Leichliter v. W. Va. Dept. of Health and Human Serv., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met is burden of proof. Hammer, supra.

The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a “substantial nature directly affecting rights and interests of the public.” House v. Civil Service Comm'n, 181 W. Va. 49, 380 S.E.2d 226 (1989). “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 (1985); Oakes v. W. Va. Dept. of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Service Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965).” Scragg v. Bd. of Directors W. Va. State College, Docket No. 93-BOD-436 (Dec. 30, 1994).

Faced with defining 'gross misconduct' justifying discipline or dismissal, the Court in Thurmond v. Steel, 159 W. Va. 630, 225 S.E.2d 210 (1976) declined, deciding that the severity of the employee's misconduct should be evaluated and considered in the context of the circumstances of each case.” Hayes v. W. Va. Div. of Juvenile Justice, Docket No. 98-DJS-220 (Dec. 14, 1998). Moreover, “[c]onsiderable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospectsfor rehabilitation.” Overbee v. Dept. of Health and Human Resources, Docket No. 96-HHR- 183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge cannot substitute her judgment for that of the employer. Jordan v. Mason County Bd. of Educ., Docket No. 99- 26-8 (July 6, 1999).

DHHR charges Grievant with falsifying initial assessments to show she made contact with families, when in fact she did not. DHHR maintains Grievant's conduct violated DHHR rules and regulations, as well as the Code of Ethics of Social Workers, and that she has violated the public trust.

Grievant denies she engaged in the misconduct identified by DHHR, alleges she was not afforded

her due process in association with her termination, and contends that the DHHR's decision was based solely on hearsay evidence, and therefore, insufficient to support her termination.

DHHR acknowledges that some of the evidence introduced to demonstrate Grievant's misconduct is hearsay, but argues that the State's duty to protect the health and welfare of its children from risk of abuse or maltreatment simply leaves it no choice but to terminate Grievant's employment when it can no longer place any trust in her work.

Because formal rules of evidence, excepting the rules of privilege recognized by law, do not apply in grievance proceedings, hearsay evidence is generally admissible. W. Va. Code § 29-6A-6. See Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996); Seddon v. W. Va. Dept. of Health, Docket No. 90-H-115 (June 8, 1990). Nonetheless, an administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. See Holmes v. Bd. of Directors,Docket No. 99-BOD-216 (Dec. 28, 1999); Harry v. Marion County Bd. of Educ., Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996); Seddon, supra.

There are several factors to consider in determining the weight to be allocated to hearsay evidence, including: the availability of persons with first-hand knowledge to testify at the hearing; whether the declarants' out-of-court statements were in writing; were signed, or were in affidavit form; the employer's explanation for failing to obtain signed or sworn statements; whether the declarants were disinterested witnesses to the events and whether the statements were routinely made; the consistency of the declarants' accounts with other information in the case, their internal consistency, and their consistency with each other; whether corroboration for the statements can otherwise be found in the employer's records; the absence of contradictory evidence; and the credibility of the declarants when they made the statements attributed to them. Jennings v. Wyoming County Bd. of Educ., Docket No. 98-55-379 (Mar. 10, 1999); Miller v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997).

Inconsistent entries were found in four initial assessments prepared by Grievant: the A.'s, J.'s, K.'s, and W.'s Each family will be discussed separately, applying the legal principles set forth above.

1.

The A.'s.

The A. family was identified as part of the internal audit of Grievant's cases performed by Ms. Cook. The A. family includes the parents and four children. A referral was received on January 2,

2003, reporting that the father had whipped two sons and a teenage daughter with a belt on or about December 24, 2002. The intake form noted the father had been reported the year before for whipping the teenage girl. DHHR Ex. 8. Grievant was assigned the case, and on January 9, 2003, she left the office to interview the family. G. Ex. 13.

Grievant testified she went to visit the children at their schools the day she received the case, and these entries are on the assessment as face to face contact (school). She said she could not find the family home. On January 14, 2002, Grievant said Mrs. A. came to the office and was very upset, because she did not want Grievant bothering the children at school. This contact is entered on the assessment as face to face contact (other). Grievant testified it should have been face to face contact (office), but that she must have just hit the wrong computer key. Grievant testified that on another occasion, Mr. and Mrs. A. and the teenage daughter came into the office, but this visit is not recorded on the assessment sheet at all. DHHR Ex. 9.

After receiving Ms. Cook's audit, Mr. Roach and Sharon Gannon interviewed Mrs. A. in the office, and had her prepare a written statement. Mrs. A. told Mr. Roach that she and Grievant spoke on the telephone the day Grievant made contact with the two sons and the teenage daughter at their schools. Mrs. A. said Grievant told her she was going to talk to the younger daughter as well, but Mrs. A. said she never did meet with the younger daughter. Mrs. A. said Grievant never mentioned coming to their home for a home visit, but told her she needed to meet with her and her husband and the teenage daughter at the office. Mrs. A. stated she called Grievant and left a voice mail to call and schedule an appointment, but Grievant never called back or made further arrangements for an interview. DHHR Ex. 9.

There are several inconsistencies regarding the A. family's assessment. First, Grievant indicated she could not find the home and could not conduct a home visit. However, she spoke with Mrs. A. on the telephone, but did not ask directions to the home in order to do that home visit. Second, Grievant entered the January 14, 2003 contact with Mrs. A. as face to face (other), which she says should have been office. Mrs. A. said she telephoned Grievant to arrange an appointment, but Grievant never called back or scheduled an appointment. Grievant's notation for the January 14, 2003 contact is consistent with her testimony that Mrs. A. was upset about Grievant visiting the children at school, but the last line of the entry states, “[a]rrangements were made to interview her at the office.” DHHR Ex. 9. If this January 14, 2003 contact was held in the office as Grievant maintains, this last sentence

makes no sense, leaving the undersigned to conclude that the January 14, 2003 contact was indeed a telephone call, as related by Mrs. A. There are no further entries on the assessment, supporting Mrs. A.'s contention that Grievant never followed up to schedule an interview in the office with her and her family. The undersigned understands that the State's Child Protective Service Workers have enormous case loads, and that mistakes could occur in recording entries into a computer. For instance, hitting the “other” key instead of the “office” key would appear to be an insignificant error. However, claiming that the “other” entry was an office visit which was in fact a telephone call is more serious, especially when that telephone call is not followed up with an actual interview of the family. It is the CPS Workers' duty to attempt to interview all family members in a reported child abuse or maltreatment case. Grievant's attempt to pass off a telephone conversation with the mother as a face to face office visit with the entire family, including the abusive father, becomes an error of much larger proportion. Quite simply, Grievant misstated her actions regarding this family, and any other caseworker who might pick up this file would be deprived of a complete history. Moreover, Grievant simply did not make an entire entry for an alleged visit of the parents and the teenage daughter, which would seem to be of extreme importance, since the abuse of the father towards the teenage daughter was the crux of the referral in the first place. The undersigned finds it incredible that a CPS Worker of Grievant's tenure, and up until now, above satisfactory performance, would simply forget to make an entry of a visit of this enormity. Therefore, I can only conclude that the visit did not happen, and Grievant never met with Mr. and Mrs. A. and the daughter together in her office as she maintains.

2. The J.s.

The J. family was identified by Ms. Cook in her internal audit as a case containing inconsistencies in Grievant's reporting. A referral was received on October 17, 2002, that a young female child in the J. family had gotten her hand caught in a wringer washer and had been taken to the hospital. DHHR Ex. 4. Grievant was assigned the case the same day. She reported she attempted to visit Mrs. J., but found no one home on October 21, 2002. See G. Ex. 12. The next day she contacted Mrs. J. by telephone. Another telephone contact is reported on October 29, 2002, to make arrangements for a home visit. On October 30, 2002, Grievant reports a face to face (home) contact with the J. family, during which she watched the mother change the child's bandage. See also G. Ex. 12.

Ms. Cook telephoned Mrs. J. in March 2003, as part of her investigation into Grievant's cases.

Mrs. J. told Ms. Cook Grievant made two appointments with her; the first day Grievant did not show up, and the second day, Grievant called to cancel. DHHR Ex. 2. Ms. Cook found no report by Grievant that she had canceled appointments with Mrs. J. on the initial assessment. Mr. Roach called in Mrs. J. and conducted a taped interview, because Mrs. J. said she could not read or write very well. During that interview, Mrs. J. confirmed that Grievant had called to say she was coming to the home, but then called later to say she would not be able to make it. The next week, Grievant again made arrangements for a home visit, but called shortly before she was supposed to be there saying she could not make the appointment. Mrs. J. told Mr. Roach there had never been a CPS worker at her home. G. Ex. 9.

Grievant testified she did meet with Mrs. J. at her home. She said she went to see Mrs. J. after the first day of hearing in this case, and Mrs. J. told her there were so many people coming and going at her home that she could not remember everybody. Grievant testified when she went to the J. home, she saw the injured child with her arm wrapped up, and remembered the mother doing something with the bandage. Grievant denies calling and canceling any appointment with Mrs. J.

3. The K.'s.

The referral on the K. family came into the office on January 31, 2003, alleging the children were being left unsupervised, and the home was filthy. DHHR Ex. 6. Grievant was assigned the case the same day. The directions to the home given on the referral were vague, and Grievant made several unsuccessful attempts to find the residence on February 5, and 10, 2003. On February 10, 2003, Grievant telephoned the K. residence, and noted there was no answer, and “no answering machine kicked on.” On February 11, 12, and 14, Grievant made several more attempts to locate the residence, and made more unanswered telephone calls. DHHR Ex. 7. After that, Grievant asked permission from Mr. Roach to close the case because she could not make contact with the family. Mr. Roach reviewed the assessment form, and saw the notation that “no answering machine kicked on,” and found that an odd entry. He had never seen any entry like that before. Mr. Roach called the telephone number on the assessment and got an answering machine. He left a message for Ms. K. to call the DHHR office, and she called the next day. He set up a meeting for her to come into the office to meet with him and Mr. Maynard.

Ms. K. came into the office on February 26, 2003, met with Mr. Roach and Mr. Maynard, and made a written statement. Ms. K. told them she was a traveling nurse, and if someone had attempted

to call her, she would have received the call. She said she had an answering machine, caller I.D., and voice mail. She was adamant that no one from DHHR had attempted to contact her. DHHR Ex. 7.

After meeting with Ms. K., Mr. Roach gave Grievant permission to close the case. He then did a new referral, and investigated the case himself. He went to the K. home and interviewed the children and Ms. K. She showed him her answering machine and caller I.D., including the DHHR number that had displayed when he called her home. She told him that was the only DHHR number she had ever had on her caller I.D.

Mr. Maynard testified that he saw nothing in Ms. K.'s demeanor to suggest she was not telling the truth. He wanted to be included in the meeting with her to ensure there was no possibility of miscommunication or mistake with regard to any contacts she may have had or not had with DHHR in general, and Grievant in particular.

Grievant testified she tried several times to find the K. residence, and made numerous unanswered telephone calls to the K. telephone number. Grievant had no explanation why her calls would not have shown up on Ms. K.'s caller I.D., or why the answering machine did not come on. Grievant testified she told Mr. Roach twice about theproblems she was having contacting this family, and that he never told her he had called Ms. K. and got the answering machine on the first try. She testified the notation on her assessment that the answering machine didn't kick on was a normal comment she would have made. She did not know why there was no reference on the assessment to any “staffing” with Mr. Roach. Staffing means talking to the supervisor about the case, or asking for advice on how to proceed.

Grievant's mother, Ernestine Adkins, testified that after the first day of hearing in this case, she called the telephone number listed on the K. assessment. She told the woman who answered the phone she was calling for Grievant, and wanted to speak with Ms. K. She testified the woman told her there was no one at that number by that name, and that her name was K. J.

4.

The W's.

The W. referral came in to the office on January 4, 2002, alleging that Mr. W. threw shoes at his son, Z., and pushed him down. On January 15, 2002, Grievant reported on the assessment a face to face contact (school) with Z. On January 17, 2002, Grievant attempted a home visit, but could not locate the residence. Jt. Ex. 2; G. Ex. 10. On January 30, 2002, Grievant reported a face to face

(home) contact with Mr. and Mrs. W. Jt. Ex. 2.

A year later, in January 2003, another referral came in on the W. family, which was assigned to James Dillon. Mr. Dillon visited Z. at his school, and Z. told him, among other things, that someone had come to his house before and talked to his father. Mr. Dillon visited the home and spoke with Mr. and Mrs. W. Mr. W. told him someone from DHHR had talked to him before. Mrs. W. said no one had spoken to her. Mr. Dillon returned to the office and looked up the previous referral. He found the assessment Grievant had completed the year before, in January 2002. He saw Grievant reported she had spoken to Z. at his school, and had met with Mr. and Mrs. W. at their home. Because this was inconsistent with what the W.'s had told him, he brought the matter to the attention of his supervisor, Mr. Roach. Mr. Roach made Mr. Maynard aware of the situation, and Mr. Maynard told him to have the family brought into the office.

Mr. Maynard and Mr. Roach met with W.'s in the office on January 17, 2003. Mr. Maynard told them they were doing some quality control review on the case workers, and that they wanted to ask them some questions about their experience. Mr. Maynard did not mention Grievant by name to them. Mr. Maynard asked Mrs. W. alone if she was sure no other worker had contacted her before. She said no one had spoken to her during the previous incident, and gave a written statement to that effect. Mr. Maynard asked the child, Z., the same thing, and Z. stated no one had visited him at school or at home during the previous incident. Z. also gave a written statement. See Jt. Ex. 2.

Finally, Mr. Maynard spoke with Mr. Z., who said someone had talked to him during the previous incident. He also supported Mrs. W. and Z.'s recollections from the previous incident. Mr. Maynard did not take a written statement from Mr. Z.

Grievant testified she did talk to Z. at school as reported on her assessment. She said she then telephoned Mr. W. and got directions to the home. When she arrived at the home, Grievant said Mr. and Mrs. W. were in the driveway, and Mrs. W. was preparing to leave in the car. Grievant said Mrs. W. told her she did not have time to talk, but that Grievant should go ahead and talk to Mr. W.. Mrs. W. left, and Grievant stayed and talkedto Mr. W. Grievant testified she later talked to Mrs. W. on the phone to tell her they were not going to open the case.

The telephone calls Grievant testified to are not reported on the assessment, and Grievant surmised she must not have hit the enter key on her computer to save the contact. Grievant also thought Mrs. W. and Z. might have been mad at her, or simply forgot, explaining why they told Mr.

Maynard they had not spoken to a case worker about the 2002 incident.

5.

Hearsay.

Grievant argues that the interviews and written statements of the various family members, as well as any testimony from witnesses regarding the same, should not be afforded any weight in deciding this matter, because the evidence is hearsay. There is, of course, no dispute that this evidence is hearsay. DHHR explains that it did not bring in any of the subject family members to testify, because it wanted to preserve their expectation of confidentiality in dealing with the agency. DHHR is concerned that if families knew their testimony and statements would be brought into public hearings, they would be less forthright and truthful in their communications with the CPS Workers, thus jeopardizing the families and children even more.

The competing interests in this case are substantial. On one side is Grievant's continued employment. On the other is the agency's need to rely upon the work performed by its Child Protective Service Workers in carrying out its charge to protect children from abuse and maltreatment.

DHHR argues that if it was just a matter of Grievant having a high incidence of unable to locates, or minor documentation errors, it could work with her to improve herperformance. However, DHHR had no problems of that sort with Grievant, and indeed, she received good evaluations during her tenure. It is the fact that DHHR cannot trust Grievant's reporting anymore, and there is no way that can be fixed. Certainly in a couple of instances, DHHR has proven Grievant either never made certain contacts, or failed to report them on her assessments, without the benefit of the hearsay evidence. Grievant testified to telephone calls and office visits she had with the families, which are not listed on the assessments. Her only excuse is she must have hit a wrong computer key and failed to save the entries. That alone is a serious problem since other workers must rely on the assessments when dealing with the families.

Grievant testified the families perhaps forgot about her contacts, or were mad at her, and therefore lied about meeting with her. Grievant asserts that these “types” of individuals are prone to lying, given the fact they have been reported to DHHR for abuse in the first place. If they were not lying, then Grievant has a myriad of reasons why they would not remember her visit or telephone call. Grievant's explanations are certainly viable, but no less persuasive than DHHR's evidence that no

contact was made at all. Weighing all of the evidence, including DHHR's witnesses, Grievant's testimony, and the hearsay evidence, the undersigned is convinced that it is more likely than not that Grievant falsified or merely omitted reports of contacts in her assessments. Other than perhaps to save time in an effort to conclude her investigation, the undersigned cannot think of any reason Grievant would have done this.

The position of a Child Protective Service Workers is one of public trust, one where a worker is responsible for the protection of children at risk of abuse and/or maltreatment. The information from such a worker is relied upon to ensure the safety of children. A CPSworker must not only abide by the rules and regulations of their employer, but more importantly they must adhere to the Code of Ethics of Social Workers. The Code of Ethics requires that a social worker maintain the integrity of the profession by upholding and advancing the values, ethics, knowledge and mission of the profession, and to promote the general welfare of society.

The actions of Grievant, a veteran worker, in falsifying or omitting entries in her initial assessments, are egregious to the children she was charged with protecting, to the social work profession, and to society as a whole. It goes without saying that CPS workers are overworked, have deadlines that are hard to meet, and have limited resources. The audit report of Ms. Cook listed other shortcomings of Grievant, all of which DHHR could work on with Grievant to overcome. Those shortcomings are not the reason Grievant was dismissed. There is no amount of training or education that can overcome the lack of integrity, and extremely poor judgment, of Grievant that lead her to falsify records.

6.

Mr. Roach.

Grievant claims that her supervisor, Mr. Roach, did not like her, and set out to get her fired. She reported various disagreements they had over case management, and other incidents where Mr. Roach informed her he did not like her. Mr. Roach denies telling Grievant he did not like her, or that he wanted her fired. He acknowledges they had some differences of opinion in case management, but did not think it was a big deal at the time. Mr. Maynard testified that Grievant told him of all these things, and he investigated every alleged incident to make sure he was being completely fair with Grievant. He did not find Grievant's claims to be substantiated. Nevertheless, even if Mr. Roach did not like Grievant, that does not explain her failure to make required contacts, falsification of her

assessments, or failure to report contacts in her assessment. Grievant's claims against Mr. Roach simply do not excuse her own gross misconduct.

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. Dept. of Health, Docket No. H-88-005 (Dec. 6, 1988).

2. "The West Virginia Supreme Court of Appeals has determined that classified employees may be dismissed for misconduct which is of a 'substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention.' Syl. Pt. 1, Oakes v. W. Va. Dept. of Fin. and Adm., 164 W. Va. 384, 264 S.E.2d 151 (1980).

3. Faced with defining 'gross misconduct' justifying discipline or dismissal, the Court in Thurmond v. Steel, 159 W. Va. 630, 225 S.E.2d 210 (1976) declined, deciding that the severity of the employee's misconduct should be evaluated and considered in the context of the circumstances of each case." Hayes v. W. Va. Div. of Juvenile Justice, Docket No. 98-DJS-220 (Dec. 14, 1998).

4. "Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. Dept. of Health and Human Resources, Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations,and the undersigned Administrative Law Judge cannot substitute her judgment for that of the employer. Jordan v. Mason County Bd. of Educ., Docket No. 99-26-8 (July 6, 1999).

5. Respondent met it burden of proving gross misconduct by Grievant, and that dismissal is the appropriate penalty.

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. 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

_____

MARY JO SWARTZ

Administrative Law Judge

Dated: September 18, 2003

Footnote: 1

Consistent with Grievance Board procedure, the names of the clients will be referenced by initials to protect their privacy.

Footnote: 2

Grievant contends Mr. Maynard did not tell her the names of the families during this meeting, which prohibited her from responding. Mr. Maynard testified he provided Grievant the last names of the families during the meeting, but was instructed not to reveal the names of the families in his dismissal letter. Clearly, Grievant subsequently obtained the names of the families through her counsel, and had every opportunity to formulate her response in time for the level four hearing. Any potential prejudice Grievant may have suffered, if in fact the names were not revealed to her at the meeting with Mr. Maynard, was corrected prior to the level four hearing.