JASON KIRCHNER,

Grievant,

v. Docket No. 03-HEPC-411

HIGHER EDUCATION POLICY COMMISSION/

WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Jason Kirchner ("Grievant"), filed a level one grievance on October 21, 2003, following the termination of his employment. Grievant seeks reinstatement to the position of Campus Service Worker at West Virginia University ("WVU"). The grievance was denied at all lower levels, and appeal to level four was made on December 30, 2003. (See footnote 1) **A level four hearing scheduled for March 4, 2004, was canceled after Grievant, representing himself, and WVU counsel, Assistant Attorney General Samuel R. Spatafore, agreed that the matter could be submitted for decision based upon the record. Grievant then stated he misunderstood the agreement, and requested a hearing be scheduled. After the matter was rescheduled for April 8, 2004, Grievant again decided he had no additional evidence to present. The parties were given the opportunity to submit proposed findings of fact and conclusions of law, and the grievance became mature for decision upon receipt of those filed by WVU on April 13, 2004. Grievant elected not to file any additional submissions.**

The following facts have been derived from a preponderance of the credible evidence admitted at level three.

Findings of Fact

1. In May 2003, Grievant submitted applications for employment with the WVU Department of Human Resources, and the WVU Mountaineer Temps. Grievant's domestic partner, Regan Davis, completed the applications, and Grievant signed them. Both applications included the question, "[h]ave you ever been convicted of a crime (felony/misdemeanor, including DUI) other than a traffic violation?" The question was followed with a statement that "[a] convictions does not necessarily bar you from employment." "No"

was marked on both applications. The applications also included a certification statement, signed by Grievant, which advised that "any material misrepresentation or omission from this application may be grounds for rejection of my application or termination of subsequent employment with the University."

2. Grievant was first employed by WVU as a Mountaineer Temp Worker on June 17, 2003, as a Campus Service Worker assigned to the Student Recreation Center. Grievant was never absent, always reported to work on time, and performed his duties in a satisfactory manner.

3. Sometime later, Grievant was interviewed for a regular, full-time position as Campus Service Worker. During his interview, Paul Kelly, Operations Manager of the Student Recreation Center, advised Grievant that a criminal background check would be conducted. Grievant responded that the only reason he might not get the job was his prior record. Grievant assured Mr. Kelly that he had moved to West Virginia to start over and make a new life for his children, and that any past problems were resolved. Mr. Kelly interpreted Grievant's comments to mean that he had a juvenile record, and did not believe that it would be a problem. 4. On September 22, 2003, Grievant was employed as a regular, full-time Campus Service Worker at the Student Recreation Center.

5. On or about October 8, 2003, Bob Roberts, Chief of the WVU Department of Public Safety, advised the Department of Human Resources that his background check on Grievant from the National Crime Information Computer, revealed the following:

Inflicting corporal injury on spouse	1999	California
Possession of a controlled substance	1999	California
Theft-probation terminated	1995	California
PC-Force ADW Not Firearm/ GBI likely probation revoked	1993	California
Driving on revoked license	2001	Morgantown
Assault/Obstructing Officer-No court disposition	2003	Morgantown

Mr. Roberts' also stated in his report that several other charges were listed that did not include court dispositions and would require further research, if needed.

6. By letter dated October 10, 2003, Mr. Kelly notified Grievant of the intent to terminate

his employment, based upon falsification of his employment application. Grievant was further advised that he would be given an opportunity to meet with Mr. Kelly and Jim Morris, Director of Employment and Employee Relations, to discuss the matter prior to a final decision being made.

7. Grievant was subsequently notified by letter dated October 15, 2003, that his employment was terminated effective that date.

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.

WVU argues that the falsification of two applications established just cause for immediate dismissal pursuant to Policy HR-9. Grievant asserts that he did not complete the applications himself, and that Ms. Davis had simply committed an unfortunate error when marking “No” the question of whether he had a criminal record. Ms. Davis testified that she had completed the application “in a hurry” and had just made a mistake, since she was aware of Grievant's record.

Grievant's defense of innocent mistake is not credible. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993). The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude

toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. See Holmes v. Bd. of Directors/W. Va. State College, Docket No. 99-BOD-216 (Dec. 28, 1999); Perdue, supra.

Grievant's interest in retaining employment is evident, and neither his nor Ms. Davis' testimony is plausible. First, while he did not complete the applications, Grievant signed them attesting to their veracity. Second, Ms. Davis may have been hurried once, but this does not explain why the same erroneous response was on two applications. It appears to the undersigned that notwithstanding the advisory on the application that a criminal conviction would not necessarily bar the applicant from employment, Grievant and/or Ms. Davis simply did not want to take the chance that it might.

As noted by Mr. Kelly in his "Memorandum of Intent to Terminate Employment," the position of Campus Service Worker "requires regular interactions with students, faculty, and staff as well as a high degree of trust and integrity since [Grievant has] access to equipment, facilities, locked rooms, etc." Mr. Kelly further expressed concern that Grievant's criminal convictions could pose a potential threat to the safety and welfare of the University community. Certainly, Mr. Kelly has expressed a lack of trust in Grievant as a result of the criminal report. WVU Policy HR-9 establishes a discipline policy for employees. While progressive discipline is generally favored to correct deficiencies, immediate termination is approved in instances of gross misconduct. Examples of gross misconduct include "dishonesty and/or falsification of records." Termination for falsification of an application has recently been upheld in the matter of Smith v. Bureau of Employment Programs, Docket No. 03- BEP-043 (July 2, 2003), and was specifically upheld under WVU Policy HR-9 in Hartley v. Board of Trustees/West Virginia University, Docket No. 99-BOT-512 (May 25, 2000).

The undersigned finds that WVU has proven by a preponderance of the evidence that Grievant's falsification of two job applications by responding that he had not been convicted or pled to a crime other than a routine traffic violation was good cause for termination of his employment. **(See footnote 2)**

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. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993).

3. The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. See Holmes v. Bd. of Directors/W. Va. State College, Docket No. 99-BOD-216 (Dec. 28, 1999); Perdue, supra.

4. The testimony of Grievant and Ms. Davis regarding the falsified applications is not credible.

5. The undersigned finds that WVU has proven by a preponderance of the evidence that Grievant's falsification of two job applications by responding that he had not been convicted or pled to a crime other than a routine traffic violation was good cause for the termination of his employment.

Accordingly, this grievance is DENIED. Any party 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 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.

Date: May 4, 2004

Sue Keller

Senior Administrative Law Judge

Footnote: 1

.Grievant was apparently not advised 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.

Footnote: 2

[2] It is 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. Dep't of Defense, 40 M.S.P.R. 418, 426-27 (1989), aff'd, 895 F.2d 1420 (Fed. Cir.), cert. denied, 110 S. Ct. 2598 (1990); Delessio v. U.S. Postal Serv., 33 M.S.P.R. 517, 521, aff'd, 837 F.2d 1096 (Fed. Cir. 1987).