CAROLYN PHILLIPS,

Grievant,

v. DOCKET NO. 05-HHR-035

DEPARTMENT OF HEALTH AND

HUMAN RESOURCES/BUREAU

FOR CHILDREN AND FAMILIES,

Respondent.

DECISION

Grievant Carolyn Phillips filed this grievance against her employer, Respondent Department of Health and Human Resources (DHHR) on October 8, 2003, alleging the following:

> I hereby grieve my unwarranted 5 day suspension. I grieve that I was given time to submit an answer to the letter tenured [sic] by Charles Young however he was not available to receive said answer nor did he afford me the opportunity to verbal discussion of said information prior to suspension. I hereby grieve that Laura Harbert, supervisor pending reorganization, has willfully engaged in unlawful and unprofessional practices in during her tenure as supervisor, she has misrepresented facts to this worker and others, has appeared to have engaged in discrimination or retaliation in addition to her demeaning of this worker and others. I hereby grieve that I have been required to work in excess of 40 hours per week in the office by said supervisor without compensation plus with my supervisors knowledge encouraged to work at home to just barely maintain the excessive workload. I hereby grieve that as a HHRSS, in addition to the specialist job function, I have an individual active case load beyond any acceptable standard or expectation (in the neighborhood of 4000 cases children and providers to provide case management). Plus around 400 new applications to process a year. I grieve that I have not been afforded permanent assistants. My only help since the permanent OAIII position was relinquished by said supervisor is two temporary manpower office assistants with a new person that has to be trained every six months if they stay that long. (It takes six months toadequately learn the clerical/assistant jobs) This causes additional hardship to the work flow and unnecessary stress to myself.

Her stated relief sought is,

> I request a public apology for the unwarranted suspension. I request reimbursement of monies lost including money unnecessarily spent for attorney. I request compensation for work completed at home and consideration of compensation for hours acknowledged in my time sheets for the time I have been in this position. I request consideration of (as recommended by many committees in the past) the reassignment of a permanent HHRA or OAIII and additional HHRSS to help case manage the ever growing adoption caseload (I understand that an additional case load of guardianship

cases will be added.)

A level four hearing was held in the Grievance Board's office on March 15, 2005. (See footnote 1) Grievant was unrepresented, and Respondent was represented by counsel, Jennifer Akers, Assistant Attorney General. The matter became mature for decision on April 1, 2005, the deadline for filing of the parties' proposed findings of fact and conclusions of law. (See footnote 2)

Issues and Arguments

Grievant raises a number of issues in her Statement of Grievance, but the general matters in contention are Grievant's caseload and its effect on her job performance; specifically, that her work load is so heavy that Respondent's performance expectations are unreasonable. Grievant also contends she should be paid overtime, while Respondent's position is that she is exempt.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievant is employed by the Bureau for Children and Families (BC&F) as a Health and Human Resources Specialist Senior ("HHRSS") assigned to the Division of Children and Adult Services. She oversees the Adoption Assistance Program.

2. By letter dated September 19, 2003, Grievant was suspended from her position for five days without pay, effective September 29, 2003 through October 6, 2003. Grievant was suspended for her failure to meet time frames established by her supervisor, Laura Harbert.

3. Grievant had received several prior disciplinary actions for her failure to meet deadlines.

4. On January 10, 2003, Ms. Harbert met with the members of Grievant's work unit. Grievant was present at this meeting. Each member of the unit was told to provide certain information to Ms. Harbert no later than January 14, 2003. Ms. Harbert would, in turn, provide this information to the reorganization committee.

5. Grievant failed to provide this information to Ms. Harbert on January 14, 2003.

6. On January 17, 2003, Grievant's supervisor administered a verbal reprimand to Grievant for

her failure to supply the requested information by the January 14, 2003 deadline. Ms. Harbert explained to Grievant that a verbal reprimand is the first step of progressive discipline. Grievant was then told to provide the requested information by the end of the day of January 17. 7. Grievant failed to meet the January 17, 2003 deadline and on January 29, 2003, Grievant was issued a written reprimand by Ms. Harbert for missing this second deadline.

8. On March 25, 2003, Grievant's supervisor, Ms. Harbert, met with Grievant regarding Grievant's failure to generate an adoption subsidy agreement within a reasonable length of time. The adoption had been finalized on November 4, 2002. However, as of March 14, 2003, Grievant had failed to generate the subsidy agreement for the adoption. This meant that the adopting family had not received their non-recurring adoption reimbursement or their monthly cash assistance that the subsidy agreement provided.

9. As a result of the meeting on March 25, Grievant was given a deadline of noon on March 28 to enter the payment information into the computer to generate the back pay due to the adoptive family. This information was memorialized in a written plan which was signed by Grievant. Grievant met this deadline. Grievant was also advised in the same written plan that her continued failure to meet deadlines could lead to suspension. 10. On August 12, 2003, an adoption worker in another county left a phone message for Ms. Harbert informing her that the worker had not received a subsidy agreement for an adoption hearing which was set for the following day. The subsidy agreement should have been sent by Grievant to the worker. Grievant had knowledge as far back as July 3, 2003 that the agreement was needed for the August 13th hearing. However, Grievant failed to provide the document to the adoption worker in a timely manner. As a result, a copy was faxed to the worker and she was forced to submit a faxed copy to the court in order for the adoption hearing to proceed. 11. On August 28, 2003, Ms. Harbert met with Grievant to discuss the many deadlines Grievant had missed. Grievant was made aware that Ms. Harbert and Charles Young, the Assistant Commissioner for BC&F, were consulting with the Division of Personnel to determine what disciplinary action should be taken. Grievant was also made aware that she would be notified immediately when such determination had been made.

12. On September 19, 2003, Grievant was advised by Mr. Young that she was being suspended for five days without pay for her failure to meet deadlines. The suspension was effective from September 29, 2003 through October 6, 2003. She was also provided with a letter advising her

of the same. Grievant's suspension letter detailed all incidents that led to the suspension, and stated Grievant could contact Mr. Young.

13. Grievant made no attempt in those eight days prior to the suspension to meet with Mr. Young to discuss the suspension. She never asked to meet with him, nor did she inform him of her plan to respond in writing.

14. On the afternoon of the last work day before her suspension was to begin, Grievant left a written response dated September 26, 2003 in Mr. Young's mail. She did not inform Mr. Young's secretary that she had left such response, nor did she ask to meet with Mr. Young.

15. Mr. Young was on annual leave on September 26, 2003, but was at his home in St. Albans, and he would have made himself available in the event that Grievant wished to meet with him.

16. On April 9, 2003, Michael McCabe, Director of DHHR's Office of Personnel Services, issued a memorandum regarding the Fair Labor Standards Act (“FLSA”) andHHRS positions. This memo stated that HHRSS's who supervised two or more employees were exempt from the overtime provisions of FLSA and were not entitled to overtime pay.

17. Grievant holds the position of HHRSS. During 2002 and 2003, Grievant was in charge or reviewing and developing all adoption subsidy agreements and consents, and ensuring families' compliance with their subsidy agreements. Grievant was also in charge of providing post-adoptive assistance to adoptive families within the state. Because Grievant managed these areas, she was assigned two clerical assistants. Grievant assigned these employees duties that assisted Grievant in completing her job tasks, and directed the assistants' daily activities. Additionally, Grievant answered any questions they had regarding their work.

Discussion

In disciplinary matters, such as the one presented here, Respondent bears the burden of proving the charges supporting Grievant's suspension by a preponderance of the evidence. (See footnote 3)

Due Process

Grievant's due process rights, contrary to her contention, were never violated. The central meaning of procedural due process is that parties whose rights are to be affected are entitled to be heard and, in order that they may enjoy that right, they must be notified. Reasonable notice and the

opportunity to be heard and present any claim or defense are embodied in the term “procedural due process.” (See footnote 4) Grievant was notified of the shortcomingsin her work performance that led to her suspension, and she was notified that continued performance problems of that kind could lead to suspension. She was given notice and an opportunity to be heard prior to the effective date of her suspension. That Grievant failed to improve her performance and failed to explain her actions prior to her suspension were entirely her fault, and not her employer's. Grievant has failed to prove any procedural due process violation that would offset the penalty imposed by Respondent.

Overtime

___The Federal Fair Labor Standards Act (FLSA) establishes minimum pay and maximum work hour standards for employees, and in 29 U.S.C. 8 § 213(a)(1), “any employee employed in a bona fide executive, administrative, or professional capacity” is exempted from those requirements. It is Respondent's contention that Grievant, because she supervises two office assistants, and based on her classification, is exempt. Unless specifically exempted, employees covered by the FLSA must receive overtime pay for hours worked in excess of 40 in a workweek at a rate not less than time and one-half their regular rates of pay.

The Division of Personnel describes the “Nature of Work” assigned to Ms. Phillips' classification as,

> Under general supervision, performs work at the advanced level by providing administrative coordination of and complex technical assistance in a component of a major statewide program, a statewide program in its entirety, or a major technical area specific to or characteristic of the Department of Health and Human Resources. Acts as liaison to facilitate problem resolution and assure compliance with federal, state, and local regulations, laws, policies, and procedures governing the program or technical area. Has primary responsibility for developing standards for major systems and for monitoring and/or evaluation of major complex systems or multi program operations. May consult on highly complex individual situations that potentially have significant impact on systems or involve sensitive legalissues. Has responsibility for development and issuance of comprehensive training programs to insure basic competency and continued development of skills, knowledge and abilities relevant to the systems for which she/he are assigned responsibility. Uses independent judgement in determining action taken in both the administrative and operational aspects of the area of assignment. Exercises considerable latitude in varying methods and procedures to achieve desired results. May supervise or act as lead worker for other professional staff. Performs related work as required.

Respondent's position is consistent with past Grievance Board and West Virginia Supreme Court of Appeals holdings. “Administrative and executive employees are exempt from the requirement that employers provide overtime pay for all hours worked in excess of forty hours per week pursuant to

the Federal Fair Labor Standards Act." (See footnote 5) The nature of an HHRSS' work fits within the exception defined by the FLSA.

Grievant's Work Load

Grievant maintains approximately twenty-five hundred cases in her case load. However, this number is not representative of her actual workload. Grievant does not deal with this number on a weekly or even monthly basis. Grievant only processes three hundred seventy to three hundred eighty cases per year. She works on each case as the need arises; not on a continual basis. Some families require no contact, some very intermittent contact. Grievant provided no evidence, other than her own inability to get her job done, that would suggest this case load is excessive. However, as is discussed in the following section, that inability has been a chronic problem, under more than one supervisor, and appears tied to Grievant's capabilities or willingness to work rather than her actual job duties or work load. Disciplinary Action

In disciplinary matters, such as the one presented here, Respondent bears the burden of proving the charges supporting Grievant's suspension by a preponderance of the evidence. (See footnote 6) "The preponderance of the evidence standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." (See footnote 7)

Here, Ms. Phillips has, in the past, been given warnings and has been subject to disciplinary actions for failing to meet established deadlines. Nevertheless, a pattern of similar misconduct has continued, and discipline has progressed to the suspension at issue here. Grievant's performance shortcoming has been identified, yet she continues to have the same problem. Her untimely work causes distress and problems with other employees and the public that relies on her work. Ms. Harbert, Grievant's supervisor, is entirely reasonable in expecting Grievant to accomplish the work assigned to her. Grievant holds a supervisory position, and is expected to work under "general supervision, perform[ing] work at the advanced level." (See footnote 8)

Respondent has met its burden and established that Grievant consistently failed to meet deadlines established by her supervisor, thereby warranting her suspension. Respondent has established by a preponderance of the evidence that Grievant failed to meet its expectations of providing timely services to the public.

The following conclusions of law support this discussion:

Conclusions of Law

1. In disciplinary matters, such as the one presented here, Respondent bears the burden of proving the charges supporting Grievant's suspension by a preponderance of the evidence. W. Va. Code § 29-6A-6; *Davis v. Div. of Motor Vehicles*, Docket No. 89- DMV-569 (Jan. 20, 1990). “The preponderance of the evidence 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 Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. It is the Employer's burden to present its disciplinary policy and in the absence thereof, the Board will consider the propriety of the disciplinary action under the principle that the employer must establish good cause for the disciplinary action. *See W. Va. Dep't of Corrections v. Lemasters*, 173 W. Va. 159, 313 S.E.2d 436 (1984).

3. Respondent has met its burden and established that Grievant consistently failed to meet deadlines established by her supervisor, thereby warranting her suspension. BC&F has established by a preponderance of the evidence that Grievant failed to meet its expectations of providing timely services to the public.

4. "When a defense is raised by a grievant in a discipline-based claim[,] it is his burden to establish the validity of that defense." *Young v. W. Va. Dep't of Health and Human Res.*, Docket No. 90-HHR-541, at 12 (Mar. 29, 1991). *Woods v. Div. of Corrections*, Docket No. 97-CORR-491 (Jan 14, 1998). 5. Grievant has failed to provide any evidence that she was denied procedural due process.

6. “'Discrimination' means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” W. Va. Code § 29-6A-2(d).

7. “An employee attempting to prove discrimination under [W. Va. Code §18-29- 2(m)] need only establish that he/she was treated differently from a similarly situated employee, and the action was neither job related nor agreed to by the grievant.” *Bd. of Educ. v. White*, 605 S.E.2d 814 (W. Va. 2004). The test is the same for the similarly- worded definition of discrimination contained in W. Va. Code § 29-6A-2(d)

8. Grievant has failed to provide any evidence of discrimination by her supervisor, Laura Harbert.

9. "Administrative and executive employees are exempt from the requirement that employers provide overtime pay for all hours worked in excess of forty hours per week pursuant to the Federal Fair Labor Standards Act. See 29 U.S.C. 209-219; W. Va. Code § 21-5C-1; *Adkins v. City of Huntington*, 191 W. Va. 317, 445 S.E.2d 500 (1994)." *White v. Dep't of Transp./Div. of Highways*, Docket No. 00-DOH-313D (2001).

10. Respondent has clearly established that during 2002 and 2003, Grievant supervised two clerical assistants, and was thereby not eligible for overtime pay.

For the foregoing reasons, this grievance is hereby **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 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.

June 3, 2005

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

Grievant's request for a determination that Respondent had defaulted at level three was denied in Phillips v. Dep't of Health and Human Res., Docket No. 04-HHR-131D (2004).

Footnote: 2

Grievant adopted the level three recommended decision as her proposals.

Footnote: 3

W. Va. Code § 29-6A-6; Davis v. Dep't of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 20, 1990).

Footnote: 4

Black's Law Dictionary, Fifth Ed. (1979).

Footnote: 5

White v. Dep't of Transp./Div. of Highways, Docket No. 00-DOH-313D (2001), citing 29 U.S.C. 209-219; W. Va. Code § 21-5C-1; and Adkins v. City of Huntington, 191 W. Va. 317, 445 S.E.2d 500 (1994).

Footnote: 6

W. Va. Code § 29-6A-6; Davis v. Div. of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 20, 1990).

Footnote: 7

Leichliter v. W. Va. Dep't of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993).

Footnote: 8

Division of Personnel Classification Specification No. 9591, for Health and Human Resources Specialist, Senior.