M. T.,

Grievant,

v. **DOCKET NO. 05-HHR-281**

DEPARTMENT OF HEALTH AND HUMAN

RESOURCES/BUREAU FOR CHILDREN AND FAMILIES,

Respondent.

D E C I S I O N

Grievant, M. T., filed this grievance against her employer, the Department of Health and Human Resources ("HHR" & "Agency") on August 12, 2005, following dismissal from her position as a Family Support Specialist after HHR found out she was listed in their Child Protective Services ("CPS") data base as a maltreating parent. Her Statement of Grievance reads:

> Verbal notice of termination given due to being listed in Facts [sic] as maltreating parent. E-mail from Paula Taylor Marion Co. was received in Kanawha Co. office on 8/5 stating status in Facts along w/details of case including polygraph results. (See attachments) (See footnote 1) - CPS/Facts [sic] clearance is not stated in the Family Support Specialist Job Description and is not listed anywhere on the job application. Was listed in Facts before date of hire and provided all necessary information for clearance checks in Jan. 2005. (See footnote 2)

> Relief sought: Reinstatement of employment as Family Support Specialist or position comparable to with same rate of pay. Back payment of wages, annual and sick leave, and tenure from the date of termination. A Level IV hearing was held in the Grievance Board's Charleston office on September 28, 2005. Grievant represented herself, and Respondent was represented by Jennifer Akers, Assistant Attorney General. This matter became mature for decision November 16, 2005, the date the proposed findings of fact and conclusions of law were due.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. HHR hired Grievant as a Family Support Specialist on January 3, 2005.

2. Family Support Specialists provide case management services for recipients of public assistance and employment programs. The goal of a Family Support Specialist is to assist the client in finding and maintaining employment. Part of this assignment includes assessing the social, education, and economic circumstances of the client and his family to determine the need for social and support services. Family Support Specialists also counsel clients to instigate change in behavior and attitude.

3. Prior to her employment, HHR had a policy that all applicants for CPS positions would be checked for findings of abuse.

4. HHR decided to apply this policy to all its workers starting January 2005. 5. Because of Grievant's date of hire, January 3, 2005, FACTS wasinadvertently not checked for past findings of adult or child abuse prior to the start of Grievant's employment.

6. Grievant was determined to be a maltreating parent in August 7, 2003, by HHR after her infant child of three and one half months, almost died from a skull fracture and related brain trauma. This abuse resulted in lasting injury to the infant. The investigation also revealed the infant had three rib fractures of different ages. Grievant maintained for a long time that these injuries were accidentally caused by her husband when she was not home, but physicians determined these injuries were not accidental. (See footnote 3) Grievant also argued the infant suffered from "brittle bone disease," but this assertion was incorrect. HHR and law enforcement jointly conducted the investigation about this abuse. This information was placed in FACTS.

7. On November 25, 2003, Grievant was adjudicated and the determination of abuse was confirmed by the circuit court.

8. The child was temporarily returned to Grievant on October 4, 2004, for a six month post disposition Improvement Period and ordered to attend counseling. Grt. No. 3.

9. Both HHR and the infant's Guardian ad Litem recommended the termination of Grievant's and her husband's parental rights.

10. During the circuit court proceedings, Grievant reported her employment with HHR and argued that if HHR "really thought she had hurt her child or allowed him to be hurt, they would not have hired [me] to work with other families." Grt's Exh.1.

11. On Grievant's application for employment, she signed a release stating:

> I authorize the State of West Virginia and any agent acting on its behalf to conduct an

> inquiry into any job-related information contained in this application. Moreover, I release the State of West Virginia and any agent acting on its behalf from any and all liability by reason of the request of suchinformation. I further authorize and request each former employer, educational institution, or organization (including law enforcement agencies) to provide all information that may be sought in connection with this application.

12. In April 2005, Grievant informed her supervisor that she needed to attend a CPS court proceeding in a case in which her husband had been found to be a maltreating parent. This information was relayed to Anita Adkins, the Community Service Manager. She incorrectly checked the files, and she did not see the report on Grievant, although this report had been entered into FACTS.

13. In early August 2005, Grievant informed her supervisor that she needed to attend another CPS court proceeding in the case, but this time stated both she and her husband had been found to be maltreating parents.

14. This information was again relayed to Ms. Adkins. On August 5, 2005, Ms. Adkins e-mailed the Marion County office in which the abuse case would have been filed, and a case worker responded. Until this response, Ms. Adkins was not aware of the finding that Grievant was a maltreating parent. Ms. Adkins also did not know Grievant had inaccurately asserted to the circuit court that her HHR employment demonstrated the agency's belief she was not at fault in the abuse of her child.

15. On August 5, 2005, Ms. Adkins again checked FACTS and located the report finding Grievant to be a maltreating parent. She then e-mailed the Marion County case worker and noted any conflict in the case would be resolved.

16. On August 5, 2005, Grievant was verbally informed she would be dismissed. 17. By letter dated August 11, 2005, and received that same day, Grievant was dismissed from her employment as a Family Support Specialist. The letter acknowledgedthe information had been overlooked, and apologized for this failure. The letter also stated that if this information had been known before the hiring, Grievant would not have been offered a position with HHR. This letter also noted Grievant's position as a Family Support Specialist and the responsibilities required by the position. HHR found a rational nexus existed between the duties she must perform and the maltreatment of her own child. HHR noted it would not be in the best interest of the Department to employ Grievant, as the agency was committed to the safety and well-being of children.

18. On September 23, 2005, despite the recommendations of HHR and the Guardian ad Litem, Judge Fred Fox returned legal custody of the child to Grievant. He found Grievant had "an overly aggressive and somewhat disagreeable personality/disposition" but would now protect the child "from harm in the future." He noted Grievant had attended counseling sessions, filed for divorce from the child's father, and was now caring properly for the child. (See footnote 4) He held the "conditions of neglect and abuse have been corrected." Grt. No. 3.

19. At the Level IV hearing, the parties discussed the possibility of placing this grievance in abeyance while Grievant utilized the identified HHR procedure for removing her name from FACTS as a maltreating parent. HHR stated that if Grievant was able to remove her name from its files through this process, the agency would return her to work. Grievant did not want to avail herself of this option.

Issues and Arguments

HHR maintains the finding that Grievant was a maltreating parent prevents her from meeting the qualifications/requirements to be a Family Support Specialist, as the current policy prevents Grievant employment in that position. HHR asserts there is a rational nexus between Grievant's responsibilities as a Family Support Specialist, and the finding she was a maltreating parent whose child received a serious physical injury. HHR notes the Family Support Specialist position requires the employee to assess a family's need for social services, to counsel the family, and to provide or arrange for the needed social services. HHR asserts it is not in the best interest of the agency or the clients it serves to employ an abusive parent, and there is a rational nexus between the duties Grievant must perform and the maltreatment of her own child.

Grievant asserts HHR had no right to look at her Child Protective Services ("CPS") files and because HHR did not find the information prior to her employment, it cannot dismiss her now. Grievant also maintains HHR terminated her because her employment with HHR "weakened" the agency's case to terminate her parental rights, and her termination removed this conflict.

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 Res., DocketNo. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

The administrative rules of the West Virginia Division of Personnel provide that an employee in the classified service may be dismissed for "cause." 143 C.S.R. § 12.2, Administrative Rule, W. Va. Div. of Personnel. The phrase "good cause" has been determined by the West Virginia Supreme Court of Appeals to apply to dismissals of employees whose misconduct was of a "substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention." Syl. Pt. 2, Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); Syl. Pt. 1, Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980). As Grievant was only employed eight months, a close examination of her work record is not required in determining whether discharge is an appropriate disciplinary measure. Buskirk, supra. See Serreno v. W. Va. Civil Serv. Comm'n, 169 W. Va. 111, 285 S.E.2d 899 (1982).

This grievance does not present the standard dismissal case. Usually, an agency dismisses an employee for behavior engaged in during the employment period. Here, the issue presented by HHR is that Grievant, pursuant to policy, would have never been hired, but for an error by the agency. This dismissal is to correct this error. (See footnote 5)

Respondent asserts the reason for this rule is the rational nexus between a Family Support Specialist and other HHR employees' duties and the maltreating parent finding. In Golden v. Board of Education, 169 W. Va. 63, 285 S.E.2d 665 (1981), the West Virginia Supreme Court of Appeals held that in order to discipline a school employee for acts performed at a time and place separate from his employment, the board must demonstrate a "rational nexus" between the conduct performed outside the job and the duties the employee is to perform. The West Virginia Supreme Court of Appeals also held in Rogliano v. Fayette County Board of Education, 176 W. Va. 700, 347 S.E.2d 220 (1986), that a rational nexus exists if the conduct performed outside of the job directly affects the performance of the occupational responsibilities of the employee. See Messer v. Mingo County Bd. of Educ., Docket No. 00-29-332 (May 16, 2001).

In this case, the evidence before HHR established a valid basis for concern about Grievant's

ability to carry out her responsibilities as a Family Support Specialist which included assessing the family's needs and problems. This judgment is supported by the West Virginia Supreme Court of Appeals ruling in Thurmond v. Steele, 159 W. Va. 630; 225 S.E.2d 210 (1976) which stated:

> Indeed, the cases which we have found from other jurisdictions clearly indicate that if a State employee's activities outside the job reflect upon his ability to perform the job or impair the efficient operation of the employing authority and bear a substantial relationship to the effective performance of the employee's duties, disciplinary action is justified. . . .

Id. at 212.

HHR, while admitting its failure to review its files adequately prior to hiring, still maintains Grievant should and would never have been hired because of her past history. It is not in the best interest of the agency for her to continue in a position that works closely with families and children. Grievant is correct that Ms. Adkins should have checked sooner and more carefully. Ms. Adkins agrees with these assertions, but this observation does not change the fact that Grievant is still identified as a maltreating parent in the CPS data base, and the injury to the infant is recognized as "serious physical abuse-bone fractures." Resp. Exh. 4. Additionally, while not mentioned by the parties, the undersigned Administrative Law Judge takes notice of the fact that if Grievant were called to give testimony in a court case, her credibility would be severely compromised by these facts.

Grievant's assertion that she did not give HHR permission to check in the FACTS data base is without merit. Grievant gave this consent on her job application when she gave permission for the employer to conduct "an inquiry into any job-related information." Resp. No. 5.

Grievant also asserts HHR terminated her to correct a conflict in her parental rights case. First, if Ms. Adkins had known of Grievant's maltreating parent status, she would not have hired Grievant, and therefore no conflict would have existed. Second, Grievant, unknown to Ms. Adkins, was using her position at HHR to assist her in her abuse case. Third, it is clear there was a conflict, and HHR took steps to correct this problem.

Grievant's termination was for "good cause." While it is certainly positive that Grievant has sought help and her child has been returned to her, at this point in time, she is still an identified maltreating parent, and HHR's assessment that she should not work with families in crisis and should never been hired, cannot be seen as incorrect. See Buskirk, supra; Guine, supra; Oakes, supra.

The above-discussion will be supplemented by the following Conclusions of Law.

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). "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 Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

2. "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064.

3. State employees who are in the classified service can only be dismissed for "good cause." See Oakes v. W. Va. Dep't of Finance & Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965).

4. Grievant granted HHR the right to check her CPS files when her completed her employment application, and stated HHR could conduct "an inquiry into any job-related information." Clearly, whether Grievant had been identified as a maltreating parent or not was pertinent to meeting the qualifications for her position. 5. "[I]f a State employee's activities outside the job reflect upon [her] ability to perform the job or impair the efficient operation of the employing authority and bear a substantial relationship to the effective performance of the employee's duties, disciplinary action is justified. . . ." Thurmond v. Steele, 159 W. Va. 630; 225 S.E.2d 210 (1976).

6. HHR established a rational nexus between Grievant's responsibilities as a Family Support Specialist and the finding of severe child abuse.

7. But for an error on the part of HHR, Grievant would never been hired, and this dismissal was to correct this error.

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." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7. 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: December 30, 2005

Footnote: 1

No polygraph results were attached to the grievance form.

Footnote: 2

The acronym FACTS stands for Families, Adults, and Children Tracking System, and this data base houses HHR's official Department records.

Footnote: 3

HHR also questioned whether Grievant was at home at the time of the incident.

Footnote: 4

The Court found the allegations against Grievant were that she failed to protect the child from his father and failed to believe he had intentionally harmed their infant.

Footnote: 5

HHR, while it noted Grievant's behavior, did not focus on her abuse of her position during the circuit court proceedings, and/or the falsehoods she told the circuit court.