THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

PAMELA GAINER,

Grievant,

v. **Docket No. 06-HHR-401**

Denise M. Spatafore

Administrative Law Judge

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/

BUREAU FOR CHILDREN AND FAMILIES,

Respondent.

DECISION

Pamela Gainer ("Grievant") initiated this proceeding on July 16, 2006, challenging a 4-day suspension without pay, imposed by her employer, Respondent Department of Health and Human Resources ("DHHR"). The grievance was initiated at level two and was denied at that level, and it was also denied at level three on October 27, 2006, following a level three hearing. Grievant appealed to level four on October 31, 2006. During a telephonic prehearing conference conducted on January 8, 2007, the parties agreed to submit this grievance for a decision based upon the record developed below. This matter became mature for consideration on February 23, 2007, the deadline for submission of the parties' final fact/law proposals. Grievant was represented in this matter by counsel, Loren B. Howley, and Respondent was represented by Jennifer K. Akers, Assistant Attorney General.

Synopsis

Grievant contends that the act for which she was suspended, disclosure of confidential client information, was necessary and permissible in order to protect a child in the custody of DHHR from imminent harm. Respondent has provided evidence that there was no imminent threat to the child in question and that Grievant's actions were contrary to various confidentiality rules and regulations. Respondent has met its burden of proving that the 4-day suspension was appropriate under the circumstances.

Findings of Fact

1. Grievant has been employed by DHHR for over 31 years. She has been classified as a social worker (Social Service Worker I, II, or III) for the past thirty years. Grievant has been assigned to foster care cases since approximately 1992. 2. As part of her job duties, Grievant is required to monitor and report upon the care and welfare of minor children who have been placed in foster homes assigned by DHHR.

3. One of the cases assigned to Grievant was a young child, C.S., (See footnote 1) who was placed in the care of a foster parent, S.B., in 2004.

4. As part of her assigned duties, Grievant made visits to the foster home in which C.S. had been placed, and she became concerned that he was not receiving proper care and attention, specifically that he spent long periods of time in a playpen. However, despite those concerns, she did not recommend that he be removed from the home, and, in fact, concluded that it would be better for him to remain in a familiar environment.

5. C.S.'s case was turned over to the Adoption Unit on September 3, 2004, and Jennifer Hogue, Adoption Specialist, was assigned to his case. S.B. formally adopted C.S. on August 29, 2005.

6. A younger sibling to C.S. was born in early 2004 and taken into custody by DHHR. This child, H.T., was placed in a separate foster home and was not initially placed with S.B.

7. During the summer of 2005, after having learned that C.S. had a sibling who had been placed with another foster family, S.B. petitioned for custody of H.T., and a hearing was scheduled before a Calhoun County Circuit Court. 8. In preparation for potentially testifying in the custody matter regarding H.T., Grievant requested access to the database notes she had made regarding the

care of C.S. Because C.S. had been referred for adoption, Grievant no longer had access to his FACTS system file, which is a computer file maintained for every case and contains information entered by DHHR employees. Grievant's request to access C.S.'s file was granted by the regional adoption supervisor, so that Grievant could review the notes that had been made while she had been assigned to C.S.'s case.

9. When a FACTS file is “unlocked,” the entire file is opened, rather than only portions of it. Therefore, when Grievant opened the case notes on C.S., she was able to review her own notes, in addition to the notes of Ms. Hogue, the adoption worker. Grievant printed out the entire file of notes, including her own and Ms. Hogue's, because she could not separate the file. (See footnote 2)

10. A custody hearing for H.T. was conducted on August 8, 2005, after which S.B. was granted custody of H.T. However, after that order was entered, H.T.'s foster mother filed a petition to intervene in the case and have the order temporarily stayed, pending an additional hearing. That hearing was scheduled for September 8, 2005, and both Grievant and Jennifer Hogue were told to be there to testify.

11. During that hearing, questions were raised about S.B.'s history as a foster and adoptive parent. Jennifer Hogue testified that she did not recall there being any questions or concerns regarding S.B.'s care of C.S. when she was handling C.S.'s adoption case. 12. Grievant believed that Ms. Hogue's testimony regarding S.B. and C.S.'s care were inconsistent with Ms. Hogue's notes in the FACTS record. Therefore, during the hearing, she provided the report to counsel for H.T.'s foster parent, and also gave it to the Guardian Ad Litem for H.T. This document was then used by counsel in an attempt to discredit Ms. Hogue's testimony.

13. Grievant provided the FACTS records to attorneys involved in the custody hearing because of her concern that, if another child were placed in the home, S.B. could not properly care for the children already in her custody, especially in light of her observations of S.B.'s past care of C.S. S.B. had custody of five children at the time of the hearing, two of whom had special needs issues.

14. After an investigation was conducted, prompted by a complaint filed by Ms. Hogue, Grievant was suspended for four days without pay. In correspondence dated July 10, 2006, Louis Palma, Regional Director, notified Grievant of the suspension, the reason for it being that she had breached the confidentiality of sensitive social service case records. He specifically cited several DHHR policies and the Social Workers' Code of Ethics.

15. Grievant met with Mr. Palma prior to issuance of the suspension letter. When confronted with her actions, Grievant admitted that she had disclosed confidential information, but stated she believed she needed to do this to protect the best interests of the child involved.

16. There is no evidence that S.B. abused or harmed C.S., or that there was any legal cause for removing C.S. from that home.

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

Respondent contends that, because of Grievant's violation of various policies protecting the confidentiality of DHHR client records, her suspension was warranted and appropriate. Because of Grievant's extremely long tenure and experience dealing with these policies, she was well aware that this information was confidential, and she admitted as much when confronted with her actions. Grievant counters that her actions were allowed under exceptions to the confidentiality rules, in order to prevent “serious, foreseeable and imminent harm” to a child. She believes that she should not have been disciplined at all for her conduct.

DHHR Policy Memorandum 2108, Section VIII, provides in part that employees of the agency are to “maintain confidentiality of all agency records including personnel, resident/patient/client records.” In addition, DHHR's “Common Chapters Manual” provides in Chapter 200 that client records are confidential, that “no . . . detail concerning a situation of an individual client shall be disclosed by [DHHR] staff,” case records are not to be removed from offices without a supervisor's permission, and that “a decision to release confidential information should be given careful and thorough consideration.” Moreover,FACTS Policy 1.9 provides that “adoption records are not to be released under any circumstances.”

In addition to these policies, Grievant was also disciplined for violating the Social Workers' Code of Ethics, which provides that social workers are to protect the confidentiality of all information

obtained through their professional work, prevent access to client information by others who are not authorized to have access, and they “should respect confidential information shared by colleagues.” The only exception to these strict confidentiality rules is contained in Part 1, Section 1.07, which states that “[t]he general expectation that social workers will keep information confidential does not apply when disclosure is necessary to prevent serious, foreseeable and imminent harm to a client[.]”

Although Grievant admits that she did disclose the information, she has offered various explanations for why her disclosure was basically harmless. First, she argues that she only revealed the information to attorneys who were already involved in the case, so her disclosure was limited and pertinent to an issue being determined by the court at that time. Second, she contends that her conduct falls within the confidentiality exception which allows the disclosure of information to protect a child against imminent harm. Grievant believed that the placement of another child in S.B.'s home would have affected her ability to properly care for C.S., let alone the new child, H.T., so her actions prevented harm from occurring to either child. (See footnote 3) "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). After full consideration of all of the evidence of record, the undersigned does not find that Grievant's disclosure of confidential information was encompassed by any exception to the policies involved. Although Grievant may have felt that C.S. spent too much time in a playpen on the occasions when she visited the home, there was no evidence that the child was in imminent danger of any kind. Moreover, as his foster care worker, Grievant consciously chose to allow C.S. to remain in S.B.'s home, a decision which is nonsensical if she truly believed the child was ever in danger of “serious” or “imminent” harm.

It is apparent that Grievant became emotionally engaged in this case and concerned when it became possible that another child could be placed in S.B.'s home, having potentially negative consequences for the care of the children. While her heart was in the right place, the fact remains that “rules are rules,” so to speak, and the confidentiality policies exist for very important reasons. Grievant clearly reacted “in the heat of the moment,” when other options for revealing the information could have been pursued, which would not have violated DHHR policies or the Social Workers' Code. Grievant had the option of explaining her own observations and notations regarding C.S.'s care and S.B.'s circumstances, (See footnote 4) or she could have suggested to the appropriate parties that the

information from the FACTS file should be subpoenaed. Grievant's conduct is also of grave concern due to her testimony that she chose not to disclose this information to DHHR's counsel of record in the case, a local prosecuting attorney, because she did not believe this individual was advocating the Department's position. Whether or not this was true, it was not Grievant's decision to make as to who should have access to confidential information that she was responsible for protecting. Such decisions are left to judges and other responsible parties, to be made within the confines of the rules and procedures of the court system and the agency. Allowing a DHHR employee to “overstep boundaries” in this manner would set a dangerous precedent and an undesirable example for the hundreds of other workers who have similar access to these types of records.

Respondent has proven by a preponderance of the evidence that Grievant violated DHHR confidentiality policies and the Social Workers' Code of Ethics, for which it was appropriate to impose discipline. “Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation.” *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, 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 judgement for that of the employer. *Jordan v. Mason County Bd. of Educ*., Docket No. 99-26-8 (July 6, 1999); *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ*., Docket No. 97-06-150 (Oct. 31, 1997). Accordingly, there is no basis upon which to conclude that a four-day suspension was inappropriate under the circumstances. This decision is supported by the following conclusions of law. (See footnote 5)

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. Respondent has proven by a preponderance of the evidence that Grievant violated DHHR confidentiality policies and the Social Workers' Code of Ethics, and that a four-day suspension was appropriate under the circumstances presented.

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.

Date: March 9, 2007 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The identity of individuals and minor children involved in the underlying foster care issue which led to Grievant's suspension are confidential and are not pertinent to the outcome of this case. They will be identified by initials only.

Footnote: 2

Grievant testified that she did not know how to separate portions of the file for printing. It is unclear from the record whether or not this is possible.

Footnote: 3

Grievant submitted the lengthy circuit court order in the underlying custody case involving H.T., in which it was found that H.T. should not be placed in S.B.'s home. Although Respondent strongly objected to the submission of this document into evidence, the undersigned does not find the outcome of the custody case to have any particular bearing on the outcome of this grievance.

Footnote: 4

It does appear, however, that Grievant testified at the hearing and shared her own observations of C.S. in the playpen.

Footnote: 5

Grievant had requested copies of emails between herself and Sarah Bleigh, the supervisor who approved her access to the FACTS adoption record for C.S., so that she could review her contacts in the file. After Respondent stated that the emails had been deleted, Grievant has continued to object to not being provided the records. Nevertheless, there is no

dispute that Ms. Bleigh approved unlocking the file for the stated purpose of allowing Grievant to review her contacts, so this issue has no relevance to the outcome of this grievance, and Grievant has not been prejudiced thereby.