WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

VIVIAN RICHARDS,

Grievant,

v. **Docket No. 07-HHR-320**

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

Employer.

DECISION

Vivian Richards ("Grievant") filed this grievance at level two on June 14, 2007, challenging the termination of her employment as an Economic Service Worker for the Department of Health and Human Resources' Bureau for Children and Families. The grievance was denied at level two on June 25, 2007, and, following a hearing conducted by Christopher Amos, Level Three Grievance Evaluator, it was denied by level three decision dated July 20, 2007. Grievant appealed to level four on July 24, 2007. A hearing was conducted by the undersigned in Westover, West Virginia, on September 28, 2007, at which Grievant represented herself, and Respondent was represented by Jennifer Akers, Assistant Attorney General. This matter became mature for consideration upon receipt of the parties' fact/law proposals on October 18, 2007.

Synopsis

Grievant was terminated for submitting a fraudulent application, misrepresenting the residence of her children, in order to obtain Medicaid coverage for them. The evidenceestablished that Grievant had her children stay at her mother-in-law's house for approximately four days in April of 2007. She submitted an application for Medicaid benefits, on her mother-in-law's behalf, containing the representation that the children were residing with their grandmother and would continue to do so for thirty days or more. This representation was proven to be untrue, as the children never moved from their permanent residence with Grievant, and they only stayed with their grandmother temporarily as guests, as they had often done in the past. Grievant's conduct was knowing, intentional and fraudulent, for which termination was appropriate.

Based upon a detailed review of the record in its entirety, the undersigned makes the following findings of fact:

Findings of Fact

1. Prior to her termination, Grievant had been employed by the Bureau for Children and Families in Marion County as an Economic Service Worker for approximately three years. Grievant's primary responsibility is to process applications for financial assistance offered by the state and federal government, such as Food Stamps, Medicaid, and Emergency Assistance. Grievant's position requires her to be knowledgeable regarding various laws, policies, and procedures applicable to these programs.

2. Beginning in mid-March of 2007, Grievant and her husband were having marital problems and considered divorcing.

3. Open enrollment for state employees' medical insurance begins in April of each year. Due to their troubled situation, Grievant and her husband argued as to which of them should provide insurance coverage for the children for the upcoming coverage year, which would begin on July 1, 2007. Grievant's husband, who was a long-termemployee of Fairmont State College, had historically carried the children on his insurance policy, provided through his employer. The children were listed on their father's policy through July 1, 2007.

4. Because she feared she could not afford to provide insurance coverage for the children, Grievant decided to have her two children temporarily stay with her mother-in- law, and prepared an

application for children's health care coverage through the West Virginia Medicaid program. She listed the applicant as her mother-in-law, Jackie Richards, and listed her children as living in Mrs. Richards' household. The application was dated and completed on April 1, 2007. Attached to the application were statements signed by Grievant and Mrs. Richards, stating that the children were currently residing with Mrs. Richards, with the intent to live with her for more than thirty days.

5. Mrs. Richards is elderly and admits to having problems with her memory. She signed the Medicaid application without fully understanding what it was or that she was representing that the children actually lived with her.

6. The Medicaid application listed Mrs. Richards' address as the mailing address, but contained Grievant's address as the “address where you live.”

7. Although Grievant's children were still receiving insurance coverage through her husband's policy, the application stated that the children had no other insurance coverage.

8. Grievant took her children to Mrs. Richards' home on approximately March 31, 2007, and they stayed with Mrs. Richards until April 3, 2007. It was not unusual for the children to stay overnight at Mrs. Richards' home, but their permanent residence has always been at Grievant's home. 9. On April 3, 2007, Grievant removed the children from Mrs. Richards' home and took them to stay with her friend, Angela Hammonds, where they stayed for several days before returning to Grievant's home.

10. Prior to submitting the Medicaid application, Grievant discussed it with Brian Martin, a supervisor in her office. Although he believed it was “morally questionable” to transfer custody of the children in order to obtain medical coverage through Medicaid, he told Grievant she could have her mother-in-law apply for the benefits. Mr. Martin also discussed the application with his region's community services manager and the regional director, who agreed that the application could be approved, based upon the information given. These individuals believed that the children's residence had been permanently moved to Mrs. Richards' home and were unaware of the discrepancies on the application.

11. Because Mr. Martin discussed the application with Grievant and allowed it to be approved, despite the irregularities on the application itself and his knowledge of the situation, he was also disciplined, but not terminated.

12. On April 9, 2007, the Office of Investigations and Fraud Management (“OIFM”) was

contacted by Donald Calloway, another supervisor in the Marion County office. Mr. Calloway had just been informed by Mr. Martin about the circumstances surrounding Mrs. Richards' application and was concerned that fraud had occurred, due to the irregularities on the application and the lack of verification of the children's actual residence.

13. Jolynn Marra, Assistant Director of the OIFM, conducted an investigation. After interviewing Grievant, her husband, Mrs. Richards, and Mr. Martin, along with otherDepartment officials and employees of the children's school system, (See footnote 1) Ms. Marra concluded that Grievant had falsely reported that her children were living with Mrs. Richards in order to fraudulently obtain Medicaid coverage.

14. As she interviewed witnesses during her investigation, Ms. Marra took handwritten notes in her own words, and then asked each witness to sign the notes as verification of their statements during the interview. Both Grievant and her husband declined to sign the notes prepared by Ms. Marra.

15. The written notes from Ms. Marra's interview with Mrs. Richards were four pages long, with Mrs. Richards' signature on the final page, which was noted as “Page 4 of 4.” Mrs. Richards' initials, apparently in her own handwriting, also appear on page 3 of the notes.

16. On May 30, 2007, Community Services Manager Paula Taylor discussed the results of the investigation with Grievant and informed her that serious disciplinary action was being considered. Grievant maintained that she had not committed fraud and had not been dishonest about her children's living situation. However, she still did not inform Ms. Taylor that the children had only resided with Mrs. Richards from March 31 until April 3.

17. By letter dated May 31, 2007, Regional Director Louis Palma informed Grievant that she was being dismissed from her position, effective June 16, 2007, forviolations of the West Virginia Code, the Ethics Act, and the Department's Code of Employee Conduct.

18. Grievant never intended for her children to live with Mrs. Richards and only had them stay with Mrs. Richards as houseguests while the Medicaid application was being processed.

Discussion

In dismissal cases involving classified employees, the burden of proof is upon the employer to establish the charges relied upon by a preponderance of the evidence and to establish good cause

for dismissing an employee. W. Va. Code § 29-6A-6. (See footnote 2) *Davis v. W.Va. Dept. of Motor Vehicles*, Docket No. 89-DMV-569 (Jan.22, 1990); *Broughton v. W. Va. Div. of Highways*, Docket No. 92-DOH-325 (Dec. 31, 1992). "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 & 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.*

Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rightsand interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and 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); *See also West Virginia Division of Personnel Administrative Rule*, 143 C. S. R. 1 § 12.02.

Grievant has raised numerous defenses throughout this grievance proceeding, challenging Ms. Marra's investigative report and the statements obtained by Ms. Marra, She also contends that she was never dishonest regarding where her children resided at the time the Medicaid application was filed and that she relied upon Brian Martin's approval of the application as an endorsement of the arrangement.

While it is accurate that neither Grievant nor her husband signed the "statements" prepared by Ms. Marra, their testimony is fairly consistent regarding the events in question. Mr. Richards testified that he and Grievant were having marital problems in March and April of 2007; they argued about who was going to carry the children's insurance coverage beginning in July; and the children "stayed with his mother some" during that time period. However, neither Mr. Richards nor his mother ever stated that the children took up permanent residence with her or that Grievant had expressed an intention to have them actually move in with her.

Grievant has also argued extensively that the "statement" taken from Mrs. Richards by Ms. Marra contained numerous inaccuracies. Mrs. Richards testified at the level four hearing, for the first time in this grievance, and stated that the four-page statement was not what was prepared by Ms. Marra when she interviewed her. She insisted that Ms. Marrahanded her one page of notes, which she [Mrs. Richards] signed at the bottom, and that she had never seen the four-page document until months later, when Grievant showed it to her. She also maintained that the statement contained several

inaccuracies.

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 Res*., Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res*., 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 Res./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*.

Interestingly, although Mrs. Richards adamantly denied that she made many of the statements contained in the four-page document prepared by Ms. Marra, her testimony regarding the pivotal issue presented here, i.e. the true residence of her grandchildren,supports Respondent's contentions. Mrs. Richards testified that the children “have stayed with her,” but she did not recall dates when that may have occurred. While she focused the majority of her testimony upon the four-page statement and her contention that this was not the statement given during her interview, she gave very little information regarding where the children actually lived. In fact, Grievant only asked her one question in this regard, which was whether the children had ever “stayed” with her, and she gave the response set forth above. Mrs. Richards also insisted repeatedly that she remembered giving her statement to Ms. Marra, because it was an unusual event, and that she only has problems remembering everyday things. Assuming this is true, it would seem that Mrs. Richards would certainly remember when her grandchildren “moved in” with her in early April and would have discussed it during her testimony.

While the undersigned does not believe that Mrs. Richards fabricated her testimony or intentionally lied, it does appear that she has problems with her memory, and it is quite possible that

she simply did not recall that the statement she signed was the final page of a four-page document. Nevertheless, her testimony does not disprove Respondent's contention that Grievant fabricated the information regarding her children's residence on the Medicaid application. In fact, Mrs. Richards never stated that the children “lived” with her or “moved in” with her, but only testified that they “stayed” with her. It is quite common for children to stay overnight with their grandparents as houseguests, but this does not constitute a permanent, or even temporary, change of residence. The various portions of the statement that Mrs. Richards contends are inaccurate, such as whether or not she hadever seen her grandson's middle school or whether or not she “babysat” the children, (See footnote 3) are not pertinent to the issue of whether or not Grievant knowingly engaged in fraudulent conduct. Based upon her testimony and all of the other evidence in this case, the undersigned concludes that Mrs. Richards did not understand what the Medicaid application was or that Grievant was attempting to fraudulently obtain benefits by misrepresenting her children's true residence.

Grievant also contends that the Medicaid application was approved largely because of Brian Martin's “improper processing.” It is interesting that Grievant would make this argument, when she has contended throughout this proceeding that she did nothing dishonest. By placing blame on Mr. Martin for approving an application that she seems to agree should not have been approved, or at the very least should have been investigated prior to approval, she seems to be admitting that the application was inaccurate, if not fraudulent. Mr. Martin did not testify at either hearing in this matter. However, his statement indicates that he believed Grievant was being honest about transferring custody of her children, which would have technically made her mother-in-law eligible for benefits. He stated he never encouraged her to have the children stay with Mrs. Richards under false pretenses only to make them eligible for benefits, for which he was sorry, once he discovered Grievant's deception. Also, at the time he processed the application, he failed to notice the discrepancy in addresses, and he admitted that he should have more thoroughly investigated the circumstances. Grievant testified at level four, and also stated in her post-hearing submission, that Mrs. Richards requested that the Medicaid case be closed once the children left her household, and the Medicaid card was shredded without being used. However, when she testified, Mrs. Richards still did not appear to understand what the Medicaid application was, and, as discussed above, she has never stated that the children resided with her on a long-term or permanent basis. In his statement to Ms. Marra, Mr. Martin stated that, once the application was under investigation, Grievant came to him

on April 13 and requested that the case be closed, stating that she had removed the children from Mrs. Richards home, so “they would not be scrutinized.” After Grievant was informed that only Mrs. Richards could request closure of the case, Mr. Martin stated that Mrs. Richards called later the same day, also requesting that the case be closed.

Clearly, once her conduct became the subject of a formal investigation, Grievant thought better of her plan. At the hearings in this grievance, Grievant claimed that the children were removed from Mrs. Richards home due to concerns regarding Mrs. Richards husband, a supposed alcoholic, and whether the home was suitable for them. However, the evidence leads to the conclusion that the children were removed from the home for two other reasons: first, Grievant only intended for them to stay there until the application had been processed, and, second, she decided not go through with her deception once it became the subject of investigation.

Grievant has also stated that she believes it was discriminatory for her to be terminated as a result of these events, while Mr. Martin received a lesser discipline. “Discrimination” is defined by W. Va. Code § 29-6A-2(d) as “any differences in the treatment of employees unless such differences are related to the actual jobresponsibilities of the employees or agreed to in writing by the employees.” In discussing discrimination claims under the grievance statutes, the Supreme Court of Appeals has noted that “[t]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]” *Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004). In the instant case, Grievant was not similarly situated to Mr. Martin, because he was disciplined for his inappropriate handling of the application and his failure to acknowledge or investigate the possible improprieties contained in it, while Grievant was disciplined for committing a serious, knowing, fraudulent act. Accordingly, Respondent was not obligated to give them the exact same discipline.

The undersigned finds that Respondent has proven by a preponderance of the evidence that Grievant knowingly provided fraudulent information in order to obtain Medicaid coverage for her children. She admittedly was distraught over her marital problems and was concerned that she could not afford the expense of insuring them. As an Economic Service Worker, Grievant worked on a daily basis with Medicaid applications and the laws governing them, and she used this knowledge to attempt to obtain benefits dishonestly. Because the children only stayed at Mrs. Richards' home for four days, and neither Mrs. Richards nor the children's father have supported Grievant's contention that she “gave custody” of the children to Mrs. Richards, the inescapable conclusion is that Grievant

never intended to have her children actually reside with Mrs. Richards, but merely left them there for a few days during the processing of the application. It is quite unfortunate that Mrs. Richards appears to have never fully understood what the application was for, nor that she was being used to perpetrate fraud. Grievant's conduct was of asubstantial nature and cannot be described as trivial or inconsequential; therefore, Grievant's termination was appropriate. *See Oakes, supra*.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. In dismissal cases involving classified employees, the burden of proof is upon the employer to establish the charges relied upon by a preponderance of the evidence and to establish good cause for dismissing an employee. W. Va. Code § 29-6A-6. *Davis v. W.Va. Dept. of Motor Vehicles*, Docket No. 89-DMV-569 (Jan.22, 1990); *Broughton v. W. Va. Div. of Highways*, Docket No. 92-DOH-325 (Dec. 31, 1992).

2. Permanent state employees who are in the classified service can only be dismissed for “good cause,” meaning “misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.” Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and 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); *See also West Virginia Division of Personnel Administrative Rule*, 143 C. S. R. 1 § 12.02.

3. Respondent has proven by a preponderance of the evidence that Grievant was dismissed from her employment for good cause.

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 thisdecision. *See* W. Va. Code § 29-6A-7 (*repealed by* Senate Bill No. 442, March 7, 2007*)* (*but see Executive Order No. 2-07*, May 8, 2007). 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: November 16, 2007 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant has argued that, since the school records were out of date, and the bus driver who was questioned gave inaccurate information regarding who picked up the children at the bus stop, this proves that the entire investigation was improperly conducted. However, as will be discussed later in this Decision, these matters are extraneous to the central issue in this case, which is whether Grievant fraudulently misrepresented where her children lived in order to obtain Medicaid benefits.

Footnote: 2

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes and rules, which continue to control the proceedings in this case.

Footnote: 3

Because the older child is 17 years old, Grievant repeatedly emphasized that the children do not actually "need" a babysitter. Nevertheless, this is not pertinent to the issue of whether the children took up residence with their grandmother.