WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

CRYSTAL STILES,

Grievant,

v. **Docket No. 07-HHR-162**

DEPARTMENT OF HEALTH AND

HUMAN RESOURCES/BUREAU

FOR CHILDREN AND FAMILIES,

Respondent.

DECISION

Crystal Stiles ("Grievant") initiated this proceeding on January 25, 2007, challenging a ten-day suspension imposed by her employer, Respondent Department of Health and Human Resources ("DHHR"). After denials at levels one and two, a level three hearing was held on May 2, 2007, followed by a decision denying the grievance dated May 7, 2007. Grievant appealed to the Grievance Board at level four on May 11, 2007. A hearing was held in Westover, West Virginia, on January 18, 2008. Grievant was represented by counsel, Joshua P. Sturm, and DHHR was represented by B. Allen Campbell, Senior Assistant Attorney General. This grievance became mature for consideration upon receipt of the parties' fact/law proposals on February 29, 2008.

Synopsis

Grievant received a ten-day suspension for entering "falsified" time study information. Evidence established that, while Grievant accepted responsibility for her conduct, DHHR did not provide

training to employees regarding the time study system, did not explain its importance and purpose to employees, and did not have compliancemonitoring in place. Therefore, Grievant proved that, under the circumstances, mitigation of the punishment was appropriate, and the ten-day suspension should be reduced to three days.

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

Findings of Fact

1. Grievant has been employed by DHHR's Bureau for Children and Families (“BCF”) as an Economic Service Worker at the Customer Service Reporting Center, North, since July 16, 2004.

2. Many DHHR workers, including Grievant, are required to periodically complete online Economic Service Activity (“EATS”) forms, documenting their activities. Employees are notified, via e-mail, approximately five times per month that they are to complete EATS forms on the following day. The forms are time studies used by the federal government to pay the state matching funds for the time workers spend on various activities. Workers enter the name of a client and the type of work performed, along with how many minutes were spent on the particular activity. If the worker's information is entered incorrectly, or their time working on client cases is not documented, the state does not receive reimbursement.

3. Prior to October of 2006, DHHR had no formal training sessions to teach employees how to complete EATS forms, and their purpose was not explained to new employees. Some employees joked about completing the forms, entering client names such as “Jack Daniels” and “Jose Cuervo.” 4. When employees are on leave or in training, they are to enter this information on their EATS forms.

5. Grievant's immediate supervisor is Steve Bevins. Shortly after she began her employment, Mr. Bevins instructed Grievant to enter all EATS forms as “training” until she had completed her initial training period and was instructed to begin entering actual client information onto the forms.

6. Grievant was unsure exactly how long her official training period lasted, and Mr. Bevins never instructed her to begin entering her actual activities on the EATS forms.

7. In October of 2006, Jim Kautz, Director of the Office of Customer Services, was contacted by DHHR officials in Charleston, who informed him that it had been discovered that some employees

were falsifying their EATS forms by reporting that they were in training or on leave when they were actually working. Therefore, Mr. Kautz directed all Customer Services supervisors to audit their employees' EATS forms.

8. A review of Grievant's EATS forms for the period of September 1, 2005, through August 28, 2006, revealed that she recorded every EATS reporting day as 480 minutes of training, with the exception of three occasions when she was on leave. On 55 occasions, Grievant recorded her work time as training, rather than listing specific work conducted for specific clients.

9. Mr. Bevins had an informal meeting with Grievant to discuss the findings of the review of her EATS forms. During this conversation, Grievant stated that she was “busted” and understood that she was not entering the information correctly. Grievant admitted that she was aware her training period had ended prior to the time period at issue. 10. Also during this discussion with Mr. Bevins, Grievant was instructed to begin entering proper information on the EATS forms and was asked whether she needed instructions or assistance in doing so. Grievant told Mr. Bevins that she did not need assistance, but if the need arose, she would consult her co-workers, which she did do.

11. Effective November 30, 2006, DHHR Secretary Martha Yeager Walker implemented Policy Memorandum 3702 regarding “Personnel Activity Reports, Time Studies, and Effort Certifications.” This policy discusses the importance of time study forms and how they are to be completed. It also contains a “Monitoring Compliance” provision, which states that each supervisor, along with the Office of Accountability and Management Reporting (“OAMR”), must monitor each employee's compliance with the policy and verify the accuracy of their reporting. It states that “[s]econd and subsequent incidences of an employee's failure to comply shall result in application of the terms of the progressive discipline policy.”

12. Also beginning in November of 2006, DHHR began a training program for all employees, explaining the reasons for time studies and how to complete the forms.

13. In December of 2006, Mr. Kautz, Mr. Bevins, and Elizabeth Richendollar, another Customer Service Supervisor, met with Grievant to discuss the allegations against her. During this discussion, Grievant acknowledged that she had entered incorrect information and took responsibility for her actions. She was advised that disciplinary action was being considered.

14. In a letter dated January 8, 2007, Mr. Kautz advised Grievant that she was being suspended without pay for ten days for “having provided false [EATS] forms duringthe period

September, 2005 through August, 2006." The suspension was effective January 15, 2007, through January 26, 2007.

15. Grievant's testimony regarding her reasons for entering incorrect EATS information -- that she was told to enter them as "training" indefinitely -- is not credible.

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). (See footnote 1) "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). The Division of Personnel Administrative Rule, Section 12.3 provides "[a]n appointing authority may suspend any employee without pay for cause or to conduct an investigation regarding an employee's conduct which has a reasonable connection to the employee's performance of his or her job."

Grievant contends that the ten-day suspension was excessive and that DHHR did not follow its own policies applicable to discipline in this situation. Respondent countersthat Grievant's conduct was fraudulent and deliberate, warranting the punishment imposed. It also points out that the progressive discipline policy does not require that each step be followed in every situation. Indeed, DHHR Policy Memorandum 2104, "Guide to Progressive Discipline," has been construed as a permissive, discretionary policy that does not create a mandatory duty to follow a progressive disciplinary approach in every instance. *Oiler v. Dep't of Health & Human* Res., Docket No. 02-HHR-074 (Aug. 28, 2002); *Ferrell v. W. Va. Dep't of Health & Human Res.*, Docket No. 97-HHR-526 (Apr. 30, 1998); *Artrip v. W. Va. Dep't of Health and Human Serv.*, Docket No. 94-HHR-146 (Sept. 13, 1994).

The instant case presents a situation where Grievant does not deny that she engaged in the conduct with which she is charged. Rather, the focus of her grievance is her lack of understanding regarding how to enter the information and its importance, along with her allegation that she was following her supervisor's instructions. Grievant has maintained throughout this proceeding that, although she did realize that her training period had ended at some point, Mr. Bevins had instructed

her to enter her time on EATS as training until told otherwise. She admitted that she did not “take the initiative” and go to a supervisor to question whether her EATS entries should change at some point, but she also stated that she assumed that someone would notify her if the entries were wrong. She contends that, when Mr. Bevins confronted her with the information regarding her EATS entries, she pointed out to him that she had never been told to begin entering the proper information.

Mr. Bevins testified that, when confronted, Grievant stated that she was “busted,” acknowledging that she was entering the EATS information improperly. He never really explained when Grievant had ended her training period, and he was not asked whetherGrievant's version of events was true regarding his alleged instructions. He did state that, based upon his conversation with Grievant, he believed that she was entering the information as training to save time, because she had told him she was “having enough trouble” accomplishing her other work in a timely fashion.

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*.

Obviously, Grievant would have motive for blaming her alleged misconduct on her supervisor by accusing him of not instructing her to change her EATS entries after hertraining period had concluded. However, Grievant did not challenge or deny Mr. Bevins' statements that she had told him she was having difficulty getting her other work done, giving her reason to enter the EATS information quickly. In fact, Grievant herself testified that workers generally complain about the fact

that completing EATS forms costs them valuable time by taking them away from their “real work.” Moreover, as Mr. Bevins testified, only four workers, including Grievant, were disciplined for entering false EATS information, and other employees apparently did not share Grievant's alleged misunderstanding that she was to enter her work as “training” indefinitely. It must be noted that the time period for which Grievant's EATS entries were discovered to be incorrect began months after her first year of employment was over. It is difficult to imagine that Grievant honestly believed that she should still enter her information as a trainee by that time.

Accordingly, the undersigned finds that Grievant's testimony is not credible, and Mr. Bevins explanation of the conversation he had with Grievant is truthful. Therefore, Grievant knew that she should have been entering her actual work information on the EATS forms, but entered it as training, likely in an effort to save time.

As to Grievant's arguments regarding Respondent's failure to follow the progressive discipline policy, DHHR is correct in its assertion that the policy need not be followed to the letter in every case, i.e. beginning with a verbal warning, followed by a written warning, then a suspension, and ultimately dismissal. As the policy itself states, verbal warnings may be issued for misconduct which “is not of a serious or repetitious nature,” and a written warning or suspension may be issued for a “serious singular incident.” Therefore, DHHRdid not necessarily violate this policy by issuing a suspension for conduct which it believed was of a serious nature.

Grievant also argues that Respondent violated the provisions of the newly- implemented Policy 3702 regarding time studies. Respondent contends that, because it was implemented after (and likely in response to) the discovery that some employees were entering incorrect information, it does not apply. Grievant believes that it should, because she was not actually suspended until January.

It is quite clear that Policy 3702 was enacted in response to the misconduct of Grievant and the other employees who were disciplined in late 2006 and early 2007 for entering false EATS information. Moreover, it is difficult to construe it as being applicable to this situation, in that it calls for supervisors and the OAMR to monitor each employee's compliance, and it appears that no such responsibility was placed upon supervisors during the time period for which Grievant was disciplined. Accordingly, the provisions of this policy are not applicable to Grievant's misconduct which occurred prior to late 2006. Finally, Grievant contends that a ten-day suspension was an excessive penalty for her actions in this case. The argument that discipline is excessive given the facts of the situation

is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similaroffenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ*., Docket No. 93-45-105 (Mar. 31, 1994). *See Austin v. Kanawha County Bd. of Educ*., Docket No. 97-20-089 (May 5, 1997).

Mitigation of a penalty is considered on a case by case basis. *Conner v. Barbour County Bd. of Educ*., Docket No. 95-01-031 (Sept. 29, 1995); *McVay v. Wood County Bd. of Educ*., Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. *Pingley v. Div. of Corr*., Docket No. 95-CORR-252 (July 23, 1996).

This Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. 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).

In the instant case, the most troubling issue is Respondent's lack of clear instruction to its employees regarding the reason for and the importance of the EATS forms. It is undisputed that, prior to the incident which gave rise to this grievance, DHHR had noformal training in place regarding EATS, and many employees did not take it seriously. One would think that, since a major portion of DHHR's funding is reimbursed by the federal government pursuant to this system, the importance of the completion and accuracy of EATS information would have been a priority to be stressed to all employees on a continual basis. However, until the discovery that some employees entered incorrect information as a result of their failure to understand the system's importance, DHHR did not take the

necessary steps to implement formal policies and procedures governing the federal time study system. In addition, Respondent's characterization of Grievant's conduct as providing “falsified” and fraudulent information seems unduly harsh.

Therefore, under the circumstances presented, the undersigned believes that the deprivation of a half-month's salary is too severe a penalty for Grievant's actions. Reduction of the punishment is also consistent with the provisions of W. Va. Code § 29-6A-5(b) (2006) which gives administrative law judges the authority to "provide relief as is determined fair and equitable . . ." and to " provide appropriate remedies . . . ." *See Graf v. W. Va. Univ.,* 189 W. Va. 214, 429 S.E.2d 426 (1992); *Wilkerson v. Lincoln County Bd. of Educ*., Docket No. 99-22-420 (March 27, 2000). While it is true that Grievant took responsibility for her behavior, the evidence also indicates that her lack of respect for the EATS system was, in part, caused by her employer's failure to properly explain the importance of the time studies, train employees on their completion, and implement procedures for monitoring compliance. Accordingly, the ten-day suspension should be reduced to three days.

The following conclusions of law are appropriate in this matter.

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. DHHR's progressive discipline policy is a permissive, discretionary policy that does not create a mandatory duty to follow a progressive disciplinary approach in every instance. *Oiler v. Dep't of Health & Human* Res., Docket No. 02-HHR-074 (Aug. 28, 2002); *Ferrell v. W. Va. Dep't of Health & Human Res.*, Docket No. 97-HHR-526 (Apr. 30, 1998); *Artrip v. W. Va. Dep't of Health and Human Serv.*, Docket No. 94-HHR-146 (Sept. 13, 1994).

3. "[M]itigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. 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).

4. DHHR did not violate its progressive discipline policy in this case by imposing a suspension for a single incident of a serious nature, prior to issuing any warnings or reprimands. 5. Grievant has established by a preponderance of the evidence that a ten-day suspension was too severe a penalty under the circumstances presented.

Accordingly, this grievance is **GRANTED IN PART**, and Respondent is **ORDERED** to reduce the ten-day suspension to three days in Grievant's personnel file and reimburse her for all lost wages and benefits beyond a three-day suspension period.

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. *See* W. Va. Code § 29-6A-7 (repealed, *See Footnote 1, supra)*. Neither the West Public 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 31, 2008

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

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, which continue to control the proceedings in this case.