THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

NANETTE SMITH,

Grievant,

v.

Docket No. 2008-0286-KanED

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Nanette Smith ("Grievant") filed this grievance directly to level three on August 24, 2007, following the termination of her employment as a bus operator for the Kanawha County Board of Education ("Respondent"). A level three hearing was conducted in Charleston, West Virginia, on March 19, 2008. Grievant represented herself. Respondent was represented by James W. Withrow, Esquire. This matter became mature for consideration upon receipt of the parties' fact/law proposals on May 28, 2008.

Summary

Grievant was terminated from her position as a bus operator for Respondent because of her admitted involvement in an unlawful scheme in which she falsified overtime records in order to receive compensation for work which she had not performed. Accepting compensation for time worked when no such work was actually performed constitutes larceny or theft. Grievant accepted responsibility for her actions, and expressed remorse for receiving compensation for work that she did not perform. Grievant offered to make restitution to Respondent in the matter. Grievant seeks mitigation of the punishment in contending that discharge is too severe. Respondent established by a preponderance of the evidence that Grievant's conduct constituted theft, and that termination was

appropriate. Further, Grievant did not demonstrate that the discipline imposed was soclearly disproportionate to the Grievant's offense that it amounts to an abuse of discretion. Finally, Grievant failed to establish a violation of her due process rights. The grievance is DENIED.

Procedural History

This grievance was filed on August 24, 2007, after Grievant was advised by letter dated August 17, 2007, the Respondent had voted to suspend Grievant, without pay, pending the outcome of the disciplinary action against her. Carole A. Lewis Bloom, Hearing Examiner, conducted a pre-disciplinary hearing on October 18, 2007, and on November 1, 2007. The Hearing Examiner issued a decision on November 13, 2007, recommending that Grievant be terminated from her position with Respondent. The Superintendent of Schools advised Grievant that he intended to recommend to the Board that her employment be terminated by letter dated November 16, 2007. The Board voted to terminate Grievant's employment at its meeting held on December 13, 2007. Grievant was notified of this decision by letter dated December 14, 2007. A level three hearing was conducted before the undersigned on March 19, 2008. A “Petition to Re-Open Hearing of March 18, 2008" was filed by Grievant on May 28, 2008. Respondent did not file any responsive pleading to this request by Grievant to reopen the level three hearing. The “Petition to Re-Open Hearing” is DENIED for reasons more fully set out below.

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

Findings of Fact

1. Grievant was employed by Respondent as a school bus operator at the Elkview Bus Terminal. Grievant had been employed full time by Respondent for approximately ten years. Grievant was considered a good employee.

2. Respondent's Superintendent began an investigation after he received information there existed a scheme by which the Elkview Bus Terminal Supervisor, Nancy Bowen-Kerr, had falsified overtime or extra pay records in order to pay certain employees for work which they had not performed. The employees would then use all or part of that money to purchase Mary Kay products from Ms. Bowen-Kerr and her daughter, Amanda.

3. The Superintendent requested that George Beckett, Administrative Assistant for Pupil Transportation, and Jeane Ann Herscher, Investigator, conduct an investigation of the allegations.

During the course of the investigation, Mr. Beckett and Ms. Herscher reviewed documentation and interviewed employees. Grievant was interviewed during the investigation.

4. During the interview and at the pre-disciplinary hearing, Grievant admitted that she received income for work she did not perform. Grievant cooperated with Investigators.

5. Ms. Bowen-Kerr was Grievant's supervisor at the Elkview Bus Terminal. In October 2005, Ms. Bowen-Kerr approached Grievant about purchasing Mary Kay products and becoming a distributor. Grievant told Ms. Bowen-Kerr that she could not afford to buy Mary Kay products. Ms. Bowen-Kerr told Grievant that she would let her work overtime hours to pay for the products. 6. Sometime later, Ms. Bowen-Kerr told Grievant that she would write in extra hours for Grievant on the time sheet, even though Grievant was not working those hours, in order for Grievant to be able to purchase Mary Kay products. Grievant questioned Ms. Bowen-Kerr about whether or not they should be involved in this scheme, and whether or not they would get caught.

7. Between January 2006, and January 2007, Ms. Bowen-Kerr falsified numerous time sheets by adding overtime and extra pay hours for Grievant, although Grievant had not performed that work. Ms. Bowen-Kerr reported that Grievant was present at work on several days when she was actually off work on sick leave. This resulted in Grievant being able to receive overtime pay during that period.

8. For each applicable time period, Ms. Bowen-Kerr informed Grievant how much extra income had been added to Grievant's paycheck as a result of the scheme. Once Grievant received her Kanawha County Schools paycheck, she brought the extra pay in cash to Ms. Bowen-Kerr. In exchange, Grievant usually received Mary Kay products.

9. As part of this fraudulent scheme, Grievant delivered cash every pay period to Ms. Bowen-Kerr in amounts between one hundred dollars ($100) and four hundred dollars ($400), except for the month of March 2006.

10. Grievant admitted to having been paid by Respondent approximately six thousand dollars ($6,000) in gross pay for hours which she did not work between December 2005, and January 2007. Grievant did not alert any law enforcement personnel or Board officials that she had received money for work she had not performed, nor of Ms. Bowen-Kerr's fraudulent scheme.

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.

Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2007); *Holly v. Logan County Bd. of Educ.,* Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.,* Docket No. 33-88-130 (Aug. 19, 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 & 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.*

Pursuant to West Virginia Code, school personnel may be suspended or dismissed at any time for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a nolo contendere to a felony charge. W. Va. Code § 18A-2-8; *Kanawha County Bd. of Educ. v. Sloan*, 219 W. Va. 213, 632 S.E.2d 899 (2006).

The term “immorality,” as used in West Virginia Code Section 18A-2-8, is defined as conduct which is “not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially not in conformity with the acceptable standards of proper sexual behavior.*” Golden v. Bd. of Educ. of Harrison Co.*, 169 W. Va. 63, 285 S.E.2d 665, 668 (1981) (citing *Webster's New Twentieth Century Dictionary*, Unabridged 910 (2d ed. 1979)); *Harry v. Marion Co. Board of Educ.*, 203 W.Va. 64, 506 S.E.2d 319, 321 (1998). Although most frequently used to define sexual misconduct, immorality may include other forms of conduct not in conformity with accepted principles of right and wrong behavior, such as theft. *Arnold v. Monongalia County Bd. of Educ*., Docket No. 02-20-097 (Jan 13, 2003); *Cooper v. Kanawha County Bd. of Educ*., Docket No. 02-20-097 (July 31, 2002). Accepting pay for time worked when no such work was actually performed constitutes theft. *Arnold, supra.*

It is the contention of Respondent that Grievant is guilty of immorality by engaging in a scheme to misappropriate public funds from the Kanawha County Board of Education. Respondent further maintains this violation of trust is of sufficient nature to warrant discharge. Grievant argues that her level of involvement in the scheme does not warrant the sanction imposed by Respondent. In addition, Grievant argues she was denied due process in this matter.

Grievant does not deny participation in the scheme to defraud Respondent. Grievant contends that she is not fully responsible for her actions because she was coerced by her supervisor, and because she did not use the Mary Kay products. This argument is not persuasive. Grievant willfully

deprived Respondent of money by means of fraudulent pretenses on numerous occasions. Such conduct constitutes larceny (commonly referred to as theft), and is a violation of West Virginia Code for which she may be suspended or dismissed. W. Va. Code § 18A-2-8.

Although it may be true that Grievant's supervisor devised the scheme at issue in the instant matter, Grievant admitted that she knew her actions were wrong. This was not an isolated incident; in fact, Grievant participated for an extended period of time in thescheme without informing anyone in authority. Even if she was initially unduly influenced into participating in the scheme, that does not excuse her failure to properly report such wrongdoing. Grievant's argument that rumors linking Ms. Bowen-Kerr and Mr. Beckett (transportation director) prevented her from being able to safely report the scheme is unpersuasive. Grievant could have safely reported the scheme to anyone in authority other than Mr. Beckett if she had wished to cease her participation in the scheme. Instead, Respondent has established that Grievant repeatedly received income for work she had not performed over an extended period of time as a result of the scheme. Notwithstanding Grievant's assertions that she was coerced, that those in authority conspired against her, and that she was intimidated, there is no factual dispute that she participated in the scheme to defraud Respondent.

Grievant's submitted proposal following the level three hearing asserts mitigation of the penalty. 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 similar offenses; 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).

Given the considerable deference afforded to employers in disciplinary situations, the undersigned is not persuaded that the discipline imposed was disproportionate to the offense committed. Despite the fact that Grievant was otherwise a good employee for approximately ten years, and that she is willing to make restitution in the matter, her dismissal is not disproportionate to the offense proven. There exist aggravating circumstances to support Grievant's dismissal in this case; the amount of money involved, and the illegality of Grievant's misconduct. First, the sum of money involved that was obtained by false pretense is substantial. Over the course of twelve months, Grievant managed to receive approximately $6,000.00 in pay for hours which she did not work. It is small consolation that, as Grievant stated in her brief to this Grievance Board, “[T]he source of irregularities in recording, drafting, approving, and processing payroll records were the direct fault of KSC (See footnote 1) executives who mis-managed the KSC enterprise, said mis-management being the direct cause of Smith being bullied, coerced, intimidated, and threatened into involvement into payroll processing irregularities, and further, mis-management by KSC executives prevented Smith from extricating herself from involvement.” Moreover, misappropriation of this magnitude potentially implicates numerous criminal statutes. (See footnote 2) Respondent's decision is clearly not disproportionate to Grievant's offense. Accordingly, Grievant's request for a reduction of the penalty imposed is denied.

Grievant contends she was denied due process by the Grievance Board because she received erroneous instruction about the grievance hearing process. In essence, she complains that she was misinformed concerning the process for serving a subpoena on a witness. Grievant also asserts she was denied due process because her request for transcripts of other hearings was denied. This

argument asserting a denial of due process is not persuasive. The West Virginia Supreme Court of Appeals has recognized that "due process is a flexible concept, and that the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) (*citing Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)). "What is required to meet procedural due process under the Fourteenth Amendment is controlled by the circumstances of each case." *Barker v. Hardway*, 238 F. Supp. 228 (W. Va. 1968); *See Buskirk*, *supra*; *Edwards v. Berkeley County Bd. of Educ.*, Docket No. 89-02-234 (Nov. 28, 1989).

It is a well-settled principle of constitutional law, under both the State and Federal Constitutions, that an employee who possesses a recognized property right or liberty interest in his employment may not be deprived of that right without due process of law. *Buskirk*, *supra*; *Waite*, *supra*; *Clark*, *supra*. "An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and an opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494, (1985), *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

Clearly, Grievant was provided with notice of the level three hearing, and an opportunity for an administrative hearing following a direct appeal to level three. Grievant represents that she spoke to support personnel at the Grievance Board concerning obtaining subpoenas. Grievant was informed that she could request subpoenas and they would be issued by the administrative law judge. Grievant was guided to the agencywebsite to obtain additional information relating to the service of subpoenas. After that, it appears that the failure to request subpoenas and the service of those subpoenas was the product of neglect by Grievant. Grievant was given instruction by support personnel at the Grievance Board on the fundamentals of obtaining a subpoena.

The thrust of Grievant's argument in asserting a due process violation is that she could not afford the cost of the process service fee for those subpoenas. While it is understandable that the cost associated with a contested case may have been discouraging, the support personnel at the Grievance Board office provided accurate information on the acceptable means to serve a subpoena pursuant to W. Va. Code § 29A-5-1. That Code section, the Administrative Procedures Act, in pertinent part provides:

> Every such subpoena and subpoena duces tecum shall be served at least five days before the return date thereof, either by personal service made by any person over eighteen years of age or by registered or certified mail, but a return acknowledge signed by the person to whom the subpoena or subpoena duces tecum is directed shall be required to prove service by registered or certified mail . . . Any person who serves any such subpoena or subpoena duces tecum shall be entitled to the same fee as sheriffs who serve witness subpoena for the circuit courts of this state; and fees for the attendance and travel of witnesses shall be the same as for witnesses before the circuit court of this state . . . All such fees related to any subpoena or subpoena duces tecum issued at the instance of an interested party shall be paid by the party who asks that such subpoena duces tecum be issued.

Pursuant to W. Va. Code § 29A-5-1(b), W. Va. Code § 6-2-4(c)(4), and the Procedural Rules of the West Virginia Public Employees Grievance Board, 156 C.S.R. 1 § 6.5 (2008), any witness fee owed to a witness is owed by the person issuing his or her subpoena. *See also Atkins v. Parkways Economic Dev. and Tourism Auth.*, 99-PEDTA-335 (May 1, 2001).

This set of facts does not rise to the level of a fundamental deprivation of a right without due process of law. Grievant filed a witness list with the Grievance Board on March 6, 2008. In the past, Grievant filed pleadings in the matter. Among those pleadings filed was at least one motion to continue the matter. This demonstrates a fundamental understanding of the process. Grievant had ample time to prepare this matter for a level three hearing. In fact, Grievant indicates she spoke to support personnel at the Grievance Board more than a month before the scheduled level three hearing. Grievant was provided with sufficient time to clarify and correct any confusion she may have had concerning the subpoena process. The burden was on Grievant to request the subpoenas to require the attendance and testimony of her witnesses. This was further explained to Grievant by the undersigned at the level three hearing.

Had Grievant moved to continue the matter, as she had on at least one previous occasion, the argument that the undersigned may have engaged in an abuse of discretion may have some merit. However, no motion to continue the hearing based upon the failure to subpoena witnesses, for whatever reason, was made by Grievant. In this circumstance, no abuse of discretion can be said to have occurred. Further, it was explained to Grievant that upon the conclusion of the level three hearing the evidence was closed. Grievant effectively waived any argument concerning the failure to subpoena witnesses at the conclusion of the level three hearing. Accordingly, Grievant's assertion that she was denied due process is without merit.

The following Conclusions of Law support the decision reached.

Conclusion 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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2007); *Holly v. Logan County Bd. of Educ.,* Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.,* Docket No. 33-88-130 (Aug. 19, 1988).

2. Pursuant to West Virginia Code, school personnel may be suspended or dismissed at any time for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a nolo contendere to a felony charge. W. Va. Code § 18A-2-8; *Kanawha County Bd. of Educ. v. Sloan*, 219 W. Va. 213, 632 S.E.2d 899 (2006).

3. Although most frequently used to define sexual misconduct, immorality may include other forms of conduct not in conformity with accepted principles of right and wrong behavior, such as theft. *Arnold v. Monongalia County Bd. of Educ*., Docket No. 02-20-097 (Jan 13, 2003); *Cooper v. Kanawha County Bd. of Educ*., Docket No. 02-20-097 (July 31, 2002). Accepting pay for time worked when no such work was actually performed constitutes theft. *Arnold, supra.*

4. 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. FireComm'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 similar offenses; 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).

5. 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).

6. The West Virginia Supreme Court of Appeals has recognized that "due process is a flexible concept, and that the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) (*citing Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)). "What is required to meet procedural due process under the FourteenthAmendment is controlled by the circumstances of each case." *Barker v. Hardway*, 238 F. Supp. 228 (W. Va. 1968); *See Buskirk*, *supra*; *Edwards v. Berkeley County Bd. of Educ.*, Docket No. 89-02-234 (Nov. 28, 1989).

7. It is a well-settled principle of constitutional law, under both the State and Federal Constitutions, that an employee who possesses a recognized property right or liberty interest in his employment may not be deprived of that right without due process of law. *Buskirk*, *supra*; *Waite*, *supra*; *Clark*, *supra*. "An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and an opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494, (1985), *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

8. Respondent has met its burden of proof by a preponderance of the evidence, and proven the charges against Grievant that led to her dismissal.

9. Grievant failed to meet her burden of demonstrating the penalty was clearly excessive or reflects an inherent disproportion between the offense and the personnel action.

10. Grievant effectively waived any argument concerning the failure to subpoena witnesses without raising that issue prior to the conclusion of the level three hearing. Nevertheless, this set of facts does not rise to the level of a fundamental deprivation of a right without due process of law.

Accordingly, this grievance is **DENIED**. Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. *See* W. Va. Code § 6C-2-5. Neither the West Virginia 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

Date: July 18, 2008

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Ronald L. Reece

Administrative Law Judge

Footnote: 1 *Grievant's abbreviation for Kanawha County Schools.*

Footnote: 2 *W. Va. Code § 61-3-24 (obtaining money by false pretenses); W. Va. Code § 61-3-24d (fraudulent schemes); W. Va. Code § 61-3-13 (grand larceny).*