THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

RICHARD GOLDSTEIN,

Grievant,

v.

Docket No. 2008-1061-DHHR

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/

BUREAU FOR CHILD SUPPORT ENFORCEMENT,

Respondent.

DECISION

___Richard Goldstein, employed by the Bureau for Child Support Enforcement ("BCSE") as a child advocate attorney, filed this grievance on January 16, 2008, challenging his one day suspension effective February 20, 2008. His unedited Statement of Grievance reads as follows:

1. The allegation is false.

2. The agency has not complied with progressive disciplinary policy.

3. The agency is retaliating against me for previous complaints that I have made, including a complaint to Commissioner Perry about unprofessional and abusive conduct by Deputy Commissioner David Welker, I met with Commissioner Perry on April 10, 2007 to present this complaint.

4. In a meeting on February 28, 2007, David Welker described my handling of court hearings as a "clusterfuck,"[sic] I asked him to "coach" me on how to be a good attorney. He said he would; but he never did and I never heard anything else about my courtroom ability until now.

5. There has been no previous history of any misconduct. I have been practicing law actively in West Virginia and Missouri since 1981. I have handled more than 12,000 hearings in the past 15 years as an attorney with the agency, in Family Court, Circuit Court and the Supreme Court of Appeals. I have never been warned, reprimanded, counselled [sic] or sanctioned.

It should be noted that, although the agency accuses me of some kind of misconduct in Summers County Family Court, it postponed the original effective date of my suspension because it wanted to make sure that I was available to handle Summers Family Law hearings on January 25th!!

6. I have appeared in *thousands* of child support cases with at least fifteen judges in Mercer, McDowell, Fayette, Monroe, Raleigh and Summers counties. There has been no history of similar problems.

7. Improper notice: The first "notice" I received that I was suspended were two e-mails, attached.

Relief Sought: To rescind the suspension and award backpay, if appropriate.

Grievant filed this grievance directly to level three. (See footnote 1) A level three hearing was conducted before the undersigned on March 12, 2008, at the Grievance Board's hearing room in Beckley, West Virginia. Grievant represented himself. Respondent was represented by Jennifer K. Akers, Assistant Attorney General. The matter became mature for decision on April 14, 2008, upon receipt of the parties' fact/law proposals.

Synopsis

Grievant is employed by the BCSE as a child advocate attorney. As part of his case assignments, Grievant appeared at a hearing in Summers County before Family Court Judge Janet F. Steele. During the proceedings, a party paying support raised an issue relating to a payment made in compliance with a child support obligation. Judge Steele asked Grievant to go with her case coordinator to review BCSE's computer records to ascertain the status of this payment. Grievant refused Judge Steele's directive, and replied it was not part of his job.

Judge Steele contacted the Commissioner for BCSE, and complained to her of the incident. A predetermination conference was conducted on January 10, 2008. It wasexplained to Grievant that Judge Steele had complained to the Commissioner about his actions. It was further explained to Grievant that the Commissioner was considering disciplinary action against him for his inappropriate behavior while appearing before the Family Court Judge. Grievant neither offered anything in

defense of his actions, nor accepted responsibility for his misconduct as an officer of the court. The Commissioner suspended Grievant for one day based upon her consideration of Grievant's offense to the court. In addition, the Commissioner based her decision on the fact that his actions did nothing to resolve the issue raised by a party to the proceeding. Respondent has proven the elements of the charge against Grievant by a preponderance of the evidence.

After thorough review of the record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed by the BCSE as a child advocate attorney for fifteen years in the Mercer and Summers County offices.

2. On December 6, 2007, Grievant appeared at a hearing in Summers County before Family Court Judge Janet F. Steele. During the hearing, a party paying support raised an issue concerning the crediting of a payment made towards a child support obligation.

3. Judge Steele directed Grievant to assist her case coordinator with reviewing the BCSE's computer records in checking the status of the payment. Grievant refused Judge Steele's request, and told her it was not part of his job. Judge Steele contacted Susan Perry, Commissioner of BCSE, and complained to her about the incident. JudgeSteele was displeased that Grievant refused to offer assistance to the court. The child advocate attorney is responsible to both the party seeking enforcement of an obligation, and the party making payment on the obligation.

4. Commissioner Perry reviewed the case that was the subject of the report. She then contacted Kelly Kemp, Grievant's supervisor, and David Welker, Deputy Commissioner, to discuss whether disciplinary action should be imposed.

5. Ms. Kemp and Mr. Welker held a predetermination conference on January 10, 2008. Ms. Kemp explained to Grievant that Judge Steele had complained to Commissioner Perry about his refusal of a directive. Ms. Kemp advised Grievant that Commissioner Perry was considering disciplinary action. Ms. Kemp informed Grievant that the conference was his opportunity to tell his recollection of events, and to explain what had been reported. Grievant's response was that he had nothing to say.

6. Commissioner Perry imposed a one day suspension based upon her consideration of Grievant's disrespect to the court. In addition, her decision was based on the fact that his actions did

nothing to resolve the issue raised by a party to the proceeding. Commissioner Perry described this incident as inappropriate conduct by an officer of the court, and failing to provide customer service.

7. Grievant neither testified at the level three hearing, nor offered any evidence which would refute Judge Steele's complaint.

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); *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 & 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 the decision by Commissioner Perry to suspend Grievant was appropriate based upon his actions. Respondent points to the exchange with Judge Steele in refusing to follow a directive. Grievant was the only BCSE employee present at the hearing, and therefore, it was his responsibility to make an effort to obtain the information requested by Judge Steele. Grievant counters that the suspension was in violation of the agency's progressive discipline policy; violated his due process rights; and, was a pretext to punish Grievant for unrelated job performance issues.

The facts in this grievance are essentially undisputed. On December 6, 2007, Grievant appeared as child advocate attorney in Summers County before Family Court Judge Steele. During the hearing, the party paying support raised an issue concerning the crediting of a payment made towards a child support obligation. Judge Steele instructed Grievant to assist her case coordinator to review the computer records of the case.Grievant refused Judge Steele's request, and told her it was not part of his job. Thereafter, Judge Steele contacted Commissioner Perry to complain about the incident.

Commissioner Perry reviewed the case that was the subject of the complaint. She met with Kelly Kemp, Grievant's supervisor, and David Welker, Deputy Commissioner, to discuss whether disciplinary action should be taken, and if so, what action was appropriate. Ms. Kemp and Mr. Welker held a predetermination conference with Grievant on January 10, 2008. Ms. Kemp explained to

Grievant the nature of the complaint made by Judge Steele to Commissioner Perry. She further explained that Commissioner Perry was considering disciplinary action against Grievant for his inappropriate behavior. Grievant declined to discuss the matter at this conference.

Respondent has met its burden of proof by a preponderance of the evidence. Grievant claims that he could not have obtained the information requested by Judge Steele. However, this excuse is no defense to his statement to the Judge that obtaining the information was not his job. Respondent viewed this statement by an officer of the court as completely inappropriate. Respondent files many cases that are placed on Judge Steele's docket; therefore, child advocates should be helpful in assisting the court so that rulings can be issued in a timely fashion. Additionally, Commissioner Perry made clear that as an employee of BCSE, it is Grievant's responsibility to place issues on a path to resolution. Grievant was the only BCSE employee present at the hearing, as such, it was his job to assist the court in obtaining the needed information.

Grievant's assertions that the progressive discipline policy was not followed, and his due process rights were violated, are without merit. Policy Memorandum 2104 sets out theProgressive Discipline Policy. The policy states, in pertinent part, that Progressive Discipline is:

> [d]etermined by the severity of the violation, progressive discipline is the concept of increasingly severe actions taken by supervisors and managers to correct or prevent an employee's initial or continuing behavior or performance . . . progressive and constructive disciplinary action will progress, if required, along a continuum from verbal warning to dismissal, with incremental steps between . . . It is important to remember, however, that the level of discipline will be determined by the severity of the violation.

The policy leaves a significant amount of discretion to the decision maker when issuing progressive discipline. It is not necessary to institute discipline at the first step if the severity of the behavior warrants stronger action. The undisputed evidence establishes that Grievant disobeyed a direct request from a Family Court Judge in a matter in which he appeared as child advocate. In doing so, Grievant failed to provide service to a party in the proceeding. Under this set of facts, Grievant was not doing his job. The suspension was a reasonable exercise of discretion given the severity of the behavior. Therefore, no violation of the progressive discipline policy has been demonstrated in this grievance.

The due process rights afforded an individual for less than a termination, or "a temporary deprivation of rights may not require as large a measure of procedural due process protection as a

permanent deprivation." *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 241 S.E.2d 164 (1978) (citing *North v. Bd. of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977)). Prior to a thirty-day suspension without pay, Waite, a civil service employee, had a sufficient property interest to require notice of the charges and an opportunity to present her side of the story to the decision-maker. *Waite* at 170. Further, 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 *Clarke 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*, 283 F.Supp. 228 (S.D. 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). The question here is whether the due process protections afforded Grievant were sufficient.

It has previously been held that a full-blown hearing is generally not required before an employee may be terminated, but that employee has the minimum pre-deprivation right to at least have an opportunity to respond to the charges either orally or in writing. *Loudermill*, 470 U.S. at 542. An employee is also entitled to written notice of the charges and an explanation of the evidence. *Wirt*, *supra*. In other words, notice of the charges,explanation of the evidence, and an opportunity to respond is all the due process that Respondent is required to provide. *Id*. at Syl. Pt. 3. This fact is especially true, given that Grievant was suspended not terminated. It should be remembered that the purpose of a pre-suspension hearing or opportunity to respond is to assure that there are reasonable grounds to support the suspension. *Gilbert v. Homar*, 520 U.S. 924, (1997); *Loudermill*, *supra*.

Grievant was informed of the charges against him, and Respondent identified the conduct for

which he could be suspended. Grievant was given an opportunity to respond to the charges prior to his suspension. Grievant was informed that the predetermination conference was his opportunity to tell his side of the story. Grievant offered nothing to refute the complaint of Judge Steele, nor did he accept responsibility for his actions as an officer of the court. Commissioner Perry discussed the situation with both Ms. Kemp and Mr. Welker prior to making an informed decision to suspend Grievant.

Grievant asserts that he was suspended based upon an allegation of misconduct that was factually incorrect. Grievant argues that he was somehow given the wrong case name, and DVD recording, reflecting the subject matter of Judge Steele's complaint. As a result, Grievant was not given a meaningful opportunity to investigate, review or respond to his suspension. This assertion is contrary to the level three evidence, and based on spurious reasoning. Judge Steele testified at level three that she provided Grievant with a DVD recording of the hearing that reflected his refusal to assist her case coordinator. Through his own neglect or oversight, Grievant failed to recognize the appropriate case to review, notwithstanding the fact that it was provided to him. In addition, regardless of theindividual case recording that reflected his inappropriate conduct, Grievant was put on notice of the conduct that was the basis of the suspension. Accordingly, Grievant's contention that he was denied due process is without merit.

Grievant asserts that the suspension was unwarranted, and too severe for the alleged infraction. 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 witha 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. The undersigned does recognize Grievant's praiseworthy tenure in what can be a difficult, contentious court environment. As well, the undersigned acknowledges that Grievant has a history of otherwise satisfactory work. However, Grievant's long tenure as a child advocate attorney does not warrant mitigation of the discipline imposed. Attorneys practicing in this State are bound by the Rules of Professional Conduct. As Commissioner Perry correctly noted at level three, a lawyer must make reasonable efforts to expedite litigation consistent with the interest of the client. (See footnote 2) By refusing the request of Judge Steele, Grievant did not make any reasonable efforts tomove the litigation forward in that particular case. Accordingly, Grievant's request for reduction of the penalty imposed must be denied. (See footnote 3)

The following Conclusions of Law support the decision reached.

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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2007); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. The due process rights afforded an individual for less than a termination, or "a temporary deprivation of rights may not require as large a measure of procedural due process protection as a

permanent deprivation." *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 241 S.E.2d 164 (1978) (citing *North v. Bd. of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977)).

3. "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).

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. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

5. "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).

6. 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).

7. Respondent has met its burden of proof by a preponderance of the evidence, and proven the charges against Grievant that led to his suspension. Grievant was the onlyBCSE employee present at the hearing, and therefore, it was his responsibility to make an effort to obtain the information requested by Judge Steele.

8. Respondent provided Grievant with notice of the charges, explanation of the evidence, and an opportunity to be heard prior to imposing the suspension. As a consequence, Respondent provided Grievant with necessary due process protections.

9. The progressive discipline policy of Respondent was not violated in this matter.

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

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County. The appeal must be filed within thirty (30) days of receipt of this decision. 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 the Rules of Practice and Procedure of the West Virginia Public Employees Grievance Board, effective December 27, 2007, at . 6.19 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 certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County.

DATE: May 23, 2008

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Ronald L. ReeceAdministrative Law Judge

Footnote: 1

"An employee may proceed directly to level three upon the agreement of the employee and the chief administrator or when discharged, suspended without pay or demoted or reclassified resulting in a loss of compensation or benefits." W. Va. Code § 6C-2-4(a)(3) (2007).

Footnote: 2

Rule 3.2, West Virginia Rules of Professional Conduct, State Court Rules.

Footnote: 3

Grievant's final assertions that Respondent's actions were somehow a pretext, or based upon impermissible hearsay are not supported by the evidence presented at level three. Accordingly, they are without merit and need not be addressed.