# .THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**SANDRA LEE GIBSON,**

**Grievant,**

**v.** **Docket No. 2009-0424-DHHR**

**WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES/ BUREAU FOR CHILD SUPPORT ENFORCEMENT,**

**Respondent.**

## DECISION

Sandra Lee Gibson ("Grievant") is a Child Support Specialist 2 assigned to the Sutton area office of the Department of Health and Human Resources/Bureau for Child Support Enforcement ("DHHR"). Grievant has been employed in that office and position for eight years. On September 17, 2008, Grievant Gibson was suspended for three working days for allegedly failing to comply with the provisions of a performance improvement plan. Ms. Gibson filed a grievance contesting her suspension on September 24, 2008, at level three of the Public Employees Grievance Procedure.[1] A level three hearing was held in the Charleston office of the Public Employees Grievance Board on July 29, 2009. Grievant was present at that hearing and was represented by Gordon Simmons, of the UE Local 170, West Virginia Public Workers Union. Respondent DHHR was represented by B. Allen Campbell, Senior Assistant Attorney General. At the conclusion of the hearing, the parties agreed to submit written Proposed Findings of Fact and Conclusions of Law no later than August 28, 2009. Both parties hand delivered their

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[1] W. VA. CODE § 6C-2-4(a)(4) allows a grievant to proceed directly to level three to contest a suspension without pay.

fact/law proposals on August 28, 2009, and this matter became mature for decision on that date.

## Synopsis

DHHR alleges that Grievant has failed to meet the conditions of a performance improvement plan that was implemented as part of a settlement agreement resolving a previous grievance. Based upon Grievant's failure to successfully complete the plan, Respondent suspended Grievant for three working days. Grievant counters that Respondent did not implement the improvement plan in a timely way and that the suspension was retaliation for her prior participation in the grievance process. DHHR was able to prove Grievant did not successfully complete the terms of the performance improvement plan and Grievant failed to prove that the disciplinary action was a reprisal or retaliation. However, the agreement of the parties specified that the consequence for failing to complete the plan would be reinstatement of the written reprimand not suspension.

The following Findings of Fact are based upon a thorough review of the entire record in the grievance.

## Findings of Fact

1. Grievant, Sandra Lee Gibson, is employed by the DHHR Bureau for Child Support Enforcement as a Child Support Specialist 2. She has served in that position continuously for eight years in the Sutton area office.

2. Grievant was given a written reprimand for alleged poor job performance and filed a grievance contesting the reprimand on August 10, 2007.

3. During a mediation session, Grievant and DHHR entered into a settlement agreement whereby Grievant agreed to be placed on a corrective action plan for a period of two months. The two months were to commence on the date of the last signature on the settlement agreement. If Grievant successfully completed the corrective action plan the written reprimand would be reduced to a verbal reprimand. If Grievant failed to meet the requirements of the plan, the written reprimand would stand.[2]

4. At the time the settlement agreement was reached, Otis Cox was the Director of the Division of Personnel. He was the last person to sign the settlement agreement and his signature was dated June 6, 2008.

5. By the terms of the agreement, the corrective action plan for Grievant was to commence on June 6, 2008, and continue for two months. Accordingly, it would end on or about August 6, 2008, unless Respondent exercised the right reserved in the agreement to extend the corrective action plan due to Grievant's failure to successfully complete the plan. Respondent's Exhibit 4.

6. Holly Dennison is a supervisor at the DHHR Sutton area office and has been Grievant's supervisor for the past five or six years.

7. Ms. Dennison was Grievant's supervisor when Grievant received the written reprimand in the summer of 2007, but she did not participate in the mediation that led to the settlement agreement and was not immediately aware that the agreement had been reached.

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[2] The results of mediation conducted pursuant to the Public Employees Grievance Statute are confidential. 156 C.S.R. 1 § 5.2.1. However, compliance with the agreement is one of the basic issues in the grievance and Respondent offered the settlement agreement as an exhibit. Grievant did not object to admission of the agreement into the record. The confidentiality requirement was constructively waived by the parties.

8. Ms. Dennison was informed in early August that she was to prepare a corrective action plan for Grievant pursuant to the settlement agreement. She prepared a corrective action plan within a week of becoming aware of that obligation and held a meeting with Grievant regarding the plan on August 15, 2008.[3]

9. The corrective action plan was very comprehensive. It consisted of two columns. The left column contained the heading "**Deficiency**" and the right column contained the heading "**Performance Expectations"** (Emphasis in original)**.** Under the heading Deficiency were nineteen items. Each of these items listed a job duty of the Grievant. In the right column, beside each job duty, was a list of activities Grievant was expected to perform to properly complete the job duty.[4] The number of activities for each listed duty varied from one to seven, but most duties had three or four activities listed. Respondent's Exhibit 1.

10. The nineteen duties listed in the deficiency column included all of the areas of job performance that were performed by Grievant. Ms. Dennison included all of the areas of responsibilities in the corrective action plan because she believed that Grievant's performance was inadequate in all areas. At the August 15, 2008 meeting, Ms. Dennison read the plan to Grievant.

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[3] There was some indication that this meeting may have occurred on August 11, 2008. However, the majority of the testimony from both Grievant and Dennison identified the date as August 15, 2008. The exact date of this meeting is not essential to the outcome of this grievance.

[4] For example, Item 6 in the left column was "Phone Calls." In the right column was listed: "1. Calls need to be returned within 2 business days. 2. You must place a narr[ative] in each case a return call is made. . .even if you leave a message or no one answers."

11. Dennison informed Grievant that Item 18 of the plan required that Grievant meet with her every two weeks. The first meeting was scheduled for Monday, August 25, 2008, at 2:30 p.m. Additional meetings were to be held every two weeks thereafter on Monday at 2:20 p.m. If Grievant needed to re-schedule any meeting she was to contact Dennison immediately by e-mail to reset the meeting. Dennison gave Grievant a calendar with the meeting dates circled and asked if the dates would be acceptable. Grievant acknowledged that the dates were available at that time and kept the calendar.

12. On August 25, 2008, Grievant was at work but did not show up at her supervisor's office for the first meeting of her corrective action plan. Ms. Dennison did not remind Grievant of the meeting and it was not held.

13. On September 8, 2008, Grievant was at work but failed to attend the second scheduled meeting of her corrective action plan. Ms. Dennison did not remind Grievant of the meeting and it was not held.

14. Grievant did not attempt to contact Dennison regarding either of the scheduled meetings even though Grievant acknowledged that she knew they were scheduled. Ms. Dennison did not remind Grievant of the meetings because she felt that one of the reasons for the corrective action plan was for Grievant to be more responsible in the performance of her duties.

15. When Grievant received the corrective action plan in August, she was confused because it was not implemented in June when the last signature was acquired. She had hoped that DHHR had decided not to implement the plan and the matter had ended. When she was presented with the plan, Grievant told Ms. Dennison that she could not sign the plan until her representative had approved it. Ms. Dennison gave her the plan

to be shown to Grievant's representative and instructed Grievant to return a signed copy after her representative had seen it. Grievant never signed or returned the plan.

16. Grievant did not bring the lack of a plan to her supervisor's attention in June because she believed it was her employer's obligation to implement the plan.

17. When Ms. Dennison was first hired as Grievant's supervisor, Grievant had a different grievance pending. A hearing was not held in a timely fashion on that grievance and Grievant prevailed by default at a lower level with Ms. Dennison's supervisor as the hearing officer. Grievant believes that the allegations that she was not performing well on the job were actually reprisals for her prevailing in that prior grievance.[5]

18. Grievant's failure to be on time for work was one of the deficiencies to be addressed in the corrective action plan. Respondent's Exhibit 1, Item 14. Grievant was late for work by the listed amount of time on the following days in August 2008:

- August 6, 2008 15 minutes;
- August 8, 2008 60 minutes;
- August 14, 2008 60 minutes;
- August 19, 2008 60 minutes;
- August 21, 2008 30 minutes.

19. Grievant offered no explanation for her tardiness on these dates. Ms. Dennison allowed Grievant to take leave time for the missed time so that she would not lose pay.[6]

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[5] Neither the nature of the prior grievance nor the remedy were made clear on the record of this case.

[6] Grievant testified that in August she was caring for her sister, who was suffering from cancer and often had to take her sister to the doctor. However, it was not clear that the doctor appointments were the reason for Grievant's tardiness on these specific dates. It was clear that there were other times during the month that Grievant was granted leave for doctor's visits that were not cited in any disciplinary action. Grievant's sister died on

20. On September 15, 2008, Ms. Dennison met with Grievant Gibson and told her that information regarding her failure to comply with her corrective plan was going to be given to the commissioner with a recommendation that Grievant be suspended.

21. By letter dated September 17, 2008, Bureau for Child Support Enforcement Commissioner Susan Shelton Perry informed Grievant that she was suspended without pay for three working days beginning on Monday, October 6, 2008, and ending at the end of the workday on Wednesday, October 8, 2008. The reasons for the suspension were failure to sign and return the performance improvement plan("PIP") and failure to comply with the provisions of the PIP. As specific violations, Commissioner Perry noted the incidents of tardiness listed above and Grievant's failure to attend the scheduled PIP meetings.

**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 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). Where the

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August 30, 2008. Grievant's brother was also diagnosed with cancer in August. Fortunately, he recovered. However, this was undoubtedly a very difficult time for Grievant.

evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Respondent issued a written reprimand to Grievant in August 2007, expressing dissatisfaction with her job performance. A grievance was filed contesting that reprimand and an agreement was reached between the parties to settle that grievance. The agreement required Grievant to successfully complete a written performance improvement plan. The consequences of success or failure in this plan were specified in the agreement. If Grievant successfully completed the plan the written reprimand would be reduced to a verbal reprimand. If Grievant did not successfully complete the plan,[7] the written reprimand would remain intact. Respondent's Exhibit 4. Respondent was able to demonstrate that Grievant was not successful in completing the plan. Grievant failed to attend the first two meetings that were scheduled with her supervisor to review her performance and she was tardy on five days in the month of August 2008, when the plan was implemented.

However, Respondent was not completely compliant with the plan either. If the plan had been implemented starting on the date of the last signature it would have ended on August 7, 2008.[8] The plan would have concluded prior to Grievant receiving the burden of caring for her terminally ill sister. Also, three of the incidents cited for Grievant being tardy in August occurred prior to the implementation of the plan on August 15, 2008. Those dates were August 6, 8 and 14, 2008. Additionally, had Grievant's supervisor truly

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[7] In some of the documents the performance improvement plan was also referred to as a corrective action plan. For purposes of this grievance those terms refer to the same plan.

[8] The last signature was affixed to the agreement on June 6, 2008 and the plan was to last for two months from that date.

wanted to correct Grievant's performance, she would have reminded Grievant of the meetings on August 25 and September 8, so they could review her progress rather than simply noting Grievant's failure to attend. Nevertheless, Respondent did prove that Grievant failed to meet some of the requirements of the plan. Further, as Respondent noted in its argument, an employee is expected by the DHHR to arrive at work on time "no matter what is going on in an employee's personal life."[9] Respondent's Proposed Findings of Fact and Conclusions of Law, p 5.

Grievant argues that her job performance is adequate and Respondent's complaints are actually reprisals for her winning a grievance when her supervisor first took the supervisory position. WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal as "the retaliation of an employer toward a grievant, witness, representative or other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it. To demonstrate a prima facie case of reprisal the grievant must establish by a preponderance of the evidence the following elements:

> (1) that she engaged in a protected activity (i.e., filing a grievance);
> (2) that she was subsequently treated in an adverse manner by the employer or an agent.
> (3) that the employer or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

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[9] This position seems unduly rigid given the facts that two of Grievant's siblings were diagnosed with cancer during that month and Grievant was administering to her sister who died at month's end. As Justice Ketchem recently noted: "[s]ometimes we need to mix a little mercy with justice" *Lawyer Disciplinary Bd. v. Brown*, 2009 W. Va. LEXIS 45 (W. Va. May 6, 2009)(Ketchum J., dissenting).

*Hudok v. Randolph County Bd. of Educ.,* Docket No. 2008-0790-RANED (Jan. 13, 2009)*; Vance v. Jefferson County Bd. of Educ.*, Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.,* Docket Nos. 93-01-543/544 (Jan. 31, 1995).

Grievant participated in a protected activity, a grievance, and the employer certainly was aware of that fact. However, there was a basis for Respondent's action other than the filing of a prior grievance. Respondent was able to demonstrate specific instances of Grievant's failure to meet performance expectations that were the basis for its disciplinary action. Therefore the reprisal claim must fail for lack of a causal connection between the protected activity and the adverse treatment.

The final issue is the nature of the discipline taken. Under certain circumstances the punishment given to a grievant may be examined to determine if it is truly proportionate to the offense committed. *See 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). Such an examination is not necessary in this case. The parties set out the consequences of Grievant successfully completing the plan in their settlement agreement. The agreement specifically states the following:

> If Grievant successfully completes the Corrective Action Plan, Respondent agrees to reduce the written reprimand to a verbal reprimand. If Grievant does not successfully complete the Corrective Action Plan, Grievant agrees the written reprimand will remain intact. If grievant does not successfully complete the Corrective Action Plan, Respondent reserves the right to continue the Corrective Action Plan.

Respondent's Exhibit 4.

This agreement is unambiguous. The consequence for failing to satisfactorily complete the corrective action plan was that the written reprimand would remain.

Additionally, Respondent reserved the right to extend the plan. The parties did not agree that additional penalties could be added if Grievant failed to successfully complete the plan.[10] Both parties are bound by the provisions that they agreed to in the mediation.[11] The reasons cited for the suspension were directly related to Grievant's failure to successfully complete the corrective action plan. The suspension letter specifically states:

> To summarize, you have failed to sign and return your Performance improvement Plan, you did not attend your meeting with your supervisor to discuss your PIP, you did not ask to reschedule your meeting, and your attendance has been unreliable.[12]

Respondent's Exhibit 2. Respondent cannot add suspension as a penalty for failure to successfully complete this plan after agreeing to a specific lesser penalty. Therefore, the suspension for three working days must be overturned.

Grievant could have been disciplined differently for infractions not included in the corrective action plan and Grievant may be disciplined differently for poor performance after the plan is ended because of Grievant's failure to comply with its provisions. But Respondent is limited to the penalty clearly specified in the agreement for performance issues directly related to the plan which was created pursuant to the agreement.[13]

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[10] It seems that Grievant would have little incentive to enter into a settlement agreement contesting a written reprimand if the consequences of the agreement would be a greater punishment than she was facing without the agreement.

[11] W. VA. CODE § 6C-2-4(b)(2) provides that agreements entered into at level two mediation "are binding and enforceable in this state by mandamus."

[12] The plan required regular and prompt attendance at Item 14 and the meetings missed by Grievant were set out in Item 18.

[13] Respondent is not required to wait the full two months before moving forward with progressive discipline. Grievant was put on notice that she failed to meet the conditions of the corrective action plan by the letter of September 17, 2008. Respondent advised Grievant at that time that continued poor performance could lead to more severe penalties.

Accordingly, the grievance is GRANTED to the extent that the three day suspension is overturned and is null. The written reprimand that was the subject of the 2007 grievance is intact as was set out in the settlement agreement of the parties.

**Conclusions of Law**

1. This grievance involves a disciplinary action. 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 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. Respondent was able to prove by a preponderance of the evidence that discipline was justified.

3. West Virginia Code § 6C-2-2(o) defines reprisal as "the retaliation of an employer toward a grievant, witness, representative or other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it. To demonstrate a prima facie case of reprisal the grievant must establish by a preponderance of the evidence the following elements:

> (1) that she engaged in a protected activity (i.e., filing a grievance);
> (2) that she was subsequently treated in an adverse manner by the employer or an agent.
> (3) that the employer or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

*Hudok v. Randolph County Bd. of Educ.,* Docket No. 2008-0790-RANED (Jan. 13, 2009)*;* *Vance v. Jefferson County Bd. of Educ.*, Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.,* Docket Nos. 93-01-543/544 (Jan. 31, 1995).

4. Grievant did not prove that the disciplinary action taken by Respondent was the result of reprisal as defined in W. VA. CODE § 6C-2-2(o).

5. W. VA. CODE § 6C-2-4(b)(2) provides that agreements entered into at level two mediation are binding upon the parties who enter into them. The three day suspension issued to Grievant for failing to successfully complete the corrective action plan was in excess of the penalty agreed to by the parties and is therefore null.

Accordingly, the grievance is GRANTED. Respondent is Ordered to remove any records of the three day suspension and to reimburse Grievant for three days pay plus benefits and appropriate statutory interest.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *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 (2008).

**DATED: OCTOBER 7, 2009.**

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**WILLIAM B. MCGINLEY**
**ADMINISTRATIVE LAW JUDGE**