THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

GEORGIANA VELA,
Grievant,

v. **DOCKET NO. 2008-0180-DHHR**

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

DECISION

This grievance was filed at level three of the grievance procedure by Grievant, Georgiana Vela, on July 26, 2007, after she was suspended without pay pending the outcome of an investigation, by Respondent, the Department of Health and Human Resources/Bureau for Children and Families. The statement of grievance reads:

> On July 10, 2007, I was verbally advised of being suspended without pay and told to clear out my desk. This occurred without progressive discipline policy being followed. This action took place without just cause.

The relief sought by Grievant was "I am asking that my job be restored and made whole and to have the incident removed from my file." After completion of the investigation, Grievant was dismissed from her employment by letter dated September 14, 2007, and this grievance now includes a challenge to the dismissal.

Three days of hearing were held at level three before the undersigned Administrative Law Judge, with the first two days being held on January 29, 2008, and August 28, 2008, in the Grievance Board's Westover office. The third day of hearing was held by telephone on December 9, 2008. Grievant was represented by Laura E. Spadaro,

Esquire, and Respondent was represented by Jennifer K. Akers, Assistant Attorney General. This matter became mature for decision upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law on March 4, 2009.

Synopsis

Grievant was dismissed from her employment as a Child Protective Service Worker for failure to protect children, insubordination, and failure to report a conflict of interest. Respondent proved the charges against Grievant. Grievant's conduct was of a substantial nature directly impacting the rights and interests of the public.

The following Findings of Fact are made based upon the record developed at level three.

Findings of Fact

1. Prior to her dismissal, Grievant was employed by the Department of Health and Human Resources ("HHR"), as a Child Protective Service Worker in the Ohio, Brooke, Hancock District. She had been employed by HHR for nine years, and worked out of the Ohio County Office.

2. Michelle Hogan was Grievant's supervisor. Ms. Hogan's supervisor was Teresa Haught, Social Services Coordinator, and Ms. Haught's supervisor was Michelle Hall, Community Services Manager for Ohio, Brooke and Hancock Counties.

3. On June 28, 2007, Aric McCreery, an employee of the National Youth Advocate Program, a provider of services for HHR clients, supervised a visitation at the home of a client of Grievant's, JK/WP.[1] During the visit, WP told Mr. McCreery that he had

[1] In order to keep the identity of HHR's clients confidential, the clients' initials were used at the level three hearing, and will be used in this decision.

been working for Grievant's son for a couple of years, and that Grievant told him not to say anything because she would be removed from his case due to a conflict of interest. Mr. McCreery reported this conversation to Ms. Hogan, who reported it to her supervisor. Grievant had not advised any of her supervisors that one of her clients, WP, worked for her son.

4. HHR received a letter dated July 9, 2007, from Paula Silver, Assistant Prosecuting Attorney, Ohio County, raising issues about Grievant's casework on the JK/WP case, Grievant's failure to report information to the Multi-disciplinary Team ("MDT") assigned to the case, and the relationship between Grievant's son and WP.

5. Around this same time, HHR personnel also discovered that Grievant had used Gibson Funds to pay some electric bills for the JK/WP family, without authorization.

6. Ms. Hall spoke with Louis Palma, Regional Director, about the concerns which had been raised about Grievant, and he advised her to contact HHR's Office of Inspector General ("OIG") and request an investigation. Ms. Hall did so. Ms. Hall asked the OIG to investigate the alleged conflict of interest, the use of Gibson Funds, and Grievant's casework. The OIG agreed to investigate the first two issues, but they could not investigate Grievant's casework.

7. Ms. Hall spoke with Grievant on July 10, 2007. She asked her if she felt she had any conflicts of interest with any of her clients. Grievant replied that she did not. Ms. Hall asked her if WP worked for her son, and Grievant acknowledged that he did, but stated that she had asked the client if he wanted her to report this information, and he did not. Grievant told Ms. Hall she did not think she needed to disclose this information to her

supervisor. Grievant stated she thought this was a gray area, but she thought it was up to the worker to decide whether there was a conflict.

8. After Ms. Hall met with Grievant, on July 10, 2007, Grievant was suspended without pay by HHR, pending the outcome of an investigation by HHR's Office of Inspector General. The suspension letter, signed by Mr. Palma, states that "[t]he customary notice has been waived in order to protect the integrity of any evidence." The letter states the reasons for the investigation are as follows:

> On July 2, Ms. [Mickie] Hall [Community Services Manager] was made aware of a possible conflict of interest in the WP/JK case with which you were working. Upon review of the case, she determined there was a possible conflict of interest. She also reviewed other aspects of the case in which you had Gibson payments generated for this client(s) which were questionable specifically for the requests, authorization, and approval of Gibson funds. This is not the only case where there is question regarding your performance. A review of some of your cases has caused your supervisor, your Community Services Manager and me to lose confidence in your decision-making as it relates to casework. Therefore, a referral was made to the Office of the Inspector General for an investigation to be conducted.

Respondent's Exhibit Number 4.

9. By letter dated September 14, 2007, and signed by Mr. Palma, Grievant was dismissed from her employment by HHR, effective September 30, 2007. The letter explains the reasons for this action as follows:

> I, as well as your supervisors, believe that in more than one case, you have left children in unsafe situations and disregarded concerns and recommendations by other professionals working with the families in the cases assigned to you. You have failed to take protective action involving children in some of these cases. You have also been insubordinate by failing to follow policy and disregarding direction given you by your supervisors on more than a few occasions. In one specific case, you have acted in complete contradiction to direction given you by your supervisors, specifically by dispersing Gibson Funds in which your request was denied. One of the instances of insubordination resulted in violation of a Court Order. Attached is a compilation of the review of your casework.

> A review of the OIG report reveals "investigations disclosed Vela submitted unauthorized transactions involving Gibson funds for payment, thus acting insubordinate. Investigations further disclosed an employer and employer to employee relationship between Vela's son and Vela's CPS client [WP]. A personal relationship between Vela and [WP] could not be substantiated: however, statements of all parties are included in this report for evaluation based on SS policies." Your statement to [WP] regarding possibly being removed from this case because [sic] known to your superiors indicates that you realized there was a possible conflict of interest. Your supervisor, your coordinator and your CSM agree that this constitutes a conflict.
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> It is noted you have received and completed all the training for the Child Protective Service Worker.
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> Upon evaluation of all information made available to me, I have concluded that your action/lack of action creates a great liability for this agency. Moreover, I have lost complete confidence in your ability to carry out your job duties as expected and required. I have no reason to believe you would follow policy in the future with regard to making decisions that are in the best interest of the children we serve.

Respondent's Exhibit Number 6.

10. The dismissal letter advised that Grievant had the "opportunity to respond to the matters of this letter provided you do so by the close of business on September 30, 2007." The letter further states that Ms. Hall had attempted to contact Grievant, to discuss her recommendation of disciplinary action, but Grievant's telephone number was not in service. Respondent's Exhibit Number 6. Grievant did not respond to this letter.

11. Grievant was interviewed by the investigator for HHR's Office of Inspector General, Bennie Cogar. Grievant told Mr. Cogar that she did not believe she had a conflict of interest in the JK/WP case, but acknowledged that she told WP that if he mentioned to anyone that she was his employer's mother, she "would probably be removed as his worker." Grievant also admitted that "the new administration in the Ohio County Office

probably would" see this relationship as a conflict of interest. Grievant's Exhibit Number 5.

12. Mr. Cogar concluded in his report that Grievant had violated "Employee Conduct Code 2108 by acting insubordinate in approving two Gibson Fund transactions totaling $199 after being informed the transactions were not approved. SHE further attempted to approve for payment a third transaction involving Gibson Fund monies. VELA circumvented authority of supervisory staff to make unauthorized payments with Gibson Funds." Mr. Cogar could not substantiate the allegation of conflict of interest, noting that Grievant and WP did not have a close relationship. Grievant's Exhibit Number 5.

13. Gibson Funds are a funding source available to HHR for use to assist in reunifying families, or to keep children from being removed from the home. They are funds of last resort, and documentation is required to demonstrate a need for the funds, and that all other sources of funding have been exhausted, before the use of Gibson Funds is approved. Grievant did not have the authority to approve the use of Gibson Funds, and she was aware of this. She was required to submit a written request for these funds to her supervisor for approval.

14. On March 13, 2007, Grievant made a written request for Gibson Funds for the JK/WP case. She requested $2000.00 for a down payment on a house for the family. This request was denied in writing by Ms. Haught, and Grievant was aware of this. Grievant was advised that it would be more appropriate for the family to rent a home at a lower price, or seek a loan for the down payment. On March 15, 2007, Grievant again requested Gibson Funds for this same family, in the amount of $50.00 for a water deposit, $100.00 for an electric deposit, and $300.00 for bunk beds for the children. The request

for bunk beds was denied, and the remainder of the request was denied at that time due to lack of necessary documentation, and Grievant was aware of this. The form submitted by Grievant for approval was clearly marked as not approved. Nonetheless, Grievant used Gibson Funds to pay utilities for the JK/WP family. Between March 24 and May 31, 2007, Grievant used Gibson Funds to pay American Electric Power $199.00 in two payments. Grievant did not have approval to use Gibson Funds for these payments, and she was aware of this.

15. On May 29, 2007, Grievant again requested Gibson Funds for the JK/WP family for rent, and for the purchase of furniture. The request for Gibson Funds for furniture was denied. Grievant was directed by Ms. Haught that clarification was needed on whether the family was paying rent, or buying the home, and that documentation was needed that all other resources had been exhausted. The written request for Gibson Funds was returned to Grievant without being signed. Grievant marked the written request as approved "partially by T. Haught to pay one (1) month's rent." The documentation in HHR's computer system, "FACTS," states that Ms. Hogan had told Grievant the Gibson Funds could be used to pay one month's rent. Ms. Haught had not approved this, and Ms. Hogan had not told Grievant the Gibson Funds could be used for the rent.

16. Sometime in March 2007, an Order was entered by Judge Gaughan[2] ordering removal of children from the home of one of Grievant's clients, and ordering placement of the children at a particular out of state facility. Certain paperwork had to be completed in order to place the children out of state, and discussions took place among Ms. Haught,

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[2] The record does not reflect Judge Gaughan's first name, or the identity of the Court.

Tammy Lewis, Child Protective Services Supervisor, and Cathy Nogay, Guardian ad Litem, regarding placement of the children at the Children's Home of Wheeling ("CHOW") until the paperwork could be processed. Ms. Haught advised Grievant of these discussions by email dated March 30, 2007, stating in conclusion that "I believe Cathy is going to speak to the other MDT members to see if they would be in agreement with this plan and then request a court order from the Judge allowing the children to be placed at CHOW." Grievant, on her own, placed the children at CHOW, without the approval of the other members of the MDT, and in direct violation of the Court Order.

17. Tanagra O'Connell, Social Services Program Manager for Region 1, was assigned the task of reviewing Grievant's cases. She, in turn, assigned this project to Stephanie Dawson and Bob Wiedebusch, Child Welfare Consultants for Region 1. Grievant had 27 cases assigned to her in July 2007, which were reviewed. Ms. Dawson and Mr. Wiedebusch reviewed the paper files for each case, if available, entries made for each case on the computer file in FACTS, and all contacts listed by Grievant, and they contacted service providers. They documented their findings and shared their observations with Ms. O'Connell. They found caseworker problems in 14 of the 27 cases, and 4 cases had child protection issues, where Grievant had failed to take some action which was called for. Ms. O'Connell found Grievant's casework to be poor.[3]

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[3] Grievant noted that she had been assigned a number of cases which had originated with other employees, and that she had a large caseload in the Spring of 2007. Grievant received the cases from other employees in February 2007. By July of 2007, these families had been Grievant's responsibility for five months. Further, it is clear from the testimony of Ms. Dawson and Mr. Wiedebusch that it was Grievant who had not taken the proper action, not the previous caseworker.

18. The CW case was closed by Grievant, rather than transferred to another HHR district or another state, when the client moved. The proper procedure would have been to transfer the case.

19. Ms. Dawson reviewed the MP case, and concluded that Grievant failed to take protective action. Service providers had reported unsavory individuals in the home, lack of supervision, improper parenting, and uncooperative behavior with in home services. There were issues with the child attending school, there was a report from the school of alcohol being smelled on the parent, and the child missed a medical appointment. Grievant found no improper behavior, she did not evaluate whether there was a substance abuse issue, and she did not discuss the failure to cooperate with providers with the family. Grievant closed this case, and it was reopened two months later.

20. Ms. Dawson reviewed the DR/GR case. In this case there were domestic violence issues, and the father was not cooperative. The father was required to participate in counseling. Grievant did not document any contacts with the counselor to see whether the father participated in counseling. When the mother moved to Ohio, Grievant did not refer the case to Ohio. She closed it. There was no documentation of outcomes, and no follow-up.

21. Ms. Dawson reviewed the HB case. The mother was staying at a domestic violence shelter. The case file did not contain the report from the shelter which had been sent to Grievant. There were reported concerns about parenting skills and that there was not a stable home for the children. Grievant's safety assessment concluded that there were no concerns.

22. Ms. Dawson reviewed the RM case. There was a report from Paula Silver, Assistant Prosecuting Attorney, that Grievant had testified in a hearing that she interviewed neighbors of the family, and they had told her they had no concerns about the family. This testimony was contrary to the information Ms. Silver had obtained, and there were no contacts listed by Grievant in FACTS to support her statement that she had spoken to any neighbors.

23. Ms. Dawson reviewed the DK/MC case. That case was opened in April of 2007, and assigned to Grievant on April 26, 2007. HHR's records do not show any contacts were attempted by Grievant until June or July of 2007, and no family assessment or treatment plan had been done. The father had been drinking alcohol while driving, with the child in the car, and was to attend outpatient treatment. Grievant had not checked to see whether the father was attending treatment. Ms. Dawson checked on this, and discovered that he was not attending.

24. Ms. Dawson reviewed the MB case. This case was opened because of lack of supervision of a four year old child, and was assigned to Grievant in April 2007. HHR received a report that the same adult had left an eight year old child home alone in June 2007. Grievant found no safety concerns with this second episode of lack of supervision.

25. Mr. Wiedebusch reviewed the AW/JB case. Mr. Wiedebusch found that the information entered by Grievant into FACTS differed from the report of progress by the provider. Specifically, the May 2007 Progress Report from the provider noted a concern "regarding the parents' cognitive ability to gain much knowledge from the parenting curriculum, does not feel there has been much progress in their parenting skills." The worker assigned to a case is to relay the information in the provider reports to the MDT.

Grievant did not bring the information in the May 2007 Progress Report to the attention of the MDT. She noted on the MDT Screen on July 6, 2007, that an improvement period was to be initiated, and no barriers were noted.

26. Mr. Wiedebusch reviewed the JK/WP case. Mr. Wiedebusch found that Grievant did not follow-up on a psychological report which indicated the children should not be returned to the home until allegations of physical and sexual abuse were investigated throughly. Grievant also did not bring problem behaviors of the children and provider concerns, such as lack of progress due to parental noncompliance, to the attention of the MDT. On July 10, 2007, Grievant had indicated that the family was ready for reunification.

27. Mr. Wiedebusch reviewed the TM/JC case. Grievant had noted she was in the home on March 18, 2007, and noted no concerns. Other department staff found the home in deplorable condition in March and July 2007, specifically on March 23, 2007.

28. Grievant was provided with a copy of the summary of Ms. Dawson's and Mr. Wiedebusch's analysis of her cases, as an attachment to the dismissal letter.

29. Prior to her dismissal, Grievant's overall performance had been rated as "meets expectations" on her most recent performance evaluations, and she had never been disciplined. Grievant's performance evaluation signed on September 15, 2005, noted four areas in which Grievant needed to improve her performance. The comment in one section of this evaluation noted that complaints had been received about Grievant's work from attorneys and foster parents. The comment on another section stated that Grievant had not completed family assessments and treatment plans on most of her cases.

30. In 2005, the Guardian ad Litem for a child whose family was one of Grievant's clients, complained to HHR about testimony Grievant had given at a hearing. Ms.

O'Connell's review of the situation led her to conclude that there was no basis for the testimony given by Grievant.

31. Grievant was dismissed because her supervisors believed this was in the best interest of the children and families who were Grievant's clients. For this reason, Ms. Hall did not believe Grievant should have been placed on an improvement plan. Also, Grievant did not acknowledge that the matters Ms. Hall spoke with her about during the conference on July 10, 2007, were problems.

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). "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). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, [175 W. Va. 279, ___,] 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir. W. Va. State College,* Docket No. 93-BOD-436 (Dec. 30, 1994).

The first issue which must be addressed is Grievant's argument that her due process rights were violated. Grievant asserted that the dismissal letter did not sufficiently advise Grievant of the reasons for her dismissal, and that the summary of problem cases prepared from the work of Ms. Dawson and Mr. Wiedebusch, and provided to Grievant with the dismissal letter, did not adequately notify her of the "policies, statutes, rules or codes of ethics" violated.

"Where an act of misconduct is asserted in a notice of dismissal, it should be identified by date, specific or approximate, unless the characteristics are so singular that there is no reasonable doubt when it occurred. If an act of misconduct involves persons or property, these must be identified to the extent that the accused employee will have no reasonable doubt as to their identity." Syl. Pt. 2, *Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981), citing Syl. Pts. 4 and 5 of *Snyder v. Civil Serv. Comm'n*, 160 W. Va. 762, 238 S.E.2d 842 (1977).

The dismissal letter clearly identified the reasons for Grievant's dismissal. It identified the client when noting the conflict of interest and the unauthorized use of Gibson funds, and the summary of problem cases identified the client and the problems found by Ms. Dawson and Mr. Wiedebusch, and cited to a policy which was violated. The dismissal letter met the notice requirements.

Grievant was charged with insubordination. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(*per curiam*). *See Riddle v. Bd. of Directors, So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31,

1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and c) the order (or rule or regulation) must be reasonable and valid." *Butts, supra.* In other words, there must be not only a refusal to obey a reasonable and valid order, but the refusal must be wilful. *Id.* "[F]or a refusal to obey to be 'wilful,' the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order." *Id.*

There is no dispute that Grievant used Gibson Funds to pay for utilities for the JK/WP family, after her request was specifically denied by her supervisor. Grievant also falsified a document, writing on the document that Ms. Haught had approved the use of Gibson Funds when she knew this was not true. Grievant decided to place children at CHOW in violation of a Court Order, and without the consent of the MDT. Grievant chose not to bring to her supervisors' attention the fact that one of her clients worked for her son, even though she acknowledged this would likely be considered a conflict of interest by her supervisors. All of these acts, proven by Respondent, paint a picture of an employee who had decided that she could do as she wished, without anyone else's approval; and in at least two instances, with the explicit disapproval of her supervisor.

This picture continued as Respondent's witnesses related the lack of documentation in the case files maintained by Grievant, the decisions by Grievant to ignore the observations of service providers, and the decisions by Grievant to not keep the MDT up to date on case developments.

Grievant testified at the level three hearing. The bulk of her testimony addressed the good evaluations she had received over her tenure, and her caseload in general. Grievant did not attempt to explain why she had placed children at CHOW in violation of a Court Order, and without the approval of the MDT, why she had not reported that WP worked for her son, why she had used Gibson Funds for utilities for the JK/WP family when her request for this had been specifically denied, or why she had noted on the Gibson Funds request that it was partially approved by Ms. Haught when Ms. Haught had not approved the request. Grievant further did not specifically address any of the cases where Respondent's investigation had concluded that Grievant had placed children at risk.

Respondent proved the charges against Grievant, and it proved that Grievant's conduct was of a substantial nature directly impacting the rights and interests of the public, in particular, the children Grievant was charged with protecting.

Grievant also argued that HHR was bound to follow its Progressive Discipline Policy. Grievant did not place this Policy into evidence for the undersigned to review. Ms. Haught testified that steps in this Policy may be omitted based on the seriousness of the offense. She stated that an employee may be dismissed for a singular incident which is of such severity that dismissal is warranted. The Grievance Board has reviewed HHR's Progressive Discipline Policy in other cases, and has determined that:

> 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). That policy states, in part: Determined by the severity of the violation, progressive discipline is the concept of increasingly severe actions taken . . . to correct or prevent an

> employee's initial or continuing unacceptable work behavior or performance. It is important to remember, however, that the level of discipline will be determined by the severity of the violation.
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> Specifically with regard to suspensions, the Policy Memorandum states that they "may be issued where minor infractions/deficiencies continue beyond the written warning **or** when a more serious singular incident occurs." Resp. Ex. 5 (Emphasis added).
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> As recently noted in *Stiles v. Dep't of Health and Human Resources*, Docket No. 07-HHR-162 (March 31, 2008), pursuant to DHHR's progressive discipline policy, "a suspension may be issued for a 'serious singular incident . . .' and DHHR did not necessarily violate this policy by issuing a suspension for conduct which it believed was of a serious nature." However, in that case, although a suspension was not found to be improper, mitigation was granted, due to the particular circumstances in that case (employer did not have formal policies and/or training regarding the system Grievant was accused of abusing).

Brown v. Dep't of Health and Human Resources, Docket No. 2008-1229-DHHR (Nov. 24, 2008).

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 agency 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).

The 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).

While Grievant demonstrated she had received good performance evaluations, even those evaluations note problems with Grievant's work. More importantly, these performance evaluations do not serve to disprove the inadequacies found when an in depth analysis of Grievant's case work was performed, which concluded that Grievant had placed children at risk. Likewise, these good evaluations do not excuse Grievant's falsification of documents in order to obtain Gibson Funds for a client. Grievant seemed to argue that she should not be dismissed because Respondent presented no evidence that any child had actually suffered harm as a result of her actions. Respondent is not

required to wait until Grievant does some damage to a child before it can act. Grievant did not demonstrate that the punishment imposed was excessive given the seriousness of her actions.

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. W. VA. CODE § 29-6A-6; *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, [175 W. Va. 279, ___,] 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir. W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994).

3. "Where an act of misconduct is asserted in a notice of dismissal, it should be identified by date, specific or approximate, unless the characteristics are so singular that there is no reasonable doubt when it occurred. If an act of misconduct involves persons or property, these must be identified to the extent that the accused employee will have no reasonable doubt as to their identity." Syl. Pt. 2, *Clarke v. W. Va. Bd. of Regents*, 279 S.E.2d 169 (W. Va. 1981), citing Syl. Pts. 4 and 5 of *Snyder v. Civil Serv. Comm'n*, 238 S.E.2d 842 (W. Va. 1977).

4. The dismissal letter clearly identified the reasons for Grievant's dismissal. It identified the client when noting the conflict of interest and the unauthorized use of Gibson funds, and the summary of problem cases identified the client and the problems found by Ms. Dawson and Mr. Wiedebusch, and cited to a policy which was violated. The dismissal letter met the notice requirements.

5. Respondent proved the charges against Grievant. Grievant's actions were of a substantial nature, directly impacting the rights and interests of the public.

6. HHR'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).

7. 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 agency 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).

8. Grievant did not demonstrate that the penalty imposed was excessive given the seriousness of the offenses.

Accordingly, this grievance is **DENIED**.

Any party or the Division of Personnel 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 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. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: April 7, 2009