THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

MICHAEL WILLIAM HAWK,
Grievant,

v. **Docket No. 2009-0812-DHHR**

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

DECISION

Michael William Hawk, Grievant, filed this grievance against Respondent, Department of Health and Human Resources/Bureau For Children and Families (DHHR), on December 19, 2008, challenging a demotion. His unedited statement of grievance and relief sought reads as follows:

> On Dec 9th I was informed that I was demoted to a case aid, as I did not have my social work license in on time. At no time was I without a license.
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> Before I took a vacation on 11/21/2008, I was informed that I would be demoted if I did not have my social work license renewed on time. I had already sent my information to the Social Work board, and was awaiting my renewal. While on Vacation, I was able to speak with Judy Williams from the Social Work board on 11/24. Judy reported that all of my information was in, and that she was looking at it on her desk. It had been there for some time, but she was shorthanded, as someone in the office had been out on Medical Leave, and she did not know if she could get all of the work done. I let her know that my license expired on 12/02/2008, and she did not state that she knew that she could get to it on time. I then called my supervisor Chris Aubrey, and reported this to him. He too was having the same problem, as his license was up for renewal as well.
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> After returning to work I made many calls to the board to see if the license was ready. On 12/02/2008 the board sent a fax reporting that my license was renewed and that my payment was processed. The license was valid, and they had sent it out. The fax also included the dates in which I had sent the board my information. My information was in on time. I informed my supervisor, and he was pleased, as my old license was to expire on the same day. Thus there was no lapse in my licensing. My license came in the mail on Dec 5th. I was not allowed to go home to get the license without

> taking annual leave. Per Chris Aubrey. I brought the physical license in on Dec 8th.
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> On Dec 9th, I was informed by Chris Aubrey that I was going to be demoted to Case Aid for a pay period, as I did not have my license in on my hand on time. I am not to perform any CPS duties until Dec 16th at noon. During this time I was required to attend court and MDTs and give my input. These are CPS duties. The only difference was that my supervisor sat beside me, while I gave my input. This did not take away from the fact that I was doing the work. I was also asked to perform other tasks such as entering referrals, which I have never seen a case aid do.
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> I am attaching the FAXs from the social work board, and copies of my license with no lapse in validity. I am seeking the lost wages, which I am estimating will total over $600. I will not know the exact number until the next pay period. I believe they are starting the demotion on Dec 3rd. I am also asking to not be responsible for the lost work productivity, which was not due to my negligence. I am being asked to work overtime to catch up on the work. If necessary, I can provide at least one past worker who was not suspended for the same problem.

As this grievance concerned a disciplinary matter, Grievant filed directly to level three following his demotion for one pay period. W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held before the undersigned Administrative Law Judge on May 6, 2009, at the Grievance Board's office in Westover, West Virginia. Grievant represented himself and Respondent appeared by B. Allen Campbell, Senior Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on June 13, 2009.

Synopsis

Grievant was demoted for one pay period for failure to maintain a license to practice social work. Respondent asserts that Grievant's license expired on December 2, 2008 and he failed to provide documentation of an extension granted by the Board of Social Work Examiners. Respondent's policy on the matter mandates that all employees assigned to

a classification that requires a social work license must be properly licensed pursuant to state law. The evidence demonstrated that Grievant was properly licensed by the Board of Social Work Examiners on December 2, 2008 and Grievant properly maintained a valid license to practice social work. The evidence further demonstrated that this information concerning Grievant's license renewal on December 2, 2008 was communicated to his supervisor. Respondent failed to prove by a preponderance of the evidence that Grievant did not maintain his license to practice social work. This grievance is granted and Grievant's request for back pay is granted.

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

Findings of Fact

1. Grievant is employed by DHHR as a Child Protective Service Worker in its Ohio/Brooke/Hancock District.

2. Throughout the relevant time period in question in this grievance, Grievant possessed a temporary social worker license issued by the West Virginia Board of Social Work Examiners. A valid license to practice social work is required in order to maintain a Child Protective Service Worker position.

3. On April 5, 2005, Margaret Waybright, then Commissioner for DHHR's Bureau for Children and Families issued a memorandum regarding social worker licenses. The memorandum provides that any employee assigned to a classification that requires a social worker license must be properly licensed, that if an employee is not properly licensed, the employee shall not be allowed to practice social work, and that it is the employee's responsibility to fulfill the requirements necessary to maintain their license. The memorandum notes it is management's responsibility to verify that all employees do

possess a valid social worker license. Finally, the memorandum states that any employee who does not have a valid license shall be demoted immediately to the classification and duties of a Health and Human Services Aide with the following conditions: 1) An employee so demoted will have 60 calendar days to obtain a valid license; 2) if an employee fails to obtain a valid license within 60 days the employee will be terminated; 3) if the employee obtains a valid license, then the employee will be returned to their classification and salary; and 4) no demotion shall be for the duration of less than one pay period.

4. In November of 2008, Mickie Hall, the Community Service Manager for the Ohio/Brooke/Hancock District, held a conference with Grievant outlining the personnel procedures that would occur if Grievant failed to renew his social worker license. At that time, Grievant's temporary social worker license was set to expire on December 2, 2008.

5. On November 14, 2008, Ronda Colanero, Regional Director, Region I, sent Grievant a correspondence which indicated that due to his failure to maintain a valid social worker license he was being demoted effective December 3, 2008.

6. Grievant sent his renewal application to the Board of Social Work Examiners in October 2008; however, Grievant did not send his continuing education information on the correct form and had to resubmit that information on November 20, 2008.

7. Chris Aubrey, Grievant's supervisor, was aware that the Board of Social Work Examiners was having difficulty processing license applications due to a staffing shortage. Out of concern over possible delay, Mr. Aubrey instructed Grievant of this problem on November 24, 2008, and encouraged him to check on the status of the renewal.

8. Grievant received a fax communication from the Board of Social Work Examiners on December 2, 2008 stating that his application for temporary license renewal

had been processed on that date. Grievant's license renewal from the West Virginia Board of Social Work Examiners clearly indicates that it was issued on December 2, 2008. Grievant's previous license expired on that same date; therefore, at no time was Grievant without a license to practice social work.

9. Grievant did not have a copy of the social worker license in hand until December 8, 2008.

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 Bd. 156 C.S.R. 1 § 3 (2008); *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). "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). In other words, "[t]he 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).

Respondent's sole assertion at level three in support of Grievant's demotion was his failure to renew his license in a timely manner so that he had a license in hand on December 2, 2008, the date his temporary license to practice social work expired. While

Respondent understands "Grievant's dilemma, it is his responsibility to ensure that he has a valid license in hand lest he be demoted according to agency policy."[1] The undersigned disagrees with this analysis.

"An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs. Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d220 (1977)" *Morris v. Kanawha County Bd. of Educ.*, Docket No. 99-20-200 (July 27,1999). The policy upon which DHHR relies mandates that all employees assigned to a classification that requires a social worker license must be properly licensed pursuant to the provisions of W. VA. CODE § 30-30-4.[2] This policy does not provide that an employee in a classification that requires a social worker license "have a valid license in hand." The policy, and the statute which the memorandum cites, requires that the employee be properly or duly licensed to practice social work. Such was the status of Grievant in this case.

Grievant's letter informing him of DHHR's decision to demote him is based upon Grievant's alleged failure to maintain a valid license to practice social work as required by the West Virginia Board of Social Work Examiners. Respondent has failed to establish this charge against Grievant by a preponderance of the evidence. The record of this matter

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[1]Respondent's proposals, page 3.

[2]W. VA. CODE § 30-30-4(a) provides, in pertinent part, that "no person may represent that he or she is a social worker by using such titles as independent clinical social worker, certified social worker, graduate social worker, social worker or any other title that includes a facsimile of such words unless he or she is duly licensed under the provisions of this article or specifically exempted hereunder . . ."

This statute provides that any person violating this section is guilty of a misdemeanor, and may be fined up to five hundred dollars or imprisoned for up to one year, or both.

established that the Board of Social Work Examiners issued a renewal of Grievant's temporary social worker license on December 2, 2008 with an expiration date of December 2, 2010. Grievant's previous temporary license was issued on December 2, 2006 with an expiration date of December 2, 2008. Contrary to Respondent's assertion, Grievant maintained his license to practice social work. That is all that is required.

Respondent's letter of demotion goes on to state "[f]ailure to maintain a license to practice social work is a very serious matter. It is your responsibility to take appropriate action to maintain required credentials for your position. Surely, you understand the liability you have placed upon the Department and understand that we cannot, by law, allow you to continue to practice social work until this matter is resolved. Effective Wednesday, December 3, 2008 are [sic] not to engage in any social work practice." Respondent's concerns over the seriousness of the matter and potential exposure to liability were both premature and misplaced. Grievant fulfilled his responsibility to maintain a valid social work license with the Board of Social Work Examiners satisfying both DHHR's policy and W. VA. CODE § 30-30-4.

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 Bd. 156 C.S.R. 1 § 3 (2008); *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. "An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs. Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d220 (1977)" *Morris v. Kanawha County Bd. of Educ.*, Docket No. 99-20-200 (July 27,1999).

3. DHHR failed to prove by a preponderance of the evidence that Grievant did not maintain a valid license to practice social work as required by the West Virginia Board of Social Work Examiners, DHHR's policy, and the controlling statute.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to pay Grievant back pay for the pay period he was demoted in the amount of the difference between his pay as a Health and Human Service Aide and as a Child Protective Service Worker, and to compensate Grievant for all benefits for which he is entitled. No interest will be awarded as Grievant did not request it.

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 (eff. July 7, 2008).

Date: August 28, 2009

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Ronald L. Reece
Administrative Law Judge