THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TAMMY DAWN FRAZIE,
Grievant,

v. **Docket No. 2009-0663-DOR**

DEPARTMENT OF REVENUE/
INSURANCE COMMISSION,
Respondent.

DECISION

Grievant is employed by Respondent as an Employment Programs Specialist Senior with the Office of Judges Division, Offices of the Insurance Commissioner. She filed this grievance on November 12, 2008, alleging:

> 5-day suspension w/o pay. Policies were requested in writing and directives that were never given to me. Misleading information in first & final reports as well as false information, new information in second report that I was unable to respond to since it should have been in the first report. Hostile work environment, continued retaliation & harassment, and discrimination.[1] Told it was a non-work related matter & could of respond [sic] on work time.

For relief, Grievant seeks:

> False & hearsay information taken out of my report and file. A written statement of being falsely accused of being in the building after hours on several occasions[2], permission to delete emails, job duties appropriate to my skills and education, realistic expectation in my work improvement plan, etc. etc. etc.

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[1]At the conclusion of testimony, Respondent made a motion to dismiss Grievant's claims of harassment and discrimination, as no evidence had been presented to support those claims. After hearing the parties' arguments, these claims were dismissed because they were not supported by the evidence.

[2]Testimony during the hearing indicated that the allegations of Grievant being in the building after hours were not founded, and therefore, that allegation was taken out of the disciplinary letter.

A hearing was held on January 23, 2009, in the Grievance Board's Charleston office. Grievant was represented by Reverend Terry Yahr, and Respondent was represented by Gregory A. Elam, Associate Counsel. This case became mature for decision at the conclusion of the hearing, as parties opted not to file proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was suspended for five days for misuse of office equipment and work performance. Grievant argues she is treated differently from other employees who send out non-work related emails. Grievant also asserts she is a pleasant worker who is able to handle special projects.

Respondent avers Grievant was using work equipment for personal and secondary employment. Respondent also argues Grievant's work performance was less than satisfactory. Upon investigating, there appeared to be a correlation between her failing work performance and the times she was working on her secondary employment.

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

Findings of Fact

1. Grievant is employed as an Employment Programs Specialist Senior with the Office of Judges Division, Offices of the Insurance Commissioner.
2. Grievant's Supervisor, Nancy Workman, had noticed there were problems with the accuracy of Grievant's work. Also, Grievant was not working at the volume expected.

3. Ms. Workman continually addressed this with Grievant via email and discussions with her.

4. After some of the discussions with Ms. Workman, Grievant alleged she needed additional computer training, and Respondent accommodated her by sending her to additional training.

5. On August 20, 2008, Grievant was given an Employment Performance Appraisal (EPA) due to a substantial change in duties.[3]

6. On September 9, 2008, an anonymous email was sent to Judge Leach[4] with a copy of an email from Grievant attached.

7. The anonymous email said, "This is the type of work your employees are doing on insurance time." An attached email was from Grievant soliciting donations for her rental properties on the West Side. The email was signed by her from Diamond Star Realities, and was sent from her state-issued email account.

8. Between June 18, 2008, and October 2, 2008, Grievant used her state-issued email account and computer to send nine personal emails.

9. Between March 29, 2007, and October 16, 2008, Grievant used her state-issued email account and computer to send and/or draft 44 emails and documents for personal gain.

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[3]The change in job duties had nothing to do with Grievant's performance. When employees came to the Insurance Commission from Workers' Compensation, they were placed in positions based on job skills. However, the Commissioner could reorganize as needed. Grievant's change in duties was as a result of that.

[4]Judge Leach was the Chief Administrative Law Judge for the Office of Judges at the time this email was sent.

10. The emails and documents for personal gain included documentation indicating she was working for a company called Ameriplan, that is regulated by Respondent.

11. Grievant's involvement with Ameriplan constitutes a conflict of interest, as the company is regulated by Respondent.

12. Until Respondent began to investigate Grievant's computer use, no one in the office was informed of her involvement in Ameriplan.

13. Grievant was suspended for five days due to the volume of personal emails and the documents and emails for personal gain.

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 (2008); *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 suspended Grievant for violating Office of Insurance Commission (OIC) policies. Specifically OIC Policy IC-060 specifically prohibits employees from conducting personal and/or profit making activities on Commission-provided IT sources.

This policy also states that Commission-provided IT resources are to be used only for work-related purposes.

Division of Personnel Policy P-21 governs secondary employment. This policy prohibits employees from using work time, supplies, or equipment to perform work for the secondary employment. It also requires employees to inform the agency and the secondary employer if there is a conflict. This policy also explains that secondary employment must not interfere with the employee's official duties. In addition, it sets forth the procedure employees must go through to notify the state agency of secondary employment to ensure no conflicts and provides the necessary form.

W.Va. CSR §143-1-17 prohibits employees from having conflicting employment while in the classified service. This section, along with W. Va. CSR §158-6-8 prohibits public employees from receiving private compensation for performing private work during public work hours.

Grievant argued others in the agency were allowed to use their computer and state-issued email address for personal use without disciplinary action being levied. First, Grievant sent a considerable amount of personal emails. However, that alone is not the basis for the suspension. Perhaps the more egregious conduct was using her state-issued computer and email address for personal gain. When reviewing the voluminous documents admitted by Respondent, it is very clear Grievant was spending a considerable amount of time working on her various secondary employments during work hours and was unable to efficiently and effectively complete her work assignments in a timely manner. What is more troubling is that Grievant doesn't seem to understand that creating numerous documents, sending emails, and making phone calls is wrong. She is very

fortunate Respondent chose only to suspend her for the five days. With that being said, the undersigned believes from the testimony that Grievant can be a proficient and productive worker, and Respondent sees that potential in her.

Respondent has met its burden, and this grievance must be denied. The undersigned, therefore, makes the following Conclusions of Law.

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 (2008); *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.*
2. Division of Personnel Policy P-21 requires an employee provide all necessary information to the agency before obtaining secondary employment and prohibits employees from using state equipment and time to perform duties for secondary employment.
3. W. Va. CSR §143-1-17 prohibits employees from having conflicting employment while in the classified service.

4. W. Va. CSR §158-6-8 prohibits public employees from receiving private compensation for performing private work during public work hours.

5. Respondent has met its burden.

WHEREFORE, based upon the foregoing, the grievance is **DENIED**.

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).

Date: March 23, 2009

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Wendy A. Campbell
Administrative Law Judge