THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SANDRA LEE GIBSON,

Grievant,

v. **Docket No. 2009-1475-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 March 27, 2009, Grievant Gibson was given a letter suspending her for ten days without pay due to continuing poor performance and failure to comply with a Performance Improvement Plan.[1] On April 16, 2009, Sandra Gibson filed a grievance contesting the suspension. Since this grievance involves a suspension, she filed it at level three. *See* W. VA. CODE § 6C-2-4 (a)(4). As relief, Grievant seeks "to be made whole concerning this issue."[2] A level three hearing was held in the Charleston office of the Public Employees Grievance Board on July 29, 2009. Grievant appeared in person and

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[1] The suspension letter was hand delivered to Grievant by her supervisor and was signed by Susan Shelton Perry, Commissioner for the Bureau for Child Support Enforcement.

[2] From this statement it can be reasonably surmised that Grievant seeks to have the suspension overturned and to be compensated for the ten days of lost pay.

through her representative, Gordon Simmons, UE local 170, WVPWU.[3] Respondent DHHR was represented by B. Allen Campbell, Senior Assistant Attorney General. At the conclusion of the hearing, the representatives for the parties agreed to submit proposed findings of fact and conclusions of law. Both parties submitted proposals, the last of which was delivered to the Grievance Board on October 16, 2009. This grievance became mature for decision on that date.

Synopsis

Respondent asserts that Grievant was not meeting performance expectations. Grievant was provided with a Performance Improvement Plan[4] to provide guidance regarding Respondent's expectations, and meetings were scheduled to discuss how those expectations might be met. DHHR argues that Grievant did not improve her performance and did not comply with the provision of the plan, therefore, discipline was justified. Grievant alleges that her performance met standards and that she was not given training necessary to help her succeed in areas where her skills may have been weak.

Respondent proved that Grievant failed to successfully meet the expectations set out in her Performance Improvement Plan and discipline was justified.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

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[3] West Virginia Public Workers Union.

[4] The Performance Improvement Plan is also referred to by the parties as a corrective action plan and a PIP. These terms are used interchangeably herein and all refer to the same document.

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. 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.

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

5. On August 15, 2008, Supervisor Dennison held a meeting with Grievant and discussed the corrective action plan she had prepared consistent with the prior settlement agreement.

6. 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.[5] The number of activities for each listed duty varied from one to seven, but most duties had three or four activities listed.

7. 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.

8. 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.

9. 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

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[5] 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."

incidents of tardiness listed above and Grievant's failure to attend the scheduled PIP meetings.

10. Grievant Gibson filed a grievance contesting the three-day suspension and the suspension was overturned by the Grievance Board decision in *Sandra Lee Gibson v. W. Va. Dep't of Health & Human Res./Bureau for Child Support Enforcement*, Docket No. 2009-0424-DHHR (Oct. 7, 2009) (Hereinafter referred to as *Gibson 1*). In that decision, the Administrative Law Judge ("ALJ") held that DHHR proved that Grievant failed to comply with the Performance Improvement Plan and that discipline was justified. However, the three-day suspension was reduced to a written reprimand because, in the mediated settlement, that was the penalty the parties agreed would be implemented for failure to comply with the plan.

11. By agreement of the parties, the factual record developed in *Gibson 1* is incorporated into the record in this case.

12. On March 26, 2009, Grievant met with Supervisor Dennison and the Bureau's Regional Manager, Charlotte Stalnaker.[6] Grievant's co-worker, Sue Davis, attended the meeting as Grievant's representative. At that meeting, Grievant's supervisors informed her that she was still not meeting the requirements of the corrective action plan and that her performance was below acceptable standards. The supervisors shared with Grievant that they were recommending further disciplinary action be taken against her. Grievant did not respond directly to the allegations but stated that she understood the action that was being proposed.

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[6] Ms. Stalnaker is Ms. Dennison's direct supervisor.

13. Grievant received a letter from the Bureau Commissioner, Susan Shelton Perry, dated March 27, 2009. The letter informed Grievant that she was suspended for ten days, beginning on April 6, 2009, due to poor performance. The specific reasons for the suspension were:

- Missing, and failing to reschedule, the appointed meetings that had been scheduled with her supervisor to review her performance. Those dates were: August 25, September 8, September 22, October 6 and October 20, all in 2008.[7]
- Failing to show improvement in Grievants's case work product.

14. Commissioner Perry cited the following as examples of Grievant's poor work product:

- Failure to timely file a Motion to Extend Child Support before a child's eighteenth birthday. The motion was assigned to another case worker who filed it that day. The failure to timely file this motion could have caused the child to lose support payments through graduation from high school.
- Requested DNA testing to be performed without a Court Order or a request for the testing from either party.
- Attached an ARTM [8] to a Petition to Show Case that was not properly completed pursuant to the Sutton office guidelines. The ARTM reflected arrearages in excess of $20,000 more than were actually owed. The Petition had to be dismissed and re-filed.

15. In addition to the items cited in the March 27, 2009, letter, Grievant also had the following performance problems:

- Habitual failure to return telephone calls;
- Repeated mistakes in preparing documents;

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[7] Grievant had significant family issues that can explain her missing the meetings in August and the first one in September. Those issues are discussed in *Gibson 1.* There were no similar reasons for her absence from the subsequent three meetings.

[8] ARTM is an acronym for a financial document attached to filings in child support cases which details, among other things, the amount of support that is in arrears.

- Failure to follow instructions given by attorneys;

Respondent's Exhibit 2.

16. Grievant did not deny the allegations, although she offered explanations for some. Grievant indicated that the new attorney in the office wanted things done differently than Grievant had learned to do them, that there was too much work for anyone to keep up with and that she had not been sufficiently trained.

17. Grievant received the basic training offered to all Child Support Specialists when they begin working for the Bureau and advanced training when it was due. Respondent also sent Grievant through the basic training again in 2007.

Discussion

This case involves a disciplinary suspension and the burden of proof rests with the employer. 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 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).

A large part of Grievant's job consists of maintaining files and preparing documents to assist attorneys in obtaining and enforcing child support orders in circuit court. The cases also include the establishment of paternity. Grievant is charged with preparing documents related to the finances of the responsible parties and tracking payments so that arrearages may be recovered. It is important that these documents be prepared without errors and in a timely way to ensure that custodial parents regularly receive the support necessary to provide for the basic needs of these children. Respondent was able to prove that Grievant was failing to properly prepare these documents after several attempts were made to assist her.

Grievant also failed to attend the meetings that were scheduled as part of her corrective action plan to monitor her progress and provide feedback. Supervisor Dennison gave Grievant a calendar with the dates for those meeting circled, so that Grievant would know when they were. Grievant was instructed to attend the meetings or make arrangements to reschedule them if she could not. Admittedly, Supervisor Dennison did not remind Grievant of the meetings, even after she had missed the first two. But, reminding Grievant of scheduled meetings was not her supervisor's responsibility. More to the point, the fact that Grievant had missed the first two meetings was part of the reason she was disciplined in *Gibson 1.* After she received the notice of that disciplinary action, Grievant still missed the next three meetings.

Ms. Stalnaker testified that Grievant was extremely delinquent in getting her tasks accomplished and returning telephone calls. Occasionally, Ms. Stalnaker was forced to remove the backlogged messages from Grievant's telephone and return the calls herself to ensure that they were returned within a reasonable period of time.

Grievant offered explanations for a few of the incidents listed in the suspension letter. Specifically, she noted that she received conflicting instructions concerning the Motion to Extend Child Support for the client who was about to have his eighteenth birthday. However, these explanations did not address her difficulty in accurately completing important financial documents, missing scheduled meetings or failing to complete her work in a reasonable period of time.

Grievant also asserted that she was not given training to help her correct her mistakes and improve. The record shows that Grievant was provided the same training as all other employees in her classification. Grievant was also sent for a refresher course in 2007. Ms. Stalnaker stated that she did not send Grievant for additional training because the manager of the training unit told Ms. Stalnaker not to send Grievant for additional training. Karen Yahr, Manager of the Bureau's Training Unit, denied that she told Ms. Stalnaker to not send Grievant back for training. However, Manager Yahr did report to Ms. Stalnaker that Grievant displayed a significant lack of knowledge of the Bureau's procedures for someone with her experience and that Grievant had a difficult time keeping up with the training.

Ultimately, Respondent proved that Grievant's job performance continued to fall below acceptable standards after she had received a corrective action plan and a written reprimand for failing to comply with that plan. Respondent was justified in disciplining Grievant for poor performance.

The remaining issue is whether the discipline was disproportionate to the offense. The allegation that a disciplinary action was excessive is an affirmative defense, and Grievant bears the burden of proving the discipline 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)." *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001). "Whether to mitigate the punishment imposed by the employer, depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995) (citations omitted). 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 & Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

Grievant's work record over the last two years has been poor. She has been given a Performance Improvement Plan as well as a written reprimand and her performance has not improved. Additionally, Grievant has been given clear written documentation of her employment expectations. Grievant appears sincere in her desire to do a good job but, for reasons that are not readily apparent, she has not been able to accomplish that goal. The imposition of a ten day suspension is reasonable given Grievant's work history. Consequently the Grievance is DENIED.

Conclusions of Law

1. In disciplinary actions such as this grievance, the burden of proof rests with the employer. 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).

2. Respondent proved, by a preponderance of the evidence, that Grievant's job performance continued to be below acceptable standards, even after she received a Performance Improvement Plan and a written reprimand for failing to comply with that plan. Respondent's discipline of Grievant was justified.

3. The allegation that a disciplinary action was excessive is an affirmative defense, and Grievant bears the burden of proving the discipline 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)." *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

4. "Whether to mitigate the punishment imposed by the employer, depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995).

5. Given the totality of the circumstances in this grievance, a ten day suspension was reasonable and mitigation of that penalty is not appropriate.

Accordingly, 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: DECEMBER 2, 2009

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE