THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TINA FOX,
Grievant,

v. **Docket No. 2010-0089-DHHR**

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

DECISION

Grievant Tina Fox is an Economic Service Worker employed by the West Virginia Department of Health and Human Resources (DHHR) in the Kanawha District. Grievant was suspended for fifteen working days by letter dated July 22, 2009. Ms. Fox filed a level three[1] grievance form on July 27, 2009, contesting this suspension, arguing that it was without cause. As relief Grievant seeks to have the suspension withdrawn and to be paid backpay with benefits and interest.

A level three hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board on February 2, 2010. Grievant appeared at the hearing and was represented by Gordon Simmons, UE Local 170, WVPWU.[2] Respondent DHHR was represented by Jennifer Akers, Assistant Attorney General. At the conclusion of the hearing, the parties agreed to submit Proposed Findings of Fact and Conclusions of Law.

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[1] Suspension without pay is one of the reasons that an employee may file a grievance directly at level three. *See* W. VA. CODE § 6C-2-4 (a) (4).

[2] West Virginia Public Workers Union

The last of these fact/law proposals was received by the West Virginia Public Employees Grievance Board on March 15, 2010 and this matter became mature for decision on that date.

Synopsis

Grievant was suspended for allegedly coaching her neighbors regarding responses they needed to provide to an Economic Service Worker ("ESW") in order to qualify for emergency assistance after their electricity had been shut off. Grievant is believed to have told the applicants to say their electricity had been shut off the previous day when in fact it had been shut off more than thirty days previous to that day. Such action would have been a serious violation of DHHR policy had Grievant done what she was accused of.

The evidence indicated that the applicants' electricity had been shut off by the power company for more than thirty days before they sought emergency assistance. However, for reasons more fully set out herein, Grievant believed that the applicants' electricity had been shut down the previous day and did not attempt to help the applicants qualify improperly for Emergency Assistance. Accordingly, the grievance is Granted.

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.

Findings of Fact

1. Grievant Tina Fox is an Economic Service Worker ("ESW") employed by the DHHR in the Kanawha District of the Bureau for Children and Families. She has been employed in that position for more than three years.

2. Grievant's neighbors had been suffering from financial difficulties for a period of time. Grievant and her daughter had been allowing the neighbors to shower in their home because the neighbors' water had been shut off.

3. On June 8, 2009, Grievant's neighbors asked her if they could store food in her refrigerator and freezer because the neighbors' electricity had been shut off. Grievant allowed the neighbors to store their food at her house and advised them to apply with DHHR for Emergency Assistance to help with their terminated utilities.

4. On June 9, 2009, the neighbors came to the DHHR Kanawha District Office and talked to a receptionist regarding the Emergency Assistance Program. It was determined during that visit that the neighbors' electricity had been shut off by the electric company more than thirty days, before the visit. Because the electricity had been shut off for more than thirty days the neighbors were informed that they were not eligible for the Emergency Assistance Program. They were referred to another agency for possible assistance. Grievant had no contact with the neighbors during the June 9th visit.

5. When Grievant returned home from work on June 9, 2009, she was contacted by a different neighbor who told Grievant that the initial neighbors had been denied services. Grievant was asked if she could help. Grievant told the second neighbor to tell the initial neighbors to reapply at the DHHR office the next day.[3]

6. Upon arriving at work on June 10, 2009, Grievant asked her co-worker, Robin Finley, if she would speak with her neighbors regarding their application for Emergency

[3] Grievant testified that the first neighbor had hearing problems and she thought there may have been some confusion about their application for assistance.

Assistance. Grievant could not take the application of her neighbors because she knew them and it would constitute a conflict of interest.

7. Asking a co-worker to see clients is not an unusual practice at the Kanawha District Office when an ESW has a conflict of interest that prevents her or him from taking the client's application.

8. Grievant did not ask Ms. Finley to give her neighbor's any special treatment or to handle the application differently than she would normally.

9. Grievant saw her neighbors when they arrived at the office and introduced them to Ms. Finley. During the brief discussion Grievant said the following to her neighbors: "Your electricity was turned off yesterday, right?" The neighbors responded affirmatively, and shortly thereafter Grievant left the office for an appointment.

10. It is standard procedure for an ESW to contact the utility company to confirm the date the service was disconnected while processing an application for Emergency Assistance.[4]

11. Ms. Finley contacted the electric company to verify when the electricity had been cut off and was told that the power had been shut off more than thirty days prior to the date of application for the neighbors.[5] Ms. Finley told Grievant's neighbors that they were not eligible for benefits and they left.

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[4] Grievant and Ms. Finley both testified that they routinely make this check. Grievant did not ask Ms. Finley to skip this procedure and testified that she expected Ms. Finley to contact the utility company since it was standard procedure.

[5] The neighbors' electricity had actually been cut off by the electric company in April 2009.

12. Ms. Finley reported to her supervisor, Pat Landers, that she suspected that Grievant may have attempted to coach her neighbors to give a false response in an attempt to get Emergency Assistance benefits when they were not eligible. The basis for her suspicion was Grievant's question to the neighbors about when their electricity had been cut off when Grievant introduced the neighbors to her.

13. Supervisor Landers and Ms. Finley met with Maureen Rogers to discuss the situation. Ms. Rogers is the Family Assistance Coordinator and Ms. Landers' supervisor. Coordinator Rogers then met with Grievant's immediate supervisor, Nelson Hudson, and the Bureau's Community Services Manager, Anita Adkins.

14. Ms. Rogers and Mr. Nelson met with Grievant on June 11, 2009, to discuss the incident with her. At that time, Grievant reiterated that her neighbors' electricity was disconnected on June 9, 2009, but their water had been shut off for more than thirty days. Grievant also told the supervisors that she had left for her doctor appointment when her neighbors arrived to apply for services. Respondent Exhibit 1.[6]

15. A predetermination conference was held on June 29, 2009. Grievant, Nelson Hudson, Maureen Rogers and Anita Adkins attended that conference. At that conference, Grievant corrected her prior statement and noted that she was present when her neighbors came to reapply for assistance. Grievant was there when her neighbors arrived but left for her appointment after introducing them to Ms. Finley. Grievant denied that she tried to coach her neighbors so they could qualify for assistance. Grievant maintained that she

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[6] After this meeting, Mr. Nelson affirmed with the electric company that the neighbors' electricity had been disconnected on April 23, 2009. Respondent Exhibit 1.

believed that her neighbors' power had been cut off on June 8, 2009, noting that was the day they requested freezer space from her for their food.

16. By letter dated July 22, 2009, Grievant was suspended for fifteen days without pay for failing to assure compliance with agency policy regarding the granting of benefits and for violation of DHHR Policy Memorandum 2108 related to Employee Conduct.

17. The electricity of Grievant's neighbors was initially disconnected on April 23, 2009. Shortly thereafter, the neighbors surreptitiously reconnected their electricity at the electric meter running into their home. The electric company discovered this ruse and fully disconnected the power to the neighbors' home on June 8, 2009. This was the day the neighbors asked to store food in Grievant's freezer.

Discussion

Since this grievance involves a disciplinary matter, the burden of proof rests with the employer, and the employer must meet that burden by proving the charges against Grievant 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).

The reason given for Grievant's suspension was that she coached her neighbors to give a false date regarding when their electricity had been disconnected for non-payment. It was suspected that Grievant told her neighbors to tell Ms. Finley that their electricity had been shut off on June 9, 2009, instead of April 23, 2009. If their power had been shut off for more than thirty days prior to applying for Emergency Assistance, they would not be eligible. Grievant does not deny that it would be improper for her to coach her neighbors so that they could get services for which they were not eligible.

Rather, she argues that she believed, in good faith, that her neighbors' electricity was disconnected on June 9, 2009. She contends that she followed proper procedure by referring her neighbors' claim to a co-worker and that she neither suggested nor expected that Ms. Finely would show any favoritism to the applicants. If Grievant's account of the events is believed and she did not participate in her neighbors' deception the reason for the suspension is not proven. Therefore, a credibility assessment is essential to the resolution of this matter.

The Grievance Board has applied the following factors to assess a witness's testimony: (1) demeanor; (2) opportunity or capacity to perceive and communicate; (3) reputation for honesty; (4) attitude toward the action; and (5) admission of untruthfulness. Additionally, the administrative law judge should consider (1) the presence or absence of bias, interest or motive; (2) the consistency of prior statements; (3) the existence or nonexistence of any fact testified to by the witness; and (4) the plausibility of the witness' information. *See Gramlich v. Div. of Motor Vehicles,* Docket No. 2010-0929-DOT (June 14,

2010); *Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth.,* Docket No. 2009-1588-DOT (Dec. 1, 2009); *Elliott v. Div. of Juvenile Serv.,* Docket No. 2008-1510-MAPS (Aug. 28, 2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD- 216 (Dec. 28, 1999).

Grievant's testimony was believable. She acknowledged that it was standard practice for an ESW to verify the date that a utility was disconnected with the provider before authorizing Emergency Assistance. Grievant had worked with Ms. Finley for some time and knew her to be a diligent and honest worker. She fully expected Ms. Finley to follow this procedure with her neighbors. Additionally, Grievant testified that she had observed the window air conditioners operating in her neighbors' residence up until June 8th, when her neighbors asked to store food in her freezer. These uncontested facts tend to support Grievant's version of the events. Ms. Finley also noted that Grievant did not treat her any differently after Grievant's neighbors were denied Emergency Assistance, which would be unlikely if Grievant had expected Ms. Finley to grant her neighbors special treatment.

Ms. Finley noted that she did not have any experience with Grievant being dishonest and that she believed Grievant to be a competent employee. She confirmed that Grievant did not ask her to give anyone special treatment. The only thing that concerned Ms. Finley was when Grievant asked her neighbors, "Your electricity was turned off yesterday, right?" This statement coupled with the confirmation that the electricity had been cut off a month sooner made Ms. Finley uncomfortable and she properly reported the incident to her supervisor.

Grievant delivered her testimony with a calm and straight-forward demeanor and acknowledged that, under the circumstances she might have been suspicious as well. She did not try to diminish the seriousness of the charge and she acknowledged a prior incident she had been involved in related to her ex-husband. Her explanation of how her neighbors had reconnected their electricity was plausible and appeared to be truthful. Both Grievant and Ms. Finley were credible and truthful witnesses.

Because Grievant's testimony related to her actions was credible and consistent, Respondent did not prove that Grievant coached her neighbors in an effort to gain benefits to which they were not entitled. Consequently, the grievance is GRANTED.

Conclusions of Law

1. Since this grievance involves a disciplinary matter, the burden of proof rests with the employer, and the employer must meet that burden by proving the charges against Grievant 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).

2. The Grievance Board has applied the following factors to assess a witness's testimony: (1) demeanor; (2) opportunity or capacity to perceive and communicate; (3) reputation for honesty; (4) attitude toward the action; and (5) admission of untruthfulness. Additionally, the administrative law judge should consider (1) the presence or absence of

bias, interest or motive; (2) the consistency of prior statements; (3) the existence or nonexistence of any fact testified to by the witness; and (4) the plausibility of the witness' information. *See Gramlich v. Div. of Motor Vehicles,* Docket No. 2010-0929-DOT (June 14, 2010); *Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth.,* Docket No. 2009-1588-DOT (Dec. 1, 2009); *Elliott v. Div. of Juvenile Serv.,* Docket No. 2008-1510-MAPS (Aug. 28, 2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD- 216 (Dec. 28, 1999).

3. Grievant provided a reasonable and credible explanation for her actions and Respondent failed to prove the charges against Grievant by a preponderance of the evidence.

Accordingly, the grievance is GRANTED. Respondent is ORDERED to reimburse Grievant all pay and benefits she lost as a result of the suspension and to remove all record of the disciplinary action from its files.

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: JULY 15, 2010.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE