THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TAMMY L. JONES,
Grievant,

v. **DOCKET NO. 2009-1028-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
Respondent.

DECISION

This matter comes on for decision following a level three hearing held in the Grievance Board's Charleston office on February 9, 2010. The Grievance was filed on February 24, 2009, alleging "Personal medical information revealed to coworkers; privacy rights violated by using coworkers to effect removal of family members." As relief, Grievant seeks "to be made whole, including restoration of leave used, transfer to another location."

Grievant was represented by Gordon Simmons and Respondent was represented by Heather Laick, Assistant Attorney General. The matter became mature for decision on March 8, 2010, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant was employed as a Youth Service Worker in the same county as a Child Protective Services (CPS) unit that was investigating a matter involving her grandchildren. Rather than immediately transferring the case to another county to avoid a potential conflict, CPS workers from her county investigated the matter. Grievant was not accused of any impropriety, but CPS workers who worked in the same building knew she was a relative. Prior to placing the children in Grievant's custody, the CPS supervisor questioned

Grievant about a known health issue in the presence of another CPS worker, which caused Grievant embarrassment and anxiety. She took sick leave, and seeks restoration of the leave she used due to the handling of the CPS case. Grievant did not meet her burden of proof, and the Grievance is denied.

Findings of Fact

Based on a preponderance of the evidence, I find the following material facts have been proven:

1. Grievant is employed by Respondent in its Wood County office as a Youth Service Worker.

2. On Friday, February 13, 2009, Respondent's Wood County Child Protective Services (CPS) unit received a referral regarding some children whom the reporter believed would be in imminent danger if they returned home from school that day.

3. Some of the children were the subjects of an ongoing Child Protective Services case, and the Respondent father in that case lived with Grievant's daughter and her children; the CPS unit planned to remove all of the children from the home that day.

4. Grievant was called to the office of Rose Ann Bullman, CPS Supervisor, in the presence of Melissa Urban, a CPS worker. Ms. Bullman was formerly a coworker of Grievant in the Youth Services unit.

5. Grievant agreed that her grandchildren could be placed with her after the removal from her daughter's home.

6. Ms. Bullman, who was aware that Grievant took medication for depression and concentration, asked her if she was taking her medication, because she would need it.

7. It is the policy of DHHR to have CPS workers from another county handle a case when the children involved were related to a worker in the home county. Previous CPS actions involving Grievant's grandchildren had been referred to Wirt County.

8. At the time the referral came in, it was not known that Grievant's grandchildren were involved; this only became known after the Wood County CPS workers assigned to the case went to the endangered childrens' school and interviewed them, and determined that they lived in the same household as Grievant's grandchildren.

9. Grievant took sick leave from work while the children were placed with her, and stayed off work when the children were returned to their home. She was stressed, anxious and too humiliated and embarrassed to go to work, and fearful the children would be removed again.

10. The referral and the removal of the children from their home occurred after 12:00 p.m. on a Friday, and on the following Monday the case was transferred to the Wirt County CPS office.

11. Grievant had custody of her grandchildren from February 13, 2009 through February 27, 2009. She used sick leave from February 17 through the end of June, 2009.

Discussion

Essentially, Grievant claims she was forced to use leave during the time she was humiliated by the events surrounding the removal of her grandchildren, because the manner in which the case was handled constituted a hostile work environment due to the failure to follow the procedure for transferring so-called "conflict" cases to another county, and the disclosure of her private medical information to others in the office.

In the CPS case at issue, Grievant's grandchildren were living in a household with some other children who were the subject of a CPS referral. When these children were removed from the home, all children living in the home had to be removed as well. When the necessity of the removal became apparent, the CPS supervisor asked Grievant if she could take custody of her grandchildren, and she agreed to do so. Grievant's grandchildren were not referred as being in imminent danger, their mother (Grievant's daughter) was not accused of endangering any children, and Grievant was given custody as a responsible relative. All this occurred late in the day on a Friday, and the case was transferred to another county as soon as possible the following Monday. At no time was Grievant or her family held up to ridicule by Respondent's CPS unit, and Grievant was not subjected to any improper conduct in the removal process. Instead, she was the first person CPS looked to as a responsible relative who could care for the children.

It is understandable that Grievant would be upset and subject to anxiety that her grandchildren were the subjects of a CPS investigation. However, it is Respondent's duty to protect the children who it believes are in danger, and cannot be faulted for taking immediate action in this case. But the creation of a hostile work environment, such that an employee cannot be reasonably expected to endure it, takes much more than occurred here. "To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment. *See Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)."[1]

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[1] *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998).

Grievant's reaction to the stressful events, while understandable, is not reasonable. The evidence is undisputed that Ms. Bullman, in assessing a placement for the children revealed her knowledge of Grievant's medical history to a coworker, but her doing so was not an invasion of privacy and was procedurally proper. Privacy violations may be part of a pattern of inappropriate conduct, as the right to privacy is protected by law. "The right to privacy, including the right of an individual to be let alone and to keep secret his private communications, conversations and affairs" is a right protected by a common law action for tortious damages.[2] While a cause of action may lie in another forum, the Grievance Board does not award damages in tort.[3]

Nevertheless, privacy issues can be grieved, as they are a guaranteed right for a public employee, and disclosure of sensitive information could be perceived as hostile or provoking. However, privacy of information is not an absolute right. Although this was not a public disclosure of private information, since it was in the course of a confidential abuse and neglect proceeding, the test for public disclosure of private information is instructive. In assessing Freedom of Information Act (W. VA. CODE § 9B-1-4) disclosures, the West Virginia Supreme Court of Appeals evaluates the reasonableness of a disclosure by five factors:

> 1. Whether disclosure would result in a substantial invasion of privacy, and if so, how serious;
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> 2. The extent or value of the public interest, and the purpose or object of the individuals seeking disclosure;

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[2] *Roach v. Harper*, 143 W. Va. 869, 105 S.E.2d 564 (1958).

[3] *Snodgrass v. Kanawha County Bd. of Educ.,* Docket No. 97-20-007 (June 30, 1997)*; Reidel v. West Virginia Univ.,* Docket No. 07-HE-395 (Feb. 24, 2009).

3. Whether the information is available from other sources;

4. Whether the information was given with an expectation of confidentiality; and

5. Whether it is possible to mould relief so as to limit the invasion of individual privacy.[4]

Here, the CPS workers had a duty to remove the children from the imminent danger it believed existed, and was under an obligation to either take custody of them itself or transfer custody to a "responsible relative."[5] It follows that the CPS worker must determine that the relative is responsible, and Ms. Bullman had knowledge, directly from Grievant, that she required medication for her depression and ADHD. That information came to her in personal conversations with Grievant, and not as a consequence of Grievant's employment by Respondent or her supervision by Bullman. Hence, it was not given in expectation of privacy; Grievant herself made it public. The disclosure, in a closed-door meeting with another CPS worker, who was not told what the medication was or why Grievant took it, was not substantial, even if it could have been made with more tact. The public interest, that of placing endangered children with responsible family members who would be able to care for them and keep them out of harm, was significant. As the Supreme Court of Appeals has stated many times, "the welfare of the child is the polar star by which the discretion of the court will be guided."[6]

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[4] *Syllabus Pt. 2, Child Protection Group v. Cline*, 177 W. Va. 29, 350 S.E.2d 541 (1986).

[5] W. Va. Code § 49-6-3(a).

[6] *State ex rel. Cash v. Lively*, 155 W.Va. 801, 187 S.E.2d 601 (1972).

Even if the privacy violation was improper, Grievant's use of sick leave as a consequence was not reasonable. Grievant used her sick leave to cover the time when she had the children in her custody, and for a significant period of time afterwards. This later time is the period, apparently, when she could not bear to return to work out of embarrassment for the way the case was handled. However, the evidence is that a necessary disclosure of a part of Grievant's medical history was made in a proper context and only to one person. Grievant's assumption that everyone in both the Youth Services unit and the CPS unit were in on the disclosure is not borne out by the facts. There is also no evidence that the disclosed information was anything that Grievant should be embarrassed about, as depression and ADHD are so common that no reasonable person would think negatively about them.

The following conclusions of law support this discussion:

Conclusions of Law

1. Grievant bears the burden of proving her grievance by a preponderance of the evidence. 156 C.S.R. 1 § 3.

2. "To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment. *See Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998).

3. Grievant did not meet her burden of proving a pervasively hostile work environment such that she was forced to use her sick leave to escape it.

4. "The right to privacy, including the right of an individual to be let alone and to keep secret his private communications, conversations and affairs" is right protected by

a common law action for damages. *Roach v. Harper*, 143 W. Va. 869, 105 S.E.2d 564 (1958).

5. The Grievance Board does not award damages in tort. *Snodgrass v. Kanawha County Bd. of Educ.,* Docket No. 97-20-007 (June 30, 1997)*; Reidel v. West Virginia Univ.,* Docket No. 07-HE-395 (Feb. 24, 2009).

For the foregoing reasons, this grievance is hereby **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).

July 1, 2010

M. Paul Marteney
Administrative Law Judge