THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CAROL ADELE MESSER,
Grievant,

v. **Docket No. 2009-1539-DHHR**

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

DECISION

On April 24, 2009, Grievant Carol Messer was suspended for ten working days from her position as a Child Protective Services worker employed by the West Virginia Department of Health and Human Resources ("DHHR"). Grievant works for the DHHR Bureau for Children and Families at the Bureau's ("BC&F") Mingo County office.

On May 15, 2009, a grievance signed by Ms. Messer on May 12, 2009, was received by the West Virginia Public Employees Grievance Board. In her Statement of Grievance, Ms. Messer wrote:

> Worker was suspended for 10 days for failing to follow a directive given by a supervisor. This did not happen, CSM suspended worker even though there were witnesses that said it didn't happen.

As relief Grievant requests to be reinstated to the days she was suspended, with back pay and to have the suspension removed from her personnel file. Because grievance involved a suspension without pay Grievant waived levels one and two and filed the grievance directly at level three. *See* W. VA. CODE § 6C-2-4 (a) (4). A level three hearing was held at the Charleston office of the West Virginia Public Employees Grievance Board on April 12, 2010. Grievant appeared in person and was represented by Matthew R. Oliver, Esquire. Respondent was represented by Jennifer K. Akers, Assistant Attorney General.

Both parties submitted post hearing Proposed Findings of Fact and Conclusions of Law which were received by the West Virginia Public Employees Grievance Board on June 1, 2010. This Grievance became mature for decision on that date.

Synopsis

Grievant was suspended for ten working days for failing to follow directives given to her in investigating a sexual abuse allegation made by a minor. Additionally, she is accused of failing to take necessary steps to ensure the safety of the minor while the investigation was pending by allowing her to be transported home in the company of the alleged offender. Grievant denies that she refused to follow a supervisor's directive and states that she put an approved corrective action plan in place to ensure the child's safety while the investigation continued. She avers that she should not be held responsible for the mother's decision to allow the alleged offender to go home with the child who accused him of sexual abuse.

Respondent proved that Grievant failed to follow a supervisor's directive to record an interview with the child who was making a complaint of sexual abuse. Respondent also proved that Grievant's failure to take reasonable precautions subjected a minor to potential for harm by allowing her to be transported to her home in the company of the person she had just accused of abusing her.

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 Messer is employed by the DHHR in the Bureau for Children and Families office in Mingo County, West Virginia. Grievant has been classified as a Child Protective Service Worker ("CPSW") for all seven years of her employment with the DHHR.

2. The Child Protective Services ("CPS") Unit in the Mingo County office has two CPS supervisors. Tonya Webb supervises the investigation unit, and Jeanie Curry supervises the intake unit. Grievant is assigned to the intake unit under the supervision of Ms. Curry.[1]

3. Grievant has completed all Child Protective Services training and Sexual Abuse training. She has also received training related to sexual abuse of children through the West Virginia Prosecutors Institute. She has conducted sexual abuse investigations alone and with other workers. Respondent Exhibit 5.

4. On February 25, 2009, at approximately 12:00 p.m., BC&F received an emergency referral from a local elementary school. A nine year old female student had disclosed that she was being sexually abused, and was frightened to go home.

5. Supervisor Curry was absent from the office on February 24, and had asked Grievant to act as the "back up" supervisor for the intake unit in her absence. This temporary duty allowed Grievant to assign tasks and make minor decisions to direct the work flow in the intake unit while Supervisor Curry was out. Grievant remained subordinate

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[1] All CPSWs are trained in investigating allegations of child abuse and neglect and may be called upon to perform those duties when necessary, regardless of the unit to which they are assigned.

to other supervisors such as Tonya Webb and needed to exercise her "back up" supervisor duties only if no other CPS supervisor was available.

6. There is one CPSW assigned each day to be the "Emergency Worker of the Day." That person conducts interviews for emergency referrals that come into the office on that day. This duty is rotated among the CPSWs so that no single worker has his or her regular work constantly disrupted by emergency referrals.

7. A monthly calendar is kept in the office that records who is assigned as the Emergency Worker for each day. Grievant was the designated Emergency Worker for February 25, 2009, in addition to being the "back up" supervisor for the intake unit. Grievant Exhibit 1.

8. Noting that Grievant was the Emergency Worker of the Day, Supervisor Webb directed Grievant to respond to the emergency referral from the local school by going to the school and conducting an interview with the child who made the complaint.

9. Grievant Messer resisted the emergency assignment noting that she was the back up supervisor for the intake unit and she felt that she needed to remain in the office. Grievant suggested that Ms. Webb assign the emergency referral to a different CPSW, Nettie Goan.

10. Supervisor Webb approached CPSW Goan and asked her to respond to the emergency referral. Ms. Goan responded that she had been directed by Supervisor Curry to remain in the office and work on her case backlog in an effort to bring her work load up to date.

11. Understandably frustrated, Supervisor Webb called Grievant, Ms. Goan and the remaining available CPSW investigative worker, Benjamin Blankenship, into her office.

She instructed the three workers to work it out among themselves who would respond to the emergency referral and then return to her office.

12. Supervisor Webb had not heard from the CPSWs for approximately forty minutes so she called them back into her office to see what had been decided. Mr. Blankenship offered to take the emergency referral but noted that he was scheduled to be in court at 1:00 pm. He was concerned that the interview could not be finished in time for him to make his hearing. After continued discussion, Grievant abruptly agreed to take the referral and left the room.

13. DHHR procedures require that a CPSW make an audio and video recording of interviews with children who make accusations of sexual abuse for potential use in criminal or civil court proceedings. Supervisor Webb reminded Grievant to take the recording equipment with her to the school for the interview.[2]

14. Grievant proceeded to the school and spoke with the complainant, but school was being let out early so Grievant did not have time to interview the child there. Grievant did not take recording equipment to the school. Grievant arranged with the child's mother for the mother to bring the child to the DHHR office for an interview.

15. The child was brought to the DHHR office by her mother and her step-father.

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[2] Grievant denies that Supervisor Webb told her to record the interview and the other CPSWs testified that they did not hear the reminder. This is a minor discrepancy since no one disputes that CPSWs are required to record such interviews and Grievant had been trained in that procedure. It was not a requirement that Supervisor Webb remind Grievant of her responsibility to tape the interview, it was a courtesy.

Her seven year old brother also came to the office with the family. The step-father is the person the child alleged was sexually abusing her.

16. Grievant interviewed the child and the mother at the DHHR office. She did not record either of these interviews. During the interview with the child, the child described how her step-father sexually abused her. In her interview, the mother stated that she did not believe the child and that the child had made similar allegations against a different boyfriend in Ohio that turned out to be untrue.

17. After the interviews, Grievant reported to Ms. Webb that the child had stated that she had been sexually abused by her step-father. Grievant prepared a Protection Plan agreement that was signed by the mother. In the agreement, the mother promised to keep the step-father away from the child while an investigation into the allegation was completed. Respondent Exhibit 1. Grievant provided a copy of the Protection Plan to Ms. Webb.

18. The mother asked Grievant if the step-father could ride home with her and the children and Grievant told her that he could not. The mother said that they would make arrangements for the father to be picked up by a family member and the mother would take the children home.

19. Witnesses saw the mother and the step-father leave to drive home from the DHHR office with the children in the car.[3]

20. The case was then assigned to another case worker, Greta Bevins.

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[3] There is no information available as to how long the step-father stayed at the home that evening before leaving to stay with his sister.

21. On February 26, 2009, the mother called Ms. Bevins and asked "when is this all going to be over." When Ms. Bevins re-interviewed the mother and the child, the mother stated that she didn't understand why it was a big deal to keep her husband out of the house now because Grievant let them go home together after the initial interview.

22. During the mother's interview, she exhibited a negative attitude toward her daughter and reiterated her story that the child had made similar accusations against the mother's boyfriend in Ohio that were false. When Ms. Bevins investigated this accusation she discovered that no such investigation was conducted while the family lived in Ohio.[4]

23. Ms. Bevins became very concerned that the mother was taking such a negative attitude toward her daughter and asked Ms. Webb to come talk to the mother. The mother reiterated to Ms. Webb that she believed the daughter was not telling the truth and that she had told this to Grievant at their initial investigation.

24. Shortly thereafter, Ms. Webb discussed the situation with the DHHR Community Service Manager, Carolyn Sansom. Ms. Webb told Manager Sansom that Grievant had let the step-father go home with the children. She also indicated that she no longer believed the Protection Plan for the children was adequate. After hearing first hand that the mother did not believe her daughter, and that the mother could not see why the step-father had to stay away, Ms. Webb did not believe that the mother could be trusted to protect the daughter.

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[4] Eventually, the DHHR took custody of the children and the mother lost her parental rights. This fact is not relevant to the discipline that was taken against Grievant but is noted only to highlight potential harm that may have occurred by the step-father remaining in the presence of the children.

25. Ms. Sansom held a predetermination meeting with Grievant, Ms. Webb and Ms. Curry, Grievant's supervisor, on March 19, 2009, to discuss Grievant's actions regarding this situation. She gave Grievant the opportunity to explain her actions of February 25, 2009. Grievant stated that she knew, at the time of this meeting, that the step-father had been allowed to leave with the child who accused him of sexual abuse.

26. Manager Sansom discussed the situation with her supervisor, James Kimbler, who is a DHHR Regional Director. These administrators also discussed the incident and possible disciplinary actions with Louis Palma, Deputy Commissioner for Field Operation for the DHHR Bureau for Children and Families.

27. Grievant was ultimately suspended for ten days without pay by letter dated April 24, 2009. The letter was signed by Director Kimbler and the reasons for the suspension were:

- Grievant's failure to follow Ms. Webb's directive to go to the school to interview the child and to make an audio and video recording of the interview.
- Grievant allowing the child to leave with the step-father after she gave an interview accusing him of sexually abusing her.
- Exercising carelessness in the investigation which could have compromised the victim's ability to trust or disclose future abuse and left the child at risk for future abuse.

Grievant Exhibit 2.

28. On May 12, 2009, Director Kimbler issued Grievant an "amended letter" to replace the suspension letter he had given her dated April 24, 2009. The two letters differed because a paragraph related to an earlier alleged incident was not included on the second page of the amended letter. This incident allegedly occurred in January of 2009

and the elimination of this paragraph did not change any of the allegations that were the basis of Grievant's suspension. Grievant Exhibit 3.

29. Director Kimbler and Deputy Commissioner Palma considered Grievant's long and successful employment in making their determination regarding the appropriate disciplinary action to take. They balanced those factors with the potential harm that might have befallen the child based upon Grievant's actions.

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 § 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).

Respondent asserts that Grievant was disrespectful and failed to follow Supervisor Webb's directives by arguing with her about whether Grievant should have to respond to the emergency call from the school and by failing to make a video and audio recording of the interview once she did conduct it. Additionally, Respondent avers that Grievant was careless in the performance of her duties related to this allegation of sexual abuse.

Respondent asserts that Grievant failed to adequately protect the child from potential future abuse by allowing her to go home with her step-father and by failing to recognize that the mother could not be trusted to carry out the proposed Protection Plan to keep the step-father away from the children.

Grievant raises four reasons why she should not have been suspended. Grievant alleges that: she followed all directives given to her by Supervisor Webb; she was not disrespectful or unprofessional with Ms. Webb when she initially declined the assignment; she did not neglect her duties or fail to meet performance standards; and that Respondent did not follow its Progressive Discipline Policy by suspending Grievant.

Initially, there was a disagreement between Grievant and Supervisor Webb because Ms. Webb asked Grievant to respond to the emergency call even though Grievant was the back-up supervisor in Ms. Curry's absence. Supervisor Webb made this assignment because Grievant was scheduled to be the Emergency Worker of the Day and emergency intakes were her responsibility. Supervisor Curry testified that being the back-up supervisor does not conflict with an employee acting as Emergency Worker and that Grievant should have responded to the call. On the other hand, all of the workers except Supervisor Webb testified that Grievant was not disrespectful in questioning whether she should take the emergency referral since she was the back-up supervisor. Ultimately, Grievant responded to the call and went to the school to meet with the student. While these circumstances were certainly not ideal, Respondent did not prove that Grievant was disrespectful toward Supervisor Webb in this exchange.

Next, Grievant avers that she did not ignore Ms. Webb's directive to make an audio and video recording of the initial interview with the child. Grievant claims Ms. Webb did not

tell her to record the interview and notes that neither of the other two CPSWs heard Ms. Webb tell Grievant to record the interview. The mere fact that the other workers did not hear Ms. Webb tell Grievant to record the interview does not mean it did not happen. More importantly, it should not have been necessary for a supervisor to tell Grievant to record the initial interview. All the DHHR employees who testified on this topic, with the exception of Grievant, stated that it is DHHR policy and procedure to make a video and audio tape of the initial interview of a child who is making a claim of being sexually abused. This procedure is essential because one of the major defenses to such a claim is that the interviewer coached the child into making accusations that may not be true. A recording of the interview is essential evidence that the interview was conducted properly. Grievant had been fully trained in conducting interviews related to sexual abuse allegations and should have been aware of this procedure. Grievant claimed that she did not perform a sexual abuse interview on February 25, 2009, because she knew that the case would be assigned to a different CPSW. However, the initial interview needed to be recorded regardless of who would handle the case in the future. By failing to record the initial interview with the child, Grievant failed to meet a basic CPSW performance standard whether Ms. Webb told her to record the session or not and ultimately placed future remedial actions for the child at risk.

There is no dispute that the child went home after the interview with the step-father whom she had just accused of sexually abusing her. All witnesses, including Grievant, testified that this event put the child at risk of further abuse and could diminish her trust that she would receive help if she made similar complaints in the future. Grievant insists that she told the mother specifically that the step-father could not go home with the rest of the

family and that arrangements were made for him to be picked up by his sister. Grievant insists that if she had known the step-father was going to leave with the family she would have stopped them.

There is no testimony to dispute Grievant's claim except that the mother later said Grievant allowed the family to go home together. Given the fact that the mother lied about her daughter making previous, unfounded, abuse accusations her statement totally lacks credibility. *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). It was not proven that Grievant intentionally allowed the step-father to go home with the family after the initial interview. What was demonstrated was that Grievant put too much trust in the mother.

The mother told Grievant that she did not believe the allegations that her daughter made, and generally was unsupportive of her daughter. Both Supervisor's Webb and Curry testified that the mother's actions were indicators that rendered her willingness to abide by a Protection Plan questionable. Their view was that under these circumstances, the protective plan proposed by Grievant was insufficient to protect the child because the mother could not reasonably be trusted to keep the step-father away or to protect the child's safety generally. Ms. Webb testified that she would not have approved the plan had she known how the mother viewed the daughter's claims and that she took further action to protect the child once she became aware of the mother's lack of support. The managers for the Bureau all testified that the action taken by Grievant during and immediately after the initial interview with the family fell significantly short of what was necessary to adequately protect the child under the circumstances.

The Grievance Board has regularly held that deference will be given to the agency's interpretation of its own policy. *Koblinsky v. Putnam County Health Dep't,* Docket No. 2010-0824-PutCH (May 4, 2010); *McCoy and Domingues v. W. Va. Parkways Economic Dev. and Tourism Auth.,* Docket No. 99-PEDTA-074 (July 19, 1999). In this case, the Bureau for Children and Families administrators agree that the DHHR policy and procedures require that initial interviews with children alleging that they have been sexually abused must be recorded with audio and video equipment. There are compelling reasons for this practice. Additionally, both supervisors testified that the statements and behavior of the mother should have led Grievant to believe that the mother was not likely to abide by the protective plan that Grievant developed. Respondent proved by a preponderance of the evidence that Grievant's handling of this complaint fell short of expected standards for protecting the safety of the child in this case. Consequently, disciplinary action was warranted.

Finally, Grievant argues that even if discipline is appropriate, the DHHR violated their progressive discipline policy by suspending Grievant rather than imposing a lesser form of discipline. DHHR Policy Memorandum 2104 is the agency's Guide to Progressive Discipline.[5] It is noted by Grievant that the policy states that "progressive and constructive disciplinary action will progress, if required, along a continuum from verbal warning to dismissal, with incremental steps between. . ." Policy 2104, 3rd page.[6] Since this is the first disciplinary action against Grievant, her counsel opines that it should start at the beginning

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[5] Respondent Exhibit 4

[6] The pages of Policy 2104 are not numbered.

of the continuum with a verbal warning. Grievant also points out that the initial suspension letter cited a prior disciplinary action against Grievant that was removed from the amended letter. Grievant avers that if the alleged prior discipline was considered in the suspension and then removed, the suspension should be removed.

Respondent points out that while Policy 2104 does establish a continuum of punishment, "it is important to remember, however, that the level of discipline will be determined by the severity of the violation." Policy 2104, 3rd page. The supervisor is not required to start with the lowest punishment in every case. Indeed, Policy 2104 has been interpreted to be a permissive, discretionary policy that does not create a mandatory duty to follow a progressive disciplinary approach in every instance. *Oiler v. Dep't of Health & Human* Res., Docket No. 02-HHR-074 (Aug. 28, 2002); *Ferrell v. W. Va. Dep't of Health & Human Res.*, Docket No. 97-HHR-526 (Apr. 30, 1998); *Artrip v. W. Va. Dep't of Health and Human Serv.*, Docket No. 94-HHR-146 (Sept. 13, 1994).

"The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty 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). 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 and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

Respondent felt that the actions of Grievant were serious and could have placed the child in danger fo abuse. Additionally, the child's trust in the agency could have been significantly impaired resulting in a reluctance to seek help in the event of further abuse. Director Kimbler balanced the perceived seriousness of the offense against Grievant's long and successful career. In spite of the events described herein, it is apparent that Grievant is considered a good and valuable employee who generally has the best interests of her constituents in mind. Director Kimbler ultimately decided that a ten day suspension was appropriate. Given the totality of the circumstances, the discipline imposed cannot be said to be clearly excessive or an abuse of discretion. Accordingly, the Grievance is DENIED.

Conclusions of Law

1. Since this is a disciplinary matter, the burden of proof 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 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. The Grievance Board has regularly held that deference will be given to the agency's interpretation of its own policy. *Koblinsky v. Putnam County Health Dep't,* Docket No. 2010-0824-PutCH (May 4, 2010); *McCoy and Domingues v. W. Va. Parkways Economic Dev. and Tourism Auth.,* Docket No. 99-PEDTA-074 (July 19, 1999).

3. Respondent proved by a preponderance of the evidence that Grievant's actions of conducting interviews without recording them and preparing a Protection Plan that relied too heavily on the mother did not comply with DHHR policy and performance standards. Therefore disciplinary action was appropriate.

4. "The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty 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).

5. 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 and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

6. Given the totality of the circumstances, a ten day suspension without pay was not disproportionate to the offense and was not an abuse of Respondent's discretion. Additionally, the suspension does not violate DHHR Policy Memorandum 2104.

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: SEPTEMBER 24, 2010.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE