THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

PATRICIA COLSHER,
Grievant,

v. **DOCKET NO. 2010-1107-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
Respondent.

DECISION

Grievant filed this grievance on February 21, 2010, stating, "On 2/18/10 my employment was terminated following a pretextual predetermination conference. I was deprived of my due process rights by not being permitted to review the 'evidence' against me and subjected to an action that is far in excess of the actual acts involved and thus an abuse of discretion." Her stated relief sought is "Reinstatement with all seniority, pay and benefits restored, removal from my personnel file of all reference to this matter and to be made in all ways whole."

A level three hearing was held in the Grievance Board's Charleston office on April 15, 2010. Grievant was represented by counsel, William E. Murray, and Respondent was represented by Assistant Attorney General Heather L. Laick. The matter became mature for decision on May 7, 2010, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant was dismissed from her position as director of the West Virginia Cancer Registry after she conspired with a subordinate to falsify an application for the other

employee to be deemed eligible for a needed certification. Respondent met its burden of proving the dismissal was for good cause, 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 was employed by Respondent as an Epidemiologist 3 from January 17, 2002 through March 6, 2010. She was the director of the Cancer Registry ("Registry") for the Bureau for Public Health ("BPH.")

2. Grievant was notified on February 18, 2010, by Acting Commissioner Chris Curtis, that she would be dismissed from employment effective March 6, 2010, after a predetermination conference call with Grievant and her attorney.

3. The dismissal letter stated:

> Your dismissal is the result of conspiring to falsify employment records regarding tenure with WVDHHR in order for Shelley L. Cogar to be perceived eligible to take a certification exam, which, in turn caused expenditures of State funds for testing, registration fees, and travel reimbursement as reported by the Office of the Inspector General. Your actions represent a violation of DHHR Employee Conduct policy 2108 which indicates that employees are expected to: "comply with all Division of Personnel and Department policies.

4. In April 2008, Shelley Cogar, a Licensed Practical Nurse and Certified Coding Specialist, was hired by the Registry in a data collection position, supervised by Grievant.

5. On January 27, 2009, Ms. Cogar submitted an application to the National Cancer Registrars Association (NCRA) to qualify for a test to become a Certified Tumor Registrar (CTR).

6. On this application, she listed her “experience in cancer registry work” as “less than 1 year,” but then listed that she had registry experience with the West Virginia Cancer Registry as a Cancer Registrar “part-time 4/1/7 - 3/31/8" and “full-time 4/1/8 - present.”

7. In a block immediately below the listed experience, Grievant signed Ms. Cogar’s application under “Supervisor Verification,” verifying that, to the best of her knowledge, Cogar’s “listed experience is accurate, correct and complete, plus meets the eligibility route selected above.”

8. Cogar had never worked for the Registry part time, and Grievant had full knowledge of this fact, as she had attempted to hire Cogar in 2007.

9. Cogar had listed that she was eligible for the examination under the NCRA’s “Route 4: minimum one year full-time (12 months or 1,950 hours) or equivalent experience in the Cancer Registry field AND successful completion of a minimum of an Associate degree (or equivalent 4 semesters/6 quarters) AND license or certification in a recognized allied health field as determined by BCRA’s Council on Certification.”

10. Cogar did not have the required associate’s degree or equivalent education. Grievant knew this because she hired Cogar and her educational background was listed on her employment application.

11. In July 2009, Cogar re-submitted the application because she did not pass the test the first time. On the July application, she listed her experience as “1 to 2 years” and listed the same false part-time dates with the Registry.

12. Again, Grievant signed off on the Application verifying Cogar’s experience and eligibility.

13. In 2007, Cogar attended a workshop held by the Registry, and took part in webinars relating to Cancer Registry work.

14. Because Cogar had applied for the NCRA testing and had been accepted for examination based on her application, Grievant, as her supervisor, approved her for travel to training seminars paid for by the agency, and the agency paid for the test.

15. Respondent spent in excess of $2,000.00 on Cogar's training, travel and test registration fees.

16. Cogar was not permitted to take the exam the second time she applied because she was deemed ineligible by NCRA.

17. Cogar was also dismissed from employment.

18. A requirement for the Health and Human Resources Specialist position that Cogar was hired into by Grievant is listed in the Division of Personnel Classification Specification as: "For West Virginia Cancer Registry cancer surveillance positions, applicant must hold the Certified Tumor Registrar (CTR) credential OR be eligible to take the CTR exam, as determined by the National Cancer Registrars Association."

Discussion

Grievant's termination is a disciplinary action, and Respondent therefor bears the burden of proving its allegations against her by a preponderance of the evidence. 156 C.S.R. 1 § 3. Dismissal of a civil service employee must be for good cause, which means misconduct of a substantial nature directly affecting the rights and interests of the public,

rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without a wrongful intention.[1]

Grievant and Ms. Cogar had an acquaintance going back to 2007 when Cogar attended a workshop held by the Registry, and Grievant attempted to recruit her as an employee. The evidence is uncontroverted that Cogar listed her employment dates with the Registry on her NCRA application falsely, and that Grievant, with knowledge of their falsehood, verified the application to the NCRA. As Grievant points out, however, this was not an "employment record" as is stated in Grievant's dismissal letter, and was not even a document used by Respondent for any purpose. And, as Grievant points out, she did not benefit in any way from the subterfuge.

Respondent, on the other hand, expended in excess of $2,000 of state funds as a result of Grievant's willful and knowing endorsement of Cogar's NCRA application. And there is no doubt that both Grievant's and Cogar's misrepresentation on the application was made with their full knowledge of the truth. Neither employee, both of which testified at the Grievance hearing, was in any way credible.

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required.[2] Demeanor is only one of the factors to be considered in assessing the credibility of a witness. Other factors include the witness' opportunity or capacity to

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[1] *West Va. Dep't of Corrections v. Lemasters*, 173 W. Va. 159; 313 S.E.2d 436 (1984).

[2] *Jones v. W. Va. Dep't of Health & Human Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health and Human Resources*, Docket No. 95-HHR-066 (May 12, 1995).

perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the trier of fact should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of witness' information.[3]

Ms. Cogar's testimony as to why she listed part-time employment with Respondent was not logical, and not forthright. When asked to explain why the application says she worked part-time for the registry from 2007 to 2008, she answered "That should not have been there" and "I put that on in error." She described her action as "neglect." However, she had previously explained that she and Grievant collaborated on her application because she was "lacking 3 days of a full year and [she] and Dr. Colsher were trying to make it up." They planned to justify the time by saying overtime and past training would make up the time. However, in her statement to the Office of the Investigator General, she said, "I have no idea of why I put down the part time employment of 04/01/07 - 03/31/08, except I believe the April 07 part had to do with when I first interviewed with Dr. Colsher."

Grievant's explanations are not much better. Grievant acknowledges that she had been trying to hire Cogar into the Registry as a Health and Human Resources Specialist for quite some time. Both she and Cogar knew that the CTR certification, or at least eligibility for it, is a requirement of the position. Grievant knew Cogar did not have the certification, and her machinations in helping to fill out the CTR application form were made with the intent to have Cogar deemed eligible even though she was not. Grievant claims

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[3] *See Perdue v. Dep't of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994).

the “route” to eligibility chosen by Cogar permits the applicant to use past experience, and since Cogar did not have any, the two conspired to make it look like she did. Grievant also states the listing of part-time experience with the registry was a “mistake, it should have been more clearly worded.” She also stated “it was an error, we did not fill out the form perfectly.” Grievant’s demeanor while answering questions during the hearing was marked by strenuous equivocation, and her explanation of a willful act as almost accidental is not rational.

Both Grievant and Cogar participated in filling out Cogar’s CTR certification application, and knew its contents and designed them to make it appear that Cogar was eligible when they both knew she was not. Grievant approved and the agency spent a large sum of money on certification-related training for Cogar, including out-of-state travel. Grievant knew she had to support her decision to hire an employee who was not qualified, and testified as to the pressure the agency received from the Center for Disease Control to have CTR’s on staff.

Respondent met its burden of proving Grievant’s conduct was willful and substantial, and its dismissal of Grievant for her part in the falsification of Cogar’s CTR application was for good cause. This was not just some technical violation of the trust put in Grievant in her highly-responsible position as Director of the registry, it was a planned subterfuge that maligned the agency’s overall credibility, cost it a substantial sum of the public’s money, and destroyed the agency’s ability to rely on Grievant in the future.

The following conclusions of law support this discussion:

Conclusions of Law

1. In dismissal cases involving classified employees, the burden of proof is upon the employer to establish the charges relied upon by a preponderance of the evidence and to establish good cause for dismissing an employee. 156 C.S.R. 1 § 3. *Davis v. W. Va. Dep't of Motor Vehicles*, Docket No. 89-DMV-569 (Jan.22, 1990); *Broughton v. W. Va. Div. of Highways*, Docket No. 92-DOH-325 (Dec. 31, 1992). "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. "'Dismissal of a civil service employee must be for good cause, which means misconduct of a substantial nature directly affecting the rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without a wrongful intention.' Syl. Pt. 1*, Oakes v. West Virginia Department of Finance and Administration*, 164 W. Va. 384, 264 S.E.2d 151 (1980)." *West Va. Dep't of Corrections v. Lemasters*, 173 W. Va. 159; 313 S.E.2d 436 (1984).

3. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health and Human Resources*, Docket No. 95-HHR-066 (May 12, 1995). Demeanor is only one of the factors to be considered in assessing the credibility of a witness. Other factors include the witness' opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action,

and admission of untruthfulness. Additionally, the trier of fact should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of witness' information. *See Perdue v. Dep't of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994).

4. Grievant's testimony was not credible, as her demeanor, inconsistency, and implausibility indicated.

5. Respondent met its burden of proving its dismissal of Grievant was for good cause.

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