THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BARBARA PAXTON,
Grievant,

v. **DOCKET NO. 2010-1035-BSS**

BUREAU OF SENIOR SERVICES,
Respondent.

DECISION

Grievant filed this grievance on February 9, 2010, stating, "Letter dated 10/22/09 stated I would be placed on Performance Improvement Plan before any further disciplinary action would be taken. Letter dated 1/22/10 I would be demoted with Loss of Pay [sic]." Her stated relief sought is "Remain at current title and salary."

A level three hearing was held in the Grievance Board's office on April 6, 2010. Grievant was *pro se*, and Respondent was represented by its Commissioner, Sandra K. Vanin. The matter became mature for decision on April 26, 2010, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant was suspended for neglect of duty and was told she would be placed on a performance improvement plan when she returned. Instead, she was assigned to duties unrelated to her position, and then later demoted for the same reasons she was suspended. Respondent failed in its burden of proving its actions were not arbitrary and capricious, and the Grievance is therefore granted.

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 a Senior Services Program Specialist II, pay grade 12.

2. On October 22, 2009, Julie McClanahan, Director of Medicaid Program Operations, suspended Grievant for three days for her "continued unwillingness or inability to perform your assigned duties in an efficient and effective manner," due to major errors in Grievant's work on a critical database used by the Bureau.

3. Included in the letter informing Grievant of her suspension was this statement: "On your return to duty, you will be placed on a performance improvement plan, and you[r] performance will be monitored closely. Future instances of this or similar types may result in more severe disciplinary action, up to and including dismissal. We sincerely hope, however, that our working with you on the performance improvement plan will result in your work performance improving to an acceptable level."

4. On January 22, 2010, Grievant was demoted to Telephone Operator, pay grade 4. Grievant's monthly salary was reduced from $2,855 to $2,333.

5. The demotion, endorsed by Commissioner Sandra K. Vanin, was for Grievant's "neglect of duty," and cited the same reasons as the earlier suspension.

6. When Grievant returned to work from her suspension in October 2009, she was reassigned to duties as a telephone operator, and worked at those duties up until the date of her demotion.

7. Grievant was never placed on a performance improvement plan.

8. Grievant's performance and attendance during the period of time between her suspension and her demotion were without any problems.

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.[1] Suspensions for neglect of duty are reviewed under a standard similar to that for dismissals.[2] The misconduct must be "of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." [3]

Although there is no "double jeopardy" rule for disciplinary actions, there is a fundamental unfairness and unreasonableness apparent when an employee is disciplined twice for the same misconduct. Grievant accepted her 3-day suspension, and accepted the change in her assignment without filing a grievance. Months after these actions were taken, Respondent demoted Grievant without any intervening misconduct on her part. This action fails the "arbitrary and capricious" test. Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable.[4] An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard

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[1] 156 C.S.R. 1 § 3, Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427.

[2] *Jordan, et al., v. Division of Highways*, Docket No. 2010-0812-CONS.

[3] Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965).

[4] *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

of facts and circumstances of the case."[5] Respondent's demotion of grievance in the face of its spurious contention that it did invoke a performance improvement plan (PIP) was an action that clearly disregarded the facts and circumstances of the case, most specifically the facts that Grievant had already been disciplined for the same misconduct and had performed flawlessly in the intervening period between suspension and demotion.

Particularly troubling in this case is the fact that Grievant was never placed on a PIP after her return from suspension. She was told in no uncertain terms that a plan would be put in place upon her return to work from her suspension. Although the notice did not, as Grievant asserts, state that she would not be disciplined until after a PIP was instituted, she was reasonable in assuming that she would be given a PIP and that she had already been disciplined for her problems in managing the database for which she was responsible.

Respondent argues that Grievant was subject to "performance monitoring" in her current duties as telephone operators, duties she was assigned as soon as she returned from her suspension. Respondent argues this was a PIP. Grievant's new supervisor, Susan Silverman, stated she had no plans to create a PIP, and since she began those duties there have been no issues with Grievant's attendance or performance. If Respondent's argument is taken at face value, even though it is clearly meretricious, then Grievant's performance while in her new duties does not merit further disciplinary action.

Respondent has not met its burden of proving Grievant's demotion was for good cause.

The following conclusions of law support this discussion:

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[5] *Eads*, *supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

Conclusions of Law

1. 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. 156 C.S.R. 1 § 3, Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427.

2. Suspensions for neglect of duty are reviewed under a standard similar to that for dismissals. *Jordan, et al., v. Division of Highways*, Docket No. 2010-0812-CONS.

3. The misconduct must be "of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* Sections 12.02 and 03, Administrative Rules, W. Va. Div. of Personnel (June 1, 1998).

4. "An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs. Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977)." *Morris v. Kanawha County Bd. of Educ.*, Docket No. 99-20-200 (July 27, 1999).

5. Respondent failed in its burden of proving a justification for disciplining Grievant twice for the same misconduct, and such action was proven to be arbitrary and capricious.

For the foregoing reasons, this grievance is hereby **GRANTED**. Respondent is ORDERED to restore Grievant to her previous position and classification, and to pay her

any accumulated back pay and benefits from the date of her demotion, with interest. Respondent is further ORDERED to implement a meaningful Performance Improvement Plan consistent with the guidelines of the Division of Personnel, to assist Grievant with the performance of her duties.

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).

June 30, 2010

M. Paul Marteney
Administrative Law Judge