THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

MELISSA A. KENNEDY,
Grievant,

v. **Docket No. 2009-1443-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
Respondent.

DECISION

Grievant Melissa A. Kennedy filed this grievance on April 8, 2009, following the termination of her employment with the Department of Health and Human Resources. Her statement of grievance indicates that she "was dismissed from her position with the WV DHHR effective 3-31-09 due to allegations of misconduct in the form of accepting favors from clients, falsifying documents, among others, in the course of her employment. DHHR also violated grievance procedure prior to dismissal." Grievant's relief sought is "immediate reinstatement, lost wages and benefits, record expungement, and all relief available to this employee, including but not limited to attorney fees and costs."

This grievance was filed at level one with a request for a conference. A conference was not scheduled by Respondent and Grievant filed a Petition for Writ of Mandamus in the McDowell County Circuit Court requesting that Court to issue a rule to show cause against the Respondent. Grievant did not file a request for default pursuant to the grievance procedure. The undersigned Administrative Law Judge conducted a phone conference with the parties on May 26, 2009, during which time the Writ of Mandamus action was still pending. The Writ of Mandamus action was dismissed by the McDowell County Circuit Court for lack of jurisdiction. Notwithstanding the fact that a level one

conference was not conducted in the matter, the parties requested that a level two mediation session be conducted for both the termination grievance and the corresponding suspension grievance.[1] The level two mediation session was conducted on September 9, 2009. Appeal to level three was perfected on September 21, 2009. A level three hearing was conducted on December 8, 2009, at the Grievance Board's Beckley location before Administrative Law Judge Mark A. Barney. Grievant appeared in person and by her counsel, Lacy Wright, Jr. Respondent appeared by its counsel, Jennifer Akers. This grievance became mature upon receipt of the last of the parties' proposed findings of fact and conclusions of law on January 19, 2010. The grievance was reassigned to the undersigned Administrative Law Judge following the resignation of Mr. Barney.

Synopsis

Grievant was dismissed from her employment as an Economic Service Supervisor at the Welch office of the West Virginia Department of Health and Human Resources. She was dismissed for falsification of records, misuse of approval authority, failure to follow a supervisor's directive, working on cases in which she had a personal conflict, dishonesty during the investigation, and failure to provide the timely processing of hearing requests. The only evidence to support these accusations was the testimony of the investigator, and his report summarizing his interviews with co-workers and clients of the Respondent. This is hearsay and, in some instances, hearsay upon hearsay. Under the circumstances of this grievance, this hearsay is entitled to no weight. Respondent did not prove the charges against Grievant. This grievance is granted.

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[1]Docket Number 2009-0905-DHHR.

The following findings of fact are based upon the record developed at level three.

Findings of Fact

1. Prior to her dismissal, Grievant was employed by the Department of Health and Human Resources ("DHHR"), the Bureau for Children and Families, as an Economic Service Supervisor at DHHR's office location in Welch, West Virginia.

2. Grievant began work for the DHHR on October 3, 1994 as a Human Services Aide. Grievant's personnel file reveals no adverse notations or reprimands against Grievant from the date of her employment until the date of her dismissal. Grievant's annual evaluations demonstrate a pattern of meeting and exceeding expectations in addition to commendable client service over a period of fourteen years.

3. The Office of Inspector General ("OIG") is the agency within DHHR given authority to investigate reported instances of employee misconduct or illegal workplace activity.

4. The OIG received complaints regarding Grievant based upon perceived violation of law and policy for the period of time from October 2007 through December 2008. In particular, the complaint alleged that Grievant was involved in the approval of Medicaid benefits for which clients were not eligible.

5. The matter was approved for investigation by the DHHR.[2] Christopher Nelson, Assistant Director of the Investigation and Fraud Management of OIG, led the

[2]The date on which the investigation was approved is not obvious from the record; however, it must have taken place around the time that Grievant was suspended in December 2008.

investigation of Grievant with other investigators conducting some of the interviews in the matter.

6. The investigation revealed that Grievant had presumptively approved a client for Medicaid benefits. Under certain circumstances, in which a client has need for immediate medical treatment, an applicant may be presumptively approved for disability-related Medicaid. This allows for the issuance of medical coverage to the applicant while the worker continues to process the application. The applicant may, or may not, be approved regardless of presumptive approval status.

7. Only certain medical diagnoses qualify an applicant for presumptive approval. This client had a diagnosis of Hepatitis-C. While this is not a diagnosis that allows an applicant to be presumptively approved for Medicaid benefits, Grievant believed that Hepatitis fell in the category of infectious diseases and, therefore, pre-approved the application.

8. In cases where there exists presumptive approval decisions based upon an apparent immediate need for treatment, Grievant did so on the basis of the medical information available at the time either through documentation or in talking with the client.

9. On December 11, 2008, a correspondence addressed to Grievant was opened during mail processing at the Welch office. The correspondence contained two applications and a handwritten note from a client. The note indicated that if Grievant would put the fix in for the applications, the client would return the favor by providing Grievant with prescription pain medication.

10. Mr. Nelson interviewed Grievant on December 15, 2008. Grievant explained that her presumptive approval for a client based upon the presence of Hepatitis-C had

been an honest mistake. She explained that there was no falsification of records in that it appeared from the medical information then available that there was an immediate need for medical services. Grievant explained that she had no knowledge of the note concerning being given prescription medication in exchange for fixing an application until she met with Mr. Nelson. In addition, the individual presenting the note was not interviewed and did not present testimony at level three to ascertain if she possessed ulterior motives to compromise Grievant's position at DHHR.

11. This client was not interviewed by Mr. Nelson, or any other investigator, concerning either the note or any relationship with Grievant that may have resulted in some ulterior motive to author such note.

12. Grievant was suspended without pay from her employment on December 29, 2008, pending the outcome of the OIG investigation. Grievant's suspension was subsequently extended by Joseph Bullington, Regional Director, on January 22, 2009, February 23, 2009, and March 30, 2009.

13. Mr. Nelson found in his report dated June 3, 2009 that "the possibility of an exchange of drugs on State property or for preferential treatment can not [sic] be excluded. It can be determined with certainty, however, that KENNEDY provided false information to Investigator Nelson during HER interview . . ." The report goes on to summarize that "indications show that KENNEDY was abusing drugs both on and off duty. Whether there was an actual agreement to trade drugs for benefits or preferential treatment from the Department, it is clear that KENNEDY's behavior had led others to **perceive** that SHE would be willing to trade drugs for benefits or preferential treatment from Department." The investigator goes on to conclude that "[w]hatever the reasons that led up to its occurrence,

there should be concern within the Department when an individual walks into a Department of Health and Human Resources office, and submits, in writing, a proposal to trade off drugs for benefits. At this point, evidence indicates KENNEDY'S behavior, drug use, and probable drug addiction, led [the client] to believe such an exchange could occur."

14. None of the potential witnesses that were interviewed by Mr. Nelson or other investigators used to conduct interviews were called to testify at the level three hearing.

15. All of the clients that were interviewed during the investigation failed to provide any direct evidence that Grievant participated in the use of non-prescribed drugs and medication during the course of her work day.

16. Few co-workers of Grievant were able to provide any relevant information when asked by the investigator if they are aware of any customer, directly - indirectly - or allegedly, who may have received benefits based on anything other than eligibility issues through the help of another DHHR employee, including favoritism, fraud, cronyism, or "taking care of buddies." In the event a co-worker did answer this question in the affirmative, it was based on hearsay, speculation, or conjecture.

17. The only relevant evidence offered by Respondent consisted of the investigative report prepared by Mr. Nelson of the Inspector General's office, and a letter of dismissal signed by Mr. Bullington.

18. Grievant was notified that she was being dismissed from her employment with DHHR by letter dated March 31, 2009. The dismissal letter states Grievant is being dismissed for falsification of records, misuse of approval authority, failure to follow a supervisor's directive, working on cases in which she had a personal conflict, dishonesty during the investigation, and failure to provide the timely processing of hearing requests.

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 Bd. 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 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). In other words, "[t]he 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).

Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct 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).

The main argument in Respondent's submissions is the assertion that they have established through the OIG investigation and subsequent report, as well as the testimony of Christopher Nelson, that Grievant has not been truthful about her actions and

relationships. Grievant denied any intentional wrongdoing during the investigation and at level three. Grievant pointed out that she had in fact made an honest mistake in the Hepatitis case by not checking the appropriate manual setting out the guidelines for presumptive approval. In fact, the limited record of this matter established that inadvertent error could not be ruled out when making determinations involving food stamp and medical card eligibility due to the high volume of cases. Grievant acknowledged and admitted that she knew some of the clients that live in the same town of War, West Virginia, but that nothing improper or unethical resulted.

The charges against Grievant are serious and, on the face of the dismissal letter, damaging. If Grievant had engaged in a pattern of behavior evidencing drug use and obtaining drugs through favoritism for DHHR customers, she should not be returned to her employment. However, the only evidence offered by Respondent in support of its allegations were the findings of the investigative report as an exhibit and through the testimony of Christopher Nelson. Mr. Nelson's report, and his testimony regarding what he was told and what other investigators were told, is hearsay.

Under the statutes and procedural rules relating to grievances the formal rules are not applicable in grievance proceedings, except for the rules of privilege recognized by law.[3] The issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings. Accordingly, an administrative law judge must

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[3] *See generally* W. VA. CODE § 6C-2-4(a)(3).

determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. *Warner v. Dep't of Health and Human Resources*, Docket No. 07-HHR-409 (Nov. 18, 2008)*; Miller v. W. Va. Dep't of Health and Human Resources*, Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ.*, Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996).

The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements.[4] *Gunnells v. Logan County Bd. of Educ.*, Docket No. 97-23-055 (1997); *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-8-115 (June 8, 1990).

Applying these factors, the undersigned determines that Mr. Nelson's testimony and the co-worker and clients' statements are entitled to virtually no weight. Mr. Nelson was not present for any of the alleged acts of impropriety at the Welch office, and obtained the

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[4]The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing hearsay. *See Borninkhof v. Department of Justice*, 5 MSBP 150 (1981).

majority of his information from other investigators who were also not present. None of the eighteen witnesses with some first-hand knowledge, co-workers and clients, were subpoenaed to testify at the level three hearing. In any event, in reviewing the statements one comes away with nothing but uncertainty because the interview subjects based their representations on hearsay and speculation. For example, only two of the co-workers interviewed were able to give any evidence that any customer may have received benefits which were based on favoritism or fraud on the part of Grievant. Again, these two co-workers were not subpoenaed to testify at the level three hearing; the statements were contradicted by the testimony of Grievant; and the credibility of the declarants when they made the statements could not be assessed.

Turning to the charge of drug use on the job, none of Grievant's co-workers were able to provide any evidence that was not based on hearsay and speculation. Some answers to the question of whether any employee within the previous two years appeared to work impaired or under the influence appear as follows: "I have no proof or have never seen Melissa Kennedy take any drugs, but the last 1 1/2 years it appears she may be under the influence of something." Investigative Report, Respondent's Exhibit 1, page 27. "I've seen Melissa Kennedy go from someone helpful to someone who missed 1-2 days a week every week. Melissa's behavior was concerning and like maybe someone on drugs. I never asked her if she was on drugs but I asked her if she was okay or if there was something I could help her with. She said she was fine. Another former worker asked Melissa straight out if she was on drugs and Melissa said no. I'm not a doctor so I don't know." Investigative Report, Respondent's Exhibit 1, page 29. "I've seen people disheveled but I don't know for certain who might be on drugs. Some of the people that

ask to see Melissa Kennedy are known, or rumored into drugs, but I'm not aware of what Melissa does." Investigative Report, Respondent's Exhibit 1, page 31. "Melissa Kennedy often appeared frazzled when at work. I know she had pain issues. She had really bad arthritis in her hands. She wore braces on them. I know she took prescription pain medicine because she told me she did. She also put a medication on her hands that smelled like menthol. Some of the office staff made a big stink about how it smelled. Melissa would have to go in her office and put on the medication with her door closed and then wait for the smell to die down. The situation reduced Melissa to tears several times." Investigative Report, Respondent's Exhibit 1, page 48. Once again, any co-workers that made an allegation that Grievant appeared to be impaired or possibly using drugs were not subpoenaed to testify at the level three hearing; the statements were contradicted by the testimony of Grievant; and the credibility of the declarants when they made the statements could not be assessed.

None of the clients of the Welch DHHR office were subpoenaed to testify concerning the allegation that Grievant had been untruthful about her actions in the course of her employment or concerning any personal relationships she may have had with a client. The statements given to the investigator do not provide any damaging pieces of evidence or even the appearance of a smoking gun. In fact, at least one of the statements was taken from the mother of the client and is completely useless double hearsay. The other troubling aspect of this case is the fact that some of the clients were interviewed by an investigator other than Mr. Nelson. This leads once again down the path of double hearsay. The client that allegedly attempted to bribe Grievant into fixing certain eligibility forms in exchange for pain pills was scheduled to be interviewed, but failed to appear. A

common theme that runs through the statements is the proposition that, as a drug user, the clients would be able to opine that Grievant was under the influence of drugs. This is dubious at best, and complete rubbish at worst.

Under the factors set out above, the witnesses with some first-hand knowledge were clearly available to testify at the hearing; the statements were not routinely made; there is no consistency of the declarants' accounts with other information and other witnesses; limited or meaningless collaboration of these statements can be found in agency records; contradictory evidence exists in the case; and, the credibility of the declarants could not be tested at level three. The Respondent cannot meet its burden of proof in this grievance based solely upon this hearsay evidence.

The following conclusions of law support the Decision reached.

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. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

2. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct 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).

3. Respondent failed to prove the charges against Grievant.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to reinstate Grievant to her position as an Economic Service Supervisor at the Welch DHHR office, and to pay her all backpay to which she is entitled from the date her employment was terminated, and backpay for the period of time she was suspended without pay, plus interest, and restore all benefits, as though she had not been dismissed.

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 (eff. July 7, 2008).

Date: March 11, 2010

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Ronald L. Reece
Administrative Law Judge