THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SANDRA LEE GIBSON,
Grievant,

v. **Docket No. 2010-0148-DHHR**

DEPARTMENT OF HEALTH AND
HUMAN RESOURCES/BUREAU
FOR CHILD SUPPORT ENFORCEMENT,
Respondent.

DECISION

Grievant Sandra Lee Gibson filed a grievance against her employer on August 13, 2009, stating "Termination w/o good cause. Retaliation." For relief, she seeks, "Disciplinary action against manager responsible.[1] To be made whole, restoration of job, benefits, backpay [sic], interest."

Because this grievance is contesting a dismissal, Grievant elected to file directly to level three of the Public Employees Grievance Procedure. *See* W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held at the Grievance Board's Charleston office on September 15, 2010. Grievant was represented by Gordon Simmons, United Electrical Radio and Machine Workers of America 170, and Respondent was represented by Heather Laick, Assistant Attorney General. This case became mature for decision on November 11, 2010, upon the parties' submissions of findings of fact and conclusions of law.

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[1]Relief which entails an adverse personnel action against another employee is extraordinary, and is generally unavailable from the Grievance Board. *Stewart v. Div. of Corr.*, Docket No. 04-CORR-430 (May 31, 2005); *Jarrell v. Raleigh County Bd. of Educ.* Docket No. 95-41-479 (July 8, 1996).

Synopsis

Respondent terminated Grievant due to poor performance. Grievant argues there was a clear bias toward her and much of the disciplinary actions were based on pretextual reasons.

Respondent has met its burden. This grievance is DENIED.

Findings of Fact

1. At the time of Grievant's termination, she was employed by Respondent as a Child Support Specialist II in Braxton County.

2. Grievant was hired in 2001 as a Child Support Specialist III.

3. Charlotte Stalnaker became Regional Manager in 2006. When Ms. Stalnaker started her tenure as Regional Manager, she noticed some deficiencies with Grievant's work.

4. In 2007, Ms. Stalnaker had Tony George, Child Support Supervisor, shadow Grievant to assist in determining Grievant's strengths and weaknesses. Based on Mr. George's observations, it was decided that Grievant was to attend more training. This decision was discussed with Grievant, and she attended additional training.[2]

5. On April 11, 2007, Ms. Stalnaker, Holly Dennison, Grievant's supervisor, and Jennifer Grindo, Bureau of Child Support and Enforcement ("BCSE") attorney met with

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[2]Much argument and testimony was made concerning whether Grievant was unable to keep up with the instructor during the training. Grievant received a certificate for successful completion and was exposed to the teaching and had someone to which she could ask questions. Therefore, how she performed during the training is of little concern to the undersigned.

Grievant to discuss her poor work performance and to issue a verbal warning. A memo was provided listing specific case errors.

6. On August 2, 2007, Ms. Dennison met with Grievant and issued her another verbal warning regarding Grievant's availability to work and failure to abide by the office hours. Grievant was working later than her work hours. She did not request overtime for this, nor was she adjusting off. Even though Grievant was not asking for overtime, it is a violation of West Virginia Code for Grievant to work hours for which he/she is not paid, as she is not an exempt employee as defined in the Fair Labor Standards Act.

7. On August 13 2007, Grievant was issued a written reprimand for misrepresenting Respondent's financial records. On July 17, 2007, Attorney Jennifer Grindo attended a hearing on a Child Support Contempt Proceeding. The obligor provided a written receipt from the BCSE to the Court that stated "Pd. Arrearages through 1-31-06 for Brenda." This was inaccurate.

8. Grievant was put on a corrective action plan by letter dated August 13, 2007.

9. On November 1, 2007, Grievant received a written warning due to working past 5:00 p.m., without approval to work overtime.

10. On March 3, 2008, Grievant was demoted from Child Support Specialist III to Child Support Specialist II as a result of a guilty plea to petit larceny on a criminal charge not related to her position. As a Child Support Specialist II, Grievant was not required to accept money from clients.[3]

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[3]During the level three hearing and in the proposed findings of fact and conclusions of law, there was much made about the fact that Attorney Jennifer Grindo's husband represented Grievant on the criminal charges. Mr. Grindo was hired by Grievant. Mr. Grindo had been in contact with Respondent BCSE to determine the effect a misdemeanor

11. Around June 6, 2008, Grievant was placed on a corrective action plan for a period of two months, as the result of a settlement agreement reached in another grievance. In the agreement, Respondent agreed to withdraw a written reprimand from Grievant's file if she made the improvements enumerated in the corrective action plan. Grievant's work performance did not improve; therefore, Respondent suspended her for three days. This suspension was later overturned by an Administrative Law Judge ("ALJ") because the settlement agreement stated only that Grievant's written reprimand remain in her file if she failed to make improvements. *See Gibson v. DHHR/Bureau for Child Support Enforcement*, Docket No. 2009-0424-DHHR(Oct. 7, 2009).

12. As part of Grievant's corrective action plan of June 6, 2008, Grievant was to attend regularly scheduled meetings with Ms. Dennison. Grievant knew about and missed the meetings scheduled for August 25, 2008, September 8, 2008, September 22, 2008, October 6, 2008 and October 20, 2008. On some of those dates, Grievant was in the office, but Ms. Dennison did not remind Grievant of the meetings because she wanted Grievant to learn to be more responsible.

13. On March 27, 2009, Grievant was suspended for ten days for missing the meetings scheduled with Ms. Dennison. Grievant was also given a list of specific cases detailing errors Grievant had committed which were of a nature that could "cause the loss of support arrears to families in your [Grievant] caseload, and could potentially subject the Bureau to legal action by aggrieved parents." Respondent's Exhibit 3.

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plea would have on Grievant's position with the agency.

14. There continued to be issues with Grievant's work product. As part of Grievant's job duties, she traveled to Webster County occasionally to meet with clients. Ms. Dennison received complaints from the receptionist at that office that Grievant was late for appointments and clients were waiting for an extended period of time.

15. On July 14, 2009, BCSE Attorney Grindo informed Ms. Dennison that 11 of the 16 court files she needed for a hearing scheduled the following day had not been updated by Grievant, and Attorney Grindo could not locate the files for her review.

16. Grievant knew Attorney Grindo requested the files be updated two weeks in advance of the hearing.

17. Ms. Dennison, who was in Charleston attending training, phoned Grievant and told her to bring the files back to the Braxton County office.

18. The files were not updated, and Attorney Grindo had to complete them.

19. On July 15, 2009, Ms. Dennison emptied 52 messages out of Grievant's voice mailbox. The narratives in the cases in the computer system had not been updated. These messages were dated from July 6, 2009, through July 14, 2009.[4] Grievant was directed to return the calls and update the case files.

20. On July 21, 2009, Grievant was more than an hour late for scheduled appointments in Webster County.

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[4]Grievant's Exhibits 1 and 2 contained information, including clients' names, that were not redacted. During the hearing, Respondent's counsel requested the names and identifying information be redacted from these exhibits. Because of the number of documents and needed redactions, the undersigned has decided to place these items under seal.

21. On August 13, 2009, Grievant was terminated due to “continuing excessive deficiencies in your [Grievant’s] duties as a Child Support Specialist II.

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. W. VA. CODE § 29-6A-6; *Ramey v. W. Va. Dep't of Health,* Docket No. H-88-005 (Dec. 6, 1988). "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.*

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 & 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).

Respondent asserts it has counseled and coached Grievant, given her verbal and written reprimands, a ten day suspension and placed her on corrective actions in an attempt to improve her deficient work product and work performance. Respondent argues Grievant has been made aware of the specific problems and even underwent additional training. Yet, Grievant’s work product did not improve. Respondent also avers it followed

the progressive discipline policy and only after every attempt to improve Grievant's issues were unsuccessful, was she terminated.

Grievant argues that some of the instances used for termination have already been used for disciplinary action and therefore, constitute double jeopardy. Double jeopardy exists in criminal law. "The double jeopardy clause in Article 3, Section 5 of West Virginia Constitution, provides immunity from further prosecution where a court having jurisdiction has acquitted the accused. It protects against a second prosecution for the same offense after conviction. It also prohibits multiple punishments for the same offense." Syl. Pt. 1 *Conner v. Griffith*, 160 W. Va. 680, 238 S.E.2d 529 (1977).

Respondent has shown that it worked diligently to bring Grievant's deficiencies to her attention and provide her with an opportunity to correct the problems. Respondent has followed the Progressive Disciplinary Action which provides for a system that begins with a verbal reprimand, followed by a written reprimand, suspension and then dismissal. While the policy states it should be followed in most cases, it is also clear that the severity of disciplinary action should be made on a case-by-case basis. Progressive discipline benefits the employee because it provides opportunities for the employer and employee to have frank discussions about expectations and what can be done to meet those. Not only is Grievant's claim of double jeopardy legally incorrect, but the instances of prior disciplinary issues have been used to show Respondent's numerous attempts to both inform and correct Grievant's deficiencies. Unfortunately for Grievant, she has either been unable or unwilling to make the adjustments to improve her work product.

Grievant also avers that Ms. Dennison and Attorney Grindo have a clear bias against her. Grievant points out that Ms. Dennison testified that when it was time for the

meetings with Grievant which were required as a result of her corrective action plan, Ms. Dennison did not remind Grievant, and expected her to be present for these meetings. The second instance to which Grievant points relates to the 52 voice mail messages that were not listened to and were left on Grievant's phone system. Ms. Dennison testified that she had assisted employees in the past with making calls when the employees were behind. Ms. Dennison did not assist Grievant.

While the undersigned gives short pause to the fact that Ms. Dennison did not initially remind Grievant of the scheduled meeting, she also believes that Grievant has to take responsibility for herself and her own actions which contributed to this unfortunate situation. From the testimony it appears as if Grievant was content to continue to function with her status quo despite the knowledge that her work product was not adequate or correct.

With respect to the telephone calls, Grievant was not doing her job. Ms. Dennison made a decision not to assist Grievant in returning the calls and gave Grievant enough time to complete the calls. The main issue with the phone calls is not who did not assist Grievant in returning them, but the fact that Grievant had not listened to or dealt with 52 phone messages on her work voice mail concerning files she was assigned. These messages accumulated over a week. Grievant was at work during this period of time, and there was no reason why she could not check her messages and return the phone calls, as her job requires.

Respondent has met its burden of proof in this matter. This grievance is DENIED.

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. W. VA. CODE § 29-6A-6; *Ramey v. W. Va. Dep't of Health,* Docket No. H-88-005 (Dec. 6, 1988). "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. 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 & 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 has met its burden in this matter.

Accordingly, this 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: December 10, 2010

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Wendy A. Elswick

Administrative Law Judge