THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

GALE POORE,

Grievant,

v. **Docket No. 2010-0448-DHHR**

**WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES/
BUREAU FOR CHILDREN AND FAMILIES,**

Respondent.

DECISION

Grievant Martha Gale Poore[1] is an Adult Protective Services Worker employed by the Department of Health and Human Resources ("DHHR") and assigned to the Bureau for Children and Families. Ms. Poore filed a level one grievance form dated July 30, 2009, alleging that she is "being harassed and treated in a discriminatory manner by Norm Reynolds, Tina Mitchell and Anita Atkins"[2] which she alleges is in violation of the laws of the State of West Virginia. This Grievance was assigned the docket number 2010-0105-DHHR by the West Virginia Public Employees Grievance Board.

The parties met on October 1, 2009, for a scheduled level one hearing. At that time, the parties agreed to waive level one and proceed to level two.

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[1] Grievant is generally known by her middle name, Gale, rather than Martha.

[2] These three people are supervisors employed by the DHHR. Norm Reynolds was Grievant's direct supervisor. Ms. Mitchell is Mr. Reynold's supervisor and Ms. Atkins is Ms. Mitchell's supervisor.

Ms. Poore filed a second level one grievance form dated October 1, 2009. In that grievance, Ms. Poore contested a written reprimand that she was issued by Anita Atkins on September 21, 2009. Grievant alleges that the written reprimand was issued in retaliation for her filing grievances in July and September of 2009 against her supervisors and an EEO complaint against Supervisor Norm Reynolds. Grievant also alleges that she was subjected to harassment and disrespect in the workplace because she also filed an EEO complaint against her first supervisor. Grievant seeks the following relief:

> –Revocation of the letter of reprimand and a cessation of all discriminatory treatment and disrespect from my supervisors.
> –Remedial training for all DHHR APS [3] supervisors in EEO [4] and what constitutes discrimination and unfair treatment of employees.

This Grievance was assigned the docket number 2010-0448-DHHR.

The parties met on October 29, 2009, for a scheduled level one hearing. At that time the parties agreed to waive level one and proceed to level two. The parties decided not to consolidate the two grievances but asked that they be mediated together. A level two mediation was conducted with the parties on November 24, 2009, and an Order was entered the following day. Thereafter, Grievant filed a timely appeal for a level three hearing.

A level three hearing was conducted in the Charleston office of the West Virginia Public Employees Grievance Board over the course of six days. Those days were: February 18, 2010; March 25, 2010; March 26, 2010; June 9, 2010; June 11, 2010; and

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[3] APS is short for Adult Protective Services.

[4] EEO is short for Equal Employment Opportunity.

July 6, 2010. Grievant was present at the hearing and was represented by Katherine L. Dooley, Esquire. Respondent DHHR was represented by Heather L. Laick, Assistant Attorney General. The parties agreed to keep the grievances separate but that the factual record for both grievances would be made during this hearing. The parties requested that a separate decision be issued for each grievance. This decision relates to the second grievance which was dated October 1, 2009.

After the hearing, the parties agreed to submit proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals, the last of which was received by the West Virginia Public Employees Grievance Board on August 31, 2010. This grievance became mature for decision on that date.

Synopsis

Grievant alleges that the letter of reprimand was issued to her in retaliation for her filing grievances against her supervisors and an EEO Complaint against her immediate supervisor Norm Reynolds. Respondent counters that the letter of reprimand was simply the next step in the progressive discipline process that they were utilizing to address ongoing problems with Grievant's work performance. Respondent proved that the letter of reprimand was related to problems with Grievant's work performance and was not issued as a reprisal for Grievant making complaints against her supervisors.

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 Gale Poore is an African-American woman employed by the DHHR Bureau for Children and Families as an Adult Protective Services Worker ("APS"). She has been employed in that capacity in the Kanawha District for three years.

2. Ms. Poore filed a grievance dated July 30, 2009, alleging that her supervisors and their supervisors were discriminating against her based upon her race. She also filed a complaint against her supervisor, Norm Reynolds, which was turned over to the EEO Office for investigation.

3. The EEO investigation regarding comments made by Supervisor Norm Reynolds was initiated by Manager Anita Adkins when she received a complaint from Grievant about Mr. Reynold's comments. The investigation was coordinated by EEO Officer Donald Raynes. Donald Raynes has many years of experience as an investigator in the military and law enforcement. He also has received extensive training and experience in investigating EEO complaints. Mr. Raynes was Director of the Human Rights Commission for ten years, was Interim Director of the State EEO for one year and has been an EEO Specialist for two years. He is presently serving as the EEO Officer for the DHHR.

4. Officer Raynes reviewed all of the statements taken during the EEO investigation and issued a report dated September 10, 2009, regarding the claim against Norm Reynolds. He specifically found that "the allegation of an inappropriate comment made by Norm Reynolds is substantiated." Grievant Exhibit 6A. In response to an e-mail from Manager Adkins asking for more information regarding the report, Officer Raynes noted that he specifically found that Mr. Reynolds had made an inappropriate comment

and that he may have made others. Officer Raynes did not find that Norm Reynolds had "discriminated against anyone based on anything." Respondent Exhibit 30.[5]

5. The DHHR Community Services Manager for the Kanawha District, Anita Adkins, gave Grievant a written reprimand dated September 21, 2009. That letter cited instances of alleged improper job performance by Grievant including, but not limited, to the following:

- Failing to follow a directive to conduct a guardianship assessment for client TH prior to a court hearing.
- Transporting client HD to an adult care facility without making arrangements for her personal belongings[6] to be transferred to her by her conservator.
- Leaving work early without approval of her supervisor after numerous reminders and instructions from the supervisor regarding the proper procedure for signing in and out and adjusting her schedule.[7]

Respondent Exhibit 19.

6. Ms. Adkins tried to meet with Grievant for some time to hold a predetermination conference prior to taking disciplinary action. She was unable to schedule a time when the DHHR supervisors, Grievant and Grievant's attorney could all be available for the meeting. Ms. Adkins informed Grievant on September 16, 2009, that

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[5] For a detailed discussion of the allegations against Supervisor Reynolds and the EEO investigation *See Poore v. Dep't of Health & Human Res./Bureau for Children & Families*, Docket No. 2010-0105-DHHR (Feb. 11, 2011).

[6] The personal belongings included the client's medication, clothing and medical card.

[7] Manager Adkins noted that Grievant had previously received a verbal reprimand related to these issues.

she intended to send the letter to Grievant without the conference to avoid further delay. Grievant agreed to that action. Respondent Exhibit 19.

7. When Grievant was initially hired her immediate supervisor was Katheren DeLuca. Ms. DeLuca was employed as an APS Supervisor.

8. Tina Mitchell is employed by the DHHR as an APS Coordinator. She is the supervisor for APS Supervisors such as Katheren DeLuca, Norm Reynolds and Autumn Hager. Ms. Mitchell has been the APS Coordinator in the Kanawha District for four years.

9. Anita Adkins is the DHHR Community Services Manager for the Kanawha District. She is the manager for all community services in that district including Adult Protective Services. Ms. Adkins is the immediate supervisor for Coordinator Tina Mitchell. Ms. Mitchell and Ms. Adkins are Caucasians.

10. During Grievant's probationary period she was a good worker with excellent documentation of her actions. After about a year her work began to decline steadily.[8]

11. All APS workers in the Kanawha District office are required to sign in upon arrival at the office and sign out when they are leaving. After Grievant's probationary period she regularly failed to sign in and out as she was supposed to do. On one occasion Supervisor DeLuca looked for Grievant in the office at 9:15 am without being able to find her, only to note that Grievant had later marked the sign in sheet that she arrived at 8:30 am. On another occasion Supervisor DeLuca noted that Grievant wrote on the sign in sheet that she had worked from 8:30 am to 4:30 pm on a day that Grievant was actually off work on approved annual leave.

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[8] Testimony of Katheren DeLuca.

12. Supervisor DeLuca admonished Grievant several times regarding the importance of accurately recording her time and gave her at least one verbal reprimand. Eventually, Supervisor DeLuca required Grievant to sign in and out by e-mail so that there would be an electronic time stamp on the document to verify that the time was correct.

13. Supervisor DeLuca and successor Supervisor Reynolds who followed her, corrected other employees occasionally for failing to properly sign in and out but no other employee violated this procedure as frequently as Grievant.

14. When Supervisor DeLuca began bringing performance problems to Grievant's attention, Grievant began avoiding Ms. DeLuca and seeking guidance regarding her cases from another supervisor. Since Ms. DeLuca was ultimately responsible for these cases this practice created problems. Eventually, Ms. DeLuca was forced to direct Grievant to stay out of the other supervisor's office.

15. Supervisor DeLuca was documenting performance problems with Grievant in anticipation of the need to take progressive disciplinary measures. During this time period Grievant filed an EEO complaint against Supervisor DeLuca alleging that she was discriminating against Grievant Poore on the basis of her race.

16. The EEO complaint was found to be unsubstantiated. Supervisor DeLuca transferred to a position as a Child Protective Services Worker ("CPS"). She was frustrated with her efforts to supervise Grievant and the complaints Grievant had filed against her.[9]

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[9] Grievant alleged in her grievance statement that the EEO complaint she filed against Supervisor DeLuca lead to her removal as a supervisor. No evidence was produced to substantiate this allegation. In fact, the EEO allegation was not substantiated. Supervisor DeLuca voluntarily took a position as a Child Protective Services Worker which resulted in a salary increase. Testimony of Katheren DeLuca.

17. Norm Reynolds was hired as the new APS Supervisor to replace Katheren DeLuca in September 2008. Mr. Reynolds is Caucasian. He had been a social worker for 29 years before taking this supervisory position. Prior to and shortly after taking this position he was told that there were problems in the unit such as a clique atmosphere among a number of the employees and that there were specific performance issues with Grievant. Supervisor Reynolds had access to the personnel files of the employees he supervised but decided not to utilize the voluminous performance documentation that had been collected by Supervisor DeLuca. He preferred to make a fresh start with the employees in the Kanawha APS Unit.

18. Prior to the employment of Mr. Reynolds, Autumn Hager approached Tina Mitchell to discourage the placement of Mr. Reynolds in that position. Ms. Hager is also employed as an APS Supervisor in the Kanawha District unit. At that time, Ms. Hager was not Grievant's supervisor.

19. On February 27, 2009, Supervisor Reynolds sent an e-mail to Grievant documenting that it was the second written notification within three days that Grievant was not properly signing in and out and that she was adjusting her schedule[10] without permission from her immediate supervisor. Supervisor Reynolds advised APS Coordinator Tina Mitchell of the situation and asked for a meeting to address these issues. Respondent Exhibit 12.

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[10] APS workers are sometimes required to work late hours to meet the needs of their clients. When that happens they are allowed to adjust their schedule so that they receive compensatory time off during the regular work day. The practice is generally referred to as "adjusting off." DHHR policy and practice requires APS workers to get approval from their supervisor before adjusting off so that scheduling problems can be avoided.

20. On that day, Supervisor Reynolds also provided Grievant with a list of dates on which she had failed to properly sign in or improperly adjusted off in the past. Those dates ranged from November 5, 2008 through February 26, 2009. This document was signed by Supervisor Reynolds with a notation that Grievant refused to sign it. Respondent Exhibit 11.

21. On July 14, 2009 Norm Reynolds sent Grievant an e-mail noting that it was her third verbal / written[11] warning for failing to sign in immediately upon returning to the office. Grievant responded that she had to return the keys to a vehicle to a co-worker before she signed in and that when she would have signed in Mr. Reynolds was holding the book which kept her from entering her time. Mr. Reynolds replied that he observed Grievant having a lengthy conversation with a co-worker upon returning to the office during which time the book was available for Grievant to sign in. He also reminded Grievant that the procedure required APS workers to sign in immediately upon returning to the office. Respondent Exhibit 7.

22. On July 16, 2009, Grievant was given a verbal/written warning for failing to return to the office and sign in on the afternoon of July 15, 2009. Mr. Reynolds reminded Grievant that APS procedures requires APS workers to return to the office and sign in or get permission not to return from the supervisor.

23. Occasionally Supervisor Reynolds would note the time that Grievant placed on the time sheet for return to the office would not be consistent with the time he saw her

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[11] These actions are called verbal warnings in the progressive discipline process. However, the fact that a verbal warning was issued is documented in writing to demonstrate that it was complete before moving to the next phase.

making the notation. On those instances Mr. Reynolds would make a notation on the time sheet as to the actual time he saw Grievant sign in. Supervisor Reynolds made a notation on the time sheet of August 6, 2009, that Grievant had signed back in to the office at 2:15 pm. Grievant had placed the time of 1:35 pm on the sheet. Later in the day Reynolds noted that Grievant had marked out his notation.

24. Supervisor Reynolds sent Grievant an e-mail instructing her to refrain from erasing the entries he places on the time sheet. Thereafter, Grievant removed a time sheet from the book that Supervisor Reynolds had placed a notation on and replaced it with a new time sheet. Grievant also marked through all of the blank spaces on the time sheet to impede her supervisor's ability to make notations on the sheet. Grievant was again instructed by Supervisor Reynolds to refrain from erasing his comments and to refrain from defacing the sign in sheet. Mr. Reynolds also sent an e-mail to coordinator Mitchell and manager Adkins documenting these incidents. Respondent Exhibit 9.

25. Other APS workers testified that the sign in rules were regularly enforced and that they each had been reminded of the appropriate procedure when they failed to comply. None of the other APS workers had received a written warning regarding failure to properly sign in but they did not have as many incidents of non-compliance as Grievant.[12]

26. Norm Reynolds issued a verbal/written reprimand dated June 11, 2009. Among other things, Supervisor Reynolds noted that Grievant lacked follow through on her

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[12] Olivia Wood is an African -American APS worker in the unit who is supervised by Autumn Hager. Ms. Wood noted that she fails to sign in about once a year and usually receives a reminder when she fails to follow the proper procedure.

cases, had to be regularly reminded to follow up on standard practice investigation procedures and resisted efforts by her supervisor to provide her with direction and instruction. Respondent Exhibit 17.

27. In April 2009, Grievant attempted to place client HD[13] in an independent living setting. Because of a myriad of problems that occurred on the day HD was to be transferred Grievant was forced to transport HD back to a more restrictive setting. Because the return transport was a difficult situation, Grievant was not able to take HD's purse with her when she took HD back to the original setting. Grievant took a month to arrange to get HD's purse to her even though the unit received regular complaints from the placement center that HD was very upset that she did not have her purse.

28. On July 13, 2009, the APS unit was advised by Thomas Memorial Hospital[14] that a client HD was ready for discharge. This had been previously assigned to Grievant and Grievant had made arrangements for HD to be housed in an adult care facility located in Wayne County.

29. Grievant was supposed to transport HD from the Hospital to the care facility on the morning of July 13, 2009, when HD was discharged. There was no state vehicle available to use in this transport so Supervisor Reynolds instructed Grievant to transport the client in her own vehicle. Respondent Exhibit 1.

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[13] Initials are used herein instead of the names of the DHHR clients to protect the clients' confidentiality.

[14] Thomas Memorial Hospital is located in South Charleston.

30. It is DHHR policy that APS workers must have a vehicle to transport clients in if there is no state vehicle available.[15] Grievant initially refused to transport the client in her vehicle because she felt it was against agency policy. Supervisor Reynolds confirmed with Tina Mitchell that it was appropriate for APS workers to transport clients in their personal vehicles. When Grievant was told this she stated that she could not use the vehicle she was driving because it belonged to her husband and he would not allow it to be used for that reason. Respondent Exhibit 1.

31. Around 10:30 am Mr. Reynolds relayed Grievant's response to Tina Mitchell. Ms. Mitchell directed Mr. Reynolds to relay to Grievant that she was to pick up HD for transport within thirty minutes. Mr. Reynolds relayed that information to Grievant.

32. Grievant then told her supervisors that HD was medically frail and unable to be transported in her vehicle which was a Jeep Wagoneer.

33. Mr. Reynolds contacted the charge nurse at Thomas Memorial Hospital and inquired about the client's medical condition. At 11:06 am Tina Mitchell sent an e-mail to Grievant[16] informing her that the Hospital nurse stated that HD was doing extremely well and that there was no reason why she would need any special transportation. The nurse had also noted that the client would be discharged within an hour. Ms. Mitchell reminded Grievant that it was a job requirement for APS workers to have a vehicle to transport clients when necessary. She ended by advising her that she was issuing a directive for Grievant

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[15] Other APS workers who testified during the level three hearing agreed that they are required to transport clients in their own vehicles from time to time.

[16] This e-mail was copied to Manager Anita Adkins and Norm Reynolds since all were involved in the discussion by this time.

to transport HD to the care facility and failure to do so would result in progressive discipline. Grievant Exhibit 14.

34. At 11:14 am Manager Anita Adkins sent Grievant an e-mail asking the following:

> As far as the information needed from the hospital is there something else you need Gale, or does this address everything?

Grievant responded in ten minutes stating that she would have to contact the sheriff department to get items from the client's home such as her walker and clothing. Two minutes later, Manager Adkins instructed Grievant that her first priority was to transport the client to the AFC provider that day. Grievant responded at 11:31 am that she would need gas for the car and did not have money for it. She asked for assistance in buying the gas. Grievant Exhibit 14.

35. During the time period that this discussion was taking place another worker returned a state vehicle. Grievant was given this vehicle and instructed to pick up HD for transport immediately. Sometime after 12:00 pm Grievant left to transport the client from the Hospital to the adult care facility. Respondent Exhibit 1.

36. Grievant did not take HD's personal belongings with her to the Care Facility because she was instructed that transporting the client was her first priority. She did not follow up with the personal belongings thereafter.

37. Mr. Reynolds received complaints from the manager of the Adult Care Facility that HD did not have her personal items. Supervisor Reynolds instructed Grievant to get that client's personal belongings to her. On July 16, 2009, Grievant replied that she had not been in the field or office the previous day to take care of the request.

38. On July 20, 2009, an e-mail exchange took place between Grievant and Manager Adkins wherein Grievant noted that she was instructed to take HD on July 13, 2009, and worry about the personal property later. Ms. Adkins responded that regardless what happened on the day of transport it was Grievant's responsibility to provide for the needs of the client on the short term and that responsibility did not end in one day. After more than a week Grievant did ultimately get the client's personal items to her.

39. In November 2008, APS worker Lisa Craddock was assigned as case manager for the client HT. An effort was being made to determine the mental capacity of TH and if necessary appoint a guardian to look after the client's financial affairs. Grievant Exhibit 43.

40. In December 2008, and January 2009, the management of HT's case was transferred to Grievant Poore. APS Worker Melissa Reed monitored the HT case in late January and early February 2009, until Grievant returned from sick leave in February and assumed the case management again on February 27, 2009.

41. On April 9, 2009, Grievant spoke with a staff person from the law firm who managed the client's trust to see if he had relatives who could serve as the client's guardian. Respondent Exhibit 15.

42. Grievant noted on June 17, 2009 that a hearing had been scheduled for July 21, concerning the appointment of as DHHR as the guardian for HT. The notation indicated that there were at least ten potential candidates who could serve as the guardian for HT. Respondent Exhibit 15. It is the APS workers responsibility to determine if there are relatives or other willing, responsible adults who will voluntarily serve as guardian rather than DHHR. Grievant had two other contacts with HT prior to the hearing but the file

records do not indicate that she made any further effort to contact candidates listed as potential guardians for HT.

43. On July 20, 2009, Supervisor Reynolds discovered that Grievant Poore apparently had not contacted the potential guardians for HT and instructed her to do so immediately since the hearing for guardianship was the next day.

44. At 1:51 pm on July 20, 2009, Grievant contacted Susie Layne, DHHR Program Senior Specialist noting that Mr. Reynolds had instructed her to contact the ten relatives for HT and asking if that was the responsibility of the DHHR in-house attorney rather that the APS worker. At 2:16 pm Grievant received the following reply:

> Sorry Gale you are wrong. You should have contacted the attorney who petitioned that DHHR be appointed guardian to ascertain the names and phone numbers of family members if you do not have access to that information. You will find this information in APS Policy under Investigations, as a Request to Receive for Guardianship utilizes the same process for investigating. If you look in Guardian Policy under Adult Initial Assessment it outlines the process for investigation.
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> There would be no reason for the Regional Assistant Attorney General to do research on appropriate family members. That is your role.

Respondent Exhibit 16.

45. At 3:13 pm July 20, 2009 Grievant sent an e-mail to Mr. Reynolds stating that: “There are no parties of the family who are wanting guardianship of Mr. HT.”

46. At 3:41 pm Mr. Reynolds responded to Grievant that she had previously indicated that there were at least ten family members. The case file notations did not indicate that Grievant had made contact with any of those family members. He also noted the APS policy required the APS worker to document such contacts immediately after they

are made. Three minutes later Grievant replied that she had located her personal notes and would document the contacts. Respondent Exhibit 16.

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).

Grievant alleges that the letter of reprimand was issued in retaliation for her filing grievances and complaints against her supervisor. Respondent counters that the letter of reprimand is simply the next step in the progressive disciplinary procedure that is being utilized to address consistent and chronic problems in Grievant's job performance.

For purposes of the grievance procedure the term "reprisal" is defined as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." W. VA. CODE § 6C-2-2 (o). To demonstrate a *prima facie* case of reprisal Grievant must establish by a preponderance of the evidence the following elements:

> (1) That she engaged in protected activity (i.e., filing a grievance);
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> (2) That she was subsequently treated in an adverse manner by the employer or an agent;
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> (3) That the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
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> (4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Hoffman v. W. Va. State Police, Docket No. 2010-0880-MAPS (Sept. 28, 2010); *Vance v. Jefferson County Bd. of Educ.* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W . Va. 53, 365 S.E.2d 251 (1986).

The filing of grievances and EEO complaints is a protected activity. In addition to the foregoing definition for reprisal, W. VA. CODE § 6C-2-3 contains the following provision:

> (h) Reprisal.--No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination.

This provision makes the legislation intent that filing grievances was a protected activity abundantly clear. There is also no doubt that Respondent has knowledge that Grievant has engaged in this protected activity nor is there any dispute that Grievant has been disciplined by her employer which could have an adverse effect on her future employment. The remaining and contested issue is whether engaging in the protected activity caused the adverse treatment.

An inference of a retaliatory motive can be drawn in the absence of and evidence to the contrary. *Frank's Shoe Store supra.* In this matter, Respondent produced sufficient

evidence to demonstrate that the letter of reprimand was not issued in retaliation to the protected activity of filing grievances.

One of the reasons cited for the reprimand was Grievant's chronic refusal to comply with the APS sign in policy. She argues that her supervisor gave her several verbal reprimands for failure to follow the sign in policy but did not do so to other employees. Other APS workers testified that the sign in rule was something that was closely watched. Grievant's failure to comply with this policy was documented as beginning with Supervisor DeLuca who ultimately was forced to have Grievant sign in electronically. The non compliance continued with Supervisor Reynolds even after he abandoned the documentation that Ms. DeLuca had assembled in an effort to give Grievant a fresh start. Supervisor Reynolds gave Grievant ample opportunity to comply with the policy before a written reprimand was finally issued. Grievant offered regular excuses for failing to comply with the policy but consistently failed to meet the policy expectations. Additionally, she resisted compliance by erasing her supervisor's comments on the time sheet and marking over any blank on the sheet in an effort to keep Mr. Reynolds making new notations.

Another reason given for the issuance of the written reprimand was the transportation of client HD from Thomas Memorial Hospital to an Adult Care Facility in Prichard, West Virginia. Her supervisor instructed Grievant to transport the client in her own vehicle because there were no state vehicles available and HD was about to be discharged. It is DHHR policy that APS workers must have a vehicle to transport clients in if there is no state vehicle available. Other APS workers testified that it is rare but they have been required to transport clients in their own cars. Rather than comply with a simple directive, Grievant made numerous excuses as to why she could not use her own vehicle.

By the time the matter was resolved Grievant did not have time to gather HD's personal belongings and it was several days before those could be taken to her. This problem was exacerbated by that fact that on a previous occasion Grievant had transported HD and was unable to take HD's purse with her. On that occasion it took Grievant a month to get HD's purse to her.

Grievant was also criticized for her handling of the guardianship petition for client HT. Grievant had not noted any contacts with the ten relatives of HT who were potential guardians. APS policy requires that such contacts be recorded immediately in the case notes.[17] APS policy also requires that the APS worker make an investigation to find potential guardians and contact them. *See* Respondent Exhibit 16. When Supervisor Reynolds checked the case notes the day before the guardianship hearing, he could find no indication that efforts were made to contact the ten relatives and instructed Grievant to make the contacts. Rather than consult her own notes Grievant attempted to deflect this responsibility to the in-house attorney who was representing the agency. When the Program Specialist confirmed that the investigation was her responsibility she informed Supervisor Reynolds that she had looked through her handwritten note and found that she had made the appropriate contacts. Supervisor Reynolds did not dispute this claim but reiterated to Grievant that it was a performance expectation that she enter contacts into the case file data base as soon as they had been made.

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[17] The case notes are kept in a computer data base identified by the acronym FACTS. The APS workers type their notes into this data base so that others working on the case also have access to what has been done to assist the clients.

The evidence indicates that the written reprimand was issued as part of a continuing effort to correct Grievant's performance and was based upon incidents that were observed by both of her supervisors as well as Ms. Mitchell and Ms. Adkins. The evidence does not establish that there is any connection between the letter of reprimand and the grievances or complaints filed by Grievant Poore.

Respondent proved by a preponderance of the evidence that the disciplinary action was justified and appropriate. Consequently, the 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. 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).

2. For purposes of the grievance procedure the term reprisal is defined as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." W. VA. CODE § 6C-2-2 (o). To demonstrate a *prima facie* case of reprisal

Grievant must establish by a preponderance of the evidence the following elements:

> (1) That she engaged in protected activity (i.e., filing a grievance);
>
> (2) That she was subsequently treated in an adverse manner by the employer or an agent;
>
> (3) That the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
>
> (4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Hoffman v. W. Va. State Police, Docket No. 2010-0880-MAPS (Sept. 28, 2010); *Vance v. Jefferson County Bd. of Educ.* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W . Va. 53, 365 S.E.2d 251 (1986).

3. Grievant did not prove by a preponderance of the evidence that there was any causal connection between the letter of reprimand that was issued to her and her filing of grievances or EEO complaints against Respondent.

4. Respondent proved by a preponderance of the evidence that the disciplinary action was justified and appropriate.

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: FEBRUARY 11, 2011.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE