WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CRYSTAL SUTPHIN,
Grievant,

v. **Docket No. 2011-1808-DHHR**

DEPARTMENT OF HEALTH
AND HUMAN RESOURCES/
BUREAU FOR CHILDREN
AND FAMILIES,
Respondents.

DECISION

Grievant, Crystal Sutphin, was employed by the Respondent, Department of Health and Human Resources ("DHHR"), as a family support specialist in the Respondent's Boone County office. Ms. Sutphin filed a grievance form at level three[1] dated June 15, 2011, alleging that her employment had been terminated without good cause. As relief, Grievant seeks "To be made whole, including pay & back pay with interest & benefits restored."

A level three hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board on April 12, 2012. Grievant appeared personally with her representative Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent DHHR was represented by James "Jake" Wegman, Assistant Attorney General. This grievance became mature for decision upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law on May 30, 2012.

Synopsis

Grievant was dismissed from employment as a family support specialist for allegedly working on cases for public support which involved her neighbors and for intentionally

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[1] W. VA. CODE § 6C-2-4(a)(4) authorizes an employee to file a grievance directly at level three when contesting the termination of her employment.

assisting her son to receive benefits for which he was not qualified. These activities are specifically prohibited by DHHR policy. Grievant admitted that she worked on cases where her neighbors were involved but argued that the neighbors were not her friends. Grievant denies assisting her son in receiving improper benefits. Respondent proved that Grievant violated DHHR policy by working on her neighbor's case but failed to prove that she assisted her son in receiving overpayment in benefits. The grievance is GRANTED in part and DENIED in part.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant , Crystal Sutphin, was employed in the Boone County office of the Respondent DHHR as an Economic Service Worker from October 12, 1999, and promoted to a Family Support Specialist in July 2005. She stayed in that classification until her employment was terminated on June 15, 2011.

2. All of Grievant's Employment Performance Appraisals ("EPA") as a Family Support Specialist indicated that her performance met or exceeded standards.[2] Respondent's Exhibit 9.

3. Brenda Toppings is the Family Support Supervisor for the Boone County office and was Grievant's immediate supervisor. On January 18, 2011, Supervisor Topping received an anonymous telephonic complaint alleging that Grievant's son, D.S., was living

[2] Grievant testified that there was a time when she had problems with arriving late for work and was counseled regarding her attendance. These matters did not cause her EPA ratings to go below "Meets Standards."

with her and was receiving benefits from the Supplemental Nutrition Assistant Benefits Program ("SNAP").[3] The complaint also alleged that another person, P.E., who received SNAP benefits was living in the home as well. The complaint identified P.E. as Grievant's boyfriend.[4]

4. Grievant's son, D.S., is over twenty-two years old and is allowed to receive SNAP benefits for himself. Grievant denied that P.E. was her boyfriend and no credible evidence was introduced that he was. However, he was Grievant's neighbor at one time.

5. Supervisor Toppings reported the complaint to her supervisor, Customer Service Manager ("CSM") Gary Baker and, at CSM Baker's direction, reduced the complaint to writing and gave a copy to CSM Baker. Respondent's Exhibit 1. In her written report, Supervisor noted that she had looked into P.E.'s benefit file and found no notation that P.E. had moved in with Grievant, but she did notice that Grievant had approved Non-Emergency Medical Transportation ("NEMT")[5] assistance for P.E. which had previously been denied by his regular case worker.[6]

6. CSM Baker shared the complaint with James Kimbler, DHHR Regional

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[3] This program was historically known as the Food Stamps Program. The use of actual stamps has more recently been replaced by EBT and Debit cards which can be used in any state in the country at locations that are qualified to accept SNAP benefits. *See http://www.snap-help.com.*

[4] Initials are use to protect the privacy of program participants since their names are not necessary for the adjudication of the issues herein.

[5] This program provided reimbursement for trips clients are required to make for medical appointments and non-emergency medical treatment.

[6] Supervisor Toppings stated that this particular activity "looks a little suspicious." Respondent's Exhibit 1.

Director for Region II, who referred it to the DHHR Office of Inspector General ("OIG") to conduct an investigation.[7]

7. The OIG assigned two Certified Welfare Fraud Investigators, Trish Kerbawy and Danita Bragg to investigate the allegations made in the complaint against Grievant. These investigators are based in the DHHR Raleigh County office.

8. Investigators Kerbawy and Bragg conducted an investigation into the allegations made in the anonymous complaint, and submitted an extensive report dated March 14, 2011. Respondent's Exhibit 9.

9. The report concluded that Grievant had assisted her son in improperly obtaining Low Income Energy Assistance Program ("LIEAP") benefits by failing to report that she was living with her son on an application the son made for those benefits on February 28, 2011. It was concluded that this action resulted in an overpayment of LIEAP benefits in the amount of $335.00.

10. The report also concluded that Grievant failed to report that the son's prior roommate C.L. had moved out of the home and she had moved in. The investigators concluded that there had been an overpayment of SNAP benefits to D.S. in the amount of $1,008.00 that resulted from failure to report that C.L. no longer lived in the home with D.S.

11. The report concluded that Grievant violated DHHR Policy Memorandum 2108

[7] The OIG investigates allegations of DHHR employee misconduct or illegal activity related to their employment.

by working on her neighbors' assistance cases. The neighbors were P.E. and E.G.[8]

12. In addition to the Policy violation, the investigator's found that:

> "Evidence supported that [Grievant Sutphin] violated W. VA. CODE § 9-5-4 [related to felony welfare fraud] for obtaining or assisting to obtain more welfare benefits than which her son, [D.S.] was entitled.

Respondent's Exhibit 9. However, there is no indication that criminal charges were pursued or that this information was ever submitted to the prosecuting attorney. [9]

13. Steve Hill was Grievant's Supervisor when the applications related to D.S. receiving LIEAP assistance was made. He was the DHHR worker who was handling D. S.'s case at that time. Grievant delivered the LIEAP application to Supervisor Hill in a sealed envelope. The application had been completed and signed by D.S. without any assistance from Grievant and she did not know what he had written on it. D.S. had incorrectly stated on the form that he was the only person living in the house. Respondent's Exhibit 9, Tab 4.

14. Grievant's son receives Social Security Disability benefits. He had applied for and received SNAP benefits. Originally, he was living with C.L. who was unemployed. The SNAP benefits for the household were based upon both of the occupants.

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[8] It is noteworthy that P.E. is the same person who the anonymous tipster alleged was living with Grievant as her boyfriend. In fact, he appears to be itinerant and was living for a time with E.G. but never lived with Grievant nor her son.

[9] The report specifically stated that, "Due to mitigating circumstances, the matter may not be presented to the prosecuting attorney." No discussion was included as to what those circumstances might be, but the undersigned may surmise that the State Hearing Officer for the OIG's Board of Review's conclusion that, "The Department provided ample evidence that [Grievant's son] misrepresented his household composition in the SNAP and LIEAP programs. There was no clear and convincing evidence the [Grievant] knew her son had done this," indicates what the mitigating circumstances were. Grievant's Exhibit 1.

15. In the summer of 2010, C.L. moved out of the house. Grievant moved into the house with her son, D.S., to help with expenses in July or August 2010.

16. On September 15, 2010, D.S. completed a telephone review for his SNAP benefits eligibility with his caseworker. At that time he did not report to the caseworker that C.L. had moved out of the home.[10]

17. Grievant made no effort to hide the fact that she was living with her son and believed that her co-workers, including Steve Hill knew that C. L. had moved out and Grievant had moved in. Grievant told Mr. Hill that she had moved into her son's residence and that his file needed to be updated accordingly.[11]

18. On September 21, 2010, a DHHR caseworker denied twelve requests for NEMT payment for P.E. indicating that it appeared that the medical practioner listed on the forms did not work at the facility. On November 11, 2010, a different caseworker[12] denied more NEMT payments because it appeared to her the dates had been altered on the forms.

19. On November 24, 2010, Grievant reviewed these requests after fielding a call from P.E. who denied that he altered the forms. She checked with the doctors' office and confirmed that P.E. had visited the offices on the dates in question. Grievant then approved

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[10] Respondent's Exhibit 9, page 9.There is no indication that Grievant knew anything about this review. Because of her relationship to D.S., she had no access to his file.

[11] Grievant testified that she told Mr. Hill on several occasions that D.S.'s file needed to be updated to reflect that she now lived in the home. Supervisor Hill denied that these conversations took place and insisted that he would have changed the file immediately if Grievant had given him this information.

[12] The caseworkers are identified on the form by numbers.

six requests for NEMT payments.[13] Respondent's Exhibit 7.

20. The Boone County DHHR office has a heavy caseload and the workers sometime get behind. Grievant helped a co-worker by taking some cases on which cases she was behind. One of the cases Grievant worked on was for E.G. That client lives in the same trailer park where Grievant lives. There is one trailer between the two occupied by Grievant and E.G. Grievant did not believe it would violate DHHR policy to work on E.G.'s case because she is not her friend. In fact, Grievant and E.G. have a running dispute which included Grievant calling the police regarding alleged illegal activity in E.G.'s home. Grievant approved NEMT and LIEAP payments for E.G.

21. By letter dated June 15, 2011, Regional Director Kimbler informed Grievant that she was dismissed from employment. This action was based upon the conclusion that Grievant violated W. VA. CODE § 9-5-4 by assisting her son in obtaining welfare benefits to which he was not entitled by failing to report that C.L. had moved out of the home, and not reporting on the application for LIEAP benefits that she was living with her son. She was also accused of violating Policy Memorandum 2108 related to Employee Conduct by failing to report her household circumstances and working on assistance cases involving her neighbors.

22. Director Kimbler considered giving Grievant a lesser penalty but felt that dismissal was necessary to uphold the standards of the agency and maintain public trust. He testified that the termination of Grievant's employment was based upon a knowing and deliberate defrauding of the agency.

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[13] The date for the trips to the doctors' office which were approved were 09/22/10, 09/23/10, 09/24/10, 09/24/10,11/09/10, 11/19/10.

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 was a permanent state employee in the classified service. 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). *See also Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004)(per curiam). "*Oakes v. W.Va. Dept. of Finance and Administration*, *supra*, requires that a violation sufficient to support a dismissal be of a substantial nature and that if it involves a violation of a statute or official duty it must be done with wrongful intent." *Serreno v. W. Va. Civil Serv. Comm'n*, 169 W. Va. 111, 115,

285 S.E.2d 899, 902 (1982)(per curiam). "'Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. W. Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988).

In support of Grievant's dismissal, Respondent argues that Grievant violated W. VA. CODE § 9-5-4 by failing to report that C.L. no longer lived with her son, D.S., and she knew that the amount of SNAP benefits D.S. received was based upon C.L. living with him. Additionally, Respondent argues that Grievant assisted her son in receiving LIEAP benefits for which he was not entitled because she delivered a form to Supervisor Hill on which D.S. claimed he lived alone when Grievant was living in the home. W. VA. CODE § 9-5-4 provides:

> Any person who obtains or attempts to obtain, or aids or abets an applicant or recipient in obtaining or attempting to obtain, by means of a willfully false statement or misrepresentation or by impersonation of any other fraudulent device:
>
> (1) Any class of welfare assistance to which the applicant or recipient is not entitled; or
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> (2) Any class of welfare assistance in excess of that to which the applicant or recipient is justly entitled; shall upon conviction be punished as follows:
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> (b) If the aggregate value of all funds or other benefits obtained or attempted to be obtained shall exceed five hundred dollars, the person so convicted shall be guilty of a felony. . .

The investigators felt that Grievant's actions would amount to a felony since D.S. received excess SNAP benefits in the amount of $1,008 and LIEAP benefits for which he was not eligible in the amount of $335. Based upon the investigative report, Regional Director Kimbler concluded that Grievant knowingly and deliberately defrauded the DHHR and

termination of her employment was necessary.

Grievant does not deny that her son may have received benefits for which he was not entitled. However, she denies assisting him in that endeavor. She states that she did not hide the fact that she was living with her son and that she had told Supervisor Hill on several occasions that C.L. had moved out of the home. The Investigators note on page nine of their report that D.S. gave a telephonic SNAP benefit review in September 2010, and failed to report that C.L. had moved out and his mother had moved in. There is no evidence that Grievant willfully gave a false statement or made a willful misrepresentation regarding the persons living with D.S. Respondent argues that Grievant violated the statute simply by failing to mention that C.L. moved out. That does not meet the statutory definition.

Additionally, Grievant testified that she told Supervisor Hill, a number of times, that C.L. had moved out of the home and he took no action. Supervisor Hill stated that he did not remember Grievant telling him that and if she had, he would have amended the file accordingly. This creates the need for a credibility assessment. The Grievance Board has applied the following factors to assess a witness's testimony: (1) demeanor; (2) opportunity or capacity to perceive and communicate; (3) reputation for honesty; (4) attitude toward the action; and (5) admission of untruthfulness. Additionally, the administrative law judge should consider (1) the presence or absence of bias, interest or motive; (2) the consistency of prior statements; (3) the existence or nonexistence of any fact testified to by the witness; and (4) the plausibility of the witness' information. *See Gramlich v. Div. of Motor Vehicles,* Docket No. 2010-0929-DOT (June 14,2010); *Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth.,* Docket No. 2009-1583-DOT (Dec. 1, 2009); *Elliott v. Div. of Juvenile Serv.,*

Docket No. 2008-1510-MAPS (Aug. 28, 2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999).

Grievant has been consistent in her insistence that she had previously told Supervisor Hill that C.L. was no longer living with her son. This fact was noted in her dismissal letter. Respondent's Exhibit 12. She appeared to be earnest when she was testifying. She has an obvious motive for deception, to avoid discipline, but did not make any effort to deny that she worked on her neighbor's case which is another charge. Given the large caseload of the Boone County office, it is plausible that she mentioned this information to Mr. Hill and he did not remember it. Additionally, there is no evidence that she made an overt effort to hide her living arrangement from anyone. Her testimony was credible.

Supervisor Hill's testimony was also straight forward. However, his memory of events seemed less clear. He relied heavily upon the records and exhibits while testifying. At one point he said that Grievant gave no reason for approving the NEMT payments for P.E. after they had been denied by another caseworker. Yet, Grievant clearly noted in the case logs that P.E. had called and denied that he had altered the forms.[14] She then confirmed with the medical providers that P.E. had been present on the days in question so she approved the payments. It does not appear that Supervisor Hill intentionally misstated the facts, but his memory of the events appeared to be less reliable than Grievant's. Accordingly, on the issue of whether Grievant informed Supervisor Hill that

[14] Interestingly, no evidence was submitted that Grievant's determinations regarding P.E.'s NEMT payments were incorrect notwithstanding Supervisor Topping's assessment that they looked "a little suspicious"

C.L. had moved out of the home, Grievant's testimony is found to be more credible than Supervisor Hill's.

Grievant's undisputed testimony was that D.S. filled out the application for LIEAP assistance by himself and gave it to her in an envelope that Grievant gave to her Supervisor. There is no doubt that D.S. gave false information about who was living in the house on that form. However, there is no evidence that Grievant knew anything about this deception. Respondent failed to prove that Grievant knowingly and willfully aided D.S. in gaining more benefits than he was entitled to in violation of W. VA. CODE § 9-5-4. The evidence indicates that D.S. acted alone in these endeavors and there was no basis for punishing Grievant for his actions.

Grievant is additionally charge with violating DHHR Policy Memorandum 2108 related to Employee Conduct. That policy specifically states:

> Employees are expected to avoid conflicts of interest between their personal life and their employment. Employees shall not provide services to or make decisions concerning eligibility for Agency programs for spouses, **relatives,** friends, **neighbors**, present or former co-workers, or club or church acquaintances.

Id. Page 2. (Emphasis added). Grievant did not work on her son's case and did not interfere in it by filling out forms for him. It is more likely than not that she provided accurate information regarding the people who were living in her home when it became known to her. On the other hand, Grievant did make benefit determinations on at least one of her neighbor's cases. Grievant admitted that she approved NEMT and LIEAP payments for E.G. Additionally, P.E. lived with E.G. at some point and Grievant approved NEMT

payments for him.[15] Grievant felt that it was no conflict of interest for her to work on E.G.'s case because she was not her friend. In fact, they openly dislike each other. Therefore, Grievant felt she would not be inclined to do her any favors which would create a conflict. Obviously, Grievant did not understand that working on a neighbor's case, with whom she has a feud, is just as great a conflict as working on a friend's case. While it might not appear that she was showing favoritism, it might give the appearance that the caseworker would be more stringent in her assessments of her foe's benefits. Either is unacceptable under Policy Memorandum 2108. Consequently, Respondent did prove the charge that Grievant violated Policy Memorandum 2108 by making benefit eligibility determinations for her neighbors. Discipline was appropriate for this infraction.

Finally, Grievant argues that if any discipline was appropriate termination was disproportionate to any infraction she committed. "Whether to mitigate the punishment imposed by the employer, depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case-by-case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995) (citations omitted). The Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the

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[15] Grievant asserts that P.E. was not living with E.G. at the time she approved his NEMT payments but he was clearly her neighbor at one point.

employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996); *Vance v. W. Va. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2011-1705-MAPS (Feb. 22, 2012).

In this case, Respondent only proved a portion of the charges against Grievant. They did not prove that Grievant knowingly bilked the agency out of improper benefits for her son. This was the reason given by Regional Director Kimbler for feeling he had no choice but to terminate her employment. What Respondent did prove was that Grievant made benefit determinations for two of her neighbors. This is a violation of Policy Memorandum 2108, but not nearly as serious a transgression as defrauding the agency. Grievant admitted that she did these acts and gave an explanation that indicated that she did not understand the nature of conflicts of interest. Furthermore, she only worked on E.G.'s case because she was attempting to help a co-worker reduce her backlog. While discipline is appropriate for this infraction, given Grievant's relatively unblemished work history, termination of her employment is grossly out of proportion to this misconduct. A five-day suspension is more than enough to ensure that Grievant is more careful in complying with this policy directive.

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). 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. 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). *See also Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004)(per curiam).

3. W. VA. CODE § 9-5-4 makes it a felony for any person who "aids or abets an applicant or recipient in obtaining benefits, by means of a willfully false statement or misrepresentation or by impersonation of any other fraudulent device."

4. Respondent did not prove the charge that Grievant violated W. VA. CODE § 9-5-4.

5. DHHR Policy Memorandum 2108 related to Employee Conduct states, in part, that:

> Employees are expected to avoid conflicts of interest between their personal life and their employment. Employees shall not provide services to or make decisions concerning eligibility for Agency programs for spouses, relatives, friends, neighbors, present or former co-workers, or club or church acquaintances.

6. Respondent did prove by a preponderance of the evidence the charge that Grievant violated Policy Memorandum 2108 by making eligibility determinations for her

neighbor.

7. Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996); *Vance v. W. Va. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2011-1705-MAPS (Feb. 22, 2012).

8. Given the totality of the circumstance, Grievant proved that termination of her employment was so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. A five-day suspension fits the infraction she committed.

Accordingly, the Grievance is GRANTED in part and DENIED in part. Respondent is ORDERED to reinstate Grievant to her previous position and restore her benefits and pay, with appropriate statutory interest, from the date her employment was terminated until the date she is reinstated minus five days of pay for the five-day suspension for violation of Policy Memorandum 2108.

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: SEPTEMBER 10, 2012.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE