WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

NETTIE L. GOAN,

Grievant,

v. **Docket No. 2011-0876-DHHR**

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

Respondent.

DECISION

Grievant, Nettie Goan, is employed by the Department of Health and Human Resources ("DHHR") as a Child Protective Services Worker in the Mingo County office of the DHHR's Bureau for Children and Families ("Bureau"). Ms. Goan filed a level three grievance form[1] dated December 10, 2010, alleging that a suspension letter she received in late November 2010 was in violation of the Division of Personnel's Administrative Rule, Section 12.3. As relief, Grievant seeks "Pay, leave accrual and interest and remove all reference of this suspension or allegations from personnel file and to be made whole in every way."

A level three hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board on August 18, 2011. Grievant appeared in person and was represented by Pamela L. Ray, Acting Executive Director, AFSCME[2] Council 77. Respondent DHHR was represented by Anne B. Ellison, Esquire, Assistant Attorney

---

[1] The grievance was filed directly at level three pursuant to W. VA. CODE § 6C-2-4(a)(4) since it was contesting a suspension without pay.

[2] American Federation of State, County and Municipal Employees.

General. At the close of the hearing the parties agreed to submit Proposed Findings of Fact and Conclusions of Law, both of which were received by the Grievance Board on September 26, 2011. This matter became mature for decision on that date.

Synopsis

Grievant was suspended for ten days without pay based upon allegations of insubordination and failure to follow directives given by three supervisors. Specifically, Grievant was charged with failing to properly and promptly investigate a report regarding a six-month old infant that allegedly weighed less than eleven pounds and had seven knots on his head and bruises all over his body.

Grievant alleges that the complaint was received on a holiday weekend and she made an appropriate but unsuccessful attempt to locate the child. She was told by family members that the child was fine. Grievant admits that she was told by her supervisors to locate and examine the child on the first morning she returned to the office, but she was ill and could not complete that task.

Respondent notes that investigations of child abuse are extremely important and must be investigated as quickly as possible. While Grievant made some attempts to locate the child during the weekend, she was specifically instructed to personally see the child the first thing upon returning to the office. Grievant did not tell her supervisors that she was ill so they could immediately assign another employee to locate the child. Given the totality of the circumstances, Respondent proved that the discipline of Grievant was justified.

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, Nettie Goan, had been employed as a Child Protective Service ("CPS") worker for more than fourteen years.

2. As a CPS worker, Grievant receives and processes reports of child abuse and neglect and makes initial assessments regarding necessary actions to protect the health and welfare of the child involved. The first priority of the CPS worker in reported instances of abuse or neglect is to protect the safety of the child.

3. DHHR policy provides that an allegation of unexplained injury to an infant requires immediate response. "Immediate response" is defined as "face-to-face contact with the child(ren) within" two hours, but no later than the same day, of receipt of the allegation.[3]

4. Child Protective Services operates a twenty-four hour telephone hotline through which reports of suspected abuse and neglect may be reported. At least one of the CPS workers is on call each day after office hours and on weekends to respond to such reports.

5. September 5, 2010, was Sunday, the day before Labor Day. Labor Day was a paid holiday for CPS workers and they did not have to report to the Mingo County office on Monday, September 6, 2010.

6. Grievant, Nettie Goan, was on call on Sunday, September 5, 2010. Her fellow CPS worker, Carol Messer, received a call on the CPS Hotline late that evening, alleging that a six-month old child who weighed only eleven pounds was seen with knots

---

[3] Respondent's Exhibit 1, Child Protective Services Policy (revised July 10, 2008); Respondent's Exhibit 2, FFA: Initial Contact Intervention Standards.

on his head and bruises all over his body.

7. Pursuant to proper procedure, Ms. Messer contacted her supervisor, Jeannie Curry, who made a determination that the complaint involved allegations of "imminent danger to an infant and required an immediate response. Supervisor Curry instructed Ms. Messer to contact Grievant Goan and a law enforcement official so that they could all go and make face-to-face contact with the child.

8. Ms. Messer contacted Grievant Goan and together they ontacted a deputy sheriff who refused to accompany the CPS workers to see the child. Grievant and Ms. Messer proceeded to the address where they were informed that the infant was located which was the home of the infant's grandfather.

9. When the CPS workers arrived at the address, they discovered that the aunt of the infant had been baby-sitting the infant for the parents but the parents had already been there and picked up the child. The aunt indicated that the child was healthy and well fed. She showed a picture of the infant to the CPS workers that she had on her cell phone. The aunt told the CPS workers that she did not know the exact location of the parents' home and that she could not give them accurate directions. She also told Grievant that the parents lived in a very remote location that was hard to find in the daylight and would be nearly impossible to find at night. By this time, it was in the early morning hours of Monday, September 6, 2010.

10. Grievant Goan called Supervisor Curry from the grandfather's house and told her that they had not been able to see the child and could not get directions for finding the parents that night. Under the circumstances, Supervisor Curry told Grievant to find the child first thing Tuesday morning since Monday was a holiday.

11. On the morning of Tuesday, September 7, 2010, Grievant felt she was too ill to drive to work and rode with a co-worker, Vickie Fields.

12. Upon arriving at work around 9:00 a.m. on Tuesday morning, Grievant began trying to locate the child by checking in the agency database for the parents' address, as well as calling the grandfather and aunt.

13. At approximately 10:00 a.m. the Community Services Manager ("CSM") for the Mingo County office, Carolyn Sansom, called a meeting of all the CPS staff to discuss issues related to staff positions and conduct. CPS Supervisor, Tonya Webb was assisting her in the meeting. CPS Supervisor Curry was not at work on that day. In Ms. Curry's absence, Ms. Webb substituted as Grievant's supervisor. Supervisors Webb and Curry are subordinate to CSM Sansom.

14. During the meeting Grievant and Ms. Messer discussed the referral relating to the infant and the difficulty they had getting cooperation from the deputy sheriff. They explained to CSM Sansom and Supervisor Webb that they had seen a picture of the child and it appeared that what had been reported as bumps and bruises were bug bites.

15. CSM Sansom and Supervisor Webb instructed Grievant and Ms. Messer that a face-to-face meeting needed to be made with the child immediately to ensure the infant's safety. Since the child was in Grievant's coverage area, it was her responsibility to go into the field and see the child right away. Grievant agreed to accomplish this task and did not tell either CSM Sansom or Supervisor Webb that she was ill and did not have her vehicle at work.[4] The meeting ended at approximately 11:00 a.m.

---

[4] Co-worker Vickie Fields testified that Grievant was free to use her vehicle to go into the field. She noted that Grievant had ridden with her before and had told Grievant

16. Grievant ate lunch with her co-workers Jeremy Reid, Carol Messer, and Renee Moore at approximately 1:00 p.m. Grievant asked each of her co-workers if they could make the visit to see the infant since she was sick. Each of Grievant's co-workers declined to take the assignment because they had work of their own that needed to be done. Carol Messer agreed to go see the infant on her way home from work around 4:30 p.m. after she completed her assigned tasks.

17. Sometime before 2:00 p.m. Grievant went to Supervisor Webb's office. She began to cry and told Supervisor Webb that she was sick and could not go into the field to see the infant. Supervisor Webb offered to take Grievant to the doctor but Grievant declined and then went to her desk to do work at the computer. Supervisor Webb briefly attempted to find someone to make the visit but had to leave the building to check on a situation at the courthouse.

18. Supervisor Webb returned to the office around 3:00 p.m. and heard the staff in Grievant's unit still discussing who would go to make the face-to-face confirmation that the infant was safe. She then went to CSM Sansom's office and reported to Ms. Sansom that no one had gone out on the infant referral that was discussed in the morning meeting.

19. CSM Sansom immediately went to Grievant's desk and asked why she had not gone out on the referral as instructed that morning. Grievant told her that she was sick and could not go. CSM Sansom then found Ms. Messer and told her that she needed to go on the infant referral. Ms. Messer told CSM Sansom that she had told Ms. Goan that she would go on the referral at the end of the day. CSM Sansom directed Ms. Messer to

---

that she could use her vehicle if Grievant needed to for work purposes.

leave immediately to see the infant and Ms. Messer complied. Grievant remained in the office until 5:30 p.m. when she rode home with Ms. Fields. *See,* Respondent's Exhibit 4, office sign-in sheet for Tuesday September 7, 2010.

20. Grievant missed the next few days of work due to illness.[5]

21. Upon her return to work later in the week Supervisor Curry informed CSM Sansom that she had directed Grievant to go see the infant immediately upon her arrival at work on Tuesday, September 7.

22. A predetermination conference was held on October 19, 2010, by CSM Sansom. Grievant attended with her representative, Hiram Justice. Supervisor Curry was also at the meeting. At that conference, CSM Sansom explained to Grievant that she was considering disciplining Grievant for insubordination. The insubordination charge was based upon Grievant failing to follow the directives from her three supervisors to follow up immediately on Tuesday, September 7, the allegation of abuse and neglect made related to an infant. Grievant argued that she should not be disciplined because she was sick and could not go on the referral.

23. Grievant had been previously disciplined for prior incidents of failing to follow up on assigned matters as directed.[6]

24. By letter dated November 22, 2010, DHHR Regional Director, James Kimbler,

---

[5] Grievant visited a doctor on September 9, 2010, and received a verification that she was ill and should be able to return to work on September 13, 2010.

[6] Respondent's Exhibit 4. The disciplinary action taken related to the incident on April 24, 2009 was contested through the grievance procedure. The parties reached a settlement in that grievance which resulted in a reduction of the discipline originally imposed.

informed Grievant that she was suspended for ten working days without pay based upon "insubordination and failure to follow the directives given to [Grievant] by her two supervisors." Specifically, Director Kimbler noted that Grievant failed to follow up on a serious referral alleging abuse of an infant. Respondent's Exhibit 5.

Discussion

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). "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). "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 and 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*.

The facts in this case are largely undisputed. Grievant received a call alleging physical abuse and neglect of a six-month old infant while she was on duty. That type of allegation requires an immediate response which means the CPS worker must have a face-to-face meeting with the child who is the subject of the allegation within two hours or at least the same day. Respondent's Exhibit 1. Grievant unsuccessfully attempted to see

the infant on the night the complaint was made and was given clear instruction from her supervisor to try again immediately upon returning to work on the Tuesday after Labor Day. No one disputes that Grievant was ill on Tuesday when she reported to work. Rather, her supervisors testified that Grievant's illness was not readily apparent to them and she did not tell a supervisor until after 1:30 p.m. Grievant knew when she arrived at work that she felt too ill to drive. Yet, when she was specifically instructed to immediately go make face-to-face contact with the infant she agreed to do so without telling her supervisors that she was sick. She then spent the next two and a half hours attempting to get one of her co-workers to make the contact for her. Ultimately, no one left the building to make contact with the infant until Ms. Messer was ordered to do so at 3:30 p.m.

Grievant's defense is that she was ill and unable to go on the referral immediately Tuesday morning as she had been specifically ordered to do by her supervisors. This defense might be reasonable had she bothered to tell any of her supervisors that she was ill. At that point the supervisors could have immediately ordered one of the other CPS workers to make the contact. Instead, she entered into discussions with her co-workers to get one of them to make the contact for her. This too may have been understandable had she immediately told her supervisors of her unsuccessful attempts. Unfortunately, Grievant did not bother to bring the problem to the attention of Supervisor Webb until nearly 2:00 p.m., at which time Supervisor Webb was on her way to the Courthouse.

What seemed to be lost in this entire event was the sense of urgency required by the DHHR policy to make an "immediate response" to protect the safety of an extremely vulnerable infant child. While the child might very well have been safe, the risk of serious injury or death to an infant from abuse or neglect requires quick action. Once Grievant told

CSM Samson that she was too ill to see the child, another CPS worker was dispatched within minutes. This could have happened as early as 9:30 a.m. after Grievant arrived, or by 11:00 a.m. when Grievant was unequivocally ordered to go on the referral. Instead, no worker was dispatched until 3:30 p.m. Fortunately, the passage of these hours did not have a tragic effect on the life of this child. It easily could have.

"[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interin Governing Bd.,* 212 W. Va. 209, 569 S.E.2d 456 (2002)(*per curiam*). A number of Grievance Board decisions have held that an employer can establish insubordination by demonstrating a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995); *Domingues v. Fayette County Bd. of Educ.*, Docket No. 04-10-341 (Jan. 28, 2005).

In the present case, there was a clear policy in place that required a CPS worker to make face-to-face contact with an infant who was the subject of an abuse allegation within two hours of receiving the report or at least during the same day. Respondent's Exhibit 1. Grievant testified that she was aware of the policy and knew that reports of abuse of an infant had to be investigated immediately. Grievant made an initial unsuccessful attempt to see the child on the night the report was made. She was then ordered that night to find the child immediately upon reporting to work on Tuesday. She was given the order again at a meeting at 10:00 a.m. on Tuesday. Instead of complying or immediately telling her

supervisor that she was unable to comply with this critical policy provision, Grievant attempted to get others to do this task and it was not accomplished until late that afternoon. Grievant's wilful failure to comply with the policy or the clear and reasonable orders of her supervisors constitutes insubordination and discipline was appropriate.

While Grievant did not specifically raise the issue of mitigation of the punishment she did argue that her suspension was excessive. In assessing the penalty imposed, "[w]hether 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); *Crites v. Dep't of Health & Human Ser.*, Docket No. 2011-0216-DHHR (Nov. 16, 2011). In this situation, the policy and orders Grievant failed to follow were clear. Additionally, Respondent proved that Grievant had been previously disciplined for situations in which Grievant failed to appropriately respond to a report of alleged abuse and argued with her supervisor concerning whether she should be assigned to a particular investigation. Given the importance of such investigations and the significant peril for failure to properly implement them, as well as Grievant's prior discipline, a ten-day suspension without pay was not clearly excessive. Consequently, the grievance is DENIED.

Conclusions of Law

1. In disciplinary cases, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *Nicholson v. Logan*

County Bd. of Educ., Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989) *Petry v. Kanawha County Bd. of Educ.* Docket No.96-20-380 (Mar. 18, 1997). "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 and 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. "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd.,* 212 W. Va. 209, 569 S.E.2d 456 (2002)(*per curiam*). An employer can establish insubordination by demonstrating a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional as to constitute the defiance of authority inherent in a charge of insubordination. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995); *Domingues v. Fayette County Bd. of Educ.*, Docket No. 04-10-341 (Jan. 28, 2005).

3. Respondent proved by a preponderance of the evidence that Grievant wilfully failed to follow a written policy she was aware of and to comply with reasonable directives from her supervisors. Respondent proved that Grievant was guilty of insubordination and that discipline was appropriate.

4. "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); *Crites v. Dep't of Health & Human Ser.*, Docket No. 2011-0216-DHHR (Nov. 16, 2011).

5. Given the clarity of the policy and the directives from her supervisors, as well as her prior discipline, the suspension imposed upon Grievant was not clearly excessive and mitigation of the penalty is not 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: JANUARY 19, 2012

_____

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE