THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

SHANNON DAUGHERTY, et al.,
Grievants,

v.

DOCKET NO. 2012-0803 CONS

DEPARTMENT OF HEALTH AND
HUMAN RESOURCES/ BUREAU
FOR CHILD SUPPORT ENFORCEMENT,
REGION 2,
Respondent.

DECISION

Shannon Daugherty, Tamara Skidmore, and Thomas Smith (Grievants), filed the underlying grievance on February 2, 2012 for what they assert as suspension without good cause. The relief Grievants are seeking is "to be made whole including back pay with interest and benefits restored." This grievance addresses a suspension and proceeded directly to a Level Three proceeding. A Level Three hearing was conducted before the undersigned Administrative Law Judge on September 5, 2012, in the Board's Westover office. Grievants, appeared with their representative, Gordon Simmons, UE Local 170 West Virginia Public Employees Union. Respondent appeared by Michael E. Bevers, Assistant Attorney General. This matter became mature for consideration on October 25, 2012, upon receipt of the last of the parties' proposed findings of fact and conclusions of law.

Synopsis

On January 30, 2012 each Grievant was informed in writing of a five (5) day suspension, with staggering effective and ending dates for February 2012 . (R Exs 12,13 &14). The Grievants were issued this five day suspension for misconduct based on not accurately reporting their actual work hours, as a result of information gathered during an investigation conducted by the State of West Virginia Department of Health and Human Resources Office of the Inspector General. (R Exs 12,13 & 14). The Respondent has met its burden of proof and established that the suspensions were justified . The following findings of fact are based on the record developed at the Level Three Hearing.

Findings of Fact

1. Shannon Daugherty, Tamara Skidmore, and Thomas Smith, the Grievants (individually as "Ms. Daugherty", "Ms. Skidmore", or "Mr. Smith", or collectively as ("Grievants"), are employed by the Department of Health and Human Resources at the Lewis County Bureau for Child Support Enforcement. The Department suspended each Grievant five days for failure to report proper and accurate attendance and actual work hours.(Hearing Testimony/R Exs 12,13 &14).

2. The Grievants asked that the record from the Lisa Kesner (the Grievants' former supervisor) Level Three Hearing be admitted, and their request was granted by the undersigned Administrative Law Judge.

3. Larry B. LeFevre has been the Director of Field Operations for the Bureau for Child Support Enforcement for approximately fourteen years. Mr. LeFevre testified that for

several years, he had received reports about problems in the Lewis County office with absenteeism, tardiness, and extended breaks. (Hearing Testimony.) Mr. LeFevre had received complaints from employees that Lisa Kesner, Child Support Supervisor, was taking long breaks and never in her office. *Id*. Ms. Kesner was the Grievants' supervisor and her role was to set the standard for office behavior. *Id*. Mr. LeFevre noted that when he would visit the Lewis County office, Ms. Kesner and the Grievants would stay in their offices. *Id.* Mr. LeFevre requested an investigation, which was to be directed primarily at Ms. Kesner. *Id.* The investigation was approved, and the investigation confirmed that Ms. Kesner and the Grievants were taking excessive breaks and were not accurately reporting their time. *Id.* The investigation confirmed that Ms. Kesner set a bad example for the Grievant's. *Id.* Based on the investigation reports, the Department terminated Ms. Kesner and suspended the Grievants. *Id*.

4. Andrew J. Petitt is a Criminal Investigator with the Office of Inspector General. Mr. Petitt testified that the Inspector General received a request for investigation from Larry LeFevre, who asked for an investigation into suspected attendance infractions and falsification of records. Acting Inspector General Jolynn Marra authorized the investigation. (Hearing Testimony.)

5. On May 18, 2011, Mr. Petitt and two of his supervisors installed a video surveillance camera in the Child Support wing of the Department's Lewis County Office Building. (Hearing Testimony.) They placed the camera above the copy machine and pointed it down the hallway toward the only entrance to the Bureau of Child Support Enforcement. (Hearing Testimony.) The area within view of the camera included the Child

Support entrance/exit door, the Sign In/ Sign Out area, the door to Jessica Squires' office, and the door to the office shared by Ms. Daugherty and Mr. Smith. (Hearing Testimony.) The camera was not focused on the area around Lisa Kesner's office, the Child Support conference room, or the rooms containing scanners and shredders. Any of which said spaces would constitute as a valid work area and therefore, any time spent there would be construed as legitimate working hours. Only those areas that were not deemed as necessary work spaces and utilized outside of the daily scope of performing work related functions and/or tasks were filmed and monitored. (Hearing Testimony)

6. Mr. Petitt testified that the investigators had recorded several weeks of video surveillance. The Investigation Report included eight different twelve-hour days as a sample. (Hearing Testimony.) The eight days were June 16, 2011; June 30, 2011; July 1, 2011; July 5, 2011; July 6, 2011; July 7, 2011; July 8, 2011; and July 11, 2011. *Id*.

7. Mr. Petitt identified Respondent's Exhibits 5, 6, and 7 as the Investigation Reports he had prepared. (Hearing Testimony; R Exs 5, 6, & 7.) Mr. Petitt described the investigation process and discussed the contents of the Investigation Reports (Hearing Testimony.)

8. Mr. Petitt testified that he personally reviewed all ninety-six hours of the video surveillance. (Hearing Testimony.) Mr. Petitt testified that on each of the sampled days, the Grievants reported on OPS-2A forms that they worked eight hours or more. However, the surveillance video showed that on the eight randomly sampled workdays, the Grievants had reported that they worked eight or more hours, noting that only one of the Grievants worked eight hours on one day (Ms. Skidmore worked more than eight hours on June 16, 2011) and all other known workdays ranged from 5.65 hours to 7.7 hours, including

providing credit for approved break and meal times. Mr. Petitt gave detailed testimony about what he saw on the surveillance video and what was contained in the Investigation Report outlining exact hours and minutes each Grievant spent outside of approved work spaces and areas. (Hearing Testimony.)

9. Mr. Petitt testified that he was the only person who had reviewed the surveillance videos and that the videos had remained exclusively in his custody and control. (Hearing Testimony.)

10. Mr. LeFevre provided detailed testimony about why the Department suspended the Grievants. Mr. LeFevre identified and discussed Department of Health and Human Resources Policy 2108, Department of Health and Human Resources Policy 2102, and the Division of Personnel Administrative Rule 143 C.S.R. § 1. (Hearing Testimony; R Exs 9, 10, & 11.)

11. Mr. LeFevre identified Respondent's Exhibit 9 as Department of Health and Human Resources Policy 2108, the Department's policy on employee conduct. Mr. LeFevre identified and explained the relevant provisions. The policy provides that the Department expects professional behavior from its employees. Department employees are expected to comply with all relevant Federal, State, and local laws, to comply with all Division of Personnel and Department Policies, to be accurate when completing Agency records, to be ethical and attentive to their job responsibilities, and to refrain from disrupting the normal operations of the Agency. He explained the Grievants breached these duties by taking excessive breaks and not accurately reporting their time. (Hearing Testimony; R Ex 9 at p. 2 of 4.)

12. Mr. LeFevre identified Respondent's Exhibit 10 as Department of Health and

Human Resources Policy 2102, the Department's policy on hours of work and overtime. Mr. LeFevre identified and explained the relevant provisions. Policy 2102 provides that a standard workday consists of eight hours with a thirty-minute meal break and two fifteen minute rest breaks when practical. (Hearing Testimony; R Ex 10 at p. 10 of 33.) Policy 2102 provides that the agency meal period is defined as compensable work time of thirty minutes during which an employee is normally relieved of duties. (Hearing Testimony; R Ex 10 at p. 11 of 33.) Policy 2102 also provides that although rest periods are not required by law, it is the practice of the Department to allow employees a brief rest period of up to fifteen minutes for each four hours worked. (Hearing Testimony; R Ex 10 at p. 12 of 33.)

13. Alice A. Fultz is the Regional Manger for the Bureau for Children and Families Lewis County Office. Ms. Fultz testified that she has been with the Department since 1984 and has been a Regional Manager with the Bureau for Child Support Enforcement since 1992. (Hearing Testimony.) Ms. Fultz directly supervises the Lewis County Child Support Supervisor. Ms. Fultz testified to multiple complaints regarding the Grievants and their former supervisor, Lisa Kesner, and noted that she had seen the Grievants and Ms. Kesner take extended breaks. (Hearing Testimony.)

14. Ms. Fultz identified Respondent's Exhibits 1-4 as documents relating to corrective plans as they related to the Grievants Ms. Daugherty and Ms. Skidmore's frequent absenteeism and attendance issues.

Discussion

As this grievance involves a disciplinary matter, the burden of proof rests with the Respondents to prove that the action taken was justified. Procedural Rules of the W. Va.

Public Employees Grievance Board C.S.R.156 1 § 3; *Holly v. Logan County Board of Education*, Docket No. 96-23-174 (April 30, 1997); *Hanshaw v. McDowell County Board of Education*, Docket No. 33-88-130 (August 19, 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. Department of Health & Human Resources*, Docket No. 92-HHR-486 (May 17, 1993). Upon consideration of the facts and testimony herein, it is concluded that the Respondent did meet its burden of proof that the Grievants' suspensions were executed with good cause.

The Grievants requested that the record be admitted from the Kesner termination hearing. It was established in that hearing that the areas under surveillance were areas outside of the typical realm of normal office operations. Areas that contained scanners, conference rooms and legitimate work-related necessary places were NOT under surveillance and therefore times spent in these areas were NOT counted negatively against time reported. (*Kesner v. Department of Health & Human Resources*, Docket No. 2012-0600 DHHR).

"An appointing authority may suspend any employee without pay for cause or to conduct an investigation regarding an employee's conduct which has a reasonable connection to the employee's performance of his or her job." Administrative Rule of the West Virginia Division of Personnel 143 C.S.R. § 12.3 (R Ex 11 at p. 40.) Excessive and prolonged absence from designated work areas would qualify as having a connection to the expectation and performance of an employee's job. The surveillance footage was taken

for a period of approximately two weeks and a random sampling of days were then analyzed to calculate the discrepancies in hours worked versus hours reported. (Hearing Testimony; R Exs 5, 6, and 7.) Although a progressive disciplinary system is utilized by the Department, the policy specifies that "the level of discipline will be determined by the severity of the violation." The policy provides the Department may suspend an employee when minor infractions or deficiencies continue beyond a written warning, or when a more serious incident occurs. (Department of Health and Human Resources Policy Memorandum 2104). The fraudulent reporting and falsification of time reports more than justified the Respondent's action in seeking a suspension for the Grievants.

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 evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C. S. R. 1 § 156-1-3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interests 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); "Good cause for

dismissal will found when an employee's conduct shows a gross disregard for professional responsibilities for the public safety." *Drown v. West Virginia Civil Service Commission*, 180 W.Va. 420, 549 S.E.2d 294 (2001).

3. Respondent has met its burden of proof and established by a preponderance of evidence that Grievants had indeed falsified reports by inaccurately reporting their time, and such actions warranted suspension.

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 Employee Grievance Board nor any of its Administrative Law Judges is 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: May 20, 2013

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Hunter D. Simmons
Administrative Law Judge