

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**KIMBERLY DAWSON,
Grievant,**

v.

Docket No. 2022-0752-DHHR

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
Respondent.**

DECISION

Grievant, Kimberly Dawson, filed this action against Respondent, Department of Health and Human Resources, on or about April 29, 2022. Grievant indicated that she received a written warning from Director Angela Ferris without just cause. Grievant seeks to have the written warning removed from her personnel file and to made whole in all other ways. A level one conference was held on September 12, 2022. This grievance was denied by a Level 1 Decision dated September 29, 2022. No level two mediation was held pursuant to the request of the parties. A level three hearing was held on February 2, 2023, before Administrative Law Judge Carrie H. LeFevre at the Public Employees Grievance Board's Charleston office. Grievant appeared in-person and by her representative, Gordon Simmons, UE Local 170. The Department of Health and Human Resources appeared by Angela Ferris and by James "Jake" Wegman, Assistant Attorney General. This matter was reassigned to the undersigned on or about April 6, 2023, for administrative reasons. This case became mature for consideration upon receipt of the parties' Findings of Fact and Conclusions of Law on March 13, 2023.

Synopsis

Grievant was working in the Office of Human Resources Management as a Payroll Manager at the time of the events surrounding this grievance. Grievant was issued a

written reprimand for disclosing confidential employee information and violating policy. Respondent met its burden of proof in demonstrating that Grievant's behavior was inappropriate and in violation of established policies. The grievance is denied.

The following Findings of Fact are based on the record of this case.

Findings of Fact

1. At the time of the events surrounding this case, Grievant was working in the Office of Human Resources Management as the Payroll Manager. The Payroll Manager audits and approves payment for payroll and ensures that payrolls are processed correctly and timely each pay period.

2. On March 22, 2022, Grievant learned that Department of Health and Human Resources' employee M.S. had received paychecks on December 31, 2021, and January 14, 2022, even though this employee was not working during that time.

3. By email dated March 22, 2022, Grievant reached out to Nancy Ritchie, the Human Resources Associate in Region 1 where M.S. was employed. Grievant informed Ms. Ritchie that M.S. was going to be hired at the West Virginia Supreme Court of Appeals.

4. That same day, Ms. Ritchie responded to Grievant and copied Tammy Smith, Payroll/Personnel Director at the Supreme Court, stating that M.S. should not have received a paycheck for either of the pay periods in question because M.S. had not worked at DHHR for almost three years.

5. On March 24, 2022, Ms. Smith sent an email asking Grievant for an update as to when M.S. would be removed from DHHR payroll because M.S. was scheduled to go onto the Supreme Court payroll on May 28, 2022.

6. Grievant received a private message from Ms. Ritchie on March 25, 2022, which stated, "I can't term her out as she is on a Suspension and the ongoing investigation is still open. Per Tracy Keese, the other agency can do a Multi Appointment but we will not be able to give them final balances until the investigation is concluded." Respondent Exhibit No. 4.

7. Grievant forwarded Ms. Ritchie's confidential message to Ms. Smith at the Supreme Court on March 25, 2022.

8. The fact that M.S. was suspended pending an investigation was confidential personnel information that Grievant should not have shared with an employee at an outside agency.

9. When Director Farris discussed the alleged misconduct with Grievant on April 14, 2022, Grievant admitted that she sent the confidential information to the Supreme Court.

10. Grievant had been coached regarding employee confidentiality after an employee complained that Grievant had family members present during a confidential video meeting.

11. In addition, Grievant had previously acknowledged the West Virginia Department of Health and Human Resources Confidentiality Statement, in which Grievant agreed, "I will only share personally identifiable data or other confidential information (1) in the context of a legitimate work situation, and/or (2) with staff who are known by me to have prior authorization by my superior to have access to the data." Respondent Exhibit No. 5.

12. In a separate incident, on March 25, 2022, Director Farris began receiving phone calls from Commissioners within DHHR informing her that employees were concerned because they had not received their direct deposits from payroll.

13. The Office of Human Resources Management was required to run a Zero Dollar Report every other Monday. This report shows if an employee has received no paycheck or if their paycheck does not contain the full compensation.

14. After Director Ferris discovered that one employee had not received her check in a timely manner, she asked Grievant if she had checked the report.

15. On March 25, 2022, Grievant responded that the “Zero Dollar Report was checked. I think I just overlooked as I just checked it again and I saw her on there. This is my mistake and I will look much more closely the next time. I apologize for that.” Respondent Exhibit No. 8.

16. Grievant failed to ensure that the Zero Dollar Report was reviewed for approximately one month. Numerous employees did not receive their paychecks in a timely manner due to Grievant's failure to ensure that the Zero Dollar Report was reviewed.

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 Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2018); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). The generally accepted meaning of preponderance of the evidence is “more likely than not.” *Riggs v. Dep't of Transp.*, Docket No. 2009-0005-DOT

(Aug. 4, 2009) *citing Jackson v. State Farm Mut. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004). See *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter, supra*.

Department of Health and Human Resources Policy Memorandum 2108 provides that employees are expected to:

1. Comply with all relevant federal, state and local laws;
2. Comply with all applicable state and federal rules and regulations governing their field;
3. Comply with all Division of Personnel, Department, and Agency Policies;
4. Be thorough and accurate when completing business records;
5. Maintain the confidentiality of all business records contents;
6. Follow directives of their management personnel; . . .
12. Be ethical, alert, polite, sober, and attentive to the responsibilities associated with their jobs.

Director Ferris issued the Grievant a written reprimand for her misconduct, which included disclosing confidential information to external agencies and individuals and providing inaccurate information. It is undisputed that Grievant shared M.S.'s confidential personnel information with Ms. Smith at the Supreme Court outside of the context of a legitimate work situation and without prior authorization. Grievant's action regarding this confidential information violated Respondent's policy and the Respondent's Employee Confidentiality Statement. See Respondent Exhibit No. 5 and 6. Respondent has met its burden of proof as it relates to those allegations in the written reprimand.

The record also supports a finding that Grievant failed to ensure that the Zero Dollar Report was properly completed. Director Ferris questioned Grievant regarding the report after receiving information that employees were not being paid. Grievant violated Respondent policy when she failed to check the report as she had been directed to do by

management personnel. Grievant's failure to be accurate and attentive in her job duties resulted in several employees not receiving their paychecks in a timely manner, which resulted in hardship for the affected employees. Respondent has met its burden of proof as it relates to those allegations in the written reprimand.

Setting a penalty in a disciplinary matter is a discretionary function of an employer. Unless it is clear from the employer's policy what penalty should be imposed, the employer must be given an opportunity to exercise that discretion. *Mills v. Dep't of Administration*, Docket No. 90-ADMIN-180 (July 23, 1991). Respondent's policy does not specify what penalty should be imposed for violations of Policy Memorandum 2108, so Respondent has discretion as to what discipline should be imposed in this matter. The record supports a finding that Grievant's conduct was serious enough to warrant a written reprimand.

The following Conclusions of Law support the decision reached.

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 Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2018); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). The generally accepted meaning of preponderance of the evidence is "more likely than not." *Riggs v. Dep't of Transp.*, Docket No. 2009-0005-DOT (Aug. 4, 2009) citing *Jackson v. State Farm Mut. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004). See *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket

No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter, supra*.

2. Respondent met its burden of proof in demonstrating that Grievant's behavior was inappropriate and in violation of established policies.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Intermediate Court of Appeals.¹ Any such appeal must be filed within thirty (30) days of receipt of this Dismissal Order. 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

Date: April 26, 2023

Ronald L. Reece
Administrative Law Judge

¹On April 8, 2021, Senate Bill 275 was enacted, creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over "[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]" W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend W. VA. CODE § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.