THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DEBBIE PIGMAN,

Grievant,

v. **Docket No. 2023-0312-DHHR**

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU OF SOCIAL SERVICES,**

Respondent.

DECISION

Grievant, Debbie Pigman, filed an expedited level three grievance against her employer, Respondent, Department of Health and Human Resources (DHHR), Bureau for Social Services, dated October 15, 2022, stating as follows: "[r]etaliatory unpaid suspension without good cause or due process." As relief sought, Grievant seeks, "[t]o be made whole in every way including all back pay with interest and benefits restored."

A level three hearing was held at the Grievance Board's Charleston, West Virginia, office on January 18, 2023. Grievant appeared in person and by counsel, Paul M. Stroebel, Strobel & Strobel, PLLC, and Respondent appeared by counsel, James "Jake" Wegman, Esquire, Assistant Attorney General. Melanie Urquhart served as the Respondent's representative. This matter became mature upon the receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law on February 14, 2023.

Synopsis

On October 7, 2022, Respondent suspended Grievant without pay pending investigation into allegations of inappropriate and unprofessional comments with clients. Respondent referred the matter to the Department of Health and Human Resources Office of Inspector General (OIG) for investigation. As of the date of the level three

hearing on January 18, 2023, OIG had not completed its investigation and Grievant was still suspended without pay. Further, as of that date, Grievant had exhausted all her accrued annual leave, which she had been using to cover her absence, and was no longer receiving income. Grievant asserts that her suspension is disciplinary, and that it was improper and violated her due process rights. Respondent denies Grievant's claims arguing that Grievant was properly suspended pending investigation into complaints it received about her performance as a CPS crisis worker, that such suspensions are permitted by the Division of Personnel Administrative Rule, and that the suspension is not disciplinary. Grievant proved by a preponderance of the evidence that Respondent violated her constitutionally guaranteed due process rights to continued employment by suspending her without providing her notice of the reasons for her suspension and for suspending her without an opportunity to be heard while an unreasonably long investigation was conducted. Grievant failed to prove her claim that her suspension is disciplinary. Therefore, the grievance is GRANTED, in part and DENIED, in part.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is employed by Respondent as a child protective services worker in the crisis unit. Crisis CPS workers are sent to counties around the state that are experiencing backlogs of CPS cases. Crisis CPS workers help clear such backlogs in these counties. Grievant had been employed by Respondent for eleven years.

2. In her capacity as a crisis CPS worker, Grievant is regularly assigned to work in DHHR cases in which a child has been removed from a home as a result of

allegations of abuse and/or neglect, there are or have been investigations of allegations of child abuse and/or neglect, and/or there are active court proceedings in formal child abuse and neglect lawsuits brought by DHHR. Also in this capacity, Grievant may serve as an investigator into child abuse and/or neglect allegations reported to DHHR, may advocate for the removal of a child from his or her home, and may take positions and actions in opposition to the wishes of a child's parents and/or family.

3. Given that children can be and are, at times, removed from their homes during abuse and neglect investigations and proceedings, these types of cases tend to be highly stressful and have the potential for volatility. Accordingly, it is not uncommon for parties in abuse and neglect cases to make complaints against social workers who are assigned thereto, whether warranted or not.[1]

4. Melanie Urquhart is the Deputy Commissioner of the Bureau for Social Services.

5. At the times relevant herein, Kelly White served as Grievant's immediate supervisor.

6. Upon information and belief, at the times relevant herein, Chris Nelson was the Director of Investigations at the Office of the Inspector General (OIG). Tim Moses is an investigator at OIG.

7. In September 2022, a woman whom Grievant was investigating in a child abuse and neglect case in Greenbrier County, the mother of the subject child, telephoned Crystal Martin, a supervisor in Respondent's Greenbrier County office, and made a complaint alleging that Grievant was pressuring the child to say negative statements

[1] *See*, testimony of Melanie Urquhart.

about her. Ms. Martin shared this information with Kelly White. Ms. White emailed Ms. Urquhart about the complaint. No one completed a formal complaint as a result of the telephone call.

8. On October 7, 2022, Ms. Urquhart telephoned Grievant and verbally informed her that she was being suspended and that a letter about the same would follow. It is unclear from the record whether Ms. Urquhart explained to Grievant the reason for her suspension that date.

9. By letter dated October 7, 2022, Ms. Urquhart informed Grievant that she was being suspended without pay pending investigation, stating, in part, as follows:

> The Bureau for Social Services has received allegations that you have communicated with clients in an unprofessional manner, as well as, shared inaccurate information in the course of conducting child abuse and neglect investigations. We have determined that an investigation into the matter is warranted. During the investigation, you will be suspended without pay effective immediately; however, you may elect to use accrued Annual Leave. This action serves to preserve the integrity of any evidence verifying your innocence or the truthfulness of the allegations, and to ensure safety, as well as that of the public.
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> On September 6, 2022, allegations were reported that you upset a family with inappropriate and unprofessional comments. This case represents one example where your behavior toward clients crosses the boundary of professionalism and where you convey information that is either inaccurate, misconstrued, or not aligned with supervisor recommendations. . .
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> Upon conclusion of this investigation, you will be advised of any action that may be contemplated regarding the outcome of and your employment with the Department. If the allegations are determined to be unfounded, you will be compensated for the period of suspension not otherwise covered by Annual Leave, and any Annual Leave used will be credited back to your leave balance, and your personnel file will be purged of any documentation thereof. If, however, it is

> determined that the allegations are true, disciplinary action up to and including dismissal, may be taken.[2]

10. The October 7, 2022, suspension letter was drafted and signed by Ms. Urquhart, and contains no specific details of the allegations cited as the basis for Grievant's suspension. The only somewhat identifying detail stated in the letter is that the allegations were reported to DHHR on September 6, 2022.

11. The October 7, 2022, suspension pending investigation letter does not mention that OIG would be conducting the investigation.

12. It is unknown when Respondent decided to refer the matter to OIG for investigation or when it was so referred.

13. In or about March 2022, Ms. Urquhart was informed by Kelly White that she [Ms. White] had received a complaint that Grievant committed a confidentiality breach by giving a DHHR summary regarding a child's parent to an attorney representing another party in an abuse and neglect proceeding then pending in Berkeley County, West Virginia, and that Grievant had given the grandparents in that same case inappropriate advice. The substance of this alleged inappropriate advice is unknown. Thereafter, Ms. Urquhart met with Grievant about "confidentiality" in April 2022. However, neither Ms. Urquhart nor anyone else, imposed any discipline upon Grievant for this alleged breach of confidentiality.[3]

14. Also in March 2022, a party's counsel subpoenaed Grievant to testify at a child abuse and neglect hearing in the Circuit Court of Berkeley County, West Virginia. Grievant retained her own private counsel to represent her and appeared as ordered by

[2] *See*, Grievant's Exhibit 7, Suspension Letter dated October 7, 2022.
[3] *See*, testimony of Melanie Urquhart.

the court.[4] Ms. Urquhart referred to the Berkeley County abuse and neglect case as "convoluted" because at least some parties had moved for discovery and Grievant had retained her own attorney.[5]

15. At some point following the hearing in the Circuit Court of Berkeley County, West Virginia, Ms. Urquhart and an attorney representing Respondent met with Grievant and her counsel. It is unclear from the record when or why this meeting was held. Respondent did not take any action against Grievant, or impose discipline on her.

16. Ms. Urquhart alleged that DHHR had received similar complaints about Grievant in the past and that Grievant had been "coached" about the same. However, no evidence supporting this allegation was presented.

17. Respondent presented no documentation or other supporting evidence of the complaints about Grievant allegedly received in 2022 upon which it based its decision to suspend Grievant pending investigation on October 7, 2022. The only evidence Respondent presented was the testimony of Melanie Urquhart and the October 7, 2022, suspension pending investigation letter.

18. Grievant did not learn any details of the alleged complaints upon which Respondent claims to have based its decision to suspend her without pay until Ms. Urquhart testified at the level three hearing in this matter.

19. Respondent did not call as witnesses any of the people who made the complaints about Grievant's conduct at issue in this matter.

[4] The attorney who represented Grievant in that matter is not Mr. Stroebel.
[5] *See*, testimony of Melanie Urquhart.

20. Respondent refused to provide Grievant's counsel with the documents and/or information Grievant requested in discovery asserting that OIG's on-going investigation prohibited it from disclosing the same.

21. Respondent cited no rules, regulations, statutes, case law, or any authority whatsoever for its contention that it was not permitted to produce any of the requested documents and/or information to Grievant because of OIG's "confidential, on-going investigation."

22. Grievant submitted no motion to compel her discovery requests with the Grievance Board, and did not otherwise raise Respondent's refusal to provide documents and/or information in response to the same with this ALJ prior to the level three hearing.

23. No one from the Office of the Inspector General was called to testify at the level three hearing. Any and all information about this investigation was gleaned from Ms. Urquhart's testimony at the level three hearing.

24. Respondent presented no documentary evidence to support its contention that the OIG investigation was on-going, such as a letter from OIG confirming the same. Respondent's counsel and Ms. Urquhart only asserted that they were still waiting on the investigatory report from OIG.

25. The only witnesses called at the level three hearing were Grievant and Ms. Urquhart.

26. As of the date of the level three hearing on January 18, 2023, Grievant had not been interviewed by anyone at OIG, nor had she had any contact with anyone from that office.

Discussion

Burden of Proof

At the commencement of the level three hearing, the parties, by counsel, informed this ALJ that they dispute which of them has the burden of proof in this matter. Grievant argued that her suspension is disciplinary given that she has been suspended without pay since October 2022. Respondent asserted that the suspension is not disciplinary as it is a suspension pending investigation, and that the OIG investigation is on-going. Respondent noted that if the investigation does not substantiate the allegations made against Grievant, she would be returned to work and paid for the time she has been suspended, and the annual leave she used for this time period would be restored. However, if the allegations are substantiated, Respondent may then consider taking disciplinary action against Grievant. The Grievance Board has not been made aware of any change in the status of the OIG investigation since the level three hearing.

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). However, in a non-disciplinary matter, the grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

Grievant provided no authority to support her argument that her suspension pending investigation was disciplinary. Grievant simply asserted that, as a matter of fact

based upon the undisputed evidence, her suspension is disciplinary. She was not being paid anymore, her leave was exhausted, she is about to lose her employee health insurance because she cannot pay the premiums, and there is no end to her suspension in sight. Respondent countered citing the Division of Personnel's Administrative Rule as authority for its position that the suspension pending investigation is non-disciplinary and that, as such, Grievant bears the burden of proof. Given when and how this issue was raised, and consistent with the Grievance Board's practice of dealing with disputes over which party has the burden of proof, this ALJ held the issue in abeyance to allow the parties to address the issue, citing authority for the same, in their post-hearing, proposed Findings of Fact and Conclusions of Law, and that this ALJ would issue a ruling on the same in her final decision. This ALJ instructed the parties to assume that they both had the burden of proof, and proceeded with the presentation of evidence.[6]

However, despite this, about halfway through counsel for Grievant's questioning of Melanie Urquhart, counsel for Grievant stopped and asked to address a legal issue, which this ALJ allowed. Counsel for Grievant then revived his argument that this was a disciplinary matter and argued that Respondent should have the burden of proof. He further asserted that Respondent's refusal to produce requested documents and information in response to his discovery requests and its failure to state any details of the

[6] It is not uncommon for parties to dispute which has the burden of proof in grievance matters and for grievances to proceed in this manner. This allows the parties the opportunity to more fully explain their arguments and to provide their authority for the same to the ALJ for consideration. *See e.g.*, *Hale v. Div. of Corr.*, Docket No. 97-CORR-353 (Feb. 20, 1998); *Conley v. Div. of Corr.*, Docket No. 2016-0399-MAPS (Feb. 16, 2016).

allegations on which Respondent based her suspension pending investigation made it "impossible for Grievant to defend herself" in this grievance. In response, Respondent stood firm on its argument that the matter is non-disciplinary, and that the suspension pending investigation was proper. Respondent also asserted that it could not produce the documents and information Grievant requested in discovery because of confidentiality and the on-going OIG investigation. Respondent cited no authority for this position. Respondent then moved to dismiss the grievance.

Upon hearing the arguments of counsel, this ALJ reiterated her ruling on the issue of the burden of proof, and addressed the other various issues raised by the parties. Prior to the level three hearing, Grievant took no action to seek to compel the requested discovery from Respondent. Despite counsel for Grievant's comments that it was impossible for Grievant to defend herself against the allegations without the requested discovery, Grievant opposed this ALJ's stated inclination to continue the level three hearing and order the production of the documents and/or information requested. Grievant insisted on proceeding with the level three hearing explaining that Grievant did not wish to prolong her suspension any longer. This ALJ ruled the level three hearing would proceed as Grievant wished. This ALJ then ruled that, consistent with the Grievance Board's prior decisions and practice, the Respondent would be limited to addressing only the charges stated in the October 7, 2022, suspension pending investigation letter, and that Respondent's motion to dismiss the grievance was denied before proceeding with the level three hearing. The level three hearing was concluded that same day.

In her proposed Findings of Fact and Conclusions of Law submitted following the hearing, Grievant cited no authority supporting her argument that her suspension pending investigation is disciplinary. Grievant's argument appears to be that given the length of Grievant's suspension, the vagueness of Respondent's reasoning for the same, and the resulting hardship Grievant has endured, the suspension is disciplinary. Respondent continued to argue that the suspension pending investigation is non-disciplinary.

The law is clear that the suspension of an employee pending investigation of an allegation of misconduct is not disciplinary in nature and the grievant bears the burden of proving that such suspension was improper. *Ferrell and Marcum v. Reg'l Jail and Corr. Facility Auth./W. Reg'l Jail*, Docket No. 2013-1005-CONS (June 4, 2013); W. VA. CODE ST. R. § 143-1-12.3.b. Therefore, Grievant bears the burden of proving her grievance by a preponderance of the evidence.

Merits

Grievant argues that her suspension without pay pending investigation was improper and that Respondent violated her due process rights as Respondent failed to give her proper notice of the reasons for her suspension and as her suspension has lasted for months and the investigation is still not completed. Respondent contends that both the DOP Administrative Rule and its Policy Memorandum 2104, "Progressive Correction and Disciplinary Action," permit suspensions pending investigation in situations like the one presented in this matter, and that Respondent's decision to suspend Grievant and refer it to OIG for investigation was proper.

By letter dated October 7, 2022, Respondent suspended Grievant without pay pending investigation stating, in part, as follows:

> The Bureau for Social Services has received allegations that you have communicated with clients in an unprofessional manner, as well as, shared inaccurate information in the course of conducting child abuse and neglect investigations. We have determined that an investigation into the matter is warranted. During the investigation, you will be suspended without pay effective immediately; however, you may elect to use accrued Annual Leave. This action serves to preserve the integrity of any evidence verifying your innocence or the truthfulness of the allegations, and to ensure safety, as well as that of the public.
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> On September 6, 2022, allegations were reported that you upset a family with inappropriate and unprofessional comments. This case represents one example where your behavior toward clients crosses the boundary of professionalism and where you convey information that is either inaccurate, misconstrued, or not aligned with supervisor recommendations. . . .[7]

The Division of Personnel's Administrative Rule states the following regarding suspensions pending investigation:

> 12.3.b. Non-disciplinary Suspension. - An appointing authority may suspend any employee without pay indefinitely to perform an investigation regarding an employee's conduct which has a reasonable connection to the employee's performance of his or her job or when the employee is the subject of an indictment or other criminal proceeding. Such suspensions are not considered disciplinary in nature and an employee may choose to use accrued annual leave during the period of non-disciplinary suspension but is not eligible for any other leave afforded in this rule. The appointing authority shall give the employee oral notice confirmed in writing within three (3) working days, or written notice of the specific reason or reasons for the suspension. A predetermination conference and three (3) working days' advance notice are not required; however, the appointing authority shall file the statement of reasons for the suspension and the reply, if any, with the Director. . .

The rule further provides as follows:

> Upon completion of the investigation or criminal proceeding, the appointing authority shall:

[7] *See*, Grievant's Exhibit 7, Suspension Letter dated October 7, 2022.

> 12.3.b.1. initiate appropriate disciplinary action as provided in this rule; and,
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> 12.3.b.2. unless the employee is dismissed or otherwise separates from employment prior to completion of the investigation or criminal proceeding, provide retroactive wages or restore annual leave for the period of suspension; provided, that such retroactive wages may be mitigated by other earnings received during the period of suspension. . . .

W.VA. CODE ST. R. § 143-1-12.3.b. (2022).

Permanent civil service employees have "a property interest arising out of the statutory entitlement to continued uninterrupted employment." Syl. Pt. 4, *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 156, 241 S.E.2d 164, 166 (1977). That property interest "warrant[s] the application of due process procedural safeguards to protect against the arbitrary discharge of such employee under Article 3, Section 10 of our constitution." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 283, 332 S.E.2d 579, 583 (1985) (*per curiam*) (citing *Waite*). *See* W. VA. CONST. art. III, § 10. Further, Justice McHugh noted the Supreme Court of Appeals of West Virginia's (WVSCA) long held position on this issue in *West Virginia Department of Environmental Protection v. Falquero*, 228 W. Va. 773, 778, 724 S.E.2d 744, 749, (2012), stating as follows:

> This Court has unequivocally said that '[a] person covered under a civil service system is afforded certain statutory protections surrounding his employment and is, therefore, *not* an at-will employee.' *Williams v. Brown,* 190 W.Va. 202, 205, 437 S.E.2d 775, 778 (1993). Emphasis added). This observation is based on our holding in syllabus point four of *Waite v. Civil Service Commission*, 161 W.Va. 154, 241 S.E.2d 164 (1977), that '[a] State civil service classified employee has a property interest arising out of the statutory entitlement to continued uninterrupted employment' . . . .

Id.

"[O]utside of the area of criminal law, due process is a flexible concept, and . . . the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case. *Clarke v. West Virginia Board of Regents,* [166 W. Va. 702, 710], 279 S.E.2d 169, 175 (1981); *Bone v. West Virginia Department of Corrections,* 163 W. Va. 253, 255 S.E.2d 919 (1979); *North v. West Virginia Board of Regents,* 160 W. Va. 248, 233 S.E.2d 411 (1977)." *Buskirk,* 175 W. Va. at 283, 332 S.E.2d at 583. "The extent of due process protection affordable for a property interest requires consideration of three distinct factors: first, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of a property interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Waite* at Syl. Pt. 5.

Under this test, the WVSCA "'has traditionally shown great sensitivity toward the due process interests of the government employee by requiring substantial due process protections,' including, generally, predischarge notice and a hearing. *Major v. DeFrench,* [169 W. Va. 241, 255], 286 S.E.2d 688, 697 (1982)." *Buskirk*, 175 W. Va. At 283, 332 S.E.2d at 583. In determining the due process that is required for public employees the WVSCA has determined "[t]he constitutional guarantee of procedural due process requires '"some kind of hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment.' *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 [84 L. Ed. 2d 494, 105 S. Ct. 1487] (1985)." Syl. Pt. 3,

Fraley v. Civil Serv. Comm'n, 177 W. Va. 729, 730, 356 S.E.2d 483, 484 (1987). "'Due process must generally be given before the deprivation occurs unless a compelling public policy dictates otherwise.' Syl. Pt. 2 (in part), *North v. West Virginia Board of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977)." Syl. Pt. 5 *Clarke v. West Virginia Board of Regents*, 166 W. Va. 702, 710, 279 S.E.2d 169, 175. "The essential due process requirements, notice and an opportunity to respond, are met if the tenured civil service employee is given 'oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story' prior to termination." *Fraley*, 177 W. Va. at 732, 356 S.E.2d at 486 (citing *Loudermill* at 546). Accordingly, a long-term public employee such as Grievant has a constitutionally protected interest in their continued employment.

Subsection 12.3.b. of the Administrative Rule requires that the appointing authority give the employee oral notice confirmed in writing within three working days, or written notice of the specific reasons or reasons for the suspension. Ms. Urquhart gave Grievant oral notice of her suspension pending investigation and sent a letter confirming the same that same day. However, in neither communication did Ms. Urquhart provide Grievant the specific reasons for her suspension or all the allegations that were being submitted to OIG for investigation. The letter contains no references to a case name or number, the name of the person who made the allegations, or what those allegations were. Instead, the letter contains only the vague accusations and refers only to allegations Respondent asserts were reported to it on September 6, 2022. No other dates or incidents are mentioned in the letter.

Despite this, Respondent alleges that the first paragraph of the letter "alludes" to at least three other complaints about Grievant's conduct Respondent asserts it received before September 6, 2022. Respondent admits that these earlier complaints were received months before Grievant's suspension, that Ms. Urquhart had already addressed at least two of them with Grievant, and that Ms. Urquhart had imposed no discipline for the same. Given the vagueness of the letter and that Respondent refused to provide Grievant with documents and information in response to her discovery requests, Grievant first learned the extent Respondent's investigation at the level three hearing during Ms. Urquhart's testimony.

During her testimony, Ms. Urquhart explained that the September 6, 2022, complaint was made by a woman whom Grievant was investigating for child abuse and neglect with respect to her child, and that the woman had asserted that Grievant "pressured and scared" the child to make "negative" statements against her [the woman]. Further, the woman alleged that Grievant told the child that "she had seen children die from not sharing information." Given that Grievant was alleged to be improperly trying to influence a child to make negative, potentially false, statements about the child's mother during an active abuse and neglect court action, the allegations were wholly related to Grievant's employment.

Respondent argues that it had a duty to suspend Grievant given the seriousness of the allegations made, the nature of the same, and Grievant's history of similar complaints in order to protect the public. The allegations made against Grievant on September 6, 2022, are very serious, and warrant investigation. Given the stated provisions of the Administrative Rule, Respondent had the authority to suspend Grievant

pending investigation while the investigation was conducted. Respondent has not explained why it referred the matter to OIG for investigation when employee misconduct investigations are commonly conducted by the agency itself, as Ms. Urquhart stated she had always done before. Ms. Urquhart testified that the decision to refer the matter to OIG for investigation was made in conversations to which she was not a party and that she did not know the reasoning for such. While Respondent's decision to refer the matter to OIG for investigation seems unusual, it is not unprecedented and has not been demonstrated to be improper. However, OIG has still not completed its investigation which, as of the writing of this decision, has lasted more than five months, and Grievant has been given no opportunity to tell her side of the story with respect to the allegations made against her. Further, as of the date of the level three hearing, Grievant had not been interviewed by OIG. As explained earlier herein, Grievant is entitled to be heard, to be given notice of the charges, and the opportunity to defend herself before her right to continued employment can be taken away.

The Grievance Board addressed a similar situation in *Kendall, et al., v. Department of Health and Human Resources Bureau for Children and* Families, Docket No. 2019-1336-CONS (May 19, 2020), *aff'd in part, denied in part*, Kanawha Cnty. Cir. Ct. Civil Action No. 20-AA-60 (Mar. 31, 2022). In that matter, several employees of the DHHR Bureau for Children and Families, including two CPS supervisors, were accused of using their employment positions for their own personal gain, or that of another person, related to the foster care placement of a child who had come into the custody of DHHR-BCF in violation of West Virginia law and DHHR policies. The grievants were suspended indefinitely pending investigation by OIG. For reasons unknown, OIG expanded the

scope of the investigation, and as of the date of the level three hearing, the grievants had been suspended without pay pending investigation for nearly a year and the OIG investigation had not yet been completed. While *Kendall* concerns more extreme allegations of employee misconduct than that alleged in the instant grievance, *Kendall* is directly on point with the issues to be decided herein. The ALJ in *Kendall* stated the following:

> [t]here is no question that Grievants are entitled to a hearing[,] to be given notice of these charges[,] and the opportunity to defend themselves under the due process clauses of the federal and state constitutions before their right to continued employment can be taken away. (citations omitted). The opportunity to be heard is a fundamental requirement of the due process clause. *Armstrong v. Manzo*, 380 U. S. 545, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965). However, where there is an overriding public interest involved[,] the hearing may be postponed for a reasonable period of time in order to allow an investigation to be conducted. [*See*] *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971).

Id. at 28. Certainly, an overriding public interest was involved in this matter given that Grievant is a CPS worker who had been accused of pressuring a child to make negative, and/or potentially false, statements about his or her parent during an active abuse and neglect investigation, and such would allow for the postponement of Grievant's opportunity to be heard, or "hearing," for a reasonable period of time while an investigation was conducted. However, just as in *Kendall,* Respondent asserts that section 12.3.b of the Administrative Rule "authorized it to suspend Grievant 'indefinitely' while the investigation is being conducted." The *Kendall* ALJ concluded that, "[n]otwithstanding the DOP Rule, the West Virginia and Federal Constitutions require that the investigation be conducted within a 'reasonable time' to meet constitutional due process standards." *Id*.

In examining what constitutes "a reasonable time," *Kendall* provides the following guidance: "the WVSCA has held that, '[i]n the absence of a specific time limit, the failure of a state board or agency to take decisive action with a reasonable time, upon a matter properly before it, [such as providing Grievant's a hearing] will be assumed to be a refusal of the action sought.'" *Id.* at 29 (quoting Syl. Pt. 2, *State ex rel. Sheppe v. West Virginia Board of Dental Examiners*, 147 W. Va. 473, 128 S.E.2d 620 (1962)). Further, "[i]In Syllabus Point 3 of *State ex rel. Bowen v. Flowers*, 155 W. Va. 389, 184 S.E.2d 611 (1971), involving the suspension of a pharmacist from participation in pharmaceutical programs administered by the Department of Welfare, [the] Court stated, '[w]here a suspension is justified prior to a hearing, the refusal to hold a hearing after a reasonable time has elapsed in which to conduct a proper investigation constitutes *arbitrary* or *capricious* action on the part of the administrative officer involved.' *Allen v. State Human Rights Comm'n*, 174 W. Va. 139, 156, 324 S.E.2d 99, 116-117 (1984)." (Footnote omitted). *Id.*

"Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health & Human Serv.,* 789 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind,* Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *See State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized

as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Id. (citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

Bowen involved a pharmacist's claim that his right to participation in a West Virginia DHHR program was being denied without a hearing while an investigation was being conducted. In *Kendall*, the ALJ further explained,

> [t]he Court found that the pharmacist was entitled to defend himself under the Due Process Clauses of article XIV, § 1 of the Federal Constitution and Article III, § 10 of the W. Va. Constitution. Although the DHHR Commissioner could temporarily suspend the pharmacist's participation in the programs pending an investigation, the investigation had to be promptly conducted and the hearing had to be held within a reasonable time. The investigation had been ongoing for seven months and had not been concluded. The Court concluded that thirty days was a reasonable time within which to complete the investigation of the pharmacist's practices. Having found that the length of the deprivation of the pharmacist's right to a hearing for a seven-plus month investigation, the Court ordered that the investigation be concluded within thirty days. The *[Bowen]* case was brought in the form of a writ of mandamus, but the principles announced therein are equally applicable and instructive toward the resolution of this grievance. As in this case, there was no statutory or policy limit on the duration of an investigation in *[Bowen]*.

In granting the grievance in *Kendall*, the ALJ reasoned as follows:

> In this case, Grievants were suspended for a specific complaint, alleged improper placement of a client child for personal gain. This is the only reason given for the suspension in their written notice. That charge could have been investigated in thirty days.
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> While the allegation is serious, it is relatively simple. The main questions were whether on of [the] Grievants was related to the foster parents[,] whether that family would financially benefit from the placement[,] whether there was an alternative

> placement[,] and whether the supervisor of Grievants knew about the conflict in the placement and approved it anyway . . .
>
> The relevant witnesses were already identified and available for questioning. However, the OIG investigators expanded the investigation. . . A year has gone by and there is no indication that any of this matter has been referred to a law enforcement agency. A year-long investigation of the charges for which Grievants were given is clearly unreasonable, arbitrary, and capricious. Grievants cannot be deprived of their right to continued employment while the OIG combs through their employment history for irregularities with limited notice of a charge.
>
> It cannot be over emphasized that while OIG is conducting their investigation, Grievants are left without any income. These are long term employees with good employment records who have been deprived of their job for more than a year based upon nothing more than an allegation. Very few people, let alone public employees, have financial reserves necessary to get them through a year without pay. As mentioned before, they are left neither able to pay their utility bills and other debts, nor procure necessities such as food, shelter, or medication. In some ways, Grievants are worse off than it they were fired. They are stuck in an uncertain status without knowing all of the allegations against them and no opportunity to defend themselves from those charges. [OIG] Director of Investigations Nelson testified that employees often give up and quit because the long time without a salary is not worth waiting for the results of the investigation.

Id. at 30-31.

As in *Kendall*, Grievant remains suspended as of this date, and she has exhausted her accrued annual leave. As a result, Grievant stopped being paid in January 2023, even though she was still employed by Respondent. During the January 2023 level three hearing, Grievant testified that she would soon lose her employee insurance benefits because, given her suspension and the exhaustion of her accrued annual leave, she would be required to pay her monthly premium to maintain such, and she had no money

to do so. Further, as of this date, the status of the OIG investigation remains unknown but it is clear that OIG has failed to interview Grievant regarding the allegations. Regardless, at the time it was referred to OIG, Respondent was aware of the allegations made against Grievant, who made them, the identities of the potential witnesses, as well as when and how the allegations were made and to whom. Even if it were appropriate for the three other client complaints to be referred for investigation at the time Grievant was suspended, the same is true for those complaints as well. Also, Ms. Urquhart had already looked into at least two of said complaints months earlier in 2022, and she decided to impose no discipline on Grievant for the same.

Given the evidence presented, a more than five-month investigation into the one charge of misconduct identified in her suspension letter is clearly unreasonable, arbitrary, and capricious. Even if Respondent's contention that the other allegations of misconduct made against Grievant in 2022 were identified in the suspension letter were accurate and are being investigated by OIG concurrently, an investigation of more than five months is still too long as the allegations, though serious, are not complex. The investigation could have been completed in thirty days. Based upon the reasons set forth herein, Grievant proved by a preponderance of the evidence that Respondent has violated her constitutionally guaranteed due process rights to continued employment by suspending her without proper notice and an opportunity to be heard while an unreasonably long investigation is conducted. Accordingly, this grievance is GRANTED, in part and DENIED, in part.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). However, in a non-disciplinary matter, the grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

2. The suspension of an employee pending investigation of an allegation of misconduct is not disciplinary in nature and the grievant bears the burden of proving that such suspension was improper. *Ferrell and Marcum v. Reg'l Jail and Corr. Facility Auth./W. Reg'l Jail*, Docket No. 2013-1005-CONS (June 4, 2013); W. VA. CODE ST. R. § 143-1-12.3.b.

3. Permanent civil service employees have "a property interest arising out of the statutory entitlement to continued uninterrupted employment." Syl. Pt. 4, *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 156, 241 S.E.2d 164, 166 (1977). That property interest "warrant[s] the application of due process procedural safeguards to protect against the arbitrary discharge of such employee under Article 3, Section 10 of our

constitution." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 283, 332 S.E.2d 579, 583 (1985) (*per curiam*) (citing *Waite*).

4. "[O]utside of the area of criminal law, due process is a flexible concept, and . . . the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case. *Clarke v. West Virginia Board of Regents,* [166 W. Va. 702, 710], 279 S.E.2d 169, 175 (1981); *Bone v. West Virginia Department of Corrections,* 163 W. Va. 253, 255 S.E.2d 919 (1979); *North v. West Virginia Board of Regents,* 160 W. Va. 248, 233 S.E.2d 411 (1977)." *Buskirk,* 175 W. Va. at 283, 332 S.E.2d at 583.

5. "The extent of due process protection affordable for a property interest requires consideration of three distinct factors: first, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of a property interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Waite* at Syl. Pt. 5.

6. The Supreme Court of Appeals of West Virginia "'has traditionally shown great sensitivity toward the due process interests of the government employee by requiring substantial due process protections,' including, generally, predischarge notice and a hearing. *Major v. DeFrench,* [169 W. Va. 241, 255], 286 S.E.2d 688, 697 (1982)." *Buskirk*, 175 W. Va. At 283, 332 S.E.2d at 583. In determining the due process that is required for public employees the WVSCA has determined "[t]he constitutional guarantee of procedural due process requires '"some kind of hearing" prior to the discharge of an

employee who has a constitutionally protected property interest in his employment.' *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 [84 L. Ed. 2d 494, 105 S. Ct. 1487] (1985)." Syl. Pt. 3, *Fraley v. Civil Serv. Comm'n*, 177 W. Va. 729, 730, 356 S.E.2d 483, 484 (1987).

7. "'Due process must generally be given before the deprivation occurs unless a compelling public policy dictates otherwise.' Syl. Pt. 2 (in part), *North v. West Virginia Board of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977)." Syl. Pt. 5 *Clarke v. West Virginia Board of Regents*, 166 W. Va. 702, 710, 279 S.E.2d 169, 175. "The essential due process requirements, notice and an opportunity to respond, are met if the tenured civil service employee is given 'oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story' prior to termination." *Fraley*, 177 W. Va. at 732, 356 S.E.2d at 486 (citing *Loudermill* at 546).

8. The opportunity to be heard is a fundamental requirement of the due process clause. *Armstrong v. Manzo*, 380 U. S. 545, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965). However, where there is an overriding public interest involved[,] the hearing may be postponed for a reasonable period of time in order to allow an investigation to be conducted. [*See*] *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971).

9. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp.*

v. Health & Human Serv., 789 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind,* Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *See State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Id. (citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

10. "In the absence of a specific time limit, the failure of a state board or agency to take decisive action within a reasonable time, upon a matter properly before it, will be assumed to be a refusal of the action sought.'" Syl. Pt. 2, *State ex rel. Sheppe v. West Virginia Board of Dental Examiners*, 147 W. Va. 473, 128 S.E.2d 620 (1962).

11. "Where a suspension is justified prior to a hearing, the refusal to hold a hearing after a reasonable time has elapsed in which to conduct a proper investigation constitutes *arbitrary* or *capricious* action on the part of the administrative officer involved." Syllabus Point 3 of *State ex rel. Bowen v. Flowers*, 155 W. Va. 389, 184 S.E.2d 611 (1971)

12. "W. VA. CODE ST. R. § 143-1-12.3.b. authorized an agency to suspend an employee "indefinitely" while the investigation is being conducted. Notwithstanding the DOP Rule, the West Virginia and Federal Constitutions require that the investigation be conducted within a "reasonable time" to meet constitutional due process standards. *State ex rel. Bowen v. Flowers*, 155 W. Va. 389, 184 S.E.2d 611 (1971)." *Kendall, et al., v. Dep't of Health & Human Res. Bureau for Children &* Families, Docket No. 2019-1336-

CONS (May 19, 2020), *aff'd in part, denied in part*, Kanawha Cnty. Cir. Ct. Civil Action No. 20-AA-60 (Mar. 31, 2022).

13. Grievant proved by a preponderance of the evidence that Respondent has violated her constitutionally guaranteed due process rights to continued employment by suspending her without proper notice and an opportunity to be heard while an unreasonably long investigation is conducted. Accordingly, this grievance is GRANTED, in part and DENIED, in part.

Accordingly, this grievance is **GRANTED, in part, and DENIED in part**.

Respondent is hereby **ORDERED** to complete any investigation being conducted pursuant to Grievant's suspension pending investigation and issue a report of the findings within 30 calendar days of receipt of this decision. Within a reasonable time, as discussed herein, following the receipt of the findings of the investigation, Respondent is ORDERED to give Grievant a predetermination hearing prior to any contemplated discipline, or return Grievant to work in accordance with all the provisions of W. VA. CODE ST. R. § 143-1-12.3.b.1. and W. VA. CODE ST. R. § 143-1-12.3.b.2. Grievant's request for backpay with interest and benefits restored is **DENIED.**

Any party may appeal this decision to the Intermediate Court of Appeals.[8] Any such appeal must be filed within thirty (30) days of receipt of this decision. 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: March 24, 2023.

Carrie H. LeFevre
Administrative Law Judge

[8] On 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 West Virginia 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.