THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TRACEY NEVILLE,
Grievant,

v. **Docket No. 2023-0625-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU OF SOCIAL SERVICES,
Respondent.

DECISION

Grievant, Tracey Neville, was employed by Respondent, Department of Health and Human Resources within the Bureau of Social Services. On Februrary 8, 2023, Grievant filed this grievance against Respondent stating, "Dismissal without good cause." For relief, Grievant seeks to be made whole with back pay, benefits, and tenure with statutory interest on lost wages.

The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held on July 8, 2024, before the undersigned at the Grievance Board's Charleston, West Virginia office via video conference. Grievant appeared and was self-represented. Respondent appeared by Social Service Manager Christie Fortney and was represented by counsel, Heather L. Olcott, Assistant Attorney General. This matter became mature for decision on August 9, 2024, upon final receipt of Respondent's written Proposed Findings of Fact and Conclusions of Law.[1]

Synopsis

Grievant was employed by Respondent as a Child Protective Services Worker. Grievant protests the termination of her employment for falsification of records. Grievant

[1] Grievant elected not to file written Proposed Findings of Fact and Conclusions of Law.

failed to visit foster children as required by policy and entered false records stating she did visit the children. Respondent proved it was justified in terminating Grievant's employment for this misconduct. Grievant failed to prove mitigation of the punishment is warranted. Accordingly, the grievance is denied.

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 was employed by Respondent as a Child Protective Services Worker ("CPSW") in Randolph County working under a provisional social work license.

2. Respondent's Foster Care Policy requires face-to-face contact with each child at least once each calendar month to ensure the child's needs are being met and to evaluate the safety of the placement.

3. Respondent is currently also under a federal improvement plan which requires Respondent to meet the face-to-face contact requirement at least 95% of the time.

4. All case actions, including the monthly contact, must be documented in Respondent's computer system.

5. DHHR Policy 2108.VIII.A.4 requires that employees "[b]e thorough and accurate when completing business records." Grievant acknowledged that she had received and read the policy by her signature on October 21, 2021.

6. Grievant also signed the Employee Acknowledgement Form Employee Conduct and Falsification of Records which states:

> I understand that I must abide by all the terms of the policy, including that portion which states that employees must be

> accurate when completing Agency records. In addition, falsification of any BCF document, be it a record in a written format, in RAPIDS or FACTS, or any other agency document will be considered gross misconduct and dereliction of my duties as an Employee with the Bureau for Children and Families and will result in my immediate dismissal.

7. To ensure compliance with the monthly contact requirement, Social Service Manager Christie Fortney performs random reviews of cases for each of her subordinate CPSWs. As part of the review, Ms. Fortney also contacts the family or foster care provider regarding the visit.

8. During her random review of Grievant's December 2022 face-to-face contacts, two of the families reported that Grievant had not visited in December although Grievant had documented face-to-face contacts in December in the computer system. One family stated that no worker had visited since the last worker left in October and the other said Grievant had not visited since before Thanksgiving.

9. Ms. Fortney then reviewed the remainder of Grievant's caseload and discovered that Grievant had documented December 2022 visits in a total of five or six cases in which the families/foster care providers stated Grievant had not visited in December.

10. Ms. Fortney then conducted a predetermination conference with Grievant on January 12, 2023. Grievant admitted that she had not visited some children in her caseload and admitted she had entered false contacts for some cases because she was overwhelmed and afraid of what would happen if she did not document that she had seen all of her clients for the month.

11. Although the office was short-staffed with new staff at the time, which resulted in higher-than-normal caseloads, Ms. Fortney had consistently offered help both

in writing and in person.

12. By letter dated January 26, 2023, Deputy Commissioner Melanie Urquhart terminated Grievant's employment for Grievant's violation of policy for documenting foster care child visits that did not occur.

Discussion

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). "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 & 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*.

Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin*., 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* W. VA. CODE ST. R. § 143-1-12.2 (2022).

Grievant admitted that she documented in Respondent's computer system face-to-face contacts with children that did not occur. Grievant asserts she was overwhelmed by her caseload due to vacant and newly-hired staff and that she was afraid to ask for

help because she thought her supervisor wanted to fire her. Grievant characterizes her behavior as a mistake that could be corrected through corrective actions.

Grievant's actions were not a mere mistake. Grievant chose not to visit the children to ensure their safety and well-being. She chose not to ask for help and, in fact, failed to accept the help that Ms. Fortney offered on multiple occasions. Grievant then chose to lie and enter fabricated records of these face-to-face visits with children that she had failed to make. All of these actions were intentional misconduct that could have had serious consequences of endangering children, federal financial penalties, and loss of credibility with the courts. Respondent proved it was justified in terminating Grievant's employment for this serious and intentional misconduct.

In arguing that termination of her employment was too harsh a penalty, Grievant is essentially asking for mitigation. "Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995). *See Martin v. W. Va. State*

Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989). When 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)(citations omitted).

Grievant's misconduct was serious and intentional, so termination of her employment was not inherently disproportionate. Respondent's policy is clear regarding Grievant's duty to visit children monthly and accurately document the same. It goes without saying that falsifying records is improper and, in addition, Grievant had specifically acknowledged by her signature of the falsification of records acknowledgement that falsification of records would result in her immediate dismissal. Grievant failed to prove that her length of service or prior work record would warrant mitigation. Although it is true that Grievant's workload was challenging, her excuse that she could not ask for help and had to lie for fear of her job is completely unsupported by the record. Therefore, Grievant failed to prove mitigation is warranted.

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). "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 & 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. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin*., 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* W. VA. CODE ST. R. § 143-1-12.2 (2022).

3. Respondent proved it was justified for terminating Grievant's employment for her intentional and serious misconduct of falsifying records.

4. "Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996).

5. An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the

offense and the personnel action. *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995). *See Martin v. W. Va. State Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

6. When 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)(citations omitted).

7. Grievant failed to prove that mitigation of the punishment is warranted.

Accordingly, the grievance is **DENIED.**

"The decision of the administrative law judge is final upon the parties and is enforceable in the circuit court situated in the judicial district in which the grievant is employed." W. VA. CODE § 6C-2-5(a) (2024). "An appeal of the decision of the administrative law judge shall be to the Intermediate Court of Appeals in accordance with §51-11-4(b)(4) of this code and the Rules of Appellate Procedure." W. VA. CODE § 6C-2-5(b). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such an appeal and should not be named as a party to the appeal. However, the appealing party must serve a copy of the petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b) (2024).

DATE: September 18, 2024

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Billie Thacker Catlett
Chief Administrative Law Judge