THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

HELEN ANNE WHITE,
Grievant,

v. **Docket No. 2014-0478-DHHR**

DEPARTMENT OF HEALTH
AND HUMAN RESOURCES,
Respondent.

DECISION

Grievant, Helen Anne White, was employed by Respondent, Department of Health and Human Resources ("DHHR"), as a Social Service Worker 2. She was assigned to Respondent's office in Clay County, West Virginia. As authorized by WEST VIRGINIA CODE § 6C-2-4(a)(4), Ms. White filed an expedited grievance directly to level three challenging the termination of her employment. The grievance was dated October 18, 2013, and alleges:

> I was dismissed by WVDHHR for pleading no contest to a Misdemeanor that stemmed from "wrong doing" in 1997 which was prior to my employment with WVDHHR on Nov. 16, 2004.[1]

As relief Grievant seeks reinstatement to her prior position plus back pay from July 11, 2013, the date she was suspended pending an investigation.

This matter was originally scheduled for a level three hearing on May 6, 2014. At that time the attorneys for both parties agreed that there was additional discovery that

[1] The statement of grievance is set out herein as it appeared on the grievance form.

needed to take place and the matter was continued.[2] After additional continuances, a change of attorneys for Grievant, and a telephonic hearing regarding discovery and evidence, a level three hearing was held in the Charleston Office of the West Virginia Public Employees Grievance Board on September 22, 2015. Grievant personally appeared and was represented by Daniel R. Grindo, Esquire. Respondent was represented by Steven R. Compton, Senior Assistant Attorney General, at each step of the grievance procedure. The grievance became mature for decision on November 3, 2015, upon the Grievance Board's receipt of Respondent's Proposed Findings of Fact and Conclusions of Law.

Synopsis

Respondent terminated Grievant's employment after she entered a plea of no contest to a misdemeanor criminal charge of fraud in obtaining welfare benefits. Grievant was originally charged with two felony counts of fraud and two felony counts of conspiracy. When Grievant entered a plea to the lesser included misdemeanor charge, the remaining counts were dismissed. Grievant argues that the facts leading to the plea of no contest occurred years before her employment with DHHR and should not be grounds for the termination of her employment. Respondent proved that the charge that was the subject of the plea of no contest was sufficiently related to the duties performed in Grievant's employment to justify her dismissal based upon the no contest plea.

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.

[2] Grievant was represented by Barbara Harmon-Schamberger, Esquire during this hearing and in the underlying criminal proceedings.

Findings of Fact

1. Grievant, Helen White, was employed by Respondent DHHR in the Social Service Worker 2 classification. She began working for Respondent in November 2004 and worked in the Clay County office. In her position Grievant had to work closely with other workers charged with making benefit determinations. She often worked with clients who were receiving such benefits and was charged with reporting violations of policies related to those benefits.

2. Robert Lane is an investigator with the DHHR Office of Inspector General ("OIG"). While checking the status of open files relating to investigations of welfare fraud allegations, Mr. Lane discovered charges against Grievant which had been turned over to the Clay County Prosecuting Attorney's office in 1997. He also found a more recent allegation against Grievant.

3. Investigator Lane reviewed the investigation of the charges from 1997 and investigated the new charges as well. At the conclusion of these investigations Mr. Lane submitted two report files to the Clay County Prosecutor's office. One file related to allegations of obtaining welfare benefits or helping another person obtain such benefits, by fraud, during the period of June 1996 through January 1997. (Respondent's Exhibit 5). The second file related to similar allegations which were supposed to have occurred during the period of June 2010 through December 2011. (Respondent's Exhibit 6).

4. As part of the renewed investigation into the charges from 1996 and 1997, Grievant gave a written statement to Timothy Tomer, an investigator with the DHHR/OIG. The statement was made on June 30, 2011, and signed by Grievant. Grievant stated that

she knew that there was a welfare fraud case pending with the Clay County Prosecutor from November 1997. With regard to those charges she stated:

> I admitted in 1997 that I failed to report my marriage to James White, that he also lived with me, and had an income of $11,985.06 that was not reported to the Clay County DHHR office. The total amount of benefits that I obtained fraudulently was $4,408.00. I did make payments to the DHHR office for past claims.

(Respondent's Exhibit 5).

5. Based upon the reports and testimony submitted to a Grand Jury, an indictment was issued on July 9, 2013, charging Grievant with the following crimes:

> **Count 1:** The felony of obtaining or abetting in the obtaining welfare benefits by fraud between June 2010 and December 2011, in the amount of $8,736.21, in violation of W. VA. CODE § 9-5-4.
>
> **Count 2:** The felony of conspiring with another to commit the felony of welfare fraud during the period between June 2010 and December 2011, in violation of W. VA. CODE § 61-10-31.
>
> **Count 3:** The felony of obtaining or abetting in the obtaining welfare benefits by fraud between June 1996 and January 1997, in the amount of $4,408.00, in violation of W. VA. CODE § 9-5-4.
>
> **Count 4:** The felony of conspiring with another to commit the felony of welfare fraud during the period between June 1996 and January 1997, in violation of W. VA. CODE § 61-10-31. [3]

6. Grievant entered into a plea agreement with the Prosecutor's office wherein she agreed to enter a plea of no contest to the lesser included misdemeanor offense of welfare fraud related to Count 3 of the indictment related to the acts occurring in 1996 and 1997. The remaining charges were dropped by the State. Under this plea Grievant

[3] (Joint Exhibit 2). The charges are paraphrased herein and are not written out in the official language set forth in the indictment.

was adjudged guilty of that offense and sentenced to one year in the Central Regional Jail. However, the jail sentence was suspended and Grievant was placed on four years of supervised probation and Ordered to pay restitution and court cost. The Amended Sentencing Order is dated October 29, 2014. It sets out the original conviction date of September 24, 2013, and the original sentencing date of November 4, 2013.[4]

7. Grievant's plea of no contest was reported in the local newspaper and was generally known in the community where she was employed. Thereafter, it was brought to the attention of Joe Bullington, who was then the Director of the DHHR Region IV containing Clay County.[5] Mr. Bullington issued the letter dated October 7, 2013, to Grievant terminating her employment as a Social Service Worker 2 with the DHHR for the reasons fully set out above.[6]

Discussion

Motion to Exclude Evidence:

During a telephonic hearing and at the level three hearing, counsel for Grievant moved to exclude all evidence concerning the facts leading to the charge which was dismissed in the plea agreement. Grievant argues that the letter terminating her employment sets out the reason as her plea of no contest to the charge of welfare benefit

[4] (Joint Exhibit 9, Agreed Amended Sentencing Order). There was a significant amount of confusion created by the fact that Grievant originally went on record with a plea of no contest to Count 1 of the indictment which related to the 2010-2011 incidents. However it is clear by the Amended Order and the additional documents in the record, that Grievant intended to enter a plea related to the 1996-1997 incidents and the other charges were dismissed.

[5] The regions have subsequently been realigned and Clay County is no longer in the Region IV.

[6] The Amended Sentencing Order was entered more than a year after Grievant was dismissed.

fraud. Since she only pled to one charge, the facts related to the second charge were not a basis for her dismissal rendering those facts irrelevant and needlessly prejudicial.

Respondent argues that the termination letter is sufficiently broad to charge Grievant with all of the conduct which was the basis for the charges in the criminal indictment, including the charges which were dismissed. Respondent was allowed to present the evidence to preserve the record and a ruling concerning whether it would be considered was delayed giving the parties the opportunity to address the issue in their post-hearing submissions.

The portion of the dismissal letter which specifies the reason for terminating Grievant's employment states:

> On 7/9/13 the WVDHHR was notified that you were indicted on two counts of felony welfare fraud and two counts of conspiracy to commit a felony, involving the WVDHHR in which you are an employee of. On October 2, 2013, the WVDHHR was informed that you agreed to plead no contest to the charge of fraud in obtaining welfare benefits. According to Policy Memorandum 2108 Employee Conduct section VII "Employees are expected to: comply with all relevant Federal, State and local laws"; "an employee's receipt of any benefit from the Agency must be based solely upon eligibility to receive those benefits," and "while off the job conduct of employees is generally not subject to the Department's scrutiny, it should not reflect adversely upon an employees' ability to perform their job, nor should it impair the efficient operation of the Department." You have violated the above mentioned sections of Policy Memorandum 2108 by your actions stated above.

The indictment and subsequent plea of no contest is the sole reason given for the termination of Grievant's employment. While an internal investigation had been conducted by the Respondent's Office of Inspector General, no employment action was taken until she was indicted and entered a plea. Accordingly, no consideration was given

to any evidence that was not related to the matters for which Grievant entered a plea of no contest since they were not the cause of her dismissal from employment.

Merits:

As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008).

> . . . *See* [*Watkins v. McDowell County Bd. of Educ.,* 229 W.Va. 500, 729 S.E.2d 822] at 833 (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education,* 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). *See also Hovermale v. Berkeley Springs Moose Lodge,* 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) ("Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence."). . .

W. Va. Dep't of Trans., Div. of Highways v. Litten, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision).

Grievant was a permanent classified state employee. 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. § 143-1-12.02 and 12.03 (2012).

In order to dismiss a [public] employee for acts performed at a time and place separate from employment, the [employer] must demonstrate a "rational nexus" between the conduct performed outside of the job and the duties the employee is to perform. Syl. Pt. 2, *Golden v. Bd. of Educ*., 169 W. Va. 63, 285 S.E.2d 665 (1981). A rational nexus may be shown "(1) if the conduct directly affects the performance of the occupational responsibilities of the [employee]; or (2) if, without contribution on the part of the [employer], the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the particular [employee] to discharge the responsibilities of the [employee's] position." 169 W. Va. at 69, 285 S.E.2d at 669. (Citation omitted). "[I]f a State employee's activities outside the job reflect upon his ability to perform the job or impair the efficient operation of the employing authority and bear a substantial relationship to the effective performance of the employee's duties, disciplinary action is justified. . ." *Thurmond v. Steele*, 159 W.Va. 630 at 634, 225 S.E.2d 210 at 212 (1976).

Respondent terminated Grievant's employment after she entered a plea of no contest for misdemeanor welfare fraud. While the conduct that gave rise to the conviction occurred around seven years before Grievant became employed by Respondent, her plea and sentencing took place while she was employed. The plea led to a finding of guilt for charges directly related programs in which her clients participated. As part of her duties Grievant was obligated to report suspected abuses of those benefits. Her conviction for welfare fraud called into question her ability to perform those functions fairly and accurately. Respondent notes that WVDHHR Policy Memorandum 2108, *Employee Conduct,* specifically states:

> Employees are expected to: comply with all relevant Federal, State and local laws;
>
> Further, an employee's receipt of any benefit from the Agency must be based solely upon eligibility to receive those benefits. Employees whose behavior conflicts with their employment are subject to discipline.
>
> While off the job conduct of employees is generally not subject to the Department's scrutiny, it should not reflect adversely upon an employee's ability to perform their job, nor should it impair the efficient operation of the Department. In those instances disciplinary actions might be appropriate.

Id. The conduct Grievant pled to clearly, adversely reflected upon her ability to effectively perform her job.

Grievant points out that Respondent hired Grievant after the initial investigation into her activities had been turned over to the Prosecutor's office. While this is undoubtedly true, there is no evidence that the persons involved in hiring her had any knowledge of the investigation. The investigation was conducted by the WVDHHR/OIG in a separate office, and evidently nothing had been done by the Clay County Prosecuting Attorney's office to bring the charges to public attention. Once the plea was entered and reported in the local paper, there was sufficient public notoriety to significantly affect Grievant's ability to effectively perform her job in that community.

Grievant also put on evidence to indicate that she did not actually commit the welfare fraud and that the investigation was flawed. However, in her statement given to the investigators she admitted to not reporting household income which would have significantly affected benefits and agreed to pay the Agency restitution for the benefits in 1997. Furthermore, while her plea was "no contest," she was adjudged guilty and the distinction is not one which would be readily understood among the general public or the constituency of the Agency.

The Grievance Board has recently upheld the 2015 dismissal of a DHHR Child Protective Services Worker, when it was discovered that he had pled guilty to two misdemeanors in 1992 which sufficiently related to the performance of his job to have an adverse impact. *Huff v. Dep't of Health & Human Res.,* Docket No. 2015-0843-DHHR (July 20, 2015).[7] While the conduct which was the basis of Grievant's plea may not be thought to be as odious as in *Huff,* it is directly related to wilfully violating the very rules and procedures she is required to enforce upon others. Accordingly, Respondent established a rational nexus between Grievant's outside misconduct and the performance of her job and proved the charges by a preponderance of the evidence. Accordingly, the grievance is DENIED.

Conclusions of Law

1. As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008).

2. Grievant was a permanent classified state employee. 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*

[7] The grievant in *Huff* pled guilty to the federal misdemeanor of depriving another of her constitutional rights when he was a probation officer by coercing a parolee under his supervision into having sex in exchange for his recommendation that she remain on probation despite a positive urinalysis and a DUI charge. *Huff, supra.*

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. § 143-1-12.02 and 12.03 (2012).

3. In order to dismiss a [public] employee for acts performed at a time and place separate from employment, the [employer] must demonstrate a "rational nexus" between the conduct performed outside of the job and the duties the employee is to perform. Syl. Pt. 2, *Golden v. Bd. of Educ*., 169 W. Va. 63, 285 S.E.2d 665 (1981).

4. A rational nexus may be shown "(1) if the conduct directly affects the performance of the occupational responsibilities of the [employee]; or (2) if, without contribution on the part of the [employer], the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the particular [employee] to discharge the responsibilities of the [employee's] position." 169 W. Va. at 69, 285 S.E.2d at 669. (Citation omitted).

5. "[I]f a State employee's activities outside the job reflect upon his ability to perform the job or impair the efficient operation of the employing authority and bear a substantial relationship to the effective performance of the employee's duties, disciplinary action is justified. . ." *Thurmond v. Steele*, 159 W.Va. 630 at 634, 225 S.E.2d 210 at 212 (1976); *Huff v. Dep't of Health & Human Res.,* Docket No. 2015-0843-DHHR (July 20, 2015).

6. Respondent established a rational nexus between Grievant's outside misconduct and the performance of her job.

7. Respondent proved by a preponderance of the evidence that Grievant participated in misconduct which was substantial enough to support the termination of her employment.

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: NOVEMBER 25, 2015.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE