

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**ALICIA SEESE¹,
Grievant,**

v.

Docket No. 2015-1063-DHHR

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR CHILDREN AND FAMILIES,
Respondent.**

DECISION

Grievant, Alicia Seese, was employed by Respondent, Department of Health and Human Resources (“DHHR”) in the Bureau for Children and Families (“BCF”) at the Wood County District office. She was classified as a Child Protective Service Worker. Ms. Seese filed an expedited grievance form to level three² alleging that she was dismissed from employment without good cause. The form was dated March 20, 2015. As relief, Grievant seek, “to be made whole in every way including back pay with interest and benefits restored.” Continuances were granted for good cause by Orders dated June 18, 2015, September 8, 2015, and January 6, 2016.

A level three hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance Board on April 20, 2016. Grievant appeared personally and was represented by Gordon Simons UE Local 170. Respondent was represented by Harry C. Bruner, Jr., Assistant Attorney General. This matter became mature for decision

¹ While this grievance was pending, Ms. Seese was married and changed her name to Alicia Bryan. Because all documents in this case use her maiden name, that name will be used herein to avoid confusion.

² See W. VA. CODE § 6C-2-4(a) (4).

on June 2, 2016, with receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is a CPS worker for the DHHR with three years of acceptable performance. Respondent initiated an investigation of Grievant's pending cases after receiving a telephone complaint from an individual with a personal grudge against Grievant. Respondent found no evidence to support the allegations made by the caller, but terminated Grievant's employment based upon charges that Grievant willfully put false documentation of client contacts on the FACTS database to cover her failure to make sufficient contacts with clients.

Grievant argues that the contacts are valid and the written statements relied upon by Respondent are mistaken and unreliable as hearsay. Respondent did not prove by a preponderance of the evidence that Grievant had willfully entered contact notes on the FACTS database for clients she had not met.

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.

Findings of Fact

1. Grievant was employed by Respondent DHHR as a Child Protective Service ("CPS") worker on August 16, 2011. She has been continuously assigned to the Wood County District office in Parkersburg, West Virginia.

2. During the entire course of her employment, Grievant's immediate supervisor was Child Protective Service Supervisor ("CPSS"), Cory Delbaugh.

3. The Families and Children Tracking System (“FACTS”) is a comprehensive state-wide electronic client case management system used by CPS workers to track contacts and actions taken for individual clients and families. The case management system was developed pursuant to requirements established by the U. S. Department of Health and Human Services to support the State’s federal reporting requirements. Accurate and timely reporting of required activity in the FACTS system provides documentation that appropriate measures are taken to promote safety and well-being of children and families receiving child protective services. (Respondent Exhibit 5). Actions documented on the FACTS system are used to ascertain progress made by the family toward parenting goals and are used by the county Multidisciplinary Team (“MDT”) in making recommendations to the Circuit Court regarding child custody and treatment orders.

4. Grievant worked at “in-take” her first year. After she was assigned as a case worker she was given a full caseload. At some point her case load was reduced and she was assigned to work on a FACTS Merger Project which ended in January 2015.

5. Grievant received DHHR training provided for CPS workers. She had a total of 68 hours of “in-service” and “professional development” training. (Respondent Exhibit 6).

6. Grievant received an annual Employee Performance Appraisal (“EPA-3”) for the period of September 2011 through August 2012, dated September 14, 2012. She was rated as “Meets Expectations” in every rating category and in her overall score.³

³ An employee receives a numerical “Alpha Score” as their overall rating. That score is achieved by adding the ratings from the twenty-three indicators and dividing the total by the number of indications. Grievant’s Alpha Score for this EPA-3 was “2”. An Alpha Score

7. On the EPA-3 Grievant received for the period of September 2012 through August 2013, she also received an overall rating of “Meets Expectations” but there were seven specific indicator cited identified where Grievant needed improvement.⁴ The indicators needing improvement were in two areas:

First, Grievant was having difficulty meeting the agency standards for holding face-to-face meetings with families assigned to her. This was particularly troublesome for the first two months of 2013, wherein she only met with 45% of her families. However, her supervisor noted that in the last few months of the rating period Grievant showed “progress and consistency in maintaining monthly face-to-face contact with her assigned families.” (Respondent Exhibit 7).

Second, Grievant was rated as needing improvement addressing conflict situations with patience and tact. This criticism was not related to her dealings with clients but was related to problems in the office. Grievant was made to move to different locations in the office. The first move was from a private office to a group setting. These moves made her upset and feel as if she were being picked on.⁵

CPSS Delbaugh noted that Grievant’s work was “typically thorough and error free” making her a valuable asset to the unit when she remained current. *Id.*

8. An EPA-3 was completed for Grievant’s performance from September 2013 through August 2014. A notation that Grievant was “unavailable to sign” was hand written

between 1.51 and 2.50 equals a “Meets Expectations” overall rating. This EPA – 3 was signed by John Arbaugh as the supervisor in Mr. Delbaugh’s absence.

⁴ Grievant met expectations in the remaining sixteen of the twenty-three total indicators of performance. Her Alpha Score was “1.6” resulting in a “Meets Expectations” rating.

⁵ Mr. Delbaugh also indicated that Grievant’s attendance had been subpar during this period which may have been affected by dissatisfaction with office situation. He also noted that Grievant had a very large caseload during this rating period.

on the employee signature line and the document was apparently not shared with her. It was signed by CPSS Delbaugh the reviewing manager, and Laurea Ellis on November 14, 2014. Grievant was rated as “Needs Improvement” on five indicators and “Meets Expectations” on the remaining eighteen resulting in an Alpha Score of 1.78 and an overall rating of “Meets Expectations.” Three of the five negative ratings were related to attendance and the supervisor noted that she had exhausted all of her leave over the past eight months. Another indicator noted that Grievant was frequently behind on documentation in the FACTS system which made it difficult for the supervisor to know what actions she had taken. The last indicator needing improvement was related to consistently meeting deadlines. After this indicator Supervisor Delbaugh commented:

Alicia generally does not meet the deadlines for PCFA nor CSE, however, she does complete the assignments. Alicia’s timeliness has improved since being assigned to the FACTS Merge Project.

In the summary comments, CPSS Delbaugh noted that Grievant had an understanding of her job and had proven that she is able to perform up to expectation. His only criticism was that her absences had caused her to get behind on her assignments and late on the documentation. The last EPA-3 indicated a performance improvement from the prior rating period. (Respondent Exhibit 7). Grievant was making more contacts and in a timely manner.⁶

9. Grievant was living with her fiancée (now husband) throughout the period giving rise to this grievance. Her fiancée has a daughter from a prior relationship of whom he shares custody with the child’s mother.

⁶ In his testimony CPSS Delbaugh noted that during this period the “office situation had stabilized” and Grievant was returned to a private office.

10. The fiancée's daughter disclosed that she had been subject to treatment by her mother which Grievant believed to be abuse. As a mandatory reporter, Grievant reported the suspected abuse which might indicate imminent danger to Child Protective Services as well as her supervisor.⁷ Thereafter, the daughter's mother threatened to get Grievant fired for making the CPS report.

11. In mid to late January, 2015, Social Services Coordinator ("SSC"), Laurea Ellis,⁸ received a telephone call from an individual complaining about Grievant. The person initially refused to identify herself, but as the conversation continued she eventually said she was the grandmother of Grievant's fiancée's daughter. The complaints covered three concerns:

- Grievant supposedly identified herself as a child protective service worker during a custody hearing involving her fiancée and his daughter,
- Grievant having access to DHHR records pertaining to the daughter and her mother, and,
- Grievant allegedly left work every day in the early afternoon to pick up her fiancée and go home for the rest of the day, which the caller characterized as a waste of tax dollars.⁹

12. No evidence was presented to show that Grievant had acted improperly at any custody hearing, improperly accessed records unrelated to her assigned cases, or left work every day to pick up her fiancée and go home in the early afternoon. Grievant often picked up her fiancée at Parkersburg Community College during her lunch break

⁷ No further evidence was offered regarding the abuse allegation beyond Grievant's testimony. The child was not interviewed by the agency within the time frames mandated by statute.

⁸ Service Supervisors in the areas of Child Protective Services, Adult Protective Services and Youth Services, including CPSS Delbaugh, Report to SSC Ellis. She reports to the CSM.

⁹ Level three testimony of SSC Ellis.

and dropped him off at a friend's home nearby. This never took longer than her allotted lunch break.

13. SSC Ellis reported the telephone call to Delbert Casto, the Community Service Manager ("CSM") for the Parkersburg office.¹⁰ CSM Casto instructed SSC Ellis to investigate the allegations made by the caller.

14. For the next five days, SSC Ellis reviewed the DHHR records related to Grievant's cases. She reviewed her case files, FACTS entries and time sheets to see if they matched and the data was properly recorded.

15. Two "sign-in and sign-out" sheets are maintained in the Wood County office. One sheet for all employees consists of four vertical columns entitled; "Date," "Time In," "Name," and "Time Out." Each employee is expected to note the time he or she arrives at work, write their name, and note his or her time of departure on the form each day. The second form for CPS workers has the date at the top of the form, below which are four vertical columns titled: "Name," "Time Out," "Where," Estimated Return Time," and "Return Time." This form helps the supervisors keep track of where the CPS workers are visiting during the day. It serves as a safety check in case an employee does not return within a reasonable time, a search for the employee may begin at the places listed on the form.

16. SSC Ellis reviewed these forms for the months of November and December 2014, as well as January 2015, and prepared a list indicating when Grievant signed in and out each day. (Respondent Exhibit 13). The list demonstrated that Grievant

¹⁰ At all times relevant to the events in this grievance Delbert Casto was acting as the Interim Regional Director for DHHR Region 1.

consistently listed her arrival time in the morning, and the visits she intended to make throughout the day.¹¹

17. The “all employee” sign-in sheets for January 2015, indicate that it was not unusual for the CPS workers to leave the office for home visits and not return to sign out. Only one CPS worker signed out with any regularity and that person signed-out on less than half of the days he or she signed in. The remaining CPS workers sign-outs varied between four and zero, CPSS Delbaugh never listed a “sign-out” time for January 2015. (Respondent Exhibit 14.) Actual return times were often missing on the second sign-in sheets as well. It was is fairly common for the worker to list the expected visits on the form and not “WNR” in the “Estimated Return Time” column indicating that he or she would not return. (Respondent Exhibit 1).

18. Grievant did not consistently list on FACTS failed attempts to contact clients or contacts she had with clients at the DHHR offices. Accordingly, her sign out sheet would frequently indicate that she was going out to check on or meet with clients but there would be no confirmation on FACTS that she had met or tried and failed to meet with those clients.

19. Instead, Grievant often called CPSS Delbaugh from the field to let him know where she was and when she was having difficulty contacting particular families. She had proved herself to be a valuable worker prior to the allegations giving rise to this matter notwithstanding these reporting lapses. (Testimony of CPSS Delbaugh).

¹¹ The visits listed included client families, family and circuit court appearances, and meetings with MDT members such as the prosecuting attorney.

20. After receiving an initial report from SSC Ellis near the end of January 2015, CSM Casto directed CPSS Delbaugh to perform quality assurance checks on six cases Grievant was working at that time.¹² A quality assurance check consists of reviewing the files and FACTS entries related to the cases as well as interviewing the clients about the services they are receiving. One of the documents reviewed is the client contact report which each CPS worker under his supervision provides to CPSS Delbaugh monthly containing the FACTS contacts for each client during that month. (Respondent Exhibit 18).

21. By February 11, 2015, CPSS Delbaugh had met with five of the clients and made several unsuccessful attempts to contact the sixth. Two of the clients were very complimentary of Grievant's work with them, but three of the clients said they had never met Grievant. Grievant had verbally advised CPSS Delbaugh a number of times that she had been unable to contact the one client but she had not recorded many of those unsuccessful attempts on FACTS.

22. On February 6, 2015, CPSS Delbaugh met with client CF.¹³ CF stated that she had been cooperating with a worker from Wellsburg services named Autumn, and her contact with the DHHR was Ms. Pickens. She last met with Ms. Pickens in December and had been told by Autumn near the end of January 2015 that Grievant would be her new CPS worker. She had not met Grievant as of that date. Mr. Delbaugh met with CF

¹² Grievant only had six open cases at that time because she had been working on the FACTS Merge project which required her to have a reduced caseload. Cases were being added to her load as they came in once the Merge project concluded.

¹³ The initials of the clients are used to protect their privacy. Their files are identified by discrete numbers and Grievant was able to identify the client listed by Respondent to prepare her defense.

again and obtained a written notarized statement from her to that effect. The statement is dated as signed on February 6 but the notary signature date is February 24, 2015. (Respondent Exhibit 10).

23. On February 11, 2015, CPSS Delbaugh met with client CT who reported that her last meeting with a DHHR employee was sometime in the fall with CPS worker Wells. CT had met with a service provider in October 2014 and believed that meeting concluded her services. She indicated that she had not been contacted by Grievant. Mr. Delbaugh met with CT again and obtained a written notarized statement from her. The statement is dated as signed on February 11, 2015, but the notary signature date is February 24, 2015. (Respondent Exhibit 10).

24. On February 11, 2015, CPSS Delbaugh met with client TD who reported that her last contact with a CPS worker was at the end of November or beginning of December 2014. At that time CPS worker Kuhn told her she would have an open case with a new worker. She had not been contacted by Grievant at that time. Mr. Delbaugh met with TD again and obtained a written notarized statement from her. The statement is dated as signed on February 11, 2015, but the notary signature date is February 24, 2015. (Respondent Exhibit 10).¹⁴

25. A predetermination conference was held on February 18, 2015. Grievant attended the meeting with Lisa Tanner serving as her representative. Also attending the meeting were CSM Casto, SSC Ellis, and CPSS Delbaugh.

¹⁴ All three of these statements were notarized by SSC Laurea Ellis on February 24, 2015. It is curious that the notarization took place six days after the predetermination conference took place where Grievant was supposed to be appraised of the basis for the allegations against her. See FOF 25, *supra*, and Respondent's Exhibits 10 and 11.

26. At the predetermination conference, the group went through the client families of whom CPSS had performed quality assurance checks.¹⁵ The notes from the predetermination conference (Respondent Exhibit 11) and the Grievant's Client Contact Report (Respondent Exhibit 18) reflect the following concerns raised regarding each family and the contacts recorded by Grievant.

- Family LR - 20234822 - Grievant had made and recorded contacts from one to three times each month. Grievant saw the children in the family at school but had not recorded those contacts in FACTS. The managers had no problem with Grievant's work with this family.
- Family DH - 20164078 - Grievant had made appropriate contacts, with this family. Grievant was unable to name all three of the children in this family at the meeting.
- Family CT¹⁶ - 20277485 - The case file listed this family as living on "A Street".¹⁷ CPSS Delbaugh went to the A Street address. The person there told him she had not seen a service provider since October and believed that the services ended then. She stated that she had never met or spoken with Grievant.

Grievant had entered contacts regarding this family in FACTS on November 26, 2014, December 8, 2014, and January 28, 2015. In the November and December contacts she noted that CT and her children were living at a friend's home in nearby town "B". CT was looking for a permanent home for her family, the children were clean and dressed appropriately. In the January contact Grievant also spoke with the friend who noted how far CT had come since moving in with her. She felt once CT got her own place, CT would take care things well like she was there.

¹⁵ On the contact reports there is a case number listed for each family and there are separate case numbers listed for each person in the family. For clarity the family case number is listed with the initials for each family discussed.

¹⁶ There are at least six case numbers related to the family. Four different case numbers are assigned to someone with the initials CT. No explanation was offered regarding whether these case numbers were assigned to one person or if there were four individuals in the family with those initials. Grievant's FACTS notations refer to a mother and two children.

¹⁷ The letter "A" is used to delineate the street and "B" to delineate the nearby community in an effort to maintain the privacy of the clients while discussing necessary details in the FACTS contact notations.

CT's mother lives on A Street. The prior CPS worker told Grievant the file could be closed but CT's told Grievant she felt was not certain CT was ready. (Grievant's testimony.)

- Family WR - 20257075 - Grievant reported contacts with this family on November 25, 2014, December 30, 2014, and January 15, 2015. The contact reports were specific and detailed. When CPSS Delbaugh met with the family, he was told that they had last met with Grievant around the holidays. Grievant was unable to recall the names of all the family members at the predetermination meeting.
- Family TD - 20194269 - Grievant noted in-home contacts with the family on December 19, 2014, January 5, 2015, and January 28, 2015. The first meeting was an introduction and to make an appointment for a deeper interview and discovery. The second meeting was rescheduled and when Grievant arrived for the rescheduled meeting on January 5, 2015, the family had forgotten and were rushing out to get to an "important" appointment. On January 28, 2015, no one was home when Grievant arrived and she left a note regarding the importance of the family contacting her. Grievant also made efforts to speak with the client by telephone on January 15, 2015, and February 2, 2015. Grievant noted in FACTS that she stopped by the home again on February 6, 2015, and no one was home. At that point she noted her intent to send out an appointment letter. (Respondent Exhibit 18).

TD told CPSS Delbaugh that she had never met Grievant and that the last contact she had with a CPS worker was at the end of November or the beginning of December 2014. (Respondent Exhibit 10)

- Family CF - 20300087 - Grievant listed one contact with this family in FACTS on January 30, 2015. Grievant's reports do not show her visiting the client on that date and she could not remember the names of the family members. CF told CPSS Delbaugh that she had not met Grievant and the FACTS data indicated that a different case worker was meeting with the family in December. Upon reflection Grievant indicated that she was confused and had not yet met with the family. She believed the contact in the FACTS system was for a different family and she mistakenly entered it in the wrong file.

27. When Grievant arrived at work on the day scheduled for her predetermination conference, a large number of empty boxes had been placed in her office apparently implying that she was about to be fired and would need the boxes to

pack her belongings.¹⁸ This event caused Grievant to be even more nervous and upset about the meeting than she would have been normally.

28. By letter dated March 3, 2015, Regional Director, Tanagra O'Connell, informed Grievant that her employment was terminated "for misconduct and willful negligence." Grievant was charged with "knowingly and willfully" violating "Child Protective Service Policy Sections 5.9 Ongoing Safety Management, 5.9.1 Managing the In Home Safety Plan and 5.9.2 Managing the Out of Home Safety Plan." Specifically, the letter stated that Grievant "entered contact information into the FACTS data base system indicating that she had met with families when, in fact, home visits never occurred." These allegations relate to the six cases checked by CPSS Delbaugh. (Respondent Exhibit 1).

29. While the foregoing policies were cited in the letter to Grievant, Respondent relied almost exclusively on the first bulleted paragraph of Child Protective Service Policy Section 5.9.1, "Managing the In-Home Safety Plan" which states:

Contacts with caregivers, children and safety services providers must be based upon the safety plan in the family circumstances. The supervisor should be involved in making this determination, but in no case should face-to-face contacts be less than once a month.

(Respondent Exhibit 2).

Discussion

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).

¹⁸ There was no evidence presented as to how the coworkers knew about the meeting but it seems unlikely that Grievant would have shared that information.

. . . 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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant was a permanent state employee in the classified service. 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 *Sloan v. Dep’t of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004)(per curiam). “*Oakes v. W.Va. Dept. of Finance and Administration*, *supra*, requires that a violation sufficient to support a dismissal be of a substantial nature and that if it involves a violation of a statute or official duty it must be done with wrongful intent.” *Serreno v. West Va. Civil Serv. Comm’n*, 169 W. Va. 111, 115, 285 S.E.2d 899, 902 (1982) (per curiam). “Good cause’

for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. West Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988).

The DHHR Child Protective Service Policy sets a standard requiring that where an in-home safety plan is in place for a family, the assigned CPS worker must have face-to-face contact with the caregivers and children at least once a month. (Respondent Exhibit 2, §5.9.1 *Managing the In-Home Safety Plan*). Respondent charges Grievant with willfully violating that policy provision and intentionally listing false contacts on the FACTS system to hide the fact that timely contacts were not made. The main evidence offered to prove these allegations is the notarized statements of three client families that they had never had contact with Grievant, and the FACTS entries made by Grievant detailing contacts she had with the families.

It is important to note that this matter began with a telephone call from a person who was seeking to cause Grievant trouble with her job because Grievant's fiancée was seeking custody of his child. This person originally tried to remain anonymous but later revealed herself as the child's grandmother. She made three charges against Grievant: that she identified herself as a CPS worker at the custody hearing;¹⁹ that Grievant accessed the DHHR records of the child and the mother prior to the hearing; and, that Grievant was leaving work each day at lunchtime to pick up her fiancée at college and not working the rest of the day. Not one of these charges were found to be true. In fact,

¹⁹ This charge was not found to be true, but even if it were, there is no prohibition against an employee of the DHHR revealing what they do for a living. There was no allegation or proof that Grievant falsely held herself out to be acting on the agency's behalf at the hearing.

when asked why he had assigned Grievant a larger caseload while the investigation was ongoing he replied that the project she had been working on had ended and she had previously proven herself to be a valuable worker.

Grievant had received three annual evaluations up to that point, and she was rated as meeting standards in all of them. Problems with attendance and productivity were noted in her second year evaluation which seemed to be exacerbated by the fact that her work area had been moved several times during that period. The next evaluation showed marked improvement at least in part because the office situation stabilized.²⁰

Grievant turned in her monthly contact reports to Mr. Delbaugh and there were no complaints or problems which were brought to her attention. There was some criticism at the predetermination meeting that Grievant had not been recording all of her attempts to contact families on FACTS yet the testimony indicated that she often called her supervisor to let him know when the clients were not home and where she was going next. This process seemed to be acceptable to Mr. Delbaugh. In short, until the telephone complaint Grievant was considered to be a trustworthy and competent CPS worker.

As a result of the complaint CPSS Delbaugh was required to perform a quality assurance audit with the six open and active cases Grievant was working. Of the six cases he summarized that he was unable to contact one after making several failed attempts, two clients were very positive about Grievant's work with them and three said they had never met her. He wrote statements which he said reflected what they told him, and had them sign the statements.

²⁰ Testimony of CPSS Delbaugh.

The three are the essence of Respondent's charges against Grievant. They indicate that Grievant never met with these clients which is inconsistent with the contact reports Grievant has entered in to the FACTS database. Respondent argues that the statements are true and that Grievant intentionally falsified the entries in the FACTS database to appear that she was meeting the CPS contact requirements. Therefore, the reliability of the statements as evidence must be closely examined.

We start with the understanding that these statements are hearsay. "[T]he primary reason for the exclusion of hearsay is that there is no way for the trier of fact to judge the trustworthiness of the information." *Handbook on Evidence for West Virginia Lawyers*, Vol. 2, 4th Edition, Franklin D. Cleckley, © 1994. The evidence is inherently unreliable because: it denies the accused the opportunity for cross examination of the speaker at the time it is being made, it often lacks the sanction of being made under oath, and it facilitates the use of perjured evidence. *Id.*

Under the statutes and procedural rules relating to grievances, the formal rules are not applicable in the grievance procedure. See *generally* W. VA. CODE 6C-2-4(a)(3). The issue is one of weight rather than admissibility. This reflects a legislative recognition of two unique factors in grievance proceedings; the participants are often not lawyers and are not familiar with the technical rules of evidence, as well as the reality that the triers of fact are not lay jurors, but administrative law judges who are trained to understand and take into account the reasons why some forms of evidence are much less reliable than others. Accordingly, an administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. *Warner v. Dep't of Health and Human Resources*, Docket No. 07-HHR-409 (Nov. 18, 2008); *Miller v. W. Va. Dep't*

of Health and Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ.*, Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996). That means that hearsay evidence, while generally admissible, will be subject to scrutiny because of its inherent susceptibility to being untrustworthy.

In applying that scrutiny, administrative law judges apply the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. *See, Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (March 11, 2010) (affirmed by the Circuit Court of Kanawha County, WV, June 9, 2011).

In this situation, the agency demonstrated sound reasons why the clients did not appear in person. Their privacy as recipients of DHHR services is protected by policy. The fact that they are subject to serious allegations regarding the treatment of their parenting emphasizes that issue. Additionally, clients have limited resources which would significantly hamper their ability to travel to a hearing to testify. The statements were signed by the individuals and a notary. This normally would aid the reliability of the statements. However, the documents were dated four days after the initial conversations

occurred (February 6 and February 11, 2015) but they were notarized on February 24, 25, and 26, 2015. Curiously, the statements were relied upon during the predetermination conference on February 18, 2015, six days before they were notarized, which puts the authenticity of the notarizations in question.

The statements were not taken from disinterested individuals. Respondent witnesses and their counsel noted that these families were not the “Ozzie and Harriet” types, but were under a remediation plan for allegedly abusing or neglecting their children. The implication was that constant monitoring was essential because compliance was essential to the safety of the children, and the clients could not be trusted to cooperate without close monitoring. Grievant was the face of the agency who was placing these individuals under scrutiny, and it is not unlikely that resentment would build up over what the clients view as intrusive monitoring and control of their daily lives. Uncooperativeness such as avoiding meetings and not providing accurate contact information, was evident in some of the cases. These issues negatively impact the credibility of the statements.

CPSS Delbaugh testified that the statements reflected what the clients told him when he originally met with them. His testimony provided no more detail than what was on the statements. That testimony was no less hearsay than the statements because he was only reciting what he had been told. The same motives for the declarants to make the statements applied and Grievant was still unable to test the accuracy of the statements through cross examination. While CPSS Delbaugh’s testimony was given under oath, he only testified as to what he was told. His oath did not apply to the truth of those statements.

Where her evidence is contradictory regarding specific critical facts, the credibility of these statements must be balanced against the credibility of the sworn testimony of Grievant when ascertaining which facts are most likely true. See *generally*, *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995).²¹

The Grievance Board has applied the following factors to assess a witness's testimony: (1) demeanor; (2) opportunity or capacity to perceive and communicate; (3) reputation for honesty; (4) attitude toward the action; and (5) admission of untruthfulness. Additionally, the administrative law judge should consider (1) the presence or absence of bias, interest or motive; (2) the consistency of prior statements; (3) the existence or nonexistence of any fact testified to by the witness; and (4) the plausibility of the witness' information. *Yerrid v. Div. of Highways*, Docket No. 2009-1692-DOT (Mar. 26, 2010); *Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth.*, Docket No. 2009-1583-DOT (Dec. 1, 2009); *Elliott v. Div. of Juvenile Serv.*, Docket No. 2008-1510-MAPS (Aug. 28, 2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999).

Grievant was understandably nervous when testifying, but her demeanor was open and straight forward. She did not unduly hesitate nor avoid eye contact. She had no prior disciplinary issues and no recorded or suspected incidents of prevarication. She had an obvious interest in protecting her job. However, she showed no signs of evasion or

²¹ An Administrative Law Judge is charged with assessing the credibility of the witnesses. See *Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1993).

deception when responding to questions on either direct or cross examination. She showed no animosity toward the clients who made statements against her interest, but gave explanations as to why their statements conflicted with her FACTS recording. In short, Grievant's testimony was very credible and believable.

With regard to family CT, CPSS Delbaugh visited the address on A Street which appeared in the file. The person at that address said she had last spoken with a service provider in October and believed her services were ended at that time. She was told by a previous CPS worker that a new worker would be assigned to the case but said she had never met or talked with Grievant.

Grievant made specific and detailed contact reports in FACTS regarding CT. On November 26, 2014, she met with her and her two boys. They had moved out of her mother's house on A Street and were living with a friend in B town. CT was attending a specified class. The boys were taking a nap but Grievant looked in on them and they were clean and dressed appropriately. Grievant again met with CT at the friend's house on December 8, 2014. CT was attending her class and looking for a place for herself and the boys to live. The boys were clean, appropriately dressed and doing well. Grievant began a "cpe"²² with the family. On January 28, 2015, Grievant once more met with CT and her children at the house in B town. Grievant spoke with the friend who noted the progress CT had made since moving in with her. CT was still attending her class and had an interview for a job after putting in dozens of applications.

There are four participants in the file with the initials CT, all with separate numbers assigned to them. There is no way for the undersigned to determine if the CT who signed

²² No one explained what these letters represented.

the affidavit for CPSS Delbaugh at A Street is the same CT who Grievant met with in B town. The FACTS entries made by Grievant are contemporaneous and give specific details which are not typical of false reports. Whether the statement taken by CPSS Delbaugh was the result of a mistake, or the person giving it was being intentionally deceptive is unknown. What is known is that the statement is a hearsay declaration made by someone unidentified to the undersigned who likely has a strong motive for deception. Significantly, Grievant was not given the opportunity to cross examine the person making this statement, which could have clarified all the questions surrounding it. Because of these problems the statement is entitled to much less weight than the personal, sworn and credible testimony of Grievant. It is more likely than not that the FACTS contacts entered by Grievant related to family CT reflect legitimate contacts with the client and are not deliberate fabrications as charged by Respondents.

Grievant described client TD as “not very cooperative.” The contacts she listed in the FACTS database bear out that delineation. Grievant notes two face-to-face contacts and an additional attempted contact. The first contact was short. Grievant introduced herself to the family and made an appointment to come back ten days later. The next contact was rescheduled for January 5, 2015. When Grievant arrived TD was hurrying the family out the door for an “important” appointment. TD stated that she had forgotten the appointment with Grievant. Grievant was able to note that the children were clean and dressed appropriately. TD promised to call Grievant the next day to make another appointment, which she failed to do. A week later Grievant called TD because she had not heard from her but received no answer. She left a voicemail for a return call. Three days later the same thing happened and Grievant left a more insistent voice message.

On January 28, 2015, Grievant stopped by TD's home, found no one there and left her card with a note stating that she really needed to meet with the family. On February 2, 2015, Grievant received a voicemail from TD stating that she had received the note and was leaving a telephone number where she could be reached. Grievant called the number and a man answered who said he would call TD to the phone and then hung up. Grievant called back four times and no one answered. Grievant again stopped by the home on February 6, 2015, found no one home and noted her intent to send an appointment letter.

These contact descriptions are contemporaneous, and detailed. They reflect a client who was avoiding contact with Grievant while knowing that such contact was required. Grievant's live testimony was straight forward, believable and held up under cross examination. It is not surprising that TD would deny contact with Grievant when questioned by Mr. Delbaugh. She had failed to cooperate with Grievant and had no excuse for that conduct. Grievant could not confront nor cross examine the declarant. The statement was given by someone Respondent had characterized as generally unreliable and had substantial motivation to be dishonest. Consequently, it is entitled to very little weight. It is more likely that not that Grievant's contact notations in FACTS related to this client are accurate and not deliberate fabrications intended to cover inactivity as charged by Respondent.

Finally, CPSS Delbaugh received a written statement from client CF who stated that she had been meeting with a service provider initiated by her previous CPS worker three times per week. CF stated that she had last met with the service provider approximately a week before Mr. Delbaugh's visit and at that time the service provider said CF's new CPS worker would be Grievant, but she had not been contacted by

Grievant as yet. Grievant listed a face-to-face introductory contact on FACTS in CF's file on January 30, 2015.

Grievant stated at the predetermination conference that she had not yet met with this family. When confronted with the FACTS notation believed that she must have made the entry in error while meaning to put a contact in another file. While erroneous FACTS notations are not commonplace Mr. Delbaugh and Ms. Ellis indicated that they do occasionally occur. No one can erase a notation from FACTS. Any corrections must be made in a subsequent notation which sets out the error and then gives the accurate information.²³ The statement of CF seems credible and Grievant does not deny that she had not meet with the client. Grievant's admission to making a mistake appeared to be straight forward. She seemed disappointed in making it but credibly denied that the notation was a deliberate attempt to cover her lack of contact with CF.

Given that the service provider had not told CF she was going to get a new CPS worker until the end of January there does not appear to be any motivation for Grievant to falsify a contact in this case. She was only slightly behind in making a contact if at all. Respondent offered no evidence to demonstrate that the notation was a deliberate deception beyond the general belief that it was so. Grievant's explanation was credible and consistent with her prior testimony. It is more likely than not that this notation was placed in the CF file by mistake than as a deliberate falsification intended to mislead Grievant's supervisors as Respondent alleges.

A full review of the testimony and exhibits entered into the records demonstrates that Respondent did not prove by a preponderance of the evidence that Grievant

²³ Testimony of CPSS Delbaugh.

“knowingly and willfully” violated specific DHHR policies by “enter[ing] contact information into the FACTS database system indicating that she had met with families when, in fact, home visits never occurred.” Accordingly, the Grievance is GRANTED.

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).

. . . 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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. Grievant was a permanent state employee in the classified service. 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 *Sloan v. Dep’t of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004)(per curiam). “*Oakes v. W.Va. Dept. of Finance and Administration*, *supra*, requires that a violation sufficient to support a dismissal be of a substantial nature and that if it involves a violation of a statute or official duty it must be done with wrongful intent.”

3. Under the statutes and procedural rules relating to grievances, the formal rules of evidence are not applicable in the grievance procedure. See generally W. VA. CODE 6C-2-4(a)(3). The issue is one of weight rather than admissibility. An administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. *Warner v. Dep’t of Health and Human Resources*, Docket No. 07-HHR-409 (Nov. 18, 2008); *Miller v. W. Va. Dep’t of Health and Human Resources*, Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ.*, Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996). Hearsay evidence, while generally admissible, will be subject to scrutiny because of its inherent susceptibility to being untrustworthy.

4. Administrative law judges apply the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants’ out of court statements were in writing, signed, or in affidavit form; 3) the agency’s explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the

declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. *See, Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (March 11, 2010) (affirmed by the Circuit Court of Kanawha County, WV, June 9, 2011).

5. Because the written statements attained by Respondent were made by individuals with motives to be deceptive and who were generally portrayed as unreliable by Respondents, were not subject to clarification through cross examination, and because the validity of the notarization is dubious, the statements are entitled to very little weight as evidence to prove the charges brought by Respondent.

6. The Grievance Board has applied the following factors to assess a witness's testimony: (1) demeanor; (2) opportunity or capacity to perceive and communicate; (3) reputation for honesty; (4) attitude toward the action; and (5) admission of untruthfulness. Additionally, the administrative law judge should consider (1) the presence or absence of bias, interest or motive; (2) the consistency of prior statements; (3) the existence or nonexistence of any fact testified to by the witness; and (4) the plausibility of the witness' information. *Yerrid v. Div. of Highways*, Docket No. 2009-1692-DOT (Mar. 26, 2010); *Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth.*, Docket No. 2009-1583-DOT (Dec. 1, 2009); *Elliott v. Div. of Juvenile Serv.*, Docket No. 2008-1510-MAPS (Aug. 28, 2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999).

7. When viewed under the lens of the forgoing factors, Grievant's testimony was credible and entitled to much more weight than the hearsay evidence offered by Respondent.

8. Respondent did not prove by a preponderance of the evidence that Grievant "knowingly and willfully" violated specific DHHR policies by "enter[ing] contact information into the FACTS data base system indicating that she had met with families when, in fact, home visits never occurred."

Accordingly, the Grievance is GRANTED.

Respondent is ORDERED to reinstate Grievant to her prior position immediately, pay her back pay from the date her employment was terminated until the date she is reinstated, plus statutory interest, and reinstate all other benefits she would have accrued had she not been dismissed.

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: AUGUST 16, 2016.

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE