THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MIRANDA J. CURRY,

Grievant,

v. **Docket No. 2015-0608-DHHR**

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

Respondent.

DECISION

Grievant, Miranda J. Curry, filed a level three grievance against her employer, Respondent, Department of Health and Human Resources ("DHHR")/Bureau for Children and Families ("BCF"), dated November 21, 2014, stating as follows: "[t]he termination of CPSS Curry is unjust and extreme. CPSS Curry has no record of prior discipline and or any plan of corrective counseling. As relief, Grievant seeks, "[t]o reinstate Ms. Curry to the position of CPSS (same work location). All lost wages and benefits recovered from time of termination and to be made whole."

The level three hearing was held on four days, November 17, 2015, April 6, 2016, May 12, 2016, and August 26, 2016, before the undersigned administrative law judge at Grievance Board's office in Charleston, West Virginia. Grievant appeared in person, and with her representative, David H. Warrick, American Federation of State, County and Municipal Employees, AFL-CIO, AFSCME Council 77. Respondent appeared by counsel, Steven R. Compton, Esq., Senior Assistant Attorney General. This matter became mature for decision on October 17, 2016, upon the receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a Child Protective Service Supervisor ("CPSS"). Respondent dismissed Grievant from employment for job performance failures and misconduct in violating provisions of CPS policy. Grievant denied Respondent's allegations, and argued that her dismissal was improper, arbitrary and capricious, and excessive. Respondent proved by a preponderance of the evidence that Grievant failed to perform the duties of her job, and that she engaged in misconduct of a substantial nature which constituted good cause for her dismissal. Grievant failed to demonstrate that mitigation of the discipline imposed was warranted. Therefore, 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. At all times relevant herein, Grievant, Miranda J. Curry, was employed by Respondent as a Child Protective Services Supervisor ("CPSS") at Respondent's Mingo County, West Virginia, office. Grievant had been employed by DHHR for over twenty years. Before becoming a CPSS, Grievant had been employed by Respondent as a Child Protective Services Worker ("CPSW").

2. Cheryl Salamacha is employed by Respondent as a Regional Director. Ms. Salamacha began in this position during the summer of 2014. At that time, she was employed as the Regional Director over Region II, of which Mingo County was a part. However, soon after Ms. Salamacha became Regional Director, Mingo County was moved into Region IV, and Joe Bullington was its Regional Director. Before taking the

position of Regional Director, Ms. Salamacha had been employed as a Social Services Director for Region II, which then included Mingo County, and she had worked with the Mingo County office in that capacity.

3. Carolyn Sansom was employed by Respondent as a Community Services Manager at its Mingo County office. Ms. Sansom had been employed by Respondent in the Mingo County office for about thirty years, serving in various capacities. As Community Services Manager, Ms. Sansom supervised the operations of the Mingo County DHHR office. Ms. Sansom was Grievant's immediate supervisor, and had been so for over ten years. Ms. Sansom's immediate supervisor was the Regional Director, that being Ms. Salamacha or Mr. Bullington.

4. Jim Kimbler was the Regional Director assigned to cover Mingo County prior to Ms. Salamacha. Mr. Kimbler retired in November 2013.

5. At all times relevant herein, Tonya Webb was employed by Respondent as a Child Protective Services Supervisor. Ms. Webb was also stationed in the Mingo County DHHR Office.[1]

6. While Grievant and Tonya Webb were both Child Protective Services Supervisors, they had different job responsibilities. Grievant supervised the Intake Unit. Ms. Webb supervised the Case Management Unit. Grievant was responsible for overseeing all processes and decisions from the initial Child Protective Services ("CPS") referral until the matter was accepted for services and transferred to Ms. Webb's Case Management workers. Ms. Webb's unit dealt with ongoing cases and cases that were in

[1] Ms. Webb voluntarily left employment with Respondent in or about 2015.

the court system. Grievant and Ms. Webb were cross-trained, meaning each received training on the other's job duties and responsibilities.

7. Given the nature of Child Protective Services' work, workers and supervisors take turns being on-call for referrals that are received outside of normal business hours. As supervisors, Grievant and Ms. Webb alternated weeks being on-call. Workers needing to consult with a supervisor regarding a case or referral were to call the supervisor on-call for that week.

8. Reports of abuse and/or neglect made to CPS are called referrals. CPS has an established intake assessment protocol that is designed to gather the necessary information to determine whether there is reasonable cause to suspect that child abuse or neglect has occurred. This protocol is set forth in CPS policy and designates the duties of both the intake workers and their supervisors.[2]

9. All actions taken with respect to referrals or reports of abuse and/or neglect, and all contacts made in cases must be entered into the Family and Child Care Tracking System ("FACTS") computer system. FACTS is a state-wide computer system for case management and tracking. While there is no formal policy stating that referrals are to be entered into FACTS immediately, Mingo County had been directed by Ms. Salamacha to put referrals into the FACTS system at the time a call was received.[3] However, instead of entering the information into FACTS when the call was received, Mingo County staff wrote down information received from the call on paper, and entered the referral into

[2] *See*, Respondent's Exhibit 3, Child Protective Services Policy Manual, Sections 3.1 and 3.2.

[3] *See*, testimony of Cheryl Salamacha; testimony of Carolyn Sansom; testimony of Miranda J. Curry, Grievant.

FACTS later. There is no way to determine if all referrals received by Mingo County were entered into FACTS because the paper notes were regularly shredded.[4] The paper notes were the only record a referral was received until it was entered into FACTS.

10. If a referral is accepted for services, CPS workers are required to complete Family Functioning Assessments ("FFAs") within set timeframes.[5] The CPS workers must gather information to complete the FFAs, and such helps to determine whether a child has been subjected to abuse and/or neglect. FFAs had to be submitted to Grievant, as supervisor, for review and approval. FFAs were to be completed for all accepted cases before services could be offered to the family or be transferred to Ms. Webb's Case Management Unit for court action.[6] Thus, the FFAs could not go any further in processing without Grievant's approval.

11. CPS Policy requires that FFAs be completed within seven days if there is a finding of maltreatment with present or impending danger. In those cases, a written home safety plan is developed which may allow the child to be removed from the home for up to seven days without court action. If the parents refuse to sign and cooperate with the plan, a petition for removal must be filed immediately with the court. In such situations, the CPS worker must consult with the CPS Supervisor, preferably before leaving the family, but at a maximum, within 24 hours of the implementation of the protection plan. In limited circumstances, a protection plan may be reauthorized, or extended, with the approval of a CWC or Regional Program Manager ("PM"). If there is no finding of

[4] *See*, testimony of Miranda J. Curry; testimony of Carolyn Sansom; testimony of Nettie Goan; testimony of Cheryl Salamacha.
[5] *See*, Respondent's Exhibit 3, Child Protective Services Policy Manual, Section 3.2.
[6] *See*, testimony of Cheryl Salamacha; testimony of Rebecca Marcum; testimony of Miranda J. Curry, Grievant.

impending danger, CPS workers have 30 calendar days to complete the FFA and have it approved by the CPS Supervisor.[7]

12. There were instances where Grievant returned FFAs to workers for minor grammatical corrections which acted to delay the process. Further, at times, FFAs would sit in Grievant's inbox for extended periods of time, which also delayed the process and had the potential to allow children to remain in danger. At times, in order to clear her computerized inbox of FFAs, Grievant would simply "unclick" the FFA, and send it back to the worker without review. Such made it appear that the worker never sent the same to Grievant.[8]

13. For years prior to the events detailed in this grievance, Grievant had problems meeting the deadlines for referrals and FFAs.[9]

14. Grievant regularly made decisions regarding cases that were contrary to policy, and instructed the workers she supervised to take actions that were contrary to policy.[10]

15. In early July 2014, Child Welfare Consultant ("CWC") Jennifer Beckett was asked to review a case that was opened following the receipt of a referral alleging that a child was being sexually abused by its mother's boyfriend.[11]

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[7] *See*, Respondent's Exhibit 3, Child Protective Services Policy Manual, Section 4.8.
[8] *See*, testimony of Rebecca Marcum; testimony of Ron May; testimony of Tonya Webb.
[9] *See*, Respondent's Exhibit 9, Grievant's Employee Performance Appraisal signed November 6, 2013; Grievant's Exhibit 2, signed September 29, 2014; testimony of Cheryl Salamacha.
[10] *See*, testimony of Rebecca Marcum; testimony of Cheryl Salamacha; testimony of Tonya Webb; Grievant's Exhibit 2, Employee Performance Appraisal, pg. 3, "Demonstrates Credibility," and pg. 6, "Improvement and/or Development Plan."
[11] *See*, testimony of Jennifer Beckett.

16. CWC Beckett reviewed the case in FACTS, which was supposed to contain the same information and documentation as the paper file located in the county office. CWC Beckett found the following information in FACTS: Mingo County CPS received a referral at 2:20 p.m. on May 29, 2014, concerning allegations that a child was being sexually abused by its mother's boyfriend. CPSS Webb assigned CPS Worker Stephanie Lucas[12] to complete the intake with a 24-hour response time. CPSW Lucas met with the child the next morning at school. Later that evening, she met with the child and grandmother at the grandmother's house. Thereafter, CPSW Lucas met with the mother at her home. CPSW Lucas noted in FACTS that a Temporary Protection Plan ("TPP") would be put in place until a forensic interview was completed on June 2, 2014 at 1:30 p.m. This TPP provided that the child would be taken out of the mother's home and would live with the maternal grandmother, and that this TPP would begin on May 30, 2014, and end on June 6, 2014. The maternal grandmother and CPSW Lucas signed the TPP form. The mother refused to sign this TPP, indicating that she did not agree, but verbally agreed to allow her child to stay with the maternal grandmother. No removal petition was completed by Mingo County CPS at this time.[13]

17. CWC Beckett also found information, called "contacts," in FACTS that indicated CPSW Lucas staffed the case with Grievant on June 2, 2014, and discussed the protection plan. The forensic interview with the child was conducted on June 5, 2014. Further, notes in FACTS from that day indicate that CPSW Lucas staffed the case again

[12] Ms. Lucas was not called as a witness at the level three hearing.
[13] *See*, testimony of Jennifer Beckett; Respondent's Exhibit 8, Case Summary drafted by Jennifer Beckett; Respondent's Exhibit 6, Temporary Protection Plan; Respondent's Exhibit 7, Temporary Protection Plan; testimony of Cheryl Salamacha.

with Grievant that same day, and that Grievant directed CPSW Lucas to complete a 90-day in-home safety plan with the child remaining at the maternal grandmother's home and allowing supervised visits between the mother and child. FACTS indicates that this safety plan was created and that the maternal grandmother signed the same. However, FACTS does not indicate that the mother signed the plan. Also, a copy of this plan was not placed into FACTS as it should have been.[14]

18. The written 90-day plan completed at the direction of Grievant was located and presented as an exhibit at the level three hearing. This document was never entered into FACTS. It appears that CSPW Lucas and/or Grievant drafted the written 90-day plan by using the original 7-day temporary protection plan and adding handwritten provisions concerning the mother's visitation and a therapy recommendation. Further, the preparer scratched out the original end date (June 6, 2014), and replaced it with "8-30-14." Therefore, the time period section of the form reads as follows: "(Plan may only be in effect for 7 days unless approved in accordance with policy) This protection plan begins on 5-30-2014 and will end on 8-30-14." At the bottom of the second page of the form is the following handwritten notation: "*This plan will be re-evaluated in 90 days." In addition to the signature of CPSW Lucas dated May 30, 2014, and the grandmother's signature which is undated, but appeared on the original plan, is the mother's signature, which is dated June 5, 2014. At the bottom of the third page, below the signatures, is the following handwritten notation: "Let it be noted that [mother's name redacted] refused to sign protection plan on 5-30-2014 and stated she was obtaining an attorney." It is unknown who wrote this notation. A second handwritten notation appears below the first which

[14] *See*, testimony of Jennifer Beckett; Respondent's Exhibit 8, Beckett Case Summary.

states, “Let it be noted this plan was signed not admitting [to] allegations but to allow me to be able to see my daughter until my lawyer can review the paperwork and advise me of the best course of action to take. As he advised me to send him the paperwork.” This notation was signed by the mother.[15]

19. Despite the protection plan being called an “in-home safety plan,” the child was not left in its home. The child had been removed from its home at the direction of Grievant for 90 days, and given visitation with its mother all without a court order.

20. There was no information in FACTS concerning the mother’s attorney, and no indication that CPSW Lucas or Grievant attempted to contact him or her.

21. Upon her review of the case in FACTS, on or about July 2, 2014, CWC Beckett telephoned Carolyn Sansom to discuss the same. CWC Beckett informed Ms. Sansom of what she found, then reviewed CPS policy about separating children from parents with her. CWC Beckett further explained that what had occurred in this case violated policy, that this plan could not be followed, and explained the need for court oversight. CWC Beckett advised Ms. Sansom and her staff to meet with the mother and her attorney, explain that they could not keep the mother and child separated, and attempt to do an in-home safety plan or file a petition with the court. At the time of this conversation, the FFA had not been completed.

22. CPSW Lucas completed the FFA on July 7, 2014, and it was approved that day by Grievant, 38 days after receiving the referral. More importantly, the child had been removed from the home for those 38 days without a petition with the court being filed.

[15] *See*, Respondent’s Exhibit 7, 90-day protection plan.

23. In the FFA, CPSW Lucas made a finding that the mother's boyfriend sexually abused the child, and emotionally abused the child as he committed acts of domestic violence in the home. CPSW Lucas also made a finding on the mother for lack of supervision and emotional abuse. It was reported that the boyfriend did not live in the home, and he was not interviewed by CPSW Lucas, or anyone else, during the assessment.

24. Mingo County CPS filed a petition to remove the child from the mother's home on or about July 11, 2014. Thereafter, the child was placed with its maternal grandmother by court order.

25. Following her review of the case, after her July 2, 2014, conversation with Ms. Sansom, CWC Beckett drafted a case summary in which she concluded that the findings made regarding the mother and boyfriend were not supported by the documentation in the case. Further, CWC Beckett wrote the following in her case summary:

> "[t]he findings should have been made on mom only if that is who is being assessed and should have been described specifically in the maltreatment element. It is also important to note that the only information describing the maltreatment in the nature element appeared to be the case contacts copied into this element. It is very difficult for this reviewer to determine the child's exact disclosure, parent's explanation, etc. The FFA also concluded impending dangers of one or both parents fear they will maltreat and request placement. I did not find this impending danger supported in documentation. The other impending danger identified was cannot control behavior. This was very loosely supported during assessment, if at all. . . .[16]

[16] *See*, Respondent's Exhibit 8, Case Summary prepared by Jennifer Beckett.

26. CWC Beckett noted the following concerns in her case summary: "1. Neither protection Plans nor Safety Plans are valid without the parents signature. 2. When making a finding of abuse/neglect documentation needs to be specific information to support the finding. No finding should be made on a person that was not assessed. 3. When completing an in home safety plan a child cannot be removed from the parents care, custody and control."[17]

27. Jessica Cooper, a therapist at Highland Hospital in Clarksburg, West Virginia, contacted Mingo County CPS on June 2, 2014, to make a referral because she and other Highland Hospital staff had concerns about releasing a child back into the family's custody. The child had sexualized behavior issues. The family lived in a very small trailer, and Ms. Cooper and Highland Hospital staff were concerned about adequate supervision in the home, and feared the child could potentially abuse the other children in the home. Ms. Cooper documented her calls to and from Mingo County CPS, and the details of the communications.[18]

28. The child had been admitted to the facility by its family on or about May 31, 2014. In such situations, it is standard for the admission to be for five to seven days, but no more than two weeks.[19]

29. Jessica Cooper initially spoke to CPSW Nettie Goan when she called Mingo County CPS to make the referral. During this conversation, Ms. Cooper learned that there was a CPS case involving the family. CPSW Goan informed Ms. Cooper that she would

[17] *See*, Respondent's Exhibit 8, Case Summary prepared by Jennifer Beckett.
[18] *See*, testimony of Jessica Cooper.
[19] *See*, testimony of Jessica Cooper.

need to obtain a release before she could discuss the case with her. Ms. Cooper complied, and sent the same to CPSW Goan.

30. From June 2014 to August 2014, Ms. Cooper attempted to communicate with Mingo County CPS regarding its referral about the child and whether it was safe to send the child back to the home. Ms. Cooper had contact with Mingo County CPS employees Nettie Goan, Grievant, Molly Wells, Vicki Fields, Tonya Webb, and Carolyn Sansom. However, it became increasingly difficult to get in touch with the Mingo County CPS staff, and for them to return her calls, and the child still remained at the facility.[20]

31. On or about August 5, 2014, Ms. Cooper and other Highland Hospital staff, contacted the Mingo County Prosecuting Attorney's office for help as CPS was not returning their calls and the child had been at the facility for months.[21]

32. DHHR took legal custody of the child on or about August 10, 2014, but the child remained at Highland Hospital awaiting placement in a long-term facility.[22]

33. On August 20, 2014, Valerie Hutson, Ms. Cooper's supervisor at Highland Hospital, contacted Ms. Salamacha for help in getting the outstanding issues addressed. Along with Ms. Hutson and Ms. Cooper, Dr. Toni Goodykoontz, a doctor at Highland, had also called Mingo County CPS for action on the case. Ms. Salamacha reviewed FACTS to see what has happening, she discovered that no referral had ever been made, and few, if any, contacts with Highland Hospital and/or Ms. Cooper had been entered into FACTS.[23]

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[20] *See*, testimony of Jessica Cooper; Respondent's Exhibit 4, notations.
[21] *See*, testimony of Jessica Cooper.
[22] *See*, testimony of Jessica Cooper.
[23] *See*, testimony of Cheryl Salamacha.

34. The child was released from Highland Hospital near the end of September 2014, four months after its admission.[24]

35. Ms. Salamacha emailed Carolyn Sansom about this matter, and was told that they did not understand that Ms. Cooper had been making a referral for services. Instead, Ms. Sansom explained that it was their understanding that she was only seeking information about the child, and as they did not have custody of the child, they did not enter the information into FACTS. Grievant also did not document any of her contacts with Highland Hospital in FACTS.

36. On or about August 25, 2014, Ms. Salamacha sought to place the Mingo County Office/District on corrective action, and directed the supervisors, with assistance, to draft a corrective action plan. Ms. Salamacha directed that their plan be submitted to her by early September 2014, and it was not so submitted. It appears that the supervisors submitted at least one plan, but Ms. Salamacha directed corrections, and she did not receive a corrected plan.

37. Cheryl Salamacha and Joe Bullington conducted a predetermination conference with Grievant on or about September 25, 2014. Also in attendance at this predetermination conference was Grievant's representative, David Warrick.

38. Following Grievant's predetermination conference, Ms. Salamacha, Mr. Bullington, and Deputy Commissioner Tina Mitchell discussed the situation, and all agreed that dismissal was appropriate. However, the decision to dismiss Grievant was

[24] *See*, testimony of Jessica Cooper.

ultimately made by Deputy Commissioner Mitchell in consultation with Commissioner Nancy Exline.[25]

39. By letter dated November 5, 2014, Respondent dismissed Grievant from employment effective November 20, 2014.[26] The letter stated, in part, as follows:

> [y]our dismissal is the result of your history of performance failures and misconduct that include the following situations: You have failed in your role as a Child Protective Services Supervisor to follow the policies and directives of the agency regarding casework. You also instructed your staff not to follow established policies and processes based on your personal opinion. Additionally, you have failed to ensure the timely and accurate assessment of families and children as required by your position."[27]

This letter was signed by Ms. Salamacha. This letter also detailed fifteen enumerated paragraphs detailing the different concerns Ms. Salamacha and Mr. Bullington had raised during the predetermination conference and Grievant's responses thereto.

40. Ms. Salamacha and Mr. Bullington also conducted predetermination conferences with Ms. Webb and Ms. Sansom around the time they conducted Grievant's. However, Ms. Salamacha and Mr. Bullington determined that Ms. Webb should not be dismissed, as Ms. Webb appeared to be following policy and that it was Grievant who was responsible for the problems. It is unclear what Ms. Salamacha and Mr. Bullington recommended to Deputy Commissioner Mitchell regarding Ms. Sansom. Ms. Sansom

[25] *See*, testimony of Cheryl Salamacha; testimony of Tina Mitchell.
[26] The original dismissal letter dated November 5, 2014, lists the effective date of such as November 5, 2014. However, by second letter also dated November 5, 2014, the effective date of Grievant's dismissal was modified to November 20, 2014. *See*, Respondent's Exhibit 2, "Amended November 5, 2014" letter.
[27] *See*, Respondent's Exhibit 1, November 5, 2014, letter.

retired from her position with DHHR in February 2015, about three months after Grievant was dismissed.[28]

41. Grievant admitted to not following policy with respect to directing the removal of the child from its mother's home for more than seven days without approval from a CWC or PM and without court intervention. Grievant also admitted that FFAs were not being completed within the timelines set by policy.[29]

42. Grievant received regular Employee Performance Appraisals ("EPA") while employed by Respondent. Grievant received an overall score of 1.78, which is "Meets Expectations," on her last evaluation in September 2014. While Grievant's overall score was Meets Expectations, she received "Needs Improvement" in eleven categories evaluated, "Meets Expectations" in twenty-three categories, and "Exceeds Expectations" in nine categories. Such was signed by Grievant and Ms. Sansom on September 29, 2014. Ms. Salamacha initialed the same as reviewing manager on October 14, 2014.[30]

43. Prior to her dismissal, Grievant, personally, had not been placed on any type of corrective action plan, or improvement plan. Further, she had not received any other discipline.

44. During all times relevant herein, Child Protective Services in Mingo County was understaffed. The office had eleven Child Protective Worker positions, but nine people were actively working in the unit at that time. The other two positions were filled, but one employee was off on leave, and the other could not work a full caseload because

[28] *See*, testimony of Cheryl Salamacha; testimony of Carolyn Sansom.
[29] *See*, testimony of Grievant, Miranda J. Curry; Respondent's Exhibit 1, dismissal letter.
[30] *See*, Grievant's Exhibit 2, Employee Performance Appraisal.

she or he had not completed training. Of the nine employees, four worked on intake and five worked "on-going" cases, which included those going to court.[31]

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W.VA. CODE ST. R. § 156-1-3 (2008); *Ramey v. W. Va. Dep't of Health,* Docket No. H-88-005 (Dec. 6, 1988). "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.*

Respondent argues that Grievant violated numerous Child Protective Services policies and procedures justifying her dismissal. Grievant denies Respondent's allegations, and asserts that Respondent's decision to terminate her employment was arbitrary and capricious. Respondent further asserts that Ms. Salamacha, as the new Regional Director, was intent on "getting rid" of her, and that her dismissal was not justified.[32]

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,

[31] *See*, testimony of Carolyn Sansom; testimony of Grievant, Miranda J. Curry; testimony of Tonya Webb.
[32] *See*, Grievant's proposed Findings of Fact and Conclusions of Law, pg. 3.

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).

In the November 5, 2014, dismissal letter, Respondent states the following with respect to the reasons for Grievant's dismissal:

> [y]our dismissal is the result of your history of performance failures and misconduct that include the following situations: You have failed in your role as a Child Protective Services Supervisor to follow the policies and directives of the agency regarding casework. You also instructed your staff not to follow established policies and processes based on your personal opinion. Additionally, you have failed to ensure the timely and accurate assessment of families and children as required by your position.[33]

Near the conclusion of that same letter, following the fifteen enumerated paragraphs, Respondent further states the following:

> After consideration of your predetermination conference response, I have decided your dismissal is warranted. This action complies with Section 12.2 of the West Virginia Division of Personnel, Administrative Rule. Based on the information provided and your responses, I cannot conclude that your continuation as a Child Protective Services Supervisor is in the best interest of customers or the agency. You have shown a pattern of not following nor requiring your staff to follow the policies, processes, and practice of Child Protective Services as outlined. Your belief that you have the insight to decide what is best for a family, regardless of the policies, or uncompleted assessments, places children and families at risk. Due to not requiring staff to complete proper documentation, it often cannot be assessed whether or not you have a child in unsafe environments. The position you currently hold should assist staff in following processes and ensuring safety bases (sic) on a set of criteria. Your personal concept of setting your own criteria will not be tolerated, and

[33] *See*, Respondent's Exhibit 1, page 1.

> does not assess what families may actually need, but allows you to judge them based on your beliefs.[34]

No specific policy titles or policy numbers are identified in the termination letter. Such is because Respondent is alleging that Grievant violated various provisions of the actual Child Protective Services Policy Manual that sets forth the duties, responsibilities, and procedures employees, including supervisors, are to follow to perform their jobs. This is not a situation in which Respondent has alleged that an employee has violated a single policy, such as an attendance or employee conduct policy, on a single occasion, or during a particular incident. In this matter, Respondent asserts that Grievant ignored established procedures and policies for accepting and taking action in abuse and neglect case referrals, and that she instead substituted her own judgment and instructed her subordinates to ignore agency policies. It is noted that Respondent alleged at the level three hearing that Grievant was not available to her staff as she should have been. However, that is not mentioned as a reason for Grievant's dismissal in the November 5, 2014, dismissal letter. As such was not a reason for Grievant's termination, the allegations regarding Grievant's availability will not be further addressed herein.

Many of the facts are disputed in this grievance. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *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). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County*

[34] *See*, Respondent's Exhibit 1, page 3.

Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995)*; Perdue v. Dep't of Health & Human Res.*, Docket No. 93-HHR-050 (Feb. 4, 1994).

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. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the administrative law judge should consider the following: 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's information. *See Id., Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Safety Plan and Removal of Child from Home

Child Protective Services Policy Manual Section 4.8 "Temporary Protection Plans" states, in part, as follows:

> With the identification of present danger, it is the CPS Social Worker's responsibility to assure that children are safe while the Family Functioning Assessment continues by establishing a protection plan. Temporary protection plans are a specific and concrete strategy implemented the same day a present danger is identified, if at all possible before leaving the family or situation. . .
>
> A temporary protection plan must meet the demand for **immediate** action to control present danger while more information about the family is being gathered. . .
>
> When creating a protection plan, the worker must:
>
> 1. Inform the caregivers why a protection plan is necessary

2. Consult with supervisor, insofar as possible, to determine the best course of action.
3. **Identify with the caregivers** what protection plan options are available and acceptable in order to ensure child safety
4. Attempt to use resources within the family network to form the protection plan.
5. Confirm that there is agreement by caregivers and safety resources
6. Verify that the safety resources are reasonable, available, capable, trustworthy and able to sufficiently protect
7. Put the protection plan in place prior to leave the family or situation
8. Consult with the supervisor, preferably before leaving the family or situation
9. Attempt to gain legal custody as the protection plan when present danger exists; and there are no family network resources available; and/or parents/primary caregivers are unwilling to permit the CPS Social Worker to deploy a protection plan. If the protection plan includes legal custody, supervisor consultation should occur prior to court intervention if at all possible as required by the Gibson Decree. (See the Gibson vs. Ginsberg Decree and Policy Section 4.18 Statutory Remedies for Protecting Children for more information)
10. Complete the Family Functioning Assessment within 7 days. In limited circumstances the protection plan can be reauthorized. A reauthorization can be granted in order to collect more information to correctly determine if a child is in impending danger and the appropriate safety plan be implemented. The reason for the reauthorization must be clearly outlined in the case record and be approved by the CPS Supervisor. Consultation with a Child Welfare Consultant or Regional Program Manager must occur prior to the approval in order to determine if the reauthorization is appropriate and to assist the supervisor and worker in clearly identifying the additional information required to make the necessary decisions.
11. Document all information, supervisory consultation and approval and action taken on

> the appropriate family functioning assessment screen within FACTS.
>
> The supervisor will:
>
> 1. Be available or arrange for availability of supervisory consultation for emergency situations.
> 2. Review all information available relevant to the imminent danger of the child.
> 3. Approve legal action to protect the child, if indicated and no other alternatives are appropriate or available.
> 4. Document supervisory consultation and approvals on the appropriate screens within FACTS.

Further, the policy states, the following:

> The protection plan options include, but are not limited to: . . .
>
> 3. The child is cared for part or all of the time outside the child's home by a friend, neighbor, or relative until the Family Functioning Assessment is complete (maximum of 7 days.) . . . .[35]

With respect to the case referral received by Mingo County DHHR on May 30, 2014, Grievant ultimately admitted that she did not follow policy with respect to how this case was handled. However, Grievant appears to assert that there has been at least some misunderstanding as to what occurred, and that her actions do not justify her dismissal. Grievant and Ms. Sansom testified that the CPS worker used the wrong form, and such initially caused the problem. However, that does not make sense as the child was removed from the mother's home and was staying with the grandmother. The child

[35] *See*, Respondent's Exhibit 3, policy manual excerpts. This is a direct quotation from the exhibit presented during the level three hearing. Grammatical errors contained therein have not been corrected in this quotation. This is how the policy, as presented, is written.

was not in the home; this was no in-home safety plan. Grievant also alleges that the mother initially verbally agreed to allow the child to stay with the grandmother, but thereafter refused to sign the plan. Grievant has further argued that she tried to call CWC Becky Farmer to get authorization to extend the initial 7-day plan before approving it herself, but Ms. Farmer could not be reached, and it was hard to get people in Charleston on the phone.

Even if what Grievant says is true, and she tried to call Ms. Farmer, the wrong form was used, and the mother verbally agreed to the plan, Grievant still violated the policy. First, the original 7-day plan was not signed by the mother; therefore, it was invalid. Pursuant to policy, a CWC or PM has to approve any reauthorization, or extension, of a 7-day protection plan. Grievant did not get that approval, and extended the plan to 90 days on her own. Also, it does not matter if the mother agreed verbally. The policy requires a written plan to be signed by the parent. Lastly, the facts do not support the assertion that merely the wrong form was used. While Grievant and the CSPW were referring to the plan as a 90-day in-home safety plan, they knew that it was not such. Pursuant to the plan, the child was taken out of the mother's home and placed with the grandmother. Grievant knowingly violated policy and procedure for removing a child from a home when there is a claim of abuse and/or neglect. Without approval from anyone within DHHR, Grievant directed and approved a plan requiring the child to be removed from its home for more than seven days without court intervention. Grievant was aware of the policy and the correct procedure, but chose to ignore it. According to the policy, when the mother refused to sign the plan, a petition for removal should have then been

filed with the court because there was no agreement.[36] Grievant has somewhat admitted to this. Grievant testified that, despite the very serious allegations made in the case, she thought that they could start services to help the family without court intervention. While Grievant portrays her conduct as trying to deliver services to the family, she minimizes the fact that she violated established policy that protects the rights of parents and children. Grievant was an experienced supervisor, and knew the policy. Lastly, Grievant appears to suggest that what she did caused no harm because the child was always safe with the grandmother, and such is where the court ultimately placed the child after this case was discovered and a petition was filed. This argument is wholly without merit, and demonstrates that Grievant has missed the point. She is not the court, and had no authority to do what she did.

Highland Hospital Contact

Jessica Cooper, therapist at Highland Hospital, testified that she contacted Mingo County CPS to make a referral about a child who had been admitted to the facility. She and the Highland staff had concerns about the child being released back to the home due to the child's sexualized behavior and the family's living conditions. Ms. Cooper documented her many calls to and contacts with Mingo County CPS from June 2014-August 2014. Other hospital staff made contacts as well. However, no referral was ever made, and few entries were made in FACTS about Highland's contact with Mingo County CPS. Grievant, CPSW Nettie Goan, and other CPS workers testified that Highland made contact with them at Mingo County CPS, but they did not understand that Highland was

[36] *See*, Respondent's Exhibit 3; testimony of Jennifer Beckett; Carolyn Sansom; Cheryl Salamacha.

attempting to make a referral. They testified that they thought Highland was only seeking information about the child and family, and that as DHHR did not have custody of the child, they did not have to enter the contacts in FACTS.

Ms. Cooper testified that she made it clear that she was making a referral. However, CPSW Goan, CPSW Vickie Fields, former CPSW Molly Wells and Grievant denied the same. In fact, CPSW Goan, CPSW Fields, and CPSW Wells testified that Ms. Cooper and/or Dr. Goodykoontz said that they did not want to make a referral. CPSW Goan testified that Ms. Cooper never expressed concern at allowing the child to return to the home. The Mingo County employees who testified stated that it was their belief that Highland was attempting to get them to do something so that the medical expenses would continue to be paid. The Mingo County workers kept virtually no records of the contacts with the Highland employees. Paper notes were shredded, and as they did not consider these calls attempts to make a referral, they did not enter the same into FACTS. Grievant did not enter any of her contacts with Highland into FACTS. Ms. Cooper, on the other hand, made written notations of all of her communications with Mingo County CPS. Valerie Hutson and Dr. Goodykoontz's communications were also noted.

While Ms. Cooper testified telephonically, she demonstrated the appropriate demeanor, and was not evasive. Ms. Cooper had her notations with her during her testimony, and the same were presented as an exhibit. Her notations list dates and times for all of her communications with Mingo County CPS, as well as for her attempts made to speak to someone and when she left messages. Ms. Cooper's notes were typewritten and filled five pages. Ms. Cooper demonstrated detailed knowledge of the case, and

understanding of the issues. Ms. Cooper has no known interest in this matter, and there was no evidence of bias or motive.

The Mingo County CPS employees each had some independent memory of the case and the calls, but nothing as detailed or specific as mentioned in Ms. Cooper's testimony. The Mingo County CPS employees, including Grievant, could not remember Ms. Cooper's name or her position. Those who had spoken to Dr. Goodykoontz remembered her name. Nonetheless, they each were adamant that this was not a referral, and that Ms. Cooper and Dr. Goodykoontz explicitly stated that they did not want a referral. CPSWs Goan, Fields, and Wells were not evasive, but they did not remember many of the details of the communications. They did not know names, dates, times, or all the details of the communications. This is somewhat logical given the passage of time, and that they had no notes to use to refresh their memories. However, despite not remembering many of the details, they testified that they specifically recalled that the Highland staff members had explicitly stated that they did not want to make a referral. Such seems odd given their lack of memory. Further, CPSW Goan's testimony that Ms. Cooper expressed no concern about the child being released to the home seems implausible given that is what prompted the initial call that CPSW Goan answered. While they were not parties to this grievance, CPSWs Goan, Fields, and Wells had each worked on the case involving Highland, and they had communicated with Highland staff. Given that it has been alleged that the case was not handled correctly, such gives the CPSWs an interest in the matter, and perhaps motive to be less than truthful. Also, they each had worked with Grievant, and appeared somewhat sympathetic to her. Moreover, if the Highland staff were not trying to make a referral, it is unclear as to why else there had

been so many calls and contacts with them. The CPSWs offered no clear explanation of this in light of their position that there was no referral. The evidence also demonstrated that when Ms. Cooper was unable to get action after months, her supervisor, Ms. Hutson, contacted the county prosecutor, and Ms. Salamacha. Thereafter, action was taken, and the child was taken into DHHR custody. Given all of this, Ms. Cooper appeared to be more credible than the CPSWs with regard to the events regarding the Highland case. Accordingly, it is more likely than not that Ms. Cooper and Highland staff were seeking to make a referral about the subject child and that Grievant and her staff repeatedly failed to take the appropriate action. Grievant had communicated with Highland herself, and was responsible for making sure the CPSWs followed policy and handled referrals correctly. Grievant failed in her duties and responsibilities. The lack of action on the part of Grievant and her staff resulted in the child being in the facility for months, instead of the standard two-week maximum.

Performance Issues

The evidence presented established that Ms. Salamacha directed that Mingo County CPS enter referrals immediately into FACTS, but Mingo County did not comply. Respondent asserts that entering referrals directly into FACTS when the referral is being taken is more efficient, and reduces delay in providing services to children. Grievant directly supervised the CPSWs assigned to take referrals. Mingo County CPSWs took written notes from referral calls, and later entered the information into FACTS. CPSW Goan testified that she had a printed paper form she used when she was assigned exclusively to take referrals. After CPSWs entered the referral into FACTS, they shredded their handwritten notes. These notes were not retained as part of any paper

file, or entered into FACTS. Grievant testified that she checked the CPSWs' work by asking them whether they had entered all of the referrals into FACTS. However, as the documents were shredded, there was no way to cross check to see if they were actually entered. Grievant admitted this. Grievant further claimed that she was never given the directive that referrals were to be entered into FACTS as they were received. However, Ms. Sansom testified that Ms. Salamacha gave that direction. Given their training and the communications between Ms. Salamacha and the Mingo County CPS management members, Grievant's claim that she did not know about Ms. Salamacha's directive does not seem plausible. Further, all witnesses, including Grievant, seemed to agree that everything had to be promptly documented in FACTS.

Grievant and Ms. Sansom testified that entering the information directly into FACTS when a call was received was too difficult because the computer system was slow in their office, and it would take too long. Thus, taking referrals on paper and entering into FACTS later was more efficient. Even if this were correct, Grievant and Ms. Sansom had no authority to ignore Ms. Salamacha's directives. They had no authority to instruct their staff to take referrals in a manner contrary to instructions. While no policy requiring immediate entry of referrals into FACTS was introduced, the evidence was clear that Ms. Salamacha, as Regional Director, had directed that Mingo County stop taking referrals on paper and instead enter them directly into FACTS, and Grievant did not comply. Instead, Grievant substituted her own judgment and continued having her staff take referrals on paper without informing Ms. Salamacha of such.

Respondent also asserts that Grievant failed to promptly review and approve FFAs which caused delay in cases, caused backlogs, and possibly placed children at risk. The

evidence presented established that some FFAs had been delayed so long that they had not been completed before the case went to court contrary to policy. Grievant admitted that she failed to ensure that FFAs were completed within the applicable timeframes, and that there were backlogs. Some of the CPSWs testified that Grievant would not promptly review the FFAs they submitted to her, and that they would sit in her inbox for extended periods of time. The evidence established that timeframes for the completion of the FFAs were routinely missed, and that there was normally a backlog. The evidence suggests that backlogs had existed for years.[37] It was Grievant's job to review and approve the FFAs, and ensure their completion, within certain established timeframes. Grievant has asserted that there was just too much work and that they were understaffed, and that meeting the deadlines was impossible.

Rebecca Marcum and Ron May, who had both worked as CPSWs supervised by Grievant, testified that Grievant would return their FFAs for simple grammatical errors, and that sometimes, Grievant would not even review the FFAs and would instead "unclick" them in the system so that they were returned to the workers. Such made it appear that the workers never sent the FFAs to her. Ms. Sansom testified that FFAs should not have been returned for simple grammatical errors, and Grievant denied returning FFAs to the workers for simple grammatical errors. Ms. Marcum and Mr. May both showed the appropriate demeanor toward the proceeding and were not evasive. After Grievant was dismissed, Ms. Marcum was hired as CPSS, which possibly shows some motive, or interest in the outcome of this grievance. However, she was overall

[37] *See*, Respondent's Exhibit 9, Employee Performance Appraisal; Grievant's Exhibit 2, Employee Performance Appraisal.

credible. Mr. May had had difficulties with Grievant when she was his supervisor, and he had asked to be transferred to CPSS Webb, which was granted. While this may indicate a bias against Grievant, Mr. May was overall credible.

As for the "unclicked" FFAs, Grievant and Ms. Sansom admitted to "unclicking" the FFAs which sent them back to the worker without review, and claimed that Ms. Salamacha told them to do so in order to clear the supervisor inbox every day. It makes absolutely no sense that Ms. Salamacha would instruct Grievant and Ms. Sansom to do this. The evidence presented establishes that Ms. Salamacha instructed them that inboxes had to be *cleared* every day. Nothing suggests that Ms. Salamacha directed Grievant and Ms. Sansom to send the FFAs back to the CPSWs without review just to clear Grievant's inbox. It is most likely that Ms. Salamacha was telling Grievant and Ms. Sansom to get all of the FFAs reviewed each day, thereby clearing the inbox each day. Further, it is most likely that Grievant "unclicked" the FFAs without review in order to clear her inbox while knowing she was not following the proper procedure. The purpose of processing the FFAs in a timely fashion is to get services to the children and families needing help as soon as possible, and to get children out of dangerous situations. It is totally illogical to suggest that Ms. Salamacha instructed Grievant and Ms. Sansom to send the FFAs back to the workers without review only to clear the supervisor inbox. The only person who benefited from sending the FFAs back to the worker by "unclicking" them without review was Grievant because it made it appear that she had completed her work.

Grievant received Employee Performance Appraisals ("EPA") every year while employed by Respondent. Ms. Sansom prepared Grievant's evaluations, and they had to be approved by the Regional Director. Grievant's EPAs for September 2012 to

September 2013, and September 2013 to September 2014 were introduced by the parties as exhibits at the level three hearing. No other EPAs were introduced. These EPAs clearly show that she had been having performance issues at least since 2012. Even though her overall scores on both EPAs were "meets expectations," Grievant was evaluated as "needs improvement" in many important aspects of her job.

In the 2012-2013 evaluation, Grievant was evaluated as needing improvement in the following areas in the "Quantity of Work" section: work output matches expectations established; employee completes all assignments; and, employee consistently meets deadlines. Further, Ms. Sansom noted in that section that "Mingo District CPS Intake continues to have backlog with FFA assessments. At least (2) corrective action plans were filed this rating period. Ms. Curry needs to be prepared to set goals and include plans of how she will complete assessments timely and help staff meet deadlines." Also, in the "Quality of Work" section, Grievant was evaluated as needing improvement in "work results satisfy organization's goals." Ms. Sansom noted in this same section that, "[a]gain this rating period, Ms. Curry needs to make improvements to plan ahead and organize her work. She needs to make improvements in providing timely feedback to staff regarding their CPS assessments and explain why she failed to approve assessments timely." In the "Leadership" section, Grievant was evaluated as needing improvement in the following two categories: "demonstrates influencing skills by setting goals" and "empowers subordinates to achieve objectives." In that section, Ms. Sansom noted that "Ms. Curry needs to make improvements in setting goals with her staff and make sure staff are productive at all times, which is a daily requirement of her job." In the "Management" section, Grievant was evaluated as needing improvement in two areas,

"monitors, documents, and evaluates employee conduct and performance" and "provides appropriate and timely feedback." Ms. Sansom noted that, "[a]gain, this rating period Ms. Curry's staff needs to know her expectations and follow up if they fail to meet those expectations." In the "Improvement and/or Development Plan" section, the following is stated:

> Mingo District CPS Intake continues to have backlog with FFA assessments. At least (2) corrective actions plans were filed this rating period. Ms. Curry needs to be prepared to set goals and include plans on how she will complete assessments timely and help staff meet deadlines. Ms. Curry needs to make improvements in setting goals with her staff and make sure staff are productive at all times, which is a daily requirement of her job. Again, this rating period Ms. Curry's staff needs to know her expectations and follow up if they fail to meet those expectations.[38]

In the 2013-2014 EPA, in the "Demonstrates Credibility" section, Grievant was evaluated as needing improvement in the "performs work according to current guidelines and directives" section. In that section, Ms. Sansom noted that, "[t]his rating period several issues are being addressed regarding Ms. Curry performing work according to current guidelines. Ms. Curry needs to make improvement in following CPS Policies (which Includes Protection Plans, Updating Service Logs for payments, Safety Plans, (sic) follow policy by approving payments she requested. Corrective Action Plan will be issued." In the "Quantity of Work" section, Grievant was evaluated as needing improvement in the following categories: "work output matches expectations established; employee completes all assignments; and, employee consistently meets deadlines." Ms. Sansom further noted that "Mingo District CPS Intake continues to have backlog with FFA

[38] *See*, Respondent's Exhibit 9, EPA.

assessments. At least (1) corrective actions plan was filed this rating period. Intakes are not entered or assigned timely. FACTS Supervisory Bo[x] is not being cleared daily. Staff are not following CPS Policies which include Protection Plans, Safety Plans, Updating Service Logs for payments." In the "Quality of Work" section, Grievant was evaluated as needing improvement in the following categories: "work results satisfy organization's goals" and "work product is free of flaws and errors." In this section, Ms. Sansom noted that, "[a]gain, this rating period, She (sic) needs to make improvements in providing timely feedback to staff regarding their CPS assessments and explain why she failed to approve assessments timely. This rating period Ms. Curry requested and approved a payment. She is fully aware that this can not be done." In the "Leadership" section, Grievant was evaluated as needing improvement in the following categories: "provides clear direction and purpose; demonstrates influencing skills by setting goals; and empowers subordinates to achieve objectives." In this section, Ms. Sansom noted that, "Ms. Curry needs to make improvements in setting goals with her staff and make sure staff are productive at all times, which is a daily requirement of her job. Ms. Curry need (sic) to make improvement in meeting deadlines for Protection Plans, Safety Plans. Consultation (sic) with staff needs to improve." In the "Management" section, Grievant was evaluated as needing improvement in the following two categories: "monitors, documents, and evaluates employee conduct and performance," and "provides appropriate and timely feedback." Ms. Sansom noted that, "[a]gain, this rating period Ms. Curry's staff needs to know her expectations and follow up if they fail to meet those expectations." In the "Improvement and/or Development Plan" section, the following is stated:

> Mingo District CPS Intake continues to have backlog with FFA assessments. At least (1) corrective actions plan was filed this

> rating period. Ms. Curry needs to be prepared to set goals and include plans of how she will complete assessments timely and help staff meet deadlines. Ms. Curry needs to make improvements in setting goals with her staff and make sure staff are productive at all times, which is a daily requirement of her job. Again, this rating period Ms. Curry's staff needs to know her expectations and follow up if they fail to meet those expectations. Mingo District CPS Intake continues to have backlog with FFA assessments. Intakes are not entered or assigned timely. FACTS Supervisory Box is not being cleared daily. Staff are not following CPS Policies which include Protection Plans, Safety Plans, Updating Service Logs for payments. This rating period Ms. Curry requested and approved a payment. She is fully aware that this can not be done.[39]

It is noted that there are significant duplications and similarities in the two EPAs, but Grievant's score dropped in the 2013-2014 EPA. Further, in the 2013-2014 EPA, Grievant's failure to follow policy is noted. Ms. Sansom testified that some of the wording in the 2013-2014 EPA was Ms. Salamacha's, and not her own. She explained that Ms. Salamacha would not approve the EPA without certain language. Despite Salamacha's involvement in the 2013-2014 EPA, some of the same issues were marked as needing improvement, such as in the Quantity of Work, Quality of Work, Leadership, and Management sections, in the 2012-2013 EPA. For example, the backlog of FFAs, corrective actions plans issued, goal-setting, and staff productivity are mentioned in both EPAs with respect to improvement needed. Therefore, Grievant had been having serious performance issues for a significant period of time before she was dismissed. However, it appears that the issues regarding failure to follow agency policy were not noted until the 2013-2014 rating period. While Grievant appears to argue that Ms. Salamacha was out to get her, these EPAs demonstrate otherwise. Grievant had significant performance

[39] *See*, Grievant's Exhibit 2, EPA.

issues in crucial aspects of her job despite her overall score of "Meets Expectations." The major difference in the two EPAs is that failure to follow policy is noted in the 2013-2014 EPA. As stated herein, Ms. Salamacha learned of two particular incidents of Grievant failing to follow policy in 2014 prior to Grievant's evaluation that year, and Grievant has admitted to failing to follow some of the policies. There has been no allegation that Grievant disputed or grieved either of these EPAs.

Dismissal

In addition to longstanding performance issues, Respondent has asserted that Grievant knowingly violated CPS policy and procedure, and directed her staff to do the same. Grievant asserts that her dismissal was arbitrary and capricious, excessive, and that it was improper for Respondent to dismiss her from employment without following progressive discipline. 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)). "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 and Human Serv.*, 769 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 and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997).

Further, the “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *See Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). “While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer].” *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ*., Docket No. 01-20-470 (Oct. 29, 2001).

The evidence presented at the level three hearing in this matter established that, in one instance, Grievant knowingly directed the removal of a child from its mother’s home for 90 days without the mother’s agreement or court intervention in violation of CPS policy. Grievant’s actions violated the rights of the mother and the child, and showed a remarkable willingness to substitute her judgment for policy and law. With respect to the Highland Hospital matter, the subject child remained in the facility for months as a result of Grievant’s failing to ensure the matter was handled pursuant to policy. Also, Grievant’s continual failure to timely complete FFAs put children and their families at risk, because the longer those FFAs remain incomplete, the longer the child stays in a potentially dangerous environment. There were instances where Grievant simply returned the FFAs to her staff without review just so that she could clear her inbox. This demonstrates Grievant’s total lack of regard for the safety of the subject children and the established policy. Further, the failure to document actions and contacts in FACTS is a serious matter because such documentation is a way of keeping track of the subject children, their

needs, their whereabouts, and the actions being taken and needing to be taken in the cases. Documenting contacts in FACTS serves to promote the safety of the subject children. It is noted that there were other acts of misconduct and violations of policy alleged in the dismissal letter, and some evidence regarding the same was introduced at the level three hearing. However, the bulk of the evidence presented at the level three hearing involved these policy violations and misconduct. Therefore, the undersigned is focusing on the same.

Based upon the evidence presented, the undersigned cannot conclude that Respondent's decision to dismiss Grievant from employment was arbitrary and capricious. Grievant's misconduct with respect to removing the child from its mother's home, the Highland Hospital matter, her continual failure to properly document actions and contacts in FACTS, and her propensity to substitute her personal judgment for policy is substantial, and directly affected the rights and interests of the public. The same is true for Grievant's misconduct in directing her staff to violate policy. These are not mere technical violations of policy without wrongful intent. Grievant was aware of policy and chose not to follow it. Grievant has admitted such. Grievant believed that her judgment was better than policy, and that she knew what was better for the families. While Grievant had no known disciplinary history, the seriousness of her infractions justify her dismissal. Grievant repeatedly and habitually engaged in misconduct that affected the rights and interests of the public, which included the children she was to protect. Accordingly, there was good cause for Grievant's dismissal, and Respondent's decision was not unreasonable.

Further, Grievant introduced no policies regarding progressive discipline. However, Grievant introduced the "Supervisor's Guide to Progressive Corrective and Disciplinary Action" which is a guide published by the West Virginia Division of Personnel. This is not a policy, and it does not supersede any law, rule, or policy.[40] Grievant introduced no policy that would require Respondent to follow progressive discipline in all situations. The "Supervisor's Guide" even notes that employers may dismiss employees when progressive discipline has not been used.[41] Accordingly, the undersigned cannot conclude that Respondent's decision to dismiss Grievant from employment without following progressive discipline was improper.

Grievant also appears to argue that her dismissal was excessive. The Grievance Board has held that "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). "Nevertheless, a lesser disciplinary action may be imposed when mitigating circumstances exist. *See Conner v. Barbour County Bd. of Educ.,* Docket No. 95-01-031 (Sept. 29, 1995). Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long

[40] *See*, Grievant's Exhibit 4, Supervisor's Guide to Progressive Corrective and Disciplinary Action, pg. ii, "Disclaimer."
[41] *See*, Grievant's Exhibit 4, pg. 10.

service with a history of otherwise satisfactory work performance. *See Pingley v. Div. of Corr.,* Docket No. 95-CORR-252 (July 23, 1996). 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)." *Daugherty v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital*, Docket No. 2016-0821-CONS (May 17, 2016). "The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was 'clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. [State] Fire Comm'n,* Docket No. 89-SFC-145 (Aug. 8, 1989)." *Meadows v. Logan County Bd. of Educ.,* Docket No. 00-23-202 (Jan. 31, 2001).

Grievant failed to present any evidence to suggest that her dismissal was clearly excessive, or disproportionate to her offense. Grievant was a veteran supervisor. Supervisors "may be held to a higher standard of conduct because [they are] properly expected to set an example for employees under their supervision, and to enforce the employer's rules and regulations, as well as implement the directives of [their] supervisors." *Wiley v. W. Va. Div. of Natural Res., Parks and Recreation*, Docket No. 96-DNR-515 (Mar. 26, 1988); *Bourne v. Div. of Veteran's* Affairs, Docket No. 2009-0437-MAPS (Aug. 25, 2009). While Grievant's evaluations were scored "Meets Expectations"

overall, they noted serious performance issues. Moreover, Grievant knowingly violated various policies that affected the rights and interests of the public, and directed her subordinates to do the same. Grievant's conduct resulted in children being placed at risk. Dismissal from employment was an appropriate response.

Accordingly, this grievance is DENIED.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W.VA. CODE ST. R. § 156-1-3 (2008); *Ramey v. W. Va. Dep't of Health,* Docket No. H-88-005 (Dec. 6, 1988).

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 Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004)(per curiam).

3. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *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). 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 & Human Res.*, Docket No. 93-HHR-050 (Feb. 4, 1994).

4. 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)). "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 and Human Serv.*, 769 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 and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997).

5. Respondent proved that Grievant's work performance was deficient and that she knowingly violated numerous CPS policies and procedures pertaining to abuse and neglect referrals and cases as detailed herein; therefore, Respondent had good cause to dismiss Grievant, and the dismissal was not arbitrary and capricious.

6. "[M]itigation 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).

7. "The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was 'clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. [State] Fire Comm'n,* Docket No. 89-SFC-145 (Aug. 8, 1989)." *Meadows v. Logan County Bd. of Educ.,* Docket No. 00-23-202 (Jan. 31, 2001).

8. Supervisors "may be held to a higher standard of conduct because [they are] properly expected to set an example for employees under their supervision, and to enforce the employer's rules and regulations, as well as implement the directives of [their] supervisors." *Wiley v. W. Va. Div. of Natural Res., Parks and Recreation*, Docket No. 96-DNR-515 (Mar. 26, 1988); *Bourne v. Div. of Veteran's* Affairs, Docket No. 2009-0437-MAPS (Aug. 25, 2009).

9. Grievant failed to prove by a preponderance of the evidence that mitigation was warranted. Despite her good record, Grievant was deficient in her duties and performance. Further, Grievant knowingly violated agency policies affecting the rights of the public, and directed her subordinates to do the same.

Accordingly, this 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 (eff. July 7, 2008).

DATE: May 3, 2017.

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Carrie H. LeFevre
Administrative Law Judge