THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LESLIE RIDDLE,

Grievant,

v. **Docket No. 2017-1358-DHHR**

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

Respondent.

DECISION

Grievant, Leslie Riddle, filed an expedited level three grievance against her employer, Respondent, Department of Health and Human Resources ("DHHR")/Bureau for Children and Families ("BCF") dated December 6, 2016, which stated as follows: "[s]uspension without good cause." As relief, Grievant sought, "[t]o be made whole in every way including back pay with interest and benefits restored."

The undersigned administrative law judge conducted a level three hearing on this grievance on May 4, 2017, at Grievance Board's office in Charleston, West Virginia. Grievant appeared in person, and with her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by counsel, James "Jake" Wegman, Esquire, Assistant Attorney General. This matter became mature for decision on July 12, 2017, upon the receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as an Economic Service Worker. Respondent charged Grievant with violating the DHHR Policy Memorandum 2108

"Employee Conduct" and the Employee Confidentiality Statement by taking certain actions to work in a friend's case. Respondent suspended Grievant for ten days without pay. Respondent proved by a preponderance of the evidence that Grievant violated DHHR Policy Memorandum 2108 "Employee Conduct" and the Employee Confidentiality Statement. As such, Respondent proved that Grievant's suspension was justified. Grievant failed to prove by a preponderance of the evidence 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. Grievant, Leslie Riddle, is employed by Respondent as an Economic Services Worker ("ESW"), and has been so employed since June 1999. Grievant works in Respondent's Wood County, West Virginia office.

2. Cree Lemasters is the Regional Director for BCF Region 1, the region in which Grievant is stationed. Ms. Lemasters is not Grievant's direct supervisor, but is in her chain of command.

3. Lisa Heater is an Economic Services Supervisor ("ESS"), and is Grievant's immediate supervisor. Larry Hamilton is another ESS in the Wood County office.

4. Laurea Ellis is the Interim Community Services Manager for the Wood County DHHR office.

5. As an ESW, Grievant's job duties include determining clients' eligibility for economic assistance programs and verifying their personal, financial, and social information.

6. At one time, Grievant had been in a relationship with J. C., who had an economic assistance case with DHHR. Additionally, J. C. had a minor child who received economic assistance through DHHR. Grievant was not included in J. C.'s household or authorized to access his case.

7. At the level three hearing, Grievant explained that she and J. C. are friends, that they still do things together, and that they have a relationship with respect to his child.

8. In or about February and March 2016, Grievant was assigned to work as the "Worker of the Day" in her office. In this position, Grievant did not work a regular caseload. Instead, Grievant met with customers who came into the office for services or assistance each day. One of the things that Grievant did routinely in this position was to print medical cards for customers who came to the office needing replacements.

9. On or about February 12, 2016, Grievant accessed the case of J. C. and issued a medical card for someone included in that case.[1] J. C.'s case was not assigned to Grievant.[2] Upon information and belief, at that time, J. C.'s case was not coded confidential in the computer system, and it was not assigned to be worked by a supervisor.

10. In or about March 2016, Grievant contacted BCF Division of Client Services seeking information on J. C.'s case. She initially asked the worker at Client Services general questions about Medicaid billing, but later disclosed that she was seeking information about J. C.'s case and J. C.'s child's medical card. Thereafter, Grievant reported her call to Client Services to Larry Hamilton. Grievant did not seek permission,

[1] *See*, Respondent's Exhibit 2, OIG Investigation Report, pg. 17.
[2] *See*, testimony of Lisa Heater.

or obtain permission, to call Client Services to access information about J. C.'s case before making the call.[3]

11. There was no evidence presented to suggest that Grievant made any changes to J. C.'s case, reviewed or approved J. C. or the child for any benefits or services, made any eligibility determinations, or otherwise worked the case.[4]

12. After Grievant's call to Client Services, on March 9, 2016, Laura Bennett, a Client Services employee, sent an email to Larry Hamilton and Lisa Heater which stated as follows: "[w]e recd a phone call from Leslie Riddle [Grievant], wife of J. who states they have been married and living together for a few years, to check on medical cover for L. stepson. Leslie has never been in this case and is working. Her DOB is [redacted]. J. and L. are receiving SNAP. Can you please evaluate for fraud referral."[5]

13. After receiving the email from Laura Bennett, Larry Hamilton forwarded the same to Interim CSM Laurea Ellis, and added the following comments: "Michelle and I were in our office when Leslie came in and without any prompting told us the following. She had called client services because J. had a question about L.'s Medicaid coverage. She said that the client services representative had twisted what she said. Leslie says that she (Leslie) said 'no I don't live there all the time' and 'I am the only Momma that L. has known.' Leslie asked me if client services would contact us about an investigation

[3] *See*, Respondent's Exhibit 2, OIG Investigation Report; testimony of Larry Hamilton; testimony of Lisa Heater.
[4] *See*, testimony of Lisa Heater; Respondent's Exhibit 2, Investigation Report.
[5] *See*, Respondent's Exhibit 1, email dated March 9, 2016. It is noted that this is a direct quote, except for the redaction of client names and Grievant's birthdate, and includes typographical errors.

and I told her that most of my contacts with them concerned a client not receiving a benefit. I just wanted to let you know."[6]

14. Laura Bennett was not called as a witness at the level three hearing. Further, it does not appear that the OIG investigators interviewed her during their investigation.[7]

15. In or about March 2016, Laurea Ellis referred this matter to the Office of Inspector General ("OIG") for investigation into potential economic assistance fraud. The investigation was conducted by OIG Investigators Danita Bragg and Robert Lane.[8] During this investigation, it was discovered that on February 12, 2016, Grievant accessed J. C.'s case and printed replacement Medicaid cards.

16. The OIG investigators interviewed Grievant, along with others, during their investigation. The OIG investigation did not substantiate any allegation of fraud. However, the investigators concluded that Grievant had violated DHHR Policy Memorandum 2108 by taking actions in J. C.'s case and the Employee Confidentiality Policy by accessing J. C.'s case without authorization. This information was passed along to Grievant's supervisors.

17. By letter dated July 5, 2016, Interim CSM Laurea Ellis informed Grievant that a predetermination conference would be held on July 8, 2016, to address the allegation that she had violated DHHR Policy 2108 Employee Conduct, and that such would be held in Delbert Casto's office. The letter further stated that "[t]he purpose of the

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[6] *See*, Respondent's Exhibit 1, email dated March 9, 2016. It is noted that this is a direct quote, except for the redaction of client names, and includes typographical errors.
[7] *See*, Respondent's Exhibit 2, Investigation Report.
[8] *See*, testimony of Robert Lane; testimony of Danita Bragg; Investigation Report, Respondent's Exhibit 2, pgs. 3, 8.

predetermination meeting is to give you an opportunity to respond to the aforementioned item and provide input for our consideration. You may present any information you believe would be supportive of your position."[9]

18. On July 8, 2016, Respondent held the predetermination conference as scheduled to address the allegation that Grievant violated DHHR Policy 2108 Employee Conduct. In attendance were Interim CSM Ellis, Community Services Manager Secretary Brenda Lewis, Grievant, and Grievant's representative, Gordon Simmons. This conference pertained to the call Grievant made to Client Services in March 2016, and Grievant's printing of medical cards for J. C.'s child in February 2016. At this predetermination conference, Grievant admitted to printing the medical cards from J. C.'s case, and admitted to calling Client Services about J. C.'s case. Grievant also stated that "she didn't think about it" and "was trying to be helpful," but she "shouldn't have been in the case."

19. By letter dated November 28, 2016, Grievant was informed that a second predetermination conference would be conducted on December 1, 2016, at the office of the Community Services Manager to address another allegation that Grievant had violated DHHR Policy 2108 when she called Client Services in March 2016.[10] Specifically, the issue was whether Grievant had permission from a supervisor to call Client Services as she did. During the OIG investigation, Lisa Heater told investigators that Grievant had told her that she had Larry Hamilton's permission to call Client Services.[11] Mr. Hamilton informed investigators that he had not given Grievant any such permission. Delbert Casto

[9] *See*, Respondent's Exhibit 3, July 5, 2016, letter.
[10] *See*, Respondent's Exhibit 5, November 28, 2016, letter.
[11] *See*, Respondent's Exhibit 2, Investigation Report, pgs. 8-9, 26-28, 31-33.

testified that this second predetermination conference was held to "clarify a couple of statements that were conflicting from the previous conference."[12]

20. Delbert Casto, Community Services Manager, Grievant, Gordon Simmons, Grievant's Representative, Brenda Lewis, Secretary, and Lisa Heater, ESS, attended this second predetermination conference on December 1, 2016. At this conference, Grievant stated that she did not recall saying to Ms. Heater that Mr. Hamilton had given her permission to call Client Services, and that she did not think she needed such permission when she made the call.[13]

21. By letter dated December 5, 2016, Respondent charged Grievant with violating "Employee Conduct Code 2108,"[14] and the Employee Confidentiality Agreement, and suspended her without pay for ten days, effective December 8, 2016, through and including December 21, 2016.[15] These charges were the result of Grievant accessing J. C.'s case, printing the medical cards, and calling Client Services and asking questions specific to J. C.'s case. The letter further stated the following: "[y]our untruthfulness in answering questions that were asked of you by your supervisors was also a significant factor in this decision."[16]

22. Prior to Grievant's suspension now grieved, she had no history of discipline from her employer.

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[12] *See*, testimony of Delbert Casto.
[13] *See*, testimony of Delbert Casto; Respondent's Exhibit 6, type-written notes from December 1, 2016, predetermination conference.
[14] It appears that Respondent mistakenly identified the policy in this letter. The correct title of the policy is "Policy Memorandum 2108 Employee Conduct." *See*, Respondent's Exhibit 7, policy memorandum.
[15] *See*, Respondent's Exhibit 9, December 5, 2016, suspension letter.
[16] *See*, Respondent's Exhibit 9, December 5, 2016, suspension letter.

23. All of Grievant's performance evaluations prior to receiving the discipline grieved herein were good. On the last three performance evaluations, Grievant received a score of "Meets Expectations."

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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.,* Docket No. 96-20-380 (Mar. 18, 1997). "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), ***aff'd,*** Pleasants Co. Cir. Ct., Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Respondent asserts that Grievant violated certain DHHR policies thereby justifying the ten-day suspension without pay it imposed upon Grievant. Grievant denies Respondent's allegations. However, Grievant has admitted to printing medical cards from J. C.'s case at his request, and calling Client Services at which time she asked case-specific questions about J. C.'s case. Grievant asserts that she called Client Services to ask general non-case specific questions, but was pressed for specific case information, which she then provided. No one claims that Grievant altered or made any changes to J.

C.'s case. Grievant argues that the actions she took on J. C.'s case were too trivial to constitute a conflict of interest. However, it appears that Grievant stated in her predetermination and in her interview with OIG that she should not have accessed J. C.'s case, that such was a conflict of interest, and that she did not ask her supervisors for permission to access J. C.'s case or print the medical cards. She simply did not think about it because it was her job to do such things.[17]

DHHR Policy Memorandum 2108, "Employee Conduct," states in part, as follows:

> Employees are expected to avoid conflicts of interest between their personal life and their employment. Employees shall not provide services to or make decisions concerning eligibility for Agency programs for spouses, relatives, friends, neighbors, present or former co-workers, or club or church acquaintances. Requests for services and questions regarding eligibility in these potentially conflicting situations should be referred to supervisors for reassignment. Employees should not solicit or accept any monetary gain for their services to residents/patients/clients, other than their salary and benefits paid by the Department.
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> Further, an employee's receipt of any benefit from the Agency must be based upon eligibility to receive those benefits. Employees whose behavior conflicts with their employment are subject to discipline. . . .[18]

The Employee Confidentiality Statement states, in part, as follows: "I agree to use my special access to information only as is absolutely necessary to administer the system(s) for which I am responsible, and will not obtain or attempt to obtain confidential information for any unauthorized persons or uses."[19]

[17] *See*, testimony of Grievant, level three hearing.
[18] *See*, DHHR Policy Memorandum 2108, "Employee Conduct," Respondent's Exhibit 7.
[19] *See*, Respondent's Exhibit 8, "Employee Confidentiality Statement (ECS)."

DHHR Policy Memorandum 2108 clearly states that '[e]mployees shall not provide services to . . . spouses, relatives, friends, neighbors, present or former co-workers, or club or church acquaintances." Grievant, while performing the duties of the worker of the day, accessed her friend J. C.'s case and provided him with services. She printed medical cards for him. Later on, she, admittedly, called Client Services and sought information about J. C.'s case. Again, by doing this, Grievant was providing J. C. a service. As J. C. was a friend and as she was a mother figure to the child in his case, Grievant had a conflict of interest, pursuant to this policy, and she violated the policy by working in the case. Further, Grievant violated the Employee Confidentiality Statement by accessing J. C.'s case for an unauthorized purposes.

Grievant appears to argue that her suspension without pay was arbitrary and capricious. 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).

Grievant violated the Employee Confidentiality Statement and DHHR Policy Memorandum 2108. Grievant was a tenured employee with years of training and experience. She knew that she was not allowed to work J. C.'s case, and if she had questions as to whether printing medical cards for him was considered "working" the case, she knew to ask her supervisors. She did not do so. Respondent had the right to discipline Grievant for her misconduct. This ALJ cannot substitute her judgment for that of the employer. Based upon the evidence presented, this ALJ cannot find that the ten-day suspension without pay imposed upon Grievant was arbitrary and capricious.

While she does not use the exact words in her post-hearing submissions, Grievant appears to assert that her suspension was excessive given the circumstances. 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 Res./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 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 Res./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).

By all accounts, Grievant has been a good employee, and has had no prior discipline. However, the evidence presented does not demonstrate that the discipline imposed for Grievant's misconduct was excessive, an abuse of discretion, or disproportionate to the offense. Violating conflict of interest and confidentiality policies is a serious offense. Grievant has failed to prove by a preponderance of the evidence that mitigation of the discipline imposed is warranted. Therefore, 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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.,* Docket No. 96-20-380 (Mar. 18, 1997). "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), *aff'd,* Pleasants Co. Cir. Ct., Civil Action No. 93-APC-1 (Dec. 2, 1994).

2. 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).

3. 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).

4. 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 Res./Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996).

5. "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).

6. Respondent proved by a preponderance of the evidence that Grievant violated Policy Memorandum 2108 and the Employee Confidentiality Statement. Therefore, Respondent has proved that the discipline imposed upon Grievant for this misconduct was justified.

7. Grievant failed to prove by a preponderance of the evidence that mitigation of the discipline imposed upon her was warranted.

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: September 14, 2017.

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Carrie H. LeFevre
Administrative Law Judge