THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JONI WHITT,

Grievant,

v. **Docket No. 2017-1982-CONS**

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU OF CHILD SUPPORT ENFORCEMENT,**

Respondent.

DECISION

Grievant, Joni Whitt, is employed by Respondent, Department of Health and Human Resources/Bureau of Child Support Enforcement ("DHHR"). Grievant filed a grievance (Docket No. 2017-1096-DHHR) on October 14, 2016, challenging a reprimand and placement on a performance improvement plan, and requesting to be made whole including back pay, interest, and all benefits restored. Subsequently, Grievant filed a second grievance (Docket No. 2017-1218-DHHR) on November 21, 2016, protesting a suspension issued to her on November 21, 2016. The two grievances were consolidated by Order dated March 23, 2017.

A level three hearing was held on May 14, 2017, before the undersigned in Beckley, West Virginia. Grievant was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by counsel, Jake Wegman, Esq. This matter became mature for decision on August 8, 2017, the deadline for submission of the parties' written Proposed Findings of Fact and Conclusions of Law.

SYNOPSIS

Grievant is employed as a Child Support Specialist 1. Grievant protests her reprimand and suspension for five days for unsatisfactory performance, and

unprofessional behavior in the work place. Respondent proved by a preponderance of the evidence that Grievant engaged in the behavior set forth in her suspension letter. Moreover, the suspension was proper and justified as Grievant's performance and behavioral issues had been addressed with her many times throughout her employment, and had not improved, even after having been placed on employee performance improvement plans. 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

Performance Improvement Plan

1. Grievant is employed by the Department of Health and Human Resources ("DHHR") as a Child Support Specialist I (CSSI) in the Bureau of Child Support Enforcement ("BCSE"). Grievant has been employed at BCSE since June 16, 2015.

2. Melissa Sexton has been the Supervisor at BCSE's Fayette County office for approximately two years. Ms. Stalnaker manages Grievant. Ms. Sexton does employee performance appraisals; coaches; counsels, and guides employees; and handles discipline when appropriate.

3. Ms. Sexton explained that as a CSSI Grievant is responsible for doing client intake, creating case files, taking cases to court, establishing child support and collection of arrears. Grievant performs face-to-face interviews, converses via email with the public, and works with the court system in managing cases. Grievant interacts with other agencies, including social security, probation, and out of state child support offices. Grievant's average caseload is approximately 550 open cases. It is important to stay on task at all times due to the high volume of work.

4. On October 12, 2016, Ms. Sexton completed a monthly Employee Performance Appraisal on Grievant, concluding that Grievant did not meet expectations for the review period. Ms. Sexton placed Grievant on a Performance Improvement Plan. R. Ex. 1. Ms. Sexton commented that:

> Joni is exceeding in area of legal referrals by way of numbers. Joni's caseload was lowered from 562 to 379 during 30 day prior period but has raised to 453 during this rating period. She remains unable to satisfactorily complete the full complement of work and meet expectations of carrying a full caseload with minimal supervision as one would expect a child support specialist I with minimum of twelve months tenure to do. Joni now has tenure of 15 months and continues to struggle and fail to meet minimum expectations even with less than a full caseload after successful completion of training and ongoing mentoring.

R. Ex. 1.

5. Each Child Support Specialist is expected to perform monthly case reviews to make sure the case is up to date. They are to ensure the correct court order is in place, as well as ensuring liens, writs, and other orders are in place. The Federal Department of Health and Human Resources routinely performs case audits, with the goal being 100% current on case reviews. Grievant completed 21 out of 33 case reviews, or 64%. R. Ex. 1.

6. Ms. Sexton found that during the rating period Grievant was lacking in the area of follow up once an order had been entered. Lack of follow-up in one instance caused a $300 support payment from being properly processed. In another instance, Grievant failed to enter an amended income withholding for an increased amount of child support. R. Exs. 1, 2.

7. Ms. Sexton found that in at least three cases, no notes or case comments had been entered by Grievant. This is the only way anyone else reviewing the case file

would know what had been done, and what the current status is of the case. Grievant's failure to file case notes makes it look like nothing has been done on a case file.

8. Ms. Sexton found that Grievant was not giving "Held" money high priority. Held money is payments that come in but are "held" for processing for some reason. Processing the held money is a high priority because the money needs to get to the custodial parent. Ms. Sexton said that Held alerts must be processed within two days. The computer system will issue an ALRT H if the held money has not been processed in the two-day timeframe. Grievant continues to have messages on her ALRT H. R. Exs. 1, 2.

9. Ms. Sexton found that Grievant was deficient in setting and following through with ticklers in order to process new cases with the appropriate timeframe. In one instance, Grievant failed to follow through on a change of custody modification order, and the information did not get processed in a timely manner. R. Exs. 1, 2.

10. Ms. Sexton found that Grievant does not work her alert messages on a daily basis, and is inconsistent in the manner in which she does work her alerts. These alerts include held money, out-of-state interaction alerts, and officers' enforcement messages, and automatic income withholding messages. R. Exs. 1, 2.

11. Ms. Sexton found that Grievant did not work up her financial balances in cases to be sure they are correct. She also had follow-up issues once an audit of a case had been completed, to go back to the case and see what needs to be done. R. Exs. 1, 2.

12. Ms. Sexton found Grievant was not working her mail within the 10-day timeframe established by BCSE. This results in cases lacking in areas of legal, updating screens, updating locale information, and collections. R. Ex. 1, 2.

13. Ms. Sexton found Grievant was not following policy in the areas of adoption and deceased NCP (non-custodial parent). Grievant was not following through in cases where a child was adopted. If a NCP dies, it is important to look to see if there is an estate for collection purposes. The case should be referred for audit, the county clerk should be contacted, and appropriate steps taken in the case. Grievant was either not performing these steps, or not recording her efforts in the case file. R. Ex. 1, 2.

14. Ms. Sexton recommended, among other things, that Grievant needed to continue to review agency policy and procedures regarding the day-to-day operations of the office. Ms. Sexton moved Grievant, at Grievant's request, to a cubicle outside of her supervisor's office with hopes of there being fewer distractions. In the past, Grievant had been cautioned about spending too much time at other workers' desks, and excessive chatting with other workers. R. Ex. 1.

15. Ms. Sexton said that after two years, a child support specialist should be able to meet the 50-case review, handle referrals and collection, and be able to work a caseload with minimal supervision without the need of a mentor. Grievant has had three mentors in a two-year period of time.

Reprimand

16. On October 5, 2016, Kimberly Atkins, was working late in the office. Grievant approached Ms. Atkins and asked her why she was still at work. Ms. Atkins explained that she had been fifteen minutes late that morning due to traffic, and that their

supervisor, Ms. Sexton, had told her she could work fifteen minutes later to make up for the time. Grievant replied, "that bitch", referring to Ms. Sexton, apparently because Ms. Sexton had not allowed Grievant to similarly adjust time in the past.

17. Ms. Atkins had only been on the job for two days. She was shocked at Grievant's response, and felt she had been placed in an uncomfortable situation by Grievant, and did not want to be associated with that type of behavior in the office. Ms. Atkins reported the encounter to Ms. Sexton, and then typed up a statement regarding the incident. R. Ex. 3.

18. Ms. Atkins noted that there were two other workers present at the time of the incident, Becky Moore and Terri Massey. R. Ex. 3.

19. Ms. Sexton reported the incident to her manager, Deborah Bradley. Ms. Sexton did not interview either Ms. Moore or Ms. Massey regarding the incident. Ms. Bradley told Ms. Sexton to write a letter of reprimand to Grievant for Ms. Bradley's signature, in compliance with DHHR Policy Memorandums 2108, Employee Conduct, and 2104, Guide to Progressive Discipline. R. Exs. 4, 8, 9.

20. Ms. Bradley and Ms. Sexton hand-delivered the letter to Grievant on October 14, 2016. R. Ex. 5.

21. Grievant wrote a response to the letter of reprimand on October 19, 2016, denying all the allegations contained therein. R. Ex. 6.

Suspension

22. On November 21, 2016, as a result of Grievant's misconduct as reported in her letter of reprimand, and her unsatisfactory performance review, BCSE Commissioner Garrett Jacobs issued Grievant a notice of suspension for five working days, setting forth

Grievant's "continued unacceptable performance and behavior and ability to meet established goals and expectations for the position of Child Support Specialist 1." R. Ex

23. The letter of suspension indicates a "path" of corrective action attempts have been made for Grievant, beginning in February 22, 2016, and continuing through her employment period up and until the unsatisfactory performance review. The path of corrective action shows Grievant received approximately six prior PIPs and EPAs. Additionally, Grievant was suspended for three days on September 8, 2016. R. Ex. 7.[1]

24. On November 17, 2016, Ms. Bradley sent Grievant a notice of a pre-determination conference to be held on November 21, 2016.

25. At the pre-determination conference, Grievant informed Ms. Bradley and Ms. Sexton that she was legally blind, and would never be able to meet the expectations of her job.

26. Grievant had informed Ms. Bradley when she was offered the job that she was legally blind. Ms. Bradley believed Grievant could do the work of a child support specialist. Ms. Bradley encouraged Grievant to provide documentation of her visual impairment to the DHHR Office of Human Resource Management (OHRM). Grievant received a larger computer monitor, and was relocated in an area with better lighting. S*ee Whitt v. Dept. of Health and Human Res.*, Docket No. 2017-0971-DHHR (Apr. 11, 2017).

27. Ms. Bradley indicated that it is the hope to be able to promote a CSS1 to a CSS2 at the end of their first twelve months of employment. She said Grievant had never

[1]The previous improvement plans and disciplinary actions are more fully set forth in *Whitt v. Dep't of Health & Human Res.*, Docket No. 2017-0971-DHHR (Apr. 11, 2017), in which Grievant challenged a 3-day suspension and reprimand. The ALJ upheld DHHR's imposition of discipline on Grievant.

been able to obtain a full case load with overall sufficiency enough to be promoted to a CSS2, even after two years. She indicated Grievant had received necessary training, and had had more mentors in her two years than any other worker, without satisfactory results.

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. *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 and Human Res.*, Docket No. 92-HHR-486 (May 17, 26 1993), ***aff'd,*** Pleasants Co. Cir. Ct., Civil Action No. 43-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

DHHR argues that the performance improvement plan, reprimand and suspension were proper because Grievant failed to meet expectations even after lower methods of disciplinary action were utilized. The five-day suspension represents the next step in progressive discipline.

DHHR has shown by a preponderance of the evidence that it worked with Grievant through EPAs, PIPs and progressive discipline. Grievant was suspended only after other avenues of progressive discipline failed, in accordance with DHHR's Policy 2104, which favors a "corrective approach that implements non-disciplinary measures progressive through levels of discipline." R. Ex. 9.

The Grievance Board recently upheld a three-day suspension of Grievant. *Whitt v. Dep't of Health & Human Res.*, Docket No. 2017-0971-DHHR (Apr. 11, 2017). In that matter, Grievant was notified of her work deficiencies through numerous Performance Improvement Plans (PIP) and Employee Performance Appraisals (EPA). Grievant was ultimately suspended for three days after she did not improve after approximately six PIPs and EPAs. The Grievant Board upheld the suspension finding the Department proved Grievant failed to meet expectations over a period of several months.

Many of Grievant's deficient work practices discussed in *Whitt* are similar to the current issues, including not meeting case review expectations and not completing required reports. After the three-day suspension, Grievant did not improve, and she was issued an EPA and PIP on October 12, 2016. R. Ex. 1. Grievant was then reprimanded for calling her supervisor a bitch to another employee. R. Ex. 4. Because the deficiencies did not improve, Grievant was suspended for five days. R. Ex. 7.

Grievant claims she told Ms. Bradley at the beginning of her employment that she was legally blind, and would not be able to meet the expectations of her job. Ms. Bradley believed Grievant would be able to do the job. Grievant was provided with a larger computer monitor, and relocated to an area with better lighting. No other accommodations were requested by Grievant.

While there is no doubt that Grievant's visual impairment might make it more difficult for her to read some computer screens, her repeated deficiencies in work performance do not necessarily relate to her visual impairment. Many of the deficiencies noted include failure to keep case files up to date, failure to communicate actions taken on cases, and failure to keep up with her case load. One of the issues noted by Ms.

Sexton is Grievant's inability to stay on task, and spending too much time at other worker's desks.

Moreover, Grievant has had three different mentors to assist her in her work load. If her problems were primarily associated with her visual impairment, surely that would have been brought to the attention of her supervisor and manager. Her visual impairment was not noted as a reason for Grievant's inability to effectively perform her job.

With regard to the reprimand for calling her supervisor a bitch, Grievant denies the incident occurred, and challenges Ms. Atkins' credibility. She also questions why Ms. Sexton did not interview the two other workers who were present in determining whether the incident occurred as described by Ms. Atkins.

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 and Human Res./Huntington State Hosp.*, 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. Additionally, the administrative law judge should consider 1) the presence or absence of

bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra.*

The undersigned had the opportunity to observe Ms. Atkins during her testimony. Ms. Atkins was forthright in her recollection of the incident. Ms. Atkins had only been on the job three days at the time of the incident. She did not want to be associated with the conduct displayed by Grievant, and was put in an uncomfortable position. There was nothing in Ms. Atkins' testimony or demeanor to suggest she had an ulterior motive for reporting the incident to Ms. Sexton other than wanting to stay out of trouble in her new job.

Finally, Grievant argues that the suspension was excessive and should be mitigated. An allegation that a disciplinary measure is disproportionate to the offense proven is an affirmative defense. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995). The Grievance Board has held "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 to the employer's assessment of the seriousness of the employee's conduct and the prospects of rehabilitation." *Overbee v. Dep't of Health & Human Res.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

It is undisputed that Grievant's work performance issues have been addressed with her many times over the course of her two-year employement. Grievant has a history

of coachings, counselings, Performance Improvement Plans, verbal reprimands, and written reprimands for unsatisfactory performance, as well as for unprofessional conduct, all of which had been thoroughly documented by Respondent. Grievant has failed to provide any mitigating circumstances which would warrant a reduction in the punishment imposed by Respondent.

The following conclusions of law are appropriate in this matter:

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. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. Mitigation of a penalty is considered on a case-by-case basis. *See Conner v. Barbour County Bd. of Educ.*, Docket No. 95-01-031 (Sept. 29, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. 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).

3. However, “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 & Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

4. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994).

5. An allegation that a disciplinary measure is disproportionate to the offense proven is an affirmative defense. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995). The Grievance Board has held "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 to the employer's assessment of the seriousness of the employee's conduct and the prospects of rehabilitation." *Overbee v. Dep't of Health & Human Res.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

6. 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 and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1994).

7. The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra.*

8. Respondent proved the charges against Grievant by a preponderance of the evidence.

9. Grievant failed to prove mitigation was warranted.

10. Respondent's imposition of a five-day suspension is consistent with Policy 2104, in light of Grievant's previous disciplinary actions for the same unsatisfactory performance and behavior.

WHEREFORE, 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 W. Va. Code St. R. § 156-1-6.20 (2008).

Date: August 28, 2017

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Mary Jo Swartz
Administrative Law Judge