

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KIMBERLY COLLINS,

Grievant,

v.

Docket No. 2018-2061-DHHR

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

Respondent.

DECISION

Grievant, Kimberly Collins, filed an expedited level three grievance against her employer, Respondent, Department of Health and Human Resources (“DHHR”)/Bureau for Children and Families (“BCF”) stating as follows: “[d]ismissal without good cause.” As relief sought, Grievant seeks, “[t]o be made whole in every way including back pay with interest and all benefits restored.” The Grievance Board received this statement of grievance on April 9, 2018, but as it was postmarked April 6, 2018, such is considered the filing date.

A level three hearing was held on July 2, 2018, before the undersigned administrative law judge 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, Mindy M. Parsley, Esquire, Assistant Attorney General. This matter became mature for decision on August 13, 2018, 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 Services (“CPS”) worker in its Mingo County office. Grievant made an entry in the agency computer system indicating that she made face-to-face contact with a family in her caseload in January 2018. However, no such contact was ever made. Respondent dismissed Grievant alleging violation of certain policies and falsification of an agency record. Grievant denied Respondent’s allegations, asserting that the contact she entered contained errors, but that she did not falsify the agency record. Respondent failed to prove by a preponderance of the evidence that Grievant violated DHHR Policy Memorandum 2108 and CPS Policy 4.6 and 4.6(4). Respondent proved by a preponderance of the evidence that Grievant falsified an agency record which constituted good cause for her dismissal. 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 the times relevant herein, Grievant, Kimberly Collins, was employed by Respondent as a Child Protective Services (“CPS”) worker at Respondent’s Mingo County, West Virginia, office. Grievant has been employed by Respondent since February 1, 1995. Grievant has been a CPS worker since 2015. Grievant was a CPS Case Aide before becoming a CPS worker. Grievant also worked for DHHR-BCF in other capacities before becoming a CPS Case Aide.

2. Grievant began her CPS career as an intake worker completing family functioning assessments (“FFA”). Grievant was later assigned to CPS case management duties, including working in the field to make face-to-face contact with families.

3. Jessica Campbell is employed by Respondent as a CPS Supervisor in its Mingo County office. Ms. Campbell became Grievant’s direct supervisor on March 1, 2017.

4. James Blackburn is a CPS Supervisor in Respondent’s Mingo County office. At the times relevant herein, Mr. Blackburn was not Grievant’s immediate supervisor, but had been in the past. Mr. Blackburn had also worked with Grievant in Respondent’s Mingo County office before he became a CPS Supervisor in October 2015.¹

5. Heather McCoy is employed as the Community Services Manager (CSM) in Respondent’s Mingo County office. Ms. McCoy is the direct supervisor of Ms. Campbell and Mr. Blackburn.

6. On or about December 20, 2017, Ms. Campbell and/or Heather McCoy placed Grievant on a six-month Employee Performance Improvement Plan (“PIP”) to address issues of absenteeism and poor job performance.² This PIP was reviewed every thirty days and required that Grievant complete all tasks assigned to her on or before their deadlines, attend trainings as required to keep her social work license current, have annual leave pre-approved by a supervisor, and bring documentation for sick leave taken. Grievant was also required to see all of her clients at least once a month, and to see new

¹See, level three hearing testimony of James Blackburn.

² Jessica Campbell testified that she placed Grievant on the PIP; however, the December 20, 2017, PIP was signed by Heather McCoy.

clients within seven days of receiving their cases. The PIP also provided that Grievant was to adhere to all DHHR policy, procedures, and guidelines.³

7. Grievant did not grieve the decision to place her on the PIP.

8. Since Ms. Campbell became a CPS supervisor, she and Mr. Blackburn have conducted monthly audits of their CPS workers' cases to make sure the workers have made contact with their clients and that they are doing their jobs. Ms. Campbell and Mr. Blackburn may also audit cases for specific reasons, such as performance issues. When auditing cases, Ms. Campbell and Mr. Blackburn routinely call clients to ensure that contacts in the computer system are accurate.⁴

9. On or about January 26, 2018, Grievant entered a "contact" in the DHHR computer system in one of her cases, indicating that she had face-to-face contact with client V. C. at his or her home.⁵ When entering the contact, Grievant had the option of choosing "attempted contact" or "face-to-face" for the type of contact made with the client. Grievant listed five members of the household as "participants" in the contact.⁶ Grievant entered the following in the comment section of the contact entry: "[w]orker went to the home and made face to face with the family. V. (redacted name) reports the kids are going to school but have missed some days due to illnesses. Worker stressed the

³ See, Respondent's Exhibit 3, December 20, 2017, letter to Grievant signed by Heather McCoy; level three hearing testimony of Jessica Campbell.

⁴ See, level three hearing testimony of James Blackburn.

⁵ There is some dispute as to when the contact was entered into the computer. The contact is dated January 26, 2018. However, Grievant has asserted that the date listed on the contact may be the date on which the contact took place, or it may simply be the date the contact was entered into the system.

⁶ Respondent's clients will only be identified herein by their initials, if at all.

importance of attending school and keeping the children out of the court system due to truancy.”⁷

10. On Friday, January 26, 2018, Mr. Blackburn saw Grievant driving in town at around 4:10 p.m. and noticed that Grievant’s daughter was in the car with her. Mr. Blackburn promptly called the office and spoke to Ms. Campbell inquiring if Grievant had already gone home for the day. Ms. Campbell told him that Grievant was signed out to be working in the field. Mr. Blackburn told Ms. Campbell about seeing Grievant with her daughter in the car.

11. On Monday, January 29, 2018, Mr. Blackburn drafted and signed a written statement, bearing on the subject line “Kimberly Collins,” that stated as follows:

CPSS Blackburn observed Kimberly Collins driving near the BB&T bank on Second Avenue in Williamson on Friday, January 26, 2018 at approximately 4:10 p.m. Ms. Collins was driving the vehicle and CPSS Blackburn observed Ms. Collins’ daughter, [name redacted], in the passenger seat (sic). Upon observing Ms. Collins, CPSS Blackburn called Ms. Collins (sic) supervisor to see if Kimberly was already off work. CPSS Blackburn was informed that Ms. Collins was out in the field doing home visits. CPSS Jessica Campbell was informed that Ms. Collins had her daughter in the car driving in Williamson.”

Mr. Blackburn gave this statement to Ms. Campbell.⁸

12. Grievant had previously received permission from Ms. Campbell to pick her daughter up from a class or school and take her home during Grievant’s afternoon break and had done so.⁹ Mr. Blackburn was aware that, at least, in the past, Grievant had been

⁷ See, Respondent’s Exhibit 7, “Client Contact Report.”

⁸ See, Respondent’s Exhibit 10, James Blackburn memo dated January 29, 2018.

⁹ See, level three hearing testimony of Grievant; level three hearing testimony of James Blackburn.

granted such permission, and used her break to pick up her daughter and take her home. During the level three hearing, no one asked Ms. Campbell whether Grievant had permission to pick up her daughter while on her break on January 26, 2018.

13. Sometime after January 29, 2018, Mr. Blackburn audited at least one of Grievant's cases and/or contacts. It is unclear from the record if any of Grievant's other cases were audited, or if audits of other CPS workers' cases were audited at this time. When conducting case audits, it was common for Mr. Blackburn and Ms. Campbell to call clients to verify the accuracy of the contacts entered in the computer system.¹⁰

14. Mr. Blackburn found a contact dated January 26, 2018, at 4:30 p.m., which was the day he had seen Grievant driving in town. The contact indicated that Grievant had made face-to-face contact with the client. Mr. Blackburn telephoned the client, V. C., to verify the contact. Mr. Blackburn spoke with V. C. and asked her if she had met with her CPS worker, Grievant, on January 26, 2018. According to Mr. Blackburn, V. C. said no, and that she had not seen Grievant since December 20, 2017. Mr. Blackburn asked V. C. if she would provide a written statement to that effect and she stated that she would.

15. On or about February 6, 2018, Mr. Blackburn went to the home of V. C. and received a handwritten statement from her that stated as follows: "[t]o whom it may concern, [m]y worker Kimberly Collins last came by my house on December 20, 2017. Thank you, V.C. [name redacted] Feb. 06, 2018."¹¹

¹⁰See, level three hearing testimony of James Blackburn; level three hearing testimony of Jessica Campbell.

¹¹See, Respondent's Exhibit 11, note from V.C. dated February 6, 2018; level three hearing testimony of James Blackburn.

16. By letter dated February 15, 2018, Heather McCoy informed Grievant that a predetermination conference would be held on February 16, 2018, at 9:00 a.m. at the Mingo County DHHR office. This letter, serving as a notice, further states that,

[t]his meeting has become necessary based on the following allegations and/or policy violations. . .

In accordance with DHHR Policy Memorandum 2108-Employee Conduct. Employees of the Department of Health and Human Resources are expected to be accurate when completing all agency records.

On January 26, 2018, you recorded that you made a face to face contact with a customer in your caseload at 4:30 p.m. Upon performing case audits, it was discovered upon speaking with the customer, that you did not make a face to face contact with this customer on this date. The customer has provided statements accordingly, stating the exact date you last made a face to face contact with them.

On May 9, 2016, you signed an Employee Acknowledgement form regarding employee conduct and falsification of documents per policy 2108 which states, "I understand that I must abide by all terms of the policy, including that portion with (sic) states that employees must be accurate when completing agency records. In addition, falsification of any BCF document, be it a record in a written format in Rapids or Facts, or any other agency document will be considered gross misconduct and dereliction of my duties as an employee with the Bureau of Children and Families and will result in my immediate dismissal. . . .¹²

17. A predetermination conference was conducted on February 22, 2018. In attendance at this meeting were Heather McCoy, Jessica Campbell, James Blackburn, Grievant, and her representative Gordon Simmons, appearing telephonically. Grievant was asked about the contact, she stated that the contact was erroneous in that she had not made face-to-face contact with V. C., but that she had attempted contact with V. C.

¹²See, Respondent's Exhibit 1, February 15, 2018, letter.

Grievant was not informed of any determination of discipline at the conclusion of the predetermination conference.

18. By letter dated April 4, 2018, nearly two months after her predetermination conference, Respondent charged Grievant with “misconduct violating West Virginia Department of Health and Human Resources Child Protective Service Policy 4.6(4) Information Collection and West Virginia Department of Health and Human Resources Policy 2108 Employee Conduct Policy” by falsifying the January 26, 2018, contact, and dismissed her from employment for the same, effective April 20, 2018.¹³ This letter is signed by William Elden Belcher, Interim Regional Director, Region IV. However, Heather McCoy drafted this letter at the direction of the Office of Human Resource Management (OHRM).¹⁴

19. The April 4, 2018, letter described Grievant’s alleged misconduct in the letter, in part, as follows:

[y]our conduct has compromised the safety of vulnerable children as well as your credibility as a Child Protective Service Worker with the West Virginia Department of Health and Human Resources.

You recorded a face to face contact was made at 4:30 p.m. on January 26, 2018 on case # [redacted] with VC. Upon completion of case audits for this time period, Supervisor Blackburn made a call to the family in question and it was discovered that the face to face with VC is incorrect and false. The family provided two written statements to DHHR which stated that the last face to face contact had occurred with the family by Ms. Collins on December 20, 2017. This is in violation of DHHR Policy Memorandum 2108-Employee Conduct which states “Employees of the Department of Health and Human Resources are expected to be accurate when completing all agency records.”

¹³See, Respondent’s Exhibit 2, April 4, 2018, letter.

¹⁴See, level three hearing testimony of Heather McCoy.

Your conduct is in violation of the above-mentioned policy for which you were made fully aware. On May 9, 2016, you signed an Employee Acknowledgement form regarding employee conduct and falsification of documents per policy 2108 which states: "I understand that I must abide by all terms of the policy, including that portion which states that employees must be accurate when completing agency records. In addition, falsification of any BCF document, be it a record in a written format in Rapids or Facts, or any other agency document will be considered misconduct and dereliction of my duties as an employee with the Bureau of Children and Families and will result in my immediate dismissal." This action complies with the Department of Health and Human Resources (DHHR) Policy Memorandum 2104, *Progressive Correction and Disciplinary Action* and Section 12.2 of the West Virginia Division of Personnel, *Administrative Rule W. Va. Code R. §143-1-1 et seq. . . .*¹⁵

20. Nowhere in the dismissal letter are Grievant's PIP, her EPA-2s, her attendance, leave, or her daughter riding in her car mentioned. Grievant was dismissed solely for falsifying the January 26, 2018, contact she entered into the computer system in violation of policy.

21. William Elden Belcher was not called as a witness at the level three hearing in this matter, and did not otherwise appear.

22. The April 4, 2018, dismissal letter states that V. C. provided DHHR with two written statements. However, only one written statement was mentioned during the level three hearing and introduced as evidence.

23. Grievant had a good work record and her performance was evaluated as meeting expectations before Ms. Campbell became her supervisor. It is noted that in recent years, management and staffing changes were made in the Mingo County DHHR

¹⁵ See, Respondent's Exhibit 10, April 4, 2018, letter.

office, and many of the people Grievant had previously worked with had resigned their employment or been dismissed.¹⁶

24. Respondent did not present as evidence at the level three hearing copies of DHHR Policy 2108, DHHR-CPS Policy 4.6 and 4.6(4), or DHHR Policy 2104. These policies are not part of the West Virginia Code of State Rules, or the Division of Personnel Administrative Rule. Respondent referenced these policies in both its predetermination notice and the dismissal letter. These policies are not otherwise part of the record of this case.

25. On May 9, 2016, Grievant signed a form entitled, "Employee Acknowledgment Form Employee Conduct and Falsification of Records," which stated as follows:

I, Kimberly Collins, acknowledge that I have received and read the Department of Health and Human Resource[s], Employee Conduct Policy (Document #2108) that was effective February 28, 1992.

I understand that I must abide by all the terms of the policy including that portion which states that employees must be accurate when completing Agency records. In addition, falsification of any BCF document, be it a record in written form, in RAPIDS or FACTS, or any other agency document, will be considered gross misconduct and dereliction of my duties as an Employee with the Bureau of for Children and Families and will result in my immediate dismissal.

By my signature below I further acknowledge my understanding that falsification of documents could subject me to disciplinary action by the West Virginia Board of Social Work and that any testimony I may give, based upon falsified documents, could lead to criminal prosecution pursuant to West Virginia Code Section 61-5-2.¹⁷

¹⁶See, level three hearing testimony of Grievant.

¹⁷See, Respondent's Exhibit 8, unnumbered page 4, "Employee Acknowledgment Form Employee Conduct and Falsification of Records.

This document attached to a one-page memorandum from Nancy N. Exline, Commissioner, bearing the subject line, “Release of SOP and Acknowledgement Form Questionable Casework and Falsification of Records Policy,” and a two-page document entitled, “Standard Operating Procedures,” dated April 12, 2016, was presented as evidence at the level three hearing. It is noted that the memorandum purports to contain hyperlinks to DHHR Employee Conduct Policy 2108, and the National Association of Social Workers (NASW) Code of Ethics. DHHR-CPS Policy 4.6 and 4.6(4) are not mentioned in this memo, or in the attached Standard Operating Procedures.

26. The Standard Operating Procedures (SOP) document contained in Respondent’s Exhibit 8, states on the first line on page one, “[t]he following is a standard operating procedure (SOP) to guide Community Service Managers and Regional Directors should casework integrity become an issue.” This document contains no references to policies or hyperlinks to policies. This document is directed to management, and is a recitation of procedures management is to follow when a potential issue with the integrity of a worker’s casework, whether it be a CPS worker, or Foster Care, Youth Services, Adult Protective Services, or Adult Services workers. Nowhere in this document is dismissal of a worker for falsification of records mentioned.¹⁸

27. The SOP states, in part, the following: “[i]f a Community Service Manager (CSM) is alerted to a potential issue with the integrity of a worker’s casework, the CSM must immediately notify the Regional Director (RD) and Deputy Commissioner (DC) of the possible issue. The DC, RD & CSM will take action to protect the public and cause

¹⁸See, Respondent’s Exhibit 8, unnumbered page 2, Standard Operating Procedures.

an immediate review to take place. If the issue is confirmed, the RD & CSM will work with the Regional Program Manager (RPM) to audit all other casework performed by the worker in question. Additionally, the CSM will immediately reassign all open assignments to another worker.”¹⁹

28. There has been no evidence to suggest that an audit of all Grievant’s other casework was conducted, or that Grievant’s other open cases were reassigned to another worker prior to her dismissal on April 6, 2018.

Discussion

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). “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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. 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 DHHR-CPS Policy 4.6(4) “Information Collection” and DHHR Policy Memorandum 2108, “Employee Conduct,” by falsifying a contact she entered into the agency computer system and that such justifies her dismissal. Grievant denies Respondent’s allegations, asserting that she did not falsify any records. Grievant argues that she made an error when entering a contact in the computer system. She contends that she meant to enter the information as an attempted contact and that she made an error.

¹⁹See, Respondent’s Exhibit 8, unnumbered page 2, Standard Operating Procedures.

Permanent state employees who are in the classified service can only be dismissed “for good cause, which means 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); *Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004) (*per curiam*). See also W. VA. CODE ST. R. § 143-1-12.2.a. (2016). “Although it is true that dismissal is inappropriate when the employee's violation is found to be merely a technical one, it is also true that seriously wrongful conduct can lead to dismissal even if it is not a technical violation of any statute. . . . The test is not whether the conduct breaks a specific law, but rather whether it is potentially damaging to the rights and interests of the public.” *W. Va. Dep't of Corr. v. Lemasters*, 173 W. Va. 159, 162, 313 S.E.2d 436, 439 (1984). “‘Good cause’ for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety.” *Drown v. W. Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988) (*per curiam*). “[T]he work record of a long time civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct.” *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 285, 332 S.E.2d 579, 585 (1985). See *Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983); *Serreno v. W. Va. Civil Serv. Comm'n*, 169 W. Va. 111, 285 S.E.2d 899 (1982).

As the facts in this matter are disputed, credibility determinations must be made. 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); *Young v. Div. of Natural Res.*, Docket No. 2009-0540-DOC (Nov. 13, 2009); See also *Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 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 ALJ 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. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Grievant testified at the level three hearing in this matter. Grievant appeared calm and otherwise demonstrated the appropriate demeanor. Grievant has an interest in this matter as she is seeking to be reinstated in her CPS worker position which could be a motive to be untruthful. On direct examination, she was direct and answered the questions asked of her. She was not evasive. On cross examination, Grievant appeared evasive when asked about when she entered the contact dated January 26, 2018, and the contact comments section. When asked about the case-specific comments in the contact, and how such could be an error, she kept saying that she entered the contact when she had notes “all around her.” She really did not answer the question. Grievant also appeared to suggest that the contact in question may have been from her December

2017 face-to-face contact, and not the attempted contact on January 26. These statements made no sense given her responses during direct examination and suggested that Grievant had no independent recollection of the day she supposedly entered the contact at all. She appeared to be guessing at why those case-specific comments were entered in the contact. She further suggested that she could have copied older comments already in the computer and pasted them into the January 26, 2018, contact by mistake. It is certainly possible that Grievant was confused, but her responses damaged her credibility.

Jessica Campbell testified at the level three hearing in this matter. While being questioned, Ms. Campbell appeared calm and professional. She demonstrated the appropriate demeanor during the hearing. In answering the questions asked of her, Ms. Campbell was direct, but somewhat quiet. She did not appear evasive. While Ms. Campbell had only been a CPS supervisor for about a year when Grievant was dismissed from employment, she appeared knowledgeable about CPS and the duties and responsibilities of CPS workers. As Grievant's supervisor, Ms. Campbell had some input into the decision to dismiss Grievant and she participated in the predetermination conference. As at least some of her decisions are being challenged by this grievance, Ms. Campbell can be viewed as having some interest in this matter. Also, Ms. Campbell is the person who placed Grievant on the PIP and evaluated her as not meeting expectations around the time of the events at issue. While Grievant's work performance is irrelevant in this matter given that she was dismissed for the charge of falsification of a record, such could certainly be considered a bias against Grievant, or a motive for Ms. Campbell to be untruthful.

Heather McCoy testified at the level three hearing. During her questioning, she appeared calm, professional, and direct. During her direct examination, Ms. McCoy answered the questions asked of her, and she was not evasive. Ms. McCoy's demeanor changed some during her cross examination by Grievant's representative. Ms. McCoy appeared more reserved and less comfortable. Further, her answers to some of the questions were confusing. For example, when asked how she determined that the January 26, 2018, contact was a falsification and not merely an error, she would only say that is what the evidence showed. She had mentioned the case specific comments in the contact, but would not explain why she believed the contact was deliberately falsified. Ms. McCoy was involved in the decision to dismiss Grievant, and participated in the predetermination conference. She communicated with OHRM regarding the decision to dismiss Grievant and drafted the dismissal letter. Ms. McCoy is also Ms. Campbell and Mr. Blackburn's direct supervisor. Ms. McCoy's involvement in the disciplinary process and decision-making, as well as her relationship to Ms. Campbell and Mr. Blackburn, could suggest an interest in this matter, bias against Grievant, and a motive to be untruthful.

James Blackburn testified at the level three hearing in this matter. During his direct examination, Mr. Blackburn appeared calm and his answers were direct. During his cross examination by Grievant's representative, his demeanor changed some. He answered most of the questions asked of him, but he appeared evasive at times. For example, Mr. Blackburn would not answer Grievant's representative's yes or no question about whether he had ever found errors, mistakes, or faulty information in Grievant's cases when

auditing her work in the past until the ALJ intervened. Ultimately, Mr. Blackburn's answer to that question was "no."

Also, during his testimony, both direct and cross examination, Mr. Blackburn seemed eager to find fault with Grievant's actions. While he testified that he and Ms. Campbell audit cases randomly, it did not seem like a coincidence that he was auditing Grievant's contact from the same day and about the same time as when he reported seeing her driving in town with her daughter when she was signed out to do field work. Mr. Blackburn was the person who investigated that contact, spoke to the client, V.C, and went to the client's house to obtain a written statement. This contact is the allegedly falsified record for which Grievant was dismissed from employment. Mr. Blackburn also made a point to work into his testimony that, in the past, he and Ms. Campbell had received "multiple reports" of Grievant driving with people in the car with her while out doing field work, but they had been unable to verify the same. Mr. Blackburn admitted during cross examination that he knew of Grievant having permission to pick up her daughter during her break in the past. However, he further testified that he was not aware of such permission having been granted on January 26, 2018. Mr. Blackburn appeared credible during portions of his testimony, but not credible during others. The fact that he appeared so eager to find fault with so much of Grievant's actions and work diminished his credibility.

In this matter, Respondent must prove the charges against Grievant and that the disciplinary action it took against Grievant was justified. Respondent failed to enter into evidence any of the policies Grievant is accused of violating. There is a hyperlink to DHHR Policy Memorandum 2108 referenced in Respondent's Exhibit 8, but the policy

itself is absent from the record. Respondent has produced Grievant's acknowledgment of receipt of DHHR Policy Memorandum 2108, but no copy of the policy is included. There is no mention of CPS Policy 4.6 or 4.6(4) anywhere in Respondent's Exhibit 8, not even in the Grievant's acknowledgement. There is no way for the ALJ to determine whether Grievant has violated the policies if the ALJ does not know what the policies say. Despite being given opportunity to submit the complete policy, Respondent failed to do so. Therefore, Respondent has failed to meet its burden of proving that Grievant violated any of the policies alleged.

Respondent introduced evidence of Grievant's performance issues, and counsel for Respondent stated that the dismissal was for attendance and performance issues in addition to falsification of a record. However, there is no mention in the dismissal letter of any performance or attendance issues. Also, Ms. Campbell and Ms. McCoy testified that Grievant was dismissed for falsification of a record, not for performance issues. Accordingly, the PIP, evaluations, and other evidence regarding Grievant's work performance are irrelevant, and entitled to no weight.

This issue now becomes whether Respondent proved by a preponderance of the evidence that Grievant falsified the contact dated January 26, 2018. Grievant has claimed throughout that she made an error when entering the contact. However, her testimony regarding such did not make much sense. Grievant does not dispute that the contact does not reflect what actually occurred. She claims this was a simple entry error. However, that does not seem plausible.

Grievant claims that she had attempted a contact with V. C.'s family that day, but they were not at home when she stopped by. However, she entered the contact as a

face-to-face contact. When entering the contact, Grievant had the option of choosing “attempted contact,” but she did not select it. Instead, she entered it as an actual face-to-face contact, and then went on to enter case-specific comments summarizing a conversation she had with V. C. This conversation simply did not happen because there was no contact made that day, and Grievant does not dispute this. Grievant had only guesses as to why she entered these comments or where they came from. Grievant claimed to have spoken to V.C. on the phone sometime and at the face-to-face visit in December 2017. However, Grievant did not appear to have any real recollection of this particular conversation taking place. If this contact were only erroneous, it would seem more plausible that there would be no case comments at all. For example, if Grievant just checked the wrong box, marking “face-to-face” instead of “attempted,” it would appear more likely that she would have proceeded to treat it like an attempted contact and make no comments because no conversation happened. Grievant is asserting that not only did she check the wrong box, but also she mistakenly entered comments in which she includes V. C.’s name.

Grievant also theorized that she could have “copied” these comments from an older entry and mistakenly “pasted” them into the contact. This also does not seem plausible because she appeared to have no recollection of making this contact entry in January, or of having the conversation with V. C. at all. Grievant did not claim that she reviewed the past entries routinely when entering contacts. Grievant also did not explain how she would have been in the older entries to “copy” the comments. If Grievant had a recollection of making this entry, or having the conversation with V. C. at some point, this analysis might be different.

Grievant's only recollection of entering the contact at issue is that she "had notes all around her" when she entered it. It appears that Grievant was suggesting that she mistakenly pulled the information from an old note. Grievant also testified that this contact could be an entry for her December 20, 2017, face-to-face meeting with V. C. However, it does not make sense that she would be entering the contact for that meeting over a month later on January 26, 2018, just after having attempted another contact with that family that day. Grievant also testified that the date on the contact, January 26, 2018, may not have been the date she entered the contact. Instead, that may have only been the date she stopped by V. C.'s home and attempted the contact.

Based upon Grievant's testimony alone, it appears more likely than not that she intentionally entered the January 26, 2018, contact as a face-to-face contact and intentionally entered the case specific comments summarizing a conversation with V. C. Grievant's lack of recollection of entering the contact, and her never having that conversation with V. C., along with it being highly improbable to both mistakenly enter the contact as face-to-face and mistakenly enter case-specific comments summarizing a conversation she had with the client, make Grievant's claim of mere error simply implausible.

Further, an intentional misstatement of facts, or falsification, in a Child Protective Services case record is good cause for dismissal. Face-to-face contacts between CPS workers and the children they are assigned to protect are critical to ensure the safety of the children. When face-to-face contacts do not occur, children are placed at risk of harm. To intentionally report a face-to-face contact in a CPS case indicating that the subject children are okay when that contact never occurred actually endangers those children.

Therefore, Grievant's conduct shows a gross disregard for public safety. Grievant was a long-term employee at the time in question and had a good work record until Ms. Campbell became her supervisor. However, given the significance of Grievant's misconduct, as detailed herein, dismissal is appropriate. Respondent has proved that there was good cause for Grievant's dismissal. 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 to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. 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.*

2. Permanent state employees who are in the classified service can only be dismissed "for good cause, which means 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); *Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004) (*per curiam*). See also W. VA. CODE ST. R. § 143-1-12.2.a. (2016). "Although it is true that dismissal is

inappropriate when the employee's violation is found to be merely a technical one, it is also true that seriously wrongful conduct can lead to dismissal even if it is not a technical violation of any statute. . . . The test is not whether the conduct breaks a specific law, but rather whether it is potentially damaging to the rights and interests of the public.” *W. Va. Dep’t of Corr. v. Lemasters*, 173 W. Va. 159, 162, 313 S.E.2d 436, 439 (1984). “‘Good cause’ for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety.” *Drown v. W. Va. Civil Serv. Comm’n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988) (*per curiam*).

3. “[T]he work record of a long time civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct.” *Buskirk v. Civil Serv. Comm’n*, 175 W. Va. 279, 285, 332 S.E.2d 579, 585 (1985). *See Blake v. Civil Serv. Comm’n*, 172 W. Va. 711, 310 S.E.2d 472 (1983); *Serreno v. W. Va. Civil Serv. Comm’n*, 169 W. Va. 111, 285 S.E.2d 899 (1982).

4. 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).

5. 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).

6. Respondent failed to prove by a preponderance of the evidence that Grievant violated DHHR Policy Memorandum 2108 and Child Protective Services Policy 4.6 and 4.6(4).

7. Respondent proved by a preponderance of the evidence that Grievant falsified the CPS case contact dated January 26, 2018, and that such was good cause for Grievant's dismissal.

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* W. VA.
CODE ST. R. § 156-1-6.20 (2018).

DATE: October 11, 2018.

Carrie H. LeFevre
Administrative Law Judge