

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KELLIE DESROSIERS,

Grievant,

v.

Docket No. 2018-1349-DHHR

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

Respondent.

DECISION

Grievant, Kellie Desrosiers, 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: “[o]n this day June 4, 2018 I received a Notice of Dismissal from Raleigh County DHHR signed by Joe Bullington. I would like to file a grievance and appeal this decision. I am attaching a full statement of some events that took place during my employment that I feel should have been addressed earlier and were swept away. . . .” Grievant then attached a twelve-page typed document further detailing her claim. Therein Grievant alleges a claim of hostile work environment. As relief sought, Grievant seeks, “[r]einstatement of my position and permanent transfer to another county preferably Mercer, Greenbrier or Summers.” This grievance form bears Grievant’s signature which is dated June 15, 2018. The Grievance Board received the grievance form on June 21, 2018, but as it was postmarked June 18, 2018, such is considered the filing date.

A level three hearing was held on October 11, 2018, before the undersigned administrative law judge at the Raleigh County Commission on Aging in Beckley, West

Virginia. Grievant appeared in person, *pro se*.¹ Respondent appeared by counsel, Mindy M. Parsley, Esquire, Assistant Attorney General. This matter became mature for decision on November 19, 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 Raleigh County office. Respondent dismissed Grievant alleging violation of certain policies and falsification of agency records. Grievant admitted to entering the false contacts, but argued that she did so out of fear of losing her job for failing to make all of her contacts for the month and that she was told by a coworker that entering such false contacts was common practice. Respondent proved by a preponderance of the evidence that Grievant violated DHHR Policy Memorandum 2108 by falsifying the three contacts and that such 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, Kellie Desrosiers, was employed by Respondent as a Child Protective Services ("CPS") Worker at Respondent's Raleigh County, West Virginia, office. Grievant has been employed by Respondent since April 3, 2017.

¹ For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

2. Grievant began at CPS as an intake worker. In this position, Grievant received and investigated referrals regarding alleged child abuse or neglect.

3. At the times relevant herein, Lora Bailey was employed by Respondent as a CPS Supervisor in the Raleigh County DHHR office. Ms. Bailey was Grievant's direct supervisor. Michael S. Horton was employed by Respondent as the Social Services Coordinator at the Raleigh County DHHR. Elden Belcher was employed by Respondent as the Community Services Manager for Raleigh County. Joe Bullington was employed by Respondent as the Regional Director for Region IV which includes Raleigh County.

4. On or about April 13, 2018, Grievant entered three "contacts" in the DHHR computer system in one of her cases, indicating that she had face-to-face contact with three children in three separate placements at their homes that same day. However, Grievant had not made face-to-face contact with those children. Grievant admits that she knowingly entered these false contacts into the computer system.

5. By letter dated May 24, 2018, Michael Horton informed Grievant that a predetermination conference would be held on May 30, 2018, at 10:00 a.m. at his office at the Raleigh 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. (sic)

A review of FACTS indicates that in case #[redacted] you have documented face to face contact with three children in three separate placements for April 13, 2018, at 12:30 PM on April 13, 2018, at 01:00 PM on April 13, and at 02:00 PM on April 13, 2018. Each of the three individuals who have placement of these three children indicate that they did not see you, you were not in their homes, you did not see any of the three children on that date or any date during the month of April 2018. The April 13, 2018[,] documentation that you have entered in FACTS for case #[redacted] is incorrect, false and did not occur. Falsification of any Bureau for Children and

Families (BCF) document is a violation of Employee Conduct Policy, Document 2108.

The purpose of the predetermination meeting is to give you an opportunity to respond to the aforementioned items and provide input for our consideration. You may present any information you believe would be supportive of your position.
..²

6. A predetermination meeting was conducted as scheduled on May 30, 2018. In attendance at this meeting were Social Service Coordinator Horton, CPS Supervisor Bailey, and Grievant. At this meeting, Grievant was asked about the three contacts and she admitted to entering them as face-to-face contacts even though she had not made contact with them that month. Grievant explained that a coworker told her that if she failed to make contacts each month, she would be terminated from her position and that entering false contacts was a common practice. Fearing that she would be fired, she knowingly made the entries in the computer system indicating that she had made face-to-face contact with the children.³

7. By letter dated June 4, 2018, Respondent charged Grievant with “misconduct violating the West Virginia Department of Health and Human Resources Child Protective Service Policy 5.9(2) Managing the Out of Home Safety Plan and the West Virginia Department of Health and Human Resources Policy 2108 Employee Conduct Policy” by falsifying the April 13, 2018, contacts, and dismissed her from employment for the same, effective June 20, 2018. This letter is signed by Joe Bullington, Regional Director, Region IV.

² See, Respondent’s Exhibit 2, May 24, 2018, letter.

³ See, testimony of Grievant; Respondent’s Exhibit 2, May 24, 2018, letter; testimony of Michael Horton.

8. The June 4, 2018, letter described Grievant's alleged misconduct in the letter, in part, as follows:

Your dismissal is the result of your misconduct violating the West Virginia Department of Health and Human Resources Child Protective Service Policy 5.9(2) Managing the Out of Home Safety Plan and the West Virginia Department of Health and Human Resources Policy 2108 Employee Conduct Policy. Your 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.

Your dismissal is the result of the following: A review of FACTS indicates that on case # [redacted] you have documented face to face contacts with each of three separate children in three separate placements for April 13th, 2018 at 12:30 PM, April 13th, 2018 at 01:00 PM, and April 13th, 2018 at 2:00 PM. Each of the three individuals who have placement of each of the three respective children in your documented contacts on those specific dates/times indicate that they did not see you, you were not in their homes, and you did not see any of those three concerned children on that date, or any date during the month of April 2018.

The April 13th, 2018 documentation that you have entered in FACTS for case #[redacted] is incorrect or false. Falsification of any Bureau for Children and Families (BCF) document is a violation of Employee Conduct Policy 2108. . .

Your actions have called your credibility into question as a child protective services worker and will legally compromise any investigation/assessment or case that is assigned to you. By not observing/interviewing the placement providers and children in custody face to face, and failing to enter factual documentation, the safety of the children was not fully ensured and confirmed. Furthermore, falsifying case records poses a threat of further harm. By obstructing the Agency's historical evaluation and delivery of appropriate future services, persons involved are placed at risk of continuing danger. . . .⁴

⁴ See, Respondent's Exhibit 4, June 4, 2018, letter.

9. Grievant had a good work record and her performance was evaluated as meeting expectations. However, Grievant had only been employed by CPS for about one year at the time of the events at issue.

10. Respondent did not present as evidence at the level three hearing copies of DHHR-CPS Policy 5.9(2) and 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.

11. On April 3, 2017, Grievant signed a form entitled, "Employee Acknowledgment Form Employee Conduct and Falsification of Records," which stated as follows:

I, Kellie Desrosiers, 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 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 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 61-5-2.⁵

⁵See, Respondent's Exhibit 1, 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 DHHR Policy 2108 Employee Conduct, was presented as evidence at the level three hearing. It is noted that the one-page 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 5.9(2) is not mentioned in this memo, Policy Memorandum 2108, or the Employee Acknowledgement Form.

12. Grievant called no witnesses other than herself at the level three hearing. Grievant did not request subpoenas for witnesses prior to the hearing as permitted by the Grievance Board Procedural Rules, and as noted in the Notice of Hearing issued on July 10, 2018. Grievant informed the ALJ that she wished to go forward on her grievance despite calling no witnesses, and stated that she did not want a continuance.

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). In non-disciplinary matters, the grievant has the burden of proving his claims by a preponderance of the evidence. See *Id.* “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 burden has not been met. *Id.*

Respondent asserts that Grievant violated the DHHR-BCF Standard Operating Procedures (SOP) Regarding Questionable Casework, DHHR Policy Memorandum 2108, "Employee Conduct," and Child Protective Service Policy 5.9(2) "Managing the Out of Home Safety Plan," by falsifying contacts she entered into the agency computer system and that such justifies her dismissal. Grievant has admitted to entering the three false contacts in the computer system. However, Grievant asserts that she made the entry because coworkers told her that it was common practice and that she would be fired if she failed to make all of her contacts each month. Grievant also asserts that Supervisor Bailey created a hostile work environment for her which resulted in her dismissal.

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).

In this matter, Respondent must prove the charges against Grievant and that the disciplinary action it took against Grievant was justified. DHHR Policy Memorandum 2108 Employee Conduct states, in part, as follows:

Employees are expected to: comply with all relevant Federal, State and local laws; comply with all Division of Personnel and Department policies; comply with all applicable State and Federal Regulations governing their field of employment; follow directives of their supervisors; conduct themselves professionally in the presence of residents/patients/clients, fellow employees and the public; respect the property of residents/patients/clients, fellow employees and the State; be accurate when completing Agency records; maintain the confidentiality of all Agency records including personnel, resident/patient/client records; use State vehicles, telephones and equipment only as authorized; exercise standard client residents/patients/clients or fellow employees⁶; exercise safety precautions; and be ethical, alert, polite, sober, and attentive to the responsibilities associated with their jobs.⁷

The “Employee Acknowledgement Form, Employee Conduct and Falsification of Records” signed by Grievant on April 3, 2017, states as follows:

⁶ This is a direct quotation and the undersigned ALJ does not understand the meaning of this particular clause.

⁷ See, Respondent’s Exhibit 1, unnumbered page 3, DHHR Policy Memorandum 2108 Employee Conduct, Section VIII “Policy and Procedures.”

I, Kellie Desrosiers, 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 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 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 61-5-2.⁸

By her own admission, Grievant has violated Policy Memorandum 2108 by entering the false contacts into the CPS computer system. Further, she acknowledged by her signature that such behavior is considered gross misconduct that would result in her immediate dismissal. There is no mention of CPS Policy 5.9(2) anywhere in Respondent's Exhibit 1, not even in the Employee Acknowledgement Form. Respondent did not otherwise present CPS Policy 5.9(2) as evidence at the level three hearing, and it is not a part of the record of this grievance. Also, Respondent did not introduce the actual Standard Operating Procedures. Respondent only introduced a memorandum containing hyperlinks to other policies that appears may have accompanied the Standard Operating Procedures when they were released. Accordingly, there is no way for the ALJ to

⁸See, Respondent's Exhibit 1, unnumbered page 4, "Employee Acknowledgment Form Employee Conduct and Falsification of Records.

determine whether Grievant has violated CPS Policy 5.9(2) and the Standard Operating Procedures if ALJ does not know what the policies say.

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 endangers those children. Therefore, Grievant's conduct shows a gross disregard for public safety. Grievant had a good work record until this issue with false contacts arose. However, given the significance of Grievant's misconduct, as detailed herein, dismissal is appropriate.

Grievant appears to argue that Supervisor Bailey created a hostile work environment for her that eventually lead to her dismissal. "Harassment" means repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." W. VA. CODE § 6C-2-2(I). "What constitutes harassment varies based upon the factual situation in each individual grievance." *Sellers v. Wetzel County Bd. of Educ.*, Docket No. 97-52-183 (Sept. 30, 1997).

This Board has generally followed the analysis of the federal and state courts in determining what constitutes a hostile work environment. *Beverly v. Div. of Highways*, Docket No. 2014-0461-DOT (Aug. 19, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-95 (Mar. 31, 2015); *Vance v. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2011-1705-MAPS (Feb. 22, 2012), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 12-AA-32 (Jul. 5,

2012); *Rogers v. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2009-0685-MAPS (Apr. 23, 2009), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 09-AA-92 (Dec. 8, 2010). The point at which a work environment becomes hostile or abusive does not depend on any "mathematically precise test." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22, (1993). Instead, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, 'considering all the circumstances.'" *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (citing *Harris*, 510 U.S. at 23). These circumstances "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance" but "no single factor is required." *Harris*, 510 U.S. at 23.

"To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment. See *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998) (*per curiam*). "As a general rule 'more than a few isolated incidents are required' to meet the pervasive requirement of proof for a hostile work environment case. *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 573 (8th Cir. 1997)." *Fairmont Specialty Servs. v. W. Va. Human Rights Comm'n*, 206 W. Va. 86, 96, 522 S.E.2d 180, 190 n.9 (1999).

While Grievant testified about her relationship with Supervisor Bailey, her training deficiencies, and produced the outline she drafted in anticipation of meeting with Mr. Horton in or about October 2017 which detailed issues and concerns she had about her work and Supervisor Bailey, she introduced no other evidence to support her claims.

Grievant's testimony and her outline are evidence, but they are self-serving, and amount to mere allegations. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Trs./W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998) (citing *Harrison v. W. Va. Bd. of Drs./Bluefield State Coll.*, Docket No. 93-BOD-400 (Apr. 11, 1995)). Grievant called no witnesses other than herself, and presented no other documentation. When asked by the ALJ about calling witnesses, Grievant stated that no one would come because they were afraid they would lose their jobs. Grievant did not give any other details or expand on this statement. Also, Grievant had not requested subpoenas for anyone in advance of the hearing as is permitted under the Grievance Board's Procedural Rules. It is obvious that Grievant and Supervisor Bailey did not get along well, and that Grievant was afraid of Supervisor Bailey; however, Grievant has failed to prove her claim of hostile work environment by a preponderance of the evidence.

Grievant has admitted entering the false contacts. She even states in the attachment to her grievance form that she felt sick after she entered them. Grievant knew that entering false contacts into the computer system was wrong. However, she argues that she did so because her coworker told her that Supervisor Bailey would dismiss her for failing to make her contacts for the month and that entering false contacts was a common practice. Given the evidence presented, it really does not matter. Grievant knowingly entered three false face-to-face contacts in the computer system indicating that she had seen three children who were in foster care placements and that they were okay. This is unacceptable. Respondent had the authority to dismiss Grievant for this misconduct and did. Respondent has met its burden of proving that Grievant violated

Policy Memorandum 2108 which justifies her 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). In non-disciplinary matters, the grievant has the burden of proving his claims by a preponderance of the evidence. See *Id.* “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 burden has not been met. *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. Respondent failed to prove by a preponderance of the evidence that Grievant violated Child Protective Service Policy 5.9 (2) and the Standard Operating Procedures.

4. Respondent proved by a preponderance of the evidence that Grievant falsified three CPS case contacts dated April 13, 2018, in violation of DHHR Policy Memorandum 2108, and that such was good cause for Grievant’s dismissal.

5. “Mere allegations alone without substantiating facts are insufficient to prove a grievance.” *Baker v. Bd. of Trs./W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998) (citing *Harrison v. W. Va. Bd. of Drs./Bluefield State Coll.*, Docket No. 93-BOD-400 (Apr. 11, 1995)).

6. Grievant failed to prove her claim of hostile work environment by a preponderance of the evidence.

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: January 9, 2019.

Carrie H. LeFevre
Administrative Law Judge