THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CHELSEA NARKEVIC,

Grievant,

v. **Docket No. 2019-0473-DHHR**

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

Respondent.

DECISION

Grievant, Chelsea Narkevic, was employed by Respondent, Department of Health and Human Resources/Bureau for Children and Families (DHHR). On October 15, 2018, Grievant filed this grievance against Respondent stating, "Grievant has been wrongfully terminated, for 'gross misconduct,' from her employment as a Child Protective Service Trainee with the Department of Health and Human Resources, Bureau for Children and Families. The ostensible reasons for the termination are, in the opinion of Grievant, either vague or specious, unfounded, factually baseless or misleading, and legally unsupportable . . ." For relief, Grievant seeks "Reversal of the wrongful termination and reinstatement to her position of employment. …"

Grievant filed directly to level three of the grievance process.[1] A level three hearing was held on February 5, 2019, before the undersigned at the Grievance Board's Elkin's office. Grievant appeared in person and was represented by Jodi Durham, Esq. Respondent was represented by Katherine Campbell, Assistant Attorney General. This

[1]West Virginia Code § 6C-2-4(a)(4) permits a grievant to proceed directly to level three of the grievance process when the grievance deals with the discharge of the grievant.

matter became mature for decision on March 25, 2019, after receipt of each party's written proposed findings of fact and conclusions of law.

Synopsis

Grievant was a probationary employee as a Child Protective Service Worker Trainee when Respondent dismissed her for gross misconduct. Respondent contends that Grievant started a romantic relationship with a client's father while working on the child's abuse and neglect case. Respondent asserts that Grievant's conduct was unethical, even though the father was the non-offending parent, because the father also became a client once listed on the petition filed by DHHR on behalf of the child. Grievant contends that Respondent did not provide sufficient ethics training or adequately define "client". Respondent counters that it was Grievant's responsibility to familiarize herself with her ethical obligations through the resources made available to her. Grievant asserts that these resources did not define "client" to include the father and that, even if she committed an infraction, Respondent's harsh penalty warranted mitigation, given her lack of training and resources, and her stellar employment record. Even though it is not clear that the father was a client under the resources provided Grievant, these resources do make clear that Grievant engaged in misconduct by violating her ethical obligations when she had sexual contact with the father of a known client. Grievant did not prove her punishment was arbitrary and capricious or warranted mitigation. Accordingly, the grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant was employed as a Child Protective Service (CPS) Worker Trainee with DHHR since January of 2018.

2. Grievant worked out of the Barbour County DHHR office.

3. Grievant's immediate supervisor was Amanda Gifford.

4. As an intake worker, Grievant received initial referrals, took the beginning steps in opening a case, and contacted families to determine if allegations of abuse and neglect could be substantiated. (Grievant's testimony)

5. An intake worker has the case for 30 days to determine whether to open it for investigation or close it. An intake worker attends preliminary hearings. If the intake worker opens the case, it is passed off to an ongoing worker. An intake worker might continue to have access to and influence a case even after it has been passed off to other workers. (Ms. Gifford's testimony)

6. In order to be a CPS Worker or a CPS Worker Trainee, one must hold a license with the West Virginia Board of Social Work. (Ms. Gifford and Mr. Taylor's testimony)

7. Soon after beginning her employment with Respondent, Grievant obtained a provisional license with the West Virginia Board of Social Work to practice as a social worker. (Respondent's Exhibits 1, 2, & 3)

8. In holding a provisional license, Grievant is required to familiarize herself with and adhere to the National Association of Social Workers (NASW) Code of Ethics. (Respondent's Exhibits 1, 2, & 3)

9. Grievant signed an acknowledgment that she would strictly adhere to the NASW Code of Ethics. (Respondent's Exhibit 1)

10. The NASW Code of Ethics, section 1.06 (c), states that "[s]ocial workers should not engage in dual or multiple relationships with clients or former clients in which there is a risk of exploitation or potential harm to the client." (Respondent's Exhibit 4)

11. Grievant's licensing supervisor was Lawrence Taylor.

12. Mr. Taylor did not cover the definition of "client" with Grievant. (Mr. Taylor's testimony)

13. On or about June 18, 2018, Grievant was assigned a case regarding a drug affected infant. (Grievant's testimony)

14. Because Grievant was not in the office for the few days during and after the case assignment, a co-worker implemented a safety plan. Upon her return, Grievant determined that the safety plan was inadequate to protect the child and removed the child from the mother's home. (Grievant's testimony)

15. After the drug affected child was removed, Grievant determined that the mother had another child who was not at the time present in her home, but was with the child's father, Adam Everson. (Grievant's testimony)

16. Both Mr. Everson and the child's mother had equal custodial time with this second child. (Grievant and Ms. Gifford's testimony)

17. The mother resided in West Virginia, but Mr. Everson resided out of state. (Grievant and Ms. Gifford's testimony)

18. Grievant contacted Mr. Everson on behalf of CPS, informing him that the mother of their child had a child unrelated to Mr. Everson removed from her home and

requested that Mr. Everson bring their mutual child in for a forensic interview. This was the first time Grievant communicated with Mr. Everson. (Grievant's testimony)

19. DHHR added the mutual child and Mr. Everson to the petition it had already filed with the court for removal of the drug affected child from the mother's home. (Ms. Gifford's testimony)

20. DHHR considered Mr. Everson to be the non-offending parent. (Grievant and Ms. Gifford's testimony)

21. DHHR considered Mr. Everson to be an ongoing DHHR client. (Ms. Gifford's testimony)

22. Mr. Everson was not receiving services from DHHR, but it was possible that he could receive services from DHHR in the future. (Ms. Gifford's testimony)

23. Grievant first met Mr. Everson when he brought his child to the forensic interview at the Child Advocacy Center on or about July 11, 2018, and then again at the July 13, 2018, preliminary hearing in the matter. (Grievant's testimony)

24. Grievant did not perceive Mr. Everson to be a client because he lived out of state, was not required to participate in the investigation, was participating in the investigation for informational reasons, was the non-offending parent, and was not receiving services from DHHR. (Grievant's testimony)

25. The case was transferred from Grievant to an ongoing case worker on July 13, 2018. (Grievant's testimony)

26. Even after the case was transferred, there existed the possibility that Grievant would be called to testify in ongoing hearings in the matter. (Ms. Gifford's testimony)

27. Grievant started talking to Mr. Everson outside of a professional setting at the end of July 2018. (Grievant's testimony)

28. Grievant and Mr. Everson became involved in a romantic relationship on August 20, 2018. (Grievant & Ms. Gifford's testimony)

29. At the end of August 2018, Ms. Gifford heard from three coworkers that Grievant was engaged in an inappropriate relationship, whereupon she checked Grievant's Facebook page and determined that Grievant was in a relationship with Mr. Everson. (Ms. Gifford's testimony)

30. Ms. Gifford contacted her direct supervisor, Community Service Manager Rick Parks, with this information. Mr. Parks contacted his supervisor, Regional Director Heather Grogg, and was directed to arrange a predetermination meeting to obtain information and Grievant's version of events. (Mr. Parks testimony)

31. Near the end of August 2018, Grievant received a telephone call from Ms. Gifford and Mr. Parks advising her that a predetermination conference was going to be held due to Grievant's relationship with Mr. Everson. (Grievant's testimony)

32. On August 30, 2018, Respondent sent Grievant a notice of predetermination conference for September 4, 2018, alleging violations of DHHR Policy 2108 Employee Conduct. (Respondent's Exhibit 5)

33. DHHR Policy Memorandum 2108 Employee Conduct, section VIII, states that employees are expected to "refrain from <u>any</u>; type of exploitation of residents/patients/clients or their families including but not limited to, intimate, personal, financial, emotional, sexual or business exploitations." Moreover, "[e]mployees are

expected to avoid conflicts of interest between their personal life and their employment." (Respondent's Exhibit 8)

34. At the September 4, 2018, predetermination meeting, Respondent informed Grievant of its concern that an inappropriate relationship between Grievant and a client could affect the client's case and was in violation of the NASW Code of Ethics and DHHR Policy Memorandum 2108. In attendance at the meeting with Grievant were Ms. Gifford and Mr. Parks. (Respondent's Exhibit 6)

35. The predetermination meeting is "a meeting with an employee to inform him/her that disciplinary action is being considered, and to give the employee the opportunity to articulate why the proposed action may be improper or inappropriate." (Grievant's Exhibit 1)

36. At the predetermination meeting, Grievant did not deny having an intimate relationship with Mr. Everson. Grievant expressed her belief that Mr. Everson was not a client, as he was the non-offending party and the case had been transferred to an on-going case worker by the time they started their relationship. Grievant was then informed that Mr. Everson was a client because he had attended hearings and was listed as a party on the petition. She was further told that their relationship was improper, even though she was recused from the case, because she could overhear relevant information and relay it to Mr. Everson. (Ms. Gifford & Mr. Park's testimony and Respondent's Exhibit 6)

37. During the meeting, Grievant requested an audit trail review to confirm that she did not access the case after her relationship with Mr. Everson began. An audit trail review showed that the last time Grievant accessed the case was at the beginning of August 2018. (Ms. Gifford and Mr. Parks' testimony)

38. In the same meeting, Grievant informed Ms. Gifford and Mr. Parks that she had received very little ethics training and had limited discussions with her licensing supervisor, Mr. Taylor, about anything, including ethics. (Grievant's testimony)

39. At the time of the predetermination conference, Grievant was signed up to attend a training focused solely on ethics, scheduled for November 2018. (Grievant's testimony)

40. A cogent definition of "client" is not found in either the NASW Code of Ethics or DHHR Policy Memorandum 2108. The only definition of "client" is found in the preamble to the NASW Code of Ethics, which states that "'[c]lients' is used inclusively to refer to individuals, families, groups, organizations, and communities." (Respondent's Exhibits 4 & 8)

41. Prior to the September 4, 2018, predetermination meeting, Respondent had not provided Grievant, or the coworkers who started in the same time period, a definition of "client". (Tammy Hatfield and Grievant's testimony)

42. NASW Code of Ethics 1.06 - Conflict of Interest - (d) sets general parameters for provision of services in stating that "[w]hen social workers provide services to two or more people who have a relationship with each other (for example, couples, family members), social workers should clarify with all parties which individuals will be considered clients and the nature of social workers' professional obligations to the various individuals who are receiving services. Social workers who anticipate a conflict of interest among the individuals receiving services or who anticipate having to perform in potentially conflicting roles (for example, when a social worker is asked to testify in a child custody dispute or divorce proceedings involving clients) should clarify their role with the parties

involved and take appropriate action to minimize any conflict of interest." (Respondent's Exhibit 4)

43. NASW Code of Ethics 1.09 – Sexual Relationship - (b) sets broad parameters in its prohibition against sexual relationship within a client's sphere in stating that "[s]ocial workers should not engage in sexual activities or sexual contact with clients' relatives or other individuals with whom clients maintain a close personal relationship when there is a risk of exploitation or potential harm to the client. Sexual activity or sexual contact with clients' relatives or other individuals with whom clients maintain a personal relationship has the potential to be harmful to the client and may make it difficult for the social worker and client to maintain appropriate professional boundaries. Social workers – not their clients, their clients' relatives, or other individuals with whom the client maintains a personal relationship – assume the full burden for setting clear, appropriate, and culturally sensitive boundaries." (Respondent's Exhibit 4)

44. Over the course of her employment with Respondent, Grievant approached management with potential conflicts of interest for reassignment, but never about her relationship with Mr. Everson. (Grievant and Ms. Gifford's testimony)

45. At no point did Respondent ask Grievant to end her relationship with Mr. Everson if she wanted to keep her job. (Grievant's testimony)

46. After the predetermination meeting, Grievant did not receive any further warning regarding her relationship with Mr. Everson or any further training on ethics. (Grievant's testimony)

47. On September 7, 2018, Mr. Parks sent Ms. Grogg a synopsis of the predetermination meeting. (Respondent's Exhibit 6)

48. On September 24, 2018, Respondent sent Grievant a notice of dismissal for gross misconduct due to the willful disregard of the employer's interests and wanton disregard of the standards of behavior. Respondent expressed concerns that Grievant's relationship would tarnish her credibility in the upcoming hearings in the matter and that it violated DHHR Policy 2108 and NASW Code of Ethics.

49. Grievant did not have any prior disciplinary issues and was considered a good employee, having received a Certificate of Appreciation from her supervisor on August 9, 2018. (Ms. Gifford's testimony & Grievant's Exhibit 3)

50. DHHR Policy Memorandum 2104 guides Respondent's progressive correction and disciplinary action. It states that, "[d]etermined by the severity of the violation, progressive discipline is the concept of increasingly severe penalties taken by supervisors and managers to correct or prevent an employee's initial or continuing unacceptable work behavior or performance. It is important to remember, however, that the level of discipline will be determined by the severity of the violation and other factors." (Grievant's Exhibit 1)

51. DHHR Policy Memorandum 2104 defines "gross misconduct" as "conduct which implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees. It includes behavior for which the employee has previously been warned in writing, that further similar conduct could lead to dismissal." (Grievant's Exhibit 1)

52. Respondent does not appear to have a policy on the steps an employee must take when she discovers the existence of a dual relationship.

53. After Grievant's dismissal, Respondent, via Mr. Taylor, conducted additional training for its employees in the Barbour County, Taylor County, and Preston County offices, specifically focused on client relationships. (Ms. Hatfield's testimony)

54. The most recent case of an employee engaging in conduct similar to Grievant's was over 25 years ago. (Mr. Parks' testimony)

Discussion

Respondent agrees it has the burden of proof since it terminated Grievant for misconduct rather than unsatisfactory performance. Using Grievant's dates of employment and termination, it is clear that Grievant was employed for less than a year prior to dismissal. However, the Administrative Rule allows for a probationary period of less than a year. "Appointing authorities shall make all original appointments to permanent positions from officially promulgated registers for a probationary period of not more than one (1) year. The Board shall fix the length of the probationary period for each class of position. The appointing authority shall notify the Director when a probationary period has been completed and permanent status has been granted. …" W. VA. CODE ST. R. § 143-1-10.1.b. (2016). No evidence was presented showing that the probationary period for Grievant's position was less than a year or that the Director was notified that Grievant had been granted permanent status. Evidence was presented that Grievant maintained the title of CPS Worker Trainee from the time she began employment until her termination. The undersigned concludes that this title was a probationary title, as this was the only title Grievant held for the duration of her employment.

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). If a probationary employee is terminated on the grounds of misconduct, the termination is disciplinary, and the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. See *Cosner v. Dep't of Health and Human Res*., Docket No. 08-HHR-008 (Dec. 30, 2008); *Livingston v. Dep't of Health and Human Res*., Docket No. 2008-0770-DHHR (Mar. 21, 2008). When a probationary employee is terminated on grounds of unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the burden of proof is upon the employee to establish that his services were satisfactory. *Bonnell v. W. Va. Dep't of Corrections*, Docket No. 89-CORR-163 (Mar. 8, 1990); *Roberts v. Dep't of Health and Human Res*., Docket No. 2008-0958-DHHR (Mar. 13, 2009). "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 contends that Grievant engaged in gross misconduct when she had an intimate relationship with a client. Grievant counters that Respondent could only terminate her for good cause and that it did not have good cause because Grievant did not have prior disciplinary issues, that Grievant was a good employee, that Respondent did not have a policy regarding the actions an employee must take when there exists a dual relationship with a client, and that Respondent did not train Grievant on how to determine when someone is a client, leading her to believe that the father of the child being served was not a client. Grievant further asserts that these factors also mitigate

against termination and in favor of a lessor form of discipline under Respondent's progressive discipline policy. Respondent counters that Grievant should have familiarized herself with the definition of "client" and contends that, as Grievant was a probationary employee, it has broad leeway in dismissing her, as long as the dismissal is not arbitrary and capricious.

Grievant contends that her discipline was unreasonable in light of her lack of proper training, unavailability of her licensing supervisor, and inadequate definition of "client". Respondent posits that it has great discretion in terminating probationary employees and the discipline it imposed on Grievant was proportionate to Grievant's infraction. Because Grievant is a probationary employee, Respondent has the authority to terminate her without adhering to the normal employee protection protocol for state employees. The Division of Personnel's administrative rule discusses the probationary period of employment, describing it as "a trial work period designed to allow the appointing authority an opportunity to evaluate the ability of the employee to effectively perform the work of his or her position and to adjust himself or herself to the organization and program of the agency." W. VA. CODE ST. R. § 143-1-10.1.a. (2016). The same provision goes on to state that the employer "shall use the probationary period for the most effective adjustment of a new employee and the elimination of those employees who do not meet the required standards of work." *Id*. A probationary employee may be dismissed at any point during the probationary period that the employer determines his services are unsatisfactory. *Id*. at § 10.5(a).

The Division of Personnel's administrative rules establish a low threshold to justify termination of a probationary employee. *Livingston v. Dep't of Health and Human Res*., Docket No. 2008-0770-DHHR (Mar. 21, 2008).

> A probationary employee is not entitled to the usual protections enjoyed by a state employee. The probationary period is used by the employer to ensure that the employee will provide satisfactory service. An employer may decide to either dismiss the employee or simply not to retain the employee after the probationary period expires.

Hammond v. Div. of Veteran's Affairs, Docket No. 2009-0161-MAPS (Jan. 7, 2009) (*citing Hackman v. Dep't of Transp*., Docket No. 01-DMV-582 (Feb. 20, 2002)). In spite of this low threshold, Respondent provided strong justification for terminating Grievant by proving that Grievant engaged in misconduct in violating the NASW Code of Ethics by engaging in an intimate relationship with a client's father. Respondent's dismissal of Grievant for misconduct and failure to follow its policy and the NASW Code of Ethics was within its discretion.

The lynchpin of Respondent's argument is that Grievant is solely responsible for familiarizing herself with the NASW Code of Ethics and DHHR Policy Memorandum 2108 to determine who qualifies as a client and to understand her ethical obligations. Respondent implicitly argues that in concealing her romantic relationship with Mr. Everson, Grievant revealed her knowledge of wrongdoing. Grievant counters that Respondent never directly or indirectly provided her a cogent definition of "client" and that she was open with coworkers about her relationship with Mr. Everson, but was not told it was wrong. Grievant also asserts that she attempted to obtain guidance on ethical issues from her licensing supervisor, Mr. Taylor, but he would not respond to her in a timely matter.

When there are disputed facts, the undersigned must make a credibility determination. 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).

A credibility determination on some of these contested facts is unnecessary. Respondent did not submit evidence showing that, prior to Grievant's relationship with Mr. Everson, Grievant's supervisors informed her that a "client" is anyone who is listed on a petition filed by DHHR on behalf of an abused child. As to the lack of guidance by Mr. Taylor, Grievant did not present any evidence showing she asked Mr. Taylor to provide her with a definition of "client" or that she requested guidance on any other issue directly relevant to this grievance. The only evidence Grievant presented regarding Mr. Taylor's failure to timely respond was a text message she apparently sent him on June 26, 2018,

informing him of a protective plan (unrelated to Mr. Everson's child) that had expired that day. Mr. Taylor replied by text on July 14, 2018, that the "inboxes are clear". As for Grievant's contention that she was open about her relationship with Mr. Everson, there is conflicting testimony. Grievant testified that she told everyone in the office about her relationship with Mr. Everson and that no one raised concerns to her or told her to go to her supervisor. Grievant testified that she specifically told coworker Tammy Hatfield about the relationship. Ms. Hatfield was the only coworker Grievant called as a witness. While Ms. Hatfield did back Grievant in testifying that Respondent never covered the definition of "client" with them and that she did not know until after Grievant was terminated that "once a client always a client", she contradicted Grievant in testifying that Grievant never discussed her relationship in the office. Ms. Hatfield further stated that even though she learned of the relationship on Facebook, she believes the posting of their relationship status was by Mr. Everson and that the status made it to Grievant's page only because Grievant was tagged. While Grievant has a motive for bias, Ms. Hatfield's testimony seemed unbiased and against her own interest, specifically where she contradicted Grievant's version. While Ms. Hatfield was murky on whether Mr. Everson or Grievant posted the relationship status on Facebook, she did not let her uncertainty sway in favor of Grievant. While the undersigned is hesitant to attribute Grievant knowledge of wrongdoing solely based on this discrepancy (due to the possibility of other reasonable explanations), the undersigned is struck by the undisputed testimony from both Grievant and Respondent's witnesses showing Grievant was never given a definition of client prior to her predetermination meeting.

In insisting that Mr. Everson was a client, Respondent unnecessarily hinges its argument that Grievant violated the rules of ethics (in having a romantic relationship with Mr. Everson) on whether Mr. Everson was in fact a client. Respondent cites NASW Code of Ethics, section 1.06 (c), stating that "[s]ocial workers should not engage in dual or multiple relationships with clients or former clients in which there is a risk of exploitation or potential harm to the client." Respondent did not persuade the undersigned that it provided Grievant a clear definition of "client" prior to Grievant's relationship with Mr. Everson. Neither Ms. Gifford nor Mr. Taylor could recall directly providing Grievant with a definition of "client". They did, however, tell her that it was her responsibility to familiarize herself with DHHR policy and the NASW Code of Ethics. The only definition of "client" provided in either of these documents is the one found in the preamble to the NASW Code of Ethics, which states in total that "'[c]lients' is used inclusively to refer to individuals, families, groups, organizations, and communities." This is not a feasible working definition of client for a CPS Worker, but does put Grievant on notice to be cautious about limiting her interpretation of "client" to a dictionary definition.[2] Ms. Gifford testified that Mr. Everson was not receiving services from DHHR, but was still considered a client because he was named in the petition DHHR filed on behalf of Mr. Everson's child. While Grievant did not successfully refute the definition of "client" offered by Respondent, the issue is whether Grievant knew or should have known Respondent's definition of "client" prior to entering into a relationship with Mr. Everson. There is nothing in NASW Code of Ethics or DHHR's written policy that would reasonably lead Grievant to

[2]The most relevant dictionary definition of "client" as it applies to DHHR is "a person served by or utilizing the services of a social agency". WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 248 (1983)

conclude that Mr. Everson was a client. Further, Respondent failed to meet its burden of proving that it provided Grievant, prior to her relationship with Mr. Everson, a definition of "client" that would put Grievant on notice that Mr. Everson was a client.

Nevertheless, Respondent has proven that Grievant committed gross misconduct in having a romantic relationship with Mr. Everson. "The term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." *Graley v. Parkways Econ. Dev. & Tourism Auth*., Docket No. 91-PEDTA-225 (Dec. 23, 1991) (*citing Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) and *Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983)); *Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sep. 13, 2002); *Crites v. Dep't of Health & Human Res*., Docket No. 2011-0890-DHHR (Jan. 24, 2012). In submitting the NASW Code of Ethics and presenting the undersigned with authority supporting its' proposition that Grievant had an obligation to familiarize herself with this document, Respondent proved that Grievant committed gross misconduct. NASW Code of Ethics 1.09 – Sexual Relationship - (b) sets broad parameters in its prohibition against sexual relationships within a client's sphere in stating that "[s]ocial workers should not engage in sexual activities or sexual contact with clients' relatives or other individuals with whom clients maintain a close personal relationship when there is a risk of exploitation or potential harm to the client. Sexual activity or sexual contact with clients' relatives or other individuals with whom clients maintain a personal relationship has the potential to be harmful to the client and may make it difficult for the social worker and client to maintain appropriate professional boundaries. Social workers – not their

clients, their clients' relatives, or other individuals with whom the client maintains a personal relationship – assume the full burden for setting clear, appropriate, and culturally sensitive boundaries." The most relevant dictionary definition of "client" is "a person served by or utilizing the services of a social agency". WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 248 (1983). It is indisputable that, even under a restricted dictionary definition of "client", Mr. Everson's child was receiving services from DHHR. Mr. Everson's child was therefore a client. If any one individual in this situation was DHHR's client, it was Mr. Everson's child. Mr. Everson was the client's father. Therefore, Grievant was prohibited, under the NASW Code of Ethics, from having sexual contact with Mr. Everson. While it is feasible that, by the time of the September 4, 2018, predetermination meeting, Grievant had not had sexual contact with Mr. Everson, Grievant did not refute Respondent's implied claims that she had sexual contact with Mr. Everson.[3] As Respondent's witnesses aptly highlighted, in having sexual contact with Mr. Everson, Grievant made it difficult to maintain appropriate professional boundaries when providing services for Mr. Everson's child. In investigation potential harm to the child, Grievant's conclusions and recommendations would have been suspect if they continued to shed a negative light on the mother or avoided pursuit of any hint of impropriety against Mr. Everson.

Grievant contends that her dismissal was arbitrary and capricious because Respondent failed to utilize progressive discipline. Grievant asserts that she should have

[3]"Sexual contact" is not necessarily "sexual intercourse", but can entail kissing or touching of a sexual nature. "Sexual" can mean "of, relating to, or involving sex". "Sex" can mean "sexual activity or behavior". WEBSTER'S NEW EXPLORER DICTIONARY AND THESAURUS 453 (2005). "Relating" can mean "causal connection between". MERRIAM-WEBSTER'S DICTIONARY AND THESAURUS 679 (2007). While kissing or touching may or may not be seen as sexual behavior, there is typically a "causal connection between" these and sex, especially in a romantic relationship.

received a lessor punishment due to her stellar performance record and her lack of any prior discipline. DHHR Policy Memorandum 2104 guides Respondent's progressive correction and disciplinary action. It states that, "[d]etermined by the severity of the violation, progressive discipline is the concept of increasingly severe penalties taken by supervisors and managers to correct or prevent an employee's initial or continuing unacceptable work behavior or performance. It is important to remember, however, that the level of discipline will be determined by the severity of the violation and other factors." Respondent has much leeway in terminating probationary employees, as long as it is not arbitrary and capricious, and progressive discipline is not applicable to probationary employees.

While Grievant implies that Respondent acted arbitrarily in terminating her when it has taken corrective actions for other employees, Respondent's witnesses testified that DHHR has not within 25 years dealt with an ethical infraction of the type committed by Grievant. "'[T]he "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ*., 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res*., Docket No. 93-HHR-322 (June 27, 1997), ***aff'd*** Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ*., Docket No. 01-20-470 (Oct. 29,

2001), *aff'd* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003). As a result of Grievant's gross infraction and her status as a probationary employee, Respondent clearly acted within its authority in bypassing lesser levels of discipline.

Even if Grievant had not been a probationary employee, Respondent proved that it had grounds to terminate her. As a provisional licensee of the West Virginia Board of Social Work, Grievant was obligated to strictly adhere to the NASW Code of Ethics. Grievant acknowledged as much when she signed her Provisional License Eligibility Agreement. Respondent had a right to expect that Grievant would adhere to the NASW Code of Ethics. In not adhering to this code, Grievant displayed a wanton disregard of the standards of behavior which Respondent has a right to expect of its employees. Grievant was therefore culpable of gross misconduct. Gross misconduct is sufficient grounds for termination of any employee. 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). "'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*). Grievant's professional

responsibilities entailed abiding by the NASW Code of Ethics. Grievant disregarded this responsibility.

Grievant argues that Respondent's lack of policy on proper protocol for an employee who finds herself in a dual relationship also mitigates against the severity of her punishment. "[A]n allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was 'clearly excessive or reflects an abuse of agency discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989)." *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No 95-AA-66 (May 1, 1996), *appeal refused*, W.Va. Sup. Ct. App. (Nov. 19, 1996). "Mitigation of the punishment imposed by an employer is extraordinary relief and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996); *Olsen v. Kanawha County Bd. of Educ*., Docket No. 02-20-380 (May 30, 2003), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), appeal refused, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004). "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); *Cooper v. Raleigh County Bd. of Educ*., Docket No. 2014-0028-RalED (Apr. 30, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015). Grievant has not proven that the punishment she received in being terminated was disproportionate to her infraction. Grievant has not shown that Respondent abused its discretion in terminating her. Considerable deference is afforded Respondent's judgment, and the undersigned will not substitute Respondent's decision with his own where the punishment is not clearly disproportionate to the offense. In consideration of mitigation, Grievant has in her favor a stellar performance record. Factoring against mitigation is the severity of Grievant's infraction; the non-existence in recent decades of a case involving a similar offense, let alone one resulting in a lessor punishment than termination and one involving a probationary employee; and that the NASW Code of Ethics, which Grievant had an obligation to read, clearly prohibits sexual contact between a social worker and a client's relatives. Whether Respondent had a protocol for employees to follow once they violated their ethical obligations has no bearing on the issue of mitigation.

Respondent has proven that Grievant committed gross misconduct. Grievant has not proven that her termination for gross misconduct was arbitrary and capricious or that it warranted mitigation. Therefore, the 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. When a probationary employee is terminated on grounds of unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the burden of proof is upon the employee to establish by a preponderance of the evidence that his services were satisfactory. *Bonnell v. Dep't of Corr*., Docket No. 89-CORR-163 (Mar. 8, 1990); *Roberts v. Dep't of Health and Human Res*., Docket No. 2008-0958-DHHR (Mar. 13, 2009).

3. If a probationary employee is terminated on the grounds of misconduct, the termination is disciplinary, and the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *See Cosner v. Dep't of Health and Human Res*., Docket No. 08-HHR-008 (Dec. 30, 2008); *Livingston v. Dep't of Health and Human Res*., Docket No. 2008-0770-DHHR (Mar. 21, 2008).

4. "[W]hile an employer has great discretion in terminating a probationary employee, that termination cannot be for unlawful reasons, or arbitrary or capricious. *McCoy v. W. Va. Dep't of Transp*., Docket No. 98-DOH-399 (June 18, 1999); *Nicholson v. W. Va. Dep't of Health and Human Res*., Docket No. 99-HHR-299 (Aug. 31, 1999)." *Lott v. W. Va. Div. of Juvenile Serv*., Docket No. 99-DJS-278 (Dec. 16, 1999). An action

is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv*., 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res*., Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

5. "The term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." *Graley v. Parkways Econ. Dev. & Tourism Auth*., Docket No. 91-PEDTA-225 (Dec. 23, 1991) (*citing Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) and *Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983)); *Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sep. 13, 2002); *Crites v. Dep't of Health & Human Res*., Docket No. 2011-0890-DHHR (Jan. 24, 2012).

6. The Division of Personnel's administrative rule discusses the probationary period of employment, describing it as "a trial work period designed to allow the appointing authority an opportunity to evaluate the ability of the employee to effectively perform the work of his or her position and to adjust himself or herself to the organization and program

of the agency." W. VA. CODE ST. R. § 143-1-10.1.a. (2016). The same provision goes on to state that the employer "shall use the probationary period for the most effective adjustment of a new employee and the elimination of those employees who do not meet the required standards of work." *Id*. A probationary employee may be dismissed at any point during the probationary period that the employer determines his services are unsatisfactory. *Id*. at § 10.5(a).

7. Division of Personnel's administrative rules establish a low threshold to justify termination of a probationary employee. *Livingston v. Dep't of Health and Human Res*., Docket No. 2008-0770-DHHR (Mar. 21, 2008).

> A probationary employee is not entitled to the usual protections enjoyed by a state employee. The probationary period is used by the employer to ensure that the employee will provide satisfactory service. An employer may decide to either dismiss the employee or simply not to retain the employee after the probationary period expires.

Hammond v. Div. of Veteran's Affairs, Docket No. 2009-0161-MAPS (Jan. 7, 2009) (*citing Hackman v. Dep't of Transp*., Docket No. 01-DMV-582 (Feb. 20, 2002)).

8. "'[T]he "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ*., 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res*., Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998);

Blake v. Kanawha County Bd. of Educ., Docket No. 01-20-470 (Oct. 29, 2001), ***aff'd*** Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

9. "[A]n allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was 'clearly excessive or reflects an abuse of agency discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989)." *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No 95-AA-66 (May 1, 1996), *appeal refused*, W.Va. Sup. Ct. App. (Nov. 19, 1996). "Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996); *Olsen v. Kanawha County Bd. of Educ*., Docket No. 02-20-380 (May 30, 2003), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004). "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); *Cooper v. Raleigh County Bd. of Educ*., Docket No. 2014-0028-RalED (Apr. 30, 2014), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

10. Respondent has proven by a preponderance of evidence that Grievant engaged in gross misconduct through sexual contact with a minor client's father.

11. Grievant has not proven by a preponderance of evidence that Respondent acted arbitrarily and capriciously in dismissing her or that her punishment warranted mitigation.

Accordingly, the 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: May 5, 2019

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Joshua S. Fraenkel
Administrative Law Judge