THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JOANNE PORTER,
Grievant,

v. **Docket No. 2018-1315-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, JoAnne Porter, is employed by Respondent, Division of Highways. On June 8, 2018, Grievant filed this grievance against Respondent asserting she had been suspended without good cause. For relief, Grievant seeks removal of the suspension, back pay, and restoration of benefits. The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4).

A level three hearing was held on December 14, 2018, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant appeared in person and was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by Jason Nichols and was represented by counsel, Xueyan Z. Palmer, Assistant Attorney General. This matter became mature for decision on February 25, 2019, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as a Transportation Worker 3. Grievant was suspended for ten days for violation of a confidentiality agreement and acceptable standards of conduct. Respondent proved Grievant, with no proper purpose, viewed employee performance evaluations containing social security numbers that were

located on her supervisor's desk and discussed the contents of the evaluations, including scores, with multiple co-workers. Respondent was justified in suspending Grievant for ten days for her misconduct. Respondent violated Grievant's right to representation during the investigatory interview and, under the facts and circumstances of this case, the appropriate remedy is to exclude the interview transcript and written statement. Grievant is not entitled to prevail in her grievance for Respondent's alleged failure to provide documents in informal discovery. 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 is employed by Respondent as a Transportation Worker 3 in District Three and has been so employed for approximately twelve years.

2. Grievant is supervised by James Smith, Crew Leader, who is supervised by Jason Nichols, Maintenance Assistant 3.

3. On either February 9, 2018 or February 14, 2018, Grievant entered Mr. Smith's office to turn in documentation for mileage reimbursement. The employee performance evaluations ("EPAs") for the crew were on Mr. Smith's desk. Grievant looked through the performance evaluations and noted the scores for each employee.

4. Grievant was offended she was scored low on her EPA and had concerns with the EPAs of other employees. Grievant viewed this as continued mismanagement of the organization by Mr. Nichols. Grievant discussed the evaluations in detail with other members of the crew, including the specific scores of the EPAs, with the intention

of getting them to join her in filing a grievance. When co-workers did not appear interested in doing so, Grievant told them she had pictures of the EPAs that could be used as evidence.

5. Because District 3 had failed to use updated forms for the EPAs, the full social security number of each employee appeared on the evaluations. Grievant's co-workers became concerned when they realized their social security numbers were on the evaluations and Grievant had stated that she had photographed them.

6. On an unspecified date later in February, one of Grievant's co-workers reported their concerns to Mr. Nichols, including his belief that Grievant had taken pictures of the EPAs.

7. Mr. Nichols held a meeting with Grievant and Mr. Smith regarding the accusations. Grievant admitted to looking at the EPAs and discussing them with co-workers but denied taking pictures of the evaluations.

8. Another co-worker reported the same concerns to Lora Witt, Employee Relations Manager, who instructed Mr. Nichols to obtain statements from any employee with information regarding the allegations.

9. Two investigators with Respondent's Legal Division were assigned to conduct an investigation. The investigators conducted interviews with Grievant and the witnesses, collected notarized statements, and reviewed corroborating documentation.

10. When the investigators called Grievant in for her interview she told the investigators that she wanted her attorney, Walt Auvil, to be present and that he was unavailable. The investigators insisted that Grievant appear the next day for the interview as that was "ample time" for her attorney to arrange to appear. When

Grievant appeared for the interview but stated her attorney was still not available, the investigators insisted that Grievant submit to the interview without her attorney. Further, the administrative notice of rights Grievant was required to review and sign stated, "I understand that refusing to answer questions in relation to this investigation…may result in disciplinary action, up to and including dismissal from employment."

11. On March 8, 2018, the investigators submitted an *Investigative Report* finding that Grievant had viewed and taken pictures of the EPAs.

12. The exposure of social security numbers is a serious privacy breach. As a result of the breach, Respondent was required to notify its insurance carrier, notify all potentially affected persons of the breach, and to provide free credit monitoring.

13. Ms. Witt and Acting Director Smith discussed the appropriate discipline for the misconduct. Neither were aware of any employee who had been disciplined for the same misconduct, so they compared it to another employee who had been disciplined for improperly accessing a network, who had received a fifteen-day suspension. Determining that accessing the social security numbers was a serious breach but one that was not as serious as improperly accessing a network, they determined a ten-day suspension would be appropriate.

14. On June 8, 2018, Mr. Nichols issued to Grievant Form RL-544, *Notice to Employee*, stating he was recommending her suspension for ten days. Grievant refused to sign the acknowledgement of receipt of the form. The attached Form RL-546, *Employee's Verification of Disciplinary Action*, which Grievant also refused to sign, further stated that Grievant had the opportunity to respond either in writing, or, if she

desired an in-person meeting to contact Mr. Nichols' office to schedule a meeting. Grievant did not request a meeting or respond in writing.

15. By letter dated June 28, 2018, the Human Resources Division's Acting Director, Drema L. Smith, suspended Grievant for ten days for violation of Respondent's standards of workplace conduct and the "WV DOT Confidential Information Agreement" for reviewing and photographing the EPAs of other employees and then discussing the contents of the EPAs with other employees.

16. In relevant part, the *West Virginia Department of Transportation Acknowledgement of and Agreement to Protect Confidential Information* defines personally identifiable information to include social security numbers, requires that personally identifiable information remain confidential, and that the employee agrees to access such information only as required to perform his/her job. Grievant acknowledged her understanding and agreement by her signature on two separate agreements on May 12, 2010 and December 15, 2011.

17. Grievant also received training on privacy on May 12, 2010 and September 14, 2016.

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. W. Va. Dep't of Health & Human Res*., Docket No. 92-HHR-

486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

Grievant asserts the following: that her due process rights were violated when Respondent failed to allow her attorney to attend the investigatory interview; that Respondent failed to comply with discovery; that Respondent failed to meet its burden of proof, and that Grievant was placed in double jeopardy by the removal of her crew leader upgrades in addition to her suspension.

Grievant argues the grievance should be granted for Respondent's failure to properly respond to informal discovery by failing to provide copies of the EPAs when Grievant requested "copies of any and all documents relevant to Respondent's decision to discipline Grievant. . . ." Regarding informal discovery, the Grievance Board administrative rules state, "All parties must produce, prior to any hearing on the merits, any documents requested in writing by the grievant that are relevant and are not privileged." W. VA. CODE ST. R. §156-1-6.12. While this rule creates an automatic entitlement to informal discovery, the administrative rules provide no automatic remedy for violation, instead stating that the parties are to "attempt to resolve any discovery disputes among themselves before making a motion requesting an order compelling discovery…" W. VA. CODE ST. R. § 156-1-5.12.2. If Grievant believed Respondent's discovery response was lacking, it was her burden to make a motion to compel that discovery; that is the remedy available to her, not the granting of her grievance.

Grievant argues her suspension must be overturned due to the Respondent's violation of her due process rights by conducting the investigatory interview without allowing Grievant's lawyer to be present. Although Grievant states in her PFFCL that

this is a due process violation, the entitlement to representation during an investigatory interview is actually a right that arises under statute, not the constitutional right to due process. "An employee may designate a representative who may be present at any step of the procedure as well as at any meeting that is held with the employee for the purpose of discussing or considering disciplinary action." W. VA. CODE § 6C-2-3(g)(1). The Grievance Board has interpreted this statute to include meetings conducted for the purpose of investigation as the findings of an investigation could lead to disciplinary action. *Koblinsky v. Putnam County Health Dep't*, Docket No. 2010-1306-CONS (Nov. 8, 2010).

Grievant did have a statutory right to representation at the investigatory interview, which Respondent brazenly violated. The investigator's assertion in his level three testimony that giving Grievant until the next day to allow her attorney to appear was "ample time" is ridiculous and displays contempt for Grievant's clear statutory right. However, Grievant was then given an opportunity for a pre-determination meeting, the proceeding that is required to protect Grievant's due process rights, and Grievant did not avail herself of that opportunity. Grievant argues her grievance should be granted simply for the denial of representation during the investigatory interview, citing *Hammer v. Greenbrier County Bd. of Educ*., Docket No. 2008-0302-GreED (May 21, 2008). *Hammer* is not applicable as that grievance involved the employer's failure to provide the grievant with a pre-determination conference before suspending her. In this case, Grievant was denied her representative in an investigatory interview, was provided an opportunity for a pre-determination conference, and then was disciplined as a result of

the investigation findings after she failed to avail herself of the pre-determination conference.

Although the Grievance Board has previously addressed the statutory right to representation in an investigatory interview, none of those decisions squarely address the appropriate remedy for the factual circumstance present in this case. *See Koblinsky v. Putnam County Bd. of Educ.*, Docket No. 2010-1036-CONS (Nov. 8, 2010) (termination overturned when the grievant was dismissed for insubordination for refusing to attend an investigatory interview without representation); *Beaton v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital*, Docket No. 2013-0496-CONS (December 20, 2013) (employer guidelines found to be contrary to law but no grievant protested any discipline issued under the guidelines); *Deyerle v. Dep't of Health and Human Res.*, Docket No. 2013-2231-CONS (July 15, 2014) (indefinite suspension overturned for violation of both the right to representation but also for the violation of the prohibition of indefinite suspension when Grievant also not afforded a pre-determination conference).

In contrast, in a case involving the violation of the constitutional due process right of representation at a pre-termination hearing, a more serious violation than occurred in the instant grievance, the West Virginia Supreme Court of Appeals did not overturn the termination imposed when the discipline was otherwise justified but awarded the grievant back pay for the period of time between the date of her dismissal and her post-termination hearing. *Wines v. Jefferson Cty. Bd. of Educ.*, 213 W. Va. 379, 582 S.E.2d 826 (2003). In this case, Grievant was given notice and opportunity to be heard in a pre-determination conference, which she declined. The denial of representation at the

investigatory interview could have been cured by the predetermination conference had Grievant chosen to participate. This fact pattern is distinguished from the Grievance Board decisions that overturned suspensions and the remedy granted in *Wines* is unavailable as Grievant was not terminated from employment. Under the facts and circumstances of this case, it appears the appropriate remedy would be to exclude the investigatory interview and written statement that were taken in violation of Grievant's statutory right to representation. Therefore, the transcript of the investigatory interview and Grievant's written statement taken during the investigation were given no weight in the decision.

Respondent has met its burden of proof that Grievant violated the confidentiality agreement and acceptable standards of conduct. Grievant admits that she saw the EPAs on her supervisor's desk, looked through them, and discussed the EPA contents, including scores, with multiple co-workers. She did not dispute in her testimony that the EPAs contained full social security numbers. Grievant admits she told co-workers that she took pictures in an attempt to encourage them to file a grievance, but she disputes she actually took pictures of the EPAs. One coworker testified that he saw her take the pictures. Ultimately, however, it is not necessary to make credibility determinations to determine whether Grievant actually took pictures of the EPAs because Grievant's admitted misconduct is serious enough to warrant her ten-day suspension even if she did not take pictures of the EPAs. There is no question Grievant's actions violated her confidentiality agreement and caused significant harm to her employer and significant concern to her co-workers.

As to the length of the suspension, "[c]onsiderable 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). Respondent provided logical reasons for its determination of the appropriate length of the suspension. Grievant's testimony at level three also demonstrates that she has still not accepted the seriousness of her misconduct. Therefore, Respondent was clearly justified in suspending Grievant for ten days for her misconduct.

Grievant last argues that the suspension was arbitrary and capricious because she has been disciplined twice for the same misconduct, in that she also has been removed from eligibility for temporary crew leader upgrades, citing *Paxton v. Bureau of Senior Serv*., Docket No. 2010-1035-BSS (June 30, 2010). In *Paxton*, the administrative law judge found that Respondent's action was arbitrary and capricious when it suspended an employee for neglect of duty, assigned her to duties unrelated to her position, and then later demoted her for the same reasons she was suspended. Unlike *Paxton*, Grievant has not been disciplined twice for the same conduct. Grievant's removal from the crew leader upgrade list was not a disciplinary action, it was a management decision made at the time of the investigation that has been continued due to Grievant's misconduct that makes her unsuited for a leadership position.

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. W. Va. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

2. "All parties must produce, prior to any hearing on the merits, any documents requested in writing by the grievant that are relevant and are not privileged." W. VA. CODE ST. R. §156-1-6.12. While this rule creates an automatic entitlement to informal discovery, the administrative rules provide no automatic remedy for violation, instead stating that the parties are to "attempt to resolve any discovery disputes among themselves before making a motion requesting an order compelling discovery…" W. VA. CODE ST. R. § 156-1-5.12.2.

3. Grievant is not entitled to prevail in her grievance for Respondent's alleged failure to provide documents in informal discovery.

4. "An employee may designate a representative who may be present at any step of the procedure as well as at any meeting that is held with the employee for the purpose of discussing or considering disciplinary action." W. Va. Code § 6C-2-3(g)(1). The Grievance Board has interpreted this statute to include meetings conducted for the purpose of investigation as the findings of an investigation could lead to disciplinary

action. *Koblinsky v. Putnam County Health Dep't*, Docket No. 2010-1306-CONS (Nov. 8, 2010).

5. Respondent violated Grievant's right to representation during the investigatory interview and, under the facts and circumstances of this case, the appropriate remedy is to exclude the interview transcript and written statement.

6. "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).

7. Respondent has met its burden of proof that Grievant violated a confidentiality agreement and acceptable standards of conduct when Grievant, with no proper purpose, viewed employee performance evaluations containing social security numbers that were located on her supervisor's desk and discussed the contents of the evaluations, including scores, with multiple co-workers.

8. Respondent was justified in suspending Grievant for ten days for her misconduct.

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: April 8, 2019

_____

Billie Thacker Catlett
Chief Administrative Law Judge