THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

L.Y.,
Grievant,

v. **Docket No. 2018-0606-DHHR**

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

DECISION

Grievant, L.Y.[1], was employed by Respondent, Department of Health and Human Resources within the Bureau for Children and Families. On October 19, 2017, Grievant filed this grievance against Respondent stating, "Suspension without good cause." For relief, Grievant sought "[t]o be made whole in every way including back pay/leave with interest and all benefits restored." The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). Grievant was later dismissed from employment and Grievant's request to amend the grievance to include the dismissal was granted.

A level three hearing was held on May 16, 2019, 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 Addison Hamilton and was represented by counsel, Steven R. Compton, Deputy Attorney General. This matter became mature for decision on July 15, 2019, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

[1] At Grievant's request due to the sensitive nature of the facts of this grievance Grievant's initials will be used in this decision.

Synopsis

Grievant was employed by Respondent within the Bureau of Children and Families as an Economic Service Worker. Grievant was terminated from employment for gross misconduct. Respondent proved it had good cause to terminate Grievant's employment for gross misconduct and violation of Respondent's employee conduct policy when Grievant continuously accessed her boyfriend's case, assisted her boyfriend's mother in accessing and using her boyfriend's benefits that were improperly accruing while he was incarcerated, and then caused a new benefits card to be issued for her to also use her boyfriend's improperly accruing benefits. Grievant failed to prove mitigation of the punishment was warranted. 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 by Respondent within the Bureau of Children and Families as an Economic Service Worker in the Boone County office.

2. Grievant became employed with Respondent in December 2012 as an Office Assistant and was promoted to Economic Service Worker in November 2016.

3. As an Economic Service Worker, Grievant determined client eligibility for Supplemental Nutrition Assistance Program (SNAP) and Medicaid benefits.

4. By letter dated October 12, 2017, Regional Director Cheryl Salamacha suspended Grievant without pay pending investigation after receiving allegations that Grievant falsified information on a Family Assistance case of an incarcerated individual,

made herself the authorized representative of the incarcerated individual, and used the benefits of the incarcerated individual.

5. The incarcerated individual was Grievant's boyfriend, J.Y.[2].

6. J.Y. was arrested and incarcerated on March 29, 2017, as a result of a domestic violence incident perpetrated against Grievant in which J.Y. also shot a responding law enforcement officer.

7. J.Y. received both SNAP benefits and medical benefits from Respondent's Kanawha County office.

8. Incarcerated persons are not eligible to receive SNAP benefits.

9. SNAP benefits are disbursed onto a debit card, called an Electronic Benefits Transfer Card, for use by the beneficiary and requires the entry of a personal identification number at the point of sale for use.

10. The allegations were investigated by Criminal Investigator Addison Hamilton with Respondent's Office of the Inspector General.

11. Investigator Hamilton interviewed Grievant, J.Y., and J.Y.'s mother. He also reviewed the electronic funds transfer records of J.Y.'s benefit cards and reviewed video surveillance from stores where the benefit cards were used.

12. Investigator Hamilton's review of the benefits cards and the electronic funds transfer history revealed that transactions were attempted on J.Y.'s benefits card after his incarceration, that a new benefits card was issued on August 18, 2017, and that a total of $364.20 had been spent from J.Y.'s cards after his incarceration.

[2] As a benefit's recipient, only J.Y.'s initials will be used.

13. Investigator Hamilton's review of the video surveillance revealed that both J.Y.'s mother and Grievant had used J.Y.'s card.

14. During the investigation, Investigator Hamilton handwrote statements memorializing the interviews of Grievant and J.Y.'s mother and asked each to certify the statement by their signature. Each made several corrections to the statements and each signed.

15. J.Y.'s mother admitted that she had used J.Y.'s card but stated that Grievant had told her she could do so as long as she had written permission from J.Y., which Grievant then helped her obtain. J.Y.'s mother also admitted that she had given the new benefits card to Grievant.

16. Although the statements were not written in her hand, Grievant did not dispute that the statements were true in her testimony and did certify by her signature on the statements that they were true.

17. Grievant signed two written statements: the first on October 6, 2017, and the second on February 7, 2018. Grievant admitted the following in her two signed statements:

a. She was not living with J.Y..
b. She accessed J.Y.'s benefits case on Respondent's computer system both before and after J.Y. was incarcerated.
c. She was aware J.Y.'s mother was using the benefit card while J.Y. was incarcerated.
d. She admitted that after J.Y. was incarcerated she told J.Y. that benefits "were building up on the card" and instructed J.Y. to send in written

permission for her to use the card, which J.Y. provided by a handwritten, signed note[3]. Grievant also signed the note, date-stamped it using the official stamp of the Boone County office, and mailed the original to the "Change Center."

e. She obtained the personal identification number for the card from J.Y.'s mother and then used the card to purchase food for herself, justifying the use of the card by stating she was giving J.Y. money for extra food while he was incarcerated.

f. "I should have realized that I can't transfer SNAP benefits to another person. As a worker and a prior recipient, I should have been aware of that fact. I was exposed to the fact that I cannot transfer SNAP benefits as a recipient and as an Economic Service Worker through training."

18. In addition, Grievant signed a *Waiver of Administrative Disqualification Hearing* in which she admits that she received SNAP benefits in the amount of $364 through intentional violation of a program rule by "unauthorized use of an access device."

19. By letter dated March 28, 2018, Director Salamacha dismissed Grievant from employment for gross misconduct for "obtaining and divulging client information from the West Virginia Department of Health and Human Resources computer system on a client (J.Y.)," and using the client's Electronic Benefits Transfer Card for personal gain in violation of W.Va. Code §§ 61-4-9, 61-10-31, 61-3C-9, 61-3C-11, 61-3C-12,

[3] It appears to the undersigned that it was Grievant who drafted the note, not J.Y., as the handwriting appears remarkably similar, however, neither the investigator nor Respondent has asserted that Grievant falsified this document.

Respondent's Policy Memorandum 2108 Employee Conduct, the Employee Confidentiality Agreement, and Common Chapters Manual 200 (Confidentiality).

20. In relevant part, Respondent's Policy Memorandum 2108 Employee Conduct states as follows:

> Employees are expected to:
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> Respect the property of . . . the State;
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> maintain the confidentiality of all Agency records including personnel, resident/patient/client records;
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> use State vehicles, telephones and equipment only as authorized;
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> . . .
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> be ethical;
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> . . .
>
> refrain from illegal or immoral acts while on State property or while engaged in activities related to their employment;
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> avoid conflicts of interest between their personal life and their employment. Employees shall not provide services to or make decisions concerning eligibility for Agency programs for spouses, relatives, friends, neighbors, present or former co-workers, or club or church acquaintances. Requests for services and questions regarding eligibility in these potentially conflicting situations should be referred to supervisors for reassignment. . . .

21. Grievant acknowledged her receipt of Respondent's *Policy Memorandum 2108 Employee Conduct* by her signature on December 18, 2012.

22. On February 7, 2019, Grievant made full restitution of the entire amount of the transactions made on J.Y.'s benefits cards while he was incarcerated.

23. Grievant caused a new benefit card to be issued in J.Y.'s name and mailed to J.Y.'s mother, which was the card J.Y.'s mother then gave to Grievant to use.

24. Prior to her suspension, Grievant had not previously received any discipline and her work performance met expectations.

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*.

Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "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); *See also* W. VA. CODE ST. R. § 143-1-12.02 and 12.03 (2012).

"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). "The employing authority's right to dismiss a Civil Service protected employee for gross misconduct is not conditioned upon or limited by the outcome of any criminal charges which may have been brought against the employee." Syl. 3, *Thurmond v. Steele*, 159 W.Va. 630, 225 S.E.2d 210 (1976).

As a preliminary matter, although Grievant admitted that she accessed Respondent's computer system to provide information regarding two other clients to J.Y., which was clearly a serious breach of confidentiality, Respondent did not charge Grievant in the dismissal letter with that misconduct stating instead only that Grievant "admitted to obtaining and divulging client information from the West Virginia Department of Health and Human Resources computer system on a client (J.Y.)." Respondent presented evidence and made argument regarding Grievant's disclosure of the other client information to J.Y. in support of its decision to terminate Grievant. "An employee covered by civil service may be discharged for good cause but the reasons therefor must be given to him at the time his employment is so terminated and cannot be supplied for the first time at a civil service hearing on his appeal from such discharge." Syl. Pt. 2, *Yates v. Civil Serv. Comm'n*, 154 W. Va. 696, 697, 178 S.E.2d 798, 798 (1971). As the admitted misconduct above was not included in the dismissal letter as a basis for Grievant's termination that evidence cannot be considered in this decision. As Respondent made no argument that Grievant breached confidentiality regarding J.Y., it is unnecessary to address Grievant's Employee Confidentiality Agreement and Common Chapters Manual 200 (Confidentiality).

Apart from the above, Respondent mainly argues Grievant's admitted misconduct violated Respondent's Policy Memorandum 2108 and that Grievant's misconduct was of a substantial nature, intentional, and not a technical violation. Although Respondent also included in the findings of its PFFCL that Grievant's misconduct violated various criminal statutes and, as had been stated in the dismissal letter, Respondent made no argument regarding the same. As such, and as Grievant was ultimately only criminally charged with violation of one code section, which was dismissed, the allegations regarding the violation of criminal statutes will not be addressed. Grievant asserts her misconduct was not intentional but was the result of her misunderstanding of policy. Alternatively, Grievant argues the discipline should be mitigated.

Grievant's assertion that her misconduct was not intentional is not credible. While it is true Grievant admitted to her misconduct during the investigation and her testimony, which she asserts is evidence of her lack of original wrongful intention, other details of her testimony and her assertion that she did not understand the policy appear to be an attempt to minimize her culpability. Without doubt, it is improper and a conflict of interest for Grievant to access her boyfriend's case. Grievant knew she was not permitted to access her boyfriend's case and she chose to do so in direct conflict with her employer's best interests. Grievant admitted in her testimony that she knew an incarcerated individual was not eligible to receive SNAP benefits, although asserted she believed he would be entitled to receive the benefits that had accrued before he was incarcerated. However, the benefits Grievant and J.Y.'s mother used were not simply benefits that had accrued prior to Grievant's incarceration and Grievant's written

statement shows she knew the benefits were continuing to accrue. In her written statement, Grievant states she told J.Y. that the benefits "were building up on the card." This statement clearly shows Grievant knew the benefits were continuing to accrue and not that there were simply remaining benefits from before J.Y.'s incarceration.

Rather than reporting to Kanawha County office that J.Y. was incarcerated and should no longer be receiving benefits, Grievant then assisted and encouraged J.Y.'s mother to use the benefits that neither J.Y. nor his mother were entitled to receive. Grievant then improperly used the Boone County date stamp to submit the note she used to "transfer" J.Y.'s improperly accruing benefits to herself. Grievant asserts that she did not know at the time that benefits could not be "transferred" from one person to another and that she followed the applicable policy. It defies belief that an employee of the DHHR would not understand that benefits may be used only by the person who applies for the benefits or those included in their household. Even if Grievant had been honestly confused about the policy, no harm would have arisen because she would have gone to her supervisor and asked about the situation. However, Grievant continued to improperly access J.Y.'s case and process the case information herself so that no other employee in the office knew what she was doing.

Further, Grievant attempted to minimize the amount of money she converted for her personal gain. In testimony, she asserts her portion of the money spent was less than $75. This assertion is contradicted by the other evidence in the case in the form of J.Y.'s mother's sworn statement, the date which Grievant was given "permission" to use the card, and the summary of the transactions contained in the investigatory report. In addition, Grievant's two sworn statements are contradictory regarding her use of the

card with her stating in her October 2017 statement that she only used the card twice and in her February statement saying she used the card three times. Also, Grievant failed to disclose in her statements that she had caused a new card to be issued on J.Y.'s case specifically for her use of the benefits J.Y. was not entitled to receive because he was incarcerated.

Grievant's actions unquestionably violated Respondent's employee conduct policy and constituted gross misconduct. Grievant repeatedly and willfully disregarded the standards of behavior expected of her as an employee and disregarded her employer's interest in favor of her own. Respondent has proven it had good cause to terminate Grievant's employment.

Grievant also argues that her punishment should be mitigated. "[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 argues mitigation is warranted due to her previous work record, dubious initial training, and her misunderstanding of the applicable rules and procedures. Grievant had been employed by Respondent for seven years and Grievant's assertion she had no previous disciplinary history and that her prior performance met expectations is undisputed. Although in her PFFCL Grievant asserts her training was inadequate, in neither her written statements nor her testimony did Grievant indicate what happened was because of poor training. In fact, Grievant repeatedly admitted that she knew she was wrong. As for Grievant's misunderstanding of the applicable rules and procedures, Grievant asserted in her testimony at level three that she believed she was following policy and that, although she knew she had done something wrong she could not find it in policy. Grievant did not provide the policy she asserts she followed

and, as stated above, it defies belief that Grievant's actions were a result of a mistaken understanding of policy. Grievant's misconduct was repeated and serious. Mitigation is not warranted.

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. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "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); *See also* W. VA. CODE ST. R. § 143-1-12.2.a. (2016).

3. "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).

4. "The employing authority's right to dismiss a Civil Service protected employee for gross misconduct is not conditioned upon or limited by the outcome of any criminal charges which may have been brought against the employee." Syl. 3, *Thurmond v. Steele*, 159 W.Va. 630, 225 S.E.2d 210 (1976).

5. “An employee covered by civil service may be discharged for good cause but the reasons therefor must be given to him at the time his employment is so terminated and cannot be supplied for the first time at a civil service hearing on his appeal from such discharge.” Syl. Pt. 2, *Yates v. Civil Serv. Comm'n*, 154 W. Va. 696, 697, 178 S.E.2d 798, 798 (1971).

6. Respondent proved it had good cause to terminate Grievant’s employment for gross misconduct and violation of Respondent’s employee conduct policy when Grievant continuously accessed her boyfriend’s case, assisted her boyfriend’s mother in accessing and using her boyfriend’s benefits that were improperly accruing while he was incarcerated, and then caused a new benefits card to be issued for her to also use her boyfriend’s benefits.

7. “[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).

8. Grievant failed to prove mitigation of the punishment is warranted.

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: August 26, 2019

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Billie Thacker Catlett
Chief Administrative Law Judge