THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CRYSTAL LYNN KENDALL, et al.,
Grievants,
v. **Docket No. 2019-1336-CONS**

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

DECISION

Grievants, Crystal Kendall, Loretta Smith and Joyce Underwood, are employed by Respondent, Department of Health and Human Resources ("DHHR") in the Bureau for Children and Families ("BCF"). Each Grievant filed a separate grievance form alleging, "Retaliatory suspension without cause" and requested "to be made whole in every way including back pay with interest and benefits restored." Grievant Underwood filed a level one grievance form dated March 6, 2019, Grievants Kendall and Smith filed level one grievance forms dated March 8, 2019.

By forms dated March 15, 2019, Grievants Loretta Smith and Joyce Underwood filed separate grievances alleging *inter alia* harassment, retaliation and hostile work environment. Grievant Joyce Underwood filed a separate grievance dated March 30, 2019, alleging Respondent was improperly investigating her private life.

The parties met on April 9, 2019 and agreed to waive the first two levels and move the grievances to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). The three grievances alleging retaliatory discharge were consolidated by an order dated April 24, 2019 and were given the docket number set out above.[1] On October 9, 2019, Grievants moved to amend

[1] The remaining three grievances have also been consolidated into the action by agreement of the parties.

the consolidated grievances related to the suspensions to include the allegation of "dismissal without good cause." The motion to amend was granted by an order dated October 15, 2019. A level three hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance Board on February 20, 2020. Grievants Kendall, Smith, and Underwood appeared in person and through their counsel, Anthony Brunicardi, Esquire, The Employment Law Center, PLLC. Respondent DHHR was represented by Stephen R. Compton, Deputy Attorney General. The parties agreed to limit the hearing to the grievances related to suspension and dismissal and hold the harassment and hostile work environment grievances in abeyance until this decision was rendered. Accordingly, an Order has been issued severing those grievances from this consolidated matter and holding them in abeyance. The matter became mature for decision on April 3, 2020, upon receipt of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievants were suspended without pay pending an investigation based upon a specific complaint received by Respondent. The investigation has gone on for a year without resolution. While the investigation was ongoing, Grievant Kendall would not participate in an interview scheduled by the Respondent's Office of Inspector General. Respondent dismissed Grievant Kendall for gross misconduct by forfeiting her job pursuant to W. VA. CODE § 29-6-19 when she did not participate in an interview to be conducted by an Office of the Inspector General investigator. Also, during the course of the investigation, Grievant Underwood retired after exhausting all of her accrued annual

leave days. Respondent argues that her grievance is now moot as a result of her retirement.

Grievants argue that the indefinite suspension of their right employment pending an investigation violates their due process rights by terminating their property interest in their continuing employment. Respondent argues that the Division of Personnel Administrative Rule specifically allows for an "indefinite" suspension of an employee without pay pending an investigation.

Grievant Underwood's grievance is not moot because she has an available remedy concerning her accrued annual leave should her employment be restored. Grievant Underwood did not prove that she was subjected to constructive discharge when she chose to retire during the course of the suspension. Respondent did not prove that Grievant Kendall was guilty of gross misconduct because W. VA. CODE § 29-6-19 does not apply to the facts in this matter. Grievants proved that the length of the investigation was unreasonable and violated their due process rights.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievants, Crystal Kendall, Loretta Smith and Joyce Underwood, are employed by Respondent, Department of Health and Human Resources ("DHHR") in the Bureau for Children and Families ("BCF"). Joyce Underwood is the Community Service Manager ("CSM") for Calhoun, Gilmer, and Wirt Counties. Crystal Kendall is a Child Protective Services ("CPS") Supervisor for Calhoun County and Loretta Smith is a CPS Supervisor in Calhoun County.

2. A hearing was held in the Circuit Court of Gilmer County, West Virginia, before Circuit Judge Jack Alsop, on March 28, 2019, related to a permanency plan for a child who was taken into protective custody by the BCF on March 6, 2018.[2]

3. The BCF received a complaint following the hearing alleging that Grievants violated W. VA. CODE § 6B-2-5. The BCF determined that an investigation into these allegations was warranted. (Joint Exhibits 2, 3, & 4)

4. All three Grievants received a letter dated March 29, 2019, suspending them from employment pending an investigation pursuant to the Division of Personnel ("DOP") Administrative Rule subsection 12.3.b. (W. VA. CODE R. 143-1-12.3.b.). The specific reason for the suspension pending investigation was the following:

> On March 28, 2019, allegations were reported that you acted in connection with other [DHHR, BCF] employees for the purposes of personal gain related to placement of children who have come into the custody of the [DHHR, BCF]. This was specifically addressed in findings in Gilmer County Court on March 28, 2019, by Judge Jack Alsop during the course of a case heard that date in his Court, which implied that the Calhoun County Office of CPS, may have knowingly and intentionally used employment positions for own private gain or that of another person in violation of the West Virginia Code and violated DHHR Social Service Policies regarding conflict of interest and confidentiality.[3]

Grievants were permitted to utilize any accumulated annual leave during the suspension, which would be reimbursed if the allegations were unsubstantiated. W. VA. CODE R. 143-1-12.3.b.[4]

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[2] Joint Exhibit 1, Order entered by Judge Alsop on April 14, 2019.
[3] Joint Exhibit 2, letter to Joyce Underwood; Joint Exhibit 3, Letter to Mabel Loretta Smith; and Joint Exhibit 4, letter to Crystal Kendall.
[4] There was no testimony regarding whether Grievants utilized their accumulated leave or how much each employee had accumulated. However, the maximum annual leave days an employee may carry from one year to the next is forty (40) days. W. VA. CODE R. 143-1-14.3.a.

5. The crux of this complaint centers around the allegation that Grievant Smith recommended that the foster parents of the child be given permanent custody. The foster parents were the son and daughter-in-law of Grievant Underwood, with whom Ms. Smith allegedly consulted about the placement. Grievant Kendall was Ms. Smith's supervisor and is alleged to have approved her recommendations regarding the child's placement. The allegation implies that the foster parents would benefit financially by receiving support payments for the child from DHHR.

6. The complaint that was the basis of the suspensions pending investigation, was referred to the DHHR Office of Inspector General ("OIG") for investigation when the suspensions were issued. The OIG Investigation and Fraud unit has the responsibility for conducting investigations of internal matters at the direction of the Inspector General and for conducting investigations of suspected fraud and abuse within DHHR administered programs.

7. For reasons which were not revealed at the hearing, the OIG significantly expanded the scope of the investigation into the conduct of the Grievants including an examination of all the placements made by one or all the Grievants during their extended careers with the BCF. The investigation began in March 2019 and was not concluded by the time of the level three hearing on February 20, 2020.[5]

8. Grievant Loretta Smith was scheduled for an interview with an investigator for the OIG. She attended the interview and voluntarily answered questions. The interviews were conducted on June 12, 2019 and were split into two three-hour sessions.

[5] Testimony of Christopher Nelson, OIC Director of Investigations. Mr. Nelson testified that additional allegations that might lead to potential administrative or criminal charges were included to the investigation but maintained that it was all confidential and he would not discuss any specifics.

The level three hearing was conducted more than eight months after that interview and Grievant Smith has not received any information regarding the investigation or potential discipline. She remains suspended without pay.

9. Attempts were made by OIG investigators to schedule interviews with Grievant Underwood in June and July 2019. However, Grievant Underwood had retired from employment effective May 30, 2019. By this time, she had exhausted her accumulated annual leave and did not feel she could cope financially without any pay coming in. At age sixty-nine, with thirty-five years of service with DHHR, she qualified for retirement and felt it was her only viable option.

10. Notwithstanding the fact that Grievant Underwood had retired prior to any meetings being scheduled, Director Nelson sent a memorandum to Jolynn Mara, Interim Inspector General, stating that Grievant Underwood was no longer eligible to maintain her job as a result of not attending the interviews under W. Va. Code § 29-6-19. (Joint Exhibit 8)

11. In his memorandum to the Interim Inspector General, Director Nelson listed the issues to be involved in the interview were "related to worker's compensation, reported abuse of position by employees, and a hostile work environment." None of these issues relate to the allegations for which Grievant Underwood was suspended. (Joint Exhibit 8)

12. An interview was scheduled for Grievant Kendall by an OIG investigator for June 11, 2019. Grievant Kendall did not appear for the interview. When contacted, Grievant Kendall stated that she would not attend any scheduled interviews.[6]

[6] Joint Exhibit 7, Memorandum from Director of Investigations Nelson to Interim Inspector General Marra.

13. A second interview was scheduled for Grievant Kendall for August 1, 2019. In the notice for the interview, Grievant Kendall was told that if she failed to attend the interview, she would forfeit her employment. Ms. Kendall did not attend the interview.[7]

14. Grievant Underwood was told by her union representative that since she was suspended from employment without pay, she did not have to attend meetings scheduled by her employer.

15. Grievant Kendall had exhausted all her accumulated annual leave in May 2019 and was approved for unemployment compensation by Workforce West Virginia on May 23, 2019.

16. Director of Investigations Nelson sent a memorandum to Interim Inspector General Marra dated August 5, 2019, stating *inter alia*, "Given her refusal to testify in regard to this matter, Ms. Kendall is no longer eligible to maintain a position under W. Va. Code § 29-6-19." He described the matters to be addressed at the interview as "criminal issues, reported abuse of position by employees, a hostile work environment as well as numerous other issued to discuss." Many of these issues were not the reasons listed in the notice of suspension pending investigation given to Grievant Kendall.[8]

17. A predetermination conference was scheduled for Grievant Kendall on August 21, 2019, which she did not attend. BCF Deputy Commissioner Tanagra O'Connell contacted Grievant Kendall by telephone on September 4, 2019, regarding the predetermination meeting that Grievant had not attended. Grievant Kendall told Ms. O'Connell that she was advised by her union representative and her attorney not to attend the meeting. Ms. O'Connell asked Grievant Kendall if she would attend a meeting with

[7] *Id.*
[8] *Id.*

either or both of her representatives present, and Grievant Kendall declined. Deputy Commissioner O'Connell sent a letter dated September 12, 2019, confirming the telephone conversation. (Joint Exhibit 5)

18. Grievant Kendall received a "Notice of Dismissal for Gross Misconduct" by certified letter dated October 9, 2019. The notice stated that Grievant Kendall had been suspended pending an investigation into an allegation that she "had placed children in the care of others for personal gain." The specific reason given for dismissal was Grievant's alleged failure to cooperate with an OIG investigation in violation of W. VA. CODE § 29-6-19. (Joint Exhibit 6)

19. At present there is no indication that the investigation has been completed or any action has been taken regarding Grievant Loretta Smith. She is still suspended from her employment without pay pending investigation more than a year after the suspension occurred.

20. The DOP Administrative Rule related to suspensions pending investigation requires that the employee receive notice of the reasons for the suspension as follows:

> The appointing authority shall give the employee oral notice confirmed in writing within three (3) working days, or written notice of the specific reason or reasons for the suspension.

(W. VA. CODE R. 143-1-12.3.b) Respondent gave Grievants specific reasons for their suspension. *See* FOF 4 *supra.*

21. OIG investigations into welfare fraud routinely take one year and often last up to five years before a final report is issued. In this case, the OIG determined that the

investigation included several facets and they are looking at every case in which any of the Grievants were involved during their careers.[9]

Discussion

Respondent began by moving to dismiss the grievance of Grievant Underwood regarding the suspension pending investigation, because she has retired while the grievance is pending. Respondent argues that the grievance is now moot because Grievant is no longer employed by DHHR. Grievant argues that she did not voluntarily retire. She claims that she was forced to retire because she no longer had an income as a result of the improper suspension and therefore the grievance is not moot.

When the employer asserts an affirmative defense, it must be established by a preponderance of the evidence. *See, Lewis v. Kanawha County Bd. of Educ.,* Docket No. 97-20-554 (May 27, 1998); *Lowry v. W. Va. Dep't of Educ.,* Docket No. 96-DOE-130 (Dec. 26, 1996); *Hale v. Mingo County Bd. of Educ.,* Docket No. 95-29-315 (Jan. 25, 1996). *See generally, Payne v. Mason County Bd. of Educ.,* Docket No. 96-26-047 (Nov. 27, 1996); *Trickett v. Preston County Bd. of Educ.,* Docket No. 95-39-413 (May 8, 1996).

The Grievance Board will not hear issues that are moot. "Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." *Bragg v. Dept. of Health & Human Res.,* Docket No. 03-HHR-348 (May 28, 2004); *Burkhammer v. Dep't of Health & Human Res.,* Docket No. 03-HHR-073 (May 30, 2003); *Pridemore v. Dep't of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996).

[9] Level three testimony of Director of Investigations Christopher Nelson.

Grievant Underwood was suspended without pay on March 29, 2019.[10] As permitted by the section 12.3b of the DOP Administrative Rule,[11] she utilized her accumulated annual leave so that she would have income during the period of suspension. When her accrued annual leave was exhausted, she retired effective May 30, 2019. If the reasons for the suspension were determined unsubstantiated, Grievant Underwood would be entitled to reimbursement for annual leave used during the period of her suspension. There remains a remedy available to Grievant Underwood under the suspension grievance and the matter is not moot. Accordingly, Respondent's Motion to Dismiss the suspension grievance is denied**.**

Grievant Underwood argues that she did not voluntarily retire but was forced to do so by the unreasonable length of the investigation. Without income she could not pay her bills, buy food and medicine, or pay for housing. While Grievants did not identify a specific legal argument to support this claim it appears the Grievant may be asserting that she was constructively discharged.

The term "constructive discharge" has specific meaning within the grievance procedure. It is been routinely held that in order to prove a constructive discharge, a grievant must establish that working conditions created by or known to the employer were so intolerable that a reasonable person would be compelled to quit. It is not necessary that a grievant prove that the employer's actions were taken with a specific intent to cause her to quit. Syl. Pt. 6, *Slack v. Kanawha County Housing*, 188 W. Va. 144, 423 S.E.2d 547

[10] Joint Exhibit 2.
[11] W. VA. CODE R. 143-1-12.3.b.

(1992); *Preece v. Public Serv. Comm'n*, Docket No. 94-PSC-246 (Apr. 25, 1997); *Coster v. W. Va. Div. of Corrections*, Docket No. 94-CORR-600 (Aug. 12, 1996); *Jenkins v. Dep't of Health and Human Resources/Mildred Mitchell-Bateman Hosp.*, Docket No. 02-HHR-214 (Oct. 22, 2002). "The trier of fact must be satisfied that the…working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Slack,* 423 S.E.2d at 556 (citing *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114, 119 (1st Cir. 1977).

In this case, Grievant Underwood appears to argue that the suspension was the difficult and unreasonable working condition which caused her to retire. Unfortunately, as discussed in detail, later in the decision, Respondent had the right to initially suspend Grievant Underwood without pay while an internal investigation was conducted into a charge of misconduct. Ms. Underwood voluntarily retired at an early stage in the investigation. This situation does not constitute such unreasonable working conditions to cause a reasonable person to resign or retire.

Respondent dismissed Grievant Kendall for alleged gross misconduct related to her refusal to be interviewed by an OIG investigator examining her activities related to her employment with DHHR. As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018).

> . . . *See* [*Watkins v. McDowell County Bd. of Educ.,* 229 W.Va. 500, 729 S.E.2d 822] at 833 (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education,* 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). *See also Hovermale v.*

> *Berkeley Springs Moose Lodge,* 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) ("Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence."). . .

W. Va. Dep't of Trans., Div. of Highways v. Litten, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

All Grievants, including Grievant Kendall, were suspended without pay pending an investigation into their actions regarding the placement of a child in the custody of a foster parent who was the son of Grievant Underwood. DHHR's OIG was charged with conducting that investigation. Grievant Kendall was notified that a date had been scheduled for her to be interviewed by an OIG investigator in the course of their investigation. Grievant Kendall did not appear at the appointed time and informed the investigator that she would not be attending any other meetings for the purposes of being interviewed by the OIG. Nevertheless, a second date was scheduled for an interview and Grievant Kendall was sent a written notification. In the notice, Grievant Kendall was told that if she failed to attend the interview, she would forfeit her employment pursuant to W. VA. CODE § 29-6-19. Grievant Kendall did not attend the second scheduled meeting and she was called to determine the reason. She informed the caller that she was advised by her union representative and her attorney not to attend the meeting. Grievant Kendall was offered the opportunity for an interview with her union representative and/or her attorney present and she declined. Subsequently, Respondent scheduled a predetermination meeting, which Grievant Kendall also declined to attend, and Respondent terminated her

employment thereafter, citing her failure to cooperate with an OIG investigation in violation of W. VA. CODE § 29-6-19. WEST VIRGINIA § 29-6-19 states the following:

> §29-6-19. Refusal to testify
>
> If any employee in the classified or classified-exempt service shall willfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or answer any question relating to the affairs or government of the state or the conduct of any state officer or employee on the ground that his testimony or answers would tend to incriminate him or shall refuse to accept a grant of immunity from prosecution on account of any matter about which he may be asked to testify at any such hearing or inquiry, he shall forfeit his office or position and shall not be eligible thereafter for appointment to any position in the classified or classified-exempt service.

Grievant Kendall points out that she was suspended without pay during the time she was scheduled to be interviewed by the OIG. She argues that because she was not working and not being paid, she was temporarily unemployed by Respondent and therefore not subject to the statute. Grievant Kendall cites the fact that she was approved to receive unemployment compensation during that time.

Grievant Kendall did not cite any specific authority for this position. She receives certain benefits of employment while she is suspended that she would not receive if she were no longer employed, such as use of annual leave and insurance coverage. The Division of Personnel ("DOP") Administrative Rule still applies to Grievant including the provisions of section of W. VA. CODE R. 143-1-12.3.b which requires that she be reimbursed for lost pay or leave if the charges which led to her investigation are not substantiated. Grievant did not prove that she was not an employee covered by §29-6-19 because she was suspended without pay.

However, there is an issue regarding whether the investigation by the DHHR OIG regarding Grievant's suspension is a "hearing or inquiry" contemplated by §29-6-19. This issue was specifically addressed in an Attorney General opinion issued in 2017 at the request of the Cabinet Secretary of the DHHR. The Opinion was issued pursuant to WEST VIRGINIA CODE § 5-3-1, which requires the Attorney General to give written opinions when requested in writing to do so by any "state officer, board, or commission." In the Opinion the question was framed as follows:

> In your letter, you explain that union representatives have advised Department of Health and Human Resources ("DHHR") employees not to answer any questions posed to [them during internal investigations of employee, client, customer, patient, or resident complaints. You indicate that this lack of cooperation makes it more difficult for DHHR to investigate complaints effectively.

WV Attorney General Opinion, Aug 04, 2017, 2017 W. Va. AG LEXIS 10.

With this in mind, the specific question was stated as:

> Under West Virginia Code § 29-6-19, does a West Virginia civil service employee forfeit his or her office or position by refusing or failing to comply with a DHHR internal investigation?

After an analysis of the statute, the ultimate answer was:

> We conclude that W. Va. Code § 29-6-19 does not apply to internal investigations conducted by agency employees, and therefore, the statute does not mandate an employee who refuses or fails to participate in such investigations to forfeit his or her employment.

The Attorney General determined that an internal investigation does not appear to constitute a "hearing or inquiry" under the statute. The following reasoning was applied in reaching that conclusion:

> Absent additional context, it might be possible to construe the word "inquiry" to apply to any question or investigation conducted by anyone, regardless of degree of formality. But the associated-words canon ["*noscitur a sociis* "] again demonstrates that the term is properly read narrowly. When paired with the word "hearing," and in connection with the antecedent references to courts, legislative committees, and various administrative tribunals, the word "inquiry" most naturally takes on a more formal connotation-namely, an official investigatory or adjudicative proceeding before some duly-authorized public body.
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> This conclusion finds support in the U.S. Supreme Court decision in *United States v. Nugent*, 346 U.S. 1 (1953). In that case, the Court considered the scope of the similar terms "appropriate inquiry" and "hearing" for claims of conscientious objection under Section 6U) of the Selective Service Act. *Id.* at 3-7. The Court explained that, under Section 6U), the Department of Justice must "accord a fair opportunity to the registrant to speak his piece before an impartial hearing officer, " "produce all relevant evidence in his own behalf," and supply him or her with "any adverse evidence in the investigator's report." *Id*. at 6. These requirements of an impartial hearing officer and presentation and receipt of adverse evidence are not characteristic of (and are certainly not required in) internal investigations conducted by agency employees.

The OIG investigators are DHHR employees conducting an internal investigation regarding a complaint made against Grievants. Grievants were not advised of the full scope of the investigation, nor given any opportunity to produce any evidence on their own behalf. They were simply expected to answer the investigator's questions. This certainly is not the kind of "hearing or inquiry" contemplated by W. VA. CODE § 29-6-19. Attorney General opinions are not binding but are viewed in West Virginia jurisprudence as persuasive. *See Stover v. W. Va. Div. of Corr*., No.12-0434 (W. Va. Sup. Ct., May 17, 2013) (memorandum decision).

Additionally, the West Virginia Supreme Court of Appeals ("WVSCA") has held that, "In construing an ambiguity in a statute, this Court will examine the title to the Act of the Legislature as a means of ascertaining the legislative intent, and the overall purpose of the legislation." Syl. Pt. 2, *City of Huntington v. State Water Comm'n*, 135 W. Va. 568, 64 S.E.2d 225 (1951). *Accord* Syl. Pt. 4, *L.H. Jones Equip. Co. v. Swenson Spreader LLC*, 224 W. Va. 570, 687 S.E.2d 353 (2009). The title of the code section in question is "Refusal to Testify." While the term "inquiry" is used in the statute, the title to the Act infers the "inquiry" must have some formality and certainly something more than an interview incident to an internal agency inquiry. The fact that the OIG is a separate branch of DHHR from the Bureau for Children and Families does not change the fact that Grievant Kendall is not subject to the statute. Notwithstanding the issues the OIG added to the investigation, this is the type of standard internal investigations of alleged employee misconduct which are regularly conducted by many State agencies. There is no reason DHHR employees should be subjected to additional constraints, such as an extended fishing expedition through their entire work history, merely because Respondent chooses to utilize the OIG for its internal investigations.

Grievant Kendall is accused of not subjecting herself to an interview by employees of the DHHR. As indicated by the Attorney General opinion, W. VA. CODE § 29-6-19 does not apply to the internal investigation of the Grievant's employment activities conducted by agency employees. Therefore, the statute does not mandate Grievant Kendall forfeit her employment for refusing to be interviewed by said employees.

All three Grievants argue that their suspension pending an investigation was improper and that the length of the investigation, and subsequently their suspension

violates their constitutional due process rights. Respondent counters that the suspensions were properly based upon serious complaints and the DOP Administrative Rule allowing such suspensions to last indefinitely.

The suspension of an employee pending investigation of an allegation of misconduct is not disciplinary in nature and the grievant bears the burden of proving that such suspension was improper. *Ferrell and Marcum v. Reg'l Jail and Corr. Facility Auth./W. Reg'l Jail*, Docket No. 2013-1005-CONS (June 4, 2013); W. VA. CODE R. 143-1-12.3.b. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. 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 burden has not been met. *Id*.; *Corley v. Dep't of Health & Human Res.,* Docket No. 2019-0532-DHHR (May 7, 2019).

The DOP Administrative Rule at section 12.3.b states:

> 12.3.b. Non-disciplinary Suspension. – An appointing authority may suspend any employee without pay indefinitely to perform an investigation regarding an employee's conduct which has a reasonable connection to the employee's performance of his or her job or when the employee is the subject of an indictment or other criminal proceeding. Such suspensions are not considered disciplinary in nature and an employee may choose to use accrued annual leave during the period of non-disciplinary suspension but is not eligible for any other leave afforded in this rule. The appointing authority shall give the employee oral notice confirmed in writing within three (3) working days, or written notice of the specific reason or reasons for the suspension. A predetermination conference and three (3) working days' advance notice are not required;

> however, the appointing authority shall file the statement of reasons for the suspension and the reply, if any, with the Director.

The rule further provides that at the completion of the investigation the agency must:

> 12.3.b.1. initiate appropriate disciplinary action as provided in this rule; and,
>
> 12.3.b.2. unless the employee is dismissed or otherwise separates from employment prior to completion of the investigation or criminal proceeding, provide retroactive wages or restore annual leave for the period of suspension; provided, that such retroactive wages may be mitigated by other earnings received during the period of suspension. . . .

Respondent suspended Grievants after receiving a complaint that they may have used their employment positions for personal gain by placing a client child in the custody of a foster parent who was Grievant Underwood's son. The allegation was brought pursuant to a hearing regarding permanent placement of the child. In the resulting order, the Circuit Judge was critical of the conduct of one or more Grievants. Grievants received written notice of the reasons for the suspension as required by rule 12.b.3.[12] These were serious charges that were specifically related to Grievants' employment. The suspension pending investigation for the reasons cited was justified pursuant to the DOP Administrative Rule.

The issue regarding whether the length of the suspension violates Grievants' due process rights remains. The first question is whether Grievants, long term public employees, have a constitutionally protected interest in their continued employment. The answer is yes. In *W. Va. Dep't of Envtl. Prot. V. Falquero*, 228 W. Va. 773, 778, 724 S.E.2d 744, 749, (2012), Justice McHugh noted the Court's long held position on this issue:

[12] *See* FOF 4 *supra.*

> This Court has unequivocally said that "[a] person covered under a civil service system is afforded certain statutory protections surrounding his employment and is, therefore, *not* an at-will employee." *Williams v. Brown*, 190 W.Va. 202, 205, 437 S.E.2d 775, 778 (1993) (emphasis added). This observation is based on our holding in syllabus point four of *Waite v. Civil Service Commission*, 161 W.Va. 154, 241 S.E.2d 164 (1977), that "[a] State civil service classified employee has a property interest arising out of the statutory entitlement to continued uninterrupted employment."

The Civil Service system was put in place to protect public employees from the uncertainty of work created by the electoral system. Excellent employees regularly lost their jobs because of the election of a new official and the exercise of the "spoils system." The public lost valuable employees and inconsistency in the application of rules and regulations were often the result. This protected interest requires that state employees must be afforded specific protections prior to being deprived of their employment.[13] The WVSCA determined "[t]he constitutional guarantee of procedural due process requires '"some kind of hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment.' *Cleveland Bd. of Educ. V. Loudermill*, 470 U.S. 532, 542 [84 L. Ed. 2d 494, 105 S. Ct. 1487] (1985)." Syl. Pt. 3, *Fraley v. Civil Serv. Comm'n*, 177 W. Va. 729, 730, 356 S.E.2d 483, 484 (1987). "'Due process must generally be given before the deprivation occurs unless a compelling public policy dictates otherwise.' Syl. Pt. 2 (in part), *North v. West Virginia Board of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977)." *Clarke* at Syl. Pt. 5. "The essential due process requirements,

[13] In Syllabus Point 2 of *State ex rel. Ellis v. Kelly,* 145 W. Va. 70, 112 S.E.2d 641 (1953), [the WVSCA] recognized that, "Due process of law, within the meaning of the State and Federal constitutional provisions, extends to actions of administrative officers and tribunals, as well as to the judicial branches of the governments." *See also* Syl. pt. 5, *State ex rel. Bowen v. Flowers, supra;* Syl. pt. 2, *State ex rel. Gooden v. Bonar,* 155 W. Va. 202, 183 S.E.2d 697 (1971); Syl. pt. 1, *Smith v. Siders,* 155 W. Va. 193, 183 S.E.2d 433 (1971).

notice and an opportunity to respond, are met if the tenured civil service employee is given oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story' prior to termination." *Fraley*, 177 W. Va. At 732, 356 S.E.2d at 486 (citing *Loudermill* at 546).

At least one of these procedural protections is set out in the DOP Rule. Within three days of the suspension, the employee must be given written notice of the reasons for the investigation. In this situation, such specific notice was given. However, Grievants have not been given all the reasons involved in the OIG investigation nor any opportunity to give their side of the allegations. This is particularly true since the OIG has expanded the investigation into significantly more areas that than those set out in the written notice of suspension, including: unspecified "criminal matters"; "criminal matters related workers compensation"; "hostile work environment"; "numerous other issues."[14] There is no question that Grievants are entitled to a hearing to be given notice of these charges and the opportunity to defend themselves under the due process clause of the federal and state constitutions before their right to continued employment can be taken away. U.S. Cont. art. XIV, § 1; W.Va. Const. art. III, § 10; *Simpson* v. *Stanton*, 119 W.Va. 235, 193 S.E. 64; *In Re Downs*, 82 N.M. 319, 481 P.2d 107. The opportunity to be heard is a fundamental requirement of the due process clause. *Armstrong* v. *Manzo*, 380 U.S. 545, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965). However, where there is an overriding public interest involved the hearing may be postponed for a reasonable period of time in order to allow an investigation to be conducted. *Boddie* v. *Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971).

[14] Joint Exhibits 7 & 8.

Clearly there was an overriding public interest involved in the protection of the child to allow the hearing to be postponed for a reasonable period of time while an investigation was conducted. Respondent argues that section 12.3.b authorized it to suspend Grievants "indefinitely" while the investigation is being conducted. Notwithstanding the DOP Rule, the West Virginia and Federal Constitutions require that the investigation be conducted within a "reasonable time" to meet constitutional due process standards.

In Syllabus Point 2 of *State ex rel. Sheppe v. Board of Dental Examiners,* 147 W. Va. 473, 128 S.E.2d 620 (1962), [the WVSCA] held that, "In the absence of a specific time limit, the failure of a state board or agency to take decisive action with a reasonable time, upon a matter properly before it, [such as providing Grievant's a hearing] will be assumed to be a refusal of the action sought." "In Syllabus Point 3 of *State ex rel. Bowen v. Flowers,* 155 W. Va. 389, 184 S.E.2d 611 (1971), involving the suspension of a pharmacist from participation in pharmaceutical programs administered by the Department of Welfare, [the] Court stated, "Where a suspension is justified prior to a hearing, the refusal to hold a hearing after a reasonable time has elapsed in which to conduct a proper investigation constitutes *arbitrary* or *capricious* action on the part of the administrative officer involved."[15] *Allen v. State Human Rights Comm'n*, 174 W. Va. 139, 156, 324 S.E.2d 99, 116-117, (1984).

[15] Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

In *Bowen*, the WVSCA was addressing a Pharmacist's claim that his right to participation in a DHHR program was being denied without a hearing while an investigation was being conducted. The Court found that the pharmacist was entitled to defend himself under the Due Process Clauses of article XIV, § 1 of the Federal Constitution and Article III, § 10 of the W. Va. Constitution. Although the DHHR Commissioner could temporarily suspend the pharmacist's participation in the programs pending an investigation, the investigation had to be promptly conducted and the hearing had to be held within a reasonable time. The investigation had been ongoing for seven months and had not been concluded. The Court concluded that 30 days was a reasonable time within which to complete the investigation of the pharmacist's practices. Having found that the length of the deprivation of the pharmacist's right to a hearing for a seven plus month investigation the Court ordered that the investigation be concluded within thirty days.[16]

In this case, Grievants were suspended for a specific complaint, alleged improper placement of a client child for personal gain. This is the only reason given for the suspension in their written notice. That charge could have been investigated in thirty days. While the allegation is serious it is relatively simple. The main questions were whether one of Grievants was related to the foster parents. Whether that family would financially benefit from the placement. Whether there was an alternative placement, and whether the supervisor of Grievants knew about the conflict in the placement and approved it anyway. The Circuit Judge had already made specific findings related to some of these issues. The relevant witnesses were already identified and available for questioning. However, the OIG

[16] The *Bailey* case was brought in the form of a writ of mandamus, but the principles announced therein are equally applicable and instructive toward the resolution of this grievance. As in this case, there was no statutory or policy limit on the duration of an investigation in *Bailey.*

investigators expanded the investigation as set out above and are looking into potential criminal charges. A year has gone by and there is no indication that any of this matter has been referred to a law enforcement agency. A year-long investigation of the charges for which Grievants were given is clearly unreasonable, arbitrary, and capricious. Grievants cannot be deprived of their right to continued employment while the OIG combs through their employment history for irregularities with limited notice of a charge.

It cannot be over emphasized that while OIG is conducting their investigation, Grievants are left without any income. These are long term employees with good employment records who have been deprived of their job for more than a year based upon nothing more than an allegation. Very few people, let alone public employees have financial reserves necessary to get them through a year without pay. As mentioned before, they are left neither able to pay their utility bills and other debts, nor procure necessities such as food, shelter, or medication. In some ways Grievants are worse off than if they were fired. They are stuck in an uncertain status without knowing all the allegations against them and no opportunity to defend themselves from those charges. Director of Investigations Nelson testified that employees often give up and quit because the long time without a salary is not worth waiting for the results of the investigation.

Grievants proved by a preponderance of the evidence that Respondent has violated their constitutionally guaranteed due process rights to continued employment by suspending them without an opportunity to be heard while an unreasonably long investigation was conducted. Accordingly, their consolidated grievance is granted.

Regarding Grievant Underwood's claim of constructive discharge, Grievant did not prove that she was subjected to such unreasonable working conditions that would require

a reasonable person to resign or retire at that time she did. According, that grievance is denied.

Regarding the dismissal of Grievant Kendall, Respondent did not prove by a preponderance of the evidence that Grievant Kendall was guilty of gross misconduct for refusing to be interviewed by the DHHR OIG incident to an internal investigation of alleged misconduct nor that Grievant forfeited her position pursuant to W. VA. CODE § 29-6-19. Accordingly, the grievance is granted.

Conclusions of Law

1. When the employer asserts an affirmative defense, it must be established by a preponderance of the evidence. *See, Lewis v. Kanawha County Bd. of Educ.,* Docket No. 97-20-554 (May 27, 1998); *Lowry v. W. Va. Dep't of Educ.,* Docket No. 96-DOE-130 (Dec. 26, 1996); *Hale v. Mingo County Bd. of Educ.,* Docket No. 95-29-315 (Jan. 25, 1996). *See generally, Payne v. Mason County Bd. of Educ.,* Docket No. 96-26-047 (Nov. 27, 1996); *Trickett v. Preston County Bd. of Educ.,* Docket No. 95-39-413 (May 8, 1996).

2. The Grievance Board will not hear issues that are moot. "Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." *Bragg v. Dept. of Health & Human Res.,* Docket No. 03-HHR-348 (May 28, 2004); *Burkhammer v. Dep't of Health & Human Res.,* Docket No. 03-HHR-073 (May 30, 2003); *Pridemore v. Dep't of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996).

3. Respondent did not prove by a preponderance of the evidence that there were no cognizable issue or available remedies available to Grievant Underwood.

4. The term "constructive discharge" has specific meaning within the grievance procedure. A grievant must establish that working conditions created by or known to the employer were so intolerable that a reasonable person would be compelled to quit. Syl. Pt. 6, *Slack v. Kanawha County Housing*, 188 W. Va. 144, 423 S.E.2d 547 (1992); *Preece v. Public Serv. Comm'n*, Docket No. 94-PSC-246 (Apr. 25, 1997); *Coster v. W. Va. Div. of Corrections*, Docket No. 94-CORR-600 (Aug. 12, 1996); *Jenkins v. Dep't of Health and Human Resources/Mildred Mitchell-Bateman Hosp.*, Docket No. 02-HHR-214 (Oct. 22, 2002). "The trier of fact must be satisfied that the…working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Slack,* 423 S.E.2d at 556 (citing *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114, 119 (1st Cir. 1977).

5. Grievant did not prove that she was subjected to such unreasonable working conditions that would require a reasonable person to resign or retire at that time she did.

6. As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

7. WEST VIRGINIA § 29-6-19 states the following:

§29-6-19. Refusal to testify

> If any employee in the classified or classified-exempt service shall willfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or answer any question relating to the affairs or government of the state or the conduct of any

> state officer or employee on the ground that his testimony or answers would tend to incriminate him or shall refuse to accept a grant of immunity from prosecution on account of any matter about which he may be asked to testify at any such hearing or inquiry, he shall forfeit his office or position and shall not be eligible thereafter for appointment to any position in the classified or classified-exempt service.

8. The West Virginia Supreme Court of Appeals ("WVSCA") has held that, "In construing an ambiguity in a statute, this Court will examine the title to the Act of the Legislature as a means of ascertaining the legislative intent, and the overall purpose of the legislation." Syl. Pt. 2, *City of Huntington v. State Water Comm'n*, 135 W. Va. 568, 64 S.E.2d 225 (1951). *Accord* Syl. Pt. 4, *L.H. Jones Equip. Co. v. Swenson Spreader LLC*, 224 W. Va. 570, 687 S.E.2d 353 (2009).

9. The title of W.VA. CODE § 29-6-19 IS "Refusal to Testify." While the term "inquiry" is used in the statute, the title to the Act infers the "inquiry" must have some formality and certainly something more than an interview incident to an internal agency inquiry.

10. Attorney General opinions are not binding but are view in West Virginia jurisprudence as persuasive. *See Stover v. W. Va. Div. of Corr*., memorandum opinion, W. Va. Sup. Ct. No.12-0434 (May 17, 2013).

11. W. Va. Code § 29-6-19 does not apply to internal investigations conducted by agency employees, and therefore, the statute does not mandate an employee who refuses or fails to participate in such investigations to forfeit his or her employment. WV Attorney General Opinions, Aug 04, 2017, 2017 W. Va. AG LEXIS 10.

12. Respondent did not prove by a preponderance of the evidence that Grievant Kendall was guilty of gross misconduct for refusing to be interviewed by the DHHR OIG

incident to an internal investigation of alleged misconduct nor that Grievant forfeited her position pursuant to W. VA. CODE § 29-6-19.

13. The suspension of an employee pending investigation of an allegation of misconduct is not disciplinary in nature and the grievant bears the burden of proving that such suspension was improper. *Ferrell and Marcum v. Reg'l Jail and Corr. Facility Auth./W. Reg'l Jail*, Docket No. 2013-1005-CONS (June 4, 2013); W. VA. CODE R. 143-1-12.3.b.

14. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. 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).

15. ". . . A person covered under a civil service system is afforded certain statutory protections surrounding his employment and is, therefore, *not* an at-will employee." *Williams v. Brown*, 190 W.Va. 202, 205, 437 S.E.2d 775, 778 (1993) (emphasis added). This observation is based on our holding in syllabus point four of *Waite v. Civil Service Commission*, 161 W.Va. 154, 241 S.E.2d 164 (1977), that "[a] State civil service classified employee has a property interest arising out of the statutory entitlement to continued uninterrupted employment." *W. Va. Dep't of Envtl. Prot. V. Falquero*, 228 W. Va. 773, 778, 724 S.E.2d 744, 749, (2012).

16. This protected interest requires that state employees are be afforded specific protections prior to being deprived of their employment. The WVSCA determined "[t]he

constitutional guarantee of procedural due process requires '"some kind of hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment.' *Cleveland Bd. of Educ. V. Loudermill*, 470 U.S. 532, 542 [84 L. Ed. 2d 494, 105 S. Ct. 1487] (1985)." Syl. Pt. 3, *Fraley v. Civil Serv. Comm'n*, 177 W. Va. 729, 730, 356 S.E.2d 483, 484 (1987).

17. "The essential due process requirements, notice and an opportunity to respond, are met if the tenured civil service employee is given 'oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story' prior to termination." *Fraley*, 177 W. Va. At 732, 356 S.E.2d at 486.

18. The opportunity to be heard is a fundamental requirement of the due process clause. *Armstrong* v. *Manzo*, 380 U.S. 545, 85 S. Ct. 1187, 14 L. Ed. 2d 62. However, where there is an overriding public interest involved the hearing may be postponed for a reasonable period of time in order to allow an investigation to be conducted. *Boddie* v. *Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113.

19. "In the absence of a specific time limit, the failure of a state board or agency to take decisive action with a reasonable time, upon a matter properly before it, will be assumed to be a refusal of the action sought." Syl. Pt. 2 *State ex rel. Sheppe v. Board of Dental Examiners,* 147 W. Va. 473, 128 S.E.2d 620 (1962).

20. "Where a suspension is justified prior to a hearing, the refusal to hold a hearing after a reasonable time has elapsed in which to conduct a proper investigation constitutes *arbitrary* or *capricious* action on the part of the administrative officer involved." *State ex rel. Bowen v. Flowers,* 155 W. Va. 389, 184 S.E.2d 611 (1971)

21. Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

22. W. VA. CODE ST. R. § 143-1-12.3.b, authorized an agency to suspend an employee "indefinitely" while the investigation is being conducted. Notwithstanding the DOP Rule, the West Virginia and Federal Constitutions require that the investigation be conducted within a "reasonable time" to meet constitutional due process standards. *State ex rel. Bowen v. Flowers,* 155 W. Va. 389, 184 S.E.2d 611 (1971).

23. An investigation of ten months to a year of the charges for which Grievants were given is clearly unreasonable, arbitrary, and capricious.

24. Grievants proved by a preponderance of the evidence that Respondent has violated their constitutionally guaranteed due process rights to continued employment by suspending them without an opportunity to be heard while an unreasonably long investigation was conducted.

Based upon the foregoing, the grievance claiming the Respondent violated their due process rights is **GRANTED.** Grievant Underwood's grievance alleging constructive discharge, is **DENIED**. Grievant Kendall's grievance contesting the termination of her employment is **GRANTED.**

Respondent is **ORDERED** to complete any investigation being conducted pursuant to the suspension of Grievants and issue a report of findings within 30 calendar days of receipt of this decision. Within five working days of receipt of that report, Respondent is **ORDERED** to give Grievants a predetermination hearing prior to any contemplated discipline, or return Grievants to work in accordance with all the provisions of W. VA. CODE ST. R. §§ 143-1-12.3.b.1 and 12.3.b.2, with the exception of Grievant Underwood who Respondent must pay for all annual leave she utilized during the suspension and any days she was not paid during the suspension.

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* 156 C.S.R. 1 § 6.20 (2018).

DATE: May 19, 2020

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE