

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CASSI SMITH.,
Grievant,

v.

Docket No. 2020-0403-DVA

DEPARTMENT OF VETERANS ASSISTANCE,
Respondent.

DECISION

Cassi Smith, Grievant, was employed by Respondent, West Virginia Department of Veterans Assistance (“DVA”), in the Veterans Service Officer Assistant II classification. Ms. Smith filed an expedited grievance to level three¹ dated September 19, 2019, contesting the termination of employment. As relief she seeks “[r]einstatement.” A level three hearing was conducted in the Charleston office of the West Virginia Public Employees Grievance Board on December 18, 2019. Grievant personally appeared and was represented by Charles W. Bellomy. Respondent DVA appeared through Steve Mooney, Supervisor of the DVA Huntington Field Office and was represented by Mark S. Weiler, Assistant Attorney General. This matter became mature for decision on January 23, 2020, upon receipt of the last Proposed Findings of Fact and Conclusions of Law submitted by the parties.

Synopsis

Respondent terminated Grievant’s employment as a Veterans Service Officer Assistant II after it was discovered that she and two United States Department of Veterans Affairs (“USDVA”) employees separately accessed a veteran’s confidential records on the

¹ See W. VA. CODE § 6C-2-4(a)(4)

USDVA database system without authorization which at some point became public. The USDVA revoked Grievant's access privileges to utilize their database rendering Grievant unable to perform the essential duties of her job. Grievant argues that she made a simple mistake without intent or malice, and there was insufficient cause to release her, a tenured civil servant, from employment. She also argues that an employee, working for the USDVA also gained access to the same information without losing access to the database or being dismissed. Respondent proved that there was sufficient reason to dismiss Grievant, that she was not subject to discrimination and that mitigation of the punishment was not required.

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. Grievant, Cassi Smith, was employed as a Veterans Service Officer Assistant II in the DVA Huntington Field Office. That office is located in the building occupied by the USDVA Regional Office. She had served in that position for more than five and a half years.

2. The DVA veterans service office guides and assists veterans and their families through the claims process, regarding service-related injuries and services. Grievant's duties included assisting West Virginia veterans and their families through the benefit claims and appeals process which included service connected disability and pension claims and appeals.

3. Claims are filed, stored and processed through the USDVA "Stakeholder Enterprise Portal" ("SEP"). The SEP is a secure web-based access port for the USDVA's

business partners and veterans service organizations to more quickly, efficiently, and electronically serve and assist veterans. (Respondent Exhibit 10)

4. While veteran claims forms may technically be made on a paper application, all claims must ultimately be entered into the SEP for processing. The DVA field office employees spend approximately 95% of their time working each day on the SEP accessing veterans' files and answering questions about claim status and processing. The office email is operated through the SEP. If an employee cannot get access to the system he or she cannot effectively communicate with other agencies, providers, and constituents.

5. The SEP is the process used to access the Federal Veterans Benefits Management System database. That database contains service records, claims and appeals records, as well as medical and personal information of veterans and their families. This data must be securely protected to safeguard an individual's private and sensitive information.

6. The USDVA is the only entity that can authorize access privileges to the SEP and Benefits Management database to DVA employees including Grievant. As part of the security protocol, DVA employees are fingerprinted and subjected to a background check. DVA employees must complete "VA Information Security Awareness and Rules of Behavior" training² before being issued a Personal Identity Verification Card. ("PIV Card"). All positions at the DVA Huntington Field Office require access to the Veterans database with a PIV Card to perform their job duties.

² Respondent Exhibit is the training course transcript for fiscal year 2018. The policy and training are referred to as the "Rules of Behavior".

7. The training addresses system access, privacy, compliance. unauthorized access, data security, and other issues related to safe and secure operation of the SEP and veterans database. Grievant completed this annual training in 2015, 2016 and 2017', and was issued a PIV Card to gain access to the Veterans database in the course of performing her essential duties for the DVA.

8. Once any user logs into the SEP system their actions are monitored. Users leave a digital footprint of all they do in the system. WVDVA employees are considered Non-Organizational Users.

9. The Rules of Behavior specify that users may only "access the VA computer system and/or records for officially authorized purposes." The training explains it is a violation of the Rules of Behavior and the veteran's privacy to access a veteran's records without a "work-related need to know." The training example specifically states, "Your curiosity about people is no excuse for a breach of privacy, and it's not worth risking disciplinary action." (Respondent Exhibit 5, pg. 8)

10. On March 2, 2018, on two separate occasions, Grievant went into the veterans database through the SEP and accessed the file of a veteran, R.O.³ who was then serving as a State Senator. The veteran had no claims or appeals pending at that time. Grievant had never assisted the veteran with any claims. Grievant printed information from R.O.'s file but did not share it with others. (Testimony of Grievant)

³ The veteran's initials are used to protect his privacy. The witnesses referred to the veteran by his initials and his name was not revealed at the level three hearing.

11. At some point, information from R.O.'s veteran records became public. At the time he was running for Congress. There is no evidence indicating that Grievant disseminated that information.

12. On July 17, 2018, an investigator for the USDVA Office of Inspector General and two FBI agents interviewed Grievant. She acknowledged that she had accessed R.O.'s veteran records even though she had never assisted him with a claim or appeal.

13. Steven Mooney supervises the DVA Huntington Field Office. In August 2019, he was notified that the USDVA Office of Inspector General investigation was complete. Supervisor Mooney obtained a copy of the investigation report and communicated the results to Mike Lyons, DVA Operations Manager. Grievant's access privileges to the SEP and the veterans database were temporarily revoked.

14. The USDVA requested a written letter of explanation from Grievant explaining why she had accessed R.O.'s veteran file. Grievant faxed a letter to Mr. Lyons on September 4, 2019.⁴ The letter stated that she had accessed R.O.'s file during the teacher's strike and she had started seeing his campaign signs. She specifically stated:

I was like "Hey that name seems familiar, I think we've helped him!" I wanted to find out. It was merely a curiosity got the better of me situation. I wanted to see if we represented him and what we did for him, nothing more. I never printed anything or talked to anyone or texted any documents pertaining to his service connection. I would never share a veteran's information!

(Emphasis in original) (Respondent Exhibit 7)

⁴ On the cover sheet Grievant noted, "I would have emailed it but evidently they have killed my card. I have no access whatsoever." (Emphasis in original)

15. Mr. Lyons received an email on September 12, 2019, from Ron Bonecutter, USDVA Privacy Officer, Chief of Support Services for the USDVA Regional Office in Huntington. Mr. Bonecutter stated, “I can confirm [Grievant] will not be receiving access privileges to the VA systems.” (Respondent Exhibit 9) Officer Bonecutter provided a Declaration dated December 9, 2019, for the level three hearing stating, “The VA revoked Cassi Smith’s access privileges to the VA systems. The VA has no plans to restore Cassi Smith’s access privileges to the VA system.” The document was declared under penalty of perjury to be true and current. 28 U.S.C. § 1746. (Respondent Exhibit 12) ⁵

16. Mr. Lyons held a predetermination conference with Grievant. He also explored options regarding other positions to which Grievant could be assigned which would not require her accessing the veterans database through the SEP. He was not able to find any such positions or classification for the DVA Huntington Field Office. Grievant did not identify any such positions or classifications either.

17. By letter dated September 16, 2019, Mike Lyons informed Grievant that she was dismissed from employment.⁶ Mr. Lyons listed the following reasons for the dismissal:

This action is being taken because of your access of a veteran’s e-file without authorization or exceeding authorized access in violation of applicable policies and procedures including but not limited to, WVDVA’s (Executive Branch) confidentiality agreement and policies related to the federal Veterans Benefits Management System and SHARE . . . You

⁵ Staff Attorney for the USDVA Office of General Counsel wrote a letter with the Declaration attached to Respondent’s counsel stating “Mr. Bonecutter’s testimony is limited to providing the attached Declaration. To be clear, he is not permitted to provide any in-court/hearing testimony or any out-of-court/hearing testimony. (i.e., deposition or interview). (emphasis in original) (Respondent Exhibit 12)

⁶ The letter was hand-delivered to Grievant and she acknowledged her receipt of it by signing the letter on the same day.

accessed a veteran's file without need a need to know in violation of policy, procedure, and training. . . As a result of your misconduct, you no longer have access privileges to the federal VA system that you need to accomplish your essential job responsibilities as a Veterans Service Officer Assistant II.

(Respondent Exhibit 11)

18. Two USDVA employees also accessed R.O.'s veteran files on the Veteran database without a work-related reason. One was charged with six misdemeanors and another had her sensitive access revoked. Apparently, both were still employed by the USDVA at the time of the level three hearing.⁷ Neither of these employees were identified, nor were the classifications of their jobs revealed. They are not employees of the DVA.

Discussion

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,

⁷ Grievant's level three testimony.

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).

Grievant was a permanent State employee when her employment was terminated. 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).

Grievant argues that there is not good cause for her dismissal because her access of R.O.'s information was not a serious violation of policy and that she had no malicious intent but was merely curious. However, she admitted that she knew it was wrong to access the information without a work-related reason. The specific training Grievant received annually concerning the Rules of Behavior for the Veterans database specifically stated that it is a violation of the Rules of Behavior and the veteran's privacy to access a veteran's records without a work-related need to know. The training example specifically states, "Your curiosity about people is no excuse for a breach of privacy, and it's not worth risking disciplinary action." Further the training stresses that the information on the database includes specific medical records for the veterans and personal information regarding the veterans and their families. Veterans have specific privacy rights related to

this information⁸ and access to it must be securely guarded. Grievant admitted that the only reason she accessed the private information from R.O.'s private records was because her curiosity got the better of her. It is also notable that in her letter she stated that she did not print anything from the veteran's file, but she testified under oath that she did.

Respondent proved by a preponderance of the evidence that Grievant's misconduct was a serious violation of the policy and procedures established for utilization of the veterans database and SEP. The discipline was justified.

Grievant lost access to the SEP and veterans database. This access is essential to the performance of the Veterans Service Officer Assistant II position in the DVA field office. It is undisputed that 95% of the work of all employees in that office must be done through accessing those programs. These programs are owned and controlled by the USDVA and access privileges are granted and denied by that agency. Respondent has no control or access to those privileges without authorization from the USDVA.

As a result of her misconduct, the USDVA has revoked Grievant's PIV Card and access to the SEP and veterans database. Furthermore, there is no reason to believe that access will be returned in the foreseeable future. The revocation of those access privileges makes it impossible for Grievant to perform the essential duties of her job.

The Grievance Board has consistently held that where an employee loses the ability to perform the essential duties of their job, especially through the revocation of a required authorization, dismissal is appropriate. See *Earls v. Dep't of Health & Human*

⁸ See for example the HIPPA Privacy Act related to the limited disclosure of an individual's medical information.

Res., Docket No. 2015-1269-DHHR (July 7, 2016) (where an employee whose job it was to transport clients to treatment facilities was no longer eligible for insurance coverage to operate a State vehicle). See also, *Loudermilk v. Dep't of Transp./Div. of Highways*, Docket No. 2010-0558-DOT (Oct. 8, 2010); *Rockwell v. Dep't of Transp./Div. of Highways*, Docket No. 2010-1070-DOT (June 25, 2010); *Smith v. Dep't of Transp./Div. of Highways*, Docket No. 2010-0972-DOT (June 17, 2010); *Reed v. Dep't of Transp./Div. of Highways*, Docket No. 07-DOH-023 (May 16, 2007) (where highways employees lost their driver's license as the result of a DUI, and holding a valid driver's license was a requirement of their jobs). Grievant lost program access privileges which were essential to the performance of her job. As in the previous cases, dismissal was an appropriate action.

Grievant argues that it was unreasonable for her to be dismissed when USDVA employees who were guilty of virtually the same misconduct did not lose their jobs. While Grievant does not use the specific words, she is arguing that she is being subject to discrimination. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2 (d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

- (a) That he or she has been treated differently from one or more similarly-situated employee(s);
- (b) That the different treatment is not related to the actual job responsibilities of the employees; and,
- (c) That the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

The obvious problem is that Grievant is not similarly situated with the USDVA employees. They are employed by a different agency in a different level of government. Further, we do not know the specific nature of their misconduct nor the specific rules and regulations which control discipline by the federal agency. The information regarding their jobs, misconduct and discipline was provided by Grievant, who did not have detailed first-hand knowledge of their specific situations. Grievant did not prove by a preponderance of the evidence that she was subjected to discrimination as that term applies to the grievance procedure.

Finally, Grievant argues that she has been a valuable employee and dismissal is far too severe a punishment for her misconduct. "The argument that discipline is excessive given the facts of the situation is an affirmative defense, and [Grievant bears] the burden of demonstrating the penalty was clearly excessive or reflects an abuse of the agency's discretion or an inherent disproportion between the offense and the personnel action." *Hudson v. Dep't of Health and Human Res./Welch Cmty. Hosp.*, Docket No. 07-HHR-311 (March 21, 2008). "Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case-by-case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995); *Crites v. Dep't of Health & Human Ser.*, Docket No. 2011-0216-DHHR (Nov. 16, 2011).

Respondent demonstrated that Grievant violated the Rules of Behavior for working within the veterans database. While this was a single event, Grievant knew that her actions were improper and the safeguarding of the personal and medical information of veterans and their families is crucial to protecting their privacy interests. Moreover, because of the loss of her access privileges Grievant can no longer effectively perform her job. Grievant did not prove by a preponderance of the evidence that dismissal was clearly excessive given or disproportionate to the misconduct. Accordingly, the grievance is DENIED.

Conclusions of Law

1. 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).

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. § 143-1-12.02 and 12.03 (2012).

3. Respondent proved by a preponderance of the evidence that Grievant's misconduct was a serious violation of the policy and procedures establish for utilization

of the Veterans database and SEP. The disciplinary action was for good cause and justified.

4. The Grievance Board has consistently held that where an employee loses the ability to perform the essential duties of their job, especially through the revocation of a required authorization, dismissal is appropriate. See *Earls v. Dep't of Health & Human Res.*, Docket No. 2015-1269-DHHR (July 7, 2016). See also, *Loudermilk v. Dep't of Transp./Div. of Highways*, Docket No. 2010-0558-DOT (Oct. 8, 2010); *Rockwell v. Dep't of Transp./Div. of Highways*, Docket No. 2010-1070-DOT (June 25, 2010); *Smith v. Dep't of Transp./Div. of Highways*, Docket No. 2010-0972-DOT (June 17, 2010); *Reed v. Dep't of Transp./Div. of Highways*, Docket No. 07-DOH-023 (May 16, 2007). Grievant lost program access privileges which were essential to the performance of her job. As in the previous cases, dismissal was an appropriate action.

5. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees."

6. W. VA. CODE § 6C-2-2 (d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

- (a) That he or she has been treated differently from one or more similarly-situated employee(s);
- (b) That the different treatment is not related to the actual job responsibilities of the employees; and,
- (c) That the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

7. Grievant was not similarly situated with the employees with whom she was comparing herself. Grievant did not prove by a preponderance of the evidence that she was subjected to discrimination as that term applies to the grievance procedure.

8. "Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case-by-case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995); *Crites v. Dep't of Health & Human Ser.*, Docket No. 2011-0216-DHHR (Nov. 16, 2011).

9. Grievant did not prove by a preponderance of the evidence that dismissal was clearly excessive or disproportionate to the 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* 156 C.S.R. 1 § 6.20 (2018).

DATE: March 4, 2020

**WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE**