

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**FRANCES HAMILETT,  
Grievant,**

**v.**

**Docket No. 2020-1535-CONS**

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

**DECISION**

Grievant, Frances Hamilett, was employed by Respondent, Department of Health and Human Resources within the Bureau for Children and Families ("BCF"). On October 19, 2019, Grievant filed a grievance protesting her suspension from employment, which was assigned docket number 2020-0524-DHHR. On June 11, 2020, Grievant filed a second grievance protesting the termination of her employment, which was assigned docket number 2020-1519-DHHR. The grievances were consolidated into the above-styled action by order entered July 14, 2020. For relief, Grievant seeks reinstatement, back pay, restoration of benefits, and expungement of disciplinary records from her personnel file.

A level three hearing was held on November 17, 2020, before the undersigned at the Grievance Board's Charleston, West Virginia office via video conference. Grievant was represented by by counsel, Kurt E. Entsminger, Estep Entsminger Law Group PLLC. Respondent was represented by counsel, James "Jake" Wegman, Assistant Attorney General. This matter became mature for decision on December 22, 2020, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

## **Synopsis**

Grievant was employed by Respondent as a Child Protective Service Worker. Grievant was suspended pending investigation and later dismissed from employment at the conclusion of the investigation. Respondent proved it had good cause to terminate Grievant's employment for the misuse of clothing vouchers and improper handling of client prescription medication. Grievant failed to prove her due process rights were violated. 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 as a Child Protective Service Worker ("CPSW") from May 2016 until June 17, 2020.
2. As a CPSW, Grievant was required to manage a caseload of around forty cases, which would include the oversight of around sixty children. Children are referred to as clients of the CPSW.
3. The BCF is subject to state and federal audits. Federal audit failures can result in sanctions including the loss of funding. BCF is required to maintain accurate records and document actions in a timely manner. The BCF is already subject to a federal performance improvement plan.
4. On February 26, 2018, Grievant was placed on a performance improvement plan due to her failure to meet deadlines and complete proper documentation. In his letter explaining the plan, Community Services Manager Michael

Hale notes that Grievant's history shows "a consistency of missing deadlines and incomplete documentation."

5. On June 14, 2019, Grievant received a verbal reprimand for failing to keep her supervisor informed, failing to enter contacts in a timely manner, lack of productivity, and lack of treating others with respect.

6. On July 10, 2019, Grievant was placed on a performance improvement plan due to her failure to meet deadlines, complete proper documentation, and complaints of rudeness and combativeness towards clients, providers, and attorneys. In her letter explaining the plan, Social Services Coordinator Melissa Sheppard notes, "Your history with the department shows a consistent lack of following directives as well as ignoring general office practice that is set in place, such as entering contacts timely, mandatory weekends, and asking permission before working overtime."

7. Grievant's employee performance evaluations met expectations and commented positively on Grievant's dedication and advocacy for her clients but noted deficiencies in documentation, timeliness, organization, and concerns with Grievant's "tendency to want to be in total control over her assigned cases."

8. In April 2019, clothing vouchers were issued for two of Grievant's clients, N.P. and A.M., both of whom were girls aged ten to eleven. Neither of the vouchers were used at that time.

9. Clothing vouchers are issued as a one-page document with the client's name printed on the document. Vouchers are issued per child, not per family, and may only be used for the child in whose name the voucher is issued.

10. A.M.'s clothing voucher was used at Gabe's on July 3, 2019, to purchase clothing, including two packages of men's underwear and one package of boys' socks. This clothing was not purchased for A.M., who was in a juvenile detention facility at the time, nor was it purchased for N.P. but Respondent does not assert that Grievant used it for personal gain.

11. On August 14, 2019, at 12:15 a.m., Grievant purchased \$149.58 worth of clothing for A.M., but she used N.P.'s clothing voucher to do so.

12. The purchase of clothing for A.M. was necessary because A.M. had been suddenly discharged from the juvenile detention facility on August 13, 2019, and was being transferred to a facility in Georgia on August 14, 2019.

13. On August 13, 2019, Grievant was required to make all the arrangements for A.M.'s transfer to the facility and all travel arrangements for a hotel and flight and to transport A.M. from the facility in Huntington to a hotel for overnight stay. Upon collecting A.M. from the facility, Grievant discovered A.M. did not have necessary clothing. After settling A.M. into the hotel under the supervision of another worker, Grievant went to Walmart to purchase the clothing.

14. On August 14, 2019, Grievant flew with A.M. to Georgia for placement into the facility there.

15. A.M. was prescribed several controlled medications, which had been provided to Grievant by the juvenile detention facility.

16. The Georgia facility refused to accept A.M.'s prescription medication, forcing Grievant to return to West Virginia with A.M.'s medication.

17. Grievant flew back to West Virginia on the same day. She arrived back at the office after hours and placed the manila envelope containing the medication in her desk.

18. Grievant's desk did not lock and there was no place available in the office to lock up the medication after hours.

19. During business hours, workers give medication to supervisors who have access to a safe in which to secure sensitive items.

20. Supervisors are on-call twenty-four hours a day.

21. Grievant did not contact a supervisor regarding the medication and took no further action to secure the medication prior to her suspension a month and a half later.

22. Although Grievant mentioned the medication in the computer record of the events, she failed to state what she did with the medication.

23. On September 23, 2019, Kanawha County Circuit Judge Carrie Webster emailed Grievant's supervisor, Michelle McCune, regarding a family's accusation that Grievant had misused or misappropriated children's social security checks and Judge Webster's concerns regarding other actions Grievant had taken or failed to take on the case.

24. By letter dated October 1, 2019, Regional Director Lance Whaley suspended Grievant pending investigation into "allegations including falsification of records and improper use of client resources." Grievant was suspended without pay but permitted to use any accrued annual leave.

25. Respondent did not conduct a pre-determination hearing prior to Grievant's suspension.

26. Respondent referred the matter to the Office of the Inspector General for an investigation, as it involved potential criminal conduct.

27. Robert Cooper and Timothy Moses were assigned to conduct the investigation. The investigators searched Grievant's workspace, reviewed documents, reviewed the computer system entries, collected written statements, and conducted interviews.

28. When the investigators searched Grievant's workspace they discovered bottles of A.M.'s prescription medication in a manila envelope with A.M.'s name written on the outside.

29. None of the medication is alleged to be missing.

30. Mr. Cooper and Mr. Moses interviewed Grievant on April 8, 2020. Mr. Moses recorded the interview in a seven-page written statement which Grievant signed and certified was true and correct after being advised of her rights.

31. The majority of the interview and statement pertained to the allegation of mishandled social security money.

32. After reviewing the vouchers and receipts for A.M. and N.P., Grievant said that each voucher had been split with the sibling of each child.

33. Grievant said she was not certain but she thought she had brought A.M.'s medication back from Georgia.

34. On April 23, 2020, the Office of the Inspector General issued a report of the investigation concluding that Grievant had misused children's clothing vouchers and

had unlawfully possessed prescription medication in violation of statute and policy. The report stated that the investigation into the alleged misappropriation of Social Security monies remained under investigation.

35. On May 29, 2020, Community Services Manager Michael Hale held a predetermination conference attended by Grievant, Social Service Coordinator Melissa Sheppard and Ms. McCune. Regarding the clothing voucher, Grievant referred to yet another child, H.H., who had the same name and that the Gabe's voucher was used for that child. Regarding the medication, Grievant stated she had placed it in an envelope and it was probably in the upper cabinet of her desk. Grievant stated she was unsure if there was a policy regarding medication storage or clothing vouchers.

36. By letter dated June 2, 2020, Respondent terminated Grievant's employment for misuse of children's clothing vouchers in violation of West Virginia Code § 61-4-9 and Respondent's Policy Memorandum 2108, Employee Conduct, and unsecured storage of A.M.'s prescription medication in violation of West Virginia Code § 60A-4-401(c), the employee conduct policy, and the Division of Personnel's Drug-and-Alcohol-Free Workplace policy.

37. The Division of Personnel's Drug-and-Alcohol-Free Workplace Section II D states, "[t]he unlawful possession, use, manufacture, distribution, or dispensation of a controlled substance or illegal drug; the reporting to work under the influence of a controlled substance or illegal drug; having an illegal drug in the body system; or possession of drug paraphernalia are all prohibited in the workplace."

38. Respondent's Policy Memorandum 2108, Employee Conduct, in relevant part, states,

Employees are expected to: comply with all relevant Federal, State and local laws; comply with all Division of Personnel and Department policies; . . . conduct themselves professionally . . . respect the property of . . . the State; . . . and be ethical, alert, polite, sober, and attentive to the responsibilities associated with their jobs.

. . .

Employees are expected to: refrain from illegal or immoral acts while on State property or while engaged in activities related to their employment; refrain from disrupting the normal operations of the Agency; . . . [and] refrain from the possession of . . . illegal substances on State property . . .

### **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. § 143-1-12.2a (2016).



In situations where “the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required.” *Jones v. W. Va. Dep’t of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res.*, Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Grievant had an appropriate demeanor. She was serious, calm, and quiet in her testimony and did not hesitate in her answers to questions. However, Grievant’s testimony regarding the vouchers was inconsistent with her prior statements and her testimony that she simply switched the vouchers by accident is not plausible given the other evidence as will be further discussed below. Therefore, Grievant’s testimony on that issue is not credible.

Ms. McCune’s demeanor was problematic. She was somewhat evasive in her answers, providing the information she wanted to provide without answering the actual question that was asked, which persisted even after instruction by the undersigned. Her

story regarding helping pack A.M.'s new clothing and Grievant's alleged statement that she had purchased the clothing with her own money was oddly animated and detailed and did not appear genuine. It seems unlikely that a supervisor would accept without question that a CPSW would buy a large amount of clothing with her own money for a client as the same should have raised red flags regarding favoritism and inappropriate personal attachment. Further, Ms. McCune could have motivation to cover up her own failure to review the voucher.

Ms. McCune's assertions that N.P. needed clothing after her case was reassigned from Grievant and that the new worker had to ask for multiple vouchers is contradicted by the record. The *Client Payment History Report* shows that only one other voucher was issued and that was not until June 2020. In addition, the *Inventory of Personal Effects* from Highland Hospital dated September 29, 2019, showed N.P. had 25 pairs of pants, 17 shirts, 9 pairs of underwear, and assorted other clothing. Ms. McCune testified that she got along well with Grievant and had taken up for her yet admitted that she told the investigators that Grievant was controlling and threatening. Therefore, Ms. McCune's testimony on these issues is not credible.

Respondent asserts Grievant's misuse of the clothing vouchers was a violation of the following statute: "Any person who presents, or causes to be presented, benefits or one or more benefit access device for payment, allotments, money, goods or other things of value knowing the same to have been received, transferred or used in any manner in violation of the terms of the benefit program is. . ." guilty of a misdemeanor. W. VA. CODE § 61-4-9(c).

There is no question Grievant used clothing vouchers improperly. Vouchers are issued in the name of a specific child, which is clearly printed on the voucher, and may only be used to purchase items for the child in whose name the voucher is issued. A.M.'s voucher was spent at Gabe's on July 3, 2019, on clothing for someone not A.M. N.P.'s voucher was spent at Walmart on August 14, 2019 on clothes for A.M. The question is whether Grievant's misuse of the vouchers was knowing or simply mistaken. Respondent does not allege Grievant used A.M.'s voucher for her own personal gain but rather that she used the voucher for some other child in custody. Respondent insists Grievant's misuse was knowing because the name of the child is listed on each voucher and because Grievant lied about how the clothes for A.M. were purchased. As discussed above, Ms. McCune's testimony that Grievant stated she purchased the clothing for A.M. with her own money was not credible, so the assertion that Grievant knowingly misused the vouchers must be established by other means.

Grievant testified at level three she used A.M.'s voucher to purchase clothes for either N.P. or N.P.'s sister E.P. Although Grievant testified she kept the documents for her cases in a binder, Grievant did not explain specifically how she might have switched the two vouchers. While a mistake in purchasing A.M.'s clothes with N.P.'s voucher would be understandable, given that Grievant had worked for sixteen hours and made the purchase after midnight, that was the second voucher improperly used. A.M.'s voucher had already been used a month and a half prior under no such extraordinary circumstances. Further, the receipt for A.M.'s voucher showed the purchase of two packs of men's underwear and a pack of boy's socks along with fifteen pieces of what was labeled simply "childrens" clothing. The presence of male clothing, while possibly

explainable by mislabeling at the store, more likely than not indicates the clothing was not purchased for N.P., E.P., or H.H. as Grievant has variously asserted as those children are all female. Grievant's assertion that she simply switched the vouchers is also contradicted by her statement during the investigation that she split the vouchers between siblings and her statement in the predetermination meeting that the Gabe's voucher was actually used for child H.H. Grievant's assertion that she switched the vouchers by mistake would mean that on two separate occasions Grievant failed to read the voucher and see the name of the child, which is either unlikely or evidence of Grievant's lackadaisical attitude towards the administrative portion of her duties.

Grievant's assertion in the investigatory statement that she split the vouchers between siblings is itself an admission of misconduct. Each child is entitled to his/her own voucher in full. Each child is entitled to receive the clothing he/she needs promptly. The vouchers were issued in April and were not used until months later, depriving the children of needed clothing. If she split the vouchers between siblings then she deprived each child of a portion of clothing to which he/she was entitled. Although Grievant did not appear to have specific ill intent, it is more likely than not she knowingly misused children's vouchers for the benefit of other children. Using the vouchers for whomever and whenever she saw fit, rather than as was required, also matches with Grievant's evaluation and disciplinary history which documented this type of behavior as inappropriate.

Respondent also asserts Grievant violated the following statute in her handling of A.M.'s prescription medication. "It is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or

pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this act. Any person who violates this subsection is guilty of a misdemeanor. . . .” W. VA. CODE § 60A-4-401(c).

Grievant was in possession of A.M.’s medication pursuant to a valid prescription. This was the medication prescribed to the child who was in the custody of the state. As her caseworker, Grievant stood *in loco parentis*. She had possession of the child’s medication in order to transport the child to another facility. She retained possession of the medication because the facility refused to accept it. Respondent’s witnesses testified that caseworkers do end up with children’s prescription medication in their possession and that the proper protocol is to store such medication in a safe at the DHHR office. Rather than store it in the safe, Grievant stored it in her desk. None of the medication was missing. Grievant did not attempt to convert it to her personal use. Grievant simply failed to store it properly. To state that Grievant was in criminal possession of this medication is absurd.

That is not to excuse Grievant’s misconduct. Controlled substances are controlled because they are dangerous. By leaving the medication unsecured, Grievant risked the theft or misuse of the medication, including its possible ingestion by a child as children are frequently present in the office. While the undersigned is not unsympathetic to the fatigue Grievant appears to have experienced that night, and Grievant might be excused temporarily storing the medication in her desk overnight, she had a duty to properly secure the medication the next morning. Further, Grievant’s contact report regarding the transfer of A.M. to Georgia specifically mentions that “When

we arrived at the facility they were not able to give her the medication the worker had from Robert Shell.” Yet Grievant failed to report how she had disposed of the medication.

Respondent has proven it had good cause to terminate Grievant’s employment under these circumstances. These are more than simple mistakes as asserted by Grievant. These instances are a culmination of Grievant’s history of doing things her own way, failing to properly complete documentation, and failing to act in a timely manner. Grievant’s actions delayed and deprived children of clothing to which they were entitled, opened Respondent up to possible sanctions from the federal government, and created a hazard. Prior to this time, Grievant had been given every opportunity to correct her behavior and failed to do so.

Grievant argues her due process rights were violated when Respondent failed to provide her with a predetermination conference prior to her suspension and failed to suspend Grievant for a specific period of time. In support of this argument, Grievant cites the Division of Personnel’s historical legislative rule, West Virginia Code of State Regulations section 143-1-12.3 (2012). The Division of Personnel’s legislative rule was amended in 2016 and the current applicable rule provides,

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.

W. VA. CODE ST. R. § 143-1-12.3.b (2016). Therefore, Grievant was not entitled to a predetermination hearing prior to her suspension pending investigation. Further, Grievant provides no argument, other than the inapplicable historical rule, why her period of investigatory suspension otherwise violated her due process rights.

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. “Any person who presents, or causes to be presented, benefits or one or more benefit access device for payment, allotments, money, goods or other things of value knowing the same to have been received, transferred or used in any manner in violation of the terms of the benefit program is. . .” guilty of a misdemeanor. W. VA. CODE § 61-4-9(c).

4. “It is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this act. Any person who violates this subsection is guilty of a misdemeanor. . . .” W. VA. CODE § 60A-4-401(c).

5. Respondent proved it had good cause to terminate Grievant’s employment for the misuse of clothing vouchers and improper handling of client prescription medication.

6. The Division of Personnel’s legislative rule was amended in 2016 and the current applicable rule provides,

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.

W. VA. CODE ST. R. § 143-1-12.3.b (2016).

7. Grievant failed to prove her due process rights were violated.

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: February 9, 2021**

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**Billie Thacker Catlett**  
**Chief Administrative Law Judge**