JUDY NEAL,

Grievant,

v. DOCKET NO. 94-HHR-1130

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/OFFICE OF INCOME MAINTENANCE,

Respondent.

D E C I S I O N

Grievant, Judy Neal, filed this grievance directly at level four pursuant to W. Va. Code § 29-6A-4(e), protesting her dismissal from the Department of Health and Human Resources on December 19, 1994. Hearings were held on February 8, 1995, March 20, 1995, March 21, 1995 and April 17, 1995. The parties submitted post-hearing briefs on or about May 4, 1995, at which time this case became mature for decision.

Grievant was dismissed on December 19, 1994, by letter from Sue H. Sergi, Commissioner, Bureau for Children and Families, for the following:

> . . . through false representation you attempted to defraud the State of West Virginia, to-wit: The Public Employees Insurance Agency (PEIA).

> More specifically, you did attempt to or knowingly allowed another individual to unlawfully present fraudulent documents or other fraudulent devices in order to obtain medical services for a non-eligible individual (Diana Topeka) in the amount of $457.00 from KanawhaValley Radiologist, Inc., $8,890.15 from St. Francis Hospital and $2,500 from Surgical and Vascular Associates, Inc., under false pretenses. As a result of your false pretense whereby you acted alone or in concert with a non-eligible person to fraudulently bill the West Virginia Public Employees Insurance Agency for services provided by the above medical providers, you were indicted on a criminal felony charge in the Circuit Court of Kanawha County for obtaining services by false pretense, a violation of W. Va. Code § 61-3-24. As a result of the indictment, you entered a plea of nolo contendre to Count II of the misdemeanor offense of Obtaining

> Services Under False Pretenses as contained in Felony Indictment Number 94-F-74.
>
> Your dismissal is not conditioned upon or limited by the outcome of the criminal charge. Your misconduct as an employee of the State was not inconsequential, but rather of a substantial nature reflecting upon your ability to perform the duties of your position. Further, your misconduct impairs the efficient operation of the Department of Health and Human Resources and bears a substantial relationship to duties directly affecting the rights and interests of the public.
>
> Insofar as your duties as an Economic Service Worker involve determining eligibility for individuals making application for public assistance and food stamps, and includes determining eligibility for medicaid coverage and an insurance card the nature of your unlawful conduct has a job-related impact and significantly impairs your ability to perform your job. . . .

R Ex. 12.

Grievant denies the charges brought against her by Respondent. There is no dispute that Grievant's alleged conduct occurred outside of her job. Thus, the issues to be decided are twofold: 1) whether Respondent has proven by a preponderance of the evidence the charges brought against Grievant, and 2) whether Respondent has proven a rational nexus between Grievant's alleged conduct outside the job and the duties she performs as an Economic Service Worker.

In disciplinary matters, the burden of proof is on the Respondent to prove the charges by a preponderance of the evidence. Schmidt v. W. Va. Dept. of Highways, Docket No. DOH-88-063 (Mar. 31, 1989). West Virginia Code § 29-6-10 requires the dismissal of a Civil Service employee be for good cause, which means "misconduct of a substantial nature directly effecting the rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of a statute or official duty without wrongful intention." Oakes v. W. Va. Dept. of Finance and Admin., 264 S.E.2d 151 (W. Va. 1980). The conduct of a State or public employee outside the job may be examined, and the disciplinary action against the employee based upon that conduct is proper only where there is a proven rational nexus "between the conduct and the duties to be performed." Golden v. Bd. of Educ. of County of Harrison, 285 S.E.2d 665 (W. Va. 1981).

Background

Grievant had been employed by Respondent as an Economic Service Worker in its Kanawha County office for nine years at the time of her dismissal in December, 1994. Grievant served as the union representative for public employees in her office.

Grievant met and befriended Diana Topeka in 1988 or 1989. Diana Topeka, a nurse anesthetist, had a history of drug problems and was unable to obtain medical insurance. Topeka was not a State employee. In 1989, Grievant contacted PEIA about the procedure for adding a non-family member to her insurance. She did not pursue the matter at that time, however.

Sometime in 1990, Ron Hubbard, one of Grievant's superiors, asked Grievant if she had her insurance card with her. Sheproduced her card and Hubbard advised her that someone was attempting to obtain services through her insurance coverage. She told Hubbard she knew nothing about it. He contacted PEIA and "everything was fine". LIV, Neal. Later, Grievant received a bill at her home for medical services she did not receive. Grievant called PEIA and its management company, HEC, and informed them she had not incurred the services. Their response was since she had single coverage, the services would not be paid, and everything would be taken care of. Grievant did not know who incurred the charges. LIV, Neal; Randolph.

Grievant eventually did attempt to add Diana Topeka to her insurance coverage. Topeka's physician advised her that because she had a disability, she could be added to Grievant's insurance as a non-family member. Sometime in early 1991, Grievant and Topeka made application to PEIA for insurance coverage.

While the application was pending, on April 16, 1991, Topeka called and asked Grievant to take her to the hospital because an aneurysm in her arm had burst. Grievant took Topeka to St. Francis Hospital Emergency Room at approximately 8:45 a.m. The emergency room information sheet in Topeka's chart shows Topeka as covered by PEIA insurance. R Ex. 1.

Grievant testified that she left the hospital that morning to go home and retrieve some personal items for Topeka, and did not return to the hospital until the afternoon. LIV, Neal. Topeka was admitted to the hospital and the admissions sheet indicated she was covered under PEIA insurance. R Ex. 1. The admissions officeprepared Topeka's chart on the basis of the information supplied from the emergency room. LIV, Cook.

Macel Hagger, St. Francis Admissions Clerk, called Topeka's room after her admission to get a copy of her insurance card. Hagger testified Grievant brought a card to the admissions office, where

it was copied for Topeka's file. The card shows Topeka is covered under Grievant's PEIA insurance. Specifically, under "Name", it reads: "Judy E. Neal & Diani [sic] Topeka." Under "Coverage type" it reads: "Single/Family." R. Ex. 3. The words "Diani Topeka" and "Family" appear to be a different type style than the words "Judy E. Neal" and "Single". There is no dispute that Grievant's PEIA card was altered.

St. Francis Admissions called PEIA to verify coverage and found Topeka was not covered under Grievant's insurance. LIV, Hagger, Cook. The admissions form in Topeka's chart was changed to reflect "private pay", meaning she was primarily responsible for payment of the services provided. R. Ex. 1. Every patient who comes through the admissions office is signed in on a Reservation Sheet. The Reservation Sheet for April 16, 1991, also shows Diana Topeka as "private pay". R Ex. 2; LIV, Cook. Despite this notation, on the day of Topeka's admission, the hospital subsequently attempted to bill PEIA for the services rendered, as well as directing other medical providers to bill PEIA for their services. LIV, Criner; Spradling.

Needless to say, PEIA refused coverage for Topeka's medical bills. Teri Newcomb, Patient Accounts Coordinator for St. Francis,called Topeka on May 1, 1991, after her discharge, to discuss payment of her bills, and Topeka informed her she had no insurance. LIV, Newcomb. Further attempts to get payment from Topeka were futile. Topeka's accounts were forwarded to the South Charleston Adjustment Bureau, a collection agency, and were handled by Virginia Spencer. R Ex. 4; LIV, Spencer.

Spencer was unsuccessful in her attempts to communicate with Topeka directly. Topeka never responded to letters or telephone calls. Grievant called Spencer and told her Topeka had no insurance and they discussed a payment arrangement. Grievant offered to pay $50.00 a month on Topeka's bills until Topeka could go back to work. R Ex. 6; LIV, Spencer. Spencer testified Grievant never told her or claimed that HEC or PEIA was responsible for Topeka's bills.

Records from the South Charleston Adjustment Bureau show that on or about July 24, 1992, a letter was received, purportedly from Grievant, advising that Topeka was covered under her PEIA insurance and that all bills should be resubmitted to PEIA. R Ex. 4. Spencer's notes indicate she received the letter in August, 1992. R Ex. 7. Spencer then forwarded the account to the credit bureau. LIV, Spencer.

About that time, PEIA contacted the police about the matter, and Grievant was contacted by Sgt.

K.T. Quinlan of the West Virginia State Police in December, 1992. Sgt. Quinlan took a statement from Grievant at her workplace regarding the incident involving the PEIA card and Diana Topeka. R Ex. 9. Grievant toldSgt. Quinlan she had tried to get Topeka added to her insurance, but she was not covered by her insurance. Grievant did not tell Sgt. Quinlan she was responsible for Topeka's medical bills. R Ex. 9; LIV, Quinlan.

Sgt. Quinlan produced a copy of a letter allegedly prepared by Grievant, dated May 22, 1992, to all medical providers, which advised that Topeka was covered under her insurance and all bills should be resubmitted to PEIA. This is presumably the same letter Virginia Spencer received at the South Charleston Adjustment Bureau. Grievant denied writing the letter. She admitted she had prepared a letter at that time, but that it advised the medical providers that Topeka was not covered under her insurance and she (Grievant) was not responsible for Topeka's bills. R Ex. 9; LIV, Quinlan, Neal. Quinlan also produced a copy of the PEIA insurance card from St. Francis Hospital which indicated Topeka was covered under Grievant's insurance. Grievant testified it was the first time she had ever seen the card. LIV, Neal. Grievant talked to Topeka about this matter and Topeka maintained that she should not have to pay the bills because she was covered under PEIA.

Joyce Green, a secretary temporarily located in Grievant's office, also gave a statement to Sgt. Quinlan. Grievant had previously represented Green in a grievance she filed against her employer. Green typed the May 22, 1992, letter for Grievant. Green testified Grievant told her Topeka was under her custody and covered by her insurance and the purpose of the letter was to advise medical providers that Topeka had insurance. R Ex. 10; LIV,Green. Grievant produced a hand-written letter which she testified she gave Green to type from, which says just the opposite, that Topeka was not covered under her insurance. G Ex. 8. Grievant also produced a typed letter dated May 22, 1992, that conforms to the hand-written letter. G Ex. 1.

Following the meeting with Sgt. Quinlan in December, 1992, Grievant heard nothing further from anyone about the PEIA incident until nearly a year and a half later. In March, 1994, she read in the newspaper that she was being indicted for attempting to obtain services under false pretenses. LIV, Neal. Grievant obtained an attorney and talked to her supervisor, Sandy Schrader, about the PEIA incident.

Grievant was never questioned by anyone at work regarding the incident. However, she brought up the subject with Ron Hubbard, Joe May, then-Regional Administrator, and John Boles, then-EEO

Coordinator, because she was concerned that her job would be affected. Grievant and two witnesses who were present in the room with Grievant when she spoke with Mayes and Boles, testified that May and Boles told Grievant that the incident had nothing to do with her job. LIV, Neal; Lynon; Shamblin. May and Boles do not remember the conversation. LIV, May; Boles.

In August, 1994, the charges against Grievant were reduced to a single misdemeanor of attempting to obtain services under false pretenses, and she entered a plea of nolo contendre, because she could not afford a full-blown trial. LIV, Neal. Again, no one ina managerial position at work ever questioned her or talked to her about the incident. LIV, Neal.

Apparently, Respondent had decided not to pursue any action against Grievant until the criminal proceeding was resolved. At some point following the resolution of the criminal proceeding, the DHHR's Office of the Inspector General, Investigation and Fraud Management ("OIG"), conducted an investigation of Grievant in relation to the PEIA incident. John Lester "Lex" Poindexter, an Investigator with OIG, testified that OIG cleared Grievant of any wrongdoing. LIV, Poindexter. Despite OIG's conclusion, apparently another administrative investigation was conducted. In a November 21, 1994, memorandum from David Pardue, Regional Administrator, to Grievant, she was informed that a recommendation for her dismissal had been made based on the fact that "an administrative investigation has revealed that through false representation you attempted to defraud the State of West Virginia, to-wit: The Public Employees Insurance Agency (PEIA)." R Ex. 11.

Respondent maintains that the decision to dismiss Grievant was not in any way a result of her pleading nolo contendre to the misdemeanor charge. A plea of nolo contendre is inadmissible in a civil proceeding and has no evidentiary value in a grievance proceeding. See Graham v. Berkeley County Bd. of Educ., Docket No. 94-02-324 (Oct. 19, 1994), citing Lough v. W. Va. Dept. of Health, Docket No. 90-H-240 (Aug. 31, 1990).

Still, up until that point, no one in management at DHHR had ever questioned Grievant or even talked to her about the PEIAincident. LIV, Neal. The November 21, 1994, memorandum advised her that she could meet with Sue Sergi to discuss the matter, which she did. She also filed a grievance at that time over the November 21, 1994, letter. Subsequently, of course, Grievant was dismissed. R Ex. 12.

Discussion

Respondent alleges that Grievant either acted in concert with Topeka, or at least had knowledge of and condoned Topeka's actions. (See footnote 1) Grievant denies any wrongdoing or any knowledge that Diana Topeka was attempting to obtain medical services under her PEIA insurance coverage.

There are only two factual discrepancies regarding the PEIA incident which must be analyzed in order to render a decision on this matter, specifically: 1) whether Grievant, herself, brought the altered PEIA card to the St. Francis Admissions Office; and, 2) whether Grievant authored the May 22, 1992, letter, typed by Joyce Green, which states that Topeka was covered under Grievant's PEIA insurance.

Regarding the first question, the Admissions Clerk at St. Francis testified that she remembered Grievant bringing the insurance card to the Admissions Office when Topeka was admitted. LIV, Hagger. Grievant testified she left the hospital by the time Topeka was admitted and never went to the admissions office. LIV, Neal. Grievant told Sgt. Quinlan that she presented someidentification to the emergency room personnel when she brought Topeka into the hospital. Grievant never told Sgt. Quinlan that she went to the Admitting Office at St. Francis. R Ex. 9. Karren Graham, a Medical Social Worker at St. Francis who knew Grievant because of her work as an Economic Social Worker, testified that Grievant stopped by her office at the hospital to inform her Topeka had been admitted, and also told her that Topeka did not have any insurance. LIV, Graham; Neal.

Why, if Grievant were going to attempt to obtain Topeka's medical services with her PEIA card, would she, on the very same day, tell an employee of St. Francis that Topeka had no insurance coverage? The admissions personnel at St. Francis have no motive to fabricate a story that Grievant presented them with her insurance card. On the other hand, the incident occurred nearly four years ago, and with the amount of traffic that undoubtedly comes and goes through the admissions office, it would be impressive that the admissions clerk can specifically remember Grievant.

Although no evidence was presented which would suggest the admissions clerk was aided in her attempts to remember what happened that day, the power of suggestion is persuasive, and it is entirely possible the clerk "remembered" Grievant after being reminded Grievant was Topeka's friend at the hospital who admitted her into the emergency room.

The second question is a complete mystery. Grievant testified she gave Joyce Green a hand-written letter to type which clearlystates Topeka was not covered under her insurance. Grievant also

produced a typed letter which conforms to the hand-written letter. Grievant testified she gave the letter to Topeka to mail out, because she would have better knowledge of who her medical providers were. However, the letter that was eventually sent to the providers indicated Topeka was covered under Grievant's insurance. A few months later, Sally Richardson at PEIA, called Grievant about the letter that had been sent. Grievant realized then that the original letter she drafted had not been sent out. The inference could be drawn that Topeka altered the letter before sending it out, however, there is absolutely no evidence either to support or rebut this inference.

Joyce Green testified Grievant told her Topeka was covered and the letter she typed informed the recipients of this fact. No evidence was presented other than Grievant's and Green's testimony, and Sgt. Quinlan's report, regarding these letters.

Evidence was presented that Grievant represented Green in a grievance matter at or about the time the letter was written, and that Green was visibly upset and angry with Grievant over her representation. LIV, Uzelac. Yvonne Stamper, an Economic Service Supervisor, testified that Green was furious over Grievant's representation and "wanted blood." She said Green felt that Grievant had sabotaged her grievance. Larry Stamper, an Economic Service Worker, testified he saw Green right after her grievance hearing and she was visibly and unduly upset at Grievant over her representation. Her disappointment with Grievant over herrepresentation could present a motive for Green to tell Sgt. Quinlan, when presented with a copy of a letter some two years after it was typed, that it was the same letter she typed for Grievant. It is also possible, and less sinister, that Green simply did not remember the specific contents of the letter she typed, but when presented with a copy from Sgt. Quinlan, assumed it was the same letter.

Grievant certainly has a vested interest in maintaining she never sent out the letter stating Topeka was covered under her insurance. However, her testimony cannot necessarily be discredited simply because it is self-serving; most testimony is self-serving to some degree. Amell v. GSA, 7 MSPB 382 (1981); Hall v. Veterans Administration, 7 MSPB 79 (1981). Grievant's testimony regarding the letter remained consistent, from the first time she was questioned by Sgt. Quinlan, up to and including the Level IV hearing. In fact, when questioned by Sgt. Quinlan about the letter, Grievant described the contents of the letter as stating Topeka did not have insurance prior to being shown a copy of the "other" letter by Sgt. Quinlan. She then unequivocally stated she did not recognize that letter and that it was a mistake.

These are difficult factual issues because, in both instances, the witnesses' testimony is credible. One is not clearly lying and the other clearly telling the truth. Nonetheless, they are completely opposite renditions of the same stories. The standard Respondent must meet is a preponderance of the evidence. In this particular situation, the undersigned is not convinced by theevidence that Grievant more likely than not is lying about producing the altered insurance card to the St. Francis Admissions Office, or writing the May 22, 1992, letter stating Topeka was covered under her insurance.

Having resolved those two difficult factual issues in favor of the Grievant, and based upon the foregoing discussion and analysis, the undersigned finds Respondent has not met its burden of proving by a preponderance of the evidence that Grievant attempted to obtain services under false pretenses through use of her PEIA insurance card.

However, even if Respondent had proven the charges against Grievant, the undersigned also finds it has not established a nexus between her conduct outside of her employment and her job duties and responsibilities.

In Golden v. Bd. of Educ. of Harrison County, 285 S.E.2d 665 (W. Va. 1981), the Court found that courts must seek to determine if a "rational nexus" exists between the conduct complained of and the duties to be performed. The conduct in question must indicate an unfitness or inability to perform the duties and responsi-bilities of the job, or that it has impaired or threatened the welfare of the community.

The reason for requiring a "nexus" is because to allow dismissal merely upon showing of some immoral conduct would constitute an unwarranted intrusion upon the employee's right to privacy. Id. at 669. Thus, conduct ceases to be private in at least two circumstances: 1) if the conduct directly affects theperformance of the occupational responsibilities of the employee; or 2) if, without contribution on the part of the employer, the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the employee to discharge the responsibilities of the position. p. 669.

The Court addressed the "nexus" issue in cases following Golden. In Bledsoe v. Wyoming County Bd. of Educ., 394 S.E.2d 885 (W. Va. 1990), a maintenance supervisor in charge of purchasing supplies for the county board, was discharged for using his office to extort political contributions from a supplier. The Court found the county board proved that the employee's criminal act directly involved

his occupational responsibilities, and thus, proved a rational nexus.

However, in Rovello v. Lewis County Bd. of Educ., 381 S.E.2d 237 (W. Va. 1989), the Grievant, a high school Principal, was dismissed for "immorality" for improperly charging travel expenses to the Board. The Court found that not every infraction relating to character has been sufficient to support dismissal of an employee. Misconduct alone, even immorality, will not always support dismissal. p. 241. The evidence showed the Grievant did not act wilfully at time of the infraction, the incident was isolated, and was mitigated by his years of lengthy service to the Board. Further, if Grievant repaid the expenses, the Board would suffer no substantial harm from the action.

The instant case more closely resembles Rovello than Bledsoe. Here, the only connection between Grievant's alleged conduct andher employment is the fact that an attempt was made to secure medical services for Topeka through use of Grievant's PEIA card, a benefit she received through her employment. Similarly, the only connection between Rovello's conduct and his employment was his attempted use of a benefit provided because of his employment: travel reimbursement. More importantly, the connection in the instant case is even more tenuous than in Rovello because the undersigned finds it was not Grievant who attempted to obtain medical services under false pretenses; it was Topeka. There is no doubt Rovello himself attempted to avail himself of his travel reimbursement privileges as Principal.

Respondent argues that Grievant's primary responsibility as an Economic Service Worker is to determine eligibility for various income maintenance programs, such as AFDC, food stamps, and Medicaid. The purpose of Medicaid is to provide medical coverage for low income families, and Grievant's job is to send them letters verifying their eligibility and providing them with medical cards, which are similar to insurance cards. LIV, Pardue; Smith; Sergi. The inference is, since Grievant "allowed" Topeka to fraudulently use her PEIA card to obtain medical services, this indicates she would be more inclined to do the same with families applying for Medicaid benefits.

Respondent has simply provided no evidence at all to support this theory. Virtually every witness who testified to Grievant's work performance found her an outstanding worker who always "goes by the book". There is no evidence that Grievant's effectivenessas an Economic Service Worker will be hampered by the charges brought about her. Indeed, it is clear her co-workers will be extremely pleased to see Grievant cleared of these charges and returned to work.

Frankly, it appears that someone in management decided Grievant was guilty of the charges long

before the criminal proceeding was ever resolved. After Grievant pled nolo contendre to the charges, an internal investigation by the Office of the Inspector General was conducted, in which Grievant was cleared of any wrongdoing. Despite that finding, another administrative investigation was conducted which finally resulted in Grievant's dismissal. The evidence simply does not support that Grievant is guilty of the charges brought against her in her dismissal letter.

The above discussion is supplemented by the following findings of fact and conclusions of law.

Findings of Fact

1. Respondent failed to prove by a preponderance of the evidence that Grievant, herself, brought an altered PEIA card to the St. Francis Admissions Office on the day Diana Topeka was admitted to the hospital.

2. Respondent failed to prove by a preponderance of the evidence that Grievant authored and distributed a letter dated May 22, 1992, which states that Diana Topeka is covered by Grievant's PEIA insurance.

3. Grievant did not, through false representation, attempt to defraud the Public Employees Insurance Agency (PEIA).

Conclusions of Law

1. Respondent has failed to prove by a preponderance of the evidence that Grievant was discharged for cause. Oakes v. W. Va. Dept. of Finance and Admin., 264 S.E.2d 151 (W. Va. 1980).

2. Respondent has failed to prove by a preponderance of the evidence that there is a rational nexus between the alleged conduct of Grievant outside of her job and her job responsibilities. Golden v. Bd. of Educ. of County of Harrison, 285 S.E.2d 665 (W. Va. 1981).

Accordingly, this grievance is **GRANTED** and Respondent is hereby **ORDERED** to reinstate Grievant to her employment as an Economic Social Worker, with full backpay and benefits from the effective date of her dismissal.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and

should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: June 13, 1995

Footnote: 1 *Topeka was also indicted and charged with fraud and attempting to obtain services under false pretenses.*