AARON E. ALTIZER,

Grievant,

v. DOCKET NO. 94-HHR-1089

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU OF PUBLIC HEALTH,

Respondent.

D E C I S I O N

Grievant, Aaron E. (Ed) Altizer, filed this grievance directly at Level IV on December 1, 1994, pursuant to W. Va. Code § 29-6A-4(e), challenging his dismissal by Respondent on October 21, 1994. Hearing was held in this Board's Charleston office on February 14, 1995, and the parties submitted post-hearing briefs on or about March 6, 1995, at which time this case became mature for decision.

Background

Grievant had fifteen (15) years of experience as a Public Health Field Worker for the West Virginia Immunization Program, prior to accepting the position which is the subject of this grievance.

Grievant applied for a research analyst position under the Right From The Start program, Office of Maternal and Child Health, Division of Women's Services, in the Fall of 1992. Grievant was interviewed in November, 1992, by Kathy Kress and Mary Jo Fouty,both employees of the Right From The Start program (hereinafter "RFTS"). Kress was Grievant's predecessor as the research analyst for the RFTS program, and had 1-1/2 years of personal computer job experience before she came to the RFTS program in 1990.

Grievant indicated in his interview that he had little experience with computers. He told Kress and Fouty that he had attended a computer workshop at the West Virginia College of Graduate Studies

for two days, and that he had experience with Lotus. Grievant's resume indicated that he had worked with an IBM PC, and Grievant indicated he had a personal computer at home. G Ex. 4.

Apparently, despite Grievant's limited experience with computers, he was the best candidate for the position and he was hired on December 1, 1992, as a Research Analyst. Grievant's position was reclassified as part of the Statewide Reclassification Project on December 16, 1992, to a Data Analyst I. R Exs. 1, 2.

Grievant was responsible for the operation and maintenance of the "Problem-Oriented Perinatal Risk Assessment System" database (hereinafter "POPRAS") within the Division. The purposes of the RFTS program are to reduce infant mortality and morbidity, to increase infant birth weights, and to improve the parenting skills and home environments for the families of West Virginia. In order to meet these goals, obstetrical providers who serve women on Medicaid complete a "POPRAS", or problem-oriented perinatal risk assessment form. The information from this form is then entered into the POPRAS computer program which provides a risk-assessmentfor that woman. If the woman is deemed to be high-risk, she will be included in the RFTS program and receive a care plan which includes childbirth classes, parenting skills, smoking cessation classes, and nutrition information. Grievant was also expected to perform data analysis on the information stored in POPRAS. He was to analyze the data, develop research projects based on that data, and help define policy within the Office of Child and Maternal Health.

Kress had been responsible for the installation and maintenance of the POPRAS system at RFTS before Grievant's arrival. Kress testified that it took her from 6-8 months to become familiar with the program, with assistance from the parent company, Perinatal Health, in California. Kress testified that the support person at Perinatal responsible for POPRAS left the company and there was no one with the company who knew how the system operated. Therefore, the decision was made between RFTS and Perinatal to design a new POPRAS program, tailored to the needs of RFTS, and eventually phase out the old POPRAS system. The phase out of the old POPRAS system had just begun when Grievant arrived at RFTS.

On December 10, 1992, Diane Kopcial, the Director of the Division of Women's Services, requested that Grievant provide her with an "outline and workplan for [your] orientation needs for the next six weeks." Ms. Kopcial provided Grievant with some examples of what the workplan should include and indicated that she wantedGrievant to be "ready and up to speed" when they were "ready

to go" with the new POPRAS system. G Ex. 5. (See footnote 1)

Grievant responded to Ms. Kopcial on December 15, 1992, outlining his orientation plans. He indicated that the discussion since he had begun centered principally on the transition from the old POPRAS to the new POPRAS. Among other things, Grievant indicated that he had begun to familiarize himself with the old POPRAS, while inquiring about training and computer classes to assist in the implementation of new POPRAS. G Ex. 5.

Grievant testified that, despite this outline of orientation needs, no one, except Kress, ever provided him with any of the information or assistance requested. Kress trained Grievant for about 1-1/2 weeks before she left the Division. She kept in contact with Grievant after she left, and continued to provide some assistance. Kress testified that Grievant was a little slow in learning the job, but that his supervisors' expectations were too high. Kress testified that they were mad because Grievant did not come in and solve all of their problems right away.

Grievant was responsible for preparing an annual report on the RFTS program. That report "summarizes client demographics, characteristics, habits and problems both statewide and by region and identifies regional variations in pregnancy risk conditions." G Ex. 10. Kress testified that the annual report encompassed the only type of research analysis she ever did as the RFTS research analyst and as far as she knew, that was what was anticipated for Grievant's job.

Phil Edwards, Administrative Assistant of the Office of Maternal and Child Health, Division of Women's Services, began working in the Division in January, 1993, shortly after Grievant was hired. Diane Kopcial asked Edwards to act as Grievant's day-to-day supervisor. Edwards testified that Grievant had problems working in the field, specifically, he had trouble installing the new POPRAS system. Edwards testified that Grievant was the main contact with the POPRAS parent company in California, and the new version had to be installed in each regional office. Edwards said "something happened to the computers and they did not work", and he told Grievant to be careful, because he was being identified with the new POPRAS system. Edwards testified that he was told by people in the automation support system that he (Grievant) was having a great deal of trouble with the POPRAS system.

Kress testified that when she installed the old POPRAS, each regional office only had one personal computer. However, each computer was different because of different contracting arrangements, which made the installation of POPRAS very difficult. When Grievant installed the new

POPRAS, each of the eight regional offices had two separate personal computers on which POPRAS had to be installed. Again, the computers were different which made the installation difficult and time-consuming.

Edwards testified that a major portion of Grievant's job was to do research analysis. Grievant was expected to analyze the raw data being entered into the POPRAS system and come up with research ideas and projects for the division. Edwards said that Grievant "never got that far." He said that Grievant was working hard at getting the mechanics of the system down, but did no analysis.

On November 18, 1993, Diane Kopcial wrote Grievant informing him that his work performance was deficient and outlined areas that needed improvement. Kopcial stated "[Y]our position requires you to administer and manage a statewide database for risk assessment of publicly sponsored pregnant women and to plan and conduct a variety of reports and studies for distribution to medical providers and care coordinating agencies." R Ex. 3. The letter included a copy of Grievant's position description as a Data Analyst, a Performance Evaluation apparently conducted in November, 1993, rating Grievant from "poor" to "fair" in four areas, and a 60-day improvement plan.

The improvement plan lists three required job expectations.

> 1) Technical proficiency with computer systems/POPRAS; 2) Planning and organizational skills development to improve credibility with field staff; and
>
> 3) Communication skills - written and verbal, need to be clear. Too many misunderstandings and incomplete information as preceived [sic] by field staff. R. Ex. 3.

Kopcial also attached a time frame for meeting the outlined job expectations and other directions to this memorandum. The bulk of the items directed Grievant to have all communications approved by either Kopcial or Edwards. The directives also required Grievant to demonstrate a beginning knowledge of SQL language forquery of the POPRAS system, by delivering reports generated by at least five different queries of the Old or New POPRAS system by January 12, 1994. (See footnote 2)

Grievant provided the reports requested in the November 18, 1993 letter utilizing the old POPRAS system, because the new POPRAS system had not yet even been installed. G. Ex. 9. Grievant also completed the SQL query, however, Phil Edwards testified that he did not see the response.

On January 21, 1994, Grievant wrote Kopcial a memorandum regarding SQL training for the new POPRAS, and indicating the types of training that were available and would be needed for the new POPRAS system. G. Ex. 7.

Grievant testified that on January 27, 1994, he, Edwards and Kopcial met to discuss his performance and they indicated that he was doing "OK". On February 3, 1994, Grievant wrote Kopcial a memorandum informing her that it was estimated that it would take from six to ten hours of instruction for Grievant to become acquainted with the basics of the new POPRAS system, and submitted a proposal for the training course. Grievant testified that he never was granted approval for training, nor did Kopcial ever even respond to his requests for training.

On March 23, 1994, Grievant received a letter from Pat Moss, Director of the Division, placing him on a one-day suspension andestablishing another "final" 45-day improvement plan. The letter states:

1. As you may recall, on November 18, 1993 you were issued a letter regarding your poor performance and placing you on a sixty (60) day Improvement Plan. Your sixty (60) day Improvement Plan period ended on January 18, 1994 and a review of your performance was conducted by Ms. Kopcial and Mr. Edwards.

2. As was discussed with you on January 27, 1994 by your supervisors, Ms. Kopcial and Mr. Edwards, your performance as a Data Analyst continues to be deficient in: (a) understanding your role within OMCH; (b) your use of independent judgement; and (c) your verbal and written communication skills.

Grievant was given several "tasks" to complete as part of this Improvement Plan, including developing and preparing a presentation on four (4) selected queries on the new POPRAS system, and to submit a research proposal to the Division, which would include comparisons of data from the new POPRAS system, the RFTS Tracking System, the most current Vital Statistics Report, and the Birth Score Report. R. Ex. 4. On May 18, 1994, Grievant presented the reports on the four queries using the new POPRAS system. G. Ex. 11. On May 20, 1994, Grievant presented the research proposal. Edwards testified that the proposal was an idea that he (Edwards) had given Grievant. Grievant testified that he got the idea in connection with a discussion he had with Rhonda Kennedy,

the Regional Care Coordinator of Region III of the RFTS program. Kennedy suggested a possible research project at a Regional Care Coordinators' meeting and Grievant told her he would be glad towork with her on that idea. Kennedy testified that she and Grievant developed the idea at the RCC meeting.

Edwards testified that he met with Kopcial in July 1994, and they discussed terminating Grievant at that meeting. They showed Grievant a draft dismissal letter. R. Ex. 8. They did not feel Grievant could do the job and felt they should give him an opportunity to find another job. Edwards testified that they told Grievant he should be looking for another position.

On October 16, 1994, Grievant was issued a dismissal letter from William T. Wallace, Jr., Commissioner, Bureau of Public Health, effective October 21, 1994. R. Ex. 5. On October 20, 1994, Commissioner Wallace agreed by letter to extend the effective date of dismissal until November 16, 1994, to allow Grievant an opportunity to find another position within state government. R. Ex. 6. On November 11, 1994, Grievant requested another extension of the effective date of his dismissal; however, this request was denied by Commissioner Wallace. R. Ex. 7.

Argument

Respondent argues that it has proven by a preponderance of the evidence that Grievant was incompetent in the performance of his job as Data Analyst. He was provided with opportunities to improve through two improvement plans, yet did not succeed in correcting his deficiencies. Finally, Respondent had no other alternative but to dismiss him. Nonetheless, his effective date of dismissal was extended to allow him an opportunity to find other employment, which he did not, and the office could not carry him any longer.

Grievant contends that he was set up to fail from the beginning of his employment with the RFTS program, that he was the target of harassment from his superiors, that he was never given the proper training for the job, that he had to work with a defective product, and that he was never given any clear direction as to what his job responsibilities entailed.

Discussion

W. Va. Div. of Personnel Rules and Regulations, § 12.02 (1993), provides that the appointing authority may dismiss any employee for "cause". A broad definition of cause was stated in Oakes v.

W. Va. Dept. of Finance and Admin., 264 S.E.2d 151 (W. Va. 1980), as "misconduct of a substantial nature directly affecting the rights and interests of the public, rather than upon trivial matters or technical violations of law or official duty without wrongful intent." Id., p. 152. "Within these general parameters is a vast middle ground where most cases . . . fall. Accordingly, many facts and circumstances must be considered in making a determination as to whether dismissal was the appropriate course of action." Childers v. Dept. of Human Serv., Docket No. 90-DHS-064 (Feb. 27, 1991).

There are really two issues to be resolved in this type case. The first involves proof of wrongdoing; in this case, incompetence. The second, assuming that proof of incompetence is established, concerns the question of whether the punishment assessed by the employer should be upheld or modified. See Noland v. W. Va. Dept. of Health, Docket No. 90-H-119 (Dec. 20, 1990).

Grievant does not deny that he had trouble performing his job at RFTS, and there is little doubt that Grievant's work performance was not exemplary. However, it definitely was not as bad as characterized by Respondent. Grievant's reasons for his lackluster performance can be viewed as mitigating circumstances, but do not disprove Grievant's poor performance in this instance.

Having established incompetence, the second question is whether the punishment of dismissal should be upheld or modified. The general purpose of the Civil Service System (Personnel) is to attract to the service of the state personnel of the highest ability and integrity and to give such personnel security of tenure so that they are not required to serve at the whim and will of the employer. Thurmond v. Steele, 225 S.E.2d 210 (W. Va. 1976).

Grievant presented testimony which substantiated his claim that he was a target of his superiors and that he had been set up to fail in his position at RFTS. Kathy Kress, Grievant's predecessor, testified that after she left RFTS, Pat Moss, Director of the Division, asked her to keep track of her contact with Grievant, i.e., how many questions he asked, and what kind of assistance she gave him. Kress kept notes of her contact with Grievant. The earliest note Kress had was dated January 25, 1993, six weeks after Grievant was hired. G. Ex. 14. Kress testified that Moss told her, perhaps as early as February, 1993, that they were in the process of documenting Grievant for his dismissal. At this point in time, Grievant had been employed at RFTS for approximately two months.

Kress testified that Mary Jo Fouty, who had interviewed Grievant for the position, was "mad" because he did not come in and solve all of their problems right away. Kress also testified that Pat

Moss and Diane Kopcial "targeted" employees for harassment, and that Grievant was one of those employees. Kress felt that Grievant's "improvement plans" were pretextual, and that Moss and Kopcial were just trying to get rid of him.

Grievant also presented the testimony of Caroline Irvine, who had been the State Coordinator of RFTS for approximately one year, and who worked with Grievant during this time. Irvine testified that she had been a Regional Care Coordinator at Cabell/Huntington for RFTS and had gotten outstanding evaluations during her three years there. The year Irvine took the position as State Coordinator of RFTS, she received a below average evaluation from Diane Kopcial. Irvine testified that Kopcial was not a good manager; she could not communicate well and would become frustrated and angry at her employees. She would give an employee an assignment and then turn around and give another employee the same assignment without informing them of the change in assignment. Irvine testified that she left RFTS because of Kopcial. She stated that "it wouldn't have mattered what I had done, it would be wrong." She felt she was not effective in her position because Kopcial would not allow her to do her job.

Irvine was placed on an improvement plan in the Fall of 1993 and left shortly thereafter because she did not want to get fired. Irvine testified that she worked with Grievant for a while and thathe appeared to be doing his job. She had heard that Grievant was not performing well and asked the Regional Care Coordinators if they were having trouble with him. They responded that he was doing fine. Irvine told Grievant to document what was going on in the office and to look for another job because he was going to be fired.

Grievant also presented the testimony of Rhonda Kennedy, a Regional Care Coordinator for Region III while Grievant was at RFTS. Ms. Kennedy testified that she had approached Grievant with an idea for a research project relating to POPRAS and that he agreed to help her with that. Kennedy testified that the State was not happy with the POPRAS program and had a lot of problems with it - problems that existed before Grievant took the job. She was pleased that Grievant agreed to help her with her research idea, because she did not feel the State office was very interested in what was going on in the regional offices. She said there had been a turnaround in administration and that the State office was "chaotic." Kennedy testified that there is no one to do Grievant's job now that he is gone.

"Progressive and corrective discipline is not simply an escalator to crucify an employee. Through it

an employer must demonstrate an honest and serious effort to salvage rather than savage an employee. To hold otherwise distorts, demeans and defeats the goals underlying the concept of progressive and corrective discipline." Philanthropic Mutual Life Ins. Co. andFood and Commercial Workers Union, Local 1776, 91-1 ARB ¶ 3210 (May 11, 1990).

In the instant case, Grievant had fifteen years of service with the State and had been a good employee until he took the position at RFTS. Respondent was well aware that Grievant had limited computer experience but believed he was the best candidate for the position. Grievant entered a workplace in flux: The administration of the office had recently changed and was "chaotic". The old POPRAS system, which Kathy Kress had spent 1-1/2 years implementing with considerable difficulty, was being phased out. Nevertheless, Grievant had to become familiar with that system until the phase out occurred. There was no one left at Perinatal Health to service the old POPRAS or who knew anything about it; thus, Grievant was left to his own devices, along with help from Kress, to learn and operate the system. Despite these problems, Grievant was expected to come into the office and "solve" all the problems.

Finally, Grievant was responsible for implementation of the new POPRAS system, a system fraught with problems from the onset. Perinatal Health sent Grievant no less than four different programs over the course of a year which were supposed to meet the needs of RFTS. The programs were not tailored to RFTS, and Grievant had to continue to work with Perinatal to correct the deficiencies in the program. Finally, a year after Grievant began his employment at RFTS, the new POPRAS was installed. Grievant then had to become familiar with the new system and install it in all of the regionaloffices. Thus, it is no surprise that Grievant had problems in the field while installing the new POPRAS program on the regional computers.

The Respondent was well aware of Grievant's deficiencies, but the evidence regarding the efforts of Respondent to assist him in remedying his deficiencies is not as clear cut. Grievant testified that he was never given any training on either POPRAS program, or any other type of training he requested. Grievant's improvement plans do not give Grievant any guidance on how he was to achieve the "goals" outlined therein. Rather, the plans consist of simple "tests" on the POPRAS system, coupled with directives to have anything he worked on checked by his superiors. The November 11, 1993, improvement plan merely copies the job description of a Data Analyst, and then tells Grievant that his performance does not meet the standards required of the position. Frankly, the undersigned

Administrative Law Judge suspects that Grievant's superiors had no idea what they wanted Grievant to do, but knew that he wasn't helping them with their problems.

Conclusion

The Grievant, a fifteen-year state employee, deserves better. Although Grievant's work performance was less than desirable, it was not so poor as to warrant discharge, especially given the mitigating factors which Grievant faced. The following findings of fact and conclusion of law are appropriate.

Findings of Fact

1. Respondent proved by a preponderance of the evidence that Grievant did not adequately perform the job of a Data Analyst I for the Right From The Start program.
2. Respondent failed to provide specific performance standards to which Grievant would be held in his position of Data Analyst I.
3. Respondent failed to provide Grievant with training or assistance in his position, and in effect, set him up to fail in his position.

Conclusion of Law

Respondent has failed to prove by a preponderance of evidence that Grievant's poor job performance, given all the circumstances, constituted good cause for his dismissal from the classified service. Oakes v. W. Va. Dept. of Finance and Admin., 264 S.E.2d 151 (W. Va. 1980).

Accordingly, this grievance is GRANTED. Respondent is directed to return Grievant to his former position as a Data Analyst I, or to a comparable position within the agency, and to compensate him in the full amount of back pay and benefits to which he is entitled.

Grievant should be aware of what is expected of him as an employee and that his employer cannot afford to carry any employee for a prolonged period of time who is not producing according to requirements. Of course, the employer, in an effort to salvage a long term state employee, should make available to him whateverassistance he may need to become a productive member of the RFTS program.

Any party 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.

_____

MARY JO SWARTZ

Administrative Law Judge

Dated: April 13, 1995

Footnote: 1 *The new POPRAS program originally was targeted to go on-line in January, 1993, one month after Grievant began working at RFTS. However, the new POPRAS program was fraught with technical problems, and Grievant received no less than four different programs from Perinatal Health over the course of the year before the system was actually implemented in or around December, 1993, one year later that its original target date.*

Footnote: 2 *SQL (Standard Query Language) is a format used to elicit information from the computer database, similar to the query formats used in LEXIS or Westlaw.*