CAROL L. WIGGINS

v. Docket No. 94-BEP-599

WEST VIRGINIA BUREAU OF EMPLOYMENT PROGRAMS

D E C I S I O N

Grievant protests her October 6, 1994 dismissal as a worker in Respondent West Virginia Bureau of Employment Programs' (BEP) Parkersburg office on a charge of "flagrant" insubordination. BEP maintains that Grievant's termination was justified because she repeated an infraction after she had been warned that she could be disciplined for committing the offense again. Grievant insists she had been directed to perform tasks in addition to her regular job, and due to a lack of proper training and other factors, she inadvertently reviewed claim forms she was not supposed to process. Grievant seeks reinstatement and a lesser form of discipline such as suspension.1

1Grievant filed directly to level four via the expedited grievance procedure set forth in W.Va. Code 29-6A-4(e) for cases involving dismissal and long-term suspension. A hearing set for October 31, 1994 was reset for November 9, 1994 at the parties' request. Grievant, who appeared pro se at the hearing, filed post-hearing arguments (letter form) on December 14, and BEP's counsel filed fact/law proposals on December 19, 1994.

Some background information is necessary. Grievant was employed in January 1992 to serve in BEP's Division of Employment Security, Unemployment Insurance Section (UIS) as an Office Assistant II (OA2). The September 20, 1994, termination letter enumerated four specific "reasons" for Grievant's dismissal: 1) that Grievant had been "reminded" in late 1992 or early 1993 of

BEP's policy that workers should not process friends' or rela tives' claims and advised that further infractions could result in disciplinary action; 2) that in August 1994 Grievant's supervisor discovered Grievant had processed several more forms submitted by an ex-husband and a brother-in-law; 3) Grievant admitted in writing that she processed the claims in question; and 4) Grievant's excuse that her acts were not intentional was "unacceptable," especially since Grievant repeated the violation "after a previous verbal warning" had been issued by her super visor.

At the level four hearing, BEP presented the testimony of Betty Devol, presently a deputy in UIS' Parkersburg office. Ms. Devol stated that she receives claim forms after they have been processed by staff and enters the claims for payment to claim ants who have qualified for benefits. At that point, BEP introduced a document, purported to be a copy of "Section 1100.B" from BEP's Claims Manual. A highlighted portion of Section 1100.B, entitled "General Interviewing Principles," states: "NOTE: An employee of the Department of Employment Security must not take, process, or adjudicate a claim of a relative(s), close friend(s), or any other person(s) who might create a conflict of interest." BEP Exhibit 1.

Ms. Devol agreed with BEP's counsel that Grievant "was involved in the processing of claims." T.10. Ms. Devol related that in late 1992 or early 1993 she noticed a claim form which had been placed on her desk by Grievant and realized that it was Grievant's ex-husband's claim form. She stated that she took the form to her supervisor, Mary Jane Holliday. She testified that she was present when Ms. Holliday "went to [Grievant] and told her that she could not process the claim form of the

individual, her ex-husband, and gave it back to her at that time and we went on with it." T.11. This is the only testimony, save Grievant's, which described the official reaction to this event.

Ms. Devol further testified that in August 1994, she was reviewing some low earnings forms and noticed handwriting on one that was similar to Grievant's. She said she discussed this with Ms. Holliday and that they learned the form was a claim of Grievant's brother-in-law. She agreed with counsel that after the discovery, an investigation of Grievant ensued. T.13-14.

Finally, Ms. Devol agreed with BEP's counsel that all of the Parkersburg office staff had access to the office's two official claims manuals, that all employees were "instructed of the policy" that prohibited any processing of a relative's or close friend's claim, and that Grievant was required to attend Friday staff meetings in which policy changes were discussed. T.13-14.

During cross-examination, Ms. Devol could not recall Grievant's version of an event in early 1993 when Grievant had taken a claim form submitted by her ex-husband to Ms. Devol and Ms. Holliday and had joked about her having to reject it because it had not been filled out properly. Ms. Devol did agree with Grievant that neither she nor Ms. Holliday had ever brought BEP's claims manual to Grievant's attention. T.18,20.

BEP next presented "J.D." Smith, who identified himself as a BEP "investigator with special investigations." He testified that he was asked to conduct an investigation of Grievant on August 19, 1994. He said he subsequently took a statement from Grievant. At the request of BEP's counsel, Mr. Smith read some passages contained in the statement into the record. Grievant's

"statement," apparently handwritten on the form by Mr. Smith, states in pertinent part:

I recall being told by Mary Jane Holliday that I wasn't supposed to process claims submitted by rela tives or close friends or words to that effect. This occurred when I processed a claim belonging to my ex-husband, [K.M.].
Since then, I have processed claims submitted by ex-husband [K.M.] and brother-in-law, [K.G.]. The claims for [K.G.] were Low Earnings Reports. I didn't do this intentionally.

The bottom of the form contains the typewritten words, "THE ABOVE STATEMENT HAS BEEN MADE BY ME AND I AGREE WITH IT IN ITS ENTIRETY." Beneath that are lines and spaces for "Claimant's Signature and Date," in which Grievant's undated signature appears (the word "Claimant" has been struck) and "Interviewer's Signature and Date," in which Mr. Smith's signature and date (August 31, 1994) appear. BEP Exhibit 2.2 Mr. Smith stated that Grievant signed the document in his presence. T.22.
Mr. Smith also testified that in the course of his investi gation he retrieved and reviewed some claim forms processed and initialed by Grievant which belonged to Grievant's ex-husband and brother-in-law. Two types of forms were involved, a "Contin uing Claim" form or "WVUC-B-89" and an "Initial Claim/Low Earn ings Report" claim form, known as a "WVUC-B-11." Three of the documents were continuing claim forms of Grievant's ex-husband which had been submitted on or about August 16, 1993, December 27, 1993, and March 12, 1994, and five of them were low earnings forms of Grievant's brother-in-law which had been submitted on or about April 18 and 25, 1994, and May 2, 9 and 30, 1994. BEP

Exhibit 3.

Gerard Everett was BEP's only other witness. Mr. Everett, an Assistant Director of Field Operations, agreed with BEP's counsel that an employee's violation of "Policy 1100.B" was "considered a very serious matter with the Department." He also agreed that such violations in the past had resulted in dis charges of employees. T.33. During cross-examination, Grievant asked Mr. Everett about disciplinary actions for a Policy 1100.B

2It is noted that the first and last paragraphs of the text of this document have been omitted because they relate to either irrelevant items or matters other than that which prompted the dismissal letter. Also, inasmuch as there is no need to identify Grievant's ex-husband or brother-in-law by name, only their initials have been used.

offense and about what type of reprimand should take place prior to a dismissal. Mr. Everett responded:

In the course of those types of situations, the manager always warns the employee that this is not to be done and that in order to protect the integrity of the program, if it occurs again we recommend dismiss al.

T.34.

Grievant testified on her own behalf. According to her, at the time she was hired in January 1992 to perform clerical tasks, BEP's office was already staffed with personnel whose primary duty was to process unemployment compensation claims. These ten employees all possess their own copy of a claims manual. At some point in late 1992 when the claims workload

became heavy, probably November 1992, Grievant was directed to process claim forms. After that initial period, the claims processing duties continued, especially on certain days, usually Mondays and Tuesdays. In all, Grievant eventually spent forty percent of her work time on claim reviews, usually six hours on Monday and Tuesday and two hours on Wednesday through Friday. Grievant never worked directly with claimants. Rather, the two types of forms she reviewed either arrived in the mail or had been placed by claimants in an office "drop box." She stated she received no training at all with regard to BEP policy, and was never given a claims manual such as that held by each of the ten staff workers employed to process claims. Her training consisted of being shown merely the mechanics of claims review. With respect to the continuing claim form, she first date-stamped the document and then checked the various areas on the form to make sure the claimant had filled in the required information and had signed and dated the form in the designated spot. After she completed the review, Grievant initialed the form. On the low earnings form, Grievant had to date stamp the document and check the social security number in the computer for accuracy. None of the claims processing work Grievant was required to perform had any impact upon the claimants' eligibil ity for benefits.

Grievant related that shortly after she had begun the claims review work, she noticed a claim form with her ex-hus band's name which had to be rejected (and not initialed and advanced for payment) because it had not been filled out proper ly. She said she had been amused because the form was a "re ject" and that she took it to Ms. Holliday. According to Grievant, at that time Ms. Holliday merely told her that it was

not a good idea to work on forms submitted by a relative or friend because of possible later court action. Grievant claimed that she always rushed to complete the claims processing work so that she could keep up with her regular duties and that she never noticed K.G.'s or K.M.'s names on later forms. Grievant essentially related that her supervisor, Ms. Holliday, who retired after Grievant's termination, had given her both incomplete and mixed messages about processing claims of friends and/or family. She said Ms. Holliday never informed her, let alone reminded her, that BEP had a policy about the matter. She also stated that Ms. Holliday had processed her (Grievant's) ex-husband's claims, despite the fact that Holliday's immediate family and he were very close friends.
In its level four fact/law proposals, BEP specifically cites the relevant portion of Section 1100.B and then proposes the following conclusion of law:
The Policy and Procedures Manual [PPM] of the West Virginia Bureau of Employment Programs provides in Section 6400.20, Subsection (D) that an employee may be dismissed for misconduct which is of a serious nature reflecting on the integrity of the Bureau. The policy violated by the Grievant, viz., the processing of claims of close friends, seriously affects the routine business of the Bureau and reflects upon the integrity of the system. Therefore, the Commissioner had no alternative but to terminate an individual for repeatedly violating this policy.

In Grievant's post-hearing submission (letter form), she basically reiterated the points she made during hearing. She claimed she failed to notice claim forms belonging to her

ex-husband and her brother-in-law "due to lack of training, heavy workload and pressure to process unemployment claims quickly to ensure fast payment." She also urged that she was not an interviewer and had never been trained as an interviewer (interviewing principles being the subject Section 1100.B) nor had she ever been given a copy of BEP's claims manual. Grievant also maintains that she had never received any oral or written reprimands. She argues that BEP's "Policy and Procedures Manual" only permits dismissal or demotion without previous disciplinary action in cases of "flagrant misconduct" including gross misconduct, insubordination and other such serious offenses. She claims she has not engaged in insubordination or any of the other serious offenses described in the policy (Section 6400.20.D) during the course of her employment.

The dismissal of a classified employee in West Virginia must be for good cause. This means "misconduct of a substantial nature directly affecting the rights and interests of the public, rather than upon trivial or inconsequential matters or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 2, Buskirk v. Civil Service Comm'n, 332 S.E.2d 579, 581 (W.Va. 1985); Oakes v. W.Va. Dept. of Finance and Admin., 264 S.E.2d 151 (W.Va. 1980); Guine v. Civil Service Comm'n, 141 S.E.2d 364 (W.Va. 1965).

The evidence conclusively shows that on nine separate occasions over the course of Grievant's employment she performed a review (for accuracy) of claim forms submitted by her ex-hus band and her brother-in-law, a practice prohibited by BEP's policy. In light of that evidence, Grievant does not deny that she reviewed and initialed the forms. However, Grievant raises

issues about whether she was guilty of insubordination and whether the alleged and admitted conduct in question constitutes "good cause" for her dismissal. The evidence in this case will not support a conclusion that Grievant's misconduct warrants dismissal.

BEP's case regarding Grievant's dismissal fails for several reasons. The Grievance Board has essentially defined insubordi nation as the willful failure or refusal to obey an order or directive given by a person authorized to give such orders. See Ramey v. W.Va. Div'n of Veterans Affairs, Docket No. 91-VA-115 (Aug. 2, 1991); Noland v. W.Va. Dept. of Health, Docket No. 90-H-119 (Dec. 20, 1990); Gill v. W.Va. Dept. of Commerce, Docket No. COMM-88-031 (Aug. 8, 1988). This definition has been modified to include the willful failure or refusal to obey a known policy directive. Grooms v. Raleigh County Bd. of Educ., Docket No. 91-41-482 (Apr. 30, 1991).

The evidence in this case shows that, while Grievant may have worked in either a sloppy or inattentive manner as she rushed through the claim forms, Grievant's acts of neglecting to identify and ignore claims she was not supposed to process were not acts of willful disobedience. Grievant was never advised as to the existance of Section 1100.B, nor was she ever apprised of the consequenses of a violation of the regulation. In other words, while Grievant failed to heed a written policy on a few occasions, those acts did not rise to the level of insubordina tion. At the most, Grievant is guilty of incompetence in processing claims.

In that vein, it must also be noted that Grievant was not hired to perform any work relating to claims processing. Rather, it is undisputed that Grievant had been told when hired

as an OA2 that she was supposed to type, file, answer the telephone and perform other clerical tasks in UIS' Parkersburg office. The record also supports that Grievant had never been formally or adequately trained to process unemployment compensa tion claims. It is possible that BEP was requiring Grievant to perform duties that were not listed on her OA2 classification specification or even on an in-house job description. Other wise, BEP surely would have submitted evidence that processing claims was a proper task for Grievant to perform.3

Moreover, the evidence shows that Grievant had never been sufficiently informed, through formal training as a claims processor or by any other means, that an infraction of Section 1100.B could result in discipline, let alone result in a dis missal. See, Ms. Devol's testimony at T.11. Under all of the circumstances, BEP simply imposed too harsh a penalty for Grievant's infractions. In fact, PPM's Section 6400.20.C states that, instead of implementing progressive discipline for various types of employee offenses, a thirty calendar day suspension "may be considered as the first disciplinary step if the employ ee is guilty of serious offenses, such as. . .failure to comply with regulations." In this case, Grievant's neglecting to ignore claim forms she was not supposed to review falls under this type of offense.

As was held in Noland v. W.Va. Dept. of Health, Docket No. 90-H-119 (Dec. 20, 1990), "It is well settled that 'An adminis trative body must abide by the remedies and procedures it properly establishes to conduct its affairs.' Syl. Pt. 1, Powell v. Brown, 160 W.Va. 723, 238 S.E.2d 220 (1977)."

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3Given that Grievant's job classification is not that of a claims processor, and given the fact that Grievant was not hired or trained to process claim forms, it would seem that BEP bears some responsibility when assigning claims to Grievant to exclude those documents which she is not supposed to process. Therefore, consistent with BEP's disciplinary policy, the proper penalty for Grievant would be a thirty-day suspension.

In addition to the foregoing, the following formal findings of fact and conclusions of law are made.

Findings of Fact

1. Grievant, classified as an Office Assistant II, was told when hired that her duties consisted of typing, answering the telephone and performing related clerical tasks.

2. Grievant was eventually directed to help with claims processing. Her review consisted of determining whether the claim forms had been properly filled out by the claimants and had no bearing on whether the claimants were eligible for benefits.

3. Grievant received no formal training as a claims processor, nor was she ever given an office claims manual or any other written directives or policies as were the office's regular claims processors.

4. At one point, Grievant's supervisor told her in a casual fashion that she should not process forms submitted by her ex-husband because of possible later court actions.

5. Subsequent to her supervisor's admonishment, Grievant inadvertently processed some claim forms belonging to her ex-husband and some belonging to a brother-in-law.

6. Grievant was never given any prior warning as to the seriousness of the offense or that dismissal could result.

7. After an investigation and at the time Grievant willingly signed a statement admitting that she had processed the claims in question, she was not informed that dismissal was being considered as punishment for her acts.

Conclusions of Law

1. BEP conclusively proved that Grievant processed some claims of a friend or relative, a practice prohibited by BEP's policy.

2. BEP failed to prove that Grievant's infractions rose to the level of willful insubordination. See Ramey v. W.Va. Div'n of Veterans Affairs, Docket No. 91-VA-115 (Aug. 2, 1991); Grooms v. Raleigh County Bd. of Educ., Docket No. 91-41-482 (Apr. 30, 1991); Gill v. W.Va. Dept. of Commerce, Docket No. COMM-88-031 (Aug. 8, 1988).

3. BEP failed to comply with its disciplinary policy which provides for the suspension of an employee who has not followed regulations by discharging Grievant from employment for the offense of not following regulations.

4. In West Virginia, the dismissal of a classified employee must be for good cause, which means "misconduct of a substantial nature directly affecting the rights and interests of the public, rather than upon trivial or inconsequential matters or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 2, Buskirk v. Civil Service Comm'n, 332 S.E.2d 579, 581 (W.Va. 1985).

5. Under the circumstances, BEP failed to establish good cause for Grievant's dismissal in this case.

6. The thirty day suspension of an employee who has not followed regulations, as outlined in BEP's disciplinary policy, is the proper penalty in this case. See Powell v. Brown, 160

W.Va. 723, 238 S.E.2d 220 (1977); Noland v. W.Va. Dept. of Health, Docket No. 90-H-119 (Dec. 20, 1990).

Accordingly, this grievance is GRANTED, and Grievant must be reinstated with back pay, less a set-off for a justified thirty-day suspension.

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 appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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NEDRA KOVAL

Administrative Law Judge

Date: January 31, 1995