VONDA SPENCER,

Grievant,

v. **Docket No. 96-BEP-134**

WEST VIRGINIA BUREAU OF

EMPLOYMENT PROGRAMS,

Respondent.

D E C I S I O N

Grievant, Vonda Lou Spencer, grieves a reprimand she received on November 28, 1995, and states "[t]he reprimand was unjust and unfair. The response on 2-13-96 from Mr. Burdette is not satisfactory." She requests as relief "[t]o have the reprimand and all documents related to the reprimand removed from any and all files." This action was dismissed at all lower levels as untimely. Grievant appealed to Level IV, and after several continuances for good cause, a hearing was held on March 10, 1997. This case became mature for decision on March 31, 1997, the deadline for the parties' proposed findings of fact and conclusions of law.

Prior to the Level IV hearing, Respondent West Virginia Bureau of Employment Programs ("BEP") filed a Motion to Dismiss the grievance based on timeliness. Grievant's Representative filed a response to this motion, and at the Level IV hearing, the partiespresented evidence on this issue prior to a discussion on the merits of the case. The facts of the matter, as they relate to the timeliness issue, are stated below.

Findings of Fact - Timeliness

1. On November 28, 1995, BEP issued Grievant a written reprimand for accessing confidential information through her computer at work for other than official business.

2. Grievant received this reprimand on or about December 4, 1995. Grievant took this reprimand to her Union Steward Pamela Wiley, either on that day or the day after, to decide what she should do. If necessary to resolve the issue, Grievant wished to file a grievance over the disciplinary action.

3. Ms. Wiley recommended that she (Ms. Wiley) try to resolve the issue informally with Mr. Ed Burdette, Executive Director of Workers' Compensation. Grievant agreed to this plan of action.

4. Ms. Wiley did not meet right away with Mr. Burdette as she had told Grievant she would.

5. Ms. Wiley kept telling Grievant she would handle the issue informally with Mr. Burdette.

6. In December, Ms. Wiley told Grievant she had met with Mr. Burdette, and he had promised to remove the reprimand from her personnel file by March 31, 1996, instead of the usual eighteen months, and Mr. Burdette would be sending Grievant a letter to that effect.

7. Grievant agreed this compromise would be satisfactory with her. 8. After some time passed, Grievant began asking Ms. Wiley where Mr. Burdette's letter was, promising to remove the reprimand from her file.

9. Ms. Wiley kept promising Grievant she would check into it. Eventually, Ms. Pamela Ray, Union Representative, advised Grievant to write a letter to Mr. Burdette requesting the reprimand be removed and stating the reasons why. On January 10, 1996, Grievant wrote Mr. Burdette.

10. Mr. Burdette responded to Grievant's letter by letter dated February 9, 1996, and received by Grievant on February 13, 1996, stating he would not remove the reprimand early.

11. Grievant then asked her representatives to file a grievance, and they responded she had missed the deadline.

12. Grievant filed this grievance to remove the reprimand on February 23, 1996.

13. Mr. Burdette has no memory of Ms. Wiley ever discussing this issue with him. Additionally, the contemporaneous notes he takes at all meetings make no reference to Grievant's reprimand. Further, the notes his secretary makes to inform him of the agendas for his meetings make no reference to Grievant or her reprimand.

Discussion - Timeliness

The timeliness issue is governed by the timelines set out in W. Va. Code § 29-6A-4(a), which states a grievance must be filed:

> Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to thegrievant or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance. . ..

"Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed,

the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated that a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his or her failure to file in a timely manner." Sayre v. Mason County Health Dept., Docket No. 95-MCHD- 435 (Dec. 29, 1995). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995). It is clear that this grievance was not filed within the timelines set out in W. Va. Code §29-6A-3.

The situation presented here requires the Undersigned Administrative Law Judge to answer two questions. The first issue is to decide what really happened, and what Grievant's role was in the events described above. The second issue is whether Grievant has demonstrated "a proper excuse for her failure to file in a timely manner." Sayre, supra. The first answer requires an assessment of the credibility of the witnesses, and an assessment of the plausibility of the explanations given.

It is an administrative law judge's responsibility to assess the credibility of the witnesses before her. Some factors to be considered in assessing a witness's testimony 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 and 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.

Ms. Wiley did not appear nor was she subpoenaed by either party. The parties were aware, before the Level IV hearing, that timeliness was an issue. Mr. Burdette did appear, and I found his testimony to be credible. His demeanor was appropriate, and he answered all questions in a forthright manner. His testimony was consistent with his contemporaneous notes and the notes of his secretary.

Grievant's testimony about the events was also credible. It was clear she believed what Ms. Wiley told her, and relied upon it to her detriment. The testimony of Grievant and Mr. Burdette is not necessarily contradictory. I find that Ms. Wiley misrepresented the situation to Grievant, and Grievant, relying upon these misrepresentations, did not pursue her right to file a grievance. The next issue to resolve is whether the negligence of a grievant's representative can and should be imputed to a grievant, thus preventing her from filing a grievance. This is not a situation where Grievant was

ignorant of the grievance procedure. If so, ignorance is not an excuse and will neither toll nor excuse the failure to file a timely grievance. Dudding v. W. Va. Dept. of Health and Human Resources/Welch Emergency Hosp., Docket No. 91-HHR-440 (Sept. 30, 1992). In this instance, Grievant thought the situation was resolved.

There have been very few cases on this issue before the Grievance Board. The case most on point dealt with an attorney admitting he committed a negligent act that caused the grievant's failure to file in a timely manner to Level IV. See Jack v. W. Va. Div. of Human Services, Docket No. 90-DHS-524 (May 14, 1991). That case held that because the grievant was "utterly without fault in failing to timely file her Level IV appeal [, and] since the delay was caused by negligence in her counsel's office, her Level IV appeal w[ould] not [be] dismissed for untimely filing." Id. This case is similar to Jack. Grievant relied to her detriment on the statements of her representative. She frequently contacted her representative and was not aware of any problems until after the time to file had passed. As soon as she received Mr. Burdette's letter, she requested to file a grievance, and even though she was told it would be untimely, did so anyway. She did not sit on her rights. Accordingly, I find the negligence of Grievant's representative will not be imputed to her, and this grievance will be seen viewed as timely filed.

The next issues to examine are the merits of the case. The following are the findings of fact on Grievant's written reprimand.

Findings of Fact - Merits

1. Grievant is a long term employee with BEP.

2. On November 28, 1994, Grievant signed a Code of Ethics Agreement with her employer, BEP, and promised she would regard theelectronic records to which she had access as confidential, and promised "to take proper precautionary steps to avoid any breach of privacy for any of our clients, employers, or employees of this Bureau." Resp. Exh. 1, Level IV Hrg.

3. In a training session, Grievant was told to protect her password as it was her responsibility, and she was informed that if she allowed someone to use her password or allowed them to illegally access her computer, she would be held responsible for their actions.

4. On October 13, 1995, Mr. Donald Pardue, Director of Internal Security, wrote Grievant asking her to explain why she had accessed wage information of two fellow employees, Arnold

Grinstead and Kizzie Nunley, on September 21, 1995. Grievant discussed this letter with her supervisor, the above-identified Mr. Grinstead, and he told her not to worry.

5. Grievant responded on October 13, 1995, stating she "had no idea how or why [her] security would come up regarding an inquiry of wage data on Ms. Nunley or Mr. Grinstead." Resp. Exh. 2, Level IV Hrg. She stated she may have failed to lock her system when she was away from her desk or may have been using a system that did not lock at that time.

6. On November 28, 1995, Mr. Burdette issued Grievant a written reprimand for accessing confidential information through her computer at work for other than official business. This reprimand was issued based on the report from Internal Security,and Grievant's failure to offer a sufficient explanation for the breach of security with her computer.

7. Grievant received this reprimand on or about December 4, 1995, and then asked Mr. Grinstead to write her a letter stating that he had at times directed her to access his wage data. Mr. Grinstead wrote this memo on December 4, 1995. This memo stated he had requested Grievant to access his wage data as a test of the system, and that at times he had asked her to check wage information for black lung claimants. He also stated that neither he nor Grievant remembered requesting that data on September 19, 1995.

8. At times, Grievant's computer would lock up and she would be required to give her password, over the phone, to repair people.

9. At times, not only did Mr. Grinstead, Grievant's direct supervisor, ask her to call up his personal wage information, but occasionally, Mr. Jerry Parker, Mr. Grinstead's supervisor, asked Grievant to access wage data. Except for the wage data she accessed for Mr. Grinstead, Grievant did not know whose wage data she accessed.

10. Sometime after Grievant received her written reprimand, Mr. Parker requested Grievant access wage data for him. Grievant protested and informed him she had gotten in trouble for doing that and did not want to fulfill his request. Mr. Parker's response was for Grievant to do as she was told. Grievant accessed the requested data. Again, she did not know whose wage data she hadaccessed. Test., Level IV; Grievant and Ms. Cindy Robinson (co-worker).

11. When Grievant accessed this data for Mr. Parker or Mr. Grinstead she did not know whose information was being accessed as the name of the individual did not appear; the data was accessed by Social Security number. On certain pages a partial name would appear. Test., Level IV; Grievant

and Ms. Robinson.

12. At the same time Grievant was questioned, other employees were also questioned about their use of the wage screen. Thirty- three employees received written reprimands.

13. BEP chose to issue written reprimands instead of oral reprimands, as they considered this breach of confidentiality to be very serious and to hold the possibility of opening the agency up for legal liability. See W. Va. Code §§ 21A-10-11(b) & 61-3C-12. See generally Maxey v. W. Va. Dept. of Health and Human Resources, Docket No. 93-HHR-007 (Feb. 28, 1995).

14. The other employee whose Social Security number was accessed, Ms. Nunley, is an Office Assistant II, whose cubicle is next door to Grievant's. Ms. Nunley has access to Grievant's computer and could have heard Grievant give her password out to the repair people.

15. Grievant has complained to BEP about Ms. Nunley's behavior toward her numerous times. Grievant states Ms. Nunley has threatened and cursed her.

16. The mainframe computer system was designed to shut down access to certain data if it was not utilized. The user would then be required to input their password again to access the system. Attimes this control process did not work as planned, and when Grievant's computer locked up and was then reactivated by the repair people, the system would come on line at the same wage screen without reinputting the password.

Discussion

In cases dealing with disciplinary matters, the burden of proof rests with the employer 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). Thus, BEP must prove that the written reprimand received by Grievant was warranted. The issue in this case is a close one and made closer by Grievant's supervisors requiring her to access data for them. Clearly, Grievant was to guard her password and was not to access data for her personal benefit or to satisfy her curiosity. Grievant knew this and signed an oath stating she would not use the information for any purpose other than work. She was also told to lock her machine when she was away from her desk so others could not access her machine. However, Grievant was also required to give data to her supervisors and to give her password over the phone.

There appears to be no way to prove who may have accessed Grievant's machine if she did not.

Obviously, someone utilized her machine to look up information inappropriately. Just as obviously, it would be impossible to believe that Grievant could accidently come up with Ms. Nunley's Social Security number to use fortraining or demonstration purposes. (See footnote 1) As previously stated, Grievant appeared credible, and Ms. Robinson corroborated her story as to the actions of Mr. Grinstead and Mr. Parker. Neither side called Mr. Grinstead, Ms. Nunley, or Mr. Parker. Their testimony might have been helpful in resolving some of the issues raised by this case.

However, since BEP has the burden of proof in this case and chose not to clarify or rebut Grievant's evidence in these areas, the issue is whether BEP proved its case. "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, . . . [and the witnesses'] opportunity for knowledge, information possessed, and manner of testifying [; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96- 20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. "If the evidence is evenly balanced between the parties, there can be no recovery" by the party bearing the burden of proof. Adkins v. Smith, 142 W. Va. 772 (1957).

I find, after weighing the evidence presented by both sides, that BEP has not met its burden of proof and proven by a preponderance of the evidence that Grievant was either theindividual who accessed the data, or that she did not access the data at the direct order of her supervisors.

Conclusions of Law

1. In a disciplinary grievance, the employer bears the burden of proving by a preponderance of the evidence that the employee committed the acts for which she was disciplined and that the conduct effected the rights and interests of the public. W. Va. Code § 18-29-6; Thompson v. W. Va. Dept of Health and Human Resources. Docket No. 94-HHR-254 (Jan. 20, 1995).

2. "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, . . . [and the witnesses'] opportunity for knowledge, information possessed, and manner of testifying [; this] determines the weight of the

testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064.

3. "If the evidence is evenly balanced between the parties, there can be no recovery" by the party bearing the burden of proof. Adkins v. Smith, 142 W. Va. 772 (1957).

4. Some factors to be considered in assessing a witness's credibility are the witness's: 1) demeanor; 2) opportunity or capacity to perceive an communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Harold J. Asher and 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 no existence of any fact testified to by the witness; and 4) the plausibility of the witness's information. Id.

5. After a review of the above-identified factors the Undersigned finds the testimony of Grievant and her witness, Ms. Robinson, to be credible.

6. Respondent failed to prove by a preponderance of the evidence that Grievant was more likely than not the individual who illegally accessed wage information about Mr. Grinstead and Ms. Nunley, or that she failed to properly protect her password.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to remove immediately any and all references to the written reprimand from Grievant's personnel file.

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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JANIS I. REYNOLDS

Administrative Law Judge

Dated: September 30, 1997

Footnote: 1

Occasionally Grievant would demonstrate how to utilize the various programs to other employees.