MARY FERRELL,

Grievant,

v. DOCKET NO. 97-HHR-526

WEST VIRGINIA DEPARTMENT OF
HEALTH & HUMAN RESOURCES,

Respondent.

DECISION

Grievant, Mary Ferrell, challenges her 14-day suspension without pay on the grounds that the Department of Health and Human Resources ("DHHR") failed to follow its progressive discipline policy, her personal circumstances were not considered, she was not given an adequate opportunity to respond, office procedures were not followed, and the suspension was excessive. The grievance was initiated at level one on June 12, 1997, at which time all parties agreed to proceed to level three. A hearing was held on October 22, 1997, where Grievant was represented by her husband and DHHR was represented by counsel, David Alter. The grievance was denied in a written level three decision dated November 18, 1997. Grievant appealed to level four on November 24, 1997, and the parties agreed to submit this matter for a decision based upon the existing record. No written arguments were submitted, and this matter became mature for decision on January 20, 1998.

The following findings of fact are made from a preponderance of the evidence introduced at level three, including the transcript of testimony and all documentary evidence.

Findings of Fact

1. Grievant is employed by DHHR as a legal assistant in the Child Support Enforcement Division.

2. Grievant's assigned caseload normally consists of approximately 600 to 800 cases. Her responsibilities include initiating and processing wage garnishments, locating absent parents, establishing paternity, and enforcing court orders and obligations. She also

responds to questions and provides information to parents who wish to utilize the agency's services.

3. On January 23, 1996, Grievant met with Mary Randolph, Team Leader, and Tom White, Division Attorney, regarding problems with her work performance. The results of the meeting were memorialized in a memorandum to Grievant from Ms. Randolph. The memorandum indicated that the subject of the meeting was Grievant's "lack of acting upon requests from Mr. White and me for action on specific cases." It further stated that Grievant "admitted to being disorganized and tired." A plan was established for Grievant to organize her desk and files, turn in slips regarding telephone calls, and prioritize her work. Finally, the memo informed Grievant that lack of improvement would result in disciplinary action.

4. A written reprimand was issued to Grievant on March 8, 1996, for inadequate work performance, specifically "failure to address concerns of specific caretakers and absent parents has resulted in undue hardships for those persons." Again, a corrective plan was established for returning telephone calls and keeping a log, and the letter informed Grievant that further discipline would include a suspension without pay.

5. The March 8, 1996, letter was mailed to Grievant's former address, and she did not receive it. 6. On October 25, 1996, while searching for a case file, Mr. White discovered an enormous pile of files, loose documents and mail hidden under and around Grievant's desk. After consultation with Grievant's supervisors, Mr. White packed the documents into boxes, after taking pictures of Grievant's work station.

7. Ms. Randolph and Sally Montello, Regional Manager, spent several months sorting, categorizing and prioritizing the documents found under Grievant's desk. "Loose" documents were found relating to 221 case files, and approximately 100 of them required some type of action on Grievant's part, most involving input of information into OSCAR, the agency computer system. Many of the documents were at least a year old, and some were up to three years old.

8. Failure of a legal assistant to put information into the computer system can result in the agency's failure to obtain child support payments from an obligated parent.

9. Ms. Randolph held a conference with Grievant on February 21, 1997, to discuss Grievant's failure to take action on two specific cases. (See footnote 1) **Ms. Randolph issued a**

memorandum of the same date memorializing the meeting and instructing Grievant to print specific screens from her computer each morning and provide them to Ms. Randolph. **(See footnote 2)**

10. Ms. Randolph and Ms. Montello held a conference with Grievant on February 28, 1997, to generally discuss Grievant's difficulties in performing her job and hiding work when she gets behind. Grievant was given very specific instructions as to how to prioritizeher work each day, and she was directed to keep in close contact with Ms. Randolph for assistance and evaluation. Grievant was informed that these steps were being taken to insure that further punitive actions would not be necessary.

11. Without prior notice, Grievant was called into a meeting with Ms. Randolph and Mr. White on May 20, 1997, at which time twenty-three of Grievant's cases were discussed, some of which involved the documents found under her desk. Grievant was asked to explain her actions or lack thereof for each case. However, because of her extensive caseload and the lack of notice about the subject of the meeting, Grievant could only comment on less than half of them. She was afforded the opportunity to provide written responses after the meeting, but not within any specific time frame.

12. On June 4, 1997, two weeks after the meeting with Ms. Randolph and Mr. White, Grievant received a certified letter from Jeffrey Matherly, Interim Director of the Child Support Enforcement Division. Mr. Matherly informed her of his decision to suspend her for fourteen working days, from June 13, 1997, through July 2, 1997. The stated specific reasons for the action were the documents found under Grievant's desk in October of 1996, specific cases which she had handled negligently and for which she had been counseled by her supervisors in 1997, her repeated ignoring of offers of assistance and directives from supervisors, and Grievant's "continuing pattern of malfeasance and neglect." This letter also set forth a "Corrective Action Plan" to go into effect upon Grievant's return from the suspension.

13. Grievant did not provide responses to the matters raised during the May 20, 1997, meeting until after she received notice of her suspension.

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the

evidence. W. Va. Code § 29-6A-6; Ramey v. W. Va. Dept. of Health, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dept. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). The employee bears the burden of proving any affirmative defenses raised. Smith v. W. Va. Div. of Corrections, Docket No. 95-CORR- 547 (June 28, 1996).

In addition to the West Virginia Division of Personnel's regulation stating that employees may be suspended "for cause," (See footnote 3) **DHHR has a progressive disciplinary policy. Policy Memorandum 2104 provides:**

> **[Progressive discipline] is determined by the severity of the violation, progressive discipline is the concept of increasingly severe actions taken by supervisors and managers to correct or prevent an employee's initial or continuing unacceptable work behavior or performance . . . . Progressive and constructive disciplinary action will progress, if required, along a continuum from verbal warning to dismissal, with incremental steps between (i.e. verbal warning, written warning, suspension, demotion, dismissal). . . . It is important to remember, however, that the level of discipline will be determined by the severity of the violation.**

The policy also states that a suspension "may be issued where minor infractions/deficiencies continue beyond the written warning or when a more serious singular incident occurs."

The specific DHHR policy at issue here has been previously interpreted by thisGrievance Board to be a permissive, discretionary policy that "does not create a mandatory duty to follow a progressive disciplinary approach." Artrip v. W. Va. Dept. of Health and Human Serv., Docket No. 94-HHR-146 (Sept. 13, 1994); See also Thompson v. W. Va. Dept. of Health and Human Resources, Docket No. 94-HHR-254 (Jan. 20, 1995). While progressive discipline is encouraged when employees commit "infractions of agency rules," serious infractions which affect the rights of the public do not necessitate use of this approach. Thompson, supra.

In the instant case, Respondent contends that, although it did, in fact, follow the progressive discipline policy, the results of the investigation of the documents found under Grievant's desk in October of 1996 alone warranted suspension. Respondent maintains that, because so many members of the public were adversely affected by Grievant's negligent handling of cases, it considered terminating her. However, because of Grievant's 28-year record of satisfactory employment with DHHR, a suspension was determined to be the

appropriate disciplinary action.

The undersigned finds that DHHR has met its burden of proving the charges against Grievant by a preponderance of the evidence. Grievant testified that she did not receive the written reprimand of March 8, 1996, because it was mailed to the wrong address; therefore, the progressive discipline policy was not followed. However, even if Grievant did not receive the written reprimand, DHHR's imposition of a suspension in this case was not improper. Even without the written reprimand, the record shows that Grievant was given several oral and written warnings or admonitions regarding her various failures to properly handle cases. While the written memoranda issued to her may not have been posited as "reprimands," only written "warnings" are required by Policy Memorandum 2104. At thevery least, Grievant received written warnings of her unsatisfactory performance in memorandums dated January 23, 1996, February 21, 1997, and May 23, 1997. (See footnote 4) **Grievant cannot now contend that she was not on notice, verbally and in writing, that her work performance was problematic. Moreover, DHHR's policy clearly leaves the agency with the discretion to determine that some infractions are serious enough not to warrant progressive discipline, and it was clearly not contrary to that policy to deem Grievant's negligence in this case deserving of more serious action.**

After she was suspended, Grievant provided written explanations for her lack of action in the various cases with which she was confronted on May 20, 1997. Her responses range from claims that she was not assigned a particular case to not yet having taken the action needed. The undersigned finds that these explanations are insufficient to overcome the overwhelming overall picture of Grievant's poor work performance. If a case was not assigned to her, she should not have allowed a document pertinent to that case to remain on her desk for an extended period of time; why not take the document to the person to whom the file was assigned so that appropriate action could be taken? Grievant has not sufficiently explained her severe negligence in handling numerous cases assigned to her.

Grievant also contends that the death of her mother and a flood at her home impacted her work performance. The record does not reflect exactly when these events occurred, but it appears that it was some time in the middle of the calendar year of 1996. Respondent has pointed out that Grievant's performance was problematic prior to theseevents, and that she

received verbal and written warnings in January of 1996. Grievant provided no response to Respondent's contentions.

At the level three hearing, Grievant called other legal assistants to testify regarding the overwhelming workloads assigned to them. There can be no argument that the caseloads assigned to DHHR legal assistants are, indeed, ridiculously burdensome. However, the other legal assistants also testified that they did adequately manage their enormous caseloads by prioritizing and organizing. These are things that Grievant has been instructed to do on numerous occasions, but she has not done. In addition, other legal assistants who feel completely overwhelmed stated that they have never hesitated to go to their supervisors for assistance. Grievant stated that she did not feel she could do so, because she feared for her job. This would seem to be all the more reason for Grievant to improve her performance and get organized.

Grievant argues that a suspension was an excessive punishment in this case. An administrative law judge may reduce the discipline imposed if it is determined to be clearly excessive or disproportionate to the offense. "Factors to be considered in this analysis include the employee's past disciplinary record, the clarity of notice to the employee of the rule violated, and whether the employee was warned about the conduct, and mitigating circumstances. Stewart v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 91- ABCC-137 (Sept. 19, 1991)." Evans v. Dept. of Health and Human Resources, Docket No. 97-HHR-280 (Nov. 12, 1997). Under these circumstances, when Grievant was counseled on so many occasions and provided explicit instructions as to how to improve her performance, the undersigned cannot find mitigation to be appropriate. Grievant has not proven that her punishment should be mitigated. In addition to the foregoing findings and discussion, the following conclusions of law are appropriately made.

Conclusions of Law

1. In disciplinary matters, the employer must prove the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; Ramey v. W. Va. Dept. of Health, Docket No. H-88-005 (Dec. 6, 1988).

2. DHHR Policy Memorandum 2104 regarding progressive discipline "does not create a

mandatory duty to follow a progressive disciplinary approach." Artrip v. W. Va. Dept. of Health and Human Serv., Docket No. 94-HHR-146 (Sept. 13, 1994); See also Thompson v. W. Va. Dept. of Health and Human Resources, Docket No. 94-HHR-254 (Jan. 20, 1995).

3. Respondent proved by a preponderance of the evidence that Grievant received several oral and written warnings and counseling sessions regarding her inadequate work performance and negligent handling of cases.

4. The discipline imposed against an employee may be mitigated if determined to be clearly excessive or disproportionate to the offense. Evans v. Dept. of Health and Human Resources, Docket No. 97-HHR-280 (Nov. 12, 1997).

5. Grievant did not prove that the discipline imposed against her was excessive or disproportionate to the offenses committed.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or 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.

Date: April 30, 1998 _____

V. DENISE MANNING

Administrative Law Judge

Footnote: 1

The record does not reflect whether these two cases were included in the documents found under Grievant's desk.

Footnote: 2

It was not explained what information is contained on the specific computer screens involved.

Footnote: 3

DHHR personnel are civil service employees governed by the Division of Personnel's Administrative Rule;

Section 12.03 authorizes suspensions.

Footnote: 4

The May 23, 1997, memorandum from Ms. Randolph set forth in writing Grievant's responses to the cases with which she was confronted on May 20, 1997.