RUTH LADISH,

Grievant,

v.

DOCKET NO. 98-BEP-340

WEST VIRGINIA BUREAU OF
EMPLOYMENT PROGRAMS,

Respondent.

D E C I S I O N

Grievant, Ruth Ladish, filed this grievance on or about March 10, 1998, protesting a written reprimand issued by her immediate supervisor, Thomas K. Rardin, on March 2, 1998. The grievance was waived by agreement of the parties at levels one and two, and a level three hearing was conducted on March 30, 1998 and July 7, 1998. Jack C. McClung, Grievance Evaluator, recommended that the grievance be denied by decision dated August 27, 1998, and William F. Vieweg, Commissioner, notified Grievant that he accepted that recommendation on September 1, 1998. Grievant appealed to level four on September 2, 1998, and a level four hearing was scheduled for October 6, 1998. At the level four hearing, the parties agreed to submit the case on the record developed at level three, including proposed findings of fact and conclusions of law filed at that level, and it became mature for decision on October 6, 1998. Grievant was represented by Edgar F. Heiskell, III, Esq., and Respondent Bureau of Employment Services ("BEP") was represented by Harold Chambers, Esq., Assistant Attorney General.

SUMMARY OF EVIDENCE

Joint Exhibits

Ex. 1 -

Handwritten note from Ed Burdette to Thomas Rardin.

Ex. 2 -

Personnel Action Form for Diana Mixer, effective February 23, 1998.

Ex. 3 -

Cancellation of Personnel Action Form for Diana Mixer, dated February 20, 1998.

Ex. 4 -

February 23, 1998 memorandum from Thomas K. Rardin, Personnel Administrator, to Adna I. Thomas, Director, FAM Division.

Ex. 5 -

February 20, 1998 memorandum from Ed Burdette, Executive Director, to Ad Thomas, FAM Administration.

Ex. 7 -

February 23, 1998 memorandum from Thomas K. Rardin, Personnel Administrator, to Adna I. Thomas, Director, FAM Division.

Ex. 8 -

West Virginia Bureau of Employment Programs Employee Privileged and/or Confidential Information Agreement, signed December 3, 1996.

Ex. 9 -

March 2, 1998 memorandum from Thomas K. Rardin, Personnel Administrator, to Ruth Ladish, Administrative Services Assistant I.

Ex. 10 -

March 3, 1998 memorandum from Ruth A. Ladish to Thomas K. Rardin.

Ex. 11 -

March 4, 1998 memorandum from Thomas K. Rardin to Ruth Ladish.

Grievant's Exhibits

Ex. 12 -

February 20, 1998 letter from Ed Burdette, Executive Director, to Diane Mixer.

Ex. 13 -

Postmarked envelope addressed to Diane Mixer, dated February 21, 1998.

Ex. 14 -

Undated memorandum from Diane Mixer, with attachments.

BEP Exhibit

Ex. 1 -

Answer to Interrogatories: Melissa Balser, dated March 30, 1998.

Testimony

BEP presented the testimony of Thomas K. Rardin and Vicki Elkins. Grievant testified in her own behalf and presented the testimony of Diana Mixer, John E. Burdette, Frederick F. Mixer, and Adna Earl Thomas.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Grievant is an Administrative Services Assistant I and has been in Personnel Service for 13 years. 2. Grievant's immediate supervisor is Thomas K. Rardin, Personnel Administrator for BEP.

3. Grievant's responsibility as an Administrative Services Assistant I is to “work with the Workers' Compensation Division and the related Fund activities to the Office of Judges, the Workers' Comp. Appeal Board, in providing the personnel transactions and other related functions that deal with employees of that division and those offices.” LIII Tr., Vol. I, p. 25.

4. As part of Grievant's understanding of her job responsibilities regarding confidentiality of information, Grievant, on December 3 1996, signed a statement acknowledging her understanding,

titled “Employee Privileged and/or Confidential Information Agreement.” Ex. 8.

5. Mr. Rardin continually stressed to his employees the need for confidentiality of information received in connection with personnel transactions and services within BEP.

6. It is an unwritten policy that personnel information is not to be discussed with anyone who does not have a right or need to know the information. Those with a right to know include the individual employee, his or her supervisor, the director of the division, and the Commissioner. LIII Tr., Vol I, p. 43.

7. With regard to new hires, the division director has the final contact with the new hire regarding their starting date and other pertinent information. Employees in the Personnel office can tell an employee their starting date only if the division director gives them authorization. LIII Tr., Vol, I, p. 43.

8. “The normal recommended procedure is that an employee, a potential employee, not be given a start date by the director of the division that they are intendingto work in until such time as the office of personnel services notifies that director that the paperwork has been approved for that employee to begin work.” LIII Tr., Vol. I, p. 32.

9. Ed Burdette, Executive Director of the Workers' Compensation Division, was interviewing for an executive secretary in late January, early February 1998. The position was exempt, and there was a critical need to hire someone for the position as soon as possible.

10. Mr. Fred Mixer, Staff Development Specialist in the Workers' Compensation Division, gave Mr. Burdette a copy of his wife, Diana's, resume sometime in January 1998.

11. Mr. Burdette told Mr. Mixer he was interested in meeting Mrs. Mixer, told him the salary for the position, and told him to tell her to call to set up an appointment.

12. Mrs. Mixer set up an appointment, and met with Mr. Burdette on February 5, 1998, to discuss the executive secretary position. LIII Tr., Vol. I, p. 112. During this meeting, Mr. Burdette discussed his concern that Mrs. Mixer's husband also worked in the same division, and the need for confidentiality of sensitive information. At the end of the interview, Mr. Burdette told Mrs. Mixer he wanted to hire her for the position, and that he would initiate the necessary paperwork.

13. Mr. Burdette testified that, at that point, “there was certainly an understanding that she would come to work for me.” LIII Tr., Vol., p. 153. No starting date was established by Mr. Burdette with Mrs. Mixer.

14. Mr. Burdette forwarded Mrs. Mixer's resume with a handwritten note to Mr. Rardin, indicating: “I would like to offer this person my exempt sec. job at $25,000. Will you process the necessary paper work. Thanks. Ed B.” Ex. 1. 15. Mr. Rardin called Mrs. Mixer to get necessary information for processing the paperwork. Mr. Rardin and Mrs. Mixer discussed the fact that he was going to put down February 23, 1998, as a possible starting date. LIII Tr., Vol. I, p. 117.

16. Mr. Rardin instructed Grievant to begin processing the paperwork to effectuate Mrs. Mixer's appointment. He told her to expedite the process and “walk it through”, because Mr. Burdette had a critical need for a secretary. Mr. Rardin and Grievant discussed February 23, 1998, as a possible effective starting date, and put that date down on the paperwork.

17. An effective starting date means that a new employee cannot start working before that date. However, it does not necessarily mean the employee will actually start on that date. It is up to the division director to actually establish a starting date with the employee, and that date can be adjusted. LIII Tr., Vol. I, p. 45.

18. Grievant processed the paperwork as instructed and kept Mr. Rardin informed of its status.

19. Sometime late during the week of February 9, 1998, or early the week of February 16, Mr. Mixer called Mr. Rardin to inquire about the status of his wife's paperwork. Mr. Rardin was not available, and his secretary, Vickie Elkins, transferred the call to Grievant, notifying her of the nature of the call. LIII Tr Vol. 1, p. 104; Vol. II, pp. 10, 73. Since Mr. Rardin had discussed February 23, 1998, as a possible starting date with Mrs. Mixer, she and Mr. Mixer were curious as to the status of the paperwork, as that date was looming nearer.

20. Mr. Mixer asked Grievant the status of the paperwork. She replied she did not know where it was, but would check on it. She called him back the same day to tell himthe paperwork was in the Governor's office. Mr. Mixer asked Grievant to call Mrs. Mixer when she learned the paperwork was finally approved. LIII Tr. Vol. 1, p. 120, Vol. II, p. 10, 73.

21. Grievant received the paperwork with all final approvals on Friday, February 20, 1998. Mrs. Mixer was approved to start work on Monday, February 23, 1998. Ex. 2; LIII Tr., Vol. II, p. 73.

22. Grievant attempted to reach Mr. Burdette several times on February 20, 1998, to inform him that the paperwork for Mrs. Mixer was approved. Mr. Burdette was not available, and Grievant left several messages with his secretary, Melissa.

23. Grievant talked with Mrs. Mixer the morning of February 20, 1998, to tell her the paperwork

had been approved. Grievant told Mrs. Mixer she did not have the authority to give her a starting date, and that Mrs. Mixer would have to contact Mr. Burdette directly regarding her starting date. LIII Tr., Vol. I, p. 120; Vol. II, p. 84.

24. Mrs. Mixer tried to contact Mr. Burdette on Friday, February 20, 1998, and left a message with his secretary, Melissa, asking whether she should be prepared to start work on February 23. LIII Tr., Vol. I, p. 120. Mr. Burdette did not call her back that day.

25. Mr. Burdette got the message from Mrs. Mixer the afternoon of February 20, 1998. His interest was “peaked” as to why she would inquire about starting work on February 23, since he had not discussed a starting date with her. LIII Tr., Vol. I, p. 162.

26. Mr. Burdette called Grievant and she informed him that Mrs. Mixer's paperwork was approved, and also that Mr. Mixer had inquired about the status of the paperwork. 27. Mr. Burdette told Grievant that the information she had given to Mr. Mixer was in “violation of discussions he had with Mrs. Mixer”, and was a breach of confidentiality. LIII Tr., Vol. I, p. 163.

28. He told Grievant to cancel Mrs. Mixer's appointment, that he was not going to hire her, and told Grievant not to tell anyone about this situation. LIII Tr., Vol. I, p. 164; Vol. II, p. 127.

29. Later that afternoon, at about 5:00 p.m., Mr. Mixer stopped in to see Mr. Burdette. Mr. Burdette was in a conference, and Mr. Mixer popped his head in and asked if his wife should start work on Monday. Mr. Burdette told Mr. Mixer he did not know what he was talking about, that he had never offered Mrs. Mixer the job, and that he still had another candidate to interview for the job. LIII Tr., Vol. I, pp. 121, 167; Vol. II, pp. 10-14.

30. Mr. Burdette lied to Mr. Mixer about having another candidate to interview; he did not. LIII Tr., Vol. I, p. 168.

31. In the meantime, unbeknownst to Grievant, Mr. Rardin, Mr. Mixer, or Mr. Burdette, Mrs. Mixer resigned her position with her current employer the afternoon of February 20, 1998, in anticipation of starting her new job on Monday, February 23, 1998. She testified that, even if she did not start the week of the 23rd, it would be alright because she would have a week off. LIII Tr., Vol. I, p. 121. Mrs. Mixer had previously informed her employer that she had applied for the job at BEP, and her employer was supportive of her decision.

32. After Mr. Mixer spoke with Mr. Burdette, he went directly to pick up his wife from work, and told her what Mr. Burdette had said about her not having the job. Mrs. Mixer was able to rescind her

resignation with her employer. 33. Meanwhile, after Grievant had received the telephone call from Mr. Burdette, telling her to cancel Mrs. Mixer's appointment, she went directly to Mr. Rardin to tell him what had happened. She told Mr. Rardin that maybe she should not have given Mr. Mixer any information, because Mr. Burdette was so upset. LIII Tr., Vol. I, p. 51.

34. Mr. Rardin called Mr. Burdette in Grievant's presence. It was clear Mr. Burdette thought Grievant had done something wrong, but Mr. Rardin told Grievant Mr. Burdette would probably forget about it over the weekend, and that it would all blow over. He orally reprimanded her, cautioning her about giving out confidential information to those who did not need to know. He told her Mr. Mixer did not have the right to know Mrs. Mixer's starting date. Mr. Rardin considered his oral reprimand of Grievant sufficient at the time and under the circumstances. LIII Tr., Vol. I, pp. 65, 75.

35. Mr. Burdette wrote a memorandum to Adna Earl Thomas, Director of the Fiscal Administrative Management Division, and Mr. Rardin's direct supervisor, on February 20, 1998, regarding this incident. Ex. 5.

36. In his memorandum, Mr. Burdette represented to Mr. Thomas that Grievant had told Mr. Mixer that Mrs. Mixer's starting date was February 23, 1998, without his approval, and that he was not going to hire Mrs. Mixer for this reason. Mr. Burdette also mentioned his concern that Personnel was giving out information “too freely” to anyone who calls there. Ex. 5. However, Mr. Burdette could not think of any other instances of Personnel or Grievant giving out information, other than the situation involving Mrs. Mixer. LIII Tr., Vol. I, p. 174. 37. Mr. Thomas call Mr. Rardin on the afternoon of February 20, 1998, about this situation. Mr. Rardin told Mr. Thomas he had just discussed the situation with Grievant. Mr. Thomas told him they would discuss the matter further on Monday, February 23.

38. On February 20, 1998, Mr. Burdette wrote a letter to Mrs. Mixer informing her that he could not offer her the secretarial position. Ex. 12.

39. Mr. Rardin testified he gave the situation a lot of thought over the weekend, and on Monday, February 23, 1998, he wrote a memorandum to Mr. Thomas, indicating he believed Grievant had engaged in a very serious breach of confidentiality. Mr. Rardin recommended Grievant be given a written reprimand, rescinded his recommendation for a merit raise for Grievant, and asked that she be reassigned to another division. Ex. 4; LIII Tr., Vol. 1, p. 57.

40. On February 23, 1998, Mr. Burdette called Mrs. Mixer and asked to meet with her. She met

with Mr. Burdette at his offices on February 23, 1998. Mr. Burdette told her his concerns about a breach of confidentiality, and his concerns about having a husband and wife work for the same division. Mr. Burdette told her he was shocked that her husband would have called Grievant about her employment information. He told her he was unhappy with Grievant telling Mr. Mixer his wife's start date was February 23, 1998, and that Grievant was “just a clerk.” LIII Tr., Vol. I, pp. 123-125.

41. Mrs. Mixer told Mr. Burdette that Grievant did not tell her or Mr. Mixer that she could start work on February 23, 1998. LIII Tr., Vol. I, p. 123-125.

42. Mr. Burdette admitted to her that he did not have another candidate to interview, and that he had lied to her husband. LIII Tr., Vol. I, p. 127. 43. Mr. Burdette offered Mrs. Mixer the secretarial job on February 23, 1998. She declined because she did not think they could work together based on personality differences.

44. On March 3, 1998, Mr. Rardin issued Grievant a written reprimand and advised her he had rescinded his recommendation for a merit increase for her. Ex. 9.

45. Mr. Rardin testified he recalled that Grievant told him she had told Mr. Mixer that his wife's starting date was February 23, 1998. Mr. Burdette told Mr. Thomas that Grievant had told Mr. Mixer his wife could start February 23, 1998. Mr. Thomas did no independent investigation, but took the managers at their word as to what happened.

46. Grievant did not tell Mr. Mixer his wife could start work on February 23, 1998.

47.

Grievant did not tell Mrs. Mixer she could start work on February 23, 1998.

48. Grievant told Mrs. Mixer she had an effective starting date of February 23, 1998, but that she needed to receive her start date directly from Mr. Burdette, and that Grievant had no authority to tell her when to start work.

49. Mr. Rardin testified that Mrs. Mixer had a right to know whether she was supposed to start work on February 23, 1998. LIII Tr., Vol. I, p. 77.

DISCUSSION

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 affected 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); Schmidt v. W. Va. Dept. of Highways, Docket No. DOH-88- 063 (Mar. 31, 1989). Thus, BEP must prove that the written reprimand received byGrievant was warranted. Spencer v. W. Va. Bur. of Employment Programs, Docket No. 96-BEP-134 (Sept. 30, 1997).

Mr. Rardin's March 2, 1998, letter of reprimand to Grievant reads as follows:

> Confidentiality is a critical part of maintaining the integrity of the Office of Personnel Services. As you know, I have frequently reinforced that requirement with you.
>
> On Friday, February 20, 1998, I became aware that you had provided information on the paperwork to affect the hire of the secretary to Ed Burdette, Executive Director of the Workers' Compensation Division, to the applicant's spouse, who is also an employee of the Workers' Compensation Division. The spouse had no right to this information, until a list of new hires for that division was provided for specific purposes. In this case, that was not the reason the information was provided by you. (See footnote 1)
>
> This issue has seriously impeded the integrity of the Office of Personnel Services and its ability to maintain the trust of the Workers' Compensation Division. A breach of confidentiality is intolerable, let alone the effect it has on the operations of this office. An employee's failure to maintain confidentiality inhibits management from making objective decisions on proposed personnel determinations. Disclosing confidential information regarding proposed personnel actions could give job candidates false expectations and place the Bureau in a position of having to defend management decisions in claims against the agency.
>
> While I believe that you did not intend to divulge confidential information to another employee, such disclosure demonstrates a serious error in judgement. This breach in confidentiality cannot be accepted without consequence.
>
> Therefore, this is an official written reprimand to you for the direct violation of maintaining the professional requirements and my specific direction and expected standard for strict adherence to maintaining confidentiality. Any further infraction may result in additional disciplinary action up to and including suspension or termination. You may meet with me or file written comments for inclusion in the record on this matter within 8 calendar days from the date of this memorandum.

Ex. 9. In addition, Mr. Rardin withdrew his recommendation that Grievant receive a merit increase.

The facts pertinent to this decision are established: Mr. Rardin and Mrs. Mixer talked early on about the possibility of a February 23, 1998 effective starting date, when Mr. Rardin called her to get

her social security number. Mr. Mixer called Mr. Rardin sometime the week before February 23, 1998, to inquire about the status of his wife's paperwork. Grievant took that call and advised Mr. Mixer, after checking, that the paperwork was in the Governor's office. Mr. Mixer told Grievant to call Mrs. Mixer as soon as the paperwork was finally approved. That was the extent of Mr. Mixer's involvement with Grievant over this matter.

When the paperwork was finally approved and returned to Grievant on February 20, 1998, she attempted several times to contact Mr. Burdette to let him know. She also called Mrs. Mixer to tell her the paperwork had been approved, but that she, Grievant, had no authority to tell Mrs. Mixer when to start work, and that Mrs. Mixer would have to wait to hear from Mr. Burdette about her starting date. When Mr. Burdette got the messages from Mrs. Mixer wondering if she was going to start work on Monday, he became outraged and canceled Mrs. Mixer's appointment. When Mr. Mixer approached him at 5:00 p.m. that Friday evening, he lied to him about offering his wife a position, and told him he had another applicant to interview for the position.

Mr. Burdette must have calmed down over the weekend, because on Monday, February 23, 1998, he called Mrs. Mixer to meet with her and offered her the secretarial job, but only after berating her husband, Mr. Rardin, Grievant, and even Mrs. Mixer herself, for giving her employer only one day's notice before resigning. Mrs. Mixer declined theposition. Other than Mr. Burdette's concern that some serious breach of confidentiality had occurred between Grievant and Mr. Mixer, there was no other reason given to explain his angry outburst on Friday, February 20, 1998.

It is clear from the record which has been established, that first, Grievant did not tell Mr. Mixer anything of substance about his wife's appointment; and second, that Mrs. Mixer already knew through Mr. Rardin that February 23, 1998, had been targeted as her effective starting date. Mr. Rardin testified that Mrs. Mixer, the employee involved, had a right to know about the status of her appointment and her effective starting date. No one told anyone but Mrs. Mixer this information. Grievant did not tell Mr. Mixer anything except that her paperwork was not complete. Therefore, BEP has failed to prove by a preponderance the charges alleged against Grievant in the March 2, 1998, written reprimand.

As part of her relief, Grievant requested that she be given a merit raise. However, the only evidence presented regarding the merit raise is that Mr. Rardin had recommended her for one. No evidence was presented as to whether Mr. Rardin's recommendations were always accepted,

whether any employees in his department received merit raises, or whether Grievant would have received the merit raise at all. Therefore, the undersigned cannot order BEP to award Grievant a merit raise, as she has not proven by a preponderance of the evidence that she is entitled to one. However, the undersigned strongly recommends that Mr. Rardin reinstate his recommendation for a merit raise for Grievant, as his reason for rescinding it was based on events which did not occur. In addition, Grievant has asked for attorneys' fees and costs, which are not authorized by this Grievance Board in grievance proceedings, and that request is denied.

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 affected 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); 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. Spencer v. W. Va. Bur. of Employment Programs, Docket No. 96-BEP-134 (Sept. 30, 1997).

2. BEP has failed to prove by a preponderance of the evidence that Grievant conveyed information to Mr. Mixer about his wife's starting date, or that she told Mrs. Mixer she could start work on February 23, 1998.

Accordingly, this grievance is **GRANTED** and BEP is **ORDERED** to rescind and remove the March 2, 1998 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 Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7(1998). 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: October 21, 1998

Footnote: 1

There is no dispute that Mr. Mixer inquired of the status of his wife's paperwork from Grievant in his capacity as her spouse, and not in connection with his responsibilities as Staff Development Specialist.