PATSY G. DILLARD,

_____Grievant,

v. Docket No. 98-DOH-127

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,

DIVISION OF HIGHWAYS,

Respondent.

DECISION

___Patsy G. Dillard (Grievant), formerly an Office Assistant III employed by Respondent W. Va. Department of Transportation, Division of Highways (DOH), filed a grievance pursuant to W. Va. Code §§ 29-6A-1, et seq., contesting her termination for falsification of records and theft. Grievant requests reinstatement to her position. Pursuant to W. Va. Code § 29-6A-4(e), this matter was filed directly at Level IV, where a hearing was conducted before the undersigned in the Grievance Board's office in Beckley, West Virginia, on July 8, 1998. At that hearing, DOH was represented by Jeff Miller, Esq., and Grievant represented herself. This matter became mature for decision on July 28, 1998, the date for submission of the parties' proposed findings of fact and conclusions of law.

The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

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Grievant was employed by DOH as an Office Assistant III. She had been a regular full-time employee of DOH for approximately 28 years.

2. Grievant was also employed by the City of Bluefield Parks and Recreation Department. 3. As part of her duties for DOH, Grievant entered payroll data for herself and others into DOH's computer payroll system, and so had knowledge of DOH's payroll procedures. Grievant's position was one of fiscal responsibility and trust.

4. Grievant's duties also included traveling to distant construction projects supervised by DOH.

5. Anonymous employees of DOH complained that Grievant reported payroll hours that were not actually worked, including Saturdays and holidays; that she arrived at work late without taking leave time; and that she reported sick leave while working elsewhere.

6. As a result of these complaints, DOH conducted a thorough and extensive investigation into Grievant's payroll records, resulting in meticulous documentation of Grievant's actions.

7. Between April 4, 1995, and February 15, 1997, Grievant charged at least 135.25 hours as time worked for DOH when she was, in fact, working for the City of Bluefield Parks and Recreation Department. This occurred on 90 dates and cost DOH $2,580.76.

8. Between June 5, 1995, and January 22, 1996, Grievant charged 100.5 hours as time worked for DOH, which exceeded the hours of work reflected in her sign-in/sign-out sheets. This occurred on 127 dates and cost DOH $1,847.45.

9. DOH's investigation revealed several other serious acts of fiscal misconduct likely committed by Grievant, which may have cost DOH in excess of $30,000.00.

DISCUSSION

In disciplinary matters, the employer has the burden of proving the charges by apreponderance of the evidence. W. Va. Code § 29-6A-6; Evans v. Dep't of Health & Human Resources, Docket No. 97-HHR-280 (Nov. 12, 1997), Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). A preponderance of the evidence is defined as “evidence which is 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.” Black's Law Dictionary (6th ed. 1991); Leichliter v. W.Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

DOH based its decision to terminate Grievant upon provisions of its Personnel Operating Procedures regarding Disciplinary Action, Suspension and Dismissal. "Addendum B" to that document lists examples of first offenses warranting dismissal, which include "altering, forging records” and “theft.” DOH's Director of Human Resources, Jeff Black, testified that Grievant was terminated because her conduct fit within both of these categories.

Clarence L. Hughart (Hughart), Procedures/Investigations Supervisor for DOH, testified that he

conducted an investigation of Grievant after receiving anonymous complaints regarding her payroll practices. His investigation discovered that between April 4, 1995, and February 15, 1997, Grievant charged at least 135.25 hours as time worked for DOH when she was, in fact, working at the City of Bluefield Parks and Recreation Department. This occurred on 90 dates and cost DOH $2,580.76. His investigation also discovered that between June 5, 1995, and January 22, 1996, Grievant charged 100.5hours as time worked for DOH, which exceeded the hours of work reflected in her sign- in/sign-out sheets. This occurred on 127 dates and cost DOH $1,847.45. These are the charges relied upon by DOH in terminating Grievant's employment.

Hughart's investigation also revealed several other serious acts of fiscal misconduct likely committed by Grievant, which may have cost DOH in excess of $30,000.00. These included charging hours for work allegedly performed on nights and weekends when that work could not be corroborated by other employees, charging hours for work on construction projects when that work could not be corroborated by other employees, failure by Grievant to complete sign-in/sign-out sheets, failure by Grievant to complete Inspector's Daily Reports, which are to be completed by inspectors working on construction projects, charging hours for work on construction projects that had not yet begun, sick leave abuse, and charging DOH for time spent traveling to Grievant's job in Bluefield. However, because these allegations were not relied upon by DOH in terminating Grievant's employment, they will not be discussed further.

Hughart's investigation was thorough and extensive. It produced meticulous documentation of Grievant's fiscal wrongdoing. This documentation included a very large and intricately detailed spreadsheet setting forth every detail of Grievant's payroll record. When the investigation revealed situations where it was likely, but not completely certain, that Grievant had falsified records or committed fraud, DOH and Hughart properly chose not to rely on those findings. They are to be commended for the thoroughness of their investigation and the fairness of its conclusions.

DOH's Personnel Operating Procedures provide that an employee may be dismissed for "good cause." The phrase "good cause" has been determined by the WestVirginia Supreme Court of Appeals to apply to dismissals of employees whose misconduct was of a "substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention." Syl. Pt. 2, Buskirk v. Civil Serv. Commission, 175 W. Va. 279, 332 S.E.2d 579 (1985); Syl. Pt. 1, Oakes v. W. Va. Dep't of Finance and Administration, 164 W. Va. 384, 264 S.E.2d 151 (1980);

Guine v. Civil Serv. Commission, 149 W. Va. 461, 141 S.E.2d 364 (1985), § 12.02, Administrative Rule, W. Va. Div. of Personnel (Aug. 3, 1993). See Westfall v. W. Va. Dep't of Transportation, Docket No. 97-DOH-349 (Jan. 16, 1998); Hercules v. W. Va. Div. of Highways, Docket No. 97-DOH-006 (Apr. 17, 1997). The undersigned finds that falsification of records and theft of public funds are violations of a substantial nature, are not trivial or inconsequential, and are not mere technical violations of statute or official duty without wrongful intention.

At the Level IV hearing Grievant, although never sworn as a witness, made a closing argument in which she stated that she never intentionally did anything wrong, that someone should have told her earlier if she was filling out payroll forms incorrectly, and that intolerant co-workers were jumping on a bandwagon to get her. Grievant called no witnesses, and produced no evidence of any kind, to prove that falsification of records and theft did not occur. Accordingly, DOH has met its burden of proof and demonstrated, by a preponderance of the evidence, that Grievant was guilty of falsification of records and theft.

A punishment may be determined to be excessive when the employee establishes that it was clearly disproportionate to the offense, displaying an abuse of agency discretion. Hunt v. W. Va. Bureau of Employment Programs, Docket No. 97-BEP-412 (Dec. 31, 1997);Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Overbee v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-183 (Oct. 3, 1996). Overbee provides that "deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." In Hercules, the administrative law judge noted that, since dismissal is such an extreme measure, it should only be used when it is clear that removal of the employee from the work environment is absolutely necessary.

In considering the propriety of Grievant's dismissal, the undersigned finds it significant that Grievant's duties included entering payroll data for herself and others into DOH's computer payroll system. Her position was one of fiscal responsibility and trust. This Grievance Board has held that theft of DOH property by a Storekeeper, whose primary function is to protect and guard such property from unlawful taking, is a more serious violation of trust than theft of state property by other types of employees. Hamilton v. W. Va. Div. of Highways, Docket No. 94-DOH-1116 (Nov. 29, 1995); James E. Symns v. W. Va. Dep't of Transp., Div. of Highways, Docket No. 94-DOH-091 (July 7, 1994). See Rice v. W. Va. Div. of Highways, Docket No. 96-DOH-482 (Nov. 21, 1997). The same reasoning

applies to Grievant. Because her duties included entering payroll data for herself and others into DOH's computer payroll system, her falsification of records and theft constituted more serious violations of trust than would falsification of records and theft by other types of employees.

The amount of public funds misappropriated by Grievant also argues for her dismissal. In Symns, $1,969.67 worth of DOH property was taken. In Hamilton, the value of DOH property taken over a period of years was impossible to calculate, but was foundto be several hundred dollars at a minimum. This Grievance Board upheld both dismissals. Grievant misappropriated at least $4,428.21.

Because Grievant held a position of fiscal responsibility and trust within DOH, and because the amount of public funds she misappropriated was so large, the undersigned finds that dismissal under the circumstances of this case was appropriate.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. In disciplinary matters, the employer has the burden of proving the charges by a preponderance of the evidence. W. Va. Code § 29-6A-6; Evans v. Dep't of Health & Human Resources, Docket No. 97-HHR-280 (Nov. 12, 1997), Miller v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992.).

2. Dismissal of a DOH employee must be for good cause, which means misconduct of a substantial nature directly affecting the rights and interests of the public, rather than some trivial or inconsequential matters, or some technical violations of statute or official duty without wrongful intention. Syl. Pt. 2, Buskirk v. Civil Serv. Commission, 175 W. Va. 279, 332 S.E.2d 579 (1985); Syl. Pt. 1, Oakes v. W. Va. Dept. of Fin. and Adm., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Serv. Commission, 149 W. Va. 461, 141 S.E.2d 364 (1985). See Westfall v. W. Va. Dept. of Trans., Docket No. 97-DOH-349 (Jan. 16, 1998); Hercules v. W. Va. Div. of Highways, Docket No. 97-DOH-006 (Apr. 17, 1997).

3. Respondent proved by a preponderance of the evidence that Grievant, onnumerous occasions, charged DOH for time she actually worked for the City of Bluefield Parks and Recreation

Department.

4. Respondent proved by a preponderance of the evidence that Grievant, on numerous occasions, charged DOH for time which exceeded the hours of work reflected in her sign-in/sign-out sheets.

5. A punishment may be determined to be excessive when the employee establishes that it was clearly disproportionate to the offense, displaying an abuse of agency discretion. Hunt v. W. Va. Bureau of Employment Programs, Docket No. 97-BEP-412 (Dec. 31, 1997); Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996).

6. Given her position of fiscal responsibility and trust, and considering the large amount of DOH funds misappropriated, Grievant's dismissal was not clearly disproportionate to the offense or an abuse of agency discretion.

Accordingly, this grievance is **DENIED**.

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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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated August 10, 1998