

**ROBERT J. CAMPBELL,**

**Grievant,**

**v.**

**Docket No. 00-MCHD-078**

**MORGAN COUNTY HEALTH DEPARTMENT,**

**Respondent.**

### **DECISION**

Grievant, Robert J. Campbell, employed by the Morgan County Health Department (MCHD or Respondent) as a Sanitarian, filed a grievance directly to level four, as is permitted by W. Va. Code §29-6A-4, following his dismissal. Grievant asserts that the action was “without good cause and in retribution and retaliation for my testimony resulting in removal of a County Commissioner as Chairman of the Health Dept. and in retaliation for filing [a] complaint that the Health Officer was performing the duties of a Sanitarian in violation of WV statute.” Grievant requests reinstatement with back pay, benefits, attorney fees, and court costs.

A level four hearing was conducted in the Grievance Board's Morgantown office on May 17, 2000, at which time Grievant was represented by Mark Jenkinson, Esq., and MCHD was represented by Nathan Cochran, Esq. The matter became mature for decision upon receipt of proposed findings of fact and conclusions of law by Grievant on June 1, 2000, and a post-hearing brief filed by MCHD on June 2, 2000.

The essential facts of this matter are undisputed and may be set forth as the following findings of fact.

#### **Findings of Fact**

1. Grievant has been employed by MCHD as a Registered Sanitarian since its inception in 1989, and was employed with its predecessor, the Morgan-Berkeley Health Department, since 1988.

2. In response to a complaint, Grievant completed a “Nuisance Investigation Report” dated September 11, 1996, in which he found a mobile home in Paw Paw, West Virginia had no septic system. Some discussion with the owners, David and Zoe Trevarrow, was had regarding the installation of a septic system; however, no real progress had been made when, in late January 1997, Mr. Trevarrow advised Grievant that his wife had been seriously injured in a car accident, and that he

needed to get the system installed for her care.

3. Mr. Trevarrow completed an application, which was filed with MCHD on September 30, 1997, for a permit to install a small sewage disposal system. The second page of the application requires a description of the proposed system, including the results of a percolation (perk) test. ([See footnote 1\)](#)

4. Grievant admits to filling in the results of the test with the knowledge that no such procedure had been completed. The numbers he recorded were an estimate made based upon his observation of the soil, and were consistent with his training and experience.

5. Upon filing the application, Mr. Trevarrow was granted a permit to install a septic system. 6. On September 29, 1998, Grievant conducted an inspection of the system installed by Mr. Trevarrow, and found that it did not meet the minimum standards established by the West Virginia State Department of Health. Specifically, Grievant found the system to be draining onto bedrock rather than in a fill dirt area, and expressed concern that the sewage would possibly drain into either the Trevarrow's or a neighbor's well.

7. Some alteration of the system was completed, and Grievant conducted a second inspection on April 29, 1999, again finding that it did not meet the minimum standards.

8. At some point, the matter was reviewed by a second Sanitarian, Richard Wheeler. Mr. Wheeler characterized the situation as a public health hazard and indicated that it would be necessary to "excavate center dirt to create a square pit (bed), and then have a sanitarian evaluate the soil conditions at the bottom of the bed." Depending on the soil conditions, Mr. Wheeler indicated that either a standard bed system could be installed, or, if the soil was not conducive to that, "at least twelve inches of clean graded sand needed to be placed in the bed, then lay pipe grid and fill around with more sand."

9. On July 7, 1999, Grievant, along with other MCHD employees, met with Mr. Trevarrow and others at the property to discuss the situation. During the course of the meeting Grievant was struck, causing him to fall down an embankment and under an abandoned building. Grievant subsequently pressed charges against Mr. Trevarrow for the battery.

10. Mr. Trevarrow appeared before MCHD at its meeting on July 21, 1999, to discuss his situation. He provided a chronology of events, noting that Grievant had drawn up plans for a septic system with the knowledge that no perk test had been done on the property. Grievant left the meeting

early; however, no inquiry was ever made of him by any MCHD member regarding the perk test.

11. Following Mr. Trevarrow's presentation, MCHD determined that, contingent upon a finding that it was within the Board's authority to override the decision of a Sanitarian, "the Health Officer or Sanitarian will be directed to issue an approval of the system based upon the fact that it is working."

12. On August 23, 1999, MCHD Health Officer, Dr. William R. Graves, completed an inspection form on which he determined the Trevarrow septic system met the minimum standards of the Department of Health.

13. Subsequent to Dr. Graves approving the Trevarrow system, Grievant filed a criminal complaint against him for performing the duties of a Sanitarian. Ultimately no probable cause was found to pursue this action.

14. In May and June of 1999 Grievant had made public statements at County Commission meetings opposing the re-appointment of Glen Stotler to the MCHD. Mr. Stotler had been acting as Chair of MCHD since its inception.

15. On November 12, 1999, a trial in the matter of the State of West Virginia v. David Lee Trevarrow was conducted in the Magistrate Court of Morgan County. During these proceedings, Grievant testified that no perk test had been conducted on the Trevarrow property.

16. A transcript of the November 12, 1999, proceedings was completed by the court reporter on January 11, 2000.

17. By undated letter, Dr. Graves notified Grievant that he was dismissed effective February 17, 2000. The sole reason given for the action was the entering of false information on an application for permit to install a sewage disposal system. On February 16, 2000, MCHD voted to support the "personnel action/letter of dismissal presented to the sanitarian, Rob Campbell."

### Discussion

In disciplinary matters, the employer has the burden of proving each element of the charges by a preponderance of the evidence. W. Va. Code §29-6A-6; 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 generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

The administrative rules of the West Virginia Division of Personnel provide that an employee in

the classified service may be dismissed for "cause." 143 CSR § 12.2, Administrative Rule, W. Va. Div. of Personnel (July 1, 1998). The phrase "good cause" has been determined by the West Virginia 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 Service Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985); Guine v. Civil Service Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1985); Syl. Pt. 1, Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980).

The dismissal letter states only one reason for the disciplinary action, i.e., Grievant knowingly entered false information on a permit to install a sewage disposal system. In support of the action, MCHD argues that: a failure to dismiss Grievant would amount to approval of state employees reporting false information; Grievant's claim of an emergency is clearly wrong and does not support his rationale for falsifying the permit; Grievant had no statutory authority to falsify records; Grievant's action could lead to his license suspension, a fact that supports the sanction of discharge; Grievant's action violated the law and/or breached the public trust; Grievant violated his duty to treat the public equally; and the dismissal was justified because the falsification goes to the core of Grievant's duties as a Sanitarian.

Grievant admits that he entered estimated numbers on the permit knowing that no test had been conducted, but argues that the reason given for his dismissal is pretextual, since the MCHD members had been aware of that fact since July 1999. Grievant suggests that the real reason for his dismissal was the fact that he had filed a criminal charge against Dr. Graves, and his ongoing feud with then-Chair Stotler.

Although the knowing insertion of false information onto an official form is a very serious matter, it does not appear that this was the reason for Grievant's dismissal. It is undisputed that Mr. Trevarrow informed the MCHD members of the matter in July 1999, yet Mr. Stotler, and present-Chair Susan Bayliss both testified that they did not even ask Grievant about the matter at that time. As noted by Ms. Bayliss, Grievant did leave the meeting early, but the Board could certainly have scheduled a meeting with him concerning such a serious allegation. Ms. Bayliss further stated that she thought Mr. Trevarrow was simply trying to cause Grievant trouble, and she gave the employee the benefit of the doubt. Nevertheless, it is astonishing that this employer now characterizes the action to be so severe that it warranted immediate dismissal, when not one member asked Grievant about the matter at the

time they were made aware of the situation. Even if all the MCHD members were initially giving Grievant the benefit of the doubt, it is reasonable to believe that they were aware of Grievant's testimony in the Trevarrow trial conducted in December 1999. Mr. Stotler is an attorney, and while no one specifically stated that he or she was present at the trial, there is some indication that the members were aware of the testimony, as indicated by Ms. Bayliss' testimony that they had to wait until February before a transcript was produced. It is not clear why the members believed it to be necessary to have a transcript prior to taking disciplinary action. The record does not indicate that any type of investigation was conducted, or that Grievant was ever given an opportunity to address the charge prior to the action being taken.

MCHD did not respond to Grievant's allegation that the real reason for his dismissal was due to ongoing opposition to Chairman Stotler, and his filing a criminal charge against Dr. Graves. Dr. Graves did not testify at the hearing, and Mr. Stotler was not questioned regarding Grievant's participation at the County Commission meetings. The record does not establish when the criminal charge filed by Grievant against Dr. Graves was dropped, but the dismissal occurred within less than six months from the time the installation was approved. Given MCHD's lack of concern when advised regarding the perk test, and the imposition of the dismissal shortly after the criminal charge against Dr. Graves was dismissed, it appears that the real reason for the dismissal was not Grievant's falsification of the test results.

Even if it is accepted that the dismissal was based on the information Grievant placed on the Trevarrow application, the charge that he "knowingly enter[ed] false information on a Health Department Application . . ." is not supported by the evidence of record. Grievant credibly testified that the Trevarrows were working with an extremely limited income, and had made little actual progress since the 1996 complaint had been filed. When, in January 1997, Mr. Trevarrow tearfully explained his wife's condition, and asked Grievant for help, Grievant complied by estimating the perk test results, thereby facilitating the process, allowing the Trevarrows to proceed with the installation. At hearing, Grievant stated that due to his years of training and experience he "knows dirt", and that having seen the soil at the Trevarrows, knew where it would perk. Although he indicated that the numbers he used were reliable, Grievant appeared genuinely remorseful, and acknowledged that he should have indicated on the application that the numbers were estimated.

Finally, the charge of falsification is inaccurate. A charge of entering false information implies that

the actual numbers were altered, or that numbers were selected with no basis. That simply is not the case. Grievant has passed the required tests to obtain the designation of Registered Sanitarian. He has worked in this area approximately twelve years. It is not unreasonable that a person with such credentials could provide a reliable estimate of the test results. Further, the estimation of the perk test would not result in an inadequate system being installed, as evidenced by the fact that Grievant twice refused to approve the installation. Clearly, Dr. Graves did not consider any perk test results prior to approving the system "based upon the fact that it [was] working".

Grievant's estimation of the perk test results was wrong. However, his explanation as to why it was done, and the fact that it was not his intent to allow a substandard system to be installed, are credible. Grievant twice declined to approve the system as installed, apparently infuriating Mr. Trevarrow. Although a second opinion was obtained from another Sanitarian which concluded that the system was unsatisfactory, after a third review by a part-time Sanitarian and Respondent's Office Manager, whose credentials are unknown, Dr. Graves approved the installation.

The fact that Grievant estimated the information did not compromise public health standards. MCHD has not filed any criminal charges against him, and he has not been subject to a license suspension. It appears then, that while Grievant's action was contrary to proper procedure, and not to be condoned, it was more of a technical violation, committed without wrongful intention, rather than misconduct of a substantial nature.

W. Va. Code § 29-6A-5(b) provides authority to an administrative law judge of the West Virginia Education and State Employees Grievance Board to "provide such relief as is deemed fair and equitable in accordance with the provisions of W. Va. Code §§ 29-6A-1, et seq. Where the employer fails to establish all of the charges which were alleged to support a particular disciplinary action, the penalty imposed must be reviewed to determine if it is excessive in the circumstances. See Walters v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-086 (Jan. 23, 1995), *aff'd*, Cir. Ct. of Kanawha County, No. 95-AA-23 (Dec. 19, 1996); Schmidt v. W. Va. Dept. of Highways, Docket No. DOH-88-063 (Mar. 31, 1989). See generally Douglas v. Veterans Admin., 5 M.S.P.B. 313 (1981).

Grievant's insertion of estimated perk test results on an application for a permit to install a septic system is not acceptable, and warrants some discipline. However, in consideration of the charges actually proven and Grievant's length of service, which MCHD has not represented to be anything less than satisfactory, the appropriate penalty would be a thirty day suspension, without pay.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following conclusions of law.

### Conclusions of Law

1. Pursuant to W. Va. Code § 29-6A-6, 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. Wellman v. W. Va. Dep't of Health & Human Services, Docket No. 93-HHR-079 (Oct. 18, 1993); Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988).

2. Dismissal of a civil service employee must be for good cause, which means misconduct of a substantial nature directly affecting the rights and interest of the public, rather than some trivial or inconsequential matters, or some technical violations of statute or official duty without wrongful intention. Oakes v. W. Va. Dep't of Fin. & Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980).

3. MCHD failed to establish good cause for dismissing Grievant.

4. W. Va. Code § 29-6A-5(b) provides authority to an administrative law judge of the West Virginia Education and State Employees Grievance Board to "provide such relief as is deemed fair and equitable in accordance with the provisions of W. Va. Code §§ 29-6A-1, et seq. Where the employer fails to establish all of the charges which were alleged to support a particular disciplinary action, the penalty imposed must be reviewed to determine if it is excessive in the circumstances. See Walters v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-086 (Jan. 23, 1995), aff'd, Cir. Ct. of Kanawha County, No. 95-AA-23 (Dec. 19, 1996); Schmidt v. W. Va. Dept. of Highways, Docket No. DOH-88-063 (Mar. 31, 1989). See generally Douglas v. Veterans Admin., 5 M.S.P.B. 313 (1981).

5. Dismissal was disproportionate to the charges ultimately proven in this matter. The maximum appropriate penalty given the charges actually proven and Grievant's prior work record over a period of twelve years as a productive employee, is a 30-day suspension without pay. See Walters, supra.

Accordingly, the grievance is **GRANTED**, and MCHD Ordered to reinstate Grievant with all back pay and benefits, offset by the thirty day suspension. The Grievance Board does not award attorney fees and costs at this level. Smarr v. Wood County Bd. of Educ. Docket No. 54-86\_62 (June 16, 1986).

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. However, the appealing party is required by W. Va. Code §29- 5A-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: June 22, 2000 \_\_\_\_\_

Sue Keller

Senior Administrative Law Judge

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[Footnote: 1](#)

*In a Magistrate Court proceeding, Grievant explained that the percolation test measures how fast the soil absorbs water. Four holes, each two feet deep, and approximately the size of a post hole are excavated, and filled with water for four hours. The drainage of the last six inches of water is timed to determine the soil porosity.*