ELLEN HARTLEY,

Grievant,

v. **Docket No. 99-BOT-512**

BOARD OF TRUSTEES/WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, Ellen Hartley, employed by the Board of Trustees as a Clerk II at West Virginia University (Respondent), filed a level one grievance on August 21, 1999, after she was dismissed. Grievant requested reinstatement with back pay and benefits. After the grievance was denied at levels one and two, Grievant elected to bypass consideration at level three, and advanced her claim to level four on December 13, 1999. An evidentiary hearing was conducted on February 22, 2000, at which time Grievant was represented by Jacques R. Williams, Esq., and Respondent was represented by Samuel R. Spatafore, Esq., Assistant Attorney General. The matter became mature for decision upon receipt of proposed findings of fact and conclusions of law submitted by the parties on March 27, 2000.

The following findings of fact are derived from the record developed at level two and level four.

Findings of Fact

1. Grievant was initially employed by Respondent on a part-time basis as an Accounting Clerk I in October 1990. She was made a full-time employee in 1991, and was promoted to Accounting Clerk II in 1994.

2. On a job application dated October 14, 1991, Grievant responded that shehad not been convicted of a crime, when she had pled guilty to a shoplifting charge in 1984.

3. In general, Grievant's duties include receiving and preparing deposits for twenty-two to twenty-five cash money bags per day, and reconciling funds to ensure they balance out at the end of each day.

4. By memorandum dated March 12, 1999, Cathy Sampey Barber, Manager of Accounts Receivable and Grievant's immediate supervisor, thanked Grievant and her co- worker, Ada McBee,

for alerting her to a $200 deposit shortage for the week of February 18, 1999, and advised them that effective immediately, their bank deposit was to be verified by a second person prior to sending it to the bank. An exception to the practice was when only one person is working, “however, [the] person preparing the deposit will be held responsible.” Ms Barber concluded that she was very concerned about the numerous overages/shortages that had occurred, even though with the exception mentioned previously, they had all been discovered to have been mistakes. She urged them to take their time and “be extra careful handling the deposits and imprest funds.”

___5. On April 8, 1999, Ms. Barber issued Grievant a first letter of warning citing numerous errors resulting in a shortage in the imprest fund discovered when an audit was conducted by the State Treasurer's Office on March 30, 1999. The audit reported the fund to be short by $55.46, later determined to be $68.04. Additionally, the imprest count for April 5, 1999, was short $8.04. Grievant was advised that she was expected to accurately and completely perform her responsibilities. 6. On June 25, 1999, Ms. Barber issued Grievant a second letter of warning regarding her failure to maintain performance standards. That letter stated in pertinent part: Specifically, we discussed the error in the Vault Cash Count on June 8, 1999. The events that occurred are as follows. On June 9, 1999, Ada McBee contacted me to report that the Student Affairs Downtown Imprest Fund was short $1,000. As you know, I reported to the Mountainlair Cashiers' Office and recounted the vault and audited the Vault Cash Count form for June 9. The audit of the Vault Cash Count for June 9 indicated that a $500 shortage occurred on June 9. I then audited the Vault Cash Count form for June 8 which you completed. The Vault Cash Count form for June 8 was incorrectly added. Based on the information you recorded on the Vault Cash Count form for June 8, it appears that there was a $500 shortage. Had the form been completed accurately, you may have discovered that the imprest fund was short $500.

Once again I want to stress to you the importance of accuracy in performing your duties. Your position is responsible for handling large amounts of cash. Failure to meet the performance requirements of your position can negatively impact the Student Affairs operations by resulting in cash losses/shortages, unnecessary overtime, dissatisfied customers, etc. You must be extremely careful when auditing the imprest fund, providing change, making deposits, etc. You are expected to accurately and completely perform your position responsibilities . . .I expect you to fulfill your duties of your position in the manner in which you have been trained and instructed. Failure to comply with this

directive regarding your performance will result in termination of your employment.

7. During an investigation by Respondent's Department of Public Safety, Sergeant Rose Ann Wolfe requested both Ms. McBee and Grievant submit to polygraph examinations. Ms. McBee complied; however, Grievant declined after discussing the matter with her counselor, because she was concerned that the stress would elevate her blood pressure, and affect the test results. 8. By memorandum dated June 21, 1999, Sergeant Wolfe reported that "[d]uring the course of a recent investigation, I discovered [Grievant] was charged with a misdemeanor offense of shoplifting and was arrested 11/08/84. Plea was guilty. Finding was conviction. She was assessed a fine and paid restitution. Arresting agency was Morgantown Police Department."

9. By memorandum dated August 5, 1999, Ms. Barber advised Grievant that her employment was terminated.

Discussion

Respondent asserts that Grievant was dismissed for falsification of her job application, dated October 14, 1991, in which she indicated that she had never been convicted of a crime, and for continued performance deficiencies, consistent with progressive discipline practice. Embezzlement was specifically stated not to be a basis for the dismissal.

Grievant asserts that she was improperly dismissed for refusing to take the polygraph test.

In disciplinary matters, the employer bears the burden of proving the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). 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. Dept. of Health and Human Res., 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. The August 5, 1999, dismissal letter states in part:

The purpose of this correspondence is to confirm our discussion of August 5, 1999 regarding the results of the recent investigation of the $1,000 vault cash shortage in the Mountainlair Cashiers Office and the previous investigation of $200 deposit shortage. During our meeting we discussed the

facts of the case as follows:

$1,000 Vault Cash Shortage:

* On June 7, 1999 at 12:00pm the vault was counted by your co-worker and all money was accounted for.

* On June 8, 1999 at approximately 2:00pm you counted the vault and indicated that all money was accounted for. Your co-worker was on scheduled vacation leave.

* On June 9, 1999 at 11:00am the vault was counted by your co-worker and was short by $1,000.

* During an audit of the vault, it was discovered that they [sic] vault cash count you prepared on June 8, 1999 was inaccurate and actually there was a $500 shortage on June 8 in addition to a $500 shortage on June 9.

* During this time period, your co-worker was on vacation.

* The $1,000 vault cash shortage occurred whenever you were the responsible employee for the vault. Although your co-worker had access to the vault during her scheduled vacation leave, she submitted to and passed a polygraph test as part of the investigation.

* As part of the investigation, it was found that you were convicted in 1984 for shoplifting. On your job application for the University, dated October 14, 1991, you falsified the information by indicating you had never been convicted of a crime.

$200 Deposit Shortage:

* On February 22, 1999 you reported a $200 shortage in our previous day's bank deposit.

* The bank processed the deposit using dual verification.

* The $200 deposit shortage occurred whenever you were the responsible employee for preparing the deposit.

You responded to the $1,000 shortage by stating that after you had prepared the Vault Cash Count form on June 8, 1999 you audited it to the forms used to record vault activity and determined that there appeared to be an error in the ten dollar bill count. You recounted the ten dollar bills to confirm. Thenyou changed the ten dollar bill count on the Vault Cash Count form, but you forgot to change the totals. You indicated that the missing $500 was not there when you counted the vault. You also verified that you were the responsible employee for the funds when this shortage occurred.

Your [sic] responded to the $200 shortage by stating that you had placed the entire deposit in the deposit bag and delivered it to Stewart Hall night depository using University Security.

The funds missing under your control total that have been investigated by University Security total $1,200. You were responsible for these monies, however, can not provide a reasonable explanation for their loss. Further you have falsified your job application relative to your conviction. Such behavior is unacceptable, and can not continue.

Historically you have received both verbal and written instructions and warnings regarding expected performance:

* On March 21, 1999 you received a memo concerning the $200 deposit shortage which occurred when you were the responsible employee.
* On April 8, 1999 you received a first letter of warning relating to the State Treasurer's Office imprest account audit which reported a $55.46 shortage ($47.42 of this shortage was later accounted for) when you were the responsible employee. This letter also contained some written procedures for handling cash.
* On April 8, 1999 and April 26, 1999 you received written updates to procedures.
* On June 25, 1999 you received a second letter of warning concerning your error in completing the vault cash count form for the activity of June 8, 1999.
* On July 7, 1999 you received written and verbal instructions on the Mountainlair Cashiers' Office Work Flow.

Both the WV Board of Regents (Trustees) and WVU classified employee handbooks, allow dismissal for cause if an employee violates rules, regulations, standards of accepted behavior or performance. As forewarned in your prior warning letter, failure to sustain acceptable performance would result in termination of your employment.

Based upon the above information your employment with West Virginia University is being terminated. This matter is currentlyunder consideration for referral to the Prosecuting Attorney's office. . . .

Although the August 5, 1999, letter does include detailed accounts of Grievant's unsatisfactory performance, as addressed in the first and second letters of warning, Grievant was not the

responsible employee for the June 9, 1999, cash vault account, and is not held accountable for that shortage in the dismissal letter. Thus, Ms. Barber appears to base the dismissal, at least in part, on the same events for which discipline had already been imposed. Since Respondent asserts that progressive discipline was being used in this instance, it would be improper to issue a letter of warning and then dismiss an employee for the same event. In the usual progression of discipline, a third occurrence might warrant a suspension, or possibly dismissal, depending on the nature of the offense. However, since no third incident occurred, the dismissal was not properly based on unsatisfactory performance.

The remaining matters cited by Ms. Barber are Grievant's refusal to take the polygraph test, and the falsification of her employment application. Although Ms. Barber does not explicitly state Grievant's refusal to complete the polygraph test was a reason for the dismissal, she did state that Ms. McBee took, and passed, the test. As Grievant argues, this statement shows that Ms. Barber gave consideration to whether the test was taken, and that the dismissal was based, at least in part, on Grievant's decision not to submit to the examination.

W. Va. Code §21-5-5b provides that “[n]o employer may require or request either directly or indirectly, that any employee or prospective employee of such employer submit to a polygraph, lie detector or other such similar test utilizing mechanical measures ofphysiological reactions to evaluate truthfulness . . . .” Grievant does not fit either of the exceptions included in the provision, i.e., employees of an employer authorized to manufacture, distribute or dispense the drugs to which the provisions of Code §§30-5-1, et seq. apply, or to law-enforcement agencies or military forces of the state.

This provision was upheld by the West Virginia Supreme Court of Appeals in Cordle v. General Hugh Mercer Corp., 174 W. Va. 321, 325 S.E.2d 111 (1984), in which it was determined to be contrary to public policy in West Virginia for an employer to require or request that an employee submit to a polygraph test or similar test as a condition of employment. Noting that the rights of employees are not absolute, as evidenced by the exceptions stated within the statute, the Court stated that the public policy against such testing is grounded upon the recognition in this state of an individual's interest in privacy.

Therefore, any weight given by Ms. Barber to the fact that Grievant elected not to submit to a polygraph test cannot be considered cause for the dismissal.

The sole remaining reason for the dismissal is the fact that Grievant responded in an untruthful manner to an inquiry on her job application, “[h]ave you ever been convicted of a crime or are you under charges for any offense against the law other than minor traffic violations?” Grievant checked “No”, when she had pled guilty to a shoplifting charge some seven years earlier. When questioned about this matter at hearing, Grievant stated that she had walked out of a store with merchandise and was on her way back in when she was stopped by a security guard. She explained that she entered a guilty plea and paid a fine because it was the “easy way out”. After that, Grievant stated that the matter just slipped her mind because she did not consider herself a criminal, and did not realize themagnitude of what had happened. She further opined there is no relationship between that incident and her job as a cashier.

A review of the “Pre-Employment Information Form” which inquires only regarding criminal charges and whether the applicant has ever been discharged or forced to resign from employment, includes:

SPECIAL NOTE: A conviction record is not necessarily a bar to employment at WVU. A number of factors will be taken into account during the application assessment process including, but not limited to, age at time of the offense, number, recentness, seriousness and nature of the violation(s), and relationship of the offense to the job sought, rehabilitation, prior work history and other job-related criteria.

It also includes a certification statement which states, “I hereby certify that my answers to the above questions are true, complete and correct. I understand that if I am employed, false answers on this statement may be grounds for immediate dismissal. . . .” Grievant signed the form and dated it October 14, 1991.

The undersigned finds it incredible that an individual who exhibits sensitivity to job- related stress to the degree described by Grievant, and who was concerned that the stress of a polygraph test could affect her physically to the point of affecting the results of the test, could “forget” about an incident in which she was convicted of a crime. The matter had occurred only seven years earlier, and was not so far removed in time as to be a distant memory. Contrary to Grievant's opinion, the charge of shoplifting is relevant to her employment as a cashier. Although Grievant was not charged with embezzlement, she routinely works with large amounts of money, and Respondent must be confident that employees in these positions are trustworthy. Perhaps Grievant is trustworthy,

andperhaps she would have been hired had she disclosed the matter in 1991. The fact that she responded negatively to the inquiry of whether she had been convicted of a crime, and attested that she had responded truthfully, placed Grievant's employment in jeopardy in 1991.

Respondent's discovery of the fraudulent application in 1999 established cause for immediate dismissal under Respondent's Human Resources Policy 9 (HR-9) which defines gross misconduct as consisting “of substantial actual and/or potential consequence to operations or persons, typically involving flagrant or willful violation of policy, law, or standards of performance or conduct.” Behaviors considered gross misconduct include “[d]ishonesty and/or falsification of records”. The policy provides that gross misconduct may incur any level of discipline, up to and including immediate dismissal.

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

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of proving the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989).

2. Respondent has proven by a preponderance of the evidence that Grievant engaged in gross misconduct when she falsely responded to an inquiry of whether she had ever been convicted of a crime, and attested to the truthfulness of the statement, at the time she was hired as a full-time employee in 1991, establishing just cause for her dismissal. Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. 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. However, the appealing party is required by W. Va. Code §29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit

court.

Date: May 25, 2000 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE