

**DOTTIE CLOSE,**  
**Grievant,**

**v.                                   Docket Nos. 99-CHD-536 and**  
**00-CHD-017**

**PRESTON COUNTY HEALTH DEPARTMENT,**  
**Respondent.**

### **DECISION**

Grievant, Dottie Close, employed by the Preston County Health Department (Respondent or Board of Health) as an Office Assistant II, filed a level four grievance appeal on December 28, 1999, following her suspension for 30 days. Grievant filed a second complaint on January 6, 2000, following a decision by Respondent to dismiss her. At the request of the parties the grievances were consolidated at level four. An evidentiary hearing was conducted on February 29, 2000, at which time Grievant was represented by Sheila Kae Williams, Esq., and Respondent was represented by Badar Giggerbach, Esq. The matter became mature for decision with the submission of proposed findings of fact and conclusions of law filed by the parties on or before April 3, 2000.

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

#### **Findings of Fact**

1. In November 1999, Grievant had been employed by Respondent for more than twenty-two years. She had served as a Secretary II, Secretary III, and had held the classification of Office Assistant II since December 1992.

2. Grievant's duties included many administrative functions, including preparation of the payroll and drafting checks for payment of benefits and reimbursement of employee expenses. Grievant did not question bills or personnel expenses, but simply prepared the checks which were typically stamped with the signatures of Sheriff Cecil Strawser, who acts as Treasurer for Respondent, and Board of Health President Gerald Kirk, and were personally signed by Dr. Thomas Haymond,

Respondent's Health Officer.

3. From its inception, Respondent functioned without an administrator. Although Dr. Haymond signed checks, he assumed no responsibility for supervisory duties or administration of the Board. Shirley Gainer, employed by Respondent as a nurse, was appointed acting administrator in the late 1990's but limited her activities to updating policies prior to her retirement. She did not assume financial responsibilities or supervisory duties for Grievant or any other non-medical personnel employed by Respondent. The Board members did not provide any supervision, and did not even meet on a regular basis.

4. In June 1992, Respondent employed students, including Grievant's niece Rachel Shrout, now Rachel Sybolt, as temporary employees to assist Grievant with clerical work. Ms. Sybolt continued to work for Respondent, and after graduation from high school in 1995, she increased her hours to become a full-time employee.

5. The record does not reflect that Respondent took any action to make Ms. Sybolt a full-time employee or to make her a classified employee. She received no benefits other than paid holidays.

6. Gerald Kirk assumed the position of Respondent's President in July 1998.

7. In July 1998, at President Kirk's direction, Grievant and Ms. Sybolt began maintaining records reflecting Ms. Sybolt's accrual and usage of sick and annual leave. Employer's Exhibit #3 from the level two hearing is a chart which tracks the leave time, showing a beginning balance of 14 days of sick leave and 20 days of annual leave, effective July 1998. Ms. Sybolt accrued 1½ days of annual leave per month, and had a balance of 39 ¼ days annual leave in August 1999.

8. In July 1999, Respondent terminated the employment of Ms. Sybolt. Grievant objected, and gathered information to persuade Respondent that the assistant was needed. The termination was subsequently delayed for a brief period of time while efforts were made to secure additional funding. When those efforts were unsuccessful, the termination became effective in August.

9. Effective August 16, 1999, Respondent employed Alcinda Shockey as a full-time Administrator for the Health Department.

10. While reviewing recent expenditures, Ms. Shockey found a check had been issued in August 1999, to Ms. Sybolt in the amount of \$2,278.60. Realizing that the amount was excessive for a regular payroll check, Ms. Shockey investigated and found that Ms. Sybolt had been paid for accrued annual leave at the time her employment was terminated.

11. By letter dated November 2, 1999, President Kirk advised Grievant that she was to be suspended without pay, effective November 3, 1999, for a period not to exceed 30 calendar days pending an investigation into allegations of gross misconduct, specifically, "using your position for the gain of yourself or another."

12. Grievant filed a grievance as a result of the suspension. Ms. Shockey denied the request for reinstatement at level two, in consideration of the ongoing investigation.

13. By letter dated December 1, 1999, President Kirk extended the suspension an additional 30 days. 14. A level three hearing was conducted by Respondent on December 20, 1999.

President Kirk served as hearing evaluator, with Board members Roy D. Smith and Malene Smith also participating.

15. On December 23, 1999, President Kirk denied the grievance after addressing the issues of the check issued to Ms. Sypolt, and the fact that Grievant's annual salary of more than \$31,000.00 exceeded the salary range for the position of Office Assistant II.

16. The salary range for the position of Office Assistant II is \$12,267.00 to \$20,016.00; however, documentation indicates that the classification changes which resulted in Grievant's enhanced salary were approved by the Division of Personnel.

17. President Kirk notified Grievant by letter dated December 30, 1999, that she was dismissed for gross misconduct in the performance of her duties, specifically, the "unauthorized and unpermitted payment of \$2,278.60 to former Health Department employee Rachel Shrout (now Sypolt), who is also your niece." No reference was made in this letter to Grievant's own salary.

### 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. 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). 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). State employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the

public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); See also Section 12.02 and 03, Administrative Rules, W. Va. Div. of Personnel (June 1, 1995). A charge of gross misconduct arising from an unauthorized payment to an employee would constitute good cause for dismissal, if proven.

Because Grievant admits that she issued the check to Ms. Sybolt, but claims that she was acting under the direction of President Kirk, who in turn denies any such action, it will be necessary to make a determination as to credibility. An Administrative Law Judge is charged with assessing the credibility of the witnesses who appear before her. Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dept. of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993). The United States Merit System Protection Board Handbook is helpful in setting out factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984). Some factors to consider in assessing a witness's testimony are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Id. Additionally, the Administrative Law Judge should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information.

Grievant testified at levels three and four that shortly after assuming his position, President Kirk met with her in July 1998, to discuss various office functions. She answered his questions as to billing, etc., When the matter of personnel was being discussed, President Kirk inquired as to how Ms. Sybolt's time was calculated. Grievant clearly recalled that when she advised him that when Ms. Sybolt needed time off, she was just let go, and that nothing was formalized, President Kirk stated that she should be given leave time the same as the other employees. Grievant stated that she assumed the President of the Board had the authority to grant the time, and directed Ms. Sybolt to keep track of her time accrued and used. They interpreted his comment to grant leave effective from the date she became a full-time employee, and "guesstimated" the beginning balances of sick and annual leave.

Ms. Sypolt testified at level four that she was present during the conversation between Grievant and President Kirk, and corroborated the account provided by Grievant.

President Kirk testified for the first time at level four, and denied any such conversation ever took place. He further stated that Grievant had not requested authorization to give Ms. Sypolt leave time, and that any decision of that nature would have been made by a Board vote.

Initially, the fact that it was Grievant's niece who was given leave time for which she was subsequently compensated, reasonably raises the question of whether an impropriety occurred. However, Grievant testified forthrightly that she drafted the check. She further stated that she calculated the leave time retroactively, an action which was overly-generous even accepting her version of the nature of the conversation with President Kirk. This admission was not particularly favorable to her, and is indicative that she was providing an accurate account of the events.

President Kirk's terse denial that any such conversation was ever held, by comparison, is less credible. Of course, given the sequence of events that have taken place, to admit the conversation occurred would be contrary to his interests, as indicated by his own testimony that the decision to grant Ms. Sypolt leave would have required a Board vote. Clearly, he does not want to admit to acting beyond his authority.

Several other matters support a finding in Grievant's behalf. First, Respondent stresses that Ms. Sypolt is Grievant's niece. While the familial relationship would certainly raise questions, it is not unusual in rural West Virginia for family members to work for the same governmental agency. This is perfectly illustrated by the fact that Respondent's current administrator, Ms. Shockey, is a cousin of Mr. Kirk. While Grievant made efforts to help her niece retain her employment, her activity in that regard does not impute any wrongdoing relating to her employment status. Grievant had been a long-term employee of the Board, and it would have shown extremely poor judgement for her to have jeopardized her own employment simply to give her niece leave time, and there is no evidence that Grievant was prone to making bad decisions.

On the contrary, the evidence establishes that she did not make any decisions, but simply paid the bills presented to her, including that of Ms. Sypolt. This testimony was supported by Board member Roy Smith, who testified at level four that Grievant had not been given the authority to determine whether a bill would be paid. Respondent's Exhibit #3, Ms. Sypolt's record of her sick and annual leave, is of particular importance in this matter, because it begins in July 1998, the same

time Grievant alleges the conversation occurred with President Kirk. If Grievant had simply wanted to provide Ms. Sypolt with leave time, she could have done so at any time. The fact that the records begin the same time President Kirk assumed office, is supportive of Grievant's claim that he directed her to give Ms. Sypolt the benefit.

Under normal circumstances, President Kirk's statement that to give Ms. Sypolt leave time would require a vote by the Board would be accepted as a routine business practice for which Grievant should be held accountable. In this instance, the evidence establishes that Respondent was managed in the most informal manner conceivable. Grievant was given signature stamps for check writing purposes. The one individual who actually signed the checks never looked at, or questioned them. The Board did not meet regularly. Ms. Sypolt somehow became a full-time employee with no apparent Board action. Dr. Haymond testified that he assumed Grievant was the Board's administrator. Ms. Gainer was the acting administrator for a time, but did not become involved in personnel or financial matters. Mr. Smith, who has been a Board member for approximately 30 years, testified that he was not even aware that Ms. Sypolt was a full-time employee when her employment was terminated. Board member Davis testified that Grievant was given no directives on what to do or not do, and that the role of Ms. Gainer as acting administrator was "very gray".

Next, it appears that the decision to terminate Grievant's employment may have been made for a reason other than that given. A substantial portion of the level three transcript is directed to the matter of Grievant's salary. The concern indicated was that her income was significantly above the pay scale for the Office Assistant II position. Since Grievant was responsible for payroll and personnel matters, the implication of wrongdoing for her own benefit was evident. Although this was not stated as a reason for her dismissal, the significant concern expressed during the hearing and the decision issued at level three, leaves a concern that Grievant's own salary was considered when making the decision.

Finally, Respondent's decision to uphold the suspension, and very possibly the decision to dismiss, were made in part based upon evidence not in the record. Although Grievant did not object to President Kirk acting as hearing evaluator, it precluded any testimony being offered by him notwithstanding his role in the entire matter. Nevertheless, in the level three decision, President Kirk stated, "[t]he Board has made a finding of fact that I did not have the conversation which you state we had regarding your alleged authorization of issuing the check to your niece." Since President Kirk had

offered no testimony, and the record does not contain any other evidence of this fact, the finding was based upon belief or information not properly made a part of the record. In fact, despite the fact that a 60 day suspension was imposed pending an investigation, the record does not address how the investigation was conducted, or by whom it was conducted. There is no documentation of any investigation, or the results of any investigation. Therefore, there is no evidence to substantiate the decision to dismiss.

For all the foregoing reasons, it is concluded that Respondent's dismissal of Grievant was improper.

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 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. 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). 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).

2. State employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); See also Section 12.02 and 03, Administrative Rules, W. Va. Div. of Personnel (June 1, 1995).

3. Respondent has failed to prove that Grievant engaged in gross misconduct by knowingly and intentionally paying her niece for accrued leave time to which she was not entitled.

Accordingly, the grievance is **GRANTED**, and Respondent Ordered to reinstate Grievant with back pay and all other benefits to which she is entitled. 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: May 25, 2000 \_\_\_\_\_

Sue Keller

Senior Administrative Law Judge