JOSEPH L. WALKER,

Grievant,

v.

Docket No. 95-RS-229

DIVISION OF REHABILITATION SERVICES,

Respondent.

DECISION

Joseph L. Walker (Grievant) is employed by the Division of Rehabilitation Services (DRS), as a Senior Rehabilitation Counselor at DRS' Beckley office. On or about June 5, 1995, he filed this grievance directly at Level IV to challenge his demotion.

A Level IV hearing was held on August 4 and 22, 2000, before the undersigned Administrative Law Judge, at the Grievance Board's Beckley office. Grievant was represented at this hearing by Jerry A. Wright, Esq., and DRS was represented by Warren Morford, Esq. and Assistant Attorney General M. Claire Winterholler. The parties were given until October 10, 2000, to submit proposed findings of fact and conclusions of law, both did so, and this grievance became mature for decision on that date. The followingFindings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. In 1992, Grievant was employed by DRS as the Manager of its Beckley District Office.

2. Grievant, who has never been subject to discipline nor received a less than satisfactory evaluation during some thirty years of employment with DRS, had a flexible schedule and often worked overtime as needed to accomplish the goals of the Beckley Office.

3. Beginning in approximately 1992, the operations of the Beckley Office were disturbed by an intra-office dispute, in which two of Grievant's subordinates, Tom Rapp and Peggy Giampalo (Rapp and Giampalo), carried out a vendetta against him. See Bragg v. W. Va. Div. of Rehabilitation Serv., Docket Nos. 98-RS-478/398 (Mar. 31, 2000).

4. As part of their vendetta, Rapp and Giampalo hired an unlicensed private investigator to follow Grievant.

5. When Grievant later submitted a travel expense document for a trip from Beckley to Hinton and back on November 25, 1992, Rapp and Giampalo filed a complaint with the West Virginia Ethics Commission (Ethics Commission), claiming that Grievant did not make the trip.

6. Also in 1992, the Beckley District Office held an open house. Expenses for it were sixty dollars more than DRS had budgeted. Grievant, James Bragg, and Thomas Hurley (Hurley) each contributed twenty dollars to make up the difference. 7. Hurley eventually entered into a Conciliation Agreement with the Ethics Commission, in which he admitted submitting a false travel expense account settlement form to recoup the twenty dollars he contributed for the open house, and claimed that his action was suggested and approved by Grievant.

8. On May 4, 1995, the Ethics Commission found, beyond a reasonable doubt, two violations of W. Va. Code § 6B-1-1 et seq., the West Virginia Governmental Ethics Act (Ethics Act), by Grievant: one for submitting a false travel expense account settlement form for the Hinton trip, and one for approving Hurley's false travel expense form.

9. The Ethics Commission ordered that Grievant reimburse the State thirteen dollars, reprimanded him, and assessed a fine of one thousand five hundred dollars.

10. As a result of the Ethics Commission's action, by letter dated May 18, 1995, DRS demoted Grievant from Rehabilitation Services Manager I to Senior Rehabilitation Counselor and reduced his salary by $2424.00 per year.

11. The Ethics Commission's decision was appealed through the Raleigh County Circuit Court to the West Virginia Supreme Court of Appeals. In Walker v. W. Va. Ethics Comm'n, 201 W. Va. 108, 492 S.E.2d 167 (1997), the Court substantially upheld the Ethics Commission's decision.

DISCUSSION

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. 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.

The administrative rules of the West Virginia Division of Personnel provide that an employee in the classified service may be disciplined 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 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. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985); Guine v. Civil Serv. 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); See Hundley v. W. Va. Div. of Corrections/Mount Olive Correctional Complex, Docket No. 97-CORR-197A (May 12, 1999). The administrative rules of the West Virginia Division of Personnel also provide that an employee in the classified service may be demoted for "improper conduct," 143 CSR § 12.2, Administrative Rule, W. Va. Div. of Personnel (July 1, 1998), although the rules do not explain what conduct may justify demotion. DRS demoted Grievant pursuant to Section 1808 of its Employee Handbook, which provides: “[a] supervisor may request that an employee be demoted to a lower classification because of unit reorganization or inability or failure of an employee to meet the required level of performance.” Paragraph 1722 of that Handbook places DRS employees on notice that the Ethics Act prohibits a state employee from using his office for his private gain or the private gain of another.

DRS demoted Grievant for “fail[ing] to meet a reasonable standard of conduct expected of an employee,” arguing that his demotion was not excessive given the misconduct found beyond a reasonable doubt by the Ethics Commission, which decision was sustained on appeal, and that the undersigned must uphold Grievant's demotion under the doctrine of res judicata. Grievant argues that, by relying on the record created at the Ethics Commission, which is hearsay, DRS failed to meet

its burden of proof at Level IV, relying on Landy v. Raleigh County Bd. Of Educ., Docket No. 89-41-232 (Dec. 14, 1989); and that Grievant's punishment was disproportionate in light of his decades of service as an exemplary employee. Grievant seeks reinstatement to his former position and reimbursement of his lost wages, with interest.

Res judicata is an equitable doctrine which, when applied, bars the litigation of factual and legal issues on which a final judgment has previously been rendered. Wolfe v. Forbes, 159 W. Va. 34, 217 S.E.2d 899 (1975). The inquiry into the applicability of the doctrine is necessarily focused on whether the cause of action in the second suit is the same as in the first suit. Mellon-Stuart v. Hall, 178 W. Va. 291, 359 S.E.2d 124 (1987). Generally, the party seeking to invoke the doctrine must show identity in the thing sued for;identity of the cause of action; identity of persons, and of parties to the action; and identity of the quality in the persons for or against whom the claim is made. Wolfe, supra; Hannah v. Beasley, 132 W. Va. 814, 53 S.E.2d 729 (1949).

"For issue or claim preclusion to attach to quasi-judicial determinations of administrative agencies, at least where there is no statutory authority directing otherwise, the prior decision must be rendered pursuant to the agency's adjudicatory authority and the procedures employed by the agency must be substantially similar to those used in a court. In addition, the identicality of the issues litigated is a key component to the application of administrative res judicata or collateral estoppel." Syl. pt. 2, Vest v. Bd. of Educ. of Nicholas County, 193 W. Va. 222, 455 S.E.2d 781 (1995).

The preclusion doctrine of res judicata may be applied by an administrative law judge to prevent the "relitigation of matters about which the parties have already had a full and fair opportunity to litigate and which were in fact litigated." Liller v. W. Va. Human Rights Comm'n, 180 W. Va. 433, 376 S.E.2d 639, (1988). "The identicality of issues litigated is the key component to the application of administrative res judicata. Res judicata focuses on whether the cause of action in the second suit is the same as in the first suit." Id.

Clearly, the parties and their legal capacities are not the same in both actions. In the complaint before the Ethics Commission, the parties were Grievant and Complainant Thomas Rapp. DRS was not a party. There are also significant differences in the nature of the issues raised in the two cases and the remedies available from the two agencies which compel a finding that there is no identicality of the “issues litigated" or "the cause of action." Id. It is apparent from the lengthy record of the Ethics Commission proceeding against Grievant that the sole focus of that agency's inquiry was

whether he violated W. Va. Code § 6B-1-1 et seq, the West Virginia Governmental Ethics Act. It is also clear from the Ethics Commission's decision that the Commission was not concerned with, and by statute was not able to address, the issues of whether Grievant's subsequent demotion violated or contradicted the agency's personnel policies and practices; whether the punishment imposed was too harsh; whether the employee was afforded procedural and substantive due process; or whether the employer consistently levied like discipline for like offenses. See Maxey v. W. Va. Dep't of Health and Human Resources, Docket No. 93-HHR-007 (Feb. 28, 1995).

The authority of this Grievance Board is much broader than that of the Ethics Commission. Essentially, the Grievance Board is authorized by a statute to examine many aspects of a particular disciplinary action, including those listed above. In disciplinary cases involving state employees, the Grievance Board must ultimately address whether the employer proved that the employee engaged in the conduct for which he was disciplined and whether that conduct was "of a substantial nature directly affecting the rights and interests of the public." Oakes, supra.

The remedies available from the Grievance Board are also dissimilar to those provided by the Ethics Commission. Pursuant to W.Va. Code § 29-6A-5(b), the Grievance Board may “provide relief as is determined fair and equitable . . . and take any other action to provide for the effective resolution of grievances. . . including, but not limited to, making the employee whole.” Such remedies have included ordering the employee reinstated withreimbursement for lost wages and benefits; the punishment being reduced or reassessed; and\or the employee's records being expunged. In short, the Grievance Board conducts a rather broad assessment of the propriety of the disciplinary action itself, while the Ethics Commission determines whether a state employee's conduct violated the Ethics Act. For these reasons, it is concluded that the cause of action litigated before the Ethics Commission is sufficiently different from that litigated before the Grievance Board to preclude the application of the doctrine of res judicata.

As noted above, Grievant argues that by relying on the record created at the Ethics Commission, DRS failed to meet its burden of proof at Level IV, relying on Landy. supra.

Grievant is correct that the record created at the Ethics Commission is hearsay. However, under W. Va. Code § 29-6A-6, formal rules of evidence are not applicable in grievance proceedings, except for the rules of privilege recognized by law. Hearsay evidence is generally admissible in grievance proceedings. The issue is one of weight rather than admissibility. This reflects a legislative

recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings. Seddon v. W. Va. Dep't of Health, Docket No. 90-H-115 (June 8, 1990). Accordingly, an administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. See Jennings v. Wyoming County Bd. Of Educ., Docket No. 98-55-379 (Mar. 10, 1999); Miller v. W. Va. Dep't of Health and Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Harry v. Marion County Bd. of Educ., Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996); Seddon, supra. There are several factors to consider in determining the weight to be allocated to hearsay evidence, including: the availability of persons with first-hand knowledge to testify at the hearing; whether the declarant's out-of-court statements were in writing, were signed, or were in affidavit form; the explanation for failing to obtain signed or sworn statements; whether the declarants were disinterested witnesses to the events and whether the statements were routinely made; the consistency of the declarants' accounts with other information in the case, their internal consistency, and their consistency with each other; whether corroboration for the statements can otherwise be found in the employer's records; the absence of contradictory evidence; and the credibility of the declarants when they made the statements attributed to them. See Borninkhof v. Dep't of Justice, 5 M.S.P.B. 150 (1981).

Applying these factors, the undersigned determines that the record created at the Ethics Commission, although hearsay, is entitled to substantial weight. With respect to the availability of persons with first-hand knowledge to testify at the Level IV hearing in this grievance, the record shows that Margaret Giampalo, Thomas Rapp, James Bragg, Thomas Hurley, Billy W. Kester, John Weaver, and William Clinton, who testified at Grievant's hearings before the Ethics Commission, were not called to testify at Level IV. (See footnote 1) However, Donna Meadows, William Tanzey, and James Morgan, who testified before the EthicsCommission, did testify at Level IV, as did DRS witnesses Charles Forsythe and Ron Self. The record created at the Ethics Commission was, of course, in writing, and consisted of both sworn statements made by six of the above-named witnesses in deposition, and the transcripts of two days of hearings, conducted by attorneys under trial-like conditions, in which the above-named witnesses testified under oath and were subject to cross- examination.

At least three of the witnesses before the Ethics Commission were not disinterested ones: Hurley,

who had entered into a Conciliation Agreement with the Ethics Commission, in which he admitted submitting a false travel expense account settlement form to recoup the twenty dollars he contributed for the open house, and Rapp and Giampalo, who were pursuing a vendetta against Grievant. The testimony of the witnesses before the Ethics Commission was highly consistent with the testimony presented at Level IV, and with the record of this grievance, and corroboration for their statements can be found in DRS' records, which are part of the record of this grievance. There is little or no contradictory evidence in the record. The credibility of the witnesses when they made the statements attributed to them in the record of the Ethics Commission proceeding could not be assessed by the undersigned, but is bolstered by the fact that their testimony was highly consistent with the credible testimony presented by them and others at Level IV.

Grievant relies on Landy. supra, in arguing that, by relying on the record created at the Ethics Commission, DRS failed to meet its burden of proof. In Landy, a board of education offered as evidence in its disciplinary case against the grievant only a transcript of a lower level hearing, calling no witnesses and introducing no records. The undersignedfinds that Landy is readily distinguishable from the facts in this grievance. First, DRS called four witnesses at Level IV, two of whom had not testified before the Ethics Commission. Second, the lower level record in Landy had not been, as the record in this grievance was, reviewed and relied upon by a circuit court and the West Virginia Supreme Court of Appeals before being submitted at Level IV. Finally, and as noted above, DRS also presented its records as evidence, which corroborated its version of events. Accordingly, this argument must be rejected, and the merits of this grievance will be addressed.

Grievant credibly testified that he occasionally traveled to Hinton and other points in Summers County as part of his duties; that he frequently did not charge the state for meals and worked after hours giving speeches on behalf of DRS; that his expense account for November, 1992, showed a trip on November 25, 1992, from Beckley to Hinton and back; that he had searched his mind regarding his possible trip to Hinton, but could not recall going to Hinton on November 25, 1992; that he did not intentionally submit a false travel expense account settlement form but that a mistake could have occurred. Grievant denied that he induced Mr. Hurley to submit a false travel expense account settlement form to recover the twenty dollars Hurley contributed to the open house.

The credible testimony of DRS' witnesses at Level IV established that Grievant, as a supervisor, was in a position of trust; that Grievant could have been fired for his actions, but was not due to his

decades-long history as an exemplary employee; that no other DRS employee has ever been found to have violated the Ethics Act; and that its records substantially corroborate its version of events. This testimony, combined with the record established by the Ethics Commission, established that Grievant more likely than not fileda false travel expense account settlement form for November 25, 1992, and induced Hurley to submit a false travel expense account settlement form.

This Board has upheld the demotion of classified state employees in several other cases. For example, a grievant was demoted and suspended for inappropriate remarks and actions of a sexual nature to a student in Bradley v. Cabell County Bd. of Educ., Docket No. 99-06-150 (Sept. 9, 1999). A grievant was demoted and suspended for falsifying time sheets reflecting travel time in Westfall v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 97-DOH-349 (Jan. 16, 1998). Similarly, a grievant was demoted and transferred for cheating on in-service training tests in Lane v. W. Va. Div. of Corrections, Docket No. 96- CORR-260 (Nov. 2, 1996). Finally, a grievant was demoted and suspended for falsifying turkey tracking data and mileage reports in Holland v. W. Va. Dep't of Commerce, Labor, & Environmental Resources, Docket No. 93-CLER-465 (June 13, 1994). Grievant's demotion is consistent with the discipline imposed by other state employers for similar offenses, and the undersigned cannot conclude that the punishment imposed, demotion, was too harsh.

Grievant's counsel was right to characterize this case as sordid. It is apparently not disputed that the charges against Grievant were motivated by a vendetta carried out by Rapp and Giampalo, who maliciously hired an unlicensed private investigator to dig up dirt on him. The expense to Grievant, an otherwise exemplary employee of some 30 years, in terms of legal fees, cumulative loss of income over several years, and damage to his reputation, was tremendous. However, regardless of their origin, DRS' charges against Grievant have been proven by a preponderance of the evidence. The undersigned declinesto disagree with the findings of the Ethics Commission, which found these charges established beyond a reasonable doubt, a standard of proof higher than that applied here, particularly when the Ethics Commission's decision has been substantially upheld by the Raleigh County Circuit Court and the West Virginia Supreme Court of Appeals. Accordingly, DRS has proved, by a preponderance of the evidence, that it had good cause to demote Grievant. His demotion was appropriate for the offenses proved.

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. 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.).

2. Dismissal of an employee in the classified service must be for good cause, which means misconduct 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. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985); Guine v. Civil Serv. 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); Hundley v. W. Va. Div. of Corrections/Mount Olive Correctional Complex, Docket No. 97-CORR-197A (May 12, 1999). 3. The administrative rules of the West Virginia Division of Personnel provide that an employee in the classified service may be demoted for "improper conduct," 143 CSR § 12.2, Administrative Rule, W. Va. Div. of Personnel (July 1, 1998).

4. DRS's Employee Handbook Section 1808 provides: “[a] supervisor may request that an employee be demoted to a lower classification because of unit reorganization or inability or failure of an employee to meet the required level of performance.”

5. DRS's Employee Handbook Paragraph 1722 places DRS employees on notice that the Ethics Act prohibits a state employee from using his office for his private gain or the private gain of another.

6. Respondent DRS established, by a preponderance of the evidence, that it had good cause to demote Grievant.

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. 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.

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ANDREW MAIER

Administrative Law Judge

Dated: February 2, 2001

Footnote: 1

It is noted that some witnesses testified at the Ethics Commission hearing concerning issues that were marginal, at best, to the issue in this grievance. For example, Billy W. Kester, a bank security guard, testified concerning whether James Morgan could have remained in his bank's parking lot for six hours while surveilling Grievant.