**SARAH RANKIN,**

**Grievant,**

**v.** **Docket No. 02-BEP-106D**

**BUREAU OF EMPLOYMENT PROGRAMS,**

**Respondent.**

**D E C I S I O N**

Grievant, Sarah Rankin, employed by the Bureau of Employment Programs (BEP or Respondent) as an Employment Counselor II, filed a level one grievance on March 23, 2001, after she was suspended for ten days. Hearing evaluators at levels one and two responded on April 4, 2001, and April 5, 2001, respectively, that they lacked authority to grant the requested relief. An evidentiary hearing was conducted at level three on August 15 and September 6, 2001, and January 31 and February 11, 2002. A level three decision was issued by BEP Commissioner Robert Smith on April 17, 2002; however, prior to its receipt, Grievant notified Respondent of a default on April 18, 2002. Respondent requested a hearing on the default that same date. Subsequently, the parties agreed to mediate. When a settlement could not be reached, a hearing on the default was conducted on June 25, 2002. After determining that a default had occurred at level three, a hearing was conducted at level four on September 10, 2002, to determine whether the relief should be granted. Grievant was represented by Kevin Church of AFSCME, and BEP was represented by Kelli D. Talbott, Deputy Attorney General. The matter became mature for decision upon receipt of the level three exhibits on October 3, 2002.

The following facts have been derived from the record in its entirety.

Findings of Fact

1. Grievant has been employed by BEP as an Employment Counselor II at the Clarksburg Job Service Office at all times pertinent to this grievance.

2. On January 30, 2001, Grievant interviewed client Holly Sears for referral for employment training under the Workforce Investment Act. Ms. Sears had been referred by Natalie Traugh at the Department of Health and Human Resources (DHHR) and Terry Melotte of ARC of Harrison County. (See footnote 1)

3. During the interview, Ms. Sears revealed that she was working on the picket line at the local Foodland. Grievant advised Ms. Sears that she had no business picketing an establish where she did not work, and should not be there if she did not know what was going on. Grievant notified Ms. Traugh of Ms. Sears' employment, which resulted in her benefits being sanctioned by one-third for not turning in her pay stubs to DHHR, although Ms. Sears had not yet worked one week, and DHHR allows ten days to report such income.

4. During the session Grievant indicated that she knew Ms. Sears' ex-husband and his family. She inquired as to whether Ms. Sears continued to experience the drug and alcohol related problems she had when she was married, and also inquired as to why another former spouse was incarcerated.

5. Ms. Sears advised Grievant that she wanted to work from home since she has three young children, one with special needs. Ms. Sears specifically indicated a desire to work as a medical transcriptionist. 6. In 1993, Ms. Sears was convicted for selling marijuana, a felony, and was placed on probation for two years.

7. Grievant told Ms. Sears that because of the felony, she could not be employed in a medical field, and would be denied training in that area. Grievant suggested that Ms. Sears investigate the possibility of completing the two courses necessary for her to obtain an Associates Degree in Computer Technology.

8. Following the interview, Grievant entered Ms. Sears' computer record and inserted comments including that her request for training as a medical transcriptionist was denied due to the nature of criminal issues, and that she had engaged in substance use within the prior six months.

9. Grievant notified Ms. Traugh that due to her background, it was inappropriate to provide Ms. Sears training as a medical transcriptionist since she should not have access to medical papers and prescription pads. Ms. Traugh passed this information on to Mr. Melotte, who made Ms. Sears aware of the situation.

10. On or about February 2, 2001, Ms. Sears filed a complaint with BEP, alleging that Grievant had engaged in discrimination, inappropriate behavior and questioning, and had improperly denied her requested training.

11. After an investigation was completed, BEP Commissioner Robert J. Smith notified Grievant by letter dated March 14, 2001, that she would be suspended without pay for ten days. The reasons

given for the suspension were:

January 31, 2001, you made inquires and recorded information of a customer which were not pertinent to your job as an Employment Counselor II.

January 31, 2001, you used your prior knowledge of a customer to determine eligibility for training. Proper protocol was not followed. This customer should have been certified eligible for training.

February 15, 2001, you falsified information to the investigators in this customer's allegation.

12. Following the level three hearing, Commissioner Smith issued a decision in which he determined that the evidence did not support the falsification charge, but that the ten day suspension remained appropriate given the nature of the remaining two charges.

Discussion

Because Grievant is presumed to have prevailed by default, the burden of proof is upon Respondent to prove by clear and convincing evidence that the relief requested by Grievant is clearly wrong or contrary to law. This standard requires the party with the burden of proof to produce evidence substantially more than a preponderance of the evidence, but less than that required to prove the matter beyond a reasonable doubt. Farley v. Dep't of Health and Human Resources, Docket No. 02-HHR-088D (May 8, 2002); Lohr v. Div. of Corrections, Docket No. 99-CORR-157D (Nov. 15, 1999).

BEP asserts that Grievant's actions were in violation of the following sections of Chapter VI of the West Virginia Employment Service Operations Manual:

Section 6101 G, which dictates that Job Service employment counselors must function with a cognizance of the inherent dignity and worth of each individual. Section 6102 C which provides that a counselor's beliefs, opinions, preferences, and general personality traits should not adversely affect his/her job performance, relationships and effectiveness with counselees.

Section 6201C3, which dictates that courteous treatment is the right of every counselee.

BEP additionally asserts a violation of Administrative Directive 6400.01 which sets forth the expectation that employees are to provide courteous treatment to customers and are expected to treat customers with dignity and respect. Finally, BEP notes that Grievant received a memorandum dated May 7, 1999, informing her that counseling notes entered into the computer should not include sensitive information, which should be hand written and placed in the file. BEP concludes that

Grievant's actions toward Ms. Sears were discourteous, disrespectful, degrading and irrelevant to the counseling relationship, and that to rescind the suspension would be clearly wrong.

Grievant first argues a violation of her due process rights when she was not given notice of the specific charges for her suspension, depriving her of the opportunity to present any meaningful, informed argument at her pre-deprivation hearing. If Grievant had only the charges as stated in the suspension letter to guide her, she may well have been denied specific notice of her alleged infractions. However, BEP conducted an official investigation in the matter which included an interview with Grievant on February 15, 2001. Ms. Sears was discussed at that time, and Grievant undoubtedly was aware of the specific charges at that point. Addressing the charges, Grievant denies that she acted inappropriately, and attacked Ms. Sears' credibility, noting that she had failed to report her work on the picket line, and did not disclose the fact that she had previously worked as a Certified Nursing Assistant. Grievant opined that she had steered Ms. Sears away from a career choice in which she would not likely be successful, and because she elected to complete her degree in Computer Technology, she suffered no harm. Grievant concludes that absent any real evidence of what was said during the counseling session, BEP has failed to prove that rescinding the suspension would be clearly wrong.

Acknowledging that there are different styles of counseling, Sharon Cunningham, Manager of the Clarksburg Job Service Office, testified that Grievant's role is to assist clients with obtaining education or training for placement in the workforce. Grievant did not treat Ms. Sears in an objective, non-judgmental manner. Most importantly, Grievant denied a client the opportunity to explore training which she requested based upon erroneous assumptions and personal opinions. BEP has established by clear and convincing evidence that to rescind the suspension would be clearly wrong.

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

## Conclusions of Law

1. Because Grievant is presumed to have prevailed by default, the burden of proof is upon Respondent to prove by clear and convincing evidence that the relief requested by Grievant is clearly wrong or contrary to law. This standard requires the party with the burden of proof to produce evidence substantially more than a preponderance ofthe evidence, but less than that required to prove the matter beyond a reasonable doubt. Farley v. Dep't of Health and Human Resources,

Docket No. 02-HHR-088D (May 8, 2002); Lohr v. Div. of Corrections, Docket No. 99-CORR-157D (Nov. 15, 1999).

2. BEP has proven by a preponderance of the evidence that Grievant acted contrary to the Service Manual and an Administrative Directive by treating a client in an unacceptable manner, and that to rescind the suspension imposed for the behavior would be clearly wrong.

Accordingly, the 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 §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: September 25, 2002 _____ Sue Keller

Senior Administrative Law Judge

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*Footnote: 1*

*ARC was originally the Association of Retarded Citizens but has broadened its scope to assist welfare recipients into the workforce.*