WILLIAM KINCAID,

Grievant,

v v.

Docket No. 02-INS-282

DEPARTMENT OF TAX and REVENUE/

INSURANCE COMMISSION,

Respondent.

D E C I S I O N

Grievant, William Kincaid, is employed by the Department of Tax and Revenue/Insurance Commission ("Commission"). On August 21, 2002, he filed this grievance on the suspension he received on August 9, 2002, after he was indicted on federal charges. His Statement of Grievance reads, "An indictment from Prior employment. 12.3 of WV Administrative Rule." The Relief Sought was "To be reinstated & paid for days suspended."

As the grievance was a suspension exceeding twenty days, it was filed directly to Level IV. A Level IV hearing was held on September 20, 2002. This case became mature for decision on October 15, 2002, after receipt of the parties' proposed findings of fact and conclusions of law. **(See footnote 1)**

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Before Grievant was hired by the Commission, he was employed by the Charleston Area Medical Center ("CAMC") as a Reimbursement Coordinator. In thisposition, he coordinated payments and reimbursements to the Medicare Program, and was to provide federal auditors with accurate documentation of payments due CAMC.

2. Grievant was suspended by CAMC when certain problems with the December 2001 audit surfaced, and a federal investigation ensued.

3. Later, Grievant resigned from CAMC.

4. On April 12, 2002, the Commission posted a vacancy for an HCFA I. The HCFA I "Nature of Work" is described as:

> **Under general supervision, performs work at the full performance level by reviewing and analyzing financial information submitted by hospitals and health care providers regulated by the Health Care Cost Review Authority. Performs financial analysis independently. Collects, compiles and analyzes data obtained from research studies, source documents and surveys. Works in either the Certificate of Need Program, the Rate Review Program, the Research, Data and Development Division or the Health Planning Division. Performs related work as required.**

5. General "Examples of Work" for an HCFA I are:

> **Reviews submitted information for completeness and conformity to costs criteria; analyzes financial data for the development of new services and facilities; analyzes data to determine whether the estimated cost is accurate, whether possible hidden costs exist, and the financial impact the service or facility will have on other services.**

6. In the Certificate of Need Program, the HCFA I typically performs the following tasks:

> **Analyzes the financial feasibility studies included in proposals submitted by health care providers for the development of new services and facilities; analyzes data to determine whether the estimated cost is accurate, whether possible hidden costs exist and the financial impact the service or facility will have on other services.**
>
> **Determines the need for the proposed services and facilities by evaluating utilization data and comparing that data to the State Health Plan.**
>
> **Participates in public hearings in the review of Certificate of Need proposals.**
>
> **Writes administrative decisions pertaining to the HCCRA Board's determinations on proposals.**
>
> **Researches and compiles information for special projects as assigned.**
>
> **Researches national health care information to maintain awareness of new procedures, their costs, market trends, the use of new technology and treatments.**
>
> **Advises health care providers in the completion of applications; verifies information submitted.**
>
> **Participates in health planning activities with other agencies.**

7. In the Rate Review Program, the HCFA I typically performs the following tasks:

Analyzes the financial condition of hospitals by weighing the effects of such areas as cash flow, return on equity, capital costs and financial obligations.

Reviews and analyzes rate applications in order to ascertain and evaluate the cost of services provided by the hospital.

Reviews expenditures to determine whether more effective management of resources would alleviate the need for a rate increase.

Represents the program at hearings and fact-finding meetings.

Performs financial and statistical audit of books and records of hospitals.

Performs financial statement analysis ratios.

Writes administrative decisions in accordance with the decisions of the Authority's Board.

May represent the agency at public hearings and industry task forces.

8. Grievant was aware when he interviewed for the HCFA I position that he was under investigation by the federal government for charges of falsifying Medicare documents. He did not inform the Commission of the possible charges and told the interviewers he left CAMC because he had not received an expected promotion.

9. Grievant began employment with the Commission on August 1, 2002, as a regular employee. Because Grievant had previously been employed with the state, theCommission decided to hire him without a probationary period. The key duties of his position were to analyze certificates of need and rate increases from hospitals across the state.

10. On August 6, 2002, Grievant was indicted on federal charges of obstructing a federal audit by "altering and falsifying documents. . . ." Resp. Ex. No. 1. This indictment was reported in the newspaper on August 7, 2002. The report in the newspaper was the first information the Commission received on Grievant's criminal charges.

11. On August 9, 2002, Grievant was verbally notified by Deputy Commissioner Bill Kenny that he was suspended immediately, without pay, pending the outcome of the criminal proceedings. After the charges were resolved, Grievant would then be informed of any further action the Commission might take regarding Grievant's employment. At this meeting, Grievant indicated he had been aware of the charges at the time he interviewed for the position, and

had decided not to inform the Commission of his situation. (See footnote 2) The major reasons for Grievant's suspension were: 1) the belief Grievant could be perceived by the hospitals whose materials he reviewed as being biased; and 2) the effect on his credibility since he was accused of a federal felony.

12. This verbal discussion was followed by a letter of suspension dated August 13, 2002. This letter specified Grievant was suspended pending the outcome of the criminal proceedings in federal court. The letter noted Grievant had been accused of misrepresenting documents to federal Medicare auditors. 13. On September 9, 2002, Grievant pled guilty to obstruction of a federal audit, and admitted he altered patient records and submitted them as correct to federal auditors. His sentencing is scheduled for December 2002.

14. Grievant changed these records because he believed the federal auditors did not correctly review all the records as they should, and this omission resulted in CAMC not being correctly reimbursed for their "disproportionate share of low-income patients." Test. Grievant; Resp. Ex. No. 1.

15. Grievant's position at the Commission would, at times, require him to assess the needs of CAMC vis à vis other hospitals, and to assess CAMC rate requests. Additionally, Grievant's position would, at times, require him to testify about his findings, analysis, and assessments; thus, credibility is a key ingredient for the person occupying the HCFA I position.

16. Grievant was disappointed CAMC did not stand behind him when he was charged. Test. Grievant.

17. Grievant is currently seeking personal references from personnel at CAMC to utilize at his sentencing.

Issues and Arguments

Respondent maintains Grievant's suspension until federal charges were resolved was appropriate. Grievant asserts he could still have performed his duties, and he would not engage in any bias actions toward any health care provider whose materials he would be required to review during the course of performing these duties. Grievant also asserts the conduct he has pled guilty to is not connected to his job duties as a Health CareFinancial

Analyst I ("HCFA I"), and there is no rational nexus. Grievant also asserts he was told he was suspended because he violated Division of Personnel Administrative Rule 12.3, and Respondent has failed to meet its burden of proof and demonstrate a violation.

Discussion

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. W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

Division of Personnel Administrative Rule 12.3 states:

> **12.3. Suspension - Eight (8) calendar days after oral notice confirmed in writing or by written notice, the appointing authority may suspend any employee without pay for cause or to conduct an investigation regarding an employee's conduct which has a rational nexus to the employee's performance of his or her job. The suspension shall be for a specific period of scheduled work time, except where an employee is the subject of an indictment or other criminal proceeding. The appointing authority shall allow the employee being suspended a reasonable time to reply in writing, or upon request to appear personally and reply to the appointing authority or his or her designee. The eight (8) calendar day notice is not required for employees in certain cases when the public interests are best served by withholding the notice. The appointing authority shall file the statement of reasons for the suspension and the reply, if any, with the Director of Personnel.**

(Emphasis Added.)

This Grievance Board has ruled an employer "may conditionally suspend an employee based upon an indictment alone, if it can establish a rational nexus between the indictment and the employee's ability to perform the duties of [his] position." Kitzmiller v. Harrison County Bd. of Educ., Docket No. 13-88-189 (Mar. 31, 1989). See John C. v. Dep't of Pub. Safety, Docket No. 95-DPS-497 (Jan. 31, 1996); Lemery v. Monongalia County Bd. of Educ., Docket Nos. 91-30-477/494 (Apr. 30, 1992); Susser v. Kanawha County Bd. of Educ., Docket No. 20-85-002 (Jan. 8, 1986). See also Golden v. Bd. of Educ., 169 W. Va. 63, 285 S.E.2d 665 (1981). Grievant has been indicted for obstructing a federal audit by "altering and falsifying

documents. . . ." This charge goes to Grievant's credibility, a key component of the HCFA I position. Accordingly, there is a rational nexus with Grievant's duties. Additionally, Grievant has verbalized some negative feelings about CAMC, and this is a hospital whose rate increases and certificate of need requests he would be reviewing as an HCFA I. These facts form a rational nexus between the alleged behavior and the duties of his position.

The above discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. 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. W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested factis more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

2. An "appointing authority may suspend any employee without pay for cause or to conduct an investigation regarding an employee's conduct which has a rational nexus to the employee's performance of his or her job. The suspension shall be for a specific period of scheduled work time, except where an employee is the subject of an indictment or other criminal proceeding." Division of Personnel Administrative Rule 12.3.

3. An employer "may conditionally suspend an employee based upon an indictment alone, if it can establish a rational nexus between the indictment and the employee's ability to perform the duties of [his] position." Kitzmiller v. Harrison County Bd. of Educ., Docket No. 13-88-189 (Mar. 31, 1989). See John C. v. Dep't of Pub. Safety, Docket No. 95-DPS-497 (Jan. 31, 1996); Lemery v. Monongalia County Bd. of Educ., Docket Nos. 91-30-477/494 (Apr. 30, 1992); Susser v. Kanawha County Bd. of Educ., Docket No. 20-85-002 (Jan. 8, 1986). See also Golden v. Bd. of Educ., 169 W. Va. 63, 285 S.E.2d 665 (1981).

4. Respondent has established "a rational nexus between the indictment and the employee's ability to perform the duties of [his] position." Kitzmiller, supra.

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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: October 29, 2002

Footnote: 1

Grievant represented himself, and Respondent was represented by its Attorney, Greg Elam.

Footnote: 2

While Grievant did not exactly lie to his interviewers, he did omit data from his answers to questions about why he left CAMC.