MELISSA I. TICKLE,

GRIEVANT,

v. DOCKET NO. 02-HHR-101

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/

BUREAU FOR CHILDREN AND FAMILIES,

RESPONDENT.

DECISION

Grievant Melissa I. Tickle filed this grievance directly at Level IV on April 11, 2002, (See footnote 1) alleging that she was dismissed from her position unjustly and wrongfully, and further alleging her dismissal constitutes discrimination when compared to discipline given coworkers for similar infractions. She seeks, "written exoneration of the false charges set against [her] surrounding [her] dismissal and the right to a recorded departure from the agency with a resignation rather than the termination now in effect." (See footnote 2)

A Level IV hearing was held in the Grievance Board's Beckley office on June 3, 2002. Grievant appeared *pro se*, and Assistant Attorney General Jon Blevins, Esq. represented Respondent. The parties elected not to file proposed findings of fact and conclusions of law, so the matter became mature for decision at the close of the hearing.

The following facts were proven by a preponderance of the evidence:

FINDINGS OF FACT

1. Grievant was employed in Respondent's Mercer County office as a Protective Services Worker (PSW) until she was terminated on April 24, 2002. She had been employed for approximately three years in the PSW Trainee classification until she was promoted to PSW on or about January 9, 2002. Usually, but not as a rule, PSW Trainees are upgraded to PSW after one year in that classification and completion of training.

2. On April 9, 2002, Grievant was sent a letter from John J. Najmulski, Regional Director, notifying her of his decision to terminate her employment. The letter stated in part: "The reason for this action is your failure to meet a reasonable standard of conduct as a Protective Services Worker

of the West Virginia Department of Health and Human Resources." [Exhibit No. 1].

3. The letter continued, specifying the one instance of misconduct on which the termination was based, plus two previous incidents that establish a history of misconduct. The first and most serious offense was the failure to enter a critical referral into the FACTS system on December 27, 2001. It stated in part:

> 1. On December 26, 2001, TRM was born to TN [sic] of Bluefield. TM has previously been a client of CPS beginning on 6/18/96. On December 19, 1997 TM's parental rights were terminated on her two infant children.
>
> 2. On December 27, 2001, Tracy Freund, a social worker at Bluefield Hospital made a referral to Mercer District, Department of Health and Human Resources, which you received. You advised Tracy Freund that CPS has a record on TM, however she was not an active case at that time. You were advised that a "Right from the Start" (See footnote 3) referral had been made for this mother and new baby. You advised the hospital that a new case would not be opened at this time, but that "Right from the Start" could make a referral if they felt it necessary.
>
> 3. You did not enter the referral into the FACTS system nor did you obtain supervisory approval to screen out the referral. This is contrary to CPS policy. . . .

[ALJ Exhibit No. 1].

4. The letter also stated that in May, 2001 "it was discovered that you were misusing Departmental equipment and resources to access pornographic material via the Internet during work time." Grievant received a verbal warning for that incident.

5. The third instance cited was a breach of confidentiality in February, 2001, for which Grievant received a written warning. No grievance was filed contesting either disciplinary action.

6. The long time between the December, 2001 offense and the disciplinary action was a result of Respondent's not having known about the incident at the time it happened. Respondent received another referral with regard to the same family on March 9, 2002, and discovered the earlier referral had not been entered by Grievant.

7. The second referral was described in the April 9, 2002 letter as follows:

> 4. On March 9, 2002 at approximately 1:29 a.m. an emergency call was placed to the local 9-1-1 Center that TRM had stopped breathing. A short while later [TRM] was pronounced dead at Bluefield hospital. This was the first contact CPS had with regard to this case since the referral had been made by Bluefield Hospital on December 27, 2001.
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> 5. At approximately 1:00 p.m. on March 9, 2002, the on call CPS worker received a referral regarding the death of TRM and that the medical examiner's office suspected homicide. The final results of the autopsy are currently pending.

> 6. A review of the FACTS record by the on call worker revealed you had looked at the FACTS record on 12/27/01. On March 15, 2002 Bluefield Hospital records were received with regard to TM and social services progress notes revealed a referral was made to you, as the CPS worker.

[Exhibit No. 1].

8. Grievant did receive a referral on December 27, 2001, and did access the FACTS record of the former client TM, where she saw or should have seen that TM's parental rights had been involuntarily terminated in the past. Grievant did not enter the referral in the FACTS system and did not obtain supervisory approval to screen out the referral.

9. Linda McKinney, a social worker/receptionist in Grievant's office, on one occasion delayed entering referral information in the FACTS system. Ms. McKinney, however, is not a CPS worker and unlike Grievant did not “screen out” the referral - instead she was interrupted in the middle of working on it by another, more urgent referral. Further, the referral was not an aggravated circumstance like the one Grievant failed to enter. Ms. McKinney ultimately did enter the first referral later that same day. She was not disciplined for the delay.

DISCUSSION

To sustain this disciplinary action the employer must prove the charges against the 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.

Of the three instances of misconduct mentioned in the termination letter, Grievant has already been disciplined for two: the alleged misuse of the computer and the breach of privacy. Therefore, the only charge that must be proven in order to support Respondent's decision to terminate Grievant is the charge that she failed “to meet areasonable standard of conduct as a Protective Services Worker of the West Virginia Department of Health and Human Resources” by failing to enter a referral into the FACTS system on December 27, 2001 and failing to obtain supervisory approval to do so. [Exhibit No. 1].

It is undisputed that Tracy Freund, a social worker at Bluefield Hospital, called CPS on December 27, 2001, and spoke to Grievant, informing her that TRM had been born to TM, a former CPS client

whose parental rights to two other children had been involuntarily terminated in 1997. At issue is whether Grievant complied with agency policy on screening referrals, and whether this one instance of misconduct warrants dismissal.

Respondent's policy regarding referral intake is set forth in the termination letter as follows:

> **2.3 Screening Process**
>
> This is a process used to determine the acceptance of the report for initial assessment. Part of the screening process may be performed by the intake worker alone or in conjunction with a supervisor. All cases screened out must include supervisory consultation and a justification/explanation for the decision which must be documented.
>
> The supervisor will:
>
> 1 * review the intake for thoroughness and completeness.
>
> 2 * determine whether the report will be accepted for a CPS initial assessment or if the report is screened out and not accepted for a CPS assessment. **If screened out, the supervisor must document an explanation for the decision in FACTS.**

[ALJ Exh. No. 1 (emphasis in original)].

There is no documented supervisory approval of Grievant's decision to screen out the referral from Ms. Freund. On April 8, 2002, Grievant met with Mr. Najmulski, at which time she stated she obtained approval for the screen-out from her back-up supervisor, whodenies that Grievant did so. These opposing versions of the events require a determination of whose testimony is more credible. Grievant chose not to testify at the Level IV hearing, so the undersigned had no opportunity to observe her demeanor while making her assertion. However, “[d]emeanor is only one of the factors to be considered in assessing the credibility of a witness. Other factors include the witness' opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the trier of fact should consider the presence or

absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of witness' information. *See* Perdue v. Dep't of Health & Human Resources, Docket No. 93- HHR-050 (Feb. 4, 1994)." Meyers v. Dep't of Transp./Div. of Highways, Docket No. 01- DOH-592 (April 1, 2002).

Grievant's version of the events of December 27, 2001, are related by Mr. Najmulski in the termination letter thusly:

> I met with you to advise you that dismissal was being contemplated. You responded you did not put [the] referral on the TM case in the FACTS system at the advice of [the] acting supervisor. In addition you stated the hospital made no allegations, so therefore you did not believe it necessary to enter the referral in the FACTS system for supervisory approval. You stated it was your belief from reviewing the hard copy record and discussing the case with the original assigned worker, that parental rights were voluntarily terminated. You stated you did not look at the FACTS record with regard to the TM case.

[ALJ Exhibit No. 1]. This version of events is directly contradicted by the testimony of Ms. Freund, the social worker who made the referral, and by the testimony of Cindy Snuffer, the back-up supervisor on the date in question. In addition, the empirical evidence supports a conclusion that Grievant's version is inaccurate. Ms. Snuffer testified that, on December 27, 2001, she was on call as back-up to supervisor Billie Boyd, who was out of the office that day. In a written memorandum to Customer Service Manager Linda Morrison, dated May 1, 2002, and in her sworn testimony at the Level IV hearing, she stated she has no recollection of discussing the TM case with Grievant and no documentation of such conversation. Since the policy quoted by Respondent makes it the supervisor's duty to document the screening-out of a referral, Ms. Snuffer did have a motive to conveniently forget the discussion. However, she provided a compelling logical explanation why the scenario as posed by Grievant is highly unlikely: every CPS worker knows (See footnote 4) that the involuntary termination of parental rights is a "red flag" that there are aggravated circumstances, and no cases with aggravated circumstances are ever screened out.

Ms. Freund stated that as a mandatory reporter, she made the original report to CPS based on the information that TM had previously had parental rights terminated. Her credibility is bolstered by the fact that she documented her contact with Grievant on the day it was made, before Respondent knew of any problems with the contact. She stated that Grievant told her at the time she made the contact that no new case would be opened, after she informed Grievant why she was making the referral.

Kira LeBlanc was the CPS worker who handled TM's case when it was originally opened. She was out of the state and did not testify, but in a signed (but unsworn) statement to Ms. Morrison dated May 2, 2002, she denied having any conversation with Grievant regarding the case, and asserted that Grievant's statements “are completelyfalse.” Given that the information Ms. LeBlanc entered in the FACTS system regarding the TM case is accurate, it is highly unlikely that Ms. LeBlanc would have given Grievant information contrary to that record.

CSM Linda Morrison testified that she reviewed the “audit trail” in the FACTS system, and that although Grievant read TM's case file on December 27, 2001, no referral was entered, and nothing was sent to Grievant's supervisor for screen-out approval. The audit trail confirms that Grievant viewed the “hearing screen,” which indicates that TM's parental rights were terminated by court order rather than voluntarily. She further testified that the audit trail cannot be changed after the fact, and is generated automatically.

Grievant's version of her actions on December 27, 2001, is not credible. It is implausible that experienced CPS workers would give her advice contrary to their training and to department policy, and the FACTS audit trial establishes that Grievant's claim not to have accessed the file is false. What the credible facts do establish is that Grievant exercised faulty judgment after review of the FACTS case file, determining that the call from Ms. Freund was a “contact” rather than a “referral” since no allegations with respect to the newborn were raised. She incorrectly determined that the “contact” did not need to be documented, therefore screening out the referral on her own without supervisory approval. These actions were contrary to established CPS policy, as charged by Respondent.

Even though Respondent has proven the charge for which Grievant was terminated, “State employees who are in the classified service can only be dismissed for '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 ofstatute or official duty without wrongful intention.' [Citations omitted.]” Hayden v. Dep't of Health and Human Resources/Bureau for Children and Families, Docket No. 98-HHR-133 (Sep. 30, 1999). While progressive discipline is normally followed, an employee may be terminated for a singular transgression if it amounts to gross misconduct, even if that term is not actually used in the reasons given for the termination. “Gross misconduct is a major offense which could warrant immediate dismissal . . . and the label applied to

the conduct forming the basis for the dismissal is not determinative, Davis v. W.Va. Dept. of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 22, 1990)." Morris v W. Va. Dep't of Human Services, Docket No. 90-DHS-135/168 (Feb. 6, 1991).

Grievant sought to establish that failure to enter a referral on the FACTS system has not been considered gross misconduct by Respondent when another employee failed to do so. This assertion amounts to a claim of discrimination. In order to establish a claim of discrimination, an employee must establish a *prima facie* case by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

> (a) that she is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and
>
> (c) that such differences were unrelated to actual job responsibilities of the Grievant and/or the other employee(s) and were not agreed to by the Grievant in writing.

See, Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Grievant questioned Respondent's witness Linda McKinney, a social worker/receptionist in Grievant's office, about an incident in which Ms. McKinney delayed entering referral information in the FACTS system. Ms. McKinney, however, is not a CPS worker and unlikeGrievant did not "screen out" the referral - instead she was interrupted in the middle of working on it by another, more urgent referral. She ultimately did enter the first referral later that same day. She was not disciplined for the delay. Grievant failed to establish a *prima facie* discrimination claim based on these facts, therefore Respondent need only prove Grievant's misconduct was of such a serious nature that it warranted dismissal.

Gross misconduct "implies a willful disregard of the employer's interest or a wanton disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." Vickers v. Board of Directors/W. Va. State College, Docket No. 97-BOD-112B (Jan. 31, 1995) (quoting Graley v. W. Va. Parkways Economic Dev. and Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991)). Child Protective Services Workers have a special standard of

care as to their duties, which Grievant neglected. They are the first line of defense armed by the statutes that authorize their existence, and as the Supreme Court of Appeals of West Virginia recently put it, “Doing what can be done to rescue a child from an abusive situation is more than a metaphorical celestial aid to our navigation; the welfare of the child is the *raison d'etre* for our abuse and neglect law - nothing is more important.” In Re James G. and Emmett M. L., III, 2002 W.Va. Lexis 73 (June 13, 2002).

Grievant had a clear and specific duty that did not leave room for her to exercise her judgment, and she knew of should have known what that duty was. Specifically, “When the parental rights of a parent to a child have been involuntarily terminated, W. Va. Code, 49-6-5b(a)(3) [1998] requires the Department of Health and Human Resources to file a petition, to join in a petition, or to otherwise seek a ruling in any pending proceeding, to terminate parental rights as to any sibling(s) of that child.” *Syl. pt. 1*, In re George Glen B.Jr., 207 W. Va. 346, 532 S.E.2d 64 (2000). Grievant neglected a primary duty to protect the rights of the child and the public interest by choosing to effectively screen out a referral which all other witnesses, even those without three years of training, knew was a “red flag.” Then, when Respondent investigated the matter, Grievant was less than truthful about what happened, suggesting little understanding of the consequences and that in the future, she can not be relied upon. This wanton neglect of a primary duty amounted to misconduct “of a substantial nature directly affecting the rights and interest of the public, rather than . . . trivial or inconsequential . . ., or mere technical violations of statute or official duty without wrongful intention.” Hayden, *supra*.

The following conclusions of law supplement this discussion:

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 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.

2. “Demeanor is only one of the factors to be considered in assessing the credibility of a witness. Other factors include the witness' opportunity or capacity to perceive and communicate,

reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the trier of fact should consider the presence orabsence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of witness' information. *See* Perdue v. Dep't of Health & Human Resources, Docket No. 93-HHR-050 (Feb. 4, 1994)." Meyers v. Dep't of Transportation/Div. of Highways, Docket No. 01-DOH- 592 (April 1,2002).

3. "State employees who are in the classified service can only be dismissed for '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. Dept. of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Service Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); W. Va. Code § 29-6A-6; Logan v. Regional Jail Auth., Docket No. 94-RJA-225 (Nov. 29, 1994); Section 12.02, Administrative Rule, W. Va. Div. of Personnel (Aug. 3, 1993)." Hayden v. Dep't of Health and Human Resources/Bureau for Children and Families, Docket No. 98-HHR-133 (Sep. 30, 1999).

4. "Gross misconduct is a major offense which could warrant immediate dismissal . . . and the label applied to the conduct forming the basis for the dismissal is not determinative, Davis v. W.Va. Dept. of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 22, 1990)." Morris v W. Va. Dep't of Human Services, Docket No. 90-DHS-135/168 (Feb. 6, 1991).

5. "Doing what can be done to rescue a child from an abusive situation is more than a metaphorical celestial aid to our navigation; the welfare of the child is the *raisond'etre* for our abuse and neglect law - nothing is more important." In Re James G. and Emmett M. L., III, 2002 W.Va. Lexis 73 (June 13, 2002).

6. "When the parental rights of a parent to a child have been involuntarily terminated, W. Va. Code, 49-6-5b(a)(3) [1998] requires the Department of Health and Human Resources to file a petition, to join in a petition, or to otherwise seek a ruling in any pending proceeding, to terminate parental rights as to any sibling(s) of that child." *Syl. pt. 1*, In re George Glen B. Jr., 207 W. Va. 346, 532 S.E.2d 64 (2000).

7. In order to establish a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant

must show:

(a) that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c) that such differences were unrelated to actual job responsibilities of the Grievant and/or the other employee(s) and were not agreed to by the Grievant in writing.

See, Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

8. Grievant did not establish a *prima facie* discrimination claim.

9. Grievant did commit misconduct of a substantial nature directly affecting the rights and interest of the public.

For the foregoing reasons, this grievance is hereby **DENIED.**

Any party 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). Neitherthe 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: June 25, 2002 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Grievant filed an amended version on April 12, 2002, that was not materially different.

Footnote: 2

Grievant also requested that Respondent pay for her grievance-related expenses and a polygraph examination. Grievant was informed this relief was not available through the grievance procedure.

Footnote: 3

"Right from the Start" is a program of the county health department that assists new parents with parenting skills and assists them with aid programs.

Footnote: 4

When posed with this hypothetical, all of Respondent's CPS-worker witnesses corroborated Ms. Snuffer's statement.