DIANE THOMPSON,

Grievant,

v.

Docket No. 04-DOE-161

WEST VIRGINIA DEPARTMENT

OF EDUCATION/CEDAR LAKES,

Respondent.

DECISION

The grievant, Diane Thompson (hereafter “Grievant”) was employed by the respondent, the West Virginia Department of Education (hereafter “the Department”) as a Cook III at Cedar Lakes Conference Center (hereafter “Cedar Lakes”). She was an at- will employee who was initially suspended when the Department realized that Grievant was continuing to receive unemployment compensation benefits despite the fact that she had been reinstated to her position and reclassified after successfully grieving her earlier dismissal during a reduction in force. After conducting an investigation, the Department determined that Grievant knowingly made false statements in order to obtain or to increase her unemployment compensation benefits. The Department, which characterized Grievant's actions in this regard as gross misconduct and fraud, dismissed her from her position at Cedar Lakes.

Grievant filed an initial grievance challenging her suspension. She subsequently filed another grievance challenging her dismissal. Both grievances were denied at lower levels. The Department then waived proceedings at Level III in both grievances. Therewas some confusion at Level IV about

which underlying grievance was being appealed. (See footnote 1) The parties agreed to treat both grievances as having been appealed and consolidated for hearing and decision at Level IV. As relief, Grievant sought reinstatement to her position as a cook at Cedar Lakes.

A Level IV hearing (See footnote 2) was conducted on June 11, 2004, at the Charleston office of the West Virginia Education and State Employees Grievance Board (hereafter "the Grievance Board"). The Department was represented by Heather L. Deskins, Esquire. Grievant represented herself. At the outset of the Level IV hearing, the Department questioned whether Grievant had timely filed an appeal to Level IV as to either the suspension or the dismissal. This grievance matured for decision on July 16, 2004, when the time for filing post-hearing submissions expired.

After careful review of the entire record, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

FINDINGS OF FACT

1 1. Grievant began employment at Cedar Lakes as a part-time Cook in 1995, and began working as a regular hourly employee in 1997.

2 2. Grievant was an at-will employee.

The Precursor Grievance

3 3. On July 1, 2003, Grievant lost her job due to a reduction in force brought on by budget constraints.

4 4. Grievant had been targeted for the reduction in force because she was the least senior Cook II at Cedar Lakes. However, she prevailed in her grievance because, after a Level II hearing, it was determined that Grievant had been improperly classified as a Cook II. Grievant was reinstated into her position at Cedar Lakes, effective August 27, 2003, (See footnote 3) awarded back pay, and reclassified as a Cook III.

5 5. Grievant had received unemployment compensation for the period she had been out of work due to the reduction in force.

Suspension and Dismissal

6 6. After being reinstated at Cedar Lakes, Grievant continued to submit weekly wage forms to the Bureau of Employment Programs indicating that she was still unemployed and had not worked or earned any wages for the weeks ending August 30, 2003, September 6, 2003, September 13,

2003, September 20, 2003, September 27, 2003, October 4, 2003, October 11, 2003, and October 18, 2003, respectively.

7 7. It was not until she submitted her weekly wage form for the week of October 11, 2003, that Grievant indicated to the Bureau of Employment Programs that she was returning to work. However, she incorrectly stated that she would be returning to work on October 20, 2003, when, in fact, she had been reinstated near the end of August.

8 8. Grievant failed to report her back pay award to the Bureau of Employment Programs. (See footnote 4)

9 9. Near the beginning of December 2003, Ron Grimes, Executive Director/General Manager of Cedar Lakes, (hereafter "Director Grimes") discovered that the Bureau of Employment Programs had charged the Department for unemployment benefits paid to Grievant through September 20, 2003.

10 10. Director Grimes contacted the Bureau of Employment Programs and learned that Grievant had submitted claim forms from August 30, 2003, through October 18, 2003, while she was working at Cedar Lakes. He also learned that Grievant had falsely informed the Bureau of Employment Programs that she would be returning to work at Cedar Lakes on October 20, 2003.

11 11. Grievant was suspended without pay pending a more thorough investigation into her actions in connection with her receipt of unemployment benefits after she had returned to work at Cedar Lakes.

12 12. At the conclusion of the investigation, Grievant was dismissed. As set forth in correspondence, dated January 5, 2004, to Grievant from David Stewart, State Superintendent of Schools, her dismissal was based on "gross misconduct and fraud"when she "violated state law in knowingly making false statements in order to obtain or increase . . . [her] unemployment compensation benefits."

The Underlying Suspension Grievance

13 13. Grievant challenged her suspension in a grievance filed on December 8, 2003.

14 14. After the grievance was denied at the lower levels, the Department informed Grievant that Level III proceedings were being waived. As reflected in the return receipt card signed by Grievant, she received notice of the Department's waiver on February 23, 2004. The notice advised Grievant that she had five days in which to file a written appeal to Level IV and provided her with the

proper address for submitting such appeal to the Grievance Board.

15 15. Grievant did not file a Level IV appeal from the denial of her suspension grievance until April 22 or April 23, 2004. (See footnote 5)

The Underlying Dismissal Grievance

16 16. On January 7, 2004, Grievant received a dismissal letter, dated January 5, 2004.

17 17. On January 7, 2004, Grievant initiated a grievance to challenge her dismissal.

18 18. After the dismissal grievance was denied at the lower levels, the Department directed correspondence to Grievant informing her that the Level III proceedings werebeing waived. However, there is nothing in the record to reflect that Grievant received this correspondence, which was dated April 9, 2004.

19 19. Subsequently, the Department sent a cover letter, dated April 19, 2004, with a copy of the earlier April 9 correspondence in which the Department advised Grievant of the decision to waive a Level III proceeding and informed her of her right to bring a Level IV appeal to the Grievance Board. Grievant signed a receipt for the April 19 letter on April 21, 2004.

20 20. Grievant's Level IV appeal was filed on April 22 or April 23, 2004. (See footnote 6)

DISCUSSION

In terms of timeliness, the Department, who bears the burden of establishing this affirmative defense, was unable to prove that Grievant received notice that the Level III proceedings in the dismissal grievance were being waived until April 21, 2004. In light of the fact that the Level IV appeal was filed within two days of that date, the Department is unable to meet the burden of proving that the dismissal appeal was not timely.

As to the suspension grievance, the Department established that Grievant was informed of the Level III waiver and her right to appeal on February 23, 2004. Nonetheless, she failed to file her Level IV appeal on the suspension issue until late April 2004. The Department has thus met its burden and proven, by a preponderance of the evidence, that the appeal on the suspension grievance was untimely. Therefore, only the dismissal issue will be addressed on the merits. Grievant does not dispute that she improperly sought and received unemployment compensation benefits to which she was not entitled. She argues that her dismissal is too severe a response to actions that she characterizes as a mistake. This argument is not supported by the record.

Grievant's assertion that she thought she was entitled to receive unemployment benefits for six months regardless of her employment status does not comport with her actions. She falsified weekly wage statements and falsely informed the Bureau of Employment Programs that she would be returning to work on October 20, 2003, rather than August 27. Such overt actions on Grievant's part reflect an awareness of wrongdoing and undercut her claim of an innocent mistake.

Grievant has attempted to place the blame for her misconduct on the Department. She argues that, if the Department had not improperly terminated her during the reduction in force, she would not have been placed in the position to receive unemployment compensation in the first place. While true, this does not excuse Grievant's wrongdoing. The Department did not take any actions that compelled Grievant to falsify documents.

As an at-will employee, Grievant could be dismissed for no reason or for any reason that did not offend a substantial public policy. Grievant has failed to identify any way in which the Department's decision to dismiss her contravened any public policy, substantial or otherwise.

Based upon the foregoing, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

CONCLUSIONS OF LAW

Timeliness

1 1. " Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Ooten v. Mingo County Bd. of Educ., Docket No. 96-29-122 (July 31, 1996); Hale v. Mingo County Bd. of Educ. , Docket No. 95-29-315 (Jan. 25, 1996)." *Lively v. W. Va. Dep't of Educ*., Docket No. 03-DOE-204 (Oct. 21, 2003).

2 2. Grievant had five days from notice of a Level III waiver to file a Level IV appeal with the Grievance Board. W. Va. Code § 18-29-4(d)(1).

3 3. The Department proved, by a preponderance of the evidence, that Grievant did not file a timely Level IV appeal with respect to her suspension.

4 4. "The burden of proof now switches to Grievant to demonstrate 'a proper basis to excuse [her] failure to file in a timely manner.'" *Casey v. Mason County Bd. of Educ*., Docket No. 01-26-394 (September 25, 2001). Grievant did not present any reasons or arguments to

excuse her failure to appeal to Level IV within the requisite time period. Therefore, the issue of Grievant's suspension without pay will not be addressed further.

5 5. As to the dismissal grievance, the Department failed to prove that Grievant received the notice of waiver, with directions about filing a Level IV appeal, when it was initially distributed on April 9, 2004. In the absence of such proof, the Department has failed to satisfy its burden of proving, by a preponderance of the evidence, the affirmative defense that Grievant's Level IV appeal of the dismissal grievance was untimely. Therefore, the dismissal challenge must be addressed on the merits.

Dismissal

6 6. Employees of the Department of Education are at-will employees and are not included in the classified service. *Dye v. W. Va. Dep't of Educ.*, Docket No. 99-DOE-217 (Sept. 16, 1999).

7 7. An at-will employee may be dismissed for no reason or for any reason that does not contravene some substantial public policy. *Page v. Columbia Natural Resources*, 198 W. Va. 378, 480 S.E.2d 817 (1996); *Wilhelm v. W. Va. Lottery*, 198 W. Va. 92, 479 S.E.2d 602 (1996) (*per curiam*) ("In this case, Mr. Wilhelm failed to state a valid claim because he, as an at-will employee, could be discharged with or without cause by the Lottery Director unless such a discharge violated a substantial public policy. No substantial public policy was violated in this case because no liberty interest was harmed and no impermissible discrimination was alleged.").

8 8. In light of the fact that Grievant was an at-will employee, she bore the burden of proving, by a preponderance of the evidence, that there was a violation of substantial public policy in connection with her dismissal. (See footnote 7) *Mayhew v. Dep't of Envtl. Prot.,* Docket No. 01-DEP-516 (Aug. 27, 2003).

9 9. Grievant has neither alleged nor proven that the Department's decision to discharge her contravened any substantial public policy.

10 10. The Department did not need to establish any grounds for Grievant's dismissal. Nonetheless, the Department proved that Grievant knowingly submitted falsedocuments to the Bureau of Employment Programs in an effort to obtain additional unemployment compensation payments to which Grievant was not entitled.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County. Any such appeal

must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. 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 West Virginia Code section 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.

Date: August 30, 2004

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JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

The forms submitted by Grievant were confusing because it appears that she blended some of the dates from the suspension and the dismissal.

Footnote: 2

Pursuant to agreement of the parties, the record from the lower levels was redacted to delete social security numbers and other personal information contained therein.

Footnote: 3

The record also identifies August 26, 2003, as the date for Grievant's reinstatement. This inconsistency does not need to be resolved in order to properly address this grievance.

Footnote: 4

The Department made it clear that Grievant's dismissal was not based on her failure to report her back pay award.

Footnote: 5

Many of the documents prepared by Grievant contain inconsistent or obviously unreliable dates, making it difficult to ascertain a precise chronology. Fortunately, greater precision in determining the dates is not required for resolution of this grievance.

Footnote: 6

Grievant's lack of clarity regarding dates was evident at Level IV, as well.

Footnote: 7

This burden was misstated at the Level IV hearing. There was no objection by either party and the mistake inured to Grievant's benefit. Therefore, although it was a mistake, it does not impugn the validity of this decision.