THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

HEATHER HOLLEN,

Grievant,

v. **Docket No. 06-HHR-217**

Janis I. Reynolds

Senior Administrative Law Judge

DEPARTMENT OF HEALTH AND HUMAN

RESOURCES/BUREAU FOR CHILDREN

AND FAMILIES,

Respondent.

D E C I S I O N

Grievant, Heather Hollen, filed this grievance against her employer, the Department of Health and Human Resources ("HHR"), on March 6, 2006, over her three-day suspension. Relief sought is reversal of the suspension, all lost wages and leave returned, and removal of all information about her suspension and the investigation from her personnel file.

This grievance was denied at all lower levels, and Grievant appealed to Level IV on July 3, 2006. The parties agreed to submit this case on the record developed below. Grievant was represented by Norman Henry, and HHR was represented by Jennifer Akers, Assistant Attorney General. This case became mature for decision on August 24,

2006, the date the parties' proposed Findings of Fact and Conclusions of Law were received.

Synopsis

Respondent asserts the three-day suspension Grievant received was appropriate for the offense, excessive personal use of e-mail, especially since the abuse included specific violations of Use of Information Technology Resources Policy ("IT-501"). HHRalso asserts Grievant was or should have been aware of the policies governing e-mail usage, was a supervisor, and as such is held to a higher standard. HHR noted other similarly situated employees had received like discipline.

Grievant avers the punishment was too severe for the offense, and mitigation would be appropriate. Grievant also asserts she was unaware of the IT-501 Policy, and once she was made aware of these policies, at the end of the investigation, she committed no further violations. Grievant believes HHR violated its own policies in obtaining her e-mail from her computer.

Respondent met its burden of proof and demonstrated Grievant had knowingly violated the e-mail policies, all required policies were followed in obtaining Grievant's e-mail from her work computer, and mitigation was not appropriate, given that other similarly situated employees had received like discipline.

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

Findings of Fact

1. At the time of the events surrounding this grievance, Grievant was employed as a supervisor by HHR. Grievant has since quit her job.

2. On September 9, 2004, Sharon O'Dell, then Director of Investigations and Fraud Management ("IFM"), in the Office of the Inspector General ("OIG"), received an

anonymous complaint stating Grievant was abusing her work time, and was unavailable when needed for work-related activities. The complainant also stated Grievant was sending and receiving inappropriate e-mail on her work computer. 3. OIG investigated the possible abuse of work time first, in October and November 2004, and did not find any wrongdoing in this area. (See footnote 1)

4. On September 15, 2004, Molly Jordan, Inspector General, gave written authorization to investigate the complaint. Ms. Jordan has delegated her authority to request e-mail access for the MIS Division of HHR "to each and every investigator employed in the IFM section." Respondent No. 11.

5. Darlene Thomas, Chief Technical Officer ("CTO"), has given Cindi Cvechko, HHR Groupwise Administrator, the authority to proceed with and request e-mail for routine investigations. Respondent No. 11.

6. On March 14, 2005 and again on June 9, 2005, Investigator Lynda Travis, requested access to Grievant's e-mail from Ms. Cvechko, and told Ms. Cvechko she could contact her supervisor for verification of this request. Respondent No. 11. This request to access Grievant's e-mail was granted.

7. In approximately March 2005, OIG began its investigation into the e-mail portion of the complaint. (See footnote 2)

8. The investigation of Grievant's e-mail revealed that from July 12, 2004, to May 19, 2005, Grievant sent or received 195 personal e-mails, many with attachments,including personal pictures and a power point presentation. Grievant had also received and sent chain letters and inappropriate jokes.

9. Contrary to Grievant's assertion, the jokes/cartoons, while not considered pornographic, were offensive and of a sexual nature. These cartoons contained pictures of nude, private body parts, dildos, and urine, contained such words as shit, bitch, ass, boobs, and erection, and made fun of "ugly" people.

10. Grievant received training about the proper use of her e-mail on June 14,

1999, and July 13, 2003.

11. Grievant's computer, like the majority of computers in HHR, received pop-up messages giving information about the proper use of the computer, links to additional information, warning about inappropriate usage, and instructing about how to get rid of unwanted e-mail. Additionally, pamphlets were occasionally sent which detailed information and courses and gave directions to additional information and contact people for questions. One specific e-mail sent system wide on December 19, 2003, noted there was a chain letter with a power point presentation being sent that had the potential of crashing the e-mail system, and another sent on June 15, 2005, noted the need for all employees to be aware of the rules regarding e-mail. Respondent Nos. 13 & 14.

12. Operating procedure OP-12 discusses e-mail, and specifically identifies the sending and receiving of certain e-mail as unacceptable. This list includes chain letters, jokes, and sexually oriented material. Respondent No. 3. Employees are to report the receipt of unnecessary e-mail.

13. IT-501 states at Section 4.3.1, "only minimal personal use of DHHR IT resources is allowed and should not interfere with the legitimate business of the State." IT-501 states at 4.4.1, "Employees should have no expectation of privacy while using state- provided equipment."

14. Grievant was interviewed by an Internal Affairs Investigator on August 30, 2005. Grievant stated she understood there should be no personal e-mail, but she did not think it was "a big issue," and she had not read the policies governing e-mail. She agreed she had received the e-mail from the Technology Department, but did not go to the website and read the policies. Grievant admitted she used her computer to send the personal e- mails and that chain letters and jokes were sent and received by her.

15. On December 21, 2005, the OIG filed a report of its findings. Respondent No. 10.

16. On February 7, 2006, Grievant's supervisor Rebecah Carson, met with

Grievant to discuss the findings of the investigation. Grievant did not believe her actions were worthy of punishment, as there was widespread abuse of the system.

17. By letter dated February 23, 2006, Grievant was suspended for three days.

18. HHR expects all supervisors to ensure employees conduct themselves properly, and all employees to comply with all HHR Policies. Respondent No. 3.

19. Other similarly situated employees have received like discipline for this same offense. Test. Fitzgerald.

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 generallyrequires 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 Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id. Grievant's assertions will be addressed one at a time.

I. Lack of knowledge

Grievant admitted she violated the policies identified above, but asserts she was not aware of them. This assertion is without merit. Grievant was a long-term employee, who was a supervisor. She had received training on the proper use of her computer and had received frequent reminders and warnings about the proper use of her computer. She either knew or should have known the sending and receiving of her 195 personal e-mails, with specific violations, such as chain letters and offensive cartoons, violated HHR's policies. Supervisors are expected to ensure that employees conduct themselves properly, and employees are to comply with all HHR Policies. Respondent No. 3. "When an intelligent, professional employee is given data and fails to hear it, fails to act on it, or

fails to investigate a situation when a reasonably prudent [employee] would, these acts can be seen as willful and intentional and more serious than incompetence. Williams v. Cabell County Bd. of Educ., Docket No. 95-06-325 (Oct. 31, 1996). See also Drye v. Educ. Broad. Auth., Docket No. 98-EBA-030 (May 29, 1998); Huffstutler v. Cabell County Bd. of Educ., Docket No. 97-06-150 (Oct. 31, 1997).

II. Failure of HHR to follow its policies in obtaining Grievant's e-mails

Grievant asserts HHR did not receive written permission to search Grievant's computer and points to Section 3.8 of HHR's Operating Procedure, OP-12 on e-mail. This Section states: "Bureau Commissioners, Office Directors, and/or the OIG must submit a request in writing or e-mail and obtain approval from the CTO." As revealed by the Findings of Fact, this Section was followed. Ms. Jordan authorized the investigation and delegated the right to request e-mail access "to each and every investigator employed in the IFM section." It was one of her investigators who requested access, and this request was granted. Further, it should be noted that HHR's policy is very specific in stating that employees do not have the expectation of privacy for anything contained on their work computer. Grievant has failed to establish HHR violated its policies.

III. Mitigation/Severity of Penalty

Grievant's assertion the suspension is excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

"When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of

Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997). Mitigation of a penalty is considered on a case by case basis. Conner v. Barbour County Bd. of Educ., Docket No. 95-01-031 (Sept. 29, 1995); McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995).A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. Pingley v. Div. of Corr., Docket No. 95-CORR-252 (July 23, 1996).

This Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute her judgement for that of the employer. Tickett v. Cabell County Bd. of Educ., Docket No. 97-06-233 (Mar. 12, 1998); Huffstutler, supra.

While it is true, this was Grievant's first disciplinary action, it is important in this analysis to keep in mind that Grievant was a supervisor. "As a supervisor, Grievant may be held to a higher standard of conduct, because [s]he is properly expected to set an example for those employees under [her] supervision, and to enforce the employer's proper rules and regulations, as well as implement the directives of his supervisors." Wiley v. W. Va. Div. of Natural Res./Parks and Recreation, Docket No. 96-DNR-515 (Mar. 26, 1998). The undersigned Administrative Law Judge cannot find Grievant's suspension forthe numerous violations of HHR's policies to be excessive, especially

since Grievant was a supervisor and received the same discipline as other, similarly situated employees.

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 fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

2. When an employee is given "data and fails to hear it, fails to act on it, or fails to investigate a situation when a reasonably prudent [employee] would, these acts can be seen as willful and intentional and more serious than incompetence." Williams v. Cabell County Bd. of Educ., Docket No. 95-06-325 (Oct. 31, 1996). See also Drye v. Educ. Broad. Auth., Docket No. 98-EBA-030 (May 29, 1998); Huffstutler v. Cabell County Bd. of Educ., Docket No. 97-06-150 (Oct. 31, 1997). This failure to act will not prevent disciplinary action.

3. Grievant did not meet her burden of proof and demonstrate HHR failed to follow its procedures when accessing her e-mail.

4. "As a supervisor, Grievant may be held to a higher standard of conduct, because [s]he is properly expected to set an example for those employees under [her]supervision, and to enforce the employer's proper rules and regulations, as well as implement the directives of his supervisors." Wiley v. W. Va. Div. of Natural Res./Parks and Recreation, Docket No. 96-DNR-515 (Mar. 26, 1998).

5. The argument a suspension is excessive given the facts of the situation, is an affirmative defense, and a grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

6. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997). Mitigation of a penalty is considered on a case by case basis. Conner v. Barbour County Bd. of Educ., Docket No. 95-01-031 (Sept. 29, 1995); McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995).

7. This Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects forrehabilitation." Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996).

8. Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute her judgement for that of the employer. Tickett v. Cabell County Bd. of Educ., Docket No. 97-06-233 (Mar. 12, 1998); Huffstutler, supra.

9. The undersigned Administrative Law Judge cannot find Grievant's suspension

for the numerous violations of HHR's e-mail policies, some of which were clearly specified in the policies, to be excessive in light of her supervisory status, and the discipline received by similarly situated employees.

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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Janis I. Reynolds

Senior Administrative Law Judge

Date: September 29, 2006

Footnote: 1

Two employees were assigned to follow Grievant. This issue, although listed in the same grievance, has a different burden of proof and was considered separately by the parties and will be addressed in Docket No. 06-HHR-264.

Footnote: 2

OIG is a very busy place and with a limited number of employees has to prioritize the complaints received. The amount of time it took to complete an investigation into all facets of this complaint was not unusual.