# THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

**PATTY BENNETT SPADE,**

**Grievant,**

**v.** **DOCKET NO. 06-HHR-322**

**DEPARTMENT OF HEALTH AND**

**HUMAN RESOURCES,**

**Respondent.**

## DECISION

Grievant, Patty Bennett Spade, filed this grievance on September 27, 2006, stating, "Termination from employment for misuse of sick leave." Her stated relief sought is reinstatement with back pay. On November 15, 2006, Grievant's attorney, Jason Parmer, filed an amended statement of grievance in which he enumerated the following allegations:

1. Mrs. Spade was fired without good cause;

2. Mrs. Spade was engaged in protected activities of which DHHR was aware and for which she was subsequently fired;

3. Mrs. Spade's termination is an unlawful reprisal;

4. The reasons stated by the DHHR for Mrs. Spade's firing are pretexts for the unlawful reprisal; and

5. Mrs. Spade was maliciously discharged.

A level four hearing was held in the Grievance Board's Beckley office on March 23, 2007. Respondent was represented by Jennifer Akers, Assistant Attorney General. The matter became mature for decision on April 23, 2007, the deadline for filing of the parties' proposed findings of fact

and conclusions of law.

## Synopsis

Respondent asserts Grievant was terminated because of her long history of leave abuse and poor work performance. Grievant asserts her firing was the result of unlawful reprisal for engaging in protected activities regarding office issues, such as the sufficiency and adequacy of office management.

Respondent met its burden of proof by proving the charges against the employee by a preponderance of the evidence. Therefore, this grievance must be denied.

Based on a preponderance of the evidence, I find the following material facts have been proven:

## Findings of Fact

1. Grievant was employed as an Economic Service Worker for the Bureau of Children and Families. She was located in Summers County.

2. Grievant was responsible for taking applications for clients who wished to receive Medicaid Nursing Home Benefits.

3. On January 26, 2004, John J. Najmulski, then Regional Director, sent Grievant a letter explaining she had been placed on Unauthorized Leave Status for December 5, 2003, and December 12, 2003. She did not have sufficient leave to cover her time out of the office on those days.

4. In February 2004, Grievant notified Janet Turner that she had been diagnosed with major depressive disorder and provided documentary evidence.

5. On March 3, 2004, Grievant was given a written reprimand from Mr. Najmulski. Mr. Najmulski had been forced to place Grievant on Unauthorized Leave Status for February 6, 2004, February 19, 2004, and February 26, 2004. The letter then went on to state that Grievant had previously been notified of her violations of the attendance policy and provided with an opportunity to correct her actions. Yet, given the continued abuse of the leave policy, the letter was to serve as a written reprimand. 6. Grievant did not grieve the written reprimand.

7. On March 8, 2005, Grievant was informed by Mary Ann Dean, Interim Regional Director, that she had been placed on Unauthorized Leave for February 28, 2005.

8. On June 28, 2005, Grievant was issued a written reprimand from Gayla Adkins, Family

Support Supervisor. This written reprimand was issued because Grievant failed to perform her duties.

9. Prior to issuing the written reprimand, Ms. Adkins had verbally counseled Grievant on numerous occasions concerning her work performance.

10. The reprimand issued on June 28, 2005, included a ninety day Corrective Action Plan which outlined Respondent's expectations. The reprimand also advised Grievant that help was available to her if she needed any assistance with work issues.

11. On July 1, 2005, Susan Godby was assigned to supervise Grievant because she had more familiarity with nursing home benefits.

12. Grievant filed a grievance on July 7, 2005, concerning the written reprimand she was given on June 28, 2005.

13. A level 2 conference was held on July 20, 2005. A written decision was issued on July 21, 2005. In that decision, Ms. Godby documented that Grievant acknowledged she had not performed her job duties as required and the problem with completing work load had been on going for an extended period of time.

14. Grievant never appealed this decision to level 3.

15. On September 30, 2005, Ms. Adkins and Ms. Godby completed Grievant's Employee Performance Appraisal ("EPA"). The appraisal was for the time frame of September 1, 2004 through August 31, 2005. 16. Grievant received an overall score of 1.5 out of a possible 3.00. A rating of 1.5 corresponds with "Needs Improvement." Grievant did not agree with the assessment and refused to sign her evaluation.

17. On October 26, 2005, Ms. Godby issued a written reprimand to Grievant for repeated failure to adhere to the leave plan established by Respondent. Grievant had also failed to comply with all the requirements of her Corrective Action Plan. Grievant was placed on a Performance Improvement Plan, the specifics were set forth in the October 26, 2005, letter.

18. On April 25, 2006, Grievant was suspended without pay for a period of ten working days for non-compliance with procedures and poor case work. Grievant had failed to follow the Corrective Action Plan provided to her in October, 2005, with regard to both work performance and leave usage. Grievant's case work revealed a severe lack of documentation. Several clients were improperly made eligible for food stamps and Medicaid Nursing Home benefits. Audits of the RAPIDS system, the

computer system used by Respondent, revealed that Grievant spent little time entering information into the system.

19. The suspension letter included a third Corrective Action Plan. The plan's requirements were clearly delineated in the suspension letter.

20. Grievant refused to sign the appraisal, but did not file a grievance.

21. During this period, a client's son applied for Medicaid nursing home benefits for his father in August, 2005. The application was taken by another worker who did not confirm the information and entered a recording as such, stating that an asset test needed to be run. 22. In January, 2006, Grievant approved the case and backdated the approval to August. The client's son had a question about his father's benefits and called the worker who originally took the application. The worker questioned the approval of Medicaid nursing home benefits because the family had originally reported over $200,000 in assets, specifically CD's.

23. When Ms. Godby reviewed the case, she discovered Grievant had changed the assets to $800 in a checking account and $0 in CD's. Ms. Godby sent a closure notice based on the assets originally reported.

24. Upon receipt of the closure, the client's son contacted Ms. Godby and explained that Grievant had informed him that, due to a change in policy, assets could be transferred from the client's name without penalty. He confirmed that he had provided verifying documentation regarding the $200,000 in CD's to both the worker who initially processed the application and to Grievant.

25. Ms. Godby verified that the information was originally inputted correctly by the employee who originally processed the application by going into the history of the document in the RAPIDS system. By reviewing that history, she was also able to verify Grievant went in and changed the assets, incorrectly making the client eligible for Medicaid nursing home benefits.

26. Ms. Godby discovered at least four other cases where Grievant had committed similar acts.

27. Ms. Godby shared this information with Janet Turner, Community Services Manager. Ms. Turner sent a memorandum to Sharon O'Dell, Director of Investigations and Fraud Management with the Office of the Inspector General ("OIG"). 28. Bennie Cogar conducted an investigation for OIG into Grievant's actions. Mr. Cogar interviewed numerous witnesses, including clients who had been improperly approved for benefits.

29. On July 12, 2006, Mr. Cogar issued a report concluding that Grievant approved at least two

applications for nursing home coverage where the individual was not eligible. Mr. Cogar also concluded Grievant used the internet for personal use excessively. He also found Grievant had violated the Negotiables Policy by accepting checks from outside sources on behalf of customers and not submitting those checks to the financial clerk.

30. Grievant's excessive use of the internet for personal use was demonstrated by a report which tracked Grievant's personal use of the internet at work. The report showed Grievant spent many hours on internet shopping sites. In April 2006, a total of 1,235 hits on internet sites were found.

31. With respect to the Negotiables Policy, when a check comes into the office, it must be logged and listed on a deposit slip. Grievant did not have access to deposit slips or access to make deposits.

32. Verna Welch, a local minister's wife, stated Grievant contacted her about providing emergency assistance for clients. Grievant would instruct Ms. Welch regarding whom to make the check payable. Grievant would either give her the name of the payee of instruct her to write the check to Respondent.

33. Respondent has no record of receiving this money.

34. On September 18, 2006, Ms. Turner issued a memorandum to Grievant regarding Unauthorized Leave. Grievant had taken 30.5 hours of leave between August 14, 2006 and September 6, 2006. Grievant failed to provide a doctor's statement asrequired by her Corrective Action Plan. Grievant was placed on Unauthorized Leave Status.

35. On September 18, 2006, Grievant was terminated from employment.

## Discussion

In dismissal cases involving classified employees, the burden of proof is upon the employer to establish the charges relied upon by a preponderance of the evidence and to establish good cause for dismissing an employee. *W. Va. Code* § 29-6A-6; *Davis v. W.Va. Dept. of Motor Vehicles*, Docket No. 89-DMV-569 (Jan.22, 1990); *Broughton v. W. Va. Div. of Highways*, Docket No. 92-DOH-325 (Dec. 31, 1992).

Permanent state employees who are in the classified service can only be dismissed for “good

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. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* Sections 12.02 and 03, Administrative Rules, W. Va. Div. of Personnel (June 1, 1998). The West Virginia Supreme Court of Appeals has also stated that "the work record of a long-term civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985). *See Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983); *Serreno v. W. Va. Civil Serv. Comm'n*, 169 W. Va. 111, 285 S.E.2d 899 (1982).

Grievant was terminated for inadequate job performance, attendance deficiencies, inordinate amount of time on the internet for personal use, and not following theNegotiables Policy. Respondent has proven all the allegations against Grievant by a preponderance of the evidence.

The evidence provided at the Level IV hearing showing Grievant changed assets to make certain individuals eligible for benefits is overwhelming. Her actions are appalling and amount to fraud. From the evidence presented, it is clear Grievant adjusted assets intentionally, making ineligible clients eligible for Medicaid benefits. While the reason is unclear, there is no justification for continually ignoring assets when determining Medicaid eligibility.

It is well documented Grievant failed to follow the attendance policy established by Respondent. On numerous occasions Grievant's absences required she be placed on unpaid leave status. While Grievant did submit several doctor's excuses for absences, they do not begin to touch the extent of time taken off from work. The undersigned does sympathize with the issues in Grievant's personal life, but it does not explain the excessive, unexcused absences.

Respondent presented computer reports showing the excessive amount of time Grievant spent on the internet. Grievant's time on the internet far outweighed her time spent in the RAPIDS system.

Lastly, Grievant failed to follow the Negotiables Policy by accepting, retaining and disbursing checks written to and on behalf of customers. Grievant's flagrant disregard for policy and fraudulent activity regarding Medicaid benefits clearly warrants her termination. Respondent has met its burden.

The following conclusions of law support this discussion:

## Conclusions of Law

1. In dismissal cases involving classified employees, the burden of proof is upon the employer to establish the charges relied upon by a preponderance of the evidence and to establish good cause for dismissing an employee. *W. Va. Code* § 29-6A-6; *Davis v. W.Va. Dept. of Motor Vehicles*, Docket No. 89-DMV-569 (Jan.22, 1990); *Broughton v. W. Va. Div. of Highways*, Docket No. 92-DOH-325 (Dec. 31, 1992).

2. Permanent state employees who are in the classified service can only be dismissed for "good 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. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* Sections 12.02 and 03, Administrative Rules, W. Va. Div. of Personnel (June 1, 1998). The West Virginia Supreme Court of Appeals has also stated that "the work record of a long-term civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985). *See Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983); *Serreno v. W. Va. Civil Serv. Comm'n*, 169 W. Va. 111, 285 S.E.2d 899 (1982).

3. Respondent has demonstrated that it had "good cause" to dismiss Grievant as Grievant's conduct constituted substantial misconduct.

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, and such appeal must be filedwithin 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.

**DATE: June 4, 2007**

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**Wendy A. Campbell**

**Administrative Law Judge**