WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

HAROLD A. BROWN,

Grievant,

v. **Docket No. 2008-1299-DHHR**

DEPARTMENT OF HEALTH AND

HUMAN RESOURCES/BUREAU

FOR CHILDREN AND FAMILIES,

Respondent.

DECISION

Harold A. Brown ("Grievant") initiated this proceeding on March 14, 2008, challenging a ten-day unpaid suspension imposed by his employer, the Bureau for Children and Families ("BCF") of the Department of Health and Human Resources ("DHHR"). He seeks as relief to have all pay and benefits lost during the suspension period restored to him and requests that the suspension not be considered during his next performance evaluation. This matter was filed directly at level three, and a hearing was convened before the undersigned in the Grievance Board's office in Westover, West Virginia, on October 1, 2008. Grievant represented himself, and DHHR was represented by Jennifer Akers, Assistant Attorney General. This matter became mature for consideration upon receipt of Respondent's fact/law proposals on November 3, 2008.

Synopsis

Grievant was suspended for ten days after it was discovered that he was not conducting federally-

mandated interviews required when food stamps cases are reviewed at 24 months, yet entering log information indicating that the reviews had been completed. He admitted he engaged in the conduct alleged and knew he was required to conduct the interviews, but alleged that a ten-day suspension was too harsh and that Respondent failed to follow its progressive discipline policy.

Policy Memorandum 2104 does not require that progressive discipline be followed in every case, and a suspension is permitted for a serious, singular incident. It was within Respondent's discretion to suspend Grievant for conduct which was serious in nature, with potential financial consequences for his employer. Grievant did not demonstrate that mitigation was required, and the grievance is denied.

Findings of Fact

1. Grievant has been employed by the BCF as an Economic Service Worker ("ESW") since March 1, 2001.

2. Grievant's job duties involve the management of a caseload of food stamp recipients, which includes processing applications for benefits, interviewing clients, and determining eligibility for benefits. He is also required to conduct periodic reviews of clients' cases to determine whether benefits should be altered or terminated.

3. After having been determined eligible for food stamps, some clients are approved for 24 months of benefits. At the conclusion of the two-year period, the ESW must interview the client, either in the office or by telephone, and conduct a review of the case. (See footnote 1) The ESW must determine if any changes in the client's circumstances warrant any change in benefits, and benefits cannot be continued until the ESW verifies that the reviewhas been completed. If an interview is not conducted, because the client is unavailable or refuses, the case can be closed after notification.

4. On February 7, 2008, one of Grievant's clients, "F.S.," (See footnote 2) came into the Monongalia County office, expressing concern that he had received a letter of notification of continuing benefits, even though he had not received an in-office interview as requested for a 24-month review.

5. Grievant's supervisor, Christine Hughes, reviewed the computer log for F.S.'s case, which revealed that Grievant had entered comments on January 9, 2008, stating that a 24-month review had been conducted. In the case comments, "conducted 24-month review" normally contains an additional notation of whether a phone or office interview was conducted, since an interview is

required. The notation “conducted 24-month review” contains an inference that an interview was conducted.

6. F.S. was not in the office, nor was he interviewed, on January 9, 2008.

7. Ms. Hughes met with Grievant on February 7, 2008, regarding the F.S. case. Grievant admitted he had entered case comments reflecting completion of a 24-month review, even though he knew that an interview was required and had not been done in that case. Ms. Hughes asked him if he had done this in any other cases; he initially said he had not, but when advised by Ms. Hughes that she would be checking records to verify the information, he stated that he “possibly” could have done this in a “few” other cases.

8. Ms. Hughes reviewed the records for all of Grievant's cases which were due for 24-month reviews during the months of October, November and December of 2007,contacting the clients to verify whether or not interviews took place. She discovered four more cases in which Grievant's records reflected completion of a 24-month review, but no interview had been conducted.

9. In some of the cases where Grievant did not conduct an interview prior to approval of continuation of benefits, the clients' circumstances had changed, which would have resulted in an alteration of their food stamp benefits. Grievant was directed by Ms. Hughes to conduct interviews in these cases and obtain the updated client information, which resulted in adjustments in their benefits. When clients receive benefits to which they are not entitled, this can result in sanctions from the federal government, and DHHR and the client can be required to repay funds.

10. On February 26, 2008, Paula Taylor, Community Service Manager, met with Grievant to discuss the allegations against him and the possibility of discipline. Grievant admitted he had engaged in the conduct as alleged, stating that his wife had been sick and he had been under stress at the office, due to being assigned additional work of absent employees. He promised that it would never happen again.

11. By letter dated February 27, 2008, Louis Palma, Regional Director, advised Grievant that he was being suspended for ten days, beginning on March 10, 2008. The specific cases in which Grievant falsely reflected completion of reviews were discussed individually, and Mr. Palma advised that Grievant was being suspended for falsifying client case records, having the potential to cause financial liability for the agency.

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 apreponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *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 & 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.*

There is no question in the instant case of Respondent proving the allegations against Grievant, in that he has admitted that he falsified client records and did not conduct federally-mandated interviews in several cases. However, he contends that DHHR failed to follow its progressive discipline policy and that a ten-day suspension was excessively harsh.

DHHR Policy Memorandum 2104, “Guide to Progressive Discipline,” has been construed as a permissive, discretionary policy that does not create a mandatory duty to follow a progressive disciplinary approach in every instance. *Oiler v. Dep't of Health & Human* Res., Docket No. 02-HHR-074 (Aug. 28, 2002); *Ferrell v. W. Va. Dep't of Health & Human Res.*, Docket No. 97-HHR-526 (Apr. 30, 1998); *Artrip v. W. Va. Dep't of Health and Human Serv.*, Docket No. 94-HHR-146 (Sept. 13, 1994). That policy states, in part:

> Determined by the severity of the violation, progressive discipline is the concept of increasingly severe actions taken . . . to correct or prevent an employee's initial or continuing unacceptable work behavior or performance. It is important to remember, however, that the level of discipline will be determined by the severity of the violation.

Specifically with regard to suspensions, the Policy Memorandum states that they “may be issued where minor infractions/deficiencies continue beyond the written warning **or** when a more serious singular incident occurs.” Resp. Ex. 5 (Emphasis added).

As recently noted in *Stiles v. Dep't of Health and Human Resources*, Docket No. 07- HHR-162 (March 31, 2008), pursuant to DHHR's progressive discipline policy, “a suspension may be issued for a 'serious singular incident . . .' and DHHR did not necessarily violate this policy by issuing a suspension for conduct which it believed was of a serious nature.” However, in that case, although a suspension was not found to be improper, mitigation was granted, due to the particular

circumstances in that case (employer did not have formal policies and/or training regarding the system Grievant was accused of abusing).

The argument that discipline 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).

As the evidence has established, Grievant's conduct had serious implications for his employer, in that the interviews he did not conduct were federally mandated, and he placed DHHR and his clients at risk of having to repay benefits. Indeed, other DHHR employees have been terminated for conduct involving falsification of agency documents. *See Richards v. Dep't of Health and Human Res.*, Docket No. 07-HHR-320 (Nov. 16, 2007);*Clay v. Dep't of Health and Human Res.*, Docket No. 96-HHR-315

(Nov. 27, 1996). Ms. Hughes explained that, although Grievant's behavior was serious enough that termination was discussed, administrators decided to suspend him, because of his tenure and good work record.

Under the circumstances presented, the undersigned cannot find any abuse of Respondent's discretion in disciplinary matters, and a ten-day suspension for falsification of important client records cannot be found to be excessive. The following conclusions of law are appropriate in this matter.

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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. DHHR's progressive discipline policy is a permissive, discretionary policy that does not create a mandatory duty to follow a progressive disciplinary approach in every instance. *Oiler v. Dep't of Health & Human* Res., Docket No. 02-HHR-074 (Aug. 28, 2002); *Ferrell v. W. Va. Dep't of Health & Human Res.*, Docket No. 97-HHR-526 (Apr. 30, 1998); *Artrip v. W. Va. Dep't of Health and Human Serv.*, Docket No. 94-HHR-146 (Sept. 13, 1994).

3. "[M]itigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measureis 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).

4. Respondent did not violate the provisions of its progressive discipline policy by imposing a suspension upon Grievant for falsifying food stamp case records.

5. Grievant has failed to prove that mitigation is necessary or appropriate in this case.

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. *See* W. Va. Code § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: November 24, 2008

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The interview at 24 months is mandated by the federal government for all food stamps recipients.

Footnote: 2

The initials of DHHR clients were used throughout this proceeding, in order to protect their privacy.