THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DAVID L. MAYNARD,
Grievant,

v. **Docket No. 2011-1430-DHHR**

WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES/
BUREAU FOR CHILDREN AND FAMILIES,
Respondent.

DECISION

Grievant, David L. Maynard, filed a grievance against Respondent on April 6, 2011. The statement of grievance reads:

> On November 10, 2010 Mr. Maynard asked case aide Phyllis Thompson to run a personal errand for him during work hours. Mr. Maynard acknowledges that this action was inappropriate, however, he grieves the disciplinary action taken against him on March 28, 2011 demoting him to the position of Child Protective Service Worker effective April 13, 2011.

In support of his grievance, an addendum was attached to his filing. As relief, Grievant seeks:

> Reinstatement to the position of Community Services Manager 1, an award of any back wages payable, a three (3) day suspension pursuant to the administrative policy of progressive discipline as the imposition of an appropriate disciplinary action, restitution of mileage expense claimed and case aide's wages reimbursed to DHHR, a reimbursement of any retirement benefits lost, and attorney fees."[1]

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[1]An ALJ for the Grievance Board is not authorized to grant attorney's fees. W. VA. CODE § 6C-2-6*; Long v. Kanawha County Bd. of Educ.*, Docket No. 00-20-308 (Mar. 29, 2001); *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-

Grievant elected to file directly to level three of the Public Employees Grievance Procedure in accordance with WEST VIRGINIA CODE § 6C-2-4(a)(4). A level three hearing was scheduled for September 22, 2011, at the Grievance Board's office in Charleston, West Virginia. Instead, a level two mediation was conducted. A level three hearing was conducted by the undersigned on October 24, 2011, at the Grievance Board's office in Charleston, WV. Grievant was represented by Lora L. Lake, Esq. Respondent was represented by Jennifer K. Akers, Assistant Attorney General. This matter became mature for decision upon final receipt of the parties' proposed findings of fact and conclusions of law on December 7, 2011.

Synopsis

Grievant, Community Services Manager I, abused his supervisory position by asking a Case Aide to perform a personal errand for him. Grievant also permitted employees' children in the workplace under certain circumstances. Although Grievant had never received any disciplinary actions during his 19 years of employment for Respondent, Respondent demoted Grievant to a Child Protective Services Worker for his offenses.

Respondent argues that the disciplinary action was appropriate for the offenses committed. Grievant argues that the demotion was excessive and inconsistent with discipline administered to another supervisor committing the similar offense of sending a Case Aide on a personal errand. Unlike Grievant, that supervisor received a three day

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HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June 21, 1996); *Cosner v. Dep't of Transp.*, Docket No. 2008-0633-DOT (Dec. 23, 2008). West Virginia Code § 6C-2-6 states in part, "[a]ny expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expense.'" Thus, the Board has no authority to grant attorneys fees as sought by Grievant.

suspension for her multiple offenses. Respondent does not have a written policy concerning employees' children in the workplace. Grievant has successfully demonstrated the affirmative defense that the penalty he received was clearly excessive and indicated an abuse of discretion. Accordingly, this grievance is GRANTED.

Findings of Fact

1. Grievant has worked for Respondent for approximately nineteen years. He began his employment as a Child Protective Services Worker on August 5, 1992.

2. At the time of the action arising to the filing of this grievance, Grievant was employed by Respondent as a Community Services Manager I in the Wayne County office.

3. On November 10, 2010, Grievant requested that Phyllis Thompson, Case Aide, run a personal errand for him. Ms. Thompson did perform the errand of driving to Kentucky to retrieve an item that Grievant desired to rebuild his recently burned down home.

4. Unbeknownst to Grievant, Ms. Thompson submitted a travel voucher for reimbursement of mileage for running the errand. Helen Wall, Social Services Supervisor, processed the travel voucher submitted by Ms. Thompson even though she was aware the trip was not business related. Ms. Wall did not discuss the reimbursement request with Grievant.

5. James Kimbler, Community Services Manager for Respondent's Wayne County office, received an anonymous phone call stating that Grievant had sent a Case Aide on a personal errand. Mr. Kimbler contacted Grievant regarding the allegation and subsequently discussed it with Grievant over an already scheduled lunch meeting. Grievant admitted to Mr. Kimbler that he sent Ms. Thompson to Kentucky on a personal

errand.

6. Ultimately, Mr. Kimbler determined that the incident needed to be investigated. He interviewed staff at Respondent's Wayne County office.

7. During the investigation Ms. Thompson notified Mr. Kimbler that other than the trip to Kentucky giving rise to the present grievance, Grievant had never requested that she perform any other personal errand for him. Ms. Thompson notified Mr. Kimbler that Natalie Murphy, CPS Supervisor, had requested that Ms. Thompson perform a personal errand for her on three to four occasions.[2] Ms. Thompson did perform the personal errands for Ms. Murphy. Ms. Thompson never informed Grievant of Ms. Murphy's errand requests.

8. Ms. Murphy also sent Vickie Maynard, Case Aide, on personal errands, including going to Wal-Mart and picking up prescriptions.[3]

9. Ms. Thompson and Nancy Lewis, formerly a Case Aide now working as an Office Assistant, had been instructed by Grievant on 3 separate occasions to deliver a sealed brown envelope to the Wayne County School Board.

10. Ms. Wall and Ms. Murphy were both suspended for three (3) days for their actions.

11. Grievant was demoted to Child Protective Service Worker, effective April 13, 2011.

12. Grievant was demoted from a paygrade 18 to a paygrade 15.

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[2]Level three hearing testimony of Phyllis Thompson.

[3]Level three hearing testimony of Vickie Maynard.

13. Grievant had never received any prior reprimand or discipline prior to this demotion.

14. A predetermination conference was held on March 11, 2011.

15. Grievant received a disciplinary letter dated March 28, 2011. The letter notified him of his demotion from Community Services Manager I to a Child Protective Service Worker. The letter stated, in part:

> On November 10, 2010, you directed Phyllis Thompson, Health and Human Resource Aide, to travel to Olive Hill, Kentucky to run a personal errand for you. This errand had nothing to do with the business of our agency. According to Ms. Thompson, she advised you that her back was hurting. Ms. Thompson complied with your directive traveling a distance of 122 miles on agency time and at agency expense. This was not only a personal errand, it was an out of state travel which requires prior approval. Upon her return, Ms. Thompson submitted an expense account for $49.41 in order to cover the expenses she incurred to her immediate supervisor, Helen Wall. Ms. Wall approved and signed the expense account even though she believed it not to be related to the business of the agency. She realized that you had directed Ms. Thompson to make the trip and therefore felt compelled to approve the expense. Your actions placed Ms. Wall in a position of jeopardizing her career. This action was careless and thoughtless.
> ...
> Your actions in this matter are in violation of West Virginia Code § 6B-1-2 which states in part that "The Legislature herby finds that the holding of a public office or public employment is a public trust"...
> ...
> Your actions are also in violation of West Virginia Code § 6B-2-B(b) which states that a public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person.
> ...
> In addition to this event, it was discovered during the course of interviewing employees that you condoned and allowed a common practice for employees to have their children at work for long periods of time. It was learned that parents frequently bring their children to work when there is no school for such things as snow days, holidays, Spring break and sometimes when a child is too ill to attend school or if daycare is unavailable. Case Aides and other employees are sometimes asked to supervise the children. The children are sometimes given activities to do such as shredding

documents and affixing labels to envelopes.[4]

16. At the predetermination conference, Grievant admitted that he shouldn't have sent Ms. Thompson on a personal errand. He offered to repay Ms. Thompson's mileage and wages for the trip to Kentucky. Grievant stated that he was not aware of anything in the office security policy that would have been directly violated by having children in the workplace. Grievant stated that he felt as though the benefit to the staff outweighed any small inconveniences. Grievant was not aware that the children were shredding papers or affixing envelope labels. He stated that children are in the office when the parent has daycare problems and that a few children get off the bus at the office at 3:30pm when their working parent's shift ends at 4:00pm. Grievant stated that if he had been told not to allow this, he would have stopped the practice of allowing children to come to the office with their parents.

17. On April 7, 2010, Mr. Kimbler had sent Grievant an email[5] with the subject line "Breach of Confidentiality." The email stated, in part:

> Dave, it was reported to me that Dede and Natalie routinely bring their children to work and that they are present during specific case conversations regarding child abuse and molestation with specific case names being used.
> ...
> If this is happening, it's a serious breach of confidentiality not to mention the issue of work time/visitor policy, etc.

18. Grievant allowed employees to bring their children into the workplace to prevent the employee from missing work. Although Grievant was aware that employees were bringing their children to the workplace when extenuating circumstances existed, he

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[4]Respondent's Exhibit No. 3, demotion letter dated March 28, 2011.

[5]Respondent's Exhibit No. 2, email from Mr. Kimbler to Grievant.

was unaware that other employees were being asked to supervise someone else's child.

19. There is no written DHHR policy concerning employees bringing children into the workplace. Mr. Kimbler never gave Grievant any written or oral directive stating that disciplinary action would be taken if Grievant allowed employees to bring children to the workplace. Mr. Kimbler has never known Grievant to ignore any directive he had given him.

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 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.*

Respondent argues that a demotion from a Community Services Manager I, paygrade 18, to a Child Protective Service Worker, paygrade 15, was appropriate disciplinary action. Respondent argues that Grievant should not remain in a position of authority. Respondent argues that the few times Grievant asked Case Aides to deliver sealed brown envelopes to the Wayne County School Board were likely to have been personal errands involving Little League and sport-related contents. Respondent does not find Grievant's demotion to be excessive or an abuse of discretion.

Grievant argues that his discipline was excessive and inconsistent with Respondent's Guide to Progressive Discipline. Grievant admits that sending Ms. Thompson on a personal errand was clearly wrong. Grievant asserts that he did not interpret the April 7, 2010 email from Mr. Kimbler with the subject line of "Breach of Confidentiality" to be a directive that children were not allowed in the workplace. Grievant interpreted that email to address the importance of protecting confidential client information in the presence of third parties. Grievant argues that his demotion should be mitigated to a three day suspension because Ms. Murphy, CPS Supervisor, has sent Case Aides on personal errands and received a three day suspension as her discipline. As for the sealed brown envelopes that Grievant asked Case Aides to deliver to the Wayne County School Board, both Case Aides testified at the level three hearing and neither witness knew for certain the contents of the envelope and admitted that the delivery may have been work related.

Respondent's Policy Memorandum 2104, Guide to Progressive Discipline, provides for a system that begins with a verbal reprimand, followed by a written reprimand, suspension, demotion and then dismissal. The policy states "the point on the continuum at which the agency initiates disciplinary action must be determined by the concept of like penalties for like offenses." The policy states that the progressive continuum should be followed in most cases but that "the level of discipline will be determined by the severity of the violation."[6] The Guide to Progressive Discipline further explains the levels of discipline. The Policy states "Demotion for cause may be the final attempt at corrective action prior

[6]Grievant's Exhibit No. 2, Respondent's Guide to Progressive Discipline.

to dismissal."

The 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). "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).

Even though Grievant's poor decision was due to the enormous stress he was under from the unfortunate circumstance of his home being burned down, he was a supervisor and should not have asked Ms. Thompson to run any personal errand for him. He not only put Ms. Thompson in a horrible situation, but he also put Ms. Wall in the unnecessary situation of having to decide whether to approve reimbursement for travel she knew was not work related. Grievant's actions put Ms. Wall in an uncomfortable position. Unfortunately, Ms. Wall chose to process the travel voucher submitted by Ms. Thompson.

As a result, Ms. Wall was suspended for three days.[7]

In Grievant's 19 years of working for Respondent, he has not received any disciplinary actions. Grievant's Employee Performance Appraisals[8] indicate an above average performance history. Mr. Kimbler testified that Grievant was the best Community Services Manager he has supervised as to the community aspect of the position, in his coordination with law enforcement agencies, the court system and other agencies providing services to the outlying community. Mr. Kimbler also testified that Grievant took an active role in the community and has been an active and valuable member of the Family Resource Network and the local Housing Authority.

Another supervisor, Ms. Murphy, committed similar offenses. Ms. Murphy sent Case Aides on personal errands on more than one occasion. Mr. Kimbler discovered these offenses while investigating Grievant's actions. As a result, Ms. Murphy received a three day suspension.

Mr. Kimbler testified that there is no written DHHR policy concerning employees' children in the workplace. Although Respondent argues the April 7, 2010 email to Grievant was a directive prohibiting children in the workplace, Grievant did not interpret the email as such. Other than that email concerning breach of confidentiality when discussing client information in front of children in the office, Mr. Kimbler testified that he did not give Grievant any oral or written directives advising him not to allow the practice of employees'

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[7]The undersigned can only hope that Grievant realizes that Ms. Wall's record of suspension and loss of pay for three days exist not only because of her decision but because his actions put her in the unnecessary situation.

[8]Grievant's Exhibit No. 1, Grievant's Employee Performance Appraisals ranging from 1993 to 2007.

children coming to the workplace. Mr. Kimbler testified that he had never known Grievant to ignore any directive he had given him. The undersigned finds that Grievant's actions on this matter are correctable.

Respondent's lack of policy, directive and clarity on the prohibition of children in the workplace does not warrant a demotion for Grievant's offense on the matter. However, Grievant was present throughout the entire level three hearing and can no longer claim to lack understanding of Respondent's desires on the matter. Grievant has a positive work history extending over 19 years for Respondent. Grievant's demotion was inconsistent with the disciplinary action given to a supervisor found guilty of similar offenses. The other supervisor received a three day suspension. Grievant has successfully demonstrated that the disciplinary measure taken by Respondent of demoting him was so clearly disproportionate that it indicates an abuse of discretion.

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 &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. Grievant committed a violation by intentionally asking a subordinate

employee to run a personal errand for him.

3. Due to Respondent's lack of policy, directive and clarity on the prohibition of children in the workplace, Respondent failed to demonstrate that Grievant violated a directive on this matter.

4. The 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).

5. "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).

6. Grievant's demotion was inconsistent with the disciplinary action given to a supervisor guilty of similar offenses. That supervisor had sent Case Aides on multiple personal errands and received a three day suspension. Grievant has successfully demonstrated that the disciplinary measure taken by Respondent of demoting him was so clearly disproportionate that it indicates an abuse of discretion.

Accordingly, this grievance is GRANTED. Respondent is ORDERED to reinstate Grievant in the position of Community Services Manager 1, to pay him all back pay and benefits to which he is entitled and to issue Grievant a thirty day suspension. Grievant is ORDERED to pay restitution to the State of West Virginia for the wages paid to Ms. Thompson on November 10, 2010, and to pay $49.41 for reimbursement of the mileage expenses paid.

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: January 20, 2012

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Jennifer Lea Stollings-Parr
Administrative Law Judge