WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JEFFREY E. SMITH,
Grievant,

v. **Docket No. 2012-0451-ClaCH**

CLAY COUNTY HEALTH DEPARTMENT,
Respondent.

D E C I S I O N

Grievant, Jeffrey E. Smith, filed this grievance against Clay County Health Department ("CCHD"), Respondent, on October 24, 2011, protesting his dismissal from the position of Local Health Administrator. Grievant's eleven-page grievance statement provides amidst numerous other contentions, that the "Health Office and the Clay County Board of Health failed to follow West Virginia Department of Personnel's policies which was directly causal to any unsatisfactory job performance." Grievant seeks, *inter alia*, to be reinstated to the position of Administrator and that his employment records be expunged of disciplinary letters of reprimand, suspension and dismissal.

Grievant exercised his right pursuant to W. Va. Code § 6C-2-4(a)(4) to file directly at level three. A level three hearing was held before the undersigned Administrative Law Judge on February 2, 2012, in the Grievance Board's Charleston office. Grievant appeared *pro se*, and Respondent was represented by Christopher D. Negley, Esquire. This case became mature for decision on March 1, 2012, the deadline for the submission of the parties' proposed findings of fact and conclusions of law.

Synopsis

Respondent dismissed Grievant from his position of Local Health Administrator citing unacceptable job performance. Grievant contends training and evaluation deficiencies by Respondent. Grievant argues any unsatisfactory job performance was casually related to Respondent's failure to follow West Virginia Division of Personnel policy. Respondent established by a preponderance of the evidence that Grievant's performance of his identified and duly assigned duties were unsatisfactory. Respondent demonstrated good cause for Grievant's dismissal. Grievance DENIED.

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

Findings of Fact

1. Respondent provides local health services to citizens of Clay County and surrounding counties. Respondent's funding comes primarily from grants administered by State Department of Health and Human Resources, Bureau of Public Health ("BPH"). The Respondent's annual budget is approximately $1.7 million dollars.

2. Respondent must provide budgeting and spending information to those entities from which it receives grants and must, additionally, provide an annual budget to the Clay County Board of Health.

3. The largest grant Respondent receives stems from the Special Supplemental Nutrition Program for Women, Infants and Children ("WIC"). While the grant is federal, it is administered by BPH.

4. The WIC grant allows Respondent to provide services to six counties, including Clay, and is the chief revenue source for the salary of approximately twenty

individuals employed by Respondent. A caveat of the grant requires Respondent to affirmatively agree to be a program sponsor on a yearly basis. Should Respondent not "agree" to be a WIC provider, the grant administrator would find another entity to be the WIC provider. For Fiscal Year 2012, the grant totaled approximately $700,000.

5. The BHP requires Respondent to provide an Annual Program Plan accounting for spending related to Respondent's administering of the WIC grant.

6. Dr. Leela Patel is the Health Officer for Respondent. Local Health Officer "means the individual physician, with a current West Virginia license to practice medicine, who supervises and directs the medical activities of a local health department and is appointed by the local board of health with approval from the Commissioner." 64 C.S.R. 95 § 2.6.

7. Dr. Patel supervises the Local Health Administrator, however, she is not on site on a daily basis.

8. A Local Health Administrator I ("Administrator") is in charge of the day-to-day operations of Respondent's Clay County Office. The Administrator reports to the Health Officer and to the Clay County Board of Health.

9. Duties of the Administrator include, but are not limited to:

- Preparing Budgets
- Preparing the Annual Program Plan required by the BPH
- Preparing and/or overseeing payrolls
- Processing and/or overseeing accounts payable
- Processing and/or overseeing accounts receivable
- Personnel Management
- Materials Management including procurement and inventory
- Serving as Chief Information Officer

(Job Description, Local Health Administrator I, R. Ex. 6).

10. In late 2010, Respondent's former Administrator Linda Klotzbach retired.

11. On February 14, 2011, Respondent posted a Job Description for a Local Health Administrator I (R. Ex. 1). The closing date for the posted position was February 24, 2011.

12. Respondent's job description posting was based upon the West Virginia Division of Personnel's position description of a Local Health Administrator I classification. (R. Ex. 2).

13. On February 16, 2011, Grievant completed a West Virginia Division of Personnel, Application for Examination for the position. (R. Ex. 3). The application cited, *inter alia*, Grievant's management of budgets and grants. Grievant also included a resumé as a part of his application (R. Ex. 4). The resumé noted, *inter alia*, Grievant's training in grant writing.

14. Grievant was interviewed for the position. The interview was conducted by members of the Clay County Board of Health, by Dr. Leela Patel and by Mr. Lloyd White, a Local Health Administrator for Marion County, West Virginia.

15. During the interview process Grievant indicated that he was skillful in grant writing, preparing budgets and completing fiscal documents. Respondent expected its Local Health Administrator to perform these duties.

16. Grievant was offered the position of Administrator and accepted. Grievant's first day with Respondent was May 2, 2011. Grievant received the Respondent's New Employee Checklist upon employment. (R. Ex. 15).

17. Grievant, prior to his appointment with Respondent, had been a permanent employee for approximately seventeen years with the West Virginia Department of Health and Human Resources. (R. Ex. 3).

18. Grievant was hired by Respondent as a "permanent employee." The Administrative Rule of the West Virginia Division of Personnel defines permanent employee.

> Permanent Employee. Any classified employee who was hired from a register and who has completed the probationary period prescribed by the State Personnel Board for the job class, or any classified-exempt employee who was hired to fill a position for an unlimited period of time, notwithstanding the appointing authority's right to terminate the employee for cause or at his or her will.

143 C.S.R. 1 § 3.66

19. Approximately three weeks after Grievant was hired, the Clay County Board of Health held a meeting (R. Ex. 8). During the May 26, 2011 meeting, Dr. Patel and Board President McLaughlin indicated that Grievant was failing to perform the duties of an Administrator.

20. Grievant responded that he was unfamiliar with the duties of an Administrator.

21. Respondent prepared and reviewed with Grievant a job description, outlining the responsibilities of the position, subsequent to Grievant's representations. (R. Ex. 6.)[1]

22. Grievant's inability and/or failure to complete the duties of Administrator became more apparent during the following month. Routine administrative duties historically performed by the Administrator were not completed.

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[1] Respondent's Exhibit 6 was signed on August 19, 2011, however, testimony given by Dr. Patel indicated that Grievant received a Job Description of his position following the May 26, 2011 meeting but refused to sign it for more than two months. Job Description noted in May 26, 2011 Board minutes, R. Ex. 8.

23. Grievant continued to maintain that he needed additional training to complete the responsibilities of an Administrator or that other employees should be doing the duties that were not being performed.

24. Grievant was familiar with the duties and responsibilities of a Sanitarian.[2] Grievant did leave the office for periods of time assisting or performing the duties of a Sanitarian.

25. At that time, Respondent had another individual employed to perform the duties of a Sanitarian.

26. On July 7, 2011, the Clay County Board of Health convened a Special Meeting to discuss Grievant's inability to complete the duties of an Administrator (R. Ex. 9). During this meeting the Clay County Board of Health and Dr. Patel discussed with Grievant that routine budgeting matters were being ignored and an Annual Program Plan had not been prepared.

27. Grievant was encouraged to contact other professionals in the local health field, (e.g., other Administrators) for assistance to better understand the position.

28. On or about August 2, 2011, Grievant received a "verbal and written reprimand and warning" from the Clay County Board of Health for his failure to perform the duties of Administrator for the Respondent (R. Ex. 7). The written reprimand and warning provided that " Several issues were discussed with you during the May 26, 2011 and July 7, 2011, Board of Health meeting wherein the Board of Health determined you violated or attempted to violate a number of policies and/or procedures." Grievant was warned that

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[2] Performance of duties in the enforcement of environmental and public health sanitation laws. For example, conducts inspections, investigations, evaluations and educational programs in environmental and public health sanitation programs.

future violations of Respondent's policies and/or procedures could result in the termination of Grievant's employment.

29. On August 16, 2011, the Clay County Board of Health met again. Grievant's performance of the duties of an Administrator for Respondent was discussed (R. Ex. 10). Following this meeting Grievant agreed to sign the Job Description, which had been previously discussed with him.

30. Respondent's Local Health Administrator is responsible for personnel management issues of the office. (R. Ex. 6).

31. On or about August 31, 2011, Dr. Patel notified Grievant to attend a level one grievance filed by another employee of Respondent.

32. The level one grievance was scheduled for September 2, 2011 and involved an individual with whom the Grievant had a better working relationship than with others in the office.

33. On or about August 31, 2011, Grievant filed for an application for leave with pay for September 2, 2011. (R. Ex. 17).

34. Grievant did not attend the September 2, 2011 level one grievance hearing.

35. Grievant did not receive approval from his supervisor (Dr. Patel) prior to taking time off on September 2, 2011 as leave.

36. Respondent had desired that Grievant attend the level one grievance hearing scheduled for September 2, 2011.

37. Grievant was assigned as a part of his duties to attend the Clay County Apple Festival and to inspect mobile food units for sanitation and cleanliness. Grievant was to use the *Guidelines for Operating a Temporary Food Service Commission.* (R. Ex. 21).

Grievant had previously served as a Registered Sanitarian and was familiar with the Guidelines. The Guidelines require that "each food service concession" be inspected. *Guidelines*, page 1.

38. Grievant inspected five vendors (R. Exs. 13 and 34) and did so on the second day of the Festival. There were more than five vendors providing food at the festival.

39. Grievant admitted to inspecting only five vendors and that he quit inspecting vendors when he ran out of forms.

40. A number of food concession vendors who served food at the Clay County Apple Festival were not duly inspected. The exact number is not reliably identified.

41. Grievant was responsible, among other things, for preparing the Annual Program Plan for the WIC grant, the Threat Preparedness Grant and the annual budget.

42. In late August 2011, Jeannie Ladd-Bird, Director of the Central West Virginia WIC program received correspondence from Cindy Pillo, an employee of the Office of Nutrition Services within the DHHR. Director Ladd-Bird was informed that Grievant had failed to timely send in the necessary paperwork for Respondent to continue as a WIC provider and that he failed to prepare the Annual Program Budget for the retention of the WIC grant. Accordingly, Respondent was in grave danger of being denied as a continuing WIC program provider.

43. The disruption of the WIC program for six counties and loss associated administration fees contained in the grant was in jeopardy.

44. Director Ladd-Bird discussed with Grievant the WIC grant and the Annual Budget Plan. Grievant indicated he did not know how to draft either the Annual Budget or the budget narrative as required to retain the WIC grant.

45. As a direct result of Grievant's inability or failure to perform the duties of Administrator, Respondent rehired Linda Klotzbach, its former administrator, as a contract worker to complete the WIC grant process for Respondent. Ms. Klotzbach was able to successfully secure the WIC grant for the Respondent.

46. The Administrator was also in charge of drafting the Fiscal Year 2012 "Threat Preparedness Base Grant" justification. (R. Ex. 32). This grant comes from the United States Department of Homeland Security and is administered by the BPD. Funding for Public Health Threat Preparedness is comprised of two federal grants from the Centers for Disease Control and Protection (CDC) Bioterrorism (BT) Preparedness and Response Cooperative Agreement. The purpose of the grant is to allow local health departments to address bioterrorism, infectious disease outbreaks, and public health threats and emergencies.

47. The grant requires the Local Health Department to allocate funding for identified activities and personnel actively involved in Threat Preparedness.[3] In order to accurately assess each worker's time spent on Threat Preparedness, the Administrator must familiarize himself with the duties performed by the various employees, etc. in order to accurately assess each worker's time spent on Threat Preparedness.

48. Grievant did not properly complete the grant documentation. Grievant allocated time equally for each employee, i.e., the grant as submitted by Grievant reflected that each worker, from clerical to administrator, spent 8.33% of their time on Threat Preparedness. Further, the accompanying budget documents were presented without any

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[3] For example, if an employee spends 50% of his or her time in Threat Preparedness, then 50% of their time can be allocated to their grant.

backup information and did not contain accurate personnel and figures to substantiate the document.

49. In that the grant had not been properly submitted, the BPH contacted former Administrator Linda Klotzbach. Ms. Klotzbach redid the grant to the satisfaction of BPH. (R. Ex. 31).

50. Grievant was tasked with preparing the annual budget for Respondent (R. Ex. 6). Grievant failed to timely and properly do so.[4] This task was set forth in Grievant's job description.

51. Grievant, as Administrator, was in charge of materials management for Respondent. Grievant purchased $1,800.00 worth of nutrition materials for the WIC program and had them imprinted with the Clay County Health Department logo. Respondent oversees WIC programs in five additional counties making the materials virtually useless in those counties. Grievant was seemingly unaware that Respondent's WIC program receives these materials for free. Grievant did not discuss the purchase with the WIC program director prior to ordering.

52. Grievant purchased an approximately $9,800.00 security system without approval from the Health Officer or the Clay County Board of Health.

53. Grievant did not adequately understand the materials management needs and budget constraints associated with various programs administered by Respondent.

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[4] Grievant testified that he was denied entry into the Quick Books accounting system by a subservient employee. Thus, he could not calculate Respondent's budget. Grievant's contention is particularly egregious (disingenuous) given that he was the Administrator and had the right to request Quick Books entry the day he began as Administrator.

54. Grievant failed to complete employee appraisals in a timely manner. (R. Ex. 25).

55. At an October 3, 2011 Board meeting, Grievant discussed with the Board his performance of his job duties as an Administrator. Grievant provided that he did not "remember" some of the duties, was not proficient in others and thought some should be performed by other employees of the Respondent.

56. On October 3, 2011, Respondent suspended Grievant with pay. The verbal suspension occurred during a Clay County Board of Health meeting. A formal suspension letter followed on October 5, 2011. (R. Ex. 12).

57. Respondent terminated Grievant from his position as the Local Health Administrator with the Clay County Health Department. (R. Ex.13).

58. The five-page, October 14, 2011 Dismissal Letter referenced several reasons for the Board's determination that Grievant's job performance was unacceptable, in addition to more specific information the document provides:

> During the May 26th, 2011 and July 7th, 2011 Board of Health meeting, you were verbally notified of a number of agency policy and procedure violations that would result in a written warning up to and including dismissal. On August 2nd, 2011, Joyce McLaughlin, Board of Health President, hand delivered the "verbal warning and written reprimand" letter from the Clay County Board of Health . . . [.]
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> You have demonstrated an inability to communicate effectively as a leader with other Health Department staff. Specifically, you failed to address legitimate fiscal concerns of staff in a timely manner. As a result of your unwillingness to act, routine agency operations were adversely affected to the point of urgency. This required the hiring of additional staff to complete duties that were your responsibility.

* * *

> The State of West Virginia and its agencies have reason to expect their employees to observe a standard of conduct which will not reflect discredit on the abilities and integrity of their employees, or create suspicion with reference to their employee's capability in discharging their duties and responsibilities. The nature of your misconduct demonstrates a willful disregard of the employer's interests or a wanton disregard of standards of your **unacceptable job performance** is sufficient to cause me to conclude that you did not meet an acceptable standard of conduct as an employee of Clay County Health Department thus warranting your dismissal. (Emphasis in original).

(R. Ex. 13).

Discussion

As this grievance involves a disciplinary matter, Respondent has the burden of proving its case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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, a party has not met its burden of proof. *Id.*

The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226

(1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, [175 W. Va. 279, 284,] 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir. W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994).

Grievant was appointed to the permanent position of Local Health Administrator I with Respondent. The description for the job detailed and required, *inter alia*, the candidate perform "responsible administrative" work for a local health department. R. Ex. 1. Respondent further defined the responsible administrative duties to consist of items including, but not limited to, budgeting, grant writing, personnel management and procurement. R. Ex. 6. Primarily, Grievant offered two excuses for his failure and/or inability to perform the duties of a Local Health Administrator; first contending, he was not properly trained; second, Grievant argues that Respondent should have conducted an employee appraisal which he states would have allowed him the opportunity to rectify his conduct.

The undersigned is not persuaded by Grievant's argument. Grievant represented to the interviewers that he could perform the functions of a Local Health Administrator and then testified during the grievance hearing that (1) he did not know how to do the job and

(2) needed additional training.[5] During the hearing Grievant readily admitted that he had limited experience administering agency budgets and grant writing. Further, contrary to Grievant's misplaced belief, it is not established that Respondent was required to formally evaluate Grievant's performance of the position's duties within thirty day of his employment. Grievant was not an initial hire. Grievant had seventeen years of service with the State, transferring to Respondent as a permanent employee. Pursuant to West Virginia Division of Personnel rules, Grievant was hired by Respondent as a "permanent employee." *See* 143 C.S.R. 1 § 3.66.

The Administrative Rule of the West Virginia Division of Personnel provides when a Performance Evaluation is required for a permanent employee. The section reads:

> The Director of Personnel, after consultation with the appointing authorities, and with the approval of the Board, shall establish and make effective a system of performance evaluation designed to provide a valid evaluation of the quality and quantity of work performed by employees. Insofar as practicable the system of performance evaluation in the classified service shall be standardized. **The appointing authority shall prepare and record evaluations for all permanent employees at regular intervals not to exceed twelve months.** The appointing authority shall consider performance evaluations as well as other recorded indicators of performance in determining salary advancements and in making promotions, demotions, and dismissals. The appointing authority shall notify an employee of his or her performance evaluation in writing and shall retain copies of performance evaluations in the employee's personnel record. (Emphasis added).

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[5] Grievant was interviewed for the job by Dr. Leela Patel, Health Officer, members of the Clay County Board of Health and Lloyd White, Administrator of the Marion County Health Department. During this interview the needs of Respondent with specific emphasis on budgeting and grant writing was discussed. Grievant's application for examination and resumé indicated knowledge regarding these areas. Grievant specifically lead Dr. Patel, Ms. McLaughlin and the other interviewers to believe that he understood the nature of the job and was prepared to fulfill the duties and responsibilities of the position.

143 C.S.R. 1 § 15. Grievant was entitled to a performance appraisal within twelve months. Accordingly, Grievant's argument that he was denied a mandatory one-month appraisal is without merit. Notwithstanding, Grievant cannot in good faith represent that Respondent was not clear regarding his performance of the position's duties. Approximately three weeks after Grievant was hired, the Clay County Board of Health held a meeting where Grievant's job performance was discussed with him. This was done at and during both the May 26, and July 7, 2011 Board of Health meetings. Grievant's inability or failure to complete the duties of an Administrator was readily evident.

Respondent identified the duties of the Local Health Administrator with the Clay County Health Department. Grievant was made aware of Respondent's expectation, repeatedly. Respondent provided numerous examples of Grievant failing to perform the duties identified, and reasonably expected, to be performed by the individual employed as the Administrator. Respondent demonstrated that Grievant failed to accomplish drafting the Annual Budget and necessary accompanying documents for the WIC program or even to file the necessary paperwork for Respondent to continue as a WIC provider. As a direct result, Respondent was forced to hire its former administrator as a contract employee to complete the filing. Respondent demonstrated that Grievant failed to properly draft the Threat Preparedness Grant and its accompanying documents. Respondent established that Grievant failed to properly finalize the annual budgeting for Respondent. Respondent demonstrated the poor quality of Grievant's inventory management. Respondent also demonstrated several other areas wherein Grievant failed to perform the duties of the Administrator, to-wit, failure to timely complete employee evaluations, failure to properly inspect food vendors at the Apple Festival and dubious use of leave resulting in Grievant

not being present at a Level One Grievance. Respondent established good cause for Grievant's dismissal.

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 Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008).

2. The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, [175 W. Va. 279, 284,] 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir. W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994).

3. Respondent established by a preponderance of the evidence that Grievant's performance of his duties was unsatisfactory. Respondent demonstrated good cause for

dismissal of Grievant from his employment. Respondent met its burden of proving its dismissal of Grievant was for good cause.

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: April 17, 2012

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Landon R. Brown
Administrative Law Judge