THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

LISA JEAN PUFFINBURGER,
Grievant,

v. **DOCKET NO. 2012-0824-DOE**

DEPARTMENT OF EDUCATION/SCHOOLS
FOR THE DEAF AND BLIND,
Respondent.

DECISION

This grievance was filed at level three of the grievance procedure by Grievant, Lisa Jean Puffinburger, on February 6, 2012, after she was dismissed from her employment as a service employee at the Schools for the Deaf and Blind, by the State Board of Education, for falsification of a return to work slip. The statement of grievance reads: "18-17-8 insubordination and wilful neglect of duties, I was put on probation in June 2011 for misuse of leave. In Sept. 13, 2011 I had a heart-attack and went over my days with pay, which was what my probation said I couldn't do." The relief sought by Grievant is "[r]e-instated in my position because all the days I have miss[ed] has been due to illness or Dr. appts.[,] reimbursed all lost wages and any and all medical expense my family or I incurr [sic] during the appeal."

A level three hearing was held before the undersigned Administrative Law Judge on June 1, 2012, at the Grievance Board's Westover, West Virginia office. Grievant appeared *pro se*, and Respondent was represented by Sherri D. Goodman, Esquire, Staff

Attorney for the Department of Education. This matter became mature for decision on July 5, 2012, on receipt of the last of the parties' written arguments.

Synopsis

Grievant was dismissed from her employment by Respondent for falsification of her return to work slip, while she was on an improvement plan for excessive absenteeism. Respondent demonstrated that Grievant falsified her return to work slip, altering the return to work date to a date 12 days later than that placed on the slip by the doctor who had signed the slip, and that Grievant did not return to work when she was able to do so.

The following Findings of Fact are made based on the record developed at the level three hearing.

Findings of Fact

1. Grievant was employed under a continuing contract by the State Board of Education ("SBOE") at the Schools for the Deaf and Blind as a Custodian/Driver. She began her employment with SBOE on October 30, 2001, as a substitute employee, and became a permanent employee on December 16, 2001.

2. On June 3, 2011, Grievant received a written reprimand for excessive absenteeism and habitual tardiness. Grievant was placed on an improvement plan by her supervisor, Joseph D. Corbin, Principal of the Secondary School for the Deaf, on June 6, 2011, for "habitual misuse of leave and excessive absenteeism; willful neglect of duty because of chronic absenteeism and not reporting to work as scheduled." The improvement plan stated that Grievant had used 65.75 days of leave without pay between October 1, 2010, and May 31, 2011, and that she exhausts all her leave "as quickly as it

is earned." The improvement plan goals were for Grievant to have one or fewer occurrences of leave without pay through June 30, 2011, and from July 1 through December 30, 2011, Grievant was expected to manage her leave "in a planned, responsible manner and accrue enough leave to take care of her personal and medical needs. During this time there will be no occurrences of leave without pay."

3. Grievant was off work on sick leave on July 5, 6, 7, 8, 18, 20, and 21, and took annual leave on July 29, and one quarter of an hour of annual leave on July 11 and 19, 2011. Grievant was off work on sick leave on August 11, 25, and 26, and took annual leave on August 10, and one quarter hour on August 2, 4, and 24, 2011.

4. Grievant suffered from a heart attack on September 13, 2011, and did not return to work until October 12, 2011. She exhausted all her sick and annual leave on September 22, 2011, and was notified of this by letter dated September 28, 2011. This letter further advised Grievant that, if she did not return to work by October 3, 2011, she would need to submit checks to pay the premium for her health insurance.

5. Grievant did not submit documentation from her doctor stating that she was able to return to work until October 28, 2011.[1] This documentation, referred to as a return to work slip, was dated October 10, 2011, and stated that she could return to work with no restrictions on October 10, 2011. The return to work slip submitted by Grievant to Respondent was not an original, but rather was a copy, and it appeared that the return to work date, and the date the document was prepared, had been altered. The copy

[1] Grievant also was allowed to submit on October 28, 2011, a request for a medical leave without pay for the period of time from September 23 through October 11, 2011.

submitted by Grievant to Respondent did not have any information on it indicating it had been faxed at any time to anyone.

6. On November 2, 2011, Sondra McKenery, Director of Personnel at the Schools for the Deaf and Blind, called Grievant's doctor's office, Winchester Cardiology in Winchester, Virginia, to inquire about the date on the return to work slip, and spoke to a nurse in the office, Linda Richman, asking her what return to work date was on the original. Ms. Richman told Ms. McKenery that the original was not in Grievant's chart, as it had been provided to Grievant, but that the copy in the chart showed the return to work date as September 28, 2011. She also advised Ms. McKenery that the doctor had made a note in the chart that Grievant had asked that the return to work date be extended to October 10, 2011, but that the date should remain September 28.

7. Ms. McKenery completed a release for Grievant to sign, requesting only the "return to work date/copy of return to work release" from Grievant's doctor. Grievant refused to sign the release, and denied that the return to work slip had been altered.

8. The next doctor's appointment scheduled for Grievant by her doctor after her heart attack was October 14, 2011.

9. Grievant altered the date and the return to work date on the return to work slip, changing it both from September 28, 2011, to October 10, 2011.

10. Grievant's employment was terminated by SBOE effective January 13, 2012, for falsification of the return to work slip.

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. *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*.

As to the grounds for which a SBOE employee may be dismissed, service personnel employed by the SBOE to provide education and support services to residents at the Schools for the Deaf and Blind "are state employees." W. VA. CODE § 18A-4-17(c). As such, the statutory provisions found in W. VA. CODE § 18A-2-8, which state the reasons a county board of education may dismiss an employee, are not applicable here. Further,

> [a]lthough this Grievance Board has not previously addressed this specific issue, it does not appear that WVDOE employees are included in the classified service. W. VA. CODE § 18-3-9 expressly grants authority to the State Superintendent of Schools to employ "assistants and such other employees as may be necessary." There is no language in W. VA. CODE § 18-3-9 which indicates those employees are included in the classified service. Indeed, WVDOE has adopted its own system for classifying its employees, rather than following the DOP classification scheme. *See Begley v. W. Va. Dep't of Educ.*, Docket No. 91-DOE-281 (Oct. 24, 1991).

Dye v. W. Va. Dep't of Educ., Docket No. 99-DOE-217 (Sept. 16, 1999). The Administrative Law Judge in *Dye* went on to conclude, in addressing a due process argument, that as the employee was not in the classified service, she had acquired no tenure. Accordingly, the judicial standard for dismissal of a tenured, civil service employee, who has acquired a property interest in his employment, that the misconduct which forms the basis for the dismissal 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)), or good cause, is not applicable here.

Grievant was employed under a continuing contract pursuant to W. VA. CODE § 18-17-9, which CODE SECTION is specifically applicable to service personnel employed at the Schools for the Deaf and Blind. While W. VA. CODE § 18-17-8 sets forth the reasons for which a teacher at the institution may be disciplined, there is no such provision applicable to service personnel. Grievant's contract was not placed into the record for the undersigned's review, nor were its terms discussed by any of the witnesses. While it is possible that Grievant's continuing contract conferred on her the right to continued employment absent a showing of just cause (*See, Falquero v. West Virginia Department of Environmental Protection*, Docket No. 2008-1596-DEP (December 16, 2008), *aff'd* 724 S.E.2d 744 (2012)), without further information, explanation, or argument from the parties, the undersigned is hesitant to confer such rights, and must conclude that, Grievant had only the expectation of continued employment based on the terms of the contract.[2] Grievant did not demonstrate that she was entitled to anything more than this. *See, Dye, supra.* Under these circumstances, Respondent need only prove these charges against the Grievant by a preponderance of the evidence. *See, Cuda v. W. Va. Univ.*, Docket No. 2011-0617-WVU (May 27, 2011).[3]

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[2] It should be noted, however, that some employees of the SBOE are at-will employees. *See, Morgan v. Dep't of Educ.*, Docket No. 06-RESA-240 (Sept. 11, 2007). Neither party argued that Grievant fit into this category.

[3] Were the undersigned to conclude that Respondent was required to demonstrate just cause for dismissal, Respondent clearly met this burden.

Grievant was dismissed for falsification of the return to work slip. Respondent based its conclusion that this document was falsified by Grievant on the document itself and Ms. McKenery's conversation with Ms. Richmond regarding the documentation in Grievant's chart. On the return to work slip placed into the record by Respondent it certainly does appear that not only the return to work date, but also the date the slip was prepared, were both altered. Grievant denied that she had altered the dates, and she denied that the doctor's office had provided her with an original of this document. Respondent could not present into evidence the information from Grievant's chart maintained by the doctor's office, or verify the information obtained from Ms. Richman because Grievant refused to sign a release which would allow Respondent to obtain this information. Grievant stated that she refused to sign the release completed by Ms. McKenery because Mr. Corbin did not explain to her why the information was needed, and an unnamed attorney told her not to sign it. The questions presented are first, the weight to be given the hearsay evidence placed into the record by Respondent, and second, whether Grievant is telling the truth.

The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of

contradictory evidence; and 8) the credibility of the declarants when they made their statements.[4] *Gunnells v. Logan County Bd. of Educ.,* Docket No. 97-23-055 (Dec. 9, 1997); *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-8-115 (June 8, 1990).

> Hearsay evidence is admissible in the grievance procedures for state and education employees, but there is no requirement, statutory or otherwise, that it be afforded any particular weight. Generally, written statements, even affidavits, may be discounted or disregarded unless the offering party can provide a valid reason for not presenting the testimony of the persons making them. *See, Seddon v. W.Va. Dept. of Health,* Docket No. 90-H-115 (Dec. 14, 1997).

Cook v. W. Va. Division of Corrections, Docket No. 96-CORR-037 (Oct. 31, 1997), Conclusion of Law No. 2.

In this case, Ms. Richman could not be subpoenaed to testify in this proceeding because she resides in Virginia, and Grievant's doctor's office is in Virginia, outside the jurisdiction of the Grievance Board. Respondent made every effort available to obtain the information from Grievant's chart in her doctor's office, but Grievant would not allow the release of the information. Respondent also presented into evidence Ms. McKenery's notes that she made after she spoke with Ms. Richman, which support her recollection of her conversation with Ms. Richman. Certainly what Ms. Richman told Ms. McKenery is consistent with the appearance that the return to work slip was altered. The only evidence

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[4] The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing hearsay. *See Borninkhof v. Department of Justice*, 5 MSBP 150 (1981).

that the return to work slip was not altered by Grievant is Grievant's denial of this. The hearsay testimony is entitled to some weight.

The next issue is whether Grievant's testimony was credible. The undersigned concludes that it was not.

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

Grievant testified that she wanted to come back to work, because she had received the notice that she would have to pay her medical insurance, and she could not afford to

do so, and that she called her doctor's office on September 28, 2011, to ask for a return to work slip. As Respondent pointed out, this notice sent to Grievant by her employer is dated September 28, so it does not appear that Grievant could have already received it on that date. Grievant stated she was told on October 4, 2011, that the slip had been mailed to her on September 29, 2011, but she did not receive it. She testified that she asked the doctor's office to fax the slip to the Schools for the Deaf and Blind, and she was told that the doctor's office had tried to fax the slip for two days without success. Grievant stated she finally had the office fax the slip to her mother-in-law, and she did not receive it until late in the day on October 11, 2011, which is apparently her explanation for why she did not return to work on October 10, 2011, and pointed out that had she altered the document, she would have put October 12 on the slip, not October 10. She did not, however, offer any explanation for why the document was also dated October 10, 2011, when she had been told it had been sent to her on September 29, 2011. Grievant stated that the copy she gave her employer had the fax information on the top of the document. Ms. McKenery testified that the document placed into the record was the document received from Grievant, and Mr. Corbin testified in rebuttal that the copy he had been given had no fax information across the top or bottom. Neither Ms. McKenery nor Mr. Corbin had ever heard Grievant mention any problem with faxing the document to the Schools for the Deaf and Blind prior to the level three hearing.

The only part of Grievant's testimony that is persuasive is her statement that had she altered the date on the return to work slip, she would have changed it to October 12, not October 10. However, although it would have been a simple matter for Grievant to have demonstrated that she did not alter the document, she made no effort to do so.

Although Grievant claimed that it was not made clear to her that Respondent was only seeking the return to work slip in the release she had been asked to sign, it is quite clear from the form placed into the record that this is the only information being requested. Grievant did not at any time authorize the release of the information maintained by her doctor's office, nor did she attempt to obtain the documentation from her doctor's office herself, which would have proven that she did not alter the return to work date, if that were indeed the case.

The undersigned concludes from the evidence presented that Grievant's denial is not credible, and that Respondent has proven that it is more likely than not that Grievant falsified her return to work slip. Not only did this mean that Grievant was on unauthorized leave from September 28 through October 11, 2011, a period of time when she was on an improvement plan for her leave issues, it also obviously resulted in her employer not trusting her. Respondent proved the charges against Grievant.

Finally, Grievant testified that her health insurance was canceled on January 31, 2012, and that she was entitled to have her employer pay its share of her coverage for three months. W. VA. CODE § 5-16-13(c), applicable to former SBOE employees, states that, "[a]n employee discharged for misconduct shall not be eligible for extended benefits under this section. Coverage may be extended up to the maximum period of three months, while administrative remedies contesting the charge of misconduct are pursued." This statutory provision does not *require* the employer to pay the employer share of the former employee's health insurance after termination of employment under these circumstances; rather, it says they may do so.

The following Conclusions of Law support the Decision reached.

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. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

3. Grievant's denial of the allegations against her was not credible.

4. Respondent proved by a preponderance of the evidence that Grievant falsified the return to work slip that she presented to her employer.

Accordingly, this grievance is **DENIED.**

Any party or the Division of Personnel 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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

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BRENDA L. GOULD
Acting Deputy Chief
Administrative Law Judge

Date: August 15, 2012