WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KELLI HARRAH,
Grievant,

v. **Docket No. 2012-0723-DHHR**

DEPARTMENT OF HEALTH
AND HUMAN RESOURCES/
BUREAU FOR CHILD SUPPORT
ENFORCEMENT,
Respondent.

DECISION

Grievant, Kelli Harrah was employed by Respondent, Department of Health and Human Resources ("DHHR") in the Bureau for Child Support Enforcement ("BCSE") as a Child Support Specialist 2. Ms. Harrah filed a level three[1] grievance form, dated January 11, 2012, alleging that her employment was terminated without good cause. As relief Grievant sought, "To be made whole including back pay with interest & benefits restored."

On July 24, 2012, a level three hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board. Grievant appeared at the hearing with her Representative Gordon Simmons, UE Local 170, West Virginia Public Workers Union, with the assistance of Timbera C. Wilcox, Esquire. Respondent was represented by Harry C. Brunner Jr., Esquire, Assistant Attorney General. Both parties submitted Proposed Findings of Fact and Conclusions of Law which were received by the West Virginia Public Employees Grievance Board on August 27, 2012. This matter became mature for decision on that date.

[1] W. VA. CODE § 6C-2-4(a)(4) allows employees contesting the termination of their employment to file an expedited grievance directly to level three.

Synopsis

Grievant was dismissed for violating DHHR and BCSE policies by suspending child support arrearage payments in a case without proper authorization, at the request of a co-worker. Grievant argues that she did not violate the policies and that the penalty imposed was so disproportionate to her actions that it constituted an abuse of discretion. Respondent proved that Grievant violated the cited policies and that Grievant could be disciplined for her actions. However, Grievant proved that dismissal was out of proportion to Grievant's action and that the penalty should be mitigated. The grievance is Granted in part, and Denied in part.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant, Kelli Harrah, has been employed by DHHR for more than three years as a Child Support Specialist 2 in the BCSE Employer Relations Unit.

2. Child Support Specialists in the Employer Unit are not caseworkers. These employees work with employer-related issues or sources of income for those obligated to pay child support. They generally have no reason to access individual case files unless there is a problem with income withholding for a non-custodial parent or at the request of a caseworker.

3. OP[2] is the father of CP. OP is divorced from CP's mother, RP, and was ordered by Kanawha County Family Court to pay child support to RP as the non-custodial parent of CP.

[2] All individuals except the employees of the BCSE will be identified by their initials to protect their privacy related to child support payments and obligations.

4. In November 2011, OP owed a significant amount of money to RP in arrears for non-payment of his child support obligation. Money was being deducted by OP's employer from his paycheck to pay his child support obligation to RP.

5. On November 28, 2011, the Family Court Judge entered an Order ending OP's obligation to pay child support to RP for CP, retroactive to August 1, 2011. The Order stopped the accrual of interest on the arrears, but did not end OP's obligation to pay the arrears owed to RP for payments that had not been made in the past. OP's employer continued to withhold money from OP's pay to pay toward his past obligations.

6. An attorney for BCSE, Kim George Farha, made a notation in the electronic file for OP and RP on November 16, 2011, related to the Family Court hearing that led to the November 28, 2011, Court Order.[3]

7. On November 18, 2011, Attorney Farha made a notation that he had received a call from the attorney for OP reminding him to stop the deductions from OP's paycheck for all child support. Attorney Farha told OP's attorney, and noted in the file that the Court Order did not stop the payment of arrears.

8. Verna Osborne is the caseworker responsible for the OP and RP child support case. She is employed by a private company that has a contract with BCSE to perform BCSE's child support enforcement work in Kanawha County.

9. Kelly Plantz is presently married to OP. She is employed by the BCSE in their Central Auditing Unit as a Child Support Technician 3.

[3] Seventh unnumbered page, of a series of electronic notations made in the BCSE electronic file, which make up Respondent's Exhibit 3.

10. On November 30, 2011, Ms. Osborne made a notation in the electronic file that she had been called by Kelly Plantz regarding when the child support would no longer be deducted from OP's check. Ms. Osborne advised Ms. Plantz that she had spoken with the responsible attorney and been told that the arrears payments would continue in the same amount.[4]

11. On January 2, 2011, Attorney Farha made a notation in the electronic file that OP's attorney had called again requesting that the BCSE stop the withholding of arrears from OP's paycheck. Attorney Farha again explained that it was the BCSE's position that the Court Order did not stop the collection of arrears.[5]

12. On December 6, 2011, Grievant Harrah, made the following notation in the electronic file to reflect an action she had taken related to the child support payments from OP to RP:

> AS PER ATTORNEYS NARR AND AUDIT PUT OT'S ON ALLOCATIONS AND DISBURSEMENTS. THIS IS PER ATTORNEYS PHONE CALL.[6]

13. Putting an OT[7] on the allocations and disbursements stopped the payments of child support arrears from being sent to RP. The payments were still withheld from OP's paycheck and submitted to BCSE. However, those payments were held in an account and not sent to RP.

14. Because Grievant Harrah is employed in the Employer Relations Unit, she is not authorized to place a suspension on payments in case files unless specifically directed to do so by a supervisor.

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[4] Fifth unnumbered page of electronic notes in Respondent's Exhibit 3.
[5] Fourth unnumbered page of electronic notes in Respondent's Exhibit 3.
[6] Second unnumbered page of electronic notes in Respondent's Exhibit 3. The original was in all capital letters.
[7] No testimony explained what the letters OT represented beyond the action described in the finding of fact. This action is also referred to as a "suspension of payments."

15. BCSE Central Auditing Department has internal controls in place to monitor the actions taken by employees in the electronic case files. Through these controls, it was discovered that Grievant had suspended the payment of arrears to RP from OP. That fact was reported to Grievant's supervisor, Carol Lemon, by Central Auditing on December 8, 2011.

16. On December 8, 2011, Carol Lemon asked Grievant about the suspension of payments and Grievant advised her that an attorney told Grievant to take the action but she could not remember who it was.

17. A meeting was held with Grievant, Carol Lemon and Charlotte Stalnaker, BCSE Acting Director on December 14, 2011. At that time, Grievant was asked by Director Stalnaker, why she put a stop on the arrears payment from OP to RP. Grievant originally claimed that she suspended the payments after receiving a call from OP's attorney instructing her to do so. Director Stalnaker left the room to ask Attorney Farha to call the attorney and see if he had made that request of Grievant.

18. While Director Stalnaker was out of the room, Grievant admitted to Carol Lemon that she had not spoken to OP's attorney. Instead, Kelly Plantz had spoken with Grievant on several occasions regarding her husband's child support. Finally, Kelly Plantz told Grievant that the Judge had ordered a stop to be placed on the payments but the caseworker would not do it. Ms. Plantz asked Grievant to place the stop on the payments, and Grievant complied. Grievant told Ms. Lemon that she felt sorry for Ms. Plantz and that she was sorry for what she had done.

19. The suspension of the payments to RP was removed and the arrears payments to RP were restored. No testimony was offered as to when this took place or

what harm, if any, was caused to RP by the temporary suspension of the payments. Since, the action was discovered and reported to Grievant's supervisor within two days, it is reasonable to conclude that the payments were not suspended more than ten days at the most.[8]

20. DHHR Policy Memorandum 2108 related to Employee Conduct contains the following provision:

> Employees are expected to avoid conflicts of interest between their personal life and their employment. Employees shall not provide services to or make decisions concerning eligibility for Agency programs for spouses, relatives, friends, neighbors, present or former co-workers, or club or church acquaintances.

Id. Page 2 Section VIII., Paragraph 3. Grievant has received training regarding this policy. Respondent's Exhibit 4.

21. BCSE Policy 01010.10.25, *Relatives or Friends,* has a similar provision which states the following:

> A. BCSE Workers shall not handle cases or make decisions on BCSE matters in situations involving relatives, friends, and neighbors or business, club or church acquaintances. . .
> B. For purposes of this policy, a BCSE Worker's friends/acquaintances are those individuals whose relationships to the worker, in the eyes of a reasonably prudent person, may be interpreted as a conflict of interest if a decision about the receipt or denial of services is involved. . .

Id. Respondent's Exhibit 1.

22. Grievant had made a mistake on withholding in a previous case on November 3, 2011, and then contacted the non-custodial parent stating that she would

[8] If the dispersments are made monthly, it is conceivable that RP did not miss a single disbursement as a result of Grievant's action. However, because of the lack of specific testimony on this issue this is only reasoned speculation.

watch the case and make sure the payments were made up. She was advised by Supervisor Lemon that this action was improper, but no disciplinary action was taken.

23. On April 12, 2011, Grievant was issued a written reprimand for an incident where she had a verbal dispute with a co-worker. She allegedly made a threat to the co-worker by saying to her, "you are unbelievable, you are unbelievable." Carol Lemon noted that Grievant and the co-worker did not get along and she wanted to stop both of them from fussing with each other. Grievant did not contest the written reprimand.

24. A predetermination conference was held on January 10, 2012, and Grievant was dismissed in a letter dated the same day for violating the policies related to being involved in cases of friends, relatives or co-workers.

25. This was Grievant's first violation of the policy cited for her dismissal. Kelly Plantz had previously violated the same policy by accessing the file of RP and obtaining her social security number for her husband OP. Kelly Plantz received a one-day suspension for that violation. The suspension letter noted that Ms. Plantz "had been accessing BCSE cases that were not assigned to [her] in order to obtain personal information on customers. These cases involved members of [her] husband's family." Grievant's Exhibit 3. No other testimony was presented regarding punishment other employees had received for violating the policy.

Discussion

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Nicholson v. Logan County Bd. of Educ*., Docket No. 95-23-129 (Oct. 18,

1995); *Landy v. Raleigh County Bd. of Educ*., Docket No. 89-41-232 (Dec. 14, 1989). "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); *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.*

Grievant was a permanent state employee in the classified service. 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 Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004) (per curiam).

Respondent has demonstrated that Grievant accessed the case file related to the child support owed by OP to RP. She put a hold on the arrears payments from OP to RP without receiving a directive from her supervisor to do so and without consulting the case worker assigned to the file. Because Grievant is assigned to the Employer Relations section, she is not authorized to take such actions in case files without prior authorization. Grievant admitted that she took this action at the request of a fellow worker at the Charleston BCSE office, Kelly Plantz. Respondent argues that this action

was in violation of the DHHR and BCSE policies which prohibit a DHHR/BCSE employee from becoming involved in eligibility decisions in cases of family, friends, neighbors, or co-workers.[9]

Grievant argues that Ms. Plantz does not fall into any of these categories as they relate to her. Ms. Plantz is not part of Grievant's family and they have not been particularly close in the past. Additionally, Grievant points out that they work in different sections of the BCSE, and therefore are not co-workers. Respondent's witnesses testified that it is the practice of BCSE to consider all employees of that Bureau to be co-workers thus, triggering the policy.

While Grievant and Kelly Plantz do work in different sections of the BCSE, they both work in the Charleston Diamond Building for that Bureau, and they have sufficient daily contact for Ms. Plantz to discuss her husband's child support issues with Grievant on several occasions. Under these circumstances, Grievant and Ms. Plantz were clearly co-workers. More to the point, BCSE Policy 01010.10.25, *Relatives or Friends* provides that:

> For purposes of this policy, a BCSE Worker's friends/acquaintances are those individuals whose relationships to the worker, in the eyes of a reasonably prudent person, may be interpreted as a conflict of interest if a decision about the receipt or denial of services is involved. . .

Id. To a reasonably prudent person it is clearly a conflict for Grievant to put a hold on child support arrears payments, based upon the request of a co-worker because Grievant feels sorry for the co-worker. Respondent proved that Grievant violated the relevant policies and that discipline was appropriate.

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[9] *See,* DHHR Policy Memorandum 2108 and BCSE Policy 01010.10.25, *Relatives or Friends.*

Grievant also argues that given all of the circumstances, termination of Grievant's employment was much too severe. Her representative points to the punishment given to Kelly Plantz for a violation of the same policies in 2007. In that situation, Ms. Plantz accessed a case file in order to gain the child support recipient's social security number for her husband. Carol Lemon testified that covertly gaining someone's social security number from a file was a very serious matter. Yet, Ms. Plantz was given a one-day suspension without pay.

Any contention that a particular disciplinary action is excessive constitutes an affirmative defense, and Grievant bears the burden of demonstrating that 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. *See Witcher v. W. Va. Div. of Corrections*, Docket No. 2010-0817-MAPS (Aug. 3, 2010); *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989). 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). In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must

be determined on a case-by-case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995) (citations omitted).

Concerning the first issue, Grievant's prior work record shows that she has received a written reprimand for an ongoing dispute with a co-worker. She was also corrected for a mistake she made in contacting a customer. Other than these relative minor issues, she has had a successful tenure with the BCSE. It is not disputed that this is Grievant's first violation of the Friends and Family conflict policies.

Regarding the next issue, while the rules related to conflicts of interest are not the picture of clarity, there is little doubt that Grievant understood that she was not supposed to be taking action in the OP/RP case file without proper authority, especially on behalf of a co-worker.

The final issue is whether there are mitigating circumstances which render the punishment excessive. In this case there are. First, while Grievant's action of putting a hold on the payments would stop those payments from going to RP, they did not stop OP's employer from deducting those payments from OP's pay checks and placing them in a BCSE account for future payment to RP. Additionally, Grievant's action was quickly discovered because of her notation in the file and there is no evidence that RP missed a single payment of arrears support as a result of Grievant's action. Grievant also demonstrated that Ms. Plantz only received a one-day suspension for committing a similar action violating the same policy. In fact, one could conclude that Ms. Plantz's action was more egregious because she was seeking the private information from a customer's file for her husband. There was no evidence presented that other employees committing similar offenses have been dismissed from employment. The

fact that the employer gave another employee a one-day suspension for her first violation of this policy tends to demonstrate that the employer did not believe it was misconduct of a substantial nature justifying termination of employment as discussed in *Oakes, supra.* The Grievance Board has taken the history of punishment for the same offense into account in determining whether mitigation was appropriate. *See Prince v. W. Va. Regional Jail and Corr. Auth./Southern Regional Jail*, Docket No. 2009-0593-MAPS (Feb. 13, 2009). *Farr v. W. Va. Regional Jail and Corr. Auth./Southern Regional Jail*, Docket No. 2009-0532-MAPS (Jan. 2, 2009). *Dickens v. W. Va. Regional Jail and Corr. Auth./Southern Regional Jail*, Docket No. 2009-0534-MAPS (Mar. 23, 2009).

While Grievant and Ms. Plantz had different supervisors when they committed their violations of the conflict policies, the vast disparity in the punishments given to the two employees simply cannot be reconciled. Grievant proved that the penalty given to her was so clearly disproportionate to the employee's offense that it indicates an abuse of discretion and mitigation is appropriate.

Taking into consideration all of the circumstances involved, including the fact that Grievant had previously received a written reprimand on a completely unrelated matter, a fifteen-day suspension without pay is much more in line with the past disciplinary practice of the BCSE presented in this case. Accordingly, the grievance is GRANTED in as much as the termination of her employment is overturned, but DENIED to the extent that Respondent proved that Grievant violated a specific policy and must receive a fifteen-day suspension without pay.

Conclusions of Law

1. As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Nicholson v. Logan County Bd. of Educ*., Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ*., Docket No. 89-41-232 (Dec. 14, 1989). "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); *Leichliter v. W. Va. Dep't of Health and Human Res*., Docket No. 92-HHR-486 (May 17, 1993).

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 Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004) (per curiam).

3. Respondent proved, by a preponderance of the evidence, that Grievant violated DHHR Policy Memorandum 2108 and BCSE Policy 01010.10.25, *Relatives or Friends,* and it was appropriate for disciplinary action to be taken against her.

4. Any contention that a particular disciplinary action is excessive constitutes an affirmative defense, and Grievant bears the burden of demonstrating that 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. *See Witcher v. W. Va. Div. of Corrections*, Docket No. 2010-0817-MAPS (Aug. 3, 2010); *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

5. "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).

6. In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995) (citations omitted).

7. Grievant proved, by a preponderance of the evidence, that the penalty given to her was so clearly disproportionate to Grievant's offense that it indicates an abuse of discretion and mitigation is appropriate. A fifteen-day suspension without pay is much more in line with the past practice of the BCSE presented in this case.

Accordingly, the grievance is GRANTED in part, and DENIED in part. Respondent is Ordered to reinstate Grievant to her former position at the BCSE Respondent is also Ordered to pay Grievant all pay and benefits she would have earned had she not been dismissed, plus statutory interest, minus fifteen days of pay for the appropriate fifteen-day[10] suspension.

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 31, 2013.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE

[10] To be clear, the suspension is for fifteen working days.