# THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**KELLIE PLANTZ,**
**Grievant,**

**v.** **DOCKET NO. 2012-0756-DHHR**

**WEST VIRGINIA DEPARTMENT OF HEALTH & HUMAN RESOURCES/BUREAU FOR CHILD SUPPORT ENFORCEMENT,**
**Respondent.**

## DECISION

This grievance was filed directly at Level Three of the grievance procedure by Grievant, Kellie Plantz, on January 23, 2012, alleging that her employment was terminated without good cause by Respondent, West Virginia Department of Health & Human Resources, Bureau for Child Support Enforcement. Grievant is seeking "[t]o be made whole including back pay with interest & all benefits restored."

A Level Three hearing was held before the undersigned Administrative Law Judge on January 29, 2013, at the Grievance Board's Charleston, West Virginia office. Grievant was represented by Anthony F. Serreno, Esquire, and Respondent was represented by Assistant Attorney General Harry C. Bruner, Jr. This matter became mature for decision on March 1, 2013, upon receipt of the Respondent's[1] Proposed Findings of Fact and Conclusions of Law.

[1] No Proposed Findings of Fact and Conclusions of Law were received from the Grievant. Counsel for

## Synopsis

Grievant was dismissed from her employment by Respondent for asking a co-worker to place a suspension on payments from the child support account of her husband, OP, to OP's ex-wife, RP, in Respondent's computer system, contrary to the agency's established conflict of interest policies. These suspensions, or "stops," were initiated in the computer system by Kelli Harrah, a BCSE employee working in the Employer Relations Unit. When questioned by her supervisors, Ms. Harrah provided a hand-written statement indicating that Grievant had asked her to take this action because it had been ordered by the judge, and the caseworker would not take action to implement the suspensions. When Grievant was asked about these events, she initially denied having asked Ms. Harrah for assistance but then verbally admitted requesting the suspensions. Grievant also provided a hand-written statement acknowledging that she discussed the situation with Ms. Harrah who told her that "she could OT the case for allocations and disbursements." Respondent presented preponderant evidence that Grievant involved another employee in her husband's child support case in violation of the agency's conflict of interest policies.

The following Findings of Fact are made based upon the record developed at the Level Three hearing.

## Findings of Fact

1. Grievant was employed by Respondent, Department of Health and Human Resources, Bureau for Child Support Enforcement ("BCSE" or "Bureau"), for over eleven years.

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both parties made oral closing arguments at the conclusion of the Level Three hearing.

2. Grievant worked as a Child Support Technician III in the Central Auditing Unit, where she audited child support cases to verify that money collected by the Bureau was sent to the appropriate parties.

3. Deborah Harper is employed by BCSE as Manager of its Central Auditing Unit. In that capacity, Ms. Harper serves as Grievant's second-level supervisor.

4. Kelli Harrah was employed by BCSE as a Customer Service Representative in its Employer Relations Unit.

5. Charlotte Stalnaker is employed by BCSE as Director of Central Operations, which includes the Enforcement Unit, Customer Services Unit and Central Registry. In that capacity, Ms. Stalnaker served as Ms. Harrah's second-level supervisor.

6. Carol Lemon is employed by BCSE as Supervisor of the Employer Relations Unit. Ms. Lemon served as Ms. Harrah's immediate supervisor.

7. Grievant was dismissed from employment, effective January 25, 2012, by letter from Commissioner Garrett Jacobs dated January 10, 2012. That letter specified the reasons for Grievant's termination, in pertinent part, as follows:

> On December 5th, 2011, you approached Kelli Harrah, an employee in the BCSE Employer Relations Unit, and asked that suspensions be placed on your husband's case to prevent payments from being sent to the family. On December 20th, 2011, your manager, Debbie Harper, had a discussion with you regarding this action. You admitted to it when first asked, but then changed your answer and stated that you did not. After reviewing all the facts, I have concluded that you did request Ms. Harrah place the suspensions on the case.

R Ex 1.

8. Grievant was previously issued a one-day suspension in March 2007 for improperly accessing case information relating to members of her husband's family. *See* R Ex 1.

9. Respondent also terminated the employment of Kelli Harrah.

10. None of the 40 employees in the Central Auditing Unit, including Grievant, had the capability or authority to stop or suspend payments on any account.

11. Grievant, and all other Central Auditing Unit employees, are prohibited from accessing or working on a particular case involving themselves or a member of their immediate family. *See* R Exs 2 & 7.

12. Grievant was authorized in writing by her husband, OP, to represent his interests before BCSE in regard to his child support obligations to a former spouse, RP. *See* G Ex 1. This authorization did not give Grievant authority to take official action on her husband's case, nor did it supersede any of BCSE's conflict of interest policies.

13. Under established DHHR policy, Grievant was required to deal with her husband's case through a supervisor, or through the local BCSE office in Kanawha County.

14. An unidentified DHHR employee directed Ms. Harper's attention to a case where "stops" or suspensions had been placed on payments being made by OP to RP in BCSE's "OSCAR"[2] computer system. Ms. Harper found that a BCSE employee, Kelli Harrah, had placed the stops on the case, and those stops were inconsistent with the narrative description in the case notes, which had been placed in the file by other personnel properly involved in processing the matter.

[2] None of the witnesses indicated whether this was an acronym or the brand name of the computer

15. On December 8, 2011, Ms. Stalnaker was advised that Ms. Harrah had placed stops on the file of OP, suspending any further payments to his ex-wife, RP.

16. Ms. Lemon, Ms. Harrah's immediate supervisor, was asked to look into this allegation.

17. Ms. Lemon called Ms. Harrah and questioned her about the suspension which had been placed on the OP child support file. Ms. Harrah initially indicated that she had spoken with an attorney who had directed the suspension.

18. Shortly after questioning Ms. Harrah about the suspension, Ms. Lemon observed Grievant talking with Ms. Harrah in Ms. Harrah's cubicle.

19. Grievant acknowledged that Ms. Harrah informed her that she had gotten in trouble for placing suspensions on the OP case.

20. Following the conversation described above in Finding of Fact Number 17, Ms. Lemon reviewed Ms. Harrah's phone records but found no evidence of an incoming or outgoing call involving an attorney. Ms. Lemon questioned Ms. Harrah a second time, asking for the name of the attorney who requested the suspension. Ms. Harrah replied that she believed the attorney's name was Serreno. Again, Ms. Lemon reviewed the phone records but found no ingoing or outgoing calls involving Attorney Serreno.

21. On December 14, 2011, Ms. Lemon and Ms. Stalnaker met with Ms. Harrah and confronted her with the fact that there was no record of any calls to or from Ms. Harrah's phone to Attorney Serreno, or any other attorney. Ms. Harrah initially stuck to her original story but, after asking Ms. Stalnaker to step out of the room, admitted to

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program used to track support payments.

Ms. Lemon that she had placed the suspensions after repeated requests from Grievant. Ms. Stalnaker returned to the room and Ms. Harrah repeated her verbal confession and then Ms. Harrah provided a signed, hand-written statement which stated the following:

> Kellie Plantz approached me on several occasions asking me about her husband's [illegible] case. She then ask (*sic*.) me one day she said no more money was to go out in the case & would I put suspensions on the case because the Judge ordered it & caseworker wouldn't do it. So I did. I don't know why it was stupid – I felt sorry for her. I am so sorry.

*See* R Ex 8.

22. After Ms. Harrah's admissions to her supervisors, Ms. Harper met with Grievant and asked her if she asked Ms. Harrah to place stops on her husband's case. Grievant initially denied having done anything improper, stating twice that she only asked Ms. Harrah if something could be done. However, the third time Ms. Harper asked this question, Grievant orally admitted that she asked Ms. Harrah to place suspensions on her husband's case.

23. Grievant subsequently provided a hand-written statement to Ms. Harper dated December 20, 2011, in which she stated that she spoke with Verna, a Customer Service Representative for BCSE's contractor service provider in Kanawha County, on December 8, 2011, and that Verna told her that "there were OT's [suspensions] on the case so no current support will go out." *See* R Ex 3.

24. Grievant's statement in Finding of Fact Number 23 is inconsistent with the contemporary narrative documented by Verna Osborne in the computerized file for OP. That narrative indicates that arrears were to be collected and that collections would not

be stopped. *See* R Ex 4. In addition, there is no evidence in the file that any such stops had been placed on the OP case at that time.

25. In her December 20, 2011 written statement, Grievant further stated that she spoke with Kelli Harrah and "did discuss with her that Attorney Serreno stated from the hearing that no collections should be made until the moving child audit[3] and asked if there was something we could do to prevent overpayment of current support as it had ended, she said she could OT the case for allocations and disbursements. In any of the actions there was no misintent (*sic*.) on my part and I apologize if it was not in the best interest of the Bureau." *See* R Ex 3.

26. Respondent receives funds from the federal government to underwrite a portion of its activities in administering the child support enforcement process. The federal government may penalize Respondent when funds are improperly held by the agency rather than disbursed to the designated recipient in accordance with established time standards.

## 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. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). The generally accepted meaning of preponderance of the

[3] The "moving child audit" apparently refers to a daughter of RP and OP who was no longer living with her mother, and was no longer eligible for child support. *See* R Ex 6. Theoretically, this audit would establish when this obligation should have terminated, thereby clarifying the extent of OP's liability for payments in arrears.

evidence is “more likely than not.” *Riggs v. Dep’t of Transp*., Docket No. 2009-0005-DOT (Aug. 4, 2009) *citing Jackson v. State Farm Mut. Ins. Co*., 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004). *See 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. *Leichliter, supra*.

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, 51, 380 S.E.2d 216, 218 (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 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. 2, *Buskirk v. Civil Service Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); Syl. Pt. 1, *Oakes v. W. Va. Dept. of Finance & Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980). *See Guine v. Civil Service Comm'n*, 149 W. Va. 461, 468, 141 S.E.2d 364, 368-69 (1965); *Smith v. Clay County Health Dep’t*, Docket No. 2012-0451-ClaCH (Apr. 17, 2012).

Certain facts relating to the charges against Grievant were the subject of conflicting testimony. 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. *Young v. Div. of Natural Res*., Docket No. 2009-0540-DOC (Nov. 13, 2009); *Massey v. W. Va. Public Serv. Comm’n*, Docket No. 99-

PSC-313 (Dec. 13, 1999); *Pine v. W. Va. Dep't of Health & Human Res*., Docket No. 95-HHR-066 (May 12, 1995). *See Harper v. Dep't of the Navy*, 33 M.S.P.R. 490 (1987). *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). Some factors to consider in assessing the credibility of a witness include the witness's demeanor, opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the fact finder should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of the witness' information. *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth*., Docket No. 2009-0685-MAPS (Apr. 23, 2009); *Massey, supra*.

A significant part of the evidence supporting the charges against Grievant consists of hearsay statements. An administrative law judge must determine what weight, if any, is to be given to hearsay evidence in a disciplinary proceeding. *Hamilton v. W. Va. Dep't of Health & Human Res*., Docket No. 2011-1785-DHHR (Sept. 6, 2012); *Miller v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ*., Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996). 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 declarant's 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 declarant's

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. *Simpson v. W. Va. Univ*., Docket No. 2011-1326-WVU (May 3, 2012); *Cale v. W. Va. Univ*., Docket No. 2011-1711-WVU (Mar. 22, 2012); *Sinsel v. Harrison County Bd. of Educ*., Docket No. 96-17-219 (Dec. 31, 1996).

The Bureau for Child Support Enforcement has placed a strong emphasis on prohibiting employees in the organization from using their public position in any manner which would improperly benefit themselves or a member of their immediate family. Thus, Respondent not only provides training to its employees on various conflict of interest rules applicable to all public employees, it further provides guidance on those agency rules which BCSE has developed to avoid potential conflicts that are peculiar to the Bureau's operations. *See, e.g*., R Exs 2 & 7. Consistent with these rules, Grievant had written permission from her husband, OP, to represent his interests in regard to his child support obligations to his former spouse, RP, before BCSE. Nonetheless, as a BCSE employee, Grievant remained subject to certain prohibitions against even the appearance of using her public position to obtain any form of special treatment for OP's child support case.

The outcome of this grievance hinges principally on whether Grievant was culpable in the actions taken by her co-worker, Ms. Harrah. That Ms. Harrah placed "stops" on OP's child support file to prevent any further payments to RP was established. The OSCAR system recorded Ms. Harrah's activity in the normal course of

business, as it is designed to do. Likewise, it was not seriously disputed that Ms. Harrah took this action without proper authority. Although Ms. Harrah's position gave her access to the file, and the capability to insert a stop payment command, she clearly lacked proper authority for taking this action in regard to OP's case. Accordingly, it is necessary to consider what evidence connects Grievant to this activity.

Logically, Ms. Harrah did not simply choose OP at random and insert a stop payment in his file. Grievant admits that she spoke with Ms. Harrah regarding her husband's case. In her testimony at the Level Three hearing, Grievant denied having commanded, directed or requested Ms. Harrah to place stops on her husband's child support file, contending she was merely discussing the dilemma she was facing with a co-worker. Grievant further asserted that, based upon what had taken place in the Family Court to that point, once a proper accounting was obtained for all child support paid, her husband would be determined to have overpaid his ex-spouse. Therefore, BCSE would be required to repay OP, and would then have to attempt recovering the overpayment from RP.

Grievant also explained that she understood that she was not permitted to audit her husband's child support matter, and that she never conducted such an audit, or even accessed his file. Therefore, she did nothing to violate BCSE's conflict of interest prohibitions. Grievant had written authority to deal with BCSE personnel regarding her husband's child support case. (*See* G Ex 1.) Obviously, OP could only authorize Grievant to represent his interests to whatever extent BCSE employees are permitted to

interact with their agency regarding a matter in which they have a personal interest. OP had no authority to waive the employer's conflict of interest rules.

Grievant testified that she understood she was permitted to speak with other BCSE employees regarding her husband's case. Consistent with this understanding, she spoke with Verna Osborne in the Kanawha County BCSE office about whether OP's child support obligations had been terminated by the Family Court Judge and a suspension of payments to his ex-spouse, RP, was appropriate. Although Grievant recalled the substance of this discussion differently than Ms. Osborne, at least according to the notes Ms. Osborne recorded in the file, Respondent agreed that Grievant did nothing wrong in regard to approaching Ms. Osborne, and dealing with her concerning her husband's child support obligations.

Ms. Harper explained that Grievant could only deal with BCSE regarding her husband's case through Ms. Osborne, or other personnel in the Kanawha County Office, or through a supervisor at the BCSE main office. However, this is not what the "Schnall Memo" (R Ex 7) states. That policy authorized employees with a personal interest in a file to review their paper file in the local BCSE Office while prohibiting such employees from accessing those files through OSCAR. *See* R Ex 7. It was not established that Grievant would have violated this policy by merely discussing her case with Ms. Harrah. Consistent with this understanding, Grievant explained how she went to Kelli Harrah and reported to her that her husband had obtained new employment. That was not a violation, because it gave no advantage or appearance of an advantage

to OP. Grievant contends that her subsequent conversations with Ms. Harrah regarding developments in her husband's case were equally permissible.

The record is not clear whether Respondent was previously aware that Grievant reported her husband's new employer to Ms. Harrah, rather than the local BCSE office in Kanawha County. Because Ms. Harrah worked with employers, it was proper to report this information to her, or another employee in that section. Although Grievant could have properly reported this information to Ms. Osborne or some other employee in the Kanawha County BCSE Office, there was nothing wrong *per se* with communicating this development to Ms. Harrah, particularly where Grievant was not seeking any special advantage or treatment for her husband's case.

However, a preponderance of the credible evidence of record demonstrates that Grievant subsequently did more than just discuss the facts of her case with Ms. Harrah, knowingly permitting Ms. Harrah to act as her surrogate to access OP's file in OSCAR, and initiate a payment disbursement suspension which Grievant would not have been able to accomplish on her own. This finding is based on more than Ms. Harrah's hearsay written statement. That written statement, standing alone, does not establish preponderant evidence of Grievant's culpability.

Ms. Harrah was not called as a witness by Respondent. There was no indication that Ms. Harrah was not available to testify. Respondent did note that Ms. Harrah was also terminated from employment, and her grievance had been the subject of a separate hearing before the Grievance Board at an earlier date. However, there was no explanation why Ms. Harrah was not subpoenaed to testify as a hostile witness.

Certainly, Ms. Harrah was interested in her own employment situation. However, this would not provide an improper motive to implicate Grievant, who was already implicated because the suspensions were placed on her husband's case, and Grievant had previously requested that the same action (suspension of payments) be taken at the local level.

Respondent offered testimony from two supervisors who questioned Ms. Harrah about the actions she entered in the OP file, and presented a hand-written, unsworn, statement by Ms. Harrah admitting to initiating the suspensions, and specifically implicating Grievant as having repeatedly asked her to initiate the stops on OP's account. Grievant denies that she gave any directions to Ms. Harrah, contending that she only consulted her concerning what could be done to resolve a situation where she believed that RP was going to be overpaid by OP. Grievant repeatedly indicated that when everything was sorted out, BCSE would have to return money to OP, and attempt to recover the overpayments it made to RP.

Ms. Harrah's hearsay statement is corroborated by the stops recorded in OP's computer file which were observed by multiple witnesses. Ms. Harrah's description of Grievant's predicament (where the Court had terminated the underlying child support obligation, but the payments had not yet been suspended), was consistent with Grievant's claims about the status of her husband's case. More significantly, Grievant's admissions in the written statement she gave to Ms. Harper on December 20, 2011 corroborate Ms. Harrah's hearsay statement, and provide compelling evidence of Grievant's culpability. In that document, Grievant admits that she spoke with Ms.

Harrah and "did discuss with her that Attorney Serreno stated from the hearing that no collections should be made until the moving child audit and asked if there was something we could do to prevent overpayment of current support as it had ended, **she said she could OT the case for allocations and disbursements**. In any of the actions there was no misintent (*sic*.) on my part and I apologize if it was not in the best interest of the Bureau." *See* R Ex 3 (emphasis added). Nothing in Grievant's Level Three testimony satisfactorily explained how this was inconsistent with Ms. Harrah's statement, or the basis upon which Respondent terminated her employment.

Grievant testified very specifically at the hearing that she had no knowledge that Kelli Harrah had the ability to place suspensions on her husband's case. However, Grievant acknowledged in her own voluntary statement to her supervisor that Ms. Harrah told her that "she could OT the case for allocations and disbursements." This statement contradicts Grievant's testimony that she only expected Ms. Harrah to look into the matter and see what could be done. Not only was Grievant aware that Ms. Harrah had the ability to place suspensions on her husband's case, she knew that Ms. Harrah was intending to take action on OP's account. Grievant knew, or ought to have known, that Ms. Harrah was not authorized to make that determination.

Although the undersigned Administrative Law Judge finds that Grievant reasonably believed that suspending further payments from OP to RP pending an audit represented the proper course of action for BCSE to take in this matter, Grievant's testimony that she merely discussed her case with Ms. Harrah, and did not intend for her to take any action is simply not credible. Grievant may now wish that Ms. Harrah

had not acted on OP's case. However, a preponderance of the evidence indicates that Grievant initiated this process and was aware of what Ms. Harrah was going to do in advance of the suspensions being placed in OP's file.

Grievant's credibility was also affected by evidence that Grievant and Ms. Harrah had a conversation in Ms. Harrah's work area shortly after Ms. Harrah was confronted by her supervisors about placing unauthorized stops on the OP account. Grievant testified that she did not respond by saying anything to Ms. Harrah when Ms. Harrah told her that she had gotten in trouble for placing the stops on OP's account. Ms. Harrah's statement essentially communicates the idea "we got caught." Grievant's response to Ms. Harrah's statement is not consistent with the reaction one could reasonably expect if a co-worker did something that was completely unexpected, and had thereby created the appearance that Grievant and her husband were the intended beneficiaries of an unauthorized suspension action. Grievant stated during the hearing that she was totally surprised by this revelation. However, that claim is directly contradicted by her written statement, where she admits that Ms. Harrah "said she could OT the case for allocations and disbursements." *See* R Ex 8.

During the Level Three hearing, Grievant went on to testify that, in her opinion, Ms. Harrah "did nothing wrong." Having previously heard evidence that Ms. Harrah placed stops on payments to RP without proper authority, and contrary to the narrative information entered in the case file by the attorney representing BCSE, Grievant's testimony is further evidence that she still does not respect her employer's interest in avoiding improper favoritism by its employees in regard to their own matters, or matters

in which they, or a close family member, have a financial interest. Certainly, Grievant has not accepted responsibility for what took place, or indicated any remorse for her actions in this process.

Engaging in self-help from the inside of a government employer's process for administering child support is a serious offense. BCSE is already in the unenviable position of serving as a conduit for payments from often recalcitrant non-custodial parents to aggrieved and needful custodial parents. A BCSE employee who uses her position to override an order of the Family Court Judge is participating in a conflict of interest which discredits the integrity of the process administered by her employer. Grievant had previously been administered a one-day suspension for accessing her employer's computer system to obtain a social security number to facilitate reimbursement for her stepchild's travel to obtain medical care.[4] Obviously, that offense did not warrant termination. However, it did place Grievant on notice that conduct of this nature would not be tolerated.

Except for this one prior infraction, Grievant consistently performed her assigned duties in a satisfactory manner for nearly 11 years, meeting or exceeding her employer's expectations. Grievant thus argues that the penalty of termination for this offense is disproportionate, particularly where the suspension of payments benefitted her employer as much as her husband, avoiding the development of a complicated "payback" situation. A contention that a particular disciplinary action is excessive constitutes an affirmative defense, and Grievant bears the burden of demonstrating that

[4] There was some effort at the Level Three hearing to make it appear that the social security number was needed to obtain emergency medical care for a sick child. However, it was clear from Grievant's testimony that the social security number was only necessary for her husband to receive reimbursement

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).

Moreover, this Grievance Board has previously concluded that "[m]itigation of the punishment imposed by the 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 & Human Res*., Docket No. 96-HHR-183 (Oct. 3, 1996).

Grievant was involved in using a co-worker to obtain action which she was not able to attain through her employer's established channels. Given the sensitive nature of the files maintained and work performed by BCSE employees, her employer has made avoiding such conflicts a matter of emphasis. Grievant showed no remorse for her actions, and continued to maintain that neither she nor her surrogate, Ms. Harrah, did anything wrong. This offense involves a similar violation to the suspension Grievant was administered for improperly accessing the computer system to obtain a social security number. In these circumstances, notwithstanding Grievant's decade of otherwise satisfactory public service, the penalty of termination was not shown to be excessive, or an arbitrary and capricious exercise of disciplinary authority. *See Nguyen v. Div. of Highways*, Docket No. 2012-1368-DOT (Jan. 16, 2013); *Martin*, *supra*.

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from Medicaid for his mileage in taking the child to a routine doctor's appointment.

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

2. The employer must also demonstrate that misconduct which forms the basis for 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). *See Smith v. Clay County Health Dep't*, Docket No. 2012-0451-ClaCH (Apr. 17, 2012). Non-probationary state employees in the classified service may 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. 2, *Buskirk v. Civil Service Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); Syl. Pt. 1, *Oakes v. W. Va. Dept. of Finance & Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980). *See Guine v. Civil Service Comm'n*, 149 W. Va. 461, 468, 141 S.E.2d 364, 368-69 (1965).

3. 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 declarant's 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 declarant's 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. *Simpson v. W. Va. Univ*., Docket No. 2011-1326-WVU (May 3, 2012); *Cale v. W. Va. Univ*., Docket No. 2011-1711-WVU (Mar. 22, 2012); *Sinsel v. Harrison County Bd. of Educ*., Docket No. 96-17-219 (Dec. 31, 1996).

4. "Mitigation of the punishment imposed by the 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 & Human Res*., Docket No. 96-HHR-183 (Oct. 3, 1996). *See Lanham v. W. Va. Dep't of Transp*., Docket No. 98-DOH-369 (Dec. 30, 1998); *Martin v. W. Va. State Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

5. Respondent proved the charges against Grievant by a preponderance of the credible evidence of record, and demonstrated good cause for her dismissal. In the circumstances presented, the penalty of termination was not disproportionate to the offense established, considering Grievant's prior one-day suspension for improperly accessing personal information through her employer's computer system.

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 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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**LEWIS G. BREWER**
**Administrative Law Judge**

**Date: March 13, 2013**