WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

SABRINA PONCE,

Grievant,

v. **Docket No. 2012-1272-DHHR**

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES/ BUREAU FOR CHILD SUPPORT ENFORCEMENT,

Respondent.

DECISION

Grievant Sabrina Ponce was employed by the West Virginia Department of Health and Human Resources/Bureau for Child Support Enforcement ("BCSE") in the Wyoming County office as an Office Assistant 3. Grievant was terminated by letter dated April 18, 2012. Her termination was based upon " … providing outside vendors with your work e-mail address and phone number for contact with regard to your personal plans to open a coffee shop," and, "violat-[ing] strict confidentiality policies and procedures." On May 8, 2012, Ms. Ponce filed a grievance contesting her termination at Docket No. 2012-1272-DHHR. Grievance alleged, *inter alia*, that she was terminated without good cause, that Respondent had not demonstrated that the alleged misconduct was of a "substantial nature directly affecting rights and interests of the public." Specifically, Grievant avers that she was an "exemplary employee" of Respondent, "perform[ing] her job at an extraordinary level and had no prior disciplinary issues." Grievant further asserts that Respondent, " … had waived the computer and

confidentiality policies developed by the Office of Technology … evidenced by the practice and procedure of the supervising official of the Wyoming County Bureau of Child Support … [who] has continually sold real estate … while acting as supervisor … " Grievant asserts that the penalty of dismissal is wholly disproportionate to any violation of policy she was proven to have committed and it should be reduced in recognition of her years of exemplary service." As relief, Grievant seeks "reinstatement as an Office Assistant 3 with back pay, plus interest, all benefits restored and … State employment record be expunged."

Because this grievance involves a dismissal from employment, it was filed directly to level three. See W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held in Beckley, West Virginia on December 12, 2012. Grievant was represented by Thomas H. Evans, III, Esq. and Respondent were represented by James Wegman, Esq., Assistant Attorney General. Following the hearing, the parties agreed to submit Proposed Findings of Fact and Conclusions of Law. Both Grievant and Respondent submitted these on February 4, 2013, upon which date this matter became mature for decision.

Synopsis

Grievant was terminated for overuse and misuse of the state computer and e-mail systems by accessing them to establish a commercial venture, specifically a coffee business, and for other personal matters. In addition, Grievant was terminated for divulging confidential information from the BCSE database to third parties who were unauthorized to receive such information. Respondent proved that Grievant violated agency policies and procedures concerning computer and e-mail use by spending

extensive amounts of time on her state-owned computer in an effort to establish a personal business. In addition, Respondent proved that Grievant improperly disclosed confidential information to unauthorized individuals. Grievant's termination was justified and appropriate. Accordingly, the grievance is DENIED.

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

Findings of Fact

1. Grievant was an Office Assistant 3 employed by Respondent in the Wyoming County office of BCSE at the time of her termination. Grievant had worked as a Child Support Specialist 1 and 2 in Raleigh County before she transferred to Wyoming County to be closer to home. At the time of her termination Grievant had been employed by BCSE for over three years in Raleigh and Wyoming Counties.

2. During December of 2011, or January of 2012, BCSE Regional Manager, Ms. Deborah H. Bland, ("Regional Manager Bland") received reports that Grievant was working on personal business during work hours and using state-owned equipment to do so.

3. On the basis of this report, on February 6, 2012, Regional Manager Bland requested a technical investigation of Grievant which was conducted by the West Virginia Office of Technology. Grievant's computer use was investigated from the period of October 1, 2011, through January 31, 2012. This request was made due to Grievant's "suspected misuse and overuse of state e-mail for personal use as well as for commercial enterprise and startup of her own business (a coffee shop). Also, we

suspect misuse of Internet."[1]

4. The Office of Technology's investigation focused mainly on January of 2012, and it revealed that Grievant had been misusing state-owned equipment, e-mail and Internet in her efforts to equip and open a coffee shop.

5. With regard to Grievant's e-mail correspondence, the investigation showed that beginning in early January 2012, during work hours, Grievant used her work e-mail to send and receive dozens of e-mails from Kaldi Gourmet Coffee Roasters ("Kaldi") in her efforts to open a coffee shop.[2] Through e-mail, Grievant and Kaldi communicated concerning various equipment options, technical questions, coffee flavor options, training on equipment, and price quotes. After a multitude of e-mails, on January 31, 2012, Grievant sent a final e-mail to Kaldi stating she would consider her options and potentially place an order.[3]

6. Grievant also corresponded, through numerous e-mails at the workplace, with The Coffee Brewers. In the e-mails with The Coffee Brewers, Grievant obtained information on technical issues, cost, leasing, training and installation of equipment for the establishment of her coffee business. The e-mail correspondence with The Coffee Brewers began on January 5, 2012, and ended on January 24, 2012.[4]

7. On January 4, 2012, Grievant used work e-mail to contact a local caterer to discuss preparation of baked goods for the coffee shop.[5]

8. Beginning on January 17, 2012, Grievant corresponded via e-mail with the

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[1] Respondent's Exhibit 2.
[2] Respondent's Exhibit 3.
[3] *Id.*
[4] Respondent's Exhibit 4.
[5] Respondent's Exhibit 5.

local phone company regarding installation of phone and Internet service at Grievant's coffee shop. E-mail discussions included phone and Internet options, technical questions, and scheduling of installation. The final e-mail from the phone company was received by Grievant on January 20, 2012.[6]

9. Additionally, Grievant had other personal e-mail on her computer, including e-mail regarding online shopping and bill paying.[7]

10. The Office of Technology also investigated Grievant's Internet history and found numerous hits for the word "coffee" and coffee related search terms.[8]

11. Mr. Chris Avis of the Office of Technology analyzed the data generated from the investigation of Grievant's internet and e-mail use and explained that, "there are a lot of things that can expose the network potentially to risk ... information being transmitted in and out of the state network that is not state material may pose some type of risk to opening the door to a website ... we've seen websites with worms and viruses that will actually data-mine the computer or data-mine the state network to gather information. So we try to ... keep all activities as much as possible locked down to state-oriented business. We can't vouch for any website that anybody goes to so we try to keep focused as narrowly as we can to state business only."

12. The Office of Technology's investigation also revealed that Grievant had divulged confidential information from BCSE to third parties, who were unauthorized to receive such information.

13. The record of Grievant's personal e-mails obtained in the investigation

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[6] Respondent's Exhibit 6.
[7] Level three hearing testimony of Regional Manager Bland.
[8] Level three hearing testimony of Mr. Chris Avis of the Office of Technology and Respondent's Exhibits 13, 14, 15.

revealed an e-mail dated November 29, 2011, in which C,[9] asked Grievant "[H]ey ... can you check B for me ... he had oceana address ... box XXXX[10] oceana ... ss 234XXXXXX[11] and A ss last 4 XXXX he changed employers on me."[12]

14. By e-mail dated November 29, 2011, Grievant gave the home and work addresses of B and A to C, by responding that, "B is at [employer[13]]...304-XXX-XXXX po box XXX glen Daniel [sic] (work)[14] his is...XXXX, XXXXX XXXXX rd, Wharton wv." Grievant also informed C that "XXX-XXXX A's address...XXX XXXXX XXX XX beaver, wv he is supposedly working for [employer]."[15]

15. C responded, "[I] called [employer] on A and they do not have anything ... could you have made a mistake ... I had A at [another employer] and i only got one check. [H]ave not received anything else. I was just wondering."[16]

16. Grievant confirmed, "His wife just called and reported him, that we have his last employer, unless she was wrong. We sent out a locate on him there last week and have not heard back." [17]

17. By e-mail dated October 5, 2011, D asked Grievant, "So, XXX is getting Services via Mt. Heart. Wonder if it would make a difference if they knew how much her live in BF made?" She is going through the prenatal program? Why? It's weird."[18]

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[9] Letter names A, B, C, D and E or initials, which have been changed, are used throughout to protect the privacy of the individuals involved. C is Grievant's relative.
[10] "X" is used to protect the individual's address.
[11] "X" is used to protect the individual's social security number.
[12] Respondent's Exhibit 7.
[13] "Employer" used to protect the individual's privacy.
[14] Glen Daniel is an unincorporated town in Raleigh County, WV.
[15] Respondent's Exhibit 7.
[16] *Id.*
[17] *Id.*
[18] Respondent's Exhibit 8.

18. Grievant responded "...i also believe she probably is using a different po box and claiming she doesn't live there, wel (sic) we will see once the baby is born and she has to cooperate w/ child support when she starts to claim he helps but that they don't live together, blah blah blah, *i can check her account. What exactly is her name.*" (Emphasis added). D replied "E is all i know...DOB 1978." Grievant responded, "Yea, N. is not in the home and she is still at the 'apts.'" D replied, "Hahaha she gave up that apt ages ago.....hmmmmm...would it be shitty to tell S.L.? M.'s wife? Head of prenatal? Hehehe." Grievant responded "Funny, but don't say where it came from lol."[19]

19. Grievant breached the confidentiality requirements of Respondent when she: disclosed to C that a "locate" had been sent out by BCSE on an individual; gave the work addresses of individuals in the BCSE database to C; and when she accessed the BCSE account of E to provide information to D.

20. Regional Manager Bland explained why Grievant's unlawful disclosures were "an extremely big deal," stating that employees,

> " … are plainly told confidentiality is the most important you are not to disclose any information to anyone unless it is a court agency and you are processing the case or an interstate action ... you are not to discuss with family, friends, other people if they call and ask you for information, you are to tell them 'no' if it's not within the agency or not for agency purpose. Confidentiality is such a big deal that every year we sign an acknowledgment reviewing confidentiality policy and procedure. And we have to do that, we have federal money ... that can be cut if the IRS does an audit on us and they find out we breached confidentiality."

21. In testifying about Grievant's e-mails disclosing confidential information, Mr. Avis explained that, "Once [such e-mails are] out of the state's network we can't account for it ... it's no longer within our control."

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[19] *Id.*

22. D and Grievant also discussed personal issues, via the state e-mail system, that were sexually explicit, graphic and highly inappropriate.[20]

23. Regional Manager Bland reviewed Grievant's e-mails upon completion of the investigation. She stated that, "[I]f it was one or two e-mails ... it would have been a reprimand ... but the sheer amount of e-mails regarding the coffee shop, the time and agency equipment used in that, was something we couldn't just walk away from or say 'don't do it again' ... and then the two that basically breached confidentiality. To have two is very serious ... "

24. Director of Field Operations, Mr. Larry LeFevre, reviewed the investigation upon its completion and, together with Regional Manager Bland, participated in the decision to terminate Grievant. Director of Field Operations LeFevre explained that Grievant sent a voluminous number of e-mails from the workplace concerning her coffee shop, which constituted a violation of Respondent's Internet use policy.[21] While Grievant's e-mail and Internet misuse was a matter of serious concern to Director of Field Operations LeFevre, the Office of Technology's finding that Grievant had breached confidentiality was of even more concern to him because such violations could jeopardize BCSE's funding.[22]

25. Prior to her predetermination meeting, by letter dated April 13, 2012,

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[20] Level three testimony of Regional Manager Bland and Respondent's Exhibit 8.

[21] Level three testimony of Regional Manager Bland and Director of Field Operations LeFevre.

[22] Director of Field Operations LeFevre stated that, "… [W]e have regulations and laws and policies regarding confidentiality. A lot of it deals with the IRS, their regulations. If we breach confidentiality they [IRS] can impose a fine on the state, cut their benefits, cut our funding and we are heavily federally funded, most of our money comes from the Feds ... if they cut that, it cuts lots of our funding."[22] He explained that but for the breach of confidentiality, "[S]he (Grievant) probably would have gotten a three day suspension or at least a written reprimand [for the coffee shop]."

Grievant admitted that, "i have worked some on my husband's coffee business while here, which i know i probably shouldn't have, receiving some personal e-mails and use of computer time that is not work related."[23]

26. Regional Manager Bland and Field Operations Manager LeFevre held a pre-determination meeting with Grievant and her attorney prior to her termination.

27. Grievant's employment was terminated by a letter to her from Mr. Garrett Jacobs, Commissioner of BCSE, dated April 18, 2012. The termination letter stated, in pertinent part, that:

> "In January 2012, it was reported that you were providing outside vendors with your work e-mail address and phone number for contact with regard to your personal plans to open a coffee shop. After review of the information and allegations, it was determined that an investigation of your computer records was warranted. The investigation results provided by the Office of Technology confirmed that you had repeatedly utilized State of West Virginia, Department of Human Resources computer and e-mail system not only for your own personal business but that you violated strict confidentiality policies and procedures … In addition, you provided an outside party with the name of an employer, address and social security number of a non-custodial parent. As you are aware, giving out confidential information is strictly forbidden and violates confidentiality policies."

The letter continued that:

"On March 2, 2009, when you began your employment with the Bureau for Child Support Enforcement, you signed an acknowledgment stating you had received, read and understood several agency policies including the following:

- Computer policies which include Computer Crime and Abuse Act; Use of Information Technology Resources & Electronic Mail guidelines and requirements.
- DHHR Employee Handbook with signature page.
- DHHR Policy Memorandum 2108 regarding Employee Conduct.

[23] Respondent's Exhibit No. 10.

• Calvin Robbins' memo dated June 29, 1994 regarding employee conduct related to forbidding use of agency supplies and equipment for personal reasons and any reason other than agency business.

• Employee Confidentiality Statement effective 02/19/2002 with attachments including Responsibility and powers of department; confidentiality of records; Common Chapters Manual 1100-1150 and Common Chapter Confidentiality 200-260."[24]

28. DHHR Policy Memorandum 2108, "Employee Conduct," effective February 28, 1982, which was referred to in Grievant's letter of termination, specifies, *inter alia*, that:

> "Employees are expected to: maintain the confidentiality of all Agency records including personnel, residence/patient/client records; use … telephones and equipment only as authorized … "

29. DHHR Policy IT-0510, "E-mail Guidelines and Requirements," effective September 6, 2000, which was referred to in Grievant's letter of termination, provides at 4.2, "Employee Responsibility," subsection 4.2.1, that, "Only minimal personal use of the DHHR e-mail system is allowed, and should not interfere with the legitimate business of the State."[25]

30. DHHR Policy IT-0501, "Use of IT Resources," effective date March, 14, 2000, which was referred to in Grievant's letter of termination, states at 4.3, "Employee Responsibilities," subsection 4.3.1, that, "Only minimal personal use of DHHR IT resources is allowed, and should not interfere with the legitimate business of the State." This policy further provides at 4.3.4 that, "Inappropriate use of state-provided IT resources posing the risk of disruption to DHHR activities is prohibited." (See Appendix B)" This policy further provides at 4.7, "Violations and Disciplinary Action(s)," subsection

[24] Respondent's Exhibit 1.
[25] Respondent's Exhibit No. 18.

4.7.4 that, "Anyone who willfully or knowingly violates or otherwise abuses the provisions of this policy may be subject to: (1) disciplinary action as outlined in DHHR Policy Memorandum 2104; or (2) criminal prosecution."[26]

31. DHHR Policy IT-0501, "Use of IT Resources," effective date March, 14, 2000, which was referred to in Grievant's letter of termination, at "Appendix B-Unacceptable Uses of IT Resources," Section 1-b states that, "Employees will not use state-provided IT resources for inappropriate purposes or in support of such activities. This includes, but is not limited to the following: any use for commercial purposes, product advertisements, *or 'for-profit' personal activity."* (Emphasis added). Appendix B at Section 1-f further prohibits, "any use of the Internet other than for official DHHR business." Finally, Appendix B at Section 4 specifies that, "Employees will not knowingly or inadvertently spread computer viruses. To reduce this threat, employees must not import files from unknown or questionable sources."[27]

32. On March 2, 2009, when Grievant commenced her employment with BCSE, she signed an acknowledgment stating that she had received, read and understood the afore-cited agency policies.[28]

33. Grievant was required to take a yearly online exam concerning the confidentiality policies of Respondent.[29]

34. During her employment at BCSE, Grievant received e-mails and online training from Respondent related to the importance of securing personal identifying

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[26] Respondent's Exhibit No 17.
[27] *Id.*
[28] Respondent's Exhibit 9.
[29] Grievant testified that she may have taken the answers from another employee, rather than taking the exam on her own.

information which was available to her through the BCSE database and/or used by her in serving BCSE clients. Additionally, on an annual basis, Grievant signed an affidavit regarding confidentiality.[30]

35. Prior to her termination, there were no disciplinary actions taken against Grievant. Grievant's work was good and she was efficient.

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 Rules of the W. Va. Public Employees Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "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). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.,* Docket No. 92-HHR-486 (May 17, 1993).

Grievant was a tenured employee in the state's classified service. As such, the employer must demonstrate that the misconduct which forms the basis for the dismissal was of a "substantial nature directly affecting the 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

[30] Testimony of Regional Manager Bland and Respondent's Exhibit 1 - Letter of Dismissal dated April 18, 2012.

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, ___,] 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 admits that she used the BCSE computer and e-mail systems to conduct her personal business. Grievant asserts that she was justified in these activities because she was following the example of one of her superiors in the office who used state equipment during office hours in connection with her real estate business. While at BCSE, Grievant did not make a formal report about the individual who was allegedly misusing the state's computer system and no proof was offered to substantiate this assertion.

Grievant sent a multitude of e-mails during January of 2012, over a period of several weeks, in her efforts to establish a coffee shop.[31] Some of the e-mails drafted by Grievant were extremely detailed, and obviously time-consuming to compose.[32] In

[31] Respondent's Exhibit No. 3 alone shows approximately 45 e-mails between Grievant and Kaldi Gourmet Coffee Roasters or its representatives.

[32] Respondent's Exhibit No. 3 - A lengthy e-mail from Grievant to a Kaldi Gourmet Coffee Roasters representative, dated Jan. 30, 2012, states, "Quick question … I will review more thorough tonight with my husband. But I noticed a few different types of beans in the beginning of list. Were [sic] opening in a very small town, I don't believe we need that many different types of beans. We are looking for a more specific bean to stick w/ possibly a coffee being and decaf, then the espresso beans that would go well with all the mixed drinks. I think you have a total of eight different beans and with one

addition, Grievant visited numerous websites related to establishing a coffee business during the month of January 2012.[33] Grievant estimated that, in her effort to establish her personal business, she spent approximately one hour to an hour and fifteen minutes per day on the Internet or corresponding by e-mail.[34] The sheer volume of Grievant's e-mails and website visits related to her coffee business illustrates a blatant disregard for Respondent's Information Technology policy guidelines and requirements.

Grievant contends that Respondents did not prove that she violated confidentiality policies and procedures by providing information from the DHHR/BCSE database to unauthorized individual(s**).** Specifically, Grievant asserts that she did not disclose anyone's Social Security number, as was stated in her letter of termination, but rather provided only employer information and addresses. It is true that Grievant did not provide any Social Security numbers.[35]

As to the information which she did provide, Grievant asserts that it came from either

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machine that's a lot of interchanging. I think that's a lot of different choices that our clientele would not use and we would waste. I will go over these tonight though online and see what fits best. Also the blended ice coffee is that the same as the torani frappe blend? Or is that something different than a reg ice coffee? I also need the torani sauce holder, possibly 2 [.] You included some pumps for the sauces, and the syrups… good, need those. Also not sure if were going to offer that many different smoothies, we may stick to 3-4 and order a few more bottles of those. Some of the syrups I noticed, I didn't realize I needed (ex. Root beer, cheesecake) are some of these syrups required for certain drinks that I may be not thinking of at the moment? The drink recipe list you said you can provide gives drink examples in which to incorporate those syrups? If so great, if not may just order a few more of the must haves (choc, caramel, etc…) Thanks for getting back to me so quickly. Oh … Also ... Let's say we start to run low on something. How quick once I place an order can we have those by? (not this huge order) but an upkeep."

[33] Respondent's Exhibit Nos. 13 and 14 - Investigation Reports/Security Operations Center.

[34] Grievant did not say how many days or weeks this went on, but the records of the Office of Technology which reflect her e-mail and Internet usage in January of 2012, would seem to support her time estimate for the days of that month.

[35] But Social Security numbers were supplied to Grievant in an e-mail.

her personal “landlord/tenant files” or from a website accessible to all. Grievant testified that the individuals discussed in the subject e-mails were tenants of her aunt and that the landlord/tenant files contained information/data on her aunt’s clients. Grievant testified that she brought these "landlord/tenant files" with her to work. Grievant explained that she needed access to these files because, as a favor to her aunt, Grievant regularly filed documents with the court, which documents were related to her aunt's real estate business.[36]

Therefore, the critical matter of how Grievant obtained the information which she provided in the subject e-mails is at issue. Thus, Grievant's credibility must be examined. An Administrative Law Judge is charged with assessing the credibility of the witnesses who appear before her. *Lanehart v. Logan County Bd. of Educ.,* Docket No. 95- 23-235 (Dec. 29, 1995); *Perdue v. Dept. 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. In addition, the ALJ should consider: 1) the 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 statement. *See Holmes v. Bd. of Directors/W. Va. State College,* Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue v. Dep’t. of Health & Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1994).

The undersigned first addresses the plausibility of Grievant’s assertion that she

[36] Grievant maintained that she only made these filings after her work day at BCSE was finished.

obtained the information which she disclosed to C and D in her above- cited e-mails by referring to either her "landlord-tenant files" or the Internet**.** An examination of the plain language of Grievant's e-mails is very revealing. For example, when C asked, "[H]ey … Can you check B … ," Grievant promptly responded stating, *inter alia*, that, "*his wife just called and reported him*, that we have his last employer, unless she was wrong. *We sent out a locate on him there last week* and have not heard back." (Emphasis added). While it is possible that Grievant obtained work/home address information from the landlord/tenant file or the Internet, some of her remarks indicate to the undersigned that she obtained her information from the BCSE database/files instead. For example, the reference to B's wife "calling and reporting him," is telling. It is highly improbable that Grievant would have information in her "landlord/tenant files" about B's wife "reporting him." Rather, the undersigned finds it much more likely that Grievant revealed confidential information from the BCSE database; that B's wife reported him to BCSE for some reason. Moreover, a "locate" is a specific term employed in the BCSE office to indicate that the office is attempting to determine the whereabouts of an individual. Therefore, the undersigned finds that Grievant provided confidential information to C by disclosing to C that a "locate" was sent out by BCSE to find a particular individual.

In addition, Grievant responded to another request by C, saying, "*I can check her account.* What exactly is her name?" (Emphasis added). C responded, providing a name and date of birth to Grievant. Grievant replied, "yeah, N. is not in the home and she is still at the 'apartments.' " Again, though it is possible that Grievant obtained this address information from the landlord/tenant files or the Internet, that seems highly improbable to the undersigned because of Grievant's statement that she would "check

her account." The reference to an "account" indicates to the undersigned that Grievant obtained information on the subject individual from a BCSE account.

Grievant further contends that she had little or no training during her employment at BCSE regarding confidential information. However, Director of Field Operations LeFevre testified that the BSCE imposes strict confidentiality requirements on its employees and must do so to avoid loss of critical federal funding and to protect the privacy and interests of its clients**.** Additionally, Regional Manager Bland testified that all BCSE employees are plainly told that confidentiality is of the utmost importance and that, " … you are not [to] discuss [any confidential information] with family, friends, other people if they call and ask you for information, you are to tell them 'no' if it's not within the agency or not for agency purposes … Confidentiality is such a big deal that every year we sign an acknowledgment reviewing confidentiality policy and procedure … [37] The testimony of Director of Field Operations LeFevre and Regional Manager Bland effectively established that Grievant received ongoing training on maintaining confidentiality.

In addition, Grievant affirmed that she was responsible to review confidentiality policies on a yearly basis and to take an on-line quiz/exam on same. Grievant apparently took this responsibility lightly, as she indicated that she may have taken her answers from other employees, rather than completing the test on her own as directed. At hearing, Grievant suggested that BCSE was to blame for her failure to take the afore-mentioned quiz/exam as directed, because BCSE employed an honor system, and expected its employees to take this exam unmonitored/unwatched. She seemed to

[37] Level three testimony of Regional Manager Bland.

reason that without being watched, she and other BCSE employees could not be trusted to take the exam as directed. Grievant's cavalier attitude toward taking the required test on the confidentiality policies of Respondent is very concerning. However, whether she eschewed her obligation to review this information or not, she was responsible to abide by the policies of BCSE to protect confidential information. Grievant's attitude toward the mandatory test and her overall demeanor at the hearing seriously diminished her credibility.

Grievant further avers that the penalty of termination was too severe and that her punishment should be mitigated. “Whether to mitigate punishment imposed by the employer depends upon 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). The first area of inquiry under *McVay, supra.,* is Grievant's work record. Grievant had no disciplinary actions taken against her prior to her termination. In fact, Regional Manager Bland testified that Grievant performed well at her work. However, DHHR Policy Memorandum 2104, "Guide to Progressive Discipline" at "Dismissal" provides that "Separation from employment may be issued when (1) infraction/deficiencies in performance and/or behavior continue after the employee has had adequate opportunity for correction or (2) if an employee commits a singular offense of such severity warranting dismissal.”[38] Progressive discipline establishes levels of discipline which may be imposed when an employee

[38] Respondent’s Exhibit No 11.

exhibits initial or continuing unacceptable work behavior or performance. Progressive discipline is applied as appropriate and required. “If … the misconduct is of a substantial nature and can be shown to affect directly the rights and interests of the public by bearing directly in a substantial manner on the duties which the employee is required to discharge, then the employing authority and the Civil Service Commission have the power and the duty, upon such a showing, to enforce such remedial steps, including a dismissal, as may be found proper under all of the circumstances of the case." *Thurmond v. Steele,* 159 W. Va. 630, 635, 225 S.E.2d 210 (1976). *See Mindel v. United States Civil Serv. Comm'n*, 312 F. Supp. 485 (N.D. Cal. 1970); *Kidd v. W. Va. Dept. of Tax and Revenue*, Docket No. 91-T-127 (Dec. 17, 1991). Respondent proved that Grievant committed very serious breaches of confidentiality, which constitutes “misconduct … of a substantial nature and can be shown to affect directly the rights and interests of the public,” and which justifies her termination.[39]

The next area of inquiry under *McVay, supra*., is to determine whether the policies and procedures which Grievant violated could be clearly understood. The policies and procedures of the Respondent concerning information technology, e-mail use and confidentiality are clear and were given to Grievant when she was hired. Moreover, the credible testimony of Regional Manager Bland establishes that BCSE employees are trained and cautioned not to disseminate confidential information to unauthorized individuals or entities. In addition, every year DHHR/BCSE employees take a test on the confidentiality policies and procedures of Respondent. These

[39] Moreover, the undersigned notes that Grievant wasted a considerable amount of the state’s time, for days and weeks on end, using IT resources in furtherance of establishing her commercial business. These combined infractions are also very serious matters.

measures are certainly adequate to educate BCSE employees on the confidentiality policies of Respondent.

The final area of inquiry under *McVay, supra*., is whether there were mitigating circumstances that should be considered in judging the severity of the penalty. "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 prospect of rehabilitation." *Overbee v. W. Va. Dept. of Health and Human Resources/Welch Emergency Hospital*, Docket No. 96-HHR-183 (Oct. 3, 1996). In this situation, there were no mitigating circumstances to justify a reduction in the penalty imposed.

In summary, Grievant provided outside vendors with her work e-mail address and phone number to establish a personal business and corresponded with said vendors through the state system. Grievant did not just occasionally use e-mail and the Internet for personal reasons, but used it a multitude of times over a number of weeks, constituting serious abuse of the state's IT system. Moreover, Grievant repeatedly visited Internet websites, which may not have been secure. Strict adherence to Respondent's policies concerning proper Internet usage is vitally important to protecting the state system from viruses and "data-mining" by outside entities. There could be potentially disastrous effects on the system if compromised. Finally, BCSE's funding could be jeopardized if confidential information is provided to unauthorized third parties. Given the frequency of the Grievant's misuse of the state's computer system, her

breach of Respondent's confidentiality policy, and the potentially deleterious effect of her actions on BCSE's funding and its clients, the penalty imposed by Respondent was not excessive; it did not reflect an abuse of discretion and was not disproportionate to the offense(s).

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 W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health,* Docket No. H-88-005 (Dec. 6, 1988). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.,* Docket No. 92-HHR-486 (May 17, 1993).

2. Respondent proved, by a preponderance of the evidence, that Grievant violated agency policies and procedures concerning computer and e-mail use by spending extensive amounts of time on her state-owned computer in an effort to establish a personal business.

3. Respondent proved, by a preponderance of the evidence, that Grievant improperly disclosed confidential information to unauthorized individuals.

4. Based upon the totality of the circumstances, Respondent proved, by a preponderance of the evidence, that the discipline of Grievant for violation of its rules and policies was justified and appropriate.

5. Since Grievant was a tenured employee in the state's classified service, the employer must demonstrate that the misconduct which forms the basis for the

dismissal was of a "substantial nature directly affecting the 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, ___,] 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).

6. Respondent demonstrated that Grievant's misconduct which formed the basis for the dismissal was of a "substantial nature directly affecting the rights and interests of the public," and that her termination was therefore justified.

7. Grievant bears the burden of showing that the penalty of dismissal was too severe or was an abuse of discretion. An allegation that a disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer’s discretion, or an inherent disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ.,* Docket No. 94-01-394 (Jan. 31, 1995); *see also, Martin v. West Virginia Fire Commission,* Docket No. 89-SFC-145 (Aug. 8, 1989).

8. Grievant failed to demonstrate that the disciplinary measure of dismissal

was disproportionate to the offense, arbitrary and capricious, or an abuse of discretion by Respondent.

9. "Whether to mitigate punishment imposed by the employer depends upon 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). In assessing the penalty to be imposed, "whether to mitigate punishment imposed by the employer depends upon 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).

10. Grievant failed to prove that Respondent had any legal obligation to impose a lesser form of punishment for the charged offenses.

Accordingly, the 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 (eff. July 7, 2008).

DATE: MARCH 18, 2013

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SUSAN L. BASILE
ADMINISTRATIVE LAW JUDGE