

No. 34401

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

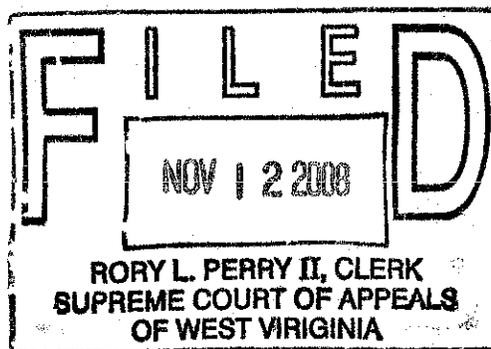
PAMELA GAINER,

Appellee,
Plaintiff below,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH
AND HUMAN RESOURCES/BUREAU FOR
CHILDREN AND FAMILIES,

Appellant,
Defendant below.



FROM THE CIRCUIT COURT OF CALHOUN COUNTY, WEST VIRGINIA
CIVIL ACTION NO. 07-P-3

APPELLANT'S BRIEF

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ATTORNEY GENERAL

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APPELLANT'S BRIEF

I.

KIND OF PROCEEDING AND NATURE OF RULING BELOW

The Appellant, West Virginia Department of Health and Human Resources/Bureau for Children and Families (hereinafter, "DHHR") seeks reversal of a October 30, 2007 Order of the Circuit Court of Calhoun County, West Virginia, overturning a Level IV Decision of the West Virginia Education and State Employees Grievance Board denying Ms. Gainer's (hereinafter, "Appellee") grievance, attached hereto as Exhibit 1. Appellee is employed by DHHR as a Foster Care Worker in its

Calhoun County office. On July 10, 2006, Appellee was suspended without pay for four working days for breaching confidentiality of sensitive social service case records.

Appellee filed a grievance regarding her suspension at Level II on July 16, 2006. The grievance was denied at this level, and Appellee appealed to Level III. A hearing was held at Level III on September 5, 2006. Appellee was represented by counsel, Loren Howley. Appellee's grievance was denied at Level III on October 27, 2006.

Appellee appealed her grievance to the West Virginia Education and State Employees Grievance Board on October 31, 2006. Appellee, again, was represented by Loren Howley, Esq. The parties agreed to submit the case on the Level III record and submit briefs to the Administrative Law Judge ("ALJ"). Ms. Howley asked to introduce an "Order Authorizing Separation of Siblings Pursuant to W. Va. Code §49-2-14(e)" from the circuit court of Calhoun County that she had not introduced at Level III. This Order was issued as a result of a hearing before the Circuit Court on August 8, 2005, where Appellee released the confidential documents. Over objection, ALJ Denise Spatafore allowed the document to be admitted, but stated that she would later determine its relevance. On March 16, 2007, ALJ Spatafore issued a decision denying Appellee's grievance and finding that Appellant had proven by a preponderance of the evidence that Appellee had violated both DHHR confidentiality policies and the Social Workers' Code of Ethics, attached hereto as Exhibit 2. Judge Spatafore stated in a footnote that the circuit court order had no bearing on determining whether Appellee's suspension was proper and, therefore, was not considered part of the record. See, Exhibit 2, footnote 3, page 7.

On April 13, 2007 Appellee appealed this decision to the Circuit Court of Calhoun County. Judge David Nibert reversed ALJ Spat fore's decision, holding that Appellant had improperly disciplined Appellee. It is from this decision that DHHR appeals to this Court.

II.

STATEMENT OF FACTS

Appellee is employed by the DHHR as a foster care worker. As part of her duties, Appellee monitors and reports on the care and welfare of minor children placed in foster homes in Calhoun County. On July 10, 2006, Appellee was suspended without pay for four working days for breaching confidentiality of sensitive social service case records. Specifically, she obtained recordings from a confidential adoption record and shared them with two attorneys not employed by DHHR.

Appellee was the Foster Care Worker for a state ward, who shall be referred to as "Christopher S." Christopher S. was placed in a foster home with a woman who shall be referred to as "S.B.". On September 3, 2004, Christopher S.'s case was transferred to the DHHR's Adoption Unit and assigned to Jennifer Hogue, Adoption Specialist. Christopher S. was ultimately adopted by S.B. Christopher S. had a half-sibling Holly S., who was also a state ward. Both S. B. and the family where Holly S. was placed wanted to adopt Holly S. Consequently, a placement hearing was scheduled. The Court also appointed a Guardian Ad Litem, Loren Howley, Appellee's counsel.

Jennifer Hogue was subpoenaed to testify at a placement hearing regarding Holly S. Appellee claimed that she had also been subpoenaed for this hearing and asked that the electronic case management file be unlocked so she could review her own contacts made prior to the case's transfer to the Adoption Unit. Sarah Bleigh, Regional Social Service Supervisor for the Adoption Unit, unlocked the case.

Families and Children Tracking System, ("FACTS"), is a large customized and statewide automated Case Management System for all DHHR's Child Welfare and Adult Service Programs. The FACTS program was established for the administration of Title IV-E Child Welfare Programs. Workers use FACTS to enter case notes. Once a case is transferred to the Adoption Unit, the records and information in FACTS become locked so that only employees with adoption access can view these records. Appellee did not have adoption access.

Ms. Hogue testified at the September 8, 2005 placement hearing. During cross-examination, an attorney representing Holly S.'s foster parents attempted to impeach Ms. Hogue's testimony by producing copies of her FACTS recordings. This attorney had not requested these documents from DHHR and had no legal reason to have them. These recordings were part of the adoption records for CHRISTOPHER S., and as such are protected by law. W. Va. Code §49-7-1 discusses confidentiality of records. §49-7-1(b) states that

"Notwithstanding the provisions of subsection (a) of this section or other provision of this code to the contrary, records concerning a child or juvenile, **except adoption records**, juvenile court records and records disclosing the identity of a person making a complaint of child abuse or neglect shall be made available . . . "

W. Va. Code § 49-7-1(b) specifically forbids disclosure of adoption records. When Ms. Hogue returned to the office, she reviewed the audit trail in FACTS to ascertain how the non-agency attorney had obtained the adoption records. Audit trails reveal who has accessed the record and what action has been taken. The audit trail revealed that Appellee had accessed the case and printed off Ms. Hogue's entries, as well as her own. Interestingly, Appellee did not testify at the hearing.

Appellee provided the FACTS information to Aaron Boone, counsel for Holly S.'s current foster parents. Appellee also provided copies of the documents to her current counsel, Ms. Howley, who had been appointed Guardian Ad Litem for the infant, Holly S. Appellee, not as a DHHR representative, but on her own volition, disclosed confidential information to impeach any testimony from Ms. Hogue recommending that the half sibling be placed with S.B.

Upon request, the DHHR Office of the Inspector General (hereinafter "OIG") conducted an investigation into the matter. During the investigation, statements were taken from relevant witnesses. On March 17, 2006, Appellee was interviewed by OIG investigator, Trina Smith. During this interview, Appellee provided a statement regarding her actions. She informed Ms. Smith that she had printed off the contacts so that she could read them. She said that she put them in a folder that she took to court with her, and shredded them afterwards. This statement was a lie. Ms. Smith asked Appellee if the contacts were presented in court. Appellee again lied, stating that they were not presented in court. When faced with evidence to the contrary, she then

admitted that she had given the contacts to attorneys Aaron Boone, and Loren Howley, the Guardian Ad Litem and Appellee's current counsel. See, Exhibit 3.

The OIG investigation determined that Appellee accessed information from a confidential adoption case and shared this information with others outside the agency, thus violating DHHR Policy Memorandum 2108, Employee Conduct; Common Chapters 200, Confidentiality; FACTS Children and Adults Policy 1.9- Confidentiality and the National Association of Social Worker's Code of Ethics Section 1.07 Privacy and Confidentiality and 2.02 Confidentiality. Appellee had attended Adoption, Permanency and FACTS training and knew that adoption cases were confidential.

On June 19, 2006, Appellee met with Jim Morford, DHHR Community Services Manager, to discuss the possibility of disciplinary action. Appellee first stated that she would do the same thing in similar circumstances. Immediately thereafter, Appellee stated that her previous statement was made in haste, and she was remorseful that she had violated policies related to confidentiality. She further stated that if faced with a similar situation she would inquire as to the proper procedure for bringing information to the Court.

As a result of the OIG findings that Appellee had breached DHHR policy and Social Worker Code of Ethics, Appellee was suspended for four days without pay for her gross failure to follow policy. In a letter dated July 10, 2006, Louis Palma, DHHR Regional Director, notified Appellee of the suspension, and specifically cited all policies Appellee had breached.

III.

STANDARD OF REVIEW

The West Virginia Code provides that a decision of the West Virginia Education and State Employees Grievance Board ("Grievance Board") may only be overturned if the decision:

1. was contrary to law or a lawfully adopted rule, regulation or written policy of the employer;
2. exceeded the hearing examiner's statutory authority;
3. was the result of fraud or deceit;
4. was clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
5. was arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W. Va. Code § 29-6A-7 (2001 & Supp. 2002).

The West Virginia Supreme Court has interpreted this statutory provision on many occasions. In summary, "a final order of the hearing examiner . . . based upon findings of fact, should not be reversed unless clearly wrong." Randolph Co. Bd. of Ed. v. Scalia, 182 W. Va. 289, 387 S.E.2d 524, 527 (1989); cited in W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); see also W. Va. Dep't of Health v. W. Va. Civil Service Commission, 178 W. Va. 237, 358 S.E.2d 798 (1987).

The Supreme Court of Appeals reiterated this standard in Board of Educ. of Mercer v. Wert, 192 W. Va. 568, 453 S.E.2d 402 (1994).

In applying the clearly erroneous standard to the findings of a [lower tribunal] sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo. Indeed, if the lower tribunal's conclusion is plausible when viewing the evidence in

its entirety, the appellate court may not reverse even if it would have weighed the evidence differently if it had been the trier of fact.

Id. at 413 (citations omitted).

Moreover, in a recent decision this Supreme Court held that Grievance rulings involve a combination of both deferential and plenary review. Since a reviewing court is obligated to give deference to factual findings rendered by an ALJ, a circuit court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations. Credibility determinations made by an ALJ are similarly entitled to deference. Plenary review is conducted as to the conclusions of law and application of law to the facts, which are reviewed *de novo*. Syl. pt. 1, Cahill v. Mercer County Bd. of Educ., 208 W. Va. 177, 539 S.E.2d 437 (2000). See also Watts v. Dep't of Health & Human Resources, 195 W. Va. 430, 465 S.E.2d 887, 891 (1995).

IV.

ASSIGNMENTS OF ERROR

A. THE CIRCUIT COURT'S ORDER GRANTING APPELLEE'S ATTORNEY FEES IN THE AMOUNT OF \$9,045.00 PLUS INTEREST IS CONTRARY TO LAW.

After granting Appellee's appeal, the Circuit Court issued an Order on December 21, 2007, ordering Appellant to pay for Appellee's costs in the action, including attorney fees and court costs, in the amount of \$9,045.00, plus interest at the rate of 10% per annum until paid in full." See, Exhibit 1.

In 2007, the Legislature promulgated a new grievance procedure for public employees. The new statute, found at West Virginia Code § 6C-2-1 *et seq.* became effective July 1, 2007. All grievances filed on or after that date follow the procedures set forth in the new statute. Grievances filed prior to July 1, 2007 follow the procedures found in the old statute. Under the old statute, attorney fees were governed by § 29-6A-10. This statute limited attorney fees to a maximum of \$1500.00. This code section states

[If] an employee appeals to a circuit court an adverse decision of a hearing examiner rendered in a grievance proceeding pursuant to provisions of this article or is required to defend an appeal and the person substantially prevails, the adverse party or parties is liable to the employee, upon final judgment or order, for court costs, and for reasonable attorney's fees, to be set by the court, for representing the employee in all administrative hearings and before the circuit court and the supreme court of appeals, and is further liable to the employee for any court reporter's costs incurred during any administrative hearings or court proceedings: *Provided*, That in no event shall such attorney's fees be awarded in excess of a total of one thousand five hundred dollars for the administrative hearings and circuit court proceedings nor an additional one thousand dollars for supreme court proceedings: *Provided, however*, That the requirements of this section shall not be construed to limit the employee's right to recover reasonable attorney's fees in a mandamus proceeding brought under section nine of this article.

Under the new statute, attorney fees are addressed at West Virginia Code § 6C-2-6(b). The new statute places no limit on attorney's fees. This code section states that in the event a grievant or employer appeals an adverse level three decision to the circuit court of Kanawha County, or an adverse circuit court decision to the Supreme Court of Appeals of West Virginia, and the grievant substantially prevails upon the appeal, the grievant may recover from the employer court costs and reasonable attorney's fees for the appeal to be set by the court.

Appellee filed her grievance on July 17, 2006. The Administrative Law Judge issued a decision on March 16, 2007. Appellee appealed that decision to the circuit

court on April 13, 2007. Appellee's grievance was already at the circuit court when the new statute became effective. Therefore, Appellee's grievance clearly falls under the old statute.

In his order, Circuit Court Judge David Nibert cites the old statute, West Virginia Code §29-6A-7, regarding the standard of review, thereby acknowledging that the case falls under the former grievance statute. However, he cites West Virginia Code §6C-2-6 when awarding attorney's fees to Appellee's attorney. Appellee cannot mix and match the two statutes. In fact, if the case had been decided under the new statute, Judge Nibert would not have had jurisdiction to render any decision, as all grievance appeals must be filed in Kanawha County Circuit Court. Appellee filed her grievance under the former grievance procedure, and any award of attorney fees should follow that statute regarding such award. Therefore, the Circuit Court's Order award of \$9,045.00 plus interest to Appellee's attorney is contrary to law.

B. THE CIRCUIT COURT ERRED IN ITS ANALYSIS OF WHETHER APPELLANT FAILED TO MEET ITS BURDEN OF PROOF REGARDING APPELLEE'S SUSPENSION.

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. W. Va. Code § 29-6A-6; Ramey v. W. Va. Dept. Of Health, Grievance Board Docket No. H-88-005 (Dec. 6, 1988). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. Leichliter v. W. Va. Dept. Of Health and Human Resources, Grievance Board Docket No. 92-HHR-486 (May 17, 1993).

The law regarding affirmative defenses and mitigation of disciplinary actions of public employees is well settled. "When a defense is raised by a grievant in a discipline-based claim, it is his burden to establish the validity of that defense." Young v. W. Va. Dept. of Health and Human Res., Grievance Board Docket No. 90-HHR-541, at 12 (March 29, 1991). Woods v. Div. of Corrections, Grievance Board Docket No. 97-CORR-491 (Jan. 14, 1998). 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., Grievance Board Docket No. 96-HHR-183 (Oct. 3, 1996).

Appellee claimed she disclosed confidential information to prevent imminent, foreseeable harm to the child involved in the underlying adoption case. However, she never established that this harm existed. At the Level III hearing, which was the only occasion where testimony was taken, it was clearly established that no imminent harm existed. Two witnesses other than Appellee testified on her behalf. On page 132 of the Level III transcript, Jacqueline Blankenship, DHHR Social Service Worker, testified that "I'm not saying that they were in eminent (sic) danger. What our concern was was the lack of interaction of stimulation with the children." The Level III decision reflected that there had been no showing that the child in question was in imminent harm. Appellee failed to establish her affirmative defense that her actions prevented imminent harm.

At Level IV of the grievance process, the case was submitted on the Level III record below. No new evidence was taken. When submitting Proposed Findings of Fact and Conclusions of Law, Appellee attempted to introduce a circuit court order entitled "Order Authorizing Separation of Siblings Pursuant to W. Va. Code §49-2-14(e)" that she had not introduced at Level III. This order was issued on December 6, 2005, following the August 8, 2005 hearing where Appellee released the confidential records. The Order discusses the underlying adoption case and the ultimate placement of the child in question. This Order never mentions the phrase "imminent harm." The purpose of this order was the placement of the child in question.

On March 16, 2007, ALJ Spatafore issued a decision denying Appellee's grievance and finding that Appellant had proven by a preponderance of the evidence that Appellee had violated both DHHR confidentiality policies and the Social Workers' Code of Ethics. Judge Spatafore stated in a footnote that the Circuit Court order had no bearing on determining whether Appellee's suspension was proper and, therefore, was not considered part of the record. See, Exhibit 2, footnote 3, page 7.

On appeal, Judge Nibert reviewed the case using an inappropriate analysis. Instead of reviewing the record to determine whether the ALJ properly held that Appellee violated DHHR rules and regulations and whether Appellee had established her affirmative defense, he reviewed the record to determine if Appellee acted in the "best interest of the child."

Judge Nibert relied solely on the Order issued by Judge Evans. The Order is referenced numerous times in Judge Nibert's reversal of the ALJ's decision below.

Judge Nibert's decision never mentions any evidence or testimony presented at the Level III grievance hearing. Among this evidence is a report from the OIG, establishing that Appellee initially denied that she had given the adoption records to anyone outside the agency. His decision is based on an Order that was never presented during the grievance process, although it was entered and available to the Appellee before she filed her grievance. This Order was not provided to Appellant until the parties submitted their written summations to ALJ Spatafore.

IV.

CONCLUSION

Based on the foregoing, Appellant respectfully asks this Court to reverse the October 30, 2007 Circuit Court Order granting Appellee's appeal.

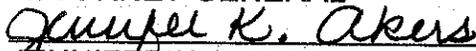
Respectfully submitted,

WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,

APPELLANT

By Counsel

DARRELL V. McGRAW JR.
ATTORNEY GENERAL


JENNIFER K. AKERS
ASSISTANT ATTORNEY GENERAL

W. VA. ID # 8771

West Virginia Department of Health
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Charleston, West Virginia 25305

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COUNSEL FOR APPELLANT

IN THE CIRCUIT COURT OF CALHOUN COUNTY, WEST VIRGINIA:

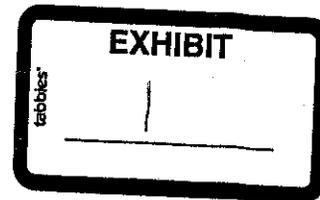
PAMELA GAINER,
Plaintiff,

vs.

MARTHA YEAGER WALKER, SECRETARY,
WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,
and the STATE OF WEST VIRGINIA,

Defendants.

FILED
CIRCUIT COURT
CALHOUN COUNTY, WV
2007 DEC 26 AM 8:02
WILELA GARNETSON
CIRCUIT CLERK



Case No. 07-P-3

RECORDED IN Div. 1 ORDER BOOK

NO. 25 PAGE 353

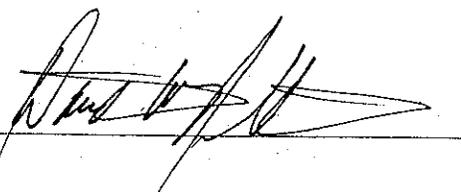
THIS IS TODAY OF December 21, 2007

O R D E R

This day the plaintiff appeared by counsel Loren B. Howley, and submitted her affidavit with itemized statement of the plaintiff's attorney fees and costs incurred in this matter, as directed by the Order of this Court entered on November 2, 2007. The court reviewed the affidavit, and found it proper. Therefore, it is ORDERED that the affidavit of Loren B. Howley, with itemized statement of the plaintiff's attorney fees and costs, is filed.

Upon consideration of all of the above, it is hereby ADJUDGED and ORDERED that the plaintiff Pamela G. Gainer is awarded judgment against the defendants for the plaintiff's costs in this action, including attorney fees and court costs, in the amount of \$9,045.00, plus interest at the rate of 10% per annum until paid in full.

ENTER this 21 day of December ~~November~~, 2007.



Judge

Presented by:

Loren B. Howley
State Bar ID #1800
Attorney for Plaintiff
P.O. Box 580
Grantsville, WV 26147
304-354-7037

Gainer v. Martha Yeager Walker, et al.,
Calhoun County C.A. No. 07-P-3

THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES
GRIEVANCE BOARD

PAMELA GAINER,

Grievant,

v.

Docket No. 06-HHR-401
Denise M. Spatafore
Administrative Law Judge

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR CHILDREN AND FAMILIES,

Respondent.

DECISION

Pamela Gainer ("Grievant") initiated this proceeding on July 16, 2006, challenging a 4-day suspension without pay, imposed by her employer, Respondent Department of Health and Human Resources ("DHHR"). The grievance was initiated at level two and was denied at that level, and it was also denied at level three on October 27, 2006, following a level three hearing. Grievant appealed to level four on October 31, 2006. During a telephonic prehearing conference conducted on January 8, 2007, the parties agreed to submit this grievance for a decision based upon the record developed below. This matter became mature for consideration on February 23, 2007, the deadline for submission of the parties' final fact/law proposals. Grievant was represented in this matter by counsel, Loren B. Howley, and Respondent was represented by Jennifer K. Akers, Assistant Attorney General.

despite those concerns, she did not recommend that he be removed from the home, and, in fact, concluded that it would be better for him to remain in a familiar environment.

5. C.S.'s case was turned over to the Adoption Unit on September 3, 2004, and Jennifer Hogue, Adoption Specialist, was assigned to his case. S.B. formally adopted C.S. on August 29, 2005.

6. A younger sibling to C.S. was born in early 2004 and taken into custody by DHHR. This child, H.T., was placed in a separate foster home and was not initially placed with S.B.

7. During the summer of 2005, after having learned that C.S. had a sibling who had been placed with another foster family, S.B. petitioned for custody of H.T., and a hearing was scheduled before a Calhoun County Circuit Court.

8. In preparation for potentially testifying in the custody matter regarding H.T., Grievant requested access to the database notes she had made regarding the care of C.S. Because C.S. had been referred for adoption, Grievant no longer had access to his FACTS system file, which is a computer file maintained for every case and contains information entered by DHHR employees. Grievant's request to access C.S.'s file was granted by the regional adoption supervisor, so that Grievant could review the notes that had been made while she had been assigned to C.S.'s case.

9. When a FACTS file is "unlocked," the entire file is opened, rather than only portions of it. Therefore, when Grievant opened the case notes on C.S., she was able to review her own notes, in addition to the notes of Ms. Hogue, the adoption worker. Grievant

14. After an investigation was conducted, prompted by a complaint filed by Ms. Hogue, Grievant was suspended for four days without pay. In correspondence dated July 10, 2006, Louis Palma, Regional Director, notified Grievant of the suspension, the reason for it being that she had breached the confidentiality of sensitive social service case records. He specifically cited several DHHR policies and the Social Workers' Code of Ethics.

15. Grievant met with Mr. Palma prior to issuance of the suspension letter. When confronted with her actions, Grievant admitted that she had disclosed confidential information, but stated she believed she needed to do this to protect the best interests of the child involved.

16. There is no evidence that S.B. abused or harmed C.S., or that there was any legal cause for removing C.S. from that home.

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. *W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

expectation that social workers will keep information confidential does not apply when disclosure is necessary to prevent serious, foreseeable and imminent harm to a client[.]”

Although Grievant admits that she did disclose the information, she has offered various explanations for why her disclosure was basically harmless. First, she argues that she only revealed the information to attorneys who were already involved in the case, so her disclosure was limited and pertinent to an issue being determined by the court at that time. Second, she contends that her conduct falls within the confidentiality exception which allows the disclosure of information to protect a child against imminent harm. Grievant believed that the placement of another child in S.B.'s home would have affected her ability to properly care for C.S., let alone the new child, H.T., so her actions prevented harm from occurring to either child.³

"When a defense is raised by a grievant in a discipline-based claim[,] it is his burden to establish the validity of that defense." *Young v. W. Va. Dep't of Health and Human Res.*, Docket No. 90-HHR-541, at 12 (Mar. 29, 1991). *Woods v. Div. of Corrections*, Docket No. 97-CORR-491 (Jan 14, 1998). After full consideration of all of the evidence of record, the undersigned does not find that Grievant's disclosure of confidential information was encompassed by any exception to the policies involved. Although Grievant may have felt that C.S. spent too much time in a playpen on the occasions when she visited the home, there was no evidence that the child was in imminent danger of any kind. Moreover, as his

³Grievant submitted the lengthy circuit court order in the underlying custody case involving H.T., in which it was found that H.T. should not be placed in S.B.'s home. Although Respondent strongly objected to the submission of this document into evidence, the undersigned does not find the outcome of the custody case to have any particular bearing on the outcome of this grievance.

and an undesirable example for the hundreds of other workers who have similar access to these types of records.

Respondent has proven by a preponderance of the evidence that Grievant violated DHHR confidentiality policies and the Social Workers' Code of Ethics, for which it was appropriate to impose discipline. "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). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge cannot substitute her judgement for that of the employer. *Jordan v. Mason County Bd. of Educ.*, Docket No. 99-26-8 (July 6, 1999); *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997). Accordingly, there is no basis upon which to conclude that a four-day suspension was inappropriate under the circumstances.

This decision is supported by the following conclusions of law.⁵

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

⁵Grievant had requested copies of emails between herself and Sarah Bleigh, the supervisor who approved her access to the FACTS adoption record for C.S., so that she could review her contacts in the file. After Respondent stated that the emails had been deleted, Grievant has continued to object to not being provided the records. Nevertheless, there is no dispute that Ms. Bleigh approved unlocking the file for the stated purpose of allowing Grievant to review her contacts, so this issue has no relevance to the outcome of this grievance, and Grievant has not been prejudiced thereby.

THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES
GRIEVANCE BOARD

PAMELA GAINER,
Grievant,

Docket No. 06-HHR-401
Denise M. Spatafore,
Administrative Law Judge

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR CHILDREN AND FAMILIES,
Employer.

Original date of filing - 7/17/2006

Date filed at Level IV - 10/31/2006

CERTIFICATE OF SERVICE AND MAILING

THE UNDERSIGNED certifies the attached **DECISION** has been sent to the following persons and addresses as listed below, by Certified First-Class United States Mail, postage prepaid, unless otherwise indicated:

Pamela Gainer
Route 1, Box 225
Sand Ridge, West Virginia 25234
(304) 354-6118

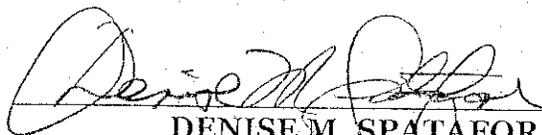
Jennifer Akers, AAG
HHR, Legal Division
Building 3, Room 210
Charleston, West Virginia 25305-0224
(304) 558-2131

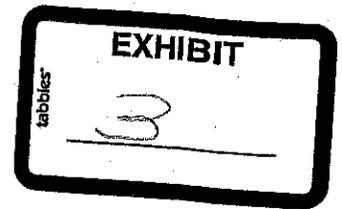
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Charleston, West Virginia 25305
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Certified sent this the 16th day of March, 2007.


DENISE M. SPATAFORE
ADMINISTRATIVE LAW JUDGE



REPORT OF INVESTIGATION

*Investigations and Fraud Management
West Virginia Department of Health and
Human Resources
Office of Inspector General
State Capitol Complex, Building 6
Charleston, West Virginia 25305*

Approved By:

*Sharon O'Dell, Director
Investigations and Fraud Management*

DATE: March 31, 2006

REPORTED BY: Trina Smith, Investigator

VICTIM: West Virginia Department of Health and Human Resources

PLACE OF OFFENSE: Calhoun County

PERIOD OF OFFENSE: July through September 2005

CHARGE:

- (1) *Violation of DHHR Policy Memorandum 2108 - Employee Conduct*
- (2) *Violation of Common Chapters 200, Confidentiality*
- (3) *Violation of FACTS Children and Adults Policy 1.9 - Confidentiality*
- (4) *Violation of the National Association of Social Worker's Code of Ethics Section 1.07 Privacy and Confidentiality and 2.02 Confidentiality*

SUSPECT:

NAME: PAMELA GAINER
SEX/DOB: Female / 04-16-52
SSN: 236-84-9174
ADDRESS: RR 1 Box 225
Sand Ridge, West Virginia 25234

PREDICATION: On October 11, 2005, the Office of Inspector General received a memo from Louis Palma, Regional Director, Region I, requesting an investigation into allegations that PAMELA GAINER, a Child Protective Service (CPS) worker in the Calhoun/Gilmer/Wirt District requested an adoption case be unlocked under the false pretense of accessing HER own contacts, when in fact, SHE accessed and subsequently distributed the confidential contacts of the Adoption Specialist.

The Inspector General authorized the investigation.

SYNOPSIS: Investigation disclosed that PAMELA GAINER, Foster Care Worker, requested access to a confidential adoption case and asserted the purpose of this access was to view and/or obtain HER own contacts, which would have been entered into the case prior to it becoming restricted. Upon gaining access, MS. GAINER printed off the contacts which were entered not only by HER, but also by the Adoption Specialist, Jennifer Hogue. Ms. Hogue's contacts were part of the confidential adoption record and were created after the case became restricted. MS. GAINER then provided a copy of these contacts to Aaron Boone, an attorney who was representing [REDACTED], a foster care provider who had filed a motion to intervene regarding placement of a child. These contacts were then presented as evidence at the hearing.

WORK HISTORY

NAME: PAMELA GAINER
SEX/DOB: Female / 04-16-52
SSN: 236-84-9174
ADDRESS: RR 1 Box 225
Sand Ridge, West Virginia 25234

According to HER personnel record, PAMELA GAINER began HER employment with the Department on September 2, 1975 as an Eligibility Specialist II in the Calhoun County Office. SHE then became a Social Service Worker I in April 1976. SHE was promoted to Social Service Worker II in 1978 and Social Service Worker III in 1984.

HER Employee Performance Appraisal scores average 7.20 out of 10, 3.93 out of 5 and 2.04 out of 3.0.

Investigator's Note: Several EPAs were missing from MS. GAINER's personnel folder; therefore, the numbers above reflect only what information was available.

DETAILS

On October 11, 2005, the Office of Inspector General received a memo from Louis Palma, Regional Director, Region I, requesting an investigation into allegations that PAMELA GAINER, a CPS worker in the Calhoun/Gilmer/Wirt District requested an adoption case be unlocked under the false pretense of accessing HER own contacts, when in fact, SHE accessed the confidential contacts of the Adoption Specialist.

(See Exhibit 1, Memo and attachments from Louis Palma, Regional Director, Region I, dated October 6, 2005, and email from Molly Jordan, Inspector General to Sharon O'Dell, Director, Investigations and Fraud Management, dated October 17, 2005.)

Investigation disclosed that PAMELA GAINER was the foster care worker for two half-siblings, [REDACTED] and [REDACTED]. [REDACTED] was placed in the home of [REDACTED]. His half-sister, [REDACTED], was placed with [REDACTED]. [REDACTED] filed a motion to intervene because she felt [REDACTED] should be placed with her. The judge agreed. [REDACTED] subsequently filed a stay and a motion to intervene. It was at this subsequent hearing that the adoption files were presented.

In her sworn statement, Jennifer Hogue, Adoption Specialist, Region I, stated that PAMELA GAINER, CPS worker in Calhoun County, emailed her on July 1, 2005 requesting she unlock the adoption case so that SHE could get HER contacts. According to Ms. Hogue, MS. GAINER's contacts would've been entered when the case was a state ward case because CPS workers have access to state ward cases. However, once it becomes an adoption case, CPS workers can no longer access it. Ms. Hogue stated she discussed MS. GAINER's request with her supervisor, Sarah Bleigh, and Ms. Bleigh said to go ahead and unlock the case to allow MS. GAINER to get HER contacts and then they would lock it back up. Ms. Hogue stated she was presented with her FACTS recordings in court on September 8, 2005. She stated she didn't know who PAMELA GAINER gave her contacts to, but the [REDACTED] attorney, Aaron Boone, ended up with them. She stated the two recordings which were specifically referenced by the attorney were made by her on October 7, 2004 and November 17, 2004. According to Ms.

Hogue, this was after the case was transferred to the adoption unit; therefore, this was restricted information which MS. GAINER should not have accessed.

Investigator's Note: During the interview, Jennifer Hogue seemed to be under the impression that she was the one to unlock the case; however, the information in FACTS indicates that Sarah Bleigh unlocked the case and Ms. Hogue re-locked it.

(See Exhibit 2, Sworn statement from Jennifer Hogue, Adoption Specialist, dated March 2, 2006 and Jennifer Hogue's memo to Sarah Bleigh dated September 22, 2005.)

(See Exhibit 3, Email from PAMELA GAINER to Jennifer Hogue, dated July 1, 2005.)

(See Exhibit 4, FACTS Client Contact Report presented in court which included contacts made by Adoption Specialist Jennifer Hogue on October 7, 2004 and November 17, 2004.)

According to the FACTS Case Summary screen, the case in question was transferred from Foster Care to Adoption on September 3, 2004. This confirms the information in Jennifer Hogue's statement regarding when the case was transferred to the Adoption Unit and access was restricted.

(See Exhibit 5, FACTS case summary screen, case# [REDACTED].)

In her sworn statement, Sarah Bleigh stated she was an Adoption Supervisor in Region I. She confirmed that Jennifer Hogue works for her and that on July 1, 2005, Ms. Hogue received an email from PAMELA GAINER requesting her to unlock the confidential adoption case in question so that SHE could get HER contacts. She further confirmed that she and Jennifer discussed this request and that she unlocked the case on July 7, 2005. Ms. Bleigh stated that adoption records should be sealed, but it's not uncommon for them to allow access to another social worker, especially if it was that worker's former record. She further stated she was not aware of any policy that dictates who has access to adoption files. She stated "We are all supposed to be on the same team, working for the same cause." Ms. Bleigh stated that she would not unlock a case again. Ms. Bleigh stated that sometime in September 2005, Ms. Hogue informed her that MS. GAINER printed off Ms. Hogue's contacts and they were presented in court. She stated MS. GAINER should not have printed these contacts because they were Ms. Hogue's contacts from an adoption record. Ms. Bleigh confirmed that adoption cases are not accessible by CPS. Ms. Bleigh further confirmed that Ms. Hogue secured the case in question on September 1, 2005. When asked why the case wasn't locked up sooner, she responded that they "probably just forgot." She further stated that she

believed either she or Ms. Hogue asked MS. GAINER to notify them when SHE was through with the case so they could lock it back up.

(See Exhibit 6, Sworn statement from Sarah Bleigh, Adoption Supervisor, Region I, dated March 16, 2006.)

In her sworn statement dated March 9, 2006, Christine Spiker, Child Welfare Consultant, stated PAMELA GAINER emailed her on July 7, 2005, asking how SHE could get the Adoption Unit to unlock [REDACTED] record. Ms. Spiker stated she responded to MS. GAINER's email on July 8, 2005, instructing HER to contact Sarah Bleigh and have Ms. Bleigh copy the contacts and send them to HER because the case could not be unlocked. Ms. Spiker stated that, as a social worker, MS. GAINER would know that adoption cases are confidential and that SHE shouldn't have accessed the case and should not have given the contacts to anyone. She stated this would be covered in FACTS training and Adoption training, both of which PAMELA GAINER has attended. She further stated that the sheer fact that these cases are restricted should be indication enough that they are confidential. Ms. Spiker also confirmed that MS. GAINER should not have been given access to this case.

(See Exhibit 7, Sworn statement from Christine Spiker, Child Welfare Consultant, dated March 9, 2006.)
(See Exhibit 8, Emails between Spiker and GAINER dated July 7, 2005 and July 8, 2005.)

The case summary report in FACTS indicates Sarah Bleigh changed the case type from Adoption to Foster Care, thereby unlocking the case, on July 7, 2005. On September 1, 2005, Jennifer Hogue changed the case type back to Adoption, thereby restricting access once again.

(See Exhibit 5, FACTS case summary screen for case # [REDACTED].)

Investigator's Note: Sarah Bleigh's policy violations are addressed in a separate report.

The case audit detail in FACTS indicates PAMELA GAINER accessed case # [REDACTED] on July 7, 2005, from 3:50 p.m. until 3:56 p.m. and printed the client contact report and again on July 8, 2005 from 11:39 a.m. to 11:41a.m. and viewed collateral information.

(See Exhibit 9, Audit Detail for case # [REDACTED].)

SUSPECT STATEMENT

PAMELA GAINER was interviewed at the Calhoun County Department of Health and Human Resources Office on March 17, 2006. SHE stated SHE is a Foster Care worker and has worked for the Agency for thirty years. MS. GAINER confirmed SHE was the foster care worker for [REDACTED] and for [REDACTED]. SHE stated there were several Multi Disciplinary Team (MDT) meetings for [REDACTED] and the decision was always unanimous, that [REDACTED] should stay with the [REDACTED] rather than being placed with [REDACTED]. SHE stated [REDACTED] initially filed a motion to intervene and then the [REDACTED] filed a stay and a motion to intervene. [REDACTED] was ultimately left with the [REDACTED]. SHE stated SHE and [REDACTED] were the only ones to testify at the first hearing, but that several others testified at the second hearing, including Lynda Trippett, Jennifer Hogue, and possibly Loretta Smith. MS. GAINER felt that [REDACTED] should stay with the [REDACTED] rather than be placed with [REDACTED]. SHE stated SHE was [REDACTED] worker for four months and every time SHE visited, [REDACTED] always had [REDACTED] in a playpen and he wasn't improving as he should. However, SHE stated SHE never entered a recording into FACTS regarding the playpen. MS. GAINER stated that Lynda Trippett, homefinder, indicated in one of her homestudies that [REDACTED] spent a lot of time in his playpen. MS. GAINER also stated that Jennifer Hogue, Adoption Specialist, had made a recording about [REDACTED] always being in his playpen. When asked how SHE knew what recordings the adoption worker made, SHE responded SHE knew this because the recordings are all in the same record.

MS. GAINER stated SHE was not subpoenaed for the hearings but SHE was in attendance at both and was in the courtroom the entire time. SHE stated that when SHE found out SHE would have to testify at the second hearing, SHE emailed Jennifer Hogue and Sarah Bleigh and asked them to unlock the case so that SHE could get HER recordings. When asked what SHE did once SHE received access to the case, SHE stated SHE printed off the contacts so that SHE could read them and SHE put them in a folder that SHE takes to court with HER. SHE further stated SHE shredded them afterwards. When asked if these contacts were presented in court, SHE responded they were not. Upon reviewing the evidence, i.e., copies of the client contact report marked "[REDACTED] #3" and "[REDACTED] #4", MS. GAINER admitted that SHE did give the contacts to the [REDACTED] attorney, Aaron Boone. SHE

stated SHE did not know that Jennifer Hogue was going to testify at the hearing until SHE saw her at the courthouse. SHE stated at that point, SHE told Mr. Boone and the child's attorney that Ms. Hogue had made recordings about [REDACTED] always being in his playpen. SHE stated it was at that point that SHE gave Jennifer Hogue's recordings to Mr. Boone. MS. GAINER confirmed SHE was aware that adoption cases are confidential but stated SHE was not thinking about policy. SHE stated SHE was trying to protect [REDACTED] from having to go into that home and Ms. Hogue's recordings proved what SHE was trying to say that [REDACTED] spent a lot of time in his playpen. SHE stated that when questioned by Mr. Boone about her recordings, Ms. Hogue responded that she felt [REDACTED] could handle having another child.

MS. GAINER stated SHE was not aware of any policy or procedure in place that would ensure Department workers do not end up testifying against each other in court. When asked if there was any policy or procedure in place dictating that one worker testify to the findings or recommendations of the MDT, SHE stated SHE was not aware of any. MS. GAINER confirmed that SHE has received FACTS training, Adoption training, and Permanency training. MS. GAINER ended HER statement by saying that SHE would do whatever is necessary to keep a child safe and if that means disagreeing with a worker from another area that is not HER concern. HER concern is what's best for that child.

(See Exhibit 10, Sworn statement from PAMELA GAINER dated March 17, 2006.)

SUMMARY

PAMELA GAINER admitted to accessing information from a confidential adoption case and then sharing that information with others outside the Agency. SHE admitted SHE has attended Adoption, Permanency, and FACTS training and admitted SHE knew adoption cases were confidential.

PAMELA GAINER's actions are a violation of DHHR Policy Memorandum 2108, Employee Conduct, Common Chapters 200, Confidentiality, FACTS Children and Adults Policy 1.9 – Confidentiality and the National Association of Social Worker's Code of Ethics Section 1.07 Privacy and Confidentiality and 2.02 Confidentiality. These policies are included herein for ease of reference.

(See Exhibit 11, DHHR Policy Memorandum 2108, Employee Conduct.)

(See Exhibit 12, Common Chapters 200, Confidentiality.)

(See Exhibit 13, FACTS Children and Adults Policy 1.9 – Confidentiality.)

(See Exhibit 14, National Association of Social Worker's Code of Ethics Section 1.07 Privacy and Confidentiality and 2.02 Confidentiality.)

No. 34401

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PAMELA GAINER,

Appellee,
Plaintiff below,

v.

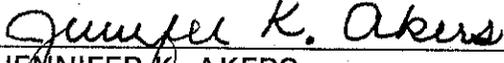
WEST VIRGINIA DEPARTMENT OF HEALTH
AND HUMAN RESOURCES/BUREAU FOR
CHILDREN AND FAMILIES,

Appellant,
Defendant below.

CERTIFICATE OF SERVICE

I, Jennifer K. Akers, Assistant Attorney General, certify that I have this 12th day of November, 2008, served a true copy of the foregoing **APPELLANT'S BRIEF** upon the following individual(s) by depositing the same in the United States Mail, postage prepaid, addressed as follows:

Loren B. Howley, Esq.
P.O. Box 580
Grantsville, WV 26147



JENNIFER K. AKERS
ASSISTANT ATTORNEY GENERAL