

IN THE CIRCUIT COURT OF CALHOUN COUNTY, WEST VIRGINIA

PAMELA GAINER,

FILED
CIRCUIT COURT
BY

vs.

2007 NOV -2 PM 2:58 Civil Action No. 07-P-3

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

SHEILA GARNETTSON
CIRCUIT CLERK

Defendants.

ORDER

This matter is before the Court upon the Petition for Appeal filed by Pamela Gainer seeking review of a Level IV grievance decision by the West Virginia Education and State Employees Grievance Board. Petitioner is represented by Loren Howley, Esquire, and Respondent is represented by Jennifer K. Akers, Esquire, Assistant Attorney General for the State of West Virginia.

The Court has considered the Petition for Appeal; Petitioner's Brief in Support; the Response Brief filed by Respondent, Department of Health and Human Resources Bureau for Children and Families; and the entire record.

Standard of Review

West Virginia Code §29-6A-7, provides that a circuit court may overturn a decision of the West Virginia Education and State Employees Grievance Board only if the decision:

1. was contrary to law or a lawfully adopted rule, regulation or written policy of the employer;

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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.

The West Virginia Supreme Court of Appeals has set forth the methodology to be utilized by the circuit court in conducting such a review as follows:

“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 administrative law judge, 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 administrative law judge 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.” Cahill v. Mercer County Board of Education, 208 W. Va. 177, 539 S.E.2d 437 (2000), Syllabus Point 1.

Statement of the Case

Petitioner is the subject of disciplinary action of a four day suspension, without pay, for violation of the Department's policy relating to confidentiality of Department records. The Court will not reiterate the factual circumstances of the disclosure of the records, which are largely undisputed, as counsel have set out those circumstances in great detail in the parties' briefs. The Court summarizes these circumstances as follows: Pamela Gainer is a CPS employee for the Department in Calhoun County. A child, C, had been placed in S.B.'s home in Harrison County. Ms. Gainer had visited the home to follow the child's care. Ms. Gainer had observed that the child, C, seemed to spend a lot of time in a playpen, which caused her to be concerned that the child's development would

suffer from his lack of ability to move about and explore his surroundings. Ms. Gainer took no action to remove the child from the home, since the child had been in the home for 18 months and the home was close to Morgantown where the child was receiving care for his special needs. The child's case was turned over to the adoption unit and the child's case was assumed by Jennifer Hogue. The child was adopted by S.B. Subsequent to C's removal from the home of his biological mother, a sibling, H, was born. Eventually, H was removed from her home and placed in foster care. In the summer of 2005 a dispute arose relating to the placement of H. Dispositional hearings were conducted before the Honorable Thomas C. Evans III to resolve the dispute whether H should remain in the foster home wherein she resided since her initial removal or whether H should be placed with her sibling, C, in S.B.'s home. H's current foster parent and S.B. each had an attorney representing their opposite positions. H had a guardian ad litem to protect her interest. Apparently, (the record is undisputed on this point) the Department's counsel decided to let the foster mothers litigate the issue. The Department's Calhoun County office supported separation of H from C and her placement with her foster mother, with whom she had resided since a couple of months after her birth. The Calhoun County DHHR office was aware concerns had been expressed about placing H in S.B.'s home out of concern regarding the issue of C being observed in a playpen for an excessive amount of time, Homefinder's advice not to place additional children in S.B.'s home and a pending IIC investigation regarding S.B. Days before the September 8, 2005 hearing the IIC investigation was closed without adverse consequences for S.B.; however, Judge Evans was not completely satisfied with the quality of the investigation.

Ms. Gainer became aware she would be called to testify regarding her observations of C in S.B.'s home. Therefore, she secured permission to access C's case records to prepare for her testimony. Access was to the entire file,

which included observations of Jennifer Hogue wherein Ms. Hogue had expressed concerns similar to Ms. Gainer's observations regarding excessive time C was present in his playpen. Ms. Gainer made hard copies of the entire record. The record is silent whether Ms. Gainer could have made copies of only her own records. She testified she did not know how to copy only her entries from the file. On September 8, 2005, at a dispositional hearing in H's abuse and neglect case, Ms. Hogue testified contrary to the entries she made expressing concerns of S.B.'s home. Ms. Gainer then made C's records available to the guardian ad litem for H and counsel for H's foster mother, who used them to refresh Ms. Hogue's memory in cross-examination. Judge Evans, in an eighteen page order entered on December 6, 2005, separated the siblings, thereby refusing to place H in S.B.'s home with her sibling.

The testimony of witnesses who appeared at the Level III hearing was submitted at the Level IV hearing, along with the December 6, 2005 order of Judge Evans. The Decision of the Administrative Law Judge, dated March 16, 2007, denied Ms. Gainer's grievance. In denying the grievance the ALJ concluded the 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.

Petitioner filed this appeal, alleging:

1. The conclusion of the Administrative Law Judge was clearly wrong in view of the reliable, probative and substantial evidence on the record; and
2. Did DHHR deprive Ms. Gainer of due process of law?

Discussion

Issue I. Is the Level IV grievance decision clearly wrong in view of the reliable, probative and substantial evidence on the whole record?

Issue II. Did the Department prove by a preponderance of the evidence that its disciplinary action against Pamela Gainer was justified because she wrongfully violated the Department's confidentiality policy?

There is no dispute that Ms. Gainer disclosed confidential/private information concerning the child C to third parties who were not authorized by Department policy to have access to the same. The ALJ made 16 Findings of Fact, of which 15 are not in dispute. Ms. Gainer contends that her actions were within and warranted by the confidentiality policy since the policy allows the disclosure of confidential information from the Department's records when it is necessary to prevent serious foreseeable or imminent harm to the child. While there is no West Virginia Supreme Court decision defining "imminent harm," the plain meaning of the word "imminent" means "ready to take place," esp.: "hanging threateningly over one's head" (Webster's Ninth New Collegiate Dictionary, 1987; The Merriam-Webster Dictionary, 1997).

Finding of Fact No. 16 in the Decision states: There is no evidence that S.B. abused or harmed C, or that there was any legal cause for removing C.S. [C] from that home. (p.5, Decision)

In her Discussion portion of the Decision at page 6, the ALJ sets out the policies which were alleged to have been violated by Ms. Gainer: "DHHR Policy Memorandum 2108, Section VIII, provides in part that employees of the agency are to "maintain confidentiality of all agency records including personnel, resident/patient/client records." In addition, DHHR's "Common Chapters Manual" provides in Chapter 200 that client records are confidential, that "no . . . detail concerning a situation of an individual client shall be disclosed by [DHHR] staff," case records are not to be removed from offices without a supervisor's permission, and that "a decision to release confidential information should be given careful and thorough consideration." Moreover, FACTS Policy 1.9 provides that "adoption records are not to be released under

any circumstances.” In addition to these policies, Grievant was also disciplined for violating the Social Workers’ Code of Ethics, which provides that social workers are to protect the confidentiality of all information obtained through their professional work, prevent access to client information by others who are not authorized to have access, and they “should respect confidential information shared by colleagues.” The only exception to these strict confidentiality rules is contained in Part 1, Section 1.07, which states that “[t]he general 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[.]”

On Pages 7 and 8 of the Discussion section of the Decision, the ALJ sets out the reasons for rejecting Ms. Gainer’s position that the release of the confidential information was justified by the exception. “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 foster care worker, Grievant consciously chose to allow C.S. to remain in S.B.’s home, a decision which is nonsensical if she truly believed the child was ever in danger of “serious” or “imminent” harm.”

This Court is of the opinion that the ALJ’s view of the harm to a client that Ms. Gainer saw as justifying the release of the confidential information is misplaced. Calhoun County CPS workers had been advised not to place any additional children in S.B.’s home. Crystal Kendall, Ms. Gainer’s CPS supervisor, testified that shortly before or after H had been removed, there was information of an investigation of S.B.’s home regarding allegations of mother drinking, children being locked out of the house and C being left in a playpen and in a high chair on a regular basis. The Homefinder in the Harrison County area had called to say Calhoun County should not place any children in S.B.’s

home. As a result, Calhoun County CPS took a firm position that the siblings should not be placed together. Ms. Kendall expressed her opinion that imminent danger would occur to C or H or both if H were added to S.B.'s home. Judge Evans devoted 17 findings in his December 6, 2005 order to the issue of placement of H in S.B.'s home (Findings of Fact 24 – 40).

Finding of Fact No. 39 of said order states, "There is clear and convincing evidence that it is in the best interests of C to remain in S.B.'s home, where he had resided for over 18 months before H was even born, and where he has now been adopted. There is clear and convincing evidence that it would not be in C's best interest to place H in S.B.'s home because it would further detract from the free attention that S.B. has to meet his special needs."

In Finding of Fact No. 40, Judge Evans stated the clear and convincing evidence established it would not be in H's interest to remove her to the home of S.B. because (1) it would disrupt H's strong attachment to the Hs' at this vulnerable stage in her development, with possible grave psychological consequences; and (2) there are already five children, including two children with special needs in S.B.'s home, and there would not be adequate attention available for H. Therefore, rather than the issue being whether C should remain in S.B.'s home as stated by the ALJ in the Decision, the concern Ms. Gainer had for the welfare of C and H was the risk of harm which would arise by placing the additional child in the home. Her concern of the risk of harm to the children is corroborated not only by the opinion of her supervisor, Crystal Kendall, but, further, established as fact by clear and convincing evidence adopted by Judge Evans [Finding of Fact Nos. 39, 40, 12-6-05 order].

The ALJ recognizes that Ms. Gainer acted out of concern for the children (Decision, p. 8). However, the ALJ went on to state "rules are rules" and Ms. Gainer could have elected to pursue other options such as to suggest a subpoena for the records. This Court disagrees with the ALJ's analysis. The witness,

Jennifer Hogue, had testified and had forgotten her concern that C was not getting adequate attention. A circuit court hearing was in progress and Ms. Gainer had in her possession the records to refresh Ms. Hogue's memory. The Court and the parties were present to litigate the issue of disposition of H. There is no reason to believe that the Court would have continued the hearing to permit records to be obtained to utilize to cross-examine Ms. Hogue, who had traveled to Calhoun County from Harrison County to testify; particularly since Judge Evans had previously found in an earlier hearing on August 8, 2005, in a close issue, the Department had not proven by clear and convincing evidence that the failure to unite C and H was in the best interest of either child (p. 6, Judge Evans' 12-6-05 order).

The evidence utilized to refresh Ms. Hogue's memory caused her testimony to be in agreement with that of Ms. Gainer (Finding of Fact No. 28, Judge Evans' order 12-6-05). It is clear that Judge Evans considered the information to be of critical importance in his decision to separate the siblings, since he had concluded at an earlier hearing that the Department had not met its burden to prove by clear and convincing evidence that the failure to unite C and H is in the best interest of either child.

In a footnote to the Decision, the ALJ stated:

"Grievant 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."

It is curious that the ALJ found that Judge Evans' order in the H custody case did not have any particular bearing on the outcome of the grievance. The issues in the case before Judge Evans were entirely about harm to H and/or C and the placement which was in the best interest of H.

The failure of the ALJ to recognize the potential harm to these children which concerned Ms. Gainer lead the ALJ to arrive at the conclusion that Ms. Gainer's actions in revealing the confidential information was not within Department policy. The burden of proof in disciplinary actions rests with the employer, and the employer must meet the burden by proving the charge against an employee by a preponderance of the evidence. There is no question in this case that Ms. Gainer revealed confidential information to persons not entitled thereto, unless her action was necessary to prevent serious, foreseeable and imminent harm to a client. The policies of the Department in place to preserve the privacy of its clients and to maintain in confidence discussions, notes and memoranda generated by Department employees are important. Unauthorized disclosure of the private and confidential information would result in serious adverse effect on the Department's ability to accomplish its various missions to provide services to families. However, the Decision in this matter is clearly wrong in view of the reliable, probative and substantial evidence on the whole record. Ms. Gainer's actions, in this instance, were entirely appropriate to prevent serious, foreseeable and imminent harm to H, certainly, and to C as well. Therefore, this Court will reverse the Decision.

ISSUE III. Did the Department deprive Pam Gainer of due process of law?

Ms. Gainer complains that she was denied due process of law because the notice of disciplinary action contained merely general information that she had breached the confidentiality of a sensitive service case record and she had accessed confidential and sensitive client information from a case record, thus compromising the Department's ability to effectively provide services to children as required by law. Ms. Gainer complains that she had never seen the complaint against her nor had she been informed of the identity of her accuser. Counsel represents that she was able to get disclosure of the body of the

investigative report shortly before the Level III hearing; however, the exhibits attached to the report were not disclosed to Ms. Gainer or her counsel until the Level III evidentiary hearing. Counsel for Ms. Gainer raised the due process argument at the Level III hearing; nevertheless, the parties proceeded to the evidentiary hearing. At Level IV, the parties submitted the testimony and documentary evidence submitted at Level III to the ALJ for decision and Ms. Gainer's counsel further submitted as evidence a decision of the Honorable Thomas C. Evans, III, in an abuse and neglect case wherein the disclosure was made.

Due process of law within the meaning of the United States and West Virginia Constitutions extends to actions of administrative tribunals. State ex rel Bowen v. Flowers, 155 W.Va. 389 (1971). The extent or standard of procedural due process depends upon the particular circumstances of the case. Generally, the more valuable the right sought to be deprived, the more safeguards will be interposed. North v. West Virginia Board of Regents, 160 W.Va. 248 (1977). In this instance, Ms. Gainer was suspended for four days without pay. Apparently, this is the only instance in her 30 years of employment with the Department that she has been the subject of disciplinary action. While the monetary loss to Ms. Gainer may be slight, the notation of a disciplinary action against her would be permanently on her employment record and might affect her ability to advance her career with the Department. The Department was in possession of several documents it intended to and did submit into evidence at the Level III hearing. Among those are a memorandum from Jennifer Hogue, which was considered the complaint against Pamela Gainer (R - 3), and which set out in some detail the underlying facts alleged to support the complaint; several e-mails (R - 5 through R - 7) and a report of investigation (E - 1), which set out in substantial detail the course of the investigation and the findings of the investigator. Since all of this information was disclosed at the Level III hearing,

this Court can see no justification for the Department's failure to make this information available to Ms. Gainer and her counsel in order that the grievant could properly prepare a response. This concerns the Court. Nevertheless, it appears that counsel was able to present the facts necessary to establish a record in this matter sufficient to arrive at an appropriate decision by submitting the decision of Judge Evans, which is referred to in this order, to the ALJ at Level IV. Had Ms. Gainer's position been compromised by the denial of due process, this Court would reverse and remand for further proceedings. However, the Court has reversed the Decision for other reasons.

Conclusions of Law

1. For reasons stated hereinabove, the Level IV grievance decision is clearly wrong in view of the reliable, probative and substantial evidence on the whole record.

2. For the reasons stated herein, the Department deprived Pamela Gainer of due process of law; however, Ms. Gainer was, nevertheless, able to present evidence which placed her actions within the policy of the Department prohibiting the release of confidential information.

It is, therefore, ADJUDGED and ORDERED as follows:

The level IV grievance decision is reversed and the Department's disciplinary action against Pamela Gainer is set aside and held for naught. The Department shall purge the personnel records of Pamela Gainer of any reference to such disciplinary action.

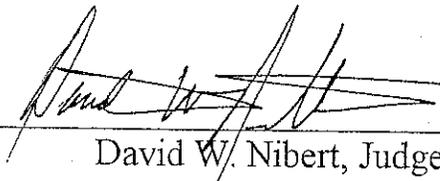
The Department shall pay Pamela Gainer the wages for the four days she was suspended, with interest at the rate of 10% per annum.

It is further ADJUDGED and ORDERED that as the petitioner, Pamela Gainer, has substantially prevailed in this matter, the Court will award

reasonable attorney's fees and costs expended pursuant to West Virginia Code Section 6C-2-6. Ms. Howley shall submit an itemized statement to the court with a copy to counsel for the respondent.

The Clerk shall forward an attested copy of this order to Loren Howley, counsel for Pamela Gainer; and to Jennifer K. Akers, Assistant Attorney General, counsel for the respondent, Department of Health and Human Resources/Bureau for Children and Families.

ENTERED this the 30th day of October, 2007.



David W. Nibert, Judge

A TRUE COPY TESTE



Clerk Circuit Court of
Calhoun County, West Va

Deputy