KENNETH THOMAS,

Grievant,

v. Docket No. 96-HHR-378

WEST VIRGINIA DEPARTMENT OF HEALTH
AND HUMAN RESOURCES/HOPEMONT HOSPITAL,

Respondent.

DECISION

Kenneth Thomas, Grievant, submitted this grievance directly to Level IV on August 28, 1996, in accordance with W. Va. Code §29-6A- 4(e), challenging his suspension without pay, and demotion by Respondent, West Virginia Department of Health and Human Resources/Hopemont Hospital. Grievant alleges that Respondent's actions are unfair and "based solely on rumors." As relief, Grievant seeks reinstatement to his former salary, and backpay. (See footnote 1) A Level IV hearing scheduled for October 31, 1996, was continued by good cause shown by Respondent. This matter was rescheduled, and an evidentiary hearing was held on November 18, 1996, at the Grievance Board's office in Elkins, West Virginia. On December 23, 1996, this case became mature upon receipt of the parties' post-hearing submissions.

The following findings of fact were derived from the record.

FINDINGS OF FACT

1. Grievant has been employed at Hopemont Hospital for fourteen (14) years. Grievant was the Building MaintenanceSupervisor at Hopemont Hospital for seven years, from June 1, 1989, through September 25, 1996.

2. By letter dated August 19, 1996, Alice Westfall, Administrator for Hopemont Hospital, notified Grievant that he was being suspended without pay, for twenty-one (21) days, from August 28, 1996 through September 25, 1996. The same letter also informed Grievant that he was being demoted to a non-supervisory position effective September 26, 1996. R. Ex. 6. Respondent took this disciplinary

action because it determined Grievant had misused state manpower, time, equipment and supplies for personal projects, and because he allowed subordinates to do the same.

3. Grievant was demoted from a Building Maintenance Supervisor II, pay grade 8, to a Health Service Worker (HSW) Trainee position, pay grade 3. R. Ex. 6.

4. While addressing favoritism grievances filed by maintenance workers, Ms. Westfall received complaints from several of Grievant's subordinates with respect to allegations of serious wrongdoing on the part of Grievant. Four maintenance employees jointly submitted a written list alleging that: a) Grievant used state time, property and personnel to build/help build a concession stand at Terra Alta ball field by using a plumber (a state employee) to take a state owned sink and install it; b) Grievant and Ron Taylor, a maintenance employee, used state time and resources to make picture frames which were sold for personal gain; c) Grievant used and allowed other maintenance employees to use state vehicles, on state time, for personal use; and d) Grievantgave three (3) bags of lime owned by the hospital to Mr. Taylor. R. Ex. 1, tab A.

5. By letter dated April 16, 1996, Ms. Westfall reported these allegations to Edgar D. VanCamp, Inspector General of the Department of Health and Human Resources' Inspector General's Office. R. Ex. 1, tab A.

6. Jim Crowder, Director of the Investigations and Fraud Management Unit of the Inspector General's Office, conducted an investigation into the complaints. R. Ex. 1.

7. Mr. Crowder interviewed all maintenance employees of Hopemont Hospital, other employees with pertinent knowledge, and the former Administrator of Hopemont, Michael Todt, with respect to the initial allegations of misconduct as well as additional allegations uncovered during the course of his investigation. Mr. Crowder also met with Grievant and confronted him with the allegations.

8. When Mr. Crowder interviewed each employee, he took notes during the interview, read his notes to the employee, and allowed the employee an opportunity to correct or clarify those notes. Next, Mr. Crowder wrote the employee's statement on a statement form based upon his corrected notes. Mr. Crowder instructed the employee to read the statement, and make any further corrections. Mr. Crowder also gave the employee an opportunity to add any additional information which the employee wished to be included in the statement. Mr. Crowder placed each employee under oath. The employee then signed the statement, adopting it as his own. 9. In Grievant's sworn statement, he admitted to various acts of misconduct. Grievant, a little league coach, first admitted that he took

his two (2) plumbers, on state time, in a state vehicle, to the Terra Alta baseball field to install a sink, faucet and drain pipe in a concession stand. Only hospital materials were used to complete this job. Grievant also admitted that he had a Hopemont Hospital electrician, under his direct supervision and on state time, wire up a light, and hook up the P.A. system at the same ball field. Grievant also stated he took Hopemont Hospital painters, under his direct supervision, during state time and using a state vehicle, and two (2) gallons of stain from Hopemont Hospital, to stain the announcer's booth at the ball field. Grievant conceded he did not have authorization to use the state's resources for these personal projects. R. Ex. 1, tab S.

10. Grievant also acknowledged that he and Mr. Taylor had made picture frames on the hospital's shop equipment, and that he used and allowed his employees to use the hospital's garage to work on personal vehicles using hospital equipment and tools, during work time. Grievant stated that Michael Todt, the prior Administrator of Hopemont Hospital from 1987 to October 1995, had verbally allowed this. R. Ex. 1, tab S.

11. Mr. Todt, currently Administrator of Sharpe Hospital, also signed a sworn statement for Mr. Crowder's investigation. Mr. Todt stated that he had never given authorization for any community service projects, and had explained to Grievant, on numerous occasions, that neither state property, equipment, nor surplusstate property could be used by employees for personal use. R. Ex. 1, tab T.

12. Additionally, Grievant confessed that he gave Mr. Taylor three (3) bags of hospital lime which he thought would be thrown away. Grievant and Mr. Taylor used a state vehicle to get the lime. R. Ex. 1, tab S.

13. Grievant also stated "[a]t the time I used the 2 gallons of stain, the sink, the fixtures and materials for the ball field, and at the time I gave Ron the 3 [three] bags of lime, I knew the property did not belong to me and it was not mine to give away. ... I probably did not use my best judgment in making these decisions and I hope it doesn't cost me my job." R. Ex. 1, tab S.

14. Mr. Crowder testified that it is his practice, when speaking with an accused employee in this type of situation, to permit them to stop the process and obtain legal representation if they request to do so.

15. Grievant voluntarily gave Mr. Crowder a statement on May 4, 1996, and June 24, 1996. At time during the interviews with Mr.

Crowder did Grievant object to speaking with Mr. Crowder, nor did Grievant object to signing, under

oath, his sworn statements.

16. Other maintenance employees, in their sworn statements, also confirmed the actions to which Grievant admitted. R. Ex. 1. Respondent also questioned the following maintenance employees during the Level IV hearing: Claude Rodeheaver, Delphia Rodeheaver, Dale Funk, David Knotts, and Bob Haskill. 17. Grievant used and allowed other to use state vehicles for personal reasons.

18. In Mr. Crowder's initial report and his follow-up report, he also investigated allegations that Grievant had mismanaged the profits from the maintenance shop's Coke machine. In the course of his investigation, Mr. Crowder determined that there was approximately $189.00 unaccounted for in the maintenance shop Coke fund. R. Exs. 1 and 2.

19. In his sworn statement, Grievant conceded to Mr. Crowder that he was responsible for the Coke machine in the maintenance shop, that he had no accounting for the money from that machine's fund, and that he had no explanation for why there was not more money in the Coke fund. R. Ex. 1, tab S.

20. Over the past two years, profits from the Coke machine should have been $496.04. Grievant turned in only $160.75 to Hopemont Hospital when he was told to turn in the profits as a result of Mr. Crowder's investigation. R. Ex. 2.

21. Ms. Westfall, Mr. Crowder, Mr. VanCamp, Jeffrey Matherly (General Counsel for Respondent), Michael McCabe (Director of Office of Personnel Services for Respondent), and Joseph Smith (Assistant Director for Employee Relations for the West Virginia Division of Personnel), met to discuss Mr. Crowder's report. At that meeting, Mr. Crowder presented the findings contained in his report. The remaining members of the group discussed the appropriate disciplinary action to be taken against Grievant.

22. The same group of individuals met on a second occasion todiscuss Mr. Crowder's follow-up report and, again, addressed disciplinary action. (See footnote 2) Relevant factors they considered included the entirety of Mr. Crowder's report, especially Grievant's sworn confession, as well as Grievant's past job history, experience, performance evaluations, attendance record, and his various questionable supervisory decisions with which the hospital administration had dealt.

23. Because of Grievant's lengthy service at Hopemont, Ms. Westfall was reluctant to agree with other members of the group who recommended Grievant's dismissal.

24. In considering all these factors, Respondent determined that Grievant should be suspended

for twenty-one (21) days and demoted to a non-supervisory position.

25. Ms. Westfall met with Grievant and presented the suspension and demotion letter to him. At that meeting, Grievant stated he was relieved that he was not fired.

26. Ms. Westfall also spoke to Grievant about his demotion. Ms. Westfall did not feel that Grievant could be placed back in the maintenance department. There were no open positions at Hopemont Hospital to offer Grievant. Because Ms. Westfall did not want to terminate Grievant, and knew that Grievant worked and related well with people, she created and offered Grievant a Health ServiceWorker (HSW) Trainee position. Grievant accepted this position.

27. Respondent went to great trouble and expense to create the HSW position, and to obtain the proper certification for training a HSW Trainee. Respondent spent approximately $1,500 and numerous personnel hours in this process.

28. At the Level IV hearing, Grievant's representative proffered that Grievant was satisfied with the HSW Trainee position, but that he is dissatisfied with his pay as a HSW Trainee.

29. The annual base salary for Grievant's position, a Building Maintenance Supervisor II, was $20,808 - pay grade 8. Following his demotion to HSW trainee, Grievant was placed in pay grade 3, at the annual base salary of $11,472.

30. Grievant's annual base salary falls within the proper pay grade for a HSW Trainee.

31. Grievant's salary was based on what the Hopemont Hospital budget allowed. Because this position was created where none existed, Hopemont Hospital's budget could only support the base salary.

RULING ON GRIEVANT'S MOTION TO EXCLUDE HIS STATEMENT

Grievant's representative made a motion to exclude the statement Grievant gave to Mr. Crowder. Grievant's basis for wanting his statement excluded was that he did not know why his statement was being taken, that he did not know that he should have counsel present when his statement was being taken, and hemade a general reference to the Constitution of the United States. Grievant did not ask for counsel when giving his statement, and failed to produce any authority for his position.

W. Va. Code §29-6A-6 provides, in pertinent part that "[n]o employee shall be compelled to testify against himself or herself in a grievance involving disciplinary action." (Emphasis added.) However, this Code Section does not prohibit the introduction of Grievant's statement in this case. Grievant

willingly chose to cooperate with an investigation, and gave a sworn statement to Mr. Crowder, from the Inspector General's office, in the course of an official investigation. Therefore, admission of Grievant's voluntary statement (confession) does not constitute “compelled” testimony “in a grievance" hearing in violation of W. Va. Code §29- 6A-6. See Overbee v. W.Va. Dept. of Health Human Resources/Welch Emergency Hospital, Docket No. 96-HHR-183 (Oct. 3, 1996); Tolley v. W.Va. Div. of Natural Resources, Docket No. 94-DNR-629 (May 18, 1995).

The purpose of the grievance procedure is to resolve employment problems fairly and efficiently for state employers and employees. Accordingly, the grievance process is not a criminal proceeding, and a grievance hearing is held merely to determine the appropriateness of a state employer's disciplinary action; it is not held to determine the guilt or innocence of a criminal defendant. W. Va. Code §29-6A-1; State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Grievant voluntarily gave a signed statement to Mr. Crowder,and it will not be excluded merely because it is damaging to his case. Consequently, Grievant's sworn, signed confession was properly offered by Respondent, and admitted during the Level IV hearing.

DISCUSSION

Rule 11.04, of the Administrative Rules and Regulations of the West Virginia Division of Personnel (DOP), entitled “Demotions,” provides, in pertinent part:

> An appointing authority may demote a permanent employee after presenting the employee with the reasons for the demotion stated in writing, and allowing the employee a reasonable time to reply thereto in writing, or upon request to appear personally and reply to the appointing authority or his/her designee.

Rule 12.03, of the Administrative Rules and Regulations of the DOP, entitled “Suspension,” provides, in pertinent part:

> The appointing authority, eight (8) calendar days after oral notice confirmed in writing or by written notice, may suspend any employee without pay for cause or to conduct an investigation regarding an employee's conduct which has a rational nexus to the employee's performance of his/her job. The suspension must be for a specific period of time, except where an employee is the subject of an indictment or other criminal proceeding. The person being suspended shall be allowed a reasonable time to reply thereto in writing, or upon request to appear personally and reply to the appointing authority or his/her designee. The eight (8) calendar day notice is not required for employees in certain cases when the public interest are best served by withholding the notice. The appointing authority shall file the statement of reasons for the suspension and the reply, if any, with the Director of Personnel.

Respondent complied with the above rules in suspending and demoting Grievant. Respondent proved, by a preponderance of the evidence, that it had good cause to take disciplinary action against

Grievant, and that he had engaged in a pattern and practiceof misusing state property and resources for personal projects. As a supervisor, Grievant held a position of trust with Respondent. Grievant misused his position and violated that trust not only for his own benefit, but authorized the same from his subordinates. Moreover, Mr. Todt stated that he personally instructed Grievant, on several occasions, with respect to agency rules involving the use of agency equipment and resources for personal reasons. Grievant's misconduct was of a substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention. Respondent proved by a preponderance of the evidence that it had “good cause” to take disciplinary action against Grievant. See Oakes v. W. Va. Dept. of Finance and Admin., 164 W.Va. 384, 264 S.E.2d 151 (1980). See also Holland v. W. Va. Dept. of Commerce, Docket No. 93-CLER- 465 (June 13, 1994).

“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, supra. See Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1991). Given Grievant's sworn confession, the sworn statements of Respondent's other employees, and Respondent's consideration of Grievant's past employment history, the twenty-one (21) daysuspension and subsequent demotion to a non-supervisory position were not inappropriate penalties. In this case the record does not reveal that Respondent's disciplinary action was disproportionate or excessive to the offenses Grievant committed, or that Respondent abused its discretion with the disciplinary action it implemented. Grievant was demoted to a HSW Trainee, pay grade 3, with the salary of $11,472. The salary range for pay grade 3 is $11,472 to $18,696. Division of Personnel Administrative Rules and Regulations, Rule 5.06, Pay on Demotion, provides:

> The pay of an employee who is demoted and whose current pay rate is above the maximum pay rate for the new classification shall be reduced to at least the maximum pay rate of the new classification. The employee's salary may remain the same if his/her pay is within the pay range of the new classification, or his/her pay may be reduced to a lower pay rate in the new range.

Emphasis added.

Pursuant to the discretion permitted Respondent in DOP Administrative Rule 5.06, and based upon budgetary restrictions, Respondent reduced Grievant's pay to the lowest pay rate in the new

range. Consequently, the record in this case does not support a finding that Respondent improperly placed Grievant in pay grade 3, with a salary of $11,472, when it demoted him to a HSW Trainee.

In addition to the foregoing findings of fact and narration, it is appropriate to make the following formal conclusions of law.

CONCLUSIONS OF LAW

1. The burden of proof, in cases dealing with disciplinary matters, rests with the employer to prove the charges by a preponderance of the evidence. Holland v. W.Va. Dept. of Commerce,Docket No. 93-CLER-465 (June 13, 1994); Schmidt v. W.Va. Dept. of Highways, Docket No. DOH-88-063 (Mar. 31, 1989).

2. Grievant's misconduct was of a substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention. Respondent proved by a preponderance of the evidence that it had “good cause” to take the disciplinary action implemented against Grievant. See Oakes v. W.Va. Dept. of Finance and Admin., 264 S.E.2d 151 (W.Va. 1980). See also Holland, supra.

3. “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. Dept. of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996). See Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1991).

4. In this case, the record does not reveal that Respondent's disciplinary action was disproportionate or excessive to the offenses Grievant committed, or that Respondent abused its discretion with the disciplinary action it implemented.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any

appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

Dated: 6/12/97 _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

Footnote: 1 Respondent did not object to Grievant's motion to amend his grievance or the relief sought. The motion was granted.

Footnote: 2 Mr. Crowder took no part in making the disciplinary decision. However, based on his experience and involvement in similar cases, Mr. Crowder testified that, upon learning that Grievant was suspended, he was surprised that Grievant was not terminated.