WALTER FINLEY, JR.,

Grievant,

v. DOCKET NO. 99-HHR-277

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/HUNTINGTON HOSPITAL,

Respondent.

DECISION

Grievant, Walter Finley, Jr., filed this grievance against Respondent, Department of Health and Human Resources ("HHR"), after he received a verbal reprimand. He sought as relief:

> **Written verbal reprimand pulled from my record, to be paid for the annual days that I used. Also be granted a regular work schedule and not be forced to work other shifts. Also cease the harassment that I have received for the past 2 years.**

Grievant withdrew any claim of harassment at the Level IV hearing. (See footnote 1)

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 Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden.

Grievant received a verbal reprimand on May 19, 1999, for insubordination, after he failed to report to work the evening shift on Friday, April 23, and Saturday, April 24, 1999.

During his five and a half years of employment, Grievant, who is a Health Service Worker, has always worked the evening shift, which is 2:45 to 11:00 p.m. He was initially scheduled to

work this shift for April 1999, but the schedule was changed, so that he was scheduled to work the midnight shift on April 23 and 24, 1999, and the evening shift the rest of the month.

Grievant suffers from sensory neuropathy. He had previously requested and received accommodation from Huntington Hospital so that he is no longer required to work more than 10 hours per day due to this illness. When Grievant was scheduled for the midnight shift, he talked to the Assistant Nurse Manager, explaining to her that he needed to take his medication at night, and that he becomes drowsy when he takesit. She told him he would have to have a doctor's excuse. When a new Nurse Manager was hired, Grievant talked to him about working the midnight shift. The new Nurse Manager told him to give him some time, and maybe he could do something. Grievant spoke with the secretary to Rebecca Dunn, Director of Nursing, asking to meet with Ms. Dunn about his schedule, but was not able to get an appointment. On April 21, 1999, he again spoke to the Nurse Manager, who told Grievant he could not help him.

On April 22, 1999, Grievant talked to Kieth Anne Dressler, Huntington Hospital's Human Resources Director, about working the midnight shift. Ms. Dressler told Grievant she needed additional information from his doctor in order to grant him a shift accommodation, and she would contact his doctor.

The next morning, Grievant called Ms. Dressler and was told she still needed additional information from his doctor. He told her he would not be available for a period of time, but gave her a telephone number for his brother-in-law's cellular telephone so she could contact his wife, as Grievant does not have a telephone. Grievant's brother-in-law lives next door. Grievant contacted his doctor's office and asked that they contact Ms. Dressler to determine what she needed from them.

Ms. Dressler attempted to contact Grievant's doctor to obtain the information, but was told he was out of town for several weeks. She then talked to Ms. Dunn and explained they needed to go ahead and grant Grievant an accommodation until his doctor returned and signed the necessary forms. Ms. Dunn agreed Grievant should not be required to work the midnight shift on April 23 or 24. Ms. Dressler called thetelephone number Grievant had provided, and a woman answered, identifying herself as Mrs. Finley. Ms. Dressler told her Huntington Hospital would not require Grievant to work any shift except evening shift until his doctor returned,

and he would not be required to work midnight shift that night or the next. Ms. Dressler stated Mrs. Finley asked whether Grievant needed to report to work the evening shift that day, and Ms. Dressler told her she would need to check.

Ms. Dressler checked with Ms. Dunn. Ms. Dunn told Ms. Dressler Grievant did not need to report for evening shift, (See footnote 2) **and could take annual leave both days. Ms. Dressler dialed the cellular phone number, and spoke with someone whom she believed to be Grievant's wife, relating that the Director of Nursing had approved Grievant to take annual leave both days.**

Ms. Dressler stated that as soon as she hung up, Barbara Bias, a Registered Nurse IV, and the day shift supervisor, called her and told her she could use Grievant on evening shift both days due to call-ins or "some sort of situation." Ms. Dressler gave Ms. Bias the cellular telephone number, and told her Grievant was out, but she could reach his wife at that number.

Ms. Dunn stated that as soon as she told Ms. Dressler Grievant could take annual leave, she went right next door and told Ms. Bias he would not be working the midnight shift. Ms. Dunn testified Ms. Bias told her Grievant was needed for theevening shift, and Ms. Dunn told her to call Ms. Dressler and relay that message. (See footnote 3) **As day shift supervisor, Monday through Friday, Ms. Bias is responsible for assuring that the staffing ratio in the three units is safe. Cindy Seagraves is evening shift supervisor on Friday, Saturday and Sunday, but apparently was never told Grievant was to report to work evening shift on Friday and Saturday. The shift supervisors are responsible for making schedule adjustments and requiring employees to hold over if an employee calls off work.**

Ms. Bias did not recall talking to Ms. Dunn about this matter. She testified she spoke only to Ms. Dressler. Ms. Bias also testified Ms. Dressler told her she had just talked to Grievant. Referring to notes she had made, Ms. Bias testified that around 2:00 p.m. she dialed the telephone number given to her by Ms. Dressler, and spoke with a woman who identified herself as Grievant's wife. She stated this woman told her Grievant had stepped out for a few minutes. Ms. Bias stated she explained to the woman that Grievant was needed for the evening shift, and the woman told her she would give Grievant the message. Ms. Bias testified the woman she spoke with assured her Grievant would be back home shortly and would be at work on time.

Grievant testified he had gone to visit his sister on April 23, after he talked to Ms. Dressler. His sister also does not have a telephone. Grievant testified he did notreturn home until 6:00 or 7:00 p.m. He testified his wife told him she had talked to Ms. Dressler, who had told her he could take two days of annual leave. He stated his wife had not told him Ms. Bias had called, or that he was to report to work. He stated he does not believe Ms. Bias talked to his wife, and stated she has caused him problems in the past. He also stated, however, that his wife is forgetful. Grievant's wife was not called to testify. Grievant pointed to the call-in sheets for April 23, 1999, which do not indicate so many employees had called off work that he was needed to work evening shift. Ms. Bias pointed out that the April 23 call-in sheets would reflect only who had called that day, and would not reflect whether employees had called off for April 23 earlier in the week.

Grievant called in to his assigned unit at 7:00 p.m. on April 23, 1999, and spoke to the charge nurse, Sarah Cook. He stated at the Level III hearing he called because his wife told him she had talked to Ms. Dressler, and he wanted to relay the message to the Nursing Department, and he wanted to find out if he had to work the midnight shift. Grievant explained at the Level IV hearing that he called to make sure his wife had gotten the message correct. He testified the charge nurse did not tell him he needed to report to work, but rather, told him she thought everything had been taken care of. The charge nurse is responsible for coordinating the activities on the shift for her unit, similar to a lead worker. Grievant explained he talked only to the charge nurse, rather than the head nurse or Nurse Manager, because he always contacts the charge nurse when he calls in, for example, if he is not going to be able to report to work; and the charge nurse then contacts the Nurse Manager or shiftsupervisor. Ms. Dressler confirmed that for the evening and midnight shifts, it is appropriate for an employee to speak to the charge nurse about his schedule.

On May 19, 1999, Grievant received a verbal reprimand for insubordination. The cited insubordination was his failure to report to work on April 23 and 24, 1999, and failure to obtain permission for annual leave from the Nurse Manager or Director of Nurses. The verbal reprimand was recorded in writing on a form, and is maintained in an administrative file. If no further infractions occur, the form will be removed from the file after one year.

Grievant's request for annual leave for April 23 and 24, 1999, was approved by his

immediate supervisor, Dwayne Napier, the Nurse Manager on Grievant's unit, on April 27, 1999, but was disapproved by Ms. Dunn on May 11, 1999, and was charged as unauthorized leave. **(See footnote 4)**

Respondent argued Grievant was insubordinate in failing to report to work when he knew his annual leave had been disapproved. It argued the only reason Grievant called his unit at 7:00 p.m. was to ensure his failure to report to work would not be recorded as a failure to call to report off work, which pursuant to Huntington Hospital's "Leave Authorization and Absence Control" policy is an automatic 15 day suspension.

Grievant denied he knew he was supposed to report to work on April 23 and 24, 1999. He thought it was odd that he was not given a verbal reprimandimmediately upon his return to work, and so many days passed before he was reprimanded.

It is well established that "[I]nsubordination involves `willful failure or refusal to obey reasonable orders of a superior entitled to give such order.' [Citations omitted.] In order to establish insubordination, the employer must not only demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, but that the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination." Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995). (Citations omitted.). Where an employee has justifiably misunderstood or misinterpreted a superior's instruction, and has failed to comply with a directive based upon this, the employee has been found lacking the intent necessary to establish insubordination. Wilson v. Marion County Bd. of Educ., Docket No. 98-24-043 (June 23, 1998) (citing Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995), and Ramey v. W. Va. Div. of Veterans Affairs, Docket No. 91-VA-115 (Aug. 2, 1991)).

In order to make a finding that Grievant was insubordinate, the undersigned would have to find that Grievant lied. While Grievant's demeanor in answering questions, and the phrasing used when asking questions, could certainly lead one to this conclusion, it could also lead one to the conclusion that he was very frustrated with this entire situation, did not trust his employer and Ms. Bias in particular, and is not a skilled, articulate advocate. On the other hand, it is very easy to see how anyone not an employee, such as Grievant's wife, could be very confused as to what Grievant was supposed to do. Ms. Dressler said his annual leave

was approved by the Director of Nursing, then Ms. Bias said he was to report to work. Which was correct?

Then the question arises as to whether the woman Ms. Bias talked to was Grievant's wife. If she was, did she forget to tell Grievant of Ms. Bias' telephone call, or did she become confused about what had occurred in what order by the time Grievant returned home? Ms. Bias' testimony regarding events was inconsistent with that of Ms. Dressler and Ms. Dunn, and she had to refer to notes at the Level IV hearing to answer questions asked of her. The undersigned concludes that Ms. Bias' memory of the details of her conversations on April 23 was so poor that her testimony about who she spoke with over the telephone and what they said cannot be accepted as accurate.

Regardless of what Grievant's wife was told, and what she told Grievant, Grievant called the charge nurse to verify whether he needed to report to work, and the charge nurse told him everything was taken care of. She had not been told Grievant was to report to work for the evening shift, nor had his supervisor, as he approved Grievant's annual leave. The undersigned cannot find under these circumstances that Huntington Hospital staff made clear to Grievant that his annual leave was revoked and he was to report to work, or that Grievant possessed the intent necessary to support a charge of insubordination. Respondent has failed to demonstrate that it is more likely than not that Grievant intentionally failed to reportto work, knowing he was supposed to do so.

Finally, Grievant requested as part of his relief that Respondent be ordered to put him on a regular work shift with no shift changes. He placed into evidence written statements from his doctor that he would not tolerate shift changes due to the medication regimen he is on for his sensory neuropathy and insomnia. Respondent did not dispute the authenticity of this evidence, or the doctor's opinion. Ms. Dressler continued to state, however, that she needed additional information from Grievant's doctor in order to grant him an accommodation. It appears from the record that the documentation she sought was a declaration from Grievant's doctor that Grievant's condition was permanent and affected a major life function. However, the record also reflects that Grievant's doctor had provided this information to Respondent in 1998 when Grievant asked that he not be scheduled to work more than 10 hours a day due to his sensory neuropathy. The undersigned does not understand why Respondent needs this

information again. (See footnote 5) Although the undersigned would prefer that the parties work this problem out themselves, it appears they have been unable to do so, and a ruling is required as has been requested by Grievant.

The following Findings of Fact are made based upon the evidence presented at Levels III and IV.

Findings of Fact

1. Grievant has been employed by HHR at Huntington Hospital as a Health Service Worker for five years. He has been diagnosed with sensory neuropathy, and must take medication. Huntington Hospital granted him an accommodation based upon this condition, so that he is not required to work more than 10 hours a day.

2. Grievant has worked evening shift for five years. In April 1999, he was scheduled to work evening shift each work day except for April 23 and 24 when he was scheduled to work midnight shift. Grievant believed this would interfere with his ability to take his medication, as he believed he needed to take it at the same time each day, before he went to bed. Grievant asked his supervisor to be relieved from working midnight shift. Grievant asked to see the Director of Nursing, Rebecca Dunn, about being relieved from working the midnight shift, but her secretary would not schedule an appointment with her. Finally, on April 22, 1999, Grievant went to the Director of Human Resources, Kieth Anne Dressler, who tried to help him get the information needed from his doctor to grant him an accommodation so that he would not have to work the midnight shift. Grievant's doctor was out of town. Ms. Dressler decided, however, based upon her conversations with the staff at the doctor's office, that it would be best that Grievant not work midnight shift until his doctor returned.

3. On April 23, 1999, Ms. Dressler explained the situation to Ms. Dunn. Ms. Dunn agreed that Grievant should not work the midnight shift on April 23 and 24.

4. Grievant does not have a telephone. He had given Ms. Dressler a cellular telephone number, however, and had told her she could reach his wife at that number, but he would be out for a while. The telephone belonged to his brother-in-law, wholives next door to him.

5. Ms. Dressler dialed the telephone number and spoke to a woman who identified herself as Grievant's wife. Ms. Dressler told the woman who answered that Grievant did not have to report to work that night or the next. The woman asked whether Grievant needed to

report for the evening shift that day, and Ms. Dressler told her she would have to check.

6. Ms. Dressler checked with Ms. Dunn, who told her Grievant did not need to report for evening shift, and could take annual leave. Ms. Dressler dialed the cellular telephone number again, the same woman answered, and she told her Ms. Dunn had approved Grievant to take annual leave, and he did not need to report for the evening shift.

7. As soon as she finished speaking to Ms. Dressler, Ms. Dunn went to the office next door to hers and told Barbara Bias, the day shift supervisor, that Grievant would not be reporting to work the midnight shift. Ms. Bias told her they needed Grievant to work the evening shift. Ms. Dunn told Ms. Bias to call Ms. Dressler and let her know. Ms. Bias called Ms. Dressler immediately. Ms. Dressler gave her the cellular telephone number she had been using to try to get messages to Grievant, and told her to call and let Mrs. Finley know.

8. Around 2:00 p.m., Ms. Bias dialed the telephone number Ms. Dressler had given her, and spoke to a woman. She told the woman Grievant was needed to work evening shift.

9. Grievant had gone to visit his sister, who also has no telephone. Hereturned home between 6:00 and 7:00 p.m. His wife told him he had been given annual leave and did not need to report for the midnight shift. Grievant called the charge nurse on his unit to make sure this information was correct. The charge nurse told him everything was taken care of. She did not tell him he needed to report to work.

10. Grievant did not know he was supposed to report to work for the evening shift on April 23 and 24, 1999, and did not do so. Grievant believed he had the approval of the Director of Nursing to take annual leave.

11. Grievant submitted a request for annual leave for April 23 and 24, 1999, to his supervisor upon his return to work, and his supervisor approved it.

12. On May 11, 1999, Ms. Dunn disapproved the request for annual leave. On May 19, 1999, Grievant was given a verbal reprimand for insubordination for his failure to report to work on April 23 and 24, 1999, and failure to obtain permission for annual leave from the Nurse Manager or Director of Nursing.

13. Grievant's doctor provided a written statement to Grievant, which he gave to Ms. Dressler on May 18, 1999, which states, "Mr. Finley is on a medication regimen specific for his neuropathy and insomnia and this must be taken at specific times to minimize side effects. He

would not tolerate shift changes and should be on a regular schedule." Level III Grievant's Exhibit 1. See also Level III Respondent's Exhibit 2, and Level II response to grievance. Grievant's doctor provided documentation to Ms. Dressler in 1998 that Grievant's sensory neuropathy is permanent in nature and affects a major life function. Level IV Grievant's Exhibit 7. The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Pursuant to W. Va. Code § 29-6A-6, 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. Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988).

2. It is well established that "[I]nsubordination involves `willful failure or refusal to obey reasonable orders of a superior entitled to give such order.' [Citations omitted.] In order to establish insubordination, the employer must not only demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, but that the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination." Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995) (Citations omitted.). Where an employee has justifiably misunderstood or misinterpreted a superior's instruction, and has failed to comply with a directive based upon this, the employee has been found lacking the intent necessary to establish insubordination. Wilson v. Marion County Bd. of Educ., Docket No. 98-24-043 (June 23, 1998), citing Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995), and Ramey v. W. Va. Div. of Veterans Affairs, Docket No. 91-VA-115 (Aug. 2, 1991).

3. Respondent did not prove Grievant possessed the intent necessary to establish insubordination.

4. Grievant established he is entitled to the relief requested, including thathe be placed on a regular work schedule with no shift changes due to his medical condition and the medicine he must take for it.

Accordingly, this grievance is GRANTED. Respondent is ORDERED to remove all evidence of the verbal reprimand from its files and records. Respondent is also ORDERED to place

Grievant on a regular work schedule, with no changes in his shift.

Any party or the Division of Personnel may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. W. Va. Code § 29-6A-7 (1998). 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

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BRENDA L. GOULD

Administrative Law Judge

Date: October 5, 1999

Footnote: 1

This grievance was filed by Grievant at Level II on May 20, 1999, waiving Level I. The grievance was denied at Level II on June 4, 1999, and Grievant appealed to Level III. A Level III hearing was held on June 22, 1999, and a Level III decision denying the grievance was issued on June 28, 1999. Grievant appealed to Level IV on July 3, 1999. A Level IV hearing was held on August 11, 1999. Grievant appeared pro se, and HHR was represented by Tiffany M. Bost, Esquire. This grievance became mature for decision on September 7, 1999, the deadline for submission of written argument. Although HHR had requested the opportunity to submit written argument, it declined to do so. Grievant submitted written argument at the conclusion of the Level IV hearing.

Footnote: 2

Ms. Dunn testified she told Ms. Dressler Grievant did not need to report unless they needed him, and she did not think they needed him. Ms. Dressler did not relate the story this way, although she was not specifically asked whether Ms. Dunn had couched her approval of annual leave for Grievant in this fashion.

Footnote: 3

As Ms. Bias was right next door, it should have been a simple matter for Ms. Dunn to check with Ms. Bias to see if Grievant was needed before telling Ms. Dressler she could tell Grievant he could take annual leave. This would have seemed the more logical approach, particularly if Ms. Dunn told Ms. Dressler he could only have annual

leave if he was not needed.

Footnote: 4

While Grievant's pay has not been affected by this action, if he does not prevail in this grievance, he will be docked two days' pay.

Footnote: 5

Grievant submitted a note to the undersigned on August 20, 1999, indicating that he believes his doctor has again provided this information to Respondent, and that this was done prior to the Level IV hearing.