JEFF WATSON,

Grievant,

v. DOCKET NO. 02-HHR-226D

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
MILDRED MITCHELL-BATEMAN HOSPITAL,

Respondent.

D E C I S I O N

On July 7, 2002, Grievant, Jeff Watson, filed a grievance against his employer, Respondent, Department of Health and Human Resources ("HHR"), challenging a 20 day suspension imposed upon him. On July 31, 2002, Grievant notified the Grievance Board that HHR had defaulted on his grievance at Level I, when his supervisor did not issue a decision within the statutory time periods. On August 5, 2002, HHR requested a hearing on the default claim. A telephonic conference was held on August 9, 2002, at which time HHR conceded that a default had occurred. A Level IV hearing was held on November 14, 2002, for the purpose of determining whether the remedy requested was contrary to law or clearly wrong. (See footnote 1) Grievant represented himself, and Respondent was represented by Jon R. Blevins, Esquire. The remedy requested by Grievant was "[t]o have all of these malicious lies removed from my file, and my suspension reversed, all backpay and benefits, plus interest." This matter became mature for decision upon receipt of Respondent's written argument on December 2, 2002.

When determining whether the remedy requested is contrary to law or clearly wrong, it is presumed that the grievant prevailed on the merits of the grievance. W. Va. Code § 29-6A-3. The burden of proof is on Respondent to prove by clear and convincing evidence that the remedy requested would be contrary to law or clearly wrong. This standard requires Respondent to produce evidence substantially more than a preponderance of the evidence, but less than that required to prove the matter beyond a reasonable doubt. Lohr v. Div. of Corrections, Docket No. 99-CORR-

157D (Nov. 15, 1999). Respondent may rebut the presumption created in W. Va. Code § 29-6A-3(a)(2) that the grievant prevailed on the merits, by presenting clear and convincing evidence that the basic facts underlying the asserted presumption are not true, and that the relief requested would be clearly wrong as the discipline imposed was processed in compliance with its progressive disciplinary policy. Stanley v. Higher Educ. Policy Comm'n, Docket No. 01-HEPC-503D (May 24, 2002).

The suspension letter signed by Lawrence Ventura, Chief Executive Officer of Mildred Mitchell-Bateman Hospital, explains the suspension as follows:

> This action has become necessary due to your continued inappropriate, unprofessional, hostile, and argumentative interaction with your superiors; specifically, your interaction with Interim Nurse Manager, Trish Elkins, RN, on June 25, 2002. At approximately 5:15 p.m. you did interrupt the orderly and peaceful process of this Unit by behaving in a hostile and unprofessional manner. As Ms. Elkins handed you (as well as several other Health Service Workers) several delinquency sheets that displayed tasks that had yet to be completed, in front of the Nurses station and in front of several staff and patients, in an argumentative and hostile tone, you stated, “I don't mean tobe a smart ass, but when do you think I am going to have the time to do this? Are you going to approve overtime for me to do this?” Ms. Elkins then asked, “What are you doing now?” You then inquired, “How would you feel if I gave you more work to do:” Ms. Elkins explained that as your supervisor and as the manager for this Unit, it was her responsibility to assign work to you. She also explained that she also had many tasks to complete, to which you replied, “Yea, but you earn four times the money than I do.” You then asked, “Would you (to Ms. Elkins) like to take this to your office?” The conversation was completed in the Nurse Manager's office. During this conversation, you again brought up the issue of how Ms. Elkins was paid more money than you. When she tried to explain that her salary was not the issue, you stated, “That's exactly the point here. You are just like all the others. You want to avoid the issue.” When Ms. Elkins asked for the delinquency sheets back in an attempt to put an end to this confrontation, you stated, “I didn't refuse to do them.”
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> In addition, at approximately 7:30 p.m. on the same day, you and an LPN entered an elevator currently occupied by Ms. Elkins, escorting an agitated patient from one Unit to another. Although Ms. Elkins pressed herself against the opposite wall of the elevator to avoid the LPN, the patient (who was under control at this time), and you, as you were entering the elevator, you purposefully and with malice, forcefully leaned into Ms. Elkins, such that your right elbow was thrust into her right breast causing her pain. When Ms. Elkins looked at you immediately after this event, you feigned knowledge and asked, “What?” This event is interpreted as a blatant attempt to intimidate Ms. Elkins who had, just a few hours before, reported your unprofessional conduct to her superiors. This unprofessional, hostile, disruptive and assaultive behavior toward a supervisor will not be tolerated. The next incident of any inappropriate conduct will result in your dismissal.
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> On June 27, 2002, you spoke to Kathy Robertson, RN, MSN, Director of Nursing, and me to explain your actions and communicate to us any mitigating circumstances surrounding this event. At that time you explained that you had indeed gotten into a rather loud discussion with Ms. Elkins regarding completing additional work. However, you stated that you did not refuse to complete the assignment nor did you interact with

> her in an inappropriate manner. You expressed that you did not understand why Ms. Elkins reacted as she did to your comments.
>
> As I am sure you recall, you received a written reprimand on April 26, 2002, for unprofessional conduct in your hostile verbalizations about a certain patient and being argumentative with your supervisor. Throughout the time you have been undergoing the disciplinary process, we have given you every opportunity to demonstrate your ability to change your behavior. In fact, as a part of your reprimand of April 26, 2002, you were required to attend an anger management course arranged through the Employee Assistance Program. We had hoped that this requirement would show you how to control your frustration and anger, which, it appears, results in the outbursts described in this letter and, in this last incident physical violence toward Ms. Elkins.

The reprimand referred to in the letter is the subject of another grievance, which is currently pending at Level III of the grievance procedure. As of the Level IV hearing in the instant matter, Grievant had not attended an anger management course.

Respondent presented the eyewitness testimony of Ms. Elkins. Her testimony differed from that of Grievant, both with regard to the discussion had at the Nurse's Station, and what transpired on the elevator. Although the suspension letter refers to other employees being present during the discussion between Grievant and Ms. Elkins at the Nurse's Station, no other employee was called to tell what they heard and saw. While Todd Jenkins was the LPN assisting Grievant in getting the patient on the elevator, Mr. Jenkins was not called by Respondent as a witness, nor was he interviewed by Mr. Ventura, although he offered insightful testimony when called to testify by Grievant.

Ms. Elkins testified that on June 25, 2002, she handed Grievant and three other Health Service Workers on the 3 to 11 shift some deficiencies to correct. A deficiency is a failure to record medical information on a patient's chart. A nurse goes through the charts at night and notes the deficiencies on a form. Ms. Elkins stated the deficiencies had been on the board for weeks and the Health Service Workers had ignored them. The deficiencies handed to Grievant were not his, meaning he was not the person who had failed to chart the medical information, nor was he responsible for them in any way. Ms. Elkins stated Grievant was hostile. She testified he said, “I don't mean to be a smart ass, but are you going to approve overtime for me to do this, because I don't have time to do it.” She told him she could not approve overtime, and he asked her how she would like it if he gave her work to do. She stated she told Grievant it was her job to give him work to do, and he then made reference to her salary. She stated he then asked her if she wanted to take it in her office, and they went to her

office and sat down. She stated Grievant made reference to her salary again, and was hollering. She stated she opened the door andasked him to leave. She did not know whether he had corrected the deficiencies as she had asked.

Grievant testified his shift was short staffed on June 25, 2002. He testified there were 31 patients on the floor that day, and he was responsible for checking all of them every 15 to 30 minutes. He testified he had just gone behind the desk, and was talking to a co-worker, when Ms. Elkins asked them what they were doing and handed him the deficiencies to correct. He testified he told Ms. Elkins the deficiencies were not his, and said, “I don't mean to be a smart ass,” and told her he did not have time to do them, and asked her if she was going to approve overtime for him. He stated Ms. Elkins then told him he did not give a damn about anyone but himself, jerked the papers out of his hand, which Ms. Elkins denied, and told him she was his superior and he would do what she told him to do when she told him to do it. He stated he told her he was not questioning that, and asked her if she wanted to take it to her office. Grievant admitted he had noted for Ms. Elkins during this discussion that he was making $7.00 an hour while she was making $45.00 an hour, but he denied he was hostile. He testified Ms. Elkins told him she could write him up, and she left the office with him sitting there. He testified she did not ask him to leave.

Regardless of which version of the events is accepted, it is clear Grievant did not embrace the assignment of additional duties to him, responded to the assignment in an inappropriate manner, and he and Ms. Elkins got into a less than cordial discussion about the matter. It is also clear that Ms. Elkins overreacted to Grievant's comments.

As to the more serious charge, Ms. Elkins testified that the patient being escorted by Mr. Jenkins and Grievant was under control when the three of them entered the elevator, although Mr. Jenkins and Grievant were holding the patient by the arms. She stated she moved back against the wall of the elevator to let them on, and Mr. Jenkins entered first, the patient second, and Grievant last. She stated she then started to get offthe elevator, and as she did so, Grievant bent over and intentionally elbowed her in the right breast.

When called to testify by Grievant, Mr. Jenkins stated that the patient he and Grievant were escorting was small, but she was struggling, and they had a physician's order to restrain her. He testified she kept wrapping her legs around his legs, and around Grievant's legs, and she was still struggling as they were getting on the elevator. He testified she was never under control while they

were escorting her, except when the elevator doors were closed and she had no audience except Grievant and him. When they got the patient to floor two, she had to be restrained with a “posey net.” This information could have been useful to Mr. Ventura in assessing the allegations made by Ms. Elkins.

Mr. Jenkins testified Grievant got on the elevator first, then the patient, and then him, facing the back of the elevator, and then they turned around to face the elevator door. He stated he asked Ms. Elkins to key the elevator so they could go to another floor, as he was having difficulty reaching his keys and the key pad. He was not in a position to testify as to whether Grievant elbowed Ms. Elkins.

Grievant is a large man. Mr. Jenkins testified that there is about a foot of clearance on either side of Grievant to get in the elevator door, and then about another foot on either side of Grievant inside the elevator.

Grievant testified he was busy with the patient as he entered the elevator, as she was trying to trip him, and did not see Ms. Elkins at first. He denied that he intentionally elbowed Ms. Elkins in the breast, and was not aware that he had made any physical contact with her.

The United States Merit System Protection Board Handbook (“MSPB Handbook”) is helpful in setting out factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984). The Grievance Board has applied these factors in manycases, and considers the following in assessing a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. See Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD-216 (Dec. 28, 1999); Perdue, supra.

The undersigned finds Ms. Elkins' testimony that the patient was under control while Grievant and Mr. Jenkins were escorting her onto the elevator not credible. The patient was acting in such a manner that she had to be restrained with a posey net shortly thereafter. Accordingly, it is more believable that she was struggling as she was getting onto the elevator. Given this finding, and considering the entirety of the circumstances, it is difficult to believe that in the midst of restraining this patient, who had been trying to trip him, Grievant gave any thought at all to Ms. Elkins, let alone

deciding to assault her. Despite Ms. Elkins' belief that Grievant intentionally elbowed her, it was not about her. Grievant was busy with a patient, who was struggling in a confined small space. Grievant took up much of that space. It is quite likely that there was contact between Grievant and Ms. Elkins, or the patient and Ms. Elkins, but it is highly unlikely that such contact was the result of an intentional act on Grievant's part. The charge that Grievant “purposefully and with malice, forcefully” elbowed Ms. Elkins in the breast has not been proven.

Whether Grievant's discussion with Ms. Elkins constitutes insubordination must be examined in light of a recent decision in this area. The Supreme Court of Appeals of West Virginia has stated that insubordination “includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued by . . . an administrative superior.” Butts v. Higher Educ. Interim Governing Board/Shepherd College, __ W. Va. __, 569 S.E.2d 456 (2002). “[F]or there to be'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid.” Id. “If an employer's policy forbids certain conduct, an order which directs an employee to engage in the banned conduct, is an unreasonable and/or invalid order. Id.” Butts v. Higher Educ. Interim Governing Bd., Docket No. 01-HE-100R (Dec. _, 2002). “[F]or a refusal to obey to be 'wilful,' the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order.” Butts, supra, 569 S.E.2d 456. “Failure to act must be based on a 'good faith belief.' Id.” Butts, supra, Docket No. 01-HE-100R. "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dep't, Docket No. 90-H-128 (Aug. 8, 1990) citing Meads v. Veteran Admin., 36 M.S.P.R. 574 (1988). See also Daniel v. U. S. Postal Serv., 16 M.S.P.R. 486 (1983); Davis v. Smithsonian Inst., 13 M.S.P.R. 77 (1983). "Uttering abusive language to a supervisor may constitute insubordination. Payne v. W. Va. Dept. of Transp., Docket No. 93-DOH-454 (Apr. 29, 1994). See Burton Mfg. Co. v. Boilermakers Local 590, 82 Lab. Arb. (BNA) 1228 (1994) (Holley, Arb.)." Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995).

At the Level IV hearing, Grievant questioned the legality of the directive that he correct someone else's deficiencies. However, he admitted he had not been thinking of this when the deficiencies were handed to him to correct. He brought this up in an effort to examine why Ms. Elkins would lie about

what occurred. The reason for his reaction was that he did not believe he had time to perform this task. He testified he had worked through his lunch the preceding day in order to get his work done, and he could not do so on the day in question. Grievant's shift was already short staffed, and Ms. Elkins was aware of this. She also knew the deficiencies were not Grievant's. It is unclear why shewould assign these deficiencies to Grievant to correct in the first place when they were not his, on a day when the shift was short-handed, and when the deficiencies had been on the board for weeks. Why not give them to the person whose deficiencies they were, particularly when they had not been a priority up to that point?

Nonetheless, even under Grievant's recollection of the exchange, Grievant was not respectful of or courteous to his supervisor. While he did not refuse the order, he did question it in a manner which was unnecessarily argumentative and rude. His response was not the type that would foster a good working relationship. While Ms. Elkins could have also responded more appropriately, Grievant's initial response to the directive was insubordinate, and that is the issue presented here. It is not clearly wrong or contrary to law to discipline Grievant for this behavior, although this behavior obviously is not deserving of a suspension. The 20 day suspension will be reduced to a verbal reprimand.

The following Findings of Fact are made based upon the record developed at Level IV.

Findings of Fact

1. Grievant has been employed at Mildred Mitchell-Bateman Hospital as a Health Service Worker for four years.

2. Patricia Elkins has been the Nurse Manager on Grievant's unit at Mildred Mitchell-Bateman Hospital since May 12, 2002, and she was Grievant's supervisor at the time he was suspended. She is a contract employee.

3. By letter dated June 28, 2002, Grievant was suspended without pay for 20 working days for “continued inappropriate, unprofessional, hostile, and argumentative interaction” with Ms. Elkins, and for “purposefully and with malice, forcefully lean[ing] into Ms. Elkins” and elbowing her in the breast.

4. On June 25, 2002, Ms. Elkins handed Grievant two pages of charting deficiencies to correct. Grievant had not caused the deficiencies, and was not responsiblefor correcting them. Grievant responded by saying, “I don't mean to be a smart ass, but,” and then questioned when he was going

to have time to perform this duty, asked if overtime would be approved, and referred to his supervisor's higher salary.

5. Grievant's response to his supervisor was not respectful of her position.

6. Grievant did not refuse to perform the assigned task.

7. Grievant did not “purposefully and with malice, forcefully” elbow Ms. Elkins in the breast as she was exiting the elevator.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Respondent defaulted at level one of the grievance procedure when a Level I decision was not issued within the statutory time period set forth in W. Va. Code § 29-6A- 4.

2. When determining whether the remedy requested is contrary to law or clearly wrong, it is presumed that the grievant prevailed on the merits of the grievance. W. Va. Code § 29-6A-3.

3. The burden of proof is on Respondent to prove by clear and convincing evidence that the remedy requested would be contrary to law or clearly wrong. This standard requires Respondent to produce evidence substantially more than a preponderance of the evidence, but less than that required to prove the matter beyond a reasonable doubt. Lohr v. Div. of Corrections, Docket No. 99-CORR-157D (Nov. 15, 1999).

4. Respondent may rebut the presumption created in W. Va. Code § 29-6A-3(a)(2) that the grievant prevailed on the merits, by presenting clear and convincing evidence that the basic facts underlying the asserted presumption are not true, and that the relief requested would be clearly wrong as the discipline imposed was processed incompliance with its progressive disciplinary policy. Stanley v. Higher Educ. Policy Comm'n, Docket No. 01-HEPC-503D (May 24, 2002).

5. Respondent did not prove that Grievant “purposefully and with malice, forcefully” elbowed Ms. Elkins in the breast as she was exiting the elevator.

6. Insubordination “includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued by . . . an administrative superior.” Butts v. Higher Educ. Interim Governing Board/Shepherd College, __ W. Va. __, 569 S.E.2d 456 (2002). “[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or

regulation) must be reasonable and valid." Id. "[F]or a refusal to obey to be 'wilful,' the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order." Butts, supra, 569 S.E.2d 456. "Failure to act must be based on a 'good faith belief.' Id." Butts, supra, Docket No. 01-HE-100R.

7. "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dep't, Docket No. 90-H-128 (Aug. 8, 1990) citing Meads v. Veteran Admin., 36 M.S.P.R. 574 (1988). See also Daniel v. U. S. Postal Serv., 16 M.S.P.R. 486 (1983); Davis v. Smithsonian Inst., 13 M.S.P.R. 77 (1983). "Uttering abusive language to a supervisor may constitute insubordination. Payne v. W. Va. Dept. of Transp., Docket No. 93-DOH-454 (Apr. 29, 1994). See Burton Mfg. Co. v. Boilermakers Local 590, 82 Lab. Arb. (BNA) 1228 (1994) (Holley, Arb.)." Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995). 8. Grievant was insubordinate in his response to his supervisor when she handed him deficiencies to correct, and it is not clearly wrong or contrary to law for him to be disciplined for such insubordination.

Accordingly, this grievance is **GRANTED IN PART AND DENIED IN PART**. Grievant's suspension is **ORDERED** reduced to a verbal reprimand for his inappropriate remarks to his supervisor. Respondent is **ORDERED** to remove the 20 day suspension from Grievant's employment record, to pay him back pay, with interest, for the 20 days, and to restore any benefits Grievant lost or failed to accrue as a result of 20 day suspension.

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.

BRENDA L. GOULD

Administrative Law Judge

Dated: December 16, 2002

Footnote: 1

The default provision for state employees is found in W. Va. Code § 29-6A-3(a), which provides, in pertinent part:

> *(2) Any assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before the level two hearing. The grievant prevails by default if a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required in this article, unless prevented from doing so directly as a result of sickness, injury, excusable neglect, unavoidable cause or fraud. Within five days of the receipt of a written notice of the default, the employer may request a hearing before a level four hearing examiner for the purpose of showing that the remedy received by the prevailing grievant is contrary to law or clearly wrong. In making a determination regarding the remedy, the hearing examiner shall presume the employee prevailed on the merits of the grievance and shall determine whether the remedy is contrary to law or clearly wrong in light of the presumption. If the examiner finds that the remedy is contrary to law, or clearly wrong, the examiner may modify the remedy to be granted to comply with the law and to make the grievant whole.*