DEBRA JO SHULTZ,

Grievant,

v v.

Docket No. 02-HEPC-293

HIGHER EDUCATION POLICY COMMISSION/

WEST VIRGINIA UNIVERSITY SCHOOL OF DENTISTRY,

Respondent.

D E C I S I O N

Grievant, Debra Jo Shultz, was employed as a Dental Assistant by West Virginia University School of Dentistry ("WVUSOD" or "University"). She filed this grievance on her termination directly to Level IV on September 13, 2002. The Statement of Grievance stated, "Termination of Employment" and the Relief Sought was "Job reinstated."

A Level IV hearing was held on January 14, 2003, (See footnote 1) and this case became mature for decision on February 24, 2003, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 2)

Issues and Arguments

Respondent asserts it properly dismissed Grievant for a one-time breach of confidentiality. This breach of confidentiality was seen as a wilful act and as gross misconduct. Grievant asserts she was never told the behavior in which she engaged was a breach of confidentiality, her statement of patient information was limited and inadvertent, and her actions did not rise to the level of gross misconduct. After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant was employed as a Dental Assistant by the WVUSOD for approximately ten years.

She was involved in direct patient care. On May 17, 18, and 29, 2001, and August 6, 2002, (See footnote 3) she attended Compliance Training which included information on maintaining the confidentiality of patients. Grievant had received satisfactory evaluations throughout her tenure with WVUSOD.

2. On August 2, 2002, Patient K came to WVUSOD Dental Clinic for emergency treatment for tooth pain.

3. Donna Neiman, then employed as a Secretary with WVUSOD, saw Patient K in the Dental Clinic with his wife, Tina. Ms. Neiman talked briefly to Tina, who told Ms. Neiman her husband was there for dental pain.

4. Shortly thereafter Ms. Neiman saw Grievant and told her that Patient K was in the Emergent Dental Clinic (See footnote 4) for dental pain.

5. Grievant is friends with Patient K's ex-wife, Marisa. Later that day Marisa called Grievant, and Grievant mentioned to Marisa that Patient K was in the Emergent Dental Clinic for dental pain. Grievant did not tell Marisa Patient K's diagnosis or the type of treatment he would receive. Grievant did not possess this information at the time of the call. 6. Grievant later found out Patient K's diagnosis and treatment, but did not share this information with Marisa.

7. Marisa told her and Patient K's daughter, Krista, about Patient K's dental problems, and Krista went to her father's house to ask about him. Tina told Krista Patient K would need several root canals. Krista reported this back to her mother, Patient K's ex- wife. Marisa.

8. On August 5, 2002, Patient K called WVUSOD and talked to Donna Haid, the Director of Clinical Services. Ms. Haid had been Grievant's direct supervisor since 2000.

9. Patient K was irate, asserted WVUSOD had breached his patient confidentiality, noted this was one of the most important responsibilities, and he expected the WVUSOD to respond to this incident.

10. Patient K believed Grievant had called his ex-wife while he was receiving treatment in the Dental Clinic and told her he was there for a root canal.

11. On August 19, 2002, Grievant was called to a meeting with Ms. Haid and Dr. Louise Veselicky, Senior Associate Dean for Educational Programs, to discuss the incident. At this meeting Grievant acknowledged she was aware of the WVUSOD/Health Science Center's Policy of Confidentiality. Grievant stated she had told Marisa her ex-husband was in the clinic for emergent

treatment, and nothing else. Grievant was informed she would be notified of what type of discipline she would receive for this breach of confidentiality.

12. By letter dated August 29, 2002, Grievant was informed of WVUSOD's intent to terminate her employment for breaching the confidentiality of a patient by "disclosing protected health information," and that she had committed gross misconduct by violating the basic trust of a patient. This letter also noted Grievant had received training that clearlyaddressed WVUSOD's policy on maintaining confidentiality, and she had "behaved in a manner that will not be tolerated." Grievant's dismissal was to be effective September 5, 2002.

13. By letter dated September 5, 2002, WVUSOD terminated Grievant's employment, noting she had met again with Dr. Veselicky and Ms. Haid and had been unable to provide any additional information to change the decision to terminate.

14. Many of WVUSOD's Clinics have sign-in sheets, and any patient that attends that clinic can see who has been treated there before him or her.

15. All patients are given "A Statement of Patient Rights and Responsibilities" handout when they attend the clinics. This handout states "[t]he patient has the right to expect that all communications and records pertaining to his/her care be treated as **confidential**." Resp. No. 5. (Emphasis in the original).

16. "The Code of Conduct Booklet" for WVUSOD employees has a confidentiality section. (See footnote 5) This section states, caregivers will actively "protect and safeguard patient information, printed or electronic," "[w]e will not discuss patient information in any public area, including, but not limited to, elevators, hallways, stairwells, restrooms, lobbies, and dining area," and "[w]e will exercise care to ensure that confidential and proprietary information is carefully maintained and managed." Resp. No. 4.

17. WVUSOD employees were not given a copy of this booklet, but its contents were discussed at in-service training. 18. The particular issue of this grievance, sharing information that a person was being seen for care, was not specifically addressed at the confidentiality training sessions. (See footnote 6)

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. Id.

I. Merits

Respondent has asserted Grievant's breach of confidentiality was gross misconduct. WVUSOD "Classified Employee Handbook" discusses gross misconduct and states this "misconduct is of substantial actual and/or potential consequence to operation or persons, typically involving flagrant or willful violation of policy, law, or standards of performance or conduct. Gross misconduct may result in any level of discipline up to and including dismissal at the supervisor's discretion." Grt. 1.

WVU's Policy, WVU-HR-9, deals with discipline. This Policy discusses gross misconduct, and identifies examples of behaviors that would be considered grossmisconduct and could result in immediate dismissal. While this list is meant to be examples and nonexclusive, none of the examples identify any behavior at all similar to Grievant's. The closest example would be "insubordination and/or disobedience," as there is a policy in place on confidentiality. Resp. No. 1. Respondent also placed into evidence the Patient Record Policy. Although this Policy is not given to employees, they are aware of its contents. While this Policy does speak mainly to written records, Section L states "[a]ny employee or student who engages in unauthorized divulgence or willful misuse of patient information or violation of this policy will be subject to disciplinary action in accordance with appropriate University policies and procedures." Resp. No. 2.

Pursuant to Respondent's definition, for Grievant's act to constitute gross misconduct, it must be "flagrant or willful." Flagrant means "extremely or deliberately conspicuous" and implies wrongdoing or moral offense that is glaring or notorious rather than an act of ineptitude. The American Heritage Dictionary 508, 186 (2d College ed. 1991). (See footnote 7) A willful act requires the behavior to be deliberate and intentional and intending the result which actually comes to pass. The American Heritage Dictionary 1382 (2d College ed. 1991); Black's Law Dictionary 824 (Abridged ed. 1983).

There are basically two separate issues involved in this grievance. The first is whether Grievant committed gross misconduct. Respondent contends all breaches of confidentiality are gross

misconduct, and this is a black and white issue. The disclosure of any information is gross misconduct, whether the information is limited, or whether the disclosure is intentional. Grievant asserts her behavior did not rise to the level of gross misconduct as defined by the Handbook. The undersigned Administrative Law Judge agrees Grievant's action were not flagrant. Grievant's act of telling her friend Patient K as in the Dental Clinic was not glaring wrongdoing, but rather more an inappropriate remark.

An argument could be made Grievant's action were willful, because she did indeed share this information with her friend. However, this act appears to be one of negligence as opposed to an intentionally wrong endeavor. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). The undersigned Administrative Law Judge finds Grievant's act of divulging this limited patient information was inappropriate, and she should have known better, but it did not constitute gross misconduct under Respondent's own definition.

The second issue is whether Grievant was informed her disclosure would result in dismissal. Respondent asserts the stringency of this interpretation was explained with clarity to all its employees, including Grievant. The evidence did not support this meaning had been explained to Respondent's employees with such exactness and precision. The testimony of several witnesses indicated they believed it would be wrong to share patient information such as treatment, diagnosis, and/or other specifics, but that to merely say someone was seen in a dental clinic was not a breach of confidentiality. Grievant was not informed such a disclosure was very serious and would result in termination. Respondent has not met its burden of proof on these issues, and demonstrated Grievant should be dismissed for her actions.

II. Mitigation/Severity of Penalty Grievant has argued her termination is excessive given the facts of the situation. This assertion is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

"When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct

involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997). Mitigation of a penalty is considered on a case by case basis. McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. Pingley v. Div. of Corrections, Docket No. 95-CORR-252 (July 23, 1996). This Grievance Board has held that "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 forrehabilitation." Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute her judgement for that of the employer. Tickett v. Cabell County Bd. of Educ., Docket No. 97-06-233 (Mar. 12, 1998); Huffstutler v. Cabell County Bd. of Educ., Docket No. 97-06-150 (Oct. 31, 1997).

Grievant was a ten-year employee with WVUSOD with a good record. Her actions were not flagrant, the data she improperly revealed was limited, and WVUSOD had not clearly informed her that her actions could result in dismissal. Pingley, supra. However, the undersigned Administrative Law Judge finds Grievant was aware that telling her friend about her ex-husband seeking treatment at the clinic was inappropriate.

Given this set of facts and in these unique circumstances, the undersigned Administrative Law Judge concludes Respondent's actions were arbitrary and capricious, and the penalty was disproportionate to the offense. However, since a breach of confidentiality is serious, and Grievant's behavior in sharing this information was inappropriate, a penalty should be assessed to notify Grievant and other caregivers that this behavior cannot be allowed. The undersigned Administrative Law Judge mitigates the penalty to a seven-day suspension. Additionally, to prevent a repeat of the behavior here, it is suggested Respondent advise all its employees immediately that actions such as those engaged in by Grievant are not allowed. No information of any kind, however limited and minor

is not to be discussed outside the confines of the treatment setting, and then only by those who have a need to know.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a 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. Id.

2. Grievant did commit a breach of confidentiality, but this breach of confidentiality was not flagrant and did not rise to the level of gross misconduct.

3. The training received by Grievant and Respondent's policies did not clearly define the act committed by Grievant as deserving of dismissal.

4. An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. Conner v. Barbour County Bd. of Educ., Docket No. 94- 01-394 (Jan. 31, 1995). See Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

5. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by theemployer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997).

6. "Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to

the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996).

7. Given the charges proven against Grievant and the lack of specificity of the policy, the penalty of dismissal was disproportionate to the offense. See Pingley v. Div. of Corrections, Docket No. 95-CORR-252 (July 23, 1996).

Accordingly, this grievance is **GRANTED**.

Respondent is **ORDERED** to reinstate Grievant to her former position, with back pay and interest, benefits, and seniority, minus seven-days of pay for the suspension.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: March 31, 2003

Footnote: 1

This case was originally scheduled for hearing in October 2002, but was continued to allow the parties to engage in mediation.

Footnote: 2

Grievant was represented by Attorney Jacques Williams, and WVUSOD was represented by Assistant Attorney General Samuel Spatafore.

Footnote: 3

The training on August 6, 2002, was after the alleged breach of confidentiality.

Footnote: 4

This Clinic is for walk-in clients who are suffering from some type of acute dental problem.

Footnote: 5

The booklet submitted into evidence was for University Health Associates and was not in existence at the time of the May 2001 in-service training. See Finding of Fact 17, infra.

Footnote: 6

Specifics on these training sessions were difficult to assess as there were no notes, handouts, outlines, or any other information presented by Respondent. The finding in this Finding of Fact comes from the testimony of multiple witnesses, including Grievant.

Footnote: 7

The second page cite refers to the comparison of the word to blatant.