DARRICK VENOY,

Grievant,

v. **DOCKET NO. 04-HHR-136**

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

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Respondent.

DECISION

Grievant Darrick Venoy filed this grievance against his employer, the Department of Health and Human Resources (Respondent) on April 5, 2004, following his dismissal from employment at Mildred Mitchell-Bateman Hospital. He claims his dismissal was discriminatory because other workers were not terminated for repeat offenses.

A level four hearing was held in the Grievance Board's Charleston office on August 24, 2004. Grievant appeared *pro se*, and Respondent was represented by Landon Brown, Assistant Attorney General. This matter became mature for decision at the close of the hearing, the parties having declined to file proposed findings of fact and conclusions of law.

Based on a preponderance of the credible evidence adduced at the hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant was employed by Respondent at Mildred Mitchell-Bateman Hospital (MMBH) as a Health Service Worker. 2. On March 24, 2004, Jack C. Clohan, Jr., Interim Chief Executive Officer of MMBH, informed Grievant by letter that he was dismissed from employment. This letter stated in part:

> The charge for this dismissal is continued non-adherence to [MMBH] policies and procedures. The specific reasons [sic] for this charge is that even after numerous counseling, second chances and reprimands you continue to refuse to conform to the level of behavior expected of an employee of [MMBH]. You have shown a continued disregard for the department's and the hospital's policies and procedures as demonstrated by your failure to follow hospital policy, after receiving $40.00 cash from a patient to place in the Trustee account, you misplaced the money. In addition, on March 18, 2004, you failed to call in to report your absence in compliance with current policy. Again, on March 20, 2004, you failed to report for your scheduled shift at 6:45 am, calling at 1:30 pm (you should have called in by no later than 4:45 am) to say you overslept.

Respondent's Exhibit No. 6.

3. The dismissal letter also detailed Grievant's excuses and explanations for this behavior, and also stated that

> While these events singularly may not warrant dismissal, the cumulative effect since your initial employment on March 27, 2000, leads me to conclude that you are unwilling to conform to the organizational expectations of your position. Taking all of this into consideration, I believe this action is warranted. When we last met on October 21, 2003, I attempted to impress on you the importance placed upon your improvement in adhering to the hospital's policies, procedures and practices. These important operational guidelines and requirements are developed to ensure the most safe, effective and efficient operation of the organization.
>
> Our records reflect the following attempts to attempt to change your behavior since your initial employment on March 22 [sic], 2000.

DATE	ACTION	ISSUE
October 9, 2000	Verbal Reprimand	Failure to comply with policy- Tardiness
October 19, 2000	Written Reprimand	Failure to comply with policy- Tardiness
February 9, 2001	Suspension (3 day)	Failure to comply with policy- Tardiness
May 29, 2001	Suspension (10 day)	Failure to comply with policy- Tardiness
July 1, 2003	Written Reprimand	Failure to comply with policy- Refusing Mandatory OT
November 10, 2003	Suspension (10 day)	Failure to comply with policies and procedures

> During each of these reprimands it has been expressed to you that your performance in these areas must show improvement for you to continue as a Health Service Worker. Throughout the time you have been undergoing the disciplinary process, you have been given every opportunity to demonstrate your ability to comply with the expectations of your position.

4. Grievant challenged the last suspension through the grievance process, and his grievance was denied at level three on December 15, 2003. Grievant did not appeal that adverse decision. In addition to citing the foregoing disciplinary actions and tardiness infractions, the suspension in that case was based on misuse of a Diner's Club Card issued to him by Respondent for business-related expenses.

5. On a date not in evidence, Grievant received $40 from a patient to put into the hospital's trust account. Proper procedure required him to document the receipt and if the administrative office is open, immediately take it there, or on off-hours, to call security to come and get it, then give it to security. Grievant prepared the proper receipt form and called security, but before anyone came, he left to answer another call, leaving the money and paperwork on a desk. It disappeared and remains unaccounted for.

6. Grievant's supervisor, Belinda Ackerson, has on multiple occasions discussed Grievant's attendance problems with him and gone over the pertinent policies. She estimates she has done this in excess of fifteen times without issuing a formal verbal or written reprimand.

7. Grievant has on several occasions refused mandatory overtime assignments.

8. Grievant's most recent performance appraisal shows he meets expectations, but also notes numerous deficiencies, especially with excessive absences.

9. On March 20, 2004, Grievant called in after 1:00 p.m. to say he would not be in for his shift, which had begun at 6:45 a.m. The policy covering his department requires an employee to call in at least two hours before the start of his shift if he will be absent. Grievant provided no excuse for his failure to timely call in, other than he “overslept.”

10. On occasion, Grievant will call to say he cannot make it to work because he has no transportation, and a coworker will be sent to get him, on work time. On occasions when Grievant has arranged for a coworker to pick him up, the coworker's tardiness is overlooked because he or she was getting Grievant.

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 & Human Res.*, Docket No. 92- HHR-486 (May 17, 1993). Grievant does not dispute the charges against him, and Respondent provided ample evidence that the events occurred, hence Respondent has met its burden of proof. However, Grievant contends that dismissal is a punishment disproportionate to the offenses, and that other employees of MMBH have not been dismissed for repeated infractions.

Permanent state employees who are in the classified service can only be dismissed for “good cause,” meaning “misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.” Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* Sections 12.02 and 03, Administrative Rules, W. Va. Div. of Personnel (June 1, 1998). The West Virginia Supreme Court of Appeals has also stated that “the work record of a long-term civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct.” *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985). *See Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983); *Serreno v. W. Va. Civil Serv. Comm'n*, 169 W. Va. 111, 285 S.E.2d 899 (1982).

Respondent has proven that, during Grievant's entire tenure of employment, he has demonstrated an unwillingness or inability to follow the polices and procedure established by the Department of Health and Human Resources and MMBH to regulate his conduct at work. Despite numerous attempts to correct his attendance problem through theprogressive disciplinary process, he has shown no improvement and no contrition at his failure to improve. Respondent has taken extraordinary measures to accommodate Grievant's poor performance, has counseled him, warned him and demonstrated the consequences of continued disregard for proper workplace behavior.

"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). "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 & Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

Grievant has a very poor work record. His prospects for rehabilitation have been drowned by his repeated failure to improve despite clear knowledge of what was expected of him and of the consequences should he maintain his lack of concern and respect for the policies and needs of his employer. Although there is no indication the work he actually performs is deficient, he is an unreliable employee with an attitude that demonstrates willful disregard for the polices and procedures established to maintain an orderly hospital. His failures in this regard have resulted in overburdened coworkers who must make up for hisabsences, the loss of property by a patient, and delinquency in a credit account held in the name of Respondent.

Grievant is correct that any one of his infractions taken in isolation is insufficient to support a dismissal, and Respondent has acknowledged this by not having dismissed him already. However, the cumulative effect of his behavior, coupled with the fact that the cumulation indicates a certainty he will continue to warrant disciplinary intervention, does support Respondent's decision.

Grievant asserts in his defense that Respondent's decision to terminate him for several infractions is discriminatory, given it has failed to dismiss other workers with similar records. “W. Va. Code § 18-29-2(m) defines 'discrimination' as 'any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.'” *Hogsett, et al., v. Wayne County Bd. of Educ.*, Docket No. 01-50-056 (Apr. 5, 2001). In order to establish a claim of discrimination, an employee must establish a prima facie case by a preponderance of the evidence. In order to meet this burden, Grievant must show:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by their employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c) that such differences were unrelated to actual job responsibilities of the Grievant and/or the other employee(s) and were not agreed to by the Grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievant did not meet this burden, as he did not identify any other employee with whom he was pertinently similarly situated. He did not identify anyone else employed byRespondent who committed a similar string of policy infractions without similar punishment. The following conclusions of law support this decision:

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

2. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* Sections 12.02 and 03, Administrative Rules, W. Va. Div. of Personnel (June 1, 1998). The West Virginia Supreme Court of Appeals has also stated that "the work record of a long-term civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985). *See Blake v. Civil Serv. Comm'n*, 172 W. Va.711, 310 S.E.2d 472

(1983); *Serreno v. W. Va. Civil Serv. Comm'n*, 169 W. Va. 111, 285 S.E.2d 899 (1982).

3. Respondent has met its burden of proving that Grievant was dismissed from employment for good cause.

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 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).

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 theemployee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health & Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

7. Grievant did not demonstrate that mitigation of his penalty was warranted. 8. “W. Va. Code § 18-29-2(m) defines 'discrimination' as 'any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.'” *Hogsett, et al., v. Wayne County Bd. of Educ.*, Docket No. 01-50-056 (Apr. 5, 2001).

9. In order to establish a claim of discrimination, an employee must establish a prima facie case by a preponderance of the evidence. In order to meet this burden, grievants must show:

> (a) that they are similarly situated, in a pertinent way, to one or more other employee(s);

(b) that they have, to their detriment, been treated by their employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c) that such differences were unrelated to actual job responsibilities of the Grievants and/or the other employee(s) and were not agreed to by the grievants in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

10. Grievant failed to establish a prima facie discrimination claim by a preponderance of the evidence.

For the foregoing reasons, this grievance is hereby **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or 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 (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.

Date: September 22, 2004 _____

M. Paul Marteney

Administrative Law Judge