THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

RITA DECKARD,

Grievant,

v. **DOCKET NO. 06-HHR-078**

DEPARTMENT OF HEALTH AND

HUMAN RESOURCES/LAKIN HOSPITAL,

Respondent.

DECISION

Grievant Rita Deckard filed two grievances on February 17, 2006, challenging her termination from employment, and alleging harassment and a hostile work environment. The grievances were combined for hearing at level four. A level four hearing was held in the Grievance Board's Charleston office on April 28, 2006. Grievant was represented by her son, Dennis Pauley, and Respondent was represented by counsel, Landon R. Brown, Senior Assistant Attorney General. The matter became mature for decision at the conclusion of the hearing, the parties having declined the opportunity to file proposed findings of fact and conclusions of law.

Issues and Arguments

Grievant was suspended, and then terminated after an altercation with her supervisor.

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

Findings of Fact

1. Grievant was employed by Respondent as a Health Service Worker at Lakin Hospital. She worked a night shift, from 7:00 p.m. to 8:00 a.m. 2. Lakin Hospital is a 114-bed facility arranged in four units or “wings.” On a given shift, there are two Licensed Practical Nurses (LPN's) working who supervise two units each. One of the LPN's also serves as Charge Nurse, and has overall responsibility for the entire facility. Each unit is staffed by two to four Health Service Workers

(HSW's).

3. The LPN's are responsible for assigning and scheduling the duties of the HSW's. Normally, the HSW's are permitted to chose their own break and lunch times, in cooperation with each other.

4. When a unit is short-staffed and someone needs to take a break, the LPN's may assign an HSW from another unit to cover the temporary absence. Some units are larger than others, and require more staff.

5. On January 29, 2006, Grievant was working on B Wing with another HSW, Carolyn Sayre, supervised by LPN Carla Weaver. Larry Kapp was the other LPN working at the time, and he was also serving as Charge Nurse.

6. Early in each shift, the LPN meets with the HSW's to brief them on any notes left by the prior shift, to assign any special jobs, or to work out the break schedule. On the night at issue, Ms. Weaver informed Grievant and Ms. Sayre they would be covering breaks on A Wing, which is a larger unit than B Wing. As they were filling out the time sheets, Ms. Weaver was under the impression that Ms. Sayre had covered all the breaks on A Wing the previous night, so she told Grievant she should cover them this night.

7. Ms. Sayre attempted to correct Ms. Weaver, and volunteered to cover some A Wing shifts. Ms. Weaver refused the offer and stated they would do it the way she had previously instructed. Grievant, who did not wish to cover on the larger unit, stated she was sick and needed to go home. Ms. Sayre called in Mr. Kapp to resolve the matter. 8. Nobody told Grievant she could not leave. When Mr. Kapp arrived he sat down at a table between Grievant and Ms. Weaver, who were both visibly upset, and asked if Grievant could stay until her replacement arrived. Ms. Weaver had begun filling out a time sheet for the replacement HSW. Grievant told Mr. Kapp she would only stay if he could keep Ms. Weaver “out of [her] fucking face.” Mr. Kapp stated that would not be possible because Ms. Weaver was her nurse for the shift.

9. Grievant communicated to Mr. Kapp that she did not feel like she should have to go up to a larger unit to cover twice per night instead of once.

10. Grievant, thinking the time sheet Ms. Weaver was filling out was hers, grabbed it from her and started to leave. Everyone attempted to tell her it was the wrong time sheet, and eventually she returned and tried to take the right one from Ms. Weaver, who would not let her have it. Grievant insisted she was entitled to the document and needed it to file a grievance.

11. Ms. Sayre, concerned that Grievant would strike Ms. Weaver, took her by the arm and led her to a storage room to calm down.

12. Mr. Kapp told Grievant to go home and stated he would copy the time sheet and give the copy to Ms. Sayre to give to Grievant. He believed there was another issue between Grievant and Ms. Weaver because their distress was out of proportion to the issue, but he was unable to get them to communicate what the real problem was.

13. Later that night, about 12:30 a.m., Grievant returned to the facility with three of her adult sons, and demanded the time sheet.

14. Mr. Kapp perceived that Grievant was disturbed and he felt threatened by her sons. They made no threatening gestures and said nothing, but did make eye contact withMr. Kapp. He left the area to get the time sheet, returned and gave it to Grievant, and she left.

15. Mr. Kapp felt as if his safety was threatened, and had “a flash” of chest pain.

16. Prior to filing this grievance, Grievant had never mentioned to anyone that she had problems with her supervisor and she had never claimed she was being harassed.

17. The Division of Personnel Workplace Security Policy, which applies to Grievant's workplace, states that “[t]hreatening or assaultive behavior will not be tolerated and must be resolved by managers/supervisors on a case-by_case basis. Any employee engaging in such behavior shall be subject to disciplinary action, up to and including dismissal.” The Policy defines “Threatening behavior” in that context as “Conduct assessed, judged, observed, or perceived by a reasonable person to be so outrageous and extreme as to cause severe emotional distress or cause, or is likely to result in, bodily harm.” The Policy further directs that

> In determining whether an individual poses a threat or a danger, consideration must be given to the context in which the threat is made and to the following:
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> 1 * the perception that a threat is real;
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> 2 * the nature and severity of potential harm;
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> 3 * the likelihood that harm will occur;
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> 4 * the imminence of the potential harm;

5 * the duration of risk, and/or

6 * the past behavior of an individual.

18. Lakin Hospital has its own policy addressing workplace security and violent behavior. This policy, designated L.208-2, states in part:

> Employees are prohibited from engaging in behavior that can be interpreted as verbally or physically threatening. This restriction includes making verbal threats in person (even those apparently made in jest) or via electronic communication equipment, i.e., telephone, e-mail, cellular telephones, etc.,and in any written form. Also prohibited are bringing a weapon (or toy that looks like a weapon) to work, stalking, outbursts such as profanity, shouting, name calling, and hitting, throwing or breaking objects. Any altercation, that results in violence or threats, will be dealt with in line with the progressive disciplinary action policy.

19. The DHHR's Employee Conduct Policy, No. 2108, states that employees are expected to:

> [A]void physical abuse, harassment or intimidation of residents/patients/ clients or fellow employees; . . . be ethical, alert, polite, sober and attentive to the responsibilities associated with their jobs; . . . refrain from disrupting the normal operations of the Agency; refrain from profane, threatening or abusive language towards others; [and] refrain from making unwanted or inappropriate verbal or physical contacts . . . .

20. DHHR's Progressive Disciplinary Policy, No. 2104, provides for dismissal as a disciplinary measure without any prior disciplinary or corrective measures “if any employee commits a singular offense of such severity warranting dismissal.”

21. The following day, January 30, 2006, Lakin Hospital CEO Keith Stouffer suspended Grievant without pay, pending investigation into the incident. On February 13, 2006, after the investigation was concluded, Grievant was dismissed from employment. The dismissal letter stated, in part,

> This action is a result of your committing violations of work place security as well as violation of Department of Health and Human Resources Policies . . . Failure to comply with conduct that would be reasonably expected of employees in the presence of patients/clients/fellow employees or public in general; . . . Use of profane, threatening or abuse [sic] language or physical threats to fellow employees, supervisor or the public.

The letter further detailed specific policies Grievant's conduct violated, and accused her of insubordination to Mr. Kapp and Ms. Weaver.

22. There was no evidence suggesting the incident was witnessed by or overheard by any patients at the facility. 23. Respondent made no investigation into Grievant's claim of harassment or hostile work environment because she would not specify any instances of alleged harassment or hostility.

24. Grievant has no record of prior disciplinary action or performance shortfalls.

Discussion

The burden of proof is upon the employer to establish the charges relied upon by a preponderance of the evidence and to establish good cause for dismissing an employee. (See footnote 1) Grievant is charged with compromising workplace security through threatening behavior, and insubordination. Although there are minor and immaterial variations in the versions of events as described by the witnesses, the essential details are as described above. Respondent met its burden of proving the conduct alleged: Grievant was disruptive and disrespectful, used abusive language toward her supervisor, returned to the facility after she was sent home, and caused Mr. Kapp to feel intimidated. Oddly, there was no evidence Ms. Weaver felt threatened or intimidated by Grievant. Respondent has also proven that there are several policies in place that proscribed the type of conduct exhibited by Grievant. Essentially, the only question remaining in this case is the level of discipline that should be imposed, that is, whether Grievant's conduct rises to the level of severity that would justify dismissal.

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 meretechnical violations of statute or official duty without wrongful intention.” (See footnote 2) 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.” (See footnote 3) The decision to terminate an employee rather than to impose a lesser disciplinary measure is a choice largely left to the discretion of the management, but that discretion must be tempered by the substantial interest an employee has in her right to continued employment. "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." (See footnote 4)

Here, several factors cast doubt on termination as the appropriate level of punishment. First, there is no record of previous disciplinary or performance problems with Grievant. This incident appeared to be a surprise to everyone involved. Second, there is no evidence in the record that the employer gave any consideration to Grievant's prospects for rehabilitation or the likelihood that she would exhibit such conduct again in the future if a lesser disciplinary action that included clear corrective measures were imposed. The employer in this case seems to have applied a blanket, all-or-nothing definition of“violence” to Grievant's conduct, and did little to assess the severity or effects of the incident. In fact, significant parts to the dismissal letter dealing with the effects were largely speculative, such as “The altercation took place on the residents' hall and if any were up or awake, could have heard or seen this altercation.”

The workplace security policies, as well as the standard for conduct for which termination is appropriate, are full of superlatives that describe an extreme or egregious type of conduct that does not seem to match the temper tantrum at issue in this case. Grievant made no overt or explicit threats to the safety of others. Although she caused Mr. Kapp and Ms. Sayre concern that she would escalate to physical violence, she apparently did not cause such concern to the target of her ire. Although she loudly used obscene language, it was not directed at anyone, but rather was just an angry, vernacular outburst. It was offensive and unprofessional, but it was not extreme misconduct of a substantial nature. Likewise, Grievant's reaching across the table to grab a paper being held away from her by Ms. Weaver was not an assault, an there is no evidence suggesting the action was intended or perceived as a bodily threat.

Later in the evening, Grievant returned to the facility with three people, two of whom were her adult sons. Ms. Weaver did not see her, and Grievant's interaction was entirely with Mr. Kapp. There is no evidence that, at that time, Grievant acted inappropriately, made any improper, disruptive, threatening or angry comments. Mr. Kapp reported her behavior as non confrontational - she asked for the time sheet, he gave it to her, and she left. Respondent characterized this action as insubordinate because Grievant had been told to go home, but that is a bit of a stretch _ Grievant could easily have taken Mr. Kapp's instruction as permission rather than an order , given she had just

stated she was goinghome. Respondent did not aver that Grievant violated any policy by bringing her family members with her. Instead, Respondent focused on Mr. Kapp's statement that he felt threatened and intimidated, to the point of having “a flash” of chest pain.

Threats are evaluated as perceived, not as intended. Although Grievant could arguably have brought her sons with her for her own security, her intent is irrelevant. If she caused another person to feel threatened, that is the crux of the analysis. The DOP policy quoted in the Findings of Fact provides an excellent guide to follow in determining whether Grievant's conduct should be considered “threatening.” While the effect of the conduct is of the essence of the proscription, the effect must be looked at in the eyes of a “reasonable person.” The DOP Policy defines “Threatening behavior” as “Conduct assessed, judged, observed, or perceived *by a reasonable person* to be so *outrageous and extreme* as to cause *severe* emotional distress or cause, or is likely to result in, bodily harm.” (Emphasis added.)

There is no reason Mr. Kapp should have felt extremely threatened by Grievant or her accompanying family members at the time she returned. Their mere presence in the room with him, and their making eye contact with him, was not outrageous or extreme. Further, he had no reason to suspect that Grievant bore him, personally, any ill will. He had assisted Grievant, gave her what she wanted, mediated a dispute he was not involved in, and generally acted as a neutral party. While he appeared credible in testifying about his being intimidated, the trigger for that intimidation as he described it was not something a reasonable person would have felt such fear over.

Respondent has met its burden of proving Grievant engaged in offensive, insubordinate, and unprofessional conduct. It has not proven the conduct was so severeas to warrant termination of Grievant's employment. Although Grievant is not entitled to complete elimination of disciplinary action for her conduct, she has proven that the punishment imposed should be mitigated.

The following conclusions of law support this discussion:

Conclusions of Law

1. In dismissal cases involving classified employees, the burden of proof is upon the employer to establish the charges relied upon by a preponderance of the evidence and to establish good cause for dismissing an employee. W. Va. Code § 29-6A-6. *Davis v. W. Va. Dept. of Motor Vehicles*, Docket No. 89-DMV-569 (Jan.22, 1990); *Broughton v. W. Va. Div. of Highways*, Docket No. 92-DOH-

325 (Dec. 31, 1992); *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 WestVirginia 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. "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 Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

4. West Virginia Code § 29-6A-5(b) grants Administrative Law Judges the authority to "provide relief as is determined fair and equitable . . . , and take any other action to provide for the effective resolution of grievances not inconsistent with any rules of the board or the provisions of this article: Provided, That in all cases the hearing examiner has the authority to provide appropriate remedies including, but not limited to, making the employee whole."

5. Respondent has met its burden of proving Grievant engaged in offensive, insubordinate, and unprofessional conduct. It has not proven the conduct was so severe as to warrant termination of Grievant's employment. For the foregoing reasons, this grievance is hereby **GRANTED**, in part.

Respondent is **ORDERED** to immediately reinstate Grievant to her former position. Respondent is further **ordered to impose a fifteen-day (calendar day) unpaid suspension** as discipline for Grievant's conduct, effective February 13, 2006. The suspension pending investigation was proper, and is not affected by this ruling. Respondent is further ordered to compensate Grievant for the any pay or benefits to which she would have been entitled but for the termination.

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 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.

May 15, 2006

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

W. Va. Code § 29-6A-6.

Footnote: 2

Syl. Pt. 1, Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980).

Footnote: 3

Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985).

Footnote: 4

Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp., Docket No. 96- HHR-183 (Oct. 3, 1996).