WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

BEVERLY DAY,

Grievant,

v. **Docket No. 07-CHD-121**

MORGAN COUNTY HEALTH DEPARTMENT,

Employer.

DECISION

Beverly Day ("Grievant") initiated this proceeding on March 20, 2007, challenging a 10-day suspension without pay imposed by her employer, Respondent Morgan County Health Department. Grievant initially filed directly at level four, improperly bypassing the lower levels of the grievance procedure, resulting in the grievance being remanded to level two by Order of this Grievance Board dated April 6, 2007.

After denials at the lower levels of the grievance procedure, Grievant again appealed to level four on April 13, 2007. Because of legislative changes, this matter was placed in abeyance until August of 2007. Thereafter, a level four hearing was convened in the Grievance Board's office in Westover, West Virginia, on October 22, 2007. Grievant was represented by counsel, Harry P. Waddell, and Respondent was represented by counsel, Claudia W. Bentley. This matter became mature for decision upon receipt of the parties' fact/law proposals on November 5, 2007.

Synopsis

Grievant was suspended for ten days for insubordination. Although Bill Kearns, previous

administrator for the MCHD, had served as a back-up administrator, the Boardhad voted to rescind Mr. Kearn's authority and directed all employees to only contact the current administrator when problems occurred. Grievant was present at a Board meeting where this matter was voted upon and also at a staff meeting the following day, where the issue was again discussed, and a memorandum was distributed, explaining the Board's directive. Despite the prohibition, Grievant contacted Mr. Kearns regarding forms she could not locate on a morning when the administrator was not at the office, but was available by telephone. Grievant later denied that she knew about the Board's directive regarding contact with a back-up administrator, demonstrating her willful violation of the order. Respondent proved Grievant's conduct constituted insubordination, and Grievant failed to establish that mitigation was appropriate under the circumstances. The grievance is denied.

Based upon a detailed review of the record in its entirety, the undersigned makes the following findings of fact:

Findings of Fact

1. Grievant has been employed by Respondent for fifteen years and is currently classified as an Office Assistant 3.

___2. Prior to August 31, 2005, Bill Kearns was Administrator for the Morgan Health Department (“MCHD”).

3. In October of 2005, Karen Dawson was hired to replace Mr. Kearns as Administrator. However, Mr. Kearns continued to function as a consultant regarding certain issues, particularly financial ones, and advised Ms. Dawson as needed. Mr. Kearns also functioned as the administrator when Ms. Dawson was absent or away. 4. At a MCHD meeting on August 16, 2006, the Board voted to rescind the appointment of Mr. Kearns as back-up administrator. Grievant attended this meeting.

5. On August 17, 2006, during a staff meeting, Ms. Dawson distributed a memorandum, signed by all Board members, stating that Mr. Kearns would no longer function as back-up administrator, and he should not be contacted for any reason. Employees were advised in this memo that Ms. Dawson should be the only person notified when problems arise and that she would make all decisions regarding such issues.

6. Grievant attended the meeting on August 17, 2006, when the memo was distributed to all

staff members.

7. Dr. Kevin McLaughlin has provided contract services to the MCHD as its family planning clinician, along with providing screening tests for breast and cervical cancer. In conjunction with this function, clinic days are scheduled periodically at MCHD, during which Dr. McLaughlin examines patients and provides related medical services.

8. In July of 2006, Dr. McLaughlin notified the MCHD that he would be closing his private practice and discontinuing his medical liability insurance. He provided advance notice of this to Ms. Dawson, so that provisions could be made to ensure that he would have liability coverage when conducting clinics at MCHD.

9. Shortly after being provided this information by Dr. McLaughlin, Ms. Dawson contacted the Board of Risk Insurance Management ("BRIM" -- which provides state liability insurance coverage to public entities), and she was advised that Dr. McLaughlin would be covered by the state's insurance while performing services as a contract physician.

10. On February 8, 2007, during a meeting with an agent for BRIM to discuss the annual review and renewal of MCHD's insurance policy, Ms. Dawson raised the issue ofDr. McLaughlin's liability coverage. A few days after this meeting, the agent phoned Ms. Dawson, advising her that Dr. McLaughlin was not covered under the current circumstances, but that he could obtain coverage by becoming a part-time employee of MCHD.

11. After being informed that Dr. McLaughlin was not covered by the BRIM policy, Ms. Dawson contacted the Division of Personnel. She was advised that forms would have to be completed, including a "WV-11," (See footnote 1) in order to make Dr. McLaughlin a part-time, professional exempt employee.

12. On Friday, February 16, 2007, Ms. Dawson telephoned Dr. McLaughlin to inform him about the insurance coverage situation. Dr. McLaughlin was out of town, so she left a message on his cell phone, stating that there were questions regarding his liability insurance and that he should call her as soon as possible.

13. A family planning clinic was scheduled for Tuesday, February 20, 2007, and Monday, February 19, was a holiday.

14. Dr. McLaughlin did not receive Ms. Dawson's message until the weekend, so he did not attempt to return her call until Tuesday morning.

15. On the morning of February 20, 2007, Ms. Dawson called the clinic and spoke with Angel Bloom, RN, advising her that she (Ms. Dawson) would not be coming in to work, due to a family illness. She provided Ms. Bloom with her cell phone number.

16. At approximately 8:30 a.m. on February 20, Dr. McLaughlin phoned the MCHD to speak with Ms. Dawson regarding the insurance coverage issue. Ms. Bloomgave him Ms. Dawson's cell phone number. He apparently called Ms. Dawson's phone while she was on another call shortly thereafter. Ms. Dawson did not answer, so he left a message on her voice mail, asking her to return his call.

17. Ms. Bloom again called Ms. Dawson, advising her of Dr. McLaughlin's call and stating he had questions regarding his insurance coverage. (See footnote 2) Ms. Dawson explained to Ms. Bloom that Dr. McLaughlin needed to become an employee and that the necessary forms would have to be completed that day to provide him with coverage. Ms. Dawson told Ms. Bloom that Grievant would know where to find the WV-11 form.

18. Grievant arrived at work at approximately 8:45 a.m. on February 20, 2007. Ms. Bloom informed Grievant of her conversations with Ms. Dawson and the need to complete forms to make Dr. McLaughlin an employee, and asked her to find the WV-11.

19. Grievant was not familiar with the WV-11 form and did not know where to find one. After looking around the office and online, she emailed Bill Kearns, asking him if he could provide her with the form.

20. After receiving Grievant's email, Mr. Kearns phoned her to inquire about the need for the WV-11. He told Grievant that what they were doing was “all wrong.” He did not believe that having Dr. McLaughlin complete the form that day would be sufficient to make him an employee and provide immediate insurance coverage.

21. Grievant relayed Mr. Kearns' comments to Ms. Bloom, who advised Grievant that she was doing what Ms. Dawson had instructed. Grievant protested, then made a phone call to an unidentified person. 22. Dr. McLaughlin arrived at the clinic at approximately 9:30 a.m. and was informed by Ms. Bloom that he would need to complete the forms to become a part-time employee, which would provide him with insurance coverage. She also informed him that he had apparently not been covered under the state's insurance coverage after the closing of his practice in August, causing Dr. McLaughlin great concern regarding his liability for all the patients he had seen during the intervening

months.

23. Grievant entered the room during Ms. Bloom's conversation with Dr. McLaughlin and proceeded to relay the information given to her by Mr. Kearns. Because of the many concerns raised, Dr. McLaughlin decided to cancel the clinic for that day and reschedule the patient appointments.

24. Dr. McLaughlin called Bill Kearns to discuss his concerns regarding his employment and liability insurance, because he had a good working relationship with Mr. Kearns when he was director, and Dr. McLaughlin valued his opinion.

25. Ms. Bloom phoned Ms. Dawson to inform her of Dr. McLaughlin's arrival, his phone conversation with Mr. Kearns, and the cancelling of the clinic. Ms. Dawson proceeded to call the Division of Personnel for clarification of the exact procedure and forms to be completed, then spoke with Dr. McLaughlin. She informed Dr. McLaughlin of the information that she obtained, made sure he had the appropriate forms to complete, and told him she was very angry that the clinic had been cancelled.

26. After the events of February 20, Ms. Dawson conducted interviews with all staff present at the clinic that morning, including Grievant, Ms. Bloom, and nurses. During their discussion, Grievant told Ms. Dawson that she did not recall the Board meeting atwhich Mr. Kearn's position as back-up administrator was rescinded, nor did she remember seeing a memorandum to that effect.

27. By letter dated March 15, 2007, Ms. Dawson informed Grievant that she was being suspended for ten days, without pay, for “insubordination which resulted in the delay of health care of three weeks for twelve family planning clients.” The letter recounted the various events of February 20, 2007, along with Grievant's contention that she did not know that Mr. Kearn's was no longer backup administrator.

28. Grievant's testimony that she did not know Mr. Kearns was no longer back-up administrator, along with her allegation that she tried to call Ms. Dawson prior to contacting Mr. Kearns on February 20, is not credible.

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). (See footnote

3) "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 Res.*, Docket No.92-HHR-486 (May 17, 1993). The Division of Personnel Administrative Rule, Section 12.3 provides “[a]n appointing authority may suspend any employee without pay for cause or to conduct an investigation regarding an employee's conduct which has a reasonable connection to the employee's performance of his or her job.”

Grievant has been charged with insubordination, defined as the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *Riddle v. Bd. of Directors/So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). In order to establish 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. *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). *See Santer v. Kanawha County Bd. of Educ*., Docket No. 03-20-092 (June 30, 2003); *Riddle v. Bd. of Directors/So. W. Va.Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989).

"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). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later.

In this case, Grievant has been charged with insubordinate conduct as a result of her contacting Mr. Kearns on February 20, 2007, in violation of the Board's previouslyissued mandate rescinding his authority as back-up administrator. However, Grievant contends that she had no knowledge of the Board's action, despite her presence at the Board meeting, and did not recall seeing the memorandum at the staff meeting the following day. Respondent counters that Grievant was present at the Board meeting when the backup-administrator issue was discussed and that she was at the staff meeting the following day, receiving the written memorandum containing the same information. Therefore, it is not plausible that she had no knowledge of the Board's directive.

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va.*

Dep't of Health & Human Res., Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res*., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ*., Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp*., Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess 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'sinformation. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD- 216 (Dec. 28, 1999); *Perdue, supra*.

Grievant's testimony on this point is not credible. Having been present both at the previous evening's Board meeting and at the staff meeting the following day, it is simply not believable that Grievant did not know that Mr. Kearns was no longer functioning as back-up administrator and that employees had been instructed not to contact him.

Similarly, when confronted by Ms. Dawson during her investigation of the events of the day in question, Grievant told Ms. Dawson that, when she could not find the WV-11 form, she tried to call Ms. Dawson both at home and on her cell phone, prior to contacting Mr. Kearns. Grievant's version of events conflicts with that given by at least two other witnesses who were present in the office that morning, who stated that Grievant had already emailed Mr. Kearns when it was suggested to her that Ms. Dawson should be called. Moreover, Ms. Dawson credibly testified that, despite the numerous calls she received on her cell phone that morning, there was no record of a missed call or message from Grievant.

Accordingly, the undersigned finds that Grievant knew that employees had been instructed not to contact Mr. Kearns, yet contacted him on February 20 about the WV-11 form. Moreover, despite her statements to the contrary, Grievant did not discuss the matter with Ms. Dawson prior to contacting Mr. Kearns. At the point in time when Grievant emailed Mr. Kearns, Dr. McLaughlin had not yet arrived at the clinic, and the situation certainly had not reached the level of an emergency. Even if Grievant had tried to call Ms. Dawson and left a message on her cell phone--which she did not do--it

would have been reasonable to wait for a return call from Ms. Dawson to resolve the issue. It also must benoted that Ms. Bloom called and spoke with Ms. Dawson several times that morning, so Ms. Dawson obviously was available and could have been reached.

The undersigned concludes that Grievant knew of the MCHD's prohibition to employees regarding contact with Mr. Kearns regarding MCHD matters, yet she knowingly violated that order on February 20, 2007, without reasonable justification. Her denial of any knowledge of the directive, despite being present at two meetings where it was discussed, supports the conclusion that her violation was knowing and willful. Grievant's after-the-fact effort to demonstrate that she tried to call Ms. Dawson prior to emailing Mr. Kearns also establishes that she knew of the directive to contact Ms. Dawson with all MCHD problems. Therefore, the undersigned concludes that Respondent has proven by a preponderance of the evidence that Grievant's conduct constituted insubordination.

Grievant has argued that the ten-day suspension was unduly harsh discipline for what she contends was, at worst, a technical violation of the Board's directive. The argument that discipline is excessive given the facts of the situation 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. *Conner v. Barbour County Bd. of Educ*., Docket No. 95-01-031 (Sept. 29, 1995); *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 Corr*., 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 for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996).

Given the considerable deference afforded to employers in disciplinary situations, the undersigned is not persuaded that the suspension imposed was disproportionate to the offense committed. Especially in view of Grievant's obvious attempts to “cover up” her willful conduct, the penalty imposed was not unreasonable. If Grievant had admitted she knew about the directive not to contact Dr. McLaughlin, but that she made a poor judgmentcall on the spur of the moment, the undersigned would likely agree that a ten-day suspension would seem severe. However, Grievant has been dishonest regarding her knowledge of the Board's directive regarding the back-up administrator, demonstrating her knowing and willful insubordination. Accordingly, Grievant's request for reduction of the penalty imposed must be denied.

The following conclusions of law are appropriate in this matter.

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).

2. In order to establish 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. *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). *See Santer v. Kanawha County Bd. of Educ*., Docket No. 03-20-092 (June 30, 2003); *Riddle v. Bd. of Directors/So. W. Va.Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989).

3. "[M]itigation 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 theseriousness 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. Respondent has proven by a preponderance of the evidence that Grievant was insubordinate, in that she knowingly and willfully violated her employer's directive regarding the back-up administrator for the MCHD.

5. Grievant has failed to establish that the 10-day suspension imposed for her conduct was disproportionate to the offense committed.

Accordingly, this grievance is **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." Any such appeal must be filed within thirty (30) days of receipt of this decision. *See* W. Va. Code § 29-6A-7 (*repealed by* Senate Bill No. 442, March 7, 2007*)* (*but see Executive Order No. 2-07*, May 8, 2007). Neither the Public 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: December 14, 2007

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DENISE M. SPATAFORE

Acting Deputy Chief Administrative Law Judge

Footnote: 1

This is the Division of Personnel's form which officially implements all personnel actions for state employees, including hiring, job title changes, and salary modifications.

Footnote: 2

At this point, Ms. Dawson had apparently not yet received Dr. McLaughlin's voice message.

Footnote: 3

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes and rules, which continue to control the proceedings in this case.