THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

JOSLYN CORNWELL,

Grievant,

v. **Docket No. 07-HHR-026**

DEPARTMENT OF HEALTH AND

HUMAN RESOURCES/MILDRED

MITCHELL-BATEMAN HOSPITAL,

Respondent.

D E C I S I O N

Grievant, Joslyn Cornwell, was employed by the Department of Health and Human Resources ("HHR") at Mildred Mitchell-Bateman Hospital ("MMBH") as a Health Service Worker. She filed this grievance over her termination on April 12, 2007. Her Statement of Grievance stated:

> **Giving a p[atien]t. my keys, I have be[en] discriminated against, other employees did same with no punishment. Was said to put p[atien]t. in harm, can show show [sic] several cases, to when nothing happened.**
>
> **Relief Sought: back pay and my job back.**

This grievance was filed directly to Level IV on April 12, 2007, and was set for pre- hearing conference on July 9, 2007, and hearing on August 9, 2007. At the request of Grievant, the hearing was continued until September 11, 2007. Grievant represented herself and was assisted by Jay Miser. Respondent was represented by Jennifer Akers, Assistant Attorney General. The Level IV hearing was conducted in the Grievance Board's Charleston office, and

the matter became mature for hearing with the submission of the parties' proposals on October 11, 2007.

Synopsis

Respondent asserts Grievant had a long history of problems during her employment with MMBH, including many verbal and written reprimands and several suspensions. Respondent maintains the progressive discipline policy was followed, and, after numerous attempts to correct Grievant's behavior, she was terminated for her continued failure to follow leave and attendance policies and because of her continued unprofessional and inappropriate behavior.

Grievant avers the leave abuse policy was not followed, and she was entitled to a ten-day suspension prior to termination. (See footnote 1) Grievant also asserts many other employees gave their keys to this same patient because it made him calmer, and these employees were not subjected to discipline. (See footnote 2)

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant had been employed by Respondent for approximately three and one-half years at the time of her termination. Although not specified exactly in the record, it appears Grievant was hired in September of 2003. 2. Over her three and one-half years of employment, Grievant received approximately forty counseling sessions and/or disciplinary actions. She was also placed on two Performance Improvement Plans.

3. The first problem noted during Grievant's employment was shortly after she began employment in September 2003 when she failed to attend required one-on-one training in the areas of communication, psychiatric disorders, and patient rights. This training was not completed until November 17, 2003.

4. Grievant received counseling sessions on September 22, and December 1, 2003, and January 23, 2004, for unprofessional behavior and not reporting a patient's attempt to elope. Thereafter Grievant received seventeen additional counseling sessions with the last one occurring on December 16, 2006. These counseling sessions dealt with excessive tardiness; failure to complete her work assignments; unprofessional and disrespectful interaction with

supervisors, administrators, and co-workers; taking extended breaks on another unit; repeated calls to another unit; failure to search a patient properly resulting in a knife being brought to the unit; and numerous violations of the leave policies. 5. Grievant received her first verbal reprimand on October 17, 2003, for unprofessional conduct with a co-worker. Thereafter, Grievant received eight more verbal reprimands, with the last one occurring on October 7, 2006. These verbal reprimands dealt with excessive tardiness, unprofessional behavior, failure to secure her keys, numerous violations of the leave policies, and failure to complete her work assignments.

6. Grievant received six written reprimands with the first occurring on May 6, 2004, for unprofessional interaction with her supervisor. Additional written reprimands were given on September 2, 2004, for continued tardiness and failure to adhere toattendance and leave policies; November 4, 2004, for continued excessive absenteeism; February 19, 2005, for failure to adhere to the call-in policy; and December 8, 2006, for unprofessional conduct with a patient. The last written reprimand was on January 31, 2007, for excessive absences and leave abuse.

7. Grievant received three suspensions during her employment. The first was for nineteen days and occurred on September 27, 2004, for "horseplay" with a male co- worker during work hours. Grievant was found in a patient bathroom in a compromising position with a co-worker with whom she had had intimate relations in the past. The second suspension was for three days and occurred on January 19, 2005. This suspension was for continued tardiness and leave abuse. The third suspension was for three days and occurred on April 11, 2005. This suspension was for continued failure to adhere to the attendance policies.

8. Grievant was placed on two Performance Improvement Plans, on April 6, 2004, and May 7, 2004, for failure to follow the attendance and leave policies. This behavior continued until Grievant's termination as noted by the numerous counselings, verbal reprimands, written reprimands and suspensions identifying these behaviors as the reasons for the disciplinary action. Toward the end of her employment, Grievant was counseled on September 23, 2006, and December 19, 2006; received a verbal reprimand on October 7, 2006; and received a written reprimand on January 31, 2007, for her continued failure to follow leave and attendance policies.

9. The last disciplinary action for unprofessional behavior was a written reprimand on December 8, 2007. 10. Grievant grieved only one of these disciplinary actions, and that grievance was abandoned at Level II.

11. Grievant was informed in the written reprimands and suspensions that further inappropriate and unprofessional behavior or violations of the attendance policy would result in further disciplinary action including dismissal.

12. On February 27, 2007, Grievant, in front of other patients, gave her staff keys to a psychotic patient in an effort to entice him to return to the facility. Grievant allowed this patient to open doors in the facility and to call the facility's elevator. Res. Exh. No. 15.

13. Grievant was terminated on March 13, 2007, for her failure to comply with behavior and attendance expectations outlined in various HHR and MMBH policies and for giving her keys to a patient. The letter stated, "you have recently admitted to allowing a long-term patient to possess your Hospital keys and allow[ing] him to open several doors. This action demonstrates continuing poor judgement and places our patients in potential jeopardy." Res. Exh. No. 1.

14. During the pre-disciplinary meeting, Grievant's behavior was discussed with her, and she informed her supervisors that she would likely continue to make mistakes because she was human. She also stated other individuals had given their keys to this patient and had not received any disciplinary action. When asked, Grievant refused to identify any other employees who had committed this act. Res. Exh. No. 1.

15. Grievant's termination letter enumerated her infractions and stated she was terminated for:

> continuing failure to comply with behavior and attendance expectations as outlined in the Department of Health and Human Resources and Mildred Mitchell-Bateman Hospital policies. More specifically, even after numerouscounseling and disciplinary actions, you have continued to exhibit unacceptable behavior including inappropriate interaction with employees and patients and excessive tardiness and unscheduled absences.

Res. Exh. No. 1.

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). Where the evidence equally supports both sides, the employer has not met its burden. Id.

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 & 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). 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). The issues presented are whether Respondent proved the facts upon which the dismissal was based, and whether HHR violated any statutes, policies, rules, or regulations in terminating Grievant's employment. The evidence presented by Respondent was clear. Over the entire period of her employment, Grievant consistently acted in an unprofessional and uncivil manner and treated patients in an improper manner. She was repeatedly late to work, did not call in on time, and exhibited excessive absenteeism. Respondent has met its burden of proof and established "misconduct of a substantial nature directly affecting the rights and interest of the public. . . . " *Oakes, supra*.

The next issue is whether Respondent violated any statutes, policies, rules, or regulations in terminating Grievant's employment. Grievant made several assertions. First, Grievant asserted she was surprised at her termination for the given reasons because she believed her leave and tardiness issues had improved, as had her inappropriate behavior.

It is unclear on what Grievant based her beliefs. In late September 2006, she received a counseling session for continued tardiness; in early October 2006, she received a verbal reprimand for failure to adhere to attendance and leave policies and for excessive absences; in early December 2006, she received a written reprimand for unprofessionalconduct with a patient; in mid-December 2006, she received counseling session for calling in sick when she was refused a shift change; and in late January 2007, she received a written reprimand for excessive absences and leave abuse. Grievant was on notice that she continued to have problems with inappropriate behavior and leave abuse. Six weeks after the last offense in January 2007, Grievant gave her hospital keys to a psychotic patient. Respondent repeatedly informed Grievant that her actions were inappropriate and further inappropriate behavior or leave abuse would result in disciplinary action up to and including termination. There should have been no surprise when she was finally terminated.

Next, Grievant maintains HHR did not follow its progressive discipline policy as it was required to give her a ten-day suspension before it could terminate her. She bases this assertion on the Bureau for Behavior Health and Health Facilities Absence Control Policy. This document was submitted by Grievant after the hearing, and HHR did not have an opportunity to respond. It was clear from the documents submitted by Respondent that MMBH has its own Absence Control Policy for its employees, and the one submitted by Grievant would not be controlling, even if it could be considered. Grievant did not assert there was an issue in the application of MMBH's Absence Control Policy.

A review of MMBH's Progressive Discipline Policy indicates the progession of disciplinary actions is as follows: verbal reprimand, written reprimand, suspension, and dismissal. There is no indication that multiple suspensions are required before an employee is dismissed. The Policy also notes that all instances of misconduct will be investigated, and the type/severity of disciplinary action taken shall be decided on a case- by-case basis. Grt. Exh. No. 2. The undersigned Administrative Law Judge has taken Grievant's arguments to also indicate that she believes her termination is excessive given the facts of the situation. As this is an affirmative defense, 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 aparticular 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). 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).

The above-cited factors demonstrate the employer has substantial discretion to determine a penalty, and the undersigned Administrative Law Judge cannot substitute her judgement for that of Respondent. *See, e.g. Hammer v. Div. of Corr.*, Docket No. 94-CORR-1084 (Nov. 30, 1995). Grievant received numerous counseling sessions, verbal reprimands, and written reprimands, as well as three suspensions for the same type of conduct for which she was

dismissed. Additionally, she had been placed on two Improvement Plans. She surely must have understood these actions were inappropriate and should cease. The incidents of misconduct in this situation are sufficiently egregious to conclude HHR did not abuse its discretion by dismissing Grievant. The undersigned Administrative Law Judge does not find the discipline imposed was clearly excessive. Grievant also averred she was discriminated against because other employees who gave keys to the same psychotic patient were not disciplined. This statement is misleading. Although asked, Grievant would not tell her supervisors who else engaged in this behavior so the assertions could be substantiated. "Discrimination" means "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." W. Va. Code § 29-6A-2(d). "[T]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]" *Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004). Grievant's refusal to name these individuals makes it impossible for her to establish discrimination, as there are no similarly situated employees with whom to compare Grievant's actions. This issue will not be discussed further.

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 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. 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 technicalviolations 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).

3. Respondent established by a preponderance of the evidence that its Progressive Discipline Policy was followed, and Grievant engaged in unprofessional behavior and leave abuse.

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 soclearly 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).

7. 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).

8. Grievant failed to demonstrate that termination for continued unprofessional behavior and leave abuse was clearly excessive or unduly harsh, given she had received multiple prior verbal and written reprimands, three suspensions and two Improvement Plans. *See Bailey v.*

***Logan County Bd. of Educ.*, Docket No. 93-23-383 (June 23, 1994); *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991).**

9. "Discrimination" means "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." W. Va. Code § 29-6A-2(d). "[T]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]" *Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004).

10. Grievant did not meet her burden of proof of the issue of discrimination.

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, *See Footnote 3, supra)*. Neither the West 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.

Janis I. Reynolds

Acting Chief Administrative Law Judge

Dated: January 31, 2008

Footnote: 1

In her proposals, Grievant raised several issues that she did not assert at her hearing and made additional statements. While Grievant's arguments were reviewed, these assertions, not made under oath and not subjected to cross-examination, were not considered. Additionally, Grievant attached numerous documents that were not admitted at hearing, and these documents were also not considered.

Footnote: 2

Grievant's discussion, in her proposals, describing how giving the hospital keys to a paranoid schizophrenic in front of other patients was therapeutic, will not be addressed. Needless to say, this action was not included in

the patient's Treatment Plan.

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, which continue to control the proceedings in this case. Procedural Rules of the Public Employees Grievance Board took effect December 27, 2007, and apply to all cases.