WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KERRA LAYNE,

Grievant,

v. **Docket No. 2008-0172-DHHR**

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

Respondent.

DECISION

This grievance was filed by Kerra Layne ("Grievant") against the West Virginia Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital ("Respondent") on or about August 5, 2008. The August 5, 2008, statement of grievance provides: "indefinite suspension on August 4, 2008, without good cause." Subsequently, on or about September 11, 2008, the Grievant filed an additional grievance form which stated that she is grieving a "written suspension [of] September 2, 2008, for 10 days." As relief, the Grievant seeks to be made whole, including revocation of her suspension and back pay with interest.

This grievance was filed directly to Level Three. A Level Three evidentiary hearing was held before the undersigned Administrative Law Judge ("ALJ") on November 20, 2008, at the Grievance Board's Charleston office. The Grievant appeared in person and through her representative, Gordon Simmons. Respondent appeared by and through its counsel, B. Allen Campbell, Senior Assistant Attorney General.

This matter became mature for decision on December 19, 2008, the date proposed

findings of fact and conclusions of law were due. Both parties have submitted proposed findings of fact and conclusions of law.

Synopsis

Grievant was suspended for ten days after an inappropriate horseplay incident involving a patient with a mental disability. She alleges that the incident was not serious and the suspension was excessive. Grievant and a patient "puffed" talcum powder on each other. The patient threw water on the Grievant. Grievant believes the suspension to be retaliatory.

Respondent argues that the horseplay incident was serious because the patient had a respiratory medical condition that could have been exacerbated by the powder. Further, Respondent maintains that Grievant's conduct sets a poor example for other patients and constitutes "physical abuse" of a patient.

Respondent has established by a preponderance of the evidence that an inappropriate horseplay incident occurred. In its suspension letter, the Respondent improperly cited and considered past disciplinary actions that should have been removed from the Grievant's file; nevertheless, mitigation is not appropriate.

For the reasons set forth below, this grievance is granted, in-part, and denied, in-part.

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

Findings of Fact

1. Grievant is employed as an Interpreter/Health Service Worker at Mildred Mitchell-Bateman Hospital. She has served in this position for approximately five years.

2. Grievant has a history of improper workplace conduct. She has received two verbal warnings and a written warning during her tenure at Mildred Mitchell-Bateman Hospital. The written warning included a Performance Improvement Plan and referral to Staff Development for additional training on what constitutes patient abuse. This written warning stemmed from "verbal patient abuse" where the Grievant was teasing a deaf patient about masturbation.

3. Grievant's past performance evaluations indicated that she needed to work on patient boundaries and address conflict situations with patience and tact. *See* Respondent's Exhibit 5. Grievant has received approximately eleven counselings concerning her workplace conduct and demeanor.

4. In March, 2008, Grievant made a request to her immediate supervisor, Susan Shields, to remove any disciplinary documents older than twelve months from her file. Disciplinary documents older than twelve months were not removed from the Grievant's file.

5. On July 3, 2008, Grievant was involved in a talcum powder "fight" with a patient.

6. On this date, a wheel-chair-bound patient with a mental disability grabbed one of the Grievant's breasts. The patient apparently had a habit of grabbing the Grievant's breasts. The Grievant "puffed" talcum powder at the patient. The patient, in return, "puffed" talcum powder back. Thereafter, patient threw a "medicine cup" of water on the Grievant. The patient suffered no adverse effects from the talcum powder incident.

7. The water and talcum powder made a mess on the floor of the hospital. A housekeeper observed the mess and the Grievant agreed to clean it up.

8. The patient has chronic breathing problems. However, the Respondent permits

the patient to be “wheeled” out to the “fresh-air area” to smoke cigarettes and use smokeless tobacco.

9. On July 4, 2008, the Grievant was verbally suspended pending the outcome of an investigation into allegations of misconduct and patient abuse.

10. By letter dated August 6, 2008, the Grievant was notified in writing that her suspension was effective on August 4, 2008, pending the outcome of the investigation.

11. An investigative report was issued on August 18, 2008, by Tami Handly, Legal Aid of West Virginia Coordinator, Libby Lewis, Bar Coded Medication Administrator Coordinator, and B.J. Lyons, Adult Protective Services. The investigation found that an incident of inappropriate horseplay occurred between Grievant and a patient on July 3, 2008.[1]

12. By letter dated September 2, 2008, the Grievant was notified that she was being suspended for ten (10) working days without pay. The letter cited a list of past disciplinary actions to support the appropriateness of the ten-day suspension. Grievant was subsequently reimbursed pay for the suspension imposed while the investigation was pending.

13. Mildred Mitchell-Bateman Hospital Policy MMBHC015 provides that “an employee may be suspended without pay for any cause involving ... misconduct of an appropriately serious nature.”

Discussion

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[1] The investigation considered the talcum powder incident as well as other incidents complained of by the patient. The investigative committee found the other incidents to be unsubstantiated.

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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *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.*

Grievant has the burden of proving her grievance relating to non-disciplinary matters by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

<u>The Inappropriate Horseplay Incident</u>

The Respondent has met its burden of proving, by a preponderance of the evidence, an inappropriate horseplay incident occurred on July 3, 2008, because the Grievant admitted to the incident.

The Grievant physically abused the patient. 64 C.S.R. 59 § 3.13 defines "physical abuse" of a patient as

> [t]he use of physical force, body posture or gesture or body movement that inflicts or threatens to inflict pain on a client. Physical abuse *includes*, but is not limited to, unnecessary use of physical restraint; use of unnecessary force in holding or restraining a client; improper use of physical or mechanical

> restraints; use of seclusion without proper orders or cause; slapping, kicking, hitting, pushing, shoving, choking, hair pulling, biting , etc.; *inappropriate horseplay*;[2] raising a hand or shaking a fist at a client, crowding or moving into a client's personal space; intentional inflicting of pain; punitive measures of any kind, including the use of corporal punishment, withholding meals for punitive reasons; inappropriate removal from treatment programs, restricting communication, or withdrawal of rights or privileges; or physical sexual abuse, *i.e.*, any physical or provocative advance such as caressing or fondling, sexual intercourse, etc.

(Emphasis added). By definition, inappropriate horseplay is physical abuse. No employee is permitted to engage in inappropriate horseplay or otherwise physically abuse a patient. *See* 64 C.S.R. 59 § 18.2.

Grievant admits that she "puffed" talcum powder on a patient with a mental disability.[3] In return, the patient "puffed" talcum powder on the Grievant and threw water on the Grievant. Grievant believes the conduct was therapeutic to the patient. The

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[2] When ascertaining the meaning of horseplay, the common, ordinary meaning is adopted. *See generally Meadows ex rel. Professional Employees of W. Va. Educ. Ass'n v. Hey*, 184 W. Va. 75, 80, n. 8, 399 S.E.2d 657, 662, n. 8 (1990)(recognizing the plain meaning approach to statutory construction). The term "horseplay" is defined as "rough or boisterous play." Merriam-Webster Online Dictionary (2009), http://www.merriam-webster.com/dictionary/horseplay.

[3] It is noted that the Respondent's evidence consisted primarily of unreliable hearsay. This "Grievance Board has applied the following factors in assessing hearsay testimony: (1) the availability of persons with first hand knowledge to testify at the hearings; (2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; (3) the agency's explanation for failing to obtain signed or sworn statements; (4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; (5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; (6) whether collaboration for these statements can be found in agency records; (7) the absence of contradictory evidence; and (8) the credibility of the declarants when they made their statements." *Warner v.Dep't of Health & Human Res*., Docket No. 07-HHR-409 (Nov. 18, 2008)(citations omitted)(internal parenthesis added). The Respondent did not address the availability of direct witnessess nor discuss signed statements. Nevertheless, the Grievant's admissions proved the necessary elements of the claim.

Grievant called a witness to the event, Jeremy Moore, who corroborated Grievant's account of the event. This ALJ is hard pressed to see how puffing talcum powder on a patient is an appropriate or professional response to a patient grabbing a worker's breast.[4] Because "inappropriate horseplay" is defined as physical abuse and the Grievant admits to inappropriate horseplay, the Respondent has met its burden of proof.[5]

Next, the Grievant's claim of retaliation is considered.

Retaliation

The Grievant's claim of retaliation must fail because the Grievant was suspended for engaging in inappropriate horseplay with a patient, not filing a past grievance. WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a prima facie case of reprisal the Grievant must establish by a preponderance of the evidence the following elements:

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[4] Though not germane to this decision, assuming, as the Grievant eludes, that this interaction was pleasant and therapeutic to the patient, this ALJ is concerned that the Grievant may be positively reinforcing the patient's breast grabbing behavior by pairing it with a positive stimuli.

[5] The Grievant fallaciously argues that it should be concluded, as a matter of law, that the Respondent is required to report this incident to the Office of Health Facility Licensure and Certification, Burea of Public Health ("OHFLAC"), in accordance with WEST VIRGINIA CODE § 9-6-11. The definition of the term "abuse," as used in WEST VIRGINIA CODE § 9-6-11, is different from the definition provided in 64 C.S.R. 59 § 3.13. *See* WEST VIRGINIA CODE § 9-6-1 (defining "abuse" as the "infliction or threat to inflict physical pain or injury or the imprisonment of any incapacitated adult of facility resident" for the purpose of WEST VIRGINIA CODE § 9-6-11). The Grievant's argument is unpersuasive and outside the purview of this grievance procedure.

> (1) that she engaged in protected activity; (i.e. filing a grievance)
> (2) that she was subsequently treated in an adverse manner by Respondent or an agent;
> (3) that the Respondent official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the Grievant being suspended.

See Atkins v. W.Va. Dep't of Health & Human Res., Docket No. 07-HHR-016 (Oct. 31, 2007). *See also West Va. Dep't of Natural Res. v. Myers*, 191 W. Va. 72, 443 S.E.2d 229 (1994)(per curiam)(applying the *Frank's Shoe Store* burden shifting analysis to claims of reprisal under the grievance procedure).

In this case, the evidence suggests that the Grievant previously filed a grievance. Likewise, there is indication that the Respondent had knowledge that the Grievant filed a past grievance. After filing the grievance and subsequently resolving it, the Grievant was verbally suspended and thereafter suspended for ten-days. However, detrimental to the Grievant's claim, there is no connection between the Grievant filing a grievance and her ten-day suspension. Grievant was suspended for inappropriate horseplay with a patient. She has not established that the suspension was a pretext for unlawful treatment. Grievant has *not* proven that it is "more likely true than not" that the ten-day suspension, or a portion thereof, was in retaliation for a previously filed grievance. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92- HHR-486 (May 17, 1993). The Grievant's retaliation claim must be denied.

Verbal and Written Warning Removal

Grievant argues that in March, 2008, she requested that all disciplinary

documentation be removed from her file; ergo, it is her position that past disciplinary documentations should not have been considered by the Respondent when it determined the appropriate punishment for the July 3, 2008, instance of inappropriate horseplay. Grievant cites *Tantlinger v. Board of Trustees/West Virginia Univ.*, Docket No. 93-BOT-364 (May 6, 1994), and maintains that upon an employee's request, it is "customary" to remove documents of reprimand from an employee's file after twelve months. Grievant's reliance upon *Tantlinger* is misplaced. The linchpin of this determination lies in the policies and procedures of the Department of Health and Human Resources and Mildred Mitchell-Bateman Hospital.

The *Department of Health and Human Resources Guide to Progressive Discipline,* Policy Memorandum 2104, provides, in part,

> Verbal reprimand[s]/warning[s] may be issued when the deficiency or misconduct is not of a serious or repetitious nature. The verbal warning may contain all the elements of a written action and documentation may be retained only in an administrative file separate from the employee's personnel file maintained by the agency. This documentation may be destroyed in twelve months at the employee's request if deficiencies do not continue. If deficiencies continue, the verbal warning may be utilized as a foundation for subsequent disciplinary actions.

See Respondent's Exhibit 8. *See also Mildred Mitchell-Bateman Hospital Policy and Procedure Manual*, Policy MMBHC015, II A, Respondent's Exhibit 8 (permitting verbal reprimands to be removed from an employee's file and stating that to remain in the file, the incident must be the "same issue"). Hence, verbal reprimands/warnings may be removed from an employee's file upon the request of the employee, if the "same issue" does not arise within a period of one year. In light of the Grievant's request, her verbal warnings of

July 7, 2003, and May 4, 2004, should have been removed from her file. As indicated by the list of past disciplines contained within the September 2, 2008, letter of suspension, these particular deficiencies did not continue to exist in March, 2008.

In the case of written reprimands/warnings, a different rule applies. *Mildred Mitchell-Bateman Hospital Policy and Procedure Manual*, Policy MMBHC015, II B, provides:

> In the case where the employee's supervisor determines that the employee has not responded to spoken warnings or when the offense is serious, the supervisor will give the employee a written reprimand. A written reprimand shall be filed in an employee's personnel file for at least one year. After one year, the employee may request that the employer's supervisor petition the Chief Executive Officer (CEO) to consider removing the written reprimand from the employee's personnel file.

As indicated by the language of the policy, greater scrutiny is required for removal of written warnings. Indeed, written warnings are serious, as indicated by the progressive discipline guidelines. *See Department of Health and Human Resources Guide to Progressive Discipline,* Policy Memorandum 2104, Respondent's Exhibit 8. The language of the policy does not provide an inalienable right to the removal of a written warning. The September 2, 2008, suspension letter evinces that the Grievant has received one written warning, on December 14, 2005, for "Verbal Patient Abuse - Teasing deaf patient about masturbation."

It is reasonable for the Grievant to assume the verbal warnings that occurred prior to March, 2007, were removed from her file after March, 2008. However, given the language of *Mildred Mitchell-Bateman Hospital Policy and Procedure Manual*, Policy MMBHC015, II B, there is no indication the Grievant had an absolute right to have the written warning removed. Hence, the onus is upon the Grievant to further inquire into the removal status of the written warning to ensure its removal. The written warning was

properly considered by the Respondent when determining the appropriate punishment for the July 3, 2008, incident.

Administrative agencies are bound to follow their own established rules and procedures. Insofar as the Respondent considered verbal warnings, such consideration was in error as the verbal warnings should have been removed from the Grievant's file. The Respondent's consideration of the written warning was appropriate because the Grievant failed to follow-up on its removal. The Grievant has met her burden of proving that verbal warnings should have been removed from her file and not considered when ascertaining the appropriate punishment for the inappropriate horseplay incident.

Counselings

The next determination is the appropriateness of the Respondent's consideration of various "counselings" contained in the September 2, 2008, suspension letter. The letter cited approximately eleven counselings. These counselings range from situations of inappropriate dress to inappropriate conversations with patients. All counselings are generally disciplinary in nature and should be treated as such. *See generally Riedel v. West Virginia Univ.*, Docket No. 07-HE-026 (October 31, 2008)(treating a counseling letter as disciplinary in nature for the purpose of the burden of proof). It must be recognized that a counseling is not listed as part of the Respondent's progressive discipline plan. Therefore, it can only be assumed that, for the purpose of disciplinary document retention, counselings should be removed in a manner similar to verbal warnings/reprimands.

Upon consideration of *Department of Health and Human Resources Guide to Progressive Discipline,* Policy Memorandum 2104, counselings that occurred prior to

March, 2007, should have been removed from the Grievant's file. These counselings do not related to the precise "same issue" and the Grievant requested that all disciplinary documents be removed from her file in March, 2008. *Mildred Mitchell-Bateman Hospital Policy and Procedure Manual*, Policy MMBHC015, II A.

There remains in the Grievant's file, however, one counseling that occurred May 5, 2008, two months *after* the Grievant's request. This counseling occurred when a "Nurse Manager had to address DHHR's Dress Code and Employee Conduct policy as [the Nurse Manager] was told that you [Grievant] was horseplaying and a male coworker pulled your slacks down revealing that you were not wearing any underwear. Your defense was that others were jealous of your physical beauty." The Grievant did not grieve this counseling at the time it occurred. It was appropriate for the Respondent to consider this counseling when determining the appropriate disciplinary measure for the July 3, 2008, incident.

Mitigation

The remaining issue for review is whether the ten-day suspension was so disproportionate to the offense that it should be mitigated. 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).

Mitigation of a penalty is considered on a case-by-case basis. *See Conner v. Barbour County Bd. of Educ.*, Docket No. 95-01-031 (Sept. 29, 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. See *Pingley v. Div. of Corr.*, Docket No. 95-CORR-252 (July 23, 1996). However, "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).

"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).

Even when recognizing the Respondent considered past disciplinary documentations that should have been removed from the Grievant's file, mitigation of the Grievant's ten-day suspension is still inappropriate. The Grievant undertook in inappropriate horseplay with a patient with a mentally disability. As the Respondent maintains, this conduct provides poor model behavior for the other patients. Grievant's past performance evaluations indicate the Grievant has been advised to improve her

patient interactions and patient boundaries. *See* Respondent's Exhibit 5. It is clear the Grievant was previously informed that horseplay with patients was not acceptable.[6] *Id*. at 4. She has received a written reprimand for inappropriate interactions with a patient. She has been counseled for horseplay with a co-worker. Apparently, she did not heed the written warning and counseling. It was not a straw, but a "puff" of talcum powder that broke the camel's back. Grievant has not established the penalty was disproportionate to the offense.

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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *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. Respondent has met its burden of proof by a preponderance of the evidence, and has proven the charges against Grievant that led to her suspension.

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[6] The past disciplinary documents are admissible to prove notice on the part of the Grievant that horseplay was inappropriate. Moreover, it is clear that the Grievant received notice via her *Employee Performance Appraisal* signed by the Grievant on November 14, 2007. *See* Respondent's Exhibit 5.

3. Grievant has failed to establish that the Respondent's conduct was retaliatory.

4. Grievant has proven that the Respondent should have properly removed verbal warnings and counselings that were placed in her file prior to March 1, 2007.

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. Grievant failed to make the necessary showing that the disciplinary measure was so clearly disproportionate to the employee's offense to constitute an abuse of discretion.

Insofar as the Grievant seeks that verbal warnings and counseling documentations, occurring prior to March, 2007, be stricken from her file, this grievance is **GRANTED**. The Respondent is hereby **ORDERED** to remove such documentation from the Grievant's file on or before February 1, 2009. Insofar as the Grievant challenges her ten-day suspension, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia 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 WEST VIRGINIA CODE § 29A-5-4(b) to serve a

copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: January 8, 2009

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Mark Barney
Administrative Law Judge