THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

CHRISTINA MILDRED LYNN,
Grievant,

v. **Docket No. 2009-0425-MonCH**

MONONGALIA COUNTY HEALTH DEPARTMENT,
Respondent.

DECISION

Christina Mildred Lynn ("Grievant") initiated this proceeding on September 30, 2008, challenging a three-day suspension without pay imposed by her employer, Respondent Monongalia County Health Department. Grievant's level three statement of grievance reads as follows:

> 1. Grievant was suspended three days for conduct which occurred before September 15, 2008 and was given a verbal warning on September 15, 2008. The acts which resulted in the three (3) day suspension have been adjudicated as a result of prior warnings and grievances.
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> 2. The Grievant has not violated West Virginia Department of Health and Human Resources Policy Memorandum 2108. Specifically, the suspension which the Grievant received was not the result of any violations of any personnel policies or illegal or immoral acts.
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> 3. The disciplinary action imposed by the employer was in retaliation for a letter sent to the employer supporting a former member of the Advisory Board.
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> 4. The Grievant has been subjected to a hostile work environment.[1]

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[1]No evidence was offered to prove any elements of the assertion that Grievant was subjected to a hostile work environment. That assertion in the statement of grievance need not be addressed. The Grievance Board has long held that elements or allegations of the grievance which are raised, but not pursued or developed will be considered abandoned. *Church v. McDowell County Bd. of Educ.*, Docket No. 33-87-214 (Nov. 30, 1987).

Her relief sought reads as follows:

A. Restoration of lost wages.

B. Installation of time clock.

C. Letters of apology from: Joyce McCallister, Immediate Supervisor; Charlene Campolongo, Lead Worker; Kathy Kerin, Personnel Specialist; Jim Strosnider, Executive Director; and Rosemary Zembar, RN.

D. All attorney fees incurred with regard to this Grievance.

This grievance was denied at level one by Decision dated October 23, 2008, and entered by Donna Tennant, Vice Chair, Monongalia County Board of Health. Grievant appealed to level three on November 10, 2008.[2] A level three hearing was conducted before Administrative Law Judge Denise M. Spatafore on January 26, 2009, at the Grievance Board's office in Westover, West Virginia. Grievant appeared in person and by counsel, Brent E. Beveridge, Esquire. Respondent appeared by Phillip M. Magro, Assistant Prosecuting Attorney for Monongalia County. This grievance was reassigned to the undersigned Administrative Law Judge for administrative reasons. This matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on March 2, 2009.

Synopsis

Grievant received an oral reprimand for tardiness, and was suspended three days for insubordination. Respondent demonstrated that Grievant reported to work late; refused to complete leave requests when she was late; refused to take a directive regarding a

[2]A level two mediation session was not conducted in the grievance. This was done due to Grievant filing a separate grievance form directly to level three which involved the same disciplinary action addressed at level one.

home care visit; and was disrespectful to her supervisors. Respondent proved Grievant's conduct constituted insubordination, and Grievant failed to offer any evidence in support of mitigating the suspension. In addition, Grievant failed to produce evidence in support of her claim that the suspension was motivated by reprisal. This grievance is denied.

After a thorough review of the entire record of this matter, including the recording of the level three hearing, the undersigned makes the following findings of fact:

Findings of Fact

1. Grievant has been employed by Respondent Monongalia County Health Department ("Respondent") since May 1994.

2. Grievant was employed in the Home Care Services Program as a Home Health Aide/Office Assistant II until November 2005, when she was promoted to Office Assistant III. When Grievant was promoted, her job description included the customary language, "performs other duties as assigned."

3. Monongalia County Health Department Employee Handbook indicates that "WORKDAY" work hours are 8:30 a.m. to 4:30 p.m. Employees are expected to be at work on time, but if employees are a minute or so late supervisors are allowed the latitude to overlook this for the first five minutes, as long as it is not on a regular basis.

4. Grievant began a pattern of coming to work late on an almost regular basis. Grievant's supervisor counseled her about her tardiness on numerous occasions; however, Grievant's pattern of tardiness continued.

5. On August 1, 2008, a meeting was called by the Program Manager to address the tardiness issue. Grievant explained that she was unable to get her son up in the morning during the week; as a result, she was continually late. A flexible work day of

8:45 a.m. to 4:45 p.m. was offered to Grievant in an effort to help her arrive at the office on time. When the offer was proposed on that date, Grievant said she would think about it. Grievant did not respond to the flex schedule offer.

6. Grievant's pattern of tardiness continued, and she often argued she was, in fact, not late and refused to complete leave forms to account for the time.

7. Respondent assigned a lead worker on or around August 13, 2008, to be the liaison for the clerical staff in the Home Care Services Program. Mrs. Charlene Campolongo was assigned the responsibility of lead worker who gave directives, monitored work assignments, verified leave requests, and was the contact for clerical staff to report time off, and tardiness. The creation of this position did not alleviate the tardiness issue with Grievant.

8. Grievant's supervisors continued to counsel her on the tardiness and to advise her of potential disciplinary action. Despite the counseling and the offer of an alternative work schedule, the pattern of Grievant's behavior continued.

9. On September 4, 2008, Grievant and another co-worker engaged in a verbal altercation which escalated and was overheard by the first floor of the Health Department. Intervention was made by three co-workers; the Program Manager, the Executive Director, and the Personnel Benefits Coordinator. The two employees were separated, instructed to calm down, return to their work areas, and exhibit professional behavior.

10. When the supervisory staff left the area, the altercation was renewed. The argument started when a registered nurse co-worker indicated that Grievant had been on a personal phone call and ignored the nurse's request to print some orders so that the nurse could complete a patient's chart that she had seen earlier in the day.

11. On September 15, 2008, an oral warning was issued to both employees of the Home Care Services Program for unprofessional behavior arising out of the incident occurring on September 4, 2008. In addition, the warning was issued to Grievant based upon Grievant ignoring a work related request from a fellow employee while on a personal phone call; behavior causing a hostile work environment; and disrespectful behavior toward her supervisors.

12. This warning was explained to Grievant during the course of a meeting attended by James Strosnider, Executive Director, Kathy Kerin, Personnel Specialist, Joyce McCallister, Home Care Services Nurse Director, and Charlene Campolongo, Lead Office Worker. At the meeting, it was shared with Grievant that progressive disciplinary action was being considered. Grievant's response was an initial refusal to sign the copy of the memo listing the items discussed in the meeting.

13. Grievant was suspended for three days without pay on September 24, 2008, for insubordination. One of the primary grounds for the suspension was Grievant's refusal to take a directive regarding a home care visit, stating it was not in her job description. Specifically, the letter of suspension from Joyce McCallister stated:

> On Tuesday, 9/9/08, you were asked to go see patient #1996A for a home care aide visit. Your reply to Charlene Campolongo, Lead Office Worker, was, "I will NOT do a home care aide visit. It's not in my job description." Charlene walked away for a few minutes and gave you the opportunity to reconsider, came back to your office and you continued to refuse. After a meeting with Jim Strosnider, Kathy Kerin, Joyce McCallister and Charlene Campolongo, you finally stated that you would see the patient. You later stated that you called the patient, then told Charlene Campolongo that the patient did not want a visit until the following day. You arranged the patient visit for 9:00 a.m. the next day and then called off work. You never did see the patient to do the visit.

> On 9/9/08, after the meeting with Mr. Strosnider, Ms. Kerin, Ms. McCallister, and Ms. Campolongo, you returned to Mr. Strosnider's office and approached him in a loud, confrontational and disrespectful manner.
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> On Thursday, 9/11/08, I walked down the hallway and your office door was partially closed. I opened the door back up and replaced the door stop and told you the door needed to stay open. A few minutes later, I walked down the hallway and the office door was completely closed (during business hours). I knocked on the door, opened the door and asked you why it was closed. Your reply, in a confrontational manner was, "This is MY office and I'll close the door if I want to." I then informed you that it is a central office that other people use and that the door needs to stay open. You said, "If I want to close my door, I'll close it." Multiple times throughout the day, you continued to partially close the door. Every time I walked by and the door was partially closed, I would re-open it and replace the door stop - until the door stop came up missing. When the door stop came up missing, I asked you what happened to the door stop and you replied, "I don't know where it's at. I didn't have it."

14. Grievant refused to leave her office door open and the desk in the location where it had been arranged by her supervisor. This office is a central office for staff and is the walk through area to access the Home Care Services Program patient chart room. The office is used by all Home Care Services Program staff; therefore, the door needs to remain open. Grievant's position does not require her to discuss privileged information leading to the need to close the office door.

15. Grievant claims the warning and suspension were the result of her letter of protest to Respondent regarding the removal of Lila Travinski from the Advisory Board. Grievant and two other employees wrote letters to the chairman of the board protesting Ms. Travinski's removal by action of Joyce McCallister.

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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). "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*. 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."

Respondent contends that a suspension was the appropriate penalty for Grievant's conduct, which made it difficult for management in general, and Grievant's supervisor in particular, to carry out leadership responsibilities while Grievant was at the work place. In addition, Grievant's repeated repudiation of her supervisor's authority disrupted and undermined the employee-employer relationship, and effectively eliminated any likelihood that a lesser penalty would cause Grievant to change her conduct and behavior. Respondent further contends that the refusal of an employee to perform any lawful directive by his or her supervisor is cause for severe disciplinary action.

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. *See Day v. Morgan Co. Health Dep't*, Docket No. 07-CHD-121 (Dec. 14, 2007).

Grievant does not dispute the events that occurred on the days in question and does not deny that she refused to conduct a home care aide visit. Grievant asserts the misconduct contained in the suspension notice was of a trivial nature; such as being five minutes tardy; rearranging office furniture; opening and closing doors; refusing to conduct a home visit because it was not in her job description; having an argument with a co-worker; and being disrespectful to a supervisor. Grievant argues the agency suffered no

adverse consequences as a result of the recurring insubordinate conduct. In addition, Grievant points out that she received a warning on September 15, 2008. The warning was for conduct which occurred between September 4, 2008, and September 12, 2008. The conduct which formed the basis for her suspension occurred prior to September 15, 2008; therefore, the warning acts as a bar to the suspension given the time frames. In essence, this discipline issued to Grievant was not progressive in nature. The undersigned disagrees.

The Grievant's three-day suspension on September 24, 2008, was the result of separate insubordinate behavior from the conduct that resulted in the oral warning.[3] As already discussed, the oral warning issued to Grievant on September 15, 2008, dealt with the in-office altercation between two Health Department employees. Progressive discipline has been construed as a permissive, discretionary policy that does not create a mandatory duty to follow a progressive disciplinary approach in every instance. *Oiler v. Dep't of Health & Human Res.*, Docket No. 02-HHR-074 (Aug. 28, 2002); *Ferrell v. W. Va. Dep't of Health & Human Res.*, Docket No. 97-HHR-526 (Apr. 30, 1998). In fact, "a suspension may be issued for a 'serious singular incident . . .' and DHHR [Respondent] did not necessarily violate this policy by issuing a suspension for conduct which it believed was of a serious nature." *Stiles v. Dep't of Health & Human Res.*, Docket No. 07-HHR-162 (Mar. 31, 2008).

An employee is expected to respect authority and does not have the unfettered discretion to disobey or ignore clear instructions. In this case, Grievant attempts to minimize the seriousness of her conduct by characterizing it as trivial and stating no patient

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[3]While the parties refer to this as a verbal warning, the record reflects that the reasons for the warning were memorialized in a memo dated September 15, 2008.

was affected or was involved in the insubordinate conduct. As mentioned above, few defenses are available to the employee who disobeys a lawful directive; rationalizations and noncompliance due to the assertion that it is not in the position's job description do not amount to defenses. As noted before, Grievant's job description included the customary language; "performs other duties as assigned." There is no question in the instant case that Respondent proved the allegations against Grievant. Hence, the Respondent has met its burden of proving the Grievant committed the alleged acts of insubordination.

Grievant alleges that this suspension was done in retaliation because she was a friend of a former employee who had been a member of the Home Care Services Program Advisory Council. Grievant's basis for this assertion was that when the member was dismissed from the Advisory Council, Grievant wrote a letter of support for that Advisory Council member.

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:

(1) that he engaged in protected activity (i.e., filing a grievance);

(2) that he was subsequently treated in an adverse manner by the BOE or an agent;

(3) that the BOE 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 adverse treatment.

Vance v. Jefferson County Bd. of Educ. Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995).

There has been no evidence presented that the suspension of Grievant occurred in response to an action taken by the Grievant. The record of this case demonstrates that the letter in issue was addressed to Joyce McCallister, but it was only delivered to Lila Travinski, the former Advisory Council member, who later forwarded it to the Board of Health Chairman. The letter was not received at the Health Department until the Chairman asked the keeper of the Board of Health files to place the letter in the Health Department files on September 25, 2008. This information was received one day after the suspension was issued; neither Joyce McCallister nor Donna Tennant had any knowledge of the correspondence until well after the level one conference. Accordingly, a prima facie case of reprisal has not been established.

Implicit in Grievant's request for restoration of her wages and asserting her conduct was of a trivial nature is a request for mitigation of the punishment. 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).

The 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).

Nevertheless, a lesser disciplinary action may be imposed when mitigating circumstances exist. *See Conner v. Barbour County Bd. of Educ.*, Docket No. 95-01-031 (Sept. 29, 1995). 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). When assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995)(citations omitted).

Given the considerable deference afforded to employers in disciplinary situations, the undersigned is not persuaded that the suspension imposed was disproportionate to the acts of insubordination. Especially in view of Grievant's acknowledgment of the behavior, but at the same time not taking any steps toward changing her behavior. The record demonstrates that Grievant continually questioned her supervisor's authority, and engaged in disruptive behavior that directly impacted on the ability of the Health Department to

discharge its duties and responsibilities. Under the circumstances presented, the undersigned cannot find any abuse of Respondent's discretion. A three-day suspension is not " so clearly disproportionate to the employee's offense that it indicates an abuse of discretion." *Overbee*, *supra*.

The following conclusions of law support the Decision reached.

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 § 3 (2008); *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 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. Respondent has proven by a preponderance of the evidence that Grievant was insubordinate, in that she knowingly and willfully violated her employer's directive to conduct a home care aide visit. The record demonstrates that Grievant continually questioned her supervisor's authority, and engaged in disruptive behavior that directly impacted on the ability of the Health Department to discharge its duties and responsibilities.

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

Accordingly, 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 W. Va. 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: March 27, 2009

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Ronald L. Reece
Administrative Law Judge