THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

VERA B. ANDREWS,

Grievant,

v. **Docket No. 2009-0436-DHHR**

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

Respondent.

DECISION

Grievant Vera B. Andrews is a full-time permanent employee of the Department of Health and Human Resources ("DHHR"). Grievant works at Mildred Mitchell-Bateman Hospital ("Bateman") in the Health Service Worker classification. Events took place on August 18, 2008, that led the management of Bateman to believe that it might not be safe to allow Grievant to return to work at the hospital. Respondent suspended Grievant without pay until she complied with conditions it set for her to return to work. Vera Andrews filed a Grievance contesting her suspension and as relief she seeks to have the suspension rescinded and to have all of her benefits and lost wages restored with interest. Because the grievance is challenging a suspension without pay it was filed directly at level three. *See* W. VA. CODE § 6C-2-4 (a)(4).

A level three hearing was held at the Charleston Office of the West Virginia Public Employees Grievance Board on September 23, 2009. Grievant appeared in person and through her representative, Gordon Simmons, UE Local 170, WVPWU.[1] Respondent was

[1] West Virginia Public Workers Union.

represented by Jennifer Akers, Assistant Attorney General. At the conclusion of the hearing, the representatives for the parties agreed to submit proposed findings of fact and conclusions of law. Both parties submitted proposals, the last of which was delivered to the Grievance Board on October 30, 2009. This grievance became mature for decision on that date.

Synopsis

Grievant was suspended without pay after she made statements to a medical professional that included an ambiguous threat regarding killing her co-workers. As a result of the threat, Respondent suspended Grievant pending the outcome of an independent medical/psychological evaluation to determine her fitness to return to work. Respondent stated that if the independent physician cleared Grievant to return to work she would be reinstated and reimbursed for all pay and benefits lost during the period of suspension.

Respondent's authority to subject employees to an independent medical or psychological evaluation is strictly limited under the Americans With Disabilities Act ("ADA"). When viewed in light of the ADA restrictions, the independent physician's report cleared Grievant to return to work. The grievance is GRANTED.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant is employed by Mildred Mitchell-Bateman Hospital ("Bateman") as a Health Service Worker.

2. On August 18, 2008, Grievant attempted to admit herself to St. Mary's Medical Center in Huntington, West Virginia. She was intoxicated. Grievant waited for what she perceived to be an inordinate amount of time and ultimately left the hospital without a full evaluation.

3. While Grievant was at St. Mary's Medical Center she was initially interviewed by Kathy Giampolo. Ms. Giampolo is a Registered Nurse with St. Mary's Medical Center in its Behavioral Health Unit. Ms. Giampolo was previously a Registered Nurse at Bateman.

4. At approximately 10:40 a.m., Ms. Giampolo made a telephone call to Pat Franz, the Director of Quality Assurance at Bateman. Ms. Franz is also a Registered Nurse, with a certification in Psychiatric Nursing. On August 18, 2008, Ms. Franz was acting in the capacity of Chief Executive Officer in the absence of Mary Beth Carlisle.

5. Ms. Giampolo informed Ms. Franz that Grievant had arrived at St. Mary's Medical Center Emergency Room in a highly intoxicated state. She stated that Grievant had threatened to kill her co-workers, but she did not identify any specific co-worker. Ms. Giampolo stated that Grievant had left the hospital before she could be admitted. Ms. Giampolo stated that Grievant was potentially homicidal, and under the influence of alcohol

and possibly other substances. Ms. Giampolo felt that she had an ethical and professional duty to report this potential threat to the authorities at Bateman.[2]

6. After a discussion with Daniel Persinger, Safety Director; Patty Ross, Director of Nursing; Dr. Shahid Masood, Clinical Director, and several other members of the management team, Ms. Franz placed Bateman in lock-down status. One of the factors considered in taking this action was the need to inform employees of the perceived potential danger since Grievant had an access key to the facility.

7. At 1:20 p.m. on August 18, 2008, Sergeant Chapman, of the West Virginia State Police, contacted Daniel Persinger and informed Mr. Persinger that he had spoken to Grievant and she was going to voluntarily admit herself to St. Mary's.

8. As a result of this conversation, the lock-down status at Bateman was lifted but the staff remained on Security Alert. Under a Security Alert, the Security Staff remains

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[2] Ms. Giampolo relied mainly on her understanding of the so-called *Tarasoff* rule which stems from a 1976 case in California styled, *Tarasoff v. Regents of University of California*, 17 Cal.3d 425, 551 P. 2d 334 (1976). In that case, the California Supreme Court ruled that: "[w]hen a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger." *Id.* at 431. West Virginia has subsequently codified when a health professional may release confidential information obtained in mental health treatment or an examination. One situation where release of the confidential information is allowed is when it is necessary "[t]o protect against a clear and substantial danger of imminent injury by a patient or client to himself, herself or another." W. VA. CODE § 27-3-1 (5). Whether Nurse Giampolo's release of information obtained from Grievant in her mental health evaluation was in compliance with West Virginia law is not at issue in this grievance. Further, since Ms. Giampolo is not an agent of Grievant's employer, this issue is beyond the Grievance Board's jurisdiction. See generally *Posey v. W. Va. Univ.*, Docket No. 2009-745-WVU (Apr. 10, 2009); and *Clutter v W. Va. Dept. of Agric.*, Docket No. 2009-1372-AGR (May 28, 2009). At issue in this grievance is the validity of Respondent's actions upon receipt of the information.

vigilant and monitors the front entrance of the facility. Additionally, the Nursing Supervisor is advised of the situation. Respondent's Exhibit 1 (Description of Events by Pat Franz).

9. Grievant returned to St. Mary's Medical Center later that day and was admitted to the Behavioral Health Unit under the care of Dr. David John Humphreys.

10. Grievant was released from the St. Mary's Medical Center on August 22, 2008, and Dr. Humphreys provided her with a note stating that she was "OK to return to work Sunday 8/24/08." She was also given a Discharge/After Care Plan that indicated that she could return to work on August 24, 2008. Grievant's Exhibit 1.

11. Grievant requested and was granted sick leave for the week of August 18, 2008 through August 22, 2008.

12. Grievant was verbally notified by telephone on August 25, 2008 that, as a result of the threats she had made, Grievant was being suspended pending the outcome of an assessment of her fitness for duty. She was given written confirmation of the suspension by certified letter dated August 26, 2008 and signed by Mary Beth Carlisle, Bateman Chief Executive Officer ("CEO").

13. The letter from Ms. Carlisle stated that Bateman was arranging for Grievant to see a physician to assess Grievant's fitness to return to work. The letter noted that Grievant would bear no expense for this examination and:

> If the examination from an independent physician determines that you are fit for duty, this suspension will be rescinded and all mention of it removed from your file. In addition, you will be reimbursed for all lost pay and benefits that you would have earned had this personnel action not been taken.

Respondent's Exhibit 2.

14. On August 29, 2008, Grievant supplied Respondent with the note from Dr.

Humphreys stating that Grievant was "OK to return to work Sunday 8/24/08" and the Discharge/After Care Plan that indicated that she had been treated at St. Mary's and could return to work on August 24, 2008. Grievant's Exhibit 1. The Discharge/After Care Plan also referred Grievant to Dr. Antonio R. Diaz, Jr. for follow-up. Grievant made the follow-up appointment with Dr. Diaz and has been under his care since September 19, 2008. Grievant's Exhibit 2.

15. Because the slip did not state that Dr. Humphreys was aware of the threats made by Grievant during her earlier visit to St. Mary's Medical Center, Respondent felt it was still necessary to have Grievant evaluated by an independent physician.[3]

16. An appointment was made for Grievant to be evaluated by Dr. Bobby Miller on September 3, 2008. Dr. Miller is board-certified in General Psychiatry, Forensic Psychiatry, Neuropsychiatry and Behavioral Neurology.

17. Dr. Miller performed a series of psychological tests and evaluations of Grievant to determine if Grievant was fit to return to work. As a result of these evaluations, Dr. Miller made a number of findings. He noted that the forensic psychiatry evaluation revealed that "Ms. Andrews is not, *per se,* a dangerous person and does not pose a physical threat to the workplace." He was however, concerned about what he termed to be Ms. Andrew's substance abuse. Grievant admitted that she had lost control of her alcohol consumption which is why she admitted herself to the St. Mary's Medical Center.

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[3] There was no testimony as to whether Grievant was asked if she shared this information with Dr. Humphreys or whether Respondent made a similar inquiry of Dr. Humphreys which could have saved Respondent the considerable expense of an independent evaluation. Additionally, it is hard to imagine that if the duty nurse felt the threat made by Grievant was serious enough to require her to notify Bateman she would not note that threat on Grievant's chart and consequently the Hospital records.

His final recommendation was that Grievant would be fit to return to work if she received treatment for her substance abuse problems, produced negative random drug screens and agreed to drug screens if she exhibited suspicious behavior. This report was provided to Bateman on September 15, 2008.

18. Grievant has never been accused or suspected of being under the influence of alcohol or a controlled substance at work. Respondent did not refer Grievant to Dr. Miller because of a concern regarding substance abuse. Rather, the referral was specifically made to determine if Grievant was fit to return to work because of the threats she made during her visit to St. Mary's Medical Center.

19. Based upon Dr. Miller's recommendations, Respondent suspended Grievant until Grievant met Dr. Miller's recommended conditions related to substance abuse. Grievant was notified of this decision by phone on September 17, 2008, and received a certified letter from CEO Carlisle dated September 26, 2008. Respondent's Exhibit 6. No mention was made in this suspension letter regarding Grievant's fitness to work based upon the previous threats that were the reason for the independent psychological evaluation.

20. On October 10, 2008 Grievant and her representative met with Kieth Anne Worden, Director of Human Resources and CEO Mary Beth Carlisle. Grievant provided a letter from Dr. Antonio Diaz, M.D. The letter stated that Grievant had been under his care since September 19, 2008. Dr. Diaz wrote that he did not feel that Grievant suffered from alcohol dependence and, therefore, did not need an alcohol treatment program. Grievant's Exhibit 2. The letter did not state whether Dr. Diaz was aware of the threats that Grievant had made against her co-workers.

21. At the meeting, Ms. Carlisle requested that Grievant complete a drug and alcohol screening. Grievant initially agreed but ultimately declined to take the test at that time.

22. By letter dated October 27, 2008, CEO Carlisle informed Grievant that she had scheduled a drug and alcohol screening for her on November 5, 2008, and that Grievant would not be allowed to return to work until the results of the drug test were received by Bateman. Respondent's Exhibit 7. Grievant participated in the drug and alcohol screening as scheduled.

23. Grievant was notified by a letter from Kieth Anne Worden, dated November 7, 2008, that the results were in compliance with the Department of Health and Human Resources/Bureau for Behavioral Health and Health Facilities Drug and Alcohol Testing Policy for State Facilities/Hospitals (hereinafter referred to as the "Drug Testing Policy"). Ms. Worden informed grievant that she was "expected to return to work on Wednesday, November 12, 2008, at 9:30 a.m. Respondent's Exhibit 8.

24. Grievant was suspended without pay for the period of August 25, 2008 through November 11, 2008. She returned to work on November 12, 2008, as directed by Ms. Worden.

Discussion

This case involves a suspension without pay and is, therefore, a disciplinary matter. 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). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

This grievance arises out of incidents that took place on August 18, 2008, when Grievant attempted to admit herself into the St. Mary's Medical Center. At that time, Grievant evidently made a nebulous threat regarding killing her co-workers. There is no specificity to the threat as to intended victims, time, place or method, and Grievant was admittedly very intoxicated when she made the statements. The only way Respondent became aware of the statement was through Nurse Giampolo's report.[4] Once Respondent became aware of the potential threat, they took the prudent action of locking down the hospital until they found out the location and condition of Grievant.

On August 25, 2008, Grievant was suspended from her employment for very specific reasons. The suspension letter dated August 26, 2008, states that Grievant was "being suspended from [her] position as a Health Service Worker pending the outcome of an assessment of your fitness for duty." Respondent's Exhibit 2. The letter told Grievant

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[4] Ms. Giampolo was exercising caution when she made this report. It is certainly not easy to balance a patient's right to confidentiality against the need to protect the safety of others, and making this report to Bateman may have been the most prudent of several tough options. However, given the limited testimony that was presented in this proceeding, it is hard to conclude that the vague threat reportedly made by Grievant, while she was inebriated and distraught, amounted to a "clear and substantial danger of imminent injury" to anyone. W. VA. CODE § 27-3-1 (5).

that the fitness for duty assessment would be performed by an independent physician and if the physician determined that she was fit for duty "this suspension [would] be rescinded and all mention of it removed from [her] file. In addition, [Grievant would] be reimbursed for all lost pay and benefits that [she] would have earned had this personnel action not been taken." Respondent's Exhibit 2.

It is clear from the Respondent's written statements that the threats that were reported to Bateman raised concern among the hospital management as to whether it was safe to allow Grievant to return to work. Grievant was suspended until a medical/psychological determination could be made regarding the single issue of the viability of the threats. This proposition is confirmed by Respondent's reaction to Dr. Humphrey's determination that Grievant could return to work on August 24, 2008. The sole reason given for not accepting Dr. Humphrey's determination was that Respondent was not certain that he was aware of the threats Grievant had made when she previously attempted to admit herself to St. Mary's.

Independent Medical Evaluation:

There is no State statute, policy or rule that specifically authorizes Respondent to subject an employee to an independent medical evaluation under these circumstances. The Grievance Board has held that a county superintendent of schools has the implied authority to require an employee to submit to an independent psychological examination to ensure the safety and welfare of the staff and students. *See Higginbotham v. Kanawha County Bd. of Educ.*, Docket No. 20-87-087-1 (Aug. 12, 1987). *See also Miller v. Kanawha*

County Bd. of Educ., Docket No. 96-20-360 (Mar. 7, 1997)[5] (holding an independent evaluation was reasonable where a teacher had made several statements that could be construed as threats related to his supervisor).

The Division of Personnel Workplace Security Policy, at Section III, provides that the State must take reasonable measures to ensure the health, safety, and welfare of employees and other citizens in State government workplaces. The policy also charges State agency managers/supervisors with resolving incidents of threatening or assaultive behavior in the workplace. One method allowed for meeting these expectations is the limited access to the workplace to anyone who poses such a threat. In light of the prior rulings in *Higginbotham* and *Miller*, this policy grants Respondents implied authority to require an employee to submit to a psychological examination before returning to work if the employee has made statements that reasonably lead Respondent to believe that the employee's return to work constitutes a threat to the health or safety of herself or other employees. The implied authority to direct an employee to submit to a psychiatric examination must be exercised reasonably and only upon a showing of just cause. Each case will be resolved on its own merits and must reveal that the action was not arbitrary or capricious. *Higginbotham*, *supra.*

A Registered Nurse in the Behavioral Center of St. Mary's Medical Center informed Respondent that Grievant made threats to kill her co-workers and that she believed Grievant might be homicidal. Under these circumstances, it was reasonable for

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[5] Both of these decisions were affirmed by the Circuit Court of Kanawha County. *Higginbotham* was not appealed and the West Virginia Supreme Court of Appeals refused to hear the appeal in *Miller*.

Respondent to require Grievant to submit to an independent medical/psychological evaluation to determine if the threats truly were enough to endanger the health and safety of her co-workers.

Americans With Disabilities Act ("ADA"):[6]

Neither *Higginbotham* nor *Miller* address the implications of the ADA on a State Agency's authority to require an employee submit to an independent medical or psychological examination prior to returning to work. This federal law specifically prohibits employers from requiring employees to submit to such examinations except under very limited circumstances. Specifically the federal statute states the following:

> A) Prohibited examinations and inquiries - A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

42 U.S.C. § 12112(d)(4)(A). This section of the ADA applies to all employees, whether or not they are deemed to be disabled under the ADA. *Fredenburg v. Contra Costa County Dep't of Health Servs.*, 172 F.3d 1176, 1182-82 (9th Cir. 1999); *Conroy v. New York State Dept. of Corr. Serv.*, 333 F.3d 88 (2nd Cir. 2003). As noted by the Tenth Circuit Court of Appeals, "[i]t makes little sense to require an employee to demonstrate that he has a disability to prevent his employer from inquiring as to whether or not he has a disability." *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1229 (10th Cir. 1997).

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[6] The undersigned is mindful of the fact that neither party raised the application of the ADA in this grievance. However, the Act is clearly implicated by the facts of this case and must be addressed, even without the assistance of the arguments of the parties.

The purpose of this prohibition is to prevent inquiries of employees' medical condition that do not serve a legitimate business purpose. *Conrad v. Board of Johnson County Comm'rs,* 237 F.Supp.2d 1204, (D. Kan. 2002); *Riechman v. Cutler-Hammer, Inc.*,183 F.Supp. 2d 1295 (D. Kan. 2001). The medical or psychological examination must be limited to tests and conclusions that specifically address the identified business necessity, since a general diagnoses will reveal disabilities (or perceived disabilities) to employers and expose individuals with disabilities to potential employer stereotypes, which is the very result that is intended to be avoided by the ADA. *Conroy,* 333 F.3d at 95. Moreover, "[t]he business necessity standard is quite high." *Cripe v. City of San Jose*, 261 F.3d 877, 890 (9th Cir. 2001).

> In proving a business necessity, an employer must show more than that its inquiry is consistent with mere expediency. An employer cannot simply demonstrate that an inquiry is convenient or beneficial to its business. Instead, the employer must first show that the asserted "business necessity" is vital to the business. For example, business necessities may include ensuring that the workplace is safe and secure or cutting down on egregious absenteeism. The employer must also show that the examination or inquiry genuinely serves the asserted business necessity and that the request is no broader or more intrusive than necessary.

Conroy, 333 F.3d at 97, 98.

In this case, the business necessity centers around the threats against co-workers made by Grievant. Because of the threats, Respondent was concerned for the safety of co-workers and patients if Grievant returned to Bateman. The business necessity was finding out whether Grievant's presence put the safety of Bateman staff and clients in peril of physical harm based upon the previous statements she made. This is a legitimate business necessity for a psychological evaluation of Grievant by an independent physician.

The next issue is whether the scope of the examination exceeded the business necessity. Dr. Miller conducted a very thorough psychological examination of Grievant. His diagnosis exceeded that which was necessary to address the business necessity of Respondent. Dr. Miller made a very pertinent finding related to the issue of the threats made by Grievant. He wrote:

> To this end, the findings of the forensic psychiatric evaluation reveal:
>
> 1. Ms. Andrews is not, *per se,* a dangerous person and does not pose a physical threat to the workplace.

Respondent's Exhibit 5. That finding answered the business necessity question raised by the threats made by Grievant and ended the need for her employer to know more. However, Dr. Miller went on to discuss "Ms. Andrew's substance abuse." He set four specific conditions for Grievant's return to work and all of them related to substance abuse.[7] Conversely, none of the recommendations related to whether Grievant presented a threat of violence in the workplace, which was the only valid business necessity for the employer to require an examination in this case.

Grievant had been employed at Bateman for fifteen years without any patient complaints. No one has raised the suspicion that Grievant has been impaired by alcohol or controlled substances at work, even though she works closely with patients and other staff members. The findings and recommendations made by Dr. Miller related to

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[7] 1. Attends her first appointment at Oasis or Prestera, has a treating psychiatrist, and verification of future mental health services. 2. Resolve her conflicts with Administration with the assistance of her Union Representative. 3. Produce six negative random urine drug screens 4. Agree to random drug screens if the Director of Nursing suspects Grievant is impaired due to substance abuse.

Grievant's substance abuse are exactly the type of diagnosis that the pertinent section of the ADA is attempting to prohibit. The diagnosis that a person is in some way impaired does not determine whether that person is disabled. Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors. *Conroy,* 333 F.3d at 96. Grievant undeniably was struggling with alcohol abuse. However, there was no evidence that this problem was having a negative impact on her job performance. Grievant was under the care of a licenced psychiatrist, Dr. Diaz, who informed Respondent that "there was nothing in her clinical history to support a diagnosis of Alcohol dependence, and therefore, there is no indication for an alcohol treatment program whether outpatient or inpatient." Grievant's Exhibit 2. Dr. Miller's comments and recommendations related to Grievant's substance abuse raised the stigma of Grievant being disabled without proof of a disability or a business necessity for her employer to know about that problem. It was beyond the scope of an evaluation allowed by the ADA. Therefore, it was not reasonable for Respondent to rely on those findings to exclude Grievant from returning to the workplace. The only finding made by Dr. Miller related to the business necessity for the evaluation was that Grievant posed no threat of physical violence in the workplace. Based upon that finding, Grievant should have been allowed to return to her job according to the conditions set out in the August 26, 2008, suspension letter. The suspension letter stated that if the examination determined that Grievant was fit for duty, the suspension would be rescinded and Grievant would be reimbursed for all lost pay and benefits that she would have earned had that action not been taken. Respondent's Exhibit 2. That is what the Respondent must do.

The discussion of the ADA herein is not to determine liability of the Respondent with regard to the ADA. The federal statute is examined solely to determine if Respondent's actions were arbitrary and capricious. Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). Since Respondent relied upon parts of Dr. Miller's psychological evaluation that exceeded the limitations of the ADA, its actions in withholding Grievant's pay relied upon criteria that were not intended by law to be considered and were, therefore, arbitrary and capricious.

Finally, the issue of requiring Grievant to submit to random drug and alcohol testing must be addressed. Respondent has established a specific policy that controls when employees may be subjected to drug and alcohol tests. The policy title is Drug and Alcohol Testing Policy for State Facilities/Hospitals. Such policies must balance the employer's need for a workplace wherein employees are not impaired by consumption of controlled substances, with the employees' constitutional rights to privacy and to be free from unreasonable searches. *See Twigg v. Hercules Corp.*, 185 W.Va. 155, 406 S.E.2d 52, (1990); *Baughman v. Wal-Mart Stores, Inc.*, 215 W.Va. 45, 592 S.E.2d 824 (2003).

Respondent's policy only allows employees to be subjected to involuntary drug and alcohol tests under three circumstances: 1) Per-employment, 2) Post-Accident, and, 3) For-cause. The drug and alcohol tests suggested by Dr. Miller and required by Respondent prior to allowing her to return to work, were not in compliance with Respondent's policy. Respondent's action in requiring such tests was arbitrary and capricious.

The tests suggested by Dr. Miller were obviously not "pre-employment" nor "post-accident." The only remaining reason for such tests is "for cause". A "for cause" test may only be required, pursuant to the policy, if "the employee's performance, behavior, appearance or odor cause reasonable suspicion that the employee is . . . under the influence of drugs or alcohol." [8] Grievant's work behavior never raised such suspicion so there was no cause to require her to submit to a drug or alcohol test. It is important to note that if reasonable suspicion should arise that Grievant is under the influence of drugs or alcohol at work such testing would be proper. This is an important safeguard for co-workers and patients at the facility.

Conclusion:

Respondent's precautionary action of placing Bateman on lock-down and alert following a report that Grievant had made threats and might be homicidal were reasonable and prudent. Respondent also acted within its implied authority in requiring Grievant to submit to an independent psychological examination for the limited purpose of determining

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[8] The policy also allows "for cause" mandatory tests following certain workplace accidents or if there is a theft of controlled substances in the workplace. Neither of these circumstances is present in this grievance.

if her presence at work constituted a threat of violence to others at Bateman. Once Respondent received the finding that Grievant's presence did not constitute a threat to others they were obligated to return her to work pursuant to the conditions set out in the original suspension letter. Respondent's Exhibit 2. All actions taken by Respondent in reliance on Dr. Miller's findings related to "substance abuse" were beyond the scope allowed by the ADA and arbitrary and capricious. Consequently, the grievance is GRANTED.

Conclusions of Law

1. The burden of proof in disciplinary matters, such as this, 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).

2. Respondent has implied authority to require an employee to submit to a psychological examination before returning to work if the employee has made statements that reasonably lead Respondent to believe that the employee's return to work constitutes a threat to the health or safety of herself or other employees. The implied authority to direct an employee to submit to a psychiatric examination must be exercised reasonably

and only upon a showing of just cause. Each case will be resolved on its own merits and must reveal that the action was not arbitrary or capricious. *See Higginbotham v. Kanawha County Bd. of Educ.*, Docket No. 20-87-087-1 (Aug. 12, 1987); *Miller v. Kanawha County Bd. of Educ.,* Docket No. 96-20-360 (Mar. 7, 1997).

_____3. Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

_____4.____The Americans With Disabilities Act ("ADA") prohibits Respondent from requiring employees to submit to an independent medical or psychological examination unless such examination is shown to be job-related and consistent with business necessity. 42 U.S.C. § 12112(d)(4)(A). This section of the ADA applies to all employees, whether or not they are disabled under the ADA. *Fredenburg v. Contra Costa County Dep't of Health Servs.*, 172 F.3d 1176, 1182-82 (9th Cir. 1999); *Conroy v. New York State Dept. of Corr. Serv.*, 333 F.3d 88 (2nd Cir. 2003).

5. Under the ADA, any required medical or psychological examination must be limited to tests and conclusions that specifically address the identified business necessity, since a general diagnoses will reveal disabilities (or perceived disabilities) to employers

and expose individuals with disabilities to potential employer stereotypes, which is the very result that is intended to be avoided by the ADA. *Conroy,* 333 F.3d 88 (2nd Cir. 2003). Consequently, "[t]he business necessity standard is quite high." *Cripe v. City of San Jose*, 261 F.3d 877, 890 (9th Cir. 2001).

_____6. In proving a business necessity for a mandatory independent medical examination under the ADA, an employer must show that the asserted "business necessity" is vital to the business, that the examination genuinely serves the asserted business necessity and that the request is no broader or more intrusive than necessary. *Conroy v. New York State Dept. of Corr. Serv.*, 333 F.3d 88 (2nd Cir. 2003).

7.____Respondent proved that it had a job related business necessity in determining whether Grievant's presence in the workplace put the safety of Bateman staff and clients in peril of physical harm based upon the previous statements reported to Bateman by Nurse Giampolo.

_____8. The independent psychological examination made a specific finding that Grievant was not a violent person and was not a threat of physical harm to the staff or employees at Bateman. Additional findings in the independent evaluation, related to Grievant's substance abuse, were beyond limited scope allowed under the ADA. Consequently, Respondent's reliance upon those findings to prohibit Grievant from returning to work were arbitrary and capricious.

9. The drug and alcohol tests suggested by Dr. Miller and required by Respondent prior to allowing her to return to work, were not in compliance with Respondent's policy. Respondent's action in requiring such tests was arbitrary and

capricious. Drug and Alcohol Testing Policy for State Facilities/Hospitals.

Accordingly, the grievance is GRANTED. Respondent is ORDERED to rescind the suspension, remove all mention of it from Grievant's file and reimburse Grievant for all lost pay and benefits that she would have earned had Grievant not been suspended.

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).

DATED: DECEMBER 9, 2009.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE