THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JENNY LYNN TAYLOR,
Grievant,

v. **Docket No. 2009-1478-WVU**

WEST VIRGINIA UNIVERSITY,
Respondent.

DECISION

Jenny Taylor, Grievant, was employed as a Campus Service Worker by West Virginia University. On April 23, 2009, she filed this grievance asserting she was wrongfully terminated, and she asserts that she was the victim of discrimination. The statement of grievance reads as follows:

> I was employed by the above employer from 4-22-07 to 4-08-09 as a campus service worker at $19,000.00 per year. My job duties were to clean rooms by dusting, sweep, mop, dust, mop, vacuum and clean restrooms. I was also required to clean theatres and check all restrooms, clean the lobby as well as clean other persons areas when they were not at work. I was not working on a probationary basis.
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> I was discharged by Vance Roby, Assistant Director of Campus Services because I could not meet the job performance standards set by the employer. I was being disciplined for not mopping and vacuuming areas but over time, I had been given additional areas and duties and was having a hard time keeping up with everything. The final incident causing the discharge was an event going on in the lobby and had been asked to work day shift to cover the event. This took me away from my regular area and responsibilities so I was not able to do everything in my 7.5 hour shift as my employer wanted.
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> I feel my work was below [sic] company standards. Additional training was not necessary for me to properly perform my job.
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> I have four and a half years of experience in this field. I was told how to improve.
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> I did perform the work to the best of my ability.

> My job duties were always being added to and I was not given help although someone was assigned to help me. I felt like I was doing more than my share of work
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> I had performed the work satisfactorily in the past.
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> My work performance started to deline [sic] when I found out I was pregnant and I suffered swollen feet and was given lifting restrictions. I also had alot [sic] of cramping.
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> I did receive a prior written warnings [sic] concerning my work. I had got a letter of counseling on 3-24-09. In November 2008, I informed my employer of my pregnancy and I also make [sic] my employer aware of lifting restrictions. I was given my first warning on 11-6-08, the second on 12-16-09 and the last was on 3-7-09.
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> I am able, available and seeking full-time work.

Grievant seeks as relief, "job reinstatement of employment, placed at a different location or area."

As this grievance concerned a termination, Grievant filed directly to level three following her dismissal. W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held before the undersigned Administrative Law Judge on September 9, 2009, at the Grievance Board's office in Westover, West Virginia. Grievant represented herself and Respondent was represented by Kristi A. McWhirter, Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on October 13, 2009.

Synopsis

Grievant was fired for unsatisfactory work performance, and failure to maintain acceptable work standards. Grievant argued that termination was too severe a penalty in the case, and that she was the victim of discrimination. Respondent asserted that Grievant had been given numerous opportunities to improve the deficiencies in her work

performance. The record supports a finding that Grievant's employment termination in this instance was justified. Grievant did not establish that she was the victim of discrimination. She presented no evidence of a situation remotely similar to her where the employee had been treated differently. In addition, mitigation is not warranted in this situation. This grievance is denied.

The following findings of fact are based upon the record developed at level three:

Findings of Fact

1. Grievant has been employed by Respondent as a Campus Service Worker since 2004.

2. Grievant first worked in the Health Science Center. While working in the Health Science Center, Grievant received a written warning for poor job performance.

3. Grievant was working in the Creative Arts Center at the time her employment was terminated.[1]

4. As a Campus Service Worker assigned to the Creative Arts Center, Grievant's job duties included vacuuming, dusting, mopping and shampooing floors and rugs; cleaning and dusting the walls, fixtures and furniture of all rooms and hallways including disinfecting the restrooms; changing garbage bags and restocking restroom supplies.

5. Grievant's core work hours were 4:00 p.m. to 12:00 a.m. Grievant's shifts were changed, with her acceptance, during CAC events.

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[1]The facility is home of the College of Creative Arts' Divisions of Art, Music, and Theatre and Dance. It includes five performance areas, the largest of which is the 1,441-seat continental style Lyell B. Clay Concert Theatre. The CAC hosts plays, concerts, and nationally known performers.

6. Respondent issues “Disciplinary Fact Sheets” to employees for poor job performance as part of its progressive discipline procedure. These sheets include a description of an employee’s unacceptable job performance. Thereafter, employees are given an opportunity to discuss the disciplinary fact sheet with their supervisor and provide a written response.

7. On March 6, 2008, Richard Nester, Grievant’s supervisor, inspected Grievant’s work areas and observed that Grievant had not completed many of her job tasks including the failure to vacuum, mop, and dust the floors and furniture in some assigned rooms. Mr. Nester also found that Grievant had failed to completely clean two rooms, a stairwell, and that she had not completely cleaned the second floor hallway. Mr. Nester issued Grievant a disciplinary fact sheet and discussed Grievant’s unsatisfactory work performance with her on that date.

8. On March 24, 2008, Respondent issued Grievant written confirmation of the counseling session held with Mr. Nester discussing in copious detail the instances of unsatisfactory work performance of March 6, 2008. Grievant received the letter on March 25, 2008.

9. On October 22, 2008, Mr. Nester inspected Grievant’s work area and observed that Grievant had failed to clean and mop the upper loading area; dust or spot mop the grey tile hallway; mop the lobby restrooms and clean the stainless steel fixtures; and vacuum certain assigned rooms. Mr. Nester discussed Grievant’s unsatisfactory work performance with her on that day.

10. On November 6, 2008, Chuck Landsberry, Campus Service Worker Lead, and Mr. Nester inspected Grievant’s work area and observed that she had not completed

all of her assignments. Mr. Nester discussed Grievant's poor performance with her on November 10, 2008.

11. Mr. Nester issued Grievant a disciplinary fact sheet for failure to have sufficient leave time to cover an absence occurring on November 8, 2008. Grievant had previously been warned about negative leave balances on May 30 and September 24, 2008.

12. On November 16, 2008, Grievant received her first written warning for her unsatisfactory work performance occurring on October 22, 2008 and November 6, 2008.

13. On December 2, 2008, Grievant did not complete all of her assignments and left work without directly notifying her immediate supervisor. Mr. Nester issued Grievant a disciplinary fact sheet for both incidents.

14. On December 4, 2008, Mr. Nester inspected Greivant's work area and observed that she had again failed to mop the hallway, clean the upper loading area and Green Room, and had not vacuumed five of her assigned rooms.

15. Grievant received a second letter of warning on December 16, 2008, for unsatisfactory work performance and using unauthorized leave.

16. On January 6, 2009, Mr. Nester received notice that Grievant had been approved for Family Medical Leave due to her pregnancy and Grievant was required to notify him if any absences were related to her medical condition. Mr. Nester made allowances that Grievant not be required to lift more than 25 pounds and she not work more than forty hours pursuant to the "Return to Work with Modification Agreement."

17. On February 11, 2009, William Young, supervisor for Building and Campus Services, and Mr. Nester inspected Grievant's work area and found that she had again not

cleaned some of her assigned area. Mr. Nester discussed Grievant's unsatisfactory work performance with her on that same day. On March 4, 2009, Grievant again failed to mop and vacuum the floors of several rooms.

18. Respondent issued Grievant an intent to terminate employment letter for unsatisfactory work performance and failure to maintain acceptable work standards on April 1, 2009.

19. Grievant met with Respondent to address the charges in the intent to terminate employment letter; however, Grievant did not provide any reasons which would change Respondent's decision to terminate her employment. Respondent terminated Grievant's employment effective April 8, 2009.

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 Bd. 156 C.S.R. 1 § 3 (2008); *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). "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). In other words, "[t]he 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).

Respondent asserts that it was justified in terminating Grievant's employment based on the fact that she did not maintain the standard of performance outlined by her supervisor. Grievant argues that she made a good faith effort to comply with her supervisor's assignment, but was unable to do so because the work expectations were unreasonable. Additionally, Grievant argues that dismissal was too severe a sanction in this case.

The West Virginia University policy at issue in this matter reads as follows:

> WVU-HR-9, "When an employee does not maintain the standards of performance or conduct as outlined by the supervisor, or, does not comply with applicable policies, procedures, or laws, disciplinary action, including but not limited to written notice, demotion, suspension, or dismissal may be taken. Dependent upon the actual and potential consequence of the offense, employee misconduct may be considered minor misconduct or gross misconduct."

The record of this grievance demonstrates that Grievant received numerous counseling sessions in an attempt to improve her work performance. In addition, Grievant received two written warnings prior to her employment termination for failure to properly clean her assigned area. Respondent provided Grievant with ample opportunity to improve her performance but Grievant failed to do so. WVU policy HR-9 establishes a discipline policy for employees. Progressive discipline is generally favored to correct deficiencies, which is what occurred in this case. Once progressive discipline was used to no avail, Respondent was justified in exercising its discretion to terminate Grievant's employment because she continued to perform the duties of her position in an unsatisfactory manner.

Grievant also asserted that she was the victim of discrimination. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant put forth no evidence which would demonstrate another employee, whose performance was similar to her own, was treated differently. The facts in the record of this matter do not make a showing of discrimination. No evidence was presented that Respondent treated Grievant differently than any other similarly situated employee, or that any other employee with similar job performance was treated differently.

The remaining issue is whether dismissal was too severe in this instance. 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); *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 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).

Mitigating circumstances do not exist in this case. Respondent provided Grievant with many “second chances” to cure the deficiencies in her work performance. In addition, Grievant admitted that prior to her assignment to the Creative Arts Center, she had received at least one written warning for poor job performance. In short, dismissal was not so disproportionate to her actions that Respondent abused its discretion in determining the level of discipline imposed.

The following conclusions of law support this Decision:

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 Bd. 156 C.S.R. 1 § 3 (2008); *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).

2. Respondent has proven by a preponderance of the evidence that Grievant failed to maintain the standards of performance as outlined by her supervisor as required by policy WVU-HR-9.

3. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

4. Grievant did not establish that she was the victim of discrimination.

5. 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); *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

6. "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).

7. "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).

8. Grievant has failed to prove that Respondent abused its discretion in terminating her employment, requiring mitigation of the discipline.

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: October 30, 2009

Ronald L. Reece
Administrative Law Judge