THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TANISHA CARR,

Grievant,

v. **Docket No. 2010-1305-CONS**

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,

Respondent.

DECISION

Grievant Tanisha Carr was employed at the Department of Health and Human Resources ("DHHR") and was assigned to the Welch Community Hospital ("Hospital") in the Office Assistant 2 classification. Ms. Carr filed a grievance dated July 10, 2009, complaining that she "was suspended from work without pay." As relief, she sought "pay for time off." Ms. Carr filed a second grievance form[1] dated July 27, 2009, stating that she was "[t]erminated on July 27, 2009, without good cause." As relief, Grievant seeks "[r]einstatement with backpay, benefits interest and to in every way be made whole." These two grievance were consolidated by Order dated April 8, 2010, and submitted together for hearing and decision.

A level three hearing was held in Beckley, West Virginia on June 29, 2010. Grievant appeared in person and was represented by Gordon Simmons of the UE Local 107,

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[1] Because Grievant was contesting her suspension and dismissal from employment, she waived levels one and two pursuant to W. VA. CODE § 6C-2-4 (a) (4) and sought a hearing at level three.

WVPWU.[2] Respondent DHHR was represented by Heather Laick, Assistant Attorney General. At the close of the hearing, the parties agreed to submit Proposed Findings of Fact and Conclusions of Law. The last of those proposals was received at the West Virginia Public Employees Grievance Board on August 6, 2010, and this matter became mature for decision on that date.

Synopsis

Grievant was dismissed from employment at the Hospital for failing to successfully comply with the terms of her plan of improvement. Respondent avers that Grievant failed to complete her tasks and responsibilities in a timely fashion and that she failed to treat co-workers and constituents in a courteous and pleasant manner. Respondent contends that the failure to comply with the improvement plan was the last chapter in a history of problematic work issues that justified terminating Grievant's employment. Grievant offers some explanation for her conduct but it falls short of excusing her actions. The grievance is denied.

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 Tanisha Carr has been employed as a Office Assistant 2 at the Welch Hospital for approximately two years. The Hospital is part of the Department of Health and Human Resources.

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[2] West Virginia Public Workers Union.

2. Grievant was assigned as a unit clerk in the emergency department and worked mostly on the night shift.

3. Grievant regularly complained to her supervisor that she wanted to work more day shifts and became angry when another worker received most of the opportunities to work that shift. Grievant's supervisor explained to Grievant that the assignments were based on seniority and the other employee had worked at the Hospital for many years more than Grievant. Notwithstanding the explanations, Grievant continued to repeatedly complain about her shift assignment.

4. Grievant received an Employee Performance Appraisal ("EPA-2") dated March 3, 2008. Her performance was rated "Fair: But Needs Improvement" by her supervisor Barbara Dalton, RN. The matters that needed improvement were listed as:

- Quick to jump to conclusions. Needs to learn to evaluate the situation before reacting, and use a more positive approach. Initially it was very difficult to give her constructive criticism. Her demeanor has been more positive.
- Needs to refrain from making and receiving multiple personal calls while on duty. She has been warned about this previously and the nursing supervisor has reported this activity to me recently.

Respondent Exhibit 11.

5. On February 12, 2009, Grievant received another EPA-2 signed by her supervisor, Nurse Manager Calvin Lucas, RN. Mr. Lucas rated Grievant's performance as "Good: Meets Expectations," but he also noted that Grievant's attitude continued to need improvement by stating:

> Tanisha needs to work on her interpersonal skills with other staff members; both in and out of the ED [Emergency Department]. She needs to develop a less paranoid attitude when she is being directed by her supervisors in the chain of command.

Grievant Exhibit 2.

6. On May 20, 2009, Grievant was given a document entitled Employee Warning Record ("EWR").[3] In that document, Nurse Manager Calvin Lucas notes that on at least three prior occasions Grievant had exhibited inappropriate and disrespectful behavior toward her co-workers including her supervisor. Manager Lucas stated that if the behavior continued Grievant would be subject to further discipline which could include dismissal. The three incidents cited in the EWR included the following:

- December 12, 2008, Grievant was counseled regarding a loud verbal confrontation she had with Jude Stewart RN after Grievant was instructed to leave the room of a patient while the patient was being treated. Grievant's work duties did not require her to be with the patient and a relative of the patient was already in the room.

- January 20, 2009, Grievant was counseled regarding ongoing disputes she was having with co-worker Lorette Dingus. These verbal disputes were conducted in the presence of other staff and where patients could hear them. They reached the point where they were causing tension with the rest of the staff. [4]

- March 10, 2009, Grievant continued to regularly and openly complain that she was not getting enough day shift assignments after she had met with her supervisor who explained in detail the scheduling process. Grievant's complaints were regular, loud and made where they could be heard by the patients.

Respondent Exhibit 16.

7. Grievant received a second EWR on May 20, 2009, related to her work production. In that EWR, Manager Lucas stated:

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[3] The EWR appears to be a written warning which is a step in the progressive discipline process.

[4] The other workers were also counseled after these incidents but there is no evidence that any of them had additional problems.

> Tanisha has not logged in any lab core results since March 8th 2009 this means that Julie and Toni had to make up the days that Tanisha worked. Also there has been several times that the other unit clerks has come to me and stated the charges had not been put in and they had to do Tanisha's as well as theirs. Failure to complete U/C duties will lead to further disciplinary measures - up to and including termination of employment.[5]

Manager Lucas attached copies of reports to the EWR demonstrating Grievant's failure to complete these tasks between the dates of March 6, 2009 and May 13, 2009. Respondent Exhibit 17.

8. Grievant noted on each of the EWR forms that she disagreed with the statements but she did not contest these disciplinary actions in any other way.

9. By letter dated May 29, 2009, Grievant was suspended without pay pending an investigation into allegations of misconduct that were made against her. Respondent Exhibit 1.

10. In her suspension letter, Grievant was restricted from all Hospital areas except to receive medical treatment for herself or a member of her family. On June 3, 2009, Grievant visited the Hospital business office to inquire about the proper procedure for purchasing copier supplies for her department. Respondent Exhibit 2.

11. Grievant was suspended while an investigation was conducted into her behavior in an incident that took place on May, 27, 2009. On that day Grievant had reported to work at the Hospital at 2:00 p.m. so that she could catch up on work she had not done previously. Reporting early was a request made by Grievant that was approved by Manager Lucas.

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[5] The statement is written herein as it appeared on the EWR without any additions, deletions or corrections.

12. Approximately ten minutes after Grievant arrived at work she became aware that a teenage girl that she knew had been brought into the emergency unit for treatment. Grievant went to the room where the patient was being treated and insisted that she be allowed to stay at the patient's bedside.

13. Because the room was crowded with personnel treating the patient, Nurse Manager Lucas told Grievant to leave the room and go back to her work station. Grievant became loud and upset in her objection to leaving the room and when Manager Lucas closed the privacy, curtain Grievant shouted, "You can close the curtain in my face if you want to." Manager Lucas again instructed Grievant to go back to her work station and Grievant refused and stated that she would "clock out" in order to stay. Manager Lucas then instructed Grievant to leave the Hospital and he returned to treating the patient.

14. Grievant had no role in treating the patient, was not related to the patient and her loud and disruptive outburst took place in the room where the patient was being treated. The outburst also took Nurse Lucas' attention away from his main concern which was the treatment of the patient.

15. In May 2009, Patricia Coleman was the Hospital Director of Nursing.[6] After Nurse Lucas finished with the patient in the emergency department, he went to Director Coleman's office to discuss the incident involving Grievant. When Mr. Lucas arrived at Director Coleman's office he encountered Grievant who again became loud and angry stating that "blood was thicker than water"[7] and she should have been allowed to stay in

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[6] Patricia Coleman is no longer employed at the Hospital.

[7] This comment is difficult to reconcile with the facts of the situation since Grievant is not related to the patient.

the room with the patient. Mr. Lucas then went into Ms. Coleman's office and closed the door.

16. Grievant left the area for a short time and returned with the patient's mother. Upon Grievant's return, the door to Ms. Coleman's office was still closed and Mr. Lucas heard Grievant shouting and someone banged on the door.

17. Ms. Coleman called the Hospital Human Resources Director, James Young, and the security guard, Larry Vandyke to assist with the situation. After discussing the situation with Ms. Coleman and Mr. Lucas, Mr. Young went into the hallway and asked Grievant to leave the Hospital. Grievant once again started shouting and Mr. Young explained that if Grievant did not leave voluntarily she would be escorted from the property by security.

18. Security guard Vandyke escorted Grievant from the property after she was told several times to calm down and be quiet. Grievant did not clock in or out on May 27, 2009, but Mr. Lucas entered her time on the time sheet so that she would be paid from 2:00 p.m. to 3:45 p.m..

19. On June 4, 2009, Grievant met with Walter Garrett, the Hospital Chief Executive Officer ("CEO"), for a predetermination conference related to her behavior on May 27, 2009. Mr. Garrett instructed Grievant to report to work at 4:00 p.m., to act professionally, and to not be disruptive in the emergency department. He also stated that he would issue a written decision regarding the May 27, 2009 incident. Respondent Exhibit 8.

20. CEO Garrett issued a letter to Grievant giving her a five day suspension without pay for her behavior in the incident on May 27, 2009. Respondent Exhibit 3.

21. Grievant was placed on a Performance Improvement Plan ("PIP") that became effective June 25, 2009. The PIP included a list of 12 expected behaviors for Grievant to demonstrate.[8] Some of those requirements included the following:

- Grievant would not perform any patient care duties.
- Grievant would refrain from disruptive and loud dialogue in the presence of patients and their families.
- Grievant would refrain from going to the bedside of patients she knew personally while on shift unless asked for assistance.
- Grievant would refrain from caustic and hostile remarks about people or the facility.
- Grievant would complete tasks and responsibilities consistent with her classification in a timely manner including the following:
  a) patient charges for discharged patients.
  b) log books for labs, transfer log, etc.
  c) input log for Department of Health reportable diseases.

Most of the remaining requirements involved following directives and maintaining a professional demeanor with supervisors, co-workers and the public. Grievant was also required to attend two training sessions related to Customer Service and Business Etiquette/Professionalism. The PIP was to last for a period of six months and be reviewed by Grievant and her supervisor at least once each pay period. Failure to abide by the conditions of the PIP could lead to dismissal. Respondent Exhibit 4.

22. Grievant received a third EWR from Manager Calvin Lucas on July 9, 2009, which stated the following:

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[8] Due to typographical errors on the PIP, it appears that 14 requirements were listed on the actual document.

> On 6/19/2009 we had a counseling session about you leaving the department and not letting the RN on duty knowing where you were going. On 7/02/2009 you went to triage at 12:45 PM and were released at 2:00 PM and failed to let the RN on duty know where you was. Also you did not clock out for this visit; you must clock out when seeing a physician for any reason.[9]

Respondent Exhibit 22.

23. By letter dated July 27, 2009, CEO Garrett informed Grievant that she was being dismissed from employment at the Hospital effectively immediately. The reasons for the dismissal were violations of the PIP including the following:

- Failure to complete tasks and responsibilities in a timely manner. Specifically:
  - June 25, 2009 no charts were done and no charts from June 26, 2009 were completed
  - July 6, 2009, 11 charts were left undone and no charts were completed.
  - July 7, 2009, no charts were completed.
  - July 23, 2009, Grievant worked 13.5 hours and only completed 10 charts even though 28 patients were seen in the department.
- Failure to respond to customers in a courteous and friendly manner. Specifically:
  - July 18, 2009, the Hospital Nurse Supervisor received a complaint from the Nurse Manager of the Beckley Regional Hospital regarding your rude and unprofessional behavior toward her, her unit clerk and a doctor at their facility.[10]

Respondent Exhibit 5.

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[9] The statement is written herein as it appeared on the EWR without any additions, deletions or corrections.

[10] See Respondent Exhibit 9.

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). 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).

Since Grievant was a permanent employee in the state's classified service, the employer must also demonstrate that misconduct which forms the basis for the dismissal was of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, [175 W. Va. 279, ___,] 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*,

[149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir. W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994).

Respondent demonstrated that Grievant was regularly loud, disruptive and combative with her co-workers and supervisors. This behavior was not only evident to the staff, but was also conducted in the presence of patients. Grievant's main excuse for her behavior was the allegation that the remainder of the staff was out to get her. While co-workers were counseled regarding participating in disputes with Grievant, there was no indication that they continued to have problems after the counseling and Grievant's loud and aggressive conduct was the one constant in all the incidents. No evidence was presented to indicate that Grievant's co-workers were conspiring to get her in trouble. Grievant managed to do that quite well without their help.

With regard to the incident on May 27, 2009, Grievant argues that she did not sign in and was not officially at work. Therefore, Grievant opines, she cannot be punished for her behavior. Additionally, she notes that she was just trying to provide comfort to the patient since the girl's mother was too distraught to be in the room with her. These explanations fall short of excusing Grievant for disrupting the patient's emergency care by becoming abusive when she was instructed to leave the room.

Grievant may not have clocked in, but she was at the hospital to catch up on work that she had not completed. Everyone understood that she was there to work. Additionally, while Grievant did not clock in for the time of the incident, she accepted pay for that time after Manager Lucas signed in for her.

Grievant had a history of wanting to stay at the bedside of patients she knew and had been counseled previously about the need to leave the room when requested. She

not only failed to follow that counseling on May 27, but she continued to be so disruptive and combative with her supervisors that she had to be escorted form the Hospital. Certainly employees may disagree with decisions made by their supervisor and even contest those decisions. However, these actions must be done in a reasonable way within established procedures. Outbursts which disrupt critical patient care are simply not appropriate adult behavior.

Grievant was suspended for her behavior on May 27, and given a plan of improvement. Even after being given this opportunity to correct her job performance, Grievant continued to fail to complete her assignments and continued to have unprofessional outbursts. Respondent followed their progressive disciplinary policy and proved the validity of reasons for Grievant's dismissal by a preponderance of the evidence. Accordingly, the grievance is DENIED.

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). "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).

2. To dismiss a permanent employee in the state's classified service, the employer must also demonstrate that misconduct which forms the basis for the dismissal was of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, [175 W. Va. 279, ___,] 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir. W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994).

3. Respondent proved by a preponderance of the evidence that Grievant was guilty of substantial misconduct and failed to adequately perform her duties and responsibilities after being given several warnings and opportunities to improve.

Accordingly, the 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 DECEMBER 6, 2010.

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE