WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

GREGORY SNODGRASS,
Grievant,

v. **Docket No. 2010-1335-MAPS**

DIVISION OF JUVENILE SERVICES,
Respondent.

DECISION

Grievant Gregory Snodgrass filed a grievance on March 28, 2010, against his employer Division of Juvenile Services. Grievant Snodgrass grieves a five day suspension he received due to alleged unsatisfactory job performance, unprofessional treatment of juveniles contrary to division policy, operational procedures, court order or philosophy, and leaving a resident unsupervised on a unit or other location.

For relief Grievant seeks, "I would like to continue to work and be paid. I would also want the harassment and unfair treatment to stop."

A level three hearing was held at the Grievance Board's Charleston office on July 30, 2010. Grievant appeared pro se, and Respondent was represented by Steven R. Compton, Assistant Attorney General. This case became mature at the conclusion of the hearing, as the parties declined to file proposed findings of fact and conclusions of law.

Synopsis

Respondent asserts Grievant violated policy by leaving a juvenile unsupervised in the hallway. When another employee of the facility went to address the situation with the juvenile, Respondent asserts that, while the other employee used the proper de-escalation technique, Grievant improperly physically restrained the juvenile, causing the juvenile to suffer a laceration above the eye which required stitches.

Grievant argues that the juvenile was in view of employees in the control unit. He further argues that he saw his co-worker step toward the juvenile in what appeared to Grievant to be an attempt at physical restraint, and Grievant merely assisted.

This grievance is denied.

Findings of Fact

1. Grievant is employed as a Youth Specialist 3 at the Robert Shell Juvenile Center.

2. On October 6, 2009, Grievant was working in the education section of the facility.

3. The medical section called and requested to have two residents brought from the education section to medical for routine visits.

4. Grievant was the employee charged with walking the two male juvenile residents to medical.

5. When Grievant and the two residents arrived at medical, Grievant took one resident into medical, leaving the other resident alone in the hallway.

6. To get to medical, Grievant had to escort the resident through a wooden door with no windows. Grievant could not watch the resident left in the hallway, thus leaving him unsupervised.

7. While unattended, the male resident who was in the hallway walked to a locked door which led to the outside of the facility and attempted to make phone calls on two separate occasions.

8. There are cameras throughout the Robert Shell Correctional Center. All of the resident's movements were filmed.

9. Control is an area where employees monitor the happenings of the Center by watching the cameras.

10. There are times when staff would call control and request that the residents be watched on camera. No one had called control to request they watch this resident's movements on the cameras.

11. Mr. Younger, a facility therapist, walked into control and noticed on the monitor that the resident was attempting to make phone calls. At that time, Mr. Younger approached the resident.

12. Mr. Younger and the resident had a verbal exchange. Then, Mr. Younger walked around the corner and the resident followed.

13. Within a matter of seconds, the resident came back into the area outside of the medical department and sat in a chair by the door leading to medical. The resident's body language appeared defiant. He sat with his head against a wall and his arms folded across his chest.

14. Mr. Younger approached the resident again, and once again there was a verbal exchange between the two.

15. Hearing loud voices, Grievant opened the door from medical and stood on the left side of the resident, while Mr. Younger stood on the right side of the resident.

16. During this verbal exchange, the resident turned to his left while continuing to speak to Mr. Younger. The resident then turned back into the chair and sat with his arms at his sides.

17. Mr. Younger stepped toward the resident with his arm extended, and both Grievant and Mr. Younger took the resident down to the ground in a physical take down.

18. Staff at the Center are trained to first use de-escalation techniques when dealing with a resident who is expressing oppositional defiance.[1] From the body language of this particular resident, it is clear he was expressing oppositional defiance.

19. When staff members are dealing with a resident, and one staff member goes to physically restrain the resident, the other staff member is expected to assist.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *Hoover v. Lewis County Board of Education*, Docket No. 93-21-427; *Landy v. Raleigh County Board of Education*, Docket No. 89-41-232. A preponderance of the evidence is defined as "evidence which is 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." *Black's Law Dictionary* (6th ed. 1991); *Leichliter v. West Virginia Department of Health & Human Resources*, Docket No. 92-HHR-486. Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Respondent asserts Grievant left a resident unattended in the hallway and then used improper physical force. Grievant argues the resident was not unsupervised, as he could be observed by the staff in control both on the monitors and through the window. It should be noted that the entire situation was taped by the monitors throughout the facility, and was admitted as Respondent's Exhibit 2. After reviewing the CD, it is clear that

[1]No testimony was solicited to explain the essence of oppositional defiance. However, that is how the resident's body language was explained throughout the testimony.

Grievant left the resident unsupervised in the hall. The resident was left alone and wandered through the hall, picked up the telephone on two separate occasions, until Mr. Younger came out from control.

Grievant asserted that the fact that Mr. Younger came to address the issues with the resident is proof someone was supervising him by watching the cameras in control. However, testimony at the hearing was that Mr. Younger[2] was walking through control and just happened to notice the resident attempting to use the telephone. The undersigned finds Grievant's argument to be disingenuous.

Respondent further asserts Grievant treated the resident unprofessionally by physically restraining him when Mr. Younger was working to de-escalate the situation with the resident. Testimony from John Marchio, Director, was that Mr. Younger was consistently attempting to de-escalate the situation with the resident, and when Mr. Younger took a step toward the resident, it was not in an attempt to physically restrain him, but instead an attempt to guide him. Grievant argues when he saw Mr. Younger move toward the resident with his hand outstretched, Grievant believed that Mr. Younger was going to physically restrain the resident, and therefore, Grievant assisted, as is required.

After watching the video of this particular incident, the undersigned does not believe Respondent has carried its burden of proof with respect to this allegation. Grievant was standing on the resident's left side, while Mr. Younger was standing on the resident's right side. Grievant testified the resident had been making threats to Mr. Younger. When pressed by the undersigned as to the exact nature of the threats, Grievant asserted that

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[2]Mr. Younger did not testify at the hearing.

the resident was saying he would get Mr. Younger when he got out of the facility. Mr. Younger stepped toward the resident with his hand outstretched. Rightly or wrongly, Grievant's interpretation that Mr. Younger was moving so as to subdue the resident caused him to do the take down maneuver. Grievant's explanation for the situation is as plausible as Respondent's when looking at the video. Therefore, Respondent has failed to meet its burden of proof with respect to this allegation.

While Grievant did not specifically argue that the undersigned mitigate the punishment levied against him, it seems appropriate to address mitigation given the circumstances of this case. In 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). 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).

Respondent indicated that Grievant was a very good employee who had been at the Center for approximately five and a half years. There was no evidence of any issues with Grievant's prior work history. With respect to the clarity of existing rules or prohibitions,

there were no rules or policies introduced during the hearing. However, from all testimony presented, it seems as if staff knows there is a prohibition to leaving a resident unattended. Lastly, the issue of whether there are any mitigating circumstances must be addressed. While it is true Respondent did not carry its burden on the issue of unprofessional conduct toward the resident, it nevertheless has asserted that but for the resident being left unsupervised the entire unfortunate event would not have occurred. Unfortunately for Grievant, this is accurate. As a result, mitigation is not warranted in this particular case.

In Grievant's requested relief, he makes reference to harassment and unfair treatment. W. VA. CODE § 6C-2-2(l) defines "harassment" as "repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." What constitutes harassment varies based upon the factual situation in each individual grievance. *Sellers v. Wetzel County Bd. of Educ.*, Docket No. 97-52-183 (Sept. 30, 1997). "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. *See Moreland v. Bd. of Trustees*, Docket No. 96-BOT-462 (Aug. 29, 1997)." *Pauley v. Lincoln County Bd. of Educ.*, Docket No. 98-22-495 (Jan. 29, 1999). Grievant did not demonstrate that he was treated in any instance in a manner that is contrary to the behavior which would be expected.

For the above stated reasons, this grievance must be DENIED.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *Hoover v. Lewis County Board of Education*, Docket No. 93-21-427; *Landy v. Raleigh County Board of Education*, Docket No. 89-41-232. A preponderance of the evidence is defined as "evidence which is 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." *Black's Law Dictionary* (6th ed. 1991); *Leichliter v. West Virginia Department of Health & Human Resources*, Docket No. 92-HHR-486. Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

2. Respondent has met its burden of proving Grievant left a resident unsupervised. Respondent has not met its burden of proving Grievant improperly restrained the juvenile resident.

3. In 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).

4. 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).

5. W. VA. CODE § 6C-2-2(l) defines "harassment" as "repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." What constitutes harassment varies based upon the factual situation in each individual grievance. *Sellers v. Wetzel County Bd. of Educ.*, Docket No. 97-52-183 (Sept. 30, 1997). "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. *See Moreland v. Bd. of Trustees*, Docket No. 96-BOT-462 (Aug. 29, 1997)." *Pauley v. Lincoln County Bd. of Educ.*, Docket No. 98-22-495 (Jan. 29, 1999).

6. Grievant did not demonstrate that he was treated in any instance in a manner that is contrary to the behavior which would be expected.

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: August 31, 2010

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Wendy A. Elswick
Administrative Law Judge