THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

NATHAN GORBY,
Grievant,

v. **Docket No. 2010-0291-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/WILLIAM R. SHARPE, JR. HOSPITAL,
Respondent.

DECISION

Grievant, Nathan Gorby, was employed by Sharpe Hospital as a Health Service Worker in Lewis County, Weston, West Virginia. On September 3, 2009, he filed this grievance asserting that he was dismissed from his job without just cause. Grievant seeks as relief to be made whole, including back pay with interest, restored tenure and benefits. As this grievance concerned a termination, Grievant filed directly to level three following his dismissal. W. VA. CODE § 6C-2-4(a)(4).

A level three hearing was held before the undersigned Administrative Law Judge on July 27, 2010, at the Grievance Board's office in Westover, West Virginia. Grievant did not appear in person but appeared by his representative, Gordon Simmons, UE170, West Virginia Public Workers Union. Respondent appeared by its counsel, Heather L. Laick, Assistant Attorney General. This matter became mature for consideration upon the receipt of the last of the parties' proposed findings of fact and conclusions of law on September 13, 2010.

Synopsis

Grievant was terminated from his position for a series of performance issues and a case of patient abuse and neglect. Prior to termination, Grievant received coaching and counseling sessions, verbal reprimands, and written reprimands, as a result of Grievant's poor work performance and insubordination. Grievant was about to be suspended for failing to report to work and for insubordination when Respondent was notified that Adult Protective Services had substantiated a claim of patient abuse and neglect. Thereafter, Respondent made the decision to discharge Grievant from his employment. Respondent proved Grievant engaged in this misconduct of a substantial nature and the dismissal is upheld. This grievance is denied.

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

Findings of Fact

1. Grievant was employed for two years as a Health Service Worker at William R. Sharpe, Jr. Hospital, a psychiatric facility operated by the West Virginia Department of Health and Human Resources located in Weston, West Virginia.

2. Grievant was terminated from his position in August of 2009 for numerous performance issues and an investigator substantiated case of abuse and neglect of a patient.

3. Veralynn Stauffer, Unit Nurse Manager, became Grievant's supervisor in March of 2009 and started to notice Grievant's work performance problems in April of 2009.

4. One of the first problems occurred when Grievant recognized a patient on another unit as someone he knew from the community and inquired about the patient to a worker on that unit. The worker informed Grievant that he could not share information about the patient since Grievant did not work on that unit and was not caring for the patient. Nevertheless, Grievant walked up to the patient and began to have some type of conversation with him. Ms. Stauffer coached and counseled Grievant regarding the rules of confidentiality to make certain Grievant was aware that he had no right to information about patients outside of his care.

5. On June 15, 2009, Ms. Stauffer issued Grievant a verbal warning for time and attendance problems due to Grievant using a large amount of sick leave and for being late for work on numerous occasions in a four-month period. After issuing the verbal warning to Grievant, his attendance did not improve.

6. On June 29, 2009, Ms. Stauffer counseled Grievant for excessive use of the unit computer for non-work related internet use. Grievant was not required to do any computer work that could take the amount of time he was using the computer, and his job was to be on the floor interacting with the patients.

7. Also on June 29, 2009, Ms. Stauffer counseled Grievant for rolling up the sleeves of his shirt so that the tattoos on his lower arms were visible. Grievant was aware that policy required him to wear long-sleeved shirts so that his tattoos were covered, but he continued to wear short-sleeves or roll up the arms of his long-sleeved shirts. Ms. Stauffer talked with Grievant about this policy violation on at least two occasions, but he continued to roll up his sleeves.

8. In July of 2009, Grievant volunteered to work a split shift. At one point during his shift he asked a nurse for a break because he was tired and she granted him a break. At 10:00 p.m., Grievant requested a break from a different nurse, who told him he could not have a break, but that she would allow him to leave at 11:00 p.m., instead of 11:30 p.m. Grievant left the unit without permission at 10:15 p.m. and did not return. At 2:00 a.m. Grievant was found asleep in the visitor's room.

9. Grievant received a verbal warning for insubordination on July 3, 2009, after he had arrived at work two times in a row in a long-sleeved shirt, but rolled the sleeves up so that his arm tattoos were visible.

10. On July 10, 2009, a complaint was made by a patient indicating that on July 9, 2009, Grievant came into her room and asked to borrow money for lunch. The patient offered to give him five dollars and was told by Grievant that was not enough. The patient subsequently offered Grievant twenty dollars, which he took. The patient asked Grievant when he would pay her back and was told he would pay her back on his next pay day. The patient was concerned because she was due to be released before Grievant's next pay day.

11. During the investigation of this complaint, Grievant was removed from patient care and assigned to the copy center.

12. Grievant failed to report to work or call in to notify his supervisor that he would not be reporting to work on July 24, 2009, while he was working in the copy center. The day before, he informed Kathy Claypool, the Copy Center Manager, that he had a doctor's appointment on July 24, 2009, and would not be coming to work. Ms. Claypool informed Grievant that his supervisor was Ms. Stauffer and he would need to contact her for

permission to take leave. Grievant did not obtain authorization to use leave from his supervisor.

13. Mandy Weirich, Adult Protective Service Worker, investigated the complaint filed by the patient and substantiated the allegation. Ms. Weirich believed the patient's allegation was true due in large part to the stable condition of the patient and the fact that she was due to be released gave her account even more credibility.

14. Ms. Weirich discovered during her investigation that Grievant was having financial difficulties, that he was constantly asking coworkers to borrow money from them, and that he had borrowed money from a coworker to buy a new car. Based upon multiple statements from staff and patients, Ms. Weirich determined that Grievant had consistently asked others for money during his employment with Respondent.

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. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92- HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights

and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965).

The charges against Grievant resulting in his dismissal are numerous performance issues and a charge of abuse and neglect of a patient. The issue before the undersigned Administrative Law Judge is whether Respondent met its burden of proof and demonstrated by a preponderance of evidence that Grievant, in fact, committed those offenses. For reasons more fully outlined below, Respondent has met its burden of proof.

The underlying facts of this grievance are basically undisputed; however, Grievant does question the sufficiency of the evidence and calls into question the "draconian increase in disciplinary severity." The record established that on or about April 20, 2009 Grievant recognized a patient on another unit as someone he knew from the community and inquired about the patient to a worker on that unit. The worker informed Grievant that he could not share information about the patient since Grievant did not work on that unit and was not caring for the patient. Nevertheless, Grievant walked up to the patient and began to have some type of conversation with him. Ms. Stauffer coached and counseled Grievant regarding the rules of confidentiality to make certain Grievant was aware that he had no right to information about patients outside of his care.

The record also established that on June 15, 2009, Ms. Stauffer issued Grievant a verbal warning for time and attendance problems due to Grievant using a large amount of sick leave and for being late for work on numerous occasions in a four-month period. After issuing the verbal warning to Grievant, his attendance did not improve.

In addition, the record demonstrates that on June 29, 2009, Ms. Stauffer counseled Grievant for excessive use of the unit computer for non-work related internet use. Grievant was not required to do any computer work that could take the amount of time he was using the computer, and his job was to be on the floor interacting with the patients. In July of 2009, Grievant volunteered to work a split shift. At one point during his shift he asked a nurse for a break because he was tired and she granted him a break. At 10:00 p.m., Grievant requested a break from a different nurse, who told him he could not have a break, but that she would allow him to leave at 11:00 p.m., instead of 11:30 p.m. Grievant left the unit without permission at 10:15 p.m. and did not return; subsequently, at 2:00 a.m., Grievant was found asleep in the visitor's room.

Grievant received many different counseling sessions regarding a violation of policy related to tattoos. Grievant received a verbal warning for insubordination on July 3, 2009, after he had arrived at work two times in a row in a long-sleeved shirt, but rolled the sleeves up so that his arm tattoos were visible. On July 7, 2009, Grievant met with Kevin Stalnaker, Chief Executive Officer, during which he was specifically informed of his employer's policy on tattoos. During the meeting Mr. Stalnaker cautioned Grievant about sleeping on the job, problems with the absence control policy, and insubordination.

Performance problems with the Grievant continued after his meeting with the CEO. Grievant failed to report to work or call in to notify his supervisor that he would not be reporting to work on July 24, 2009, while he was working in the copy center. The day before, he informed Kathy Claypool, the Copy Center Manager, that he had a doctor's appointment on July 24, 2009, and would not be coming to work. Ms. Claypool informed Grievant that his supervisor was Ms. Stauffer and he would need to contact her for

permission to take leave. Grievant did not obtain authorization to use leave from his supervisor.

Finally, the event which led to the termination decision was a complaint made by a patient indicating that on July 9, 2009, Grievant came into her room and asked to borrow money for lunch. The patient offered to give him five dollars and was told by Grievant that was not enough. The patient subsequently offered Grievant twenty dollars, which he took. The patient asked Grievant when he would pay her back and was told he would pay her back on his next pay day. The patient was concerned because she was due to be released before Grievant's next pay day. After investigation, the Adult Protective Services worker reported her findings to Mr. Stalnaker with the opinion that the events had occurred as reported.

After due consideration of the extensive testimony at level three, as well as the Adult Protective Services finding that Grievant had borrowed money from a patient with a somewhat disingenuous promise that he would pay her back on his pay day, a date after the patient was scheduled to be released, as well as the documented performance issues, the undersigned finds by a preponderance of the evidence that Respondent has proven its charges. Respondent is mandated to protect and care for a segment of the mentally challenged population of West Virginia. As a Health Service Worker within Sharpe Hospital, Grievant is responsible for the care and protection of the residents. Clearly, Grievant's misconduct was of such a nature to constitute good cause for his termination.

Grievant's argument that the punishment was draconian adopts the position that this punishment was excessive. "The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of

demonstrating the penalty was ‘clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action.’ *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).” *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

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 has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge shall not substitute her judgement for that of the employer. *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997).” *Meadows*, *supra*.

The undersigned cannot find that Grievant’s termination for numerous performance deficiencies and the report of patient abuse by Adult Protective Service committed on a

mentally challenged resident was excessive. The undersigned cannot substitute his judgement for that of Respondent's CEO decision that Grievant's misconduct was sufficient to conclude that Grievant did not meet the reasonable standard of conduct expected of an employee at the hospital.

The following conclusions of law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance 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. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965).

3. Respondent has met its burden of proving that Grievant's conduct was of a substantial nature directly affecting the rights and interest of the resident in question at Respondent's facility, as well as establishing numerous performance deficiencies. Grievant was dismissed for good cause.

4. "[M]itigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

5. "Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge shall not substitute her judgement for that of the employer. *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997)."

6. Given the charges proven against Grievant, the penalty is not disproportionate or excessive.

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: November 4, 2010

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Ronald L. Reece
Administrative Law Judge