WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JESSICA L. HOFFMAN,
Grievant,

v. **Docket No. 2010-0880-MAPS**

WEST VIRGINIA STATE POLICE,
Respondent.

DECISION

Grievant Jessica L. Hoffman filed a grievance against her employer, West Virginia State Police ("WVSP") on January 5, 2010. Her statement of grievance reads, "Wrongful termination." For relief, Grievant seeks, "reinstatement of sick leave and accrued sick and annual leave since dismissal; reinstatement of job removal of dismissal from record; back pay with interest; monetary damages; and WVSP to pay all charges associated with grievance if any."[1]

Since this grievance involves a termination, it was filed straight to level three. *See* W. VA. CODE § 6C-2-4(a)(4). The level three hearing was held in the Grievance Board's Charleston office on June 28, 2010 and July 28, 2010. Grievant appeared *pro se*, and Respondent was represented by Virginia Grottendieck Lanham, Assistant Attorney General. This case became mature on August 30, 2010, upon the parties' submissions of findings of fact and conclusions of law.

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[1]West Virginia Code § 6C-2-6 is entitled, "Allocation of expenses and attorney's fees." It specifically states: "(a) Any expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expense."

Synopsis

Grievant was terminated from her employment as a Forensic Analyst 1. Respondent avers Grievant was terminated for failing to perform assigned work, as well as taking action which impairs the efficiency and/or reputation of the WVSP. Specifically, Respondent asserts Grievant retrieved the wrong evidence sample from a piece of equipment used in the lab. Respondent also argues that on a separate occasion, Grievant hydrated an evidence sample for approximately 48 hours when the maximum time limit was 24 hours.

Grievant asserts she was wrongfully terminated as a result of retaliation and discrimination. Grievant avers she had previously filed a grievance which was denied at level one and she did not appeal. Grievant further argues the termination was the result of discrimination. She avers others have committed similar errors and have not been terminated.

Respondent has met its burden of proof in this matter. Therefore, this grievance is denied.

Findings of Fact

1. Grievant was a civilian employee of the WVSP in the Forensic Laboratory. Grievant was employed in August 2003 as an Evidence Technician 1. At the time of the events, Grievant was a Forensic Analyst 1. Grievant did not receive the Analyst position the first time she applied. She filed a grievance which was denied at level 1 and never appealed. After the grievance, another Analyst position became available, and Grievant was the successful applicant.

2. Grievant completed her Evidence Technician 1 training in February 2005.

3. Central Evidence Receiving and Processing is comprised of two sections, Evidence Receiving and Evidence Processing. Evidence Receiving is responsible for logging in the evidence, routing it through the various Sections of the lab, and returning the evidence to the submitting agency upon completion of the testing. Evidence Processing reviews bulk items of evidence for the presence or absence of biological materials, conducts presumptive and identification tests on samples of evidence, prepares reports to the investigating officer and forwards evidence to the Biochemistry Section of the lab where DNA analysis is conducted.

4. Evidence Technicians are employed in both Evidence Receiving and Processing. Technicians in Evidence Receiving perform only the documenting tasks involved in receiving, routing and returning evidence. Technicians in Evidence Processing conduct testing under the general supervision of an Analyst. Analysts are responsible for the content of the report.

5. When an item of evidence is received and it is necessary to conduct preliminary testing, an Analyst determines what samples are collected and tested. Either the Analyst or an Evidence Technician collects the samples and performs preliminary tests.

6. Preliminary testing includes presumptive testing to determine the presence or absence of material and confirmatory tests which confirm the presumptive results. There are different presumptive and confirmatory tests which determine presence or absence of blood and the presence or absence of seminal fluid. For seminal fluid, the presumptive test is called an Acid Phosphatase (“AP”) test and the Confirmatory tests are the ABA card P30 (“P30") test and microscopic examination for the presence or absence

of sperm cells. After these tests are completed the Analyst or Technician makes samples suitable for DNA analysis and those samples are forwarded to the Biochemistry Section for DNA analysis.

7. When preparing to conduct a P30 test, the sample is placed in solution on a machine called a nutator, where it is gently rocked back and forth. This gentle rocking motion should last at a minimum 30 minutes and at a maximum 24 hours so as to hydrate the sample. Less than 30 minutes and the sample may not become adequately hydrated. If left on the nutator longer than 24 hours, cell lysis may occur.

8. The time frame for leaving evidence on the nutator was not written into procedure until 2009. Prior to 2009, the time frames were taught and discussed and commonly known among Analysts and Technicians.

9. The nutator can hold more than one sample at a time, and it is common for different Technicians to place samples from different cases on the nutator. The samples are marked with the Technician's initials and case number.

10. On May 23, 2008, Grievant was working as a Technician conducting a P30 test. Grievant placed her sample on the nutator with her initials and case number written on the sample. Another employee also placed a sample from a different case on the nutator with her initials and the case number specific to the case.

11. Grievant retrieved the wrong sample from the nutator and began conducting the confirmatory tests without realizing her mistake. The other employee realized the mistake.

12. The incorrect sample Grievant removed had not been on the nutator for the required 30 minutes, causing the confirmatory tests to be invalid. The available sample was very small in that case, and the initial confirmatory tests could not be conducted.

13. Grievant does not deny taking the wrong sample.

14. The minimum and maximum time for leaving samples on the nutator had been discussed at monthly meetings that are attended by Technicians and Analysts.

15. On June 8, 2009, Grievant and Amy Shanahan, an Analyst, were working in Evidence Processing. Near the end of the day, Grievant began a P30 test and placed the sample on the nutator.

16. On June 9, 2009, Grievant went to court to observe testimony as required for her training. The sample she placed on the nutator the previous day remained on the machine throughout the day and night.

17. On June 10, 2009, Grievant returned to the office, removed the sample from the nutator and proceeded to run the P30 test.

18. After conducting the test, Grievant requested Ms. Shanahan verify the P30 test result.

19. Ms. Shanahan questioned Grievant as to the length of time the sample had remained on the nutator.

20. When Grievant told Ms. Shanahan that the sample had remained on the nutator from June 8, 2009, to the morning of June 10, 2009, Ms. Shanahan refused to second the result, as the sample had been left on the nutator well over the 24 maximum time limit.

21. Ms. Shanahan reported this incident to the Evidence Processing/Receiving Section Head.

22. Grievant did not deny leaving the sample on the nutator in excess of 24 hours.

23. On July 22, 2009, the Quality Board met and determined Grievant should be immediately removed from casework, that her supervisor, David Miller, review all Grievant's casework, and that a Professional Standards Section ("PSS") investigation be conducted.

24. Grievant was transferred to the Criminal Records Division.

25. Based upon the Quality Board's recommendation, the Laboratory Director filed a complaint with the Professional Standards Section.

26. During the time Mr. Miller was reviewing Grievant's work, he found numerous mistakes. One such issue he discovered was that Grievant used her finger to spread stains over smear slides.

27. Mr. Miller also discovered a case where Grievant noted an item of evidence did not contain any hair on her bench notes. Then later her notes indicate a hair was found. Grievant also violated procedure by revising her bench notes and not maintaining a copy of the original notes and making material changes to the case in her revisions.

28. Lieutenant D.M. Nelson conducted the PSS investigation. He sustained two allegations. First, that the Grievant failed to perform assigned work, or otherwise comply with State Police policy and procedure or administrative rules in violation of 81 CSR 10.11.3.2.1. Second, that Grievant took action which impairs the efficiency and/or reputation of its employees in violation of 81 CSR 10.11.3.3.23.

29. Based on the findings of the investigation, Respondent determined Grievant could no longer work in the Forensic Lab.

30. Respondent offered Grievant a position in the Criminal Records Division of the West Virginia State Police.

31. Grievant declined the alternative position, and chose termination.

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.*

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 & 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).

Grievant admits that she inadvertently removed the wrong sample from the nutator and that she left the other sample on the nutator longer than the maximum 24 hour period.

These two errors Grievant attempts to explain away as mistakes. She asserts she did not know the minimum and maximum time a sample was to remain on the nutator. Grievant further argues that she was not trained by the same person as the others in the lab, and while that is true, based on the collective testimony, the undersigned finds that the minimum and maximum time constraints for the nutator were general knowledge throughout the lab.

Respondent also solicited testimony that there was concern with Grievant's work. These specific instances included smearing a stain on a slide with her finger, noting in her bench notes that there was no hair present on a piece of evidence only to then later show there was a hair collected, and lastly redoing her drawings and bench notes back at the office. Grievant attempted to provide explanations for these deficiencies. With respect to smearing the stain on the slide with her finger, Grievant maintained that her hands were properly gloved. On the issue of the hair discovered on the garment, Grievant asserts she did not note the presence of a hair on the outside of the item, but upon later review on the inside of the item, she found a hair and noted and collected the item. Lastly, Grievant asserts her computer did not work in the lab, so she had to redo her notes in her office on the computer.

The work performed by the West Virginia State Police Lab is extremely important to the court system. Grievant's errors are serious, as they could call into question the integrity of the tests and the lab itself. Grievant does not appear to grasp the gravity of the errors. It is undisputed that these errors occurred. Respondent has met its burden in this matter.

While not specifically listed in her statement of grievance, Grievant asserts she has been treated in a discriminatory manner. "Discrimination" is defined by statute 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 either a discrimination or favoritism 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., 655 S.E.2d 52 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

Grievant asserts other employees have made errors while working in the lab, and they were not fired. However, Respondent generously offered Grievant a position in the Criminal Records Division, and Grievant chose termination. Testimony was that other employees have transferred departments in lieu of termination. Grievant has not shown she was a victim of discrimination as she did not prove she was treated differently than similarly situated employees.

Lastly, Grievant asserts reprisal. To demonstrate a *prima facie* case of reprisal the Grievant must establish by a preponderance of the evidence the following elements:

> (1) that she engaged in protected activity (i.e., filing a grievance);

> (2) that she was subsequently treated in an adverse manner by the employer or an agent;
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> (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
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> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Vance v. Jefferson County Bd. of Educ. Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

Grievant filed a prior grievance when she did not receive a position as an Analyst. However, no adverse action was taken by Respondent. Instead, Grievant eventually received the Analyst position, which was essentially a promotion. Only after Grievant committed errors affecting the reliability and reputation of the laboratory, was she transferred from the Analyst position. Even after the allegations against Grievant were sustained, Respondent offered her a position in the Criminal Records Division in lieu of termination. Grievant was the one who chose termination instead of transfer. Grievant did not prove there was any retaliation.

Therefore 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. 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 & 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 met its burden of proof.

4. "Discrimination" is defined by statute 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 either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

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5. Grievant did not prove she was a victim of discrimination.

6. To demonstrate a *prima facie* case of reprisal the Grievant must establish by a preponderance of the evidence the following elements:

> (1) that she engaged in protected activity (i.e., filing a grievance);
>
> (2) that she was subsequently treated in an adverse manner by the employer or an agent;
>
> (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
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> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Vance v. Jefferson County Bd. of Educ. Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

7. Grievant did not prove reprisal.

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: September 28, 2010

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Wendy A. Elswick
Administrative Law Judge