THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ANDREW CATALINA,

Grievant,

v. **Docket No. 2011-0885-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES / MILDRED MITCHELL-BATEMAN HOSPITAL,

Respondent.

DECISION

Andrew Catalina, Grievant, was employed as a Health Service Worker by the Department of Health and Human Resources ("DHHR") at Mildred Mitchell-Bateman Hospital ("Hospital") in Huntington, West Virginia. Grievant was given a letter terminating his employment at the Hospital on December 7, 2010. Mr. Catalina filed a grievance dated December 10, 2010 alleging that "Management has unjustly terminated my employment on December 6, 2010 @ 2315."[1] As relief Grievant Catalina seeks:

> To be reinstated to my employment fully. I want to be reimbursed for my lost wages, my potential overtime had I been allowed to work, and to have my legal fees reimbursed. When re-instated I want to be free of retaliation and to be returned to my former schedule under the supervision of ANYONE except prior supervisor. I want to be made whole in every way.

(Emphasis in original).

A level three hearing was held at the West Virginia Public Employees Grievance Board's Charleston office on two separate dates: March 14, 2011 and May 23, 2011. Grievant personally appeared on both days and was represented by L. Victor Navy, Esquire.

---

[1] Pursuant to W. VA. CODE § 6C-2-4(a)(4), this grievance was filed directly at level three because it is contesting Grievant's dismissal from employment.

Respondent DHHR was represented on both days by Harry C. Bruner, Jr., Assistant Attorney General. At the close of the second day of hearing, the parties agreed to submit proposed findings of fact and conclusions of law, the last of which was received at the West Virginia Public Employees Grievance Board on June 27, 2011. The grievance became mature for decision on that date.

Synopsis

Grievant cites a number of perceived errors in the disciplinary action taken against him. He alleges Respondent violated 143 C.S.R. 1 § 12.2 by not advising Grievant at the predetermination conference that termination of his employment was being considered. Grievant further alleges that by waiting for over a month between the incident that gave rise to his dismissal and the actual disciplinary action, Respondent is barred from dismissing Grievant by the doctrine of laches. Additionally, Grievant argues that Respondent failed to prove the charges against Grievant by a preponderance of the evidence. Finally, Grievant believes that the penalty of dismissal was grossly disproportionate to any offense he may have committed and therefore should be reduced.

Respondent conducted a complete investigation of the charges that led to Grievant's dismissal. DHHR proved the charges against Grievant and the delay in taking disciplinary action while the investigation was being conducted was not unreasonable. The termination of Grievant's employment was not so disproportionate to his actions as to require mitigation. 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 Catalina was employed as a Health Service Worker by the Respondent DHHR at Mildred Mitchell-Bateman Hospital. Mildred Mitchell-Bateman Hospital is a psychiatric hospital which provides support and treatment for patients suffering from mental illnesses.

2. On November 4, 2009, Hospital Nurse Manager Erin Boggess held a discussion with Grievant concerning inappropriate actions taken by the Grievant. The activities included the following:

- Grievant removed his shirt in the dining area when patients were present so that his co-worker could take a picture of his bumble bee tattoo;[2]
- Incidents of horseplay, wrestling-like behavior with patients, as well as hugging and grabbing co-workers; and,
- Becoming too physical in instances where patients needed to be restrained.

Nurse Manager Boggess specifically noted an incident where grievant was required to leave the area where a patient was restrained when he became upset and said to the patient, "so you like to hit me do you" in an unprofessional manner.[3]

3. On December 14, 2009, Grievant used a loud, threatening tone, offensive language and verbal threats when dealing with a patient. As a result of this incident,

---

[2] Grievant denied that this incident took place but could not explain how the complaining patient could describe in detail the tattoo and its location on Grievant's torso.

[3] *See,* Respondent's Exhibit 5, *Documentation of Discussion.*

Grievant received a verbal reprimand and was retrained concerning proper 1:1/2 supervision, professionalism, and Abuse /Neglect.[4]

4. On December 21, 2009, Grievant was reported to have been kissing a co-worker while the two workers were assigned to observe and supervise a patient. As a result of Grievant's inattention to the patient he was assigned to supervise, the patient pulled her tracheotomy out and had to be sent to the hospital for further treatment. This incident was investigated and Grievant ultimately received a written reprimand for violation of Hospital Policies *MMBHF084 Observation of At Risk Patients* and *MMBHE18 Patient Abuse and Neglect.*[5]

5. On January 6, 2010, Grievant was overheard questioning a patient regarding an interview the patient participated in concerning a patient complaint against the Grievant. Complaints are supposed to be confidential and the patient became anxious when Grievant questioned him regarding his statement.[6]

6. Grievant incorrectly completed a face check on January 26, 2010. Grievant marked two patients as being present on the ward. In fact, one of the patients had been discharged and the other was off the unit at an Automated Teller Machine. Accurate face checks are important because many patients at the Hospital are at risk to elope and pose a threat of harm to themselves or others.

---

[4] *See,* Respondent's Exhibit 8, *Documentation of a Verbal Reprimand*.

[5] *See,* Respondent's Exhibit 10, Written Reprimand dated March 20, 2010.

[6] *See,* Respondent's Exhibit 11, Nurse Manager Boggess' notes documenting that she overheard Grievant question a patient about the patient's interview.

7. On January 26, 2010, Grievant took a patient on a discharge transport without obtaining the patient's discharge paperwork. This resulted in the patient being discharged without medication and discharge instructions.[7]

8. Grievant was placed on a Performance Improvement Plan[8] following the issuance of the verbal reprimand dated March 4, 2010.

9. Grievant received an Employee Performance Appraisal ("EPA") on April 7, 2010. The EPA was Completed by Ray Brillantes, RN, who was the Nurse Manager supervising Grievant at that time. Grievant received a rating of "Fair, But Needs Improvement." The EPA contained the comment, "Staff [Grievant] is reliable to do what needs to be done on the unit; however needs to make significant improvement in conduct.[9]

10. One of the Hospital's patients becomes very agitated when he becomes over-stimulated and will often lash out at those around him. The hospital treatment team prescribed that this patient receive an MP3 player to listen to because it blocked out other outside stimulation and helped him control his behavior. On April 28, 2010, Grievant was assigned to observe and supervise this patient on a one-on-one ("1:1") basis. Grievant took the MP3 player away from the patient stating that the patient did not deserve it since he had previously broken one. The patient became very agitated and he and Grievant were shouting at each other. Michelle L. Meese, Staff Psychologist, had to intervene in the situation and instructed Grievant to give the MP3 player back to the patient. Psychologist

---

[7] Respondent's Exhibit 8.

[8] Respondent's Exhibit 9.

[9] Respondent's Exhibit 12(b).

Meese reported that Grievant took the MP3 player from the patient without justification and raised his voice at the patient when the patient protested. She noted that the patient's behavior had been improving prior to Grievant's inappropriate intervention.[10]

11. On September 9, 2010, Grievant was assigned to escort a forensic patient off the hospital grounds for a doctor appointment. The doctor appointment was at Cabell Huntington Hospital's Erma Ora Byrd Clinical Center which required the patient to be driven to his appointment.

12. Forensic patients are admitted to the Hospital from the criminal justice system. These patients require close supervision because of the heightened risk that they might cause harm to themselves or others, and are more likely to elope from custody. Because of these heightened risks, it is the nursing policy at the Hospital that these patients never be left unsupervised and that the staff member never let a forensic patient out of his/her sight.

13. Upon escorting the forensic patient to the doctor's office, the patient was called back to the examination room. Grievant left the patient alone in the examination room with the attending nurse in violation of Hospital policy.

14. Grievant returned to the waiting room, put up his feet and went to sleep. He was observed in the waiting room by an off-duty Hospital employee who noted that Grievant had his eyes closed and he was snoring.

---

[10] *See,* Respondent's Exhibit 13, Statement of Staff Psychologist Michelle Meese, MA.

15. When his medical examination was complete, the forensic patient came in to the waiting room, unescorted, woke Grievant and told him it was time to leave. Grievant then commented to the patient that he was "a needy little bastard" and asked the patient if he wanted to smoke a cigarette or get a snack before they returned to the Hospital.[11]

16. This incident was reported to the Hospital authorities and an investigation was conducted by Richard Coulter, a Nurse Manager at the Hospital, as well as Tami Handley and Ashley Corley, Patient Advocates with Legal Aid of West Virginia. Their report concerning the incident was dated September 22, 2010 and delivered to Pat Franz, the Hospital Interim Chief Executive Officer. The investigators concluded that Grievant violated at least three provisions of the DHHR legislative rule entitled Behavioral Health Client Rights:

- 64 CSR 59 § 3.12, by failing to properly supervise the patient while he was away from the Hospital;
- 64 CSR 59 § 3.17, by using degrading language toward the patient; and,
- 64 CSR 59 § 18.6, by encouraging patient to violate hospital rules when Grievant offered to let the patient smoke a cigarette.[12]

17. A predetermination conference was held with Grievant related to this incident on October 25, 2010. In addition to Grievant, the conference was attended by Kieth Anne Worden, Director of Human Resources, Ray Brillantes, Nurse Manager, Belinda Ackerson, Assistant Director of Nursing and Patricia Ross, Director of Nursing.

---

[11] *See* Respondent's Exhibit 3, statement of the off-duty hospital employee, and Respondent's Exhibit 4.

[12] Respondent's Exhibit 4, Legal Aid of West Virginia Investigation Report.

18. At the predetermination conference, Grievant was given notice of the charges related to the September 9 incident and given an opportunity to give his version of the events. Grievant was told that discipline was being contemplated, but he was not specifically told that he was going to be dismissed.

19. Grievant was hand delivered a letter dated December 7, 2010, terminating his employment at the Hospital. The letter was written and signed by Kieth Anne Worden, Director of Human Resources at the Hospital.

20. Grievant was allowed to continue to work at the Hospital performing his regular duties for forty-eight days between the predetermination conference and the date he was dismissed.

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 tenured 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, 281, 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).

Grievant makes a number of arguments as to why the termination of Grievant's employment was improper. First, Grievant argues that Respondent failed to prove that Grievant committed some of the actions with which he is charged. For instance, on December 21, 2009, Grievant points out that nobody actually saw the patient he was supervising pull her tracheotomy out on his shift and it might have happened at the beginning of the next shift after Grievant left. Respondent demonstrated that Grievant and a co-worker were kissing while they were supposed to be supervising the patient and the patient's roommate told them that the patient had removed the tracheotomy, but Grievant did not believe her. The workers on the next shift discovered that the tracheotomy had been removed shortly after they started their rotation and the patient was not left alone

during the shift change.[13] Respondent demonstrated that Grievant was significantly and inappropriately distracted during the time he was supposed to be monitoring the patient and, it is more probable than not, that the patient removed her tracheotomy during that time.[14]

Next, when Grievant had transported the forensic patient to the patient's doctor's appointment, the co-worker who saw Grievant sleeping in the waiting room did not specifically identify Grievant as the Hospital employee she saw. She testified that she saw a young man wearing an ID tag from the Hospital. She noted that the staff person was sleeping when she arrived and the patient woke him when he exited the examination room. While she did not specifically identify Grievant, she did recognize the patient. Grievant admitted that he was the staff person who was assigned to supervise the patient on his trip away from the hospital and that he waited for the patient in the waiting room while the patient was in the examination room. Respondent proved the actions Grievant was charged with doing by a preponderance of the evidence.

Grievant notes that no one at the predetermination conference specifically told him that the Respondent was considering dismissing him from employment. He points out that

---

[13] *See* Respondent's Exhibit*s* 10 and 11.

[14] It also should be noted that grievant did not contest his written reprimand. The Grievance Board has previously held that when a grievant does not grieve a prior disciplinary action, the merits of the disciplinary action cannot be placed at issue in a subsequent Grievance. *See, Stamper v. W. Va. Dept. of Health & Human Resources*, Docket No. 95- HHR-144 (Mar. 20, 1996); *Womack v. Dept. of Admin*., Docket No. 93-ADMN-430 (Mar. 30, 1994). "Additionally, all of the information contained in the documentation of the prior discipline must be accepted as true. *See, Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994). *Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997)." *Ferrell v. DOT*, 00-DOH-237 (Dec. 22, 2000).

the West Virginia Division of Personnel legislative rule related to predetermination conferences states:

> (a) An appointing authority may dismiss any employee for cause. Prior to the effective date of the dismissal, the appointing authority or his or her designee **shall:** meet with the employee in a predetermination conference and **advise the employee of the contemplated dismissal; . . .**

(Emphasis added). 143 C.S.R. 1 § 12.2(a).

Grievant argues that the legislative rule creates a mandatory duty on behalf of Respondent to specifically advise Grievant that dismissal is being contemplated. While Grievant does not dispute that he was told that at the conference that discipline was being contemplated, he argues that this does not meet the mandatory obligation of the rule and, therefore, the subsequent disciplinary action is invalid. Human Resources Director Worden testified that she specifically instructed Grievant as to the nature of the charges against him and that disciplinary action was being contemplated as a result of those charges. She stated that she did not specify dismissal because the Hospital management did not want to decide upon a specific disciplinary action until they had heard Grievant's explanation of his actions related to these incidents.

The West Virginia Supreme Court has ruled that personnel rules and laws should be strictly construed in the direction of "expanding and preserving employee protection, and not in the direction of limiting that protection." *Smith v. W. Va. Div. of Rehabilitative Serv.* 208 W. Va 282, 287, 540 S.E.2d 152, 155 (2000). The purpose of the legislative rule requiring a predetermination conference is to protect Grievant's due process rights to be given notice of the charges against him and the right to respond to those charges before disciplinary action is taken. *See, Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d

579 (1985); *Board of Education of the County of Mercer v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994); *Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, (1981). In this instance, Grievant was given notice of the specific charges against him, an opportunity to respondent and he was told that disciplinary action was being contemplated. Respondent's decision not to use the specific word dismissal did not diminish Grievant's rights in this process. In fact, the generic term "discipline" was specifically used in an effort to avoid prejudgement. Under these circumstances, Respondent complied with the requirements of 143 C.S.R. 1 § 12.2(a) and observed Grievant's due process rights.

Grievant next asserts that the forty-eight day period between his predetermination conference and dismissal was unreasonable and worked to his detriment in violation of the equitable doctrine of laches.

> Laches is a delay which operates prejudicially to another person's rights. A party must exercise diligence when seeking to challenge the legality of a matter involving a public interest, such as the manner of expenditure of public funds. Failure to do so constitutes laches. *Maynard v. Bd. of Educ. of Wayne County*, 357 S.E.2d 246 (W. Va. 1987); *Buchanan v. Bd. of Directors/Concord College*, Docket No. 94-BOD-078 (Nov. 30, 1994). Laches occurs when an individual sleeps on his rights or neglects to assert a right of which [he/she] is aware. Blacks Law Dictionary 435 (5th abr. ed. 1983). Knowledge, unreasonable delay, and change of position are the essential elements of laches. *Id*.

Gunnoe v. Raleigh County Bd. of Educ., Docket No. 03-41-084 (July, 21 2003).

Director Worden testified that the decision to terminate Grievant had to be reviewed by the Hospital Chief Executive Officer and officials at the DHHR state level before it was implemented. She noted that the length of the process was more than usual in this case but not surprisingly so. Grievant was allowed to work during the entire period this decision was being contemplated. While he may have concluded by the passage of time that he had

escaped discipline, he was not prejudiced by this delay. He received pay for services while the decision was being made and he retained all rights to contest that decision when it was implemented. The delay in this matter was not so long as to be unreasonable and Grievant's rights were not prejudiced. Accordingly, the doctrine of laches does not apply to this case. *Gunnoe, supra.*

Finally, Grievant argues that dismissal is excessive and disproportionate to his actions and the discipline should be mitigated. "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). 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 proved that Grievant had repeatedly violated rules and procedures that are in place to protect this particularly vulnerable population of patients. These actions had the effect of placing the patients, Hospital staff and the general public at risk of harm. Grievant has received a series of warnings, verbal and written, but seems unwilling or unable to comply. In the incident that ultimately led to his dismissal, Grievant compromised the safety of the patient and the public at large by not keeping a forensic patient in his sight and sleeping when the patient was under his supervision. The patient could easily have walked out of the doctor's office unattended instead of waking Grievant up and telling him

it was time to leave. The disciplinary action taken by Respondent in this matter was warranted given the overall circumstances. Consequently, 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. Since Grievant was a tenured employee in the state's classified service, the employer must also demonstrate that the 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, 281, 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. "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). 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).

4. Respondent proved by a preponderance of the evidence that Grievant had repeatedly violated rules and procedures that are in place to protect this particularly vulnerable population of patients. These actions had the effect of placing the patients, Hospital staff and the general public at risk of harm. Respondent proved the charges against Grievant. Grievant did not prove that dismissal was a disproportionate discipline for his conduct.

5. "Laches is a delay which operates prejudicially to another person's rights. A party must exercise diligence when seeking to challenge the legality of a matter involving a public interest, such as the manner of expenditure of public funds. Failure to do so constitutes laches. *Maynard v. Bd. of Educ. of Wayne County*, 357 S.E.2d 246 (W. Va.

1987); *Buchanan v. Bd. of Directors/Concord College*, Docket No. 94-BOD-078 (Nov. 30, 1994). Laches occurs when an individual sleeps on his rights or neglects to assert a right of which [he/she] is aware. Blacks Law Dictionary 435 (5th abr. ed. 1983). Knowledge, unreasonable delay, and change of position are the essential elements of laches. *Id*." *Gunnoe v. Raleigh County Bd. of Educ*., Docket No. 03-41-084 (July, 21 2003).

6. The delay between the predetermination hearing and Grievant's dismissal was not so long as to be unreasonable and Grievant's rights were not prejudiced by that delay. Accordingly, the doctrine of laches does not apply to this case. *Gunnoe, supra.*

7. Given the totality of the circumstances, Respondent complied with the requirements of 143 C.S.R. 1 § 12.2(a) by holding a predetermination conference in which Grievant was given notice of the specific charges against him, notified that disciplinary action was being contemplated and given an opportunity to respond to the charges, even though Respondent's agent did not specifically tell Grievant that dismissal was the disciplinary action being contemplated.

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: AUGUST 11, 2011

_____
WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE