WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MARY BETH HAMILTON,
Grievant,

v. **Docket No. 2011-1751-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR MEDICAL SERVICES,
Respondent.

DECISION

Grievant, Mary Beth Hamilton, is employed as a registered nurse by the Department of Health and Human Resources (DHHR) Bureau for Medical Services. Ms. Hamilton filed a grievance form dated June 2, 2011, contesting her suspension for the purpose of conducting an investigation and a letter of reprimand that resulted from the investigation. As relief, Ms. Hamilton seeks:

> . . . [A] suicide plan adopted by WV DHHR to not allow anyone being sent home without any intervention to assess their mental status or alert family of the suicide concern of the department. Training for Deputy Commissioners regarding professional behavior to use when family members call in to speak about a serious concern of their's, and how to recognize patterns of sexual harassment in employees. Seeking the letter in my file regarding my inappropriate behavior regarding this incident is removed immediately.

Since Grievant was contesting her suspension, she filed directly to level three. *See,* W. VA. CODE § 6C-2-4(a)(4).

A level three hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board on August 8, 2011. Grievant Hamilton appeared *pro se* and Respondent DHHR was represented by Harry C. Bruner, Jr., Assistant Attorney General.

After the hearing, Respondent submitted Proposed Findings of Fact and Conclusions of Law which were received by the West Virginia Public Employees Grievance Board on September 9, 2011. This matter became mature for decision on that day.[1]

Synopsis

Grievant made comments to her co-workers that she felt were innocent, but which caused them concern. She was suspended while her employer investigated the incident and ultimately received a letter of reprimand. Grievant believes her supervisors over reacted and seeks training for them in addition to removal of the Reprimand from her file. Given the totality of the circumstances, Respondent was justified in its actions and the grievance is Denied.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant Hamilton is a Registered Nurse and has been employed by the Respondent DHHR in that capacity since 2005.

2. Grievant and her co-workers work in a group of office cubicles on one floor of an office building in Charleston, West Virginia.

3. On the morning of May 11, 2011, Grievant went to the cubicle of a co-worker, Kurtis Canterbury, to lend him a book to read.[2] Another co-worker, Paula Duff, was also

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[1] Grievant was given the opportunity to submit fact/law proposals but apparently chose not to do so.

[2] Mr. Canterbury had previously loaned a different book to Grievant. The reading material was for leisure and had nothing to do with work.

in Mr. Canterbury's cubicle at the time.

4. Before giving the book to Mr. Canterbury, Grievant asked Mr. Canterbury if he would be her "work husband."[3] Mr. Canterbury did not consent and Grievant asked him again.[4] When Mr. Canterbury did not respond Grievant said she'd give him the book anyway and left the cubicle.

5. Moments later, Grievant returned to Mr. Canterbury's cubical and told him that if he would not be her work husband she might have to go home and shoot herself in the head.[5] Grievant then went back to work in her cubicle.

6. Grievant believed that the whole exchange was good-natured joking and did not expect Mr. Canterbury or Ms. Duff to be concerned. Neither expressed concern to her.

7. When Grievant was requesting Mr. Canterbury to be her office husband, Ms. Duff became uncomfortable and tried to end the discussion by saying that it was against the rules and citing an imaginary regulation.

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[3] One witness described this term as a close friend for a person of the opposite sex. It is defined in Wikipedia as: " a co-worker, usually of the opposite sex, with whom one shares a special relationship, having bonds similar to those of a marriage; such as, confidences, loyalties, shared experiences, and a degree of honesty or openness." *Wikipedia.org/wiki/Work_spouse.* A 2006 survey found that 32% of workers said they had an "office husband" or "office wife." Dawn Sagario, *Platonic "Spouse" at Work Accepted as Trend*, Gannett Press; Des Moines Register (March 20, 2006).

[4] Grievant was persistent in her request and asked Mr. Canterbury to be her work husband four or five times.

[5] The testimony as to what Grievant said varied. Two witnesses thought Grievant said she was going to blow her brains out while Grievant stated that she said she might shoot herself in the head. The basic concept is the same regardless of the specific words used to convey it.

8. Mr. Canterbury did not feel he knew Grievant well enough to consent to be her work husband but he was not offended by her request. However, he became concerned when she said she might shoot herself because he was not certain if she was joking or serious.[6]

9. Grievant has been under treatment for bipolar disorder and has made that fact known to some of her co-workers. Mr. Canterbury was aware of this fact and it contributed to his concern over whether Grievant was serious about shooting herself.

10. On the afternoon of May 11, 2011, Mr. Canterbury reported his encounter with Grievant to his supervisor, Tina Bailes. Ms. Bailes reported the matter to DHHR Deputy Commissioner Edward L. Dolly, who conducted an investigation.

11. On May 13, 2011, Grievant was suspended without pay while the investigation was being conducted. She was escorted from the building to her vehicle in the state parking facility.

12. Grievant's husband subsequently called and spoke with Deputy Commissioner Edward Dolly and inquired why they had sent Grievant home without contacting anyone in her family, if they actually believed she was suicidal. Deputy Commissioner Dolly did not provide Grievant's husband with an explanation that he believed was acceptable.

13. Grievant met with Supervisor Pat Woods, Deputy Commissioner Dolly and Deputy Commissioner Cynthia Beane on May 17, 2011. Grievant admitted that she made

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[6] Unbeknownst to Grievant he had a relative who committed suicide after telling a co-worker and he did not want to be part of a similar incident. Mr. Canterbury testified that Grievant could have been telling a big joke but he was not willing to take that chance.

the comment about shooting herself in the head, but asserted that it was not a threat nor did she intend it to be taken seriously.

14. As a result of the investigation, Grievant was issued a written letter of reprimand dated May 19, 2011. The reason for the reprimand was making an inappropriate statement in the workplace related to committing suicide that made her co-worker extremely uncomfortable. Respondent's Exhibit 2. Since there was no disciplinary suspension, Grievant was paid for the days she was suspended during the investigation.

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).

Respondent gave Grievant a letter of reprimand for making what it believed to be inappropriate comments in the workplace that made fellow employees uncomfortable and disrupted the workplace. Respondent argues that, given the totality of the circumstances, Grievant's co-workers had reason to be concerned that Grievant may be serious in her

threat to commit suicide. DHHR asserts that it was justified in giving Grievant a written reprimand to put her on notice that such statements are not appropriate and could lead to further discipline. Additionally, Respondent notes that Grievant suffered no financial loss as a result of the reprimand and argues that its response was measured and reasonable.

Grievant asserts that she was engaging in typical office banter and she was not serious about her statement that she was so heart broken by Mr. Canterbury's rejection that she might shoot herself. She argues that everyone overreacted to an innocent comment and a letter of reprimand was not warranted. Grievant also notes that the management's response to her statements were inappropriate for someone they believed was a suicide risk. She argues that if they believed she was at risk for shooting herself, escorting her to her car and sending her home without contacting a relative or healthcare professional was irresponsible.[7] Consequently, she seeks an order that Respondent develop a plan for dealing with employees who are suspected of being at risk for suicide and training for the DHHR Deputy Commissioners regarding this issue and in addressing the concerns of employees' relatives.

With regard to the remedies related to plans and training, the Grievance Board has consistently held that Administrative Law Judges are without authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997); *Olson v. Bd. of Trustees*, Docket No. 99-BOT-513 (Apr. 5, 2000); *Gary and Gillespie v. Dep't of Health & Human Res.,* Docket No. 97-HHR-

[7] This was the point that Grievant's husband was evidently trying to make to Deputy Commissioner Dolly when he called.

461 (June 9, 1999)." *Frame v. Dep't of Health & Human Res.,* Docket No. 00-HHR-240/330 (April 20, 2001). *Moore v. Blue Ridge Cmty.&Tech. Ctr.,* Docket No. 2011-0147-BRCTC (July 22, 2011). While the action taken by the Respondent's agents may not have been best suited for protecting the safety of an employee they truly believed was at risk of committing suicide, the undersigned is without authority to order Respondent to develop a policy or plan for addressing that issue and provide specific training pursuant to that policy. Accordingly, those remedies are unavailable.

There is no dispute about the basic content of Grievant's statements to Mr. Canterbury as witnessed by Ms. Duff. Grievant admits that she asked Mr. Canterbury to be her work husband more than once and when he did not consent she said that she might be so heart broken that she would go home and shoot herself in the head. The only issue is whether this conduct was sufficiently inappropriate to warrant a written reprimand. Grievant argues that it was good-natured kidding and should not lead to discipline. Under most circumstances she might be right. However, her co-workers were aware of her medical condition which created a heightened concern in Mr. Canterbury's mind. Additionally, Mr. Canterbury had a relative who had committed suicide after telling a co-worker of her intent which left him especially susceptible to Grievant's comments. Even though Grievant did not threaten harm to anyone else, the factors relied upon in evaluating whether comments constitute a threat under the West Virginia Division of Personnel's Workplace Security Policy are useful for reference here. Those factors include, whether the threat seems real, and the nature, likelihood and imminence of the potential harm. *Bowe v. Workers Compensation Comm'n*, Docket No. 04-WCC-268 (Oct. 10, 2004), (*citing Burkhammer v. Dep't of Health & Human Resources*, Docket No. 03-HHR-276 (Nov. 12,

2003)). Even though it was unlikely, Mr. Canterbury and others at the DHHR could not be certain that Grievant's threat of suicide was not real, and the potential for harm, if it was real, was too significant to be ignored. Given the totality of the circumstances, Respondent was justified in giving Grievant written notice that even playful threats of suicide are inappropriate in the workplace and could lead to further discipline in the future.

While Grievant did not specifically raise the issue of mitigation of the punishment she did argue that a written reprimand was excessive. 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); *Crites v. Dep't of Health & Human Ser.*, Docket No. 2011-0216-DHHR (Nov. 16, 2011). After the Respondent's initial action of suspending Grievant, it took a measured response by giving Grievant a written reprimand to put her on notice that her conduct was inappropriate and was considered serious. However, she did not suffer any monetary loss and if similar conduct is not repeated she will not likely have any further negative impact. Under these circumstances the discipline was not excessive. 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).

2. Grievance Board Administrative Law Judges are without authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997); *Olson v. Bd. of Trustees*, Docket No. 99-BOT-513 (Apr. 5, 2000); *Gary and Gillespie v. Dep't of Health & Human Res.,* Docket No. 97-HHR-461 (June 9, 1999)." *Frame v. Dep't of Health & Human Res.,* Docket No. 00-HHR-240/330 (April 20, 2001). *Moore v. Blue Ridge Cmty.&Tech. Ctr.,* Docket No. 2011-0147-BRCTC (July 22, 2011). Consequently, the undersigned is without authority to order Respondent to develop a policy or plan for addressing the issue requested herein and provide specific training pursuant to that policy.

3. Given the totality of the circumstances, Respondent proved the charges against the Grievant by a preponderance of the evidence and was justified in giving Grievant notice in the form of a written reprimand that even playful threats of suicide are inappropriate in the workplace and could lead to further discipline in the future.

4. 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); *Crites v. Dep't of Health & Human Ser.*, Docket No. 2011-0216-DHHR (Nov. 16, 2011).

5. Given the totality of the circumstances, a written reprimand was not excessive discipline and mitigation was not appropriate.

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 23, 2011.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE