THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DWIGHT WAYNE RICKS,
Grievant,

v. **DOCKET NO. 2011-0273-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/JACKIE WITHROW HOSPITAL,
Respondent.

DECISION

Grievant filed this grievance on September 2, 2010, stating, "Unpaid suspension (Aug 14-26) without good cause." His stated relief sought is "To be made whole, including lost pay with interest, restored benefits and tenure."

A level three hearing was held in the Grievance Board's Beckley office on February 9, 2011. Grievant was represented by Gordon Simmons and Respondent was represented by Jennifer Akers, Assistant Attorney General. The matter became mature for decision on March 11, 2011, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant was suspended from his employment at Jackie Withrow Hospital for insubordination after he was found sleeping on the job. The suspension followed other progressive disciplinary measures for insubordination and other infractions. Respondent met its burden of proving good cause for the suspension, and the Grievance is denied.

Findings of Fact

Based on a preponderance of the evidence, I find the following material facts have been proven:

1. Grievant is employed at Jackie Withrow Hospital as a Food Service Worker, where he has been employed for about seven years.
2. On July 24, 2010, Grievant took a break from his duties, and went to the chapel, which is near his work area.
3. Grievant is permitted a 15-minute break during his schedule.
4. Grievant had previously been instructed not to use the chapel as a break room, as there is another area for employees to take their breaks.
5. Grievant was observed by Bonnie Smith, RN Supervisor, to be asleep on a pew in the chapel at 8:05 a.m., and to still be asleep there at 8:35 a.m.
6. Although Ms. Smith had to call Grievant's name several times before he responded, he denied being asleep.
7. Grievant was under the influence of prescription medications that cause him to be drowsy.
8. On August 4, 2010, Grievant was suspended for a period of ten days for "as a result of your sleeping on the job, which represents your continued insubordinate actions and your failure to adhere to supervisory instructions."
9. Grievant admitted he had overstayed his break, but denied that he had been there for a half hour. He also admitted he had been instructed not to use the chapel as a break room.
10. Grievant has a prior record of disciplinary actions (reprimands and suspensions) for: leaving the facility without punching out; consuming food and beverages intended for patients; failing to report to work without calling off; damaging hospital property;

failure to attend a required certification course; attempted theft; and failure to follow his supervisor's directions.

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.[1] Grievant was disciplined for insubordination, and was given a ten-day suspension because the infraction was perceived to be a part of a pattern of insubordinate conduct for which he had received several prior disciplinary actions, including reprimands and shorter suspensions.

"[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be willful; and (c) the order (or rule or regulation) must be reasonable and valid."[2] In this case, although there is insufficient proof to determine whether Grievant was actually sleeping on the job or merely "resting his eyes" as he contends, this particular detail is immaterial to the charge. Grievant admitted to both overstaying his break time and to using the chapel as a break room against his supervisor's instructions. The only question that remains is whether his failure to follow his supervisor's valid directions is whether his failure was willful.

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[1]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).

[2]*Butts v. Higher Education Governing Board/Shepherd College* 569 S.E.2d 456 (W. Va. 2002).

Although the cases are not clear as to what constitutes "willfulness," the cases seem to suggest that for a refusal to obey to be "willful," the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order.[3] Grievant, in this case, defends his actions by stating that he was taking medication that made him drowsy. Although he denies being asleep and therefore by his own account he was able to keep track of the time, he admits overstaying his break by ten to fifteen minutes. He admits he was told by his supervisor not to use the chapel as a break room, and has no excuse for doing so. He clearly disregarded his supervisor and the known break time policy of the agency, without any valid reason for doing so. I conclude, therefore, that his failure was willful.

Grievant further argues that the suspension was too lengthy. He was given a ten-day suspension. Respondent contends that this suspension was the result of progressive disciplinary measures, and showed that Grievant had been previously reprimanded and suspended for insubordinate behavior several times during his employment at the hospital, most recently a reprimand for insubordination in June 2010. "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."[4] Grievant's employment could have been terminated due to these

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[3] *See* Annotation, Dismissal of Teacher - "Insubordination", 73 A.L.R.3d § 3 (1977). *Butts, supra*.

[4] *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

infractions, but he was mercifully given only a suspension. Prior written warning and shorter suspensions failed to correct his attitude toward following his supervisor's instructions or his employer's policies. The length of this suspension was a reasonable result when his prior disciplinary history was considered.

The following conclusions of law support this discussion:

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).
2. "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be willful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Education Governing Board/Shepherd College* 569 S.E.2d 456 (W. Va. 2002).
3. Respondent met its burden of proving Grievant's actions were insubordinate.
4. "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); *See also Gorby v. Dep't of Health & Human Ser.*, Docket No. 2010-0291-DHHR (Nov. 4, 2010).

5. Grievant was not able to prove that the penalty imposed by Respondent was excessive.

For the foregoing reasons, this grievance is hereby **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).

April 12, 2011

M. Paul Marteney
Administrative Law Judge