WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MICHELLE HAMILTON,

Grievant,

Docket No. 2011-1785-DHHR

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES/ WELCH COMMUNITY HOSPITAL,

Respondent.

DECISION

Grievant, Michelle Hamilton was employed as a Certified Nursing Assistant ("CNA") at the Golden Harvest Unit ("Golden Harvest" or "Facility"), a long-term nursing care facility of Welch Community Hospital ("Hospital"), operated by the Department of Health and Human Resources ("DHHR"). Grievant filed a level three grievance form[1] dated June 13, 2011, alleging that she had been terminated without good cause. As relief, Grievant seeks: "[t]o be made whole, including back pay with interest and all benefits restored."

A level three hearing was held in Beckley, West Virginia, on June 25, 2012. Grievant personally appeared at the hearing with her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by Harry Bruner, Jr., Assistant Attorney General for the State of West Virginia. At the conclusion of the 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 July 25, 2012. This grievance became mature for decision on that date.

[1] Grievant elected to file her grievance directly at level three pursuant to W. VA. CODE § 6C-2-4(a)(4) because she was contesting the termination of her employment.

Synopsis

Grievant was dismissed for misconduct/resident abuse by the misappropriation of resident and hospital property. Grievant was terminated after an investigation was completed regarding allegations that Grievant had removed two small plastic garbage bags of food and drink that belonged to the Facility and one of its residents. Grievant asserts that she was wrongfully terminated. Grievant does not deny that she took a trash bag with four broken or empty soda cans. The only allegation of misappropriation that Respondent could support by a preponderance of the evidence was that Grievant had taken one small trash bag that was the property of Respondent. While Grievant admittedly misappropriated the bag in violation of Respondent's policy, this violation was not of a substantial nature and did not justify the termination of her employment given her eleven years of satisfactory work at Golden Harvest. Mitigation is warranted under these facts. Given the totality of the circumstances, the punishment of dismissal was disproportionate to the offense. This grievance is granted in part and denied in part.

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 was employed for eleven years as a Certified Nursing Assistant ("CNA") at Golden Harvest, a long-term nursing care facility of the Hospital, operated by the DHHR. Grievant's personnel record was not introduced into evidence and there was no testimony concerning her past work performance.

2. Ms. Linda Miller is employed at Golden Harvest as a CNA and has worked at the facility for approximately 19 years. Director of Nursing Mark Simpson testified that Ms. Miller is one of the facilities' best CNAs.

3 On the early morning of May 7, 2011, while working at Golden Harvest, Ms. Miller noted two small black trash bags on top of a water pitcher cart. Ms. Miller looked into the bags and found that one contained six cans of unopened Sprite, three loose cans of unopened ginger ale and two cups of yogurt. The other bag contained approximately one dozen sandwiches and fruit cups from the facility.

4. The yogurt belonged to a patient/resident ("P.T.") of the facility. Ms. Miller recognized that the yogurt was the brand that P.T. preferred, which Golden Harvest did not stock or distribute to the residents. It had distinctive coloring, which allowed Ms. Miller to identify it as belonging to P.T.

5. P.T.'s yogurt, purchased by her family, was marked with her initials when brought in and stored in the resident's refrigerator in a room referred to as the "Kitchenette." [2]

6. P.T.'s mental status was such that she would not have known whether her yogurt was missing. P.T. was an elderly patient in the last stages of life and very dependent on staff.

7. Shortly after finding the bags, Ms. Miller called them to the attention of Ms. Avantha Porterfield, CNA. Ms. Miller testified that Ms. Porterfield looked into the bags.

8. Contrary to Ms. Miller's assertion, Ms. Porterfield did not look into or open either bag. She merely felt the contents of one of the small trash bags, through the plastic,

[2] The record was not entirely clear on this matter, but there did not seem to be a formal inventory made of the residents' incoming food or drink.

and believed that there were sandwiches in the bag because they “felt like” sandwiches. Ms. Porterfield did not report or complain to anyone about the presence of the bags.

9. Ms. Miller did not secure the bags. Rather, she left them in the Kitchenette to see who would retrieve them.

10. Approximately a half-hour after leaving the bags, Ms. Miller observed Grievant exiting the unit with a black bag or bags. Ms. Miller’s testimony concerning the number of bags Grievant carried was uncertain.

11. At some time after Grievant was seen exiting the facility with the bag(s), Ms. Miller and Ms. Porterfield saw the bag(s) next to Grievant’s car in the parking lot of the facility. Neither looked at the contents of those bag(s).

12. In the intervening period between when Ms. Miller left the bags which she had found on the water cart, and when she saw the black bag(s) in the parking lot, someone removed the bags from the Kitchenette.

13. There are inconsistencies in the record regarding: the make, model and color of Grievant’s car parked in the lot that day; the number of small black bags carried by Grievant; and the number of bags near her car in the parking lot. Ms. Miller’s testimony, in particular, lacked specificity as to the description of Grievant’s car. Additionally, Ms. Miller’s recollection of the number of bags being carried by Grievant when she exited the facility was uncertain.

14. Neither Ms. Miller nor anyone else saw Grievant enter or exit the Kitchenette, with or without bags, at any time during the morning of May 7, 2011.

15. Neither Ms. Miller nor Ms. Porterfield could identify the bag or bags in the parking lot as the same bags they had seen in the Kitchenette.

16. Ms. Miller reported the bags and their alleged removal by Grievant to Ms. Vicki Hess, R.N., who did not make a report of the incident. When Ms. Miller next returned to work, she was upset to learn that no action had been taken on her report, so she took it upon herself to go directly to Social Worker Stacie Mullins concerning the incident.

17. An investigation then ensued by the administration at Golden Harvest. Chief Nursing Officer Mark Simpson, Director of Nursing Michelle Bishop and Social Worker Stacie Mullins were part of the investigating team. Statements were taken from employees who had knowledge of the events in question. Those who investigated this matter did not require witnesses who did not appear at the level three hearing to provide their own written, sworn statements. However, in most instances, the investigators had the witnesses sign a statement which the investigators had prepared, summarizing what the witnesses had observed.

18. As a part of the investigation, Ms. Jessica Kennedy, CNA, who was working at Golden Harvest on the morning of the incident, signed a statement taken by Ms. Bishop. The statement indicated that Ms. Kennedy saw a plastic bag under Grievant's car on the morning of May 7, 2011, but did not know what the bag contained. It was not a sworn statement and Ms. Kennedy did not testify at the level three hearing because she had moved. Respondent did not indicate where she had moved. This statement was hearsay.

19. Respondent also took a "telephone statement" from employee Ms. Etta Farley, CNA, on May 25, 2011 which read as follows: "Etta stated that she did see a bag at Michelle Hamilton's car but did not know what was in the bag. Etta stated that Michelle told her, 'I'm taking these pops,' and handed Etta a bag to put on the cart in the kitchenette. Etta stated that Michelle told her that the bag contained expired sandwiches

and pop. Etta stated she did not open the bags to check the contents." There was no note of the date upon which this alleged exchange between Grievant and Ms. Farley took place. The statement is signed by members of the investigating team, but not by Ms. Farley.[3] Ms. Farley was not interviewed in person when giving this statement, but was on the telephone with the signators. Ms. Farley did not report this incident to anyone at the time it occurred. Ms. Farley did not testify at the level three hearing. Respondent indicated that Ms. Farley had moved and was no longer working at Golden Harvest. The telephone statement is hearsay.

20. At the conclusion of the investigation, Grievant was dismissed by letter dated June 6, 2011, from Chief Financial Officer Johnny Brant, which stated that, " . . . you were observed removing 2 trash bags from the Golden Harvest Unit which contained sandwiches, sodas and a resident's . . .yogurt (2) cups." The letter further documented Grievant's statement in her June 6, 2011, predetermination hearing that, " . . . you had told them that you had taken (4) pop cans and did not know what the difference was between taking four cans and a trash bag full."[4] The letter also noted that, "You [Grievant] further stated that you did not take anything from residents, that you had in fact bought things for them."

21. Mr. Mark Simpson testified that the hospital had "a zero tolerance policy for resident abuse or misappropriation of residents' funds."[5] Respondent did not refer to a written

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[3] Level Three Hearing- Respondent's Exhibit No. 5.

[4] Level Three Hearing- Respondent's Exhibit No 1.

[5] It is noted that Federal and W. Va. State laws define abuse as the willful infliction of injury, unreasonable confinement, intimidation or punishment with resulting physical harm or pain or mental anguish, inappropriate use of restraints, or the deprivation of goods or services that are necessary to attain or maintain physical, mental or psychological well-being. 42 C.F.R. §483.13(b). 69 CSR 1, *et. seq.*

policy documenting same. He further testified that removal, even of just the bags and or cans, would not be tolerated.

22. There was no formal policy by Golden Harvest to recycle aluminum cans. Therefore, they were put in the trash. However, the cans were not always disposed of in the trash. An employee who was an LPN at Golden Harvest placed a large box, lined with a garbage bag, in the employee lounge.[6] Cans were deposited into the box and the employee removed them from the facility.[7]

23. The staff regularly checked sandwiches to determine whether they were expired and disposed of them.

24. Grievant testified that other employees, including Ms. Pamela Guella, sometimes took expired sandwiches home to feed to her dog. Ms. Guella did not testify or provide a statement and is no longer working at Golden Harvest. Grievant saw a bag of expired sandwiches on the cart on May 7, 2011, but did not take them. Grievant had never taken sandwiches for any reason. She did not feed stray animals and did not have a dog or cat.

25. While cleaning out the resident's refrigerator, Grievant found four frozen soda cans in the residents' freezer on the date of the alleged misappropriation. The frozen

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[6] The LPN's name may have been Marlene Vance. However, due to the inaudibility of record below, she will hereinafter be referred to as the "LPN."

[7] Grievant took a photo of the large box in which empty soda cans were collected and removed from the premises by another employee of Golden Harvest and requested its admission into evidence to show that recycling was allowed by Respondent at the facility. Grievant specified that she took the photo on May 18, 2011, the date of her Predetermination Hearing, in the employees' lounge, with the camera on her phone. Respondent objected to admission of the photo into evidence on the basis that it had not been properly authenticated. The objection was over-ruled. Grievant properly authenticated the photo of this recycling box at Golden Harvest. *See, State of W. Va., Plaintiff Below, Respondent v. H.M.B., Defendant Below, Petitioner,* No. 11-0941 WV Supr. Ct. of App. 5/29/12, Memorandum decision.

soda had broken the cans open. She removed them and put them in a bag. On the morning of the incident, the recycling box was not in the employee lounge because the LPN had removed it. Grievant said that she told Ms. Etta Farley, who was with her, that she would take the cans and give them to someone who collected them. Grievant admitted to taking those four empty or broken soda cans in a black trash bag, which belonged to Golden Harvest, to her car on May 7, 2011. Grievant did not place the bag inside her car or trunk, but left it outside, because she thought the cans might be wet or leaking.

26. Approximately 40 employees who worked at Golden Harvest had access to the Kitchenette where the food and soda were stored and allegedly found.[8]

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden of proof 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. Dep't of Health,* Docket No. H-88-005 (Dec. 6, 1988). A preponderance "is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it." *Petry v. Kanawha County Bd. Of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). "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. Health and 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.*

[8] Level Three Hearing - Testimony of Ms. Stacie Mullins.

Respondent alleges that Grievant's employment was terminated for abuse and misappropriating property of the facility and resident P.T. The allegations against Grievant are certainly serious. If theft of these items is proven, Grievant's actions cannot be condoned. However, termination is an extremely serious penalty and Respondent is charged with putting forth a sufficient case to prove the charges against the Grievant. The dismissal letter specifically stated that Grievant was " . . . **observed removing 2 trash bags** from the Golden Harvest Unit **which contained sandwiches, sodas and a resident's . . .yogurt** (2) cups." (Emphasis added.)[9] However, there was no testimony or evidence supporting the accusation that Grievant was actually "observed" removing bags with the contents described.

Grievant asserts that Respondent has failed to meet its burden of proof because there is no direct evidence that Grievant misappropriated food and soda belonging to the Facility or P.T. Grievant contends that Ms. Miller's testimony that Grievant removed food and drinks from the Kitchenette is based upon pure supposition and speculation rather than observation. Grievant asserts that, apart from she herself, no one could testify to direct knowledge of the contents of the small trash bag that she removed.

Respondent's evidence against Grievant consists of eyewitnesses to the events of the morning of May 7, 2011. Respondent asserts that, taken together, these witnesses establish the alleged violation by Grievant. Two of the witnesses upon whom Respondent relies to make its case did not appear at the hearing - Ms. Farley and Ms. Kennedy. The admissibility of the written statements that were taken by Respondent from these two

[9] Level Three Hearing - Respondent's Exhibit No. 1.

witnesses is at issue, given that said statements were not in affidavit form and/or were unsigned by the declarants. As such, they are clearly hearsay.

According to her telephone statement, Ms. Farley was evidently the only witness with purported first-hand knowledge of the alleged misappropriation. Thus, Ms. Farley's testimony at the level three hearing, or her signed affidavit, averring that Grievant told her that she (Grievant) was taking "pop" and "expired sandwiches," could have been very significant to Respondent's efforts to establish Grievant's violation. However, as critical as that purported testimony might have been to justify Grievant's termination, Respondent did not provide a signed or sworn statement from Ms. Farley. Even if that statement had been signed and sworn, it raises important questions that remain unanswered due to Ms. Farley's absence and/or her abbreviated statement.[10] Moreover, Grievant was not afforded the opportunity to examine Ms. Farley.

An administrative law judge must determine what weight, if any, is to be given to hearsay evidence in a disciplinary proceeding. *Warner v. Dep't of Health and Human Resources,* Docket No. 07-HHR-409 (Nov. 18, 2008); *Miller v. W. Va. Dep't of Health and Human Resources,* Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ.,* Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996). The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed or in affidavit form; 3) the agency's explanation for

[10] Notably, the statement did not indicate, to Ms. Farley's knowledge, whether the soda cans Grievant allegedly took were: from the freezer; broken from freezing; or full or empty. Additionally, the investigators apparently did not explore details concerning the sandwiches.

failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements.[11] *Gunnells v. Logan County Bd. of Educ.,* Docket No. 97-23-055 (Dec. 9, 1997); *Sinsel v. Harrison County Bd. Of Educ.,* Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dept. of Health/Kanawha-Charleston Health Dep't,* Docket No. 90-H-115 (June 8, 1990).

In applying these factors to determine what weight, if any, should be afforded to Ms. Farley's telephone statement, it has already been noted that the declarant's out of court statement was neither signed nor in affidavit form. Also, it was contradicted, in significant part, by the testimony of Grievant. Finally, beyond stating that Ms. Farley had moved, the agency did not explain its failure or inability to obtain a sworn statement. The undersigned therefore determines that Ms. Farley's "telephone statement" is entitled to no weight.

In addition, as a part of its proof, Respondent sought to use the signed, unsworn statement of Ms. Kennedy. Her statement, which was prepared by the investigating team, reflected that she had seen a plastic bag under Grievant's car on the morning in question, but did not know what the bag contained. Ms. Kennedy did not testify at the level three hearing because she had moved. This statement is also hearsay. However, the declarant signed it and there is no evidence to contradict it. Grievant admitted that she put a bag

[11] The Unites States Merit System Protection Board Handbook ("MSPB Handbook") set forth these factors for consideration when assessing hearsay. *See Borninkhof v. Department of Justice,* 5 MSBP 150 (1981).

next to her car, which collaborates the Ms. Kennedy's testimony. Therefore, the undersigned finds that Ms. Kennedy's is entitled to some weight.

Respondent contends that Ms. Porterfield, in addition to Ms. Miller, viewed the contents of the bags while in the Kitchenette. However, the evidence does not support this contention. Ms. Miller said Ms. Porterfield looked into the bags and Ms. Porterfield denied doing so. Given that Ms. Porterfield had no apparent motive to be untruthful concerning this matter, Ms. Porterfield's recollection of her own acts is deemed more trustworthy and credible. She "felt" one of the bags and her belief that it contained sandwiches is credible, given that she had handled many sandwiches. But this was still supposition on Ms. Porterfield's part, as she did not actually see the contents of either bag. Thus, the credibility of Ms. Miller's testimony is of paramount importance in proving Respondent's allegations. She was the sole witness to what the bags in the Kitchenette contained and to Grievant's exit from the facility with a bag or bags.

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. In addition the ALJ should consider: 1) the absence of bias, interest or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's statement. *See Holmes v. Bd. of Directors / W. Va. State College* Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue v. Dep't. of Health & Human Res./Huntington State Hosp.,* Docket No. 93-HHR-050 (Feb. 4, 1994).

Accordingly, the undersigned made note of Ms. Miller's demeanor. Firstly, the undersigned understands that Ms. Miller is considered to be a very fine employee.

However, Grievant and Ms. Miller were not on good terms before this incident and Ms. Miller appeared to have some potential bias against Grievant. Grievant believed that because of this bias, Ms. Miller was untruthful in making the allegations against her. It is noted that the other employees at the Facility did not have the same zealous concern about the bags that Ms. Miller had. Apparently, neither Ms. Porterfield nor Ms. Kennedy were concerned or curious enough to look into the bag(s) and/or to report seeing them. In addition, Ms. Hess, the RN, did not report the incident. The apparent reluctance of the employees, who knew of the bags, to investigate the contents of those bags and/or to later report the incident is both unusual and significant. If they had believed there was abuse or misappropriation, it was incumbent upon them under state regulations to report it. Thus, it is reasonable to conclude that their suspicions were not aroused, and they did not feel the need to pursue Ms. Miller's inquires concerning the bags. It is solely Ms. Miller's testimony supporting Respondent's allegation of misappropriation of the soda and food and her testimony is directly controverted by Grievant. For the foregoing reasons, Ms. Miller's testimony lacks credibility.

Finally, assuming the bags contained the items described by Ms. Miller, approximately 40 employees who worked at Golden Harvest had access to the Kitchenette and could have taken the bags containing the food and soda.

In *Overbee v. W. Va. Dept. of Health and Human Resources/Welch Emergency Hospital,* Docket No. 96-HHR-183 (Oct. 3, 1996)**,** an eyewitness had seen grievant, Ms. Overbee, take a bag with rolls of toilet tissues, unused garbage bags and empty pop cans to her car and drive away. This incident was reported, and Ms. Overbee was watched. Garbage bags were marked to identify them as property of the hospital, and Ms. Overbee

was apprehended with those bags and empty soda cans. Immediately after she was apprehended, Ms. Overbee confessed that she had taken other items from the hospital on at least two previous occasions. She pleaded for leniency, but was terminated. Significantly, the ALJ in *Overbee* recognized and validated the hospital's concern that the grievant would steal again if retained in her position. In that connection, the ALJ noted that Ms. Overbee responded that she would "take the fifth" when asked if she had stolen other items from the hospital, beyond those to which she had previously admitted. The ALJ found that the hospital's concerns about further larceny were well founded under those circumstances. The uncontroverted evidence against Ms. Overbee supported the extremely serious measure of termination and mitigation was not warranted.

In contrast to the proof in *Overbee,* there is no direct evidence against Grievant in this matter. No one saw Grievant pick up the bag(s) from the Kitchenette and take them to her car. No one inspected the contents of the bags at the car. There was no admissible evidence that Grievant confessed to anyone that she had taken the food or soda. Rather, the evidence against Grievant is circumstantial. Grievant, in the instant case, need not have been "caught in the act" like grievant Ms. Overbee, to prove the allegations against her. Sufficient evidence is not limited to direct evidence but may also be circumstantial. See, e.g., *United States v. Crockett,* 813 F.2d 1300 (4th Cir. 1987). The circumstantial evidence in the instant grievance is simply insufficient to support Respondent's accusations concerning theft of the sandwiches, drinks and yogurt.

It is undisputed that Grievant took a bag and cans from Golden Harvest. Mr. Simpson testified that the hospital had "zero tolerance for abuse or misappropriation of funds" and that removal of only the bags and/or cans was not to be tolerated. The

Grievance Board recently addressed a zero tolerance policy and its application in *Matney v. Dep't of Health & Human Res.,/Welch Community Hospital,* Docket No. 2011-0972-DHHR (March 30, 2012). The Grievance Board determined that the hospital's zero tolerance practice, in that instance, was not in writing and was too vague for an employee to know how to adjust his conduct to avoid its consequences. The Grievance Board further decided that "the zero tolerance practice was inconsistent with the West Virginia Supreme Court's rulings that tenured employees may only be terminated for good cause." *See Syl. Pt. 4, Waite v. Civil Service Commission,* 161 W. Va. 154, 24 S.E.2d 164 (1997). Grievant, as a tenured state employee, has a property interest in her employment. *Perry v. Sinderman*, 408 U.S. 593 (1972), cited in *Jones v. Nicholas County Bd. of Educ.,* Docket No. 92-34-305 (July 28, 1993), *aff'd,* Nos. 93-AA-213, 94-AA-76 (Kanawha County Cir. Ct. Apr. 5, 1995).

Mr. Simpson did not refer to any particular written policy setting forth the zero tolerance of the Facility relating to termination for abuse or misappropriation. Whether written or not, this policy was not uniformly followed with regard to the disposal of the cans. The Facility did not require its aluminum cans to be recycled. Therefore, these cans were presumably unwanted by Golden Harvest. In the absence of a clear policy advising employees against the recycling of cans, Grievant reasonably believed that she could recycle them because the Facility allowed another employee to do so. The fact that Grievant did not hide the bags in her car but left them outside in plain view, for over an hour, is a good indication that she was unconcerned about others seeing them and did not think she had done anything wrong. The undersigned finds that Respondent's zero tolerance policy, as it applied specifically to the misappropriation of empty cans, was not

clearly articulated or published to the employees of Golden Harvest. Moreover, it was not uniformly or equitably applied to all. It was clearly arbitrary and capricious and an abuse of discretion on the part of Respondent to allow one employee to take cans without any penalty at all and to terminate Grievant for the same action.

Respondent has failed to prove that Grievant misappropriated any of the items alleged other than one small black trash bag. To justify termination, Respondent must demonstrate that Grievant, a longstanding employee of the Facility, engaged in misconduct 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 the 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 Serv. Comm'n,* [175 W. Va. 279, ___,] 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). If Respondent had proven that Grievant had misappropriated the food and drink of the Facility and a resident, that might very well have constituted misconduct justifying immediate termination. However, the taking of one small trash bag, under these particular circumstances, cannot be construed as misconduct of a substantial nature. Unlike the grievant in *Overbee*, *supra.,* who admitted to taking hospital supplies for use at her home, Grievant did not take the trash bag for her own personal use. Rather, the bag was simply used by Grievant to

remove the cans to her car. The cans and the bag into which they were placed would have been viewed by the Facility as trash if the bag had been disposed of in a trash can inside the Facility by Grievant. Instead, Grievant elected to remove the broken, leaky cans from the premises to recycle. Thus, taking the bag would appear to be a mere technical violation, without wrongful intention to misappropriate property, on the part of Grievant. Grievant bears the burden of showing that the penalty of dismissal was too severe or was an abuse of discretion. An allegation that a disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ.,* Docket No. 94-01-394 (Jan. 31, 1995); *see also, Martin v. West Virginia Fire Commission*, Docket No. 89-SFC-145 (Aug. 8, 1989). Grievant demonstrated that her misconduct was not of a substantial nature and that there was an inherent disproportion between her offense and the personnel action taken.

Though Grievant has demonstrated that her misconduct was not of a substantial nature, which would justify immediate termination, she has admitted to taking the bag from the hospital. This violation justifies a penalty, but one that is less severe. "Whether to mitigate punishment imposed by the employer depends upon 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 work record of a

long-time tenured state employee is a factor to be considered in determining whether "good cause" exists for discharging the employee in cases of misconduct. *See Blake v. Civil Service Commission,* W. Va., 310 S.E.2d 472 (1983); *Serreno v. West Virginia Civil Service Commission*, W. Va., 285 S.E.2d 899 (1982).

Applying the criterion for mitigation to the facts of the instant grievance dictates that the Grievant's penalty should be mitigated. The first area of inquiry is Grievant's work history. The Grievant's personnel record and work history were not addressed in the record below. However, her long tenure there indicates that her performance was acceptable. Respondent apparently did not consider Grievant's tenure of eleven years of service at Golden Harvest when it terminated her employment. If there was any past misconduct or a violation of the rules in the workplace by the Grievant, Respondent did not indicate that in its letter of dismissal, or in the record below. It is noted that "[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 prospect of rehabilitation." *Overbee v. W. Va. Dept. of Health and Human Resources/ Welch Emergency Hospital,* Docket No. 96-HHR-183 (Oct. 3, 1996).

The Respondent's zero tolerance policy on misappropriation was given as the reason for termination, which practice did not allow Grievant's employment history to be weighed against Grievant's admitted, technical infraction of taking one small trash bag. She was, thus, terminated without good cause in violation of her due process rights. Mitigation of the punishment is warranted under these circumstances. After weighing the

foregoing mitigating factors, the undersigned finds that a two-day suspension of Grievant is a proper penalty.

Because Respondent failed to prove that there was good cause to terminate Grievant's employment, the grievance is GRANTED in part and DENIED in part.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden of proof 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. Dep't of Health,* Docket No. H-88-005 (Dec. 6, 1988). A preponderance "is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it." *Petry v. Kanawha County Bd. Of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). "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. Health and 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.*

2. An administrative law judge must determine what weight, if any, is to be given to hearsay evidence in a disciplinary proceeding. *Warner v. Dep't of Health and Human Resources,* Docket No. 07-HHR-409 (Nov. 18, 2008); *Miller v. W. Va. Dep't of Health and Human Resources,* Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ.,* Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996). The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed or in affidavit form; 3) the

agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants account with other information; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements.[12] *Gunnells v. Logan County Bd. of Educ.,* Docket No. 97-23-055 (Dec. 9, 1997); *Sinsel v. Harrison County Bd. Of Educ.,* Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dept. of Health/Kanawha-Charleston Health Dep't,* Docket No. 90-H-115 (June 8, 1990). The unsigned, unsworn statements, which Respondent sought to use as proof of Grievant's violation of policy, were of limited evidentiary value.

3. An employer must also demonstrate that misconduct which forms the basis for the dismissal of a state employee is of "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 the 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 Serv. Comm'n,* [175 W. Va. 279, ___,] 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.

[12] The Unites States Merit System Protection Board Handbook ("MSPB Handbook") set forth these factors for consideration when assessing hearsay. *See Borninkhof v. Department of Justice,* 5 MSBP 150 (1981).

Va. 1965);" *Scragg v. Bd. of Dir./W. Va. State College,* Docket No. 93-BOD-436 (Dec. 30, 1994).

4. Grievant, as a tenured state employee, has a property interest in her employment. *Perry v. Sinderman*, 408 U.S. 593 (1972), cited in *Jones v. Nicholas County Bd. of Educ.,* Docket No. 92-34-305 (July 28, 1993), *aff'd,* Nos. 93-AA-213, 94-AA-76 (Kanawha County Cir. Ct. Apr. 5, 1995). Tenured employees may only be terminated for good cause." *See Syl. Pt. 4, Waite v. Civil Service Commission,* 161 W. Va. 154, 24 S.E.2d 164 (1997).

5. The work record of a long-time tenured state employee is a factor to be considered in determining whether "good cause" exists for discharging the employee in cases of misconduct. *See Blake v. Civil Service Commission,* W. Va., 310 S.E.2d 472 (1983); *Serreno v. West Virginia Civil Service Commission*, W. Va., 285 S.E.2d 899 (1982).

6. Respondent's zero tolerance policy or practice did not allow Grievant's long and satisfactory employment history to be weighed against the nature of the infraction of the policy and therefore resulted in the termination of her employment without a determination of good cause in violation of Grievant's due process rights. *Blake, supra.; Serreno, supra; and Buskirk, supra.*

7. Given the totality of the circumstances surrounding the policy violation, and Grievant's long, satisfactory tenure with the Respondent, Respondent failed to prove by a preponderance of the evidence that there was good cause to terminate Grievant's employment.

8. "Whether to mitigate punishment imposed by the employer depends upon 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). In assessing the penalty to be imposed, "whether to mitigate punishment imposed by the employer depends upon 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).

Accordingly, the grievance is GRANTED in part and DENIED in part. Respondent is ordered to immediately reinstate Grievant with all benefits and back pay, plus statutory interest, minus two days of pay at her daily rate, for which she is suspended.

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 (eff. July 7, 2008).

DATE: September 6, 2012

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SUSAN L. BASILE
ADMINISTRATIVE LAW JUDGE