**THE WEST VIRGINIA PUBLIC EMPLOYEES**
**GRIEVANCE BOARD**

**SANDY GRIMES,**
**Grievant,**

**v.** **Docket No. 2011-1273-WVU**

**WEST VIRGINIA UNIVERSITY,**
**Respondent.**

## DECISION

Grievant, Sandy Grimes, filed this grievance against her employer, West Virginia University, on March 2, 2011. She alleges wrongful termination and defamation of character. She seeks to have her employment reinstated and to be made whole in every respect, including back pay of wages/benefits plus interest, restore good reputation among co-workers and clients. This grievance was denied by Decision dated May 12, 2011, following a level one conference. Level two mediation was conducted on August 26, 2011. Appeal to level three was perfected on September 8, 2011. A level three hearing was conducted before the undersigned Administrative Law Judge on January 31, 2012, in the Grievance Board's Westover office location. Grievant appeared in person and by her representative, Diane C. Parker, Laborers' Local 814. Respondent appeared by its counsel, Samuel R. Spatafore, Assistant Attorney General. This matter became mature for consideration upon receipt of Respondent's fact/law proposals on March 2, 2012. Grievant did not file proposals.

## Synopsis

Grievant was employed as a Dental Assistant in the Office of Clinic Administration at the West Virginia University School of Dentistry. Grievant was terminated for multiple violations of the Health Insurance Portability and Accountability Act. Respondent was able to meet its burden of proof and demonstrate that Grievant's termination was justified.

The following findings of fact are based upon the record developed at level three.

## Findings of Fact

1. Grievant was employed as a Dental Assistant in West Virginia University's School of Dentistry.

2. Grievant received training on the Health Insurance Portability and Accountability Act ("HIPAA") each year. HIPAA pertains to any information collected in support of patient care, including name, demographics, billing, etc.

3. Grievant was cautioned that a HIPPA violation could result in termination of employment.

4. Grievant's supervisor, Donna Haid, is the Director of Clinical Education and Patient Care and the School of Dentistry Compliance Officer. Ms. Haid indicated that Grievant's high annual scores on HIPAA training demonstrated that she was aware it was impermissible to access any patient information without prior written authorization.

5. On February 9, 2011, Grievant advised a Patient Account Analyst that she had accessed her son Jeremy's records to confirm receipt of an insurance payment. Since Jeremy was not a minor, the analyst had previously advised Grievant on two occasions that Jeremy would have to provide written authorization before the matter could be discussed

with her. Grievant was provided an authorization form for her son to complete, but it was not returned.

6. Grievant's unauthorized activity was reported to Ms. Haid. She reviewed patient access logs and confirmed that Grievant had accessed Jeremy's records on February 8, 2011.

7. Ms. Haid's investigation of Grievant's access of patient logs revealed that Grievant had accessed the patient records of Jeremy, records of her husband, and the records of three different Joseph Flemings on thirty-six separate occasions. Each of the incidents was a separate HIPAA violation.

8. Grievant acknowledged that it was her responsibility to receive prior written authorization prior to accessing the patient records.

**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 Bd. 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 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). In other words, "[t]he 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. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Respondent asserts that Grievant's breach of patient confidentiality was gross misconduct. West Virginia University Discipline Policy states that insubordination is considered gross misconduct and that a single act of gross misconduct can result in immediate termination. For Grievant's action to constitute gross misconduct, it must be flagrant or willful. The undersigned concludes that Grievant was involved in accessing patient information which violated HIPAA. Grievant was aware of the HIPAA policy and had received yearly training that such patient information could not be accessed without written authorization from the patient. Grievant was warned that a violation of HIPAA could result in termination of employment. Grievant acknowledged that she was aware of all HIPAA policies and procedures. She admitted that it was her responsibility to obtain prior written authorization before accessing patient records. In summary, Grievant willfully and intentionally accessed confidential patient information in violation of HIPAA policies and procedures. Grievant's actions constituted gross misconduct.

The following conclusions of law support the decision reached.

**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 Bd. 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No.

96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

2. Respondent has proven by a preponderance of the evidence that Grievant committed numerous breaches of patient confidentiality, in violation of HIPAA, and these actions constituted gross misconduct.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

**Date: March 28, 2011**

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**Ronald L. Reece**
**Administrative Law Judge**