THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

NOLA LILLY,
Grievant,

v. **Docket No. 2011-1723-CONS**

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

DECISION

Grievant, Nola Lilly, filed a grievance against Respondent on March 9, 2011. That grievance was Docket No. 2011-1294-DHHR. The statement of grievance reads, "Suspension without good cause." As relief, Grievant seeks: "To be made whole, including back pay with interest and restoration of all benefits." On May 20, 2011, Grievant filed another grievance, Docket No. 2011-1706-DHHR. The statement of grievance reads, "Suspension & docked pay without good cause." As relief, Grievant seeks: "To be whole including back pay with interest & restored benefits." On both grievances, Grievant elected to file directly to level three of the Public Employees Grievance Procedure in accordance with WEST VIRGINIA CODE § 6C-2-4(a)(4).

Grievant was represented by Gordon Simmons, UE Local 170, WV Public Workers Union. Respondent was represented by James "Jake" Wegman, Assistant Attorney General. On May 20, 2011, Grievant filed a Motion to Consolidate Pending Grievances.

The Motion was granted by Order of Consolidation on June 2, 2011. A level three hearing was held before the undersigned on November 1, 2011, in Beckley, West Virginia. This matter became mature for decision upon final receipt of the parties' proposed findings of fact and conclusions of law on December 12, 2011.

Due to mechanical failure none of the testimony taken at the level three hearing was recorded. The undersigned held a recorded telephone conference on November 16, 2011 to discuss the issue. Attending the conference call was Mr. Simmons, Grievant's representative, and Mr. Wegman, Attorney for Respondent. Following the conference, the parties agreed to proceed with the record as is without reconvening and rehearing the grievance.[1] The lack of a recording of the level three hearing in no way affects the parties' appeal rights.

Synopsis

Grievant, a Laundry Worker for Respondent, is the chief steward for the hospital's chapter of the West Virginia Public Workers Union, UE Local 170. Respondent asserts that it followed progressive discipline when it suspended Grievant for one day for her first offense of leaving the worksite without prior authorization and for three days for her second offense of leaving the work area without authorization for time beyond her permitted break time. Grievant asserts that because both occurrences of Grievant being away from the worksite or work area without authorization involved union activity, that Grievant's discipline was retaliatory.

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[1]Grievant agreed to proceed by email dated November 17, 2011. Respondent agreed to proceed by email dated November 18, 2011.

Findings of Fact

1. Grievant is employed by Respondent, Jackie Withrow Hospital, as a Laundry Worker. She is also the chief steward for the hospital's chapter of the West Virginia Public Workers Union, UE Local 170.[2]

2. On February 9, 2011, Grievant was asked by a coworker, Dwight Ricks, to attend his grievance proceeding beginning that same day at 10:00 a.m.

3. On February 9, 2011, Grievant left the hospital facility without supervisor approval or knowledge, and without clocking out at the hospital's time clock for approximately one and one half (1.5) hours to attend Mr. Ricks' grievance proceeding.

4. Dwight Ricks' grievance form lists Gordon Simmons as his representative. Grievant is not listed as a representative anywhere on Mr. Ricks' grievance form.

5. Mr. Ricks' representative, Mr. Simmons, was present at Mr. Ricks' grievance proceeding.

6. Grievant was not subpoenaed to be a witness at Mr. Ricks' grievance proceeding. Grievant did not file a Notice of Appearance on behalf of Mr. Ricks.

7. If Grievant would have asked permission to attend the hearing as Mr. Ricks' representative or had been subpoenaed as a witness, Respondent would have let Grievant attend Mr. Ricks' grievance proceeding.[3]

8. Grievant did attempt to call her direct supervisor, Alice Harris, after being approached by Mr. Ricks, to ask permission to attend his grievance proceeding. Grievant

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[2]Level three hearing testimony of Grievant.

[3]Level three hearing testimony of Angela Booker, CEO for Respondent, and Alice Harris, Housekeeping Supervisor.

did not reach Ms. Harris and did not leave a voice message.[4]

9. On February 28, 2011, a predetermination conference was held with Grievant, Ms. Harris, Angela Booker, CEO for Respondent, and Aimee Bragg, Human Resources (HR) Director, in attendance. The purpose of the conference was to inform Grievant that disciplinary action was being considered, and to give Grievant an opportunity to explain the circumstances involved.

10. During the predetermination conference Grievant stated "I can see a written notice because of not getting authority to leave but my understanding is you are paid for that grievance if you are already on the clock. Gordon stated that he needed me as a co–something or the other, I can't remember how he said it maybe co respondent or representative consider a write up for file instead of suspension."[5]

11. Mr. Simmons is not an employee of DHHR, and has no supervisory authority over Grievant in her employment for Respondent as a Laundry Worker.

12. Grievant was not authorized to leave the worksite for Mr. Ricks' grievance proceeding.

13. Grievant was notified by suspension letter dated March 8, 2011, of Respondent's decision to suspend her without pay for one (1) working day. The letter also stated, in part:

> This suspension is based on your actions on February 9, 2011, when you left the facility premises without supervisor approval or knowledge and without clocking out on the facility's time clock, at approximately 9:45 am and were away from the worksite for approximately one and one half (1.5) hours.

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[4]Level three hearing testimony of Grievant.

[5]See Respondent's Exhibit No. 1, March 8, 2011 suspension letter.

> ...
> Should you incur another violation or exhibit behavior of a similar nature, that failure on your part will be grounds for further disciplinary action up to and including dismissal from employment.

14. Employees at Respondent's hospital facility receive two 15 minute breaks and one 30 minute lunch. Combining break time is not permitted at the hospital.

15. On April 19, 2011, Grievant was unable to take her 15 minute morning smoke break or 30 minute noon lunch break due to a backlog of laundry accumulated from machines being inoperable on previous days. In the early afternoon, Grievant notified her supervisor, Ms. Harris, that she would be taking her break. Grievant did not specify whether it would be a 30 minute or 15 minute break.

16. Grievant took her break in the conference room. Another employee, Clifford Taylor, was in the conference room as well. Grievant overstayed her break. Grievant was on break for longer than 30 minutes.

17. John Thompson, union field organizer, was in the conference room on April 19, 2011, to discuss and answer questions about any pending grievances against Respondent.

18. Grievant did not notify Supervisor Harris that she was taking her break to meet with a union organizer. Grievant did not request to take annual leave to extend her break with the union organizer. Grievant did not ask Supervisor Harris if she could combine her lunch break and 15 minute breaks to meet with the union organizer.

19. Mr. Taylor's supervisor asked CEO Booker to find out how long Mr. Taylor had been on his break in the conference room.[6] As a result, CEO Booker requested

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[6]Level three hearing testimony of CEO Booker.

Respondent's Information Technology Department (IT) to review a video camera recording[7] of the hospital facility hallway. The video camera records the hallway, not inside the conference room. From the video camera, the conference room door can be seen.

20. On April 20, 2011, Calvin Woolwine, Clinical Applications Specialist for Respondent, emailed[8] HR Director Bragg stating what times Mr. Taylor entered and exited the conference room. Mr. Woolwine also stated that Grievant went in the conference room at "1:57:58 and exited at 2:40:41." The email's subject line read: DVR.[9]

21. On April 26, 2011, Grievant attended a predetermination conference with Supervisor Harris, HR Director Bragg, and CEO Booker, regarding a suspension for overstaying her break without prior authorization.

22. Grievant was notified by suspension letter dated May 10, 2011, of Respondent's decision to suspend her without pay for three (3) working days. The letter also stated, in part:

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[7]Through pre-hearing discovery, Grievant requested a copy of the video recording. Unfortunately, before the Information Technology Department was notified of the request, the recording had been deleted and recorded over as is regular practice by Respondent. Respondent had Calvin Woolwine available to testify at the level three proceeding as to what he saw when he reviewed the recording. However, because Mr. Woolwine was not on Respondent's witness list submitted prior to the hearing, Grievant objected to Mr. Woolwine providing testimony. Grievant asserted that she was unable to prepare for this witness due to Respondent's failure to include Mr. Woolwine on the procedurally required witness list. Due to Grievant's objections and Grievant's inability to prepare for this witness without notice, the undersigned did not permit Mr. Woolwine to testify. Respondent's objection to the undersigned's ruling was noted on the record.

[8]Respondent's Exhibit No. 3, email from Mr. Woolwine dated April 20, 2011.

[9]Although Grievant objected to Mr. Woolwine testifying, she did not object to the admission of Respondent's Exhibit No. 3, the email from Mr. Woolwine stating what he had seen on the video recording.

> This suspension is based on your actions on April 19, 2011, when you extended your break from 2:00 p.m. and didn't return to the work area until approximately 2:45 p.m. This resulted in you overstaying your break by thirty (30) minutes. On April 20, 2011, in a discussion with your supervisor and the HR Director, you confirmed that you were aware that combining breaks and lunches [is] not a practice the facility allows, and you confirmed that you had never done so in the past. You also confirmed that you knew you had questions that you needed answered and you planned to work through your lunch so you would have time to get your answers. This was a unilateral decision that you made without authorization.
> ...
> After consideration of your predetermination conference responses, and because you stated you were away from your work area from approximately 2pm until 2:43 pm on a break, I have decided to proceed with your suspension from work and with the unauthorized leave of thirty minutes on April 19, 2011 for overstaying your break.[10]

23. At the predetermination conference, Grievant requested to be allowed to turn in annual leave for the time she overstayed her break. Because Grievant did not seek prior authorization for use of leave time, CEO Booker did not approve Grievant's retroactive request.[11]

24. Grievant's one day suspension issued March 8, 2011, and three day suspension issued May 10, 2011, were standard practice by Respondent pursuant to Section 12.3 of the Administrative Rule of the West Virginia Division of Personnel; DHHR Policy Memorandum 2108, Employee Conduct; and DHHR Policy Memorandum 2104, Guide to Progressive Discipline.

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

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[10]Respondent's Exhibit No. 2, May 10, 2011 suspension letter.

[11]*Id.*

preponderance of the evidence. W. VA. CODE § 29-6A-6; *Ramey v. W. Va. Dep't of Health,* Docket No. H-88-005 (Dec. 6, 1988). "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. W. Va. Dep't of Health &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.*

In addition to the West Virginia Division of Personnel's regulation stating that employees may be suspended "for cause," DHHR has a progressive disciplinary policy. Policy Memorandum 2104 provides:

> [Progressive discipline] is determined by the severity of the violation, progressive discipline is the concept of increasingly severe actions taken by supervisors and managers to correct or prevent an employee's initial or continuing unacceptable work behavior or performance . . . . Progressive and constructive disciplinary action will progress, if required, along a continuum from verbal warning to dismissal, with incremental steps between (i.e. verbal warning, written warning, suspension, demotion, dismissal). . . . It is important to remember, however, that the level of discipline will be determined by the severity of the violation.

Respondent asserts that it followed progressive discipline when it suspended Grievant for one day for her first offense of leaving the worksite without prior authorization and for three days for her second offense of leaving the work area without authorization for time beyond her permitted break time. Respondent asserts that Grievant willfully disobeyed or ignored clear instructions. Respondent asserts that Grievant was disciplined progressively for insubordinate actions. Grievant asserts that because both occurrences of Grievant being away from the worksite or work area without authorization involved union activity, that Grievant's discipline was retaliatory.

This Grievance Board has previously recognized that insubordination "encompasses

more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988) (*citing Weber v. Buncombe County Bd. of Educ.*, 266 S.E.2d 42 (N.C. 1980)). "[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).

Grievant admits that she did not inform Respondent that she was leaving the worksite on February 9, 2011, to attend Mr. Ricks' grievance proceeding. Grievant admits that she did not ask for prior authorization to leave. Respondent would have let Grievant attend the grievance proceeding if she had only requested prior authorization or even given her supervisor notice that she was leaving the worksite. It is not unreasonable for Respondent to require notice in order to adequately staff the facility during Grievant's absence. Grievant admitted at the level three hearing that she should have asked permission to attend Mr. Ricks' grievance proceeding.

Grievant also admits that she was aware that employees cannot combine their 30 minute lunch break with a 15 minute break. Grievant admits that she did not specify to her supervisor whether she was taking her 15 minute break or her 30 minute lunch break on April 19, 2011. Grievant did not notify her supervisor that the reason she was taking a break was to meet with a union organizer. Grievant testified at the level three hearing that when she looked at the clock in the laundry room that it read 2:03 p.m. when she left. She further testified that she was in the conference room meeting with the union organizer, Mr.

Thompson, until "eighteen till three." By Grievant's own testimony, she was on break for over 30 minutes.

Respondent has met its burden of proof in demonstrating that: Grievant knew of the policies prohibiting an employee from leaving the worksite without permission and the break time limits; Grievant intentionally left the worksite without permission or notification and took a break longer than 30 minutes; and, that the policies requiring prior authorization and/or notification are reasonable. Respondent's acts of administering Grievant a one day suspension for her first offense and a three day suspension for her second offense were in compliance with Section 12.3 of the Administrative Rule of the West Virginia Division of Personnel; DHHR Policy Memorandum 2108, Employee Conduct; and DHHR Policy Memorandum 2104, Guide to Progressive Discipline.

WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

> (1) That he engaged in protected activity (i.e., filing a grievance);
> (2) That he was subsequently treated in an adverse manner by the employer or an agent;
> (3) That the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
> (4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.,* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe*

Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986).

Grievant asserts that WEST VIRGINIA CODE § 6C-2-3 provides that "an employee representative shall be granted reasonable and necessary time off during working hours to attend grievance proceedings without loss of pay and without charge to annual or compensatory leave credits." Grievant points out that the statute also states that "an employee representative shall be granted time off during working hours, not to exceed four hours per grievance, for the preparation of the grievance without loss of pay and without charge to annual or compensatory leave credits."

Grievant is correct about the content of the statute. However, Respondent would have allowed Grievant to attend Mr. Ricks' grievance proceeding if she had been subpoenaed as a witness or if she had requested in advance to attend as a representative. Respondent did not discipline Grievant for participating in a grievance proceeding as a union chief steward. Grievant was suspended for one day for leaving the worksite without prior authorization and without notifying her supervisor. Even Grievant admits that she should have asked permission to attend the grievance proceeding.

Respondent does not permit employees to combine breaks at the hospital facility. Grievant was aware that breaks could not be combined. Grievant did not request to combine her breaks nor did she inform her supervisor that she was taking a break to speak with a union organizer. Grievant did not request to take annual leave prior to taking a break beyond 30 minutes on April 19, 2011. Respondent did not suspend Grievant because she met with a union organizer. Respondent suspended Grievant because she was away from her work area taking a break beyond the permitted time limit. As this was Grievant's second offense, Respondent followed its policy of progressive discipline and

suspended her for three days. As such, Grievant has failed to demonstrate a *prima facie* case of reprisal.

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. W. VA. CODE § 29-6A-6; *Ramey v. W. Va. Dep't of Health,* Docket No. H-88-005 (Dec. 6, 1988). "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. W. Va. Dep't of Health &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. This Grievance Board has previously recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988) (*citing Weber v. Buncombe County Bd. of Educ.*, 266 S.E.2d 42 (N.C. 1980)). "[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 has met its burden of proof in demonstrating that: Grievant knew of the policies prohibiting an employee from leaving the worksite without permission and

the break time limits; Grievant intentionally left the worksite without permission or notification and took a break longer than 30 minutes; and, that the policies requiring prior authorization and/or notification are reasonable.

4. Respondent's acts of administering Grievant a one day suspension for her first offense and a three day suspension for her second offense were in compliance with Section 12.3 of the Administrative Rule of the West Virginia Division of Personnel; DHHR Policy Memorandum 2108, Employee Conduct; and DHHR Policy Memorandum 2104, Guide to Progressive Discipline.

5. To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

> (1) That he engaged in protected activity (i.e., filing a grievance);
> (2) That he was subsequently treated in an adverse manner by the employer or an agent;
> (3) That the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
> (4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.,* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

6. Respondent did not discipline Grievant for participating in a grievance proceeding as a union chief steward. Grievant was suspended for one day for leaving the worksite without prior authorization and without notifying her supervisor. Respondent did not suspend Grievant because she met with a union organizer. Respondent suspended

Grievant because she was away from her work area taking a break beyond the permitted time limit. As such, Grievant has failed to demonstrate a *prima facie* case of reprisal.

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: January 26, 2012

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Jennifer Lea Stollings-Parr
Administrative Law Judge