THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JANET MARIE LINGER,
Grievant,

v. **Docket No. 2010-1490-CONS**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/WILLIAM R. SHARPE, JR. HOSPITAL,
Respondent.

DECISION

Janet Linger, Grievant, employed by the Department of Health and Human Resources ("DHHR") as a Registered Nurse at the William R. Sharpe, Jr. Hospital, filed a Motion to Amend Pending Grievance to include termination following her dismissal from employment, effective May 5, 2010. An Order of Consolidation was entered on June 2, 2010, consolidating for hearing a grievance challenging a suspension and a grievance involving the issue of payment of final wages. Grievant seeks reinstatement and to be made whole, including lost pay, benefits, tenure and interest. A level three hearing was conducted before the undersigned Administrative Law Judge in the Grievance Board's Westover office on August 28, 2012. Notwithstanding consolidation, the parties agreed prior to the beginning of the level three hearing to proceed solely with the issue of termination. Grievant appeared in person and by her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. DHHR was represented by its counsel, James "Jake" Wegman, Assistant Attorney General. The grievance became

mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on October 1, 2012.

Synopsis

Grievant was dismissed from her employment due to alleged gross misconduct involving inappropriate behavior of a sexual nature, and for violating the facility's cell phone policy. Grievant did not dispute that the conduct occurred, took responsibility for her inappropriate actions, and instructed her staff to refrain from any comments with sexual connotations. Respondent met its burden of proof in establishing the charges against the Grievant; however, termination of employment was excessive given the circumstances of this matter. Accordingly, this grievance is granted, in part, and denied, in part.

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

Findings of Fact

1. Grievant was employed by Respondent in 2006 as a Registered Nurse at the William R. Sharpe, Jr. Hospital.

2. Grievant's work history, as documented in her employee performance appraisals, was that she continually met expectations.

3. On or about March 14, 2010, a patient made a dismissive remark concerning the penis size of a Health Service Worker, Brian Large, who worked on the same unit as Grievant.[1]

4. Employees reported the comments to Grievant in jest. She referred to Brian Large as "half," or some variation, on a few occasions.

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[1]When they worked the same shift, Grievant was Brian Large's supervisor.

5. Grievant was retrieving her purse on one occasion, as well as her cell phone, as she was going to break. In doing so, she showed coworkers, including Brian Large, a cartoon penis sent by another coworker to her phone.

6. On April 8, 2010, Brian Large asked to speak to Grievant in the unit report room, where he made certain that Grievant understood that he found her "half" comments to be offensive. The record was unclear as to whether he also mentioned the cartoon penis image as being offensive.

7. Grievant apologized to Brian Large and informed him that she would not make the comment again. In addition, Grievant told the unit's staff to refrain from making any comments with sexual connotations.

8. The following day, April 8, 2010, Grievant reported the incident to her supervisor, lead nurse, Gloria Evans.

9. On April 13, 2010, Respondent's Equal Employment Opportunity Officer, Donald Raynes, sent Grievant notification of an investigation of an allegation by Brian Large of inappropriate comments of a sexual nature. On that same date, Respondent issued Grievant an unpaid suspension as a result of the alleged incident.

10. Equal Employment Opportunity counselor Franklin Hairston was appointed to investigate the complaint against Grievant with the assistance of Tammy Rush, Lewis County Equal Employment Opportunity counselor for Respondent.

11. Mr. Hairston met once with Brian Large, and, on that occasion, informed him of several available options to pursue, and indicated that he did not encourage or pressure him to file an Equal Employment Opportunity complaint.

12. It appears from the record that Brian Large did not express to Grievant his objection to her use of the dismissive name prior to April 8, 2010, or that any similar comment was made by Grievant after that date.

13. Grievant was dismissed from employment on May 5, 2010.

14. The termination letter from Respondent's Chief Executive Officer stated, in pertinent part, "The EEO investigation, conducted by representatives of the Department of Health and Human Resources, substantiated gross misconduct and determined that you were involved in inappropriate behavior of a sexual nature and you violated the facility's cell phone policy. Based on the information substantiated by the investigation, I have decided to proceed with your dismissal from employment in our facility." Respondent's Exhibit No. 4.

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).

Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965).

A review of the Equal Employment Opportunity Investigative Report reveals that the conduct as described by Brian Large is likely exaggerated. Two of the three witnesses denied having any knowledge of the alleged comments by the Grievant. The other witness did acknowledge that she heard Grievant make the "half" comment, but only on limited occasions. In any event, Grievant admitted to Mr. Hairston to calling Brian Large "half" a few times, and that she showed him a picture of a penis on her cell phone. Given that an employer is responsible to take immediate and appropriate corrective action in instances of such alleged conduct, Respondent acted correctly in suspending Grievant during the investigation conducted by the Equal Employment Opportunity office. In addition, the testimony at level three and Grievant's admissions demonstrate that Respondent did meet its burden of proof in establishing the charges of gross misconduct involving behavior of a sexual nature and a violation of phone policy in the termination letter.[2] Grievant could

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[2]The "term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991) (*citing Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985)). *See Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sept. 13, 2002).

have made better choices in this situation, but her conduct did not demonstrate good cause to justify her dismissal. *Oakes*, *supra*.

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). Grievant has been a good employee for six years. There was an acknowledged violation of the relevant policy on sexual harassment; however, it was not as egregious as was made out in the Equal Employment Opportunity Investigative Report. Respondent's action in summarily terminating Grievant's employment was inherently disproportionate between the offense and the personnel action.

It should be noted that the Grievance Board has historically held that a supervisor or one in management should be held to a higher standard in assessing conduct. "As a supervisor, Grievant may be held to a higher standard of conduct, because he [she] is properly expected to set an example for employees under his [her] supervision, and to enforce the employer's proper rules and regulations, as well as implement the directives of his [her] supervisors." *Wiley v. W. Va. Div. of Natural Resources, Parks and Recreation*, Docket No. 96-DNR-515 (Mar. 26, 1988); *Sloan v. Dep't of Health & Human Res.*, Docket No. 00-HHR-132 (Jan. 30, 2001).

It is clear from the undisputed record of this case that Grievant's comments and actions were not setting the appropriate standard of conduct as a supervisor. Mitigation of the punishment in this case is appropriate, but, as discussed above, Grievant should

have known better than to engage in this type of conduct. Given the nature of the offense, and Grievant's work history, a suspension of thirty working days is more reasonable discipline in this matter.

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 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. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965).

3. Respondent proved that Grievant engaged in inappropriate behavior of a sexual nature and violated the facility's cell phone policy.

4. Given the facts and the standard set out in *Oakes supra*, the dismissal of Grievant was clearly excessive and disproportionate to her conduct. A suspension of thirty working days without pay is appropriate under the circumstances of the grievance in its entirety.

Accordingly, this grievance is **GRANTED**, **IN PART**, **AND DENIED**, **IN PART**. Respondent is **ORDERED** to reduce Grievant's dismissal to a thirty-day suspension without pay, and to reinstate Grievant to her position as a Registered Nurse, and to pay her applicable back pay and restore all benefits she would have earned had her employment not been terminated, including annual leave, sick leave, and retirement, from thirty working days after the date of her dismissal.

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 5, 2012

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Ronald L. Reece
Administrative Law Judge