

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DEBBIE BUCKHANNON,

Grievant,

v.

Docket No. 2020-0812-DHHR

**WEST VIRGINIA DEPARTMENT OF HEALTH AND
HUMAN RESOURCES/WILLIAM R. SHARPE, JR. HOSPITAL,**

Respondent.

DECISION

Grievant, Debbie Buckhannon, challenged a written reprimand issued against her by filing a grievance on or about January 13, 2020. A level one hearing was held on February 21, 2020. This grievance was denied by decision dated March 12, 2020. The parties agreed to waive the matter to level three, and this request was granted by order dated June 25, 2021. A level three hearing was held before the undersigned on June 16, 2022, at the Westover office of the Grievance Board by Zoom. Grievant did not appear in person but by her representative, Michael Hansen, UE Local 170. Respondent appeared by its CEO Pat Ryan and by James “Jake” Wegman, Assistant Attorney General. The parties agreed to submit the case on the level one record and proposals. This matter became mature for consideration upon receipt of the last of the parties’ fact/law proposals on September 6, 2022.

Synopsis

Grievant is employed in the Dietary Department at Sharpe Hospital. Grievant was issued a written reprimand for unprofessional conduct and the failure to follow the appropriate procedures regarding hand hygiene. Respondent met its burden of proof in demonstrating that Grievant’s behavior was inappropriate and in violation of established

policies. Grievant was unable to demonstrate that her due process rights were violated. This grievance is denied.

The following Findings of Fact are based on the lower level record of this case.

Findings of Fact

1. Grievant had been employed in the Dietary Department at Sharpe for almost two years at the time this grievance was filed. On January 9, 2002, Assistant CEO, Michelle Markovich, issued Grievant a written reprimand for her conduct occurring on December 4, 2019.

2. Grievant's supervisors, Michelle Markovich and Loretta Blake, reviewed video of Sharpe's kitchen from December 4, 2019. The video showed Grievant and coworkers chest-bumping each other, smacking each other on the rear-end, touching food without using gloves, not following appropriate handwashing procedures, and eating food while preparing meals.

3. The version of Respondent's Policy Memorandum 2108 in place on December 4, 2019, provided that employees are expected to "conduct themselves professionally in the presence of residents/patients/clients, fellow employees and the public." The policy further provides that employees are expected to "refrain from making unwanted or inappropriate verbal or physical contacts."

4. Sharpe Policy regarding hand hygiene requires employees in the Dietary Department to wash their hands at the following times: upon arrival at work, before and after using gloves, before preparing and serving food, and before leaving their work area.

5. Grievant stated during the level one hearing that she did not chest bump anyone or slap anyone on the rear-end, but she admitted that she did not follow the appropriate procedure regarding hand hygiene and wearing gloves while preparing food.

6. CEO Pat Ryan pointed out that infectious control is a serious concern at Sharpe Hospital, as there are over 150 patients. CEO Ryan opined that the written reprimand was warranted even if Grievant's only misconduct was her violation of the handwashing policy.

7. Prior to issuing the written reprimand, Grievant was issued a coaching on December 13, 2019, because Grievant failed to make certain that the residents' snacks were placed on a distribution cart.

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 Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2018); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). The generally accepted meaning of preponderance of the evidence is "more likely than not." *Riggs v. Dep't of Transp.*, Docket No. 2009-0005-DOT (Aug. 4, 2009) citing *Jackson v. State Farm Mut. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004). See *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. *Leichliter, supra*.

The preponderance of the evidence in this case established that Grievant violated applicable policy by chest-bumping and smacking her co-workers on the behind. This

conduct that Ms. Markovich and Ms. Blake testified to following a review of the video confirmed that Grievant and other employees were chest-bumping , smacking each other on the rear-end, touching food without using gloves, not handwashing, and eating food while preparing meals for the residents. This conduct violated policy and was inappropriate and unprofessional.

Setting a penalty in a disciplinary matter is a discretionary function of an employer. Unless it is clear from the employer's policy what penalty should be imposed, the employer must be given an opportunity to exercise that discretion. *Mills v. Dep't of Administration*, Docket No. 90-ADMIN-180 (July 23, 1991). Respondent's policy does not specify what penalty should be imposed for violations of Policy Memorandum 2108, so Respondent has discretion as to what discipline should be imposed in this matter. The record supports a finding that Grievant's conduct was serious enough to warrant a written reprimand.

Grievant alleges that Sharpe violated her due process rights by failing to conduct a predetermination conference prior to issuing the written reprimand. The West Virginia Supreme Court of Appeals has recognized that "due process is a flexible concept, and that the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) (citing *Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)). "What is required to meet procedural due process under the Fourteenth Amendment is controlled by the circumstances of each case." *Barker v. Hardway*, 238 F. Supplement 228 (W. Va. 1968);

See Buskirk, supra; Edwards v. Berkeley County Bd. of Educ., Docket No. 89-02-234 (Nov. 28, 1989).¹

The undersigned has held that an employee was entitled to notice of her misconduct and an opportunity to respond to the charge before Sharpe placed written reprimand in her personnel file in *Byrd v. Department of Health and Human Resources/William R Sharpe, Jr. Hospital*, Docket No. 2017-0769-DHHR (Aug. 8, 2017), *rev'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 17-AA-74 (March 2, 2018). As Mr. Wegman aptly pointed out in his proposals, in reversing the undersigned, the Circuit Court of Kanawha County held that “[i]n dealing with routine personnel matter, the WVDHHR should not be required to afford extensive procedural protections for the imposition of verbal reprimands – a very minor form of discipline.”

It appears to the undersigned that there is no meaningful difference between a verbal reprimand and a written reprimand in assessing due process protections. In any event, it is undisputed that Sharpe did not conduct a formal predetermination conference with Grievant before issuing the written reprimand. However, Ms. Markovich and Ms. Blake met with Grievant and discussed the allegations against her, and they viewed the video from the kitchen with Grievant. Grievant was given an opportunity to view the surveillance video and discuss her version of events with Ms. Markovich and Ms. Blake

¹The Grievant Board has found that the purpose of the legislative rule requiring a predetermination conference is to protect the grievant’s due process rights to be given notice of the charges against her and the right to respond to those charges before disciplinary action is taken. *See, Buskirk v. Civil Serv. Comm’n*, 175 W. Va. 279, 332 S.E.2d -12- 579 (1985); *Board of Education of the County of Mercer v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994); *Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, (1981). *Catalina v. Dep’t of Health & Human Res.*, Docket No. 2011-0885-DHHR (Aug. 11, 2011).

before the letter of reprimand was issued. The record does not demonstrate that Grievant's due process rights were violated.

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 Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2018); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). The generally accepted meaning of preponderance of the evidence is "more likely than not." *Riggs v. Dep't of Transp.*, Docket No. 2009-0005-DOT (Aug. 4, 2009) citing *Jackson v. State Farm Mut. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004). See *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. *Leichliter, supra*.

2. Respondent met its burden of proof in demonstrating that Grievant's behavior was inappropriate and in violation of established policies.

3. The Circuit Court of Kanawha County has held that "[i]n dealing with routine personnel matter, the WVDHHR should not be required to afford extensive procedural protections for the imposition of verbal reprimands – a very minor form of discipline." *West Virginia Department of Health and Human Resources/William R. Sharpe, Jr. Hospital v. Bryd*, Kanawha Cnty. Cir. Ct. Civil Action No. 17-AA-74 (March 2, 2018) overruling *Byrd v. Dep't of Health and Human Res./William R. Sharpe, Jr. Hospital*, Docket No. 2017-0769-DHHR (Aug. 8, 2017).

4. Grievant was unable to demonstrate that her due process rights were violated.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Intermediate Court of Appeals.² Any such appeal must be filed within thirty (30) days of receipt of this Dismissal Order. 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

Date: October 17, 2022

Ronald L. Reece
Administrative Law Judge

²On April 8, 2021, Senate Bill 275 was enacted, creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over “[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]” W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend W. VA. CODE § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.