THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ROBIN WEEKLEY,
Grievant,

v. **Docket No. 2021-1858-CONS**

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

DECISION

Grievant, Robin Weekly, filed this action on or about January 24, 2021, challenging her dismissal from William R. Sharpe, Jr. Hospital as a lead housekeeper. This action was filed directly to level three of the grievance process. A hearing was held before the undersigned on September 9, 2022, by Zoom originating from the Grievance Board's Westover office. Grievant appeared in person and by her representative, Samantha Crockett, UE Local 170. Respondent appeared by its CEO, Pat Ryan, and by its attorney, James "Jake" Wegman, Assistant Attorney General. This case became mature for consideration upon receipt of the last of the parties' Findings of Fact and Conclusions of Law on October 18, 2022.

Synopsis

Grievant was employed by Sharpe Hospital as a lead housekeeper. Grievant was away from work on Family Medical Leave Act leave that was exhausted on September 1, 2020. Subsequently, two forms for a Medical Leave of Absence were submitted to Respondent that appear to be completed by a representative of Lively Family Health clinic. One was submitted to Respondent by Grievant and one form was submitted from Lively Family Health clinic. Two inconsistencies were noted on the form by Respondent.

Grievant was discharged from employment after Respondent came to the conclusion that Grievant had altered or falsified the form received from her. Respondent was unable to prove this charge by a preponderance of the evidence. This grievance is granted.

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

Findings of Fact

1. Grievant was employed by Sharpe Hospital as a lead housekeeper.

2. Grievant was out on Family Medical Leave Act (FMLA) leave, but that leave was exhausted on September 1, 2020.

3, Because FMLA leave was exhausted, Respondent was working with Grievant and her wife regarding approval of a Medical Leave of Absence (MLOA).

4. On September 22, 2020, Grievant submitted to the Respondent a practitioner note on Form DOP-1.5, "Medical Leave of Absence Without Pay and/or Federal Family and Medical Leave of Absence Without Pay – Certificate of Health Care Provider for Employees Serious Health Condition."

5. This statement was signed by Debra Murray, Family Nurse Practitioner from Lively Family Health, dated September 18, 2020.

6. Respondent received another Form DOP-1.5, "Medical Leave of Absence Without Pay and/or Federal Family and Med Leave of Absence Without Pay – Certificate of Health Care Provider for Employees Serious Health Condition" from Lively Family Health clinic which was signed by Debra Murray, Family Nurse Practitioner, dated September 14, 2020.

7. Jerri Nelson is the medical leave administrator for the Respondent's Office of Human Resources Management. Ms. Nelson noted that there were two

inconsistencies to the specific question on the form which states, “Will the employee be incapacitated for a single continuous period of time due to his/her medical condition, including any time for treatment and recovery?” The other inconsistency related to the amount of estimated part time schedule would be recommended.

8. It was noted on Question #5 of the Lively Family Health note that the answer was “no” to the question if the employee was incapacitated for a “single continuous period of time” and the required dates were left blank. On the form submitted by Grievant, Question #5 was answered “yes” and dates from 9-1-2020 to 9-18-2020 were indicated.

9. On question #6 of the Lively Family Health note the estimated part time schedule was 8 hours per day, 2-3 day per week from 9-14-2020 to 12-1-2020. On the form submitted by Grievant, Question #6 indicated 8 hours per day, 3-4 days per week from 9-18-2020 through 12-1-2020.

10. On November 9, 2020, Respondent sent a letter faxed to Lively Family Health’s office seeking clarification in response to the submitted Form DOP-1.5, "Medical Leave of Absence Without Pay and/or Federal Family Medical Leave of Absence Without Pay – Certificate of Health Care Provider for Employees Serious Health Condition.”

11. The letter request assistance in confirming some discrepancies that were discovered in the documents that were mailed from the Lively Family Health clinic and also submitted by the Grievant. The letter instructed Ms. Murray that “If the document your office mailed to us is the correct communication between your office and us, her employer, please indicate so in your statement. If the document submitted by Ms. Weekley is the correct communication, and the differences of what was written was NOT made by one of your staff, please indicate so in your statement.”

12. Ms. Nelson opined that the forms were altered by Grievant due to breaks in the lines on the form. Ms. Nelson conceded that in the event you fax a form multiple times there will be breaks in the lines as exhibited in both of Respondent's "Form DOP-1.5" exhibits.

13. Lively Family Health responded to the November 9, 2020, request by stating that "our office shows no records or scans of the inaccuracy that were sent to you by the patient. They have 2 separate dates on them as well. Could be inadvertently not scanned in if dates were requested as first form was rejected?"

14. Nurse Practitioner Murray indicated that Lively Family Health was a family practice and walk-in clinic. The facility is no longer in operation. Ms. Murray said that while it was not impossible, it was unlikely that another practitioner at Lively Family Health modified her note because "unless someone physically exams the patient to determine what they fell the patient should be off . . they usually decline that." Notwithstanding an acknowledgement in the original response that the changes might not have been scanned. Nurse Practitioner Murray acknowledged that the signatures on the two forms were her signature; however, she did not know why there were two different dates.

15. A predetermination conference was held on December 1, 2020. Grievant denied the allegation of submitting an altered practitioner's note. Grievant denied the allegations by written statement dated December 16, 2020. Grievant denied the allegations at the level three hearing. Grievant has no history of disciplinary action and her performance appraisals have been good.

16. At the predetermination conference, Grievant requested that her wife be able to speak to the allegation of falsification and Crystal Weekley stated: "There is

nothing falsified on our end. I took the form, and I faxed it directly to Sharpe Hospital and I asked them to fax it to DHHR. So, I'm not sure what specifically on here was falsified but we had nothing to do with any type of falsification. Why would we falsify a document? I mean how is that going to benefit anybody? I don't understand."

17. On January 19, 2021, a Notice of Dismissal letter, authored by CEO Pat Ryan was issued to Grievant dismissing her from employment for misconduct.

18. Grievant indicated at the level three hearing that she had been cleared to return to work by her physician.

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 employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 51, 380 S.E.2d 216, 218 (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 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. 2, *Buskirk v. Civil Service Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); Syl. Pt. 1, *Oakes v. W. Va. Dept. of Finance & Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980). *See Guine v. Civil Service Comm'n*, 149 W. Va. 461, 468, 141 S.E.2d 364, 368-69 (1965); *Smith v. Clay County Health Dep't*, Docket No. 2012-0451-ClaCH (Apr. 17, 2012).

The charge against Grievant is essentially gross misconduct. 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).

Respondent argues that it must keep accurate records regarding employee leave. The primary argument is that Sharpe Hospital must trust its employees because they perform essential tasks for the health, safety and welfare for patients and staff. By submitting an alleged altered practitioner's note, Sharpe Hospital lost its trust in Grievant. Grievant continued to argue at the hearing that she did not alter the note from Lively Family Health.

Respondent argues in its proposals that an employee must have a single continuous period of incapacitation to be eligible for a Medical Leave of Absence. The

note provided by Grievant indicated on Question #5 that the Grievant did have a continuous period of incapacitation. Under this note, Respondent argues that Grievant would be eligible for a Medical Leave of Absence. The note provided by Lively Family Health states that Grievant did not have a single continuous period of incapacitation. Respondent argues that under the Lively Family Health note, Grievant would not have been eligible for a Medical Leave of Absence. The undersigned cannot determine, in the lack of supporting evidence, whether this may or may not be true. In any evet, the record does not support a finding that Grievant submitted altered forms to Respondent.

Based upon the totality of the circumstances presented to the undersigned, it is just as likely that the two different responses listed in Question #5 in the two forms both originated from Lively Family Health. This could just as easily be explained as clerical error or a lack of communication between the physician and nurse at Lively Family Health. Nothing in the record supports a finding that Grievant was aware of any notations made in the form submitted directly from the Lively Family Health clinic. This begs the question as to how Grievant was even aware of the need to complete Question 5 in the affirmative concerning a single continuous period of incapacitation. If anything, this would appear to point back to a finding that the changes originated from the clinic in the event the dates were requested as the first form was rejected. This language can be found in Respondent's Exhibit No. 1 as set out by Nurse Practitioner Murray at Lively Family Health clinic. There is simply no proof in the record that established by a preponderance of the evidence that Grievant altered the submitted forms or violated any of Respondent's policies.

Respondent also calls in question the credibility of the Grievant. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Resources,* Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res*., Docket No. 95-HHR-066 (May 12, 1995). An administrative law judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ*., Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp*., Docket No. 93-HHR-050 (Feb. 4, 1993).

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. Additionally, the administrative law judge should consider 1) the presence or 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 information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

The credibility of the witnesses in this case does not come in to question by the undersigned and the existence or nonexistence of certain material facts does not hinge on witness credibility. Grievant has been consistent in her denial that she altered the note from Lively Family Health. Grievant speculated that Lively Family Health may have authored two different forms, this version is credible and in line with Respondent's evidence. Nurse Practitioner Murray indicated that this was unlikely but could not rule out

the possibility. In fact, the original response from Lively Family Health seemed to indicate that one of the forms could have been inadvertently missed as far as scanning the document. Ms. Murray indicated that it was unlikely that another practitioner modified the note but could not rule out the possibility.

In addition, contrary to Respondent's argument, the record does not provide any motive for Grievant to falsify these forms. Grievant was not being paid for the limited time period that she was off work that was the substance of the allegation that she falsified Question #5. Grievant would not have been paid regardless of whether the question was filled out or not. The limited record, which calls for speculation and conjecture, provided the undersigned with a request for a Medical Leave of Absence that was provided to Respondent by Lively Family Health. The second request for a Medical Leave of Absence was submitted by Grievant. Nothing in the record would suggest that Grievant was even aware of the contents of the first form that would lead her to make the alleged altercation to the second form. It is just as likely that Lively Family Health made the alterations to Question #5 based on the request of the Respondent or someone not identified in the record. The undersigned has no reason to question the veracity of the fact witnesses in this case.

Respondent also argued that the notation in Question #5 that Grievant did have a continuous period of incapacitation meant that she was eligible for the MLOA. Nothing in the record gives this argument any merit. The undersigned was not provided any applicable policy to support this argument. An examination of the two documents does not support this conclusion. Both forms indicate that Grievant will be subject to the same work schedule with the same estimated treatment schedule. Both forms indicate that

Grievant may be prevented from performing her job functions and may be absent from work. Both forms indicate that Grievant will have limitations or restrictions on her ability to work. Both forms indicate that Lively Family Health is unable to determine if Grievant is permanently prevented from performing her duties. Finally, on question #6 of the Lively Family Health note the estimated part time schedule was 8 hours per day, 2-3 day per week from 9-14-2020 to 12-1-2020. The form submitted by Grievant indicated 8 hours per day, 3-4 days per week from 9-18-2020 through 12-1-2020. How this discrepancy somehow benefited the Grievant would also appear to have no merit. The undersigned finds no reason to adopt Respondent's position that Grievant somehow benefited from making alterations to the Lively Family Health note to the extent that this proves Grievant falsified the note. This appears to be a clerical error or a lack of communication between the medical provider due to the remaining immediate areas of the forms being the same entries. Both notes indicate that the employee will need follow-up treatment and a reduced schedule due to the employee's medical condition. Both notes indicate that the treatments or the reduced number of hours of work are medically necessary.

Respondent's counsel aptly points out that the undersigned has ruled that the submission of a falsified doctor's excuse is misconduct of substantial nature justifying dismissal from employment. *Gaines v. Dep't of Health and Human Res.*, Docket No. 2016-1525-CONS (Sept. 13, 2016). The undersigned ruled that Respondent proved by a preponderance of the evidence that Grievant falsified a doctor's excuse allowing her to return to work with modifications. The instant case can be easily distinguished given the lack of evidence to prove that Grievant falsified the form in question. Respondent attempts to satisfy its burden of proof in this matter by conjecture and speculation

concerning the facts of this case. There is simply too much guess work and requests for the undersigned to make leaps of faith to rule that Respondent has met its burden of proof.

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. The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 51, 380 S.E.2d 216, 218 (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 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. 2, *Buskirk v. Civil Service Comm'n*, 175 W. Va. 279, 332

S.E.2d 579 (1985); Syl. Pt. 1, *Oakes v. W. Va. Dept. of Finance & Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980). *See Guine v. Civil Service Comm'n*, 149 W. Va. 461, 468, 141 S.E.2d 364, 368-69 (1965); *Smith v. Clay County Health Dep't*, Docket No. 2012-0451-ClaCH (Apr. 17, 2012).

3. The charge against Grievant is essentially gross misconduct. 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).

4. Respondent failed to prove by a preponderance of the evidence that Grievant engaged in any misconduct.

Accordingly, this grievance is **GRANTED.** Respondent is **ORDERED** to reinstate Grievant to her position as a Housekeeper at Sharpe Hospital effective on the date that Grievant provides Respondent the date from her physician that she was cleared to return to work, and to pay her back pay to that date, and reinstate all other benefits to which she would have otherwise been entitled, effective that date.

Any party may appeal this Decision to the Intermediate Court of Appeals.[1] Any such appeal must be filed within thirty (30) days of receipt of this Dismissal Order. W. VA.

[1]On 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

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: December 2, 2022

Ronald L. Reece
Administrative Law Judge

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.