THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ALLISON RENEE SAUNDERS,
Grievant,

v. **Docket No. 2022-0738-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
LAKIN HOSPITAL,
Respondent.

DECISION

Grievant, Allison Renee Saunders, was employed by Respondent, Department of Health and Human Resources at Lakin Hospital. On April 20, 2022, Grievant filed this grievance against Respondent protesting her suspension from employment. For relief, Grievant sought "to be paid for lost wages from the 5-day suspension and for the conference in April to be removed from my personnel file." The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4).

A level three hearing was held on March 7, 2023, before the undersigned at the Grievance Board's Charleston, West Virginia office via video conference. Grievant appeared pro se.[1] Respondent appeared by Danelle Wandling and was represented by counsel, Steven R. Compton, Deputy Attorney General. This matter became mature for decision on April 6, 2023, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.[2]

Synopsis

Grievant was employed by Respondent as a Food Service Worker at Lakin Hospital, a long-term care nursing home. Grievant grieved her five-day suspension from

[1] For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).
[2] Grievant did not file written Proposed Findings of Fact and Conclusions of Law.

employment. Respondent proved it was justified in suspending Grievant for five days for her violation of food service safety practices after previous discipline for similar misconduct. Grievant failed to prove her punishment should be mitigated. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant was employed by Respondent as a Food Service Worker at Lakin Hospital, a long-term care nursing home.

2. On April 1, 2022, Grievant was working the dinner line putting desserts on food trays to be served to the residents.

3. While working the line, Grievant developed a nosebleed. Grievant did not remove herself from the line to address the nosebleed. Instead, Grievant held a rag to her nose with one hand while continuing to place food on the trays with the other.

4. When Grievant's supervisor, Gary Silva, observed the rag to Grievant's nose, he instructed her to remove herself from the line to take care of the nosebleed.

5. Mr. Silva and another employee then checked all the trays Grievant had already touched to ensure they had not been contaminated.

6. As a recipient of Medicaid and Medicare funding, Respondent is required to follow federal regulations for food safety in addition to general state food safety regulations.

7. The U.S. Food and Drug Administration's *Food Code* prohibits food employees experiencing discharges from the eyes, nose, or mouth from working with exposed food or equipment. FOOD CODE § 2-401.12 (2017).

8. On April 6, 2022, Human Resources Director Randi Gheen and Food Service Supervisor January Beckett conducted a predetermination meeting with Grievant. Grievant admitted that she had continued to work the food service line while she had a nosebleed, but that she did not directly touch or get blood on the food.

9. Grievant had previously received coaching, two written reprimands, and a three-day suspension for hygiene and sanitation violations.

10. By letter dated April 13, 2022, Administrator Danelle Wandling issued Grievant a five-day suspension for violation of state and federal food safety regulations.

11. Prior to the level three hearing in this matter, Grievant had voluntarily resigned from employment to accept other employment.

Discussion

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). "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*.

Respondent asserts it was justified in suspending Grievant for five days for continuing to serve food while experiencing a nosebleed after it had previously taken

multiple disciplinary actions against Grievant for hygiene and sanitation violations. During the level three hearing, Grievant did not dispute the facts of the incident but, instead, argued that she should have received a lesser suspension under progressive discipline because sanitation and hygiene are different.

Respondent is required to "[s]tore, prepare, distribute, and serve food in accordance with professional standards for food service safety." 42 C.F.R. § 483.60(i)(2). The U.S. Food and Drug Administration's *Food Code* prohibits food employees experiencing discharges from the eyes, nose, or mouth from working with exposed food or equipment. FOOD CODE § CODE § 2-401.12 (2017). Grievant does not dispute that she continued to serve food while experiencing a nosebleed. Grievant's action was clearly unsanitary and in violation of food service safety practices. Grievant's misconduct is especially troublesome as nursing home residents are at risk for serious complications from foodborne illness due to their vulnerable health.

"[A]n allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was 'clearly excessive or reflects an abuse of agency discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n,* Docket No. 89-SFC-145 (Aug. 8, 1989)." *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 95-AA-66 (May 1, 1996), *appeal refused*, W.Va. Sup. Ct. App. (Nov. 19, 1996).

"Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly

disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996); *Olsen v. Kanawha County Bd. of Educ.*, Docket No. 02-20-380 (May 30, 2003), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994); *Cooper v. Raleigh County Bd. of Educ.*, Docket No. 2014-0028-RalED (Apr. 30, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

Respondent chose to suspend Grievant for five days due to her prior history of discipline, including a three-day suspension, for sanitation and hygiene issues. Grievant argues a five-day suspension is not justified under progressive discipline because sanitation and hygiene should be considered separate offences. On the contrary, sanitation and hygiene both relate to food safety, and both are a concern due to the potential to cause illness. Grievant presented no additional evidence why her punishment should be mitigated. A five-day suspension is not clearly disproportionate to Grievant's misconduct considering her previous discipline for similar misconduct. Respondent

proved it was justified in suspending Grievant for five days. Grievant failed to prove her punishment should be mitigated.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). "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. Respondent is required to "[s]tore, prepare, distribute, and serve food in accordance with professional standards for food service safety." 42 C.F.R. § 483.60(i)(2).

3. "[A]n allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was 'clearly excessive or reflects an abuse of agency discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n,* Docket No. 89-SFC-145 (Aug. 8, 1989)." *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 95-AA-66 (May 1, 1996), *appeal refused*, W.Va. Sup. Ct. App. (Nov. 19, 1996).

4. "Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure

is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996); *Olsen v. Kanawha County Bd. of Educ.*, Docket No. 02-20-380 (May 30, 2003), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004).

5. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994); *Cooper v. Raleigh County Bd. of Educ.*, Docket No. 2014-0028-RalED (Apr. 30, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

6. Respondent proved it was justified in suspending Grievant for five days for her violation of food service safety practices after previous discipline for similar misconduct.

7. Grievant failed to prove her punishment should be mitigated.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Intermediate Court of Appeals.[3] Any such appeal must be filed within thirty (30) days of receipt of this decision. 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: May 18, 2023

Billie Thacker Catlett
Chief Administrative Law Judge

[3] 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 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 West Virginia 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.