

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SONYA BUTCHER,

Grievant,

v.

Docket No. 2021-1497-DHHR

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

Respondent.

DECISION

Grievant, Sonya Butcher, is employed by Respondent, the Department of Health Facilities,¹ at Sharpe Hospital. On November 5, 2020, Grievant grieved a three-day unpaid disciplinary suspension and requested its removal with backpay and benefits restored. Grievant grieved directly to level three of the grievance process as permitted for an unpaid suspension by West Virginia Code § 6C-2-4(a)(4).

A level three hearing was held by videoconference before the undersigned on March 4, 2024. Grievant appeared and was self-represented. Respondent was represented by James “Jake” Wegman, Assistant Attorney General. This matter matured for decision on April 3, 2024. Only Respondent submitted proposed findings of fact and conclusions of law.

Synopsis

Grievant was suspended by Respondent without pay for leaving work during a Code White, which mandated that she stay put, and for making a derogatory statement

¹As of January 1, 2024, the agency formerly known as the Department of Health and Human Resources is now three separate agencies -- the Department of Health Facilities, the Department of Health, and the Department of Human Services. For purposes of this grievance, the Department of Health and Human Resources, or DHHR, shall mean the Department of Health Facilities.

towards coworkers. Respondent proved the prohibited conduct, which constituted insubordination and unprofessionalism. In line with progressive discipline, Respondent proved unpaid suspension was justified. 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, Sonya Butcher, is employed by Respondent, the Department of Health Facilities (DHF), as an RN/Nurse Manager on unit-N2 at Sharpe Hospital (Sharpe).

2. Sharpe is a State-owned psychiatric hospital operated by DHF and houses patients suffering from mental illness.

3. Grievant's duties include monitoring the delivery of nursing services on her unit, collaborating with other departments to improve patient care, facilitating all operations elements of her unit, communicating clearly, monitoring unit patient records, and keeping the chief nursing officer informed of unit issues.

4. On August 12, 2020, groups of Sharpe employees were standing outside the unit clerk's office discussing the upcoming management realignment when Grievant and a coworker walked by. Whereupon Grievant commented, loudly enough for everyone to hear, "Look at them already here staking out their claim."

5. On August 17, 2020, Assistant Chief Nursing Officer, Randy McDaniels, sent Grievant and other managers the following email: "Please do not begin moving units this morning until further notice due to the CODE WHITE[.] Please be on standby on the unit that you have been working up until now."

6. A Code White status indicates that regulatory surveyors are at Sharpe inspecting the facility and its records. Under Sharpe policy, during a Code White all mid-level managers must stay at the facility until debriefed. Debriefing is necessary to discuss identified issues, formulate the next day's tasks, and correct any findings with managers prior to their leaving for the day. The Code White policy ensures that Sharpe responds promptly to sudden scrutiny from regulators since this scrutiny can highlight patient care issues that require immediate attention.

7. Grievant is a mid-level manager subject to the Code White policy.

8. On August 17, 2020, Grievant not only left Sharpe while a Code White was in effect but also left prior to the mandated debriefing. This was in violation of policy and direct orders.

9. Sharpe's Chief Quality Officer, Shawna Huddle, discovered that Grievant left Sharpe prior to being debriefed and without completing necessary documents for the surveyors.

10. On the evening of August 18, 2020, Ms. Huddle notified Grievant by phone that unit-N2 documentation, including hallwalk and assignment sheets, needed to be turned in by 7:45 am on August 19, 2020. Ms. Huddle also sent Grievant an email stating: "Attached are the missing HW information that we need for your unit. Please have a copy of this in the Command center by 7:45 AM in the morning 8/19/20. OHFLAC is waiting on this information."

11. Despite this directive, Grievant did not submit the missing documentation by 7:45 am on August 19, 2020, but instead conducted the morning report at 8:30 am and only later assisted in finding the documents after again being asked to comply.

12. On October 20, 2020, Grievant received a notice of unpaid suspension, stating in relevant part:

This suspension is the result of your misconduct specifically, insubordination for refusal to follow a reasonable directive from Shawna Huddle, Chief Quality Officer. Violation of the Employee Code of Conduct by failure to conduct yourself as a professional in the presence of residents, patients, clients, fellow employees, and the public.

So, you may understand why your conduct is unsatisfactory and how this prevents or hinders this agency from meeting its objectives, the following is provided:

- On August 18, 2020, a survey was being conducted on the facility and you left at 3:00 pm before the “Code White All Clear” was announced.

This is in violation of Policy 45.804, which provides: “All leadership, Mid-Level Managers and Survey Team Members report to Conference Room “F” daily after surveyors leave the building. Debriefing topics will include the day’s identified issues, formulate the next day’s tasks, and correct any findings from the day with staff members prior to leaving for the day.”

The seriousness of dealing with Regulatory Bodies, and the repercussions of not providing required documentation, is again an issue with the violation of the Code White policy. This policy is in place to ensure that Managers on all levels do not leave the hospital until after the follow-up meeting is complete, so that the Hospital can ensure that all documentation is provided within the allotted timeframe. ...

The seriousness of this conduct alone justifies the disciplinary action that is being taken. Nevertheless, the following misconduct also occurred which further justifies your suspension.

- On August 12, 2020, after a management realignment you stated “Look at them already here staking out their claim.”

This is in violation of DHHR Policy 2108: Employee Conduct, which provides: “Employees are expected to: ... conduct themselves professionally in the presence of

residents/patients/clients, fellow employees and the public.”

The comments made to another Unit Manager and other staff members is unprofessional; could be perceived as “bullying” and is unacceptable conduct for a Unit Manager, and it sets a poor example for unit staff and peers.

As a supervisor, you are held to a higher standard of conduct because you are properly expected to set an example for those employees under your supervision, and to enforce the employer's proper rules and regulations, as well as implement the directives of your supervisors.

You are reminded that there have been repeated attempts to correct your conduct. Prior to this, corrective action has included Coaching on December 19, 2019, Verbal Reprimand on February 14, 2020, Written Reprimand on March 16, 2020, and Performance Improvement Plan issued on March 16, 2020. Despite these management interventions, you have consistently failed to meet reasonable expectations. ...

While a longer period of suspension would be justified, we have decided to only impose a three (3) day suspension in the hope that this prevents further misconduct and unprofessional behavior. This action complies with ... Policy Memorandum 2104, *Progressive Correction and Disciplinary Action* and Section 12.3 of the West Virginia Division of Personnel, *Administrative Rule* W. Va. Code R. § 143-1-1 *et seq.*

13. Grievant was previously subject to progressive discipline at Sharpe.
14. On December 19, 2019, Grievant received coaching on scheduling patient trips, cooperating with the scheduler, and maintaining professional boundaries with patients.
15. On February 14, 2020, Grievant received a verbal reprimand for failing to inform her staff about a change to medication cart counting procedure.
16. On March 16, 2020, Grievant received a notice of written reprimand for failing to report problems on her unit as she had been directed. The unreported problems

included lack of communication between staff, failure of staff to give sufficient information during the morning report, and failure of staff to document information.

17. On March 16, 2020, Grievant received a non-disciplinary Performance Improvement Plan from Mr. McDaniels to help remedy unacceptable work performance.

Discussion

In disciplinary matters, the burden of proof rests with the employer to prove that the action taken was justified, and the employer must prove the charges against an employee by a preponderance of the evidence. 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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Grievant challenges her three-day unpaid disciplinary suspension. Respondent counters that insubordination was sufficient to justify Grievant’s discipline. Respondent asserts that the suspension is fortified by prior progressive discipline which was followed by an incident of unprofessionalism. Grievant does not contest that she defied orders when she left work during the Code White and without being debriefed, that she failed to follow orders to complete mandated documentation, and that she made a derogatory remark towards coworkers. Grievant does not contest her prior progressive discipline.

Sharpe Policy 45.804 provides: “All leadership, Mid-Level Managers and Survey Team Members report to Conference Room ‘F’ daily after surveyors leave the building.

Debriefing topics will include the day's identified issues, formulate the next day's tasks, and correct any findings from the day with staff members prior to leaving for the day."

On August 18, 2020, Grievant left Sharpe during a Code White, as a survey was being conducted on the facility, despite an email from Assistant Chief Nursing Officer Mr. McDaniels alerting her to the Code White and the need to stay; Grievant missed the mandatory debriefing following the Code White; and Grievant thereafter failed to abide by the Chief Quality Officer Ms. Huddle's directive to complete the mandated documentation by 7:45 am the next day.

This constitutes insubordination. "[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 wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). The Grievance Board has further 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), *aff'd*, *Sexton v. Marshall Univ.*, 182 W. Va. 294, 387 S.E.2d 529 (1989).

Respondent proved all three elements of insubordination. Grievant refused to follow directives to stay until the Code White was lifted and to complete documentation the next day. Also, Sharpe policy requires all mid-level managers such as Grievant to stay put after a Code White is lifted until they are debriefed. Grievant willfully violated directives and policy. The directives and policy were reasonable and valid. The Code White policy ensures that Sharpe responds promptly to sudden scrutiny from regulators since this scrutiny can

highlight patient care issues that require immediate attention. Debriefing is necessary to ensure that Sharpe managers discuss identified issues, formulate the next day's tasks, and correct any findings prior to their leaving for the day. Completing regulatory paperwork is a necessary part of this process. Respondent proved that Grievant's insubordination in and of itself justified a three-day unpaid suspension.

Respondent further justified the suspension based on Grievant's prior infractions. Some of these resulted in progressive discipline and one was an incident of unprofessionalism for making a derogatory statement to coworkers. "Policy 2108: Employee Conduct" provides, "Employees are expected to: ... conduct themselves professionally in the presence of residents/patients/clients, fellow employees and the public." Respondent properly determined that Grievant violated this policy through her derogatory remark to coworkers.

Respondent informed Grievant that it was holding her to a higher standard due to her supervisory role. Supervisors "may be held to a higher standard of conduct, because [they are] properly expected to set an example for employees under their supervision, and to enforce the employer's proper rules and regulations, as well as implement the directives of [their] supervisors." *Wiley v. Div. of Natural Res.*, Docket No. 96-DNR-515 (Mar. 26, 1988); *Linger v. Dep't of Health & Human Res.*, Docket No. 2010-1490-CONS (Dec. 5, 2012). Respondent proved by a preponderance of the evidence that it was justified in suspending Grievant without pay for three days. Thus, this grievance is DENIED.

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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. “[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 wilful; and (c) the order (or rule or regulation) must be reasonable and valid.” *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). The Grievance Board has further 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), *aff’d*, *Sexton v. Marshall Univ.*, 182 W. Va. 294, 387 S.E.2d 529 (1989).

3. Respondent proved by a preponderance of the evidence that Grievant was insubordinate and unprofessional and that these, along with prior progressive discipline, justified her three-day unpaid suspension.

Accordingly, this grievance is **DENIED**.

“The decision of the administrative law judge is final upon the parties and is enforceable in the circuit court situated in the judicial district in which the grievant is

employed.” W. VA. CODE § 6C-2-5(a) (2024). “An appeal of the decision of the administrative law judge shall be to the Intermediate Court of Appeals in accordance with §51-11-4(b)(4) of this code and the Rules of Appellate Procedure.” W. VA. CODE § 6C-2-5(b). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such an appeal and should not be named as a party to the appeal. However, the appealing party must serve a copy of the petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b) (2024).

Date: May 8, 2024

Joshua S. Fraenkel
Administrative Law Judge