

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**KATHY LAWSON,**  
Grievant,

**Docket No. 2022-0747-DHHR**

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

**DECISION**

Grievant, Kathy Lawson, is employed by Respondent, Department of Health and Human Resources. On April 3, 2022, Grievant filed this grievance against Respondent alleging she had been suspended without good cause. For relief, Grievant seeks “[t]o otherwise be made whole, including restoration of wages, benefits, full backpay and statutory interest. The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4).

Level three hearings were scheduled in this matter on three occasions but were continued on the motion of Grievant’s representative. A level three hearing was held on July 24, 2023, before the undersigned at the Grievance Board’s Charleston, West Virginia office via videoconference. Grievant appeared personally and was represented by Scot Shapero, UE Local 170. Respondent appeared by Human Resources Director Randi Gheen and was represented by counsel, Katherine A. Campbell, Assistant Attorney General. This matter became mature for decision on September 11, 2023, upon final receipt of the parties’ written Proposed Findings of Fact and Conclusions of Law.<sup>1</sup>

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<sup>1</sup> Grievant did not file written Proposed Findings of Fact and Conclusions of Law.

## **Synopsis**

Grievant is employed by Respondent as a Laundry Worker at Lakin Hospital. Grievant protests her suspension from employment. Respondent proved the majority of the charges against Grievant and that it was justified in suspending Grievant for three days for failing to adhere to her attendance and performance improvement plan after previously issuing her a verbal and written warning. 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 is employed by Respondent as a Laundry Worker at Lakin Hospital and has been employed for twenty-two years.
2. During the relevant time-period, Grievant's supervisor was Steve Burnett, Housekeeping Supervisor. Mr. Burnett previously worked for a private hospital and began employment with Lakin Hospital as Grievant's supervisor in September 2020.
3. On June 15, 2021, Grievant received a verbal reprimand for leaving hospital grounds without notifying her supervisor or clocking out in order to place flowers on the grave of a former resident.
4. On December 21, 2021, Grievant was approved for intermittent Family and Medical Leave Act ("FMLA") leave for her own health condition for the period of November 31, 2021, through January 31, 2022.<sup>2</sup> Grievant was permitted to take one day of

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<sup>2</sup> Although Grievant testified that she also had FMLA leave for her daughter and father, the only documentation in the record was the approval of FMLA for Grievant's own serious health condition. It appears Grievant may have been referring to her family sick leave benefit.

intermittent FMLA leave one to two times per month. Grievant was notified that she was required to follow call-in procedures for any absence and “declare that such absence is related to your FMLA/PLA approval.”

5. On December 27, 2021, Mr. Burnett placed Grievant on a *Performance & Attendance Improvement Plan* (“PAIP”) due to “unacceptable attendance, performance, and conduct.” Of relevance to this grievance, the PAIP required Grievant to do the following: notify Mr. Burnett of any unscheduled absence at least two hours prior to the start of a shift; notify Mr. Burnett or the lead worker, Betty Brown, in person when leaving and returning from breaks and lunches; submit a leave request to Mr. Burnett or Ms. Brown within one hour of returning to work after an unscheduled absence; and provide a DOP-L3 signed by Grievant’s health care provider if the absence was for medical reason not covered by FMLA.

6. On December 28, 2021, Grievant received a written reprimand for “disrespectful attitude towards supervisory personnel, being rude to your co-workers, and failing to comply with reasonable directives.”

7. Grievant did not grieve these disciplinary actions or the PAIP.

8. Grievant did not comply with the strict requirements of the PAIP. She failed to consistently notify Mr. Burnett and Ms. Brown of her lunches and breaks. She failed to submit leave requests within one hour of her return to work after an unscheduled absence. On January 26, 2022, and February 15, 2022, when Grievant was sent home by the hospital’s COVID-19 screener upon her arrival at the hospital, she did not attempt to immediately notify Mr. Burnett of her absence.

9. On April 4, 2022, after receiving an emergency phone call from her daughter, Grievant requested leave from the assistant administrator because she could not locate Mr. Burnett.

10. On April 6, 2022, Mr. Burnett issued an EPA-2 to Grievant that rated her performance as "Does Not Meet Expectations." Mr. Burnett stated that Grievant had failed to follow the PAIP as follows: failure to consistently notify of breaks and lunch times, failure to submit DOP-L3 forms for medically-related absences, and failure to notify of February 14, 2022, unscheduled absence. The EPA-2 also listed several other alleged issues that were not made part of the suspension at issue.

11. On the same day, Mr. Burnett and HR Director Gheen met with Grievant to review the EPA-2. HR Director Gheen asked Grievant to sit and Grievant declined, stating that she needed to stand due to back pain. Grievant became upset during the meeting. Grievant stated she was going to leave the room to get her cell phone to prove that she had contacted to notify. HR Director Gheen told her that it was not necessary and Grievant left the room to get her phone anyway.

12. For approximately one week following the April 6, 2022, meeting, for approximately a week Grievant began to frequently use the hospital paging system to request Mr. Burnette call so that she could notify him of her breaks and lunches. There is no way to control the volume of the paging and the intercom in the area where Grievant works which is quiet. Grievant had not received training on the paging system, except, possibly during new employee orientation more than twenty years ago.

13. On April 20, 2022, Lakin Hospital CEO Danelle Wandling, Assistant Administrator Erica Buford, and Human Resources Director Randi Gheen, and Mr.

Burnett conducted a predetermination conference with Grievant. Grievant asserted that her supervisor and lead housekeeper were not always there to notify of her breaks. Regarding the failure to test, Grievant asserted that the screener told her that someone would contact her and they did not. When questioned about not following the chain of command Grievant responded, "Don't we have an open door policy?" Grievant also asserted that there was a hostile work environment. Grievant had previously alleged hostile work environment but had not provided a written statement regarding her allegation. Grievant was again asked to provide a written statement of detail of this allegation during the conference and did not provide a statement.

14. By letter dated April 26, 2022, CEO Wandling suspended Grievant for three days for failing to adhere to the PAIP and "interrupting the normal operations of the facility." CEO Wandling found that Grievant had violated the PAIP between December 29, 2021 and March 31, 2022 as follows: failing to contact her supervisor or the Lead Housekeeper when taking breaks and lunch; failing to request FMLA within an hour of return to work; failing to provide a doctor's excuse for non-FMLA absences within an hour of return to work; failing to report an absence to her supervisor on January 26, 2022; failing to adhere to mandatory testing and failure to report the absence on February 15, 2022; and contacting the Assistant Administrator instead of her supervisor on April 4, 2022. CEO Wandling found that Grievant had been insubordinate on April 6, 2022, when she was "loud, argumentative, and disrespectful" and refused direction during the meeting to review her EPA-2. CEO Wandling found Grievant had also violated policy by rudely paging her supervisor over the loudspeaker multiple times a day for a week. CEO

Wandling further found that the prior corrective actions of verbal and written reprimand had failed to correct Grievant's performance and conduct.

### **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.*

Grievant asserts she was suspended without good cause. Grievant did not submit Proposed Findings of Fact and Conclusions of Law but it appears from her testimony that Grievant denies some of the allegations and asserts suspension was not otherwise justified. Respondent asserts suspension was justified because Grievant had been previously disciplined and then placed on an attendance and performance improvement plan but failed to correct her behavior.

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 Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res.*, Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for

honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ 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. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Grievant's demeanor was appropriate. Grievant's speaking voice is naturally loud and somewhat harsh. She speaks bluntly and with a clipped tone at times. These characteristics do not indicate disrespect of the proceeding or dishonesty. Grievant answered questions directly and without hesitation. Her memory appeared to be good. Grievant's testimony is credible.

Mr. Burnette's demeanor was appropriate. Mr. Burnette speaks quite slowly with many pauses. Although this appears somewhat due to his attempt to remember events, it mostly appears to be simply Mr. Burnette's normal way of speaking. Mr. Burnette appeared to have little specific memory of the events. Mr. Burnette's testimony and his informal record of Grievant's breaks and lunches were somewhat contradictory. Although he stated he "always" asked Ms. Brown if Grievant had notified her of lunches/breaks, the document consistently states only "did not notify me." The document was his personal document to which Ms. Brown did not have access, nor did Mr. Burnette testify that Ms. Brown had the opportunity to review the document. In addition, the document is contradicted by the suspension letter and testimony that Grievant was sent home by the screener when she arrived at work on January 26, 2022. The document states that

Grievant was at work on that date. Although Mr. Burnett appears credible, his information is less reliable for the reasons explained above.

HR Director Gheen's demeanor was appropriate. She testified professionally and seriously. HR Director Gheen's memory appeared generally good, and she readily admitted if she did not remember a specific circumstance. Although Ms. Gheen's testimony was credible, she provided little detail to explain why she viewed certain actions as improper. For example, Ms. Gheen testified that she believed Grievant was attempting to intimidate her by choosing to stand despite Grievant's plausible explanation that she chose to stand due to back pain but provided no details why she felt this way. It appears this was likely due to the unfortunate length of time between the events and the level three hearing.

It was clear from all of the testimony that there is mutual tension and dislike between both Grievant and Mr. Burnett and Grievant and HR Director Gheen. Grievant resented Mr. Burnett's lack of direct experience at the hospital and the changes he implemented. Mr. Burnett and HR Director Gheen felt Grievant had made unfair accusations against them in the past and that she was disrespectful. Although it appears this tension contributed to communication difficulties between them, it does not appear that any were motivated by negative bias to be dishonest.

Grievant felt targeted by the PAIP and clearly did not believe the PAIP's requirements were reasonable. Grievant attempted to argue that the prior discipline and the PAIP were not justified. "If an employee does not grieve specific disciplinary incidents, he cannot place the merits of such discipline in issue in a subsequent grievance proceeding. *Jones v. W. Va. Dept. of Health & Human Resources*, Docket No. 96-HHR-



371 (Oct. 30, 1996); *See Stamper v. W. Va. Dept. of Health & Human Resources*, Docket No. 95-HHR-144 (Mar. 20, 1996); *Womack v. Dept. of Admin.*, Docket No. 93-ADMN-430 (Mar. 30, 1994). In such cases, the information contained in prior disciplinary documentation must be accepted as true. *See Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994).” *Agilinsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997), *aff’d*, Monongalia Cnty. Cir. Ct. Docket No. 97-C-AP-96 (Dec. 7, 1999), *appeal refused*, W.Va. Sup Ct. App. Docket No. 001096 (July 6, 2000). Whether the requirements of the PAIP were reasonable cannot be challenged now. This grievance concerns only whether Grievant failed to comply with the PAIP and if the suspension was justified for any proven failure.

Grievant clearly resented the PAIP and thought its provisions were a waste of her time. Consistently, when Grievant testified regarding her denial of an allegation, her testimony would reveal that she took some action but that was not actually in compliance with the strict requirements of the PAIP. So, although her testimony is credible, she was still failing to comply with the PAIP. Although it does not appear that Mr. Burnett’s documentation of Grievant’s breaks and lunches was completely accurate, Grievant admitted that if she could not find Mr. Burnett then she would simply go back to work rather than “waste time” looking for him. She also testified that she often took breaks with Ms. Brown. This still was not in compliance with the PAIP, which required Grievant to notify Mr. Burnette and Ms. Brown specifically when she was going and returning from lunches/breaks.

When questioned about her failure to request FMLA within an hour of her return to work, Grievant said she did not understand what that was and that she told them before

she took the time. The PAIP required Grievant, in addition to notifying Mr. Burnette of the reason for requesting leave prior to taking the leave, to also submit a leave request within one hour of her return to work. On January 26, 2022, when the front door screener sent Grievant home due to symptoms when she arrived at work in the morning, Grievant states she called the hospital, but she did not attempt to call the hospital until the afternoon and the PAIP required to call Mr. Burnett, not the hospital. Again, on February 15, 2022, Grievant was sent home due to COVID-19 procedures during screening, and Grievant again failed to notify Mr. Burnett. She testified that she waited all day for someone to call her back from the hospital before she tried to call the hospital, and only then did she attempt to call Mr. Burnett on his cell phone. Again, this was in clear violation of the PAIP. The above is sufficient to prove that Grievant did not comply with the PAIP and was not taking the PAIP seriously, which warranted the progressive discipline of suspension.

Respondent failed to prove the remaining charges. Respondent failed to prove Grievant did not provide DOP L-3 forms for all her non-FMLA absences. Respondent provided no credible evidence<sup>3</sup> regarding which dates Grievant was absent for which she was required to provide and DOP L-3. Respondent failed to prove that Grievant improperly contacted the Assistant Administrator to request leave. Grievant testified that she had received an emergency phone call and could not locate Mr. Burnette to request leave. In such a situation, an employee should be able to go up the chain of command

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<sup>3</sup> To the extent Mr. Burnette's document was intended to prove this allegation, the document is not reliable for the reasons explained above and it also failed to indicate the type of leave taken, whether it was properly requested, or whether a DOP L-3 was required.

to request leave from whomever is available. Respondent failed to prove that Mr. Burnette was available or that Grievant's need to leave work was not urgent.

Respondent failed to prove Grievant's alleged behavior during the April 6, 2022, meeting violated policy. As discussed above, it is plausible that Grievant needed to stand due to back pain as she stated. HR Director Gheen's testimony about Grievant leaving to get her phone was not consistent. During direct, Ms. Gheen testified that she told Grievant it wasn't necessary to get her phone and that Grievant "argued" and left anyway. On cross, Ms. Gheen testified that she directed Grievant not to leave. Telling Grievant it was not necessary to get her phone and directing her not to leave are very different. The inconsistent testimony is not enough to prove that there was a clear directive that Grievant violated. HR Director Gheen did not provide detailed enough testimony regarding specifically what happened to prove that Grievant's behavior violated policy.

Respondent failed to prove that Grievant's paging warranted discipline. Mr. Burnett testified that Grievant was permitted to page him if she could not locate him. Although he testified on direct that he was in the office every time she paged, that assertion is not credible when Mr. Burnett kept no record of when the pages occurred, did not provide specific testimony, and when he admitted that he was often out of his office. If paging is considered a disturbance to the residents, then Mr. Burnett should not have told Grievant she could page and he should have explained to Grievant what to do when Mr. Burnett was not in the office, such as allowing her to call his cell phone. Further, if the paging was as problematic as Respondent asserts, then someone should have discussed it with Grievant immediately, rather than allowing the paging to go on for a week.

Although Respondent did not prove all the charges against Grievant, it proved the majority of the charges, which were of a serious nature. Respondent was justified in suspending Grievant for three days for her failure to adhere to the PAIP.

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 proved the majority of the charges against Grievant and that it was justified in suspending Grievant for three days for failing to adhere to her attendance and performance improvement plan when Grievant previously received a verbal and written reprimand.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Intermediate Court of Appeals.<sup>4</sup> Any such appeal must be filed within thirty (30) days of receipt of this decision. W. VA. CODE

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<sup>4</sup> 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

§ 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 24, 2023**

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**Billie Thacker Catlett**  
**Chief Administrative Law Judge**

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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.