

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**JIMMY LUZADER,
Grievant,**

v.

Docket No. 2015-0911-CONS

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

DECISION

This case before the Grievance Board is a consolidation of three separate grievances arising from the temporary removal from patient care and subsequent three-day suspension of Grievant. This action occurred following an incident on September 10, 2014, in which Grievant directed a forensic patient to leave his sight while on a supervised visit to the Meadowbrook Mall in Bridgeport, West Virginia.

On October 3, 2014, Grievant filed his initial grievance alleging, "neglect substantiated without good cause, without APS investigation, only informed of one allegation." Grievant's relief requested was "to be made whole in every way, including correction of records and removal of discipline or adverse effect." On November 12, 2014, Grievant filed his second grievance alleging "health service assistant functionally demoted to dietary without good cause." Grievant's relief requested was "to made whole in every way, including returned to duties under his classification." On January 23, 2015, Grievant was notified of a three-day suspension. Grievant then filed a third grievance alleging

“suspension without good cause and without predetermination meeting.” Grievant’s relief requested was “to be made whole in every way including back pay and all benefits restored.”

Following consolidation on March 9, 2015, a level three hearing was conducted before the undersigned on August 17, 2015, at the Grievance Board’s Westover office. Grievant appeared in person and by his representatives, Gordon Simmons and Jamie Beaton, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, Steven R. Compton, Senior Assistant Attorney General, and Allison C. Anderson, Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties’ fact/law proposals on December 16, 2015.

Synopsis

Grievant was suspended for three days for failure to supervise a resident while off grounds of the Transitional Living Facility. The record established that Grievant directed a forensic patient to roam freely in a public place without any level of supervision. This action was in direct violation of the Transitional Living Facility’s relevant policy. Respondent proved by a preponderance of the evidence the charges against Grievant and demonstrated that the three-day suspension was appropriate. Respondent acknowledged that Grievant was entitled to pay differential as a result of his reassignment pending the investigation of the matter. This grievance is granted, in part, and denied, in part.

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

Findings of Fact

1. Grievant is a day shift Health Service Assistant at the William R. Sharpe, Jr. Hospital Transitional Living Facility. Grievant has been employed in that position since 2008.

2. The Transitional Living Facility is a twelve bed facility located at Sharpe Hospital in Weston, West Virginia. The facility houses criminal defendants with serious mental illness who have been deemed eligible for community integration. Residents of the Transitional Living Facility are permitted to leave the grounds for various types of outings such as shopping trips and doctor's appointments, under supervision.

3. While on community outings, Transitional Living Facility residents must be supervised in accordance with Transitional Living Facility Policy 2.22, which sets forth six security levels. Phase I residents present the greatest security risk and require the highest level of supervision, while Phase VI residents present the lowest assigned risk. As a Health Service Assistant at the Transitional Living Facility, Grievant's primary role was to provide supervision to residents during community integration activities as necessitated by their assigned security levels.

4. On September 10, 2014, Grievant and Health Service Assistant Lorrie Bean were assigned to transport six Transitional Living Facility residents to the Meadowbrook Mall in Bridgeport, West Virginia, for a shopping trip.

5. Of those six residents, Ms. Bean transported four men in one state vehicle, while Grievant transported two others in a separate vehicle, identified as M.P. and K.V.¹

¹The patients who were involved in this case will be identified by their initials, consistent with this Board's practice respecting the privacy of the individuals under such

6. Resident M.P. was considered a high security risk and was a Phase I, while K.V. was classified as a Phase III. Phases I - III are to remain in sight of staff at all times while off of Transitional Living Facility grounds.

7. Grievant contended that he had reservations about taking those two particular residents on the trip. Grievant believed that a Phase I resident was not permitted to leave the grounds for shopping trips. Grievant also claimed that K.V. was restricted from taking trips to Harrison County by circuit court order setting out no contact with his victim. Neither the Transitional Living Facility Policy nor the resident's circuit court order contained any such limitation.

8. Upon arrival at the Mall, Grievant parked halfway from the end of the parking lot to the Food Court entrance. Ms. Bean had arrived some minutes earlier and was already inside the Mall.

9. While exiting the van, Grievant received a text message on his personal phone from a friend concerning his sister's hospitalization. It is undisputed that Grievant then waved his hand to direct the residents forward and told them to go ahead and to do their own thing. Grievant then shielded his eyes to read the message due to the sunlight.

10. Grievant indicated that he did not believe that he did anything wrong in giving this directive. Grievant acknowledged that he did not tell the residents to wait or stop at the entrance, or provide any other clarification. Grievant also concedes it did not occur to him to instruct the residents to wait in the van while he communicated with his friend.

circumstances. In addition, all exhibits submitted as part of the record in this case are to be placed under seal.

11. As Grievant reviewed his text message, both residents proceeded to the Mall entrance, approximately 60 yards ahead of Grievant. The residents entered the first two set of doors at the Mall entrance. One resident hesitated at the entrance, while the other resident entered and went straight to a store he believed other residents would be located.

12. Grievant acknowledged that he lost sight of M.P. at that point, and had no idea of M.P.'s whereabouts.

13. The situation created by Grievant's ill-advised directive presented a risk to public safety, given the nature of M.P.'s charge of assault, as well as the nature of his mental illness and substance abuse issues.

14. Once Grievant finished reviewing his text message, he began to walk through the Mall with K.V., although he did not attempt to contact anyone at the Transitional Living Facility. Grievant and K.V. eventually crossed paths with Lorrie Bean and her residents. Grievant asked if Ms. Bean had seen M.P., but expressed no concern or intent to search for the unsupervised forensic patient.

15. Ms. Bean located M.P. in the FYE music store and contacted supervisor Deanne Gay to obtain Grievant's cell phone number. She advised M.P. to stand with her while she called Grievant, but M.P. attempted to leave the store. Ms. Bean kept M.P. in her sight, and was able to respond to M.P.'s attempt to walk away and redirect him inside the store.

16. Grievant answered Ms. Bean's call and advised that he was in Target with K.V. Grievant did not arrive at the store to get M.P. until 30 minutes later.

17. Grievant became angry with Ms. Bean because she reported the incident to Transitional Living Facility management.

18. Upon receiving notice of the incident, Program Director Jenny Guzzi removed Grievant from patient care pending investigation of the incident. Grievant was temporarily assigned to duties in the dietary department while receiving full pay and benefits.²

19. On October 17, 2015, a predetermination conference took place with Sharpe Hospital Human Resources Director, Debbie Quinn, and Transitional Living Facility Program Director, Jenny Guzzi, in which Grievant acknowledged that he advised the residents to do their own thing and was unable to locate the Phase I resident in his care.

20. Ms. Guzzi issued a suspension letter on January 23, 2015, advising Grievant that he would be suspended for three working days, without pay, for violation of the policy which requires Phase I residents to be within sight of staff at all times when off grounds.

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. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "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 and Human Res.*, Docket No. 92-HHR-486 (May 17,

²The only issue regarding Grievant's claim of a "functional demotion" is whether Grievant is entitled to receive shift differential pay for the time spent in dietary. The parties stipulated that amount to be \$171.50, and Respondent does not object to the undersigned granting this relief. In addition, Grievant alleged that his personnel file incorrectly cited him for neglect even though the charge was never substantiated by Adult Protective Services. The parties stipulated that Adult Protective Services did not make any such finding and Grievant's file would be amended accordingly.

1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

The charge against Grievant is essentially gross misconduct, as Respondent asserts Grievant violated the Transitional Living Facility Policy concerning supervision of residents while off the grounds of the facility. 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 has met its burden of proof. The record made it clear that Grievant was aware of the policy concerning supervision of M.P. and K.V., who were considered Phase I and Phase III residents. Grievant admitted it was his responsibility to supervise these residents and that his actions allowed resident M.P. to leave his line of sight. Grievant's assertion that he did not violate policy or was not deserving of any disciplinary action are without merit. Grievant claimed that there was a policy that Phase I residents could only go to medical or mental health appointments, but could not produce the policy. Grievant also claimed that K.V. was restricted from taking trips to Harrison County by court order to avoid any contact with his victim. No such limitation concerning M.P.'s travel in Harrison County was found in the resident's court orders.

Grievant claimed that he was concerned with supervising the residents because they were security risks and had been known to run. As counsel points out, this assertion

makes his actions even more egregious, considering he allowed these residents to walk into the Mall without him and eventually out of his sight. Grievant continued to project blame when he claimed that Ms. Bean's phone call to their supervisor prevented him from reporting the incident. Although this situation ended up without a serious consequence at the time, the potential for a dangerous situation was present. A lack of vigilance on the part of an employee such as Grievant can lead to dangerous situations. This is the reason policies are put in place by Respondent and must be followed concerning the supervision of these patients.

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 Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

2. 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).

3. Respondent has met its burden of proof and demonstrated Grievant engaged in gross misconduct when Grievant directed a forensic patient to leave his sight while on a supervised visit.

Accordingly, this grievance is **DENIED**, in part, and **GRANTED**, in part.

Respondent met its burden of proof in this matter, and Grievant's challenge to the three-day suspension is **DENIED**. Grievant's claim for shift differential pay is **GRANTED**. Respondent is **ORDERED** to pay \$171.50, plus all benefits restored.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See 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 so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. See *also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

Date: January 29, 2016

Ronald L. Reece
Administrative Law Judge