THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SHONDDA ALLEN,
Grievant,

v. **Docket No. 2017-1076-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/JACKIE WITHROW HOSPITAL,
Respondent.

DECISION

Shondda Allen, Grievant, is employed by Respondent, Department of Health and Human Resources ("DHHR"), as a Health Service Worker at Jackie Withrow Hospital in Beckley, West Virginia. Ms. Allen filed an expedited grievance form[1] dated October 7, 2016, alleging "Retaliatory suspension without good cause." As relief, she seeks "To be made whole in every way including back pay with interest & benefits restored."

A level three hearing was held in Beckley, West Virginia, on March 20, 2017. Grievant was represented by Gordon Simmons, UE Local 170, but did not appear personally. Respondent was represented by Michael E. Bevers, Assistant Attorney General. This matter became mature for decision on May 17, 2017, with receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant argues that the suspension of her employment was arbitrary and capricious because Respondent failed to follow its obligations under the Attendance Improvement Plan implemented ostensibly as a tool to improve Grievant's attendance.

[1] *See,* W. VA. § 6C-2-4(a)(4).

Respondent proved that Grievant had been given unsuccessful opportunities to improve her attendance before the suspension was implemented and the suspension was justified.[2]

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant, Shondda Allen, is employed by the DHHR at Jackie Withrow Hospital ("Hospital") in Beckley, West Virginia. She is a Health Service Worker at the Hospital.

2. Jackie Withrow is a long term residential nursing facility which provides around-the-clock nursing care for the patients. Like other DHHR facilities, the Hospital has difficulty attracting and retaining staff for its positions which makes regular attendance by the existing employees a priority so that necessary services may be delivered to the patients. When an employee calls off work without prior notice, the employees who are present often have to work overtime or extra shifts to maintain required coverage for the patients.

3. By letter dated August 28, 2015, from Serena Hamb, Hospital Human Resources ("HR") Director, Grievant was placed on an attendance improvement plan ("AIP") pursuant to "section 14.5 of the Department of Personnel Administrative Rule." The reason for this action was that she had called off work twenty-nine times in an eight-month period between January 1, 2015, and August 20, 2015. The plan required Grievant

[2] The issue of retaliation was not pursued at the hearing or in the Proposed Findings of Fact and Conclusions of Law. Therefore, the issue is deemed abandoned.

to provide a physician/practitioner statement form (DOP-L3) for each day of sick leave. Additionally, all requests for annual leave had to be submitted in writing to her supervisor and approved in writing at least forty-eight hours prior to the anticipated leave. The plan was to last six months and Ms. Hamb was to meet with Grievant at least every thirty days to discuss progress and provide feedback. The plan could be extended for an additional six months and failure to comply would result in discipline. (Respondent Exhibit 1).

4. On September 22, 2015, a revised AIP was established to emphasize the seriousness of the issue and clarify any misunderstandings regarding the expectations of the plan established on August 28, 2015. This letter noted that Grievant had previously been placed on an AIP on June 3, 2014. Grievant showed some improvement and the plan was not extended after six months. (Respondent Exhibit 2).

5. The letter went on to specify the details of the AIP as follows:

> 1. For all sick leave, family sick leave and annual leave used in lieu of exhausted sick leave a DOP-L3 must be presented within two days of Grievant's return to work. Failure to timely provide a DOP-L3 would result in her pay being docked for the entire absence.
>
> 2. Requests for annual leave must be requested and approved in writing at least twenty-four hour in advance. (exception for emergency approval provided).
>
> 3. Required to adhere to the regular work schedule and break time unless give written prior approval.
>
> 4. All unscheduled absence must be reported directly to the Director of Nursing ("DON") Donna Ortiz at a specified telephone number at least two hours prior to the start of the shift. Grievant may not leave a message "via voice mail, text, email, or other form of communication."[3]

[3] The requirements have been paraphrased except where quotes are indicated for brevity.

Id. Grievant signed the letter indicating that she had received it and was aware of its contents on October 16, 2015.

6. Grievant was issued a written reprimand by Hospital Chief Executive Officer ("CEO") Angela Booker dated December 1, 2015. This letter followed a predetermination meeting attended by Grievant, CEO Booker and DON Ortiz conducted on November 25, 2015. The letter noted the prior efforts to correct Grievant's attendance issue, but regardless, Grievant had five call-ins between September 30, 2015, and October 31, 2015. Grievant did not contest this reprimand. (Respondent Exhibit 5).

7. Grievant was issued a three-day suspension by letter dated March 30, 2016, from CEO Booker. Grievant's previous problems were set out again as well as an additional "thirteen (13) call-ins" in the three months after Grievant was issued a written reprimand on December 1, 2015. (Respondent Exhibit 6).

8. On June 15, 2016, a predetermination conference was held with Grievant. DON Ortiz was present as well as HR Director Hamb and Grievant. Grievant was informed that suspension was being contemplated. Grievant told her supervisors:

> I have provided excuses for all but three days, I have improved and as long as I am improving I don't see why I'm being punished. My doctor has changed my medication and I'm a lot better. You guys just don't know how hard it is working twelve and sixteen hour shifts and having pee thrown at you, being cussed at, and called nigger."

9. By letter dated, June 20, 2016, HR Director Hamb informed Grievant that no discipline would be implemented, but her AIP was being extended until her "next review date." Additionally, Director Hamb wrote, "We do ask that you make every effort to request time off in advance so that arrangements can be made to cover your shifts." (Respondent Exhibit 4).

10. Grievant received three written Employee Performance Appraisals while she was on her AIP. These were set out on the Division of Personnel Form EPA-2 signifying that they were intermediate appraisals to inform an employee of his or her problem areas and give the employee an opportunity to improve prior to receiving an annual appraisal and rating on a Form EPA-3.

11. The first EPA-2 was dated May 26, 2016 and covered the period of April 21, 2016, through May 25, 2016. Grievant received a rating of "Does Not Meet Expectations." The EPA noted that Grievant had seven absences during this period, but had only provided a DOP-L3 for two of them.[4]

12. The second EPA-2 was signed on July 24, 2016, and covered the period of May 26, 2016, through July 21, 2016. Grievant received an overall rating of "Fair, But Needs Improvement," for that rating period which was an improvement. It was noted that Grievant had five absences over this two-month period and provided a DOP-L3 for one.[5]

13. The third EPA-2 was dated September 7, 2016. Grievant received an overall rating of "Does Not Meet Expectations." It was noted that during this rating period Grievant had five absences and did not provide a DOP-L3 for any of them. It was also noted that the supervisor had scheduled to meet with Grievant to discuss this EPA-2 on September 1 and 2, 2016 and Grievant had called off both days.

14. A predetermination conference was held to inform Grievant that further discipline was being contemplated for her failure to meet attendance goals set in her ongoing AIP. In attendance at this meeting were; DON Ortiz, RN Unit Director, Missy

[4] Respondent Exhibit 8
[5] *Id.*

Brammer, Grievant, and fellow employee, Matt Hodge as Grievant's representative. Grievant was informed that suspension was being considered because she had "incurred seventeen (17) call ins from April 1, 2016, through August 15, 2015," and had not provided a DOP-L3 excuse for most of those incidents as required by her AIP. Grievant noted that she met with the manager and was threatened with suspension every month yet other employees had failed to show up for work without even calling in. Grievant also alleged that the discipline was actually being considered because she had been restricted to working only forty hours per week by her physician.[6]

15. By letter dated October 6, 2016, Grievant was suspended for five working days, by CEO Booker. The letter recapped the past activities occurring during the entire extended AIP and based the suspension on the additional problems discussed in the predetermination meeting.[7]

16. By all accounts, Grievant is capable and competent in the performance of her job as a Health Service Worker. The only problems cited concerning her performance is her attendance record.

Discussion

As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008).

> . . . *See* [*Watkins v. McDowell County Bd. of Educ.,* 229 W.Va. 500, 729 S.E.2d 822] at 833 (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education,* 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the

[6] Respondent Exhibit 9.
[7] *Id.*

> hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). *See also Hovermale v. Berkeley Springs Moose Lodge,* 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) ("Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence."). . .

W. Va. Dep't of Trans., Div. of Highways v. Litten, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant argues that the suspension was arbitrary and capricious because it relied in part on incidents of absence occuring prior to the letter of June 20, 2016, where HR Director told Grievant that she had decided not to discipline Grievant after the predetermination conference held on June 15, 2016. Grievant also alleges that Grievant was entitled to monthly EPA-2s throughout the course of her AIP but only received three.

Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra (citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982). "While a searching inquiry into

the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Blake v. Kanawha County Bd. of Educ.,* Docket No. 01-20-470 (Oct. 29, 2001); *Butler v. Dep't of Health & Human Res.*, Docket No. 2014-0539-DHHR (Mar. 16, 2015).

Concerning the first argument, HR Director Hamb decided to forego discipline at one point during the attendance improvement process. This action did not preclude future disciplinary action if Grievant did not continue to improve. Nor did it preclude consideration of infractions which occurred prior to that date. Progressive discipline constitutes "a corrective approach that implements non-disciplinary measured progressing through levels of discipline commensurate with increasingly severe consequences for continued unsatisfactory behavior or performance." DHHR Policy Memorandum 2104 *Progressive Correction and Disciplinary Action.* Thus, it is based upon a course of conduct that is considered as each level discipline is issued. Obviously, there would be no basis for additional discipline if no performance lapses occurred after any given disciplinary measure. However, if the performance continues to fall below standard, the employer must look at the ongoing course of conduct, and prior corrective steps taken, to determine whether more severe discipline is justified.

In this instance, HR Director Hamb decided the Grievant's attendance issues since her last suspension were not severe enough to justify discipline. That did not preclude consideration of those incidents as evidence that the problem was ongoing and that prior disciplinary efforts had not lead to required performance standards, when Grievant's absences continued to be a problem after June 20, 2015. *See generally, Walls v. Dep't*

of Health and Human Res./Mildred Mitchell Bateman Hospital, Docket No. 2011-0687-DHHR (May 5, 2011) and *Loflin v. Dep't of Health and Human Res./Mildred Mitchell Bateman Hospital,* Docket No. 2012-1291-DHHR (Apr. 30, 2013).

Next, Grievant argues that Respondent's Assistance Improvement Plan for Grievant required that she receives an EPA-2 every month she was in the plan. The Respondent only placed three EPA-2 forms in evidence. Grievant avers that the failure to provide a formal EPA each month violates the AIP, so any disciplinary action for failure to comply with the plan is arbitrary and capricious. However, the words HR Director Hamb wrote in the plan were, ". . . I will meet with you no less that every 30 days to discuss your progress and provide you with direction and feedback." (Respondent Exhibit 1). In the September 22, 2016, predetermination meeting Grievant said to HR Director Hamb, "I can't fathom that I sat in this seat every month and you are saying that you are going to suspend me." (Respondent Exhibit 9). While Grievant did not get an EPA-2 each month, it is more likely than not that HR Director Hamb met with Grievant each month as set out in the AIP. Grievant did not point to any law, policy, rule or procedure which required Ms. Hamb to do more.

Respondent proved by a preponderance of the evidence that the five-day suspension of Grievant for failure to comply with an AIP was justified and not arbitrary and capricious. Accordingly, the grievance is DENIED.

Conclusions of Law

1. As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008). Where the

evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

3. Respondent proved by a preponderance of the evidence that the disciplinary action taken was justified and its action were not arbitrary and capricious.

Accordingly, the grievance is DENIED.

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 (2008).

DATE: July 5, 2017.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE