

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**MARY KATHLEEN BYRD,
Grievant,**

v.

Docket No. 2017-0769-DHHR

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

DECISION

Grievant, Mary Kathleen Byrd, filed this action against her employer, William R. Sharpe, Jr. Hospital, on August 17, 2016, alleging “[S]ubstantiation of allegation and verbal warning given with no due process. Retaliation.” She seeks to be made whole in every way including removal of all disciplinary documentation. This grievance was denied at Level One following a hearing conducted on September 29, 2016. A Level Two mediation session was conducted on January 6, 2017. A Level Three hearing was scheduled to be conducted before the undersigned on May 19, 2017. The parties requested that a decision be rendered on the record developed at Level One prior to the hearing. This request was granted and the parties were given until July 13, 2017, to submit fact/law proposals. Grievant appeared by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, James “Jake” Wegman, Assistant Attorney General. This matter became mature for consideration upon the receipt of the last of the parties’ fact/law proposals on July 17, 2017.

Synopsis

Grievant's supervisor issued a disciplinary memorandum to Grievant in August 2016, in which she reviewed an incident involving Grievant's failure to do four assigned hall walks and fifteen minute checks which Grievant was scheduled to complete. The nurse supervisor did not speak with Grievant concerning her version of events prior to placing the memorandum documenting the verbal warning in her personnel file. Respondent's position is that the subsequent Legal Aid investigation gave Grievant an opportunity to be heard on the issue of discipline. The failure of the supervisor to address her concerns with Grievant prior to issuing what is essentially a disciplinary letter is in violation of the most basic right of due process. This grievance is granted.

The following Findings of Fact are based on the lower level record.

Findings of Fact

1. Grievant is employed at William R. Sharpe, Jr. Hospital, a psychiatric unit operated by the West Virginia Department of Health and Human Resources, as a Health Service Assistant.
2. On August 16, 2016, Grievant's nurse manager, Mary Stalnaker, issued Grievant a written notice of a verbal warning for the failure to perform an assigned hall walk on July 20, 2016.
3. On August 17, 2016, Grievant filed the instant grievance objecting to the reprimand because she had not been given prior notice of the charge, or of the intent to issue discipline, nor any opportunity to respond to the allegation in a predetermination meeting with representation.

4. The limited record of this case offered no evidence that Respondent conducted any interview or discussion with Grievant prior to the issuance of the verbal warning.

5. Nurse Stalnaker only indicated that she discussed the incident after the verbal warning when Grievant explained that she did not know she was assigned the hall walk, indicating that her schedule changes made her uncertain of this duty.

6. Nurse Stalnaker acknowledged that she did not conduct a predetermination meeting with Grievant of any kind prior to issuing the memorandum documenting the verbal warning.

7. Respondent's Human Resources Director, Ginny Fitzwater, testified at Level One that due process means that employees "have the right to be aware of what . . . the issue is or what . . . infraction they're being charged with and the right to provide their side, I guess, their side of the story . . ." Level One transcript, pg. 12.

8. Ms. Fitzwater went on to testify: "[t]o my knowledge, the Bureau is still holding predetermination conferences or meetings even if a written reprimand is the result, because, typically you haven't decided on what level of disciplinary action to issue when you meet with the employee . . . then you should hold a predetermination conference with the employee and their representative if they choose, in order to gather all the facts before you make your determination as to what disciplinary action to recommend or request." Level One transcript, pg. 13.

Discussion

As the claim of being denied due process does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See also *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). "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).

The only issue presented to the undersigned in this case is limited to whether an employer may place a reprimand in an employee's personnel file without any prior due process. The answer to this question must be no. The West Virginia Supreme Court of Appeals has recognized that "due process is a flexible concept, and that the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) (citing *Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)). "What is required to meet procedural due process under the Fourteenth Amendment is controlled by the circumstances of each case." *Barker v. Hardway*, 238 F. Supplement 228 (W. Va. 1968); See *Buskirk, supra*; *Edwards v. Berkeley County Bd. of Educ.*, Docket No. 89-02-234 (Nov. 28, 1989).

It is a well-settled principle of constitutional law, under both the State and Federal Constitutions, that an employee who possesses a recognized property right or liberty interest in his employment may not be deprived of that right without due process of law. *Buskirk, supra*; *Clark, supra*. "An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and an opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

In the instant case it is undisputed that Respondent failed to conduct a predetermination meeting prior to imposing discipline. This action was contrary to the testimony of Ms. Fitzwater in explaining her understanding of due process rights afforded an employee. Respondent's argument that Grievant was somehow provided an opportunity to respond to uncertain charges when Legal Aid of West Virginia conducted an investigation is still contrary to the basic due process requirement that an employee be given notice and an opportunity to respond prior to the imposition of discipline. Grievant was entitled to notice of her misconduct and an opportunity to respond to the charge before Respondent placed the memorandum documenting a reprimand in her personnel file. See *Nadler v. West Virginia University*, Docket No. 05-HE-455 (June 22, 2006). Because Grievant's due process rights were violated, this grievance must be granted, and the underlying merits of the case need not be addressed.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As the claim of being due process does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See also *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). "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).

2. It is a well-settled principle of constitutional law, under both the State and Federal Constitutions, that an employee who possesses a recognized property right or liberty interest in his employment may not be deprived of that right without due process of law. *Buskirk, supra*; *Clark, supra*. "An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and an opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

3. The West Virginia Supreme Court of Appeals has recognized that "due process is a flexible concept, and that the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the

circumstances of the particular case." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) (citing *Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)). "What is required to meet procedural due process under the Fourteenth Amendment is controlled by the circumstances of each case." *Barker v. Hardway*, 238 F. Supplement 228 (W. Va. 1968); See *Buskirk, supra*; *Edwards v. Berkeley County Bd. of Educ.*, Docket No. 89-02-234 (Nov. 28, 1989).

4. Prior to the placement in her personnel file of the memorandum documenting a verbal reprimand, Grievant was entitled to notice and an opportunity to respond to the charge.

Accordingly, this grievance is **GRANTED**, and Respondent is **ORDERED** to remove the August 16, 2016, memorandum from Grievant's personnel file.

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: August 8, 2017

Ronald L. Reece
Administrative Law Judge