

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**WILLIAM CONKLIN,
Grievant,**

v.

Docket No. 2018-0287-SU

**SHEPHERD UNIVERSITY,
Respondent.**

DECISION

Grievant, William Conklin, filed this action against Shepherd University directly to Level Three of the grievance process on or about August 24, 2017. His Statement of Grievance form reads as follows:

Grievant is a disabled person hired by Shepherd University after seeking out a disabled hire through the West Virginia Department of Rehabilitation Services. The hiring of Mr. Conklin required him to be provided with a job coach for the first 100 hours of employment. As a condition of his hiring, Mr. Conklin released records setting forth his disabilities. With full knowledge of his disabilities, Shepherd hired Mr. Conklin to work doing custodial/housekeeping work. Shepherd failed to provide Mr. Conklin with appropriate accommodations and supports in the workplace to allow him to do the job for which he was hired. The job coach failed to work side by side with Mr. Conklin to address issues, assess his understanding of the job, and help with interactions with supervisors and co-workers but instead was pre-occupied with talking on his phone and often left the area or failed to come to the area where Mr. Conklin was working until after he had received instructions for the work to be performed and then contradicted the instructions directly impacting Mr. Conklin's intellectual and emotional disabilities. Shepherd created a hostile work environment and failed to provide Mr. Conklin with an avenue for reporting and addressing problems on the job particularly with harassment and bullying by a co-worker and supervisor. Mr. Conklin reported distressing and inappropriate behaviors by a co-worker to Human Resources but instead of being given information as to how to handle this he was told he was not there to make friends. On the day of the incident for which Mr. Conklin was terminated from employment, his supervisor, Rebecca Olean, approached Mr. Conklin at a pizza lunch for

the employees and in front of his co-workers told him that nobody liked him and no one wanted him there causing embarrassment and humiliation and directly impacting his emotional and behavioral disabilities. Mr. Conklin was suspended without pay and on or about August 13, 2017 received a letter stating that his employment was terminated. Mr. Conklin was not provided with any planned corrective program or a letter of warning prior to his termination. In addition to violations of the Americans with Disabilities Act and the Equal Employment Opportunity Act, Shepherd violated its own EEO and Affirmative Action policy, Job Accommodation policy and Probationary Period policy as contained in the Staff Handbook on pages 3 and 4.

Grievant seeks reinstatement to the job for which he was hired, with or without a planned corrective program; back pay to day of suspension; reasonable accommodations for his disabilities including providing an appropriate job coach and addressing disability based harassment and bullying by co-workers and supervisors.

The undersigned conducted an evidentiary hearing on October 13, 2017, at Shepherd University, Shepherdstown, West Virginia. Grievant appeared in person, and by his attorney, Nancy A. Dalby. Respondent appeared by its General Counsel, K. Alan Perdue. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on November 17, 2017.

Synopsis

Grievant was hired by Respondent as a custodian through the Department of Rehabilitation Services. Grievant's employment was terminated for alleged gross misconduct. Respondent failed to prove by preponderance of the evidence that Grievant acted in a violent and reckless manner, or that he posed any risk to school personnel or students justifying his immediate termination when such alleged conduct could have been correctable by counseling and/or instruction through progressive discipline.

The following Findings of Fact are based upon the record of this case

Findings of Fact

1. Grievant, William Conklin, was hired by Shepherd University on or about July 10, 2017, as a classified employee to do janitorial work.
2. Grievant was hired after Shepherd University contacted the West Virginia Department of Rehabilitation Services (DRS) and expressed a willingness to hire one of their clients.
3. Under an arrangement with DRS, that agency was to provide a job coach for Grievant for his first 100 hours. The job coach provided by the agency was Mr. Mutchler. Grievant suffers from intellectual and mental health disabilities.
4. Grievant worked evening hours and was supervised by Becky Olean. Grievant was assigned to work in both empty buildings and buildings containing classrooms sometimes during class time when students were present.
5. Grievant also worked around or with co-workers. Mr. Mutchler was not present at all times that Grievant was working and did not observe all interactions between Grievant and his supervisor, co-workers, or other personnel or students.
6. During his short tenure with Shepherd University, Grievant attempted to make a complaint about a co-worker who yelled at him and treated him in a manner with which he felt uncomfortable.
7. Grievant reported the problem to Human Resources but was simply told that he was not there to make friends, and nothing came of the report.
8. On or about July 21, 2017, Grievant was driven to work by Mr. Mutchler and

started to believe that Mr. Mutchler wanted to place someone else in the job. Grievant indicated that he felt that Mr. Mutchler had been annoyed waiting for him that morning when he picked him up for work.

9. When Grievant arrived at the University, he worked for a period of time and then attended a pizza party that was provided for the staff. At the pizza party, his supervisor, Becky Olean, informed Grievant that no one liked him and they did not want him there. Grievant felt humiliated and went to another building and ate by himself.

10. After the pizza party, Grievant was assigned to work with a co-worker cleaning scuff marks off the floor. Mr. Mutchler was not with Grievant at the beginning of this task.

11. Grievant was feeling upset about what Ms. Olean had said to him and felt the University wanted to get rid of him.

12. Grievant was unable to remove all the scuff marks with the tools he had been given. After working for sometime, Mr. Mutchler came to where Grievant was working and told him he had to go back over the scuff marks and try harder to remove them.

13. Mr. Mutchler reported that Grievant motioned like he was going to punch him in the stomach although he did not punch him. Mr. Mutchler further reported that Grievant threatened to break out the glass window panels with his scuff mark tool but did not actually hit anything with the tool.

14. Due to Grievant's distress, Mr. Mutchler drove him home before his shift was over. Sometime thereafter, Mr. Mutchler was asked by the University to provide a written statement of the incident. Mr. Mutchler conceded that this gesture was not violent, but used for the purpose of conveying Grievant's anger.

15. On July 27, 2017, Mary Hendrix, University President, sent Grievant a letter telling him he was terminated and offered him a pre-termination conference with Dr. Marie DeWalt. The letter indicated that Respondent had identified a series of occurrences and concerns relating to his ineffectiveness in completing assigned tasks, the inappropriateness of some of his workplace comments, and a general tendency toward insubordination to his supervisor. It further stated that on July 21 he had aggressive physical contact with the Job Coach and that the University can not expose its employees and its college students to recklessness and violence. The July 21 incident was the only specific incident listed.

16. On August 8, 2017, Grievant attended a pre-termination conference with Marie DeWalt, Director of Human Resources, after which he received a final termination letter.

17. Dr. DeWalt, who understood that Grievant had an intellectual disability, offered no evidence of any of the allegations against Grievant contained in the letters from President Hendrix, but indicated that she had heard complaints that Grievant had exhibited emotional volatility prior to the July 21 incident. Grievant was never given a letter of warning or a plan of correction prior to being terminated.

18. Dr. DeWalt conceded that when Grievant called to complain about a co-worker yelling at him, he had not been told how to report any harassment or bullying or been referred to any staff resources, but had been told he was not there to make friends.

19. Mr. Mutchler indicated that he had told Grievant not to report his treatment by a co-worker so as not to jeopardize his job and had not offered any help in dealing with the situation.

20. The Shepherd University Staff Handbook states, in pertinent part, at page 4:

A classified employee may be separated during the initial or extended probationary period if he/she fails to meet established position expectations. During this time period, termination of a newly hired employee may occur following one letter of warning for misconduct or performance issues.

21. The University Staff Handbook also provides the following:

Each employee must maintain standards of performance and conduct as outlined by the immediate supervisor, the department in which the employee works, and institutional policy, and must comply with all applicable policies, procedures, and laws. When a Classified employee does not maintain the appropriate standards of performance or conduct, disciplinary action, including but not limited to, demotion, suspension, transfer, or dismissal may be taken. The supervisor will provide the employee notice of the unacceptable performance, an explanation of the supervisor's concerns, and an opportunity for the employee to provide an explanation for the behavior in question. Notice and an opportunity to explain should usually precede major disciplinary actions such as suspension or dismissal.

Depending upon the actual and potential consequences of the offense, employee misconduct may be considered minor misconduct or gross misconduct. Minor misconduct is that which is generally deemed by the supervisor as correctable by counseling and/or instruction through progressive discipline. Gross misconduct is of substantial actual and/or potential consequence to operations or persons, typically involving flagrant or willful violation of policy, law, or standards of performance or conduct. Gross misconduct may result in any level of discipline up to and including immediate dismissal at the University President's discretion.

22. The University terminated Grievant's employment on the basis that the conduct on July 21, 2017, was gross misconduct which justified immediate dismissal.

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. Procedural Rules of the W. Va. Public Employees Grievance Bd. 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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

Respondent asserts that Grievant's conduct on July 21, 2017, was gross misconduct. 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).

At the evidentiary hearing Respondent presented Dr. Marie DeWalt and Mr. Mutchler as its only witnesses. Mr. Mutchler was the only witness with first-hand knowledge of the events of July 21, 2017. Mr. Mutchler acknowledged that after he gave the University his written statement of events, he was contacted by the University and told he needed to revise his statement to indicate that there had been actual physical contact by Grievant. It was apparent that Mr. Mutchler was struggling with the characterization of his account that Grievant acted like he was going to hit him in the stomach as to whether

Grievant actually touched him or not. Mr. Mutchler stated that Grievant did not actually punch him. Grievant denied that he made physical contact with Mr. Mutchler.¹

Mr. Mutchler indicated that there was another University employee present on July 21, 2017, but the University chose not to call her as a witness. There was no evidence that any of Grievant's alleged behaviors were directed toward the co-worker or viewed by anyone else. As counsel for Grievant aptly points out, Mr. Mutchler was Grievant's job coach provided by DRS. His relationship with Grievant was not one of employer and employee. Mr. Mutchler was present to be a support person to Grievant and help him handle any issues that may come up due to his disability. No interactions that Grievant had with Mr. Mutchler can be characterized as insubordination. Mr. Mutchler's relationship with Grievant was different than that of the University staff, and intended as an opportunity for Grievant to express his anxieties, stress and frustration with the job and receive help or guidance from Mr. Mutchler. The fact that the University agreed that Grievant have a job coach is an acknowledgment that his disabilities were anticipated to impact his job performance.

Mr. Mutchler failed to be with Grievant as a job coach for extended periods of his limited employment as required by the conditions of his employment leaving Grievant to

¹The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge 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. See *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Shelton v. Kanawha County Bd. of Educ.*, Docket No. 07-20-227 (Jan. 31, 2008).

deal with the pressures of learning his job and dealing with co-workers and supervisors by himself during those periods of absence. Based upon the totality of the circumstances presented in this case, Respondent failed to prove by a preponderance of the evidence that Grievant acted in a “violent and reckless manner” on July 21, 2017, or that he posed any risk to school personnel or students justifying his immediate termination without even a letter of warning. In fact, Dr. DeWalt indicated that when Grievant had a problem with the behavior of a co-worker yelling at him, he reported it to Human Resources rather than directing any anger at the co-worker.

The limited record reflects that Respondent failed to treat Grievant like it would have treated another employee by informing him of the harassment and bullying complaint procedures and by giving him a letter of warning for misconduct or performance issues as required by the staff handbook before termination. The undersigned finds that the record does not establish gross misconduct justifying Grievant’s immediate termination when such alleged conduct could have been correctable by counseling and/or instruction through progressive discipline.

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 Bd. 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. Respondent failed to prove by a preponderance of the evidence that Grievant's conduct did amount to gross misconduct and was cause for termination of Grievant's employment.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to reinstate Grievant to his former position, with a planned corrective program and an appropriate job coach, with back pay, and any other benefits which Grievant would have received had he not been terminated.

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 *a/so* 156 C.S.R. 1 § 6.20 (2008).

Date: December 15, 2017

Ronald L. Reece
Administrative Law Judge