

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**BEVERLY CREWS,
Grievant,**

v.

Docket No. 2017-2120-DHHR

**DEPARTMENT OF VETERANS ASSISTANCE,
Respondent.**

DECISION

Beverly Crews, Grievant, was employed by Respondent, Department of Veterans Assistance (“DVA”), as the Director of Nursing at the West Virginia Veterans Home in Barboursville. Nurse Crews filed an expedited grievance¹ dated April 29, 2017, alleging she was dismissed without cause and seeking reinstatement with back pay, interest and the restoration of all benefits. A level three hearing was conducted over the course of three separate days: August 29, 2017; August 30, 2017; and November 20, 2017, at the Charleston office of the West Virginia Public Employees Grievance Board. Administrative Law Judge Landon R. Brown, conducted the first two days of the hearing at which time he discovered he had a conflict which rendered him ineligible to render a decision in this matter. The matter was reassigned to the undersigned Administrative Law Judge to conclude the hearing and render a decision.

Grievant personally appeared and was represented by Gordon Simmons, UE 170, West Virginia Public Workers Union. Respondent, Department of Veterans Assistance, (“DVA”) was represented by Mark S. Weiler, Assistant Attorney General. This matter

¹ W. VA. CODE § 6C-2-4(a)(4) authorizes employees to file a grievance directly at level three if it is contesting a dismissal.

became mature for decision on February 22, 2018, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Respondent dismissed Grievant for failing to adopt a more helpful and cooperative management style after being instructed to do so, continuing to criticize her coworker in front of staff and residents after receiving written notice to altering the care plans of coworkers in other disciplines without their permission, creating an adversarial relationship with the staff of the VA Hospital, and being disrespectful of the rights of the veteran residents.

Grievant argues that she was diligently and professionally pursuing her duties as the Director of Nursing while being obstructed by the Administrator. She avers that the discipline is nothing more than reprisal for her filing a grievance against her supervisor for giving her instructions which interfered with her nursing responsibilities.

Respondent proved that there were valid non-pretextual reasons for the disciplinary action which had nothing to do with reprisal.

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. The West Virginia Veterans Home ("Veterans Home") in Barboursville, West Virginia, is an independent living facility for qualifying veterans. Social work programs and nursing services, such as health maintenance and wellness care plans, are provided to the resident veterans at the facility.

2. The nursing services are provided by a staff of licensed practical nurses (“LPN”) who perform wellness assessments and administer medication to the residents. The LPNs coordinate with the Veterans Administration Hospital concerning the residents’ medical care and carry out doctors’ orders as appropriate. The LPNs are directly supervised by the Director of Nursing (“DON”) who is charged with insuring that Veterans Home policies and procedures are followed by the nursing staff.

3. Grievant Beverly Crews was employed by the Department of Veterans Assistance (“DVA”) as the Director of Nursing at the Veterans Home. She was employed as the Veterans Home Director of Nursing since spring 2015. Grievant has been a registered nurse for more than seventeen years. As Director of Nursing (“DON”), Grievant is the direct supervisor for all the LPNs at the Veterans Home. The DON at the Veterans Home is required to work effectively with a wide range of health professionals and ancillary personnel. (Respondent Exhibit 23, DON Job Description).

4. Thomas McBride is the Administrator for the Veterans Home and has held that position for approximately five years. As the Hospital Administrator (“Admin.”), Mr. McBride is Grievant’s immediate supervisor. Mr. McBride has no specific training related to medical or nursing issues or standards.

6. The facility is organized in separate units: nursing, social work, recreation, dietary, and housekeeping. Grievant only supervises the nurses. The social workers report directly to Administrator McBride.

7. All five departments participate in the development of an interdisciplinary care plan for each of the residents. At any given time, each resident has one current care plan developed by the team. The plan is amended by the team as the needs of the

resident change. The DON is the coordinator of the interdisciplinary team but does not supervise the participants on the team.

8. The DON and her staff have the responsibility of “Establishing healthy and professional working relationships with other disciplines both directly within the facility, as well as outside sources which are an integral part in providing effective and comprehensive program of care for each resident.” Respondent Exhibit 10, *Veterans Home Nursing Policies and Procedures*.

9. Early in Grievant’s tenure at the Veterans Home, Administrator McBride received complaints from the LPNs that Grievant was overly critical of their work and treating them very disrespectfully. Mr. McBride met with Grievant to discuss these issues and told Grievant that she had to be more respectful when dealing with the LPNs and try for a less harsh tone.

10. On August 16, 2016, Administrator McBride received complaints from LPNs that Grievant was unnecessarily and improperly touching them in the course of their work which made them uncomfortable. Mr. McBride met with Grievant between August 16 and August 18, 2016, to tell her he would be investigating these allegations.

11. Nurse Crews filed a grievance dated August 25, 2016, alleging that she had been given an “[i]mproper directive by the administrator of the WV Veterans Home not to notify a physician with anything that could be an issue or problem concerning the residents.”² Grievant believed the alleged directive conflicted with her duties as a nurse and a mandatory reporter for abuse or neglect.

² *Crews v. Dep’t of Veteran Assistance*, Docket No. 2017-0806-DVA. The grievance was denied at level one, advanced through level two and was place in abeyance pending the outcome of the present grievance at level three by Order dated May 25, 2017.

12. On September 13, 2016, Administrator McBride suspended Grievant for two days without pay as a result of the investigation initiated in mid-August. In addition to the suspension, Mr. McBride directed Grievant to develop a training plan to improve her supervisory skills, submit the plan to him for his approval, and take the courses necessary to complete the plan.³ FOF 20, *Crews v. Dep't of Veteran Assistance*, Docket No. 2017-0344-DVA (Mar. 14, 2016). He also criticized Grievant for openly making disparaging remarks about Social Worker Michael Rollyson and indicated that if that behavior continued she would be subject to further disciplinary action.

13. Nurse Crews filed a grievance the same day alleging the suspension was without cause and a reprisal for her filing a grievance in August contesting Mr. McBride's prior directive. *Crews v. Dep't of Veteran Assistance*, Docket No. 2017-0344-DVA (Mar. 14, 2016).

14. A level three decision was entered finding that Grievant's excessive touching of the LPNs under her supervision, after she had been counseled against that conduct, was sufficient to "[create] a hostile environment in violation of the DOP *Prohibited Workplace Harassment Policy*." *Id.* COL 11. The decision also found that Grievant established a *prima facie* case for reprisal but, "Respondent proved that there was a legitimate, non-retaliatory reason for the disciplinary action and Grievant did not prove that the reason was pretextual." *Id.* COL 8.

³ It was anticipated that the training could be accomplished by completing management courses offered by the Division of Personnel including: Supervising for success II; Preventing Harassment; Conflict Management; and Discipline and Documentation.

15. Grievant took some management classes from the Division of Personnel but did not complete a training plan prior to the termination of her employment on April 3, 2017.

16. Michael Rollyson is employed as a Social Worker at the Veterans Home. He is the only Social Worker employed at the facility.

17. Grievant did not believe the social worker was adequately doing his job. She complained about his performance to Administrator McBride and had received a written warning about openly making disparaging remarks about Mr. Rollyson to others in the facility. (FOF 12 *supra*).

18. In early March 2017, there was a care plan meeting regarding a resident with staff members, an intern and a resident in attendance. Mr. Rollyson was not present; an intern social worker was attending the meeting in his place. During that meeting, Grievant complained about Mr. Rollyson being late with his portion of the plan and said he was lazy. She asserted that his care plans “look terrible” and that she wanted to delete them. Grievant also stated the VA was asking her if Rollyson actually attended the care plan meetings.⁴

19. Amy Gill was working at the Veterans Home as a social work intern as part of her Master’s Degree Program at Marshall University. She worked closely with Michael Rollyson and attended care plan meetings as part of her assignment. Grievant was often critical of Mr. Rollyson to Ms. Gill. In one conversation she asked Ms. Gill, “Does Michael have oxygen running to his brain?” in another conversation she told Ms. Gill:

⁴ Respondent Exhibit 14, Written statement and level three testimony of Amy Gill, social work intern.

You know that he [Rollyson] is responsible for a past resident overdosing last year, right? Yeah, he [veteran] committed suicide just days after he was admitted, and Michael was responsible for it. He got in big trouble for it.

Additionally, Grievant told the intern:

You would not want to work here with veterans, they are going nowhere in life, they are literally going nowhere in life and are never going to get better, what's the point?

The intern was surprised and upset that the Director of Nursing was so negative about their client population. (Respondent Exhibit 14).

20. Residents often complained to Ms. Gill about Grievant's attitude toward them which made them avoid interactions with her. Residents complained that Grievant threatened to kick them out of the facility if they did not comply with her directives. Several residents also made complaints to DVA Operations Manager ("OM"), Mike Lyons, about Grievant's attitude and disrespectful treatment of them. Mr. Lyons interviewed the resident veterans and reported their concerns to Randy Coleman, DVA Chief of Staff.

21. At one point, the Veterans Home was changing the software program they were using to store and track care plans and other resident data from "Ultra Care" to "Point Click Care," ("PCC"). In a conversation with Social Worker Rollyson, Nurse Crews accused the social worker of not completing any care plans for six months. Mr. Rollyson informed Grievant that he had been putting all his care plan entries into the PCC software as he had been instructed to do. Grievant became loud and insisted that Mr. Rollyson was incorrectly informed, and nothing was to be entered in PCC because the nurses had not finished their training.⁵

⁵ Respondent Exhibit 20, Statement of Michael Rollyson.

22. Peggy Kennedy was working to install the new record system. She complained to the Administrator that Grievant had gone into the system and changed social work documents that Rollyson had placed into the new system. These documents related to the social work portion of the care plan, not nursing. She also confirmed in March 2017 that all entries were to be placed in the new system. (Respondent Exhibit 31).

23. Grievant transferred many of the care plans from Ultra Care to PCC. She erased the plans from Ultra Care as she went. Peggy Kennedy who was in charge of the switch over from the Ultra Care system to the PCC reporting system, filed an incident report dated February 2, 2017, stating the Grievant was changing and deleting care plan documents and doctor orders from the Ultra Care system after being told by Ms. Kennedy on previous occasions not to do so. When Ms. Kennedy confronted Grievant about this activity she responded Grievant said that st the way it is to be done. Grievant ignored Ms. Kennedy's instructions.

24. Mike Stevens is the Recreation Specialist at the Veterans Home. He is a participant at the care plan meetings and contributes to the care plans by making entries into the computer system concerning the veterans' interactions and participation in group activities both on the premises and off. Grievant coordinated the care plan meetings but did not have supervisory authority over Mr. Stevens. Grievant modified some of the Recreation/Activity care plan entries made by Mr. Stevens and made care plan entries in his name. Grievant also altered care plan entries made by Annette Bailey, the Housekeeping Supervisor. None of these entries were related to nursing.

25. One resident who had been at the facility for fifteen years told Mike Lyons that Grievant was rude, disrespectful and threatened to throw him out of the Veterans Home.⁶ Grievant had told this resident that he had to go to the VA Hospital. The veteran objected saying he did not need to go, but Grievant had already called for an ambulance and the EMT's were on the way. While the veteran was at the hospital, Grievant telephoned him requesting his "pin number"⁷ which would give her access to the veteran's medical records kept at the hospital. The veteran refused to give up his personal pin number and Grievant told him that if he did not give up his medical records he might not be allowed to return to the Veterans Home.⁸ (Respondent Exhibit 21, investigation report completed by Michael Rollyson, at the request of DVA-OM Lyons).

26. Upon release of a veteran to the Veterans Home from the VA Hospital, the Home is given a "discharge summary" of the resident's stay. The discharge summary includes information concerning the veteran's diagnoses, treatment, drugs prescribed and follow-up care instructions. Remaining medical records may not be released without written permission from the patient.⁹

⁶ Level three testimony of Mike Lyons. Mr. Lyons identified this resident by name during his testimony. However, it has not been repeated herein to protect the resident's privacy and because his identity is not essential to the resolution of this matter since Grievant was made aware of his identity and was able to address the accusation at the hearing.

⁷ The VA Hospital gives each patient a Personal Identification Number (PIN) when he or she is admitted. The PIN gives access to the veteran's in-patient health and medical records during the stay. The veteran has the right to refuse anyone except hospital staff from receiving his PIN.

⁸ The veteran had placed the telephone on speaker setting and this conversation was heard by doctors and staff at the VA Hospital.

⁹ Level three hearing testimony Lee Ann Bills, Chief Social Worker at the VA Hospital where she has worked for ten years.

27. Grievant repeatedly sought PINs for veterans at the VA Hospital from the social workers and nursing staff. When she was refuse his information, Grievant became insistent and argumentative. Ms. Bills had participated in so many of these demanding conversations with Grievant that she complained to her supervisor and quit taking Grievant's calls.^{10d}

28. DVA Chief of Staff, Randy Coleman received all written statements that were given to Mr. Lyons and Administrator McBride when Mr. Lyons was off on medical leave. Chief of Staff Coleman was very concerned about the deteriorating relationship between Grievant and the VA Hospital staff. This is a vital link for ensuring that the veterans maintain their follow-up treatments correctly. Chief of Staff Coleman reported his findings and concerns to DVA Cabinet Secretary, Dennis Davis.

29. On April 13, 2017, Chief of Staff Coleman held a predetermination conference with Grievant and her representative. Grievant admitted to changing and editing the care plan entries made by other teams and repeated her view that Mr. Rollyson was lazy, and his work product was poor. Grievant did not specifically remember her conversations with Ms. Gill but noted that she believed they were held in confidence. Grievant was surprised by the views expressed by the VA Hospital social workers and believed she had a good relationship with the hospital staff.

30. Chief of Staff Coleman had follow-up meetings with Mike Stevens and the veteran who had made a complaint during his hospitalization to confirm their statements and then reported his findings and Grievant's responses to Cabinet Secretary Davis. After

¹⁰ Level three hearing testimony Lee Ann Bills and VA Hospital Social Worker, Beth Lawson.

a discussion regarding possible actions, Secretary Davis decided to dismiss Grievant. He issued a memorandum regarding “Discharge” which was dated and hand-delivered to Grievant on April 27, 2017. (Respondent Exhibit 2).

31. Grievant was charged with insubordination for:

- Continuing to treat the staff harshly after being specifically instructed to find more cooperative ways for dealing with subordinates.
- Failing to complete the courses set out for her to assist her in adopting a more appropriate management style.
- Continuing to denigrate Social Worker Rollyson’s work in meetings in front of staff and residents after being specifically instructed to stop that practice.

Grievant was also charged with violating *WVH*¹¹ *Nursing Policies and Practices* by:

- Failing to treat residents with dignity, fairness and understanding, and failing to respect their individual rights to privacy.
- Creating a contentious relationship with the staff of the VA Hospital which is a crucial partner with the Veterans Home by making inappropriate demands for patient records and being harsh and uncooperative with the hospital social workers.

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 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

¹¹ WVH is the initials for the West Virginia Veterans Home.

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).

Respondent dismissed Grievant for continuing to foster poor relationships with the rest of the staff at the nursing home after being specifically told to be more cooperative. As evidence of this, Respondent proved that Grievant openly and sarcastically criticized the work of Social Worker Rollyson in meetings with staff and residents present after being specifically give written instructions in her previous suspension letter to stop.

Grievant resisted informing Administrator McBride prior to calling a doctor regarding a resident or requesting an ambulance. Grievant believed this qualified as an intrusion into her professional judgment since Mr. McBride had no medical training. However, Grievant produced no evidence that Administrator McBride refused to allow her to call an ambulance or doctor in a specific situation. Rather he asked to be kept informed which is a reasonable request unless a medical emergency required immediate action.

Grievant was disrespectful to the other managers in the facility by making changes to their care plan entries without consulting with them or seeking their permission. She changed and deleted care plan entries made by Social Worker Rollyson, Recreation Specialist Stevens and House Keeper Supervisor Bailey. Grievant and these employees are on the same level of the Veterans Home organizational chart¹² and are in charge of

¹² Respondent Exhibit 4.

their separate units. Grievant had no supervisory authority over these employees and had no authority to alter their work product.

Grievant argued that she was responsible for the care plans and corrected what she believed to be mistakes. Grievant was the coordinator of the care plan process, but had no authority to override the judgment of the supervisors in the areas of Recreation, House Keeping and Social Work which are not part of her discipline. Grievant should have been acutely aware of this since she resented any attempts by Administrator McBride to oversee her nursing activities due to his lack of medical training.

Grievant also asserted that any deletions she made of the records were done when she transferred records from the Ultra Care system to the PCC system because there did not need to be records on both systems. She completely ignored the instructions of Peggy Kennedy who was in charge of the conversions of the two systems. Additionally, by deleting entries from the old system immediately after she placed entries into the new system she eliminated any possibility of others to check these entries to make sure no mistakes were made.

Grievant also created an adversarial relationship with the staff of the VA Hospital by insisting that she be provided access to residents' medical records against hospital policy, and arguing with the hospital staff when they refused to provide access. Grievant did not believe she had a poor relationship with the VA Hospital social workers and simply wanted the records to provide better care for her patients. However, the testimony and written statements of the VA Hospital Social Workers demonstrated that they were so frustrated with the treatment they received from Grievant that at least one of them quit taking her calls.

The *WVH Nursing Policies and Procedures* establishes the Nursing Service Policy as follows:

The goal of the Nursing Service is to be an effective and productive member in achieving and maintaining the highest degree of functioning to each resident. This can best be accomplished by establishing healthy and professional working relationships with other disciplines both directly within the facility, as well as outside sources which are an integral part in providing an effective and comprehensive program of care for each resident.

Respondent proved by a preponderance of the evidence that Grievant violated this policy by treating care plan team members in other disciplines like inferiors by altering their care plans to suit her views. She also regularly criticized a fellow employee in front of staff and residents. While it may be somewhat understandable that she had a one-on-one conversation with the intern, denigrating the social worker in front of staff and the residents creates an unhealthy relationship with the staff and erodes the confidence of the veterans that their welfare is being protected. Additionally, Grievant failed to maintain a reasonable and professional relationship with the staff of the VA Hospital which is an essential partner to the Veterans Home in helping the veterans achieve their highest degree of functionality.

For there to be "insubordination," the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be willful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd./Shepherd Coll.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curium*). The disobedience must be willful, meaning that "the motivation for the disobedience [was] contumaciousness or a defiance of, or contempt for authority." *Id.*, 212 W. Va. at 213, 569 S.E.2d at 460 (citation omitted). "Employees are expected to

respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990).

Respondent directed Grievant to find a way to be less harsh and confrontational with her subordinates. As part of her prior suspension letter, Grievant was specifically directed to stop openly criticizing Social Worker Rollyson and to attend specific courses provided by the Division of Personnel to help her find a more cooperative and supportive management style. Grievant took some of the courses but was unable to schedule all of them based upon when they were offered and her scheduled duties. Respondent did not prove that Grievant's failure to attend all the courses was sufficiently deliberate or willful to constitute insubordination.

However, attending the courses was not an item to be checked off the list. It was a means for accomplishing the main goal of implementing a more supportive and cooperative management style. Respondent proved by a preponderance of the evidence that Grievant continued to be harsh with the LPNs, as well as openly and sarcastically criticized Mr. Rollyson. Grievant's refusal to attempt to create more harmonious working relationships even after completing some of the specified training, and her willful defiance of clear directions did meet the definition for insubordination.

Grievant offered no defense for this behavior other than she is not a warm person and she felt that she was justified in her actions because her coworkers, and particularly Mr. Rollyson, were not performing their jobs as she believed they should. Administrator McBride sets the expectations for Mr. Rollyson's performance. Grievant appropriately complained about Mr. Rollyson's conduct to Mr. McBride. The fact that Mr. McBride did

not take the actions Grievant expected, did not give her license to openly ridicule the social worker.

Grievant's testimony indicated that she was always guided by what she felt was in the best interest of the residents. Unfortunately, she expected others to agree with her views and adjust their work performance with what Grievant felt was correct even though they were working in a completely different discipline. She expected the VA Hospital staff to meet her demands even though to do so would result in a serious breach of regulations related to the veterans' privacy. This attempt to control her coworkers and colleagues led to extremely difficult relations which impeded the ability of the staff to meet the overall goals of the home.

The federal regulations section related to "Patients' Rights" states:

(a) General. (1) Patients have a right to be treated with dignity in a humane environment that affords them both reasonable protection from harm and appropriate privacy with regard to their personal needs.

38 CFR 1 § 17.33.

Grievant's behavior toward some of the residents did not meet the obligation of treating them with dignity or respecting their privacy. Several of the residents complained to Intern Gill and Operations Manager Lyons that Grievant treated them disrespectfully to the extent that they avoided encountering her when possible. More than one resident reported that Grievant threatened to kick them out of the home if they did not comply with her directives. Grievant's insistence on receiving the residents' medical records in addition to discharge summaries indicated an unwillingness to respect their rights to personal privacy.

It has been consistently held that, “A supervisor is expected to set an example of appropriate behavior for subordinates and may be held to a higher standard of conduct.” *Cobb v. Dep’t of Admin./General Services Div.*, Docket No. 97-ADMN-404/455 (May 26, 1999); *Wiley v. Dept. of Natural Res.*, Docket No. 96-DNR-515 (March 26, 1988); *Lilly v. Dep’t of Transp.*, Docket No. 07-DOH-387 (June 30, 2008); *Henry v. Div. of Highways*, Docket No. 2011-0944-DOT (Aug. 31, 2011); *Vance v. Reg. Jail Auth.* Docket No. 2011-1705-MAPS (Feb. 22, 2012); *Bolen v. Div. of Highways*, Docket No. 2016-1198-DOT (Apr. 14, 2017). Respondent’s expectations were that Grievant would practice a more compassionate management style and model cooperative behavior for her subordinates. Grievant’s refusal to meet those expectations not only constituted insubordination, but also violated policies and rules related to basic philosophy of the Veterans Home.

Grievant argues that all the allegations against her are in fact, simply reprisal for filing a grievance against her supervisor for interfering in medically related matters. WEST VIRGINIA CODE § 6C-2-2(o) defines “reprisal” as “the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it.” To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

- (1) That she engaged in protected activity;
- (2) That she was subsequently treated in an adverse manner by the employer or an agent;
- (3) That the employer’s official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and

(4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Carper v. Clay County Health Dep't, Docket No. 2012-0235-ClaCH (July 15, 2013); *Cook v. Div. of Natural Res.*, Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.*, Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also *Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). "[T]he critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a 'significant,' 'substantial' or 'motivating' factor in the adverse personnel action." *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994).

If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *Id.* See *Mace v. Pizza Hut, Inc.*, 377 S.E.2d 461 (W. Va. 1988); *Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n*, 309 S.E.2d 342 (W. Va. 1983); *Webb v. Mason County Bd. of Educ.*, Docket No. 89-26-56 (Sept. 29, 1989). "Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive." *Carper v. Clay County Health Dep't*, Docket No. 2012-0235-ClaCH (July 15, 2013); *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994). See *Sloan v. Dept. of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

Grievant noted that all her disciplinary problems including a prior suspension originated in August 2016. She filed her grievance contesting directives given by Administrator McBride on August 25, 2016. Indeed, much of the charges and investigation which led to her suspension occurred within the same time frame of the filing of the original grievance. However, in the decision related to the suspension, Respondent proved the existence of legitimate, non-retaliatory reasons for the suspension and Grievant did not offer any evidence to prove that those reasons were pretextual. *Crews v. Dep't of Veterans Assistance*, Docket No. 2017-0344-DVA (March 14, 2016). Many of the charges in this case relate to Grievant's continuing failure to comply with directives which were the subject of the original suspension. As in the previous decision, Respondent proved the existence of legitimate, non-retaliatory reasons for the termination of Grievant's contract. Grievant offered no evidence beyond her own speculation to prove that those reasons were pretextual. Consequently, Grievant did not prove reprisal as contemplated by the public employees grievance statutes.

Finally, Respondent did not allege or contend that Grievant was not a skilled and talented nurse, but Respondent did prove the charges of insubordination and policy violations related to Grievant's management, by a preponderance of the evidence, which justified termination of her employment. Accordingly, the Grievance is DENIED.

Conclusions of Law

1. This grievance involves a disciplinary matter. Therefore, 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 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).

2. For there to be "insubordination," the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be willful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd./Shepherd Coll.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curium*). The disobedience must be willful, meaning that "the motivation for the disobedience [was] contumaciousness or a defiance of, or contempt for authority." *Id.*, 212 W. Va. at 213, 569 S.E.2d at 460 (citation omitted). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990).

3. Respondent proved by a preponderance of the evidence that Grievant intentionally did not follow prior directives which constituted insubordination.

4. Respondent proved by a preponderance of the evidence that Grievant violated the *WVNH Nursing Policy*. (Respondent Exhibit 10).

5. “A supervisor is expected to set an example of appropriate behavior for subordinates and may be held to a higher standard of conduct.” *Cobb v. Dep’t of Admin./General Services Div.*, Docket No. 97-ADMN-404/455 (May 26, 1999); *Wiley v. Dept. of Natural Res.*, Docket No. 96-DNR-515 (March 26, 1988); *Lilly v. Dep’t of Transp.*, Docket No. 07-DOH-387 (June 30, 2008); *Henry v. Div. of Highways*, Docket No. 2011-0944-DOT (Aug. 31, 2011); *Vance v. Reg. Jail Auth.* Docket No. 2011-1705-MAPS (Feb. 22, 2012); *Bolen v. Div. of Highways*, Docket No. 2016-1198-DOT (Apr. 14, 2017).

6. WEST VIRGINIA CODE § 6C-2-2(o) defines “reprisal” as “the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it.”

7. To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

- (1) That she engaged in protected activity;
- (2) That she was subsequently treated in an adverse manner by the employer or an agent;
- (3) That the employer’s official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
- (4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Carper v. Clay County Health Dep’t, Docket No. 2012-0235-ClaCH (July 15, 2013); *Cook v. Div. of Natural Res.*, Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.*, Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County*

Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also *Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

8. If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *Id.* See *Mace v. Pizza Hut, Inc.*, 377 S.E.2d 461 (W. Va. 1988); *Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n*, 309 S.E.2d 342 (W. Va. 1983); *Webb v. Mason County Bd. of Educ.*, Docket No. 89-26-56 (Sept. 29, 1989). "Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive." *Carper v. Clay County Health Dep't*, Docket No. 2012-0235-ClaCH (July 15, 2013); *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994). See *Sloan v. Dept. of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

9. Respondent proved that there was a legitimate, non-retaliatory reason for the disciplinary action and Grievant did not prove that the reason was pretextual.

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: April 26, 2018.

**WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE**