

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

LATOSHA GREENE,

Grievant,

v.

DOCKET NO. 2017-2502-CONS

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
JACKIE WITHROW HOSPITAL,**

Respondent.

DECISION

On February 23, 2017, Grievant filed a grievance asserting that her employer had improperly changed her shift assignment. This grievance was assigned Docket Number 2017-1713-DHHR. Following a Level One hearing via telephone conference on March 14, 2017, Grievance Evaluator Christina M. Bailey denied the grievance in a written decision dated April 4, 2017. On April 4, 2017, Grievant appealed to Level Two. Following unsuccessful mediation at Level Two on July 17, 2017, Grievant appealed to Level Three that same day. Thereafter, a Level Three hearing on this grievance was scheduled for November 14, 2017. On August 31, 2017, Grievant filed a second grievance directly at Level Three challenging a disciplinary suspension without pay. This grievance was assigned Docket Number 2018-0312-DHHR, and a Level Three hearing was scheduled for February 6, 2018. On November 8, 2017, the parties jointly requested that the two grievances be consolidated, and an Order of Consolidation was issued on November 15, 2017, consolidating these grievances under Docket Number 2017-2502-CONS.

On February 6, 2018, a Level Three hearing was held before the undersigned Administrative Law Judge at the Raleigh County Commission on Aging in Beckley, West Virginia. Grievant was represented by Gordon Simmons with UE Local 170 of the West Virginia Public Workers Union. Respondent was represented by Assistant Attorney General James “Jake” Wegman. At the beginning of the hearing, Grievant withdrew her grievance challenging her changed shift assignment, leaving the grievance contesting her suspension to be adjudicated. DHHR presented testimony by the Administrator/CEO of Jackie Withrow Hospital, Angela D. Booker, and Paula Brammer, the Assistant Director of Nursing. Grievant testified in her own behalf. This matter became mature for decision on March 16, 2018, upon receipt of the parties’ Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was suspended without pay for three days for insubordination involving a refusal to accept mandated overtime on one occasion, and for remarking on the motivation of her supervisors coming to her unit in the presence of a patient, and abruptly hanging up the phone during a conversation with the hospital’s CEO. Respondent established facts to support these charges by a preponderance of the evidence, thereby demonstrating good cause for Grievant’s suspension. Grievant failed to establish that her suspension represented a disproportionate penalty for the offenses proved, or that her suspension was taken in retaliation for her grievance activity.

The following Findings of Fact are made based upon the record developed at the Level Three hearing.

Findings of Fact

1. Grievant is employed by Respondent Department of Health and Human Resources (“DHHR”) as a Health Service Worker (“HSW”) at Jackie Withrow Hospital in Beckley, West Virginia.

2. Angela Booker is employed by DHHR as the Nursing Home Administrator and Chief Executive Officer (“CEO”) of Jackie Withrow Hospital. Ms. Booker has held this position for approximately fourteen (14) years. Ms. Booker is also a registered nurse with over thirty (30) years’ experience in the nursing field.

3. Paula Brammer is employed by DHHR as the Assistant Director of Nursing (“ADON”) at Jackie Withrow Hospital. Ms. Brammer has been a Registered Nurse for over eleven (11) years.

4. Donna Ortiz was employed by DHHR as the Director of Nursing at Jackie Withrow Hospital during the time period in June and July 2017 when the events surrounding this disciplinary action occurred.

5. Jackie Withrow Hospital operates in the capacity of a long-term care nursing facility.

6. HSWs, such as Grievant, are involved in providing direct care to residents at Jackie Withrow Hospital.

7. In order to maintain the required number of personal care providers for the patients in the hospital, it is sometimes necessary to mandate a staff member to stay beyond their regularly scheduled shift. These vacancies may result from various situations, including someone being unable to report to work, or failing to report and

properly call off from work, or a lack of available personnel to staff all vacancies in the duty schedule.

8. These mandates are administered in accordance with a rotating system so that each employee is mandated in turn. Under the facility's established practice, employees may initially refuse a mandate without consequence, provided another available employee accepts the mandate out of turn. When no co-worker volunteers to fill the vacancy, the mandated employee is required to remain on duty, at least until another employee arrives to provide relief.

9. Jackie Withrow Hospital's policy on mandating employees to stay beyond their regularly scheduled work day and work another shift is not set forth in any written policy.

10. Employees are informed of the hospital's policy on mandating overtime before they accept employment.

11. Grievant was advised that her position was subject to being mandated during her pre-employment interview, and Grievant indicated that this would not be a problem. See R Ex 14.

12. On March 21, 2013, Grievant signed a form for Pinecrest Hospital (the former name for Jackie Withrow Hospital), which stated: "I further understand that it may be necessary for me to work any shift or weekend, which may be assigned. If employed, I will also comply with the mandatory overtime policy." See R Ex 12.

13. During Grievant's pre-employment interview, she told the interviewers, "Just don't get me mad," and that she was "very, very outspoken." See R Exs 13, 14 & 15.

14. During her employment at Jackie Withrow Hospital, Grievant frequently worked overtime past her regularly scheduled shift to cover for a staff shortage on the following shift.

15. DHHR has adopted Policy Memorandum 2108, Employee Conduct, dated February 28, 1992, and which provides under Policy and Procedures, *inter alia*, that employees are expected to "follow directives of their superiors; conduct themselves professionally in the presence of residents/patients/clients, fellow employees and the public; . . . be ethical, alert, polite, sober, and attentive to the responsibilities associated with their jobs . . . [and] refrain from profane, threatening or abusive language toward others." See R Ex 10.

16. On June 20, 2017, ADON Brammer was working as Grievant's immediate supervisor.

17. On June 20, 2017, Grievant was mandated to work overtime following the completion of her regular work shift due to an expected staff shortage for the following shift. Grievant initially declined the mandate, as employees are routinely permitted to do in accordance with the unwritten practice at Jackie Withrow Hospital.

18. ADON Brammer was initially unable to find any volunteers to fill the vacancy on the next shift. Ms. Brammer and CEO Booker met with Grievant in Ms.

Booker's office. During that meeting, Grievant was unequivocally mandated to stay over for the following shift and Grievant adamantly refused to stay.

19. Grievant did not comply with the mandate on June 20, 2017, by remaining on duty until she was properly relieved by another qualified staff member.

20. On July 21, 2017, CEO Booker paged Grievant on the intercom, asking her to come to her office to discuss a mandation. Grievant responded by calling Ms. Booker on the telephone, stating that she was taking care of a patient.

21. A short time later, Ms. Booker and Ms. Ortiz went to Grievant's unit so they could speak with her directly.

22. When Ms. Booker and Ms. Ortiz arrived on the unit where Grievant works, Grievant was coming out of a bathroom with a resident, and she immediately stated to them, "I guess you all did not believe that I was taking care of a resident," in the resident's immediate presence. Neither Ms. Booker nor Ms. Brammer said anything upon their arrival on the unit to provoke this response.

23. Ms. Booker asked Grievant to come to her office when she finished with her patient. Grievant subsequently reported to Ms. Booker's office and requested Union representation, which was provided.

24. During the conversation that followed in Ms. Booker's office on July 21, 2017, Grievant adamantly stated that she would not stay on duty in accordance with the mandate. Ms. Booker advised Grievant that they would make every effort to find another staff member to relieve her after four hours, but failure to accept the mandate

would constitute insubordination. Grievant responded by saying, “are you finished, are you finished, because I am not staying.”

25. Grievant returned to her unit and shortly thereafter called CEO Booker on her office phone, asking Ms. Booker if she was making Grievant stay “against my will.” When Ms. Booker attempted to explain the situation to Grievant, Grievant stated: “That’s all, thanks. Goodbye,” and hung up the phone before Ms. Booker could finish her explanation.

26. Despite Grievant’s verbal protests, she remained on duty on July 21, 2017, until she was properly relieved by another employee.

27. There was no credible evidence that on June 20, 2017, or July 21, 2017, when Grievant was mandated to stay beyond her scheduled shift, it was not Grievant’s turn in the established rotation to be mandated to remain on duty.

28. Grievant was suspended without pay for three days through correspondence from Ms. Booker, dated August 25, 2017, and stating, in pertinent part, as follows:

The purpose of this letter is to advise you of my decision to suspend you without pay as a Health Service Worker with the Department of Health and Human Resources, Jackie Withrow Hospital for a period of three (3) working days. This suspension will begin on September 6, 2017 and continue through and including September 8, 2017. You are scheduled off September 9, 2017 and you should return to work on your normal shift on September 10, 2017 at 7 am.

This suspension is the result of your failure to comply with the *DHHR Employee Conduct Policy 2108*.

So you may understand why I believe your conduct to be unsatisfactory and how this prevents or hinders this agency from meeting its objectives, I offer the following:

- On June 20, 2017 you exhibited insubordinate behavior with your supervisor and the CEO when you were directed by me, the CEO, to stay and work into the next shift due to numerous call offs on the 3-11 shift. I specifically instructed you to remain on duty into the next shift until coverage could be obtained. You refused to do so and stated that you did not understand why you were being told you could be disciplined for failure to stay over. I explained that because it was your turn in the rotation, and that refusal was not an option.

While conversing with you, several other employees also called off for the 3 to 11 shift and I informed you that if you would agree to accept the mandate, the RN supervisor had obtained relief for you at 7pm and you would be able to get off duty at that time. However; if you did not accept the mandate other staff members could agree to stay and get the 7pm relief. You again stated, "Well I am not staying, what's next?" I informed you at this time, that your refusal and raising of your voice was insubordination. You replied, "Well, ok, I am not staying."

- On July 21, 2017, I paged you over the intercom and requested that you come to my office. As opposed to coming, you called me on the phone. At this time I informed you that I wanted to discuss your staying over for a mandated shift. You stated, "I am taking care of a resident. I will be there when I can." At this time I stated to you "it doesn't appear you are taking care of a patient as you are talking to me" and you stated, "I am talking to you because you asked me to call you." During the conversation, you were slightly raising your voice and I requested that you watch your tone while in conversation with me. You indicated that I was the one being rude not you. I again asked you to report to my office for further discussion when you were finished providing care to the resident. Approximately 20 to 30 minutes had passed and you still had not reported to my office, the DON and I reported to your unit to discuss the concern at hand with you on your unit, to avoid you having to leave the unit. When you came out of the resident's bathroom with a resident you saw the two of us and stated in the presence of the resident, "I guess you did not believe that I was taking care of a resident." You continued to make comments about us coming to the unit, in the presence of the resident and other staff members, as you walked the resident to his room. Rather than discuss the issue with you on the unit, I asked you to come with us to my office.

Due to your behavior, I offered you a representative and you agreed that you wanted someone present. At this time, Kevin White, Union representative came to my office. I again informed you that you were being mandated to stay over and you immediately replied, "I am not staying." I attempted to explain to you that we had had the same conversation on June 20, 2017 and you interjected and stated, "This is not June 20th this is today. This is another day and I am not staying." We continued to discuss the issue and I again informed you that you were in violation of the Employee Conduct policy and that your actions were insubordinate. You asked me why was it insubordination? I again explained to you that I was giving you a directive to stay over and that the nursing supervisor would get you relief as soon as possible, but that you might have to stay until 11pm, you raised your voice and again stated, "I am not staying, I can't do it, I have to save my house." I asked you what you meant and you stated, "I guess I don't make enough money working here to pay my rent." When I started to inform you that if you worked your mandated hours you would make additional money, however; before I could finish my comments you interrupted me and stated, "No, don't you start with I don't work my mandates and how I could make more money, I work my mandates."

I informed you again that it was not necessary to raise your voice as I was not speaking loudly to you. You proceeded to ask me, while I was speaking to you, "Are you finished, are you finished, because I am not staying?"

After you left my office you called me again on my office phone and I was trying to talk with you, you kept repeating, "Are you making me stay against my will?" I stated to you, "Well it is now 3:30pm and I see you still here, does this mean you are staying?" You again asked, "Are you forcing me to stay against my will?" When I tried to respond to you by telling you that I had mandated you to stay over, you interjected and stated, "that is all I wanted to know, goodbye." I was attempting to ask you further questions and you hung the phone up on me. I attempted to call you back and when I did connect with you, I informed you that I was not finished talking and you stated, "You told me you weren't going to do this with me and then I told you bye and hung up." You did decide to work the mandated shift however; your interactions and comments were in direct violation of the employee conduct policy.

These violations are against DHHR Policy 2108: Employee Conduct, which provides: Employees are expected to: . . . follow directives of their

supervisors; conduct themselves professionally in the presence of residents/patients/clients, fellow employees and the public; and be ethical, alert, polite, sober, and attentive to the responsibilities associated with their jobs. Employees are expected to: refrain from disrupting the normal operations of the Agency[.]

On August 8, 2017, you participated in a predetermination conference with Donna Ortiz, DON and myself. During this conference, you also requested a representative, Shonda Allen, HSW and she was also present at the conference. The purpose of the conference was to inform you that disciplinary action was being considered and to give you an opportunity to explain yourself and the circumstances involved. During that conference, you provided the following response for our consideration.

“June 20th, where is the paperwork, where is the Employee Conduct policy? You talked about June 20 being insubordination and employee conduct but I would have gotten a written warning right? Have I ever been verbally warned or written up for employee conduct? No one has ever told me about employee conduct. Number 1 – I didn’t hang up on you. I said bye. You forced me against my will to stay here. Number 2 – as far as me raising my voice, this is harassment. Straight up harassment. I come in on time at 7am, I come in at 3am, I don’t do mandates when ya’ll (sic.) want me to because I have things to do or I am tired. This is petty. This is no consideration, ya’ll (sic.) do what ya’ll (sic.) want to do. I don’t think the 2 insubordination charges should be against me. Ya’ll (sic.) say I am disrespectful, rude, but you all are rude. This is straight harassment and creating a hostile work environment. This is not right. Ya’ll (sic.) are trying to peg me as work bully. I can’t help it if you all don’t understand my personality and how I talk. I have heard people come in your office Angie and plum cuss you out. Well maybe they didn’t cuss you out, but they come in your office and say whatever and cuss, I have never cussed while in your office. This is petty and harassment. That’s the reason ya’ll (sic.) brought me to day shift for 2 reasons. To get rid of me.”

You signed the DHHR Policy Memorandum 2108, Acknowledgement page on May 2, 2013.

I remind you that I have tried to correct your attendance/employee conduct. Prior to this, corrective action has included:

- 1/26/16 Counseling for not parking in the appropriate area.
- 4/22/16 Verbal reprimand for no call no show[.]

- 8/15/16 Continuation of your Attendance Improvement Plan (AIP)[.]
- 4/7/17 Verbal reprimand for mandatory overtime refusal.
- 5/31/17 Continuation of your AIP[.]
- 6/30/17 Written reprimand for failure to provide resident care resulting in neglect.

After considering your attendance/conduct, previous corrective actions and your response, I have decided a 3-day suspension is warranted. This action complies with the Department of Health and Human Resources (DHHR) Policy Memorandum 2104, *Progressive Corrective and Disciplinary Action* and Section 12.3 of the West Virginia Division of Personnel, *Administrative Rule* W. Va. Code R. §143-1-1 *et seq.*

It is unfortunate that I must take this personnel action; however, I assure you it is my intention to maintain DHHR's integrity, which provides the Department of Health and Human Resources and Jackie Withrow Hospital and its employees with a means to ensure its efficient and effective operation. Any further neglect of duty or any other infractions will be viewed as unwillingness, rather than inability, to comply with reasonable expectations, and shall result in further disciplinary action.

. . .

R Ex 1 (emphasis in original).

29. Grievant was issued notice of a predetermination conference regarding the forgoing charges on August 4, 2017. See R Ex 2.

30. On January 21, 2016, Grievant was counseled for improper parking. See R Ex 3.

31. On April 15, 2016, Grievant was placed on an attendance improvement plan. See R Ex 5.

32. On April 22, 2016, Grievant received a verbal warning for failure to comply with the hospital's attendance policy. See R Ex 4.

33. On April 7, 2017, Grievant received a verbal warning for refusing a mandate to work overtime. See R Ex 6.

34. On May 31, 2017, Grievant was continued on an attendance improvement plan. See R Ex 7.

35. On July 26, 2017, Grievant was issued a written reprimand for failure to provide proper care for a resident. See R Ex 8.

Discussion

Because this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges against Grievant by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Cir. Ct. of Pleasants County, No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Grievant testified under oath in this matter, contradicting at least some of the factual statements made by Ms. Booker and Ms. Brammer in their sworn testimony. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Young v. Div. of Natural Res.*, Docket No. 2009-0540-DOC (Nov. 13, 2009); *Massey v. W. Va. Pub. Serv. Comm'n*, Docket No. 99-PSC-313 (Dec. 13, 1999); *Pine v.*

W. Va. Dep't of Health & Human Res., Docket No. 95-HHR-066 (May 12, 1995). See *Harper v. Dep't of the Navy*, 33 M.S.P.R. 490 (1987). See also *Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). Some factors to consider in assessing the credibility of a witness include the witness' demeanor, opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the fact finder should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of the witness' information. *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2009-0685-MAPS (Apr. 23, 2009); *Massey, supra*.

Insubordination involves “willful failure or refusal to obey reasonable orders of a superior entitled to give such order.” *Riddle v. Bd. of Directors, So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994), *aff'd*, Cir. Ct. of Kanawha County, No. 94-AA-151 (Feb. 9, 1995); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989).

In order to establish insubordination, the employer must demonstrate that the employee's failure to comply with a directive was sufficiently knowing and intentional as to constitute the defiance of authority inherent in a charge of insubordination. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995).

Generally, an employee must obey a supervisor's order and take appropriate action to challenge the validity of the supervisor's order. *Stover v. Mason County Bd. of Educ.*, Docket No. 95-26-078 (Sept. 25, 1995). 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).

In the situation presented by this grievance, DHHR alleges that Grievant was insubordinate through her conduct on two occasions: June 20, 2017, and July 21, 2017. In regard to the first alleged violation, the evidence is clear that Grievant was mandated to stay and work past the end of her regularly scheduled shift, that the directive of her superiors was clear and unequivocal, and that Grievant did not stay as directed. Insubordination involves a deliberate, willful or intentional refusal or failure to comply with a reasonable order of a supervisor. *Gill v. W. Va. Dep't of Commerce*, Docket No. COMM-88-031 (Dec. 23, 1988). Thus, Grievant refused to comply with the clear instruction of a supervisor, engaging in insubordinate conduct. *Id.* See *Riddle, supra*; *Reynolds, supra*.

On July 21, 2017, Grievant engaged in a similar litany of refusing a mandate but, ultimately, stayed to work the additional hours. However, in the process of getting to that point, Grievant interjected her displeasure with her supervisors into the life of an unnamed nursing home patient, when she accosted her approaching CEO and DON in the immediate presence of that patient, stating, "I guess you all did not believe that I was taking care of a resident." Rather than politely telling her supervisors that she would be with them as soon as she finished with her patient, she interjected the accusation that they did not trust her in front of her patient. In these circumstances,

Grievant violated DHHR's policy governing Employee Conduct, by behaving unprofessionally in the presence of a patient.

In addition, following a somewhat contentious meeting over that day's overtime mandate with her Union representative in attendance, Grievant called CEO Booker, to ask her if she was being mandated "against my will," and then hung up the phone before Ms. Booker could complete her explanation of the reasons for the mandate. The mere fact that Grievant said, "all right, thanks, goodbye," before unilaterally hanging up, does not mitigate the fact that her actions were rude and disrespectful, demonstrating contempt, or at least, disdain, for Ms. Booker's authority as the nursing facility's CEO. Grievant's testimony that she did not raise her voice to the point of being offensive is credited, as it appears that she routinely responds forcefully to what she perceives as mistreatment. Otherwise, Grievant's testimony substantially corroborated the narrative presented by Ms. Booker and Ms. Brammer.

None of Grievant's other comments, or the subjective testimony that she was rude, or raised her voice, or spoke in an inappropriate "tone" while arguing whether she should be mandated, were shown to be necessarily insubordinate. Nonetheless, these specific actions on July 21, as discussed, involved insubordinate conduct which makes Grievant subject to reasonable disciplinary action. *See Conner, supra; Burton Mfg. Co. v. Boilermakers Local 590*, 82 Lab. Arb. (BNA) 1228 (1994) (Holley, Arb.).

Ordinarily, an employer has broad discretion in selecting an appropriate penalty to redress an employee's misconduct. *Overbee v. Dep't of Health & Human Res.*, Docket No. 96-HHR-183 (Oct. 3, 1996). *See Lanham v. W. Va. Dep't of Transp.*,

Docket No. 98-DOH-369 (Dec. 30, 1998); *Martin v. W. Va. State Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989). Any determination whether the penalty imposed is excessive must necessarily be made on a case-by-case basis. In the present matter, Grievant had previously been verbally reprimanded and administered a written reprimand for other offenses. A three-day suspension thus appears consistent with the concept of imposing progressive discipline to correct an employee's actions.

In this case, the employer found that a three-day suspension was adequate to correct the employee's behavior. Grievant failed to demonstrate that such penalty constituted an abuse of discretion or an arbitrary and capricious exercise of the authority to impose discipline. Accordingly, the undersigned Administrative Law Judge finds no basis to overturn the employer's selection of the penalty imposed.

In her grievance challenging her suspension, Grievant alleged that she had been subjected to prohibited retaliation.¹ W. Va. 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 for any lawful attempt to redress it." In general, a grievant alleging reprisal or retaliation in violation of W. Va. Code § 6C-2-2(o), in order to establish a *prima facie* case, must establish by a preponderance of the evidence:

- (1) that she was engaged in activity protected by the statute (e.g., filing a grievance);
- (2) that her employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

¹ Grievant did not pursue her retaliation claim in her post-hearing argument. Nonetheless, this issue will be addressed so that any pertinent issues are properly considered.

(3) that, thereafter, an adverse employment action was taken by the employer; and

(4) that the adverse action was the result of retaliatory motivation or the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

See Coddington v. W. Va. Dep't of Health & Human Res., Docket Nos. 93-HHR-265/266/267 (May 19, 1994); *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991). *See generally Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). Once a *prima facie* case of retaliation has been established, the inquiry shifts to determining whether the employer has shown legitimate, non-retaliatory reasons for its actions. *Graley, supra*. *See Mace v. Pizza Hut, Inc.*, 180 W. Va. 469, 377 S.E.2d 461 (1989).

Grievant filed a grievance (Docket No. 2017-1713-DHHR) on February 23, 2017, challenging her supervisors' decision to change her shift assignment. On August 4, 2017, one of these same supervisors notified her of a proposed disciplinary action for alleged insubordination. This adverse action transpired within a sufficiently short span of time to infer a retaliatory motive. Accordingly, Grievant established a *prima facie* case of retaliation. *See Frank's Shoe Store, supra*.

Respondent contends that Grievant was properly disciplined for engaging in insubordinate conduct. This represents a legitimate, non-retaliatory reason for the employer's actions. Further, DHHR proved by a preponderance of the evidence that Grievant did, in fact, engage in conduct which involved insubordination, and Grievant failed to demonstrate that the penalty of a three-day suspension which she received was disproportionate to the offense, or inconsistent with the penalty imposed on other

similarly situated employees. Therefore, Respondent DHHR succeeded in rebutting Grievant's *prima facie* case, and Grievant did not establish that the justification asserted was a mere pretext for prohibited retaliation. *See Mace, supra*.

Accordingly, Respondent DHHR established by a preponderance of the evidence that Grievant engaged in insubordinate behavior which supported the penalty imposed. Grievant failed to establish any viable defense to the charges against her.

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 Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Cir. Ct. of Pleasants County, No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. Insubordination involves "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *Riddle v. Bd. of Directors, So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994), *aff'd*, Cir. Ct. of Kanawha

County, No. 94-AA-151 (Feb. 9, 1995); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989).

3. The West Virginia Supreme Court of Appeals has held that, “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.*, 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). In addition, the disobedience must be willful, meaning that the motivation for the disobedience was contumaciousness or a defiance of, or contempt for authority. *Id.* at 213, 460.

4. Respondent established by a preponderance of the evidence that Grievant’s refusal to accept mandated overtime on June 20, 2017 constituted insubordination. Further, Respondent established by a preponderance of the evidence that Grievant’s remarks to her supervisors regarding their motivation for coming to her unit, spoken in the presence of a patient, and her actions in rudely hanging up the telephone on the hospital CEO who was attempting to explain why overtime work was being mandated, also constituted insubordinate conduct.

5. W. Va. 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 for any lawful attempt to redress it.” In general, a grievant alleging reprisal or retaliation in violation of W. Va.

Code § 6C-2-2(o), in order to establish a *prima facie* case, must establish by a preponderance of the evidence:

- (1) that she was engaged in activity protected by the statute (e.g., filing a grievance);
- (2) that her employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;
- (3) that, thereafter, an adverse employment action was taken by the employer; and
- (4) that the adverse action was the result of retaliatory motivation or the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

See *Coddington v. W. Va. Dep't of Health & Human Res.*, Docket Nos. 93-HHR-265/266/267 (May 19, 1994); *Gralely v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991). See generally *Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). Once a *prima facie* case of retaliation has been established, the inquiry shifts to determining whether the employer has shown legitimate, non-retaliatory reasons for its actions. *Gralely, supra*. See *Mace v. Pizza Hut, Inc.*, 180 W. Va. 469, 377 S.E.2d 461 (1989).

6. Although Grievant established a *prima facie* case of retaliation, Respondent established legitimate non-retaliatory reasons for taking the adverse action at issue, and Grievant failed to demonstrate that the allegations against her were a mere pretext for retaliatory action. See *Mace, supra*.

7. Respondent proved the charges against Grievant, establishing good cause for her suspension. Grievant failed to establish by a preponderance of the evidence that her three-day suspension involved a disproportionate penalty or

represented an abuse of the employer's substantial discretion to discipline an employee for work-related misconduct.

Accordingly, this grievance is **DENIED**.

Any party or the Division of Personnel 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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. See *a/so* 156 C.S.R. 1 § 6.20 (2008).

Date: March 30, 2018

LEWIS G. BREWER
Administrative Law Judge