THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KRISTEN THACKER,
Grievant,

v. **Docket No. 2017-1422-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/MILRED MITCHELL-BATEMAN HOSPITAL,
Respondent.

DECISION

Grievant, Kristen Thacker, was employed by Respondent, Department of Health and Human Resources ("DHHR") and assigned to Mildred Mitchell-Bateman Hospital ("Bateman") in a Health Service Worker position. Ms. Thacker filed a Level Three grievance pursuant to W. VA. CODE § 6C-2-4 (a) (4), alleging that she had been suspended without good cause and seeking to be reinstated with back pay and restoration of benefits. That grievance was dated December 23, 2016. On April 7, 2017, Ms. Thacker amended her grievance to additionally contest the termination of her employment without good cause and seeking the same relief.

After four continuance requests were granted for good cause shown,[1] a Level Three hearing was held at the office of the West Virginia Public Employees Grievance Board in Charleston on June 4, 2018. Grievant appeared personally and was represented by Gordon Simmons, UE 170, WVPWU. Respondent was represented by Katherine A. Campbell, Assistant Attorney General. This matter became mature for decision on July

[1] Three continuances were granted to Respondent and one to Grievant with no objections from either party.

31, 2018, upon receipt of the final Proposed Findings of Fact and Conclusions of Law submitted by the parties.

Synopsis

Respondent dismissed Grievant for "gross misconduct" after discovering that she and a coworker were sharing a footlocker at the hospital which contained a significant amount of prescription and over-the-counter medications. The two employees were dismissed for allegedly violating policies and statutes related to proper storage of medication, as well as proper labeling of prescription drug containers. Grievant was additionally cited for refusing to participate in an OIC investigation of the incident.

The policies and laws cited by Respondent applied to medications stored by the hospital for patient use, as well as medicine dispensed and labeled by pharmacy personnel. The vast majority of the medication in the footlocker was being stored by Grievant for personal use. The policies and statutes did not apply. Additionally, Respondent did not prove that Grievant refused to participate in the investigation. The only thing Respondent was able to prove was that Grievant did not report that a skin care cream, which had previously been prescribed for a patient who died, was not properly disposed of. Grievant was not charged with that violation and it would not constitute "gross misconduct" if she had been.

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

Findings of Fact

1. Grievant, Kristen Thacker, was employed by Respondent in August 2012. She worked at Bateman as a Health Service Worker. Grievant was assigned to Unit Five at Bateman. The residents of Unit Five are predominately long-term physically fragile geriatric patients. These patients have a history of psychiatric treatment and often have mobility challenges due to advanced age and infirmity.

2. At the time of her employment, Grievant held an Associate degree in Science and Bachelor of Arts degree in Psychology, both from Ohio University. Grievant was a registered pharmacy tech in Ohio and worked in her father's pharmacy on occasion. Ms. Thacker was enrolled in the Marshall University Bachelor of Nursing program while she was employed at Bateman. She has subsequently completed that program and is a licensed Registered Nurse ("RN") in West Virginia and Kentucky.

3. Grievant was rated as "Meets Expectations" on all three of the employee performance evaluations she received[2]. Grievant was considered a dependable, honest and responsible health service worker prior to the events leading to her suspension and dismissal.[3]

4. Jerry Hazlett was employed as an RN on Bateman Unit Five from August 2009, until her suspension and dismissal from employment for the same incident which led to Grievant's disciplinary action.[4]

---

[2] Grievant Exhibits 2, 3, & 4.
[3] Testimony of Libby Lewis. Nurse Manager characterized Grievant as being "willing to go the extra little bit" including planning activities for the patients.
[4] *See, Hazlett v. Dep't of Health & Human Res.,* Docket No. 2017-1434-DHHR (June, 27, 2018).

5. Libby Lewis was the nurse manager on Unit Five for ten years until her retirement in December 2016. During that time, she was the immediate supervisor for Grievant and Nurse Hazlett.

6. While Ms. Lewis was nurse manager, there were lockers available for Unit Five workers to store personal items. All the lockers were located in the male and female restrooms located behind the unit nurse station. Because there was a shortage of lockers, the staff shared them. This resulted in some female workers being assigned to share lockers with men. One of those was Grievant. Because Grievant's locker was located in the men's restroom her access to it was severely limited.

7. Grievant and Nurse Hazlett occasionally brought snacks for themselves and for the patients, as well as craft supplies for the patients to use.

8. Nurse Manager Lewis gave Grievant and Nurse Hazlett permission to put a footlocker[5] in a locked closet behind the nurse station. Nurse Manager Lewis considered the footlocker to be an extension of the personal lockers. The footlocker was usually secured with a pad lock.

9. Cheryl Williams is the Director of Nursing at Bateman. On December 21, 2016, an employee reported to Cheryl Williams that another employee said the footlocker allegedly contained inappropriate items. Ms. Williams directed acting Nurse Manager, Ray Brillantes, to investigate.

[5] Respondent referred to the footlocker as a large plastic tote. Respondent Exhibit 1. The picture placed into evidence revealed a large plastic box with an attached lid which had a hasp to accommodate a lock, two metal clasps to hold the box shut and a suitcase handle on the front. It appears to be a sturdy plastic version of a classic footlocker. Ultimately, the name given to the large plastic box is not as important as the fact that it was being used by Grievant and Nurse Hazlett as an alternative to the lockers which were limited in their availability and usefulness.

10. Mr. Brillantes found the footlocker in the locked closet, but the footlocker itself was unlocked. Upon discovering a quantity of medications in the footlocker, Mr. Brillantes contacted Ms. Williams, who contacted Bateman Assistance CEO Pat Franz and Bateman Director of Pharmacy Ava Patterson. All four inspected the footlocker, took pictures and inventoried the contents.

11. The footlocker contained food and personal hygiene items, as well as various over-the-counter and prescription medications.

12. The footlocker contained the following over-the-counter medications:

Medication	**Amount**	**Use**
Antidiarrheal “ohm”	22 tablets	Anti-diarrhea
Rexall	1 bottle (86 tablets)	Unknown
Pharbetol	1 bottle	Unknown
Mucinex	8 caplets	Unknown
PSE	15 tablets	Unknown
Stomach Relief	1 bottle (7 tablets)	Stomach Relief
Acid Reducer	3 tablets	Reduce Acid
Benadryl Itch Stopping Cream	1 tube	Anti-itch

13. The footlocker contained the following prescription medications:

Medication	**Amount**	**Use**
Naproxen	25 tablets	Anti-inflammatory
Metronidazole	32 tablets	Antibiotic for fungal infection
Pyridium	2 tablets	Anesthetic for urinary tract pain
Lidocaine	2 vials	Topical anesthetic
Prednisone	68 tablets	Anti-inflammatory

Ipratropium Bromide	10 nebulizers	Emphysema; asthma pneumonia
Albuterol Sulfate	38 nebulizers	Emphysema; asthma pneumonia
Albuterol + Ipratropium	28 nebulizers	Emphysema; asthma pneumonia
Ibuprofen (prescription strength)	14 tablets	Pain reliever
HCTZ	109 tablets	Unknown
Ondansetron	45 tablets	Anti-nausea
Fluconazole	3 tablets	Anti-fungal
Promethazine	15 tablets	Anti-nausea
Ceftriaxone	1 vial	Antibiotic injection
Z Pack	1 package	Antibiotic
Dexamethasone	1 vial	Unknown
Syringe	4 insulin syringes	Injection

14. The footlocker also contained a jar of partially-used Balmex, a diaper rash cream, that had a prescription label for a deceased patient. Balmex comes in large jars and may be purchased over-the-counter at pharmacies. When it is used for a patient at Bateman, the staff member scoops out a small portion into a cup which is then administered to the skin. The cup is discarded. This method is used to avoid contamination of the medication in the main container.[6]

15. With the exception of the Balmex, none of the prescription medications had prescribing labels. Several of the prescription medications were contained in what appear to be wholesale bottles of larger quantities than are typically dispensed to individuals. Other medications were stored in blank pill bottles with handwritten labels.

[6] Testimony of Grievant.

16. Injectable Lidocaine and antibiotics are not typically prescribed for personal use.

17. Nurse Hazlett admitted she had stored over-the-counter stomach medication, Tylenol, and Zyrtec in the footlocker.

18. Grievant admitted she had stored over-the-counter and prescription medication in the footlocker. Grievant also admitted that the majority of the prescription medications were hers, with the exception of the Lidocaine, nebulizers, and Ceftriaxone. Grievant provided a letter from her doctor verifying that, with the exception of these three medications, he had prescribed the remaining medications to her.[7] Grievant also identified some of the prescription items in the footlocker, that were not on the list from her general practitioner, as medication which was prescribed by her gynecologist.

19. Grievant filled her prescriptions at her father's pharmacy and did not always properly label the containers because she was familiar with them.

20. There is no evidence that Grievant or Nurse Hazlett administered any of the medication in the footlocker to any Bateman patient or staff member.

21. Grievant was not working on December 21, 2016, when the locker contents were reported as inappropriate to management, nor the next day. On December 22, 2016, she was contacted by telephone and had a discussion in which Ms. Williams, Ms. Franz, Mr. Brillantes, and Ms. Peterson participated. Grievant acknowledged that she shared the footlocker with Nurse Hazlett, that she kept snacks, her medication, and some personal items in it. Grievant stated that she did not know that the Balmex was in the footlocker and denied putting there. When asked why the Balmex was in the locker Grievant

[7] Grievant Exhibit 8.

speculated that it was in case someone got a scratch. Grievant had not used the product on anyone.[8]

22. By letter dated December 23, 2016, Grievant was suspended without pay pending an investigation into the "storage of an unusually large amount of over-the-counter and prescription drugs on hospital property." Respondent Exhibit 4.

23. No administrator from Bateman made any attempt to interview Grievant or hold any type of conference with her after that date.

24. Grievant received a telephone message on or about February 21, 2017, from an investigator with the DHHR Office of Inspector General ("OIG") who had set a date and time for her to be interviewed regarding the footlocker. Grievant left a return message stating that she could not attend that meeting because of her school and training obligation and that she wanted to work something out about arranging a different time.

25. The investigator scheduled a second appointment for March 1, 2017 and stated that failure to attend the interview "is considered grounds for dismissal." Grievant left a telephone message on or about February 26, 2017, stating that she had daily obligations for clinical rotations and classes that she had to attend, and she would not be able to meet until May. She also reiterated that she was "very interested in resolving this." The investigator apparently interpreted this reply as a willful refusal to cooperate in the investigation. Grievant Exhibit 6.

[8] Ms. Williams testified that Grievant said the Balmex was in case somebody got a scratch. She did not specify whether "somebody" referred to a patient, a staff member or the owners of the footlocker. Grievant testified that she was merely speculating as to why it was in the footlocker in answer to that specific question.

26. Grievant received a written "Notice of Dismissal for Gross Misconduct" from Bateman Chief Executive Officer ("CEO") Craig Richardson which was dated March 27, 2017. CEO Richardson cited generally the presence of the footlocker with medications on Unit Five as the reason for Grievant's dismissal. He noted that the presence of this footlocker during an inspection by the Joint Commission could be "devastating" to the hospital. He cited the following specific violations which were the basis for the termination of Grievant's employment.

- The Joint Commission's 2017 Hospital Accreditation Standards, Standard HR. 01. 02. 70 requires that staff who deliver patient care, treatment and service, . . . practice within the scope of their certification/registration/license. . . Health Service Workers are prohibited from administering or dispensing medication. To dispense and administer medications from personal stores, without a physician's order, would be outside of the scope of your position.
- Joint Commission Standard MM 03.01 .01 requires the hospital to safely store medications. An unlocked personal container to which multiple individuals have access is not an authorized means of safely storing medications. This posed a potential for harm which is grounds for an "Immediate Jeopardy" citation.
- Joint Commission Standard 05.0 1.11 requires the hospital to safely dispense medications… To do so from personal stores without a physician's order without appropriate safeguards could have proven deadly. An unusually large amount (69 doses) of nebulizer treatments was found in the container. This medication could be fatal to one who is allergic to it, placing Bateman at huge risk of substantial regulatory and civil liability.
- Bateman policy MMBHF029: *Proper and Safe Storage of Medication/Pharmacy Unit Inspection* at K .2. Requires that antiseptics and other medications for external use be stored separately from internal or injectable medications. This container had external, internal, and injectable medications stored together with food products. Even if solely for personal use, this method of storage could result in cross-contamination, particularly of the food products.
- Bateman policy MMBHF029 at K.14., Requires that medications not immediately administered be in label containers including, medication name, strength, amount, expiration date, and initials of the person who prepared the medication. Similarly, W. Va. Code S Rules § 15-1-22.1 requires appropriate labeling. For prescription medications dispensed to ambulatory or outpatients, the label must also include the name and address of the pharmacy that dispense the drug, name of the patient, and

the administration instructions. The prescription medications found in the container were not appropriately labeled for hospital or personal use.

- The storage of an unusually large amount of improperly labeled prescription medications placed Bateman's pharmacy and its pharmacists/pharmacy technician at risk of violating The Larry W. Border Pharmacy Practices Act. Pursuant to W.Va. Code § 30-5-14, a pharmacist may not dispense any prescription order when he or she has knowledge that the prescription was issued by a practitioner without establishing a valid practitioner patient relationship. Because the prescription medications were not properly labeled, Bateman is without proof that the prescription medications were properly dispensed.
- DHHR Policy 2108: *Employee Conduct* provides in pertinent part that employees are expected to comply with all relevant Federal, state and local laws; comply with all Division of Personnel and Department policy; comply with all applicable State and Federal Regulations governing their field of employment; exercise safety precautions; and be ethical and attentive to the responsibilities associated with their job.
- 9-2-6 prohibits DHHR employees from inhibiting the Office of the Inspector General (OIG) from carrying out or completing an investigation. . . . You responded that you would not be available until semester-end in May. It is unreasonable to delay an investigation for such an extensive period of time.
- W. VA. Code § 29-6-19 provides an employee. . . In the Division of Personnel's classified service who willfully refuses or fails to appear before anybody such as the OIC, authorized to and conduct an inquiry, shall forfeit his or her position and shall not be eligible thereafter for appointment to any position in the classified-exempt service.[9]

27. Health Services Workers have no responsibility for distributing, dispensing, or disposing of medication at Bateman.[10]

28. Following her suspension, Grievant successfully continued to pursue her Bachelor's Degree in nursing. She became a full-time employee at a hospital in Kentucky in January 2018. Her wages for the nursing position substantially exceeded the pay she would have received as a Health Service Worker at Bateman during the same period of time.

[9] Respondent Exhibit 5. The citations for statutes, rules, and policies set out in the reasons for termination are listed herein as they appeared in the original document

[10] Level Three testimony from multiple witnesses.

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 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).

Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin*., 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* W. VA. CODE ST. R. § 143-1-12.02 and 12.03 (2012).

"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. Parkways Econ. 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) and *Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983)); *Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sep. 13, 2002); *Crites v. Dep't of Health & Human Res*., Docket No. 2011-0890-DHHR (Jan. 24, 2012).

It is clear from his testimony and the termination letter that Mr. Richardson's main concern with the situation was his fear of potentially disastrous consequences should the Joint Commission have found the tote during their inspection. Mr. Richardson was credible in his concern that Bateman could have been in jeopardy of being shut down due to a negative Joint Commission report for this situation, as Sharpe Hospital had been only months prior to the decision to dismiss Grievant from employment. However, Respondent simply failed to present the necessary reliable evidence to support this assertion.

Although Respondent entered into evidence the *2018 Hospital Accreditation Standards*, it was the *2017 Hospital Accreditation Standards* that Grievant was accused of violating. Further, it appears Respondent improperly relied on the *2017 Hospital Accreditation Standards* in disciplining Grievant as Grievant's conduct occurred in 2016. Respondent provided no explanation why the *2017 Hospital Accreditation Standards* would be applicable when the conduct occurred in 2016. Clearly the *2018 Hospital Accreditation Standards* are not applicable and cannot be used to prove Grievant violated

these standards in 2016. Therefore, Respondent cannot prove Grievant violated the Joint Commission standards as alleged in the termination letter.

Even if the standards entered into evidence had been the relevant standards, Respondent failed to enter into evidence any part of the standards that explained or defined the necessary terms or consequences. Respondent provided only the specific three sections Grievant was accused of violating, but asserted that her violation of these sections had the "potential for harm" which could have resulted in a finding of "Immediate Jeopardy." As neither of these were defined in any way, it is impossible to know whether the violation of these sections, if proven, would have actually constituted the "potential for harm" or would have qualified for a finding of "Immediate Jeopardy."

Another ground cited by Respondent for terminating Grievant's employment was her violation of two sections of MMBH's *Proper and Safe Storage of Medication/Pharmacy Unit Inspection* policy, MMBHF029. Grievant essentially argues that the prescription medications, with the exception of the Balmex, were personal and that there is no difference between storing personal medications in a locked footlocker, located in a locked closet, and storing medications in the employee lockers, which was permitted. Respondent argues there is a difference between the employee lockers and the tote.

This policy clearly applies to storage and labeling of medication by the hospital for patient use, not medication stored by employees for their own personnel use. It was undisputed that employees are allowed to keep their personal medications in their lockers. With the exception of the Balmex, the vast majority of the medications and the snacks located in the footlocker were for personnel use. Further, Nurse Director Lewis stated that she gave Grievant and Nurse Hazlett permission to use the footlocker as an

alternative to their assigned lockers because they had limited access to those lockers. She specifically stated that she considered the footlocker to be the same as the hospital lockers because she did not have enough of those for everyone.

Grievant provided evidence from her doctor that a great deal of the prescription medications were properly prescribed to her. She reasonably testified that some of the ones not listed by the general practitioner were prescribed to her by her gynecologist. The over-the-counter remedies were also identified as belonging to her and Nurse Hazlett. None of these medications, which were clearly identified for personal use, are covered under the provisions of the cited policy.

What remains are the Lidocaine, nebulizers, and Ceftriaxone. Both Grievant and Nurse Hazlett deny placing these drugs in the footlocker and state that they have no idea how they got there. Respondent asserts that Grievant and Nurse Hazlett locked the footlocker, so they were the only persons who could have put the drugs therein. That assertion does not coincide with the facts. On December 21, 2016, an employee, "DC", told Nurse Williams that another employee, "EM" told "DC"[11] that there was a "tote" in the Unit Five supply closet with "inappropriate supplies" in it. Obviously, at least one employee had opened the footlocker and inspected the contents. There is not reason to believe that others may not have done the same. Respondent did not prove by a preponderance of the evidence that these additional items were not placed in the footlocker by someone other than Grievant and Nurse Hazlett. Additionally, there was not a scintilla of evidence that Grievant distributed any medication to any residents nor that

[11] Initials are use instead of the employees' names because the names are not necessary for the resolution of the grievance.

Nurse Hazlett dispensed any of the medication to the patients. It is more likely than not that the medication found in the footlocker was stored for personal use and therefore not subject to the MMBH's *Proper and Safe Storage of Medication/Pharmacy Unit Inspection* policy.

Respondent asserts that Grievant violated Bateman policy MMBHF029 at K.14 and W. VA. CODE ST. R. § 15-1-22.1, by having prescription medications stored in bottles which were not properly labeled, and in some case, large wholesale bottles of medication which are not typically given to patients for personal use. Once again, these regulations apply to the person who is dispensing the medication [i.e. the pharmacist] to the patient who receives the medication. Respondent provided no law, rule or regulation, which required Grievant to keep her personal medication in any particular container. In fact, pharmacies routinely sell containers such as pill boxes, so a person can carry their daily doses of medication with them, as well as containers which allow patients to separate several drugs into boxes designated for specific days. None of these containers have labels for the specific medication and usually are designed for holding different prescribed medications together. While it may not be a wise practice, Respondent did not prove that Grievant violated the cited policy or statute by storing her personal medications in unmarked bottles.[12]

Respondent charged Grievant with violating W. VA. CODE. §§ 9-2-6 and 29-6-19 for willfully or failing to participate in the OIG investigation. Once again, the facts do not

[12] These conclusions are not precisely the same as those reached by the Administrative Law Judge in the *Hazlett* decision, *supra,* fn 4. This can be explained by the difference in the facts and testimony presented in the separate hearings. However, it is notable that both Administrative Law Judges reached the same ultimate conclusion based upon the facts and law applicable to each case.

support this allegation. The OIG investigator set two meetings with Grievant without contacting her to find mutually acceptable dates. Both times Grievant informed the investigator that she was unavailable for those dates but made it abundantly clear that she wanted to cooperate. It is noteworthy that Nurse Hazlett was unavailable for the first two scheduled meetings and was not charged with the same violation.

Grievant was struggling to finish her nursing degree and suggested that she could meet in May, two months hence. Grievant points out that she did not believe this to be unreasonable since it was two months since anyone had contacted her at all, and she was taking classes as well as completing clinical rotations. In any event, Respondent did not prove by a preponderance of the evidence that Grievant refused to participate in the OIC investigation.

This leaves us with the Balmex. This cream was clearly marked as prescribed to a Bateman patient who had passed away. When this happens either the nurses or the pharmacy staff are required to collect all unused medication and dispose of it. That obviously did not happen in this case. Grievant, as a Health Service Worker, had no responsibility in colleting and disposing of the Balmex. This bolsters her testimony that she did not place the Balmex in the footlocker. The most Respondent could prove was that Grievant failed to report that someone else has failed to properly dispose of this cream. Grievant was not charged with this and there was no policy placed in evidence that she was required to do so. Even had Respondent charged Grievant with this violation it certainly does not amount to such willful or wanton behavior to amount to gross misconduct supporting the dismissal of an employee who by all accounts had been an

efficient, caring, and effective staff member. *Crites v. Dep't of Health & Human Res*., Docket No. 2011-0890-DHHR (Jan. 24, 2012).

Accordingly, the Grievance is **GRANTED**.

There remains the issue of mitigation of damages. Grievant would normally receive back pay plus interest from the time she was dismissed until the time she is reinstated. However, Respondent properly raised the Grievant's obligation to mitigate her damages. W. VA. CODE § 55-7E-3(a) requires:

> (a) In any employment law cause of action against a current or former employer, regardless of whether the cause of action arises from a statutory right created by the Legislature or a cause of action arising under the common law of West Virginia, the plaintiff has an affirmative duty to mitigate past and future lost wages, regardless of whether the plaintiff can prove the defendant employer acted with malice or malicious intent, or in willful disregard of the plaintiff's rights. The malice exception to the duty to mitigate damages is abolished. Unmitigated or flat back pay and front pay awards are not an available remedy. Any award of back pay or front pay by a commission, court or jury shall be reduced by the amount of interim earnings or the amount earnable with reasonable diligence by the plaintiff. It is the defendant's burden to prove the lack of reasonable diligence.

The West Virginia Supreme Court of Appeals found that the obligation to mitigate damages applied to grievants in the public employees grievance procedure in the case of *Kanawha County Bd. of Educ. v. Fulmer*, 719 S.E.2d 375, 380-381, 228 W. Va. 207, 212-213, 2011.

Respondent proved that Grievant gained full-time employment in January 2018, and held that job continuously through the date of the hearing. It further proved that the wages she received were in excess of any wages she would have received during that

period at Bateman. Therefore, any back pay Grievant would have received during that period is completely offset by the wages she earned in subsequent employment.

Respondent provided no evidence to show that Grievant did not seek employment during the period from her suspension until January 2018. Nor was there any evidence provided that comparable work was available during that time and Grievant could have procured such work through reasonable diligence nor what such a job would have paid. Without such evidence the Administrative Law Judge is left to speculate whether comparable jobs were available to Grievant through a reasonably diligent search and what Grievant might have earned in such employment. Speculation is not sufficient to meet the proof burden. *See, Coleman v. Dep't of Health & Human Res.,* Docket No. 03-HHR-318 (Jan. 27, 2004). Without such evidence it is impossible to accurately establish an appropriate amount to deduct from Grievant's back pay award. *Justice v. Dep't of Envtl. Prot.,* Docket No. 2018-0362-DEP (Aug. 17, 2018).

There was evidence that Grievant was a full-time student during this period. However, Grievant was a nursing student while employed at Bateman. Without more evidence, the fact that she was going to school full-time does not prove that she was not seeking employment with the intent of returning to part-time studies.

Conclusions of Law

1. As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin*., 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* W. VA. CODE ST. R. § 143-1-12.02 and 12.03 (2012).

3. "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. Parkways Econ. 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) and *Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983)); *Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sep. 13, 2002); *Crites v. Dep't of Health & Human Res*., Docket No. 2011-0890-DHHR (Jan. 24, 2012).

4. Respondent did not prove by a preponderance of the evidence the charges against Grievant or that she was guilty of gross misconduct.

5. Respondent did not have good cause to terminate Grievant's employment given Grievant's six years of employment with no history of prior disciplinary action and job performance that otherwise met expectations for the entirety of her employment.

Accordingly, the Grievance is **GRANTED**. Respondent is **ORDERED** to reinstate Grievant to her position as a Health Service Worker at Mildred Mitchell Bateman Hospital effective December 23, 2016, to pay her back pay to that date until December 31, 2017,

with statutory pre-judgment interest on the back pay, and to reinstate all other benefits to which she would have otherwise been entitled, effective that date.

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: September 7, 2018.

_____

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE