

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**KENNETH THOMPSON,
Grievant,**

v.

Docket No. 2017-1164-CONS

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

DECISION

Grievant, Kenneth Thompson, filed a Level One action against Respondent, Department of Health and Human Resources, on August 8, 2016, alleging he was being removed from his assigned work location based on a rumor. On October 20, 2016, Grievant filed another Level One action alleging there was a wrongful substantiation of an EEO complaint. On November 3, 2016, Grievant filed a Level Three action alleging suspension without good cause. Lastly, on November 15, 2016, Grievant filed a Level One action alleging a second removal from work location without good cause. The grievances were consolidated into the matter at hand by Order of Consolidation and Notice of Hearing dated January 20, 2017.

A Level Three evidentiary hearing was held on December 1, 2017, before the undersigned at the Grievance Board's Westover office. Grievant appeared in person and by his representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by Brandolyn N. Felton-Ernest, Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' fact/law

proposals on January 16, 2018.

Synopsis

Grievant was suspended for five days for making harassing and inappropriate comments to a co-worker. Record established that Respondent had worked with Grievant to address this behavior through prior coaching and counseling. Respondent met its burden of proof and established by a preponderance of the evidence that Grievant engaged in gross misconduct when he made inappropriate comments to a female co-worker and failed to abide by Respondent's directive to limit his contact with this co-worker.

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

Findings of Fact

1. Grievant is employed by the Department of Health and Human Resources as a Health Service Worker at the William R. Sharpe, Jr. Hospital. Grievant would normally be assigned to Unit G-2.

2. On July 15, 2016, Samantha Perry, a housekeeper employed at Sharpe Hospital, filed a State of West Virginia Equal Employment Opportunity ("EEO") Discrimination Complaint Form. In her Complaint Form, she asserts she was sexually harassed on the unit by Grievant. Ms. Perry states that the harassment had been occurring since March 2016 with the most recent occurrence on July 14, 2016. Ms. Perry complained that "Kenny makes inappropriate sexual comments toward me everytime (sic) I'm on his unit cleaning" and that "I've told him several times to stop making these comments." Ms. Perry seeks to have the harassment stopped. Respondent's Ex. 1.

3. After the EEO Complaint was filed, the administrators at Sharpe Hospital

conducted an internal investigation which included interviews of the witnesses identified by Ms. Perry. In addition, Dawn Adkins, was assigned to conduct an EEO investigation and prepare an investigative report.

4. Zack Bennett was identified as a witness with firsthand knowledge of the harassment. Mr. Bennett indicated that he noticed Ms. Perry had uneasiness when on G-2 and that he personally heard a comment made regarding a cleaning appliance and how Grievant would like to use it on Ms. Perry.

5. After this EEO Complaint was filed, Grievant was directed to not go down stairs to the area where housekeeping, dietary and the store room are located.

6. Dawn Adkins conducted the EEO Complaint investigation by listening to the prior statements that were made during the hospital's investigation, and by conducting her own interviews.

7. At the conclusion of her investigation, Dawn Adkins completed an Investigative Report dated September 9, 2016. The EEO Investigation concluded the following:

On July 15, 2016, and for the 3 months prior to that, Thompson violated DOP Policy P-6: Prohibited Workplace Harassment and Policy 2109: Employee Conduct by making statements to Perry that were sexual in nature.

On July 15, 2016, Thompson made inappropriate comments to Perry regarding sticking a duster in places "she would like." Thompson offered to hold Perry's hand. Thompson also stated he would like to see Perry wear "the black jeans" again (in lieu of scrubs).

This type of behavior has occurred over the last 3-4 months including statements such as "I like to watch you walk." "I'd like to see you wear them again." "I like to look at your butt." "You should wear more tight clothes." Perry has asked Thompson to stop on numerous occasions and Bennett has walked with her to the unit over the last week, but these actions have not helped.

8. Grievant's past Employee Performance Appraisal noted in the Performance Standards and Expectations section, that "Kenny will work at maintaining appropriate workplace conversation so as not to offend coworkers and patients." Respondent Ex. 8.

9. Another Employee Performance Appraisal noted in the Performance Standards and Expectations section, that "Kenny will be mindful of appropriate language with staff and patients so as not to offend." Respondent's Ex. 9.

10. Workplace policy documents are reviewed with the employee, then the employee signs an Employee Acknowledgment Form regarding Employee Conduct that is made part of the employee's personnel file. Employee Acknowledgment Forms signed by Grievant in 2016 and 2017 were made a part of the record.

11. In a letter dated November 3, 2016, Grievant was suspended for 5 days for making "sexually inappropriate comments to a female co-worker, which was substantiated by an investigation conducted by the Department EEO Coordinator, and the Department EEO Counselor." The letter also provided that this "action follows a path of corrective actions including prior counseling and coaching for comments made in the presence of female co-workers, which was also documented in your EPA at that time." Respondent's Ex. 14.

12. Patrick Ryan, Chief Administrator of Sharpe Hospital, indicated that since Grievant had prior counseling and coaching regarding comments made in the presence of female co-workers and due to the EEO Complaint being substantiated, he felt that a five-day suspension was warranted.

13. After Grievant was directed by Mary Stalnaker to not go down stairs, Grievant continued to have interactions with Ms. Perry which were documented by Ms. Perry.

Grievant was once again moved to another area of the hospital.

14. Mr. Ryan acknowledged his obligation to make sure that all employees were comfortable at the workplace and moving Grievant was appropriate to protect staff.

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. *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 and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

The charge against Grievant is essentially gross misconduct, as Respondent asserts Grievant violated policy relating to employees conducting themselves appropriately and professionally. The "term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991) (citing *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985)). See *Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sept. 13, 2002).

Respondent has met its burden of proof. The record demonstrates that Respondent

worked with Grievant by moving him from his assigned work area after the sexual harassment allegation was made and moving him after additional interaction was had with Ms. Perry after the EEO Complaint was substantiated. The record also demonstrates that Respondent worked with Grievant through EPAs and prior counseling and Grievant was suspended only after other avenues of non-disciplinary actions failed.

The prior EPAs were considered in making the decision to suspend Grievant after the EEO Complaint against him was substantiated. The EPAs demonstrated Respondent's attempts to correct Grievant's inappropriate comments when around female employees and emphasized the need to be cognizant of language and comments made around female co-workers. Despite these efforts to coach and counsel Grievant, his language and comments did not improve, as the EEO Complaint was filed against him in July 2016. After the EEO Complaint was filed against him, it was necessary for Respondent to limit, and if possible, alleviate, his interaction with Ms. Perry. Respondent moved Grievant's assigned work locations to reduce his interaction with Ms. Perry. After the EEO Complaint was substantiated, there was subsequent interaction between Grievant and Ms. Perry, which she described in written statements. Respondent again moved Grievant's assigned work locations and attempted to limit any interaction Grievant would have with Ms. Perry.

Grievant was then suspended, but only after a predetermination conference was held, in which possible discipline was discussed with Grievant. Only after the substantiation of the EEO Complaint, the failed prior counseling and coaching, and consideration of Grievant's comments during the predetermination conference was Grievant suspended for five days. The suspension letter specifically detailed that based

upon the sexually inappropriate comments made to a female co-worker, and following a path of corrective actions including prior counseling and coaching for prior comments made in the presence of female co-workers, Respondent decided that the five-day suspension was warranted. Respondent established by a preponderance of the evidence that Grievant was properly moved to a new assigned work area, and that Grievant was appropriately suspended for five days for what can be characterized as gross misconduct.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

2. 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." *Grale v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991) (citing *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985)). See *Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sept. 13, 2002).

3. Respondent has met its burden of proof and demonstrated Grievant engaged in gross misconduct when Grievant made inappropriate comments to a female co-worker and failed to abide by Respondent's directive to limit his contact with this co-worker.

Accordingly, this 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 *a/so* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

Date: February 12, 2018

Ronald L. Reece
Administrative Law Judge