THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TABITHA DIX,
Grievant,

v. **Docket No. 2019-1273-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/JACKIE WITHROW HOSPITAL,
Respondent.

DECISION

Grievant, Tabitha Dix, is employed by Respondent, Department of Health and Human Resources ("DHHR"). She is assigned to Jackie Withrow Hospital where she works as a Health Service Worker. Ms. Dix filed a level three grievance form[1] dated March 18, 2019, alleging her suspension without pay was unfair because Respondent did not follow required procedures. As relief, Grievant seeks reimbursement for the pay she lost while she was suspended and for the discipline to be reduced to a "written warning."

A level three hearing was conducted in Beckley, West Virginia on July 26, 2019. Grievant Dix appeared personally and was represented by Nola Lilly, UE Local 170 member. Respondent appeared through Jackie Withrow Hospital Chief Executive Officer ("CEO") Angela Booker, and was represented by Mindy M. Parsley, Assistant Attorney General. This matter became mature for decision on October 1, 2019, upon receipt of the last of the parties Proposed Findings of Fact and Conclusions of Law.[2]

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[1] *See* W. VA. CODE § 6C-2-4(a)(4).

[2] Respondent's FOF&COL was originally mailed in late August 2019, but it was returned to sender after it was mailed to the old location of the Grievance Board. The parties also agreed to extend the filing deadline to September 30, 2019.

Synopsis

Grievant was suspended for three days without pay for failing to take her lunch and rest breaks according to policy and not following the DHHR Employee Conduct Policy. She argues that the punishment was too severe and not in compliance with the DHHR discipline policy because she was issued a suspension before she received a written reprimand or warning. Respondent proved the allegations which were the basis for the discipline and that Grievant had previously been issued a written reprimand in compliance with the DHHR progressive discipline policy. Mitigation of the penalty was not proven to be appropriate.

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, Tabitha Dix, is employed by the DHHR, and is assigned to Jackie Withrow Hospital ("Hospital") where she works as a Health Service Worker ("HSW").

2. Grievant has a contentious relationship with her supervisor, Registered Nurse ("RN"), Tim Doyle. Grievant alleges that RN Doyle unfairly criticizes her work and generally blames Grievant when things go wrong on the shift.

3. Lunch breaks for HSWs at the Hospital are thirty minutes. HSWs are also given two fifteen-minute breaks during each shift.

4. On February 18, 2019, at 9:00 p.m., Grievant informed RN Doyle that she was leaving the floor to take her lunch break. RN Doyle advised her that she needed to be back by 9:30 p.m., to which she responded, "I should be."

5. Grievant returned from her lunch break at 10:00 p.m., a half hour over her allotted lunch period. RN Doyle told her he was glad she made it back and Grievant responded, in front of other employees, that he should quit being an "ass."[3]

6. On February 20, 2019, Grievant informed RN Cheryl Weed that she was taking her fifteen-minute break at 7:00 p.m. She was gone from her assignment for thirty minutes. On the same shift Grievant informed RN Weed at 9:18 p.m. that she was going to lunch. RN Weed checked the area where Grievant was assigned at 10:00 p.m. and Grievant had not returned. At 10:15 p.m. RN Weed asked the person manning the front desk to page Grievant, and Grievant returned at 10:18 p.m.[4]

7. On February 21, 2019, Grievant was given a notice that a predetermination conference had been scheduled for 4:15 p.m. that day. The reasons given for the conference were Grievant taking too long for her lunch and breaks as well as calling her supervisor an "ass". (Respondent Exhibit 4).

8. Grievant attended the predetermination conference and declined representation. Grievant did not deny that she stayed too long for her breaks but said she only stayed at lunch forty minutes on February 20, 2019, not an hour as alleged. Grievant also did not deny calling her supervisor an ass but argued that he constantly provokes her.

[3] This is a summary of the conversation which lasted a few minutes. There is no dispute that Grievant told RN Doyle that he was, or was acting like, an "ass." Respondent Exhibit 2, written report of RN Doyle.
[4] Respondent Exhibit 2, written statement of RN Weed.

9. When hospital staff members do not return from lunch or breaks as scheduled it causes other workers to wait for their opportunity for breaks and lunch, disrupting the schedule and routine for the entire shift.

10. Grievant has previously received a written reprimand dated August 28, 2018. That reprimand was issued to Grievant after she was told by her supervisor that she was required to work a mandatory overtime shift. She replied to her supervisor, "I am not fucking staying." Grievant subsequently signed a "mandate refusal" form and left the building at the end of her shift. Grievant did not contest this disciplinary action.

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 (2018).

> . . . *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).

Respondent suspended Grievant for three working days without pay for violating DHHR Policy 2108: *Employee Conduct* which states in part: “Employees are expected to . . . follow directives of their supervisors . . . be ethical, alert, polite, sober, and attentive to the responsibilities associated with their jobs.” (Respondent Exhibit 6). Grievant was also cited for violating DHHR Policy 2102: *Hours of Work/Overtime*, which states in part, “An employee cannot change a wok schedule . . . without the express approval of a supervisor.” (Respondent Exhibit 1).

Grievant does not deny that she extended the time of her lunch periods and breaks on two consecutive days after being reminded of the time to return by two different supervisors on those occasions. She also does not dispute that she openly called her supervisor an “ass” with other staff in attendance. Respondent proved the reasons for the discipline by a preponderance of the evidence. In fact, Grievant does not allege that she should not have been disciplined for her misconduct. Rather, she argues that the discipline of suspension did not comply with DHHR Policy 2104: *Progressive Corrective Action and Disciplinary Action.*

Grievant contended that, pursuant to DHHR Policy 2014, she should have received a “written warning” instead of a suspension. She also generally alleges that the discipline was too harsh given the nature of the misconduct.

On page 5 of Policy 2014, a progressive continuum is suggested for corrective discipline as follows: Verbal Reprimand, Written Reprimand, Suspension, Demotion, Dismissal. The continuum is not mandatory but depends upon the “frequency/weight of the offense and considering the totality of the circumstances.” Respondent did not assert that the circumstance of this situation prompted an acceleration of the discipline levels.

On the contrary, Respondent proved that the most recent disciplinary action imposed upon Grievant was a written reprimand from 2018. This reprimand was also based upon Grievant not following the directives of her supervisor and failing to maintain a “polite and sober” demeaner with her coworkers in violation of DHHR Policy 2108 related to employee conduct. Pursuant to the progressive discipline continuum set out in DHHR Policy 2104, a suspension was the next appropriate disciplinary action to be taken. Respondent did not violate DHHR Policy 2104 by suspending Grievant for three days without pay.

Finally, Grievant asserts that RN Doyle constantly picks on her and she has been unable to get help in this regard. She believes that given the totality of these circumstances a suspension was too harsh. “The argument that discipline is excessive given the facts of the situation is an affirmative defense, and [Grievant bears] the burden of demonstrating the penalty was clearly excessive or reflects an abuse of the agency's discretion or an inherent disproportion between the offense and the personnel action." *Hudson v. Dep't of Health and Human Res./Welch Cmty. Hosp.*, Docket No. 07-HHR-311 (March 21, 2008). "Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case-by-case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995); *Crites v. Dep’t of Health & Human Ser.*, Docket No. 2011-0216-DHHR (Nov. 16, 2011).

Grievant did not dispute the misconduct with which she was charged. Her choice to significantly extend her break periods was hers alone. There is not evidence that she was forced to do so by the actions of her supervisor. Calling her supervisor an "ass" could have resulted from perceived mistreatment. However, Grievant had been previously warned and sanctioned regarding the use of inappropriate language with her supervisors. In view of the totality of the circumstances, the penalty imposed by Respondent was not clearly excessive or inherently disproportionate to Grievant's misconduct. Grievant did not prove that mitigation of the penalty is appropriate in this case. Accordingly, the grievance is **DENIED**.

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 (2018). 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. Respondent proved the basis of the disciplinary action by a preponderance of the evidence.

3. It was proven by a preponderance of the evidence that Respondent complied with DHHR Policy 2104: *Progressive Corrective Action and Disciplinary Action* in issuing Grievant a three-day suspension without pay.

4. "The argument that discipline is excessive given the facts of the situation is an affirmative defense, and [Grievant bears] the burden of demonstrating the penalty was clearly excessive or reflects an abuse of the agency's discretion or an inherent

disproportion between the offense and the personnel action." *Hudson v. Dep't of Health and Human Res./Welch Cmty. Hosp.*, Docket No. 07-HHR-311 (March 21, 2008).

5. Grievant did not prove by a preponderance of the evidence that the penalty imposed by Respondent was clearly excessive or an inherently disproportionate to Grievant's misconduct. Mitigation of the penalty is not appropriate in this case.

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 (2018).

DATE: November 6, 2019

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE