

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**FRANKLIN HAIRSTON,
Grievant,**

v.

Docket No. 2017-2508-CONS

**WEST VIRGINIA UNIVERSITY,
Respondent.**

DECISION

Grievant, Franklin Hairston, filed this action against his employer, West Virginia University, after his employment was terminated. Grievant filed other actions alleging retaliation, improper evaluations, and harassment, which were consolidated with the challenge to his dismissal from employment. Grievant seeks to be made whole in every way. The consolidated grievances were heard by the undersigned at Level Three on November 28, 2018, 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 its counsel, Samuel R. Spatafore, Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on January 9, 2019.

Synopsis

Grievant was hired on June 7, 2016, as a Program Specialist in the WVU School of Dentistry. Grievant was responsible for independently, professionally and effectively managing all dental student recruitment and graduate/postdoctoral admissions function within the School of Dentistry. The applicable policy in the instant case provides that

progressive discipline be used with employees to correct deficiencies. In this case, once progressive discipline was used to no avail, Respondent was justified in exercising its discretion to terminate Grievant's employment because he continued to perform the duties of his position in an unsatisfactory manner. Grievant failed to establish that he was victim of discrimination. Accordingly, this grievance is denied.

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

Findings of Fact

1. Grievant was hired on June 7, 2016, as a Program Specialist in the WVU School of Dentistry.
2. Dr. Shelia Price, Associate Dean, Admissions, Recruitment and Access at WVU's School of Dentistry, interviewed Grievant and hired him into the position
3. Dr. Price has presented locally and nationally on topics of diversity and inclusion within the dental field. Dr. Price's honors and awards include Fellowship in the American College of Dentists, WVU Women in Science and Health Excellence Award, WVU Chancellor's Award for Outstanding Achievement in Service, and the WVU Neil S. Bucklew Award for Social Justice.
4. Dr. Price indicated that the mission statement for the School of Dentistry is to dedicate services to transform lives through quality oral health care through service, respect and accountability.
5. The Summary Statement of the Position Description for program specialist provides that "[t]his position is responsible for independently, professionally and effectively managing dental student recruitment and graduate/postdoctoral admissions functions within the School of Dentistry, assisting with dental admission programs with

utmost discretion, and providing administrative support of the office of the Associate Dean for Admission, Recruitment and Access.” Respondent’s Exhibit No. 2.

6. Pursuant to the Position Description, Grievant was responsible for the accurate and timely presentation of his work product.

7. From Grievant’s hire date to October 13, 2016, Grievant was in the probationary period of his employment. Dr. Price then provided Grievant with a discretionary extension of his probation until February 28, 2017.

8. On October 13, 2016, Dr. Price completed a Performance Review. Grievant was rated overall as Development Needed. Grievant was informed that he needed to improve upon his attention to detail, accountability and quality of his work product, communication, initiative and job knowledge.

9. On November 16, 2016, Dr. Price awarded Grievant a discretionary raise of 10.4%, which raised his salary from \$43,000 to \$47,476. Dr. Price indicated that she made the decision to award Grievant with this raise.

10. Dr. Price trained Grievant one-on-one during the first two weeks of his employment and met with him numerous times between October 13th and November 17th to discuss his work performance. Grievant’s performance was not improving and on November 17, 2016, Grievant was issued a Letter of Counseling.

11. The Letter of Counseling provided the following examples of work conduct requiring attention:

It was clearly documented in writing that you were to assist with the applicant interview sessions on October 7 by presenting the power point presentation, “WVU and WVU School of Dentistry Crowning Characteristics” among other tasks. You chose to stand in the hallway rather than complete the presentation. You mentioned that you did not want to interrupt me but the instructions were very clearly stated that you were to

conduct the presentation and you did not. Moving forward it is expected that you will present this program as assigned and communicate the progress of each project to me at least twice weekly.

We also discussed the frequency of your tardiness arriving to work. It was noted that you communicated you would be late on nine different instances often quoting that you are stuck in traffic due to accidents and other reasons. While it is recognized that situations can and do occur, the fact remains that nine instances . . . since June 7, 2016 is excessive. You are expected to report to work as scheduled except in rare emergent situations. If those situations occur you are expected to contact me by 8 a.m. that same day via email or text message.

Additionally, you neglected to complete a time sensitive assignment relative to preparing student scholarship ballots. You were given specific instructions in writing and confirmed verbally to enter the data that you had available to you before leaving the office that day at 5pm on July 1, 2016 to provide to me the updated documents so that I could continue working on them over the holiday weekend.

You not only neglected to complete the assignment, you also informed me on Saturday morning July 2, 2016 via email that you would need to leave work for a funeral at 10:00 AM and return at 2:30 PM on Tuesday, July 5, 2016. It is expected that you complete your assignments by the deadline given.

Because you were the designated staff representative to assist with the collaborative first year student safety awareness seminar, your attendance at a planning meeting on July 14 at 11:00 AM was requested. You were late for the meeting making it necessary for me to search your desk for the appropriate handouts. I located the materials and you arrived to the meeting at approximately 11:10. Whatever the reason for your tardiness, communication that you would be late and also ensuring that I knew the location and had access to the meeting materials should have transpired.

During our morning meeting on June 29, 2016, you were informed and you confirmed that you understood that our next meeting would be July 7, 2016 at 9:30 AM. On July 7, after you neglected to show up for the meeting, I emailed to remind you of the importance of clear and consistent communications and asked that you give communication priority consideration. An example of why this communication is so important is evidenced by the mix up with scheduling an on-site visit by the Appalachian State North Carolina pre-dental group and campus visitation to Concord University. The Appalachian State event was in progress when you agreed to a visit to Concord. You have been asked to blind copy me when you are communicating on my behalf, please ensure that you do this.

Per your position description, you are expected to prepare selected correspondences for the Associate Dean as well as development of signature letters or memorandum. On several occasions, the quality of these documents has been in question and needs attention. The quality and timeliness of completion of such documents needs to improve as discussed during your evaluation.

During your evaluation on October 13, 2016 and your email to me dated September 21, 2016 you mentioned that you were near completion of a power point presentation to promote the School of Dentistry during campus visits and other off-site recruitment programs and events. As of today, I have not received this presentation. It is expected that I receive this presentation by November 18, 2016.

12. Dr. Price issued Grievant a Counseling letter instead of a Warning letter because she wanted to give Grievant the benefit of the doubt in the belief she would not have to discipline him in the future for continued poor performance.

13. The Letter of Counseling outlined the same issues of accountability and quality of work that were detailed in his October 13th Performance Review. Grievant did not contest the counseling letter nor provide any evidence to rebut the facts contained in the letter.

14. On November 17, 2016, Dr. Price issued Grievant a Development Plan and extended his probation until February 2017. Dr. Price explained that she did not have to provide Grievant with a Development Plan but did so as another means to assist Grievant.

15. Grievant did not adhere to the Development Plan and Counseling Letter and continued with an unacceptable performance. On April 13, 2017, Grievant was issued a First Letter of Warning. The Warning Letter outlined the same ongoing issues with Grievant's work including accuracy, initiative, reliability, communication and professionalism.

16. The First Letter of Warning also included a March 23rd incident wherein Dr. Price indicated that Grievant became irate and raised his voice in an angry manner with Dr. Price.

17. Grievant disregarded prior counseling and warnings on his poor performance and was issued a Second Letter of Warning on August 22, 2017. Dr. Price explained that Grievant's poor performance and issues with accuracy, reliability and accountability reflected poorly on the School of Dentistry.

18. On November 1, 2017, Grievant was issued a second Performance Evaluation. Grievant's performance was rated overall as "Development Needed." His individual performance ratings declined from the previous year as he was rated as "Development Needed" in job knowledge, accountability/produces quality work, communication, productivity/shows initiative.

19. Grievant continued to disregard counseling and warnings, continuing with his poor performance. On January 8, 2018, Grievant was issued an Intent to Terminate Employment Letter.

20. The letter addressed an issue regarding a November 27, 2017, correspondence drafted by Grievant to the attention of an incoming student. The letter contained multiple and egregious errors, which if not caught by Dr. Price, would have reflected poorly on the School of Dentistry. In particular, the incident was described as follows:

On November 27, 2017, you provided me with a letter and acceptance response/background check form you had developed for one of our applicants. This letter was to reflect this applicant's acceptance into our General Practice Residency (GPR) Program. The letter and accompanying acceptance response/background check form contained several errors. Had the letter been sent out,

it would have negatively impacted the University, potentially discredited our program, and released confidential student information. You failed to utilize the correct template letter. It was addressed to two different applicants. In addition, instead of reflecting that the applicant had been admitted into the GRP Program, the letter reflected that the committee had *retracted* its original decision and was offering the applicant provisional admission into the program. Furthermore, the acceptance response form went on to reflect admission into the Endodontic and Prosthodontic programs. These programs were not what the applicant was being admitted into. You failed to assure the accuracy of both documents before submission to me for my signature. On December 4, 2017 Donna Haid and I spoke with you regarding the letter and acceptance response form. During the meeting, you were unable to identify all the errors you had made. You also indicated it was my responsibility to uncover any errors.

21. During a pre-termination meeting, Grievant admitted that he could not notice errors in his work product because he did not proof-read due to the fast pace of the office. Grievant admitted that he was responsible for his own work product and that Dr. Price was not responsible for editing and correcting his work. Grievant's admission illustrates that he could not perform the essential functions of his position.

22. Grievant was dismissed from employment for repeated failure to adhere to counseling letters and warning letters. Grievant was repeatedly warned that failure to adhere to written warning letters and improve upon his performance could result in termination.

Discussion

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which

is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying determines the weight of the testimony.” *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, “[t]he 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). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

WVU-HR-9, Discipline Policy and Procedure states, in pertinent part, the following:

When an employee does not maintain the standards of performance or conduct as outlined by the supervisor, or, does not comply with applicable policies, procedures, or laws, disciplinary action, including but not limited to written notice, demotion, suspension, or dismissal may be taken. Dependent upon the actual and potential consequence of the offense, employee misconduct may be considered minor misconduct or gross misconduct.

The instant case demonstrates that Grievant received numerous opportunities to improve his deficiencies at work, including a development plan, numerous counseling sessions, one written counseling letter and two written warning letters regarding his repeated failure to properly perform the duties of his position. Grievant’s issues with accuracy, accountability and reliability were ongoing throughout his tenure in the position and he failed to improve. Respondent proved by a preponderance of the evidence that Grievant was provided ample opportunity to improve his performance but failed to do so. WVU policy HR-9 establishes a discipline policy for employees. Progressive discipline is

generally favored to correct deficiencies, which is what occurred in this case. Once progressive discipline was used to no avail, Respondent was justified in exercising its discretion to terminate Grievant's employment because he continued to perform the duties of his position in an unsatisfactory manner.¹

Finally, Grievant asserts that he was the victim of discrimination. For the purpose of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. Va. CODE § 6C-2-2(d). In order to establish a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

- (a) that he or she has been treated differently from one or more similarly-situated employee(s);
- (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
- (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n., 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008). Grievant did not establish that he was the victim of discrimination. Grievant failed to provide any evidence which would demonstrate another employee, whose performance was similar to his own, was treated differently. The record established that Dr. Price tried, unsuccessfully, to work with Grievant in an attempt to improve his work product. Dr. Price provided Grievant

¹See *Taylor v. W. Va. Univ.*, Docket No. 2009-1478-WVU (Oct. 30, 2009); *Aglinisky v. Bd. of Trustees/W. Va. Univ.*, Docket No. 97-BOT-256 (Oct. 27, 1997).

with a discretionary pay raise, extended his probationary period and did not administer separate discipline for Grievant's inappropriate behavior toward her.

Respondent deemed Grievant's termination necessary after his repeated failure to adhere to written warnings. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct. *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned cannot substitute his judgement for that of the employer. *Miller v. Higher Education Policy Commission/Marshall University*, Docket No. 03-HEPC-340 (Jan. 21, 2004); *Jordan v. Mason County Bd. of Educ.*, Docket No. 99-26-8 (July 6, 1999).

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 Bd. 156 C.S.R. 1 § 3 (2018); *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. Respondent has proven by a preponderance of the evidence that Grievant failed to maintain the standards of performance as outlined by her supervisor as required by policy WVU-HR-9.

3. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007);

Harris v. Dep't of Transp., Docket No. 2008-1594-DOT (Dec. 15, 2008).

4. Grievant did not establish that he was the victim of discrimination.

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 *also* 156 C.S.R. 1 § 6.20 (2018).

Date: February 7, 2019

Ronald L. Reece
Administrative Law Judge