

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KRISTIE MILLER,
Grievant,

v.

Docket No. 2018-1188-DHHR

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
WELCH COMMUNITY HOSPITAL,**
Respondent.

DECISION

Grievant, Kristie Miller, is employed by Respondent, Department of Health and Human Resources at Welch Community Hospital. On May 9, 2018, Grievant filed this grievance against Respondent stating, "Written reprimand without good cause." For relief, Grievant seeks the removal of the written reprimand.

Following the June 19, 2018 level one hearing, a level one decision was rendered on July 12, 2018, denying the grievance. Grievant appealed to level two on July 12, 2018. Grievant appealed to level three of the grievance process on October 22, 2018. By email dated February 25, 2019, the parties jointly requested to submit the grievance for decision on the lower level record. By order entered March 1, 2019, the parties' request was granted and the parties were ordered to submit written Proposed Findings of Fact and Conclusions of Law by April 1, 2019. Grievant was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by counsel, James "Jake" Wegman, Assistant Attorney General. This matter became mature for decision on April 3, 2019, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as a Certified Nursing Assistant at Welch Community Hospital. Grievant received a written reprimand for failure to follow a patient care plan, which resulted in the patient falling, and for failing to report the fall to a supervisor. As proof of the allegations, Respondent provided only unsworn, compound hearsay statements that were entitled to no weight. Respondent failed to meet its burden of proof. Accordingly, the grievance is granted.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is employed by Respondent as a Certified Nursing Assistant at Welch Community Hospital.
2. On February 26, 2019, allegations were made that Grievant had failed to use a "sit to stand" lift, which caused a patient to fall.
3. The patient's care plan required the use of a "sit to stand" lift as the patient was at risk for falls. The patient's care plan notes that the patient had been standing on her own, despite her need for assistance and staff telling her to wait for assistance.
4. Upon receipt of the allegations, both Respondent and Adult Protective Services began investigations. Respondent assigned social worker, Stacie Mullins, to conduct the investigation
5. As part of the investigation, Grievant submitted a written statement as follows: "110B was in bathroom where she was stand her starting to go down I ease her to the floor. She didn't fall and I got Terry to help me get her in her chair." Additional

notes from Grievant on the document state: "Was not use stand lift" and "She stood up by herself no help from CNA."

6. Ms. Mullins collected only one other written statement regarding the allegations, from Certified Nursing Assistant Kathy Lowe, who reported that the patient told her that she had fallen because Grievant had not used the lift.

7. Ms. Mullins provided two statements of her own, one saying Grievant allegedly said, "[E]veryone else does it, then I do it, and I am the one that gets canned." during the investigatory interview and another saying that Rhonda Beckner told Ms. Mullins that the patient told Ms. Beckner that she fell because Grievant did not use the lift.

8. Ms. Mullins also collected a statement from office assistant, Charlene Walker, also stating that during the investigatory interview Grievant stated, "[E]veryone else does it, then I do it, and I am the one that gets canned."

9. Although all the statements were signed and dated, none of the statements were sworn.

10. By letter dated April 13, 2018, Unit Supervisor Michelle Bishop issued a written reprimand to Grievant for failure to follow a patient care plan, which resulted in the patient falling, and for failing to report the fall to a supervisor. The letter notes that Adult Protective Services did not substantiate abuse in its investigation.

Discussion

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). "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). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Respondent asserts it was justified in issuing a written reprimand to Grievant for her failure to follow the patient's care plan and report the incident to her supervisor. Grievant asserts Respondent has failed to meet its burden of proof as the only evidence offered to support the allegations is hearsay.

"Hearsay includes any statement made outside the present proceeding which is offered as evidence of the truth of the matter asserted." BLACK'S LAW DICTIONARY 722 (6th ed. 1990). "Hearsay evidence is generally admissible in grievance proceedings. The issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings." *Gunnells v. Logan County Bd. of Educ.*, Docket No. 97-23-055 (Dec. 9, 1997).

The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether

collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. *Id.*; *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-H-115 (June 8, 1990).

“Hearsay evidence is admissible in the grievance procedure for public employees, but there is no requirement, statutory or otherwise, that it be afforded any particular weight. Generally, written statements, even affidavits, may be discounted or disregarded unless the offering party can provide a valid reason for not presenting the testimony of the persons making them. *See Simpson, supra*; *Cook v. W. Va. Div. of Corrections*, Docket No. 96-CORR-037 (Oct. 31, 1997).” *Comfort v. Reg'l Jail and Corr. Facility Auth.*, Docket No. 2013-1459-CONS (Apr. 18, 2013).

The only evidence Respondent presented to prove the allegations against Grievant were unsworn written statements that were collected during Respondent's investigation. All of the statements are signed and dated, but none of the statements are sworn. Respondent provided statements from the investigator, Ms. Mullins, and from an office assistant, Charlene Walker, stating that during the investigatory interview Grievant stated, “Everyone else does it, then I do it, and I am the one that gets canned.” Respondent provided a second statement from Ms. Mullins in which Ms. Mullins states that Rhonda Beckner told her that the patient told Ms. Beckner that she fell because Grievant didn't use the lift. Respondent provided a statement from Certified Nursing Assistant Kathy Lowe stating that the patient told her that Grievant had let her fall in the bathroom and hadn't used the lift.

The written statements are entitled to no weight. Respondent offered no reason why testimony from these witnesses was not available, other than that Ms. Mullins was no longer employed by Respondent, why the statements were not sworn, nor why there was no statement from the patient or the CNA Grievant names in her statement as a witness. As former employees are still subject to subpoena, Ms. Mullins was not unavailable. The statements in this case are also not simple hearsay but are compounded hearsay with the written statement saying what someone else told the author, or, in the case of Ms. Mullins' second statement, Ms. Mullins' statement of what someone told Ms. Mullins that yet another person supposedly said. In addition, there is contradictory evidence to the statements in that Grievant's written statement denies the allegation and says that the patient stood up on her own. The patient's care plan documents that the patient has a history of attempting to stand unaided even though she had been repeatedly instructed not to do so. Therefore, even if the statements about what the patient said to others are accurate, the patient may have had a motive to lie to the hospital's employees if she fell because she stood on her own when she had been instructed not to do so.

"Mere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Trs./W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998) (citing *Harrison v. W. Va. Bd. of Drs./Bluefield State Coll.*, Docket No. 93-BOD-400 (Apr. 11, 1995)). Respondent simply offered no reliable proof that the incident occurred and has, therefore, failed to meet its burden.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). "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). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. "Hearsay evidence is generally admissible in grievance proceedings. The issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings." *Gunnells v. Logan County Bd. of Educ.*, Docket No. 97-23-055 (Dec. 9, 1997).

3. The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their

statements. *Id.*; *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-H-115 (June 8, 1990).

4. “Hearsay evidence is admissible in the grievance procedure for public employees, but there is no requirement, statutory or otherwise, that it be afforded any particular weight. Generally, written statements, even affidavits, may be discounted or disregarded unless the offering party can provide a valid reason for not presenting the testimony of the persons making them. See *Simpson, supra*; *Cook v. W. Va. Div. of Corrections*, Docket No. 96-CORR-037 (Oct. 31, 1997).” *Comfort v. Reg'l Jail and Corr. Facility Auth.*, Docket No. 2013-1459-CONS (Apr. 18, 2013).

5. “Mere allegations alone without substantiating facts are insufficient to prove a grievance.” *Baker v. Bd. of Trs./W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998) (citing *Harrison v. W. Va. Bd. of Drs./Bluefield State Coll.*, Docket No. 93-BOD-400 (Apr. 11, 1995)).

6. As proof of the allegations, Respondent provided only unsworn, compound hearsay statements that were entitled to no weight. Respondent failed to meet its burden of proof.

Accordingly, the grievance is **GRANTED**. The written reprimand is void and Respondent shall remove all copies of the written reprimand from its files.

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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: May 14, 2019

Billie Thacker Catlett
Chief Administrative Law Judge