

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

KEVIN POST,
Grievant,

v.

Docket No. 2019-1899-CONS

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

DECISION

Grievant, Kevin Post, filed this action at level three on March 19, 2019, after receiving a five-day suspension for failing to perform a required hall walk and for leaving a door unlocked upon exiting the hospital. Grievant seeks to be made whole including back pay with interest and benefits to be restored. On May 15, 2019, Grievant filed a second action at level three challenging a ten-day suspension for using profanity at the hospital near the nurse station. Grievant seeks to be made whole including back pay with interest and benefits to be restored. On November 28, 2019, Grievant filed a third action challenging his dismissal after he left a patient unattended in the restroom. Grievant seeks to be made whole, restoration of his job, benefits and interest. All three grievances were consolidated.

A level three hearing was held on September 22, 2020, before the undersigned at the Westover office location of the Grievance Board. Grievant appeared in person and by his representative, Gary DeLuke, West Virginia Public Workers Union, UE Local 170. Respondent appeared by its counsel, James “Jake” Wegman, Assistant Attorney

General. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on November 19, 2020.

Synopsis

Grievant was employed at Sharpe Hospital as a Health Service Worker. Respondent met its burden of proof and demonstrated by preponderance of the evidence that Grievant was dismissed for good cause when he repeatedly violated hospital policy. Employees at Sharpe Hospital must follow policies, especially those related to patient safety. Respondent demonstrated that Grievant's conduct was of a substantial nature directly affecting the rights and interest of the residents in question at Respondent's facility. This grievance is denied.

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

Findings of Fact

1. Grievant was employed by Sharpe Hospital as a Health Service Worker. Grievant was responsible for direct care to the patients.
2. Sharpe Hospital patients must be observed by staff every fifteen minutes, and the patients' status must be documented.
3. Under Sharpe Hospital Policy 03.407, "Staff completing the 15-minute checks will enter their initials/signatures at the bottom of each 15 minute check column." Respondent's Exhibit No. 1 and 5.
4. Sharpe Hospital Policy 03.407 also provides that "the assigned staff must directly hand the checklist to the staff member scheduled to do the next 15 minute check assignment." (*Id.*).

5. Patient checks are important to make certain that the patients are safe and not doing anything inappropriate.

6. The employee performing the hall walk must physically hand the hall walk notebook to the relief worker.

7. On March 10, 2019, Grievant was assigned to perform hall walk duties. Respondent's Exhibit No. 2.

8. Charge Nurse Tammy Garvin notified Grievant that he would need to stay on the hall walk for an additional 15 minutes due to the relief worker running late. Instead of completing the hall walk, Nurse Garvin learned that the Grievant left the unit. It was also reported that the Grievant did not lock the door as he left the facility.

9. Grievant did not perform the additional 15-minute hall walk. Documentation for the additional hall walk was never completed.

10. Surveillance video shows that Grievant did not hand the hall walk notebook to relief staff, and instead he laid the notebook on a desk. Surveillance video also shows that the additional 15-minute hall walk was never completed.

11. When leaving the door unlocked behind, Grievant was in violation of Sharpe Hospital Security Management Plan. This plan mandates that all entrances at Sharpe Hospital be locked at all times.

12. In a predetermination conference, Grievant did not deny that he failed to lock the door when leaving the hospital.

13. Grievant explained that he had already worked a twelve hour shift when he was informed that he would have to continue hall walk duties. Grievant was understandably tired. Grievant acknowledged that he sat the notebook on a counter, and that he should have made certain the notebook was given to the relief worker.

14. Grievant also indicated that he was not thinking clearly when he left a door at the hospital unlocked.

15. Sharpe Hospital's doors must be locked because the facility houses patients that are suicidal and homicidal.

16. Due to this behavior, by letter dated March 18, 2019, Grievant was suspended for five days. The letter noted that Grievant had received previous disciplinary action including counseling, reprimands, and a three-day suspension.

17. Sharpe Hospital is regularly inspected and surveyed by various governmental regulatory agencies.

18. To help in the survey process, Sharpe Hospital contracts with Greeley Company to perform mock surveys.

19. On May 2, 2019, Grievant was heard by a mock surveyor saying "fuck" and "shit" at the nurse station while a Greeley surveyor was in the area.

20. The nurse station is on the hospital floor, and is centrally located where patients can regularly be found. Cursing at the nurse station does not reflect well on the hospital.

21. Grievant acknowledged that he blurted out profanity and did not take notice that an outside surveyor was in the area.

22. Grievant was issued a ten-day suspension by letter dated May 13, 2019. The suspension letter noted that Grievant had previously received a three and five day suspension; as well as counseling and reprimands.

23. Many patients at Sharpe Hospital suffer from medical conditions that require close constant observation at all times.

24. Patients under close constant observation must be in view of staff members assigned to the observation.

25. An elderly patient at the hospital was assigned close constant observation due to a risk of falling. The patient had previously fallen and broken his hip.

26. On October 26, 2019, Grievant was assigned to provide close constant observation to the patient.

27. Surveillance video shows that Grievant wheeled the patient to the restroom. Grievant leaves the patient unattended in the restroom for several minutes. Patients such as this must be in view of the Health Service Worker at all times, even if the patient is in the restroom.

28. Grievant acknowledged that he did leave the patient in order to give him privacy. Grievant felt it was permissible to sit in the doorway while the patient was in the restroom. Grievant claimed that he had seen other staff stay in the hallway, in his words, it was not a big deal.

29. Sharpe Hospital is accredited by the Center for Medicare and Medicaid Services. Care plans, including Close Constant Observation orders, must be followed. Sharpe Hospital must remain in compliance so that Sharpe Hospital can bill for the medical services that it provides.

30. Chief Executive Officer Pat Ryan opined that dismissal was proper given Grievant's record of misconduct and disciplinary action.

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. Procedural Rules of the W. Va. Public Employees Grievance Board 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). "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." *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).

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).

Given the totality of the circumstances in this case that have been established by a preponderance of the evidence, Respondent has met its burden of proof and demonstrated that Grievant was dismissed for good cause. The public has a significant interest in employees of a state-operated psychiatric hospital to strictly comply with laws and rules that are established to protect patients. Employees at Sharpe Hospital must follow policies, especially those related to patient safety. It is dangerous to coworkers and patients for employees to disregard such rules.

Sharpe Hospital policy requires that patients are observed and documented every fifteen minutes. Hall walks are important in order to ensure patient and staff safety. The hall walk policy requires that staff hand the notebook to the oncoming relief worker. Grievant was asked to work over to perform an additional hall walk. Grievant failed to complete the hall walk, and he did not hand off the notebook to relief staff. Instead, he placed the hall walk notebook on a desk and left the hospital.

Video evidence demonstrated that while Grievant was leaving the hospital that he did not lock the door which is in violation of policy. Sharpe patients can be dangerous, and as such, their access to certain areas must be restricted. Grievant admitted that he did not complete the hall walk and did not lock the door. Respondent established by a preponderance of the evidence that Grievant was properly suspended for failing to complete the hall walk and failing to lock the door.

Grievant was also suspended for cursing at the nurse station in front of a mock surveyor. The nurse station is in a central location, and patients are often in the area. Using profanity is not professional, and is not an appropriate model to set for patients. Grievant admitted that he cursed. Cursing is in violation of Sharpe policy. Respondent established by a preponderance of the evidence that Grievant was properly suspended for cursing at the nurse station.

Many patients at Sharpe Hospital suffer from medical conditions that require close constant observation. The patient in question in this case is elderly and previously suffered a bad fall. Accordingly, the patient was under an order for close constant observation. This policy states that staff must be in view of the patient at all times. Grievant was observed leaving the patient alone in the restroom unattended for several minutes. Grievant admitted that he was in violation of this policy. Because of the serious nature of this allegation, and his history of progressive discipline, Grievant was dismissed from employment. Respondent has met its burden of proof and established by a preponderance of the evidence that Grievant was terminated for good cause.

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 § 156-1-3 (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. 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).

3. Respondent has met its burden of proving that Grievant’s conduct was of a substantial nature directly affecting the rights and interest of the residents in question at Respondent’s facility. Grievant was dismissed for good cause.

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: December 30, 2020

Ronald L. Reece
Administrative Law Judge