THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

VOSS DIRK LEE,
Grievant,

v. **Docket No. 2020-0765-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
MILDRED MITCHELL-BATEMAN HOSPITAL,
Respondent.

DECISION

Grievant, Voss Lee, was employed by Respondent, Department of Health and Human Resources, ("DHHR") and assigned to Mildred Mitchell-Bateman Hospital ("Bateman") in the Cook classification. Pursuant to W. VA. CODE § 6C-2-4(4)(a)(1), Mr. Lee filed a grievance directly to level three alleging that he was "terminated under false (bias) reasons." As relief, Grievant seeks, "reconsideration for employment."

A level three hearing was held via the Zoom video platform[1] in the Charleston office of the West Virginia Public Employee Grievance Board on June 15, 2021. Grievant Voss Lee appeared *pro se.* Respondent appeared through Tamara Kuhn, Bateman Director of Human Resources and was Represented by Katherine Campbell, Assistant Attorney General. This matter became mature for decision July 28, 2021, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

[1] Grievant participated in the hearing telephonically.

Synopsis

Grievant, a probationary employee, was dismissed from his cook position for allegedly threatening to leave a female coworker dead on the floor. Grievant does not deny making the statement but argues that it is just a common expression and was not intended as a threat. He notes that the other cooks did not treat him as a colleague and constantly caused problems for him. Finally, he avers that he and the coworker were in a heated argument, and she was yelling at him as well. Yet the coworker did not receive any discipline which he believes is unfair. Respondent proved the charges against Grievant and the grievance is DENIED.

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, Voss Lee, started working for DHHR as a temporary employee at Mildred Mitchell-Bateman Hospital on September 30, 2019. He was hired as a full-time probationary employee on November 9, 2019.

2. Grievant sometimes worked with three other cooks during his typical 11:00 a.m. to 7:00 p.m. shift: Joseph Baker, Samira Henderson, and Grace Spradling.

3. On November 27, 2019, these four cooks were working in the kitchen and dining areas of Bateman on the same shift.

4. There was no supervisor working in those areas at that time. By custom, the most senior cook in is charge in the absence of a supervisor. Joseph Baker was the most senior cook on that shift.

5. Around 5:30 p.m. during the preparation of the evening meal on November 27, 2019, Samira Henderson told Grievant that he was putting the wrong kind of bread on the trays for some patients. Some were supposed to receive garlic bread and others were supposed to receive regular bread. This discussion led to a heated argument which concluded with Grievant telling Ms. Henderson he would "leave her dead on the floor."[2]

6. There is no dispute that both employees were shouting, cursing, and saying inappropriate things to each other. Samira Henderson is a fulltime employee, well past her probationary period.

7. The two separated and Grievant left the kitchen area.

8. Earlier in the day of the incident, Grievant had told Joseph Baker that he could get violent if he was pushed too far and that would not be good.

9. Grievant had been a cook in other settings for twenty-seven years and tried to give suggestions to the others to make their work easier. The other cooks were not receptive to these suggestions and told Grievant they had to follow the Bateman procedures. Grievant did not spend time with the other cooks and spent most of his break and lunch times in a separate room. Grievant noted that he was older than the rest of the cooks and did not want to be part of the drama.[3]

10. Tamara Kuhn is the Director of Human Resources at Bateman. On the evening of November 27, 2019, she received a call at home from Samira Henderson who

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[2] There were two other versions of this statement offered in testimony. One stated that "he would leave her lying dead on the floor" and another which said he would "lay her dead on the floor." There is very little difference in these statements and all three can be legitimately construed as a threat of serious violence.

[3] No specifics about any drama were offered. There was no evidence that Grievant was force or coerced to separate from the other during the breaks.

was crying. Ms. Henderson called Director Kuhn because there was no supervisor on the shift, and she was unable to reach the Dietary Director.

11. By letter dated December 2, 2019, Chief Executive Officer ("CEO") Craig Richards, suspended Grievant without pay pending an investigation into the November 27, 2019, incident. (Respondent)[4]

12. Thereafter, Director Kuhn conducted an investigation. She interviewed and took written statements from, Grievant Voss, Samira Henderson, Joseph Baker and Grace Spradling who were the only employees in the kitchen/dining area at the time of the incident. The employees wrote their statements on November 27 and 28, 2019.

13. Grievant Voss noted in his written statement dated November 27, 2019, that some questionable things had happened that day. He listed the following:

> 1. While cleaning the kettle, the cold water mysteriously cut off completely.
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> 2. During dinner preparation, the oven (bottom) apparently wasn't working properly. I didn't recognize that it wasn't working. There were my vegetable & some other items in the ovens. Someone took their items out and left the oven door open, not mentioning to me to get the veggies out.
>
> 3. It seems like people are doing things on purpose.

Grievant concluded his written statement as follows:

> I've decided to leave after I finished my part of the meal on 11-27-19. The tension is high and seems to be a bit racially motivated to me. I will address this matter and several others if needed, But I can't work with people who behave in this manner.

Grievant signed and dated this statement on November 27, 2019.

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[4] Pursuant to policy, employees suspended pending investigation may utilize accrued annual leave for the duration of such suspension.

14. During the investigation Grievant told Tamara Kuhn that Samira Henderson had said she would punch him in the mouth to which he responded he would leave her lying dead in the floor. While testifying, Grievant quoted Ms. Henderson as saying "get out of the way or I'll knock you down" prior to his response.

15. Director Kuhn finished her investigation and submitted her finding on December 6, 2019. She concluded:

> During the time of the arguments, there were no patients in the area. The dietary staff was preparing trays or those patients who eat on the units. No one corroborated Mr. Lee's statement that Samira threatened to punch him in the face. Based on the three witness statements and interviews, the investigation is substantiated.[5]

16. A predetermination conference was held on December 16, 2019. In attendance were Grievant, Director Kuhn and Toriano Brown, Dietary Director. During that conference Grievant stated that Ms. Henderson told him to go somewhere, or she would punch him in the mouth, and he responded that if she did, he would leave her dead on the floor. Grievant contended that his statement wasn't that serious. (Respondent Exhibit 3, p. 2)

17. Respondent dismissed Grievant by letter dated December 18, 2019. Respondent alleged that Grievant's threat constituted the following policy violations:

- MMBHC038 Behavioral Code of Conduct which provides: *"employees will initiate or become involved with any physical or verbal (shouting, cursing, inappropriate or profane gestured, name-calling, issuance of verbalized threats, etc.) with a patient, visitor, volunteer or coworker.*

[5] (Respondent Exhibit 2)

- DHHR Policy 2108 Employee Conduct which provides: *"employees are expected to refrain from profane, threatening or abusive language towards others."*

- MMBHC034 Violent Behavior Prohibited which provides: *"employees are prohibited from engaging in behavior that can be interpreted as verbally or physically threatening. This restriction includes making verbal threats in person even those apparently made in jest."*

- WV Division of Personnel Workplace Security which Provides: *"threatening ot assaulting behavior will not be tolerated and any employee engaging in such behavior shall be subject to disciplinary action, up to and including dismissal."*

(Respondent Exhibit 3) (emphasis in original).

18. Grievant testified that he did not want his job back. He works a second full time job with a shift from 11:00 p.m. to 7:00 a.m. which pays roughly three dollars more per hour than he was paid as a cook at Bateman.

Discussion

There is no dispute that Grievant was a probationary employee when he was dismissed. If a probationary employee is terminated on the grounds of misconduct, the termination is disciplinary, and the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *See Cosner v. Dep't of Health and Human Resources/William R. Sharpe, Jr. Hospital*, Docket No. 08-HHR-008 (Dec. 30, 2008); *Livingston v. Dep't of Health and Human Res.*, Docket No. 2008-0770-DHHR (Mar. 21, 2008). *See also* W. VA. CODE ST. R. § 156-1-3 (2008). *See also Lott v. Div. of Juvenile Serv.*, Docket No. 99-DJS-278 (Dec. 16, 1999). In this matter Grievant was dismissed for a single act of alleged misconduct so Respondent bears the burden of proving the basis of the action by a preponderance of the evidence.

"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). If the evidence is equally balanced, the party with the burden of proof has not met that burden. *See Leichliter v. W. Va. Dep't of Health and Human Res.,* Docket No. 92-HHR-486 (May 17, 1993).

The Division of Personnel's administrative rule discusses the probationary period of employment, describing it as "a trial work period designed to allow the appointing authority an opportunity to evaluate the ability of the employee to effectively perform the work of his or her position and to adjust himself or herself to the organization and program of the agency." W. VA. CODE ST. R. § 143-1-10.1(a) (2016). The same provision goes on to state that the employer "shall use the probationary period for the most effective adjustment of a new employee and the elimination of those employees who do not meet the required standards of work." *Id.* A probationary employee may be dismissed at any point during the probationary period that the employer determines his services are unsatisfactory. *Id.* at § 10.5(a).

Therefore, the Division of Personnel's administrative rules establish a low threshold to justify termination of a probationary employee. *Livingston v. Dep't of Health and Human Res.*, Docket No. 2008-0770-DHHR (Mar. 21, 2008).

> A probationary employee is not entitled to the usual protections enjoyed by a state employee. The probationary period is used by the employer to ensure that the employee will provide satisfactory service. An employer may decide to either dismiss the employee or simply not to retain the employee after the probationary period expires.

Hammond v. Div. of Veteran's Affairs, Docket No. 2009-0161-MAPS (Jan. 7, 2009) (citing *Hackman v. Dep't of Transp.*, Docket No. 01-DMV-582 (Feb. 20, 2002)).

"[W]hile an employer has great discretion in terminating a probationary employee, that termination cannot be for unlawful reasons, or arbitrary or capricious. *McCoy v. W. Va. Dep't of Transp.*, Docket No. 98-DOH-399 (June 18, 1999); *Nicholson v. W. Va. Dep't of Health and Human Res.*, Docket No. 99-HHR-299 (Aug. 31, 1999)." *Lott v. W. Va. Div. of Juvenile Serv.*, Docket No. 99-DJS-278 (Dec. 16, 1999). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

Respondent dismissed Grievant because of a statement he made during an argument with a coworker which was construed to be a threat of violence in violation of four polices cited in the dismissal letter.[6] Specifically he told the coworker that he would "leave her dead on the floor." The coworker became very upset by this statement and contacted a manager as soon as she could.

Grievant argues that the statement was no more than typical banter one might use in an argument which no one should take as an actual threat. He notes that tensions were

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[6] *See* FOF 17 *supra.*

mounting during the day because of various incidents[7] and it resulted in an argument between him and Ms. Henderson with both shouting. He alleges that his statement was in response to Ms. Henderson telling him to leave or she would hit him in the mouth.[8]

This issue is addressed on MMBHC034 Violent Behavior Prohibited which provides:

> "employees are prohibited from engaging in behavior that can be interpreted as verbally or physically threatening. This restriction includes making verbal threats in person even those apparently made in jest."

The policy makes it clear that it is not always the employee's intent in making the statement that is controlling, but whether the threat could be interpreted as verbally threatening. Grievant argues that his statement was in response to Ms. Henderson's comments and was simply hyperbole which is commonly used in such arguments and never taken seriously. Unfortunately, Grievant did tell Ms. Henderson that he would leave her dead on the floor. While Grievant may view this as harmless banter, it is certainly reasonable that others might interpret that statement as a threat of immediate and serious violence. Especially, in view of Grievant's prior statement that day to Mr. Baker, that he could become violent when provoked. Under these circumstances, Respondent proved by a preponderance of the evidence that Grievant's statement violated MMBHC038 Behavioral Code of Conduct, MMBHC034 Violent Behavior, and DHHR Policy 2108 Employee Conduct, by engaging in verbally threatening behavior. Given that Grievant was a probationary employee, this single act of misconduct was sufficient to support the

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[7] *See* FOF 13 *supra.*

[8] Or that she would knock him down if he didn't get out of the way. *See* FOF 14 *supra.*

decision to dismiss him from employment. Since Respondent dismissed Grievant for violating Agency rules their action was neither arbitrary nor capricious.

Next, Grievant made it clear that he did not want to be reinstated to his position since he has other full-time employment and no longer wished to work around the other cooks at Bateman. He argues that he should not have lost pay for participating in the argument when Ms. Henderson did not, even though she was arguing and shouting as much as he was. Grievant finds this result to be manifestly unfair. Ultimately, this amounts to an allegation of discrimination. Without using the specific words Grievant argues that it is discrimination for Respondent to terminate his employment while not giving Ms. Henderson similar discipline since they both engaged in substantially similar misconduct.

For purposes 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 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 argues that he and Ms. Henderson were both cooks at Bateman and were both engaged in the same argument in which they both yelled and spoke harshly to each

other. He argues that it is unfair for him to be dismissed for this conduct while Ms. Henderson was not. The problem is that Grievant and Ms. Henderson are not similarly situated. Grievant was a probationary employee while Ms. Henderson was a full-time employee who had finished her probationary employment period.

As stated previously,

> A probationary employee is not entitled to the usual protections enjoyed by a state employee. The probationary period is used by the employer to ensure that the employee will provide satisfactory service. An employer may decide to either dismiss the employee or simply not to retain the employee after the probationary period expires.

Hammond v. Div. of Veteran's Affairs, Docket No. 2009-0161-MAPS (Jan. 7, 2009) (citing *Hackman v. Dep't of Transp.*, Docket No. 01-DMV-582 (Feb. 20, 2002)). On the other hand, Permanent state employees, like Ms. Henderson, 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). *See also* W. VA. CODE ST. R. § 143-1-12.2.a. (2016). "'Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. W. Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988) (*per curiam*). These two standards are substantially different. Thus, even if Ms. Henderson had said exactly the same thing as Grievant, Respondent could decide not to terminate her employment considering her prior employment record. However, they would

be justified in dismissing Grievant for the single incident which violated Respondent's policy.

It is also relevant that any statement that Ms. Henderson made was not nearly as severe as the one made by Grievant. Grievant told Ms. Kuhn that Ms. Henderson threatened to hit him in the mouth. He testified that she threatened to knock him down. Ms. Kuhn pointed out that none of the other cooks who were present heard these statement. More importantly, even if either of them is true they are not nearly as severe as Grievant saying that he would leave her dead. Ultimately, Grievant did not prove he was similarly situated to Ms. Henderson, nor that Respondent was guilty of discrimination as that term is defined by W. VA. CODE § 6C-2-2 (d). Accordingly, the grievance is **DENIED**.

Conclusions of Law

1. If a probationary employee is terminated on the grounds of misconduct, the termination is disciplinary, and the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *See Cosner v. Dep't of Health and Human Resources/William R. Sharpe, Jr. Hospital*, Docket No. 08-HHR-008 (Dec. 30, 2008); *Livingston v. Dep't of Health and Human Res.*, Docket No. 2008-0770-DHHR (Mar. 21, 2008). *See also* W. VA. CODE ST. R. § 156-1-3 (2008). *See also Lott v. Div. of Juvenile Serv.*, Docket No. 99-DJS-278 (Dec. 16, 1999). In this matter Grievant was dismissed for a single act of alleged misconduct so Respondent bears the burden of proving the basis of the action by a preponderance of the evidence.

2. the Division of Personnel's administrative rules establish a low threshold to justify termination of a probationary employee. *Livingston v. Dep't of Health and Human Res.*, Docket No. 2008-0770-DHHR (Mar. 21, 2008).

> A probationary employee is not entitled to the usual protections enjoyed by a state employee. The probationary period is used by the employer to ensure that the employee will provide satisfactory service. An employer may decide to either dismiss the employee or simply not to retain the employee after the probationary period expires.

Hammond v. Div. of Veteran's Affairs, Docket No. 2009-0161-MAPS (Jan. 7, 2009) (citing *Hackman v. Dep't of Transp.*, Docket No. 01-DMV-582 (Feb. 20, 2002)).

3. "[W]hile an employer has great discretion in terminating a probationary employee, that termination cannot be for unlawful reasons, or arbitrary or capricious. *McCoy v. W. Va. Dep't of Transp.*, Docket No. 98-DOH-399 (June 18, 1999); *Nicholson v. W. Va. Dep't of Health and Human Res.*, Docket No. 99-HHR-299 (Aug. 31, 1999)." *Lott v. W. Va. Div. of Juvenile Serv.*, Docket No. 99-DJS-278 (Dec. 16, 1999).

4. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

5. Respondent proved by a preponderance of the evidence that Grievant's statement violated MMBHC038 Behavioral Code of Conduct, MMBHC034 Violent

Behavior, and DHHR Policy 2108 Employee Conduct, by engaging in verbally threatening behavior. Given that Grievant was a probationary employee, this single act of misconduct was sufficient to support the decision to dismiss him from employment. Since Respondent dismissed Grievant for violating Agency rules their action was neither arbitrary nor capricious.

6. For purposes 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).

7. 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,
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> (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).

8. Permanent state employees, like Ms. Henderson, 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). *See also* W. VA. CODE ST.

R. § 143-1-12.2.a. (2016). "'Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. W. Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988) (*per curiam*).

9. Grievant did not prove he was similarly situated to Ms. Henderson, nor that Respondent was guilty of discrimination as that term is defined by W. VA. CODE § 6C-2-2 (d).

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: September 9, 2021

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE