THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

RAYMOND D. SHORTRIDGE,
Grievant,

v. **Docket No. 2021-2316-DHHR**

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

DECISION

Grievant, Raymond D. Shortridge, employed as a housekeeper at the William R. Sharpe, Jr. Hospital, filed this action on or about March 22, 2021, against the Respondent challenging the termination of his employment. Grievant seeks to be restored to his position with back pay and benefits plus statutory interest. This grievance was filed directly to level three. An evidentiary hearing at level three was conducted before the undersigned by Zoom on January 20, 2022. Grievant appeared in person and by his representative, Michael Hansen, U.E. Local 170. Respondent appeared by its counsel, Brittany N. Ryers-Hinbaugh, Assistant Attorney General. This case became mature for consideration upon receipt of the last of the parties' fact/law proposals on March 10, 2022.

Synopsis

Grievant was employed as a housekeeper at the William R. Sharpe, Jr. Hospital. Grievant was dismissed from employment due to an abnormal drug screening test result and for gross misconduct. Respondent did not meet its burden of proof in establishing that Grievant was dismissed for good cause due to an abnormal drug screening test result. Respondent did meet its burden of proof that Grievant engaged in gross

misconduct. Grievant was able to demonstrate that the termination of his employment was clearly excessive and reflected an inherent disproportion between the offense and the personnel action. Accordingly, this grievance is granted, in part, and denied, in part.

The following Findings of Fact are based on the undisputed facts of this case.

Findings of Fact

1. Grievant was employed for approximately eight years as a housekeeper at the William R. Sharpe, Jr. Hospital located in Weston, West Virginia.

2. On February 16, 2021, a report was made to Sharpe Hospital management that the Grievant was observed drinking beer in his vehicle at the Mountaineer Mart. Grievant observed a co-worker, Rachael Ener, at the Mountaineer Mart at the same time of the reported incident. Grievant believed that Ms. Ener was the person accusing him of drinking beer in his vehicle.

3. On February 16, 2021, Grievant was observed by Nurse Megan Minigh after the reported alcohol related incident as reported by the anonymous call. Ms. Minigh determined that Grievant did not meet the criteria for "for-cause" alcohol and/or drug testing.

4. On February 17, 2021, Grievant did approach Ms. Ener in the breakroom and accused Ms. Ener of making the report accusing him of drinking beer in his vehicle before he reported for work. Grievant admitted that he made derogatory and inflammatory comments to Ms. Ener. These comments were mean and clearly violated the requirement that co-workers address one another with a modicum of civility. These undisputed comments also violated various policies against harassment and creating a hostile work environment.

5. On February 17, 2021, Grievant was told to report to the Human Resource Office at the facility. Grievant met with Cecil Pritt, Director of the Human Resource Office, and was advised that he was being suspended, pending an investigation, into the incident that occurred earlier in the breakroom.

6. Following the confrontation in the breakroom, Grievant was required to submit to a "for-cause" drug and alcohol test on February 17, 2021. The results of the test were returned on March 1, 2021, with a result of negative-dilute. Grievant was under constant observation of a security guard until he was administered the drug and alcohol test. The result of a breathalyzer test returned a negative result of .000 for the presence of alcohol.

7. On February 18, 2021, a Notice of Suspension Pending Investigation letter was issued by Chief Executive Officer Pat Ryan.

8. On February 25, 2021, a Predetermination Conference Notice was issued by Human Resource Director Pritt. On March 1, 2021, a revised notice was issued by Mr. Pritt. The revised letter indicated that the hospital was in receipt of the drug screening and that the result was abnormal, which under hospital policy, made Grievant ineligible for employment.

9. Respondent's exhibit addressing drug testing indicates that an abnormal result will result in ineligibility for employment for pre-employment applicants. Respondent's drug testing policy indicates that in the event an employee's test result is either positive or abnormal, the employee may be subject to appropriate discipline, up to and including dismissal. The only mention of dismissal for an employee is that in the

event of a positive result, disciplinary action may be taken up to and including dismissal. Respondent Exhibit No. 2.

10. On March 3, 2021, Grievant met with Mr. Pritt for a predetermination conference to offer an explanation for his actions. Grievant acknowledged that he was upset because he was accused of something that he did not do. Grievant apologized for his language and actions.

11. On March 9, 2021, a Notice of Dismissal was issued and mailed to the Grievant. The letter identifies the reasons for dismissal were the result of an abnormal drug test result and for misconduct.

12. The letter identifies the Department of Health and Human Resources' Policy 2108 which indicates that employees are prohibited from using profane, threatening or abusive language towards others and to conduct themselves professionally in the presence of residents, patients, and co-workers.

13. The letter also identifies the Department of Health and Human Resources' Policy 2123 which mandates that employees treat others with courtesy and respect, and to not participate in harassment at work.

14. The letter goes on to state, "After considering your conduct, previous corrective actions, and your response, it is decided that your dismissal is warranted."

15. The record did not provide any evidence that Grievant has any previous disciplinary actions or any corrective actions during his eight years of employment with Sharpe Hospital.

16. On March 1, 2021, an email was sent to Ginny Fitzwater, the Department of Health and Human Resources' Human Resource Director, from Julia A. Barker, Drug

Testing Centers of America, transmitting the results of the drug screen testing for Grievant.

17. The email states, "Please find a DILUTE-Negative drug screen result attached. It has been reported to the facility as Abnormal. For you reference, a dilute sample (indicated by low creatine level AND low specific gravity) means the lab could hardly detect the common human waste product (creatinine). Since this is hardly detectable, any drugs that may be in the donor's system would also be hardly detectable. The result is negative, but there is an air of uncertainty because of the dilution of the specimen. Please note: A dilute specimen could be simply over hydration on the part of the donor. However, it could also mean the donor was purposefully attempting to mask a substance. At any rate, there is no distinct way to determine the cause. A Typical Recommendation is to re-collect the specimen." Respondent Exhibit No. 16.

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 Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2018); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). The generally accepted meaning of preponderance of the evidence is "more likely than not." *Riggs v. Dep't of Transp*., Docket No. 2009-0005-DOT (Aug. 4, 2009) *citing Jackson v. State Farm Mut. Ins. Co*., 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004). *See 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. *Leichliter, supra*.

The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 51, 380 S.E.2d 216, 218 (1989). The judicial standard in West Virginia requires that "dismissal of a civil service employee be for good cause, which means 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. 2, *Buskirk v. Civil Service Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985); Syl. Pt. 1, *Oakes v. W. Va. Dept. of Finance & Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980). *See Guine v. Civil Service Comm'n*, 149 W. Va. 461, 468, 141 S.E.2d 364, 368-69 (1965); *Smith v. Clay County Health Dep't*, Docket No. 2012-0451-ClaCH (Apr. 17, 2012).

The first reason stated in Grievant's dismissal letter was the result of an abnormal drug test. The undersigned agrees with counsel that the public has a significant interest in employees of state-operated psychiatric hospitals strictly complying with rules that are established to require sobriety of its employees. Requiring Grievant to submit to drug and alcohol testing was appropriate in this case. In any event, Grievant does not contest the request by Respondent for him to submit to a for-cause drug test.

The record does seem to support that request given Grievant's behavior in the breakroom on February 17, 2021. On that date, Grievant was observed by Nurse Huddle using profanity in accusing a co-worker of making a report that Grievant was observed drinking beer before reporting to work. As a result of this report, Grievant was escorted to the NCC office to submit to a drug screening test. Grievant was escorted to the NCC

office by a hospital security guard. Grievant was in the constant presence of the security guard until the contractor responsible for administering the drug screening test arrived at the NCC office. Grievant submitted to the first test, BAC by a breathalyzer test, which returned a negative result for the presence of alcohol.

Grievant also gave a urine sample and the examiner marked Step 2 of the report as meeting the temperature requirement of the sample and made no other remarks about the sample. On March 1, 2021, the hospital reported the results of the drug screening test to the Grievant in a Predetermination Conference Notification letter, which included a comment that the result of the test made the Grievant ineligible for employment. The record established that the determination to dismiss Grievant's employment was due to their belief that he purposely attempted to alter the results of the drug screening test. Nothing in the record supports this belief. The undersigned agrees with Grievant's representative that Respondent failed to prove by a preponderance of the evidence that Grievant purposely attempted to mask a substance that would be detected in the drug screening test he took on February 17, 2021. As Mr. Hansen aptly points out, Respondent ignores the additional information provided by the drug testing company as it relates to the reason for a dilute sample. The record clearly shows that the drug testing company recommended that Respondent conduct a retest because there is no distinct way to determine the cause of the dilute test. Grievant could have easily been retested for the presence of drugs, but was not given that opportunity. In summary, the negative-dilute test result basis for dismissal of an employee of eight years does not constitute good cause.

The second charge against Grievant is essentially gross misconduct, as Respondent asserts Grievant violated policy relating to employees conducting themselves appropriately and professionally. The "term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991) (*citing Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985)). *See Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sept. 13, 2002).

Grievant, during his predetermination conference with Human Resource Director Pritt, and during the level three hearing, admitted that he used profanity and made remarks to a co-worker that were inappropriate. Respondent has met its burden of proof and demonstrated that Grievant engaged in gross misconduct. Grievant argues that, notwithstanding this misconduct, the Respondent had other options available if disciplinary action was warranted. 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.” *Martin v. W. Va. State Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

The Grievance Board has held that “mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee’s offense that it indicates an abuse of discretion. Considerable deference is afforded the

employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

Nevertheless, a lesser disciplinary action may be imposed when mitigating circumstances exist. *See Conner v. Barbour County Bd. of Educ*., Docket No. 95-01-031 (Sept. 29, 1995). Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. *See Pingley v. Div. of Corr*., Docket No. 95-CORR-252 (July 23, 1996). When assessing the penalty imposed, "[w]hether 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)(citations omitted).

It is undisputed that Grievant's language and conduct were in violation of Employee Conduct policies. However, the record established that Ms. Ener, the victim of Grievant's conduct, did not indicate any concern for her safety or that she would not be able to work with Grievant if the undersigned returned Grievant to his previous position at Sharpe Hospital. To her credit, Ms. Ener indicated that it was her hope that the two could put this incident behind them.

The record established that Grievant had long service with a history of otherwise satisfactory work performance. The record is also undisputed that Grievant was a good

employee that followed directions and was dependable. Respondent's argument that mitigation is not appropriate due to the nature of Grievant's violations of Sharpe Hospital's rules and policies regarding drug and alcohol use is not persuasive. Given the record of this case, and the principles of progressive discipline, nothing more than a thirty-day suspension was needed in this case. In addition, the undersigned imposes the additional requirement that Grievant will be returned to work after presenting a negative return to duty drug and alcohol test result. Respondent is also granted leave to impose an additional requirement that Grievant participate in training offered by the Division of Personnel relating to appropriate civility in addressing co-workers. This grievance is granted, in part, and denied, in part.

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 (2008); *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. Drug testing will not be found to be in violation of public policy grounded in the potential intrusion of a person's right to privacy where it is conducted by an employer based upon reasonable good faith objective suspicion of an employee's drug usage or while an employee's job responsibility involves public safety or the safety of others. *Syllabus Point 2*, *Twigg v. Hercules Corporation*, 185 W. Va. 155, 406 S.E.2d 52 (1990).

4. Respondent failed to prove by a preponderance of the evidence that Grievant purposely attempted to mask a substance that would be detected in the drug screening test.

5. The negative-dilute test result basis for dismissal of Grievant does not constitute good cause.

6. The "term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991) (*citing Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985)). *See Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sept. 13, 2002).

7. Respondent has met its burden of proof and demonstrated that Grievant engaged in gross misconduct.

8. "Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

9. A lesser disciplinary action may be imposed when mitigating circumstances exist. *See Conner v. Barbour County Bd. of Educ*., Docket No. 95-01-031 (Sept. 29, 1995). Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. *See Pingley v. Div. of Corr*., Docket No. 95-CORR-252 (July 23, 1996). When assessing the penalty imposed, "[w]hether 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)(citations omitted).

10. Under the facts of this case, Grievant established by a preponderance of the evidence that mitigation of the discipline imposed was proper.

11. Given the facts and the standard set out in *Oakes*, *supra*, the dismissal of Grievant was clearly excessive and disproportionate to his conduct. A suspension of

thirty working days without pay is appropriate under the circumstances of the grievance in its entirety.

Accordingly, this grievance is **GRANTED, IN PART**, **AND DENIED, IN PART**. Respondent is **ORDERED** to reduce Grievant's dismissal to a thirty-day suspension without pay, and to reinstate Grievant to his position as a Housekeeper, and to pay him back pay and restore all benefits he would have earned had his employment not been terminated, including annual leave, sick leave, and retirement, from thirty working days after the date of his February 18, 2021, suspension letter. In addition, the undersigned imposes the additional requirement that Grievant will be returned to work after presenting a negative return to duty drug and alcohol test result. Respondent is also granted leave to impose an additional requirement that Grievant participate in training offered by the Division of Personnel in relating to appropriate civility in addressing co-workers.

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: April 18, 2022

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Ronald L. Reece
Administrative Law Judge