DENNIS ARTRIP, .

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Grievant, .

.

v. . DOCKET NO. 94-HHR-146

.

WEST VIRGINIA DEPARTMENT .

OF HEALTH AND HUMAN SERVICES/ .

HUNTINGTON STATE SAU, .

.

Respondents. .

D E C I S I O N

This is a grievance by Dennis Artrip (hereinafter "Grievant"), submitted directly to Level Four of the grievance procedure in accordance with W. Va. Code § 29-6A-4(e), challenging his dismissal from employment with the Substance Abuse Unit ("SAU") at Huntington State Hospital effective April 21, 1994. An evidentiary hearing was conducted in the Board's office in Charleston, West Virginia, on June 27, 1994. (See footnote 1) Having carefully reviewed all matters of record and the arguments of the parties, the undersigned concludes the SAU has presented sufficient evidence to support Grievant's dismissal from employment.

I.

Grievant was employed in the SAU as a Health Service Worker ("HSW"), a position in the classified service. The SAU Administrator notified Grievant of his dismissal by letter dated April 6 based upon charges of "insubordination, the use of profane and abusive language, and [the] repeated failure to comply with the policies" of the SAU, citing the following specifics:

Insubordination: On March 25, 1994, you were assigned to work the 3-11 shift on

Ward 17 by Charge Nurse Janet Dickess, LPN. In response you told Ms. Dickess that you were not going to work on Ward 17. You then proceeded to go to Ward 18 totally disregarding Ms. Dickess' direction to work on Ward 17.

Use of Profane and Abusive Language: On March 25, 1994, during the 3-11 shift, Tina McComas, LPN, directed you to fill the milk machine, a job duty which had previously been assigned to a black male Health Service Worker. In response to this direction, you stated to Ms. McComas, "You and Janet (Dickess) may be nigger lovers, but I'm not." You continued by saying to Ms. McComas, "Fuck you and fuck Janet (Dickess)."

Failure to Follow Policy/Maintain Security: On March 31, 1994, at approximately 6:00 p.m., during client visitation, Therapist I, Dawn Ingles noticed visitors entering the basement of the Substance Abuse Unit with packages. She asked them if their packages had been searched (for contraband such as drugs and weapons) and they responded that their packages had not been searched. Ms. Ingles then searched the packages of the visitors, but then only after they had been admitted to the building and allowed to make their way to the basement. Since you had admitted the visitors to the building and since the Client Visitation Policy of the Substance Abuse Unit clearly made it your responsibility to search visitors' packages, Ms. Ingles asked you why you had failed to conduct the necessary search. In response, you stated it was not your job to conduct searches, which was clearly wrong as you very well know, since you were aware of the Client Visitation Policy and had signed a form indicating you knew and understood the policy.

The SAU's rationale for terminating Grievant's employment is

set forth in the dismissal letter:

Your flagrant disregard for the direct order of Charge Nurse Dickess demonstrates an utter disregard and lack of respect for management's authority and undermines the ability of the supervisory staff to make staffing assignments to meet the needs of the client of the Substance Abuse Unit. This behavior, coupled with your blatantly insubordinate, profane, and abusive language directed toward both LPN McComas and LPN Dickess, demonstrates your open contempt for authority and suggests a racist orientation on your part.

Finally, your failure to search the packages brought onto the Unit by several visitors on March 31 demonstrates a lack of concern for the safety of the clients of the Unit and also for your co-workers. Such a breach of security compromises the integrity of the entire Unit and defeats the very purpose for which such a locked unit exists.

> I find that your insubordinate, profane, abusive, and negligent behavior jeopardizes the effective operation of the Substance Abuse Unit and the safety and well-being of all individuals who work or reside therein.

The SAU is a secure residential facility where clients, some of whom are there involuntarily, live and receive care and treatment for alcohol and drug abuse problems. Robert Nida, the Nursing Director, testified concerning the SAU's policies, particularly the policies entitled Security and Safety Search (HHR Exh. 1), and Client Visitation (HHR Exh. 2). The latter policy provides that "all personal packages brought by visitors will be inspected by a staff member for contents" and requires the name, date and time of each visit by an approved visitor to be recorded.

Mr. Nida explained that Grievant, as a Health Service Worker ("HSW"), is supervised by a Licensed Practical Nurse ("LPN"). Due to prior disciplinary problems with HSWs at the SAU, he issued a memorandum emphasizing the supervisory role of LPNs and expressly provided that the failure of an HSW to comply with an LPN directivecould result in disciplinary action and would be considered as a willful disregard of SAU policies. (HHR Exh. 4). Mr. Nida's testimony and the documentary evidence introduced establish that Grievant was well aware of the SAU's policies and of his duties and responsibilities as an HSW (HHR Exhs. 5, 6, 7).

The SAU proved by a preponderance of the evidence that Grievant committed the acts for which he was dismissed from employment through documentary evidence and the testimony of Robert Nida, Charge Nurse Janet Dickess, LPN Tina McComas, HSW James "Jim" Jones, and Therapist I, Dawn Ingles. The testimony of these witnesses was credible, consistent and was not weakened on cross-examination. Charge Nurse Janet Dickess testified that when she posted the work assignments on March 25, Grievant looked at the assignment sheet and said he was "not going to do it," prompting her request that he work or "float" on both wards, a common practice when HSWs call in sick. At that time she directed Grievant to do one half of the charting and vital signs of clients on Ward 17. Ms. Dickess stated, and Grievant acknowledged in his testimony, that he did not perform any tasks assigned him on Ward 17 that day.

Ms. McComas, an LPN and three-year SAU employee, testified that when she requested Grievant fill the milk machine on Ward 17, he responded "to hell with you and to hell with Janet [Dickess]," and "look I can not help it if you are a nigger lover," and left without performing the task. He later returned that shift, apologized and inquired whether she intended to write an incidentreport. However, he never

filled the milk machine. Both of Grievant's encounters with LPNs that day were reported in an incident report (HHR Exh. 8). Ms. Ingles testified that on March 31, Grievant failed to search packages of at least three visitors entering the SAU. When she inquired why he had not searched the packages, Grievant remarked that searching packages was not his job (Incident Report, HHR Exh. 9). Ms. Ingles also stated Grievant had made a racially-oriented remark suggesting she was sexually attracted to James "Jim" Jones, an African-American HSW. Mr. Jones corroborated the testimony of the other SAU's witnesses. He also said that when LPN Chantell Bowman relayed a message to Grievant from Charge Nurse Dickess to take the vital signs of the remaining half of the clients on Ward 17, Grievant adamantly refused and uttered a profanity.

LPN Bowman was called as a witness by the Grievant. She acknowledged relaying an order from Ms. Dickess to Grievant about doing the vital signs on Ward 17, and conceded that Grievant "may have said that was a bunch of bullshit" and that he would do it "if he got time." Both LPN Bowman and Grievant's other witness, an African-American Health Service Assistant, testified they had never heard Grievant make racist comments.

Grievant elected to testify on his own behalf and gave the following testimony. To the extent that his testimony conflictswith the SAU's evidence, however, the undersigned finds his testimony not to be credible. (See footnote 2)

Grievant had been employed in the SAU for three years at the time of his dismissal, and on March 25, 1994, he was working the three to eleven shift. When he reported for work that day, the Charge Nurse, Janet Dickess, told him to work on Ward 17 but when he mentioned to her that a health service technician, Sarah Slaughter, was working on Ward 18 by herself, Charge Nurse Dickess agreed that Grievant could work on Ward 18 with Ms. Slaughter. Grievant explained that Ward 18 was a full ward, and he was concerned for Ms. Slaughter's safety because she had been "jumped" by a client on that ward about a year and a half ago.

Based upon this discussion, Grievant stated that he understood the charge nurse's assignment required him to "float" between Ward 17 and 18, and he pointed out the assignment sheet that was posted upon the bulletin board stated that he was to float due to a shortage of HSWs (Bottom of HHR Exh. 18). Grievant further stated his understanding was that he was to perform the duties on Ward 18 first and then, if he had time, to assist HSW James Jones assigned to Ward 17.

Grievant's assertion that his assignment did not require him to perform duties on Ward 17, unless

he completed his duties on Ward 18, conflicts with the testimony of at least two of the SAU's witnesses, and the undersigned finds his version of the facts to befalse. The evidence supports the SAU's position that Grievant was assigned duties on both wards and, specifically, that he was to perform the charting and vital signs on half the clients on Ward 17. Furthermore, Grievant admitted LPN Bowman informed him that Charge Nurse Dickess wanted him to obtain the vital signs on half the patients on Ward 17 and that he was dissatisfied with this order because HSW Jones, who was assigned to Ward 17, should have done the work. He admitted telling Ms. Bowman the directive was bullshit but explained that he told her he would do the vital signs when he finished on Ward 18.

Grievant stated he told LPN McComas, in response to the message to fill the milk machine, that filling the milk machine was HSW Jones' duty, and when Ms. McComas replied that Jim was busy he informed her that he was not busy but rather was playing cards. Grievant also testified that it was common for HSW Jones to play cards while at work.

As to the March 31 charge, Grievant conceded that he did not search the packages of any visitor but stated that he had seen only one visitor with a package. Grievant explained that he did not do so because it was raining and cold and he wanted to get five or six people who arrived at the same time inside quickly. He said he saw only one visitor with a package, and he instructed her to go downstairs and have the package searched. He noted that he could watch a visitor go down the stairs and that a visitor would be seen by a counselor as soon as a visitor entered the room at the bottom of the stairs. He also stated there were no clients downstairs towhom a package could have been given. Grievant also pointed out that he had never been disciplined for failing to search packages brought by visitors. On cross-examination, Grievant conceded his awareness of applicable SAU policies and that he neither prepared the flow charts nor obtained the vital signs of half the patients on Ward 17 as directed.

Grievant maintained, however, that he did not refuse to perform the assigned work on Ward 17 but simply did not do it because of the work demands on Ward 18. Grievant denied ever making any racist comments and maintained that Mr. Jones was playing cards with clients and could have performed the vital signs. To reiterate, the undersigned find Grievant's testimony not credible in view of the testimony presented by the SAU's witnesses.

II.

In disciplinary matters, W. Va. Code §29-6A-6 places the burden of proof on the employer. Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). 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. Dept. of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Service Comm., 149 W. Va. 461, 141 S.E.2d 364 (1965); Section 12.02, Administrative Rule, W. Va. Div. of Personnel (Aug. 3, 1993).

The Grievance Board has defined insubordination as the "willful failure or refusal to obey reasonable orders of a superior who is entitled to give such orders." Gill v. W. Va. Dept. of Commerce, Docket No. COMM-88-031 (Dec. 23, 1988). An employee must ordinarily obey a supervisor's order and then take appropriate action to challenge the validity of the supervisor's order; in other words, work then grieve. Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990).

In Payne v. Division of Highways, Docket No. 94-DOH-454 (Apr. 29, 1994), it was noted that insubordination is not a trivial matter, quoting the arbitration decision in Burton Manufacturing Co. v. Boilermakers Local 590, 82 Lab. Arb. (BNA) 1228 (1994) (Holley, Arb.):

> In general, if an employee refuses to obey an order or defies the authority of Management, he is guilty of insubordination. This is a serious offense and may justify disciplinary measures, including discharge. An employee may be charged with insubordination not only if he willfully disobeys an order, but also if he . . . uses abusive, threatening, or profane language in speaking to Management; or assaults a representative of Management. (Burton, supra, at 1234, citing Trotta, Arbitration of Labor-Management Disputes 282-283 (1974).)

It is concluded that the proven charges of misconduct in this matter constitute good cause for Grievant's dismissal. Grievant's misconduct can hardly be characterized as trivial or inconsequential in nature, and SAU's management reasonably concluded that his behavior jeopardized its ability to operate the unit in an effective and safe manner. Mr. Nida testified that numerous factors were considered in determining that dismissal was appropriate, such as the impact of Grievant's behavior uponclientele and the staff of the SAU, particularly the supervisory LPNs. Over objection, Mr. Nida was permitted to testify that Grievant's prior disciplinary record was a factor in the decision to

terminate his employment. (See footnote 3) Mr. Nida explained that, after discussions with the West Virginia Division of Personnel, he had decided to recommend a suspension rather than dismissal for the two March 25 incidents. (See footnote 4) He changed his mind, however, after the third infraction which he regarded as a serious violation of SAU policy, as stated in the letter of dismissal.

Grievant contends that the SAU failed to follow the mandates of its own disciplinary policy. HHR Policy Memorandum 2104, effective April 26, 1991 (HHR Exh. 11), provides guidelines designed to achieve, among other things, the consistent exercise of disciplinary actions within the HHR. These guidelines contain a section listing various infractions and suggested penalties for first, second, third and further infractions. This section is prefaced by the following statement:

> It should be emphasized that the items presented below are only guidelines rather than inflexible standards. It is impossible to provide examples that address all potential situations. Thus, it is important and necessary to consider carefully each situation in light of its unique circumstances and factors. Mitigatingfactors should always be considered. [Emphasis in original].

The undersigned agrees with the SAU that, in the circumstances of this case, it was not required to engage in "progressive discipline" when dealing with Grievant's misconduct. Policy 2104 at page 7 also provides as follows:

> Dismissal of a permanent employee should follow only after other disciplinary action has failed to bring results except for extenuating circumstances or extremely serious offenses in direct violation of agency policy, state or federal law, or other provisions, such as court mandates. [Emphasis added].

On the facts of this case, the undersigned concludes that the SAU did not violate Policy 2104 in dismissing Grievant from employment. First, the previously quoted language does not create a mandatory duty to follow a progressive disciplinary approach. Second, Grievant committed multiple offenses within a one week period, all of which were serious in nature, and previous disciplinary actions against Grievant did not cause him to comply with SAU policy. Third, Grievant's multiple acts of misconduct constitute an extenuating circumstance justifying dismissal rather than further corrective disciplinary measures.

___In addition to the foregoing factual and legal determinations, the following findings of fact and conclusions of law are made in this matter.

Findings of Fact

1. Grievant, an HSW in the classified service, was employed for approximately three years at the SAU, when he was dismissed from employment effective April 21, 1994.

2. On March 25, 1994, Grievant was properly assigned to perform duties on Ward 17 by his supervisor, and he willfully refused to perform any duties on that ward, even after the supervisor agreed he could work on both Ward 17 and 18.

3. On March 25, 1994, Grievant used abusive language directed toward his female supervisors and uttered a racial epithet upon being requested to fill a milk machine on Ward 17.

4. On March 31, Grievant failed to search packages brought by visitors for clients in violation of written policy of which he was well aware. In addition, as charged in the dismissal letter, when he was asked about why he did not search the packages he stated that conducting package searches was not his job.

Conclusions of Law

1. In disciplinary matters, the burden of proof is upon the employer to establish the charges relied upon for dismissal by a preponderance of the evidence. W. Va. Code § 29-6A-6. Davis v. W.Va. Dept. of Motor Vehicles, Docket No. 89-DMV-569 (Jan.22, 1990); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992).

2. A classified state employee cannot be dismissed from employment without good cause, meaning "misconduct of a substantial nature affecting 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. Dept. of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1985).

3. The Grievance Board has defined insubordination as the "willful failure or refusal to obey reasonable orders of a superior who is entitled to give such orders." Gill v. W. Va. Dept. of Commerce, Docket No. COMM-88-031 (Dec. 23, 1988). An employee must ordinarily obey a supervisor's order and then act appropriately to challenge the validity of the supervisor's order; that is, do the work then grieve. Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990).

4. Grievant willfully and intentionally refused to perform any duties assigned on Ward 17, as directed by his supervisor, and thus was guilty of insubordination as charged.

5. Grievant used abusive language and uttered a racial epithet when he was asked to perform duties on Ward 17 as charged in the letter of dismissal. Such remarks were grossly improper.

6. Grievant did not comply with the SAU Client Visitation Policy that, among other things, required him to search packages brought by visitors for clients, a direct and serious violation of policy.

7. A governmental agency must comply with all properly enacted rules and regulations. See e.g., Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977).

8. The SAU has proven by a preponderance of the evidence that Grievant committed the acts relied upon for his dismissal and that Grievant's proven misconduct constitutes good cause for his dismissal. Grievant's dismissal was not a clearly excessive penalty given the seriousness of the charges, his length of serviceand his prior disciplinary record involving the failure to adhere to established policy.

9. Grievant did not establish the SAU violated Policy Memorandum 2104 in dismissing him from employment.

Accordingly, this Grievance is **DENIED**.

Any party may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

RONALD WRIGHT

Administrative Law Judge

Dated: September 13, 1994

Footnote: 1 This case became mature for decision on July 29, 1994, following receipt of post-hearing briefs from the

parties.

Footnote: 2 Under the provisions of W. Va. Code § 29-6A-6, employees cannot be compelled to testify against themselves in disciplinary matters.

Footnote: 3 Grievant's prior disciplinary record consisted primarily of a three-day suspension in November 1993 for failure to follow a directive to provide a physician's statement to substantiate absences from work on two occasions due to sickness.

Footnote: 4 The evidence reveals that a personnel specialist for the Division of Personnel had advised Mr. Nida that, assuming the SAU could prove the charges by a preponderance of the evidence, the March 25 misconduct would warrant Grievant's dismissal.