GARY PERDUE

v. **Docket No. 93-HHR-050**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/HUNTINGTON STATE HOSPITAL

D E C I S I O N

Grievant, Gary Perdue, was dismissed from employment as a Health Service Worker at Huntington State Hospital ("HSH") on January 27, 1993. The reasons stated for his termination were "verbal patient abuse, violation of the West Virginia Drug-Free Work Place Policy (i.e., appearing for work with alcohol in your body system), and the flagrant disregard of the authority of your supervisor." (See footnote 1) Respondent's Exh. No. 6. This action was part of the employer's progressive discipline policy. Because this was a disciplinary action, the Grievant filed this grievance directly to Level IV on February 8, 1993. On his grievance form he stated he was "unjustly terminated in violation of West Virginia Administrative Rules and Regulations." After numerous continuances and two hearings, this case came mature for decision on October 25, 1993. (See footnote 2)

In the termination letter HSH detailed the various reasons for the Grievant's termination. In the area of patient abuse, the Grievant was alleged to have told a patient, "You better shut the hell up or I will suffocate you with a pillow." The letter also stated he taunted an alcoholic patient by saying, "Well, I'm going to go drink a cold one, and I'll think about you."

Further, the letter stated the Respondent had received multiple complaints from patients and employees, that he came to work with alcohol on his breath. The letter also charged that the Grievant had stated on January 13, 1993, in front of two RNs, that he always drank before coming to work and would continue to do so.

The dismissal letter also referred to the Grievant's prior thirty day suspension in 1988 for consuming alcohol on State property, reporting to work in an unfit condition due to intoxication, and abandonment of his position. The Grievant had also been suspended in November, 1992 for excessive absenteeism and calling in sick in conjunction with days off. (See footnote 3) Neither of theseprior suspensions were grieved. As in all disciplinary actions the Respondent has the burden of

proving the Grievant's dismissal was appropriate. Schmidt v. West Virginia Dept. of Highways, Docket No. DOH-88-063 (Mar. 31, 1989). At the hearing the Respondent presented the testimony of several employees and signed statements of two former patients as proof of these charges.

Ms. Julie Mannon, RN, the Grievant's head nurse (See footnote 4) and direct Supervisor from July, 1992 to January, 1993, testified she talked to him about the patient's complaints of alcohol on his breath. She testified that he told her he slept late, went to eat around 9 - 9:30 p.m., and had beer to drink with his meal. He denied that he was drunk. The Grievant reports to work at 10:45 p.m. She further testified that he said, "Yes, I come to work after drinking, but I'm not drunk."

Ms. Clara Woods, RN, a relief night shift nurse, supervised the Grievant after the fall of 1992 when he was assigned to one of her units. As a relief supervisor she only worked with the Grievant a couple of times a month, on Friday and Saturday during the fall and winter of 1992-1993. She stated that during that time she smelled alcohol on the Grievant's breath two or three times, and the patients complained to her about his smelling of alcohol.

HSH Patient Advocate, Nancy Fry, also testified for the Respondent. Although she had no first hand knowledge of the Grievant's behavior, she testified to the patient's complaints she had received which resulted in two signed statements from patients.

The first statement, recorded by Ms. Fry and signed by Mr. J.R. (See footnote 5), a patient, stated the Grievant smelled of alcohol every night. This patient also said Mr. Perdue told him he goes to his car at break to drink, and even kidded him about going out to drink a beer and thinking about him. Mr. Ratliff, who, according to the record had a drinking problem, also stated that on Christmas of 1992 the Grievant was clearly intoxicated as he had red eyes and face and had difficulty walking.

The second recorded statement is signed by Ms. K.W., a former patient. She stated the Grievant came to work with "blood red" eyes and the smell of alcohol on his breath which he tried to cover up with mints. She also said he had threatened to smother a patient.

The Respondent presented evidence and testimony about the prior suspension for drinking. This was unnecessary since the incident was not grieved, and the information in the suspension letter was accepted as true. Interestingly, the Grievant stated at hearing that this suspension was not for drinking even though the suspension letter clearly states the Grievant was found consuming alcohol on the premises and was in an unfit condition to work due to intoxication.

Additionally, Respondent submitted into the record, without objection, the Grievant's signed

statement saying he had read and understood the various alcohol and controlled drug policies, including the Drug-Free Work Place Policy, that were in place at HSH while he worked there.

Mr. Gary Knootz, who was qualified as an expert on alcoholism, also testified for the Respondent. He stated that it would take the body approximately one hour to metabolize each beer consumed. Mr. Knootz also testified that alcoholics were unreliable in reporting their alcohol consumption.

The Grievant's testimony consisted of a flat denial. He repeatedly denied he came to work drunk, or under the influence of alcohol. He testified he was an alcoholic (See footnote 6) and had been through two treatment programs. He also stated he had chosen not to pursue the help offered by the Employee Assistant Program.

He further testified, "Yes, I drink a beer once in awhile" but that he never drank hard liquor anymore, and it was when he drank hard liquor that he considered himself an alcoholic. He stated he might have a six-pack of beer on his day off, and on days he was scheduled to work he occasionally went to Pizza Hut® with his girlfriend and split a small pitcher of beer with her while they ate pizza. He said this eating and drinking took place at 3:00 p.m., well before he went to work. He further stated if thepatients and employees could still smell the alcohol on his breath he was sorry, but he was not drunk.

He related he had had a conversation with Ms. Mannon about his drinking, but had told her emphatically that he might have a beer, "a glass and a half" at 3:00 p.m. with his pizza, but "never" later. He further testified, "I abstain to where I have control", and that he has never gone to work drunk or with alcohol on his breath. When questioned about his prior 1988 suspension in relation to these answers he stated that he didn't get suspended for drinking, but for having an open beer can in his car at work. (See footnote 7) No other relevant testimony was adduced at hearing.

As previously noted the Respondent has the burden of proof in a discharge case. This burden must be met by the preponderance of evidence standard. Since almost no testimony was introduced to support the patient abuse charge other than the signed statement of Ms. K.W., this violation has not been proven. However, the evidence on the violation of the Drug-Free Work Place Policy is convincing and substantial.

The Respondent presented two witnesses who testified Grievant violated the employer's Drug-Free Work Place Policy. The Grievant introduced no reason why these individuals would be biased against him or motivated to lie.

Additionally, the Respondent submitted signed statements of two former patients who charged the Grievant violated the Drug-Free Work Place Policy. These statements are obviously hearsay, butrelevant hearsay is admissible in administrative hearings. W. Va. Code §29-6A-6. The key question is what weight to give this testimony.

In Borninkhof v. Department of Justice, 5 MSBP 150, (1981), the Merit System Protection Board identified several factors that affect the weight hearsay evidence should be accorded. These factors are: 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.; Seddon v. West Virginia Dept. of Health/Kanawha-Charleston Health Department, Docket No. 90-8-115 (June 8, 1990).

Mr. J.R. and Ms. K.W., the former patients, were subpoenaed to testify at the hearing, but did not respond. Their statements were recorded by Ms. Fry, the Patient Advocate, and signed by the declarants. It appears the declarants were not totally disinterested parties to the events, because they were upset that a Health Care Worker would come to work with alcohol on his breath and/or in a state of intoxication. The initial patient statementswere made in conformity with the hospital's grievance procedure. Resp. Exh. No. 8 at § 1B.

These statements are consistent with and collaborated by the testimony of Ms. Woods and Ms. Mannon, are consistent with each other, and have internal consistency. As to the credibility of the individuals at the time of the statements, this ALJ cannot judge. Although they were patients at HSH at the time these statements were dictated, no evidence was introduced that the individuals suffered from some type of psychosis or were unable to differentiate truth from reality. The Grievant testified he remembered one of the declarants, Mr. J.R., and he did talk and occasionally joke with him.

The last factor identified by the Merit System Protection Board to use in assessing hearsay evidence is the absence of contradictory evidence. The only contradictory evidence of record is the Grievant's testimony, which was a flat denial of ever coming to work impaired. After reviewing these

factors, this Judge finds the signed statements of Mr. J.R. and Ms. K.W. must be accorded some weight, and they can be used to support the direct testimony of Ms. Mannon and Ms. Woods.

Since the Grievant's testimony directly contradicts the testimony of Respondent's four witnesses it is necessary to assess the credibility of witnesses. The United States Merit System Protection Board Handbook ("MSPB Handbook") is helpful in setting out factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the UnitedStates Merit System Protection Board 152-53 (1984). Some factors to consider in assessing a witness's testimony are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Id. Additionally the ALJ should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness' information. Id.

Unfortunately this ALJ only observed the Grievant during the second hearing. There was nothing remarkable in his demeanor. He was at times somewhat hostile or sarcastic, but this alone, given the seriousness of the situation, was not assessed as unusual. Nothing untoward was noted in his capacity to communicate. His perception is called into question by his continued denials that his 1988 suspension did not involve intoxication. This testimony, a flat denial of any alcohol-related wrongdoing, also calls into question his credibility. Additionally, his veracity is questioned because he received a 3 day suspension in 1992 for abuse of sick time connected with days off. His attitude toward this action appeared to be defensive, hostile, and one of irritation. There was no admission of untruthfulness.

As with all testimony, the Grievant's statements were self-serving. There was inconsistency between his recounting of his conversation with Ms. Mannon and her recounting of the conversation.

He also remembered teasing Mr. J.R., but said he did not harass him. There was inconsistency between his statements and all other witnesses.

The two factors which really call into question the Grievant's credibility are the areas of existence of material fact and the plausibility of his information. It is a material fact that the Grievant received a ten day, ungrieved suspension for drinking at work and being so intoxicated he was unfit for work. The Grievant testified he never drank or was intoxicated at work, but that he was suspended for having an open alcohol container on state property.

Further the Grievant's testimony about his drinking gives one pause. The Grievant testified he is an alcoholic, has been in two different in-patient treatment programs, and is currently attending Alcoholics Anonymous. He then states these programs tell him to abstain or to drink in moderation. This ALJ will take administrative notice that Alcoholics Anonymous recommends total abstinence from all alcoholic beverages. The Grievant further testified that he does not have to abstain because he has control now since he is not drinking "hard liquor." This statement flies in the face of the Grievant's prior suspension in 1988 which involved the consumption of beer, not "hard liquor." Additionally, it's difficult to believe that a confessed alcoholic can go out at 3:00 p.m., have only one and a half beers, quit, and then have the smell of alcohol so strongly on his breath at 11:00 p.m. that there are multiple complaints.

As far as assessing the testimony of Ms. Mannon and Ms. Woods this ALJ found no reasons to believe their testimony was not credible. No bias or motive was demonstrated, their statements were consistent and plausible, and no evidence of dishonesty was revealed. As previously noted, Mr. Knootz, Respondent's expert on alcoholism, notes that alcoholics are unreliable in reporting their alcohol consumption.

Therefore, this ALJ finds the total testimony of Ms. Mannon and Ms. Woods, plus the written, patients' statements, to be more credible and consistent than the Grievant's. Thus, Grievant did appear at work with alcohol on his breath and in his body system.

A classified civil service employee can be dismissed only for good reason, and this means "misconduct of a substantial nature directly affecting the rights and interests of the public, rather than upon trivial and inconsequential matters, or mere technical violations of statute or official duty without wrongful intent." Oakes v. West Virginia Dept. of Finance and Administration, Syl. Pt. 1, 264 S.E.2d 151 (W. Va. 1980). Further, this Board clarified in Seddon, supra at 7, "appearing at work with alcohol on the breath, particularly by an employee whose job entails working with the general public is not an inconsequential matter and repeated conduct of this nature, if sufficiently proven, certainly can constitute good cause for dismissal...." Id. at 14.

Here the Grievant's misconduct is substantial and directly affects the rights and interest of others. Additionally, the employer has demonstrated this is repeated conduct, thus the dismissal is appropriate.

The factual determinations and legal conclusions, contained in the prior discussion are

incorporated into the following formal findings of fact and conclusions of law.

Findings of Fact

1. Grievant was employed at Huntington State Hospital as a Health Service Worker prior to his discharge for gross misconduct. The charges for dismissal were verbal patient abuse, violation of the West Virginia Drug-Free Work Place Policy (i.e., appearing for work with alcohol in your body system), and disregard for his supervisor's authority.

2. In March 21, 1992, the Grievant signed a certificate saying he had received a copy of the Drug-Free Work Place Policy, he agreed to abide by the terms of the policy, and any violation of this policy would subject him to disciplinary action up to and including termination. Respondent's Exhibit Number 5.

3. Ms. Julie Mannon, RN, testified Grievant in the Fall of 1992 told her he consumed alcohol shortly before coming to work. This discussion was held after the Grievant signed the Drug-Free Work Place Policy. Ms. Clara Woods, RN, testified that she smelled alcohol on the Grievant's breath several times in the couple of months she supervised him. These incidents were in the fall of 1992 and winter of 1992-1993 after the Grievant signed the Drug-Free Work Place Policy.

4. Mr. J.R. and K.W. former patients, signed statements in front of the HSH Patient Advocate stating they had smelled alcohol on the Grievant's breath numerous times.

5. Grievant was suspended in 1988 for consuming alcohol on hospital grounds and being in an unfit condition to work due to alcohol consumption. he did not challenge this suspension.

6. The Grievant, who by his own testimony is an alcoholic, was referred to the Employee Assistant Program for help but chose not to avail himself of this assistance.

7. The evidence presented on the issue of patient abuse consisted of two sentences in the patient's statements.

8. The major and significant reasons for the Grievant's discharge was his violation of the Drug-Free Work Place Policy, and the disrespect for the employer's authority that this violation represents.

Conclusions of Law

1. In disciplinary matters the burden of proof is on the employer to prove the charges by a preponderance of the evidence. Schmidt v. West Virginia Dept. of Highways, Docket No. DOH-88-

063 (Mar. 31, 1989).

2. "Under W. Va. Code § 29-6A-6 the 'formal rules of evidence shall not be applied' in ... grievance proceedings and hearsay evidence is generally admitted. The weight that should be accorded the hearsay evidence depends on several factors." Seddon, supra, at Conclusion of Law 2, in part. The hearsay evidence in this case by the former patients is entitled to some weight becauseit is corroborated by direct testimony and the statements are in the individuals' own words and signed.

3. The West Virginia Drug-Free Work Place Policy prohibits reporting to work under the influence of alcohol or having alcohol in the body system.

4. Grievant violated West Virginia's Drug-Free Work Place Policy by having alcohol on his breath and in his body system. Seddons, supra; Cummings v. West Virginia Dept. of Admin., Docket No. 92-ADMN-255 (Dec. 31, 1992).

5. The charges of patient abuse were not proven by a preponderance of the evidence.

6. HSH has established the majority of the charges contained in the January, 1993, dismissal letter, violation of the Drug-Free Work Place Policy and insubordination, by a preponderance of the evidence, and thus has demonstrated sufficient cause for the Grievant's dismissal.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel 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.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: February 4, 1994

Footnote: 1The Respondent clarified at the Level IV Hearing the primary reason for the Grievant's dismissal was his

violation of the Drug-Free Work Place Policy, and even if there had been no other charges this reason alone would have been sufficient for the Grievant's discharge.

Footnote: 2Multiple continuances were requested by the parties. Two hearings were held. One on July 26, 1939, with ALJ Anderson and, upon her leaving, a second hearing was conducted by the undersigned on September 12, 1993.

Footnote: 3As this suspension was not related by the Respondent to the prior suspensions and current dismissal, it was examined by the undersigned only as "a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct" of a long-term civil service employee. Buskirk v. Civil Serv. Comm'n, 332 S.E.2d 579, 585 (W. Va. 1985); Stewart v. West Virginia Alcohol and Beverage Control Commission, Docket No. 91-ABCC-137 (Sept. 19, 1991).

Footnote: 4As the Head Nurse, Ms. Mannon did not see the Grievant when he reported to work.

Footnote: 5In the interest of patient confidentiality only initials of the two former patients are used.

Footnote: 6At the first hearing with ALJ Anderson she clarified with the Grievant whether he was alleging some type of disability for which the employer owed him a special duty. Grievant said he was not requesting this type of relief.

Footnote: 7See pages 2, 4, supra.