

**RITA OVERBEE**

**v. Docket No. 96-HHR-183**

**WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES/  
WELCH EMERGENCY HOSPITAL**

**DECISION**

The grievant, Rita Overbee, a six-year tenured Nursing Assistant employed by the West Virginia Department of Health and Human Resources (HHR) and assigned to Welch Emergency Hospital (WEH), was dismissed April 24, 1996, for theft of state property. She filed an appeal of that action to Level IV May 10, 1996, and a hearing was held July 1, 1996. The parties submitted written legal argument by August 2, 1996.

The grievant does not dispute that on the morning of April 24, 1996, she stole a "handful" of unused plastic garbage bags and several empty soda cans from WEH, [\(See footnote 1\)](#) and was apprehended with the items by a hospital security officer. The grievant also concedes that several minutes later, in a conference with WEH Administrator Roger Topping, she admitted taking garbage bags, rolls of toilet tissue, bottles of liquid soap or other toiletry items on at least two previous occasions. At the conclusion of their meeting, Mr. Topping dismissed her, effective immediately, for gross misconduct.

In an April 24, 1996 letter to Mr. Topping, the grievant again confessed to taking items from the hospital; she represented that she fully realized the seriousness of her offense and asked Mr. Topping to consider a lesser punishment. She explained that she and her family would face financial hardship if she were not reinstated.

Mr. Topping declined to reconsider; the grievant was provided the following May 2, 1996 letter:

The purpose of this letter is to inform you of my decision to dismiss you from your

**employment as a Health Service Worker at Welch Emergency Hospital effective April 24, 1996 for gross misconduct. Pursuant to WV Department of Health and Human Resources Policy Memorandum 2104, the fifteen days notice period is hereby waived.**

**The reason for your dismissal is theft of state property. Specifically you are being discharged because:**

**1.**

**I, Mr. Topping, was informed on Tuesday, April 23, 1996, by Ms. Patricia Slade, Head Nurse on the Long Term Care Unit and Vickie Green, LPN Charge Nurse on the Night Shift, during a meeting that it was their belief that you were taking hospital property from the unit. Ms. Green indicated that she found a bag under the nursing station counter that had several different items in it. The items included some rolls of toilet tissue; several unused trash bags and empty pop cans. She moved the bag to another location and placed it under her seat at the counter. She observed you later looking under the counter for the bag during the shift. After the shift ended, Ms. Green, while still in the parking lot, observed you leaving the facility with the bag in your hand, she watched you place the bag in your car and leave the hospital grounds.**

**After conferring with Michael McCabe, Director of the Office of Personnel Services for the WV Department of Health and Human Resources, I was directed to contact Jim Crowder for the WVDHHR Investigation Division for advice on how to handle this situation. He advised me to mark items belonging to Welch Emergency Hospital and observe. I, Mr. Topping, instructed Ms. Green to mark some items with a black permanent marker and observe your actions on the next shift. This was done on the 11-7 p.m. shift on April 23-24, 1996.**

**2.**

**On April 24, 1996, when I reported to work, I was met in the hallway by Ms. Slade and Ms. Green. They informed me that you had taken the marked items. Ms. Karen Addair, Nursing Supervisor - 11-7 p.m. shift, was called to the Long Term Care Unit at approximately 6:45 a.m. to witness you leaving the facility carrying a large garbage bag. David Workman, Security Guard on 11-7 p.m. shift was also present with Ms. Green observing you leaving the facility. Ms. Addair, Mr. Workman and Ms. Green met you in the parking lot. When Mr. Workman and Ms. Green approached you and asked to look into your bag, you willingly allowed them to search the contents. In the bag were empty pop cans and four (4) garbage bags that had been marked by Ms. Green with a black permanent marker. You were then escorted back into the facility and Ms. Slade and myself were notified.**

**3.**

**When I joined you, Mr. Workman, Ms. Slade, and Ms. Addair in the conference room, I asked you to respond to the incident. You stated that you had taken the trash bags and empty pop cans. You also stated that you had previously taken toilet tissue rolls. You stated that you had four (4) children to care for and that your husband was disabled. When asked if you ever had taken anything else, you also admitted to having taken liquid soap.**

**While I understand and sympathize with your personal problems, I cannot tolerate theft in this facility. The items purchased and used in the hospital are for the resident's care and must not be used for personal gain. It is my understanding that you knowingly stole these items for personal use. This is unacceptable behavior at this facility.**

**You shall be given an opportunity to either meet with me in person or to present me with a written explanation of the reason why you think that the facts and grounds contained in this letter are in error and why you think this action is inappropriate. Should you choose to do so, this explanation must be received by May 15, 1996. Please contact my secretary to arrange an appointment or to deliver your written explanation.**

**HHR personnel policy suggests a "progressive,, approach to discipline, but sanctions a dismissal for a first-time instance of gross misconduct. Theft is considered gross misconduct under the terms of the policy.**

### **Argument**

**The grievant makes somewhat incongruous legal claims. Relying on her prompt and full admission of guilt, she primarily asserts that dismissal was too harsh a punishment. The grievant also asserts, however, that she was denied representation in the meeting with Mr. Topping and was, therefore, denied due process. Implicit in this contention is that she would have responded differently; the grievant does not explain how she was injured or handicapped by a lack of counsel.**

**HHR contends that the April 24 meeting was an adequate "pre deprivation" hearing, and that the grievant did not request representation. The agency denies that it abused its discretion in declining to impose a lesser disciplinary measure.**

## Findings and Conclusions

Tenured state employees have an expectation of continued, uninterrupted employment and, as a rule, must be afforded some measure of due process prior to an infringement upon that property interest. See, e.g., Blake v. Civil Service Commission, 310 S.E.2d 472 (W.Va. 1983). A post-deprivation opportunity to respond to charges is permissible when circumstances warrant the employee's immediate removal. Bd. of Educ. of County of Mercer v. Wirt, 453 S.E.2d 402 (W.Va. 1994). Adequate due process generally entails sufficient notice of the charges, an explanation of the employer's evidence, and an opportunity for the employee to relate his version of events. Id., citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). The record in the present case reflects rather clearly that at the time she was apprehended, or very shortly thereafter, the grievant made a calculated decision to admit her offense and seek leniency. Significantly, the grievant has never represented that this decision was the result of coercion or intimidation on the part of WEH administrators. By all accounts, the grievant was not pressured into a confession, and calmly admitted the April 24 theft and previous thefts; she was also able to state her case for leniency. Since the evidence conclusively establishes that the grievant's version of what occurred on April 24, and prior dates, has never been different from that of WEH officials, it must be concluded that she was afforded the opportunity to tell "her side of the story." The evidence also does not support that the grievant requested, wanted or needed a representative in the meeting with Mr. Topping. [\(See footnote 2\)](#) Indeed, given her reliance on her admissions in the meeting and her failure to explain what harm she suffered as the result of not having a representative, this part of the grievant's claim seems contrived. In any event, the grievant does not allege that, absent a request on her part, WEH had a duty to see that she had representation before proceeding with the investigation into her theft, and the undersigned is unaware of any authority which imposes such a duty.

Since the grievant was fully apprised of the charges and evidence against her and was given ample opportunity to respond prior to her dismissal, the due process requirements set forth in Wirt and cases cited therein were satisfied. To the extent that WEH was required to advise the grievant of her right to contest her dismissal, see, Durrytta v. Mingo County Bd. of Educ.,

382 S.E.2d 40 (W.Va. 1989), Mr. Topping's May 2 "post-dismissal,, letter met that requirement. Finally, the grievant's assertions regarding the severity of the punishment are also without merit. WEH Human Resources Director Cathy Addair represented that the decision to dismiss was based on a belief that the grievant would steal again if retained. To a large extent, the grievant's Level IV testimony is supportive of Ms. Addair's assessment. When asked if she had stolen items from WEH other than those specified in the May 2 letter, the Grievant first responded that she would "take the fifth" and then stated "I can't think of anything." [\(See footnote 3\)](#) The undersigned is persuaded that the grievant's confession to Mr. Topping was not as full and open as she represented, and that WEH's concerns about further larceny are well-founded.

Mitigation of the punishment imposed by the 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. Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1991).

Undoubtedly, theft of state property is one of the most serious offenses an employee can commit; the value of the property is of little consequence. Davis v. W.Va. Dept. of Motor Vehicles., Docket No. 89-DMV-569 (Jan. 22, 1990). HHRs policy clearly advises employees of the agency's stance on such conduct, and the record supports that the grievant was otherwise fully aware of the seriousness of her actions. Her service with WEH was relatively short and the testimony of WEH administrators reflects that it was unremarkable. In short, there is no evidence of record which even tends to support that the agency abused its discretion in deciding to terminate the grievant's employment.

Accordingly, the 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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**JERRY A WRIGHT**

**ADMINISTRATIVE LAW JUDGE**

**Dated: October 3, 1996**

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**Footnote: 1**     *The record reflects that WEH collects and contributes aluminum soda cans to charitable causes. The cans taken were in a recycling bin and the grievant does not dispute that she was aware of the purpose for which they were collected.*

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**Footnote: 2**     *The grievant testified that she asked to speak to a fellow union member while waiting to speak to Mr. Topping. Head Nurse Pat Slade, the person to whom this request was supposedly made, testified that the grievant at no time requested representation. The undersigned found Ms. Slade to be the more truthful witness. During her testimony, the grievant was evasive and at times, unresponsive; she did not display a great deal of conviction in her assertion that she had asked to speak to her fellow worker. The credible testimony of other participants in the meeting also generally supports that the grievant did not ask for a representative. Invariably, all represented that the grievant was chiefly, if not wholly, concerned with obtaining leniency, and that she confessed without hesitation.*

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**Footnote: 3**     *The grievant was making an apparent reference to an individuals constitutional right to decline to respond to questions when the answers might be incriminating. She did not appear serious in her request.*

*It should be noted that the grievant was aware of her right under W.Va. Code §29-6A-6 to refuse to testify altogether. She was called to testify by her representative, and the scope of questions posed on direct examination permitted cross-examination on the issue of other thefts.*