DEBORAH RIFFLE, et al.,

Grievants,

v. DOCKET NO. 96-HHR-137

DEPARTMENT OF HEALTH AND
HUMAN RESOURCES/LAKIN HOSPITAL,

Respondent.

D E C I S I O N

Grievants, Deborah Riffle, Helena Gardner, and Juanita Jeffers, are all Health Service Workers employed by Respondent Department of Health and Human Resources/Lakin Hospital. They filed this grievance on December 4, 1995, alleging that "a written warning and one hours pay docked is unfair, unjust, and in violation of progressive discipline guidelines." Grievants seek to have the November 16, 1995 written warning removed from their personnel files, reimbursement for the docked hour of pay, and to be made whole in every way. Following adverse decisions at the lower levels, Grievants made a timely appeal to level four on March 29, 1996. Hearing was held on June 12, 1996, and this case became mature for decision on June 26, 1996, upon receipt of relevant safety rules and regulations issued by Respondent.

The material facts are not in dispute and are set forth in the following findings of fact.

Findings of Fact

1. On November 12, 1995, during the second shift (3-11 p.m.) at Lakin Hospital, Grievant Deborah Riffle received a hair permanent in the nurses' lounge on "B" wing, while she was on duty. Grievants Gardner and Jeffers assisted Grievant Riffle with the hair permanent. This occurred in an area where residents, visitors and staff could observe the activity.

2. Keith Stouffer, Assistant Administrator, determined that Grievants' activity was inappropriate

and imposed on all three Grievants a written reprimand on November 16, 1995, and docked them one hours' pay. LIII R. Ex. 2, 3, 4.

Discussion

Pursuant to the provisions of W. Va. Code § 29-6A-6, 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. Ramey v. W. Va. Dept. of Health, Docket No. H-88-005 (Dec. 6, 1988). Grievants do not deny they engaged in the hair permanent activity. Rather, Grievants allege that the discipline is too severe for the infraction and that other employees engaging in similar personal activities have not received any discipline.

Mr. Stouffer testified he relied upon Respondent's Policy Memorandum 2104 on progressive discipline, which includes a table and guidelines for recommended discipline for various types of infractions. LIII G. Ex. 2. Mr. Stouffer felt the residents could not be receiving adequate care, and that Grievants could not have responded to an emergency situation while participating in the hair permanent. Therefore, he recommended a written reprimand be given to Grievants. The employee warning notice lists "working on personal matters" as the infraction, but according to Mr. Stouffer, Grievants' written reprimand was for violating safety rules andregulations, which is considered a more serious violation under the guidelines in Policy 2104. (See footnote 1) Pursuant to Policy Memorandum 2104, Progressive Discipline is:

> [d]etermined by the severity of the violation, progressive discipline is the concept of increasingly severe actions taken by supervisors and managers to correct or prevent an employee's initial or continuing unacceptable work behavior or performance . . . [p]rogressive and constructive disciplinary action will progress, if required, along a continuum from verbal warning to dismissal, with incremental steps between . . . [i.e. verbal warning, written warning, suspension, demotion, dismissal] . . . . It is important to remember, however, that the level of discipline will be determined by the severity of the violation.

The specific infractions listed under Policy 2104 are "only guidelines rather than rigid inflexible standards. . . Thus, it is important and necessary to consider carefully each situation in light of its unique circumstances and factors. . . ." It is also equally important to note that the guidelines regarding progressive discipline are "not intended to diminish the authority of supervisors and managers to exercise discretion when issuing disciplinary action." DHHR Policy Memorandum 2104.

Grievants allege that the hair permanent did not endanger or restrict in any way their ability to respond to residents' needs. Grievants also allege that other activities of a personal nature frequently occur which have not warranted discipline, including, watching television, playing cards, reading books, crocheting, and smoke breaks. Mr. Stouffer testified that he did not know of these activities, but if he found employees engaging in such activities, he would impose appropriate discipline on them as well. Respondent presented no evidence that the residents' safety was ever in danger as a result of Grievants' conduct in the nurses' lounge. Respondent only speculated that Grievants would not have been able to respond to an emergency while engaging in that conduct. Respondent did not present any specific safety rule or regulation which Grievants have allegedly violated, other than its general concern for the safety of the residents. Respondent did provide the undersigned with various "safety rules and regulations" which it alleges Grievants violated by performing the hair permanent, including Policy Memorandum 2108, "Employee Conduct"; the job description of Health Service Workers; and a Health Service Worker Shift Duty Form. These documents are very general in nature and deal with conduct normally expected of employees of Respondent and a general statement that Health Service Workers "[s]hare[s] responsibility in maintaining resident safety."

The undersigned agrees with the level three grievance evaluator's observation that Grievants' conduct more squarely falls within a violation of "conduct which would reasonably be expected of employees in the presence of patients/clients/fellow employees or public in general." However, the undersigned also must respect the authority of Grievants' supervisor to exercise discretion in issuing disciplinary action in light of the unique circumstances and factors relative to the alleged misconduct. Viewing the evidence in a light most favorable to the Grievants, the undersigned does not find Respondent has proven by a preponderance of the evidence that Grievants violated safety rules and regulations of Respondent, particularly in light of the fact that Respondent could not furnish the undersigned with any specific safety rule or regulation which Grievants were alleged to have violated. However, the progressive discipline guidelines are not meant to be rigid or restrictive, nor meant to diminish a supervisor's discretionwhen issuing disciplinary action, and Respondent did not act in an arbitrary or capricious manner in imposing a written reprimand for Grievants' conduct and docking their pay.

Conclusions of Law

1. In disciplinary matters, the burden of proof lies with the employer to prove the charges by a preponderance of the evidence. Ramey v. W. Va. Dept. of Health, Docket No. H- 88-005 (Dec. 6, 1988).

2. Each case must be determined upon the facts and circumstances which are peculiar to that case. Blake v. Civil Service Commission, 310 S.E.2d 472 (W. Va. 1983).

3. Respondent has not proven by a preponderance of the evidence that Grievants violated any safety rule or regulation of Lakin Hospital.

4. Respondent has proven by a preponderance of the evidence that Grievants' failed to conduct themselves in a manner which would "reasonably be expected of employees in the presence of patients/clients/fellow employees or public in general." Policy Memorandum 2104.

5. The guidelines set forth in Policy Memorandum 2104 are "not intended to diminish the authority of supervisors and managers to exercise discretion when issuing disciplinary action." Policy Memorandum 2104. See Artrip v. Dept. of Health and Human Resources, Docket No. 94- HHR-146 (Sept. 13, 1994).

6. Respondent's issuance of a written reprimand and docking of pay was not, in light of the circumstances and factors surrounding Grievants' conduct, an arbitrary and capricious form of discipline.

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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MARY JO SWARTZ

Administrative Law Judge

Dated: September 4, 1996

Footnote: 1

The level three evaluator upheld the written reprimand, but commented that Grievants' conduct more accurately fell under the infraction of "failing to comply with conduct that would reasonably be expected of employees in the presence of patients/clients/fellow employees or public in general." Under that infraction, a first offense would warrant a verbal warning.