KAREN STEWART, et al.

Grievants

v. Docket Nos. 97-HHR-210, 211, 215, 221, 222, 223

DEPARTMENT OF HEALTH AND HUMAN SERVICES/

COLIN ANDERSON CENTER,

Respondent

D E C I S I O N

Grievants, Karen Stewart, Roger Moore, Karen Shreves, David Williams, Clifford Lamp, and Terry Lowther, employed as Health Service Workers at the Colin Anderson Center, filed individual grievances in September 1996, in which they challenged three day suspensions imposed after they refused to accept a mandate. Following denials at levels one, two, and three, Grievants advanced their claim to level four in April and May 1997. Because all the grievances arose from the same incident and contained the same issue, they were consolidated for hearing at level four in the Wheeling office of the Grievance Board on September 5, 1997. The matter became mature for decision on that date when both parties declined the opportunity to file post hearing submissions. (See footnote 1)

The following formal findings of fact are made based upon a review of the record in its entirety.

Findings of Fact

1. Grievants are employed by the Department of Health and Human Services (Respondent) as Health Service Workers at the Colin Anderson Center (CAC). 2. The CAC is a state operated facility providing 24-hour care to handicapped residents. Respondent is required to maintain minimum staffing on all units to insure a safe environment for the residents. When assigned staff members do not report for work, employees must be

"mandated" to remain on duty at a work station for a specific period of time in addition to his/her regularly scheduled hours.

3. Per institutional policy, employees are entitled to refuse one mandate per calendar month, a second refusal results in a three day suspension, upon a third refusal a ten day suspension is imposed, and the employee is dismissed when he/she refuses a fourth mandate.

4. Grievants all refused a mandate on August 24, 1996, and again on August 25, 1996.

5. Grievants were subsequently suspended for three days without pay.

Grievants raise three issues which they argue invalidate the suspensions imposed upon them. First, the suspension letters were issued by an employee who lacked supervisory or disciplinary authority over them. Second, Respondent failed to comply with its own procedure for calling in employees to cover for those who had reported off, and, three, Respondent failed to apply progressive discipline for the alleged act of insubordination. Respondent argues that Grievants were properly suspended within policy guidelines, and by an authorized individual.

Discussion

Grievants were advised of the three day suspension by letter dated September 5, 1996, which stated in pertinent part, "[t]his letter is to inform you of my decision to suspend you without pay . . . Since I share a responsibility for the efficient operation of Colin Anderson Center, I am required to bring to your attention my expectation that employees must observe a standard of conduct consistent with my expectations . . . ." The letter was signed by Shirley Brammer. Betty Barron,Acting Assistant Administrator at CAC, testified at level four that Ms. Brammer is her secretary. Ms. Barron stated that while she had written the letter, Ms. Brammer produced it, and has signature authority on file with the Secretary of State.

Notwithstanding Ms. Brammer's signature authority, the wording of the letter, together with her signature creates the appearance that Ms. Brammer was suspending the Grievants. Of course, as a secretary, she lacked any such authority. Because the evidence reveals that Ms. Barron imposed the suspension, the fact that the letter was signed by her secretary is harmless error. It is suggested that in the future Ms. Barron either sign her own correspondence, or have the document indicate that Ms. Brammer is signing it for Ms. Barron.

Grievants next argue that CAC administrators failed to follow the procedure for replacing absent employees in that they failed to exhaust the call in list for voluntary staff and failed to solicit staff from Apartment A before mandating them. In support of this claim Grievants offered the testimony of Patty Leasure, who works in Apartment A which is the sick bay, and Mildred Jewell, who stated that she is regularly called to work overtime but was not called on August 24 or 25. Nancy Flesher, assigned to Apartment F, also testified that she was not called to work overtime. When asked if she had been asked to volunteer to work overtime, employee Peggy Deaton stated "I don't think so." Grievants also note that an employee assigned to help a patient who was apparently being discharged pack his belongings could, and should, have been assigned to the unit to avoid the mandating.

Carol Statler, Residential Director at CAC, testified that employees scheduled to work on a particular day or shift request annual or sick leave without advanced notice "fairly regularly" resulting in a high rate of report-offs. On August 24, 1996, she received four report-offs on day shift. Ms. Statler testified that only after she telephoned sixteen Health Service Workers in an attempt to secure coverage, and all of them had taken advantage of their first refusal, did she begin mandating. On August 25, Ms. Statler testified that she had received three report-offs on day shift. She recalled telephoning fourteen Health Service Workers. One took a first refusal, and ten took their second refusal, before two employees accepted the mandate, and one volunteered for overtime, allowing her to provide the needed coverage. Although Respondent offered legitimate reasons why Grievants' witnesses were not called on either day, Ms. Statler did not claim to have called all eligible employees. In fact, she noted that time constraints would not allow her to make as many as fifty-six calls to arrange coverage for a shift.

Considering the number of calls that were made, it is determined that Respondent substantially complied with its procedure. Because obtaining coverage for patient care in a timely manner is Respondent's first priority, a showing of substantial compliance must be accepted. Grievants obviously do not wish to be mandated; however, the probability that it will occur exists, and it is their responsibility as Health Service Workers to provide patient care when needed.

Grievants' next claim is that Respondent failed to apply progressive discipline for the

alleged act of insubordination. The lower-level record includes a one-page document headed "Disciplinary Action" listing infractions eleven through eighteen. The penalty listed for a first violation of infraction number thirteen, insubordination, is a written reprimand. The source of this document is not apparent, but it may be a portion of DHHR policy. While the letter of suspension stated that Grievants' refusal to work overtime was considered to be an act of insubordination, it was more precisely an act in violation of CAC Policy 013 "Mandatory Overtime." As such, the penalty for insubordination would have been inappropriate in this instance. At hearing Grievants additionally suggested that Respondent had somehow "set them up" to be mandated. Evidence establishes that Respondent had increased the living area ratios prior to the dates at issue when the residents of one building were relocated. Ms. Statler described the arrangements as an "emergency situation," but insisted that the mandates were the result of previously scheduled employees reporting off, and were not motivated by the facility-related problem. There is no other evidence that Grievants were unfairly placed in a mandating situation.

In addition to the foregoing it is appropriate to make the following conclusions of law.

Conclusions of Law

1. In disciplinary grievances the Respondent bears the burden of proving the charges supporting the disciplinary measure by a preponderance of the evidence. W. Va. Code §29-6A-6; Davis v. Dept. of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 20, 1990).
2. Respondent has proven by a preponderance of the evidence that Grievants failed to accept a second mandate to work in violation of institution policy.
3. A showing that Respondent substantially complied with policy provisions which required that other employees be called to work prior to mandating Grievants must be accepted in this instance involving time constraints and care of handicapped persons.
4. The evidence does not support a finding that Respondent manipulated the situation in any way to place Grievants in a position to be mandated.

Accordingly, the grievance is Denied.

Any party may appeal this decision to the circuit court of the county in which the grievance occurred, within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7. Neither

theWest 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.

DATE: October 1, 1997

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

This matter was transferred to the undersigned Senior Administrative Law Judge on August 15, 1997, for administrative reasons.