RON YEATER,

Grievant,

v. **DOCKET NO. 01-HHR-447**

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES/MILDRED MITCHELL-BATEMAN HOSPITAL,

Respondent.

D E C I S I O N

Grievant, Ron Yeater, filed this grievance on July 18, 2001, protesting his dismissal from the West Virginia Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital ("DHHR" or "Bateman"). Specifically, the statement of grievance reads as follows:

1. Create hostile, potentially dangerous environment for this employee.
2. Harassment and/or retaliation for good faith reporting, filing grievance.
3. Unwarranted, lack due process, retaliatory termination.
4. Deliberate attempt to hide, shield, withhold and/or provide misrepresenting facts to regulatory/monitoring governing bodies/board(s).

Relief sought: 1. Immediate reinstatement to post.
2. Reimburse and/all lost wages, benefits/annual/sick leave.
3. Protection from retaliatory tactics/malevolent behavior toward this employee.
4. Independent/unbiased review, appraisal, audit of performance of acting comm. D. Byrne, Carol Wellman and Keith A. Worden.

A level four hearing was held in the Grievance Board's Charleston, West Virginia, office on September 17, 2001. Grievant appeared pro se, and DHHR was represented by

B. Allen Campbell, Esq., Assistant Attorney General. The parties declined to present post-hearing written submissions, and this matter became mature for decision at the close of hearing.

SUMMARY OF EVIDENCE

DHHR's Exhibits

Ex. 1 - March 8, 2001 performance improvement plan from Rob Nida to Ron Yeater.
Ex. 2 - March 9, 2001 documentation of a verbal warning from Ron Nida to Ron Yeater.
Ex. 3 - March 26, 2001 written reprimand from Rob Nida to Ron Yeater.
Ex. 4 - April 24, 2001 suspension letter from Carol Wellman to Ron Yeater.
Ex. 5 - July 17, 2001 dismissal letter from Carol Wellman to Ron Yeater.
Ex. 6 - Mildred Mitchell-Bateman Hospital Policy and Procedure Manual: Leave Authorization and Absence Control.
Ex. 7 - January 1, 1995 memorandum from The Office of the Secretary to DHHR Administrative and Supervisory Staff re: Guide to Progressive Discipline.

Grievant's Exhibits

Ex. 1 - Level I grievance waiver form, dated April 13, 2001.
Ex. 2 - March 8, 2001 performance improvement plan from Rob Nida to Ron Yeater.
Ex. 3 - March 26, 2001 written reprimand from Rob Nida to Ron Yeater.
Ex. 4 - March 22, 2001 Level I Grievance Response from Rob Nida to Ron Yeater.
Ex. 5 - June 19, 2001 memorandum from Donna Shull to Ronald Yeater re: disapproved leave.
Ex. 6 - May 24, 2001 Level III Order to Show Good Cause.
Ex. 7 - April 11, 2001 grievance by Ron Yeater, with level II response.
Ex. 8 - Employee Performance Evaluation of Ron Yeater for period 7/1/97-6/30/98.
Ex. 9 - April 20, 1994 letter and resume from Keith Anne Dressler to Garrett Moran, Ph.D.
Ex. 10 - Level I grievance waiver form, dated April 13, 2001.
Ex. 11 - July 13, 2000 dismissal letter from Carol Wellman to Ron Yeater.
Ex. 12 - March 19, 2001 grievance filed by Ron Yeater.
Ex. 13 - April 11, 2001 grievance filed by Ron Yeater.
Ex. 14 - June 7, 1996 letter from Mary Kelly.
Ex. 15 - June 5, 1998 memorandum from FMH ("First Mental Health") PASARR[1] Staff to All West Virginia PASARR Evaluators.
Ex. 16 - January 6, 1992 letter from Henry E. Bays to Marshall University.

[1]This acronym was not identified.

Ex. 17 - March 26, 2001 written reprimand from Ron Nida to Ron Yeater.
Ex. 18 - Duplicates of Exs. 14, 15, and 16.

Testimony

DHHR presented the testimony of Kieth Anne Worden. Grievant testified in his own behalf, and presented the testimony of Robert Nida.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Grievant was employed by DHHR at Bateman as a MICA[2] Therapist at all times relevant to this grievance.

2. Grievant had previously been dismissed from the hospital on or about July 13, 2000, but had been reinstated by the Grievance Board. Grievant returned to work at the hospital on February 7, 2001. At that time, Grievant was provided with a number of policies and directed to review them prior to resuming his duties as a therapist.

3. On March 8, 2001, Robert Nida, MICA Program Director, and Grievant's immediate supervisor, gave Grievant a verbal reprimand and issued him a performance improvement plan in order to assist him in an area of work performance in which he was deficient, specifically, reporting to work on time. Mr. Nida had counseled Grievant verbally about his tardiness problems in the past, and sought the advice of Human Resources Director Kieth Anne Worden before issuing the written performance improvement plan. Mr. Nida again directed Grievant to review the policies he had been given upon his return to the hospital. HHR. Ex. 1.

[2]This acronym was not identified.

4. On March 9, 2001, Grievant was again late for work, resulting in a verbal reprimand from Mr. Nida. HHR. Ex. 2.

5. On March 26, 2001, Mr. Nida issued Grievant a written reprimand for his continued leave abuse and excessive tardiness. HHR. Ex. 3.

6. On March 29, 2001, Grievant was instructed by Scarlett Meadows, MICA Clinical Supervisor, that he was to remain off the patient care units until he completed the policy review assignment. That same day, Mr. Nida observed Grievant leaving a patient care unit, and inquired whether he had completed the policy review assignment. Grievant informed Mr. Nida he had not completed the assignment, and further informed him he had been meeting with a patient on the patient care unit.

7. Mr. Nida convened a meeting with Ms. Meadows and Grievant to discuss the matter further, and Grievant acknowledged his insubordinate behavior.

8. On April 24, 2001, Grievant was issued a ten (10) day suspension by Carol Wellman, Administrator, for insubordination stemming from his continued failure to complete the policy review assignment, as well as for continued leave abuse and excessive tardiness. HHR Ex. 4.

9. Grievant's attendance did not improve, and on July 17, 2001, Grievant was dismissed by Ms. Wellman for excessive leave abuse and tardiness. HHR Ex. 5.

10. When Grievant returned to work in February 2001, he started complaining to Mr. Nida about under staffing at the hospital and his concern for his and others' safety.

11. The Office of Health Facilities Licensure and Certification ("OHFLAC") performed an audit of the hospital in June 2001, and Grievant informed Mr. Nida he voiced

his concerns about staffing to the OHFLAC. OHFLAC concluded there was a staff shortage at Bateman.

12. Grievant filed two grievances, one on March 19, 2001, and one on April 11, 2001, complaining of dangerous working conditions. The first grievance evidently slipped through the cracks and was not acted upon, and the second grievance was dismissed as untimely at level two. Grievant did not appeal either grievance.

DISCUSSION

The burden of proof in disciplinary maters rests with the employer and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested facts is more likely true than not. Hammer v. W. Va. Div. of Corrections, Docket No. 94-CORR-1084 (Nov. 30, 1995); Leichliter v. W. Va. Dept. of Health and Human Serv., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met is burden of proof. Hammer, supra.

The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." House v. Civil Service Comm'n, 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.'

Syl. Pt. 2, Buskirk v. Civil Service Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985); Oakes v. W. Va. Dept. of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Service Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965)." Scragg v. Bd. of Directors W. Va. State College, Docket No. 93-BOD-436 (Dec. 30, 1994).

DHHR dismissed Grievant for excessive absenteeism and tardiness, in violation of its Leave Authorization and Absence Control policy. DHHR has proven through its evidence that, despite numerous warnings, Grievant continued to miss work and to arrive late. DHHR has also proven that it utilized the progressive discipline set forth in its leave policy, from counseling up through dismissal.

Grievant, however, raises an affirmative defense to his dismissal, claiming he was dismissed in retaliation for filing grievances over working conditions, and for voicing his complaints to OHFLAC about understaffing in the hospital. Grievant bears the burden of proving his defense by a preponderance of the evidence. Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1995).

W. Va. Code § 29-6A-3(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." A grievant claiming retaliation may establish a prima facie case of reprisal by establishing:

(1) that he engaged in protected activity, e.g., filing a grievance;

(2) that he was subsequently treated in an adverse manner by the employer or an agent;

(3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and

(4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Fareydoon-Nezhad v. W. Va. Bd. of Trustees/Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, nonretaliatory reasons for its actions. See Mace v. Pizza Hut, Inc., 180 W. Va. 469, 377 S.E.2d 461 (1988); Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 172 W. Va. 627, 309 S.E.2d 342 (1983); Webb, supra. Establishment of a prima facie case of retaliation shifts the burden of proof to the employer to show that Grievant's dismissal was the result of legitimate, nonretaliatory reasons. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Mace, supra; Shepherdstown, supra.

There is no dispute that Grievant, prior to his dismissal, reported his concerns about safety to his supervisor, Mr. Nida, and to OHFLAC, and filed at least two grievances over these concerns. Shortly after filing his grievances, and voicing his concerns to the OHFLAC representative, Grievant was dismissed from his employment. The hospital administration was aware of the grievances filed, and Mr. Nida was aware that Grievant had spoken to OHFLAC. Thus, Grievant has established a prima facie case of retaliation.

However, as discussed above, DHHR has proven by a preponderance of the evidence that Grievant was guilty of excessive absenteeism and tardiness, in violation of hospital policy, that it had attempted to work with Grievant through progressive discipline

to no avail, and that his dismissal was warranted. DHHR has shown a legitimate, non-retaliatory reason for dismissing Grievant from employment.

Grievant asserts that this reason is a pretext because of his complaint to OHFLAC, and that he was justified in missing work and being late because of his belief that the hospital presented an unsafe and hostile working condition. Grievant is in error in this respect. The Grievance Board has found that fear of harm in some instances can justify an employee's continued absence from work. See Olmsted v. BOD/Bluefield State College, Docket No. 98-BOD-108 (Oct. 21, 1998). In that case, however, the employee had been targeted by an individual and threatened with bodily harm, and it was found his employer had done nothing to alleviate the potentially threatening situation. Grievant's concerns are based on a generalized fear of harm which could occur from understaffing on the hospital floor. There is evidence that some employees in the hospital have been injured from time to time by patients. However, Grievant failed to establish that those injuries were out of the norm for institutions such as Bateman Hospital, or that they could have been prevented had there been more or sufficient staffing. Grievant simply has failed to prove that his fear of harm, however real to him, was justified by the facts, or that he was in some way specifically targeted for harm. Thus, Grievant has failed to prove his dismissal for absenteeism and tardiness was a pretext for retaliating against him for voicing his concerns of safety to Mr. Nida, OHFLAC, and for filing grievances.

CONCLUSIONS OF LAW

1. 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. W. Va. Code § 29-6A-6; Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992).

2. The employer must demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." House v. Civil Serv. Comm'n, 181 W. Va. 49, 380 S.E.2d 216 (1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, Buskirk v. Civil Service Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985); Oakes v. W. Va. Dept. of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Service Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965)." Scragg v. Bd. of Directors W. Va. State College, Docket No. 93-BOD-436 (Dec. 30, 1994).

3. DHHR proved by a preponderance of the evidence that Grievant was guilty of excessive absenteeism and tardiness, in violation of its leave policy, and that it followed progressive discipline culminating with dismissal.

4. W. Va. Code § 29-6A-3(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." A grievant claiming retaliation may establish a prima facie case of reprisal by establishing:

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Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Fareydoon-Nezhad v. W. Va. Bd. of Trustees/Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989).

5. If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, nonretaliatory reasons for its actions. See Mace v. Pizza Hut, Inc., 377 S.E.2d 461 (W. Va. 1988); Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 309 S.E.2d 342 (W. Va. 1983); Webb, supra. Establishment of a prima facie case of retaliation shifts the burden of proof to the employer to show that Grievant's dismissal was the result of legitimate, nonretaliatory reasons. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Mace, supra; Shepherdstown, supra.

6. Grievant established a prima facie case of retaliation, but DHHR articulated a legitimate, non-retaliatory reason for his dismissal, which Grievant failed to prove was pretextual.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7 (1998). 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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MARY JO SWARTZ
Administrative Law Judge

Dated: October 23, 2001