DIANE YERKOVICH,

Grievant,

v. **Docket No. 02-HHR-099**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/MARION HEALTH CARE HOSPITAL,

Respondent.

DECISION

Diane Yerkovich ("Grievant") initiated this grievance on January 28, 2002, challenging an eighteen-day suspension without pay. She seeks to have the suspension reduced to a lesser punishment. After denials at levels one and two, a level three hearing was held on March 19, 2002. The grievance was denied at that level in a written decision dated March 29, 2002. Grievant appealed to level four on April 9, 2002. A hearing was held in the Grievance Board's office in Westover, West Virginia, on July 3, 2002. Grievant was represented by her aunt, Donna Sims, and Respondent was represented by Assistant Attorney General Darlene Ratliff-Thomas. The parties declined to file post-hearing submissions, so this matter became mature for consideration at the conclusion of the level four hearing.

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievant has been employed by Respondent as a housekeeper at Marion Health Care Hospital ("the Hospital") for approximately three years.

2. On December 29, 2001, Grievant was cleaning the room of an elderly Alzheimer's patient. The patient believes that her teddy bears are "babies," and feeds them food, which had resulted in them becoming very soiled. Grievant took one of the bears to the laundry to be washed.

3. Upon returning to her room and discovering that one of her "babies" was missing, the patient became extremely agitated, partially destroying a lounge chair.

4. Effective March 1, 2002, Grievant was suspended for eighteen days without pay by Carol Merrill, Hospital Administrator. The reason for the suspension was Grievant's misappropriation of a resident's personal property, which--according to Ms. Merrill--is considered patient abuse pursuant to federal regulations.

5. On September 26, 2000, Grievant was suspended for ten days after she wore a resident's shirt. Grievant had soiled her own shirt, and she "borrowed" a resident's shirt from the clean laundry while hers was being washed. She did not ask permission to wear the shirt. Grievant was advised in the suspension letter that "[y]ou never wear a patient's personal clothing or use something that belongs to a resident." She was further advised that her "action shows no regard for a patient's personal possessions" and reminded that, during orientation, Grievant was told that residents' "personal items are theirs and to be respectful of their possessions."

6. Grievant did not file a grievance when she was suspended in September, 2000.

7. Grievant received a verbal warning on January 7, 1999, when she used another employee's radio without permission, and on September 28, 2001, for placing a patient's decorative tin in a closet.[1] She did not grieve these incidents.

Discussion

In disciplinary proceedings involving state employees, W. Va. Code § 29-6A-6 places the burden of proof on the employer, and the standard of proof is by a preponderance of the evidence. E.g., Davis v. Dep't of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 20, 1990). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

In the instant case, Grievant does not dispute that she committed the act alleged, i.e. removal of the teddy bear from the patient's room. Rather, she alleges that, because she meant no harm and was, in actuality, trying to be helpful by getting the bear cleaned, an eighteen-day suspension is far too severe a penalty for her conduct. This Grievance Board has determined that mitigation of the penalty imposed by an employer constitutes extraordinary relief, and is granted only when there is a showing that a particular punishment is so clearly disproportionate to the offense committed that imposition of such a penalty involves an abuse of discretion, Hosaflook v. West Virginia Division of Corrections, Docket Nos. 98-CORR-446/447 (Jan. 20, 2000), or the penalty is so harsh

[1]Grievant testified at level four that she had been asked by the patient to clean the tin and had meant to get to it at a later time.

under the circumstances, its imposition by the employer involves an arbitrary and capricious act. Frantz v. W. Va. Dep't of Health & Human Resources, Docket No.99-HHR-096 (Nov. 18, 1999). Lilly v. Dep't of Health & Human Resources, Docket No.00-HHR-093 (May 8, 2000). See Wilkerson v. Lincoln County Bd. of Educ., Docket No.99-22-420 (Mar. 27, 2000). Considerable deference is afforded to the employer's determination of the seriousness of the employee's conduct and the prospects for rehabilitation. Overbee v. Dep't of Health & Human Resources, Docket No. 96-HHR-183 (Oct. 3, 1996). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997).

Respondent appears to believe Grievant's intentions were harmless. However, Grievant's superiors felt that, since Grievant had been disciplined for similar conduct in the past, a more severe penalty was warranted for this incident. At each year's inservice sessions, where hospital and agency policies are reviewed with employees, Grievant has been reminded that patients' property must be respected. This, combined with the prior incident involving the patient's shirt, warranted a more lengthy suspension to "get Grievant's attention." As Grievant admitted, Respondent's strategy was successful, and in the future she will not remove anything from a patient's room without a nurse's permission.

"`Progressive and corrective discipline is not simply an escalator to crucify an employee. Through it an employer must demonstrate an honest and serious effort to salvage rather than savage an employee. To hold otherwise distorts, demeans and defeats the goals underlying the concept of progressive and corrective discipline.' Philanthropic Mutual Life Ins. Co. v. Food and Commercial Workers Union, Local 1776, 91-1 ARB ¶ 3210 (May 11, 1990)." Altizer v. Dep't of Health and Human Resources, Docket No. 94-HHR-1089 (Apr. 13, 1995). In the instant case, an eighteen-day suspension does seem to be somewhat out of proportion to the offense committed, which all parties concerned agree was a well-intentioned mistake. As discussed above, Grievant has "gotten the message," and will not engage in this type of conduct in the future. Accordingly, the undersigned finds that a 12-day suspension is appropriate for the offense committed.[2]

The following conclusions of law support the decision reached.

Conclusions of Law

1. In disciplinary proceedings involving state employees, W. Va. Code §29-6A-6 places the burden of proof on the employer, and the standard of proof is by a preponderance of the evidence. E.g., Davis v. Dep't of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 20, 1990).

2. Mitigation of the penalty imposed by an employer constitutes extraordinary relief, and is granted only when there is a showing that a particular punishment is so clearly

[2]If the prior suspension had not been ten days, perhaps this suspension could have been reduced even more. However, it would seem to be inappropriate to give Grievant a lesser punishment for a second incident involving similar conduct.

disproportionate to the offense committed that imposition of such a penalty involves an abuse of discretion, Hosaflook v. West Virginia Division of Corrections, Docket Nos. 98-CORR-446/447 (Jan. 20, 2000), or the penalty is so harsh under the circumstances, its imposition by the employer involves an arbitrary and capricious act. Frantz v. W. Va. Dep't of Health & Human Resources, Docket No.99-HHR-096 (Nov. 18, 1999). Lilly v. Dep't of Health & Human Resources, Docket No.00-HHR-093 (May 8, 2000). See Wilkerson v. Lincoln County Bd. of Educ., Docket No.99-22-420 (Mar. 27, 2000).

3. An eighteen-day suspension was disproportionate to the offense committed under the facts and circumstances presented in this case.

Accordingly, this grievance is **GRANTED**, and Respondent is directed to reduce Grievant's eighteen-day suspension to a twelve-day suspension, and compensate her for all lost benefits and wages during the additional six days of her suspension period.

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, and 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.

Date: July 12, 2002

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DENISE M. SPATAFORE
Administrative Law Judge