DAVID O. NICHOLAS,

Grievant,

v. **DOCKET NO. 02-HHR-323**

DEPARTMENT OF HEALTH AND

HUMAN RESOURCES/WILLIAM

R. SHARPE, JR. HOSPITAL,

Respondent.

DECISION

In a grievance filed October 4, 2002, David Nicholas alleged, “Sharpe Hosp. has wrongly fired me from my position in a memo dated 9-25-2002.” As relief, he seeks: “To be made whole in every way to include but not limited to [rescinding] the terminations and returning to me all loss of benefits and monies.”

A level four hearing was held in the Grievance Board's Elkins office on January 15, 2003. Grievant appeared *pro se*, and Respondent was represented by counsel, Jon R. Blevins, Esq., Assistant Attorney General. (See footnote 1) The parties agreed to file any proposed findings of fact and conclusions of law by February 14, 2003, whereupon the matter became mature for decision.

I find the following facts have been proven by a preponderance of the evidence:

FINDINGS OF FACT

1. Grievant was formerly employed by Respondent (also referred to herein as “Sharpe”) as a Food Service Worker, a position in the classified service. On September 23, 2002, he was notified by letter from Jack C. Clohan, Jr., Chief Executive Officer, that he was dismissed from employment effective that day. According to the letter, Grievant was dismissed as a result of his “inappropriate, unethical, dishonest and unprofessional behavior . . . in accordance with Section 12.2 of the Administrative Rule of the WV Division of Personnel and Sharpe Hospital's Employee Conduct Policy.” Respondent's Exhibit No. 1.

2. Mr. Clohan's letter further stated in part:

> Since January 1, 2002, you have reported several incidents in which you felt you injured yourself lifting or handling items in the kitchen area. On January 20, 2002, you reinjured yourself by scrubbing walls and floor in the pulper room. On February 12 and again on February 15, 2002, you reinjured yourself by removing trays from the bottom shelf of a cart and by lifting and stacking supplies in [a] freezer, respectively. Given these reports, we scheduled you for a lifting inservice on February 26, 2002 to provide you with appropriate maneuvers for lifting and handling items with a weight of ten pounds or more. You attended this inservice. On March 21, 2002, you reinjured yourself by scrubbing the floor with a brush. You sought medical treatment for these incidents and your treating physician Dr. Ben Orvik requested light duty for you from February 19, 2002, through March 5, 2002 which consisted of a lifting limit of 25-30 pounds. This light duty request was accommodated.
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> . . .
>
> On April 1, 2002, Dr. Snead put you off work until approximately July 15, 2002 given the fact that you were scheduled for surgery to repair your right rotator cuff.
>
> On or about July 8, 2002, we received a statement from Dr. Snead saying you could return to work on July 12, 2002 without restriction and a statement from your physical therapist, John Weber, saying you should avoid activities involving over the heading [sic] lifting or motion. Also repetitive motions below the waist (e.g. hammering, painting, etc.) were also to be avoided for long periods of time as these tasks could exacerbate your right shoulder. When we sought clarification between these two statements, Dr. Snead'soffice reported that his return to work slip had been written in error and that you could not return to work but that you would be continuing physical therapy until your next visit on August 2. Dr. Snead would make a determination at that time regarding your return to work status.
>
> Throughout this period of time, we had numerous reports from staff regarding the rumor that you were still operating your lawn service business even though you were unable to perform your duties here at the hospital. We were also informed by some of your co-workers that you had willingly shared with them information about how much money you were making while you were off from work. One quoted you as saying, “I'm drawing compensation and making $100 a day cutting grass.”

. . .

> During the investigation, it was further discovered that you falsified the Workers' Compensation's “Attending Physician Report” dated July 12, 2002 stating that “you were not performing any type of work nor receiving any type of income for work during the time you were off with the injury.” Furthermore, our investigation revealed that you were being paid for your lawn service work throughout the summer and had income

from this on a regular basis.

3. On June 27, 1997, Grievant was given a three-day suspension for misappropriating for personal use food belonging to the state and for giving three different accounts of the incident to investigators. The record does not reflect whether Grievant filed a grievance over this disciplinary action.

4. Following a series of reported workplace injuries, Grievant's doctor referred him to Dr. Joseph Snead, an orthopedic surgeon. Dr. Snead saw Grievant on March 30, 2001, and diagnosed him as having a partial rotator cuff tear and bursitis. Dr. Snead recommended physical therapy. The bursitis was diagnosed based on Dr. Snead's observation of “positive impingement sign,” which means simply that Grievant complained of pain. Respondent's Exhibit No. 7, pp. 11-12.

5. Kathy Marsh supervises the dietary department at Sharpe, and was Grievant's supervisor. On April 22, 2002, Grievant asked her what he needed to do toreturn to work on light duty, and she sent him a letter outlining the requirements. Respondent's Exhibit No. 3. The letter, which had a light duty slip and Grievant's job description and position description attached, stated in part:

> The first step is to take a light duty slip to your physician to complete. Please encourage your physician to be thorough and specific. This form should be returned to me before returning to work. I would suggest at least (2) weeks prior, as it will have to be reviewed and decided on.
>
> . . .
>
> In regard to your question concerning whether you can receive workers compensation if light duty is not available. It is my finding that you should still be able to, however I strongly urge you to contact you [sic] claim manager and ask her about this concern.

6. Grievant did not respond to Ms. Marsh's letter, and did not request light duty again. She had accommodated Grievant's previous light duty requests, and could have done so again had he followed-up on his request.

7. Ms. Marsh later learned Grievant had been causing problems with her staff by coming to visit in the department and telling people he was making money mowing lawns and collecting disability payments at the same time.

8. William Harold is a Health Service Worker employed by Respondent in the dietary department, who worked with Grievant. He saw Grievant on a day he had come to the hospital for an

unknown reason, and Grievant told him he was “making $300 a week off comp. and $100 a day cutting grass.” Grievant asked Mr. Harold if he wanted to go with him to cut grass at a church cemetery, and split the payment.

9. William Rogers also worked with Grievant at Sharpe and was sitting with Mr. Harold when Grievant came by. He heard Grievant say Respondent would not let him come back to work on light duty, so he was mowing lawns to get money and also receiving compensation payments. 10. Robert and Geraldine Marsh, parents of Kathy Marsh, live in Weston and have been Grievant's lawn care customers for about two years. In July, 2002, they also hired Grievant to paint the back of their two-story house for $100. Grievant scraped the old paint and applied new paint using a brush, some of the time working from an extension ladder.

11. Dennis Norman stated he was one of Grievant's lawn care customers, and Grievant had cut his grass between April and the latter part of June, using a riding lawn mower and string trimmer, as he had been doing for two or three years. In April, Grievant had come to mow with his arm in a sling, and said his doctor had approved the work as long as the motion was forward rather than vertical.

12. Richard Myers is a local private investigator hired by Respondent to observe and record Grievant working while he was receiving temporary total disability payments. Mr. Myers saw Grievant mowing grass for some customers, but was unable to obtain video because he couldn't get a good view. Ultimately, he had someone hire Grievant to mow her lawn while he waited inside the house with his video camera, on July 31, 2002.

13. The video tape recorded by Mr. Myers (Respondent's Exhibit No. 2) shows Grievant working for about four hours, using both a gas-powered string trimmer and a lawn mower that appeared to be self-propelled, on a steep lot.

14. Dr. Joseph A. Snead, M.D., was the surgeon who performed surgery on Grievant's shoulder. In a telephonic evidentiary deposition taken on October 23, 2002, he testified that he diagnosed a partial rotator cuff tear and bursitis on March 30, 2001. An X-ray showed no rotator cuff tear, and at that time, he agreed with Grievant's primary carephysician, Dr. Orvik, who recommended conservative treatment and physical therapy, and light-duty restriction of lifting no more than 20 pounds.

15. Dr. Snead saw Grievant again on April 20, 2001. At that time, Grievant had a full range of motion in his shoulder and no evidence of bursitis. He found at that time Grievant could resume his

regular activity, but the condition could worsen over time. Dr. Snead was of the opinion that “any kind of work with his arm over his head or away from his body might make it worse,” including any work involving a push mower, “weed eating,” or painting a house. Respondent's Exhibit No. 7, p. 13.

16. Dr. Snead saw Grievant again on September 21, 2001, and found he had an “excellent range of motion and excellent strength,” but again showed evidence of bursitis in his right shoulder. He gave Grievant an injection that relieved the pain, but when he saw Grievant again on December 7, 2001, the pain had returned.

17. The next time Dr. Snead saw Grievant was on January 25, 2002, at which time Grievant's condition was unchanged, but Dr. Snead prescribed a Magnetic Resonance Image (MRI) of the shoulder. Grievant had the MRI done on January 31, 2002, and went back to Dr. Snead on February 8, 2002, at which time Dr. Snead noted the MRI showed a tear of the rotator cuff. Dr. Snead recommended exploratory arthroscopic surgery and repair if necessary.

18. Dr. Snead performed the surgery on April 1, 2002. He found the rotator cuff intact but frayed. On April 12, 2002, he removed the sutures from the surgery and projected Grievant could return to work in one month. On May 10, 2002, Dr. Snead examined Grievant and noted he was “doing pretty well,” but was “not quite ready to returnto work lifting heavy objects yet.” Respondent's Exhibit No. 7, p. 23. He recommended another four weeks of physical therapy.

19. Dr. Snead based his determination on whether Grievant could return to work on Grievant's statement, not on his own medical prognosis. In his deposition, Dr. Snead stated:

> I always ask the patients whether they are ready to go to work and if they say they are, I send them to work. If they say they are not, I don't send them to work. I let the patient tell me whether they can do the job or not, because I don't know that much about people's jobs and I figure they would know more about it than I do. When they tell me they are ready to go back to work, if it sounds reasonable, I let them go back.

Respondent's Exhibit No. 7, p. 27. In response to a later question, he stated, “I was going to release him back to work when he told me he was ready to go.” *Id.* at p. 33.

20. On June 12, 2002, Dr. Snead examined Grievant again and noted, “He still can't return to work yet, because he's having some residual pain.”

21. On July 12, 2002, Dr. Snead examined Grievant again, and completed an Attending Physician's Report for the Workers' Compensation Division. Respondent's Exhibit No. 6. On this form, he answered “Yes” to the question, “Is claimant temporarily and totally disabled?”

22. On the same form, Grievant untruthfully answered “No” to the question, “Have you performed any kind of work or have you received income for any work during the time you have been certified temporarily and totally disabled?” He further signed the form certifying that “the statements and answers set forth above are true and correct to the best of my knowledge and belief.” *Id.* 23. The next time Dr. Snead saw Grievant was August 2, 2002. At that time, Dr. Snead recommended additional therapy, but stated Grievant could return to work the following Monday. He provided Grievant with a prescription form stating, “may return to work 8/5/02 no work [with] arm over head for now.” Grievant's Exhibit No. 1.

24. On August 12, 2002, Dr. Snead received a letter from Ms. Cook requesting clarification of a “return to work with light duty slip with a restriction of not lifting above his head.” Respondent's Exhibit No. 4. The letter stated in part:

> We want to accommodate Mr. Nicholas to the best of his ability and, at the same time, do our best to ensure that he will not be reinjured. We have a couple of places that we could use him in light duty. I have enclosed the job descriptions of both the food service worker and the maintenance worker position. We have the option of placing Mr. Nicholas onto one of those positions or mixing the duties of both.

Respondent's Exhibit No. 4. The letter had functional job descriptions for “ENCSTEC” and Food Service Worker attached.

25. Dr. Snead replied to the letter on September 3, 2002, stating he could not give a good answer to the question, because he didn't know enough about the physical requirements of the jobs. He stated he could only state the position Grievant could put his extremity in, what his musculoskeletal capabilities are in terms of positions and joint motion, and for medical liability reasons he makes it a practice not to be specific in terms of what a patient can do. Respondent's Exhibit No. 5.

26. Also on September 3, a meeting was held at Sharpe with Grievant, Mr. Clohan, Mr. Garrison and Ms. Cook. The meeting was called to discuss the investigation into Grievant's outside work and possible disciplinary action. While Grievant did not deny doing the lawn care work, and indeed had never tried to hide it, he stated Dr. Snead knewabout the work and approved it. He also stated he had asked Dr. Snead if he could return to work on light duty but Dr. Snead would not allow it. Grievant explained his false statement on Respondent's Exhibit No. 6 as a misunderstanding in that he thought it meant any work for another employer. Grievant maintained that he was physically

able to perform the work he was doing.

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DISCUSSION

Grievant challenges his dismissal from employment for cause, a disciplinary action the basis of which must be proven by Respondent. 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; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988). The allegation made by Respondent is that Grievant, while off work on a temporary total disability Workers' Compensation claim, continued to work at his own lawn care business, performing more strenuous work than his duties at Sharpe that he claimed to be unable to perform due to his injury. Grievant contends he did nothing wrong, in that the lawn care work he performed was not contraindicated by his physician, and Respondent had refused to allow him to return to work with a light duty accommodation.

It is Respondent's duty to prove its allegations, and that they amount to a level of misconduct that warrants Grievant's dismissal from employment. “The West Virginia Supreme Court of Appeals has determined that classified employees may be dismissed for misconduct which is of a 'substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention.' [citations omitted] Faced with defining 'gross misconduct' justifying discipline or dismissal, the Court. . . declined, deciding that the severity of the employee's misconduct should be evaluated and considered in the context of the circumstances of each case.” Hayes v. W. Va. Div. of Juvenile Justice, Docket No. 98-DJS-220 (Dec. 14, 1998).

Respondent presented the testimony of Assistant Administrator Chip Garrison, Human Resource Director Debbie Cook, Director of Staff Development Dennis Norman, Private Investigator Richard Myers, Robert Marsh, Geraldine Marsh, Dietary Supervisor Kathy Marsh, employees William Harold and William Rogers, and Chief Executive Officer Jack Clohan. Grievant presented the testimony of Ms. Cook and Mr. Garrison, and elected not to testify on his own behalf.

After having had numerous on-the-job injuries and light-duty accommodations, Grievant had surgery in April to repair a suspected torn right rotator cuff. (See footnote 2) While recovering from the surgery, Grievant received temporary total disability payments from Workers' Compensation, and was

unable to work at the hospital. Grievant was off work on temporary total disability claim from April 1, 2002 until his termination on September 23, 2002. During the time he was off, he worked for himself in his private lawncare business, mowing yards and lots with a riding mower, push mower and gas-powered string trimmer. He did odd jobs such as house painting. In a visit to the hospital that summer, he told coworkers he was making $100 per day at this outside work while he collected workers' compensation payments.

Mr. Garrison personally observed Grievant mowing lawns for others on three occasions, in May, June and July. He advised the Workers' Compensation Commissionand requested it conduct an investigation. In July, he hired a private investigator to do surveillance to prove Grievant was working at lawn care while claiming to be totally disabled. The video recording of that tape shows Grievant working without apparent difficulty operating power equipment on steep terrain. At several times, he can be seen running the trimmer using only his right hand, reaching up inclines and over and under obstructions. He worked very hard for long periods of time without breaks. He cannot be seen stopping to rest his arm, rub his shoulder, stretch or favor his right arm in any way, as one would expect of someone working with a sore or injured shoulder that he had told his doctor was causing him pain. It can be assumed that the work performed by Grievant in this tape is representative of they types of work Grievant performed for others throughout the period of his disability leave. The work was not at all consistent with Grievant's purported inability to return to his regular job even with a light-duty accommodation.

Grievant represented to Respondent in the September 3, 2002 meeting that his doctor would not give allow him to return to work on light duty at an earlier time, and that he told Dr. Snead about his lawncare business. However, at the hearing, Grievant did not testify in his own behalf or present any other evidence to rebut the conflicting sworn testimony of Dr. Snead, who said Grievant did not tell him about his lawn care business. Dr. Snead also contradicted Grievant's statement that he requested light duty but Dr. Snead refused to allow him to return to work. Even if he had, resolving this conflict would not be difficult. Grievant's credibility would be seriously diminished, given that he answered untruthfully, on the July 12, 2002, Attending Physician's Report, the question about whether he performed work for pay. Grievant's explanation that his answer was the result of a misunderstanding does not make sense, as the question is clear and unambiguous,and uses absolute terms such as “any kind of work” and “income for any work.” The undersigned cannot

believe this question can be misunderstood. Further, Respondent noted Grievant had been disciplined in the past for “misappropriating food belonging to the State for personal use and for giving three different accounts of the incident to investigative personnel.” Respondent's Exhibit No. 1, p. 4.

The evidence suggests Grievant was in control of his recovery, and Dr. Snead would have released him to return to work as soon as Grievant said he was able to return. Instead, Grievant reported to his physician that he could not work at the hospital, even with a light-duty accommodation. The evidence supports the plausible suggestion that Grievant chose to prolong his temporary total disability leave in order to devote time to his self- employment. It was not until the summer mowing season was dying down that he elected to represent that he was well enough to return to work. Grievant was dishonest by representing himself as being too injured to work for his employer, and by claiming disability benefits, paid for by his employer's insurance premiums, through untruthful statements on his physician's report. “[A]n employer has the right to expect an employee to perform his duties in an honest and forthright manner. See Coster v. Div. Of Corrections, Docket No. 94-CORR-600 (Aug. 12, 1996). An employer can expect its employees to interact with their co-workers and supervisors in a truthful manner. Alaeddini v. Div. Of Envtl. Protection/Office of Air Quality, Docket Nos. 95-DEP-450/580 (Jan. 28, 1998).” Vickers v. Board of Directors/W.Va. State College, Docket No. 97-BOD-112B (Aug. 7, 1998).

Respondent has proven by a preponderance of the evidence that Grievant was working for himself, for pay, at the same time he claimed to be unable to work at Sharpebecause he was temporarily, totally disabled. However, a troubling aspect of this case is the timeline in which the events took place. Respondent knew for several months that Grievant was working a second job while he was off on disability. However, the record supports a conclusion that Respondent was simply giving Grievant the benefit of the doubt and was willing to give him the opportunity to alleviate any mistrust. This, Grievant could not do.

"Deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent determined that Grievant should be dismissed because he appeared to give priority to his private work over his employment with Respondent, he was untrustworthy, and had created a morale problem at the hospital. Respondent implied, but did not

state, that Grievant's pattern of injuries and re-injuries was fictitious, and the evidence supports the idea that Grievant cannot be believed when reporting and injury. The pattern, together with Grievant's inability to admit he had done anything wrong and his specious explanation for his falsehood, supports a finding that Respondent will not be able to trust him in the future. As a final matter, Grievant sought to introduce as evidence a decision by a Unemployment Compensation Division (UCD) Administrative Law Judge that he had not been dismissed "for cause." The undersigned ruled in favor of Respondent's objection to this evidence. This evidence was excluded because it was irrelevant to the question at hand. As stated in an earlier Grievance Board opinion:

> The remedies available from the Grievance Board are also dissimilar to that provided by Employment Security. Pursuant to W.Va. Code §29-6A-5(b) [footnote omitted], the Grievance Board may order the employee reinstatedwith reimbursement for lost wages and benefits; the punishment reduced or reassessed; and\or the employee's records expunged. In short, the Grievance Board conducts a rather broad assessment of the propriety of the disciplinary action itself while Employment Security makes determinations regarding the effect of the action on the employee's eligibility for benefits. For the foregoing reasons, it is concluded that the cause of action litigated before Employment Security is sufficiently different from that litigated before the Grievance Board to preclude the application of the doctrine of res judicata.

Maxey v. W. Va. Dep't of Health and Human Resources, Docket No. 93-HHR-007 (Feb. 28, 1995). In other words, the Grievance Board and the UCD are trying to answer two different questions based on different rules and different relevant evidence, and the decision of the UCD that Grievant was not dismissed for cause under the unemployment compensation laws does not assist the undersigned in determining whether Respondent has met its burden of proving Grievant committed the alleged acts.

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; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988). "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 and 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.

2. "The West Virginia Supreme Court of Appeals has determined that classified employees

may be dismissed for misconduct which is of a 'substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty withoutwrongful intention.' Syl. Pt. 1, Oakes v. W. Va. Dept. of Fin. and Adm., 164 W. Va. 384, 264 S.E.2d 151 (1980); See Westfall v. W. Va. Dept. of Trans., Docket No. 97-DOH-349 (Jan. 16, 1998); Faced with defining 'gross misconduct' justifying discipline or dismissal, the Court in Thurmond v. Steel, 159 W. Va. 630, 225 S.E.2d 210 (1976) declined, deciding that the severity of the employee's misconduct should be evaluated and considered in the context of the circumstances of each case." Hayes v. W. Va. Div. of Juvenile Justice, Docket No. 98-DJS-220 (Dec. 14, 1998).

3. "[A]n employer has the right to expect an employee to perform his duties in an honest and forthright manner. See Coster v. Div. Of Corrections, Docket No. 94-CORR- 600 (Aug. 12, 1996). An employer can expect its employees to interact with their co- workers and supervisors in a truthful manner. Alaeddini v. Div. Of Envtl. Protection/Office of Air Quality, Docket Nos. 95-DEP-450/580 (Jan. 28, 1998)." Vickers v. Board of Directors/W.Va. State College, Docket No. 97-BOD-112B (Aug. 7, 1998).

4. "Deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-183 (Oct. 3, 1996).

5. A decision by the West Virginia Unemployment Compensation Division that a grievant is or is not eligible for unemployment compensation benefits has no bearing on whether an employer has met its burden of proof in hearing before the Grievance Board that the employee was properly dismissed.

6. The preponderance of the evidence supports Respondent's contention that Grievant was working at another job while claiming he could not work for Respondent dueto a temporary, total disability, and that he was untruthful in his explanation of the situation. Respondent proved good cause for Grievant's dismissal.

For the foregoing reasons, this grievance is hereby **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the county in which the grievable event took place. 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: February 28, 2003

M. Paul Marteney

Administrative Law Judge

Footnote: 1

On February 3, 2003, B. Allen Campbell, Esq., Assistant Attorney General, filed a notice that he was replacing Mr. Blevins as Respondent's counsel.

Footnote: 2

A group of tendons that surrounds the shoulder joint.