BRIAN BURKHAMMER,

Grievant,

v.

Docket No. 03-HHR-276

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/WILLIAM R. SHARPE HOSPITAL,

Respondent.

DECISION

Brian Burkhammer ("Grievant") initiated this proceeding at level two on July 24, 2003, following his termination from employment with William R. Sharpe Hospital ("Sharpe Hospital") on July 10, 2003. The grievance was denied at level two on August 12, 2003. A level three hearing was held on August 28, 2003, and the grievance was denied in a written decision dated September 5, 2003. Grievant appealed to level four on September 10, 2003. A hearing was held in Elkins, West Virginia, on October 29, 2003, at which time Grievant represented himself, and Respondent was represented by Landon R. Brown, Senior Assistant Attorney General. The parties elected not to file post-hearing submissions, so this matter became mature for consideration at the conclusion of the hearing.

The facts giving rise to this grievance are largely undisputed and are contained in the following findings of fact.

Findings of Fact

1. Grievant has been employed by Sharpe Hospital for approximately 13 years, most recently assigned to the switchboard. 2. During his 13 years of employment, Grievant was an exemplary employee with no discipline in his record.

3. Grievant was involved in a romantic relationship with another switchboard operator, Jani

Jones, for approximately 4½ years. That relationship was ended by Ms. Jones in early May of 2003.

4. Due to the end of his relationship with Ms. Jones, along with stress caused by his son's health problems and an unsuccessful grievance concerning another job, Grievant sought treatment for depression and anxiety. Grievant was off work for an entire month, beginning around May 12, 2003, so that his medications could be adjusted.

5. In early June, Grievant contacted Chip Garrison, Assistant Administrator of Sharpe Hospital, to request assistance in locating employment with another state agency. Grievant did not believe that he could continue working with Ms. Jones. Mr. Garrison and Debbie Cook, Human Resources Director, agreed to assist Grievant in finding another job.

6. On June 10, 2003, Mr. Garrison called Grievant and informed him that there were some postings for correctional officers in the area. They arranged a meeting for the following day to review the information concerning these positions.

7. Grievant met with Mr. Garrison early in the morning on June 11, in Mr. Garrison's office at Sharpe Hospital.

8. Shortly after his meeting with Mr. Garrison on June 11, Grievant phoned the switchboard, and Ms. Jones answered. Grievant requested that she page Melinda Orrahood, a physician's assistant at the hospital. During this conversation, Grievant stated to Ms. Jones that he knew she was “seeing someone” and that she “had better never let him see her with him or he would go crazy.” Ms. Jones hung up on Grievant. 9. Grievant met with Ms. Orrahood in the hospital lobby after Ms. Jones paged her. Grievant and Ms. Orrahood had been friendly for approximately 20 years. Grievant expressed at this time that the stress he was under was almost more than he could bear and that he “couldn't stand” the thought of Ms. Jones with other men. Because Grievant seemed much more upset than she had ever seen him, Ms. Orrahood suggested that he leave the hospital and contact his psychiatrist. Grievant then left the hospital.

10. After leaving the hospital, Grievant again phoned the switchboard and spoke with Ms. Jones. He told her that he was on his way to see his doctor, and “if he didn't get help soon there were going to be people who would be hurting.” He also stated that if he couldn't have Ms. Jones, then no one else ever would. When asked by Ms. Jones if he was threatening to kill her, he said “take it however you want to.” During the course of this conversation, Grievant also said he was going to “take care” of Ms. Jones and others who had “done him wrong,” and then kill himself. He indicated

that he was also having extreme difficulties eating and sleeping.

11. Ms. Jones was alarmed by Grievant's statements, so she reported the incident to her supervisor, who informed Mr. Garrison.

12. Shortly after Grievant's statements to Ms. Jones during the phone call, his sister arrived at the hospital, stating that Grievant was on his way to the hospital with a baseball bat, saying he was going to “bash in some heads.”

13. Mr. Garrison called the police, who found Grievant in his vehicle approaching the hospital. A short, high-speed chase ensued, ending in the hospital driveway, whichhad been blocked by the county sheriff, R. A. Rinehart. No ball bat was found, but Grievant was carrying a knife. (See footnote 1)

14. Sheriff Rinehart requested a “probable cause” hearing to determine if Grievant was a danger to himself or others and should be hospitalized. He described Grievant as “not violent” but “very disturbed.” He felt that Grievant would be better served by receiving medical treatment than being taken to jail.

15. After a probable cause hearing, Grievant was involuntarily hospitalized at Fairmont General Hospital from June 11-25. He was diagnosed as suffering from major depressive disorder and anxiety disorder.

16. At the insistence of law enforcement officials, Ms. Jones sought and received a restraining order against Grievant, although she did not believe that Grievant had any desire to harm her. She later had the restraining order lifted.

17. Prior to the events of June 11, Grievant had no history of violence, and he was described as having an easygoing, calm temperament. Ms. Jones was “shocked” by Grievant's behavior that day, and she was very concerned that he had undergone a significant weight loss and that his hands were shaking when she had seen him earlier that morning.

18. While Grievant was still in the hospital, Mr. Garrison determined that Grievant's employment could no longer continue, and he made this recommendation to Jack Clohan, Hospital CEO. After he was discharged, Mr. Garrison and Mr. Clohan met with Grievant and informed him that he could either resign or be terminated. Grievantexpressed the desire to resign “under duress,” which was not accepted by the administrators. Accordingly, he was terminated by letter dated July 10, 2003.

Discussion

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). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact 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. Dep't 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 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. Dep't 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). 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 ofeach case. Hayes v. W. Va. Div. of Juvenile Justice, Docket No. 98-DJS-220 (Dec. 14, 1998). Moreover, "[c]onsiderable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. Dep't of Health and Human Resources, Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge cannot substitute her judgment for that of the employer. Jordan v. Mason County Bd. of Educ., Docket No. 99-26-8 (July 6, 1999).

There is no dispute in this case that the events of June 11 did, in fact, occur as recited above. Rather, the issue at hand is whether or not Grievant deserved to be terminated because of his conduct. While Respondent argues that Grievant's conduct was egregious and violated workplace security policies, Grievant contends that his behavior on that day was out of character, caused by an

emotional breakdown, and should not have been cause for his dismissal.

The West Virginia Division of Personnel ("DOP") has in place a Workplace Security Policy, which is applicable to all state employees. With regard to "Threatening or Assaultive Behavior," it provides as follows:

> Threatening or assaultive behavior will not be tolerated and must be resolved by managers/supervisors on a case-by-case basis. Any employee engaging in such behavior shall be subject to disciplinary action, up to and including dismissal. . . . In determining whether an individual poses a threat or a danger, consideration must be given to the context in which a threat is made and to the following:
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> -- the perception that a threat is real;
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> -- the nature and severity of potential harm;
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> -- the likelihood that harm will occur;
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> -- the imminence of the potential harm;
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> -- the duration of risk, and/or
>
> -- the past behavior of an individual.

Respondent contends that, pursuant to provisions of this policy, Grievant's behavior was threatening and justified dismissal. (See footnote 2) In addition, Grievant was charged with violating Sharpe Hospital's policy regarding employee conduct, which prohibits "physical abuse, harassment, or intimidation of patients or fellow employees."

There can be no dispute that, whatever its cause, Grievant's behavior on June 11, 2003, was threatening and harassing in nature. Likewise, it is undisputable that, with regard to terminations for cause, and workplace security violations specifically, employers have substantial discretion regarding employment decisions. Although the undersigned, faced with the choice of terminating Grievant or giving him a "second chance," would likely have given him the opportunity to demonstrate that his conduct was an isolated incident, this would clearly involve substituting my judgment for that of the agency, which is simply not permitted. Grievant's behavior was threatening, potentially violent, and Respondent has no guarantees that it would not be repeated--or worse--if Grievant should be under sufficient stress in the future. Accordingly, in view of the broad discretion employers have in such matters, and Grievant's clear violation of policy, Respondent's decision to terminate his employment must stand.

The following conclusions of law support the decision reached.

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 apreponderance 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 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. Respondent has proven by a preponderance of the evidence that Grievant was terminated for good cause.

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, 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 appealingparty 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: November 12, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

It was not specified in the record what type of knife it was.

Footnote: 2

Sharpe Hospital also has a security policy, which essentially duplicates the provision of the DOP policy, which it contends was also violated by Grievant.