HOLLY M. PERRY,

Grievant,

v. Docket No. 04-HHR-192

DEPARTMENT OF HEALTH & HUMAN RESOURCES/

WILLIAM R. SHARPE, JR. HOSPITAL,

Respondent.

D E C I S I O N

Holly M. Perry ("Grievant"), employed by the Department of Health & Human Resources ("DHHR") as a Health Service Worker at the William R. Sharpe, Jr. Hospital, filed an expedited grievance to level four, as is permitted by W. Va. Code § 29-6A-4(e), following the termination of her employment, effective May 12, 2004. Grievant seeks reinstatement with back pay and interest, plus restoration of all benefits, including annual/sick/holiday leave time. An evidentiary hearing was conducted in the Grievance Board's Elkins office on July 12, 2004. Grievant was represented by Jack Atchison and Kevin McHenry, and DHHR was represented by Assistant Attorney General Robert Miller. The grievance became mature for decision upon receipt of the parties' proposed findings of fact and conclusions of law on July 30, 2004.

The following facts have been derived from a preponderance of the evidence.

Findings of Fact

1. Grievant has been employed by Sharpe Hospital for approximately four years, including the time she was a temporary employee, and has held the classification of Health Service Worker (HSW) at all times pertinent to this grievance. 2. After five days of annual leave, Grievant reported for work on April 29, 2004. At the beginning of the shift, she was ask if she preferred to be the Charge Aide or the Programmer, to which she replied, "I don't want either f_ing one of them." Other arrangements were made.

3. Shortly thereafter, Grievant proceeded to pick up the close constant observation (CCO) clipboard for patient J.R. Another HSW advised her that she could not sit CCO with J.R., only he and

another male staff member were assigned that duty. Grievant questioned why the arrangement excluded her, but the HSW stated that it was not the time or place to discuss the matter. Grievant again inquired about the assignment later that day, and the HSW suggested Grievant speak with a nurse, because he was due to begin the CCO duties.

4. Grievant took the matter to Donna Herrald, LPN, stating that she felt singled out, and that it just wasn't right that she was excluded from CCO. Ms. Herrald advised Grievant that for safety reasons, only male staff members were to sit CCO with J.R. due to his behavior. Grievant responded in a hateful tone of voice that it had not been explained to her.

5. Later that day, a male HSW and another LPN, observed Grievant in J.R.'s room.

6. A staffing issue arose on April 29, 2004, when it appeared that there would be inadequate coverage for the 3 - 11 shift. Janice Woofter, Nurse Manager, asked Debbie Butcher, RN, to notify the day shift staff that the next person in the work over rotation should be prepared to stay on duty for the evening shift. That person, Grievant, told Ms. Butcher that she would need to find someone else because she would not bestaying. When asked her reason, Grievant indicated that she would not have a ride home at 11:30 p.m. Eventually, coverage was secured.

7. Early Friday morning, April 30, 2004, J.R. said “hello” to Grievant, to which she responded that she was not allowed to talk to him because he was not on her personal care (PC) list. She then told J.R. that Ms. Butcher and Kay Marks, R.N., had said she could only talk to the patients on her PC list. J.R. became agitated about Grievant's comments.

8. Grievant was later called to Ms. Woofter's office to meet with Ms. Butcher and Bobbi Withers, staff nurse, to discuss the interaction that had occurred between her and J.R. Grievant admitted telling J.R. that she was not allowed to speak to him, pursuant to Ms. Marks' directive the previous day. Ms. Butcher responded that Grievant knew that was not what Ms. Marks was trying to tell her, and asked why she had given J.R. the names of nurses, including herself. Grievant explained that Ms. Butcher was in the room and did not correct Ms. Marks.

9. Observing Grievant to be upset and angry, Ms. Butcher ask if she needed to go home. Grievant indicated that she would go home. Ms. Butcher directed Grievant to stop and speak with Joan Danner, Nurse Clinical Coordinator (NCC) for that shift, to let her know she was leaving.

10. Ms. Danner spoke with Grievant who again stated her concern that she was not allowed to work with J.R. Some discussion was had regarding the possibility of trading units. Ms. Marks was

asked to join the discussion and reiterated a direction that she had given Grievant the previous day. Specifically, she stated that if a patient's behavior plan provides for redirection to his “primary care giver,” it would be a way of refocusing thepatient. Grievant interpreted the comment to mean that she was only to take care of, and talk to, her personal care patients. Ms. Marks stated that was not the intent of her example; however, Grievant replied that Ms. Marks had not corrected her at the time. Ms. Marks agreed that she had not verbally responded, but had shaken her head “No,” because someone else was speaking. Grievant then vehemently disagreed with Ms. Marks' recollection of the conversation.

11. The volume of the meeting continued to increase until Ms. Woofter asked security to be on alert if needed, and entered and asked everyone to please lower their voices. Grievant then stood, and stated that Ms. Woofter could “take these f_ing [work] keys!” Ms. Woofter accepted the keys and asked Grievant to go to the Human Resource Management office. Grievant responded, “F_ you!” and proceeded down the hallway. Ms. Woofter and security guards followed Grievant to ensure that she left the hospital grounds; however, by the time they arrived at the switchboard area Grievant was re-entering the facility to empty her locker. Ms. Woofter and the guards accompanied Grievant to her locker, and let her out the back door.

12. Grievant then proceeded to return to the NCC office, stated that she wanted her keys back, and was not quitting. Ms. Woofter informed her that she had accepted the keys as a verbal resignation, and was not prepared to return them.

13. Grievant next appeared at the Human Resources Management office, stating that she wanted her keys, and did not want to quit. Ms. Woofter again stated that she was not prepared to allow Grievant to return to work at that time. It was agreed that Grievant would take time off until the following Thursday, and Ms. Woofter would review her file and investigate the situation. 14. On Wednesday, May 6, 2004, Grievant met with Assistant Hospital Administrator Chip Garrison, the HRM Assistant, and Ms. Woofter. Grievant was placed on suspension pending completion of the investigation, but was advised that termination was being considered. Grievant again stated that she was just angry and did not intend to quit.

15. Grievant's record indicated that she had been counseled or verbally reprimanded on the following occasions:

November 2002 - regarding attendance, after Grievant used 19 sick days and was late for work 16

times between May and November.

June 2003 - regarding Grievant's involvement in a complaint by a co-worker of a hostile working environment. Grievant agreed not make further hurtful or second meaning statements.

September 2003 - Grievant was observed touching J.R.'s face. She was reminded to monitor boundaries and personal space so as not to give clients and staff the wrong impression, and the inappropriateness of releasing personal information to patients. She was directed to watch a video titled “Crossing the Line.”

March 3, 2004 - Grievant demonstrated inappropriate and unprofessional behavior with another staff member. Grievant was redirected for using a loud voice and foul language.

March 4, 2004 - Ms. Woofter advised Grievant that the shirt she was wearing was inappropriate for work. Grievant disagreed, became angry and loud, and used foul language. March 17, 2004 - Grievant's work schedule was changed to assist her with recurring tardiness and excessive absenteeism.

April 13, 2004 - Grievant was given her interim evaluation which noted absences/tardiness, use of profanity on the unit, and apparent job discontentment. Grievant declined an offer of counseling.

16. By letter dated May 12, 2004, Chief Executive Officer Jack C. Clohan, Jr., notified Grievant that her employment was terminated immediately as a result of the foregoing examples of inappropriate and unprofessional conduct.

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 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 Serv. 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 directlyaffecting 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).

Grievant was dismissed for “inappropriate and unprofessional conduct.” DHHR argues that it has met its burden of proving these charges against Grievant. While the dismissal was the direct result of Grievant's actions on April 29 and 30, 2004, DHHR asserts that it also considered a pattern of similar conduct throughout Grievant's employment. DHHR concludes that the dismissal was for good cause, and was not excessive in this situation.

Grievant argues that the contents of the May 12, 2004, letter included several inaccuracies, that her performance appraisals never rated her “unsatisfactory,” and Respondent's employees were responsible for the escalation of the April 30, 2004, meeting which led to her dismissal. Grievant concedes that she was upset on both of the days in question, and that she used foul language, although no more so than other employees. She asserts that Respondent has not followed its own progressive discipline policy in this instance, and that the level of discipline was excessive.

It is undisputed that the dismissal letter contains some errors. Specifically, a date is incorrect as the result of a typographical error, and some documents may have been misidentified as warnings. Errors are always regrettable, but are bound to occur. The typographical error is clearly just that. It is also noted that the various documents memorializing discussions of personnel issues with Grievant are not all precisely labeled as warnings, reprimands, etc.

DHHR has a progressive discipline policy which provides for measures of increasing severity “to correct or prevent an employee's initial or continuing unacceptable work behavior or performance”. The standard levels of discipline in this policy are verbal warning, written warning, suspension, demotion, and dismissal. However, DHHR does not require all levels of discipline for an employee prior to dismissal. The level of discipline, even for a first offense, is determined by the severity of the violation. Thus, an employee may be dismissed for a single incident. In the present case, Grievant had not been suspended or demoted, but she had been counseled and/or warned a number of times

regarding a number of matters. DHHR did not act in violation of the progressive discipline policy when it dismissed Grievant.

Grievant next asserts that she was provoked during the events of April 30, 2004. Certainly she was stressed, irritated, annoyed, frustrated, and just plain angry, but the testimony and written statements of the other individuals who were present do not substantiate that any provocation occurred. On the contrary, it appears that the employees were attempting to assist Grievant in her performance. While Grievant's annual performance evaluations had not rated her as “needs improvement,” it appears that her job satisfaction and performance were quickly deteriorating.

The argument that Grievant's termination is excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or aninherent disproportion between the offense and the personnel action." Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

Mitigation of a penalty is considered on a case by case basis. Conner v. Barbour County Bd. of Educ., Docket No. 95-01-031 (Sept. 29, 1995); McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity. Pingley v. Div. of Corrections, Docket No. 95-CORR-252 (July 23, 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).

This Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable 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 Res./Welch

Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion todetermine a penalty in these types of situations, and the undersigned will not substitute her judgement for that of the employer. Tickett v. Cabell County Bd. of Educ., Docket No. 97- 06-233 (Mar. 12, 1998); Huffstutler v. Cabell County Bd. of Educ., Docket No. 97-06-150 (Oct. 31, 1997).

The evidence does not support a finding that Respondent abused its discretion in designating the penalty in question. Grievant's failure to cooperate, refusal to follow directions, use of inappropriate and disrespectful language, and emotional outbursts impacted negatively on her ability to satisfactorily perform her duties, and on the ability of her coworkers to perform theirs. Given Grievant's relatively short tenure of four years with Respondent, and the failure of progressive discipline to correct her deficiencies, mitigation of the discipline is not warranted in this case.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. Pursuant to W. Va. Code § 29-6A-6, 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. Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generallyrequires 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 Res.,

2. State employees who are in the classified service can only be suspended for "cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); Logan v. Regional Jail Auth., Docket No. 94-RJA-225 (Nov. 29, 1994); Davis v. W. Va. Dep't of Motor Vehicles, Docket No. 89-DMV- 569 (Jan. 22, 1990).

3. DHHR proved Grievant engaged in actions which are inappropriate in the workplace, justifying her termination from employment.

4. An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of

demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. Conner v. Barbour County Bd. of Educ., Docket No. 94- 01-394 (Jan. 31, 1995). See Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

5. "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 theemployer 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).

6. "Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable 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 Res./Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996).

7. Given the charges proven against Grievant, the penalty is not disproportionate or excessive, and mitigation is not warranted.

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. **DATE: AUGUST 17, 2004**

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE