LISA ANN JACOBS, M.D.,

Grievant,

v.

Docket No. 02-HE-001

WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Lisa Ann Jacobs, M.D., ("Grievant"), employed by West Virginia University ("WVU") as a Resident in the Department of Anesthesiology, initiated this grievance on February 26, 2001, following her dismissal. Grievant asserts that the dismissal breached her residency agreement, was arbitrary and capricious, and constituted an abuse of discretion because WVU lacked sufficient information to make the decision. Grievant further asserts that WVU failed to provide her an opportunity to correct any perceived deficiencies in her performance, or to take progressive steps of discipline, and that the action was disproportionate to the offense. Grievant also alleges discrimination, in that she received a punishment unlike that imposed upon other residents for like offenses, most particularly male residents. Finally, Grievant asserts that a complaint filed by a male resident stating that she was harassing him was improperly considered as a factor in her termination. Grievant's requested relief was modified at level four to reinstatement as a Clinical Anesthesiologist I, Post-graduate Year II, with back pay, interest, and benefits, retroactive to January 15, 2001. Grievant requests the sum of $2,250.00 in rent she paid while staying in Morgantown through the level two process. Asserting that WVU acted in bad faith by requesting a level four hearing where it called no witnesses, and requested continuances for false reasons, i.e., the unavailability of Dr. Johnstone to testify, Grievant additionallyrequests reimbursement for attorney fees and travel

costs from Massachusetts to attend the level four hearing.

The grievance was denied at level one by Department Chair, Dr. Robert E. Johnstone, and at level two by David C. Hardesty, Jr., President of WVU. Appeal was made to level four on January 4, 2002, at which time Grievant requested a decision be made on the lower-level record. Respondent requested a hearing at level four. Following a series of delays, including Dr. Johnstone's absence due to military duty, Grievant's pregnancy, and a subsequent illness, and a death in Respondent counsel's family, a hearing was convened in the Grievance Board's Westover office on April 4, 2004. Grievant was represented by Bader C. Giggenbach, Esq., of Brewer and Giggenbach, and WVU was represented by Assistant Attorney General Samuel R. Spatafore. Grievant was called as a witness by WVU, she declined to testify, and the hearing was adjourned. The grievance became mature for decision upon receipt of the parties' responsive post-hearing submissions on or before May 24, 2004.

The following findings of fact are derived from a preponderance of the evidence included in the lower-level record.

Findings of Fact

1. Grievant graduated from Bowdoin College in June 1988 with a degree in History and Romance Languages. Grievant enrolled in the Boston University School of Medicine in August 1989 but was suspended from November 1991 through December 1992, and was subject to academic dismissal in March 1993. Grievant enrolled in the School of Medicine at the University of Liege, Belgium, in November 1993, and graduated in June 1996.

2. Following graduation, Grievant returned to the United States, and engaged in the following post-graduate training:

a. University of Rochester (Primary Care), from July 1, 1996 through August 30, 1996. Grievant resigned after her employer learned that she had attended Boston University, a fact she had neglected to include on her application.

b. Albany Medical Center (Internal Medicine), from October 1996 through October 1997. A one-year contract was completed.

c. St. Vincent's Hospital in Worcester, Massachusetts (Radiology), from September 1, through September 22, 1997. Grievant was terminated from the position for failing to indicate that she had attended Boston University, and for alleged misrepresentation on a license

application to the Massachusetts Board of Registration in Medicine.

d. SUNY-Buffalo (Radiation Oncology), from November 1997 through January 1998. Grievant was dismissed for "basically lack of improvement," in her own words.

e. UWHCA (University of Wisconsin) in Madison (Radiation Oncology), from July through November 1998. Grievant was dismissed for "performance concerns."

f. St. Vincent's Medical Center, Staten Island, New York (Internal Medicine), from July through November 1999. Grievant was dismissed for omitting information on her curriculum vitae.

3. Grievant believes the reasons given by the four institutions from which she was dismissed were pretextual. She suggests that was dismissed from St. Vincent's (MA) as a result of having filed a medical malpractice suit against a Department Chair at the Boston University School of Medicine, who she has charged with "boundary violations"while providing her psychological counseling in a private capacity, and the rest were the result of discrimination and retaliation. Grievant has legal actions pending at all institutions from which she was dismissed.

4. In Spring 2000, Grievant applied for a position of Resident in the Department of Anesthesiology at WVU. After Grievant was not offered a position, she contacted Dr. W. Andrew Kofke, Vice-Chair, by electronic mail (e-mail) to inquire, "Is it possible for you to extend a 3 month contract where we go our separate ways in 3 months if either one of us decides to go our separate ways?" Grievant also sent Dr. Johnstone an e-mail on May 15, 2000, stating: "I had liked you. Is it possible that you could extend a 3 month contract to me with a phrase that you and I can separate at the end of 3 months and go our separate ways if we like." Dr. Johnstone replied that the Department was responding to complaints from a resident terminated from the program for lack of academic progress, and until that situation was resolved, the faculty would be unwilling to accept anyone with special circumstances into the program.

5. Grievant again contacted Dr. Johnstone by e-mail on September 29, 2000, advising: " I am still looking for an opportunity. Do you have one: a second year position, a 3 month contract, a non-credit experience in the SICU of one month duration, etc. ... Please try to help out. Thanks." Dr. Johnstone replied, in part, "I will probably accept your offer to train for a

couple months at WVU for no-credit, and if everything is satisfactory then admit you into the anesthesiology residency."

6. By letter dated November 6, 2000, Dr. Johnstone offered Grievant a Residency with the Department of Anesthesiology beginning on November 15, 2000. The letter stated the following contingency: Because of the non-traditional nature of your background, we have agreed to a unique schedule for your training. You will train in our Intensive Care Unit until the end of December, at which time we will decide if you should enter clinical anesthesiology training. You will start your CA-1 training for ABA credit on January 1, 2001. If at any time during your training your performance is not satisfactory, I will notify you, and you will accept this decision without a challenge.

Grievant signed and returned the letter, indicating that she accepted the position as offered.

7. A standard "Notification of Terms and Conditions of Appointment" issued to medical and dental residents was signed and dated by Grievant on November 30, 2000. The document, signed by Dr. Robert D'Allessandri, Dean of the School of Medicine, provided that the appointment was effective from November 15, 2000, through June 30, 2001, with an annual salary of $36,300.00.

8. Grievant completed the non-credit assignment in the Surgical Intensive Care Unit (SICU) from November 15 through December 31, 2000. Effective January 1, 2001, Grievant officially began work as a Resident in the Department of Anesthesiology.

9. Dr. Johnstone advised Grievant on January 12, 2001, that her residency was not progressing successfully, and rescinded her clinical privileges. On or about the same day, a male resident complained that Grievant had been harassing him by repeatedly asking him out, leaving long, angry messages on his answering machine, and notes on his door. He also opined that she had rearranged the call schedule so they would be on call together the upcoming weekend. An e-mail from Sandra Price indicates that the residenthad complained previously, and that the harassment stopped for a brief time, but had started again. **(See footnote 1)**

10. Dr. Johnstone met with Grievant, and her mother, on January 15, 2001, to discuss his decision. Dr. Johnstone notified Grievant by letter dated January 19, 2001, that her attempt at anesthesiology training had "not worked well," and that her "style and talents seem better

suited for more deliberative disciplines than one centered in surgical operating rooms." Dr. Johnstone reiterated their original agreement, and stated that her performance had not been satisfactory.

11. Performance evaluations completed by the faculty rated Grievant for her work in December and January work as follows (1-5 is unacceptable to excellent):

	Dec.	Jan.
Essential Attributes As Listed in ABA (Average)	2.8	3.0
Is honest and ethical	4.0	3.0
Is reliable, conscientious and responsible	3.0	3.0
Learns from experience	2.0	3.0
Reacts to stressful situations in an appropriate manner	2.0	3.0
Has adequate cognitive, physical, sensory, and motor faculties	3.0	3.0
Acquired Character Skills (Average)	3.0	2.75
Communicates effectively	4.0	2.0
Demonstrates Commitment to continued education	2.0	3.0
Is adaptable and flexible	3.0	3.0
Is complete & accurate in record keeping	3.0	3.0
Knowledge (Average)	2.0	2.0
General medicine appropriate for practice of anesthesiology	2.0	2.0
Clinical anesthesia	_	2.0
Judgment (Average)	2.0	3.0
General medicine appropriate for practice of anesthesiology	2.0	3.0
Preoperative preparation	_	3.0
Intra-operative Management	_	3.0
Post-operative care	_	3.0
Clinical Skills (Average)	_	3.0
General preparation	_	3.0
General anesthesia	_	3.0

Technical Skills (Average) _ 3.0

Airway management: Mask cases and intubations _ 3.0

The following comments were included on the form:

December: Lisa was not adequately prepared for call responsibility in the SICU. She did not know enough about all the patients (as opposed to her patients) and did not appear to pay attention to others on rounds to find out. She was easily distracted and would occasionally make inappropriate or inane comments that seemed to indicate lack of attention. I was surprised her knowledge base was so poor since she seemed to put more effort and enthusiasm forward.

January: Extremely bizarre interactions with residents, nurses and staff. Several nurses made comments to me about her behavior and comments after she would leave the room. Very poor knowledge despite previous training. Limited exposure.

12.

Attached to the performance evaluation was a narrative which stated:

During Dr. Jacobs' time in the department in January I had the opportunity to work with her on one occasion. She called me with preoperative evaluations on Jan. 5 for cases on Mon. Jan. 8. During the conversation Dr. Jacobs was disorganized, confused to the point of completely repeating one preop despite my stating we had already discussed that patient, and generally below par for a resident who has had experience in any “rounds” type situation. Upon looking at the schedule myself on call that weekend, I recognized that Dr. Jacobs had misread the schedule and that she was in room 204, not 210. I tried to contact her that Sat. However there was no telephone number in the department or with the hospital operator. When I saw her Monday morning I told her she had misread the schedule and was in 204 not 210. She insisted that someone must have changed her assignment over the weekend, that when she had checked Friday she was in 210. When I told her I had made the schedule with Dr. Graf onFriday and that no one had changed the schedule, she had made a mistake, she became flustered and left the room. Dr. Jacobs's willingness to lie shows a completely inappropriate ethic for the specialty of anesthesia and potentially for a physician in any specialty, I strongly

recommend that she be dismissed from the department.

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 §18-29-6; Olmsted v. Bd. of Directors/Bluefield State College, Docket No. 98-BOD-108 (Oct. 21, 1998); 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 Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

___WVU argues that Grievant was properly dismissed pursuant to her agreement with Dr. Johnstone that she would have a three month trial period. Additionally, WVU argues that Grievant falsified her application for Residency when she failed to disclose that she had been dismissed from Boston University and from five previous residencies for similar misrepresentations/falsifications. (See footnote 2) **WVU next argues that Grievant fraudulently induced Dr. Johnstone into offering her a unique three-month position wherein she would agree to termination if her performance was not satisfactory._____Grievant asserts that the dismissal was a breach of the residency agreement, and school policy which provides for the use of progressive discipline. Grievant alleges that the decision was based on inadequate information, and for a non-education, non-employment issue, the sexual harassment complaint. Citing a number of examples, Grievant asserts that she is the victim of discrimination, as other male residents were not dismissed for similar offenses. Finally, Grievant argues that the dismissal was arbitrary and capricious because she was given no feedback on her performance, and no opportunity to improve, and the action was disproportionate to the offense.**

___Notwithstanding Dr. Johnstone's vague statements regarding Grievant's “style,” the evidence establishes that her dismissal was based upon her unsatisfactory performance. Faculty reviews were poor, and Dr. Johnstone personally observed in January that she was not able to prioritize well, and once even left the operating room. Dr. Johnstone denied that Grievant was dismissed due to a complaint by a male resident, and that his decision had

already been made prior to learning of the matter. Accepting this testimony, the dismissal shall be reviewed as if the complaint had not occurred.

As noted throughout the record, Grievant's acceptance at WVU was unique. Although she requested a three-month trial period, she accepted Dr. Johnstone's counter- offer of a six-week trial period in SICU, and then admittance to the anesthesiology residency. Retaining the residency was contingent upon her performance. While Grievant's work in SICU was only marginally acceptable, if that, Dr. Johnstone testified that he still wanted to give her an opportunity in anesthesiology. However, it quickly became apparent to him that Grievant could not be successful in that specialty. At level two, Grievant testified that she believed that if she successfully completed the trial period, shewould be granted the residency with no contingencies. Grievant cites the residency agreement, and the fact that she had not been told her SICU experience was unacceptable, to support her claim.

Certainly, the offer that Dr. Johnstone extended to Grievant was significantly different from her proposal. Nonetheless, she accepted the shorter non-credit experience and the residency, which would be contingent upon her continued satisfactory performance throughout the program. The standard contract issued to residents was completed to insure that Grievant was paid for her work. The contract was signed and dated in mid- November, and there is no evidence that Dr. Johnstone had changed his mind about the offer, or ever intended that Grievant be awarded an unconditional residency agreement. Therefore, the residency agreement issued to Grievant for the purpose of generating her salary and benefits, is otherwise void. Even if the contract should be binding, WVU still retained the authority to dismiss Grievant for unsatisfactory performance.

Grievant also argued her dismissal was discriminatory because male residents in similar situations were not treated so harshly. Discrimination is defined in W. Va. Code § 18-29-2(m), as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." To establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m), a grievant must demonstrate the following:

(a) that she is similarly situated, in a pertinent way, to one or more other employee(s);(b) that she has, to her detriment, been treated by her employer in a manner that the other

employee(s) has/have not, in a significant particular; and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once a grievant establishes a prima facie case of discrimination, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

Grievant has not established a prima facie case of discrimination. While she did elicit testimony from Dr. Johnstone that male residents who had experienced academic problems were not dismissed, Grievant did not demonstrate that any other resident had entered the program on a probationary basis, or demonstrated the lack of focus and knowledge to the same degree. Grievant did not establish she was similarly situated to any resident who had been treated differently than she, within this set of circumstances.

Grievant also argues that the dismissal was arbitrary and capricious because it was based in inadequate information, and she was given no opportunity to improve. Generally,an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health & Human Res., Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

Dr. Johnstone testified that he based his decision on faculty input and his own observations. All new residents had been given a standardized test early in January; however, the answer sheets had been lost. The test results were not have been available in any case, at the time Dr. Johnstone made his decision. While Grievant functioned as a resident for only eight working days, Dr. Johnstone and the other faculty, have a great deal of experience working with residents, and the decision was not made lightly. Finally, Grievant was not given an opportunity to improve because it was determined that she simply was not focused enough, and could not make quick decisions on a minute by minute basis, factors which are of extreme importance in the operating room. As Dr.Johnstone stated, he is responsible for the lives of patients, and simply cannot put them in danger. The decision to dismiss Grievant was not arbitrary and capricious.

The argument Grievant's dismissal 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 an inherent disproportion between the offense and the personnel action." Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989). 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, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. Pingley v. Div. of Corrections, Docket No. 95-CORR-252 (July 23, 1996). 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 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). Given the nature of the faculty concerns, and the potential harm which could be incurred, dismissal was not excessive in this instance.

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. 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 § 18-29-6; 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 Res., 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 residency agreement issued to Grievant for the purpose of generating her salary and benefits, is otherwise void. Even if the contract should be binding, WVU still retained the authority to dismiss Grievant for unsatisfactory performance.

3. Discrimination is defined in W. Va. Code § 18-29-2(m), as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

4. To establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m), a grievant must demonstrate the following:

(a) that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once a grievant establishes a prima facie case of discrimination, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981);

Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

5. Grievant did not establish a prima facie case of discrimination because she failed to prove that she was similarly situated to any resident who had been treated differently, within this set of circumstances.

6. Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health & Human Res., Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capriciousactions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

7. The decision to dismiss Grievant was based upon faculty observations of her unsatisfactory performance, and was not arbitrary and capricious.

8. The argument Grievant's dismissal 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 an inherent disproportion between the offense and the personnel action." Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

9. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. Pingley v. Div. of Corrections, Docket No. 95-CORR-252 (July 23, 1996). 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.

10. Mitigation is not appropriate in this situation. Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. 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 15, 2004 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 ***The record does not reflect Ms. Price's position.***

Footnote: 2

[2]While these charges appear to be true, they were not stated as reasons for the dismissal, and will not be considered at this time.