JANE ANN WITHROW,

Grievant,

v. Docket No. 03-WCC-228

WORKERS COMPENSATION COMMISSION,

Respondent.

D E C I S I O N

Jane Ann Withrow ("Grievant"), filed a grievance directly to level four, as is permitted by W. Va. Code § 29-6A-4(e), on July 30, 2003, following the termination of her employment by Workers' Compensation Commission ("Respondent"), as a Secretary I. Grievant stated the action was taken without just cause, and requested reintstatement with back pay, her record cleared, and to "be made whole in every other way." A level four hearing was conducted by Administrative Law Judge Mary Jo Swartz on November 12, 2003. ALJ Swartz subsequently resigned, and the hearing was concluded by the undersigned on January 8, 2004. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before April 8, 2004. Grievant was represented throughout these proceedings by Richard L. Patrick of AFSCME, and Respondent was represented by counsel, David M. Fryson.

Upon review of the record in its entirety, the following findings of fact are made based upon a preponderance of the evidence.

Findings of Fact

___1. Grievant was employed by Respondent in September 1999 as a Secretary I in the Office of Medical Services (OMS) Unit of the Workers' Compensation Division, and held that position until her dismissal, effective August 6, 2003. 2. By memorandum dated May 2, 2001, Nurse Supervisor Margaret Kelly advised Grievant that her attendance the prior three months had not been acceptable, and she was being placed on restricted leave. Specifically, any sick leave would require a physician's certification upon return to duty, and any annual leave would require approval "as far in advance as possible, but at least equal to the time requested off" consistent with Respondent's Administrative Directive 6700.40. The leave

restriction was to be reviewed in six months, or after Grievant had acquired forty hours of annual and forty hours of sick leave. Grievant never accrued the requisite hours to return to unrestricted leave.

3. Kay Probst assumed the duties of Director of Nursing and Medical Services on April 29, 2002. Shortly thereafter, two doctors presented her copies of their medical transcriptions completed by Grievant. The documents included multiple typing errors, both on the first and second drafts. The doctors expressed concern, stating that Grievant was not saving the initial corrections, as the first errors would reappear on the corrected copy. Common errors included deleting words, such as "not," and misspellings, even when the names or words were spelled on the tape. As it was an ongoing problem, the doctors no longer trusted Grievant, causing them to re-read the entire report, and decreasing their productivity. In another case, Grievant erased a two and one-half hour tape, requiring the doctor to recreate the report. Ms. Probst notified Grievant verbally and by memo dated July 10, 2002, that effective immediately, her duties were to provide clerical support for the Interdisciplinary Examining Board (IEB) Unit and the Independent Medical Examinations (IME) Unit. The medical transcription was assigned to another employee, with Grievant only to perform the duty as a back-up, when absolutely necessary. Grievant was unhappy with the reassignment of duties and promptly filed a grievance over the change. 4. On June 25, 2002, Ms. Probst verbally warned Grievant not to report to work under the influence of pain medication after Grievant was removed from a CPR training session suffering from equilibrium problems and sleepiness. Grievant advised Ms. Probst that she had been prescribed Fiorinal for shoulder pain. On August 8, 2002, Grievant underwent an arthroscopic procedure on her left shoulder to repair a torn rotator cuff. Grievant did not return to work until December 6, 2002.

5. Grievant's 2001-2002 Performance Appraisal states the essential duties and responsibilities of her position to include: transcription of OMS physician dictation; preparation of IME information; and maintain claimant files. Ms. Probst rated Grievant as "Meets Expectations" on the annual appraisal, which was dated October 31, 2002, but actually only covered the period of May through August.

6. Ms. Propst orally reprimanded Grievant in December 2002, for insubordination as evidenced by Grievant's failure to complete her assigned duty to sort and distribute incoming

mail in the morning and afternoon, her failure to sign out when out of the building, leaving her assigned work station without notifying her supervisor, maintaining an excessive amount of supplies, contrary to Ms. Propst's verbal direction, and which were improperly obtained from another Cost Center in the building; frequent conversations with other staff, interrupting their work. Grievant was advised that failure to comply with all directives could result in further disciplinary actions, including written reprimand, suspension, and termination.

7. The oral reprimand was memorialized in a memorandum by Ms. Probst, dated December 13, 2002. At this time she also notified Grievant that effective Monday, December 16, 2002, Grievant was directed to keep a daily work diary with explanation ofwork performed, including time started, time completed, description of work, claimants name, and for whom the work was being performed. The work diary was to be placed in Ms. Probst's mailbox by 4:30 p.m. each working day.

8. In April 2003 Grievant received a written reprimand for inappropriate/unacceptable behavior with a vendor. Ms. Propst stated in her memorandum of the sixteenth that on April 15, 2003, she received a telephone call from a vendor at the National Medical Evaluation Services, which provides out of state IMEs. The vendor explained that Grievant called her on April 14, 2003, to request information relating to a certain physician, and asking for demographic information. The vendor stated that when she "attempted to clarify what you were asking for, you continued to talk over, therefore not receiving the information she was presenting." The vendor characterized Grievant's demeanor as "very, very, very rude behavior," and stated it was not appreciated and would not be tolerated in the future. Ms. Probst reminded Grievant that her behavior during a staff meeting on April 2, 2003, including dozing off and cracking of chewing gum, had previously been addressed with her, and advised Grievant that her failure to present herself in a professional manner while performing her assigned job functions could result in further disciplinary actions.

9. Grievant was issued a written reprimand for insubordination by Ms. Propst on May 2, 2003. Ms. Propst stated that contrary to her directions and the oral reprimand of December 13, 2003, a Supervisor from the sixth floor advised her that on April 28, 2003, Grievant interrupted one of her employees by trying to grab a pen from her desk, and then opening the employee's desk drawer looking for pens. Grievant then went to another employee's desk and grabbed

one of her pens. Grievant was reminded that she was notto obtain supplies from other cost centers, and that supplies are available on the Office of Medical Services Floor for all OMS employees.

10. An audit of Grievant's internet usage was conducted on April 14, 2003, at Ms. Propst's request. The report completed by an Information Security Officer, concluded that 'Her personal web browsing is very extensive...that [Grievant] spends a huge amount of time surfing the Internet at anyservicemember.org (which is a forum for people to post messages to members of the armed service), various search engines looking for music videos and lyrics to songs, Yahoo to listen to music videos, and on-line games. The logs show she has an active account at anyservicemember.org and posts information there regularly."

11. Grievant's office mate, Margaret Kelly, filed several reports in April 2003, stating that Grievant spent an excessive amount of time placing and receiving personal phone calls.

12. Grievant's performance evaluation, dated April 16, 2003, indicated that she did not meet expectations. Ms. Probst commented, "[p]erformance results show deficiencies which seriously interfere with the attainment of job and performance expectations." Under "Performance Development Needs," the supervisor wrote:

Decrease in volume of assigned work being performed, as documented no EXTR letters sent per Excel file since 3/22/2003, with approximately 100 requests being entered per day by claims adjusters. Inappropriate use of the WC computer for internet browsing. Documented personal phone calls. Unacceptable workplace behavior including complaint by WV Workers Comp Vendor MLS.

13. On April 23, 2003, Ms. Propst recommended to Acting BEP Commissioner Gregory A. Burton that Grievant be given a five day suspension without pay, citing the following occurrences:

6/25/02 verbal reprimand related to taking prescription pain medication at work and unable to perform her assigned duties. She was sent home with her mother.

12/13/02 verbal reprimand related to insubordination of not performing her assigned job functions.

4/2/03 dozed off in OMS staff meeting with eyes rolling back in her head and cracking of

chewing gum.

4/10/03 marked reduction in assigned mailing of letters and forms per computer printout.

4/16/03 verbal reprimand, using Special EPA2, for computer internet violation per hard-drive audit as in clear violation of policies and verbal complaint of vendor related to rudeness in a telephone conversation on 4/14/03.

4/17/03 written reprimand related to verbal complaint of rudeness to the vendor.

14. Commissioner Burton approved the recommendation to suspend Grievant from May 22 through May 29, 2003, based upon the events cited by Ms. Propst and a subsequent written reprimand given on May 6, 2003, after Grievant again attempted to secure office supplies from another unit.

15. On July 11, 2003, Grievant completed a medical transcription contrary to Ms. Propst's directive, and then misrepresented that Cindy Pettrey, a Nursing Supervisor, and the transcriptionist, both gave their approval for her to do so. Grievant also advised a doctor that she was again doing transcription. 16. On July 17, 2003, Ms. Probst again denied a request from Grievant that she be allowed to transcribe a physician's dictation. Within five minutes, Grievant requested five and one-half hours of annual leave, stating that she had an urgent meeting with her attorney at 11 a.m. After the leave request was also denied, Grievant changed her request to make a 1p.m. appointment, if it could be changed. Grievant's request to leave at 12:50 was denied since she had already taken her break. Grievant ultimately left the office at 1 p.m. for the 1 p.m. meeting, leading Ms. Probst to conclude that she had misrepresented the truth of the matter.

17. During a conference on July 18, 2003 with Dr. Randall Short and Ms. Probst, Grievant stood up and stated that she was experiencing a great deal of stress because her grandmother was ill, and left the office. She returned shortly with a leave slip for the remainder of the day, stating that her mother had just called and her grandmother had been taken to the hospital. Ms. Probst advised she would check with Personnel, and Grievant stated that “if anything happens to my grandmother and I don't get to see her, it will be your fault.” After being advised to grant the leave, Ms. Probst found that Grievant had already left the

office. Grievant returned at 12:15 p.m. to inquire whether her leave had been approved. When asked why she didn't call from the hospital, Grievant stated she did not want to bother Ms. Probst, and that her aunt had picked her up and brought her back to work while her mother stayed at the hospital. Grievant then stated that her grandmother had been admitted to the hospital the previous night. Ms. Probst advised her that if this information was found to be untrue, Grievant would be subject to disciplinary action. Later that day Ms. Probst and another employee were walking during their lunch break. The other employee recognized Grievant's mother, who was cutting grass. Whenasked about her mother, Grievant's mother stated that she was doing well and was home in Montgomery. Grievant was then observed walking on nearby Noyes Avenue.

18. Responding to an inquiry regarding her grandmother on July 21, 2003, Grievant advised Ms. Probst that her mother came to the hospital after cutting the grass, and mentioned meeting Ms. Probst.

19. On July 22, 2003, Commissioner Burton accepted Ms. Probst's recommendation, and notified Grievant that she was dismissed, effective August 6, 2003. The reason given for the dismissal was “disruptive conduct among your coworkers and insubordination.”

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; 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.

State employees, such as Grievant, who are in the classified service can only be dismissed 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); W. Va. Code § 29-6A-6; 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).

Respondent argues that it has established just cause for Grievant's termination by proving that, despite repeated reprimands, counseling, and even a suspension, she engaged in insubordination as demonstrated by her willful failure to obey the reasonable orders of her supervisor. Respondent further asserts that it has proven that Grievant engaged in other, unacceptable behaviors at the workplace that caused serious disruptions, including misrepresenting information relating to her assignments and absences.

Grievant asserts that Respondent failed to establish good cause for her termination as the testimony of Ms. Probst and Ms. Kelly was not credible, that there was no insubordinate activity, and Respondent failed to implement a progressive discipline plan. Grievant further asserts that termination was too severe a penalty for any misconduct in which she may have engaged, and the discipline should be mitigated. Finally, Grievant argues that Ms. Probst engaged in harassment, and that several witnesses had contributed to the defamation of her character when testifying regarding her rumored drug usage.

Credibility

Because Respondent's case primarily relies upon the testimony of Ms. Probst, Grievant's assertion that she lacked credibility will be addressed first. The following criteria are considered when assessing a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward theaction; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. See Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD-216 (Dec. 28, 1999).

The testimony of Ms. Probst and Ms. Kelly was credible. Their statements were believable, clear, consistent with each others, and internally consistent. Much of their testimony was corroborated by physicians who worked with Grievant. Although the witnesses may have mistaken Dr. Becker for Dr. Gerbo, or experienced similar errors in recollection, there was no evidence of blatant untruthfulness or dishonesty. Additionally, there was no demonstration of

bias, only frustration. In viewing the evidence in its entirety, the testimony of Grievant and Ms. Probst does not differ in any significant regard.

Insubordination

Grievant has been charged with insubordination, defined as the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle v. Bd. of Directors/So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). In order to establish insubordination, the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." Butts v. Higher Educ. Interim Governing Bd., 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). See Santer v. Kanawha County Bd. of Educ., Docket No. 03-20-092 (June 30, 2003); Riddle v. Bd. of Directors/So. W. Va.Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989).

"Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dep't, Docket No. 90-H-128 (Aug. 8, 1990). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. Maxey v. W. Va. Dep't of Human Resources, Docket No. 93-HHR-424 (Feb. 28, 1995).

Respondent has proven by a preponderance of the evidence that oral and written reprimands, and even a suspension, did not correct Grievant's failure to follow reasonable directives of her supervisor. Grievant testified on cross examination that the transcription work was reassigned in July 2002, and that she was to act as backup only when the other employee was absent. The evidence establishes that Grievant advised Ms. Probst on numerous occasions that she wanted to continue to do the transcription work, and on July 11, 2003, did so, when the regular transcriptionist was at work, in willful disregard of Ms. Probst's reasonable directive.

Progressive Discipline

Grievant was given the benefit of progressive discipline, as evidenced by the reprimands

and suspension imposed prior to the dismissal. Grievant's apparent belief that she was entitled to a progressive discipline plan of improvement is mistaken.

Mitigation 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 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).

"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). 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, 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'sassessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine 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 continuing disruptions, insubordination, and misrepresentations, 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.

Harassment

Finally, Grievant claims that many actions taken regarding her by Ms. Probst constitute harassment. W. Va. Code § 29-6A-2(l) defines harassment as "repeated or continued disturbance, irritation, or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession." While Grievant appears to find nearly every interaction with Ms. Probst disturbing, irritating, and annoying, the actions taken by the supervisor to direct Grievant's work or discipline her were a direct result of Grievant's own actions. Supervisory and disciplinary measures do not constituteharassment. Rider v. Bd. of Trustees/Marshall University, Docket No. 99-BOT-348 (Apr. 7, 2000). (See footnote 1)

The above findings of fact and discussion are supplemented by the following 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 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,

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); W. Va. Code §29-6A-6; 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. In order to establish insubordination, the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." Butts v. Higher Educ. Interim Governing Bd., 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). See Santer v. Kanawha County Bd. of Educ., Docket No. 03-20-092 (June 30, 2003); Riddle v. Bd. of Directors/So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989).

4. BEP has proven by a preponderance of the evidence that Grievant, acting willfully and intentionally, engaged in ongoing behavior contrary to the reasonable directives of her supervisor, i.e., insubordination, which is misconduct of a substantial nature directly affecting rights and interests of the public.

5. 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).

6. "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. SummersCounty 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).

7. "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 Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996).

8. Given the charges proven against Grievant, the long-term continuation of the situation, and the failure of progressive discipline to correct the behavior, the penalty is not disproportionate or excessive, nor is the penalty arbitrary and capricious. See Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994).

9. W. Va. Code § 29-6A-2(l) defines harassment as "repeated or continued disturbance, irritation, or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession."

10. Supervisory and disciplinary measures do not constitute harassment. Rider v. Bd. of Trustees/Marshall University, Docket No. 99-BOT-348 (Apr. 7, 2000).

Accordingly, this grievance is DENIED .

Any party may appeal this decision to the Circuit Court of Kanawha County. 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 § 29-5A-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: MAY 25, 2004

_____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

.Grievant's claim of defamation was not raised until after the level four hearing and will not be considered at this time.