THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

HELENA HABIB,

Grievant,

v. DOCKET NO. 06-HHR-109

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/

MILDRED MITCHELL-BATEMAN HOSPITAL,

Respondent.

DECISION

Grievant Helena Habib filed this grievance on February 1, 2006, challenging the propriety of a written reprimand. She seeks to have the reprimand rescinded and removed from her personnel file.

A level four hearing was held in the Grievance Board's Charleston office on May 24, 2006. Grievant was self-represented, and Respondent was represented by Jennifer K. Akers, Assistant Attorney General. The matter became mature for decision on June 23, 2006, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Issues and Arguments

Grievant claims a written reprimand is a disproportionate response to her use of the word “gay” in a personal conversation in the workplace, especially since she was referencing a person who is not an employee and who actually is gay, and given the fact that the employee who complained about her use of the word openly describes herself as “gay.” Respondent maintains that a written reprimand is an appropriate attempt to curb offensive conduct in the workplace and to prevent a working environment characterized by discriminatory ridicule and insult. Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievant is employed by Respondent as the Nurse Manager for Unit 2 at Mildred Mitchell-

Bateman Hospital.

2. On December 23, 2005, Grievant was engaged in a private conversation with a coworker, Cordelia Metsel, in the charting room on Unit 4. Ms. Mestel was relating to Grievant that she had recently been talking to a former hospital employee, and had told him that they now had a female version of him at the hospital, referring to Grievant, who apparently has a similar supervisory style. Grievant replied, “But he's gay,” referring to the former worker.

3. Patricia Deal, a Health Service Assistant who works on Unit 4, overheard the conversation, and interjected, “What's wrong with that?” Ms. Deal describes herself as “openly gay,” and this fact was known to Grievant. Ms. Deal had worked under Grievant's supervision until she was moved to another unit due to personality conflicts.

4. Ms. Deal reported the conversation to her supervisor, and stated she was very upset and offended by what she heard.

5. Patricia Ross, Director of Nursing and Grievant's supervisor, issued Grievant a written reprimand on February 1, 2006. The reprimand stated, in part:

> This action has become necessary due to your failure to meet the standards of conduct expected of an employee in a position of leadership with Mildred Mitchell-Bateman Hospital. Specifically, on December 23, 2005, you were engaged in a conversation with several other employees part of which involved a general comparison of you and a former employee. After a statement was made suggesting similarities, you responded with the statement, “But he is gay.” Trish Deal, Health Service Assistant, who isopenly gay, was within ear shot [sic] of your comment, and was obviously offended by this thoughtless comment. Although sexual orientation is not protected under Federal or State law, as a leader, you are responsible for protecting the dignity of all employees and are expected to strive for a working environment free of discriminatory ridicule, and insult.
>
> I know that you pride yourself on being professional in your role as Nurse Manager. However, this type of insensitive comment can have a negative impact upon the working relationships between managers and employees for quite some time. As Nurse Manager, I expect you to work to heal hurt feelings and quash the perception of an organization reactive to personalities rather than the quality of work each employee exhibits. In addition, I hope this incident will not discourage you from enjoying your interaction with staff. However, it should impress upon you that as a role model, each action you display and each comment you utter has great importance to the employees who surround you.

6. Ms. Ross admitted she did not believe Grievant's comment rose to the level of “discriminatory ridicule or insult” as she used those terms in her warning letter.

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. (See footnote 1) Although Grievant believes her warning was for using the word “gay,” she ignores such fundamental considerations as context and professionalism that appear to be the focus of the warning letter. Ms. Ross made it clear at the hearing that her intent was to focus on the fact that, as a leader, Grievant just will not admit that part of her job is to foster a nurturing environment for subordinate employees consistent with the mission of the hospital. Nevertheless, the charges laid out in the warning letter have not been proven, beyond the fact that Ms. Deal stated she was offended by Grievant's statement. Given the facts that Grievant and Ms. Deal had a prior negative history that resulted in the reassignment of Ms. Deal, there is reason to infer that she intentionally escalated her reaction to cause trouble for Grievant. Certainly, her reaction appeared to have been an overreaction. Grievant was not speaking to her or about her, and there is no evidence she intentionally made the comment to offend Ms. Deal, who apparently walked into the room in the middle of the conversation. While Ms. Deal lacks credibility in her expressions of indignation, Grievant's express bewilderment at Respondent's concerns is clearly disingenuous.

Although Respondent did not “throw the book” at her in terms of discipline for the incident, as Grievant suggests, the written warning imposed is not supported by the evidence. “Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation.” (See footnote 2) Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge cannot substitute his judgement for that of the employer. (See footnote 3) 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, orreflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. (See footnote 4)

Given Ms. Ross' disavowal of the warning letter's apparent accusations against Grievant, specifically that Grievant's comment did not actually constitute “discriminatory ridicule, and insult,” and given that Respondent admits simply using the term “gay” to describe someone who is gay is not

per se offensive, a written warning is disproportionate. However, some recognition must be made to the fact that Grievant obviously intended some negative connotation, as nothing else would explain the *non sequitur* nature of her response. As Respondent pointed out, one's sexual orientation is simply irrelevant when discussing professional matters at work, and in this case in particular, had nothing to do with whether Grievant and the former employee managed their departments in a similar fashion. Respondent was correct in perceiving that Grievant needs a reminder about what is an appropriate discussion topic in a professional setting, and that as a leader she serves in a position of higher scrutiny and as a role model. Nevertheless, escalating that advice or guidance to a disciplinary action did not serve that purpose.

The following conclusions of law support this discussion:

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).

2. “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 to determine a penalty in these types of situations, and the undersigned Administrative Law Judge cannot substitute her judgement for that of the employer. *Jordan v. Mason County Bd. of Educ*., Docket No. 99-26-8 (July 6, 1999); *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).

3. 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).

For the foregoing reasons, this grievance is hereby **GRANTED**, in part. Respondent is ordered to

remove any reference to a written warning from Grievant's personnel records. However, Respondent is ordered to verbally counsel Grievant on appropriate workplace demeanor and conduct, and how to avoid similar complaints about her conduct in the future.

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 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.

August 14, 2006

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988).

Footnote: 2

Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp., Docket No. 96- HHR-183 (Oct. 3, 1996).

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Jordan v. Mason County Bd. of Educ., Docket No. 99-26-8 (July 6, 1999).

Footnote: 4

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