THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

REGINA HUDSON

Grievant,

v.

Docket No. 07-HHR-311

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/

WELCH COMMUNITY HOSPITAL,

Respondents.

DECISION

Regina Hudson, Grievant, initiated this proceeding on October 27, 2006, following the termination of her employment at Welch Community Hospital ("WCH"). Her Statement of Grievance asserts she was wrongfully terminated, WCH failed to follow their progressive discipline policy, and her due process rights were violated. Grievant seeks reinstatement and back pay as her relief.

Pursuant to Grievant's request, Administrative Law Judge Campbell entered an Order remanding the grievance to level one on November 16, 2006. The grievance was denied at level two and level three. The grievance was noticed for a level four hearing to be conducted on January 4, 2008, at the Board's Beckley location. Administrative Law Judge Gillooly entered an Order on January 22, 2008, reflecting that the parties in the matter desired to submit the grievance on the record. For reasons more fully stated in that Order, the matter was reassigned to the undersigned Administrative Law Judge to issue a decision based on the lower level record. Grievant appeared by counsel, Kenneth E. Chittum, Esq.; Respondent appeared by Jennifer Akers, Assistant Attorney General. This matter became mature for decision on January 4, 2008.

SYNOPSIS

Grievant was employed by WCH as an LPN until her termination on October 11, 2006. WCH indicated the reasons for the termination were unprofessional behavior, and possible confidentiality violations involving fellow employees. In particular, Grievant admitted that she entered the office of her Nurse Manager under false pretenses, by convincing a hospital security guard to unlock the office door because she needed access in order to retrieve a patient's chart. Grievant was observed looking through the top left desk drawer in the Nurse Manager's office by the Nurse Supervisor.

Grievant falsely stated to the Nurse Supervisor that she was able to enter the Nurse Manager's office by simply jiggling the door knob. Grievant admitted to the Nurse Supervisor that she had entered the Nurse Manager's office in order to see if she had been disciplined for a prior action. Subsequently, Grievant approached the hospital security guard and asked him to lie about letting her into the Nurse Manager's office. Grievant maintains that she was wrongfully terminated, her due process rights were violated, and WCH failed to follow its progressive discipline policy.

Based upon a detailed review of the record in its entirety, the undersigned makes the following findings of fact:

Findings of Fact

1. Grievant was employed as a Licensed Practical Nurse by WCH. (See footnote 1)

2. On August 19, 2006, Deborah Altizer, Nursing Supervisor, observed Grievant in the office of Maxine Mosko, Maternal and Child Health Nurse Manager. Ms. Altizerwitnessed Grievant going through the top desk drawer of Ms. Mosko's desk. Grievant had obtained entry into the office by instructing the hospital security guard to unlock the door.

3. Later that afternoon, Grievant paged Ms. Altizer to the obstetrics floor of the hospital. Grievant told Ms. Altizer that she did not want Ms. Altizer to think badly of her. Grievant explained to Ms. Altizer that she had just jiggled the door knob to Ms. Mosko's office, and the door opened. Grievant indicated she was in Ms. Mosko's office to look at her personnel file out of concern that she had been written up for calling off work. (See footnote 2) Ms. Altizer reported this information to Patricia Martin, Chief Nursing Officer.

4. At some point between August 19, 2006, and September 6, 2006, Grievant instructed the hospital security guard, Shiloh Hammonds, to say that Ms. Mosko's door had been unlocked on August 19. Mr. Hammonds responded that he would not lie about unlocking the door for Grievant, and reported the incident.

5. On September 6, 2006, Mr. Hammonds informed Ms. Martin, Chief Nursing Officer, that Grievant had asked him on August 19, 2006, to unlock Ms. Mosko's office so that she could retrieve a patient's chart. After unlocking the door, Mr. Hammonds was paged to come to another area of the hospital. Grievant told Mr. Hammonds to respond to the page, and that she would close the door after she had gotten the chart.

6. On August 31, 2006, Grievant delivered a note to Ms. Martin indicating that she was sorry for her actions. Grievant wrote that “I know I should not have been in Ms. Mosko's office at that time. Shilo did let me in, but I didn't want him to get in any troublebecause of my actions, that would not have been fair.” Respondent Exhibit One, Level Three. The note attempts to explain that other employees had been documenting her time, had copies of her time sheets, and she felt that was an invasion of her privacy.

7. Following a predetermination conference on October 11, 2006, Grievant's employment was terminated from WCH. The reasons cited were unprofessional behavior, and possible confidentiality violations of other employees.

8. Grievant did not testify in this case, and presented limited evidence. Grievant and Respondent agreed to submit this grievance on the sparse record.

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. *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 & 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.* (See footnote 3) Permanent state employees who are in the classified service can only be dismissed for “good 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). In the instant grievance, WCH has met its burden of proving that Grievant's conduct was of a substantial nature directly affecting the rights and interest of the public in

light of the severity of Grievant's deceitful actions.

The record of this matter reflects that Grievant entered Ms. Mosko's office under false pretense by informing the security guard that she needed access in order to retrieve a patient's chart. The lower level record also reflects that Ms. Mosko is the Maternal and Child Health Nurse Manager and, in that capacity, did not keep patient charts in her office. Afterwards, Grievant admitted to Ms. Altizer she entered Ms. Mosko's office to ascertain if she had been written up for a prior action. Grievant compounded her deceit by falsely reporting to Ms. Altizer that she had managed to enter Ms. Mosko's office by simply jiggling the door knob. Grievant then attempted to conspire with the security guard to cover up her previous deceit by encouraging Mr. Hammonds to lie about letting her into Ms. Mosko's office. WCH had serious doubts about Grievant's veracity, and was justified in their opinion that her continued employment was not in the best interest of the Hospital.

Respondent has proven by a preponderance of the evidence that Grievant's employment was terminated for good cause. The lower level record establishes thatGrievant was untruthful in gaining access to the private office of her direct supervisor. Grievant had no right to be in this area, no valid hospital business to conduct, and she had no permission to be in the office. While the lower level record does not establish Grievant's true purpose entering this office, she admitted that she had no legitimate reason for being there. Upon being observed in her supervisor's office, Grievant was untruthful to another superior as to her reason for being in this office. Shortly thereafter, Grievant asked the security guard to be untruthful for her as a cover up to her house of cards built out of lies.

Grievant's assertions that the progressive discipline policy was not followed, and her due process rights were violated, are not supported by the record. WCH's policy on “Progressive Disciplinary Action” provides for a system that begins with a verbal reprimand, followed by a written reprimand, suspension and then dismissal. However, the policy also specifically states that it should be followed in “most cases,” but that “decisions as to the severity of disciplinary action shall be made on a case-by-case basis.” Further, the policy provides separation from employment may be issued “if an employee commits a singular offense of such severity warranting dismissal.” Given that the undisputed evidence establishes that Grievant entered her Manager's office without permission, lied about her need for entry, asked another employee to lie in order to cover up her own lies; is by any reasonable interpretation, a singular offense of such severity warranting dismissal. Therefore, no violation of the progressive discipline policy has been demonstrated in this grievance. The West

Virginia Supreme Court of Appeals has recognized that "due process is a flexible concept, and that the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) (*citing Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)). "What is required to meet procedural due process under the Fourteenth Amendment is controlled by the circumstances of each case." *Barker v. Hardway*, 238 F. Supplement 228 (W. Va. 1968); *See Buskirk*, *supra*; *Edwards v. Berkeley County Bd. of Educ.*, Docket No. 89-02-234 (Nov. 28, 1989).

It is a well-settled principle of constitutional law, under both the State and Federal Constitutions, that an employee who possesses a recognized property right or liberty interest in his employment may not be deprived of that right without due process of law. *Buskirk*, *supra*; *Waite*, *supra*; *Clark*, *supra*. "An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and an opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494, (1985), *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The question here is whether the due process protections afforded Grievant were sufficient.

It has previously been held that a full-blown hearing is generally not required before an employee may be terminated, but that employee has the minimum pre-deprivation right to at least have an opportunity to respond to the charges either orally or in writing. *Loudermill*, 470 U.S. at 542. An employee is also entitled to written notice of the chargesand an explanation of the evidence. *Wirt*, *supra*. In other words, notice of the charges, explanation of the evidence, and an opportunity to respond is all the due process that WCH is required to provide. *Id*. at Syl. Pt. 3.

Grievant was informed, in writing, of the charges against her, and WCH identified the conduct for which she was to be terminated. Grievant was provided an opportunity to be heard on October 11, 2006, to address the events of August 19, 2006. Grievant was provided with notice of the charge that she had broken into Ms. Mosko's office under false pretenses. A pre-determination conference was held to advise Grievant of the contemplated disciplinary action; she was provided the specific reason for dismissal; and given an opportunity to respond. As noted earlier, in accordance with Grievant's motion, the matter was remanded by Order of the Board for a level one conference at which Grievant appeared by counsel. Accordingly, Grievant's contention that she was denied due process is without

merit.

Grievant has argued that the dismissal was unduly harsh discipline because she did not possess any intent to do any harm. The argument that discipline 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 guiltyof 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 Corr*., 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).

Given the considerable deference afforded to employers in disciplinary situations, the undersigned is not persuaded that the discipline imposed was disproportionate to the offense committed. Especially in view of Grievant's obvious attempt to “cover up” her willfulconduct, the penalty imposed was reasonable. If Grievant had admitted she knew that her actions were wrong at the time she was observed by the Nurse Supervisor in the Nurse Manager's office, the undersigned would likely agree

that termination would seem too severe. However, Grievant has been dishonest regarding her actions in gaining access to an office area she was not authorized to be in. Thereafter, she asked a co-worker to lie for her as a cover up to her previous falsehoods. This set of facts does not warrant mitigation of the discipline imposed. Accordingly, Grievant's request for reduction of the penalty imposed must be denied.

The above-discussion will be supplemented by the following 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. *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 & 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. Permanent state employees who are in the classified service can only be dismissed for "good 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).

3. "Due process is a flexible concept, and . . . the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) (citing *Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)). Prior to an unpaid suspension, an employee is entitled to notice of the charges, an explanation of the evidence, and an opportunity to respond. *Id.* at Syl Pt. 3; *Board of Education of the County of Mercer v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994); *See Starkey v. Jefferson County Bd. of Educ.*, Docket No. 02-19-010 (April 8, 2002).

4. "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).

5. 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 Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

6. Respondent has proven by a preponderance of the evidence that Grievant's employment was terminated for good cause.

7. Respondent provided Grievant with notice of the charges, explanation of the evidence, and an opportunity to be heard prior to termination of her employment. As a consequence, Respondent provided Grievant with necessary due process protections.

8. The progressive discipline policy of Welch Community Hospital was not violated in this matter.

9. Grievant failed to meet her 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.

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. *See* W. Va. Code § 29-6A-7 (repealed, *See Footnote 3, supra)*. Neither the West Public 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 actionnumber so that the record can be prepared and properly transmitted to the appropriate circuit court.

DATE: March 21, 2008

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Ronald L. Reece

Administrative Law Judge

Footnote: 1

Grievant's starting date with the Hospital is not in the record.

Footnote: 2

The exact nature of this possible disciplinary action is not evident from the lower level record. Furthermore, why Grievant felt it necessary to obtain her personnel file in this manner is not evident from the lower level record.

Footnote: 3

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.