THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

RAY WESLEY CRITES,
Grievant,

v. **Docket No. 2011-0216-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/WILLIAM R. SHARPE, JR. HOSPITAL,
Respondent.

DECISION

Grievant, Ray Crites, filed this grievance on August 21, 2010, challenging the termination of his employment with William R. Sharpe Jr. Hospital. He seeks to be made whole, including restoration of all lost wages, with interest, benefits and tenure. Grievant filed this grievance directly to level three. A level three hearing was conducted before the undersigned Administrative Law Judge on August 18, 2011, at the Board's Westover office location. Grievant appeared in person and by his representative, Gordon Simmons, UE Local 170 West Virginia Public Workers Union. Respondent appeared by its counsel, Harry C. Bruner, Jr., Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on September 20, 2011.

Synopsis

Grievant was terminated from his position as a Health Service Worker for viewing pornography on his work computer. Grievant admitted to the misconduct. Respondent proved by a preponderance of the evidence the charge of gross misconduct against the Grievant. On the issue of mitigation of the punishment, the record of this grievance does

not present a showing that the particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. This grievance is denied.

The following findings of fact are based upon the record developed at level three.

Findings of Fact

1. Grievant was employed for five years as a Health Service Worker at William R. Sharpe, Jr. Hospital.

2. Kevin Stalnaker, former Chief Executive Officer at Sharpe Hospital, received a network violation report generated by the West Virginia Office of Technology (OT). The report indicated that Grievant had accessed pornographic sites from a work computer over a five-day period.[1]

3. Two months after the OT report, on August 18, 2010, Mr. Stalnaker and Debbie Cook, Human Resources Director, conducted a predetermination meeting with Grievant concerning the June 22 incident report.

4. Grievant admitted to viewing the numerous porn sites over the five-day period reflected in the report. Grievant acknowledged that it was wrong to view pornographic material at work on a state computer. He promised to never repeat the conduct.

5. Mr. Stalnaker and Ms. Cook indicated that, based upon a review of the facts

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[1]The West Virginia Office of Technology monitors computer usage by state employees in an effort to protect the statewide network from the introduction of viruses and malware which could harm the network. OT has identified websites which are known to put the network at risk for viruses and malware, or are likely to put the network at risk, and blocks access to these websites. These websites include those considered by OT to be pornographic. When an employee attempts to access these types of websites, OT is alerted to the possible network violation, and OT personnel then review the activity for a period of time to determine whether a violation has occurred. Employees can employ various techniques to defeat the blocked access to websites.

involving Grievant's conduct over the five-day period, they concluded there existed clear evidence that Grievant had violated various policies related to computer usage.

6. After the meeting, Grievant was informed that he was terminated from employment.

7. The decision to terminate Grievant's employment was memorialized by correspondence from Mr. Stalnaker dated August 19, 2010. The letter provides the following: "So that you understand the specific reason for your dismissal, I recount the following: The Office of Technology conducted a random computer review for June of 2010. It revealed that you had over 50 incidences occurring over five different days of searches and logging on, attempting to view and viewing pornographic sites. This is a violation of the Employee Conduct Policy and the policies of DHHR governing the use of state-owned equipment and thereby constitutes gross misconduct." Respondent's Exhibit No. 1.

8. The letter also states that, "Department of Health and Human Resources and the Hospital have zero tolerance for this type of gross misconduct and employee behavior. After weighing all the options and the facts of the case, your dismissal is warranted." Respondent's Exhibit No. 1.

9. Mr. Stalnaker acknowledged that he could not identify any policy stating that unauthorized computer use was a matter of zero tolerance. Nevertheless, Grievant violated numerous policies regarding the use of his work computer.

10. Mr. Stalnaker indicated that Grievant viewing pornography from the treatment room computer presented a high probability of compromising patient care. He explained that, "it's a very concerning thing if a patient had walked into the treatment room while he

was viewing this. It could have been psychologically devastating to the client. Several patients within the facility at any point could have been sexually abused in the past."

11. The treatment room computer was the only one on which Grievant viewed pornography. The treatment room doors automatically lock, unlocking the door takes some time and can be easily heard. In addition, the computer screen was not immediately visible to anyone entering the treatment room.

12. James Earl Weathersbee, Information Security Officer for OT, indicated that the report used by Respondent to dismiss Grievant constituted what OT considers a first occurrence.

13. Grievant has no previous disciplinary measures for violation of computer use policies.

14. Apart from attendance issues, Grievant has no previous disciplinary action against him of any kind.

15. Ms. Cook indicated that the OT report on Grievant was the hospital's first occurrence of this type of violation.

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 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*.

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 directly affecting 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, 284,] 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir. W. Va. State College,* Docket No. 93-BOD-436 (Dec. 30, 1994).

Grievant, as a tenured state employee, had a property interest in his employment. *Perry v. Sindermann*, 408 U.S. 593 (1972), cited in *Jones v. Nicholas County Bd. of Educ.*, Docket No. 92-34-305 (July 28, 1993), *aff'd*, Nos. 93-AA-213, 94-AA-76 (Kanawha County Cir. Ct. Apr. 5, 1995). "When an individual is deprived of this interest, certain procedural safeguards are merited. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985)." *Jones*, *supra*.

The "term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of

standards of behavior which the employer has a right to expect of its employees." *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991) (*citing Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985)). *See Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sept. 13, 2002).

The undisputed facts of this grievance indicate that Grievant acknowledged that he viewed the pornographic material on his work computer. He expressed sorrow, regret, and shame for his actions. In addition, Grievant admitted he received Respondent's training on the proper use of his work computer. Respondent reviewed OT's investigation of Grievant's computer usage over a five-day period to visit numerous pornographic web sites and view pornographic pictures. Respondent presented this evidence at level three through documents and the testimony of Mr. Weathersbee. Respondent proved by a preponderance of the evidence that Grievant repeatedly violated numerous policies regarding the proper use of his work computer.

Grievant's viewing of pornographic material placed the State of West Virginia computer network at risk of harm, potentially compromising the confidentiality of patients' medical records. Respondent is mandated to protect and care for a segment of the mentally challenged population of West Virginia. As a Health Service Worker within Sharpe Hospital, Grievant is responsible for the care and protection of the residents. Sufficient evidence was presented to prove the charge of gross misconduct contained in the dismissal letter.

Grievant does challenge the discipline imposed and argues that the punishment was excessive. "The argument a disciplinary action was 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).” *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995) (citations omitted). The 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 to determine a penalty in these types of situations, and the undersigned Administrative Law Judge shall 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).” *Meadows*, *supra*.

Grievant notes that, “[N]o factual basis was placed into evidence that the security and future of Western civilization (despite the ominous specter of hostile nations raised by

Respondent's counsel) were placed at appreciable or even credible risk by Grievant's admittedly unwise, though brief, conduct." The undersigned does acknowledge that some of the justification behind the dismissal does appear a little far fetched. For example, Mr. Stalnaker indicated that he was very concerned about patient safety when Grievant viewed such pornographic sites as "big sexy tits behind bars" and "jailed sex kittens." Mr. Stalnaker was concerned that patients exposed to this material, and having a history of sexual abuse, could be devastated.

The undersigned tends to agree with Grievant that a more desirable outcome would have been a lesser penalty pursuant to the principals of progressive discipline in punishing such a first offense infraction. However, the record of this grievance does not present a showing that the particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. In addition, mitigation of this discipline would require second guessing and calling into question the judgment of Mr. Stalnaker. The undersigned cannot substitute his judgment for that of Respondent's CEO's decision that Grievant's misconduct was sufficient to conclude that Grievant did not meet the reasonable standard of conduct expected of an employee at the hospital. Given Grievant's acceptance of responsibility for his actions, this was an unfortunate outcome.

The following conclusions of law support the decision reached.

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. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No.

96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

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. Respondent has met its burden of proving that Grievant's conduct was of a substantial nature directly affecting the rights and interest of the residents at Respondent's facility, as well as establishing numerous policy violations. Grievant was dismissed for good cause.

4. "[M]itigation 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).

6. Nothing in the record of this grievance established that termination of Grievant was so clearly disproportionate to the offense that it indicates an abuse of discretion.

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. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: November 16, 2011

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Ronald L. Reece
Administrative Law Judge