WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CYNTHIA ROE,
Grievant,

v. **Docket No. 2012-0653-DHHR**

DEPARTMENT OF HEALTH AND
HUMAN RESOURCE/LAKIN HOSPITAL,
Respondent.

DECISION

Cynthia Roe, Grievant, was employed by Respondent, Department of Health and Human Resources, ("DHHR") as a housekeeper at Lakin Hospital. Ms. Rowe filed a level three grievance form dated December 20, 2011, alleging that her employment was terminated without good cause.[1] As relief, Grievant seeks, "To be made whole including back pay with interest and benefits restored." A level three hearing was held at the Charleston office of the West Virginia Public Employees Grievance Board on March 4, 2013. Grievant appeared in person, and was represented by Gordon Simmons, U.E. Local 170, West Virginia Public Workers Union. Respondent was represented by Michael E. Bevers, Assistant Attorney General. Following the hearing, the parties agreed to present proposed findings of fact and conclusions of law the last of which was received by the Grievance Board on April 16, 2013. This matter became mature for decision on that date.

[1] Pursuant to W. VA. CODE § 6C-2-4(a)(1) a grievant may file directly to level three when contesting termination of her employment.

Synopsis

Respondent terminated Grievant's employment for insubordination, making threats in violation of the Division of Personnel's Hostile Workplace Policy, and failing to immediately report suspected abuse of a resident at the hospital. Respondent failed to prove violation of the Division of Personnel's policy, but proved the other charges. Mitigation of the penalty of dismissal was appropriate and the grievance is GRANTED in part, and DENIED in part.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant, Cynthia Roe, was employed by the Lakin Hospital as a housekeeper since July 16, 2007. Lakin Hospital is a long term care nursing facility operated by Respondent. Housekeepers at Lakin Hospital sweep and mop the floors, clean the windows, do general dusting and clean the toilets and patient rooms, among other general housekeeping duties.

2. Grievant received an annual Employment Performance Appraisal dated September 28, 2011.[2] Grievant received an overall rating of "Meets Expectations." She received a rating of "Exceeds Expectations" in the indicator of "Willingly accepts a variety of responsibilities" and the remainder of the indicators were marked "Meets Expectations." In the comment section Grievant's supervisor wrote the following:

> Cindy has the ability to exceed her assigned duties. When Cindy is focused she is a hard worker who shows initiative

[2] Grievant's Exhibit 3. This was an EPA – 3, which is the final employee appraisal from September 2010 through August 2011.

> and care in her duties. Cindy needs to improve her attendance, following all regulations and policies regarding attendance. By doing so Cindy could achieve exceeds expectations as a dependable employee.[3]

3. On all of Grievant's Employee Performance Appraisals, dating back to September 2007, Grievant received an overall rating of "Meets Expectations." She received a rating of "Needs Improvement" on the indicator related to attendance in her 2009-2010 appraisal. All other indicators on all her previous appraisals were marked "Meets Expectations."

4. Grievant's immediate supervisor, Sheri Slone, issued a verbal warning to Grievant on August 10, 2011, concerning her absence from work on a scheduled workday without notification to her supervisor. The verbal warning was documented by memorandum dated the same day.[4] This is the only disciplinary action taken against Grievant prior to the matters giving rise to this grievance.

5. On Saturday, November 19, 2011, Grievant was working the C-North section of Lakin Hospital. Licensed Practical Nurse ("LPN") Dolores Long was also working the C-North section on that day. LPN Long asked Grievant to empty the trash a number of times during that shift, and Grievant told her that she would get to it. LPN Long also noticed a coffee spill in one of the patient's rooms and asked Grievant to clean it up. Grievant told Ms. Long that she would get to that as well.

6. On Sunday, November 20, 2011, Grievant and LPN Long were again working on C-North. LPN Long noticed what she believed the same coffee spill in the patient's room. She paged Grievant over the intercom to come to the room and take out the trash. When Grievant came to the room, LPN Long told her to mop it up spill as well

[3] Grievant's Exhibit 3.
[4] Respondent's Exhibit 3.

as take out the trash. Grievant was angry that she had been paged and told LPN Long that she was not Grievant's boss. LPN Long informed Grievant that the residents deserve to live in a clean environment. Grievant mopped up the spill and emptied the trash as directed.

7. Shortly after this exchange, Grievant went into a break room where housekeepers Darlene Miller, Carol Hess, and Christine Adkins were located. Darlene Miller gave a written statement alleging that Grievant Roe stated that she was going to find LPN Long away from the building and beat the crap out of her. Both Carol Hess and Christine Adkins[5] gave statements that they did not hear Grievant Roe make any threats against LPN Long when she entered the break room.

8. The break room is small and if Grievant had made statements about LPN Long all of the housekeepers present would've heard them. Grievant Roe and housekeeper Darlene Miller have a contentious relationship wherein Ms. Miller has previously accused Grievant of being lazy. It is more likely than not, that Grievant Roe did not make a threatening statement upon entering the break room on Sunday, November 20, 2011, as alleged by housekeeper Miller.

9. On November 22, 2011, Supervisor Slone called Grievant into her office to speak with her about taking extended breaks and the problems with LPN Long that had taken place during the previous weekend. Grievant explained to Supervisor Slone that she was upset after the confrontation with LPN Long. Grievant was concerned that she might do something inappropriate, so she met with her mother outside of the building for a half hour. Supervisor Slone told Grievant that if she is asked by an LPN to clean up a spill she should do so, the nurses have authority to assign these tasks. Ms. Slone also

[5] Grievant's Exhibits 1 and 2

instructed Grievant that she should not take extended breaks, and that if she felt concerned about the behavior of other staff members, Grievant should bring those concerns to Supervisor Slone rather than leave the building or confront the staff member. Grievant's time sheet did not reflect that she had been away from her duties for a half hour speaking to her mother.[6]

10. Grievant worked on Saturday November 26, 2011. Carolyn Moore[7] worked that Saturday and also work the next day while Grievant was off. Ms. Moore was working on A Wing and paged Grievant to come and help with housekeeping because several other staff had called off that day. Grievant had just taken out the trash and was outside talking to another co-worker for twenty minutes before she came in to answer the page. Grievant asked the nurse on C Wing what was needed and that nurse told her that she had been paged by Ms. Moore. Grievant observed Ms. Moore in the dining room talking about her for not answering the page. Grievant became upset, but did not confront Ms. Moore at the time. Later in the shift, Ms. Moore needed help with a juice spill. She found Grievant sitting in the dining room and asked her to clean up the spill when she got a chance. Grievant took an hour break because she was upset with Ms. Moore.[8]

11. Just before noon on Sunday, November 27, 2011, Grievant sent text messages to Carolyn Moore using profane language to express her anger with Ms. Moore for comments that she had allegedly made about Grievant in the dining room the day before. As with LPN Long, Grievant told Ms. Moore that she wasn't Grievant's

[6] Respondent's Exhibit 5
[7] Ms. Moore is employed as a nurse, but she was working as a nursing assistant on November 26, 2011, because the Hospital was short on staff in that position.
[8] Respondent's Exhibit 19, an interview with Grievant conducted by CEO Dailey on November 28, 2011.

“fucking boss.” Grievant called and left a message for Carolyn Moore on her phone. Ms. Moore called Grievant back to say that she was at work and could not talk to Grievant about the matter at that time, but that they could meet in Chief Executive Officer (“CEO”), Linda Dailey’s office the next day. At approximately 7:00 PM, Grievant sent Carolyn Moore another text suggesting that if they went to the CEO’s office, Grievant would tell the management how Ms. Moore mistreats the residents.[9]

12. Grievant did not work on Sunday, November 27, 2011.

13. Registered Nurse, Janice Johnson, was in charge of the C Wing of Lakin Hospital on Saturday, November 26, 2011. On the following day, Nurse Johnson sent an email to Supervisor Slone complaining that Grievant had failed to properly clean her office, that she was unable to find Grievant on several occasions, and that she felt Grievant was lazy. Nurse Johnson also noted the disagreement that Grievant had with LPN Long the previous week.

14. On Monday, November 28, 2011, Carolyn Moore reported to CEO Dailey that she had received inappropriate text messages from Grievant the previous day.

15. Supervisor Slone was instructed to bring Grievant to CEO Dailey’s office. Grievant met with CEO Dailey, Wanda Smith, Supervisor Slone, and Jason Dunigan, Assistant Administrator in-training. At the meeting, Grievant was asked about her prior confrontation with LPN Long, the text messages to Ms. Moore, her taking of extended breaks, and the allegation that she had made regarding abuse of a resident. Grievant was also informed that she may have committed neglect of a patient by failing to immediately report suspected abuse. Grievant acknowledged that she understood her

[9] Respondent's Exhibit 8

obligation to report suspected patient abuse or neglect immediately.[10] CEO Dailey informed Grievant that this meeting was a predetermination conference.

16. At the close of the meeting, Grievant was suspended without pay while an investigation was conducted into the issue of whether she failed to immediately report suspected abuse. The suspension was confirmed to Grievant in writing by letter dated November 29, 2011.

17. Following the meeting in CEO Dailey's office, Grievant met with Stephanie Click and Supervisor Slone so that Grievant could report the incident where Carolyn Moore allegedly mistreated a patient on November 26, 2011.[11] An investigation was conducted regarding the allegation and it was determined to be unsubstantiated.

18. An investigation was conducted by Supervisor Stephanie Click involving the allegation that Grievant failed to immediately report suspected patient abuse on November 26, 2011. On Monday, November 28, 2011, Ms. Click reported the allegation of neglect to the Office of Health Facilities Licensure and Certification ("OHFLAC") as required by 69 C. S. R. 6 § 3.2.a. On December 1, 2011, Ms. Click filed a five day follow-up report with OHFLAC stating that the allegation of neglect had been substantiated.[12]

19. The hospital has video cameras mounted in each of the halls to monitor patient movement in the facility. On Monday, November 28, 2011, CEO Dailey directed that the recordings from the cameras for November 26, 2011, be reviewed to see how much time Grievant spent away from her duties during her shift. The review of the video recordings indicated that Grievant was away from her assigned duties for over

[10] Respondent's Exhibit 19.
[11] Respondent's Exhibit 7.
[12] Respondent's Exhibit 18.

three hours and forty minutes during her shift. This is in addition to Grievant's two fifteen minute breaks and one half hour lunch period.

20. Grievant admitted to talking to her mother, who also works at Lakin Hospital, for an hour at one point on November 26, 2012, because she was very upset with Ms. Moore.

21. On December 1, 2011, CEO Dailey sent an email to managers at the State office of the DHHR requesting advice on how to proceed with disciplining Grievant for specified misconduct. CEO Dailey identified four separate issues.

> 1. Neglect – suspended, substantiated – discipline needs to be determined and issued. Recommending a 10 day suspension.
> 2. Extended break times following the 11/12 coaching by the supervisor and admitted to extensive breaks in excess of an hour on Sat 11/26.
> 3. Insubordination to nursing staff and unacceptable job performance on the weekend of 11/26 following a counseling with the supervisor on 11/22.
> 4. Threatening statements, texts, and behavior on multiple occasions – most recently on 11/27 and following a counseling with the supervisor on 11/22.[13]

22. Grievant requested a meeting with CEO Dailey so that Ms. Dailey could explain charges Grievant was facing to Grievant's representative. This meeting took place on Monday, December 5, 2011. Grievant was represented by Melissa Smith. Jason Dunigan and Sheri Slone also attended. CEO Dailey explained the four incidents of alleged misconduct to Grievant and her representative. She also informed Grievant that the charge of neglect for failing to immediately report suspected abuse had been substantiated. Finally, she informed Grievant that the decision would be made shortly regarding discipline.

[13] Respondent's Exhibit 21.

23. By letter dated December 12, 2011, CEO Dailey informed Grievant that she had been dismissed from employment at Lakin Hospital.

Discussion

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008).

> . . . *See Watkins supra, 229 W.Va. at _, 729 S.E.2d at 833* (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education,* 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). *See also Hovermale v. Berkeley Springs Moose Lodge,* 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) ("Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence."). . .

Litten v. W. Va. Dep't of Trans., Div. of Highways, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision).

Grievant, as a permanent state employee in the classified service, could 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). *See also Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004)(*per curiam*). "*Oakes v. W.Va. Dept. of Finance and Administration*, *supra*, requires that a violation sufficient to support a dismissal be of a substantial nature and that if it involves a violation of a statute or official duty, it must be done with wrongful intent." *Serreno v. West Va. Civil Serv. Comm'n*, 169 W. Va. 111, 115, 285 S.E.2d 899, 902 (1982) (*per curiam*). "'Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. West Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988).

Respondent set forth four reasons for dismissing Grievant. The first is creating a hostile workplace in violation of the Division of Personnel *Prohibited Workplace Harassment Policy*. Specifically respondent cites Nondiscriminatory Hostile Workplace Harassment which is defined as:

> Verbal, nonverbal or physical conduct not discriminatory in nature that is so atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency and which creates fear, intimidates, ostracize is, psychologically and physically threatens, embarrasses, ridicules, or in some other way unreasonably overburdened or precludes an employee from reasonably performing her or his work.

Id. Section IV. of the policy provides interpretive material. Nondiscriminatory hostile workplace harassment is described as follows:

> . . . unreasonable or outrageous behavior that deliberately causes extreme physical and/or emotional distress. Such conduct involves the repeated unwelcome – mistreatment of one or more employees often involving a combination of intimidation, humiliation, and sabotage of performance which may include but not be limited to . . . bullying.

Id.

During their investigation of Grievant's behavior, Respondent received a written statement from housekeeper, Darlene Miller. Ms. Miller indicated that on November 19, 2011, Grievant walked into the break room and stated she would find Dolores Long away from work and beat her up. This incident is cited as one of the reasons Grievant was accused of creating a hostile work environment. Housekeepers, Carol Hess and Christine Adkins were also in the break room at that time. Each of these employees also gave a statement to Respondent as part of the investigation. They both stated that they did not hear any threats or comments made by Grievant regarding Dolores Long. Darlene Miller and Grievant both testified that the break room is small and it is more likely than not that if Grievant had made such a statement it would've been heard by Ms. Hess and Ms. Adkins. Grievant consistently denied having made any threats toward Ms. Long.

The Grievance Board has applied the following factors to assess a witness's testimony: (1) demeanor; (2) opportunity or capacity to perceive and communicate; (3) reputation for honesty; (4) attitude toward the action; 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 Gramlich v. Div. of Motor Vehicles,* Docket No. 2010-0929-DOT (June 14, 2010); *Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth.,* Docket No. 2009-1588-DOT (Dec. 1, 2009); *Elliott v. Div. of Juvenile Serv.,* Docket No. 2008-1510-MAPS (Aug. 28, 2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999).

It was apparent during Darlene Miller's testimony that she and Grievant did not get along well at work. Additionally, there were two other housekeepers in the small break room and it is very unlikely that they would not have heard Grievant make a threat if she had done so. Given Ms. Miller's apparent bias, and the fact that it is not plausible that Grievant would have made such a statement without the other housekeeper's hearing it, Respondent failed to prove by a preponderance of the evidence that Grievant made a physical threat against Dolores Long. Even if Grievant had made the alleged statement, it would be more accurately characterized as blowing off steam rather than workplace harassment. The factors relied upon in evaluating whether comments constitute a threat under the Division of Personnel's Workplace Security Policy include, whether the threat seems real, and the nature, likelihood and eminence of potential threat. *Bowe v. Workers Compensation Comm'n*, Docket No. 04-WCC-268 (Oct. 10, 2004), (*citing Burkhammer v. Dep't of Health & Human Resources*, Docket No. 03-HHR-276 (Nov. 12, 2003)). In this instance, there was currently no real threat or imminent potential harm.

The next incident cited by Respondent to prove workplace harassment involves the texts that were sent to Carolyn Moore on November 27, 2011. Grievant sent the following texts to Ms. Moore:

- I heard what you said about me in the dining room yesterday, let me tell you something. You're not my fucking boss and you don't tell me what to do like you tried to tell everyone else. You need to worry about yourself and not anyone else. So you can take that however you want to.
- You can run your mouth but you have to have backup. You know what you said because you were telling them in the dining room yesterday.

- What was [sic] you saying we was [sic] going to the office tomorrow. Well if we do, you will get fired because I will tell them how you treat the residents.

Respondent's Exhibit 8.

While these texts were inappropriate, they do not indicate any threat of violence or "likelihood and eminence of potential harm." They are merely an angry outburst by one employee who felt that she had been treated improperly by another. While such action should be discouraged, it certainly does not constitute nondiscriminatory hostile workplace harassment or a violation of the Prohibited Workplace Harassment Policy. Respondent demonstrated that Grievant sent inappropriate texts to a coworker, but did not prove that she created a hostile work environment or made truly threatening statements.

The next two charges both relate to insubordination. Grievant was counseled by Supervisor Sloan on November 12, 2012, following Grievant's confrontation with LPN Long. Supervisor Slone instructed Grievant to comply with the request of the nurses related to housekeeping chores and to bring any complaints Grievant had about other staff people to her, rather than taking time off duty cooling off. Yet on Saturday, November 26, 2012, Grievant became angry when Carolyn Moore paged her to perform housekeeping duties and Grievant later saw her complaining about Grievant to others in the cafeteria. Rather than bring this issue to Supervisor Slone, Grievant admittedly spent at least an hour outside of the facility talking with her mother. The video evidence gathered from the hospital cameras indicated that Grievant was away from her duty station over four hours on that day. Respondent argues that Grievant's failure to comply

with the requests of nurses Long and Moore, as well as taking extended breaks after being counseled not to by her supervisor, constitutes insubordination.

"[F]or there to be '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. Interin Governing Bd.,* 212 W. Va. 209, 569 S.E.2d 456 (2002) (*per curiam*); *Goan v. W. Va. Dep't of Health and Human Res*., 2011-0886-DHHR (Jan. 19, 2012). "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); *Cornell v. Brooke County Bd. of Educ*., Docket No. 2013-1289-BroED (Aug. 2013).

Even though Grievant was unhappy with Ms. Long and Ms. Moore for paging her over the hospital intercom to come perform housekeeping duties, the evidence indicates that she did comply with their requests of emptying trash and cleaning up spills. Grievant complained about their instructions, but she neither disobeyed nor ignored them. Her action, therefore, did not constitute insubordination. Grievant did however fail to comply with Supervisor Slone's instruction to avoid spending time away from her unit. While grievant argues that she was performing other housecleaning duties away from her unit during much of the day on November 26, 2012, she admittedly spent at least an hour discussing her problems regarding the nurses with her mother. Grievant explained that she spent this time away from her duties because she was angry and did not want to confront Ms. Moore, but Supervisor Slone had previously instructed her to bring such issues to her rather than leave her work assignment. Failure to follow that clear

instruction which was issued to her only two weeks eariler does constitute insubordination.

Finally, Respondent charged Grievant with neglect for failing to immediately report suspected abuse of a resident by another staff person. Grievant indicated that she observed Carolyn Moore mistreating a patient on November 26, 2012. She did not immediately report that incident to her supervisor or anybody else in management. Grievant was off the next day and finally reported the incident to CEO Dailey when Grievant was confronted with the text that she had sent to Ms. Moore the previous day.

Respondent's regulations require that:

> Any employee of a facility, or anyone who provides services to a resident of a facility on a regular or intermittent basis, who suspects that a resident in a facility has been abused or neglected or that the resident's property has been misappropriated shall immediately report the incident to the facility administration and Adult Protective Services as required by W. Va. Code §9-6-9.

69 C.S.R. 6 § 3.1.a.

Additionally, the Office of Health Facilities Licensure and Certification interprets the failure to immediately report observed or suspected abuse of a resident by an employee as "neglect". *Williams v. Dep't of Health & Human Res.,* Docket No. 2011-1720-DHHR (May 10, 2012). Consequently, Respondent proved by a preponderance of the evidence that Grievant was guilty of neglect as defined in Respondent's regulations. In summary, Respondent proved that Grievant had been insubordinate by failing to follow the directions of Supervisor Slone, and that she was guilty of neglect for failing to report immediately suspected abuse of a resident. Respondent failed to prove that

Grievant threatened employees in violation of the workplace security policy or created a hostile work environment. Some discipline was warranted.

Grievant argues that dismissal was much too harsh a disciplinary action. She points out that the work record of a long-term tenured employee must be considered when determining whether good cause exists for discharging the employee for misconduct. *Serreno v. West Va. Civil Serv. Comm'n*, 169 W. Va. 111, 115, 285 S.E.2d 899, 902 (1982) (*per curiam*). "Whether 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); *Crites v. Dep't of Health & Human Ser.*, Docket No. 2011-0216-DHHR (Nov. 16, 2011).

Grievant has been successfully employed by Respondent at Lakin Hospital for approximately seven years. She has received regular evaluations of her job performance all of which indicate that her work meets expectations. She has received no disciplinary action prior to the events giving rise to this grievance beyond a verbal warning for failing to call in on a day she had been absent. On November 22, 2012, Supervisor Slone counseled Grievant about being away from her workstation, but she did not receive a reprimand or suspension for subsequent actions. Clearly, the most serious misconduct with which Grievant is charged is the failure to immediately report suspected abuse of a resident. CEO Dailey recommended that Grievant receive a ten-day suspension without pay for that offense. That penalty seems much more

appropriate. Grievant had been warned about taking extended breaks, and that is conduct that can be monitored and dealt with through progressive discipline. Grievant obviously has a contentious relationship some of her coworkers which can also be addressed in a similar fashion. However, this misconduct cannot be characterized as a "gross disregard for professional responsibilities or the public safety" which would justify dismissal of a tenured state employee. *Drown, supra.* Given Grievant's long and successful tenure at the hospital without prior discipline, and the recommendation of a suspension from CEO Dailey, dismissal is clearly disproportionate to the misconduct with which Grievant is charged and mitigation is appropriate.

Accordingly, the grievance is GRANTED in part, to the extent that Grievant must be reinstated to her prior employment at Lakin Hospital, and DENIED in part, to the extent that Grievant is given a suspension of ten working days without pay.

Conclusions of Law

1. As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008).

2. Grievant, as a permanent state employee in the classified service, could 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). *See also Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004)(*per curiam*). "*Oakes v. W.Va. Dept. of Finance and Administration*, *supra*, requires that a violation sufficient to support a dismissal be of a substantial nature and that if it involves a violation of a statute or official duty, it must be done with wrongful intent." *Serreno v. West Va. Civil Serv. Comm'n*, 169 W. Va. 111, 115, 285 S.E.2d 899, 902 (1982) (per curiam). "'Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. West Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988).

3. The factors relied upon in evaluating whether comments constitute a threat under the Division of Personnel's Workplace Security Policy include, whether the threat seems real, and the nature, likelihood and eminence of potential threat. *Bowe v. Workers Compensation Comm'n*, Docket No. 04-WCC-268 (Oct. 10, 2004), (*citing Burkhammer v. Dep't of Health & Human Resources*, Docket No. 03-HHR-276 (Nov. 12, 2003)).

4. Respondent did not prove that Grievant created a hostile work environment or made truly threatening statements in violation of the Division of Personnel's Workplace Security Policy.

5. "[F]or there to be '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. Interin Governing Bd.,* 212 W. Va. 209, 569 S.E.2d 456 (2002) (*per*

curiam); *Goan v. W. Va. Dep't of Health and Human Res.*, 2011-0886-DHHR (Jan. 19, 2012). "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); *Cornell v. Brooke County Bd. of Educ*., Docket No. 2013-1289-BroED (Aug. 2013).

6. Respondent did not prove that Grievant was insubordinate with nurses Long and Moore. Respondent did prove Grievant was insubordinate by failing to follow Supervisor Slone's directive to not take excessively long breaks when she became upset with a coworker.

7. Respondent DHHR's regulations require that, "Any employee of a facility, or anyone who provides services to a resident of a facility on a regular or intermittent basis, who suspects that a resident in a facility has been abused or neglected or that the resident's property has been misappropriated shall immediately report the incident to the facility administration and Adult Protective Services as required by W. Va. Code §9-6-9." 69 C.S.R. 6 § 3.1.a.

8. Respondent's Office of Health Facilities Licensure and Certification interprets the failure to immediately report observed or suspected abuse of a resident by an employee as "neglect". *Williams v. Dep't of Health & Human Res.,* Docket No. 2011-1720-DHHR (May 10, 2012).

9. Respondent proved that Grievant violated the mandate of 69 C.S.R. 6 § 3.1.a. when she failed to immediately report suspected abuse of a resident.

10. The work record of a long-term tenured employee must be considered when determining whether good cause exists for discharging the employee for

misconduct. *Serreno v. West Va. Civil Serv. Comm'n*, 169 W. Va. 111, 115, 285 S.E.2d 899, 902 (1982) (*per curiam*).

11. "Whether 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); *Crites v. Dep't of Health & Human Ser.*, Docket No. 2011-0216-DHHR (Nov. 16, 2011).

12. Given Grievant's long and successful work history without prior discipline, and the recommendation of a suspension from CEO Dailey, dismissal is clearly disproportionate to the misconduct with which Grievant is charged and mitigation is appropriate.

Accordingly, the grievance is GRANTED in part, and DENIED in part. Respondent is ORDERED to immediately reinstate Grievant to her prior position with back pay including statutory interest and benefits, minus ten days of pay for the ten-day suspension.

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).

DATED: AUGUST 21, 2013

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WILLIAM B. MCGINLEY
ADMINSTRATIVE LAW JUDGE