THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KYLE KING,
Grievant,

v. **Docket No. 2013-0067-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
JACKIE WITHROW HOSPITAL,
Respondent.

DECISION

Grievant, Kyle King, was previously employed by Respondent, Department of Health and Human Resources at Jackie Withrow Hospital. On July 17, 2012, Grievant filed this grievance against Respondent for "[d]ismissal without good cause; failure to pay final wages in 72 [h]ours[1]." For relief, grievant seeks "[t]o be made whole including job and all benefits restored, back pay with interest; treble damages on final pay." The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held on February 19, 2013, before the undersigned at the Grievance Board's Beckley, West Virginia office. Grievant was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by counsel, Michael E. Bevers, Assistant Attorney General. This matter became mature for decision on March 22, 2013, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant, a housekeeper with almost nineteen years of service at a long-term care facility, was terminated for misappropriation of resident property and

[1] No evidence was presented on this issue at level three, so the issue is deemed abandoned and will not be addressed in this decision.

insubordination in an incident involving his removal of six houseplants from a deceased resident's room. Grievant did not misappropriate resident property as the weight of evidence shows the resident consented to the removal of the plants when she stated she wanted Grievant to have the plants upon her death. Grievant also did not violate hospital policy or procedure in removing the plants when no policy was provided governing the receipt of gifts from a resident is in place and when a supervisor's frustrated statement led Grievant to plausibly believe he had permission to remove the plants. Grievant was not insubordinate in that his supervisor's order was for him to stay out of the resident's room with no mention of the plants, and Grievant had already removed the plants. Accordingly, the grievance is granted.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Prior to his termination, Grievant was employed by Respondent as a Housekeeper at Jackie Withrow Hospital for almost nineteen years. Jackie Withrow Hospital is a long-term care facility.

2. Grievant was assigned housekeeping duties in Unit 1-C, and one of the residents whose room he cared for was M.M.[2] M.M. had previously enjoyed gardening, and liked to have plants in her room. Grievant is also a gardener. M.M. was not able to care for plants herself, so Grievant took care of her plants. Grievant even brought his own soil and cuttings for M.M. Caring for the plants was not part of Grievant's regular

[2] To protect her privacy, the resident will be referred to by her initials throughout this decision.

housekeeping duties. M.M. was grateful to Grievant for caring for the plants and stated to several other employees that she wanted Grievant to have the plants upon her death.

3. The plants were just regular houseplants having little monetary value.

4. M.M. was capable of making her own decisions and was not cognitively impaired.

5. Neither M.M. nor Grievant informed any member of management that M.M. had wanted Grievant to have the plants upon her death.

6. M.M. passed away in June 2012.

7. After her death, other hospital employees expressed interest in the plants, with one actually taking a plant from the room and being told to return it, and another having left a note that she wanted the plants.

8. On June 25, 2012, several employees were gathered around the nursing station when Health Services Worker Lenekia Hicks asked Registered Nurse Zeda Pierce[3] about the note left about the plants. Ms. Pierce was frustrated about the plants and stated something to the effect that she did not care what happened to the plants, she just wanted the room cleaned out. She did not tell Grievant specifically that he was allowed to remove the plants. Grievant did not tell Ms. Pierce that M.M. wanted him to have the plants, or that he was going to take the plants.

9. Both Grievant and Ms. Hicks, who heard Ms. Pierce's statement, believed Ms. Pierce's statement gave permission to Grievant to remove the plants.

10. Later that day, Grievant removed six of the plants from M.M.'s room. He did not inform any member of management that he was taking the plants.

[3] Although Ms. Pierce's job title was never disclosed, Ms. Pierce acted in a supervisory capacity over Grievant.

11. After Grievant had already taken the plants, his immediate supervisor, Alice Harris, instructed him to stay out of M.M.'s room. Ms. Harris made no mention of the plants and did not ask Grievant any questions about being in the room. Grievant did not inform Ms. Harris that he had already taken the plants.

12. On the evening of June 26, 2012, M.M.'s son arrived to remove M.M.'s personal effects from her room and discovered the plants were missing. M.M.'s son was very upset and made a complaint to staff that night and then called the hospital's CEO the next day.

13. Early in the morning of June 27, 2012, Ms. Pierce questioned employees about what had happened to the plants. Ms. Hicks informed Ms. Pierce that Grievant had taken the plants. Ms. Hicks called Grievant to tell him to bring the plants back, and Grievant stated he had a doctor's appointment and would return the plants after his appointment. A second call was placed to Grievant in which Ms. Pierce told him he had to bring the plants back immediately, which he did.

14. CEO Booker immediately initiated an investigation. Ms. Hicks was interviewed twice, once by CEO Booker alone and once by CEO Booker and Carla Lewis. Ms. Pierce was interviewed by CEO Booker, Rebecca Marsh, and Carla Lewis. All three interviews were recorded and a typed transcript was made by CEO Booker. CEO Booker also recorded and made a partial transcript of her conversation with M.M's son. The transcript is incomplete as it begins with the conversation already in progress. CEO Booker conducted a meeting with Grievant of what appeared to be both the investigatory interview and a predetermination conference. The meeting was done by telephone and questions were asked of Grievant by three different people during the

meeting. Again the meeting was taped and a typed transcript was prepared. None of the recordings were offered as evidence. After the meeting with Grievant, CEO Booker interviewed Connie Walker and Yvonne Farley, who were named by Grievant as persons who had heard M.M. state she wanted Grievant to have the plants. These interviews were not taped or transcribed, but CEO Booker relays that neither person corroborated Grievant's story that M.M. had stated she wanted Grievant to have the plants.

15. By 4:40 pm that same day, June 27, 2012, Respondent had decided to terminate Grievant.[4]

16. By letter dated July 9, 2012, Grievant was terminated for "misconduct and failure to adhere to the Employee Conduct Policy (2108) as well as the policy[5] for prevention of resident abuse, neglect, and misappropriation" for removing the plants. The letter also states Grievant was insubordinate. Regarding the insubordination charge, CEO Booker states, "During interview with you on June 27, 2012, you also admitted that you have been instructed by your supervisor, Ms. Alice Harris, to follow the procedure for terminally cleaning a resident's room after the nursing department has contacted family to retrieve personal items. Additionally, on Tuesday, June 26, 2012, at approximately 1 pm, your supervisor instructed you not to enter this particular resident's room as family would be reporting to the facility to remove her personal items. At this time, you had the opportunity to inform your supervisor that you had taken the resident's belongings, yet you failed to do so. At no time, did you take any opportunity to inform

[4] Respondent's Exhibit #7.

[5] This policy was not submitted as evidence as the only policy submitted into evidence by Respondent was the previously mentioned Employee Conduct Policy.

your supervisor of any of your actions, and the supervisor and facility administration would not have been aware of your transgression, had the family not voiced an allegation of theft." The letter also lists the following:

- March 1, 2012: Verbal warning regarding following supervisory directives.
- April 9, 2009: Counseling communication regarding violation of cell phone usage policy in a resident area
- November 7, 2008: Written warning regarding failure to comply with policy for usage of bleach.
- May 16, 2008: Counseling communication regarding failure to comply with parking policy.
- March 11, 2008: Counseling communication regarding tardiness.
- February 6, 2008: Counseling communication regarding completion of supervisory directives.
- September 11, 2007: One day suspension warning for failure to comply with policy to clock out when leaving the facility premises.

CEO Booker goes on to state, "Despite [these] opportunities to correct any deficient behaviors, your action have demonstrated your continued failure to comply with facility policies."

17. Department of Health and Human Resources Policy Memorandum 2108, Employee Conduct, states in pertinent part that: "Employees are expected to: . . . follow directives of their superiors . . . respect the property of residents . . . be ethical . . . and refrain from any type of exploitation of residents/patients/clients or their families . . . ."

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 & 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.*

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); *See also* W. VA. CODE ST. R. § 143-1-12.02 and 12.03 (2012). The West Virginia Supreme Court of Appeals has also stated that "the work record of a long-term civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 285, 332 S.E.2d 579, 585 (1985) (*per curiam*). *See Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983) (dismissal of employees with 15 years of service too harsh a punishment for petty theft of clothing donated for patients at state hospital); *Serreno v. W. Va. Civil Serv. Comm'n*, 169 W. Va. 111, 285 S.E.2d 899 (1982) (*per curiam*) (dismissal of employee with 22 years of service for falsification of mileage vouchers not appropriate when there was no preponderance of evidence of wrongful intent and employee had a plausible explanation for his actions).

Respondent alleges Grievant misappropriated resident property by removing six plants from a deceased resident's room. Grievant asserts the resident gave him the plants and that, furthermore, an RN, who was in a supervisory role over him, had given him permission to take the plants. In addition, Respondent alleges Grievant was insubordinate when Grievant failed to confess he had already been in the resident's room and taken plants when his supervisor later told him to stay out of the room. There are multiple facts in dispute among the testimony and investigation statements of the various witnesses. Accordingly, the undersigned must make credibility determinations of the witnesses who testified about facts in dispute. In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ 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. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Ms. Hicks, Grievant's coworker, was interviewed during the investigation and testified at the level three hearing. Ms. Hicks stated that Grievant had provided cuttings, that he had taken care of the plants, that M.M. was appreciative for Grievant's care of the plants, that M.M. stated she wanted Grievant to have the plants, and that Ms. Pierce said she did not care what happened to the plants but wanted the room clean. Ms.

Hicks' demeanor was somewhat problematic in that she laughed at inappropriate times during her testimony. However, this does not appear to be due to disrespect for the process, but rather a nervous reaction. She laughed both during examination by Respondent's counsel and Grievant's representative. Her demeanor was otherwise appropriate and she was forthcoming in her answers. When she hesitated before answering, it appeared to be out of caution to make sure she answered the question appropriately and did not agree to inaccurate statements. For example, CEO Booker testified she found Ms. Hicks to be evasive in her testimony at level three because she paused or responded negatively and then corrected herself. Regarding that particular exchange, counsel had asked if Ms. Hicks had reported to Ms. Booker that Grievant had taken the plants. In common terms, Ms. Hicks had not "reported" to anyone. Ms. Hicks told Ms. Pierce Grievant had the plants after Ms. Pierce asked her. Her next answers were hesitant, and at one point she answered "no" to a question and then corrected herself when she realized the question actually meant something else. As counsel had already mischaracterized what she had said, it is natural for Ms. Hicks to be cautious in her answers and think carefully about a question before answering. Her demeanor was the same during examination by both sides. While she did testify she thought it was wrong for Grievant to be fired over "some plants," she did not display hostility towards or bias against Respondent. While Ms. Hicks is familiar with Grievant, having worked with him for three and a half to four years, there was no evidence presented that they were close friends or that she would otherwise have bias towards Grievant.

Respondent asserts that Ms. Hicks' statements were not consistent and therefore not credible because she did not say M.M. had given the plants to Grievant when she

was interviewed during the investigation. Ms. Hicks' statements were not inconsistent. Ms. Hicks was never asked in the investigation about M.M.'s directions regarding the plants. The directness and brevity of the questions she was asked would have prevented Ms. Hicks from providing any of the information she knew about M.M's wishes. Ms. Hicks was only allowed to answer the specific, narrow questions asked and was not given on opportunity to make any statement of her own. However, Ms. Hicks' statement regarding what Ms. Pierce said did change slightly. In the interview she stated, "[w]e were at the desk reading the note and Kyle said he wanted the plants and Zeda said I don't care what happens to the plants Kyle you can go ahead and take them if you want to." At the hearing, Ms. Hicks repeated several times through both direct and cross examination that Ms. Pierce stated she did not care what happened to the plants, she just wanted the room clean. Ms. Hicks denied hearing Ms. Pierce tell Grievant specifically that he could take them, while also making clear that she understood what Ms. Pierce said to have given Grievant permission to take the plants. While this is a variation between her interview and testimony, it is not inconsistent in that her interview was not an attempt to directly quote Ms. Pierce, and both her interview and testimony are consistent in the assertion that she and Grievant believed that he had permission to take the plants based on what Ms. Pierce said. In addition, her testimony that Ms. Pierce did not care what happened to the plants, is exactly what Ms. Pierce said in her interview. Further, if Ms. Hicks were lying just to help Grievant, it seems she would have simply supported Grievant's assertion that Ms. Pierce specifically told him to take the plants. Most importantly, if Ms. Hicks were willing to lie for Grievant then she could have simply denied any knowledge of the plants'

whereabouts from the beginning. She readily admitted to Ms. Pierce that Grievant had taken the plants. Therefore, Ms. Hicks is credible.

Nola Lilly, a co-worker and Grievant's previous union representative, testified that M.M. said she would not have had the plants but for Grievant and that she wanted him to have them. Again, Respondent attempts to question credibility because Ms. Lilly had not previously told Respondent that M.M. wanted Grievant to have the plants. Ms. Lilly was not given the opportunity to tell what she knew in the investigation. Ms. Lilly was not interviewed. Ms. Lilly's only contact with management on this issue was when she appeared with Grievant as his representative when he was terminated, which was after the investigation was concluded and the investigatory interview/pre-determination conference was held. Further, Ms. Lilly's impression was that Grievant was being investigated for removing the plants from the facility and not for stealing them. This does not impact Ms. Lilly's credibility. Ms. Lilly's demeanor was appropriate, she did not appear to have bias or interest, and her statements about what M.M. said are comparable to Ms. Hicks' testimony on the same. Ms. Lilly is credible.

Johnnie Farley, a fellow housekeeper, testified he had heard M.M. say she wanted Grievant to have the plants and heard Ms. Pierce tell Ms. Hicks to tell Grievant to take the plants. Mr. Farley was not a credible witness. Mr. Farley's statement about what Ms. Pierce said does not match others' testimony. The other testimony indicated that Grievant himself was standing with the group when Ms. Pierce made her statement. Mr. Farley also did not mention Ms. Pierce's statement that she did not care what happened to the plants. Mr. Farley signed a statement, stating that it was a typed statement of his own words; however, the statement does not sound at all like the way

Mr. Farley expressed himself in his testimony. Grievant and Mr. Farley are also friends, which indicates Mr. Farley may be biased. Further, Mr. Farley had previously been suspended by Respondent and exhibited some hostility towards Respondent surrounding that incident.

Ms. Pierce testified by telephone. While appearance by telephone makes it more difficult to assess credibility, demeanor encompasses not only appearance and movement, but also tone of voice and delivery. Ms. Pierce's demeanor was appropriate. However, there were several differences between Ms. Pierce's interview and her testimony, though that may simply have been due to mode of questioning. In the interview, Ms. Pierce said, "…when they were asking about the plants, I said I don't want the plants, I don't care what happens to them but I never told anybody to take them. I wasn't being rude but I just didn't care those plants have been an aggravation." In her testimony, Ms. Pierce made no mention about stating she did not care what happened to the plants, but simply denied giving Grievant or anyone else specific permission to take that plants. Both the Interview and testimony show Ms. Pierce was frustrated with the whole situation with the plants and with Grievant. Also, Ms. Pierce was leery of M.M.'s son, stating in the interview, "…we had had problems with [M.M.'s son] before and I didn't want that." This would have given Ms. Pierce motive to minimize her role in the situation during the interview, although now she is no longer employed by Respondent. Ms. Pierce is credible, but it appears that in her frustration, her statement to staff gave them a different impression than what Ms. Pierce intended.

CEO Angela Booker testified regarding the investigation, her conversation with M.M.'s son, and her decision-making. CEO Booker's demeanor was appropriate, she

exhibited no bias against Grievant, but she would have interest in the action in that reinstatement of Grievant would cost the hospital money. CEO Booker's recall of the events appeared to be good, and she was very certain in her answers. CEO Booker's testimony was credible.

Grievant, himself, was the most difficult witness. Grievant is not a sophisticated man and he has some difficulty expressing himself. Initially, he was calm and appropriate in his testimony. However, as cross examination proceeded, Grievant's behavior became hostile and defensive. At one point, Grievant refused to answer questions and became aggressive toward Respondent's counsel. While Grievant's testimony regarding M.M. wanting him to have the plants was supported by other witness testimony, his testimony that Ms. Pierce gave him specific permission to take the plants was not supported by other witness testimony. Grievant's testimony about the events after the fact seem to be self-serving and trying to cover up. Obviously, Grievant has a bias in trying to get his job back. Also, Grievant is hostile towards his former employer. For all the above reasons, Grievant cannot be considered a credible witness.

There are also multiple hearsay statements involved in this case relating to whether Grievant had permission to take the plants: the statements of M.M., the statements of M.M.'s son, and the statements of Ms. Walker and Ms. Farley. Relevant hearsay is admissible in administrative hearings. *Gunnells v. Logan County Bd. of Educ.,* Docket No. 97-23-055 (Dec. 9, 1997). The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court

statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. *Id.*; *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-H-115 (June 8, 1990).

Whether or not Grievant had M.M.'s permission to take the plants can only be determined by examining the testimony of those who had contact with M.M. prior to her death. M.M. made no writing respective to her wishes for the disposition of her plants. Two witnesses testified credibly that M.M. wanted Grievant to have the plants. The contradictory evidence is additional hearsay testimony of M.M.'s son that he did not know M.M. had given the plants to Grievant and did not believe she would. There is no direct evidence that Grievant did not have permission to take the plants. In addition, the statements are consistent with Grievant's care of the plants and gifts of soil and cuttings to M.M. Therefore, M.M.'s statements are entitled to weight. M.M's son was not called to testify and his statements were offered in an unsigned transcript of CEO Booker's interview with him. Although the transcript is not signed by M.M.'s son, it was made contemporaneous of the statements. Therefore, the statements of M.M.'s son are also entitled to weight. Neither Ms. Walker nor Ms. Farley appeared to testify. There was no

transcript introduced of their statements. CEO Booker simply stated they did not corroborate Grievant's story. Therefore, those statements are given no weight.

The evidence presented at the level three hearing was significantly different than what was before Respondent at the end of the investigation. However, it appears that this was because the investigation was rushed. The first investigatory interview was held in the late morning, and by 4:40 pm, a decision to terminate Grievant had already been reached. The interviewers did not give witnesses an opportunity to simply tell their story or follow up with anything the witness thought had been left out. Specific questions were asked of the witnesses and witnesses were only allowed to answer those questions. To be fair, Grievant had a resentful and defensive attitude and his lack of candor with his immediate supervisor was troublesome and suspicious. The undersigned could not find Grievant to be credible either. However, Grievant, especially given his nearly twenty years of service and difficulties expressing himself, was not given enough opportunity to answer the charges. He specifically said in his interview that M.M. had said to "several people" she wanted Grievant to have the plants, named Ms. Walker and Ms. Farley as two who knew, and said "I can't remember who else." As these were plants of relatively little monetary value, it is certainly plausible that anyone who did overhear M.M. give them to Grievant or talk about wanting Grievant to have them, would not think it was important enough to pay attention and remember. When Ms. Walker and Ms. Farley did not corroborate, Grievant should have been given another opportunity to put forth the additional witnesses he could not remember during his interview.

Reviewing all the credible evidence, the undersigned must make different conclusions about what happened than Respondent. The credible testimony of both Ms. Hicks and Ms. Lilly shows it is more likely than not that M.M. wanted Grievant to have the plants upon her death and told him so. The testimony of Ms. Pierce shows she was very frustrated with the plants, stating the plants had been an "aggravation," that she did not care what happened with them, and she had already had problems with M.M.'s son. Ms. Pierce denies giving Grievant specific permission to remove the plants, and Grievant's testimony that she specifically told him to take the plants is not credible. Ms. Hicks' credible testimony is exactly the same as Ms. Pierce's on the first part, but Ms. Hicks also testified that Ms. Pierce said she just wanted the room clean. While it is clear that Ms. Pierce did not intend to give anyone permission to take the plants, given her admission to the first part and her frustration, it appears more likely than not she did make some statement that she just wanted the room clean. It would, therefore, be reasonable for Grievant to conclude he did have Ms. Pierce's permission to remove the plants, and both he and Ms. Hicks believed Grievant had permission to take the plants. It is undisputed that Grievant had already taken the plants when supervisor told him to stay out of the room and that there was no discussion about the plants or other questions asked of Grievant at that time. It is undisputed that Grievant failed to inform any member of management or M.M.'s family of his plan to take the plants. It is also undisputed Grievant returned the plants once instructed to do so. Although Respondent argues Grievant improperly refused to bring them back at first, the evidence simply shows that Grievant had a doctor appointment and had asked to bring them back after

the doctor appointment. Once he was told that was not acceptable, he brought them back immediately.

Respondent asserts that when Grievant removed the plants he misappropriated resident property and violated policy. In support of this contention, Respondent provided several Code of Federal Regulations cites and DHHR Employee Conduct policy 2108. The majority of the Code of Federal Regulations cites do not appear relevant. Though they clearly deal with the subject of misappropriation, these code sections are directed to state agencies and are not regulations that Grievant can be alleged to have violated. *See* 42 CFR § 483.13(b), (c) (facilities must implement policies to prohibit misappropriation); 42 CFR § 488.301(a)(1), (2) (agency must review any allegation of misappropriation and investigate if there is reason to believe misappropriation has occurred); 42 CFR § 488.332(a)(4) (agency must act on complaint if investigation gives reason to believe misappropriation has occurred). Respondent did not provide any policies it had adopted pursuant to the Code of Federal Regulations' requirements. The policy that was provided, DHHR Employee Conduct policy 2108, is very general, requiring employees to "respect the property of residents . . . be ethical . . . and refrain from any type of exploitation of residents/patients/clients or their families . . . ." What is most relevant is the definition of misappropriation, which states, "[m]isappropriation of resident property means the deliberate misplacement, exploitation, or wrongful, temporary or permanent use of a resident's belongings or money without the resident's consent." 42 CFR § 488.301. Of particular concern to this case is the phrase "without the *resident's* consent" (emphasis added). Respondent's preoccupation, both in the investigation and at level three, with whether Grievant had

permission from M.M.'s son was misplaced. M.M. was a capacitated resident and she had the ability and right to make her own decisions, and there is no requirement she clear her decisions with her son. The weight of evidence is that Grievant removed the plants with M.M.'s consent. Therefore, he did not, by definition, misappropriate M.M.'s property.

However, obviously, it is a horrible situation for everyone involved if the family does not know a gifting had occurred. The undersigned does not understand why there is no policy prohibiting employees from receiving gifts from residents, which would serve to ensure residents could not be exploited in that way, or at least a policy on reporting any such gift. While it would have been a better decision for Grievant to have told management regarding this gifting before it became an issue, it does not appear he violated any policy in failing to report the gift or in accepting the gift. While there was no written policy or procedure, it does appear Grievant had training on not entering or removing anything from the room of a deceased resident. However, while Ms. Pierce did not give Grievant specific permission to take the plants as he testified, both Ms. Pierce's interview transcript and Ms. Hicks' testimony show that Ms. Pierce did make a statement that Grievant could reasonably interpret as giving him permission to take the plants. Therefore, it is plausible Grievant thought he had permission to remove the plants, and, at worst, the removal would have been a technical violation under the circumstances.

Respondent also alleged Grievant was insubordinate. Insubordination "includes, and perhaps requires, a willful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Butts v. Higher*

Educ. Interim Governing Bd., 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). *See also 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). "[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 willful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts,* 212 W. Va. at 212, 569 S.E.2d at 459. Grievant did not refuse to obey an order. Grievant did not go into M.M.'s room and take the plants after his supervisor told him not to go in the room. He had already taken the plants. His supervisor mentioned nothing about the plants. Respondent alleges Grievant was insubordinate because he did not tell his supervisor he had already been in the room and taken the plants. Respondent did not provide any law to support this interpretation of insubordination. Grievant's failure to inform his supervisor that he had already taken the plants, while a poor decision, cannot be stretched to show insubordination.

To be clear, Grievant is not free of fault. Grievant never told anyone before taking the plants that M.M. had given the plants to him and that he planned to take them. Further, Grievant's demeanor and behavior in the hearing and his hostility towards his employer is particularly disturbing. Certainly, this situation added to the family's grief and caused significant difficulty for Respondent. Grievant should have displayed better judgment, but it also does not appear Respondent has a clear policy on whether or how an employee may receive a gift from a resident. Whatever discipline may have been appropriate for Grievant's lack of good judgment, Respondent simply cannot terminate Grievant. Even if the undersigned were to have found that Grievant

either did not have permission to remove the plants or that M.M. had not intended to gift the plants to Grievant, termination would still probably not have been appropriate. As stated above, "the work record of a long-term civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." *Buskirk,* 175 W. Va. at 285, 332 S.E.2d at 585. In fact, even when a petty theft was proven, the Supreme Court of Appeals found that two long-term employees with no disciplinary history could not be terminated. *See Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983). This case may be distinguishable in that Grievant had some disciplinary history, though that history was minor, but Grievant also had more years of service and other mitigating factors. Either way, it appears Respondent was not justified in terminating Grievant.

The last issue is mitigation of damages. While Respondent did not address this issue in its Proposed Findings of Fact and Conclusions of Law, Respondent did take testimony and present argument on this issue at the level three hearing. This is sufficient to preserve the issue of mitigation of damages for decision. *See Kanawha County Bd. of Educ. v. Fulmer*, 228 W. Va. 207, 719 S.E.2d 375 (2011). The West Virginia Supreme Court, in a case arising from the grievance process, has stated,

> Unless a wrongful discharge is malicious, the wrongfully discharged employee has a duty to mitigate damages by accepting similar employment to that contemplated by his or her contract if it is available in the local area, and the actual wages received, or the wages the employee could have received at comparable employment where it is locally available, will be deducted from any back pay award; however, the burden of raising the issue of mitigation is on the employer.

Syl. Pt. 2, *Mason County Bd. of Educ. v. State Superintendent of Sch.*, 170 W. Va. 632, 295 S.E.2d 719 (1982). In addition, "[u]nemployment compensation benefits may not be used to reduce an award of damages under the collateral source rule." *Teaford v. Raleigh County Bd. of Educ.*, Docket No. 96-41-279 (Feb. 4, 1998) (citing *Powell v. Wyoming Cablevision, Inc.*, 184 W. Va. 700, 403 S.E.2d 717 (1991); *Orr v. Crowder*, 173 W. Va. 335, 315 S.E.2d 593 (1983).

There was no evidence presented that Grievant's termination was malicious, nor do Respondent's actions appear malicious on their face. Therefore, Grievant had a duty to mitigate damages. The testimony of Grievant at level three shows he was not employed at any time after his termination. Grievant did apply for unemployment compensation benefits and applied for multiple jobs each week while seeking and receiving unemployment compensation benefits. As noted above, unemployment compensation benefits do not reduce the amount of back pay due to Grievant. Respondent presented no evidence that work was available, or that Grievant refused to accept work. Sometime after his unemployment compensation benefits ended, Grievant applied for Social Security Disability Insurance ("SSDI"). At the time of the level three hearing, Grievant had not been awarded SSDI. Again, Grievant's demeanor was problematic. Throughout questioning on this issue, Grievant continued to be evasive and kept clicking his pen over and over. When asked if he wanted his job back, he stated, "I wouldn't step in that place if my life depends upon it" and "they're shuttin' that place down anyway." When questioned further, he stated he would take his job back if he could get it but that "my back's pretty screwed up" and he thought he would be better off on SSDI. Grievant stated he did not think he could do the job anymore.

Therefore, it is unclear whether Grievant is still physically able to perform his job duties. However, Respondent provided no law to support that this should impact Grievant's back pay award or his reinstatement. Hostility of a wrongfully terminated employee would certainly not be uncommon in such cases. Grievant was wrongfully terminated and must be reinstated. Whether Grievant is currently able to perform his job duties or how that impacts his return to work is not within the scope of this grievance.

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. 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 &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); *See also* W. VA. CODE ST. R. § 143-1-12.02 and 12.03 (2012).

3. The West Virginia Supreme Court of Appeals has also stated that "the work record of a long-term civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 285, 332 S.E.2d 579, 585 (1985) (*per curiam*). *See Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983) (dismissal of employees with 15 years of service too harsh a punishment for petty theft of clothing donated for patients at state hospital); *Serreno v. W. Va. Civil Serv. Comm'n*, 169 W. Va. 111, 285 S.E.2d 899 (1982) (*per curiam*) (dismissal of employee with 22 years of service for falsification of mileage vouchers not appropriate when there was no preponderance of evidence of wrongful intent and employee had a plausible explanation for his actions).

4. “Misappropriation of resident property means the deliberate misplacement, exploitation, or wrongful, temporary or permanent use of a resident's belongings or money without the resident's consent.” 42 CFR § 488.301.

5. Grievant did not misappropriate resident property as the weight of evidence shows it is more likely than not the resident wanted Grievant to have the plants and therefore, consented to Grievant’s removal of the plants upon her death.

6. Insubordination "includes, and perhaps requires, a willful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Butts v. Higher Educ. Interim Governing Bd*., 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). *See also 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). "[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 willful; and 9c) the order (or rule or regulation) must be reasonable and valid." *Butts,* 212 W. Va. at 212, 569 S.E.2d at 459.

7. Grievant was not insubordinate. Grievant was told to stay out of the resident's room after he had already removed the plants. Grievant's failure to inform his supervisor he had already taken the plants, when the plants had not even been mentioned by his supervisor, was not insubordinate.

8. While there is a procedure in place that staff is not to remove anything from the room of a deceased resident, Grievant reasonably believed he had permission of the supervising RN to remove the plants due to a frustrated statement made by the supervising RN.

9. Mitigation of damages is applicable to the grievance process and,

> Unless a wrongful discharge is malicious, the wrongfully discharged employee has a duty to mitigate damages by accepting similar employment to that contemplated by his or her contract if it is available in the local area, and the actual wages received, or the wages the employee could have received at comparable employment where it is locally available, will be deducted from any back pay award; however, the burden of raising the issue of mitigation is on the employer.

Syl. Pt. 2, *Mason County Bd. of Educ. v. State Superintendent of Sch.*, 170 W. Va. 632, 295 S.E.2d 719 (1982). In addition, "[u]nemployment compensation benefits may not be used to reduce an award of damages under the collateral source rule." *Teaford v. Raleigh County Bd. of Educ.*, Docket No. 96-41-279 (Feb. 4, 1998) (citing *Powell v. Wyoming Cablevision, Inc.*, 184 W. Va. 700, 403 S.E.2d 717 (1991); *Orr v. Crowder*, 173 W. Va. 335, 315 S.E.2d 593 (1983).

10. Respondent properly raised the issue of mitigation of damages. Grievant fulfilled his duty to mitigate by seeking unemployment compensation benefits and then applying for SSDI. Respondent presented no evidence that work was available, or that Grievant refused to accept work. Whether Grievant is currently able to perform his job duties or how that impacts his return to work is not within the scope of this grievance.

Accordingly, the grievance is **GRANTED.** Respondent is **ORDERED** to reinstate Grievant to full-time employment, with back pay, interest, and benefits to the date he was dismissed,

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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: June 13, 2013

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Billie Thacker Catlett
Administrative Law Judge