WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JUDY WARNER,
Grievant,

v. **Docket No. 2012-0986-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/LAKIN HOSPITAL,
Respondent

DECISION

Grievant, Judy Warner, has been employed by Respondent, Department of Health and Human Resources ("DHHR") at Lakin Hospital since 1997. Ms. Warner filed a grievance form dated March 20, 2012, contesting what she believed to be a "wrongful termination." As relief, Grievant seeks "to be made whole including back pay with interest & benefits restored." Ms. Warner filed this grievance directly to level three pursuant to the authority set out in W. VA. CODE § 6C-2-4(a)(4).

A level three hearing was conducted in the Charleston, West Virginia office of the West Virginia Public Employees Grievance Board on June 17, 2013. Grievant appeared at the hearing with her representative, Gorgon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by B. Allen Campbell, Supervising Senior Assistant Attorney General. The parties presented Proposed Findings of Facts and Conclusions of Law, both of which were received by the West Virginia Public Employees Grievance Board on July 23, 2013. This matter became mature for decision on that date.

Synopsis

Respondent dismissed Grievant from employment because she spent forty-two minutes away from work without reporting that time on her timesheet on one day, and

2.22 hours away from work on a subsequent day also without reporting that time on her timesheet. Given Grievant's prior disciplinary history, Respondent felt that dismissal was appropriate.

Grievant argues that Respondent did not have good cause to terminate her employment, and the dismissal was an act of reprisal for her filing a previous grievance, and acting as a representative for other employees in the grievance procedure.

Grievant did participate in a protected activity, and made a *prima facie* showing of reprisal. Respondent was able to demonstrate valid nondiscriminatory reasons for the disciplinary action it took. Accordingly the grievance is DENIED.

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, Judy Warner, has been employed by the DHHR as a Health Service Worker at Lakin Hospital since 1997.

2. In April 2007, Ms. Warner filed a grievance contesting her dismissal from employment at Lakin Hospital. A decision was entered by an Administrative Law Judge for the Grievance Board dated November 18, 2008, granting the grievance and ordering the reinstatement of Grievant to her prior position.

3. Grievant has served as a union[1] representative at Lakin Hospital and has represented other employees in the grievance process.

4. On February 19, 2012, Grievant arrived at work for her 3:00 p.m. to 11:00 p.m. shift at around 3:08 p.m. Grievant told her shift supervisor, Bernice Campbell, the

[1] Grievant has been a shop steward for UE Local 170, West Virginia Public Workers Union at Lakin Hospital since 2008.

tire on Grievant's car was going flat and asked if she could go fix it. Supervisor Campbell gave Grievant permission to leave to fix her tire, but told Grievant she would have to sign in upon her return.

5. Grievant made a telephone call, and at 3:14 p.m., she got into her car and drove out of the Hospital parking lot. Grievant returned to the building at 3:42 p.m., however, she did not sign in and her timesheet noted that she worked from 3:00 p.m. to 11:00 p.m., for a total of eight hours.[2] Grievant did not fill out a leave slip for the time she was away from work.

6. Grievant met with Director of Nursing, Kim Billups, and Assistant Director of Nursing, Vicky Berkley on March 5, 2012, to discuss the events of February 19, 2012. Grievant admitted coming in late on February 19, and failing to submit a leave slip for the time she was away from work fixing her tire. Grievant said she believed that the supervisor gave her permission to do this.

7. Director of Nursing Billups, investigated Grievant's allegation that she was given permission to arrive late without logging in her time. During that investigation she discovered another incident which allegedly occurred on March 4, 2012.

8. On March 4, 2012, Grievant was again working the 3:00 p.m. to 11:00 p.m. shift. A review of the video footage taken by the cameras in the Hospital indicated that Grievant got into her car at 7:45 p.m. and left the hospital parking lot. Grievant returned to the hospital at 8:33 p.m. Later that evening, the video footage indicated that Grievant went out to the parking lot and took her car to the back of the hospital to have

[2] There are video cameras in the halls and at the entrances of the building and various wings of the building installed ostensibly to insure patient safety. Grievant's movements were captured on those cameras.

air put in her tire. The video footage indicated that Grievant was away from her duties for a total of 2.22 hours during that eight hour shift.[3]

9. Grievant's timesheet for that day indicated that she worked a full eight hour shift. Grievant did not submit any leave slips for the time she was away from her assigned unit in the Hospital.

10. A Pre-determination conference was conducted on March 8, 2012, with Grievant, Director of Nursing Billups and Assistant Director of Nursing Berkley. Grievant explained that one of the times she was off her unit on March 4, 2012, her car had been acting up and she was trying to find out what was wrong with it. Part of her efforts included driving the car up and down the road that runs beside the facility.[4] An additional time Grievant was outside of the Hospital she took her car to the rear of the facility and put air in her tire. Grievant did not deny that she was away from her work station during these times, and did not submit a leave record those periods on her time sheet or submit leave slips for them.

11. Prior to making a decision related to discipline of Grievant, the Hospital Chief Executive Officer, Linda Daily, reviewed Grievant's disciplinary record and found the following:

- December 3, 2010, Grievant received a verbal reprimand for accepting a gift from a patient in violation of Policy Memorandum 2108 – Employee Conduct. Respondent's Exhibit 3.

[3] Respondent's Exhibit 16, which consists of a timeline recording Grievant's movements during her shift on March 4, 2012, as well as time stamped still shots from the video demonstrating when Grievant left her assigned unit and the Hospital and when she returned. Included were still shots of Grievant in the Hospital parking lot.

[4] Director of Nursing Billups indicated that Grievant had left the facility grounds without permission. Grievant believed that the road adjacent to the facility was on the facility grounds. This seems like a minor point since Grievant was away from her assigned unit regardless of whether the road was actually part of the facility.

- December 3, 2010, Grievant was placed on a performance improvement plan related to time spent away from her assigned duties during her scheduled workday. According to the plan, Grievant's breaks and lunch times were monitored by her supervisor for sixty working days. Respondent's Exhibit 2
- December 13, 2010, Grievant received another written reprimand for being off her assigned unit an excessive amount of time during the workday. Respondent's Exhibit 4
- March 11, 2011, Grievant received a notice of failing to meet expectations in an Employee Performance Appraisal–2, noting the difficulties that she had related to being off her assigned unit during the workday. Respondent's Exhibit 8.
- April 27, 2011, Grievant received a written reprimand for leaving the facility without approval on at least two occasions. Respondent's Exhibit 5.
- May 3, 2011, Grievant received a letter from Director of Nursing, Billups, documenting instances of failure to comply with her performance improvement plan related to being away from her assigned unit. Respondent's Exhibit 6.
- May 19, 2011, Grievant received a twenty-four hour suspension without pay for not following the assigned performance improvement plan and the performance improvement plan was extended. Respondent's Exhibit 7.
- Grievant's problems related to leaving the facility without approval and being away from her assigned unit were discussed in her Employee Performance Appraisal–3 dated September 23, 2011. Respondent's Exhibit 9.[5]

12. By letter dated March 20, 2011, Chief Executive Officer Dailey dismissed Grievant from her employment as a Health Service Worker at Lakin Hospital. The reasons given for terminating Grievant's employment were the time spent away from her work assignment on February 19, 2011, and March 4, 2011, Grievant's failure to

[5] This disciplinary hearing was set out in the letter dismissing Grievant from her employment dated March 20, 2012.

properly document this time away from her work duties, and her history of discipline for similar infractions.

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 proved that Grievant was away from her assigned duties on February 19, 2012, for forty-two minutes while getting the tire fixed on her car. Grievant had permission from her supervisor to be away from her duties at that time, however, Grievant failed to report this time on her timesheet, and claimed it as if she had been on-duty her entire shift. Additionally, Respondent proved that on March 4, 2012, Grievant was away from her assigned duties for 2.2 hours attempting to determine what was wrong with her car and putting air in her tire. Once again, Grievant did not note this time away from work on her timesheet, and claimed the full eight hours for her shift. These actions violate Lakin Hospital Policy L201.8b related to time on duty and reporting to supervisors each time a direct care employee leaves the unit. These two incidents alone would not likely be sufficient to support dismissal under the standard set out in *Oakes, supra.* However, Respondent proved that Grievant had a long history of similar violations for which she had received progressive discipline including, reprimands, a suspension, and a plan of improvement. Given the totality of the

circumstances, Respondent proved the reasons for Grievant's dismissal by a preponderance of the evidence.

Grievant argues that Respondent's alleged reasons for terminating Grievant's employment are merely pretexts for retaliatory motives. Grievant avers that she was dismissed as reprisal for her active participation in the Public Employee's Grievance Procedure. WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

> (1) That she engaged in protected activity;
> (2) That she was subsequently treated in an adverse manner by the employer or an agent;
> (3) That the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
> (4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Carper v. Clay County Health Dep't, Docket No. 2012-0235-ClaCH (July 15, 2013); *Cook v. Div. of Natural* Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.,* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ*., Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). "[T]he critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the

evidence that his protected activity was a 'significant,' 'substantial' or 'motivating' factor in the adverse personnel action." *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994).

If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *Id. See Mace v. Pizza Hut, Inc.,* 377 S.E.2d 461 (W. Va. 1988); *Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n,* 309 S.E.2d 342 (W. Va. 1983); *Webb v. Mason County Bd. of Educ.,* Docket No. 89-26-56 (Sept. 29, 1989). "Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive." *Carper v. Clay County Health Dep't*, Docket No. 2012-0235-ClaCH (July 15, 2013); *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994). *See Sloan v. Dept. of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

There is no doubt that Grievant was engaged in activities protected by W. VA. CODE § 6C-2-3(h) which states:

> (h) *Reprisal.* -- No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination.

She filed a grievance against Respondent and was reinstated to employment by a decision of the Grievance Board. *Warner v. Dep't of Health & Human Res*., Docket No. 07-HHR-409 (Nov. 18, 2008). Additionally, as a union shop steward, Grievant has represented co-workers in their grievances against Respondent at levels one, two and

three.[6] Following her participation in these protected activities, Grievant suffered the adverse consequence of being dismissed from employment and Respondent was keenly aware of Grievant's participation in the protected activities. An inference can be drawn that Respondent's actions were the result of a retaliatory motive if the adverse action occurred within a short time period of the adverse action. *Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). Grievant's representation of co-workers in the grievance process was ongoing and was occurring when or near the time Grievant was dismissed. Accordingly, an inference can be drawn that Respondent terminated her employment for retaliatory purposes and Grievant has made a *prima facia* case of reprisal.

Since Grievant established a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *See Mace, supra.* Respondent points out that Grievant was dismissed for being away from her work assignment for long periods of time without noting those times on her timesheets, and often without prior approval by her supervisors. Respondent provided video and testimonial evidence that supported these allegations. Respondent also demonstrated that Grievant had a significant history of such infractions for which she had been subjected to progressive discipline including a plan of improvement, verbal reprimands and a suspension. Clearly, Respondent demonstrated legitimate, non-retaliatory reasons for terminating Grievant's employment and Grievant did not offer any evidence that these reasons were pretexts. Accordingly, the grievance is DENIED.

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[6] *See, Roush v. Dep't of Health & Human Res.,* Docket No. 2011-1310-DHHR (Aug. 17, 2012); and *Surbaugh v. Dep't of Health & Human Res*., Docket No. 2011-1637-DHHR (Mar.16, 2012).

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).

> . . . *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).

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*).

3. Considering the totality of the evidence, Respondent proved the reasons for Grievant's dismissal by a preponderance of the evidence. and that there was good cause for the termination of Grievant's employment.

4. WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

> (1) That she engaged in protected activity;
> (2) That she was subsequently treated in an adverse manner by the employer or an agent;
> (3) That the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
> (4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Carper v. Clay County Health Dep't, Docket No. 2012-0235-ClaCH (July 15, 2013); *Cook v. Div. of Natural* Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.,* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ*., Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

5. Grievant made a *prima facia* of reprisal.

6. If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *See Mace v. Pizza Hut, Inc., supra.*

7. Respondent proved, by a preponderance of the evidence, legitimate, non-retaliatory reasons for terminating Grievant's employment.

8. "Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive." *Carper v. Clay County Health Dep't*, supra.

9. Grievant did not present any evidence to prove that the reasons offered by Respondent for the termination of Grievant's employment were pretexts for retaliatory motives.

Accordingly, the 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: OCTOBER 21, 2013.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE