WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MATTHEW LOFLIN,
Grievant,

v. **Docket No. 2012-1291-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/MILDRED MITCHELL-BATEMAN HOSPITAL,
RESPONDENT.

DECISION

Matthew Loflin, Grievant, is employed by Respondent, Department of Health and Human Resources ("DHHR") at Mildred Mitchell-Bateman Hospital ("Bateman") as a Licensed Practical Nurse. Mr. Loflin filed a level three[1] grievance contesting a three-day suspension. He alleges that the suspension was unlawful, discriminatory and violated Bateman Hospital policies MMBHCO15 and MMBHCO16.[2] As relief, Grievant Loflin seeks to be "Paid for days unlawfully suspended" and "Everything over 1 year old out of my HR and personnel file."

A level three hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board on October 15, 2012. Grievant appeared *pro se* and Respondent was represented by Harry C. Brunner Jr., Assistant Attorney General. The parties submitted Proposed Findings of Fact and Conclusions of Law, the last of which was received by the Grievance Board on November 16, 2012. This matter became mature for decision on that date.

[1] W. VA. CODE § 6C-2-4(a)(4) authorizes employees to file a grievance at level three to contest a suspension without pay.
[2] Grievant's narrative statement is in the file and part of the record.

Synopsis

Grievant was suspended without pay for three working days for allegedly failing to adhere to Bateman policies regarding behavior and attendance by having excessive absences and refusing to work overtime. Grievant alleges that the suspension was in violation of Hospital policy because Respondent took into consideration absences outside of a six-month period, suspended him after he successfully completed a plan of improvement without first taking less severe disciplinary action and was the result of discrimination. Specifically, Grievant notes that he did not have eight occurrences of unscheduled sick leave within a six-month period which would be necessary for suspension pursuant to the policy MMBHC016 under most circumstances.

Respondent proved that Grievant had a history of attendance problems and he had been given warning and opportunities for improvement. While Grievant did only have seven incidents of unscheduled sick leave in the period after his Improvement Plan, his refusal of mandatory overtime was also part of the reason for his suspension. The combination of these issues justified the three-day suspension.

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. Mildred Mitchell-Bateman Hospital is a facility for the treatment of acutely mentally ill patients. These patients require care around the clock every day of the year.

2. Grievant Loflin is employed at Bateman as a Licensed Practical Nurse.

3. Grievant has had problems with his attendance from time to time during the course of his employment with Respondent. Specifically, Respondent has taken the following actions to address Grievant's attendance issues:

- January 28, 2010, Grievant was counseled for excessive unscheduled absences.[3]
- April 13, 2010, Verbal Reprimand for excessive unscheduled absences.[4]
- July 19, 2010, Written Reprimand for excessive unscheduled absences.[5]
- February 1, 2011, Performance Improvement Plan initiated to address attendance issues.
- August 17, 2011, Verbal Reprimand for attendance issues and insubordination.[6]
- August 18, 2011, Performance Improvement Plan augmented.
- December 15, 2011, Written Reprimand for attendance issues.[7]

4. Grievant was placed on a Performance Improvement Plan on February 1, 2011, and the Plan was extended on August 18, 2011. Grievant's Plan of Improvement ended in March 2012.[8] No document was presented by either party regarding the end of the Plan of Improvement. Grievant testified that the Plan was successfully completed.

5. A predetermination conference was held with Grievant on April 8, 2012, to discuss potential disciplinary action related to Grievant's poor attendance and five recent occasions where Grievant refused to work mandatory overtime shifts.

6. Bateman Hospital, like other DHHR facilities, has experienced difficulties filling vacant staff positions; yet the Hospital must meet specific staffing levels to ensure

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[3] An unscheduled absence occurs any time an employee does not report to work if the absence has not been approved and scheduled in advance. These absences include times when the employee calls in sick and has a physician's statement.
[4] Respondent's Exhibit 5. Documentation of verbal and written reprimands issued to Grievant.
[5] *Id.*
[6] *Id.*
[7] *Id.* The list of actions is set out in Respondent's Exhibit 1, the letter of suspension.
[8] Grievant testified that his Plan of Improvement ended sometime in March 2012. He could not remember a specific date and no one contested his assertion. No document was presented concerning the end of the plan, nor was there any testimony beyond Grievant's general statement that his attendance had improved sufficiently to be removed from the plan.

basic patient care. Consequently, when staff members are not able to work their shifts due to illness, other staff members are often required to work overtime to meet the required staffing levels.

7. By letter dated May 1, 2012, from Bateman Director of Human Resources, Kieth Anne Worden, Grievant was suspended without pay for three working days. As support for this action, Director Worden cited the following attendance and overtime events that have occurred subsequent to Grievant's written reprimand on December 15, 2011:

- December 18 and 19, 2011: Called in sick.
- January 3, 2012: Called in sick.
- January 11, 2012; Left 15 minutes early.
- January 12, and 13, 2012: Called in sick.
- January 20, 2012: 15 minutes late and left 15 minutes early.
- January 31, 2012, February 1, and 2, 2012: Called in sick.
- February 21 and 22, 2012: Called in sick.
- February 23, 2012: 15 minutes late.
- March 18, 2012: Called in sick.
- April 13, 2012: Called in sick.
- April 15, 2012: Called in sick.
- April 16, 2012: Left early due to illness
- Grievant refused mandatory overtime on: February 9, 2012; March 21 and 23, 2012; April 5, 9, and 11, 2012.

These events added up to eight events that Grievant called in sick,[9] four events that Grievant arrived late or left early, and six events where Grievant refused to work a mandatory overtime shift, in a five-month period.

Discussion

Respondent suspended Grievant for three working days without pay for attendance problems and refusal to work mandatory overtime. Since this grievance

[9] For purposes of this calculation, events where Grievant called in sick on consecutive days were considered one event. That appears to be consistent with how the events were generally listed in the suspension letter.

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); *Nicholson v. Logan County Bd. of Educ*., Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ*., Docket No. 89-41-232 (Dec. 14, 1989). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ*., Docket No.96-20-380 (Mar. 18, 1997); *Leichliter v. W. Va. Dep't of Health and Human Res*., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Respondent presented evidence that demonstrated Grievant had attendance problems over the last three years. Grievant has been counseled and has received two verbal and two written reprimands during that period. Grievant argues that Respondent's Progressive Disciplinary Policy requires all reprimands that are more than a year old should to be stricken from his file and cannot be used as the basis of this disciplinary action. With regard to removing reprimands from an employee's file, Bateman Policy MMBHC015, *Progressive Disciplinary Action*, states the following:

> A. Verbal Reprimand- . . . "Documentation of a Verbal Reprimand" remains in an employee's administrative file in the supervisor's office for one year[10]. . . If no further infractions concerning the same issue occur by the employee, the form is removed from the file.
>
> B. Written Reprimand - . . . A written reprimand shall be filed in an employee's personnel file for at least one year. **After one year, the employee may request that the employee's**

[10] A copy also goes to the Human Resource Office, but not in the employee's official personnel file.

> **supervisor petition the Chief Executive Officer to consider removing the written reprimand from the employee's personnel file.** (Emphasis in original).[11]

The record demonstrates that a full year did not elapse after either of Grievant's verbal reprimands without additional occurrences of excessive absences. In fact, in a period of one and two-thirds years, between April 13, 2010, and December 15, 2011, Grievant received two verbal reprimands and two written reprimands. Grievant did not qualify to have the verbal reprimands automatically removed from his file. Additionally, Grievant did not demonstrate that he petitioned to have his written reprimands removed from his file as required by the policy. Consequently the reprimands are properly in Grievant's files and may be used for the sole purpose of demonstrating that Respondent has followed progressive disciplinary measures in attempting to remediate Grievant's attendance problems.

Next, Grievant asserts that Respondent failed to follow Bateman Policy MMBHC016, *Leave Authorization and Absence Control.* Grievant points to page three of the policy under the heading, Procedure. The policy contains a list of occurrences that take place during a six-month period and the progressive discipline which will be implemented after each progressive event. Under the heading of "Combination of Sick and Annual Leave" the progression begins with a counseling and Improvement Plan after the fifth occurrence and continues with oral and written reprimands after the sixth and seventh occurrences, and a five-day suspension after the eighth occurrence. Grievant argues that Respondent failed to follow that progression in the six months prior to his suspension and therefore, the discipline is invalid.

[11] Respondent's Exhibit 3, Bateman Policy MMBHC015, *Progressive Disciplinary Action.*

Grievant received a written reprimand on December 15, 2011, and had eight events that Grievant called in sick during the succeeding five-month period. While Respondent did not issue Grievant additional reprimands during that period he did have sufficient occurrences to warrant a suspension under the policy. Additionally, Grievant refused mandatory overtime on six occasions during this time period which could have justified the suspension without the attendance problems.[12] Respondent proved the reasons for giving Grievant a three-day suspension by a preponderance of the evidence.

Finally, Grievant argues that Respondent discriminated against him by giving him a suspension while other employees, who miss as much or more work than he does, were not disciplined. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA.CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) That he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) That the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

[12] It is noted that in addition to not giving Grievant additional reprimands, he was also given a three-day suspension instead of the five-day suspension allowed by policy MMBHC016. In the long run, employees would not benefit by invalidating a disciplinary action because Respondent was more lenient than the policy required.

Grievant testified that two employees at Bateman missed more work than he had, but were not suspended.[13] However, Grievant did not provide any documentation regarding the amount of days these employees were absent beyond his general assertion that he believed they missed more work than he did over the same time period.[14] This is not sufficient evidence to prove that Respondent treated similarly situated employees differently than Grievant. Grievant did not prove that Respondent was guilty of discrimination. Accordingly, the Grievance is DENIED.

Conclusions of Law

1. 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); *Nicholson v. Logan County Bd. of Educ*., Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ*., Docket No. 89-41-232 (Dec. 14, 1989).

2. Respondent proved the reasons for giving Grievant a three-day suspension by a preponderance of the evidence.

3. Grievant did not prove that Respondent's disciplinary action was in violation of Bateman Policy MMBHC016, nor that he was entitled to have the reprimands removed from his file pursuant to Bateman Policy MMBHC015.

4. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are

[13] Grievant theorized that one employee received preference because he was gay and the administration was afraid to discipline him.
[14] Director Warden testified that the employees were not treated differently than Grievant with regard to attendance.

related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA.CODE § 6C-2-2(d).

5. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) That he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) That the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

6. Grievant did not prove that Respondent was guilty of discrimination as that term is applied to the Public Employees Grievance Procedure.

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: APRIL 30, 2013.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE