THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

CHRIS BORCHERT,
Grievant,

v. **Docket No. 2013-1126-CONS**

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

DECISION

Grievant, Chris Borchert, filed an initial grievance against his employer, William R. Sharpe, Jr. Hospital, on July 13, 2012, grieving his three-day suspension without pay. He claims to have been suspended without a predetermination meeting, and complains about the lack of allowance of representation. Grievant seeks as relief to be made whole, including back pay with interest and benefits restored. For reasons more fully stated below, Respondent rescinded this suspension; however, Grievant did not withdraw the grievance. Grievant filed a subsequent grievance on September 8, 2012, once again challenging Respondent's disciplinary action of a three-day suspension. Grievant claims he was suspended without good cause, and makes reference to double jeopardy. Both grievances were filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). The cases were consolidated by an Order of Consolidation entered on February 13, 2013.

A level three hearing was conducted before the undersigned Administrative Law Judge on September 5, 2103, at the Grievance Board's office in Westover, West Virginia. Grievant appeared in person and by his representative, Gordon Simmons, UE Local 170,

West Virginia Public Workers Union. Respondent appeared by Michael E. Bevers, Assistant Attorney General. This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on October 21, 2013.

Synopsis

Grievant was suspended for three days for slapping another employee and pushing her against the wall. Grievant alleges the incident was horseplay, and that he was joking around. Record established that the physical altercation violated Respondent's prohibition against workplace violence and expectations of professional behavior by its employees. Respondent proved by a preponderance of the evidence the charges against Grievant and demonstrated that the three-day suspension was appropriate. Therefore, this grievance is denied.

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

Findings of Fact

1. Grievant has been employed as a Health Service Worker at William R. Sharpe, Jr. Hospital, a psychiatric facility operated by the West Virginia Department of Health and Human Resources.

2. On July 7, 2012, Grievant was working with the Charge Aide, Kathy Smith. Ms. Smith was preparing to shave some of the patients while at one of the Nurses' Station. Grievant offered to help her with the patients, and Ms. Smith said something along the lines of, "that is nice of you, Chrissy." Level three testimony of Ms. Smith.

3. Ms. Smith went into a small room containing an ice maker, referred to as the ice room, and obtained a pair of gloves to wear when shaving the patients. When Ms.

Smith turned around to leave the ice room, Grievant was standing between her and the doorway.

4. Grievant slapped Ms. Smith's face and told her to never call him Chrissy again. Grievant was blocking the doorway which resulted in Ms. Smith pushing Grievant aside to get by him, and to get out of the room.

5. Ms. Smith made it out of the ice room to the Nurses' Station, but not before Grievant pushed her against the wall and knocked her glasses off.

6. Ms. Smith had not called Grievant Chrissy before that day. Ms. Smith had worked with Grievant for two years and they got along, the incident apparently came unexpectedly. Ms. Smith did not view the slapping by Grievant as playful.

7. Recreation Specialist, Angela Starcher, was in the area at the time of the incident. Ms. Starcher indicated that she heard a scuffle in the ice room, and heard a slap. She went to the doorway, Ms. Smith came out of the ice room and told her that Grievant had just slapped her.

8. Debbie Cook, Human Resources Director, received a report on the day of the incident that Grievant had slapped Kathy Smith and pushed her against the wall. The allegations of workplace violence were substantiated.

9. Ms. Cook scheduled a predetermination conference with Grievant and his representative on September 4, 2012.[1] After the conference, Sharpe Hospital imposed a

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[1]At the time of the incident, Grievant was suspended indefinitely pending an investigation. After the allegations were substantiated, Sharpe Hospital changed the indefinite suspension pending the investigation to a three-day unpaid suspension. Grievant was off payroll for three days. He was informed upon his return to work that the three days he was off pending the investigation would be the term of his suspension. Management for Charleston's Department of Health and Human Resources office informed Sharpe

three-day suspension for the incident on July 7, 2012.

10. Grievant acknowledged at the level three hearing that he had, in fact, slapped Ms. Smith, if only very lightly.

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

The charge against Grievant is essentially gross misconduct, as Respondent asserts Grievant made physical contact and battered a fellow employee. The "term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991) (*citing Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985)). *See Evans v. Tax &*

Hospital that converting an indefinite suspension to a three-day suspension was not the proper process, and that Sharpe Hospital needed to correct the procedural deficiencies. This course of action resulted in the delay in scheduling the predetermination conference. The record also established that Grievant was reimbursed for the initial three-day suspension.

Revenue/Ins. Comm'n, Docket No. 02-INS-108 (Sept. 13, 2002).

Respondent has met its burden of proof. While Grievant attempted to downplay his actions in this case, the record demonstrates that Grievant did slap Kathy Smith and pushed her against a wall. In fact, Grievant acknowledged at the level three hearing that he had, in fact, slapped Ms. Smith, if only very lightly. The physical contact violated Respondent's prohibition against workplace violence, and the reasonable expectation that their employees conduct themselves as professionals. Respondent fairly states that they expect their employees to observe a standard of conduct that will not reflect discredit on the abilities and integrity of their employees or create suspicion about their employees' capability in discharging their duties and responsibilities. The nature of Grievant's misconduct supports the conclusion that he did not meet an acceptable standard of conduct as an employee of the Respondent.

Grievant's assertion that he was not afforded a meaningful predetermination conference is without merit. It is undisputed that Grievant was provided with a predetermination conference on September 4, 2012. Grievant asserts this was meaningless since Respondent indicated at the level three hearing that a decision to suspend had already been made. This ill advised admission is true, but Grievant and his representative were given the opportunity to be heard on the issue and offer an explanation for his behavior.

In light of the absence of a predetermination conference before the initial suspension, a finding by the undersigned that Respondent should not have converted the indefinite suspension pending an investigation into a suspension would be nothing more than an opinion that the Hospital was wrong, which Respondent has already acknowledged

by rescinding the suspension and repaying the Grievant. Such a finding would provide no practical consequence for Grievant, hence it would provide no actual relief.

Finally, Grievant does not argue that the undersigned should reduce or mitigate this discipline. The undersigned concludes that the misconduct was of such a nature to justify Respondent's decision to suspend Grievant without pay for three days.

The following conclusions of law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

2. The "term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991) (*citing Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985)). *See Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sept. 13, 2002).

3. Respondent has met its burden of proof and demonstrated Grievant engaged in gross misconduct when he struck Ms. Smith and pushed her against a wall.

For the forgoing reasons, the grievance is hereby **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 (eff. July 7, 2008).

Date: December 3, 2013

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Ronald L. Reece
Administrative Law Judge