THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CAROLYN S. FRAME,

Grievant,

V.

DOCKET NO. 2012-1423-DHHR

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

Respondent.

DECISION

Carolyn S. Frame, Grievant, filed a grievance against her employer, The West Virginia Department of Health and Human Resources/William R. Sharpe Jr. Hospital, Respondent, on June 15, 2012. Grievant asserts suspension without good cause. The relief Grievant is seeking is "to be made whole including back pay with interest and benefits restored". Grievant was suspended for three days for smoking on Hospital grounds. A level three hearing was conducted before the undersigned Administrative Law Judge on November 29, 2012, in the Board's Westover office. Grievant appeared with her representative, Gordon Simmons, UE Local 170 West Virginia Public Employees Union. Respondent appeared by Michael E. Bevers, Assistant Attorney General. This matter became mature for consideration January 22, 2013, upon receipt of the last of the parties' proposed findings of fact and conclusion of law.

Synopsis

Grievant was suspended for three days without pay for smoking at William R. Sharpe Jr. Hospital. On May 11, 2011, the Assistant CEO of William R Sharpe Jr. Hospital, Terry Small, found Grievant smoking on hospital grounds in violation of the "Tobacco Free Campus" policy. Grievant admitted to Ms. Small that she was smoking at the time. The next day, Grievant told her direct supervisor she had not been smoking, but had taken the blame for another employee. The Respondent has met its burden of proof and established that the suspension was justified and within the parameters of the hospital's progressive disciplinary policy and discretion. The following findings of fact are based on the record developed at level three.

Findings of Fact

1. Grievant Carolyn S. Frame is employed by William R. Sharpe Jr. Hospital as a Lead Housekeeper.

2. On May 1, 2009, Respondent adopted a "Tobacco Free Campus" Policy 34.316 prohibiting tobacco use on hospital property. (Respondent's Exhibit No. 17.)

3. On October 17, 2011, Grievant was found by her supervisor, Jack B. Atchison, Environmental Services Supervisor, smoking in her car. Grievant was informed that this was a direct violation of hospital policy. She was issued a first and final verbal warning and informed that another infraction would lead to progressive disciplinary action.

4. On October 24, 2011, the Board found that “Respondent failed to get the necessary approval from the Director of the Division of Personnel to impose a more restrictive smoking policy than provided for by the Division of Personnel.” (*Bailey, et al. v. West Virginia Department of Health and Human Resources*, Docket No.2011-0342-CONS)

5. Respondent’s Tobacco Free Campus Policy was not reviewed and approved by the Division of Personnel as required until November 21, 2011. (Respondent’s Exhibit No. 18.)

6. On May 31, 2012, Grievant admitted to Robert J. Kimble, CFO, and Terry Small, Assistant CEO, that she had been smoking by a bench next to a dumpster beside the facility, when they discovered the Grievant and another employee after following the scent of smoke, while inspecting the grounds for new purchases. However, her statement was later recanted, and Grievant was not actively witnessed smoking. Hearing Testimony.

7. On June 1, 2012, Grievant reported to her immediate supervisor, Jack B. Atchison, that she had informed Ms. Small that she had been smoking the day before, but had done so in an attempt to take the blame for another employee. Ms. Frame refused to identify the employee whom she alleged was smoking at that time, but in later testimony identified as Jennifer Posey, a temporary employee of the hospital. Ms. Frame later testified that her affirmative response to Ms.Small’s inquiry as to had she been smoking had been out of sarcasm. Hearing Testimony.

8. On November 17, 2009, Grievant received a verbal counseling for unprofessional conduct. (Respondent's Exhibit No. 2)

9. On March 10, 2010, Grievant was counseled for excessive sick leave. (Respondent's Exhibit No. 3)

10. On July 21, 2010, Grievant was counseled for excessive sick leave. (Respondent's Exhibit No. 4)

11. On August 30, 2010, Grievant received a written reprimand for abuse of sick leave and absenteeism. (Respondent's Exhibit No. 5)

12. On July 13, 2011, Grievant was counseled for excessive sick leave. (Respondent's Exhibit No. 6)

13. On September 12, 2011, Grievant was counseled for excessive sick leave. (Respondent's Exhibit No. 7)

14. On February 17, 2012, Grievant received a written reprimand for continued excessive absences. (Respondent's Exhibit No. 9)

15. On February 17, 2012, Grievant was placed on restrictive leave status for six months. (Respondent's Exhibit No. 10)16.On June 11, 2012, the Grievant was issued a three-day suspension at the recommendation of her supervisor, Jack B. Atchison. Mr. Atchison testified that his recommendation for suspension was based on Ms. Frame's current placement in a disciplinary track for excessive absenteeism and other various infractions of professional misconduct, including a prior warning regarding the tobacco free campus policy.

17. The hospital utilizes the Department of Health & Human Resources Progressive Discipline Policy 2104. (Respondent's Exhibit No. 20) The policy provides guidelines for progressive levels of discipline determined by the severity of the violation and maintains the concept of increasingly severe actions taken by supervisors and managers to correct or prevent an employee's initial or continuing unacceptable work behavior or performance.

Discussion

As this grievance involves a disciplinary matter, the burden of proof rests with the Respondent to prove that the action taken was justified. Procedural Rules of the W. Va. Public Employees Grievance Board C.S.R.156 1 § 3; *Holly v. Logan County Board of Education*, Docket No. 96-23-174 (April 30, 1997); *Hanshaw v. McDowell County Board of Education*, Docket No. 33-88-130 (August 19, 1988). Grievant argues that suspension for smoking is unreasonable because her first verbal warning about smoking on hospital grounds was given before the no smoking policy was approved by the Division of Personnel. If the first no smoking verbal warning was the only disciplinary action against Grievant, her argument would be persuasive, however, Grievant has many disciplinary actions against her over several years.

A preponderance of 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 Board of Education*, Docket No. 96-20-380 (March 18, 1997). In other words,

"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. West Virginia Department of Health and Human Resources*, Docket No. 92-HHR-486 (May 17, 1193).

Grievant argues that because of the absence of any direct observation or evidence that Grievant was smoking on hospital grounds and repeated denials by Grievant, Respondent cannot meet its burden of proof by mere speculation. Ms. Small testified that she caught Grievant "red handed" and that if someone else had been smoking, she would have seen that person walking away. Grievant admitted to smoking at the time. The other employee with Grievant did not say anything.

Where the existence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. West Virginia Department of Health and Human Resources*, Docket No. 96-HHR-371 (October 30, 1996); *Pine v. West Virginia Department of Health and Human Resources*, Docket No. 95-HHR-066 (May 12,1995). The Administrative Law Judge is charged with assessing the credibility of the witnesses. *Lanehart v. Logan County Board of Education*, Docket No. 95-23-235 (December 29, 1994).; *Perdue v. West Virginia Department of Health and Human Resources/Huntington State Hospital*, Docket No. 93-HHR-050 (February 4, 1994.)

Grievant testified that when confronted by Ms. Small about smoking on May 31, 2012, she answered, "yes, ma'am," out of sarcasm, as well as an unwillingness to name a temporary worker who had been there smoking a "couple of minutes" before Small's

arrival. Ms. Small testified that she and Hospital CFO, Robert Kimble, came around the maintenance building, smelled smoke, and saw Grievant and another sitting on a bench. As Small approached, Grievant quickly put her hand down to her side. Ms. Small told Grievant it was too late and that she knew she was smoking.

The following factors are applied to assess a witness's credibility: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Furthermore, the presence or absence of bias, interest or motive, the consistency of prior statements and the plausibility of the witness's information are also utilized in determination of credibility. *Rodriques v. Grant County Board of Education and Berg,* Docket No. 2008-0960-GraEd (March 10, 2009); *Holmes v. Board of Directors/West Virginia State College,* Docket No. 99-BOD-216 (December 28, 1999); *Perdue v. West Virginia Department of Health and Human Resources/Huntington State Hospital,* Docket No. 93-HHR-050 (February 4, 1994).

Contradictory testimony and statements given by the Grievant, testimony provided by the witnesses of the event and an extensive documented disciplinary progression of varying infractions support the justification and actions of the Respondent in its suspension of the Grievant. This measure of discipline was not solely based upon the singular event of one contested infraction of the Tobacco Free Campus policy, but upon repeated violations over several years. An employee may be suspended when minor infractions continue beyond the written warning or when a more serious singular incident occurs. Progressive Discipline Policy 2104 at page 5.

The following Conclusions of Law support the Decision reached.

CONCLUSIONS OF LAW

1. As this grievance involves a disciplinary matter, the burden of proof rests with the Respondents to prove that the action taken was justified. Procedural Rules of the W. Va. Public Employees Grievance Board C.S.R.156 1 § 3; *Holly v. Logan County Board of Education*, Docket No. 96-23-174 (April 30, 1997); *Hanshaw v. McDowell County Board of Education*, Docket No. 33-88-130 (August 19, 1988).

2. Department of Health and Human Resources Policy Memorandum 2104, "Guide to Progressive Discipline," has been construed as a permissive, discretionary policy that does not create a mandatory duty to follow a progressive disciplinary approach in every instance. *Oiler v. Department of Health & Human Resources*, Docket No. 02-HHR-074 (August 28, 2002); *Ferrell v. Department of Health & Human Resources,* Docket No 97-HHR-526 (April 30, 1998); *Artrip v. West Virginia Department of Health and Human Services*, Docket No. 94-HHR-146 (September 13, 1994).

3. The Division of Personnel Legislative Rule 143 C.S.R. § 12.3 provides that an appointing authority may suspend any employee without pay for cause. Hearing Testimony; Respondent's Exhibit 19.

4. An allegation that a disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the Grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportionate between the offense

and the personnel action. *Meadows v. Logan County Board of Education,* Docket No. 00-23-202 (January 31, 2001); *Conner v. Barbour County Board of Education,* Docket No. 94-01-394 (January 31, 1995); see also *Martin v. West Virginia State Fire Commission*, Docket No. 89-SFC-145 (August 8, 1989).

5. The Respondent has met its burden of proof and established that the suspension was justified and within the parameters of the hospital's progressive disciplinary policy and discretion.

Accordingly, this 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 Employee Grievance Board nor any of its Administrative Law Judges is 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 18, 2013

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Hunter D. Simmons
Administrative Law Judge