THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JAMIE BEATON, et al.,
Grievants,

v. **Docket No. 2013-0496-CONS**

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

DECISION

Grievants filed the instant grievances in September 2012 following Respondent's notification to William R. Sharpe, Jr. Hospital employees that guidelines adopted in September 2011, describing different possible scenarios that trigger an employee's right to representation during meetings, would remain in effect. Approximately 109 Sharpe Hospital employees filed grievances alleging that Respondent's Guidelines interfere with their right to representation at any meeting that is held with the employee for the purpose of discussing or considering disciplinary action.

The various grievances were denied at level one following hearings on December 5, 2012, December 10, 2012, and January 4, 2013. The grievances alleging a denial of representation were consolidated by Order of Consolidation entered on April 1, 2013. Level two mediation sessions were conducted in the grievances. Thereafter, the grievances were appealed to level three. A level three hearing was conducted before the undersigned Administrative Law Judge on September 10, 2013, at the Grievance Board's Westover office. Grievants appeared by Jamie Beaton and Gordon Simmons, UE Local

170, West Virginia Public Workers Union. Respondent appeared by its Human Resources Director, Debbie Cook, and by its counsel, Micheal E. Bevers, Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' proposed finding of facts and conclusions of law on November 5, 2013.

Synopsis

Grievants work in various classifications at Sharpe Hospital. The central issue in this case is the employee's right to representation during any meeting that is held with the employee for the purpose of discussing or considering disciplinary action. In the instant case, when there are allegations against an employee at the hospital of patient abuse or neglect, an investigation is conducted by the Respondent. If the investigatory interview is conducted by facility staff who does not have the authority to impose or recommend discipline, Respondent's Guidelines instruct staff that the employee does not have the right to have a representative present at the meeting.

This guideline is contrary to the clear applicable statutory language and recent decisions of the Grievance Board. A representative is permitted at any time a meeting could lead to disciplinary action, regardless of whether the person in the meeting has the authority to issue the discipline. Accordingly, employees have a right to representation during investigatory meetings that are not *per se* discipline, but where discipline could result. To the extent that *Knight v. Department of Health and Human Resources/Bureau for Child Support Enforcement*, Docket Number 2008-0981-DHHR (August 6, 2009), ruled otherwise, it is expressly overruled.

The following findings of fact are based upon the record developed at level one and

level three. The underlying facts of this grievance are not in dispute. Since multiple Grievants provided testimony at level one during the course of the hearings, the undersigned will provide a summary of their testimony.

Findings of Fact

1. Grievants work in various classifications at Sharpe Hospital, a psychiatric facility operated by the Bureau for Behavioral Health and Health Facilities, West Virginia Department of Health and Human Resources.

2. On July 5, 2011, employees at Sharpe Hospital were sent an email from Pam Burr, Nurse Manager, stating, "[E]ffective immediately: FYI and please be aware, we have been advised by legal counsel: If an employee requests representation at an internal investigation (i.e., one being conducted by facility staff), he/she has the right to representation at that level." Grievants' Exhibit No. 8, Level One.

3. Respondent's Adult Protective Services Policy provides that alleged perpetrators of adult abuse, neglect or financial exploitation have the "right to have a representative present, such as a union steward if the alleged allegation occurred in a facility setting where the alleged perpetrator is employed." Grievants' Exhibit No. 10, Level One.

4. On or about September 13, 2011, former legal counsel for Respondent, Susan Perry, issued a memorandum with Union Representation Guidelines attached. Grievants' Exhibit No. 2, Level One.

5. Beginning in 2011 and continuing up to the time the instant grievance was filed, Respondent and UE Local 170, West Virginia Public Workers Union, were in

negotiations regarding the language for any agency guidelines concerning an employee's right to representation.

6. In a November 15, 2011, email from Kevin Baker, UE Local 170 attorney, to Respondent's counsel, Ms. Perry, he wrote, in part: "Thank you again for meeting with us last week regarding the right to representation policy prepared by your office. As we discussed, I think that we should be able to come to a reasonable agreement as to the language in the policy. Although our perspectives may be different, I do believe that we want the same thing in the end: clarity as to when an employee is permitted to have a union representative present . . . we believe employees have a right to representation during investigatory meetings . . . where discipline could result." Grievants' Exhibit No. 1, Level One.

7. On September 5, 2012, Ginny Fitzwater, Human Resource Director for the Bureau for Behavioral Health and Health Facilities, emailed the prior representation guidelines originally issued by Ms. Perry in September 2011, to Debbie Cook, Sharpe Hospital's Human Resource Director, indicating that those guidelines are the ones to be followed. The instant grievance followed this action.

8. The central issue in this grievance relates to Respondent's Guidelines on the right to representation. The language in question states, "[I]f the purpose of the meeting is for an investigatory interview, the employee may have a right to representation, depending on the specific circumstances. The term 'investigatory interview' means a discussion to determine facts or circumstances. In situations where the investigatory interview is conducted by a person who has authority to initiate disciplinary action against the employee being interviewed, the employee must be permitted to have a representative

if he/she chooses. Where the investigatory interview is conducted by a person who has no authority to take or recommend disciplinary action in regards to the employee being interviewed, the employee does not have a right to have a representative present." Grievants' Exhibit No. 2, Level One.

9. When there are allegations of adult abuse, neglect or financial exploitation against an employee at Sharpe Hospital, an investigation is conducted by West Virginia Legal Aid. That Patient Advocate will allow any accused employee, interviewed as part of an investigation, to have a representative present during that interview.

10. Once an employee representative is requested or present, the Sharpe Hospital facility employee, who customarily helps conduct the interviews, leaves the meeting based on the guideline directive from Respondent.

11. The mandatory reporting form authored by Respondent's Adult Protective Services either substantiating or not substantiating the allegations are sent to Respondent's Office of Health Facility Licensure and Certification, Sharpe Hospital's administrator, law enforcement and the prosecuting attorney's office.

12. Once there is a substantiated charge of abuse or neglect, the administrator contacts the director of nursing and the human resource director who then consider the appropriate discipline based on that report. Under the guidelines, an employee then has the right to representation in any predetermination meeting.[1]

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[1]Grievants also presented, to a limited extent, the argument that they should be allowed representation in any meeting conducted for coaching, counseling, or conducting a performance evaluation. Grievants also complain the requirement in Respondent's Guidelines that an employee representative secure a supervisor's permission to perform representative duties constituted a conflict of interest and obstruction of statutory rights.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 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). "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). In other words, "[t]he 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).

Respondent's Representation Guidelines provide that an employee might have the right to representation depending on the specific circumstances surrounding a meeting with the employer's supervisor or supervisors. If an investigatory interview is conducted by a person who has the authority to impose or recommend discipline, the employee has the right to have a representative present at the meeting.[2] If an investigatory interview is conducted by a person who does not have the authority to impose or recommend

[2]W.VA. CODE § 6C-2-2 (n) states: "'Representative' means any employee organization, fellow employee, attorney or other person designated by the grievant or intervenor as his or her representative and may not include a supervisor who evaluates the grievant."

discipline, the employee does not have the right to have a representative present at the meeting. This guideline is fatally flawed.

The Grievance Board has previously addressed this issue in *Knight v. West Virginia Department of Health and Human Resources*, Docket No. 2008-0981-DHHR (August 6, 2009). The administrative law judge ruled that:

> The plain language of the statute at issue says an employee is entitled to representation: 1) during every step of the grievance procedure, and 2) at any meeting held for the purpose of discussing or considering disciplinary action.

In addition, Conclusion of Law 16 of *Knight*, *supra*, states, in pertinent part:

> If the individual who conducts the investigatory interview or questioning is also the one who could decide or recommend disciplinary action, the employee has the right to representation during this conference or interview.

The Grievance Board subsequently clarified the right of public employees to representation, in keeping with the principle that public employees' rights should be construed expansively rather than restrictively. *Morgan v. Pizzino*, 256 S.E.2d 592 (W. Va. 1979). In *Koblinsky v. Putnam County Health Department,* Docket No. 2010-1306-CONS (November 8, 2010), Administrative Law Judge McGinley stated, in pertinent part:

> The label given the meeting does not matter. If the topic of the meeting is conduct of the employee that could lead to discipline, the employee has a statutory right to have a representative present, if she makes such a request.

Administrative Law Judge McGinley went on to clarify that, "[T]hese meetings are distinguished from counseling sessions and evaluation meetings where the intent is solely to advise employees of issues related to their employment so that the employee may improve. To avoid the necessity of allowing a representative at such meetings, the supervisor need only inform the employee that behavior discussed or revealed at the

meeting will not lead to discipline. Additionally, investigation meetings where the employee's role is that of a witness to the conduct of others are generally not covered by W. VA. CODE § 6C-2-3(g)(1)." *Id*. Corrective Action Plans and Performance Improvement Plans are part of the evaluation process to correct unsatisfactory performance. Corrective Action Plans and Performance Improvement Plans are not disciplinary actions. *Hedrick v. W. Va. Dep't of Health & Human Res.*, Docket No. 2009-0496-CONS (Aug. 18, 2009).[3]

As this Board has noted previously, the West Virginia Supreme Court upheld the denial of a representative to an employee in a pre-disciplinary investigation meeting because the statute covering the meetings at that time allowed the employees to appear personally and to reply to charges made against them. The Court specifically noted that "[i]f the Legislature wishes to provide due process rights to union representation before termination, it may amend the statute." *Swiger v. Civil Service Commissioner*, 179 W. Va. 133, 365 S.E.2d 797 (1988).

The Legislature expressed that desire in passing W. VA. CODE § 6C-2-3(g) which states that employees are entitled to a representative at any such meetings. The clear reasoning behind this statutory expression of public policy was stated by Justices McGraw and McHugh in their *Swiger* dissenting opinion as follows:

> . . . In *City of Marion v. Weitenhagen,* 361 N.W.2d 323, 328 (Iowa App.1984), the court commented that, "[T]here is nothing in the nature of a public employee's work which would result in harm to the public if he or she is given such representation. . . the public is best served by staunch protection of fundamental rights of expression, association, and petition.

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[3]Grievants' complaint concerning the requirement in Respondent's Guidelines that an employee representative secure a supervisor's permission to perform representative duties was not fully developed in the record and in the proposals. The undersigned deems the issue abandoned and will not address the issue.

Swiger, *supra* (dissenting opinion).

That position is bolstered by other cases that have held that West Virginia's Due Process Clause requires presentation of charges and some opportunity for the employee to respond to them before the imposition of a discipline which deprives the employee of wages or salary. *Hammer v. Greenbrier County Bd. of Educ.*, Docket No. 2008-0302-GreED (May 21, 2008) (citing: *Syl. Pt.* 7, *Waite v. Civil Service Commission*, 161 W. Va. 154, 241 S.E.2d 164 (1977); *Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981) and *Knauff v. Kanawha County Bd. of Educ.*, Docket No. 20-88-095 (Jan. 10, 1989)). In passing W. VA. CODE § 6C-2-3(g)(1), the Legislature established that the right to a representative at such meetings is included in those Due Process protections.

It is undisputed that Respondent has in place a policy permitting employees alleged to have committed patient abuse or neglect the right to a representative during investigatory interviews. The undersigned agrees with Grievants that it is presumptively true that any investigation to determine whether or not there exists factual grounds to support allegations of employee abuse, neglect, or financial exploitation of a patient will be, at the same time, a foundation for the determination of whether or not discipline legitimately can or should occur. Such an investigation is not done out of idle curiosity, nor is it done out of abstract speculation. Respondent's distinction between an investigatory and a predetermination meeting is an arbitrary and capricious fiction. To the extent that *Knight v. Department of Health and Human Resources/Bureau for Child Support*

Enforcement, Docket Number 2008-0981-DHHR (August 6, 2009), ruled otherwise, it is expressly overruled.

Based upon the extensive record of this case, Grievants have met their burden of proof and demonstrated that Respondent's Guidelines instructing staff that an employee does not have the right to have a representative present at investigatory meetings conducted by a facility staff who does not have authority to impose or recommend discipline is contrary to applicable law. Grievants had a right to representation during investigatory meetings and other meetings that were not *per se* disciplinary, but where discipline could have resulted. It is clear from the record that investigatory meetings into allegations of patient abuse, neglect, or financial exploitation could have resulted in discipline. Grievants in counseling sessions and evaluation meetings, where the intent was solely to advise employees of issues related to their employment so that the employee might improve, were not entitled to representation. To avoid the necessity of allowing a representative at such meetings, the supervisor need only inform the employee that behavior discussed or revealed at the meeting will not lead to discipline.

The following conclusions of law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance 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. WEST VIRGINIA CODE § 6C-2-3(g)(1) which states: "(1) An employee may designate a representative who may be present at any step of the procedure as well as at any meeting that is held with the employee for the purpose of discussing or considering disciplinary action."

3. The label given the meeting does not matter. If the topic of the meeting is conduct of the employee that could lead to discipline, the employee has a statutory right to have a representative present if requested. *Koblinsky*, *supra*.

4. Grievants have met their burden of proof and demonstrated that Respondent's Guidelines instructing staff that an employee does not have the right to have a representative present at investigatory meetings conducted by facility staff who does not have authority to impose or recommend discipline is contrary to applicable law.

Accordingly, this grievance is **GRANTED**, in part, and **DENIED**, in part. Respondent is **ORDERED** to provide an employee with a representative, upon his or her request, in the event that employee is called to a meeting where discipline could result. This would include instances such as, meetings and interviews into allegations of patient abuse, neglect, or financial exploitation. Grievants in counseling sessions and evaluation meetings are not entitled to representation.

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 20, 2013

Ronald L. Reece
Administrative Law Judge