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BERNICE L. FOX

v.

Docket No. 91-HHR-469

**WEST VIRGINIA DEPARTMENT OF HEALTH & HUMAN
RESOURCES/DIVISION OF HEALTH**

DECISION

By letter of October 31, 1991 (Resp. Ex. 1), Bernice L. "Bee" Fox (Grievant or Ms. Fox), who for several years had been a Health Service Worker at Respondent's Weston State Hospital (Weston), an inpatient psychiatric facility, was charged with "inefficiency in . . . job duties" and "lack of interpersonal skills in . . . communication with patients and co-workers" and demoted to Laundry Worker at Weston effective November 16.¹ Pursuant to the expedited procedure of W.Va. Code §29-6A-4(e), she filed this grievance at Level IV on November 13 seeking retraction of the personnel action.²

¹ As an aside, Ms. Fox testified without contradiction that she first saw this letter as a posting on a bulletin board at Weston. No comment is intended on the propriety of this communication-mode but its peculiar appearance is noted.

² Compare Williamson v. W.Va. Dept. of Human Services, Docket No. 89-DHS-033 (Feb. 27, 1989) (downward reclassification, not for disciplinary reason, is not "demotion" for purposes of expedited grievance procedure).

Hearing was conducted on December 19³ and, with Respondent's submission of fact-law proposals by January 17, 1992, the case ripened for resolution.⁴

Rein Valdov, Weston's administrator, testified that Grievant had been a dependable and valuable long-term employee and that, when repeated problems with efficiency and communication presented themselves, he desired to guard Grievant's continued employment by moving her to a position more appropriate for her, e.g., away from direct patient contact. He related that, before he decided to take this drastic action, Grievant had been given the opportunity to adequately perform as an HSW on various shifts, with different co-workers and clients, and in several wards/worksites; it was thought that these changes might prompt improvement. He recalled that they had not and that he had then discussed transfer and/or demotion with Grievant and her union representative, Ron Grogg,⁵ when

she. . .indicated to me that at one point she had requested to move to the laundry and, because of family situation, a family member insisted that she not be moved into the laundry. And so. . .I thought it would be a win/win situation for all of us because she. . .wouldn't be losing an excessive amount of money [roughly \$35.00 per month in base salary]. She would be in a job where she wouldn't be challenged with potential dismissal; that she would continue with the

³ "T. #" references are to this hearing's transcript.

⁴ Grievant did not present post-hearing proposals and has thus waived the right to do so. T. 109-110.

⁵ Mr. Grogg was Grievant's advocate at Level IV as well.

reliable, consistent behavior that she had demonstrated in the past. We had a vacancy in the laundry. . .

T. 14. Nancy Rush, a licensed therapist and Grievant's supervisor from July 1990 through October 1991, said that she also had discussed a change from HSW to Laundry Worker with Ms. Fox and that Ms. Fox had responded with, "'[Y]es,'" and that "she would like to go to the Laundry because it was going back to day shift which she was agreeable to doing."

T. 41.

Ms. Rush further testified that she did not believe Grievant was intentionally abrasive with clients or colleagues but that her affect was often such that an unintended message was conveyed (e.g., due to sarcasm);⁶ these unintended messages were characterized as particularly harmful to certain of Weston's patients. Ms. Rush admitted that many of the complaints about Ms. Fox were related to behavior which she did not personally witness but added that she herself had observed inappropriate responses and/or interpersonal conduct on at least two occasions, which she detailed. Her comments in this regard were not meaningfully refuted by Grievant.

Ms. Rush continued that, prior to her supervision of Ms. Fox, she had been a member of a team that investigated

⁶ No witness opined that Grievant's behavior was ever intentionally poor and it is accepted that such is true. Further, there is no evidence that Grievant was ever truly abusive to patients or that her conduct was outrageous in any manner.

charges of patient abuse levelled against Grievant in 1990. While Grievant was exonerated of abuse, she was nonetheless found to have engaged in behavior that was confusing and nontherapeutic to clients.⁷ Ms. Rush suggested a transfer to her unit so that she, Ms. Rush, might provide Grievant with support and guidance in enhancing her professionalism, and the transfer was accomplished. Thereafter, several co-workers complained of Grievant's inadequate performance as an HSW and Ms. Rush, at Ms. Fox's request, transferred her to another shift. Additional steps were taken to assist Grievant. Ms. Rush counselled all of the new-shift employees to aid Grievant, to work with her in a spirit of understanding and cooperation, and not to discriminate against her or complain unnecessarily about her; further, Ms. Rush entered into a written "contract" with Grievant, specifying exactly what her tasks were and to whom she was immediately accountable, and held at least infrequent conferences with her. Ms. Rush related that this shift's personnel "really tried" with Ms. Fox for several months and finally went to "their union" for advice before approaching her with their concerns, which she found valid, significant and consistent in nature to some made against Grievant by others in the past.

Ms. Rush offered her summary assessment of Grievant's work under her purview as follows:

As for her performance, the basic areas of concern was [sic] her ability to communicate to me and to others

⁷ See Resp. Ex. 2, the investigation team's report.

her discomfort in working relationships and any problems she had encountered on the unit. . . . According to her co-workers, there were [problems with her following through with duties assigned. . .].

T. 37. Ms. Rush concluded by identifying Grievant as a person under undue stress, evidenced by the fact that she often cried during the two women's meetings regarding Grievant's performance. Ms. Rush revealed that she had opined to Mr. Valdov that Respondent would be "setting her [Ms. Fox] up for a fall" by allowing her to remain an HSW, since she had continuing problems with comprehending her ill-advised behavior and why others regularly misinterpreted her intentions.

P.R.,⁸ a Weston patient, was also a witness. She stated that Grievant had, on three occasions, upset her by making comments. The first instance, according to P.R., occurred when she said "Hello" to Grievant, who responded, "You know I never liked you."⁹ The next was when P.R. had asked another client, C.C., to retrieve some juice for her, which C.C. willingly did; Ms. Fox's remark was, "Your leg isn't broken, you should do that yourself." The final incident was when Grievant told P.R., "I never thought you'd do anything like that," apparently referring to P.R.'s intention to file a patient-abuse complaint against Ms. Fox over the earlier

⁸ This woman's name is of record but there is no reason to further display it by inclusion in this Decision.

⁹ In this Decision, language appearing inside quotation marks but without reference to source captures the essence of testimony but is not necessarily a verbatim rendering.

two statements.¹⁰ Ms. Fox does not deny making any of these comments but contends that they were jokes made in the spirit of friendliness. Ms. Rush and Mr. Valdov designated the statements as examples of Grievant's inappropriate interaction with Weston's clients.

Ms. Fox stated that her original request to be moved to Laundry Worker had been several years ago¹¹ and that she did not enjoy that position as much as she had her HSW job. She cited satisfaction at being involved in direct care and presented evidence, including four client-generated letters and/or original poems for which she apparently was the inspiration, of her close relationship with and acceptance by Weston's patients.¹² She also said that her salary

¹⁰ Ms. Ryan did file this complaint, with the assistance and encouragement of certain Weston staffers. She stated that she would have done so without this "assistance and encouragement," however.

¹¹ In an attempt at more precise recall, Grievant made reference to her "brain injury," and noted that her original request for transfer to the laundry was before such. This is the only mention of this injury in the record; no theory of disability or infirmity was posed.

¹² Grievant's Exhibit 6 is typical of this evidence. It reads as follows:

(Saying Goodbye)

Saying goodbye always hurts and is very cruel.

Saying goodbye is never easy and can turn your world upside down.

Saying goodbye can leave you empty and lonely and make you feel you've been deserted [sic].

Saying goodbye hurts very much and can never ease the pain of losing a friend as dear as you.

Saying goodbye always sounds like forever but even though we go our own ways we'll never forget the ones

(Footnote Continued)

potential was far less as a Laundry Worker since, as HSW, she worked many hours' overtime, although she conceded that she had been told that HSW overtime opportunities at Weston would shortly be markedly decreased. Finally, she charged that Respondent had not complied with proper demotion procedure per the Administrative Rules and Regulations of the West Virginia Division of Personnel (Regs), since she was not given the opportunity to confer with Mr. Valdov about her pending demotion after her receipt of the personnel-action letter on October 31 and its effective date of November 16, despite written request. She admitted, however, that she and Mr. Valdov did confer in his office about the demotion on October 31 after she read the letter.

Respondent's Exhibit 5 is a packet of Grievant's performance evaluations, covering her tenure at Weston. After an early overall rating of "Fair," Grievant has since been a "Good" or higher-ranked employee, according to these measures. However, some deficiencies are noted, particularly in taking direction, cooperation, communication and, in

(Footnote Continued)

who really care[] and love[] us dearly and who we know will always be there in our greatest time of need.

Saying goodbye is never permanent even though we say it, we never really say goodbye for we will meet again and will never lose the friendship and love that has always been there.

The End

This poem was written for a very special friend who has helped all of us in times when we needed it most. We all love you very much Bee.

recent years, initiative.¹³ Respondent concedes that Ms. Ryan's patient-abuse complaint was the precipitant for Grievant's removal from HSW status but stresses that it was viewed alongside Grievant's cumulative history of related performance problems.¹⁴

In this discipline-based case, Respondent has the burden of proving its charges by a preponderance of evidence. Newhouse v. W.Va. Dept. of Admin., Docket No. 90-FA-134 (Oct. 25, 1990); Code §29-6A-6 - ¶5. It has done so.¹⁵ Mr. Valdov, Ms. Rush and P.R. were all highly credible witnesses. As noted by Mr. Grogg, several of the individuals who levelled complaints against Ms. Fox were not present at the Level IV hearing, but their experiences, as testified to

¹³ Respondent's counsel, in an apparent attempt to highlight recent weaknesses in Grievant's initiative, carefully questioned Grievant about not only her more-current but also her past exhibition of that quality, which apparently had been good (e.g., Grievant was complimented with, "Often performs tasks without direction").

¹⁴ Grievant's Exhibits 1 and 2 are letters of appreciation to her from Mr. Valdov. They confirm that she, overall, has been a valued employee at Weston but do not, in and of themselves, support that she was improperly demoted, particularly since they are dated December 12, 1989, and February 26, 1990, long before her actual removal from HSW status.

¹⁵ Although Respondent's Proposed Conclusion of Law 2 suggests that Grievant, too, has a preponderance burden herein, that would be true only to the extent of any affirmative defenses posed; none were.

by the appearing witnesses,¹⁶ were not dissimilar to those of Ms. Rush and P.R. Further, each of the patient-writings presented by Grievant was penned after October 31, 1991, suggesting that they may have been prompted by sympathy over her impending demotion.¹⁷

Furthermore, Respondent correctly implemented the demotion. Regs 12.04 is titled "Demotions" and provides, in part:

A permanent employee may be demoted for cause after the person who is to be demoted has been presented with the reasons for such reduction stated in writing, and has been allowed a reasonable time to reply thereto in writing, or upon request to appear personally and reply to the appointing authority or his deputy.

Resp. Ex. 1, the demotion letter, is a detailed, four-page document outlining Ms. Fox's historical problems with being inefficient and interpersonally incompetent as an HSW. Ms. Fox appeared personally before Mr. Valdov later on the same day she received the correspondence and thus was given opportunity to "reply to the appointing authority or his deputy." While the record reflects that Mr. Grogg may have sent a letter requesting a later, pre-November 16 meeting,

¹⁶ Hearsay testimony is admissible in proceedings before this Grievance Board, see Code §29-6A-6, although no standard weight is assigned. Seddon v. W.Va. Dept. of Health, Docket No. 90-H-115 (June 8, 1990).

¹⁷ This is not to say that Grievant urged the clients to write letters or poems to her or in her behalf; no judgment is made on that point.

and that such was never responded to by Mr. Valdov, it also reflects that Mr. Valdov never received this request.¹⁸

In addition to the findings of fact and conclusions of law contained in the foregoing narrative, the following ones are made.

FINDINGS OF FACT

1. Grievant had been a Health Service Worker at Weston State Hospital for several years prior to her demotion to Laundry Worker on October 31, 1991, effective November 16, 1991.

2. Although Grievant's overall performance was good in many areas, she, particularly in recent years, has repeatedly been inefficient in the completion of her duties. Further, and more significantly, she has demonstrated lack of interpersonal skills, resulting in her repeated but unintentional offending of some co-workers and certain of Weston's psychiatric patients.

3. Respondent has attempted to assist Grievant with these problems by allowing her to work various shifts, with different colleagues and clients, and on several of Weston's wards. It has also provided her with more structured

¹⁸ The record also reveals Respondent's compliance with DHHR Policy Memo 2104, "Progressive Discipline," which includes this entry:

Demotions may be carried out for inefficiency or other just cause. At time demotion (rather than dismissal) is imposed to bring the individual into a more appropriate classification for his/her skills or abilities. It can be used as a means to salvage certain employees rather than to dismiss them.

supervision. Despite this, Grievant's deficiencies have not improved.

4. Grievant was given adequate notification of her demotion and the reasons therefor. She was also afforded the opportunity to discuss her demotion and its reasons, after her notification thereof, with Weston's chief administrator.

CONCLUSIONS OF LAW

1. In this discipline-based grievance, Respondent has the burden of proving its charges against Grievant by a preponderance of evidence. W.Va. Code §29-6A-6.

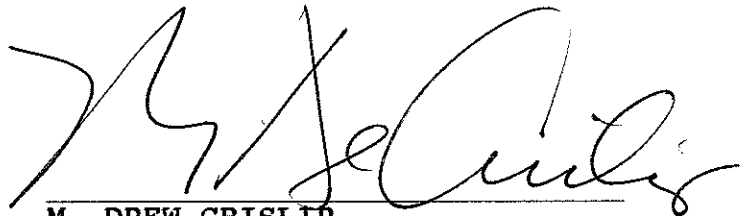
2. An employee subject to the Administrative Rules and Regulations of the West Virginia Division of Personnel, such as Grievant, may be demoted for cause. See Section 12.04 thereof. "Cause" may include inefficiency, incompetency or unsuitability for the position. See, e.g., West Virginia Department of Health and Human Resources Policy Memorandum 2104.

3. Respondent established, by a preponderance of evidence, that Grievant was inefficient and incompetent in key aspects of her job as Health Service Worker, even after its prolonged attempts to assist her in the performance of those aspects. It also established that her transfer to a Laundry Worker position, while a demotion due to the slightly-lower base pay, was for all concerned an appropriate response to Grievant's deficiencies and her strengths.

4. Respondent processed Grievant's demotion properly under Section 12.04, Administrative Rules and Regulations of the West Virginia Division of Personnel.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this Decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this Decision. W.Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.



M. DREW CRISLIP
Administrative Law Judge

Date: February 18, 1991