KATHY COCHRAN,

Grievant,

v. DOCKET NO. 94-HHR-572

WEST VIRGINIA DEPARTMENT OF HEALTH
AND HUMAN RESOURCES/LAKIN HOSPITAL,

Respondent.

D E C I S I O N

Grievant, Kathy Cochran, filed this grievance directly at Level IV on September 22, 1994, protesting her dismissal from Lakin Hospital and requesting to be made whole including return to work with back pay, removal of all references to the dismissal from her personnel file, and reinstatement of all benefits. A two-day Level IV hearing was held on December 30, 1994 and March 2, 1995. Post-hearing submissions were due on March 23, 1995, at which time this case became mature for decision.

Background

Grievant, a Health Service Worker at Lakin Hospital, was suspended on or about February 22, 1994, for a period of ten (10) working days for patient abuse by neglect. The particular incident involved an elderly gentlemen, E.W., who had allegedly been left sitting up in a bedside chair, with a restraining table on thechair, for at least a period of 16 hours, including during Grievant's shift at the hospital. Grievant worked the 3-11 shift.

Keith Stouffer, Assistant Administrator at Lakin Hospital, testified that Respondent did not intend to dismiss Grievant over this incident and believed the 10-day suspension was sufficient punishment for the offense. Nevertheless, in complying with state and Federal regulations, Respondent had to

notify the Office of Health Facilities Licensure and Certification (OHFLAC) of the alleged patient abuse and suspension of Grievant.

Pursuant to an investigation conducted by OHFLAC, wherein OHFLAC determined that "there is enough evidence to conclude that the allegation is valid", OHFLAC informed Grievant by letter dated July 14, 1994, that her name was going to be placed on the Nursing Assistant Abuse Registry pursuant to 42 C.F.R. 483.156(c). The notice also informed Grievant that she had the right to the documentation upon which the Committee based its determination, and the right to contest the determination. The notice specifically informed Grievant that she had to make her appeal request, in writing, within thirty (30) days of receipt of the notice. R. Ex. 1.

Grievant failed to respond or appeal her placement on the abuse registry within the thirty day time period. Subsequently, by letter dated August 31, 1994, OHFLAC informed Grievant that her name had been placed on the Long Term Care Nursing Assistant Abuse Registry of the State of West Virginia, and would remain there permanently. R. Ex. 2.

Due to Grievant's name being placed on the abuse registry, Respondents were required to comply with Federal law and the regulatory provisions of OHFLAC, which state: "Hospital may not employ individuals who (B) have had a finding entered into the State Nurse Aide Registry concerning abuse, neglect, mistreatment of residents or misappropriation of their property." R. Ex. 3. Respondents attempted to negotiate with OHFLAC to have Grievant transferred to another position in the Hospital that did not entail direct patient care. OHFLAC's response was that Grievant could not be employed by the Hospital, period.

Therefore, Respondents had no choice but to terminate Grievant's employment with Lakin Hospital, and by letter dated September 9, 1994, informed her of the decision to terminate her position. The reason given for Grievant's dismissal was her failure to respond to or appeal the OHFLAC notice, and the subsequent placing of her name on the abuse registry. R. Ex. 3.

Argument

Grievant protests her dismissal and asks this Board to make a finding that she is innocent of the abuse allegation and to reinstate her to her position. Respondents argue that, even if this Board found Grievant innocent of the abuse charge and ordered her reinstated, they are unable, according to state and Federal law, to reinstate Grievant at Lakin Hospital.

Unfortunately for Grievant, the undersigned must agree with Respondents. Respondents did not dismiss Grievant because of the alleged abuse. As noted before, Respondents felt the ten-daysuspension was sufficient punishment for that incident and never intended to dismiss the Grievant. However, due to Grievant's own failure to respond to the OHFLAC notice in a timely manner, indeed, at all, her name has been placed permanently on the abuse registry. Respondents dismissed Grievant because they are unable, by law, to continue her employment. This Board, likewise, has no authority to order Grievant reinstated to a position she is unable to lawfully hold.

Conclusions of Law

1. In cases dealing with disciplinary matters, the burden of proof rests with the employer to prove the charges by a preponderance of the evidence. Schmidt v. W.Va. Dept. of Highways, Docket No. DOH-88-063 (March 31, 1989).

2. Respondents have proven by a preponderance of the evidence that Grievant failed to appeal or respond to a notice from the Office of Health Facilities Licensure and Certification (OHFLAC) that her name was going to be placed on the Nursing Assistant Abuse Registry.

3. Respondents have proven by a preponderance of the evidence that OHFLAC placed Grievant's name on the abuse registry permanently, and Grievant is no longer able, by law, to be employed in a hospital facility.

4. Respondents have proven by a preponderance of the evidence that they had no choice but to dismiss Grievant from her position as a Health Service Worker once her name was placed on the abuse registry.

Accordingly, this Grievance is **DENIED**.

Any party 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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: March 31, 1995