BONNIE SCOTT,

Grievant,

v. Docket No. 96-HHR-374

DEPARTMENT OF HEALTH AND HUMAN

RESOURCES/PINECREST HOSPITAL,

Respondent.

D E C I S I O N

Grievant, Bonnie Scott, was employed as a Health Service Worker ("HSW")at Pinecrest Hospital. She states she was unjustly terminated and seeks as relief that she be made whole in every way. She requests that she be returned to her same position and shift. As this was a termination, Grievant filed directly to Level IV following her pre-termination hearing and subsequent dismissal from Pinecrest Hospital. W. Va. Code §29-6A-4(2)(e). A Level IV hearing was held on March 11, 1997,and as the parties did not wish to submit proposed findings of fact and conclusions of law, this grievance became mature on that date.

The material facts in this matter are not in dispute, and will be set out below. It should be noted that Grievant chose not to testify pursuant to W. Va. Code §29-6A-6, and further did not present any evidence to rebut Respondent's case.

Findings of Fact

1. Grievant was employed as an HSW at Pinecrest Hospital, a long-term care facility.

2. On August 8, 1996, Ms. Enna "Mary" Richmond, LPN, wrote a note to her supervisor, Ms. Shelton, stating she had been told by one of her HSW's that Ms. X (See footnote 1) was HIV positive. Ms. Richmond asked her supervisor to advise her as to what action she should take. Resp. Exh. 1.

3. This note was referred to Mr. Ray Nutter, LSW (See footnote 2) , who is the Resident Advocate for Pinecrest Hospital. Mr. Nutter called Ms. Richmond at home about this situation and was informed that HSW Ethel Yost had asked Ms. Richmond about the information. Ms. Yost told Ms. Richmond that at 4:00 p.m. on August 7, 1996, during the evening meal, Grievant had informed her

and several other HSW's that Ms. X was HIV positive.

4. Mr. Nutter spoke to Ms. Yost on August 8, 1996, and she confirmed Ms. Richmond's report as correct. Ms. Yost stated that HSW's Davis and Miller were also present.

5. When Ms. Yost was called to testify at the Level IV hearing, she credibly confirmed the above-statements.

6. Mr. Nutter also talked to HSW Bonnie Davis. Ms. Davis told her Grievant had informed her on August 7, 1996, during themeal break, that Ms. X was HIV positive. Ms. Davis credibly confirmed this statement in her sworn testimony at Level IV.

7. Mr. Nutter contacted Grievant, and she admitted she had told whoever was present at her table in the dining room that she had heard that Ms. X was HIV positive. She also admitted that she knew this information was confidential, but she felt that her co- workers had a right to know if a resident was HIV positive. Grievant was asked where she obtained this information, and she refused to tell Mr. Nutter even after he informed her that this refusal could be seen as interfering with his on-going investigation.

8. On August 12, 1996, Mr. Nutter, after consultation with his supervisor, sent his written report to Mr. Edward Eades, the Administrator of Pinecrest Hospital.

9. On August 27, 1996, Mr. Eades, Ms. Carolyn Philpot, Second Shift House Supervisor, and Ms. Elsie McCray, Director of Nursing, met with Grievant to hear her side of the story. Grievant confirmed she had repeated the "hearsay" information she had received, so her fellow workers could take extra-precautions such as always double-gloving and double-gowning when around the resident. Resp. Exh. 5.

10. The precautions Grievant stated as required by Ms. X's alleged disease process were inappropriate and unnecessary. Resp. Exh. 5 & 6. 11. During this August 27, 1996 meeting, Grievant asked if she was fired and after being told yes, she stated she was "outta here" and left.

12. Grievant had received training in infection control and resident rights and confidentiality. She signed a statement on February 21, 1996, that she had received and reviewed information and policies on resident rights.

13. On August 8, 1996, Grievant received an unrelated three- day suspension for "inadequate work performance and negligence." (See footnote 3) This suspension dealt with Grievant's failure to record resident data accurately which could jeopardize the hospital's certification and licensure.

14. Grievant's employment was terminated by letter dated August 27, 1996, and Grievant was allowed to "work out her fifteen (15) day notice if she wished to do so." Resp. Exh. 7. This termination was for violation of W. Va. Department of Health and Human Resources Clinical Policy #3311 and Pinecrest Hospital Policy #P-8302, as well as other various policies relating to residents' rights. Additionally, Grievant's recent, prior suspension for inadequate work performance and negligence was considered as a part of her work record.

Discussion

In a disciplinary action, such as this, Respondent is required to prove its case by a preponderance of the evidence. W. Va. Code §29-6A-6; Schmidt v. W. Va. Dept. of Highways, Docket No. DOH-88-063 (Mar. 31, 1989). Here, where the facts placed in evidence are not rebutted in any way by Grievant, there is little choice but to uphold her dismissal. Although Grievant, through her representative's closing argument, stated that other individuals who had done the same thing had been treated differently than Grievant, no evidence on this different treatment was presented to the undersigned. Bald assertions without evidence, cannot be accepted as true.

Grievant's representative also stated employees had a right to know Ms. X was HIV positive, and it is apparent Grievant disagreed with Respondent's policy that certain resident information is shared only on a "need to know" basis. Again, this statement was merely made in the closing statement. Although an employee may disagree with an employer's policy, the way to deal with this issue does not include ignoring Respondent's policies or a resident's rights.

W. Va. Code §29-6A-10 requires that the dismissal of a classified employee be for good cause. Good cause means "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Oakes v. W. Va. Dept. of Finance and Admin., Syl. Pt. 1, in part, 164 W. Va. 384, 264 S.E.2d 151 (1980).

In this case, Grievant knowingly violated the rights of a resident by passing on information or "gossip" she had heard fromother employees. She admitted to Mr. Nutter and Mr. Eades that she knew this information was confidential, and justified her behavior by stating the employees had a right to know. Grievant was aware of her employer's policies relating to the rights of residents. As recently as February 21, 1996, Grievant had in-service training on these rights, as well as being

required to read various policies. Resp. Exh. 1. Grievant's actions demonstrate a clear disregard for the resident's rights, and her employer's policies. Her behavior was not "trivial", "inconsequential", or "technical". The reasons for Grievant's dismissal meet the requirements outlined in Oakes, supra.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. In a disciplinary action, such as this, a respondent is required to prove its case by a preponderance of the evidence. W. Va. Code §29-6A-6; Schmidt v. W. Va. Dept. of Highways, Docket No. DOH-88-063 (Mar. 31, 1989).

2. W. Va. Code §29-6A-10 requires that the dismissal of a classified employee be for good cause. Good cause means "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Oakes v. W. Va. Dept. of Finance and Admin., Syl. Pt. 1, in part, 164 W. Va. 384, 264 S.E.2d 151 (1980). 3. Respondent has met its burden of proof and demonstrated Grievant knowingly and intentionally violated the rights of one of the residents at Pinecrest Hospital. This conduct is of a substantial nature directly affecting the rights and interests of the public.

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.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: March 28, 1997

Footnote: 1

As is typically done in sensitive cases, the name of involved individuals is reported as initials.

Footnote: 2

LSW means Licensed Social Worker.

Footnote: 3

This suspension was not grieved.