SHERRY A. BENNETT,

Grievant,

v. **Docket No. 98-HHR-378**

WEST VIRGINIA DEPARTMENT OF HEALTH & HUMAN RESOURCES,

HUNTINGTON STATE HOSPITAL,

Respondent.

D E C I S I O N

On September 29, 1998, Sherry Bennett (Grievant) filed this grievance directly at Level IV, as authorized under W. Va. Code § 29-6A-4(e), challenging her dismissal from employment by Respondent Department of Health and Human Resources (HHR). Following a continuance for good cause shown, an extensive Level IV evidentiary hearing in this matter was conducted at Huntington Hospital in Huntington, West Virginia, on November 20 and 30, and December 15, 1998. (See footnote 1) Grievant submitted a written closing argument at the conclusion of the hearing, and the parties agreed to a briefing schedule for further arguments. HHR submitted a timely post-hearing argument on January 13, 1999, while Grievant elected to waive her opportunity to submit further written argument. This matter became mature for decision on January 22, 1999.

BACKGROUND

On September 22, 1998, Grievant was notified of her dismissal in a letter from Huntington Hospital Administrator Desmond Byrne, stating the basis for this disciplinary action as follows:

> In accordance with Section 12.02 of the Administrative Rule of the West Virginia Division of Personnel, Department of Health and Human Resources Policy Memorandum 2104, *Progressive Discipline* and 208, *Employee Conduct*, and Huntington Hospital Policy HHCI5, *Progressive Disciplinary Action* you are hereby dismissed from your duties as a Licensed Practical Nurse.
>
> The charge for your dismissal is inappropriate, unethical and unprofessional

conduct. The specific reasons for this charge is that on August 10, 1998, you sat for the annual Medication Competency exam given by the hospital's Staff Development Department. Successful completion of this written exam is required at least every other year for all registered nurses and licensed practical nurses who may be administering medication to the patients. By your own admission, you provided at least three (3) licensed staff with answers to 29 of the 50 questions on this test. By this action not only did you act inappropriately by compromising the necessary confidentiality of this competency tool, you also acted unethically by encouraging your coworkers to cheat. This attempt to initiate a conspiracy for registered nurses and licensed practical nurses to cheat on the required medication administration is behavior contrary to the standards this hospital has set for licensed health care providers.

Nursing competency in the administration of medications is critical to patient safety. As an accredited and certified hospital, we are required to monitor and assess staff competency regularly to ensure the delivery of quality patient care. Your interference in this assessment process has invalidated current test results and will require that the test be re- administered to all LPN's and RN's. This is a costly and time consuming process for the hospital and an inconvenience to the staff having to retake the exam.

I met with you, Rebecca Dunn, Director of Nursing, and Kieth Anne Dressler, Director of Human Resources to discuss this issue on September 9, 1998. At that time you explained that this was not an “answer sheet” but was a study guide and that distributing this type of document was commonpractice at this hospital. After investigating your concerns I conclude that good cause does exist to warrant this action. We met with you again today to explain the type of action under consideration and to give you another opportunity to explain why you believe this action is unwarranted. You made no comments during this meeting.

Taking into consideration that we consider this action as gross misconduct, the required fifteen (15) day notice period is waived, and your dismissal is effective immediately. You have been paid for all compensatory time and all annual leave time (not to exceed the number of carry-forward hours allowed under Section 16.03 (g) of the West Virginia Division of Personnel's Administrative Rule) which have accumulated to your credit as of today. You will be given another opportunity to meet with me in person or present to me, in writing, any grounds why you believe this action is unwarranted. If you wish to meet with me, please contact my secretary, Linda Atkins, at Extension 623, by September 29, 1998, to schedule an appointment.

It is also necessary to report this conduct to the Board for Registered Nurses and Board for Licensed Practical Nurses.

I realize that you have several grievances and that you may be representing several other employees at different steps in the grievance process. Of course, we do

> not wish to interfere with the grievance of any employee. These grievances will continue through the normal process, however, to ensure that there is no disruption of work, you are not permitted access to any area of the hospital other than the Administration Building Conference Room during hearings. You are not to interrupt employees while they are working by initiating or receiving phone calls or making visits to the hospital. As always, if you require information to prepare for any grievance, please contact Kieth Anne Dressler, Human Resource Director, who will assistance (sic) you to obtain the information.

J Ex 1 (emphasis in original).

DISCUSSION

In disciplinary matters, W. Va. Code § 29-6A-6 places the burden of proof on the employer. Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). More particularly, the employer has the burden of proving each element of adisciplinary action by a preponderance of the evidence. Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

Grievant admits she took Huntington Hospital's medication competency examination for nurses on August 10, 1998, the first day it was given during the current testing cycle. (See footnote 2) Likewise, she does not dispute that, after returning to her work area, she attempted to write down as many of the test questions as she could recall, successfully jotting out notes that indicated the contents of approximately 30 questions. Moreover, Grievant testified she did this with the intention of helping other Huntington Hospital employees pass the test.

Grievant defends her actions by explaining that what she did on August 10, 1998, was a common and accepted practice at Huntington Hospital, and the only possible distinction between her conduct and past practice, was she had a better memory than her peers, and was able to recall more detail than other employees who have traditionally shared information about the test with their co-workers, either orally or in writing. Where there is undisputed evidence that the employer has allowed a custom and practice to occur which is contrary to established rules and regulations, the employer may be deemed tohave given “tacit approval” to such conduct. See Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965).

In addition, Grievant argues that her actions were blown out of proportion by her supervisors in

reprisal for her "union activity," which includes filing a number of grievances over the past several years, as well as representing employees in grievance matters, and appearing as a witness in grievance proceedings. Therefore, Grievant contends this disciplinary action was motivated by an intent to retaliate against her for engaging in protected conduct, contrary to W. Va. Code § 29-6A-2(p).

W. Va. Code § 29-6A-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." In general, a grievant alleging unlawful retaliation, in order to establish a prima facie case, (See footnote 3) must prove:

(1) that the employee engaged in activity protected by the statute;

(2) that the employee's employer was aware of the protected activity;

(3) that, thereafter, an adverse employment action was taken by the employer; and

(4) that the adverse action was the result of retaliatory motivation or the action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

Wiley v. W. Va. Div. of Natural Resources, Docket No. 97-DNR-397 (Mar. 26, 1998); Hoffer v. State Fire Comm'n, Docket No. 95-SFC-441 (June 18, 1996). See Whatley v. Metro. Transit Auth., 632 F.2d 1325, 1328 (5th Cir. 1980); Hochstadt v. Worcester Found. for Experimental Biology, 425 F. Supp. 318 (D. Mass. 1976), aff'd, 545 F.2d 222 (1st Cir. 1976); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91- PEDTA-225 (Dec. 23, 1991). If a grievant makes out a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for its action. Conner v. Barbour County Bd. of Educ., 200 W. Va. 405, 489 S.E.2d 787 (1997); Gruen v. Bd. of Directors, Docket No. 95-BOD-281 (Mar. 6, 1997). See Mace v. Charleston Area Medical Center Foundation, Inc., 188 W. Va. 57, 422 S.E.2d 624 (1992); Shepherdstown Vol. Fire Dep't v. W. Va. Human Rights Comm'n, 172 W. Va. 627, 309 S.E.2d 342 (1983). If the employer succeeds in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for the adverse action were merely a pretext for unlawful retaliation. See Conner, supra; W. Va. Dep't of Natural Resources v. Myers, 191 W. Va. 72, 443 S.E.2d 229 (1994).

Without question, Grievant established a prima facie case of retaliation. Since August of 1998,

she has filed or been a participant in at least eight grievances against Huntington Hospital. She was subpoenaed as a witness at Level IV in a grievance filed by another employee, Brenda Miller, and, shortly before the incident which led to her termination, was designated as the representative for at least three different employeeswho initiated grievances at Huntington Hospital. Administrator Byrne and Huntington Hospital's Director of Nursing (DON), Rebecca Dunn, were well aware of her grievance activity. However, they assert that the disciplinary action was fully warranted by Grievant's conduct. Thus, the ultimate issue to be resolved is whether the reasons given by Huntington Hospital to justify Grievant's dismissal were merely a pretext to mask prohibited retaliation. See Conner, supra; Dep't of Natural Resources, supra. (See footnote 4) Although many facts pertaining to this dismissal action are undisputed, there is considerable disagreement between the parties regarding the extent to which Huntington Hospital previously condoned or overlooked conduct which was condemned as a cheating conspiracy when Grievant became involved. Likewise, there is substantial disagreement about whether this disciplinary action was taken for legitimate reasons. In this regard, a number of witnesses provided conflicting testimony regarding past practices at Huntington Hospital, and various events which arguably provide circumstantial evidence of a pattern of retaliatory actions by Grievant's supervisors.

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371(Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR- 066 (May 12, 1995). See Harper v. Dep't of the Navy, 33 M.S.P.R. 490 (1987). Some factors to consider in assessing the credibility of a witness include the witness's demeanor, opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the ALJ should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of the witness' information. Lanham v. W. Va. Dep't of Transp., Docket No. 98-DOH-369 (Dec. 30, 1998). See Perdue v. Dep't of Health & Human Resources, Docket No. 93-HHR- 050 (Feb. 4, 1994). See generally, Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit System Protection Board 152-53 (1984). Accordingly, it is necessary to discuss certain aspects of this matter in detail.

Patricia Queen is currently employed by Huntington Hospital as the Coordinator of Nursing Education in the Office of Staff Development. She began working at Huntington Hospital as a Staff Nurse in 1994. She succeeded John Hipes as the Coordinator of Nursing Education. Ms. Queen's immediate supervisor is Robin Walton, who has been Huntington Hospital's Director of Staff Development since 1989.

One of Ms. Queen's duties is preparing and administering a medication competency examination for all nursing staff involved in administering medication to patients. The purpose of this examination is to measure the nursing staff's knowledge regarding medications administered to patients at Huntington Hospital. The test represents a significant aspect of Huntington Hospital's effort to assess professional competency, oneof a number of issues which the hospital is required to address in order to maintain accreditation by the Joint Commission on Accreditation of Health Care Organizations (JCAHO).

Ms. Queen personally prepared the medication competency examination that was administered in August 1998. There were actually two tests, test A and test B. Each examination contained 50 questions. Approximately 47 questions were the same on each test, but were arranged in a different order. Thus, only about 3 questions on each test were different. As with all previous examinations, answering 80 percent of the questions correctly was required to attain a passing score. There was no penalty for failing the examination on the first attempt. Anyone who failed would be given an opportunity to retake the test. (See footnote 5)

In preparation for the examination, Ms. Queen assembled a booklet entitled “Psychotropic Medication Review Self-Study.” R Ex 4. This “study guide” consists of 30 pages and contains a generic discussion covering many of the medications used at Huntington Hospital, and a sample of the kind of questions which appear on the medication competency examination. However, the sample questions in the study guide are not the same as the questions that appeared in the test. (See footnote 6) Copies of this document were madeavailable for all members of the nursing staff approximately two weeks prior to the 1998 examination. Similar study guides were prepared by Ms. Queen's predecessors. In 1996, Mr. Hipes prepared a “review outline” which was more specifically directed toward the supplying the answers to the questions contained on that year's examination. Cf. R Ex 6.

Ms. Queen scheduled the medication competency examination to be given a number of times

over a three-week period. Employees could sign up and take the test in the Office of Staff Development at their convenience during normal working hours. Grievant was the first employee at Huntington Hospital to take the examination, and she successfully completed the test on August 10, 1998. R Ex 7. From August 11, 1998, through August 22, 1998, another 25 nurses appeared to have successfully completed the examination.

Nancy Colyer is a Registered Nurse (RN) who has been employed by Huntington Hospital as a Staff Nurse for over four and one-half years. She is assigned to the Admissions Four unit where Grievant works. Ms. Colyer serves as the Neo-Adult Program Coordinator, but she does not formally supervise Grievant in that capacity. All RNs at Huntington Hospital have supervisory authority over LPNs in their unit, but the formal supervisor for the LPNs is the Nurse Manager in charge of each unit.

Ms. Colyer recalled Grievant returning from taking the test, telling her something about the test, and indicating that she would write down as many of the questions as she could remember. Ms. Colyer said nothing to dissuade Grievant from taking such action. The following day, Grievant provided Ms. Colyer with a copy of the document she had prepared before Ms. Colyer went to take the medication competency examination. Ms. Colyer asserts that she did not look at the document before taking the test, but later found another copy on the desk in her work area. On August 12, 1998, she took that copy to the Nurse Manager for Admissions Four, Kristin Richardson, because she thought her supervisor should be aware that some test answers were circulating in the unit.

Teresa Laginess has been employed as an RN working in Admissions Four for the past two years. She likewise recalled Grievant returning from the test, indicating that it was hard, and volunteering to write down test questions from memory. Ms. Laginess said nothing to Grievant, and subsequently received a document from Grievant which she claims to have thrown in the trash without reading. She encouraged Ms. Colyer to report the answer sheet to Ms. Richardson. Grievant testified she informed Ms. Laginess and Ms. Colyer she would try to remember what she could from the examination before she left her work area to take the test. Neither witness recalled this conversation, but Grievant was otherwise completely candid and forthright in discussing the events surrounding the test. Thus, it is more likely than not that she made some comment to her co-workers which they did not recall in the press of business.

Kimberly Mannon has worked as an LPN at Huntington Hospital since 1994, except for a one year

absence. She worked on Admissions Four with Grievant and recalled receiving a document with test information shortly after Grievant took the test. Ms. Mannon had not taken the 1998 test before it was canceled by Staff Development. HuntingtonHospital conducted two investigations into this incident, but only one other employee recalled seeing the test notes Grievant prepared. See R Exs 24-1, 24-2, 25-1, & 25-2.

When Ms. Colyer provided the notes to Ms. Richardson, Ms. Richardson immediately recognized the handwriting as Grievant's, and Ms. Colyer confirmed that Grievant had provided her with the document. Ms. Richardson notified the Acting DON, Barbara Bias, that she had received a document containing test information. (See footnote 7) Ms. Bias, who did not testify in this matter, apparently decided the matter could wait until DON Dunn returned from leave the following week.

On or about August 20, 1999, after DON Dunn returned from leave, Ms. Richardson advised her about the possible test compromise and gave her the document she received from Ms. Colyer. R Ex 29. DON Dunn provided Ms. Queen with a copy of the two-page document (R Ex 1) which Grievant had prepared and provided to other employees on her unit. Ms. Queen went over the document with Ms. Walton, comparing Grievant's notes with the questions on the examination (R Ex 5). Ms. Queen and Ms. Walton determined that the contents of approximately 30 questions were covered by the notations. (See footnote 8) See R Ex8. Ms. Walton and Ms. Queen provided their opinion to DON Dunn who investigated the matter further. On August 24, 1998, DON Dunn instructed Ms. Queen to stop giving the medication competency examination until it could be determined the extent to which the test had been compromised. Ultimately, DON Dunn was unable to verify to her satisfaction that only three or four nurses had seen Grievant's extensive notes, and directed that a new test be developed and administered to the nursing staff. (See footnote 9)

There was no credible evidence that, prior to this incident, Huntington Hospital employees had ever been cautioned not to discuss the test questions on the medication competency examination with other employees after completing the test. Likewise, before Grievant was terminated, no Huntington Hospital employees had ever been disciplined for revealing test information to employees who had not yet completed the examination. Moreover, before this incident occurred, Huntington Hospital had no written policyprohibiting cheating on the medication competency examination, or any other employee test. As indicated by Administrator Byrne, there had been no incidents brought to his attention which suggested a need for such a policy. Likewise, Administrator Byrne, DON Dunn, and

Ms. Walton, saw no reason to caution employees not to cheat on the examination, since they had no reason to believe employees were engaged in cheating. A surprising number of employees testified that they saw nothing wrong with Grievant's actions.

Eva Short, an LPN who has worked at Huntington Hospital for over 22 years, did not see the information sheet which Grievant prepared until it was shown to her by DON Dunn. However, because she had previously taken the medication competency examination, she immediately recognized the paper as containing information which related to the questions on the test. In her opinion, distributing such a document was not “cheating,” because you still had to study and learn the answers to the test questions. It would be cheating only if you took the paper into the test with you. At least two other LPNs expressed similar opinions regarding their definition of cheating. In Ms. Short's opinion, the document which Grievant prepared was not much different from the study guide which the Professional Development Staff prepared and distributed to all nursing personnel at Huntington Hospital. However, Ms. Short acknowledged that Grievant's document focused more specifically on questions that were actually on the test, while the study guide covered the entire spectrum of medications in use at the facility.

Anna Sullivan, an RN who has worked at Huntington Hospital for over 18 years, testified that since the first medication competency examination was given to the nursingstaff in 1985, it has been common practice for nurses to discuss the test questions among themselves after taking the examination, including telling those who had not yet taken the test what they could remember from the test. In her experience, this information sharing usually involved verbal discussion but, on occasion, extended to the preparation of “crib sheets” of up to one page in length where the nurses who had taken the test would jot down notes of what they could remember. She specifically recalled seeing such a sheet circulating at the time of the 1996 medication competency examination.

Ms. Sullivan, who was employed as a Nurse Manager at Huntington Hospital for a number of years, recalled that other Nurse Managers, particularly Margaret Myers and Julie Mannon, encouraged information sharing regarding the tests. Ms. Short similarly testified that it was common for nurses who had taken the test to discuss the answers to three to five questions they could recall from the test with their colleagues who had not yet taken the test. Ms. Short identified her handwriting on a document which appeared to contain information relating to questions which might have appeared on a medication competency examination in previous years, possibly 1994. G Ex A.

Brenda Miller, an LPN at Huntington Hospital for over 16 years, recalled that one of the Nurse Managers, Ms. Myers, had employees write down questions from the medication competency examination, and then photocopied the documents and distributed them during the 1994 testing cycle. Curiously, Ms. Short, whose handwriting was on the document, did not recall Ms. Myers giving any such direction, and Ms. Myers, who is now retired from Huntington Hospital, appeared as a witness and denied such activity, although she readily acknowledged that employees would return from the test and discuss whetherit was hard or easy, and discuss specific items on the test which surprised or stumped them.

Ms. Miller discussed her prior disputes with DON Dunn which resulted in a suspension without pay. It was obvious that she remains dissatisfied with the outcome of her grievance over that action, and is extremely critical of any action her employer takes against her co-workers. Except for glossing over the extent of her earlier personal friendship with Grievant, Ms. Myers' testimony was otherwise credible and more believable than Ms. Miller's. Accordingly, the undersigned finds that any written notes which may have circulated during prior medication competency test cycles were not prepared and distributed by Ms. Myers.

Vickie Ramey, an LPN who worked at Huntington Hospital from 1985 to 1994, recalled sharing information with other nurses about the contents of the medication competency examination. She specifically recalled Ms. Myers asking for information about what was on the test from those who had already completed the examination. She asserted that Ms. Queen's predecessors, John Hipes and Mary Connally, were aware of this practice, but did not explain why she believed they knew this was taking place. Kristy Wood, an LPN at Huntington Hospital for over 22 years, recalled that people who took the medication competency examination would share information with those who had not yet taken the test. She understood the test to be a learning tool, and saw no problem with such actions.

A.J. Sowards has worked as an LPN at Huntington Hospital since 1993. She recalled being allowed to take the 1996 medication competency examination in her workarea where Charlotte Nixon and Glenna Wiley, the employees assigned to administer the test, gave her hints to the correct answers.

While preparing to take the medication competency examination as a Staff Nurse in 1994, Ms. Queen was told by her co-workers that “someone” had an answer sheet for the test, but she never saw a copy and no one offered to provide her a copy. Ms. Sowards testified that she had heard

similar rumors of “cheat sheets” in years prior to this examination, but had never actually seen one. Ms. Ramey also noted that she had seen some written test answers three to four years before, but there was a simultaneous rumor that the test had been changed, making the answer sheet worthless. (See footnote 10)

Considering all of the foregoing evidence, the undersigned is not persuaded that Grievant's actions are excusable under the applicable law. In Guine, supra, the employer was essentially estopped from disciplining an employee, Dr. Guine, because the employer had given tacit approval to the conduct in question, traveling on state business without first obtaining written or verbal approval from his supervisor. While the facts in this grievance have some similarity to Guine, there are also some noteworthy differences.

In Guine, the evidence was clear and uncontroverted that a practice existed within the agency which condoned the specific conduct for which the employee had been dismissed. However, not all nursing employees at Huntington Hospital required to take the medication competency examination have engaged in conduct similar to Grievant bydiscussing test questions with co-workers who have not yet taken the same test. The employer, through its Human Resources Director, Ms. Dressler, surveyed 29 RNs and 20 LPNs on the staff regarding their knowledge of similar documents in previous years. Only 3 LPNs and no RNs indicated having personally seen a “cheat sheet” for any examination prior to 1998. See R Exs 24-1 & 25-1. Moreover, a number of the witnesses at Level IV, particularly most of the RNs, appeared to have no doubt in their minds that such conduct represented a form of cheating.

Further, the conduct at issue in Guine, traveling outside the office on what was otherwise legitimate state business, albeit without official approval to travel, does not involve conduct that is inherently improper. The undersigned is persuaded that those employees at Huntington Hospital who believe sharing specific information about test questions with individuals who have not yet taken the examination is a form of cheating, represent the mainstream of opinion as to what conduct is appropriate in the nursing community. The opinion of Grievant and several witnesses that sharing test information is not cheating unless that information or correct test answers are taken into the examination room for reference during the test is simply wrong.

In addition, there was no credible evidence that Mr. Byrne was aware of this practice. Likewise, it does not appear that Ms. Dunn was aware that improper activity was ongoing. Because Ms. Dunn

was not required to take the examination, she would not likely be involved in casual conversations with other staff members regarding the contents of the medication competency examination. Indeed, before this incident was brought to her attention, it does not appear that she had even seen the test. In addition, because thisexamination was only administered every two years, and everyone usually passed the test, it does not appear that the testing involved a controversial issue that was likely to be brought up to Ms. Dunn or Mr. Byrne.

Each witness who described first-hand knowledge of other forms of cheating in the past acknowledged that, for one reason or another, they had never brought the matter to Ms. Dunn's attention. Several witnesses noted that there was no reason to call the matter to Ms. Dunn's attention because they saw nothing wrong with what was taking place. Thus, the record in this matter does not reflect that an otherwise improper practice had been condoned by upper management as was established in Guine.

From the beginning of this incident, Grievant acknowledged her actions, but denied any wrongdoing. She told her employer what she had done, to whom she had provided copies of her test notes, and how many copies she made. Huntington Hospital conducted extensive investigations into this matter to ascertain whether a widespread practice of cheating on the medication competency examination existed, and to determine the extent of damage done to the validity of the examination through Grievant's dissemination of information from the test. These investigations revealed that a significant minority of employees were aware of some information sharing from the examination, but the majority recognized that such conduct was not proper and denied any knowledge or involvement. There was no evidence that Grievant's information sheet was disseminated beyond a small circle of immediate co-workers.

Although it was not demonstrated that Huntington Hospital's top administrators knowingly condoned any form of cheating on the medication competency examination, Grievant established by a preponderance of the evidence that a practice of cheating to some degree on the medication competency test had developed at Huntington Hospital prior to August 10, 1998. The evidence indicates that this practice extended over a number of years, and at least one of Grievant's former supervisors encouraged this practice to a certain degree. Even Ms. Queen, who was responsible for administering the test, had heard rumors of a “cheat sheet” or “answer key” circulating in prior years, but made no effort to discuss this issue with her supervisors, and took no action to caution

employees against such conduct when she developed the current medication competency examination.

Huntington Hospital had no rules which defined cheating on the medication competency examination, believing that the conduct in which Grievant engaged, as well as the conduct of other nursing employees which she emulated, were adequately banned by a common sense definition of cheating. The undersigned agrees that disclosing the contents of a graded examination to persons who are required to take the test, but have not yet done so, is cheating. Thus, telling other employees what specific medications are covered on the test, whether verbally or in writing, is improper and unprofessional, whether there is a specific rule which prohibits such conduct or not. None of the employees who testified in this matter and concluded that cheating only involved taking materials into the testing area could refer to any authority for such an opinion.

However, even if the conduct at issue were prohibited by a specific rule, such rules may not be selectively applied. Grievant contends she was only doing something she had seen others do since coming to work at Huntington Hospital, apparently relying on thecommon denominator rather than common sense. Accordingly, it must be determined if the penalty imposed represents an abuse of the employer's discretion in dealing with such misconduct.

An allegation that a particular disciplinary measure is disproportionate to the offense proven or otherwise arbitrary and capricious is an affirmative defense, and Grievant bears the burden of demonstrating that the penalty was clearly excessive or reflects an abuse of agency discretion, or an inherent disproportion between the offense and the personnel action. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Thompson v. W. Va. Dep't of Health & Human Serv., Docket No. 94-HHR- 254 (Jan. 20, 1995). See Martin v. W. Va. State Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989); Schmidt v. W. Va. Dep't of Highways, Docket No. DOH-88-063 (Mar. 31, 1989).

Although Grievant's conduct in writing out information on the medication competency examination to share with her co-workers was improper, the fact that other employees, including her previous Nurse Manager, on occasions prior to August 10,1998, discussed the contents of the test, to include specific topics or medications covered, may be considered as a mitigating factor. Likewise, even though it was not shown to be known to upper management, there is evidence that similar documents containing test information were circulated among a limited number of employees when the

medication competency examination was administered in previous years. This is another mitigating factor that could have led Grievant to believe such conduct was acceptable. Indeed, the undersigned might have been persuaded that a lengthy suspension would be an adequate penalty to punish Grievant for this serious misconduct, and to deter other employees from engaging in similar misconduct in the future. However, when the undersigned questioned Grievant near the conclusion of the hearing, following direct and cross-examination by counsel, the following clarification was elicited:

> Q [ALJ] Is it your statement today that even after you've heard the testimony from the people from Staff Development about what this things is all about - I'm not asking you what you thought at the time, I understand what you thought at the time, I'm asking you now what you think today - is there nothing wrong with what you did because it is inherently okay to do what you did, or is there nothing wrong with what you did because everybody else was doing it at the time?
>
> A [Grievant] I don't think there was inherently anything wrong with what I did.

Such apparent unwillingness to accept that her employer has a legitimate basis to punish her for invalidating the medication competency examination resolves any doubt whether Grievant might be a suitable candidate for rehabilitation in favor of the employer. While Grievant may be an intelligent and competent nurse in most circumstances, the undersigned cannot expect Huntington Hospital to entrust her with patient care when she refuses to accept her employer's authority to regulate nursing competency by expecting employees to pass a medication examination without cheating. Accordingly, Grievant failed to demonstrate that the penalty imposed was an abuse of discretion, or that she was terminated in retaliation for her protected activity.

Grievant further complained that DON Dunn reported her alleged misconduct to the licensing board for LPNs. Grievant believes DON Dunn took this action in retribution forGrievant's protected activity, as well as to deter other employees from challenging disciplinary actions meted out by Huntington Hospital management. Grievant suggests this is part of a pattern or practice by DON Dunn intended to silence those who criticize her management of the nursing staff.

The evidence indicates that nurses employed by Huntington Hospital who are disciplined for alleged serious misconduct which may relate to their professional responsibilities are routinely reported to the appropriate licensing board. A preponderance of the evidence indicates that this is

done in all cases involving terminations of nursing personnel, and DON Dunn honestly and reasonably believes she has a professional duty to report all such conduct. Reports to the nursing boards are not limited to employees who file grievances or are otherwise involved in “union activity.” In the circumstances presented, there was nothing improper about reporting Grievant's participation in actions which fostered and encouraged cheating on a professional competency examination for nursing personnel to the state licensing board for appropriate disposition.

One additional issue needs to be addressed. Respondent did not give Grievant 15 days' notice of her dismissal, contending she had engaged in gross misconduct which threatened the health and safety of the patients at Huntington Hospital. Upon closer examination, although Grievant's misconduct directly undermined the integrity of a testing instrument used to verify competency, there was no evidence that Grievant's conduct had any direct effect on patients. The test could be rewritten and administered to insure that no staff member was likely to make a medication error because of a lack of knowledge regarding psychotropic medications. It was apparent from his testimony that AdministratorByrne had an unpleasant experience with another employee who had been terminated and allowed to remain at work for the 15-day notice period, and was determined this was not going to be repeated with Grievant.

This notice period in dismissal cases is required by Section 12.2 of the Administrative Rule of the West Virginia Division of Personnel:

> Dismissals - Fifteen (15) calendar days after notice in writing to an employee stating specific reasons, the appointing authority may dismiss any employee for cause. The appointing authority shall allow the employee a reasonable time to reply to the dismissal in writing, or upon request to appear personally and reply to the appointing authority or his or her designee. The appointing authority shall file the reasons for dismissal and the reply, if any, with the Director of Personnel. Fifteen days notice is not required for employees in certain cases when the public interests are best served by withholding the notice or when the cause of dismissal is gross misconduct. An appointing authority may dismiss an employee after oral notice, confirmed in writing, when the dismissed employee's action(s) constitute a threat to the safety or welfare of persons or property.

143 C.S.R. 1 § 12.2 (1998).

Although Huntington Hospital had cause to dismiss Grievant for her unprofessional and unethical conduct, this was not the type of conduct contemplated by the Division of Personnel's Administrative Rule where the 15-day notice period can be waived. Grievant's misconduct was apparent to DON Dunn from the moment she received the notes containing test information, and Grievant was not

relieved from patient care or routine duties while the investigation into this matter was in progress. Huntington Hospital must comply with the properly established administrative rules applicable to all state agencies. Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). See, e.g., Parsons v. W. Va. Dep't of Transp., Docket No. 97-DOH-289 (Oct. 30, 1997); Bailey v. W. Va. Dep't. ofTransp., Docket No. 94-DOH-389 (Dec. 20, 1994). Therefore, Grievant is entitled to recover back pay for the 15 calendar days immediately following September 22, 1998.

Consistent with the foregoing discussion, the following Findings of Fact and Conclusions of Law are made in this matter.

FINDINGS OF FACT

1. Grievant was employed by Respondent Department of Health and Human Resources (HHR) at Huntington Hospital, in Huntington, West Virginia, as a Licensed Practical Nurse (LPN) from November 11,1991, to September 22, 1998.

2. Since Huntington Hospital obtained accreditation from the Joint Commission on Accreditation of Health Care Organizations (JCAHO) sometime prior to 1990, all nursing staff personnel involved in the administration of medications to patients have been required to successfully complete a medication competency examination which is given every two years.

3. Patricia Queen, Huntington Hospital's Coordinator of Nursing Education, prepared an updated medication competency examination for 1998.

4. The examination consisted of 50 questions. In order to obtain a passing score on the test, the employee had to answer 40 questions, or 80 percent, correctly. Anyone who fails this test on the first attempt is given assistance on the questions they missed and permitted to retake the examination immediately, or at their convenience during the testing period.

5. In addition to indicating whether Huntington Hospital nursing staff personnel are competent to administer medications to patients, the examination identifies areaswhere deficiencies in knowledge exist, permitting Staff Development to initiate additional on-the-job training to make nursing personnel current on all medications in use at Huntington Hospital.

6. Grievant took the 1998 medication competency examination on August 10, 1998, the first day the test was offered to Huntington Hospital personnel. Grievant obtained a passing score on the examination.

7. Upon returning to her work area after completing the test, Grievant discussed the test with

some of her co-workers, including Nancy Colyer and Teresa Laginess, Registered Nurses (RNs), and another LPN, Kimberly Mannon. Grievant offered to write down as many of the test questions as she could remember for the purpose of assisting her co-workers in successfully passing the examination.

8. None of Grievant's co-workers took any action to dissuade Grievant from writing out information contained in the examination. Grievant created a two-page handwritten document containing notes which suggested the contents of approximately 30 questions included on the examination. Grievant made copies of these notes and provided them to Ms. Colyer, Ms. Laginess, and Ms. Mannon the following day, before any of them had taken the 1998 medication competency examination.

9. Ms. Colyer took the medication competency examination on August 11, 1998, and received a passing score.

10. Ms. Laginess took the medication competency examination on August 14, 1998, and received a passing score. 11. On August 12, 1998, Ms. Colyer provided a copy of the document containing Grievant's notes to her immediate supervisor, Kristin Richardson, the Nurse Manager for the Admissions Four unit. See R Ex 29. Ms. Richardson recognized Grievant's handwriting on the notes, and Ms. Colyer confirmed that Grievant had prepared the document.

12. Ms. Richardson referred the documents to Barbara Bias, Acting Director of Nursing (DON), who deferred acting on the matter until after the regular DON, Rebecca Dunn, returned from leave on August 17, 1998.

13. Ms. Richardson provided a copy of the notes at issue to DON Dunn on August 20, 1998. R Ex 29. DON Dunn provided the document to Ms. Queen and Robin Walton, Huntington Hospital's Director of Staff Development. They compared the document with the 1998 medication competency examination and determined that approximately 30 questions on the test were addressed by the notes in the document.

14. An RN or LPN who prepared for the test using the notes Grievant made would be able to focus their preparation on specific issues covered by the test, rather than the entire scope of medications administered to patients at Huntington Hospital. As a result, DON Dunn reasonably determined that the test was invalidated by circulation of Grievant's notes because the test results would be inflated by those who used Grievant's notes to prepare, and any shortcomings in their

knowledge of medication administration would be masked by their improved performance on the examination. 15. On August 24, 1998, DON Dunn directed that administration of the current medication competency examination be discontinued. A new test was subsequently developed and administered to all nursing staff. See R Ex 9.

16. Over the years before this incident, on those occasions when the medication competency examination was administered, a substantial minority of Huntington Hospital employees who had completed the test would discuss the test with co-workers who had not yet taken the test, including the contents of specific questions on the examination. On at least one occasion a hand-written document containing notes which focused on the apparent content of the test was circulated among a limited number of employees at Huntington Hospital. At least one Nurse Manager participated in these occasional discussions, but the extent of this improper activity was not known to DON Dunn or Administrator Byrne.

17. Although a number of Huntington Hospital employees on the nursing staff see nothing wrong with discussing the actual test questions with co-workers who have not yet taken the examination, a majority of the staff recognize that such conduct is inherently unethical and unprofessional.

18. After Grievant initially alleged that her actions represented a common practice, Huntington Hospital's Human Resources Director, Kieth Anne Dressler, surveyed 29 RNs and 20 LPNs on the staff regarding their knowledge of similar documents in previous years. Only 3 LPNs and no RNs indicated having personally seen a “cheat sheet” for any examination prior to 1998. See R Exs 24-1 & 25-1. 19. Since August of 1996, Grievant has filed or participated in filing approximately eight grievances against Huntington Hospital. In addition, she has appeared as a witness at Level IV in Brenda Miller's grievance against Huntington Hospital, and has represented three separate employees who filed grievances against Huntington Hospital.

20. Since being employed at Huntington Hospital in 1991, Grievant has generally performed her LPN duties in a highly satisfactory and professional manner. Grievant's most recent performance evaluation, covering the period from November 1996 to November 1997, contained an overall rating of 3.46 on a scale where a score of 3 meets expectations and a 4 or 5 indicates “needs improvement.” R Ex 28. Grievant filed a grievance challenging this evaluation, and that grievance is still pending.

21. On October 10, 1997, Grievant was issued a written reprimand for insubordination when she refused an order to remain at work for a second shift. R Ex 21. Grievant filed a grievance challenging that reprimand and the grievance is still pending.

22. On September 22, 1998, Huntington Hospital terminated Grievant's employment for "inappropriate, unethical and unprofessional conduct," waiving the 15-day notice period normally provided under the West Virginia Division of Personnel Administrative Rule. J Ex 1.

CONCLUSIONS OF LAW

1. Pursuant to W. Va. Code § 29-6A-6, the burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Wellman v. W. Va.Dep't of Health & Human Services, Docket No. 93-HHR-079 (Oct. 18, 1993); Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988).

2. Dismissal of a civil service employee must be for good cause, which means misconduct of a substantial nature directly affecting the rights and interest of the public, rather than some trivial or inconsequential matters, or some technical violations of statute or official duty without wrongful intention. Oakes v. W. Va. Dep't of Fin. & Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980).

3. "Seriously wrongful conduct by a civil service employee can lead to dismissal even if it is not a technical violation of any statute. The test it not whether the conduct breaks a specific law, but rather whether it is potentially damaging to the rights and interests of the public." Syl. Pt. 5, Mangum v. Lambert, 183 W. Va. 184, 394 S.E.2d 879 (1990).

4. Grievant's actions in writing down notes to indicate the contents of approximately 30 questions from a 50-question medication competency examination for nursing staff, with the intent of assisting co-workers who had not yet taken the examination in attaining a passing score on the test, constitutes unethical and unprofessional conduct such as to warrant Grievant's dismissal from employment.

5. A grievant alleging unlawful retaliation in violation of W. Va. Code § 29-6A- 2(p), in order to establish a prima facie case, must prove:

(1) that the employee engaged in activity protected by the statute;

(2) that the employee's employer was aware of the protected activity; (3) that, thereafter, an adverse employment action was taken by the employer; and

> (4) that the adverse action was the result of retaliatory motivation or the action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

Hoffer v. State Fire Comm'n, Docket No. 95-SFC-441 (June 18, 1996).

6. If a grievant makes out a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for its action. Conner v. Barbour County Bd. of Educ., 200 W. Va. 405, 489 S.E.2d 787 (1997). If the employer succeeds in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for the adverse action were merely a pretext for unlawful retaliation. See Conner, supra; W. Va. Dep't of Natural Resources v. Myers, 191 W. Va. 72, 443 S.E.2d 229 (1994).

7. Although Grievant made out a prima facie case of retaliation, HHR established by a preponderance of the evidence that the decision to terminate her employment after she had filed a number of grievances, served as a grievance representative at the lower levels of the grievance procedure, and appeared as a witness for a grievant in a Level IV grievance hearing, was made for legitimate, non-retaliatory reasons involving Grievant's unacceptable conduct. See Dadisman v. W. Va. Div. of Rehabilitation Serv., Docket Nos. 98-RS-023/040 (Mar. 25, 1999).

8. An allegation that a particular 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 orreflects an abuse of agency discretion, or an inherent disproportion between the offense and the personnel action. Thompson v. W. Va. Dep't of Health & Human Services, Docket No. 94-HHR-254 (Jan. 20, 1995).

9. Given Grievant's refusal to accept that there is anything inherently wrong about sharing specific information on a medication competency examination for professional staff in a state hospital, HHR's decision to terminate Grievant's employment as an LPN was not an abuse of discretion.

10. "An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977).

11. HHR violated Section 12.2 of the Administrative Rule of the West Virginia Division of

Personnel when it failed to give Grievant 15 calendar days' notice of her dismissal when she had not engaged in gross misconduct or other acts which indicated that her continued presence on the employer's premises constituted a threat to the safety or welfare of persons or property. 143 C.S.R. 1 § 12.2 (1998). See Elliott v. Dep't of Military Affairs & Public Safety, Docket No. 98-DJS-199 (Nov. 20, 1998).

Accordingly, Grievant is entitled to receive back pay with interest covering the fifteen days following her dismissal on September 22, 1998. No other relief is granted, and this Grievance is otherwise **DENIED**.

Any party, or the West Virginia Division of Personnel, may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). 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. In accordance with W. Va. Code § 29A-5-4, 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: April 27, 1999

Footnote: 1

Both parties were represented by counsel. Grievant was represented by James E. Spurlock, and HHR was represented by Assistant Attorney General Meredith A. Harron.

Footnote: 2

The dismissal letter refers to an "annual Medication Competency exam." However, the evidence indicates that this test is administered every two years, or biennially.

Footnote: 3

A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th Ed. 1968).

Footnote: 4

Grievant also argued and presented some evidence to suggest that certain supervisors at Huntington Hospital have engaged in a pattern or practice of retaliating against employees who seek relief through the grievance procedure. Although the evidence to support this theory was largely anecdotal, and there was opposing evidence that a number of employees have filed grievances at Huntington Hospital without suffering any adverse consequences, it is not necessary to rule on this issue as it has been subsumed by Grievant's prima facie case of retaliation under W. Va. Code § 29-6A-2(p).

Footnote: 5

Apparently, if an employee failed test A on their initial try, they would be required to retake the examination using test B. Although all regular employees ultimately manage to pass the test each year, it is intended to be a "pass-fail" examination, not a "no failure" examination as claimed by Grievant.

Footnote: 6

Because the study guide did not contain any of the actual test questions, one employee on the nursing staff, A. J. Sowards, testified that she found the study guide to be "worthless." Another employee, Kristy Wood, similarly criticized the study guidebecause it did not contain any questions from the test.

Footnote: 7

Although Ms. Richardson could not remember if Ms. Colyer provided her with the document before or after she took the test, the record indicates that Ms. Richardson took the test before Ms. Colyer on August 11, 1998. See R Ex 7.

Footnote: 8

Grievant did not seriously dispute the estimation by Respondent's witnesses that her notes provided hints to the contents of at least 30 questions, suggesting that what she had prepared was no different from the "study guide" prepared by Ms. Queen and her predecessors, further stating that the undersigned could readily determine that she had not created an "answer sheet." The document in issue (R Ex 1) consists of brief notes, not in sentence format, and contains a large amount of medical shorthand or abbreviations which are largely indecipherable to the undersigned. However, Grievant's notes unquestionably focus on information needed to successfully complete the examination. For example, oneof the exam questions involves the "common dose of Seroquel." R Ex 5, 1998 Medication Competency Examination A, at question 4. One of Grievant's notes states: "Serqoquel (sic) Usual dose 300-750 mg/day." R Ex 1. It is not unreasonable to believe that the average RN or LPN would be able to recognize that there was a question on the test regarding the normal dose of Seroquel. Thus, Respondent's contention that Grievant's document undermined the validity of the nursing competency examination is supported by a preponderance of the evidence. Moreover, not being an expert in nursing pharmacology, the undersigned will defer to the opinion of Ms. Queen and Ms. Walton, who are qualified to speak to such issues. See Dadisman v. W. Va. Div. of Rehabilitation Serv., Docket Nos. 98-RS-023/040 (Mar. 25, 1999).

Footnote: 9

While the decision to require a new test was a matter within DON Dunn's discretion, it was unclear why she believed that Grievant's document might have been circulated to more than the four nurses who admitted seeing a copy. Ultimately, the undersigned finds that the decision was a conservative call to assure that the testing process could

withstand scrutiny by the JCAHO or other accreditation authorities.

Footnote: 10

Other than this rumor, there was no evidence that Staff Development had ever altered or switched tests in response to a report that an answer sheet was circulating among the staff.