LINDA McNEELY,

Grievant,

v. **Docket No. 02-HHR-296**

DEPARTMENT OF DEPARTMENT OF HEALTH

AND HUMAN RESOURCES/MILDRED

MITCHELL-BATEMAN HOSPITAL,

Respondent.

D E C I S I O N

Grievant, Linda McNeely, filed this grievance against the Department of Health and Human Resources ("HHR") directly to Level IV on September 17, 2002. Her Statement of Grievance says:

> Management has unfairly and unjustly suspended and demoted me.
>
> RELIEF SOUGHT: Reinstated to full LPN status, compensated for loss of wages due to suspension & demotion, [suspension and demotion] removed from file and to be made whole in every way.

A Level IV hearing was held on December 9, 2002, and the parties' elected not to submit findings of fact and conclusions of law. Accordingly, this grievance became mature for decision on the hearing date. (See footnote 1)

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Prior to this disciplinary action, Grievant was employed as an LPN and medication nurse at Mildred Mitchell-Bateman Hospital ("MMBH"). 2. The Medication Administration Policy, in

MMBH Policy and Procedure Manual, states:

> Controlled Drugs must be counted at every shift change by the off-going and on-coming nurses assigned to medications. . . . **BOTH NURSES MUST COUNT ALL** CONTROLLED **DRUGS TOGETHER AND THEN MUST SIGN THE CONTROLLED DRUG** COUNT **SHEET**. The controlled Drug Log should be verified at this time. Any discrepancies should be reported to the Nurse Manager and the Pharmacy.

(Emphasis in the original).

3. The Controlled Substance Log states:

> Initialing above acknowledges that you have counted the controlled medication on hand and have found the qty [quantity] of each medication counted is in agreement with the quantity on the Controlled Drug Count Record. Please sign full name in area provided below initialing for neal (sic) [meal] coverage signifies that you are responsible for the narcotic keys. This does not require a count to be done. Anyone may request a count.

4. Grievant was aware of this Policy, and she had received in service training on medication administration. (See footnote 2) Grievant testified she knew she was supposed to count the controlled drugs and did not. Grievant's testimony at Level IV; See Resp. Ex. No. 6.

5. On August 17, 2002, Grievant came on duty as the day/evening shift medication nurse. She counted the controlled drugs as required with the off-going nurse, James Hennes, and the count was correct. When Grievant was relieved by the night nurse, Grievant declared she was too tired and refused to count the controlled drugs withthe on-coming LPN, Grace Bias. Grievant assured Ms. Bias the count was correct. Ms. Bias accepted Grievant's assertions and did not count the drugs.

6. Later that evening, Grievant called Ms. Bias and told her she had not charted her PRN's. (See footnote 3) Grievant asked Ms. Bias chart and sign her medications. Ms. Bias agreed to do this even though it is a violation of the Medication Administration Policy for a nurse to chart a medication she did not give. Ms. Bias charted Grievant's PRN's on the Medication Administration Record ("MAR") and signed Grievant's initials to these PRN's. The signing of Grievant's initials is also a violation of Policy. (See footnote 4)

7. On August 18, 2002, when the day shift medication nurse, Mr. Hennes, came on duty, he counted the controlled drugs as required with Ms. Bias. The count was off.

8. When the count is off, both nurses are to work together to find out the reason and either

correct or document it.

9. Ms. Bias refused to stay and help the on-coming nurse look for the error. Mr. Hennes tried to find the error, and he even called Grievant at home to ask her if she had any knowledge. Her response was, "When I left, I think the count was right." Resp. Ex. No. 3, at Level IV.

10. Mr. Hennes reported the problem to his supervisor.

11. On August 19, 2002, Grievant was verbally suspended pending an investigation into the alleged misconduct. This verbal suspension was followed with a letterdated the same day. Grievant signed for this letter on August 22, 2002. Resp. Ex. No. 2, at Level IV.

12. On August 22, 2002, after the investigation was concluded, Grievant was sent another letter of suspension. This letter was not placed into evidence.

13. On September 10, 2002, Grievant received another suspension letter amending the August 22, 2002 letter, and advising Grievant she was to be suspended for ten working days "effective August 20, 2002, through and including August 31, 2002." This letter also informed Grievant she would be demoted to the position of a Health Service Worker.

14. The September 10, 2002 letter advised Grievant these disciplinary actions were taken because: 1) Grievant failed to count medications at change of shift; 2) Grievant failed to fill out the Medication Administration Record ("MAR"); and 3) Grievant asked another nurse to chart her PRN's. The letter noted all these acts were against policy.

15. This letter also noted Grievant had been given several opportunities to inform Lawrence Ventura, Chief Executive Officer, of any mitigating circumstance, and noted Grievant had stormed out of his office, slamming the door.

16. The letter also informed Grievant of her appeal rights and advised her she must appeal to her immediate supervisor or Kieth Anne Worden, the Human Resources Director, within ten days.

17. Ms. Bias received the same disciplinary action as Grievant. (See footnote 5)

18. Pursuant to hospital standards, if a drug or treatment is not charted, it is not considered as being received by the patient.

19. Other nurses have made medication errors and have not received the same disciplinary action as Grievant.

20. Grievant still retains her LPN license, but she is not allowed to practice as an LPN at MMBH.

Issues and Arguments

Respondent first asserts the grievance on the suspension was not timely filed and should be dismissed. As for the charges resulting in the suspension and demotion, Respondent maintains these charges were proven, and of sufficient severity to warrant the disciplinary action taken.

Grievant argues she has been subjected to disparate treatment, as others have made similar mistakes and not received such severe disciplinary action. Further, Grievant avers she was not guilty of a medication error, but only a deficiency in reporting. Grievant also contends the punishment was too harsh for the conduct in which she engaged, and the punishment should be decreased.

Discussion

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. W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't of Health, Docket No. H- 88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that areasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

I. Timeliness

HHR contends the suspension grievance is untimely as it was not initiated within the timelines contained in W. Va. Code § 29-6A-4(a). When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse her failure to file in a timely manner. Higginbotham v. W. Va. Dep't of Pub. Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dep't, Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14,

1991).

The timeliness issue is governed by W. Va. Code § 29-6A-4(a), which states a grievance must be filed:

> Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance. . . .

The relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision. See Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989); Rose v. Raleigh County Bd. of Educ., Docket Nos. 94-41-246/314 (Nov. 29, 1994), aff'd, 199 W. Va. 220, 483 S.E.2d 566 (1997).

In this case, Respondent has not demonstrated Grievant's filing was untimely. While it is true Grievant received the August 19, 2002 letter on August 22, 2002, this letter was closely followed by the August 22, 2002 letter. It is unknown what the August 22, 2002 letter stated, and when Grievant received it. Further, the second letter of suspension dated September 10, 2002, stated Grievant could file her grievance over the suspension and demotion ten days after receipt. It is unknown when this letter was received by Grievant. Grievant filed her grievance with this Grievance Board on September 17, 2002. This filing is within the time frame, as it is ten days from the date of the September 10, 2002 letter. Given this state of affairs it would be incorrect to dismiss this suspension grievance as untimely filed, and Respondent's Motion is denied.

II. Credibility

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness'information. (See footnote 6) See Proklevich v. W. Va. Dep't of Transp./Div. of Motor Vehicles, Docket No. 02-DMV-143 (Oct. 11, 2002); Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD-216 (Dec. 28, 1999).

One issue requires an examination of Grievant's and Ms. Bias' credibility. Grievant testified she did not tell Ms. Bias to sign her name to the PRN's, that she only ask Ms. Bias to chart the

medication, and told Ms. Bias she would come in the next day and sign off on these medications. Ms. Bias testified Grievant told her to chart and sign the medications, and did not mention she would be in the next day to sign off on these medications.

No evidence was presented to demonstrate Ms. Bias was untruthful, and no motive was established to explain why she would lie about this issue. Further, Grievant did not come in the next day to sign off on the medications. Given this information, the undersigned Administrative Law Judge finds Grievant did ask Ms. Bias to sign Grievant's initials on the MAR.

III. Merits

As to the merits, there appears to be little to no disagreement that Grievant failed to follow MMBH policy in the counting and documenting of controlled substances. She did not complete the MAR, she did not count as required, and she asked someone else to chart and initial her PRN's. These actions and omissions represent a clear failure to follow a policy that is in place to protect patients who cannot protect themselves. (Testimony Ventura). Failure to chart medication could result in a patient receiving more of amedication than is healthful, resulting in side effects, and, with some medications, could promote addiction. (See Testimony Ventura, Bias, Hennes, Worden). Additionally, the documentation of medications and treatments are a key standard required for hospital accreditation. (Testimony Ventura).

IV. Discrimination

Grievant also alleges discrimination. Discrimination is defined in W. Va. Code § 29- 6A-2(d), as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." This Grievance Board has determined that a grievant, seeking to establish a prima facie case (See footnote 7) of discrimination under W. Va. Code §§ 29-6A-2(d), must demonstrate the following:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

Once a grievant establishes a prima facie case of discrimination, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show theoffered reasons are pretextual. Hickman, supra. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94- DOH-376 & 377 (Feb. 23, 1995).

Grievant has not met her burden of proof and established a prima facie case of discrimination. While there was testimony other nurses had made medication errors and had not been demoted and suspended, these errors were not detailed. Grievant did not demonstrate she was treated differently than other nurses. While the undersigned Administrative Law Judge understands medication errors are made at times, as nurses are not perfect, Grievant failed to show these other nurses refused to count, failed to chart medications, and then asked another nurse to cover for them. Grievant's intentional behavior in this set of circumstances cannot be compared to other accidental medication errors, such as giving a medication at the wrong time or giving a smaller or larger dose than prescribed. Further, Ms. Bias, whose transgressions were similar to Grievant's, received exactly same the discipline as Grievant.

V. Mitigation

The argument Grievant's suspension and demotion was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of

prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997). Mitigation of a penalty is considered on a case by case basis. Conner v. Barbour County Bd. of Educ., Docket No. 95-01-031 (Sept. 29, 1995); McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. Pingley v. Div. of Corrections, Docket No. 95-CORR-252 (July 23, 1996).

This Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute her judgement for that of the employer. Tickett v. Cabell CountyBd. of Educ., Docket No. 97-06-233 (Mar. 12, 1998); Huffstutler v. Cabell County Bd. of Educ., Docket No. 97-06-150 (Oct. 31, 1997). See, e.g. Hammer v. Div. of Corrections, Docket No. 94-CORR-1084 (Nov. 30, 1995).

The undersigned Administrative Law Judge is unable to conclude MMBH abused its substantial discretion in designating the penalty in question. Grievant received in service training on the Medication Policy. The Log Sheet indicates all medication nurses must count at the change of shift. Grievant was aware and understood her actions were incorrect. Grievant did not prove other similarly situated nurses had been treated differently. The undersigned Administrative Law Judge cannot find the discipline imposed was clearly excessive.

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

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. Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988). "The 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 and Human Resources, Docket No. 92-HHR-486 (May 17, 1993).

2. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis toexcuse her failure to file in a timely manner. Higginbotham v. W. Va. Dep't of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dep't, Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991).

3. The timeliness issue is governed by the timelines set out in W. Va. Code § 29- 6A-4(a), which states a grievance must be filed:

> Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance . . . .

The relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision. See Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989); Rose v. Raleigh County Bd. of Educ., Docket Nos. 94-41-246/314 (Nov. 29, 1994), aff'd, 199 W. Va. 220, 483 S.E.2d 566 (1997).

4. Respondent has not demonstrated Grievant's filing on her suspension was untimely.

5. The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the

plausibility of the witness'sinformation. See Proklevich v. W. Va. Dep't of Transp./Div. of Motor Vehicles, Docket No. 02-DMV-143 (Oct. 11, 2002); Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD-216 (Dec. 28, 1999).

6. Respondent has proven the charges identified in the suspension and demotion letter.

7. Discrimination is defined in W. Va. Code § 29-6A-2(d), as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

8. This Grievance Board has determined that a grievant, seeking to establish a prima facie case of discrimination under W. Va. Code § 29-6A-2(d), must demonstrate the following:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;
>
> and,
>
> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

9. Once a grievant establishes a prima facie case of discrimination, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, DocketNo. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94- DOH-376 & 377 (Feb. 23, 1995).

10. Grievant did not meet her burden of proof and establish a prima facie case of discrimination.

11. 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, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. Conner v. Barbour County Bd. of Educ., Docket No. 94- 01-394 (Jan. 31, 1995). See Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

12. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997).

13. "Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of theemployee's conduct and the prospects for rehabilitation." Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996).

14. Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute her judgement for that of the employer. Tickett v. Cabell County Bd. of Educ., Docket No. 97- 06-233 (Mar. 12, 1998); Huffstutler v. Cabell County Bd. of Educ., Docket No. 97-06-150 (Oct. 31, 1997).

15. Grievant failed to demonstrate the discipline received was clearly excessive or unduly harsh, given the seriousness of her behavior and her failure to follow clearly defined and understood policy. Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994); Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991).

Accordingly, this grievance is **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 grievanceoccurred." 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. 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: January 13, 2003

Footnote: 1

Grievant was represented by Joyce Gibson, SEIU, District 1199, and HHR was represented by Assistant Attorney General Darlene Ratliff-Thomas.

Footnote: 2

Grievant asserted she had been told by the pharmacist that a count did not have to be done at the end of shift, if the off-going nurse was certain her or his count was correct. Given the pharmacist was not Grievant's supervisor and did not testify at hearing, and the Policy and the Log disagree with this assertion, this statement is found to be incorrect.

Footnote: 3

PRN denotes a medication that is given "as needed."

Footnote: 4

Grievant testified she did not tell Ms. Bias to sign her initials, and she told Ms. Bias she would come in the next day to sign her initials. Grievant did not come in the next day to sign her initials.

Footnote: 5

Due to a clerical error, Ms. Bias's salary had not yet been reduced, but she had been informed this change was in process.

Footnote: 6

The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984).

Footnote: 7

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).