LINDA McNEELY,

Grievant,

v. **DOCKET NO. 03-HHR-007**

DEPARTMENT OF HEALTH AND

HUMAN RESOURCES/MILDRED

MITCHELL-BATEMAN HOSPITAL,

Respondent.

DECISION

Linda McNeely filed this grievance directly at level four on January 8, 2003, stating: “Management has unjustly and unfairly terminated me from my position at Mildred Mitchell Bateman Hospital.” Grievant stated the relief sought as: “To be reinstated to my position, given all benefits, back pay and to be made whole in every way.”

A level four hearing was held in the Grievance Board's Charleston office on April 21, 2003. Grievant appeared *pro se*, and Respondent was represented by Darlene Ratliff- Thomas, Esq., Assistant Attorney General. This matter became mature for decision at the close of the hearing.

Respondent presented the testimony of Hospital CEO Lawrence Ventura and Personnel Assistant Angela Maynard. Grievant testified on her own behalf, but called no other witnesses. The following exhibits were admitted to record:

Respondent's Exhibit No. 1	January 2, 2003 termination letter
Respondent's Exhibit No. 2	Nightly Deficiency Checksheets
Respondent's Exhibit No. 3	Confidentiality Policy MMBHB003
Respondent's Exhibit No. 4	Policy receipt certification
Respondent's Exhibit No. 5	Confidentiality acknowledgments
Grievant's Exhibit No. 1	January 22, 2003 letter from licensing board

Based on a preponderance of the credible evidence adduced at the hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant was employed by Respondent at Mildred Mitchell-Bateman Hospital as a Health Service Worker.

2. On September 10, 2002, Grievant received a ten-day suspension and was demoted from Licensed Practical Nurse (See footnote 1) to Health Service Worker as a result of a failure to follow Respondent's medication administration policy.

3. Grievant filed a grievance over that disciplinary action, and on December 9, 2002, a level four grievance hearing was held in the Grievance Board's Charleston office. (See footnote 2)

4. During the course of that hearing, Grievant offered as evidence two Nightly Deficiency Checksheets. These Checksheets contained the names of several patients. Respondent's Exhibit No. 2. (See footnote 3)

5. These Checksheets are kept on a bulletin board at the nurse's station on Grievant's unit. They are filled out by Registered Nurses or LPN's, but Health Service Workers have access to them, and check them to see if anything needs to be completed or if there are any deficiencies in their work that should be remedied. 6. Grievant removed two checksheets and copied them for use at her prior level four hearing. She did not seek permission from anyone to do so. Grievant did not request the checksheets as part of her discovery prior to the hearing, and did not request a subpoena duces tecum for the custodian of the records to bring them to the hearing.

7. Grievant receives yearly training on confidentiality, and each year signs a statement that says:

> I, Linda McNeely, understand that all privileged patient-related information received in the performance of my duties as a hospital employee of Mildred Mitchell-Bateman Hospital shall be held in confidence and shall not be discussed with anyone for any purpose other than for the completion of my assigned tasks. These clearances to patient areas are for employees only and pertains to written material as well as personal presence.
>
> This information has been disclosed to you from records protected by Federal confidentiality rules (42 CFR, part 2). The Federal rules prohibit you from making any further disclosure of this information unless further disclosure is expressly permitted by the written consent of the person to whom it pertains.

Respondent's Exhibit No. 5.

8. Grievant certified that she had read Respondent's Confidentiality Policy. That policy states in part:

> When a patient enters Mildred Mitchell-Bateman Hospital, staff assume an obligation to keep in confidence all that pertains to him/her and his/her personal affairs. This responsibility is shared by Mildred Mitchell-Bateman Hospital. The reason for admission, diagnosis, and treatment of all patients is confidential information and must be rigidly respected. No information regarding any Mildred Mitchell-Bateman Hospital patient, past or present, can be released by any Mildred Mitchell-Bateman Hospital employee without strict adherence to the provisions set forth in this policy.
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> . . .
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> 2. Confidential information - Communications and information obtained in the course of treatment or evaluation of any patient shall be deemed to be confidential information and will include the fact that a person is or has been a patient. It does not include information which does not identify a patient or does not verify someone else's identification of the patient.
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> 3. Disclosure - Any communication of information, verbal or written, identifying someone as a patient at Mildred Mitchell-Bateman Hospital or information about an identified patient, including the verification of information that is already known by the person making the inquiry.
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> . . .
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> **General Rule on Disclosure:**
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> No patient identifying information can be released, either verbally or written, without first obtaining the valid written consent of the patient. This prohibition, on unauthorized disclosure, applies whether or not the person seeking the information already has the information, has other means of obtaining the information, enjoys official status or has obtained a subpoena.

Respondent's Exhibit No. 3 (emphasis in original).

9. The Confidentiality Policy contains exceptions for court-ordered disclosure, non-patient identifying information, regulatory processes, mandated disclosures, and internal program communications. The internal program communications exception states:

> Hospital staff may disclose information to other "program" staff, if the recipient needs the information in connection with the duties that arise out of the provision of service.

> Program staff includes other hospital staff as well as employees of Community Behavioral Health Centers and any entity having direct administrative control over Mildred Mitchell-Bateman Hospital.

10. The Confidentiality Policy contains no provisions for disciplinary action against an employee who breaches the policy.

11. On January 2, 2003, Mr. Ventura notified Grievant that he had decided to dismiss her from employment because, among other things, he believed her actions demonstrated a "lack of insight as a caregiver to the needs of the patients and [her] continued unwillingness to abide by the policies that the hospital has established in an effort to protect the patients," and because he had "lost confidence that [her] continued employment, in any capacity, would be beneficial to [the hospital's] patients." His written notification of his decision further stated:

> This action has become necessary due to your continued non-adherence to Mildred Mitchell-Bateman Hospital policies. The specific reason for this charge is that one December 9, 2002, during a fourth level grievance hearing you displayed a copy of two Hospital Nightly Deficiency Check sheets (one dated 8/20/02 and one dated 8/23/02). These sheets contained patient names. Not only did you breach several patients' confidentiality, you took advantage of your position as a direct care provider to remove this form, make a copy of this document from the Unit without permission from any official of the hospital, without written consent from the patients listed, and without asking for a subpoena or court order as would be proper to gather information to present at a hearing.
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> . . .
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> You met with Kieth Anne Worden, Director of Human Resources, and Yvonne Kolstoe, RN, Director of Nursing, on January 2, 2003, to discuss this issue. You were asked if you had any information that would lead us to believe that your behavior would change. During that meeting, you stated that you did not believe this was a breach of confidentiality as it was being presented at a "State courtroom." Although you stated that you did not share these documents with your representative, it is implausible that she did not view the patient names as you tried to share the information with the Administrative Law Judge. It was very clear that your intention was to have these documents placed into the public record at this hearing. You did also state that you were familiar with the confidentiality policy.

Respondent's Exhibit No. 1.

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). Since the facts of this case are not disputed, and Grievant admits that she copied the Checksheets without authorization and offered them for evidence in her prior grievance hearing, Respondent has met its burden of proving its allegations. However, Grievant argues that termination of her employment is too harsh of a disciplinary action because her infraction was minor and was not willful. She stated that, despite her familiarity with the Confidentiality Policy, she did not understand that using theChecksheets in her level four grievance hearing was a "disclosure" prohibited by the policy. She never denied or tried to conceal her actions, but believed that because she was going to a State forum for legal proceedings with her employer, use of the internal documents would be permitted. Respondent argues that Grievant knew and understood the policy, deliberately acted without authorization, and that her failure to follow policy was part of a pattern of disregard for hospital policies.

The question remains, therefore, of whether dismissal of Grievant from her job of 13 years was proportionate to the offense. “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 cannot substitute his judgement for that of the employer. Jordan v. Mason County Bd. of Educ., Docket No. 99-26-8 (July 6, 1999). Grievant contends her policy violation was not intentional and was the result of misunderstanding the policy, while Respondent views it as a willful disregard of hospital policy, and part of a pattern of such disregard as demonstrated by its prior disciplinary action. 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). "When considering whether to mitigate the punishment, factors to be considered include the employee's work historyand 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). “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.” Overbee, *supra.*

This case is very similar to another recent grievance decided by the Grievance Board, in which an employee wilfully revealed confidential patient information. In Shultz v. Higher Education Policy Comm'n/W. Va. Univ. School of Dentistry, Docket No. 02- HEPC-293 (Mar. 31, 2003), an employee in a dental clinic told an acquaintance that a particular patient had been seen in the clinic, in violation of the clinic's patient confidentiality policy. The Administrative Law Judge in that case found the employee's actions were not gross misconduct, and that dismissal was disproportionate to the offense, given the unique circumstances of the case, the employee's excellent work record and the lack of specificity in the policy as to the disciplinary consequences.

“The West Virginia Supreme Court of Appeals has determined that classified employees may be dismissed for misconduct which is of a 'substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention.' Syl. Pt. 1, Oakes v. W. Va. Dept. of Fin. and Adm., 164 W. Va. 384, 264 S.E.2d 151 (1980). Faced with defining 'gross misconduct' justifying discipline or dismissal, the Court in Thurmond v. Steel, 159 W. Va. 630, 225 S.E.2d 210 (1976)declined, deciding that the severity of the employee's misconduct should be evaluated and considered in the context of the circumstances of each case.” Hayes v. W. Va. Div. of Juvenile Justice, Docket No. 98-DJS-220 (Dec. 14, 1998).

In this case, Grievant presented no evidence of her past work history or performance evaluations, apart from the fact that she had been disciplined very recently for failure to follow the hospital's medication administration policy. She presented no evidence of other employees accused of similar acts. The policy which she is accused of violating is very clear and not very susceptible to misunderstanding. Nevertheless, Grievant's claim that she did not understand that presenting the material to her superiors and a Grievance Board Administrative Law Judge is credible. It is not likely a person accused of violating hospital policy would knowingly do so again in an effort to defend the accusation. Grievant testified that she would have known better than to do the same thing for a civil court hearing. Respondent contends Grievant's act in making an unauthorized copy of the

checksheets and attempting to use them at the hearing was simply a demonstration that Grievant will not adhere to hospital policy but instead just does what she wants to do. It has “lost confidence” in Grievant and Mr. Ventura no longer wants her as an employee. Respondent appears to be, to paraphrase author Robert Heinlein, attributing conditions to villainy that simply result from confusion.

As in Shultz, *supra*, Grievant's disclosure was a minor incident. Although Respondent makes much of the fact Grievant was trying to have the patients' names admitted to a public record, any party or the Administrative Law Judge could have redacted the confidential information before the documents were admitted. Grievant stated she did not reveal the documents to her representative, and although Respondent did not believeher, there was no evidence she did so or that her representative knew about the proffered evidence beforehand. Although Respondent wishes to classify this as the same behavior it had previously disciplined Grievant for, “violation of policy,” that description is too broad a generalization. Grievant's act was an overt violation of a very important policy, but her violation was not so substantial as to merit dismissal of a long-term employee from her job. Too, coming as it did on the heels of Grievant's contest of her earlier disciplinary action, the dismissal comes very close to appearing retaliatory.

In this case, dismissal is clearly disproportionate to Grievant's offense. Grievant's misconduct was serious, but it was also a technical violation of the Confidentiality Policy, and was without wrongful intention. However, effective punishment that reflects the criticality of the Confidentiality Policy is warranted, and the undersigned Administrative Law Judge finds Grievant's dismissal should be mitigated to a 60-day suspension.

CONCLUSIONS OF LAW

1. 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 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). Where the evidence equally supports both sides, the employer has not met its burden. Id. 2. Respondent met its burden of proving

Grievant violated its confidentiality policy by removing a document containing patient names and offering it as evidence at a level four grievance hearing.

3. “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 cannot substitute his judgement for that of the employer. Jordan v. Mason County Bd. of Educ., Docket No. 99- 26-8 (July 6, 1999); 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).

4. 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).

5. "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. SummersCounty 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).

6. “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.” Overbee, *supra*.

7. “The West Virginia Supreme Court of Appeals has determined that classified employees may be dismissed for misconduct which is of a 'substantial nature, and not trivial or inconsequential, nor a mere technical violation of statute or official duty without wrongful intention.' Syl. Pt. 1, Oakes v. W. Va. Dept. of Fin. and Adm., 164 W. Va. 384, 264 S.E.2d 151 (1980); See Westfall v. W. Va. Dept. of Trans., Docket No. 97-DOH-349 (Jan. 16, 1998); Faced with defining 'gross misconduct' justifying

discipline or dismissal, the Court in Thurmond v. Steel, 159 W. Va. 630, 225 S.E.2d 210 (1976) declined, deciding that the severity of the employee's misconduct should be evaluated and considered in the context of the circumstances of each case." Hayes v. W. Va. Div. of Juvenile Justice, Docket No. 98-DJS-220 (Dec. 14, 1998); Nicholas v. W. Va. Dep't of Health and Human Resources/William R. Sharpe, Jr. Hosp., Docket No. 02-HHR-223 (Feb. 28, 2003).

8. Given the specific facts of this case, dismissal was a disproportionate reaction to Grievant's violation of the Confidentiality Policy. *See* Pingley v. Div. of Corrections, Docket No. 95-CORR-252 (July 23, 1996).

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to reinstate Grievant to her former position, with back pay and interest, benefits, and seniority, minus sixty days of pay for the suspension.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Cabell County. 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: April 30, 2003 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

This action affected only her personnel classification; her licensure as a Licensed Practical Nurse (LPN) was unaffected.

Footnote: 2

This grievance was denied and the disciplinary actions were upheld. McNeely v. Dep't of Health and Human

Resources/Mildred Mitchell-Bateman Hosp., *Docket No. 02-HHR-296 (Jan. 13, 2003).*

Footnote: 3

As offered for evidence in this grievance, the patients' names have been redacted. They were not redacted prior to offering them as evidence in the prior grievance hearing.