JACQUELINE WAYSON,

Grievant,

v.

Docket No. 04-RS-225

WEST VIRGINIA DIVISION OF REHABILITATION SERVICES,

Respondent.

DECISION

The grievant, Jacqueline Wayson (hereafter "Grievant") was employed by the respondent, the West Virginia Division of Rehabilitation Services ("the Division"), as a probationary Nurse III. Grievant was hired on December 16, 2003. By correspondence, dated June 1, 2004, the Division's interim director, Janice A. Holland, dismissed Grievant for unsatisfactory performance while Grievant was still in her probationary period.

Thereafter, on June 8, 2004, Grievant brought this action directly to Level IV. The Level IV hearing was held on July 22, 2004, at the Charleston offices of the West Virginia Education and State Employees Grievance Board. Grievant represented herself while the Division was represented by Warren N. Morford, Jr., Training and Employee Relations Coordinator for the Division. At the outset of the hearing at Level IV, both parties expressly waived their rights to proceed at lower levels and opted to go forward at Level IV.

Grievant asserted that "[t]hey used a number of half truths & opinions over 3 mo. period as cause to dismiss me without any counselling or warn[ing.]" Grievant seeks reinstatement with back pay and

benefits.

This grievance matured for decision on August 31, 2004, after both parties filed post-hearing memoranda or proposed findings of fact and conclusions of law. Grievantattempted to submit additional evidence (See footnote 1) as part of her post-hearing written argument. However, the evidentiary record closed at the end of the Level IV hearing. Therefore, the additional material provided by Grievant is not part of the record and has not been considered.

After careful review of the entire record, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

FINDINGS OF FACT

1 1. Grievant is a registered nurse (hereafter “R.N.”).

2 2. Beginning December 16, 2003, Grievant was employed by the Division as a Nurse III assigned to the Rehabilitation Hospital (“the Hospital”) operated by the Division in Institute, West Virginia.

3 3. After her orientation period, Grievant worked on the evening shift, which was from 3:00 p.m. to 11:00 p.m.

4 4. The Hospital serves patients of all ages with a wide variety of medical conditions requiring rehabilitation.

5 5. Some of the patients at the Hospital suffer from traumatic brain injuries. It is expected that patients who suffer from such injuries will likely exhibit outbreaks of inappropriate behavior as a consequence of the brain trauma.

6 6. Grievant received a good evaluation after her first three months as a nurse assigned to the Hospital.

7 7. The exact cause of the decline in Grievant's performance over the next few months is unclear. There is, however, substantial evidence that Grievant was dealing with a plethora of problems in her personal life.

8 8. On June 1, 2004, Grievant met with the Director of Nursing and with the Hospital's administrator to discuss their recommendation that Grievant be dismissed. During that meeting, Grievant asked if there were any particular incidents that led to their recommendation that she be dismissed. Certain specific incidents were outlined in the dismissal letter that was provided thereafter

to Grievant.

9 9. The dismissal letter, dated June 1, 2004, advised Grievant that she was being dismissed because

> you have been unwilling or unable to meet the requisite minimum standards of performance for your position of employment, which standards include being relied upon to complete job tasks as you are instructed to do, to interact with other staff members in an appropriate and professional manner, and to also relate to our student/clients as would be expected of a Registered Nurse. For whatever reason, you have not satisfactorily met the required standards of the agency; nor the minimum level of performance of your job and duties during your probationary period; nor have you met the expectations of your supervisors, thus warranting your dismissal.

10 10. The incidents cited in the dismissal letter as the basis for the action include inappropriate interactions with patients, dorm students, and co-workers, as well as instances in which Grievant demonstrated poor nursing skills. There is no need to reiterate each and every incident. Discussion herein of a few illustrative examples will suffice.

11 11. On one occasion, when a patient was out of the asthma medication the doctor had ordered, Grievant suggested administering her own asthma medicine, which was different from the patient's prescription.

12 12. There is no evidence to suggest that Grievant is licensed to prescribe medications.

13 13. Grievant continues to argue in her post-hearing submission that the asthma medication Grievant used would have fewer side effects than the medication the doctor had prescribed for the patient in question. Her persistence in this regard raises questions about whether Grievant has an awareness of how very wrong it would be for Grievant to administer her own medications to a patient. (See footnote 2)

14 14. Grievant refused to care for one admittedly difficult patient who was suffering from a brain trauma.

15 15. Grievant's insistence that she did not have trouble catheterizing patients was controverted by the testimony of three witnesses, who included a very experienced certified nursing assistant, another R.N., and the charge nurse from Grievant's shift.

16 16. Grievant's testimony that she only catheterized one male patient (See footnote 3) at the Hospital seems highly unlikely, particularly in light of the types of patients being treated at the

Hospital.

17 17. By contrast, the witnesses who testified about Grievant's troubles catheterizing patients had no discernible reason to lie, appeared to be candid, and gave consistent accounts of the events at issue. Accordingly, their testimony must be accepted as true.

18 18. Grievant could not properly catheterize patients on at least three occasions. As a result, two patients refused to allow Grievant to attempt to catheterize them and asked that Grievant not be allowed in their respective rooms. The parent of one of the two patients also requested that Grievant not be permitted to catheterize her child.

19 19. On at least one occasion, Grievant refused to fulfill her duty to inventory the controlled drug, Midrin. The nurses are required to count certain controlled medications at the end of their shift. This includes Midrin.

20 20. Some nurses do not count the Midrin if none had been dispensed during their shift. However, it is not clear if this practice is condoned by the Hospital administration. In any event, Grievant did not prove that there had not been any Midrin used during the particular shift when Grievant refused to help inventory it.

21 21. On one occasion, Grievant clogged an irrigation syringe she was using to introduce medication into a patient's feeding tube. This type of syringe is similar in appearance to a turkey baster and does not have a needle attached to it. When it clogged, Grievant used a sterile syringe needle to dislodge the clogged medicine so that it could enter the feeding tube.

22 22. There is a dispute over how Grievant used the needle to resolve the problem. Grievant's testimony that she did not insert the needle into the feeding tube was flatly contradicted by Samantha Highley (“Ms. Highley”), the nurse who brought the sterilesyringe with the needle into the patient's room at Grievant's request. Ms. Highley stated unequivocally that she observed Grievant insert the needle into the patient's feeding tube. This action concerned Ms. Highley because, if the feeding tube were damaged, it would require a surgical procedure to remove and replace it.

23 23. Grievant's claim that Ms. Highley was not in a position to see what Grievant was doing does not seem credible. In light of the fact that Grievant was, presumably, focused on clearing the blockage, it is unlikely that Grievant would have been in a position to observe Ms. Highley's location.

24 24. In addition, the clarity, certainty, and seeming candor with which Ms. Highley testified compels the conclusion that her account of the feeding tube incident must be accepted as true.

25 25. Grievant made inappropriate remarks about killing one difficult patient, going so far as to suggest a method by which it could be done without risk of detection.

26 26. Grievant had difficulties in her interactions with dorm students. On one occasion she did not look for Tylenol when one of the dorm students requested it, despite the fact that Tylenol was always available, as reflected in Grievant's own testimony.

27 27. Grievant also had difficulties in her interactions with her co-workers. For instance, Grievant caused discomfort when she persisted in efforts to get her co-workers to sell Grievant some of their personal possessions, such as earrings and pens, that Grievant admired.

28 28. Grievant was suffering from some serious difficulties in her personal life. She would sometimes cry for no apparent reason while she was on duty.

DISCUSSION

In the ordinary course of events, Grievant would have been required to pursue her grievance at lower levels before proceeding to Level IV. However, as noted above, both parties agreed to waive the lower level proceedings.

As a probationary employee, Grievant's dismissal for unsatisfactory performance was not disciplinary. Therefore, Grievant bore the burden of proving, by a preponderance of the evidence, that her performance was satisfactory, making her dismissal improper. *Brown v. W. Va. Dep't of Health and Human Res.*, Docket No. 99-HHR-026 (Oct. 28, 1999); *Bonnell v. W. Va. Dep't of Corr.,* Docket No. 89-CORR-163 (Mar. 8, 1990). As discussed more fully below, Grievant failed to establish that her performance was satisfactory. Therefore, the Division's decision to dismiss her cannot be deemed to be arbitrary and capricious.

The evidence at the Level IV hearing established that Grievant's performance during her probationary employment was fraught with troubles. She had difficulties with her interpersonal skills with respect to co-workers, patients, and dorm students. She also failed to demonstrate the requisite level of nursing skill, as evidenced by her problems with catheterizing patients and in administering medication through a feeding tube.

Some of the facts are not in dispute. Grievant concedes that she did not like one of the male patients and that she refused to treat him. She also concedes that she made statements about wanting to kill a troublesome patient. Although Grievant characterized the remarks as jokes, she testified that she went so far as to suggest that there was potassium on hand that could be used to kill

the patient without risk of detection.

Grievant did not take issue with the fact that she refused to inventory the Midrin on at least one occasion. She claims that it was not necessary to count the Midrin if none hadbeen dispensed during that shift. It is not at all clear that this was the Hospital's policy. However, even if it were, there was no persuasive evidence that Midrin had not been dispensed during that particular shift. Therefore, even if nurses made a practice of not counting the Midrin when none had been used, Grievant failed to establish that this was the basis for her refusal to do so on that occasion.

Grievant claims that she does not recall the incident involving a dorm student requesting Tylenol. However, Grievant volunteered that she was certain that there was always Tylenol available. This incident is consistent with a colleague's statement that, when she was speaking with the dorm students, Grievant acted like she was “being imposed upon.” By way of explanation for her failure to get up and look for Tylenol, Grievant postulated that she must have been “flustered or harried.” There is no evidence to support this hypothesis. Nor is this explanation particularly helpful to Grievant in her efforts to demonstrate that her work performance was satisfactory.

There is no dispute that Grievant asked another nurse about the advisability of giving some of Grievant's own asthma medication to a patient whose medication had not been received from the pharmacy. (See footnote 4) Grievant correctly points out that, ultimately, she did not do this because she realized that the medication prescribed for the patient was different than the medication Grievant was taking. Nonetheless, in her post-hearing submission at Level IV, Grievant continues to argue that the medication she was taking “does the same thing as the one ordered [for the patient] with fewer side effects.” In this respect Grievant seriously misperceives her role and the basis for the Division's concerns about her performance. In pertinent part, the statutory definition of the practice of

> "registered professional nursing" shall mean the performance for compensation of any service requiring substantial specialized judgment and skill based on knowledge and application of principles of nursing . . . such as responsible supervision of a patient requiring skill in observation of symptoms and reactions and the accurate recording of the facts, or . . . in the **administration of medications and treatments as prescribed by a licensed physician**[.]

W. Va. Code § 30-7-1(b) (emphasis added). It is clear that, as a nurse, Grievant should only

administer medications in accordance with a doctor's instructions. It would be totally inappropriate for her to substitute any medication for the one prescribed by the patient's doctor. Although ultimately she did not pursue this course of conduct, Grievant does not dispute that she considered making such substitution. The fact that Grievant is continuing to argue that the two medications are similar and that, in fact, hers has fewer side effects does not assist Grievant's efforts to establish that her performance as a nurse was satisfactory.

Grievant takes issue with the assertion that she stuck a needle into a feeding tube. She also disputes the assertion that she had difficulties with catheterizations. Credibility thus becomes an issue. Credibility determinations are generally predicated upon factors such as a witness's 1) demeanor, 2) opportunity or capacity to perceive the events in question, 3) reputation for honesty, and 4) bias, interest or motive, as well as the plausibility of the testimony offered. *Dalton v. Monongalia County Bd. of Educ.*, Docket No.04-30-184 (Sept. 15, 2004); *Jaggers-Green v. Bureau of Employment Programs/Unemployment Comp. Div.*, Docket No. 03-BEP-026 (July 30, 2004).

With respect to the incident involving Grievant's efforts to administer medication through a feeding tube, there is a clear divergence in the testimony of Grievant and Ms. Highley, the nurse who brought Grievant the sterile needle. Grievant's claim that she only used the needle inside the irrigation syringe is controverted by Ms. Highley's testimony that she observed Grievant “uncap the needle and stick it into the [feeding] tube.”

While sticking the needle into the feeding tube does not seem like a logical approach to resolving the problem confronting Grievant, Ms. Highley's testimony seemed quite credible. It was obvious that she was upset by the incident. She noted that the patient's father gave her a look as she left the room that she interpreted as indicating disgust.

Ms. Highley has been an R.N. for fourteen years. As of the Level IV hearing, she had only been at the Hospital for approximately three months. Her testimony regarding her reasons for leaving employment at a different hospital clearly indicated that Ms. Highley has little tolerance for workplace tension and in-fighting. This attitude suggests that she would not deliberately stir up trouble or consciously make a false statement regarding a colleague's conduct. There is no obvious reason for her to misstate the events she observed with respect to the feeding tube. Furthermore, Ms. Highley seemed to take care to give accurate statements and declined opportunities to make negative remarks about Grievant. In particular, she noted that she “could not say” that Grievant was “hateful”

to the dorm students. If she were merely attempting to blacken Grievant's name, it is not likely Ms. Highley would have foregone this opportunity. Grievant argues that Ms. Highley was not really in a position to see what Grievant was doing with the needle. It is unclear how Grievant could be aware of Ms. Highley's whereabouts while Grievant was focused on clearing up the blockage. Therefore, Ms. Highley's account of the incident is deemed more credible than Grievant's version.

Even if Grievant's version of the feeding tube incident were accepted as accurate, it does little to assist her in the effort to demonstrate that her performance was satisfactory. Grievant clearly had difficulty in administering the patient's medication.

Grievant's assertion that she did not have trouble catheterizing patients was controverted by the testimony of at least three other witnesses, each of whom testified in Grievant's case-in-chief. According to Diane Dorman ("Ms. Dorman"), who has been a certified nursing assistant for approximately 28 years, Grievant had trouble catheterizing at least three patients. Mickie Burrows ("Ms. Burrows"), who has been a nurse for over 22 years, testified that two of those patients refused to have Grievant return to their rooms because she could not properly catheterize them. In one instance, a patient's mother had to intervene and stop Grievant from catheterizing her daughter. Grievant asked Carolyn Hudson ("Ms. Hudson"), who was the charge nurse on the evening shift, to perform the procedure on this same patient. (See footnote 5) According to Ms. Hudson, any R.N. should be able to catheterize a patient.

Grievant testified that she only catheterized one male patient at the Hospital. She claimed that this procedure was performed during her first week on evening shift, while she was still a temporary employee rather than a probationary employee. The testimony of Ms.Dorman about Grievant's problems in performing catheterizations was corroborated by the consistent testimony of Ms. Burrows and Ms. Hudson. There does not appear to be any collaboration between the three witnesses, particularly in light of the fact that Ms. Dorman (See footnote 6) works on the day shift while the other two work the evening shift.

As to Grievant's suggestion about how to kill a patient and avoid detection, Grievant may well be correct in her assertion that this was intended as some sort of gallows humor in which she engaged with other nurses. Nonetheless, such remarks are inappropriate and, in this case, quite alarming given Grievant's apparent state of mind and obvious unhappiness. The Division is not required to tolerate such inappropriate remarks from its nursing staff, regardless of whether Grievant perceived

or intended such remarks to be darkly humorous.

Grievant has attempted to demonstrate that her dismissal was arbitrary and capricious by challenging the facts relied upon by the Division in determining that Grievant's performance as a probationary employee was unsatisfactory. A decision is considered “arbitrary and capricious when it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 614, 474 S.E.2d 534, 544 (1996) (citing *Arlington Hosp. v. Schneider*, 547 F. Supp. 670 (E.D. Va. 1982)). The issues raised by Grievant have not been enough to undercut the Division's conclusion that Grievant's performance in the Hospital during her probationary period was unsatisfactory. Thus, Grievant has not been able to demonstrate that the Division's decision to dismiss her was arbitrary and capricious. In the form submitted at Level IV, Grievant complained that the Division did not offer her counseling or warnings prior to her dismissal. However, Grievant has failed to cite any legal authority to suggest that, as a probationary employee, she was entitled to counseling or warnings. In fact, her status as a probationary employee placed Grievant on notice that her performance was being scrutinized to determine whether she could properly fulfill the duties of a Nurse III at the Hospital.

Based upon the foregoing, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

CONCLUSIONS OF LAW

1 1. Dismissal of a probationary employee for unsatisfactory performance is not disciplinary in nature. Therefore, the dismissed probationary employee bears the burden of proof. *Bonnell v. W. Va. Dep't of Corr.*, Docket No. 89-CORR-163 (Mar. 8, 1990).

2 2. Grievant must prove her allegations by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-4.21 (2000). "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 Res.*, Docket No. 92- HHR-486 (May 17, 1993).

3 3. The Division properly used the probationary period to “evaluate the ability of the employee to effectively perform the work of his or her position and to adjust himself or herself to the organization and the program of the agency.” In part, the employing agency is to use to the probationary period to eliminate “those employees who do not meet the required standards of work.”

W. VA. CODE ST. R. § 143-1-10.1(a).

4 4. There is no evidence to support Grievant's assertion that the witnesses at Level IV were hostile and, thus, not credible.

5 5. Even without considering the matters on which there is divergent testimony, Grievant still could not prevail because she has failed to establish that her work was satisfactory.

6 6. A decision is considered “arbitrary and capricious when it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 614, 474 S.E.2d 534, 544 (1996) (citing *Arlington Hosp. v. Schneider*, 547 F. Supp. 670 (E.D. Va. 1982)).

7 7. Grievant has failed to prove that the Division's decision to dismiss her during her probationary period was arbitrary and capricious.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or the circuit court of any county in which the grievance arose. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. However, the appealing party is required by West Virginia Code section 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.

Date: September 22, 2004

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Jacquelyn I. Custer

Administrative Law Judge

Footnote: 1

She taped two vials of respiratory medications to her submission. Both vials were discarded.

Footnote: 2

According to notices routinely found on prescription medications, transferring a prescription medicine to someone

other than the patient for which it was prescribed is a violation of federal law.

Footnote: 3

It is unclear whether Grievant meant she had only catheterized one patient and that patient happened to be male or whether she meant that she had catheterized a number of patients, only one of whom was male.

Footnote: 4

See note 2, above.

Footnote: 5

It is unclear from the record whether this was the same occasion on which the patient's mother intervened to prevent Grievant from catheterizing her daughter.

Footnote: 6

Ms. Dorman only worked with Grievant for a short while during Grievant's orientation period.