THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

JOHN NELSON,

Grievant,

v. **Docket No. 05-HHR-067**

Denise M. Spatafore

Administrative Law Judge

DEPARTMENT OF HEALTH AND

HUMAN RESOURCES/MILDRED

MITCHELL-BATEMAN HOSPITAL,

Respondent.

DECISION

John Nelson ("Grievant") initiated this proceeding on February 25, 2005, following the termination of his employment at Mildred Mitchell-Bateman Hospital ("MMB"). A level four hearing was held in Charleston, West Virginia, on April 18, 2005, and on August 16, 2005, at which Grievant was represented by counsel, Paula Wilson, and Respondent was represented by Jennifer Akers, Assistant Attorney General. An additional day of hearing was scheduled for March 24, 2006 (See footnote 1), which was continued due to Grievant's illness. Grievant passed away on April 28, 2006. Accordingly, the parties agreed to have this grievance decided on the record developed to date, supplemented by fact/law proposals, which were submitted by Respondent on June 2, 2006. (See footnote 2) Thereafter, this matter wasassigned to the undersigned ALJ for a final decision, the complete record being received by me on October 19, 2006.

After a review of the record in its entirety, including the audio recording of the two days of level four hearings and the 35 exhibits introduced into evidence, the undersigned finds the following

material facts have been proven:

Findings of Fact

1. Grievant was employed by MMB as a Treatment Plan Coordinator (See footnote 3) from October of 2001 until his termination on February 16, 2005. He was African-American and 56 years old at the time of his termination.

2. As Treatment Plan Coordinator, Grievant was responsible for promulgating and administering a treatment plan for each new patient admitted to the hospital. These plans are formulated by a team consisting of a doctor (who is the head of the team), registered nurse, therapists, a psychologist and a social worker. Each team member assesses the patient and recommends a course of treatment and goals for the patient to achieve during their hospitalization. The team meets each day to review and update treatment plans for all their patients. It is Grievant's responsibility to put each treatment plan on paper, insure all the information is accurate and updated, and make sure the plan is being followed. Each plan must be in place within ten days after the patient is admitted.

3. In 2002 and 2003, Grievant received performance evaluation ratings of “meets expectations” as his overall rating. However, it was noted in his 2002 evaluation that he had difficulty accepting change and was not notifying treatment team members ofchanges in meeting dates and times; he received “needs improvement” ratings in the evaluation categories encompassing these areas.

4. Willa Hope is a Social Worker who was on Grievant's treatment team, who was sometimes asked to serve as supervisor during the absence of Janie Phelps, Director of Social Services, who is Grievant's supervisor. In November of 2003, Grievant refused to take on duties as assigned by Ms. Hope during a staff shortage, and was required to meet with Ms. Hope and Ms. Phelps to clarify his refusal.

5. Throughout 2003, there were problems with Grievant leaving patients' charts locked in his office where they could not be accessed by other staff (chiefly doctors and nurses treating the patients), losing records, not maintaining complete and updated treatment plans, and unprofessional conduct.

6. On January 2, 2004, Ms. Phelps placed Grievant on a “Performance Improvement Plan,” due to the following problems:

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Unprofessional conduct in interactions with patients and coworkers.

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Failure to report for treatment team meetings promptly and failure to have documentation prepared for these meetings.

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Failure to adhere to the requirements for leave authorization and absence reporting.

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Locking patient charts in his office, when they are to be maintained at the nurse's station.

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Insubordination, including willful refusal to complete assigned duties.

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Inappropriate interaction with patients, such as meeting with them behind closed doors in his office and interacting with patients without documenting discussions/treatment in the patient's records.

7. Throughout January, February and March of 2004, Grievant failed to appear for or cancel numerous meetings with Ms. Phelps to discuss his progress under the improvement plan. Eventually, in April of 2004, Ms. Phelps met with Grievant and Kieth Anne Worden, Director of Human Resources, to discuss Grievant's issues. Grievant was instructed that he was required to meet with Ms. Phelps to discuss his progress, and that his improvement plan would be extended through April and May. Also at this meeting, the continued problem of Grievant locking charts in his office was discussed, because more incidents had occurred where nurses and doctors did not have access to needed charts. Grievant was instructed to provide a key to Ms. Worden, who would have an extra key

placed in the medication room.

8. On several occasions in early 2004, Grievant failed to call in one hour before his shift when he was going to be absent, as is required by Ms. Phelps. On one occasion, he did not call in until over an hour after his scheduled shift began.

9. On April 13, 2004, Grievant did not attend treatment team meetings as required and was seen approximately an hour later carrying food items to his office. The plans for the treatment team meeting could not be updated or completed that day.

10. During a meeting with Ms. Phelps on April 26, 2004, to discuss his improvement plan, Grievant stated that he was not doing anything differently in any of the areas which had been identified as performance problems. Also during this meeting, Ms. Phelps informed Grievant that there appeared to be issues regarding his leave requests. She instructed Grievant that, because he was attending a conference during the first week of May, all documentation and a calendar would have to be up-to-date for the other treatment team members to use during his absence. 11. Grievant did not update treatment plan documentation before he attended the May conference, causing delays and difficulties in rendering treatment to patients.

12. During a progress meeting with Grievant on May 18, 2004, Ms. Phelps discussed Grievant's frequent tardiness, discrepancies between the time clock and Grievant's time sheets, and an inappropriate conversation with a patient.

13. On July 14, 2004, Grievant did not call in sick until more than an hour after his shift started.

14. On July 29, 2004, Ms. Phelps gave Grievant a written reprimand, citing approximately 40 specific incidents of misconduct, including all of the incidents described above, dating back to September of 2003. The reprimand advised Grievant that the reason for the action was “unprofessional conduct, insubordination, and general poor performance as Treatment Plan Coordinator.” Ms. Phelps further stated in the reprimand:

> Specifically, over the last ten months you have repeatedly avoided interaction with and failed to heed my advice and direction in my attempt to coach you into becoming a valued member of the Treatment Team. Instead of operating as an organizer and leader for the Treatment Team as is your function, your inappropriate and unprofessional behavior (in front of patients and staff) is disruptive to the operation of this vital group. Your blatant unwillingness to cooperate with other disciplines is counterproductive and will no longer be tolerated.

In addition, she stated: “Be aware, continued failure to adhere to the hospital's standard of conduct

will result in further disciplinary action as severe as suspension, demotion or dismissal."

15. After an investigation and substantiation by the patient advocate at MMB, it was found that Grievant had committed patient abuse on two occasions. On June 28, 2004, Grievant touched (non-sexually) a patient who had issues with being touched, afterthe patient made it clear he did not want Grievant to touch him. On July 13, 2004, he made a statement to another staff member that a patient should be "put in a sleeping bag and dragged" to court, which was overheard by the patient and perceived as threatening. When the patient became upset, Grievant told her to "get a grip," instead of attempting to calm her.

16. On September 10, 2004, Grievant was notified in correspondence from Mary Beth Carlisle, Chief Executive Officer of MMB, that he was being suspended for thirty days. The cited reasons for the suspension were the two occasions of patient abuse, his continued unprofessional conduct, and the cumulative effect of his failure to improve his performance after numerous warnings, a reprimand, and meetings regarding the same.

17. Throughout 2004, there were many instances where Grievant did not complete treatment plans within the required time period, plans were incomplete, or they contained incorrect information, which caused difficulties for other personnel treating the patients involved.

18. On November 17, 2004, Grievant met with Ms. Phelps to discuss the continued problems with his work, specifically with regard to treatment plans, and three specific plans were identified which needed corrections. After being instructed to make the corrections, Grievant had not made them by December 10, 2004, prompting Ms. Phelps to send him a memorandum, directing him to make the corrections by December 14, 2004. Although Grievant later attempted to provide documents showing that he had made the corrections, it was later discovered (on January 6, 2005), that Grievant had failed to correct two of the patients' charts. 19. On December 7, 2004, Grievant was overheard speaking to a patient who was about to be discharged, and he stated, "If you get out on Thursday morning, you will be looking for drugs that afternoon."

20. On February 15, 2005, Grievant was required to meet with Ms. Phelps and Ms. Worden to discuss the most recent occurrences of substandard treatment plans and inappropriate conduct toward patients. Grievant became aggressive and argumentative during the meeting, stating that he did not believe his comment was inappropriate and that any problems with treatment plans were the doctor's fault. Grievant was informed that his termination was being considered.

21. On February 16, 2005, Grievant met with Dr. Masood Aslam, Clinical Director, Dr. Shahid Masood (Grievant's team leader), and Ms. Worden. He was advised at that time that his employment was being terminated. The termination letter, also dated February 16, 2005, stated that he was being dismissed for his “continued inability or unwillingness to conform to the performance and behavioral standards required of an employee of [MMB].” He was further advised that, since his suspension in September, he had continued non-professional behavior and incidents of poor performance, specifically discussing the incorrect treatment plans and his inappropriate comment to a patient on December 7, 2004.

Discussion

Respondent contends that, due to Grievant's continuous unprofessional conduct and poor performance, as documented extensively for more than year, he was terminated for good cause. Grievant's counsel has argued that the progressive discipline policy was not followed, and that he was terminated because of his race and age. In dismissal cases involving classified employees, the burden of proof is upon the employer to establish the charges relied upon by a preponderance of the evidence and to establish good cause for dismissing an employee. W. Va. Code § 29-6A-6. *Davis v. W.Va. Dept. of Motor Vehicles*, Docket No. 89-DMV-569 (Jan.22, 1990); *Broughton v. W. Va. Div. of Highways*, Docket No. 92-DOH-325 (Dec. 31, 1992). "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Permanent state employees who are in the classified service can only be dismissed for “good cause,” meaning “misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.” Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* 143 W. Va. C. S. R. 1 §§ 12.02 and 03. In this case, Respondent has more than met its burden of proving that Grievant's conduct was substantial. Despite numerous and repeated efforts on the part of MMB officials, Grievant continuously behaved unprofessionally, performed his assigned

tasks poorly, if at all, and displayed an obvious lack of desire to accomplish his job duties in a satisfactory manner. As explained at level four by many MMB employees, incorrect, out of date, or nonexistent treatment plans impact directly upon the care and treatment administered to patients. Grievant's refusal to perform these tasks as requiredhad the potential for negative, adverse effects upon patients in the hospital's care, and upon the hospital itself, which can be cited for non-compliance with licensing regulations when patient care protocols are not followed.

As to Grievant's age and racial discrimination arguments, this Grievance Board has determined it does not have authority to determine liability for claims that arise under the West Virginia Human Rights Act (W. Va. Code §§ 5-11-1, et seq.), including claims of age and race discrimination, but does have authority to provide relief to employees for "discrimination," as that term is defined in W. Va. Code § 29-6A-2. *See Bowman v. W. Va. Educ. Broadcasting Auth.*, Docket No. 96-EBA-464 (July 3, 1997); *Rodak v. W. Va. Dep't of Tax and Revenue*, Docket No. 96-T&R-536 (June 23, 1997). In other words, the Grievance Board does have subject matter jurisdiction over such discrimination claims within the context of a grievance. *Smith v. W. Va. Bureau of Employment Programs*, Docket No. 94-BEP-099 (Dec. 18, 1996). *See Vest v. Bd. of Educ.*, 193 W. Va. 222, 455 S.E.2d 781 (1995).

W. Va. Code § 29-6A-2(d) defines discrimination 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." In discussing discrimination claims under the grievance statutes, the Supreme Court of Appeals has noted that “[t]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]” *Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004). No other employees have been identified or discussed in the context of this grievance, so Grievant's claims of discrimination are not supported by the record. As to Grievant's claim that the progressive discipline policy was not followed, this allegation also is not supported by the record. MMB's policy on “Progressive Disciplinary Action” provides for a system that begins with a verbal reprimand, followed by a written reprimand, suspension and then dismissal. However, the policy also specifically states that it should be followed in “most cases,” but that “decisions as to the severity of disciplinary action shall be made on a case-by-case basis.” Further, the policy provides for a written reprimand when “the employee has not responded to spoken warning or when the offense is serious” and a suspension can be imposed for “delinquency or misconduct of an appropriately serious nature.” Given that the purpose of progressive discipline is to

provide the employee notice that he is behaving incorrectly and a chance to remedy the situation, the undersigned finds that Grievant was well-informed of his deficiencies over a very extensive time period, and he knowingly failed to improve. Therefore, no violation of the policy has been proven in this case.

The following conclusions of law support this decision.

Conclusions of Law

1. In dismissal cases involving classified employees, the burden of proof is upon the employer to establish the charges relied upon by a preponderance of the evidence and to establish good cause for dismissing an employee. W. Va. Code § 29-6A-6. *Davis v. W.Va. Dept. of Motor Vehicles*, Docket No. 89-DMV-569 (Jan.22, 1990); *Broughton v. W. Va. Div. of Highways*, Docket No. 92-DOH-325 (Dec. 31, 1992).

2. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affectingthe rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* 143 W. Va. C. S. R. 1 §§ 12.02 and 03.

3. W. Va. Code § 29-6A-2(d) defines discrimination 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." In discussing discrimination claims under the grievance statutes, the Supreme Court of Appeals has noted that "[t]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]" *Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004).

4. Respondent has proven by a preponderance of the evidence that Grievant's employment was terminated for good cause.

5. Grievant has failed to establish improper discrimination was involved in the decision to terminate his employment.

6. The progressive discipline policy of Mildred Mitchell-Bateman Hospital was not violated in this case.

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 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. 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.

Date: October 30, 2006

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Due to the resignation of Administrative Law Judge ("ALJ") Jacquelyn Custer in December of 2005, this case was reassigned at that time to ALJ Paul Marteney for additional hearing and decision.

Footnote: 2

The record contains no such submission from Grievant's counsel.

Footnote: 3

This was a hospital title, and Grievant's actual classification was Social Worker.