THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

MADONNA L. MITCHELL,

Grievant,

v.

Docket No. 2008-0742-DHHR

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/

MILDRED MITCHELL-BATEMAN HOSPITAL,

Respondent.

DECISION

Madonna L. Mitchell, Grievant, initiated this proceeding on November 5, 2007, following the termination of her employment at Mildred Mitchell-Bateman Hospital ("MMB"). Her Statement of Grievance reads:

> On October 11, 2007, I was suspended from my employment without an investigation, predetermination hearing, or the opportunity to be heard, in direct violation of my Constitutional Due Process Rights. I was dismissed from my employment on October 31, 2007. My employer suspended and dismissed me from my employment without following its Progressive Discipline Policy and without just cause.
>
> Relief sought: I request reinstatement to my position, back pay for all the time lost, that the entire incident be removed from my personnel file, all reports made to other agencies be retracted, and that I am made whole in every way.

This grievance proceeded directly to level three, pursuant to W. Va. Code § 6C-2- 4(3), due to Grievant being terminated from her position. A level three hearing was held at the Board's Charleston office on January 8, 2008, at which Grievant was represented by Matthew R. Oliver, American

Federation of State, County, and Municipal Employees, and Respondent was represented by B. Allen Campbell, Senior Assistant Attorney General. This grievance became mature for decision on February 1, 2008, after receiptof the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant was hired by Mildred Mitchell-Bateman Hospital in October 2006 as a Licensed Practical Nurse. By January 2007 Grievant began receiving counseling from her supervisor regarding her work performance. Grievant was placed on a lengthy performance improvement plan, received reprimands, and a suspension as a result of her repeated unprofessional conduct and failure to perform her job duties as required. Subsequently, Grievant was terminated for allowing an unlicensed Health Service Worker to come into the medication room, and under her direction, draw up the medication Haldol into a syringe to be given to a patient. In terminating Grievant's employment, MMB neither violated her due process rights, nor violated the progressive discipline policy. Grievant was given repeated warnings and information as to how to improve her work, which she refused to heed.

Based upon a detailed review of the record in its entirety, the undersigned makes the following findings of fact:

Findings of Fact

1. Grievant was employed by MMB as a Licensed Practical Nurse from October 2006 until her termination on November 16, 2007.

2. For the rating period from September 1, 2006, to February 28, 2007, Grievant received performance evaluation ratings of “Good; Meets Expectations”. However, it was noted in her evaluation that she needed to improve her job performance, attendance, sign for policies/procedures, monitor deficiencies, and improve teamwork approach. It was alsonoted that Grievant needed to “continue to monitor medication deficiencies and follow policy regarding medication administration.”

3. On June 12, 2007, Grievant received a verbal reprimand for refusing mandatory overtime.

4. On June 28, 2007, Grievant received a second verbal reprimand for setting up medication to be administered without completing the medication administration record.

5. On July 3, 2007, Grievant received a written reprimand for failing to complete blood tests on patients to determine the amount of glucose in their blood until after the patient had been served a meal. (See footnote 1) Grievant was also told to remind patients to go to the nurse's station for medication, and cell phone use was prohibited in patient areas.

6. On July 5, 2007, Grievant was placed on a Performance Improvement Plan. The areas of concern addressed by the Improvement Plan were professional conduct, completing medication administration assignments according to policy, complying with mandatory overtime requirements, and complying with the dress code.

7. Subsequently, some improvement in Grievant's conduct was noted. Grievant's supervisor, Kristen Thompson, RN, observed her set up medications for the evening shift medication pass, and indicated she followed the procedure correctly.

8. However, on July 16, 2007, Grievant received a second written reprimand for inappropriately calling off work. 9. On July 27, 2007, Grievant received a three-day suspension without pay for failing to adhere to MMB policies on dress standards, mandatory overtime, conduct, and medication administration. Grievant failed to document on the medication administration record that she had given a patient his 9:00 a.m. insulin at 7:00 a.m. Another nurse was preparing to give this same patient his 9:00 a.m. dose; fortunately for this patient, Grievant had been held over and told the nurse she had previously administered the insulin.

10. Grievant's Performance Improvement Plan was extended for three months on August 1, 2007.

11. An additional medication error was reported involving Grievant on August 11, 2007. Grievant failed to do a narcotic count when leaving her shift on September 18, 2007, resulting in a narcotic being unaccounted for, and misplaced.

12. MMB terminated Grievant's employment by letter dated November 1, 2007, with an effective date of November 16, 2007. The termination was due to an incident on October 7, 2007, in which Grievant allowed a Health Service Worker, Amanda Holderby, access to the medication room, and under her direction, placed the medication Haldol into a syringe to be given to a patient. It is a violation of nursing and hospital rules for the Health Service Worker to be in the medication room. In addition, it is a violation of nursing and hospital rules for Grievant to direct the Health Service Worker to prepare medication to be administered to patients. Grievant was the Medication Nurse on duty that day.

13. Pam Hagley, RN, was the Charge Nurse on the unit at the time of the incident resulting in the termination. Upon her return to the Nurse's desk from a patient altercation, Nurse Hagley observed the Health Service Worker in the medication room drawing up asingle dose vial of Haldol.

Nurse Hagley went into the med room, and on the counter saw two syringes and two needles. Amanda Holderby held a single dose vial of Haldol, which Nurse Hagley took, completed the draw, and administered to the patient. (See footnote 2)

14. When Nurse Hagley confronted Amanda Holderby about the incident, she incredulously responded that Nurse Hagley would not have known the difference if she had not seen her.

15. Grievant's recollection was that she did not instruct Amanda Holderby to draw up a syringe with Haldol. To the contrary, she told Amanda Holderby to set the Haldol and a syringe out on a table in the medication room.

16. Nurse Hagley explained to Grievant it was a violation of the Nurse Practice Act to allow a Health Service Worker in the medication room, and to draw up medication into a syringe.

17. This matter was referred to Susan Shields, Nurse Manager, to conduct an investigation. Nurse Shields interviewed Grievant, and Grievant admitted to handing Haldol to Amanda Holderby to draw up into a syringe. Nurse Shields informed Grievant that at no time should non-licensed staff be in the medication room, and that it was a breach of the Nurse Practice Act to allow non-licensed staff members to handle or draw up medications. Grievant expressed remorse for this lack of judgment, and accepted responsibility for her actions. 18. Nurse Shields met with Amanda Holderby to discuss the incident. After initially denying involvement in the medication room, she acknowledged her participation in handling the Haldol. Ms. Holderby attempted to downplay the incident by asserting it was no more significant than a patient throwing down their medication and her then picking them up. Nurse Shields admonished Ms. Holderby about the boundaries she needed to observe as a Health Service Worker. Afterwards, Ms. Holderby admitted she had a breach in judgment in handling the medication.

19. Mary Beth Carlisle, MMB's Chief Executive Officer, was responsible for making the determination whether or not to terminate Grievant. A predetermination conference was held on October 18, 2007, at which time Ms. Carlisle became aware that the individuals involved in the incident had not given written statements. (See footnote 3) Consequently, Ms. Carlisle asked Grievant, Amanda Holderby, and Pam Hagley to provide a written statement concerning the events so that she could review them to assist in her decision- making.

20. When the written statements were submitted, some twenty days after the incident, there were conflicting and inconsistent accounts as to what happened that evening.

21. Another predetermination conference was convened on October 31, 2007, during which Grievant was given further opportunity to discuss the matter with Ms. Carlisle. 22. In evaluating the evidence, Ms. Carlisle gave substantial weight to the statement of Nurse Hagley, and the investigation results of Nurse Shields. Ms. Carlisle had first hand knowledge that both of these Nurses were very experienced, and proven professional employees. In addition, Nurse Shields' investigation results were memorialized in her notes at the time of the events in question, and Nurse Hagley's account corresponded with Nurse Shields' investigation findings.

23. Amanda Holderby is an employee known to Ms. Carlisle to have credibility shortcomings. Ms. Carlisle also took into consideration the fact that Grievant had been employed by MMB for less than one year; however, she had received two verbal reprimands, two written reprimands, and a suspension. Ms. Carlisle placed importance on the indisputable fact that Grievant had been placed on Performance Improvement Plans to correct mistakes in the administration of medication during her tenure with MMB.

Discussion

Respondent contends that, due to Grievant's continuous unprofessional conduct not befitting a Licensed Practical Nurse, as documented extensively during her tenure, she was terminated for good cause. Grievant's representative argued that the alleged misconduct that precipitated the termination was not proven, and she was terminated without good cause. In addition, Respondent's progressive discipline policy was not followed, and Grievant's due process rights were violated.

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 & 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.* (See footnote 4)

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). In the instant grievance, MMB has met its burden of proving that Grievant's conduct was of a substantial nature directly affecting the rights and interest of the patients residing at Respondent's facility. Despite numerous and repeated efforts on the part of Nurse Supervisors, Grievant continuously behaved unprofessionally, and committed numerous infractions concerning acceptable medication administration that could have had dangerous consequences. The record of this matter reflects that from the beginning of Grievant's employment with MMB on October 16, 2006, she was given instruction on many occasions regarding adherence to medication administration policies and practices. In fact, Grievant successfully completed the RN/LPN Medication Administration Checklist under the direction of a licensed medication nurse. Grievant successfully completed the General Medication Competency Exam and the Psychotropic Medication Competency Exam shortly thereafter. Notwithstanding these test results, Grievant was placed on a Performance Improvement Plan on July 5, 2007, in an effort to address several issues regarding her performance including concerns surrounding medication administration. The unfortunate and misleading twist in this matter was the apparent improvement by Grievant when, on August 10, 2007, she was monitored while successfully passing medication.

This improvement was short-lived and, apparently, disingenuous. On October 7, 2007, Grievant allowed an unlicensed staff member to go beyond the scope of her position as a Health Service Worker by entering the medication room, and placing medication into a syringe to be given to a patient by Grievant. This infraction by Grievant had the potential for negative, adverse effects upon patients in the hospital's care, and upon the hospital itself, which can be cited for noncompliance with licensing regulations when patient care protocols are not followed.

The Chief Executive Officer's decision to terminate Grievant's employment due to the above misconduct was based, in part, on her assessment of the witnesses' credibility. Some of the same individuals testified at the level four hearing. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailedfindings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res*., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ*., Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of*

Health and Human Res./Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993).

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's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD- 216 (Dec. 28, 1999); *Perdue, supra*.

Pam Hagley, RN, was the Charge Nurse on the unit on October 7, 2007. She testified to her first-hand observation of the Health Service Worker, Amanda Holderby, being in the medication room drawing up a vial of Haldol. Nurse Hagley has consistently maintained this account of events, and she is regarded as an experienced, professional employee. In addition, Nurse Shields' investigation results were memorialized in her notes at the time of the events in question, and Nurse Hagley's account corresponded with Nurse Sheilds' investigation findings. Nurse Hagley had a reputation for honesty, and testified that this event had placed a strain on her one-time friendship with Grievant. Thisrevelation, in concert with her forthright demeanor, demonstrates an absence of bias or motive to be untruthful in the matter.

Amanda Holderby, Health Service Worker, admitted she was in the medication room at the hospital pursuant to the direction of Grievant. (See footnote 5) In addition, she admitted handling the medication at the direction of Grievant. Ms. Holderby attempted to downplay the incident when she was first interviewed on October 10, 2007, insisting it was no more serious then if a patient had dropped their medication on the floor and she had picked the medication up for the patient. (See footnote 6) Subsequently, on October 29, 2007, Ms. Holderby gave a statement concerning her involvement in the incident. She continued to downplay the infraction of administration practice by indicating other Health Service Workers were allowed into the medication room by other Nurses. Ms. Holderby accepted the fact that she had no reason to be in the medication room, and could provide no reason that Nurse Hagley would be untruthful about her recollection of events. In fact, it appears from the record that Ms. Holderby has a reputation for dishonesty because she had been suspended from her current employment in the past for falsifying documents. Therefore, it appears reasonable on the part of the Chief Executive Officer to give the account of Nurse Hagley more credibility and

weight than that of Ms. Holderby. (See footnote 7) Finally, regarding Grievant's claim that the progressive discipline policy was not followed, and her due process rights were violated, these assertions are 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 she is behaving incorrectly and a chance to remedy the situation, the undersigned finds that Grievant was well informed of her deficiencies over an extensive time period, and she knowingly failed to improve. Therefore, no violation of the progressive discipline policy has been demonstrated in this grievance.

The West Virginia Supreme Court of Appeals has recognized that "due process is a flexible concept, and that the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) (*citing Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)). "What is required to meet procedural due process under the Fourteenth Amendment is controlled by the circumstances of each case." *Barker v. Hardway*, 238 F.Supplement 228 (W. Va. 1968); *See Buskirk*, *supra*; *Edwards v. Berkeley County Bd. of Educ.*, Docket No. 89-02-234 (Nov. 28, 1989).

It is a well-settled principle of constitutional law, under both the State and Federal Constitutions, that an employee who possesses a recognized property right or liberty interest in his employment may not be deprived of that right without due process of law. *Buskirk*, *supra*; *Waite*, *supra*; *Clark*, *supra*. "An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and an opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494, (1985), *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The question here is whether the due process protections afforded Grievant were sufficient.

It has previously been held that a full-blown hearing is generally not required before an employee

may be terminated, but that employee has the minimum pre-deprivation right to at least have an opportunity to respond to the charges either orally or in writing. *Loudermill*, 470 U.S. at 542. An employee is also entitled to written notice of the charges and an explanation of the evidence. *Wirt*, *supra*. In other words, notice of the charges, explanation of the evidence, and an opportunity to respond is all the due process that MMB is required to provide. *Id*. at Syl. Pt. 3.

Grievant was informed, in writing, of the charges against her, and MMB identified the conduct for which she was to be terminated. Grievant was provided an opportunity to be heard on October 18, 2007, and October 30, 2007, to address the events of October 7, 2007. Numerous attempts were made during her employment to place Grievant onnotice of her unprofessional conduct and how to improve the conduct. Grievant was provided with notice of the charge that she allowed an unlicensed employee to enter the medication room on her watch, and an opportunity to convince the administration that the incident was somehow justified, or that she was committed to change her behavior following this error. Accordingly, Grievant's contention that she was denied due process is without merit.

The above-discussion will be supplemented by the following conclusions of law.

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. *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 & 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.*

2. 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). 3. "Due process is a flexible concept, and . . . the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the

circumstances of the particular case." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) (citing *Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)). Prior to an unpaid suspension, an employee is entitled to notice of the charges, an explanation of the evidence, and an opportunity to respond. *Id.* at Syl Pt. 3; *Board of Education of the County of Mercer v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994); *See Starkey v. Jefferson County Bd. of Educ.*, Docket No. 02-19-010 (April 8, 2002).

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

5. Respondent provided Grievant with notice of the charges, explanation of the evidence, and an opportunity to be heard prior to termination of her employment. As a consequence, Respondent provided Grievant with necessary due process protections.

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

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. *See* W. Va. Code § 29-6A-7 (repealed, *See Footnote 4, supra)*. Neither the West Public Employees Grievance Board nor any of its Administrative Law Judges is aparty 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: March 6, 2008

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Ronald L. Reece

Administrative Law Judge

Footnote: 1

Once a patient has eaten, the additional food alters the patient's blood glucose level making it difficult to determine the appropriate amount of insulin to administer to the patient.

Footnote: 2

To the trained eye, this in and of itself is troubling as well. Nurse Hagley explained she completed the draw because there were no other medications on the counter, and she was confident the medicine was Haldol. Nurse Hagley acknowledged this activity was in violation of acceptable medication administration.

Footnote: 3

While Nurse Shields did not obtain formal statements from Grievant, Amanda Holderby, or Pam Hagley, she made notes contemporaneous with the incident that precipitated Grievant's termination.

Footnote: 4

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.

Footnote: 5

This action alone is a violation of acceptable nurse practice and hospital policy.

Footnote: 6

This comment is troubling given that injections are a sterile procedure, preparing and giving of the medications requires skill, practice, and knowledge.

Footnote: 7

Regardless of credibility assessment, the incident of allowing the Health Service Worker in the medication room that they both confirm, is a substantial violation of Grievant's responsibilities as the assigned Nurse in charge of medication administration.