THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

LIONEL BOURNE,
Grievant,

v. **Docket No. 2009-0437-MAPS**

DIVISION OF VETERAN'S AFFAIRS/
WV VETERANS NURSING FACILITY,
Respondent.

DECISION

Lionel Bourne, Grievant, was employed as a Licensed Practicing Nurse for the Division of Veteran's Affairs at the Veterans Nursing Facility in Clarksburg, West Virginia. On October 1, 2008, he filed this grievance asserting he was wrongfully terminated; a violation of the whistle blower law; harassment; and a violation of Executive Order #5-07. He seeks as relief to be reinstated to his job with back pay and to be treated without harassment.

As this grievance concerned a termination, Grievant filed directly to level three following his dismissal. W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held before the undersigned Administrative Law Judge on May 5, 2009, and June 1, 2009, at the Grievance Board's office in Westover, West Virginia. Grievant represented himself and Respondent was represented by Nicole A. Cofer, Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on July 22, 2009.

Synopsis

Grievant has been practicing as a Licensed Practicing Nurse (LPN) for a number of years and was employed as a charge LPN at the Veterans Nursing Facility. Grievant's

position was supervisory in nature. As a charge LPN, Grievant was in charge of his shift when working and was the overseer of the facility and residents. In September 2008, an investigation revealed that Grievant, as well as a Registered Nurse also on duty that particular night, had been sleeping in recliners in the TV room during their shift. Grievant acknowledged that, while not sleeping on the job, he was reclining with his eyes shut for a substantial amount of time. This resulted in a clear neglect of duty since to be available to residents a nurse would have to be within earshot of the audible signal that a resident seeks assistance or be able to look down the hallways and see the visible lights signifying a call for attention. Respondent proved the charges against Grievant and established he was dismissed for good cause. Grievant neither presented evidence in mitigation of the punishment nor argued for mitigation in his submissions. The other assertions made by Grievant are moot or without merit. This grievance is denied.

The following Findings of Fact are made upon a detailed review of the evidence presented at level three:

Findings of Fact

1. Grievant has been practicing as an LPN for 14 years and was employed as a charge LPN at the West Virginia Veterans Nursing Facility.

2. As a charge LPN, Grievant is responsible for supervising his shift and was the overseer of the facility and the residents.

3. In September 2008 Dr. Kevin Crickard, Administrator of the West Virginia Veterans Nursing Facility, received information from Margie Brown and Rosetta Houston, Nurse Managers at the Veterans Nursing Facility, that there had been several accusations

that Grievant, as well as a Registered Nurse (RN) from the Agency also on duty that night, had been sleeping in recliners in the TV room during their shift.

4. In order to be available to the residents, a nurse would have to be able to hear the audible signal that a resident seeks assistance or be able to look down the hallways and see the visible lights. In short, it is difficult, if not impossible, for a nurse to do their job of overseeing the well being of the residents who is not where they can respond quickly after an audible or visual signal. This area is commonly referred to as the nurses' station.

5. The area where Grievant and the RN were sleeping was out of the line of sight of the nurses' station. Furthermore, the record reveals that the TV was on with a measurable amount of volume, making it difficult to hear any of the signals from the nurses' station.[1]

6. Dr. Crickard pointed out that a nurse's responsiveness at the facility could be "[l]ife or death, literally. If a resident had an emergency issue, if they were bleeding or they had fallen, had a head injury, there's a thousand different examples clinically where a resident could be in urgent need of care and hit their call light, and if no one was there to respond or if someone failed to respond, then it would be a type of nonfeasance which would place the residents' health and safety at serious risk." Level three testimony May 5, 2009.

7. Grievant acknowledged that he was in the recliner with his feet propped up by the television with the on duty RN in the adjacent recliner. Grievant's action, of lying in

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[1]Oddly enough, the broadcast was that of a law enforcement program entitled "COPS."

the recliner in the TV room away from the nurses' station, was unacceptable for a supervisor on duty.

8. Employees on duty that shift confirmed that Grievant was in the recliner. They reported that Grievant and the RN had blankets from the facility, they kicked their feet back and appeared to sleep for a period of about two hours, while aides were taking care of the residents. Again, Grievant acknowledged he was in the recliner but denied being asleep. Whether or not he was sleeping or watching television during his shift is of no real consequence given the conclusion in both scenarios leads a finding that he was not performing his duties.

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. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

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).

Grievant was notified by Dr. Kevin Crickard, Nursing Facility Administrator, by correspondence dated September 15, 2008, of his dismissal. This correspondence provided, in pertinent part, the following:

> The following is a summary of the investigation that led me to the decision of dismissal. On September 10, 2008, Margie Brown, Director of Nursing received reports that you were reclined in a recliner and sleeping on the job for over an hour. Upon further investigation, she accepted numerous eyewitness testimonies that confirmed you sleeping in a recliner at about 3:00 a.m. on the evening in question. Mrs. Brown met with you on September 12, 2008 concerning this and you reported that in fact you were in the recliner with your feet propped up but was not asleep. In a predetermination hearing on September 10th, you furthered [sic] by rationalizing your behavior stating that ". . . other nurses do it . . ." and ". . . some nights I work by myself, we had 3 nurses on . . ."
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> Mrs. Brown further explained during this meeting sleeping or laying down on the job is a direct violation of nursing standards and professional conduct. You were further asked if you would have a problem with Health Service Workers laying in a recliner with their feet propped up in front of the TV while on duty. You stated "yes". [sic] Mrs. Brown explained that the behavior should not be acceptable for you either. Mrs. Brown told you that you have a professional obligation, and that it is inappropriate as a supervisor to give staff the impression that it is okay to sleep on the job.

In the instant grievance, Respondent has met its burden of proving that Grievant's conduct was of a substantial nature directly affecting the rights and interest of residents at Respondent's facility. It is important in this analysis to keep in mind that Grievant was

a supervisor. "As a supervisor, Grievant may be held to a higher standard of conduct, because he is properly expected to set an example for employees under his supervision, and to enforce the employer's proper rules and regulations, as well as implement the directives of his supervisors." *Wiley v. W. Va. Div. of Natural Resources, Parks and Recreation*, Docket No. 96-DNR-515 (Mar. 26, 1988); *Sloan v. Dep't of Health & Human Res.*, Docket No. 00-HHR-132 (Jan. 30, 2001).

Grievant acknowledged at level three, as a former supervisor, that the appropriate place for a nurse to be located while on duty is at the nurses' station. That is the workstation where the nurses prepare the charts of the residents, answer the phone, call doctors and family members and it is the area where the patient charts can be found and filed. Grievant corroborated the Respondent's charge that the items necessary in performing the duties of his job as a nurse are found at the nurses' station.

In order to be available to the residents, a nurse needs to be able to hear the audible signal that a resident seeks assistance or be able to look down the hallways and see the visible lights. In short, it is difficult, if not impossible, for a nurse to do their job of overseeing the well being of the residents who is not where he or she can respond quickly after an audible or visual signal. To assure the appropriate response time, a nurse should be in the nurses' station area. Grievant acknowledged he was in the recliner but denied being asleep. Whether or not he was sleeping or watching television during his shift is of no real consequence given the conclusion in both scenarios leads to a finding that he was not performing his duties and he was not setting the appropriate standard of conduct as a supervisor.

As there are several issues raised in this grievance, normally each issue would be addressed in turn. However, given Grievant's dismissal is being upheld by the undersigned, the issue of harassment is moot. "Relief which entails declarations that one party or the other was right or wrong, but provides no substantive, practical consequences for either party, is illusory, and unavailable from the [Grievance Board]." *Miraglia v. Ohio County Bd. of Educ.*, Docket No. 92-35-270 (Feb. 19, 1993). "Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." *Bragg v. Dep't of Health & Human Res.*, Docket No. 03-HHR-348 (May 28, 2004); *Burkhammer v. Dep't of Health & Human Res.*, Docket No. 03-HHR-073 (May 30, 2003).

As to Grievant's claim of retaliation for "whistle-blowing," W. VA. CODE § 6C-1-3(a) provides as follows:

> No employer may discharge, threaten or otherwise discriminate or retaliate against an employee by changing the employee's compensation, terms, conditions, location or privileges of employment because the employee, acting on his own volition, or a person acting on behalf of or under the direction of the employee, makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste.

In general, a grievant alleging retaliation in violation of W. VA. CODE § 6C-1-3, must establish a *prima facie* case, by showing:

(1) that the employee engaged in activity protected by the statute;

(2) that the employee's employer was aware of the protected activity;

(3) that, thereafter, an adverse employment action was taken by the employer, and

> (4) that the adverse action was the result of retaliatory motivation or the action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

Liller v. Mineral County Bd. of Educ., Docket No. 99-28-270 (Nov. 19, 1999). *See Whatley v. Metropolitan Transit Auth.*, 632 F.2d 1325, 1328 (5th Cir. 1980); *Hochstadt v. Worcester Foundation for Experimental Biology, Inc.*, 425 F. Supp. 318 (D. Mass. 1976), *aff'd*, 545 F.2d 222 (1st Cir. 1976); *Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); *Parker v. W. Va. Dep't of Health & Human Resources*, Docket No. 91-HHR-282 (Apr. 22, 1992).

Once a *prima facie* case of retaliation is established, the inquiry then shifts toward determining if the employer has shown legitimate, non-retaliatory reasons for its actions. If the Respondent successfully rebuts the claim of retaliation, Grievant may nonetheless establish by a preponderance of the evidence that the offered reasons are merely pretextual. *Liller*, *supra*. *See Tex. Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n*, 172 W. Va. 627, 309 S.E.2d 342 (1983); *Webb v. Mason County Bd. of Educ.*, Docket No. 89-26-56 (Sept. 29, 1989).

Grievant asserts he was forced to give a urine sample at the Facility under conditions that violated the Governor's Executive Order No. 5-07. The record of this matter does not establish that Grievant reported this violation, and therefore, engaged in a protected activity. However, assuming there was a report which rises to the level of an activity protected by the statute, and it was made recently, Grievant was unable to

demonstrate that Respondent had any knowledge of Grievant being engaged in any protected activity. Grievant did not demonstrate he was retaliated against by Respondent.

The following Conclusions of Law support the decision reached:

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. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

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. "As a supervisor, Grievant may be held to a higher standard of conduct, because he is properly expected to set an example for employees under his supervision, and to enforce the employer's proper rules and regulations, as well as implement the directives of his supervisors." *Wiley v. W. Va. Div. of Natural Resources, Parks and Recreation*, Docket No. 96-DNR-515 (Mar. 26, 1988); *Sloan v. Dep't of Health & Human Res.*, Docket No. 00-HHR-132 (Jan. 30, 2001).

4. Respondent has met its burden of proving that Grievant's conduct was of a substantial nature directly affecting the rights and interest of residents at Respondent's facility. Grievant was dismissed for good cause.

5. "Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." *Bragg v. Dep't of Health & Human Res.*, Docket No. 03-HHR-348 (May 28, 2004); *Burkhammer v. Dep't of Health & Human Res.*, Docket No. 03-HHR-073 (May 30, 2003).

6. The question of whether Grievant was the subject of harassment is moot.

7. In general, a grievant alleging retaliation in violation of W. VA. CODE § 6C-1-3, must establish a *prima facie* case, by showing:

> (1) that the employee engaged in activity protected by the statute;
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> (2) that the employee's employer was aware of the protected activity;
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> (3) that, thereafter, an adverse employment action was taken by the employer, and
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> (4) that the adverse action was the result of retaliatory motivation or the action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

Liller v. Mineral County Bd. of Educ., Docket No. 99-28-270 (Nov. 19, 1999). *See Whatley v. Metropolitan Transit Auth.*, 632 F.2d 1325, 1328 (5th Cir. 1980); *Hochstadt v. Worcester Foundation for Experimental Biology, Inc.*, 425 F. Supp. 318 (D. Mass. 1976), *aff'd*, 545 F.2d 222 (1st Cir. 1976); *Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); *Parker v. W. Va. Dep't of Health & Human Resources*, Docket No. 91-HHR-282 (Apr. 22, 1992).

8. Grievant did not demonstrate he was retaliated against by Respondent for their alleged violation of Governor's Executive Order No. 5-07.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

Date: August 25, 2009

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Ronald L. Reece
Administrative Law Judge