WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KYLE SIMPSON,
Grievant,

v. **Docket No. 2009-1524-DHHR**

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES/LAKIN HOSPITAL,
Respondent.

DISMISSAL ORDER

Grievant Kyle Simpson filed a grievance on May 6, 2009, against his employer Lakin Hospital alleging, "Termination without good cause." For relief, Grievant is seeking, "To be made whole, including job restored and benefits restored, back pay with interest." Because this grievance is contesting a dismissal, Grievant elected to file directly to level three of the Public Employees Grievance Procedure. *See* W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held at the Grievance Board's Charleston office on October 20, 2009, before Administrative Law Judge ("ALJ") Mark Barney. A second day of hearing was needed, and it was held on August 16, 2010, before the undersigned.[1] Grievant was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by Jennifer K. Akers, Assistant Attorney General. At the conclusion of the second day of hearing, the parties elected to present written proposed findings of fact and conclusions of law. The deadline for the submission was September 13, 2010.

Synopsis

Respondent terminated Grievant for being rough in the way he spoke and handled two residents. Grievant denies the allegations. Respondent asserts that this grievance

---

[1]This case was reassigned due to administrative reasons.

must be dismissed because Grievant's requested relief, reinstatement to his position at Lakin, is barred by federal regulation due to Grievant's name being placed on the Nurse Aide Abuse Registry after the Office of Health Facility Licensure and Certification ("OHFLAC") and Adult Protective Services ("APS") conducted independent investigations and independently substantiated the allegations against Grievant. Grievant avers that Respondent's chief administrator is empowered by statute to oversee and review the decision of both OHFLAC and Lakin Hospital, and therefore a ruling on the merits is warranted. Respondent has met its burden on the motion to dismiss, and this grievance must be dismissed.

Findings of Fact

1. Grievant was employed by Lakin Hospital as a Heath Services Worker.

2. On April 28, 2009, Grievant was informed by Melissa Kinnaird, Chief Executive Officer of Lakin Hospital, that there had been allegations of patient abuse made against Grievant. On that date, Grievant was also suspended without pay while Lakin conducted an investigation into the allegations.

3. Respondent also reported the allegations of patient abuse to both OHFLAC and Adult Protective Services as required by 69 C.S.R. 6 § 3.1.a.

4. All three entities conducted independent investigations into the allegations, and all three entities sustained those allegations.

5. Grievant was terminated from employment by letter dated May 1, 2009.

6. On June 25, 2009, Grievant received a letter from OHFLAC notifying him that its independent investigation had substantiated the allegations against him. The letter informed Grievant that, unless he requested a hearing within 30 days, his name would be

placed on the Abuse Registry, and by law, Grievant would be prohibited from working in long term care, assisted living, behavioral health facilities, or hospice agencies.

7. Grievant did not request a hearing regarding OHFLAC's investigation.

8. On July 27, 2009, Grievant received a second letter from OHFLAC which was to serve as official notification that his name had been entered into the Nursing Assistant Abuse Registry.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *Hoover v. Lewis County Board of Education*, Docket No. 93-21-427; *Landy v. Raleigh County Board of Education*, Docket No. 89-41-232. A preponderance of the evidence is defined as "evidence which is 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." *Black's Law Dictionary* (6th ed. 1991); *Leichliter v. West Virginia Department of Health & Human Resources*, Docket No. 92-HHR-486. Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

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 & 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).

A complaint was made concerning the way Grievant spoke to and handled two separate residents. Lakin was required by DHHR Legislative Rules to report this allegation to OHFLAC. The specific rule states:

> When allegations of abuse [or] neglect...have been reported to a facility, the facility shall immediately complete and fax an Immediate Fax Report of Allegations (OHFLAC Form 225) to the Nurse Aide Program within twenty-four (24) hours.

69 C.S.R. 6 § 3.2.a.

Once this report was made, OHFLAC was responsible for conducting an independent investigation into the allegation. 69 C.S.R. 6 § 4. If the employee is found to have committed abuse or neglect of a patient, OHFLAC places the employee's name on the Registry. 69 C.S.R. §§ 4, 5 & 6. This process is conducted solely by OHFLAC and Lakin's only role is to provide whatever information is requested by OHFLAC in their investigation. There is an appeal process, but Grievant did not avail himself of that process.

OHFLAC, during its independent investigation, found that Grievant's actions constituted abuse and listed his name on the Registry. Federal regulations prohibit Lakin from employing Grievant if he is listed on the Registry. The specific rule states:

> c) Staff treatment of residents. The facility must develop and implement written policies and procedures that prohibit mistreatment, neglect, and abuse of residents and misappropriation of resident property.
>
> (1) The facility must-
>
> (ii) Not employ individuals who have been -
>
> (A) Found guilty of abusing, neglecting, or mistreating residents by a court of law; or

> (B) Have had a finding entered into the State nurse aide registry concerning abuse, neglect, mistreatment of residents or misappropriation of their property;...

42 C.F.R. § 483.13.

Grievant argues that Respondent's chief administrator is responsible for the oversight of OHFLAC. The Grievance Board, however, does not have jurisdiction to address determinations made by OHFLAC in the grievance procedure. OHFLAC's procedure and decision are separate and apart from the procedure for employee grievances.

Pursuant to the Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 156-1-6 6.11(2007), "[a] grievance may be dismissed, in the discretion of the administrative law judge, if no claim upon which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested."

Grievant is requesting to be placed back to work, and that would be unlawful. The undersigned has no jurisdiction or authority over OHFLAC's abuse and neglect proceeding, and OHFLAC has its own procedure separate and apart from the grievance procedure. OHFLAC placed Grievant's name on the Registry, and therefore, he is unable to work in this setting. Therefore, this grievance must be DISMISSED.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *Hoover v. Lewis County Board of Education*, Docket No. 93-21-427; *Landy v. Raleigh County Board of Education*, Docket No. 89-41-232. A preponderance of the evidence is defined as "evidence which is 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." *Black's Law Dictionary* (6th ed. 1991); *Leichliter v. West Virginia Department of Health & Human Resources*, Docket No. 92-HHR-486. Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

2. 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 & 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. OHFLAC is charged with maintaining a registry of individuals who have completed approved training and competency program for long term care nursing assistants. OHFLAC must also maintain an Abuse Registry containing names of registered long term care nursing aides/assistants found to have committed acts of neglect or abuse. 42 C.F.R. § 483.156(a) (b) (c) (d).

4. Lakin was required by DHHR Legislative Rules to report the allegation that Grievant had abused a patient to OHFLAC. 69 C.S.R. 6 § 3.2.a.

5. Once the report of an allegation of abuse was made, OHFLAC was responsible for conducting an independent investigation into the allegation. 69 C.S.R. 6 § 4. If the employee is found to have committed abuse or neglect of a patient, OHFLAC places the employee's name on the Registry. 69 C.S.R. §§ 4, 5, & 6.

6. Pursuant to the Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 156-1-6 6.11(2007), "[a] grievance may be dismissed, in the discretion of the administrative law judge, if no claim upon which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested."

7. Because Grievant was placed on the Registry by OHFLAC, his requested relief is not available.

Accordingly, this grievance must be **DISMISSED**.

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 (2008).

DATE: October 19, 2010

_____

Wendy A. Elswick
Administrative Law Judge