THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JILL SURBAUGH,

Grievant,

v. **Docket no. 2010-1111-DHHR**

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,

Respondent.

DECISION

Grievant Jill Surbaugh had been employed by the Department of Health and Human Resources ("DHHR") as a Certified Nursing Assistant for Lakin State Hospital for the last thirteen years before she received a letter dated February 16, 2010, notifying her that her employment had been terminated. Ms. Surbaugh filed a grievance dated February 22, 2010, contesting her dismissal and seeking reinstatement to her job with back pay, interest, benefits and "to otherwise be made whole".[1]

A level three hearing was held at the Charleston office of the West Virginia Public Employees Grievance Board on July 19, 2010. Grievant appeared at the hearing in person and through her representative Gordon Simmons, UE Local 170, WVPWU.[2] Respondent DHHR was represented by Heather Laick, Assistant Attorney General. At the close of the hearing, the parties agreed to submit proposed findings of fact and conclusions of law.

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[1]Pursuant to W. VA. CODE § 6C-2-4 (a) (4), Grievant waived levels one and two and filed her grievance directly to level three.

[2] West Virginia Public Workers Union.

Both parties filed fact/law proposals, the last of which was received by the Grievance Board on August 19, 2010. The grievance became mature for decision on that date.

Synopsis

Respondent dismissed Grievant because she was convicted of shoplifting in another state while she was off work. While Respondent acknowledges that Grievant is a good employee it believes that the shoplifting conviction renders her ineligible to work at the Lakin Hospital under the regulations of the Office of Health Licensure and Certification ("OHFLAC") which regulates nursing home facilities in West Virginia. Grievant avers that the OHFLAC regulation cited by Respondent does not constitute a disqualification from employment but only requires Respondent to report the conduct to OHFLAC for a determination by that agency as to whether the conviction renders her unfit for service as a Certified Nursing Assistant.

Grievant's conviction for shoplifting does not automatically disqualify her from employment as a Certified Nursing Assistant at Lakin Hospital. The Grievance is Granted.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant Jill Surbaugh is a Certified Nursing Assistant ("CNA") employed by the DHHR and assigned to Lakin Hospital ("Hospital"). Grievant has been working at the Hospital in that capacity for the past thirteen years.

2. Lakin Hospital is a long term care nursing facility operated by the DHHR.

3. Grievant has worked as a CNA in various nursing facilities for 22 years and

previously worked at the Hospital from 1990 through 1992.

4. Grievance has a very good work record and her supervisor described her as an excellent employee.[3]

5. Melissa Kinnaird was the Chief Administrator for Lakin Hospital from September 17, 2007, through May 3, 2010. She was in charge of the Hospital when Grievant was dismissed from employment.

6. An employee of the Hospital provided Administrator Kinnaird with a copy an article from the *Gallipolis Daily Tribune* newspaper dated February 10, 2010. The article revealed that Grievant had pled guilty to shoplifting $100 worth of merchandise from a store in Gallipolis, Ohio.[4] Respondent Exhibit 1

7. On February 16, 2010, Administrator Kinnaird met with Grievant to discuss the matters that had been reported in the newspaper. Grievant admitted to Administrator Kinnaird that she had pled guilty to the charge of shoplifting.

8. Administrator Kinnaird determined that, as a result of Grievant's conviction for shoplifting in Ohio, she was no longer eligible to serve as a CNA at the Hospital. Ms. Kinnaird cited OHFLAC regulation 4.16.c.4.A for this proposition and dismissed Grievant from employment on that date.

9. Administrator Kinnaird believed the shoplifting incident was not an action that she was required to report to OHFLAC and she did not make a report of Grievant's

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[3] Testimony of the Chief Hospital Administrator, Melissa Kinnard. The only criticism anyone had regarding Grievant's work history was that she missed a fair amount of work when her mother went through an extended illness.

[4] Grievant paid a fine of $50 and served ten days of house arrest. She was allowed to report to work while on serving on house arrest.

conviction to that regulatory agency. Consequently Grievant was dismissed and did not receive any opportunity for a hearing before OHFLAC on the issue of her fitness to serve as a CNA.

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 Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 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). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Ms. Kinnaird made it clear that she had no problem with Grievant's work performance and that Grievant had not given her any reason to believe that Grievant was not a competent and trustworthy employee, up to the time she saw the newspaper article related to Grievant's guilty plea in Ohio. She testified that Grievant "was an excellent aid and I hate that the situation arose as it did. If there were anything that could have been done otherwise, I would have loved to have been able to make some accommodation for her. . ." Administrator Kinnaird felt that her hands were tied and she had to dismiss Grievant because of the regulation she cited. That interpretation of the OHFLAC policy is

the sole reason for the termination of Grievant's employment. Obviously, the provisions of that policy are pivotal to the resolution of this grievance.

64 C.S.R. 13 § 4.16 c is the OHFLAC regulation that deals specifically with the "abuse of residents" in Nursing facilities. The specific subsections of that section which relate to this grievance state the following:

> 4.16.c.2. Staff treatment of residents.
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> 4.16.c.2.A. The nursing home shall develop and implement written policies and procedures that prohibit neglect, abuse of residents, and misappropriation of resident property.
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> 4.16.c.3. A nursing home shall not employ persons who have:
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> > 4.16.c.3.A. Been found guilty of abusing, neglecting, exploiting or mistreating residents, incapacitated adults or children by a court of law; or
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> > 4.16.c.3.B. Had a finding entered into the Certified Nursing Assistant Registry or the West Virginia Adult Abuse Registry concerning abuse, neglect, exploitation or mistreatment of residents or misappropriation of their property.
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> 4.16.c.4. A nursing home shall report any knowledge it has of actions by a court of law against an employee, that would indicate unfitness for service as a nurse aide or other nursing home staff to the West Virginia Certified Nursing Assistant Registry or the appropriate licensing authority and the director.
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> > 4.16.c.4.A. Actions by a court of law which indicate unfitness for service include a substantiated charge of abuse, neglect or exploitation against an employee, or conviction of an offense for actions related to bodily injury, theft or misuse of funds or property, or other crimes related to public welfare, in any jurisdiction within or outside of the State of West Virginia.

Subsection 4.16.c.3 lists circumstances under which certain individuals may not be employed in a nursing home. Conviction of an offense related to theft is not included in that list or that subsection. *Expressio unius est exclusio alterius* (express mention of one thing implies exclusion of all others) is a well-accepted canon of statutory construction. *State ex rel. Riffle v. Ranson*, 195 W.Va. 121, 128, 464 S.E.2d 763, 770 (1995). That rule of construction is applicable here because the inclusion of the specific reasons for

automatic disqualification also serves to exclude all other events such as Grievant's guilty plea to a shoplifting charge.

Conviction of an offense related to theft is found in Subsection 4.16.c.4. That subsection requires certain events that could indicate unfitness for service as a CNA be reported to OHFLAC. These circumstances do not automatically disqualify a person from employment like the matters included in the preceding subsection. Rather, they are required to be reported to OHFLAC where an investigation is conducted and a determination is made as to whether the conduct actually renders the employee to be unfit for service. If such a finding is made by OHFLAC the employee is entitled to a hearing to contest the finding. *See* 64 C.S.R. 1 § 1 et seq.

Administrator Kinnaird did not report Grievant's conviction for shoplifting to OHFLAC. Rather she mistakenly decided that the conviction automatically disqualified Grievant from service as a CNA and dismissed her from employment. In fact, she determined that the conviction was not an action which was reportable to OHFLAC. That conclusion is contradictory to the specific wording of the regulation.

Generally, where the language in a policy is either ambiguous or susceptible to varying interpretations, this Grievance Board will give reasonable deference to the agency's interpretation of its own policy. *Kincaid & Skidmore v. Parkways Econ. Dev. & Tourism Auth.*, Docket No. 07-PEDTA-127 (Sept. 29, 2008), citing *McCoy and Domingues v. W. Va. Parkways Economic Dev. and Tourism Auth.,* Docket No. 99-PEDTA-074 (July 19, 1999) and *generally W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993). However, another rule of construction is more fitting in this situation. That rule states that "[w]here the language of a statute is clear and without ambiguity the plain

meaning is to be accepted without resorting to the rules of interpretation." *Syl. pt.* 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968). *Accord Syl. pt.* 1, *State v. Jarvis*, 199 W.Va. 635, 487 S.E.2d 293 (1997) ("A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.") *Syl. pt.* 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951). The plain language of the legislative rule requires that the conviction for an offense related to theft be reported to OHFLAC. If such an incident were meant to lead to automatic disqualification it would have been included in the previous subsection.

This reading of the rule is also consistent with the rulings of the West Virginia Supreme Court of Appeals related to discipline of public employees for conduct away from work. Generally, what a State employee does away from work is beyond the employer's realm of influence. However, "if a State employee's activities outside the job reflect upon his ability to perform the job or impair the efficient operation of the employing authority and bear a substantial relationship to the effective performance of the employee's duties, disciplinary action is justified. . ." *Thurmond V. Steele*, 159 W.Va. 630 at 634, 225 S.E.2d 210 at 212 (1976). Simply stated, "In order to dismiss a [public] employee for acts performed at a time and place separate from employment, the [employer] must demonstrate a "rational nexus" between the conduct performed outside of the job and the duties the employee is to perform. *Syl. Pt.2*, *Golden v. Board of Educ. of Harrison County,* 169 W.Va. 63, 285 S.E.2d 665 (1981).

The Supreme Court reviewed the basis for the *Golden* "rational nexus" rule in the recent decision of *Powell v. Paine,* 221 W. Va. 458, 655 S.E.2d 204 (2007). In *Powell* the

Court decided that a coach should not have his license to teach suspended for four years because he was convicted of battering his son at home even though the son was a student in the teacher's school system. The court noted that:

> We observed in *Golden* it would be an unwarranted intrusion on a teacher's right to privacy to discipline a teacher solely on evidence that statutorily delineated misconduct occurred outside of the school environment. To overcome the privacy interest, a legitimate interest of the school board has to be at stake, that is, there must be additional evidence of a resulting unfavorable impact on the teacher's fitness to teach or upon the school community. *Id.* at 69, 285 S.E.2d at 669. We further observed that dismissal based solely on the off-the-job misconduct of a teacher and not its effect on the teacher's fitness to teach or upon the school community would result in a statute which would be void for vagueness under substantive due process constitutional standards. *Id.* at 68-69, 285 S.E.2d at 669

Powell, supra, 655 S.E.2d 204, at 209.

As noted in *Golden* and *Powell,* the interest of the employer must be significant enough to overcome employees the constitutional privacy interest. By requiring that the conviction of an employee for an offense related to theft be reported to OHFLAC, the policy sets up a procedure whereby the incident may be investigated. Where the offense occurred away from the workplace, the employee's privacy interest may be considered by OHFLAC in determining whether there is sufficient rational nexus between the conduct and the employees' duties to actually render the employee unfit for service as a CNA. Administrator Kinnaird's decision to dismiss Grievant without reporting the matter to OHFLAC was not in compliance with the plain language of 64 C.S.R. 13 § 4.16 c 4. Since that was the sole reason for Grievant's dismissal, Respondent has not met its burden of proof and the Grievance is GRANTED.

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 Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 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).

2. "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." *Syl. pt.* 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968). *Accord Syl. pt.* 1, *State v. Jarvis*, 199 W.Va. 635, 487 S.E.2d 293 (1997) ("A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.") *Syl. pt.* 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951).

3. 64 C.S.R. 13 § 4.16.c.4 requires, in clear and unambiguous, terms that "a nursing home shall report any knowledge it has of actions by a court of law against an employee, that would indicate unfitness for service as a nurse aide. One such action that must be reported is a conviction for an offense related to theft. Administrator Kinnaird did not report Grievant's plea of guilty to the offense of shoplifting to OHFLAC as required by this rule.

4. 64 C.S.R. 13 § 4.16.c.3 lists specific offenses which automatically disqualify an individual from being employed by a nursing facility in West Virginia. Being convicted of an offense related to theft is not listed as one of those offenses. Under the well accepted rule of construction, *Expressio unius est exclusio alterius* (express mention of one thing implies exclusion of all others) that offense does not automatically disqualify Grievant from employment in a nursing facility. Ms. Kinnaird's belief that it did was contrary to the rule.

5. Since Administrator Kinnaird's sole reason for dismissing Grievant was her mistaken belief that Grievant's guilty plea to shoplifting automatically disqualified Grievant from employment at the Hospital, the Respondent has failed to prove by a preponderance of the evidence that Grievant's dismissal was proper.

Accordingly, the grievance is GRANTED and Respondent is ORDERED to immediately reinstate Grievance to her pervious position with back pay, interest and benefits.

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: DECEMBER 22, 2010.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE