THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

THERESA KEEFER,
Grievant,

v. **Docket No. 2011-1611-DHHR**

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

Grievant, Theresa Keefer, filed this grievance against Respondent on May 5, 2011. Grievant filed this grievance due to Respondent's termination of her employment as a Health Service Worker. As relief, Grievant sought: "To be made whole, including restoration of job, wages, benefits & back pay with interest." Grievant elected to file directly to level three of the Public Employees Grievance Procedure in accordance with WEST VIRGINIA CODE § 6C-2-4(a)(4).

A level three hearing was held before the undersigned on November 4, 2011, at the Grievance Board's office in Charleston, West Virginia. Grievant was represented by Gordon Simmons, UE Local 170, WV Public Workers Union. Respondent was represented by Michael E. Bevers, Assistant Attorney General. This matter became mature for decision upon final receipts of the parties' proposed findings of fact and conclusions of law on January 6, 2012.

Synopsis

Respondent asserts that Grievant's actions were misconduct of a substantial nature

directly affecting the rights and interest of the public, therefore constituting good cause to terminate Grievant. Grievant asserts that she did not verbally abuse a patient. Grievant argues that she should not have been terminated because Respondent did not prove that she verbally abused the patient.

Respondent's termination of Grievant was not solely based upon its finding of verbal abuse, but upon Grievant's previous disciplinary actions as well. Due to the sensitive care of patients at Respondent's facility, Respondent has met its burden of proof in demonstrating that Grievant's continued actions constitute misconduct of a substantial nature directly affecting the rights and interest of the public.

Findings of Fact

1. Grievant was employed by Respondent as a Health Service Worker at Lakin Hospital in Mason County, WV.

2. Grievant gave patient #8818 a bath after the patient had informed Grievant that she did not want Grievant bathing her. On November 19, 2010, an allegation was made that Grievant yelled at this patient during Grievant's attempt to bathe her. Patient #8818 is diagnosed with multiple medical conditions including, but not limited to, dementia, depression, psychotic disorder with depressive features and anxiety. Respondent investigated the allegation. During the investigation, Respondent interviewed unit staff. Several staff, including Grievant, knew that this patient did not want Grievant specifically to administer her bath. The patient expressed certain beliefs about the Grievant and those beliefs are why the patient desired that someone other than Grievant bath her.[1]

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[1]Respondent's Exhibit No. 7, Follow up report by the Director of Nursing on November 22, 2010.

3. The investigation found that although Grievant and patient #8818 were loud in tone when speaking with each other during the bathing incident, there was no willful infliction or injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish. Respondent reviewed the definitions of Abuse and Neglect and found that "Verbal Abuse was not substantiated in the case, however we have determined that the employee violated the Resident's Rights."[2]

4. Grievant met with Ms. Berkley and Kimberly Billups, Director of Nursing, on November 18, 2010. During the meeting, Grievant was informed of the allegation of resident abuse on patient #8818. Grievant admitted that she knew patient #8818 did not want Grievant bathing her.

5. By letter[3] dated December 8, 2010, Respondent informed Grievant of its decision to issue a written reprimand for a violation of resident rights. The letter stated, in part:

> I have concluded that due to the seriousness of the violation, progressive discipline is warranted. Should you incur another violation or exhibit behavior of a similar nature, that failure on your part will be grounds for further disciplinary action up to and including dismissal from employment. You are required to receive additional Resident Rights training/education from the Resident Advocate; you are directed to not bathe Resident #8818; and you are being re-assigned to a different work unit. Please be advised that as a *probationary* employee, this resident rights violation will be a consideration in whether or not you attain permanent employee status at this facility.

6. While a probationary employee, Grievant received an Employee Performance Appraisal (EPA) on December 6, 2010. Grievant's supervisor was Vicky Berkley, Assistant

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[2] *Id.*

[3] Respondent's Exhibit No. 20, Letter of written reprimand dated December 8, 2010.

Director of Nursing. Grievant's EPA rated her performance for the period of November 8, 2010 through December 8, 2010. Grievant had been in the position of Health Service Worker for three months at the time of the EPA.

7. Grievant's performance was marked as "does not meet expectations" on her EPA. Under the section titled "performance development needs", the EPA stated:

> Strive to provide quality care based on [illegible written word] job description, current standards of practice & faculty policy & procedure.

8. The "general comments" portion of the EPA stated: "Improve on & have no further issues with violation of Resident Rights."

9. Grievant signed an acknowledgment of receipt of Respondent's Nurse Aide Abuse Registry Alert, Title 69 Legislative Rule Series 6, on July 14, 2010. Grievant's acknowledgment[4] was placed in her personnel file.

10. Grievant's supervisor, Ms. Berkley, filled out Respondent's Request For Evaluation of Probationary Employee.[5] The supervisor's evaluation is to help Respondent determine if a probationary employee is to receive permanent employee status. On the evaluation the supervisor can check the recommended permanent status as recommended or disapproved. Ms. Berkley recommended that Grievant be disapproved for permanent status. As reason for disapproval, Ms. Berkley stated: "disciplinary action [illegible written word] violation resident rights, attendance during probationary period." Ms. Berkley signed the evaluation on March 9, 2011.

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[4]Respondent's Exhibit No. 17, Grievant's acknowledgement of the Nurse Aide Abuse Registry Alert.

[5]Respondent's Exhibit No. 5, Request for Evaluation of Probationary Employee regarding Grievant.

11. Respondent hired Grievant as a permanent employee.

12. On March 9, 2011, Grievant called the Human Resources Office and spoke to Wanda Smith, Human Resources Director. Grievant stated that she needed to leave work because someone she considered to be like a grandfather had passed away. Grievant was very close to this person. This person was technically Grievant's neighbor and not a relative. Ms. Smith informed Grievant that a neighbor is not an immediate family member and that she was not entitled to leave unless permission was granted by her immediate supervisor, either Ms. Billups or Ms. Berkley.

13. Grievant did not speak to Ms. Billups or Ms. Berkley. Grievant returned to her unit and told the Unit Charge Nurse that she needed to leave because her neighbor had died. Grievant told the Unit Charge Nurse that Ms. Smith in Human Resources had said that leave for the passing of a neighbor was not covered under bereavement leave, but that Grievant did have annual leave time available. The Unit Charge Nurse informed Grievant that she does not approve time.

14. Grievant's time sheet for March 9, 2011 reflects that she left work at 2:46 p.m. Grievant wrote in the comment section, "left early death in family on 3-9-11."

15. By letter[6] dated March 30, 2011, Grievant received notification of a verbal reprimand due to leaving the facility without permission. The letter stated in part:

> Kim Billups spoke with you via telephone on March 23, 2011, about 11:30 a.m., to say because you failed to get approval from either she or Vickey Berkley, disciplinary action would be issued, your status would be noted as unauthorized, and your pay docked for that time (4.75 hours). Your response was, "OK, I'm fine with that. It was my fault. I should have come to you or Vicky. I was so upset that I don't remember anything about it."

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[6]Respondent's Exhibit No. 9, Verbal reprimand notice dated March 30, 2011.

16. On April 22, 2011, Grievant had a verbal altercation with patient #8823. Patient #8823 has medical conditions that include Schizoaffective Disorder, Bipolar Type Personality Disorder. Patient #8823 asserted that Grievant did not take his vitals on the prior Sunday. Grievant had in fact taken the patient's vitals.[7] Grievant and the patient argued back and forth over whether Grievant had in fact taken his vitals.

17. Kattie Northrup, Health Service Worker, testified that she was at the nurses' station and heard Grievant and the patient arguing.

18. Andrea Hill, Registered Nurse, and Sheila Williams, Health Service Worker, also heard Grievant and patient #8823 arguing over whether or not his vitals had been previously taken.

19. Ms. Northrup, Ms. Williams and Ms. Hill heard the Grievant arguing in a loud voice saying, "Yes I did" and heard patient #8823 arguing back and saying, "No you didn't."

20. Ms. Hill reported the altercation to Ms. Berkley.[8] Ms. Berkley and Ms. Billups investigated the allegations of patient abuse. Patient #8823 and employees who witnessed the argument were interviewed during the investigation. The investigation also involved a review of the definitions of Abuse and Neglect.

21. When the hospital becomes aware of an allegation of abuse or neglect made against an employee, the nurse manager or the nurse in charge begins an investigation. The hospital will then make the decision to: (1) reassign the employee to another unit until a full investigation can be completed; (2) take the employee totally out of patient care and

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[7]Grievant's Exhibit No. 1, Vital report.

[8]Respondent's Exhibit No. 3, Ms. Hill's signed statement about what had happened.

reassign them to another area of the hospital to work until the investigation can be completed; or (3) suspend the employee until the outcome of the full investigation.[9]

22. Respondent's Policy and Procedure Manual[10] regarding resident grievance procedure states under subject heading MECHANISMS FOR RESOLUTION OF COMPLAINTS that the "alleged perpetrator(s), if any, is removed from resident contact pending the outcome of the investigation."

23. By letter[11] dated April 22, 2011, Grievant was notified of her suspension without pay "due to an ongoing investigation. This suspension was in compliance with WV Division of Personnel Administrative Rule, Section 12.3 which states that "any employee may be suspended without pay for cause or to conduct an investigation regarding an employee's conduct which has a reasonable connection to the employee's performance of his or her job."

24. The suspension letter also stated, in part:

> You were notified by Kim Billups, RN, Director of Nursing, and Vicky Berkley, RN, Assistant Director of Nursing, on April 22, 2011, at approximately 1:00pm, that there was an allegation of verbal abuse, and you were being suspended pending the results of the investigation.
> ...
> If the allegations are determined to be unfounded, you will be compensated for the period of suspension and your personnel file purged of any documentation thereof. If, however, it is determined the allegations are true, additional disciplinary action may be taken.

25. During the investigation, written statements were taken from Ms. Williams,

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[9]Level three hearing testimony of Linda Dailey, Respondent's CEO.

[10]Respondent's Exhibit No. 19, Respondent's Policy and Procedure Manual.

[11]Respondent's Exhibit No. 21, Letter of suspension dated April 22, 2011.

Ms. Northrup and Ms. Hill. All three statements affirmed the argument between Grievant and patient #8823.[12]

26. Ms. Berkley interviewed patient #8823 during the investigation. The patient admitted to having a problem with Grievant earlier that day. The patient was concerned that he was going to be "kicked out" of the hospital. The patient feared retaliation.[13]

27. Based upon the investigation, Respondent found that the allegations of patient abuse were substantiated.

28. By letter dated May 2, 2011, Respondent notified Grievant of its decision to dismiss her due to a substantiated finding of verbal abuse. The letter also stated, in part:

> It should be noted this follows a substantiated resident rights' violation in which you were issued a written reprimand on December 16, 2010. This action is taken in accordance with the WV Division of Personnel Administrative Rule, Section 12.2...
> ...
> On April 22, 2011, an allegation of verbal abuse was made. You were notified by your immediate supervisor, Kimberly Billups, RN, Director of Nursing, of the allegation on April 22, 2011, at approximately 1:00 pm, and that you were being removed from the workplace. Specifically, it was witnessed that you were yelling and arguing with Resident #8823. By your own admission, when Resident #8823 stated, "No, you didn't, no, you didn't," (referencing you had not taken his vitals on Sunday, April 17, 2011, you stated, [patient's name], I know I did." You further stated you caught yourself the second time, and apologized to Resident #8823.

Discussion

The burden of proof in disciplinary matters rests with the employer, and the

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[12]Respondent's Exhibits No. 1, 2 and 3, written statements by Ms. Williams, Ms. Northrup and Ms. Hill.

[13]Level three hearing testimony of Ms. Berkley.

employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. VA. CODE § 29-6A-6; *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.*

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* Sections 12.02 and 03, Administrative Rules, W. Va. Div. of Personnel (June 1, 1998). The West Virginia Supreme Court of Appeals has also stated that "the work record of a long-term civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." *Buskirk v. Civil Serv. Comm'n,* 175 W. Va. 279, 332 S.E.2d 579 (1985). *See Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983); *Serreno v. W. Va. Civil Serv. Comm'n,* 169 W. Va. 111, 285 S.E.2d 899 (1982).

The "term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of

standards of behavior which the employer has a right to expect of its employees." *Graley v. W. Va. Parkways Economic Dev. and Tourism Auth.,* Docket No. 91-PEDTA-225 (Dec. 23, 1991) (*citing Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985). *See Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983). "[i]f, however, the misconduct is of a substantial nature and can be shown to affect directly the rights and interests of the public by bearing directly in a substantial manner on the duties which the employee is required to discharge, then the employing authority and the Civil Service Commission have the power and the duty, upon such a showing, to enforce such remedial steps, including a dismissal, as may be found proper under all of the circumstances of the case." *Thurmond v. Steele,* 159 W. Va. 630, 225 S.E.2d 210 (1976).

Respondent asserts that Grievant's actions were misconduct of a substantial nature directly affecting the rights and interest of the public. Respondent argues that it had good cause to terminate Grievant. Grievant asserts that she did not verbally abuse patient #8823. Grievant argues that she should not have been terminated because Respondent did not prove that she verbally abused patient #8823.

Respondent's Nurse Aide Abuse Registry, 69CSR6, defines abuse to mean "the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish."[14] The Registry further states that abuse can be found "even if the resident is unaware that the harm has occurred."[15] Witnesses

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[14]69CSR6's definition of "abuse" is the same as the Code of Federal Regulations, 42 C.F.R. § 483.13(c)(4), and the Centers for Medicare and Medicaid Services. *See* Respondent's Exhibits No. 12 through 18.

[15]Respondent's Exhibits No. 17 and 18, Nurse Aid Abuse Registry, 69CSR6, and Memorandum dated July 19, 2010, addressing abuse definitions.

testified to hearing Grievant's argument with patient #8823 on April 22, 2011. Grievant and the patient were arguing over whether Grievant had taken the patient's vitals. Grievant in fact had taken his vitals. Respondent conducted an investigation into Grievant's action of arguing with the patient. Patient #8823 was interviewed during the investigation. The patient expressed concern that he would be retaliated against for arguing with Grievant. Patient #8823 asked if he was going to be "kicked out" of the hospital. As a result of the investigation, Respondent found the allegation of verbal abuse against Grievant was substantiated.[16]

Grievant asserts that following the argument she had with patient #8823 over his vitals, that she had a consoling conversation with him about the loss of his father later the same day. Grievant argues that patient #8823 could not have been intimidated by her or in fear of retaliation because he had a non-argumentative conversation with her following their vitals altercation. Grievant testified at the level three hearing that patient #8823 is delusional. Patient #8823 has been diagnosed with schizoaffective disorder. This disorder may be characterized by episodes of elevated or depressed moods. Ms. Berkley testifed at the level three hearing referring to these episodes as "cycling." Ms. Berkley testified that patient #8823 experiences "cycling."

Respondent's termination of Grievant was not solely based upon its finding of verbal abuse, but upon Grievant's previously disciplined actions as well. Grievant received a written reprimand in December 2010 for a violation of resident rights. As a result of that disciplinary action, Grievant received additional resident rights training/education from the

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[16]Respondent's Exhibit No. 11, Investigation follow up report on allegation of verbal abuse.

Resident Advocate. In March 2011, Grievant received a written reprimand for leaving the facility without permission from an immediate supervisor.

Due to the sensitive care of patients at Respondent's facility, Respondent has met its burden of proof in demonstrating that Grievant's continued actions constitute misconduct of a substantial nature directly affecting the rights and interest of the public. Accordingly, this grievance is DENIED.

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. W. VA. CODE § 29-6A-6. *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); *See also* Sections 12.02 and 03, Administrative Rules, W. Va. Div. of Personnel (June 1, 1998). The West

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3. The "term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." *Graley v. W. Va. Parkways Economic Dev. and Tourism Auth.,* Docket No. 91-PEDTA-225 (Dec. 23, 1991) (*citing Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985). *See Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983). "[i]f, however, the misconduct is of a substantial nature and can be shown to affect directly the rights and interests of the public by bearing directly in a substantial manner on the duties which the employee is required to discharge, then the employing authority and the Civil Service Commission have the power and the duty, upon such a showing, to enforce such remedial steps, including a dismissal, as may be found proper under all of the circumstances of the case." *Thurmond v. Steele,* 159 W. Va. 630, 225 S.E.2d 210 (1976).

4. Respondent’s termination of Grievant was not solely based upon its finding of verbal abuse, but upon Grievant’s previously disciplined actions as well.

5. Respondent met its burden of proof in demonstrating that Grievant’s continued actions constituted misconduct of a substantial nature directly affecting the rights

and interest of the public.

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 (2008).

DATE: February 16, 2012

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Jennifer Lea Stollings-Parr
Administrative Law Judge