**THE WEST VIRGINIA PUBLIC EMPLOYEES**
**GRIEVANCE BOARD**

**REBECCA LEE ARNOLD,**
**Grievant,**

**v.** **DOCKET NO. 2012-0746-HamCH**

**HAMPSHIRE COUNTY HEALTH DEPARTMENT,**
**Respondent.**

## DECISION

This grievance was filed at level three of the grievance procedure by Grievant, Rebecca Lee Arnold, on January 19, 2012, after she was dismissed from her employment by Respondent, Hampshire County Health Department, for unsatisfactory performance. The statement of grievance is quite lengthy, and basically disputes some of the allegations in the dismissal letter, and offers explanations for other incidents. The relief sought by Grievant is "[r]einstatement of my position as Nurse II at the Hampshire County Health Department; [r]eimbursement for COBRA insurance until I reach age 65 or am reemployed; continue to accrue annual leave until reemployed; back pay until reemployed; [l]awyers fees and court costs; compensation for pain and duress from termination and inappropriate complaint to the RN Board."[1]

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[1] It is well established that the Grievance Board does not have the authority to award attorney fees. *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June 21, 1996). New WEST VIRGINIA CODE § 6C-2-6 is entitled, "Allocation of expenses and attorney's fees." It specifically states: "(a) Any expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expense." Further, the undersigned is unaware of any legal fees incurred by Grievant

A level three hearing was held before the undersigned Administrative Law Judge on May 18, 2012, at the Grievance Board's Westover, West Virginia office. Grievant appeared *pro se*, and Respondent was represented by Denise M. Spatafore, Esquire, Dinsmore & Shohl, LLP. This matter became mature for decision on July 3, 2012, on receipt of the last of the parties' written arguments.

## Synopsis

Grievant was dismissed from her employment by Respondent for unsatisfactory performance. Respondent demonstrated that Grievant's performance did not meet the standards expected of employees.

The following Findings of Fact are made based upon the record developed at the level three hearing.

## Findings of Fact

1. Grievant was employed by the Hampshire County Health Department ("HCHD" or "Respondent"), as a Nurse 2. Grievant had been a state employee since October 2005. She had been employed elsewhere as a Registered Nurse for 20 years.

2. By letter dated December 27, 2011, Grievant was notified that she was being dismissed from her employment by HCHD, effective January 11, 2012, for failing to follow-

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in connection with this grievance, and no court costs have been incurred by Grievant. It is also well-settled that the Grievance Board does not award punitive or tort-like damages in making an employee whole. *Miker v. W. Va. Univ.*, Docket No. 06-HE-133 (July 18, 2006); *Spangler v. Cabell County Bd. of Educ.,* Docket No. 03-06-375 (Mar. 15, 2004); *Walls v. Kanawha County Bd. of Educ.*, Docket No. 98-20-325 (Dec. 30, 1998); *Hall v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-433 (Sept. 12, 1997); *Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997).

up on three patients and recording incomplete information on a fourth patient chart during a 30-day improvement period, for failing to perform her duties in a professional and competent manner during a 30-day improvement period by taking a personal cell phone call while in the treatment room with a patient and leaving the patient, and for putting a patient's life in danger and placing the health department at serious liability risk for advising a patient who was at serious risk of cancer to use a lotrimin cream to treat a medical problem, when she should have been referred for a diagnostic cancer work-up.

3. HCHD employed two nurses, Grievant and Judy Cox, the Lead Nurse. These two nurses were responsible for seeing an average of 13 walk-in patients everyday, administering immunizations and providing family planning assistance. In addition, they would gather medical information from patients who came to the clinics to see the Nurse Practitioner who performed exams for sexually transmitted diseases ("STD's") and pap smears on clinic days. The two nurses were not allowed by Respondent to examine patients or offer medical advice. The two nurses were also required to investigate contacts when HCHD receives a report of a disease, such as hepatitis, lyme disease, or STD, to determine if it is a case and what needs to be done. The nurses had 30 days to complete the investigation and enter data into the state database regarding the investigation.

4. Grievant routinely did not complete the investigations assigned to her in a timely manner, or enter the data relating to the investigation.

5. Carol Lindsey, who is a Registered Nurse, was hired by HCHD in April 2010, as the Local Health Administrator. When Ms. Lindsey first began working at HCHD she discovered that Grievant was not documenting on patient charts as patients were seen as she was expected to do. Instead, she would leave the charts in her office and document

later. Ms. Lindsey observed that there would be stacks of charts in Grievant's office. This practice resulted in some services not being billed because of the strict time frames applicable to HCHD billing, and had the potential to create a liability problem for Respondent if patient test results were not followed up on. Ms. Lindsey spoke to Grievant several times about keeping charts up to date. Grievant would get caught up, and then the charts would stack up in her office again.

6. On November 3, 2010, Ms. Lindsey verbally counseled Grievant regarding her performance. She specifically counseled Grievant regarding giving expired vaccines to patients, giving the wrong vaccine to patients, not following up on errors, not following up on forwarding x-rays, charting objectively, tardiness, and absences from work. Ms. Lindsey told Grievant that she believed the second job Grievant worked at the Juvenile Center was affecting her work at HCHD, and that if her performance and attendance did not improve, she would be asked to quit working the second job.

7. On December 7, 2010, Grievant received a written reprimand for failure to meet acceptable attendance standards. Grievant was reminded that her attendance at work was an essential element of her position. The reprimand notes that for the five month period from July 6 to December 6, 2010, Grievant had used 41.25 hours of sick leave, not including pre-approved absences, representing 5.4% of the available work hours, and that Grievant had also taken annual leave during this time without prior approval. The reprimand points out that these absences occurred in conjunction with days she was scheduled to work at her second job, holidays, and days her co-worker returned to work after being off work. The letter states that Grievant's frequent absences placed an undue hardship on the health department and Grievant's co-workers, and interfered with the

ability to properly staff Grievant's unit. Grievant was required to submit a Physician's Statement with all future sick leave requests, and use of her annual leave was restricted so that Grievant was required to submit any requests for annual leave 48 hours in advance. Grievant was further directed to report any absences or tardiness directly to Ms. Lindsey.

8. On August 21, 2011, Ms. Lindsey verbally counseled Grievant regarding performance issues.

9. On November 23, 2011, Grievant received a performance appraisal for the period July 1, 2010, through November 22, 2011.[2] Grievant was rated as "Needs Improvement" in 20 out of 23 categories. Grievant was still not documenting on patient charts as patients were seen, and she was still not completing case investigations and entering data in a timely manner.

10. On November 23, 2011, Grievant received a written warning, and was placed on a 30-day Performance Improvement Plan. This Plan noted that Grievant's "substandard performance can no longer be tolerated." The Plan addressed Grievant's failure to follow through and complete assigned tasks, Grievant's failure to complete nursing processes and provide required information for billing, and Grievant's lack of time management skills leading to longer patient waits. The Plan stated that Grievant would be expected to complete her duties in a timely and accurate manner, complete charting at the time of the patient visit, request leave 72 hours in advance and provide a doctor's excuse for all absences due to illness, manage her time effectively with no lengthy personal conversations with patients, delegate menial tasks to office assistants, conduct personal

[2] Ms. Lindsey was off work on sick leave for an extended period of time and was unable to complete the performance appraisals any sooner than this.

business during breaks only, and prioritize her work, and complete case investigations within 30 days.

11. On December 21, 2011, Ms. Lindsey met with Grievant to discuss her progress under the Improvement Plan. Ms. Lindsey believed that Grievant had been improving her performance by documenting on patient charts as she saw patients, with one exception when she went to lunch before completing the documentation, and she was starting to complete case investigations on time. Ms. Lindsey told Grievant she would meet with her again on December 28, 2011, to decide whether to extend the improvement period.

12. On December 22, 2011, Ms. Cox returned to work after taking several days of annual leave, and found four patient charts from the November 18th clinic in the area where they are to be placed when waiting for lab results, with the lab results placed inside the charts. The lab results had not been sent by Grievant to the patients. The billing had been done on these charts, but the Office Assistant had not placed the form in the charts that the nurses use to send the lab results to the patients, and Grievant had not taken any steps to locate or complete the forms and send them to the patients. Grievant had these forms in her desk. It was Grievant's responsibility to see that the lab results were sent to the patients.

13. On November 28, 2011, Grievant saw a patient who told her she had a genital lesion and had used an antibiotic cream on it, but it had not improved. Grievant asked the patient if she had tried an anti-fungal cream (lotrimin) on the area, and the patient said she had not, and asked if she should. Grievant told her she could try it. The patient then asked Grievant to look at the area, and Grievant did so. The lesion was not

like anything Grievant had ever seen, and she told the patient she needed to see a doctor. The patient told Grievant she could not afford to go to a doctor, and Grievant made sure she was signed up for the December 2011 clinic. Grievant did not document any of this in any of the patient files, nor did she tell anyone else about the lesion. When the patient was seen by the Nurse Practitioner at the December 14, 2011 clinic she disclosed that she had had the lesion for a year. The Nurse Practitioner believed the patient had cancer, and had the staff schedule her for an appointment to see a doctor immediately.

14. Sometime during December, while Grievant was in the exam room with a patient, Grievant's cell phone rang. She answered the phone, which was a personal call, and asked Ms. Cox to take her place in the exam room.

**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. *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 and 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*.

The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226

(1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, [175 W. Va. 279, ___,] 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir./W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994). "The public has a significant interest in ascertaining that employees such as Grievant perform the duties for which they are compensated in a reasonably competent and proficient manner. *See Hein v. W. Va. Dep't of Health & Human Resources,* Docket Nos. 94-HHR-1124 & 95-HHR-396 (Nov. 30, 1995). . . . Accordingly, if Grievant failed to perform [her] assigned duties as alleged by [Respondent], and the employer was not culpable for that failure, the employer's action must be sustained. *See Deyerle v. W. Va. Div. of Rehabilitation Serv.,* Docket Nos. 95-RS-034 & 96-RS-197 (Nov. 26, 1997)." *Dadisman v. Div. of Rehabilitation Serv.,* Docket No. 98-RS-023/040 (Mar. 25, 1999).

It is clear from the evidence placed into the record that Grievant had not been performing her duties in a competent manner for an extended period of time. In an effort to bring Grievant's performance up to an acceptable standard, Ms. Lindsey placed Grievant on a Improvement Plan. While she was on the Improvement Plan, however, Grievant's failure to complete the duties assigned to her placed several patients at risk.

Respondent proved that Grievant did not send out test results to four patients while she was on the Improvement Plan. Grievant's excuse for this was that the form she needed to complete had not been placed in the patient files by the Office Assistant, and she did not know where the forms were. This did not excuse Grievant from making sure the patients were notified of the test results. Further, Respondent demonstrated that Grievant had the form she needed in her desk.

Respondent also demonstrated that Grievant took a personal phone call while she was with a patient. Grievant's excuse for this was that she was afraid it was an emergency with her granddaughter, but it was not. The Improvement Plan states that Grievant is to conduct personal business during break time.

Finally, Respondent demonstrated that Grievant did not document her observations of the patient with the genital lesion on November 28, 2011, nor did she tell anyone about the seriousness of this condition. After observing the lesion, Grievant stated that she did tell the patient she needed to see a doctor, but she did not tell her that the lotrimin cream she had suggested would not help. When the patient told Grievant she could not afford to go to a doctor, Grievant's response was to make sure she was signed up for the December 14 clinic, and to tell the patient to go to the emergency room if the lesion got worse. Respondent did not believe that Grievant should have looked at the lesion, as she has been told she is not to diagnose. Once she did so, however, she certainly had an obligation to make sure the patient understood the severity of the situation, which it does not appear she did.

Respondent demonstrated that Grievant continued to have performance issues during the improvement period, and that her failure to document and follow through in

completing her duties put patients at risk. Respondent demonstrated good cause for Grievant's dismissal.

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. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, [175 W. Va. 279, ___,] 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir./W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994).

3. "The public has a significant interest in ascertaining that employees such as Grievant perform the duties for which they are compensated in a reasonably competent

and proficient manner. *See Hein v. W. Va. Dep't of Health & Human Resources,* Docket Nos. 94-HHR-1124 & 95-HHR-396 (Nov. 30, 1995). . . . Accordingly, if Grievant failed to perform [her] assigned duties as alleged by [Respondent], and the employer was not culpable for that failure, the employer's action must be sustained. *See Deyerle v. W. Va. Div. of Rehabilitation Serv.,* Docket Nos. 95-RS-034 & 96-RS-197 (Nov. 26, 1997)." *Dadisman v. Div. of Rehabilitation Serv.,* Docket No. 98-RS-023/040 (Mar. 25, 1999).

4. Respondent demonstrated that Grievant was unable to competently perform her duties, placing patients at risk, constituting good cause for dismissal.

Accordingly, this grievance is **DENIED.**

Any party or the Division of Personnel 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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

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**BRENDA L. GOULD**
**Acting Deputy Chief**
**Administrative Law Judge**

**Date: August 2, 2012**