WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ALISHA BOWEN,
Grievant,

v. **Docket No. 2011-0978-CONS**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/MILDRED MITCHELL-BATEMAN HOSPITAL,
RESPONDENT.

DECISION

Grievant, Alisha Bowen, was employed as a Health Service Worker by the Respondent, Department of Health and Human Resources ("DHHR"), at Mildred Mitchell-Bateman Hospital ("Bateman") from October, 2009 until her employment was terminated on January 14, 2011. Alisha Bowen filed a grievance dated December 29, 2010, alleging that she had been given an "Unpaid suspension without cause." As relief she sought "[t]o be made whole, including restoration of pay with interest & benefits restored." Ms. Alison filed a second grievance dated January 4, 2011, alleging "Termination without cause" and seeking the same remedy as her prior grievance. Both grievances were filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4).

A level three hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board on June 8, 2012. Grievant appeared at the hearing with her representative Gorgon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by Michael E. Bevers, Assistant Attorney General. Both parties submitted Proposed Findings of Fact and Conclusions of Law, the last of

which was received by the West Virginia Public Employees Grievance Board on July 23, 2012. The grievance became mature for decision on that date.

Synopsis

Grievant was dismissed for patient neglect based upon an incident where she was accused of leaving a forensic patient alone for a period of time in violation of Bateman Hospital rules. Grievant argues that she did not leave the patient alone. Respondent proved the charges against Grievant by a preponderance of the evidence.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Until the termination of her employment, Grievant, Alisha Bowen, was employed at Bateman as a Health Service Worker ("HSW"). She began her employment for Respondent DHHR at Bateman Hospital in October 2009.

2. On December 5, 2010, Grievant was assigned to be "one-on-one" with forensic patient, LP[1], who was at St. Mary's Hospital in Huntington for treatment related to cardiac problems. She was assigned to stay with LP from seven o'clock p.m. until eleven o'clock p.m.

3. Bateman Policy Number MMBHF084 requires that when a staff person is assigned "one on one" the staff person must keep the patient in view at all times. Respondent's Exhibit 10.

[1] Because the patient's actual identity is not necessary germane to the issues herein, his initials are used rather that the patient's name to protect his privacy.

4. A forensic patient is a person who has been charged with committing a crime, but because of the person's mental illness, has been committed to a mental health institution by the court rather than tried in the criminal court for the offense.[2]

5. When Bateman patients are referred to other health facilities they are placed on a Medical Trial Visit ("MTV").[3] Bateman Policy Number NURf59 requires the following regarding forensic patients on a MTV:

> Forensic patients must be accompanied on a MTV with one (1) staff member at all times. If they are admitted to the medical facility, there **Must** be one (1) staff member sitting with patient until they are released and returned to Mildred Mitchell-Bateman Hospital.

(Emphasis in original).

6. Bateman Policy Number MMBHF091 related to "Off-Hospital Grounds Patient Activities" requires staff persons assigned to the patient to "constantly remain with the individual or group the entire time of providing the activity. Respondent's Exhibit 11.

7. Policy Number MMBHF091 also states that:

> In the event the patient is admitted to a referral hospital for medical treatment or observation, the admitting facility assumes responsibility for the patient and the MMBH employee is to return to duty.

Respondent's Exhibit 11. There was no evidence presented as to whether LP had been admitted to Saint Mary's Hospital and Policy Number NURf59 requires "one-on-one" staff from Bateman to remain with a forensic patient, such as LP, even if the patient is

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[2] The testimony indicated that LP had "committed a serious crime" but no one elaborated regarding the specifics of the charge or charges.
[3] Respondent's Exhibit 9 (Bateman Policy Number NURf59).

admitted to another medical facility. Respondent's Exhibit 9, Policy Number NURf59, Procedure: 7.

8. Grievant had received training on the Bateman policies related to "one-on-one" assignments and responsibilities for patients on "off-hospital" activities. Respondent's Exhibits 10 and 11.

9. Christian Marquess is a nurse who is employed at Saint Mary's Hospital. He was working on the floor where LP was admitted for treatment on December 5, 2010. Between eight and nine o'clock p.m. Nurse Marquess received a call from Bateman asking him to find Grievant Bowen because the supervisor at Bateman had been unable to contact her.

10. Nurse Marquess went to LP's room to contact Grievant, but Grievant was not in the room. The bathroom door was open and Nurse Marquees noted that no one was in there. LP informed Nurse Marquess that Grievant Bowen was out but that she would return eventually. Nurse Marquess stayed with LP for ten to fifteen minutes but Grievant did not return and he had to go back to his duties.

11. Raymond Brilliantes is a Nurse Manager at Bateman and Grievant's supervisor. Mr. Brilliantes reported to work at Bateman at ten o'clock p.m. on December 5, 2010. Within twenty minutes of his arrival, he was advised that the staff had not been able to reach Grievant at Saint Mary's Hospital.

12. Manager Brilliantes attempted to call Grievant on her cell phone but only received her voice mail. He called Saint Mary's Hospital and spoke to Nurse Marquess. Nurse Marquess again attempted to transfer the call to LP's room but received no

answer. Nurse Marquees relayed the earlier incident where he could not find Grievant to Manager Brilliants.[4]

13. Ten minutes before eleven o'clock p.m., Manager Brilliantes called Grievant's cell phone and she answered. Grievant indicated that everything was fine. Manager Brilliantes instructed Grievant to see him at Bateman before she went home.

14. Grievant was relieved by another Bateman HSW at approximately eleven thirty p.m. She went home instead of reporting to Bateman. She interpreted Manager Brilliantes' instruction to report to Bateman as a request and she was concerned that if she reported to Bateman she would be forced to work an overtime shift.

15. By letter dated December 6, 2010, Grievant was suspended without pay while an investigation was conducted related to the allegation that she had violated Bateman policy by leaving a forensic patient alone while she was assigned to that patient.

16. An investigation was conducted by a team of two patient advocates[5] employed by Legal Aid of West Virginia and Bateman Nurse Manager, Teri Collins. That report, dated December 17, 2010, concluded:

> Witness statements confirm that Ms. Bowen left [LP] unattended for an undetermined amount of time. The investigation team is confirming the allegation occurred as stated in the [patient] grievance[6] and substantiating neglect.

Respondent's Exhibit 6, Investigation Report.

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[4] Respondent's Exhibit 1, Statement of Nurse Manager Brilliantes.

[5] The patient advocates who participated in conducting the investigation were Tami Handley and Nancy Fry.

[6] The Patient Grievance form alleging neglect of LP by Patient Advocate Tami Handley Grievant was admitted as Respondent's Exhibit 7.

17. Bateman Policy Number MMBHE018 related to "patient Abuse/Neglect, or Exploitation defines "neglect" as:

> Any negligent, reckless or intentional failure to meet the needs of a patient, or applicable statutory or regulatory requirements, including but not limited to: **lack of supervision**, nutritional deprivation, or failure to implement or update a treatment plan.

(Emphasis added). The policy also states that "This hospital [Bateman] will not knowingly hire or retain any person with a record of abuse or neglect." Grievant received training regarding compliance with this policy. Respondent's Exhibit 8.

18. A predetermination conference was held on December 27, 2010. Grievant attended the conference as well as Nurse Manager Cheryl Woolums, Director of Nursing Patricia Ross and Director of Human Resources Kieth Anne Worden. Grievant was told that she was being charged with violating Bateman policy by leaving a forensic patient alone in his room while she was assigned to the patient on a "one-on-one" basis which constituted patient neglect. Grievant denied leaving the patient alone except to briefly use the restroom located in the patient's room.

19. By letter dated January 4, 2011, Grievant was notified that her employment at Bateman was terminated for leaving a forensic patient alone in during an off-unit activity which constituted patient neglect.

Discussion

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Nicholson v. Logan County Bd. of Educ*., Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ*., Docket No. 89-41-232 (Dec. 14, 1989).

"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); *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.*

Grievant was a permanent state employee in the classified service. 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 Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004) (per curiam).

Respondent terminated Grievant's employment based upon the finding that she had neglected a patient by failing to stay with the patient as required by specific and clear Bateman policies. Grievant counters that she denied leaving the patient alone and the witnesses who said that she did were mistaken. Grievant also alleges that Grievant did not intentionally violate Bateman policy and the Saint Mary's staff should have been monitoring LP since he had been admitted to that facility.

Grievant points out that pursuant to Bateman Policy Number MMBHF091 when a "patient is admitted to a referral hospital for medical treatment or observation, the

admitting facility assumes responsibility for the patient." Grievant argues that LP was assigned to a bed at Saint Mary's Hospital and that facility's staff was responsible for LP. However, there was not specific evidence presented at the hearing regarding LP's admission status at Saint Mary's and the Bateman staff was clearly assigned to be with him "one-on-one." More importantly, Bateman Policy Number NURf59 requires staff from Bateman to remain "one-on-one" with a forensic patient, such as LP, even if the patient is admitted to another medical facility. There is no doubt that Bateman policy clearly and specifically required Grievant to stay with LP during the entire time she was assigned to him unless relieved by another staff person.

Bateman supervisors attempted to call Grievant, both on her cell phone and through the Saint Mary's Hospital phone system, while she was assigned to LP and were unable to reach her.[7] The Bateman supervisor spoke with Christian Marquess, a nurse who is employed at Saint Mary's Hospital and was working on the floor where LP was located. Nurse Marquess agreed to check LP's room to see if he could get Grievant to call Bateman. Upon reaching the room, Nurse Marquess found that Grievant was not there and LP told him that Grievant had left and would be back. Nurse Marquess specifically noted that the bathroom door to the room was open and he could see that no one was there. He waited for at least ten minutes and Grievant did not return. At that point he returned to his regular duties.

Grievant claims that she was in the room with LP at all times except for a brief period when she used the restroom located in LP's room. Grievant points out that Nurse Marquess could have taken a cursory view of LP's room and not seen her

[7] The initial reason the Bateman Nurse Supervisor was attempting to reach Grievant was to advise her that Bateman needed a staff person to work an overtime shift.

because she was in the restroom. Grievant also notes that Nurse Marquess was interviewed twice during the investigation and then testified at the hearing. Each time his statement became more detailed about his time in LP's room and whether he checked the restroom located therein. Grievant argues that Nurse Marquess' account is therefore flawed and is uncorroborated by other Saint Mary's staff who may have had an opportunity to see Grievant if she had left LP's room.

Where the credibility of testimony becomes an important issue, the Grievance Board has applied the following factors to assess a witness's testimony: (1) demeanor; (2) opportunity or capacity to perceive and communicate; (3) reputation for honesty; (4) attitude toward the action; and (5) admission of untruthfulness. Additionally, the administrative law judge should consider (1) the presence or absence of bias, interest or motive; (2) the consistency of prior statements; (3) the existence or nonexistence of any fact testified to by the witness; and (4) the plausibility of the witness' information. *See Gramlich v. Div. of Motor Vehicles,* Docket No. 2010-0929-DOT (June 14, 2010); *Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth.,* Docket No. 2009-1588-DOT (Dec. 1, 2009); *Elliott v. Div. of Juvenile Serv.,* Docket No. 2008-1510-MAPS (Aug. 28, 2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999).

In this situation, Nurse Marquess had no prior history with Grievant and was not employed by Bateman or affiliated with that institution in any way. There was no apparent motive for him to be biased or have any interest in the outcome of this matter. He was calm and composed when he testified and presented an honest demeanor. His testimony was plausible in as much as he was working on the floor where LP was

staying when the incident occurred and had opportunity to personally witness the events he described. The specific facts of each of his statements varied slightly in each telling but the basic testimony was specific and consistent. He entered LP's room and Grievant was not there. The bathroom door was open and Grievant was not in the bathroom. He waited in the room for Grievant to return for a period of ten to fifteen minutes and Grievant did not return to the room. This testimony is plausible and credible.

On the other hand, Grievant has a clear bias and interest in the outcome of this matter and she could not provide any reasonable explanation why Nurse Marquess would be untruthful or mistaken in his version of the events. It is implausible that Nurse Marquess would enter LP's room on at least two occasions and accidentally miss the fact that Grievant was there but in the restroom. Accordingly, Grievant's testimony is found to be not credible.

Bateman Policy Number MMBHE018 related to "Patient Abuse/Neglect, or Exploitation defines "neglect" as:

> Any negligent, reckless or intentional failure to meet the needs of a patient, or applicable statutory or regulatory requirements, including but not limited to: **lack of supervision**, nutritional deprivation, or failure to implement or update a treatment plan.

(Emphasis added). This definition is repeated in CODE OF STATE RULES at 64 C.S.R. 59 § 3.12. Policy Number MMBHE018 also states that "This hospital [Bateman] will not knowingly hire or retain any person with a record of abuse or neglect."

Bateman Policy Number NURf59 requires staff from Bateman to remain "one-on-one" with a forensic patient, such as LP, even if the patient is admitted to another medical facility. Grievant at least negligently, if not intentionally, failed to meet this clear

regulatory requirement for specific supervision by staying in LP's room while he was at Saint Mary's Hospital. Forensic patients require "one-on-one" supervision because they are at risk for causing harm to themselves or others. Respondent proved that Grievant's failure to provide for the specific supervision of a forensic patient required by policy constituted neglect as defined in the policy and state rules which led to termination of her employment pursuant to Policy Number MMBHE018. Accordingly, the grievance is DENIED.

Conclusions of Law

1. The Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008). "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); *Leichliter v. W. Va. Dep't of Health and Human Res*., Docket No. 92-HHR-486 (May 17, 1993).

2. Bateman Policy Number NURf59 requires the following regarding forensic patients on a Medical Trial Visit:

> Forensic patients must be accompanied on a MTV with one (1) staff member at all times. If they are admitted to the medical facility, there **Must** be one (1) staff member sitting with patient until they are released and returned to Mildred Mitchel-Bateman Hospital.

(Emphasis in original).

3. Bateman Policy Number MMBHE018 related to "Patient Abuse/Neglect, or Exploitation defines "neglect" as:

> Any negligent, reckless or intentional failure to meet the needs of a patient, or applicable statutory or regulatory requirements, including but not limited to: **lack of supervision**, nutritional deprivation, or failure to implement or update a treatment plan.

(Emphasis added). This definition is repeated in CODE OF STATE RULES at 64 C.S.R. 59 § 3.12. Policy Number MMBHE018 also states that "This hospital [Bateman] will not knowingly hire or retain any person with a record of abuse or neglect."

4. Respondent proved by a preponderance of the evidence that Grievant's failure to provide for the specific supervision of a forensic patient required by Bateman policy constituted "neglect" as defined in Bateman policy and the CODE OF STATE RULES at 64 C.S.R. 59 § 3.12, which led to termination of her employment pursuant to Policy Number MMBHE018.

Accordingly, the 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: JANUARY 10, 2013

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE