

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**JERRI HAZLETT,
Grievant,**

v.

Docket No. 2017-1434-DHHR

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

DECISION

Grievant, Jerri Hazlett, was employed by Respondent, Department of Health and Human Resources at Mildred Mitchell-Bateman Hospital ("MMBH"). On December 27, 2016, Grievant filed this grievance against Respondent alleging suspension without good cause. On April 6, 2017, Grievant moved to amend her claim to include dismissal without good cause, which amendment was permitted by order entered May 3, 2017. For relief, Grievant seeks reinstatement, back pay, interest, and benefits restored.

The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held on April 16, 2018, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by counsel, Katherine A. Campbell, Assistant Attorney General. This matter became mature for decision on May 15, 2018, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a Registered Nurse. Grievant was terminated from employment for gross misconduct based on the discovery of an unusually large amount of improperly labeled prescription and over-the-counter medication in a tote

belonging to Grievant and a co-worker. Respondent alleged this violated the Joint Commission's *Hospital Accreditation Standards*, Respondent's policy, and placed the Respondent at risk of violating state law. Respondent failed to prove the majority of the allegations against Grievant and did not have good cause to terminate Grievant's employment for the technical violation of policy that was proven given Grievant's eight years of employment with no history of prior disciplinary action and job performance that had otherwise met expectations for the entirety of her employment. Accordingly, the grievance is granted.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant was employed by Respondent as a Registered Nurse by Respondent and had been so employed for eight years.

2. Sometime in 2015, with the permission of her nurse manager, Grievant purchased a lockable tote to store personal items. At the time, there was inadequate space on the unit for storage of personal items by staff in the provided employee lockers. Staff were required to share lockers and personal items had been stolen. When the lock on the first tote broke, Grievant and Kristen Thacker, a Health Services Worker, purchased a second lockable tote. The tote was stored in a locked closet located behind the nurses' station. The closet was not accessible to patients, but was accessible to all staff who possessed a universal key. Only Grievant and Ms. Thacker had keys to the tote.

3. In addition to food and personal hygiene items, the tote also contained various over-the-counter and prescription medications.

4. The tote contained the following over-the-counter medications:

Medication	Amount	Use
Antidiarrheal "ohm"	22 tablets	Anti-diarrhea
Rexall	1 bottle (86 tablets)	Unknown
Pharbetol	1 bottle	Unknown
Mucinex	8 caplets	Unknown
PSE	15 tablets	Unknown
Stomach Relief	1 bottle (7 tablets)	Stomach Relief
Acid Reducer	3 tablets	Reduce Acid
Benadryl Itch Stopping Cream	1 tube	Anti-itch

5. The tote contained the following prescription medications:

Medication	Amount	Use
Naproxen	25 tablets	Anti-inflammatory
Metronidazole	32 tablets	Antibiotic for fungal infection
Pyridium	2 tablets	Anesthetic for urinary tract pain
Lidocaine	2 vials	Topical anesthetic
Prednisone	68 tablets	Anti-inflammatory
Ipratropium Bromide	10 nebulizers	Emphysema; asthma pneumonia
Albuterol Sulfate	38 nebulizers	Emphysema; asthma pneumonia
Albuterol + Ipratropium	28 nebulizers	Emphysema; asthma pneumonia
Ibuprofen (prescription strength)	14 tablets	Pain reliever
HCTZ	109 tablets	Unknown
Ondansetron	45 tablets	Anti-nausea

Fluconazole	3 tablets	Anti-fungal
Promethazine	15 tablets	Anti-nausea
Ceftriaxone	1 vial	Antibiotic injection
Z Pack	1 package	Antibiotic
Dexamethasone	1 vial	Unknown
Syringe	4 insulin syringes	Injection

6. The tote also contained a jar of partially-used Balmex, a diaper rash cream, that had a prescription label for a deceased patient. Although Grievant denied placing it in the tote, she knew the Balmex had been prescribed for a patient was in the tote. Grievant knew that the patient had died and that the Balmex had been placed in the tote to be used on other patients. Grievant did not use the Balmex on other patients and did not know of any other employee using it on other patients.

7. With the exception of the Balmex, none of the prescription medications had prescribing labels as required by law. Several of the prescription medications were contained in what appeared to be wholesale bottles of large quantities not typically for personal use.

8. Other medications were stored in blank pill bottles with handwritten notes.

9. Injectable Lidocaine and antibiotics are not typically prescribed for personal use.

10. Grievant admitted she had stored over-the-counter stomach medication, Tylenol, and Zyrtec in the tote.

11. Ms. Thacker admitted she had stored over-the-counter and prescription medication in the tote. Ms. Thacker admitted that the majority of the prescription medications were hers, with the exception of the Lidocaine, nebulizers, and Ceftriaxone.

12. Neither Grievant nor Ms. Thacker offered explanation for how the other medications came to be in the tote or why wholesale bottles of medications were in the tote.

13. Grievant's nurse manager was not aware that medications were being stored in the tote.

14. On December 21, 2016, an employee reported the tote as inappropriate to Cheryl Williams, interim Director of Nursing. Ms. Williams directed acting Nurse Manager, Ray Brillantes, to investigate.

15. Mr. Brillantes found the tote in the locked closet, but the tote itself was unlocked. Upon discovering the quantity of medications, he contacted Ms. Williams, who contacted Assistant CEO Pat Franz and Director of Pharmacy Ava Patterson. All four inspected the tote. Pictures of the medications were taken and an inventory made.

16. On the same day, Ms. Franz, Ms. Patterson, Ms. Williams, and Mr. Brillantes questioned Grievant about the tote.

17. Grievant provided a three-page signed statement in which she admitted that the tote belonged to her and Ms. Thacker, admitted to storing several over-the-counter medications, and stated that she assumed the prescription medications were Ms. Thacker's.

18. Ms. Franz and Ms. Williams reported what they had found to CEO Craig Richards, who also referred the matter to the Office of Inspector General for an independent investigation.

19. The Office of Inspector General investigation report was not presented as evidence.

20. By letter dated December 23, 2016, Mr. Richards suspended Grievant without pay pending an investigation.

21. By letter dated March 27, 2017, Mr. Richards dismissed Grievant for gross misconduct. Mr. Richards determined Grievant's storage of medications in the unlocked tote had violated three sections of the Joint Commission's *2017 Hospital Accreditation Standards*, two sections of MMBH's *Proper and Safe Storage of Medication/Pharmacy Unit Inspection* policy, and the Division of Personnel's *Secondary Employment/Certain Volunteer Activity* policy. In addition, Mr. Richards found that the "unusually large amount of improperly labeled prescription medications placed Bateman's pharmacy and its pharmacist/pharmacy technician(s) at risk of violating [t]he Larry W. Border Pharmacy Practice Act" that prohibits a pharmacist from dispensing any prescription when he/she has knowledge that the prescription was issued without the establishments of a valid practitioner-patient relationship. Mr. Richards also determined Grievant had improperly obtained secondary employment during her suspension in violation of the Division of Personnel's *Secondary Employment/Certain Volunteer Activity*. Mr. Richards stated as follows:

Although you claimed during the investigation that the prescription medications were not yours and that you had not dispensed or administered any medications to patients, you admitted giving over-the-counter medications to other staff members. On the grand scale, whether you actually dispensed or administered medication to patients is immaterial; the potential to do so was there. Had this container been discovered by the Joint Commission, Bateman's accrediting body, the facility could have been cited for "Immediate Jeopardy" and potentially shut down. A finding of "Immediate Jeopardy" does not require that any actual harm come to a patient; the potential for harm alone may constitute "Immediate Jeopardy." As one of only two (2) forensic mental health facilities in the State, a shut-down,

even if only brief, would have created a devastating situation for not only this facility, but its patients, the State's criminal justice system, DHHR, and countless others.

22. The Joint Commission is an accrediting body that inspects hospitals pursuant to its *Hospital Accreditation Standards*. The Joint Commission is not a regulatory agency, however, if the Joint Commission discovers violations that may cause harm it is required to report those violations to the regulatory agency. The regulatory agency may order a shutdown of the hospital for patients on Medicaid or Medicare.

23. MMBH's *Proper and Safe Storage of Medication/Pharmacy Unit Inspection* policy, MMBHF029, section K.2 requires that "[a]ntiseptics, and other medications for external use are stored separately from internal or injectable medications." Section K.14 states "Medication containers are labeled whenever medications are prepared but not immediately administered. The label is displayed in a standardized format according to regulations and standards of practice and includes: medication name, strength, amount (if not apparent from the container), and the expiration date, and initials of person who prepared the medication."

24. Respondent entered into evidence the Joint Commission's *2018 Hospital Accreditation Standards*. However, it was the *2017 Hospital Accreditation Standards* Grievant was accused of violating in her termination letter and the misconduct of which she was accused occurred in 2016.

Discussion

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2008). "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 W. VA. CODE ST. R. § 143-1-12.02 and 12.03 (2012).

"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. Parkways Econ. Dev. & 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) and *Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983)); *Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sep. 13, 2002); *Crites v. Dep't of Health & Human Res.*, Docket No. 2011-0890-DHHR (Jan. 24, 2012).

Respondent asserts Grievant committed gross misconduct for her violation of three sections of the Joint Commission's *2017 Hospital Accreditation Standards*, two sections of MMBH's *Proper and Safe Storage of Medication/Pharmacy Unit Inspection* policy, and for placing MMBH's pharmacy at risk of violating state law. The termination letter also

found Grievant violated the Division of Personnel's *Secondary Employment/Certain Volunteer Activity* policy, but no evidence or argument was presented on that issue, so that ground is deemed abandoned. Grievant asserts Respondent failed to prove she committed gross misconduct.

It is clear from his testimony and the termination letter that Mr. Richards' main concern with the situation was his fear of potentially disastrous consequences should the Joint Commission have found the tote during their inspection. Mr. Richards was credible in his concern that MMBH could have been in jeopardy of being shut down due to a negative Joint Commission report for this situation, as Sharpe Hospital had been only months prior to the decision to dismiss Grievant from employment. However, Respondent simply failed to present the necessary reliable evidence to support this assertion.

Although Respondent entered into evidence the *2018 Hospital Accreditation Standards*, it was the *2017 Hospital Accreditation Standards* that Grievant was accused of violating. Further, it appears Respondent improperly relied on the *2017 Hospital Accreditation Standards* in disciplining Grievant as Grievant's conduct occurred in 2016. Respondent provided no explanation why the *2017 Hospital Accreditation Standards* would be applicable when the conduct occurred in 2016. Clearly the *2018 Hospital Accreditation Standards* are not applicable and cannot be used to prove Grievant violated these standards in 2016. Therefore, Respondent cannot prove Grievant violated the Joint Commission standards as alleged in the termination letter.

Even if the standards entered into evidence had been the relevant standards, Respondent failed to enter into evidence any part of the standards that explained or defined the necessary terms or consequences. Respondent provided only the specific

three sections Grievant was accused of violating, but asserted that her violation of these sections had the “potential for harm” which could have resulted in a finding of “Immediate Jeopardy.” As neither of these were defined in any way, it is impossible to know whether the violation of these sections, if proven, would have actually constituted the “potential for harm” or would have qualified for a finding of “Immediate Jeopardy.”

Respondent’s next ground for terminating Grievant was her violation of two sections of MMBH’s *Proper and Safe Storage of Medication/Pharmacy Unit Inspection* policy, MMBHF029. Grievant essentially argues that the prescription medications, with the exception of the Balmex, were personal and that there is no difference between storing personal medications in a locked tote in a locked closet and storing medications in the employee lockers, which was permitted. Respondent argues there is a difference between the employee lockers and the tote. Both of these arguments fail. There is no difference between locked employee lockers and a locked tote in a locked closet in an area inaccessible to patients that had been approved as alternate storage by the nurse manager. The problem is the nature of the medications that were stored in the tote. With the exception of the deceased patient’s Balmex, none of the prescription medication in the tote had prescribing labels as required by law. Further, there were several large wholesale bottles of medication and several injectable medications that are not typically prescribed for personal use. The storage together of a patient’s medication, medications with no prescribing label, medications in wholesale quantities, and injectable medications, do not look like personal medications. Frankly, they look like improperly-stored or stolen hospital medications, although there was no allegation this was the case. Therefore, the

medications cannot be considered personal for purposes of analyzing whether their storage complied with policy.

Respondent asserts Grievant violated sections K.2. and K.14 of the policy. Section K.2 requires that “[a]ntiseptics, and other medications for external use are stored separately from internal or injectable medications.” The Balmex and Benadryl were topical medications that were stored with internal and injectable medications, which violated this policy section. Section K.14 states: “Medication containers are labeled whenever medications are prepared but not immediately administered. The label is displayed in a standardized format according to regulations and standards of practice and includes: medication name, strength, amount (if not apparent from the container), and the expiration date, and initials of person who prepared the medication.” There were several medications that were stored in unlabeled pill bottles, which violated this section of the policy. There was no evidence that any of these medications were ever used on patients or that Grievant intentionally violated the policy.

Respondent’s last ground for terminating Grievant was that she “placed Bateman’s pharmacy and its pharmacist/pharmacy technician(s) at risk of violating [t]he Larry W. Border Pharmacy Practice Act,” which states, “A pharmacist may not compound or dispense any prescription order when he or she has knowledge that the prescription was issued by a practitioner without establishing a valid practitioner-patient relationship.” The termination letter explains that “[b]ecause the prescription medications were not properly labeled, Bateman is without proof that the prescription medications were properly dispensed. Further, although you denied giving any patients medications from the container, the potential existed for you to have done so, which would have been without

a valid practitioner-patient relationship.” The code section upon which Respondent relies is simply not applicable. Respondent never alleged that the unlabeled medications came from MMBH’s pharmacy. Grievant’s possession of unlabeled medication has nothing to do with whether a pharmacist knowingly disbursed medication that had been prescribed without a practitioner-patient relationship. The assertion that Grievant could have violated this statute by giving patients these medications involves multiple levels of speculation. There was no allegation or reason to believe Grievant had administered these medications to patients and there was no allegation that the medications were from MMBH’s pharmacy. Respondent failed to prove Grievant’s actions placed MMBH’s pharmacy in jeopardy of violating the cited statute.

Although Respondent presented significant testimony and argument about the deceased patient’s Balmex, and the presence of the medication in the tote was clearly improper, this was not cited in the termination letter as a ground for her termination. Therefore, it cannot be considered.

As a practical matter, the unlabeled medications in the tote are highly suspicious. They do not look like medications for personal use and neither Grievant nor Ms. Thacker offered any explanation for why wholesale and injectable medications were present in the tote. However, Respondent never alleged that these medications were converted from the hospital pharmacy or were otherwise illegally obtained. Without that allegation of clear wrongdoing or proof that the situation could have jeopardized MMBH’s standing with the Joint Commission, all that is left is the technical violation of MMBH’s policy. Respondent did not have good cause to terminate an eight-year employee with no history

of prior disciplinary action whose job performance had otherwise met expectations for the entirety of her employment for the technical violation of policy.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2008). "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 W. VA. CODE ST. R. § 143-1-12.02 and 12.03 (2012).

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. Parkways Econ. Dev. & 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) and *Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983)); *Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sep. 13, 2002); *Crites v. Dep't of Health & Human Res.*, Docket No. 2011-0890-DHHR (Jan. 24, 2012).

4. Respondent failed to prove the majority of the allegations against Grievant and did not have good cause to terminate Grievant's employment for the technical violation of policy that was proven given Grievant's eight years of employment with no history of prior disciplinary action job performance that had otherwise met expectations for the entirety of her employment.

Accordingly, the grievance is **GRANTED**. Respondent is **ORDERED** to reinstate Grievant to her position as a registered nurse at Mildred Mitchell Bateman Hospital effective December 23, 2016, to pay her back pay to that date, with statutory pre-judgment interest on the back pay, and to reinstate all other benefits to which she would have otherwise been entitled, effective that date.

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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: June 27, 2018

Billie Thacker Catlett
Chief Administrative Law Judge