

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**CHUN UNDERWOOD,
Grievant,**

v.

Docket No. 2016-1885-CONS

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
WILLIAM R. SHARPE, JR. HOSPITAL,
Respondent.**

DECISION

Grievant, Chun Underwood, filed this action directly to Level Three of the Grievance Procedure after she was dismissed from Sharpe Hospital due to a history of performance failures and insubordinate behavior. The Statement of Grievance is “dismissal without good cause & without due process.” Grievant seeks “to be made whole in every way including back pay with interest & benefits restored.”

After consolidation, the cases involving Grievant’s dismissal were heard before the undersigned at Level Three on November 30, 2018, at the Grievance Board’s Westover office. Grievant appeared in person and by her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, Steven R. Compton, Deputy Attorney General. At the beginning of the hearing, the issues grieved in the previous actions were withdrawn by Grievant, leaving only the dismissal at issue. This matter became mature for consideration upon receipt of the last of the parties’ fact/law proposals on February 11, 2019.

Synopsis

Grievant was dismissed from employment as a Licensed Practical Nurse due to a history of performance failures culminating with a failure to follow a direct order of a supervisor. The record also supported a finding that Grievant mixed two drugs in the same syringe after being told by the hospital pharmacist not to do so. The record also supported a finding that Grievant had a long history of performance issues along with attempts to correct the deficiencies. Grievant offered no evidence that would contradict the evidence presented by Respondent, and offered no evidence that her due process rights were violated. Accordingly, this grievance is denied.

The following Findings of Fact are based upon the record of this case.

Findings of Fact

1. Grievant was employed at Sharpe Hospital as a Licensed Practical Nurse. Grievant provided direct care to the patient population.
2. It is undisputed that Grievant has an extensive history of performance issues and unprofessional behavior while working at Sharpe Hospital and as outlined in her dismissal letter.
3. Grievant has had difficulty interacting with co-workers and supervisors during this time. Sharpe Hospital has attempted to assist Grievant with these issues including performance improvement plans, coaching sessions, trainings and discipline.
4. On December 15, 2015, Grievant was not permitted to pass out medications at the hospital until a work analysis was received from her doctor.

5. Grievant continued to have issues interacting with co-workers and engaging in unprofessional conduct.

6. In June of 2016, Sharpe Hospital received the work analysis from Grievant's physician clearing her to return to work without restrictions. Grievant was permitted to start passing out medications after attending nursing competency class, medication class, and four supervised medication passes which included two intramuscular injections.

7. On August 26, 2016, a patient was irrational and being disruptive. An order was given by the physician to give the patient an injection of Ativan and Benadryl. Shannon Bly was the Registered Nurse on duty and supervisor of Grievant.

8. Ms. Bly directed Grievant to administer the medications to the patient in order to calm him down. Grievant refused to administer the medications as directed and became very loud and insubordinate with Ms. Bly. This drew the attention of Darlene Bender, Nurse Manager, who indicated that Grievant was yelling at Ms. Bly in an angry tone. This disruption occurred in front of the patient that needed to calm down. Against the order of Ms. Bly, Grievant then gave the patient a different oral medication instead of the medications ordered by the doctor.

9. Darlene Bender then instructed Grievant to give the intramuscular medications. Prior to giving the injection, Grievant called the hospital pharmacy and spoke to Gary McCoy, Director of Pharmacy, to see if she could mix the Ativan and Benadryl in the same syringe. Ms. Bender asked Grievant what the Pharmacy told her and Grievant stated that Mr. McCoy told her there was no data on that combination and

that she could mix the medications. Grievant then administered the medications to the patient in the same syringe.

10. Kim Brady, Head Nurse Supervisor, came in shortly after the injection was given and heard that Grievant had mixed the Ativan and Benadryl together and immediately became concerned. It was Ms. Brady's experience that the only medication that can be mixed with Ativan was Haldol. The patient in question was allergic to Haldol.

11. Ms. Brady then called Mr. McCoy and asked about the mixing of Ativan and Benadryl, and what was his conversation with Grievant. Mr. McCoy stated that he was asked by Grievant if she could mix the two medications and he told her that there was no data on the combination, and, therefore, she should not mix them. Mr. McCoy confirmed that you cannot mix medications unless there is data indicating that it is safe to do so.

12. Ms. Bender confronted Grievant with what Mr. McCoy had stated. Grievant responded with "Oh, shit" and admitted that she mixed them together, and that Mr. McCoy told her not to mix the medications.

13. As a result, the patient had to be put on a twenty-four hour medical observation which included monitoring of the injection site, repeated checking of vital signs, and monitoring of the patient respiration. The patient did not have any adverse reaction to the medical error.

14. A predetermination meeting was held on September 22, 2016. During the meeting, Grievant acknowledged that she was told not to mix the medications in the same syringe, but told Ms. Bender that the pharmacy said she could. Grievant also admitted to using a loud tone with Ms. Bly.

15. Grievant solicited the testimony of a co-worker, Brenda Thomas-Ree, during the evidentiary hearing. Ms. Ree did not have any first-hand knowledge of the events that occurred on August 26, 2016. Ms. Ree did confirm that nurses only mix Haldol and Ativan in the same syringe, and that she always gave Benadryl in a separate syringe. Ms. Ree indicated that an employee could disagree with a supervisor's directive and not do it, but you would be disciplined for insubordination.

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 (2018); *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).

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).

Grievant argues that her dismissal was without good cause and without due process. The record is without any evidence to demonstrate that Grievant's due process rights were violated by Respondent in this case. To the contrary, the record demonstrates that Grievant was provided with the required due process throughout prior to dismissal. Accordingly, Grievant's assertion that she was dismissed without due process is without merit.

Grievant's assertion that she was dismissed without good cause is also without merit. In *Roberts v. Concord University*, Docket No. 2016-1284-CONS (April 25, 2016), this Board found that:

Proper disciplinary action is determined by the severity of a violation. Progressive discipline is the concept of increasingly severe actions taken by supervisors and managers to correct or prevent an employee's initial or continuing unacceptable work behavior or performance. In theory, progressive and constructive disciplinary action will progress, if required, along a continuum from verbal warning to dismissal, with incremental steps between (i.e. verbal warning, written warning, suspension, demotion, dismissal). However, it is important to be mindful of the fact that the level of discipline will be determined by the severity of the violation (frequency may also be relevant). Progressive discipline does not mandate that all the levels of discipline be used . . . Progressive discipline, has been construed as a permissive, discretionary policy that does not create a mandatory duty to follow a progressive disciplinary approach in every instance. Proper disciplinary action is determined by the facts, circumstances, and applicable regulations.

Respondent provided an extensive history of the steps they have taken to address Grievant's repeated performance failures and insubordinate behavior. This list was not challenged by Grievant and as a matter of law, personnel actions become final and are

presumed valid upon the expiration of an employee's time limit for challenging them through the grievance process.¹ The repeated use of discipline, performance improvement plans, training and coaching indicate that Respondent has given Grievant opportunity to correct her behavior and performance issues. Notwithstanding these efforts, the events of August 26, 2016, occurred, which led to Grievant's dismissal.

The charge of insubordination is defined as the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *Riddle v. Bd. of Directors/So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). In order to establish insubordination, the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid. *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). See *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Riddle v. Bd. of Directors/So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989).

In the instant case, Grievant's refusal to follow Ms. Bly's order to administer the injections was blatant and wilful, and can be viewed by the undersigned as insubordination. Grievant had no legitimate reason to disobey this order and instead substituted her judgment for that of her supervisor, as well as a prescribing physician. Grievant did so in a loud and unprofessional manner. The record supports a finding that

¹*Cochran v. Mercer County Bd. of Educ.*, Docket No. 05-27-307 (Dec. 21, 2005).

Grievant was insubordinate. Grievant's behavior is compounded by her failure to exercise sound judgment in administering Ativan and Benadryl to the patient. Grievant's decision to ignore the directive to not mix the medications in the same syringe was a critical error. This can be viewed as more than a mistake on the part of Grievant. She completely ignored the advice of the pharmacist who had just told her not to mix the drugs.

The undersigned agrees with Respondent's counsel that this type of action is not trivial or inconsequential, it is unconscionable. Although the patient did not have an adverse reaction in this case, a similar error could have led to a medical emergency in a patient. This error caused the patient to endure twenty-four medical monitoring to watch for adverse reactions. This caused the medical staff to have to complete extra duties that would not have been required had Grievant followed directives. Respondent has met its burden of proof in establishing the conduct which led to dismissal, and demonstrated good cause for the termination.

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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

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).

3. Insubordination is defined as the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *Riddle v. Bd. of Directors/So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). In order to establish insubordination, the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid. *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). See *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Riddle v. Bd. of Directors/So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989).

4. Respondent has met its burden of proof in establishing the conduct which led to dismissal, and demonstrated good cause for the termination.

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 (2018).

Date: March 12, 2019

Ronald L. Reece
Administrative Law Judge