SUSAN G. MILLER

v. Docket No. 93-HHR-482

WEST VIRGINIA DEPARTMENT OF HEALTH AND

HUMAN RESOURCES/COLIN ANDERSON CENTER

D E C I S I O N

On or about November 24, 1993, Grievant Susan G. Miller filed a complaint directly to level four, pursuant to W.Va. Code §29-6A-4(e)'s expedited procedure, in which she sought "rein statement to employment and payment of back wages." Her "State ment of Grievance," a two-page attachment to the filing form, related that Grievant had received a November 10, 1993 termina tion letter from an administrator at Colin Anderson Center (CAC), said discharge based upon the one-year suspension of Grievant's license to work as a licensed practical nurse (LPN license). (See footnote 1)

Grievant's Statement also included extensive information about a prior termination action and subsequent litigation with respect to that earlier action. Grievant basically requests asrelief that she be placed on administrative leave with pay and benefits or, alternatively, that she be returned to work in a position other than LPN. Simply put, Grievant essentially seeks enforcement of a favorable decision rendered in a prior griev ance which ordered her reinstatement, Miller v. W.Va. Dept. of Health and Human Resources, Docket No. 92-HHR-070 (June 11, 1993), hereinafter Miller I, and/or an Order by the Circuit Court of Pleasants County which affirmed that Decision.

Unfortunately for Grievant, W.Va. Code §§29-6A-1 et seq. does not provide the West Virginia Education and State Employees Grievance Board with any enforcement powers. The only issue which can be addressed in the present dismissal action is whether the suspension of Grievant's practical nurse's license constitutes good cause for her termination by Respondents West Virginia Department of Health and Human Resources (HHR) and/or CAC. Without a doubt, the suspension of Grievant's license renders her unable to work as a Licensed Practical Nurse, and the termination must be upheld. Moreover, Grievant cites no factual basis or legal authority to support her argument that CAC should keep her on the payroll pending the outcome of her various appeals in other forums.

Based on all matters of record, the following determina tions are made:

Findings of Fact

1. On February 11, 1992, Grievant was terminated from her position as a Licensed Practical

Nurse II at CAC for grossmisconduct based on allegations that Grievant struck a severely retarded patient on the head. CAC is a state owned and operated facility which provides services to disabled adults.

2. The alleged patient abuse was reported to the Pleasants County Prosecuting Attorney and to the West Virginia Board of Examiners of Licensed Practical Nurses.

3. Grievant appealed her termination to level four of the grievance procedure and prevailed on her claim that HHR did not prove its charges of patient abuse by a preponderance of the evidence. An order was entered that Grievant be returned to work with full back pay. Miller I.

4. HHR timely appealed to the Circuit Court of Pleasants County and moved for a stay. While the stay was initially granted, on August 31, 1993 the court denied the appeal and ordered full compliance with Miller I. The court further ordered the employer not to rely on "other information regarding this incident to support action against [Grievant] or her interests."

5. When Grievant contacted CAC officials about a return to work date, she was advised that she was not to return to duty or enter CAC's grounds but that she would be placed on the payroll with reinstatement of her seniority status and all related benefits.

6. The Magistrate's Court of Pleasants County convicted Grievant of the criminal charge of battery of the patient in question. Grievant appealed this conviction to the Circuit Court of Pleasants County. On or about October 5, 1992,Grievant was again found guilty of battery and she was ordered to pay fees and costs. Grievant's appeal of this matter is pending.

7. By letter dated October 5, 1992 to CAC's chief admin istrator, the Program Administrator of HHR's Office of Health Facility Licensure and Certification advised that, if an employ ee is convicted of abusing a client, a federal regulation requires the facility to discontinue the employment of the individual when such "substantiated allegation of abuse to a client occurs."

8. On November 3, 1993, the West Virginia Board of Examiners for Licensed Practical Nurses found Ms. Miller guilty of patient abuse and suspended her LPN license for a period of one year. Grievant appealed that decision in December 1993; pending appeals do not permit the stay of the suspension.

9. On November 10, 1993, a CAC official again terminated Grievant from employment at CAC based upon her criminal convic tion and upon the suspension of her LPN license. A subsequent termination letter sent to Grievant, also dated November 10, 1993, stated that Grievant's termination

was based on the suspension of her LPN license.

10. On November 30, 1993, the Circuit Court of Pleasants County heard argument on Grievant's Writ of Mandamus, apparently filed by Grievant to obtain reinstatement relative to the dismissal prompted by the alleged patient abuse, unpaid back wages, attorney fees and other related benefits. The Order resulting from the hearing required HHR to pay Grievant backwages and attorney fees, to reinstate Grievant's State health insurance and to comply with the terms and conditions of the court's prior order. In a less than clear statement the court ordered that Grievant "be returned back to work under the prior terms and conditions of the Order of this Court subject to an independent termination [the termination based on the loss of Grievant's LPN license and subject of the instant grievance] which the Court makes no find [sic] as to validity or lack thereto."

Conclusions of Law

1. In order to be employed as an LPN II, a person must have a valid license issued by the West Virginia Board of Examiners for Licensed Practical Nurses.

2. It is a misdemeanor for any person to practice practi cal nursing during the time his or her license is revoked or suspended. W.Va. Code §30-7A-11.

3. Federal regulations provide that a facility such as CAC may not employ a person against whom there has been a substantiated allegation of patient abuse.

4. Because of Grievant's criminal conviction of battery upon a patient in her care and the one year suspension of her LPN license, effective November 3, 1993, Grievant is not quali fied to return to work as an LPN II. Grievant would be subject to criminal charges and possible permanent loss of her LPN license if she performed LPN duties during the period of her suspension. 5. CAC had good cause to terminate Grievant's employment on November 10, 1993.

6. While it is questionable whether the Grievance Board has the specific statutory authority to order that an LPN who has been convicted of patient battery and whose license has been suspended be placed on administrative leave with pay or, alter natively, to direct that the LPN be returned to work in a non- LPN position, Grievant herein has not factually or legally established that she is entitled to such relief.

7. The West Virginia Education and State Employees Grievance Board has no enforcement powers under W.Va. Code §§29- 6A-1 et seq.; for that reason alone, the relief requested by Grievant is not available.

Accordingly, the grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7. Neither the West Virginia Education and State Employ ees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appeal ing party must advise this office of the appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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NEDRA KOVAL

Administrative Law Judge

Date: April 29, 1994

Footnote: 1 A level four hearing was conducted December 12, 1993. HHR and Grievant submitted briefs on January 6 and February 1, 1994, respectively.