JAMES M. THOMPSON

v. Docket No. 94-HHR-254

W.VA. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/

WELCH EMERGENCY HOSPITAL

DECISION

The grievant, James M. Thompson, was employed by Health and Human Resources (HHR) as a radiology technician at Welch Emergency Hospital (WEH) until his dismissal on June 16, 1994, for misconduct. Appeal to Level IV was made June 22, 1994 and a hearing was held July 20, 1994. The parties declined to submit findings of fact and conclusions of law. (See footnote 1)

The events which gave rise to the dismissal occurred at approximately 12:00 a.m on May 1, 1994, and the evidence concerning those events is essentially uncontroverted. On that date, several persons arrived at WEH's emergency room in need of immediatemedical attention. Dr. Louis Tepoel, the physician on duty at the time, determined that at least one of the patients had suffered serious injuries to her neck and was showing signs of shock. He further concluded that immediate x-rays were necessary in order to assess the need to transport the patient by air to another facility. The grievant was the only x-ray technician on duty at the hospital.

At approximately 12:00 a.m., Dr. Tepoel directed Health Service Worker Steve Burroughs to locate the grievant and see that the x-rays were performed. Dr. Tepoel also directed other staff to page the grievant over the hospital's intercom system. The grievant was paged several times but did not respond. Mr. Burroughs searched the radiology department and several other areas of the hospital but could not locate him. At some point Mr. Burroughs approached a room in which ultrasound procedures were performed and found it locked. He knocked and called the grievant's name but got no response. Recalling that he had once before located the grievant in this room, (See footnote 2) he placed his earagainst the door and heard persons moving about inside. He also determined that the ultrasound equipment was in use.

Mr. Burroughs returned to the emergency room and advised Dr. Tepoel that he believed the grievant to be in the ultrasound room. He and Dr. Tepoel then proceeded to the room and knocked

again. As Mr. Burroughs was about to retrieve a key to the room, the grievant opened the door. Upon observing two females in the room and the ultrasound equipment in use, Dr. Tepoel inquired of the grievant whether the women were registered patients of the hospital. The grievant responded that they were not. Dr. Tepoel then returned to the emergency room. Mr. Burroughs informed the grievant that he was needed to perform x-rays and the grievant responded that he would be there "once he was finished."

The grievant eventually arrived in the radiology department and performed the x-rays. (See footnote 3) Dr. Tepoel subsequently complained to WEH Administrator Steven Shride that the grievant should have either been on duty during the time in question or responded to the pages. On May 5, 1994, Mr. Shride and WEH Director of PersonnelCathy Addair met with Dr. Tepoel to ascertain precisely what had occurred.

On May 6, 1994, Mr. Shride and Ms. Addair met with the grievant to question him about the charges made and provide him an opportunity to respond. During their discussion, the grievant acknowledged that the two women in the ultrasound room were his sister-in-law and mother-in-law and that his sister-in-law was pregnant. The grievant equivocated on whether he had performed an ultrasound test on his sister-in-law. He eventually admitted to performing a "procedure" on her.

After discussing the matter further with Ms. Addair, Radiology Supervisor Rita Frasher and consultants within the West Virginia Division of Personnel, Mr. Shride determined that the grievant should be dismissed. He took the action via the following May 31, 1994 letter.

> The purpose of this letter is to inform you of my decision to dismiss you from employment as Radiologic Technologist at Welch Emergency Hospital effective June 16, 1994, being fifteen (15) days notice. The reason for your dismissal is an incident which occurred in the early morning hours of May 1, 1994 and involved your wholly inappropriate performance of a diagnostic ultrasound procedure on an individual not a properly registered patient.
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> At approximately 12:30 a.m., May 1, 1994, the Emergency Room was assessing and treating patients from three motor vehicle accidents, one fall victim with a possible broken neck and one individual showing signs of shock who was being readied for transport to another facility. All of these patients required your services as the sole X-Ray Department staff member on duty at the time. For a period of twenty to forty minutes - the precise elapsed time is unclear due to the level of activity in the Emergency Room - repeated attempts to page you by intercom and to locate you were unsuccessful. The Emergency Room Physician, Dr. Tepoel, and severalother staff members proceeded to the X-ray Department, knocking on doors and paging you but to no avail. At approximately that time, Health Service worker Steve Burroughs secured a key to the Ultrasound Room, unlocked the door and entered. Mr. Burroughs

observed that the Ultrasound machine was functioning and that you were using the machine's probe to perform a procedure on a female lying on the bed. Mr. Burroughs reported his observation to Dr. Tepoel. Momentarily, Dr. Tepoel returned to the Ultrasound Room and requested that you open the door. Upon your opening the door, Dr. Tepoel observed two adult females "cowering" in a corner of the room. You replied "No" to Dr. Tepoel's inquiry to whether these individuals were registered patients. One of them, you stated, was your sister-in-law. (See footnote 4)

On May 6, 1994, you met with Rita Frasher, X-Ray Supervisor, Cathy Addair, Payroll/Personnel Supervisor, and myself, for the purpose of discussing the events of April 30/May 1, 1994. During the course of this meeting you stated that you did not respond to the pages due to the fact that you were on break and that you were in the Ultrasound Room for only ten minutes. You stated, also, that your breaks were not to be interrupted - except in extreme circumstances - and that you believed that you had taken care of all emergency patients. I have concluded that you were aware of repeated attempts to contact you, but you chose to ignore these efforts as you were on a break. During the course of the May 6, 1994 meeting you, also, admitted having the two individuals in the Ultrasound Room - your mother and sister-in-law - but, initially, denied using the Ultrasound Machine and performing a procedure on your sister-in-law.

As the sole Radiologic Technologist in the Hospital, it was imperative that you respond to all pages and efforts to locate you, regardless of whether you were on break. For you to be aware that individuals were attempting to locate you and, even then, make a conscious decision, for whatever reason, not to respond, is totally inappropriate and unacceptable and will not be tolerated. Your refusal to respond created a serious disruption inthe Emergency Room's effort to provide emergency services and jeopardized the efficient and effective assessment and treatment of its patients.

It is my belief that for all or part of the time you were being sought and failed to respond, you were performing an unauthorized Ultrasound procedure on your sister-in-law. This, too, is wholly inappropriate and unacceptable. Hospital Memorandum No. 44, "Registration of Patients", effective September 19, 1986, states in part, that "[a]ll services provided to patients will only be done after the patient has registered with Admissions and only if ordered by a physician." In addition, the "Outline for Radiological Procedures", dated April 5, 1985, states in part, that [a]ll requests for Radiological examinations shall originate with a physician..." Your performance of an Ultrasound procedure on your sister-in-law without the requisite registration and physician's order is violative of Hospital policy and exposes the Hospital to legal liability.

You shall be given an opportunity to either meet with me in person or to present me with an explanation of the reason why you may think the facts and grounds contained in this letter are in error and why you may think this action is inappropriate, provided you do so during this notice period. If you choose to either meet with me, or to write me, please contact my secretary or deliver to me your written explanation on or before June 10, 1994.

> You may work out your notice period if you choose, but you are not required to do so. In any event, you will be paid for all annual leave that has accumulated to your credit as of your last working day with the agency along with your accumulated holidays up to forty (40) hours.
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> Any questions you might have regarding this dismissal should be directed to Cathy Addair, Administrative Services Assistant-Personnel Services. Pursuant to WV Code Chapter 29-6A-4(e), dismissals are grievable directly to the WV Education nd State Employees Grievance Board, 808 Greenbrier Street, Charleston, WV 25311, within 10 working days of the effective date of the dismissal.

The record is somewhat unclear, but it appears that the grievant met with Ms. Frasher and Mr. Shride again prior to June10, 1994. Apparently, any explanation the grievant may have provided during the conference did not dissuade Mr. Shride from taking the action.

At the Level IV hearing, the grievant, under cross-examination, conceded that he instructed his sister-in-law to come to the hospital on the night in question; he planned to perform an ultrasound test on her during work time to determine the sex of her unborn child; he was fully aware that to do so would be contrary to at least two WEH policies regarding such tests; he had performed such tests in his employment in other hospitals but was not authorized to perform them at WEH; he performed the procedure on his sister-in-law but was unable to determine the fetus' sex.

The grievant further testified that he was on one of his allotted fifteen minute breaks when he performed the procedure and that he did not hear any of the pages while he was in the ultrasound room. Implicit in the grievant's testimony was that he believed WEH policy permitted him break time without interruption. Ms. Frasher confirmed that the grievant was not authorized to perform ultrasound procedures and that WEH policy prohibited any tests on persons who had not been properly admitted to the hospital. Ms. Frasher also testified that it had been WEH's long-standing practice that break time was to be taken according to the needs of the hospital and that she had communicated this policy to the grievant on his first day of employment at WEH. She represented that the grievant, like all WEH employees, fully understood that break time was "compensable" time and that theywere never free to ignore a page and were not to take a break at a time when patients were in need of emergency care. (See footnote 5) The grievant did not rebut this testimony.

The only clearly articulated legal argument advanced by the grievant is that the punishment levied was disproportionate to the offense and that WEH should have taken a "progressive" disciplinary approach. According to the grievant, he was simply trying to help his sister-in-law and since no one was harmed, he should have received either a written reprimand or suspension. As previously noted, the grievant, at least implicitly, also asserts that since he was on break time, his absence from his assigned work area could not be considered a punishable offense.

HHR asserts that the evidence supports that the grievant heard the pages and, contrary to WEH policy, ignored them. The agency also contends that its personnel policies do not mandate that it take any particular disciplinary action for a particular offense and that those policies specifically authorize dismissal for "extremely serious offenses in direct violation of agency policy, state, or federal law." HHR maintains the grievant's failure toheed the pages and his use of hospital equipment on persons not admitted to the hospital meet that definition.

Pursuant to W.Va. Code §29-6A-6, 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. Dept. of Health, Docket No. H-88-005 (Dec. 6, 1988). 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 Service Com'n., 380 S.E.2d 216 (W.Va. 1989). For the reasons discussed below, the undersigned concludes that HHR has met its burdens in the case.

Since Ms. Frasher's testimony was unrefuted, it is accepted that WEH has an established practice, consistent with HHR Policy Memorandum 2102, see n.5, whereby employees receive compensated break time but must defer its use when patients are in need of emergency care. It is further determined that the grievant was fully aware of this policy. There can be no doubt that the circumstances which prompted Dr. Tepoel to initiate a search for the grievant on the night in issue constituted a medical emergency. It is not accepted that the grievant did not hear the pages. He was not credible or convincing in this assertion and all other evidence of record indicates that there was a loudspeaker in working condition in the ultrasound room and that other persons using the room had no difficulty in hearing announcements or pages. Moreover, it is not necessary to find that the grievant did or did not hear the pages in order to infer neglect of duty on his part. As previously noted, the grievant, once he was discovered in the ultrasound room, was unequivocally advised by

Mr. Burroughs that he was needed in the x-ray department but yet chose not to respond until he had finished the unauthorized ultrasound test on his sister-in-law.

The grievant's claim that the agency was in some way bound by its disciplinary policies to impose a lesser penalty must also be rejected. A review of HHR's personnel policy reveals that, while its administrators are encouraged to take a progressive disciplinary approach to infractions of agency rules, the policy does not mandate such an approach. Moreover, the policy provides for and authorizes dismissal in the first instance where the infractions are of a serious nature and affect the rights of the public. Clearly, the grievant's conduct was serious and directly affected those rights.

To the extent that the grievant alleges that, notwithstanding HHR's personnel policies, the penalty was disproportionate to the offense, the undersigned finds that it was not. The agency has shown that the grievant was guilty of two infractions of policy, both of which prolonged the emergency treatment of a patient. Little analysis is needed to also conclude that the grievant's conduct was egregious. The liability to which WEH was exposed for an unauthorized medical procedure performed by an unlicensed employee on a person who had not been admitted for care, is, in andof itself, sufficient reason to conclude that the dismissal was warranted. Further, the grievant's inability or refusal to acknowledge the seriousness of his actions is a valid consideration in determining the propriety of the penalty. Finally, the grievant's employment history with WEH has been less than exemplary and provides no basis for mitigating the punishment imposed. See, n.3.

In addition to the foregoing, the following findings of fact and conclusions of law are made.

FINDINGS OF FACT

1) The grievant was employed by the Department of Health and Human Resources as a radiology technician at Welch Emergency Hospital for approximately three years prior to his dismissal.

2) On the morning of May 1, 1994, patients in need of emergency medical care arrived at the hospital. The attending physician ordered immediate x-rays of at least one patient. The grievant, the only radiology technician on duty at the hospital at that time, could not immediately be located and he did not respond to pages over the hospital's intercom system.

3) The grievant was eventually discovered in a room used to administer ultrasound procedures conducting such a test on a relative. The relative had not been admitted to the hospital. The grievant

did not have authorization to perform the procedure and it had not been ordered by a physician.

4) The grievant was told to report to the x-ray department but responded that he would do so when he "was finished" in theultrasound room. He eventually reported and completed the required x-rays. Between twenty and forty minutes elapsed from the time the doctor ordered the x-rays and the time the grievant reported.

5) During subsequent discussions with Administrator Steve Shride, the grievant conceded that he was performing a "procedure" on the relative and asserted that, since he was on break during the time in issue and had not heard several pages, he had committed no wrong in failing to report to the emergency room.

6) Mr. Shride determined that the grievant had committed several serious violations of hospital policy. The grievant was dismissed effective June 10, 1994.

CONCLUSIONS OF LAW

1) HHR has proven by a preponderance of the evidence that the grievant committed the violations of hospital policy with which he was charged.

2) HHR has also demonstrated that the grievant's misconduct directly affected the rights and interests of patients of Welch Emergency Hospital and that the punishment imposed was consistent with its personnel policies governing such actions.

3) An allegation that a particular disciplinary measure is disproportionate to the offense proven or otherwise arbitrary and capricious is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was "clearly excessive or reflects an abuse of agency discretion or an inherent disproportion between the offense and the personnel action." Martin v. W.Va.State Fire Commission, Docket No. 89-SFC-145 (Aug. 8, 1989). The grievant herein has failed to meet that burden.

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 Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and

provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JERRY A. WRIGHT

CHIEF ADMINISTRATIVE LAW JUDGE

January 20, 1995

Footnote: 1*The grievant appeared pro se and the employer appeared by George Surmaitis, Assistant Attorney General. At the conclusion of the hearing, the undersigned ruled that HHR had proven the charges against the grievant by a preponderance of the evidence and advised the grievant that he could submit written legal argument on the issue of the propriety of the punishment imposed and the agency would be given an opportunity to provide rebuttal. The grievant indicated that he would retain an attorney for that purpose. Although he was given until August 22, 1994 to submit argument, none was received.*

Footnote: 2*In response to questions posed by HHR counsel, Mr. Burroughs recounted that several months prior to May 1, 1994, he had gone to the ultrasound room and discovered the grievant conducting what appeared to be an ultrasound test on a pregnant female. Mr. Burroughs explained that he suspected that the test was unauthorized but, because he was not sure, he did not report the incident to hospital administrators. The undersigned cautioned counsel that since this incident was not referenced in the dismissal it should not be further explored. Counsel responded that the grievant, by contending in his opening remarks, that the punishment levied was too harsh and in violation of HHR's personnel policies, had raised the issue of his past work history at WEH. The undersigned agrees that the evidence related to the prior incident is relevant to the issue of whether the grievant's workhistory was such that a lesser penalty was in order and has assigned it weight only to that extent.*

Also, it is noted that the grievant, during his cross-examination of agency witnesses, elicited testimony concerning several other incidents in which his conduct was at least questionable, including events in March, 1993 which caused his supervisor to give him a verbal warning. This evidence has also been reviewed solely for the purpose of determining whether the grievant's work history at the hospital warrants consideration on the question of mitigation of the punishment imposed.

Footnote: 3*The hospital eventually attempted to transfer the patient to Charleston Area Medical Center but weather would not permit. The record does not reflect whether she was ever transferred.*

Footnote: 4*It is noted that Mr. Shride's recitation of the sequence of events differs slightly with the evidence presented. Mr. Burroughs testified that he and Dr. Tepoel were together as they approached the ultrasound room and that he was preparing to use a key to the room when the grievant opened the door. These variances, however, are deemed*

insignificant in that they relate only to the manner in which the grievant was discovered and not to the charges underlying the dismissal.

Footnote: 5*HHR Policy Memorandum 2102 provides:*

> *Employees will be allowed two break periods of 15 minutes duration each during each 8 hour workday. One break period should be scheduled prior to the meal period and the other after the meal period. Break periods for employees should be scheduled in such a manner as to ensure the effective continuation of agency operations. Break periods are regarded as compensable work time.*