THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MARILYN WALKER,

Grievant,

v. **Docket No. 2009-1473-DHHR**

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES/ PINECREST HOSPITAL,

Respondent.

DECISION

Marilyn Walker, Grievant, was employed as a certified nursing assistant at Pinecrest Hospital ("Pinecrest") operated by the West Virginia Department of Health and Human Resources ("DHHR"). On April 20, 2009, Ms. Walker filed a grievance contesting her dismissal from employment. As relief she seeks to be reinstated to her job with back pay, interest and all benefits appurtenant thereto. Additionally, Grievant requests to be made whole. Because her grievance was contesting a dismissal Grievant elected to file it directly to level three of the Public Employees Grievance Procedure.[1] A level three hearing was held in Beckley, West Virginia on October 14, 2009. Grievant was present at the hearing and was represented by Gordon J. Simmons, UE Local 170, WVPWU.[2] Respondent DHHR was represented by Jennifer K. Akers, Assistant Attorney General. At the conclusion of the hearing the parties elected to present written Proposed Findings of Fact and Conclusions of Law, the last of which was received at the West Virginia Public

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[1] *See* W. VA. CODE § 6C-2-4 (a) (4).

[2] West Virginia Public Workers Union.

Employees Grievance Board on November 20, 2009. This grievance became mature for decision on that date.

Synopsis

A co-worker accused Grievant of abusing a patient by moving the patient from a chair to a bed without the assistance of a mechanical lifting device. Pinecrest is required by law to report all allegations of abuse by a staff member to the DHHR Office of Health Facility License and Certification ("OHFLAC"). Such a report was made as soon as the abuse allegation was received by Pinecrest. Pinecrest investigated the incident and decided that no disciplinary action needed to be taken. OHFLAC conducted an independent investigation and found that Grievant was guilty of patient neglect and subsequently placed Grievant on the West Virginia Nurse Aide Abuse Registry ("Registry"). Pinecrest is prohibited from employing a nursing assistant who has been placed on the Registry. Consequently, Grievant's employment with Pinecrest was terminated. Respondent proved that Grievant's dismissal was justified and the grievance is denied.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant has been a Registered Nursing Assistant since August 1990. She was working at Pinecrest in that capacity in 2007. Grievant was classified as a Health Service Worker by the DHHR and the Division of Personnel.

2. Pinecrest is a long-term care nursing and assisted living facility operated by the DHHR.

3. Pinecrest has a "no lift" policy which prohibits employees from lifting patients without the assistance of a mechanical lifting device.

4. On September 28, 2007, Grievant's co-worker, Judy Wooley, made an allegation that she believed Grievant had abused a patient by lifting the patient without the use of a lift device.

5. Long-term care facilities, like Pinecrest, are required to report all allegations of abuse or neglect of residents to the OHFLAC Nurse Aide Abuse Registry.[3]

6. OHFLAC is the agency responsible for oversight of the Nurse Aide Program. This program oversees the Nurse Aide training and competency evaluation programs and maintains the Registry. The Registry contains the names of Nursing Assistants who have admitted or have been adjudicated to have abused, neglected or misappropriated the property of residents of a facility.

7. Angela Booker, Pinecrest Chief Operating Officer ("CEO"), reported the allegation of abuse against Grievant to the Registry as required. The written report of the allegation was faxed to OHFLAC which stated the following:

> Employee was noted to be lifting resident in her arms (cradling her) without the lift. Was stated that [Grievant] was not rough with the patient when she moved [the patient] from the chair to the bed, but [the co-worker] felt that it was abuse.

Grievant's Exhibit 1 (Nurse Aide Registry Reporting Form).

8. Pinecrest conducted an investigation of the allegation of patient abuse against Grievant. The conclusion of the investigation was that no injury occurred to the patient as a result of the action taken by Grievant and no disciplinary action was

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[3] *See* 69 C.S.R. 6 § 3.3.a

necessary.

9. On October 3, 2007, Pinecrest faxed to OHFLAC a Five Day Follow-Up Report regarding the allegation of abuse.[4] The Follow-Up Report stated the following:

> After interviewing Marilyn, it was determined that she lifted [the patient] without utilizing a lift. However, there was no negative outcome as a result of the health service worker manually lifting the recipient. Marilyn has been educated about this facility having a no lift policy.

Grievant's Exhibit 2

10. In 2008, OHFLAC conducted an independent investigation of the allegation against Grievant. Grievant was notified by letter dated August 5, 2008, that it found she had neglected a patient. Unless Grievant requested a hearing appealing the finding, her name would be placed on the Nursing Assistant Abuse Registry.

11. Grievant requested a hearing appealing the finding of neglect. A hearing was held in the matter on November 19, 2008.[5]

12. The hearing examiner found in her Proposed Findings of Fact and Conclusions of Law that Grievant had lifted a patient in violation of the no-lift policy, and had thereby, neglected that patient.

13. On April 7, 2009, Martha Walker, DHHR Cabinet Secretary, issued a Final Administrative Order placing Grievant's name on the Registry as a result of the finding of patient neglect.

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[4] A Follow-Up Report is required to be forwarded to OHFLAC within five days of the initial report of abuse or neglect. *See* 69 C.S.R. 6 § 3.2.d.

[5] A transcript of the OHFLAC hearing was admitted at the level three hearing as Grievant's Exhibit 4.

14. CEO Booker was informed of Secretary Walker's Order by letter on April 8, 2009.[6] CEO Booker called Grievant and informed her of the issuance of the ORDER and that she had no choice but to place Grievant on suspension while Booker investigated the issue.

15. CEO Booker ran a search of the Registry database and found that Grievant's name had been placed on the Registry. It is noted on the Registry that Grievant's name was listed effective May 7, 2009, and that Grievant "cannot be employed in a certified nursing, assisted living or behavioral health facility in West Virginia." Respondent's Exhibit 6.

16. Grievant and CEO Booker met for a predetermination meeting and by letter dated April 15, 2009, CEO Booker informed Grievant that she was dismissed from employment with Pinecrest effective May 1, 2009. The sole reason for Grievant's dismissal was that Grievant was listed on the Registry and Pinecrest is prohibited by state and federal regulations from employing a Nursing Assistant who is listed on the Registry.

17. CEO Booker had worked with Grievant at a different medical facility and at Pinecrest. She stated that Grievant was a good employee and that she would be happy to employee her at Pinecrest when Grievant's name was removed from the Registry.

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

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[6] Respondent's Exhibit 3 is a copy of the same letter received by CEO Booker on April 8, 2009. The copy entered as an exhibit was addressed to Grievant's representative. At the bottom of the exhibit it is noted that a copy of the letter was sent to CEO Booker.

preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *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).

The relevant facts in this grievance are not in dispute. Grievant manually lifted a patient from a chair to her bed in September 2007. A co-worker reported Grievant's action and alleged that Grievant had abused the patient. Pinecrest was required by DHHR Legislative Rules to report this allegation to OHFLAC. The specific rule states:

> When allegations of abuse [or] neglect . . . have been reported to a facility, the facility shall immediately complete and fax an Immediate Fax Report of Allegations (OHFLAC Form 225) to the Nurse Aide Program within twenty-four (24) hours.

69 C.S.R. 6 § 3.2.a. Once this report was made, OHFLAC was responsible for conducting an independent investigation into the allegation. 69 C.S.R. 6 § 4. If the employee is found to have committed abuse or neglect of a patient, OHFLAC places the employee's name on the Registry. 69 C.S.R. §§ 4, 5 & 6. This process is conducted solely by OHFLAC and Pinecrest's only role is to provide whatever information is requested by OHFLAC in their investigation. There is an appeal process available to the employee to contest negative

findings by OHFLAC which includes an appeal to circuit court.[7]

In their investigation, Pinecrest found that Grievant had lifted the patient manually but no harm was suffered by that patient and no discipline was necessary. If it had been left up to Pinecrest, Grievant would still be employed at the facility.[8] Unfortunately, for all concerned in this matter, OHFLAC independently found that Grievant's actions constituted neglect and listed her name on the Registry.[9] Federal regulations prohibit Pinecrest from employing Grievant if she is listed on the Registry. The specific rule states:

> c) *Staff treatment of residents.* The facility must develop and implement written policies and procedures that prohibit mistreatment, neglect, and abuse of residents and misappropriation of resident property.
>
> (1) The facility must—
>
> (ii) Not employ individuals who have been—
>
> (A) Found guilty of abusing, neglecting, or mistreating residents by a court of law; or
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> (B) Have had a finding entered into the State nurse aide registry concerning abuse, neglect, mistreatment of residents or misappropriation of their property; . . .

42 C.F.R. § 483.13. Consequently, once Pinecrest was notified that Grievant had been listed on the Registry for patient neglect, it was legally obligated to terminate her employment at the facility.

Grievant submitted testimony related to the unavailability of mechanical lifts at Pinecrest and Grievant's good employment record. Additionally, everyone agreed that Grievant was very gentle with the patient and she did not suffer in any way from Grievant's

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[7] Grievant has availed herself of the appeal process to contest the OHFLAC decision to place her name on the Registry.

[8] *See* Findings of Fact 8 & 17 *supra*.

[9] *See* Grievant's Exhibit 4 and Respondent's Exhibit 6.

actions. These facts were certainly considered when Pinecrest made its investigation and determined not to discipline Grievant. However, these matters are not relevant to the termination of Grievant's employment. The sole reason Pinecrest dismissed Grievant was that her name was listed on the Registry. Once that took place, Pinecrest was obligated to release Grievant from employment. Respondent has proven by a preponderance of the evidence that the disciplinary action taken against Grievant was justified and the grievance must be DENIED.

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 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). 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).

2. OHFLAC is charged with maintaining a registry of individuals who have completed approved training and competency program for long-term care nursing assistants. OHFLAC must also maintain an Abuse Registry containing names of registered long-term care nursing aides/assistants found to have committed acts of neglect of patients'/residents' property. 42 C.F.R. § 483.156(a) (b) (c) (d).

3. Pinecrest was required by DHHR Legislative Rules to report the allegation that Grievant had abused a patient to OHFLAC. 69 C.S.R. 6 § 3.2.a.

4. Once the report of an allegation of abuse was made, OHFLAC was

responsible for conducting an independent investigation into the allegation. 69 C.S.R. 6 § 4. If the employee is found to have committed abuse or neglect of a patient OHFLAC places the employee's name on the Registry. 69 C.S.R. §§ 4, 5 & 6.

5. Federal regulations prohibit Pinecrest from employing Grievant while she is listed on the Nursing Assistant Abuse Registry. 42 C.F.R. § 483.13.

6. Since Grievant was placed on the Registry by OHFLAC, Pinecrest proved by a preponderance that the dismissal of Grievant from employment was justified and required by law.

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: FEBRUARY 10, 2010

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE