THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

AMY SIMPSON,
Grievant,

v. **Docket No. 2013-0842-DVA**

DEPARTMENT OF VETERANS ASSISTANCE,
Respondent.

DECISION

Grievant, Amy Simpson, was employed as a Health Service Worker for the Department of Veterans Assistance at the Veterans Nursing Facility in Clarksburg, West Virginia. On December 1, 2012, she filed this grievance asserting she was unjustly terminated, and the allegations of patient neglect were untrue. She seeks as relief to be reinstated to her job with back pay and benefits restored.

As this grievance concerned a termination, Grievant filed directly to level three following her dismissal. W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held before the undersigned Administrative Law Judge on July 29, 2013, at the Grievance Board's office in Westover, West Virginia. Grievant appeared in person and by her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, Jennifer S. Greenlief, Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on September 11, 2013.

Synopsis

Grievant was dismissed from her employment by Respondent for patient neglect. Respondent demonstrated that Grievant did not provide proper care for three of the residents to whom she was assigned on one shift, and that this constituted good cause for dismissal.

The following findings of fact are based upon the record developed at level three.

Findings of Fact

1. Grievant was employed as a Health Service Worker ("HSW"), also referred to as a Certified Nurses' Aide ("CNA"), at the West Virginia Veterans Nursing Home, a long-term resident facility operated by the West Virginia Department of Veterans Assistance.

2. On November 7, 2013, Grievant was scheduled to work the day shift, which ran from 7:00 a.m. to 3:00 p.m. She was assigned to care for residents on the front hall of the first floor of the facility.

3. Near the end of the day shift, another HSW found one of Grievant's residents still lying in bed, when he should have been up and out of bed by that time. In addition, a HSW found that another resident had not been changed, his briefs were wet, and he had soiled his bed. Both residents were the responsibility of Grievant.

4. The HSW reported this to her supervisor, Cindy Yocum, Licensed Practical Nurse, who then asked her and two other HSWs to check on Grievant's other residents. They then found other residents for whom Grievant was responsible in a neglected condition. One resident was found to have dried bowel matter in his briefs, and was trying

to clean himself. One resident was found with briefs saturated with urine. The other residents were found to still be lying in bed, although Grievant should have gotten them out of bed earlier.

5. Grievant was also responsible for serving lunch to her residents; however, one of those residents was never offered his lunch tray. Respondent determined that Grievant had neglected her residents by not providing required care, such as checking on them every two hours to change briefs and offering them food at meal times.

6. During a predetermination meeting with management, Grievant stated that she asked for help on several occasions on the day in question, but could not find anyone to help her. Grievant denied the allegation that she had not offered a resident his lunch tray. Grievant did not deny that she had not cared for the residents, but claimed that she would have cared for them if she had received assistance.

7. Grievant acknowledged that the floor was fully staffed, and that there were other employees whom she did not ask for help. Nurse Yocum indicated that Grievant did not ask for any help, in fact she was offered help several different times throughout the day, but said she did not need any help.

8. Dr. Kevin Crickard decided to discharge Grievant from employment for gross resident neglect. This was communicated to Grievant by letter dated November 26, 2012, in which he explained that three separate collaborating witnesses confirmed that Grievant had left at least three veteran residents unattended.

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

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 Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, [175 W. Va. 279, ___,] 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir./W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994).

The record of this grievance supported the allegations of neglect against Grievant and established the requisite misconduct of a substantial nature affecting the rights and interest of the nursing facility residents. Multiple witnesses testified to the poor condition in which Grievant's residents were found on November 7, 2012. Three residents were

found having not been properly attended, including one resident who had dried feces on him, and another resident in briefs that were soaked through with urine.

Grievant did not dispute that her residents had not been cared for properly, but she did explain that she tried to find help, but was unable to find anyone. Dr. Crickard considered this explanation and determined that it was unsupported by the facts of the incident and not plausible. On the day in question, there were three HSWs and two Licensed Practical Nurses working that area and taking care of thirty-one residents. None of those employees indicated that Grievant requested any type of help. Dr. Crickard was correct in his conclusion that Grievant's excuses were not plausible.

The record also supports a finding that one of Grievant's assigned residents was not properly offered his lunch tray. At meal times, residents are to be presented with their trays. In order to do that, the trays must be removed from the retherm, in which they are transported from the kitchen. After a tray is presented to a resident, it cannot be returned to the retherm because doing so would contaminate an otherwise relatively sterile environment. Grievant stated that she removed the resident's tray from the retherm and placed it in front of the resident. However, the record of the case confirmed that the resident's lunch tray was still in the retherm. Hence, the lunch tray was either not offered to the resident, or was improperly returned to the retherm after being removed. Respondent was correct to conclude that, in either case, Grievant engaged in misconduct with respect to one or more residents. Respondent demonstrated that Grievant's failure to perform the duties of her position during this one shift were so egregious that it constituted good cause for dismissal.

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

2. 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 Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989). "The judicial standard in West Virginia requires that 'dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.' Syl. Pt. 2, *Buskirk v. Civil Service Comm'n*, [175 W. Va. 279, ___,] 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir./W. Va. State College*, Docket No. 93-BOD-436 (Dec. 30, 1994).

3. Respondent proved the charges against Grievant, and demonstrated good cause for her dismissal.

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 (2008).

Date: October 17, 2013

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Ronald L. Reece
Administrative Law Judge