WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SARA VAN METER,
Grievant,

v. **Docket No. 2012-0405-DHHR**

DEPARTMENT OF HEALTH
AND HUMAN RESOURCES/
LAKIN HOSPITAL,
Respondent.

DECISION

Grievant, Sara Van Meter, was employed by Respondent, Department of Health and Human Resources ("DHHR"), as a Licensed Practical Nurse ("LPN") at Lakin Hospital ("Hospital"). Ms. Van Meter filed a level three[1] grievance form dated October 12, 2011, alleging that her employment had been "terminated without good cause." As relief, Grievant sought "[t]o be made whole, including back pay with interest & all benefits restored."

A level three hearing was conducted over the course of three days: May 30, 2012, August 27, 2012, and May 20, 2013. All three days of hearing were held in the Charleston office of the West Virginia Public Employees Grievance Board. Grievant appeared with her representative, Cassy Lee, UE Local 170, West Virginia Public Workers Union, on all three days. Grievant was also represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union, on the third day. Respondent was represented by Anne Ellison, Assistant Attorney General, on the first two days, and B. Allen Campbell, Supervising Senior Assistant Attorney General, was substituted as counsel for Respondent for the third day of hearing. The parties submitted Proposed

[1] Pursuant to 6C-2-4(a)(4) an employee may file a grievance directly at level three to contest the termination of her employment.

Findings of Fact and Conclusions of Law, the last of which was received at the West Virginia Public Employees Grievance Board on July 23, 2013. This matter became mature for decision on that date.

Synopsis

Respondent dismissed Grievant for failing to administer medication to a large number of residents under her care during a single shift at the Hospital. Grievant insisted that she administered the medications. Respondent proved by a preponderance of the evidence that Grievant violated Hospital policy and failed to administer medication to medically and mentally fragile residents under her care.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant, Sara Van Meter, was employed by Respondent, DHHR, as an LPN at Lakin Hospital.

2. Lakin Hospital provides long-term nursing care and services to residents who have special placement needs due to behavioral, developmental, or other complex problems. The residents tend to be elderly and are unable to care for themselves. Many of the residents are not ambulatory and are extremely reliant upon the staff to meet their daily needs.

3. Nearly all the residents at Lakin Hospital receive a variety of medications. The Hospital has a procedure in place for the safe administration of medications to the residents by the staff. The procedure is titled “Guidelines for Safe Medication Administration” (Policy Number L. 309–29). The medications for all of the residents in a

particular section of the hospital are gathered and placed on a medication cart. A nurse then goes from patient to patient administering the medicines until all of the medication for that particular time period are given. This is known as a med pass. There may be more than one med pass for each shift.

4. The LPN is supposed to scan each medication into the computer just before he or she gives it to the resident so there is a record of what medication was given to each patient and at what time.[2] Many of the residents are unable or unwilling to swallow pills. For those patients, the LPN must crush the pill and mix it with food[3] so the patient can eat it. This adds to the time it takes for each med pass.

5. On or about September 14, 2011, LPN Pat Riley was working the midnight shift at Lakin Hospital on C Wing. Between 3 and 4 a.m. LPN Riley was emptying the trash on C Wing North,[4] and found a controlled drug card on which a resident's name was visible. The residents' names must be marked out on cards that are being thrown away to avoid violations of the resident's right to privacy.[5] When Ms. Riley removed the card to redact the resident's name, she noticed that there were a number of pill containers in the garbage bag still containing medication. She found that the medications were not expired and they matched the medications that are normally distributed to residents during the 9 p.m. med pass. LPN Riley returned the pills to the bag and reported what she had found to her supervisor, Sheri McGinnis. Ms. Riley and

[2] While this procedure is required by the medication administration policy, when asked, some of the nurses admitted that, to save time, they sometimes scan all the medications at the beginning of the med pass rather than as each pill is distributed.
[3] Often Jello or pudding.
[4] C Wing residents are separated into two groups, C North and C West.
[5] These rights are specifically set out in HIPPA (Health Insurance Portability and Accountability Act).

Ms. Guinness then performed the med passes for their shift and reported what they had found to the Director of Nursing and the Hospital Chief Executive Officer.

6. Grievant worked the 3-11 shift on C Wing, immediately before LPN Riley's shift, and was responsible for the 9 p.m. med pass on C Wing North. That was the last med pass that occurred prior to LPN Riley finding the medication in the trash bag.

7. Linda Dailey was the Chief Executive Officer ("CEO") at Lakin Hospital at the time of this incident. When she was made aware that the medications had been found in the trash she began conducting an investigation. The first step she took was to have an inventory conducted of the medications found in the trash and have them compared with the medication administration reports. She assigned this task to the Assistant Director of Nursing ("ADN"), Vicky Berkley.

8. ADN Berkley created a log of the thirty-five medications found in the trash container along with their quantity and dosage strength. Respondent's Exhibit 14. These medications included antipsychotics, anti-seizure, blood pressure, and anti-anxiety medications. Respondent's Exhibit 15.

9. ADN Berkley then made a list of the medications due each patient for the 9 p.m. med pass. Respondent's Exhibit 16. She noted that she did not discover any narcotics among the discarded medications and concluded that those medications must have been administered. Other medications, e.g., insulin, are not tracked because individual doses are taken from a single bottle. The comparison between the medications found in the medications to be administered at the 9 p.m. med pass for this unit indicated that it is more likely than not that the medications discarded were part of

the 9 p.m. med pass meaning that several residents did not get their prescribed medication at that time.

10. Only one of the residents on that unit is capable of responding reliably to the inquiry as to whether or not he received his medications. That patient was interviewed and indicated that he did receive his 9 p.m. medications. The other patients could not be reliably interviewed because of their diminished mental capacity.

11. ADN Berkley checked the computer to see when the medications for the 9 p.m. med pass were scanned into the computer. One medication was scanned at 8:01 p.m. and the rest were scanned between 8:21 and 8:36 p.m. indicating that the medications were pulled and scanned at one time. Respondent's Exhibit 9.

12. A number of the residents on C North need to have medications crushed which takes more time for delivery. Nurses were interviewed regarding the amount of time it took to make a med pass in C North. The responses varied, but no one indicated that med pass could be completed in less than forty-five minutes. When interviewed, Grievant indicated that the least amount of time it took her to do the C North med pass was thirty minutes.

13. For safety purposes, video cameras had been placed in the halls of the facility. CEO Dailey had the videos reviewed for the 3 to 11 p.m. shift on September 14, 2011. Screenshots from the video camera indicated when Grievant left the unit and returned to the unit during that shift. Respondent's Exhibit 25. The video indicates that Grievant was off the unit for three hours during her eight hour shift. The medications for the 9 o'clock med pass are to be distributed between 8:00 p.m. and 10 p.m. Grievant took the med cart to the med room on C North, but did not begin her pass at 8:00 p.m.

The videos indicate Grievant left the unit at 8:06 p.m. and returned at 8:21 p.m. Grievant scanned the medications for the med pass into the computer between 8:21 p.m. and 8:36 p.m.[6] Grievant then left the unit at 8:41 p.m. and did not return until 10 p.m. Grievant admitted that she gave the 9 p.m. medications to two residents at 5:30 p.m. It is more likely than not, Grievant did not administer the 9 p.m. med pass to the majority of the residents on C North on September 14, 2011.

14. CEO Dailey interviewed a number of nurses in management staff in an effort to find an alternative reason for the medications to be in the trash at the beginning of the shift on September 14, 2011. The only alternative explanation was that the medications may have expired and thus, needed to be thrown away. However, the dates on all of the medications indicated that they were not expired. CEO Dailey asked medical professionals if blood tests would tell whether the residents received their nine o'clock medications. She was told that the medications build up in the resident's bloodstream over time. Therefore, missing a single dose would not likely show up in a blood test.

Discussion

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008).

> . . . *See Watkins, supra, 229 W.Va. at _, 729 S.E.2d at 833* (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education,* 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly

[6] *See* Finding of Fact 11, *supra.*

> stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). *See also Hovermale v. Berkeley Springs Moose Lodge,* 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) ("Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence."). . .

Litten v. W. Va. Dep't of Trans., Div. of Highways, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision).

Grievant, as a permanent state employee in the classified service, could 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). *See also Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004)(*per curiam*). "*Oakes v. W.Va. Dept. of Finance and Administration*, *supra*, requires that a violation sufficient to support a dismissal be of a substantial nature and that if it involves a violation of a statute or official duty, it must be done with wrongful intent." *Serreno v. West Va. Civil Serv. Comm'n*, 169 W. Va. 111, 115, 285 S.E.2d 899, 902 (1982) (*per curiam*). "'Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. West Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988).

Respondent terminated Grievant's employment for failing to administer medications to the residents of C North during the 9 p.m. med pass on September 14,

2011, and for spending excessive time off the unit during that shift. Grievant denies that she failed to administer the medication to the residents. There can be little doubt the failure to administrator required medications to this medically fragile population of residents would not only constitute a serious violation of the agency's "Guidelines for Safe Medication Administration," but would also constitute "misconduct of a substantial nature directly affecting the rights and interest of the public," and would constitute good cause for dismissal. *Oakes, supra.*

There is no indisputable evidence in this matter. Nobody saw Grievant administer the medication, nor throw the medication away. Sadly, because these residents do not have enough mental acuity, they could not state whether they received the medicine or not. However, the circumstantial evidence is inescapable. Grievant was clearly responsible for making the 9 o'clock med pass on September 14, 2011. The med pass was to be made between 8 p.m. and 10 p.m. The video evidence clearly shows that Grievant could not have administered the medication during that time. Additionally, the medications found in the trash can at the beginning of the next shift were consistent with the medication that should have been distributed at the 9 p.m. med pass for C North.

Grievant admits that she violated the Safe Medication Administration policy by scanning all of the medications for the 9 o'clock med pass into the computer at one time rather than scanning them as they were distributed to each patient. She also admits that she took excessive breaks away from the unit on September 14, 2011. However, she consistently denied that she failed to administer the medications for the 9 p.m. med pass and put them in the trash. The Grievance Board has applied the following factors to assess a witness's testimony: (1) demeanor; (2) opportunity or capacity to perceive

and communicate; (3) reputation for honesty; (4) attitude toward the action; and (5) admission of untruthfulness. Additionally, the administrative law judge should consider (1) the presence or absence of bias, interest or motive; (2) the consistency of prior statements; (3) the existence or nonexistence of any fact testified to by the witness; and (4) the plausibility of the witness' information. *See Gramlich v. Div. of Motor Vehicles,* Docket No. 2010-0929-DOT (June 14, 2010); *Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth.,* Docket No. 2009-1588-DOT (Dec. 1, 2009); *Elliott v. Div. of Juvenile Serv.,* Docket No. 2008-1510-MAPS (Aug. 28, 2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD- 216 (Dec. 28, 1999).

When Grievant was initially interviewed by CEO Dailey, she denied scanning the medications at one time and stated that she administered the medications pursuant to policy. She also indicated that it took her over an hour to make the 9 p.m. med pass. During the next interview, when faced with evidence to the contrary, Grievant conceded scanning all the medicine prior to distributing it and indicated that the med pass took only thirty minutes. Additionally, the video evidence clearly demonstrates that Grievant could not have administered the med pass between 8 p.m. and 10 p.m. as required. Grievant's account is simply not consistent with the evidence presented in this matter.

Finally, Grievant presented a decision from the West Virginia State Board of Examiners for Licensed Practical Nurses which held that "no probable cause exists to substantiate disqualification from the practice of licensed practical nursing order restrictive license to practice practical nursing of Sara E. Van Meter for reasons set out in West Virginia Code 30-7A-1 *et seq*. nor in the Legislative Rules lawfully promulgated thereunder." Grievant's Exhibit 1. This decision was rendered but for a different body,

with different statutory jurisdiction, pursuant to a different record, and a different standard. It is given no weight in this matter. *See generally, Vest v. Board of Education of the County of Nicholas*, 193 W. Va. 222, 455 S.E.2d 781 (1995).

Ultimately, Respondent proved by a preponderance of the evidence, that it was more likely than not, that Grievant failed to administer prescribed medication to residents in her care in violation of the Hospital's Guidelines for Safe Medication Administration" (Policy Number L. 309–29). Under these circumstances the termination of Grievant's employment was justified. Accordingly, the grievance is DENIED.

Conclusions of Law

1. As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008).

> . . . *See Watkins, supra, 229 W.Va. at _, 729 S.E.2d at 833* (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education,* 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.). *See also Hovermale v. Berkeley Springs Moose Lodge,* 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) ("Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence."). . .

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2. Grievant, as a permanent state employee in the classified service, could 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). *See also Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004) (*per curiam*).

3. Respondent proved by a preponderance of the evidence that Grievant violated the agency's "Guidelines for Safe Medication Administration," in such a serious way that it constituted "misconduct of a substantial nature directly affecting the rights and interest of the public," justifying termination of her employment. *Oakes, supra.*

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: SEPTEMBER 4, 2013.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE