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BERNESE SAUCHUCK

v.

Docket No. 90-H-174

WEST VIRGINIA DIVISION OF HEALTH/PINECREST HOSPITAL

DECISION

Grievant, Bernese Sauchuck, was employed by Pinecrest Hospital as Patient Advocate until October 24, 1989, when she was reassigned to the position of LPN II. She initiated a grievance at Level I February 9, 1990, protesting that reassignment. The matter was waived to Level III where a hearing was held April 3, 1990. An April 25, 1990, decision by Raymona Kinneberg, Deputy Secretary for the Division of Health and Human Resources (Division), denied the grievance on the grounds that it was not timely filed. Appeal to Level IV was made May 10, 1990, where a hearing was held June 27, 1990. The parties submitted proposed findings of fact and conclusions of law by September 25, 1990.

Grievant has been employed at Pinecrest since 1969, when she was first hired as an LPN. She served in that capacity until June 1, 1988, when she was appointed to the Patient Advocate position. Her official West Virginia Division of Personnel (Personnel) classification remained at LPN II and no increase or decrease in salary was made. As Advocate she was essentially

assigned ombudsman duties in the hospital. She reported directly to Mr. Jack McVey, Administrator of Pinecrest. In August 1989, licensing officials within the Division conducted a review of the facility and issued a September 1, 1989, "Statement of Deficiencies and Plan of Correction" which detailed numerous and serious problems with the delivery of services, treatment of patients and record-keeping at the hospital.¹ Mr. McVey was required to and did submit, within ten days, a detailed plan as to how each deficiency would be corrected. Shortly thereafter, he made certain reassignments of personnel aimed at carrying out his plan. On October 24, 1989, the grievant was informed by Ms. Linda Leffel, another LPN, that she and the grievant would be monitoring some of the hospital's efforts to comply. She immediately reported to Mr. McVey and asked that he allow her to remain in the advocate position. A discussion ensued over the gravity of the review and he refused to reconsider. Grievant was then given a memorandum dated October 23, 1989, in which he memorialized her new assignment. Grievant then became ill, exited Mr. McVey's office and was examined by a nurse who reported that her blood pressure was extremely high. It was later determined, upon examination by a physician, that she had suffered a heart attack. She did not again report to work until

¹It is not clear from the record whether the review was a regularly-scheduled one or was made as the result of complaints. It appears that it may have been conducted as the result of earlier deficiencies discovered at the Colin-Anderson Center, a state hospital in St. Marys.

February 1, 1990. In an October 27, 1989, memorandum, Mr. McVey explained to the hospital staff that grievant's assignment to LPN duties would remain in effect until December 31, 1989, when he would re-evaluate that assignment. The memorandum also informed staff that Pinecrest's social worker would assume the duties of the advocate position. As previously noted, the grievance was initiated February 9, 1990. In an April 6, 1990 memorandum, Mr. McVey informed Ms. Elsie McCray, Director of Nursing, that, "Effective this date Bernese Sauchuck, Licensed Practical Nurse II, is assigned to the Department of Nursing."

Grievant maintains her reassignment was made in violation of certain regulations of Personnel and was arbitrary and capricious. The hospital contends the action was in compliance with all pertinent regulations and was taken solely for the purpose of correcting deficiencies in the Division's review report. The Hospital further asserts that the grievance was not timely filed.

The Hospital's assertions regarding the timeliness of the grievance are not supported by the evidence in the case. It is clear from the testimony of the grievant and Mr. McVey and his October 27, 1989, memorandum that the reassignment was to be only temporary pending compliance with the deficiency report. It is also clear that the grievant was extremely displeased with the idea of a temporary reassignment and could have grieved it at the time it was imposed if she wished. The assignment was, however, temporary and therefore, could have been grieved as a continuing practice pursuant to W.Va. Code §29-6A-4(a). The grievance was therefore timely filed.

Whether or not grievant's continuing and eventually permanent reassignment was proper is the more difficult question. The parties agree that the pertinent Personnel regulations in effect at the time provide:

Except as otherwise provided in Section 11.5 of these rules, a transfer of an employee from a position in one organizational subdivision of an agency to a position in the same or comparable class in another organizational subdivision of the same or another agency may be made at any time by the appointing authorities concerned. In the case of interagency transfers, annual and sick leave and all seniority rights shall be transferred with the employee.

While these specific regulations were not addressed therein, it was recognized in Crow v. West Virginia Department of Corrections, Docket No. 89-CORR-116 (June 30, 1989), that state agencies generally have wide discretion when assigning employees to jobs within their classifications but that the discretion should be exercised in a manner which is not arbitrary or capricious. Here, the motivation for the contested reassignment, as explained by Mr. McVey, was the rather emergent need to correct deficiencies in the Hospital's operations and the cumbersome and time-consuming procedures for obtaining new nurses through Personnel. It was grievant's un rebutted testimony that, during her absence, three new nurses were hired at the Hospital. It was also her uncontested testimony that she was assigned routine filing tasks upon her return to work in February. Given this additional staff and grievant's assignment to filing tasks, it must be concluded that the crisis caused by the review had either been solved or brought under some semblance of control by the time she had returned to work. The reason for the reassignment, therefore, no

longer existed. The Hospital articulated no other motivation for making the assignment permanent and it is concluded that none existed and it was an action taken in an arbitrary and capricious manner.

Moreover, despite a finding that the Hospital transferred grievant in such a fashion, the Personnel policy set out above would preclude the action. Obviously, the grievant was not being moved to a position "in the same or comparable class" when she was forced to give up her advocate position for a nursing job. While little evidence was presented concerning the duties of the two positions, there was enough adduced to establish that they were very different. Indeed, they were only alike to the extent that the advocate might be required to have some basic knowledge of nursing in order to spot deficiencies in nursing care and recommend certain corrections. As evidenced by the assignment of advocate duties to a social worker, the position required no licensure or experience in nursing.

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

FINDINGS OF FACT

1. Grievant was employed by Pinecrest Hospital as a Patient Advocate from June 1, 1988 until October 24, 1989, when she was relieved of that position and assigned LPN responsibilities. The reason given for the move was the immediate need to correct deficiencies noted in a licensing review of the facility.

2. Additional nursing staff was added to the Hospital from October 24, 1989 to February 1, 1990, yet grievant was not returned to the advocate position. Grievant was officially notified of her permanent assignment to LPN duties on April 6, 1990, but was effectively so assigned when she returned to work on February 1, 1990.

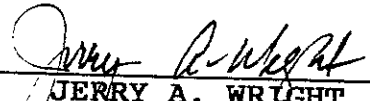
CONCLUSIONS OF LAW

1. State agencies have wide discretion in the transfer of employees to positions which are the same or comparable to ones previously held but that discretion must be exercised in a manner which is not arbitrary or capricious. Pond v. West Virginia Department of Corrections, Docket No. 89-CORR-686 (April 27, 1990); Crow v. West Virginia Department of Corrections, Docket No. 89-CORR-116 (June 30, 1989). When an employee contests his or her transfer the agency must demonstrate that it was made for legitimate reasons.

2. While the Hospital demonstrated that circumstances may have warranted grievant's temporary assignment to nursing duties, it failed to show any reason whatsoever why that assignment was made permanent.

Accordingly, the grievance is **GRANTED** and Pinecrest Hospital is hereby **ORDERED** to reinstate the grievant to the position of Patient Advocate.

Either party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Raleigh County 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 Hearing Examiners is a party to such appeal and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.



JERRY A. WRIGHT
Chief Hearing Examiner

Dated: January 31, 1991