October 2013

Lisa Hall vs. BOARD OF REGENTS

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BEFORE THE ADMINISTRATIVE LAW JUDGE
ON BEHALF OF AUSTIN PEAY STATE UNIVERSITY

IN THE MATTER OF:

Lisa M. Hall,
  Grievant,

Vs.

Austin Peay State University,
  Respondent.

DOCKET NO: 30.01-120861A

INITIAL ORDER

This matter was heard on August 1, 2013, at Austin Peay State University in Clarksville, Tennessee, before Steve R. Darnell, Administrative Law Judge, assigned by the Secretary of State, Administrative Procedures Division. This hearing is a support staff grievance heard pursuant to T.C.A. §49-8-117. The undersigned was designated to hear this matter pursuant to Tennessee Board of Regents Policy 1:06:00:05. Attorney Stephanie Reevers represented Austin Peay State University (APSU), and attorney Andy L. Allman represented Grievant, Lisa Hall.

ISSUES FOR DETERMINATION

1. Did Grievant’s conduct warrant disciplinary action?
2. Was termination the appropriate disciplinary action?

SUMMARY OF DETERMINATION

It is DETERMINED that Grievant’s conduct justified discipline, however, termination was not the proper action. Given Grievant’s longtime employment with APSU, lack of prior discipline, and how APSU disciplines similar conduct, the proper discipline for Grievant was suspension without pay for 10 days and completing a medication safety course. This determination is based upon the following Findings of Fact and Conclusions of Law.
FINDINGS OF FACT

1. Grievant is a Licensed Practical Nurse (LPN) employed by APSU’s health clinic since 1994. The clinic provides services to students, faculty, and support staff of APSU.

2. Medical services at APSU’s health clinic are provided predominately by two nurse practitioners. The nurse practitioners work under the supervision of two medical doctors who also see patients at the clinic. Grievant’s day-to-day activities at the clinic are supervised by the nurse practitioners.

3. Kristy Reed has been one of the clinic’s nurse practitioners since 2007. Ms. Reed implemented changes in the clinic and set new expectations of Grievant which caused consternation between Grievant and Ms. Reed. This ongoing conflict has been brought to the attention of the faculty in charge of the clinic, but not resolved.

4. Between 1994 and 2007, Grievant was not subjected to any disciplinary action. Grievant has received oral counselings from Ms. Reed as noted below since 2009. These counseling from Ms. Reed are Grievant’s only disciplinary history. Grievant’s annual performance evaluations were completed by Ms. Reed in 2009 (exhibit 2) and 2012 (exhibit 5). The 2009 evaluation indicated Grievant’s performance was “Minimally Acceptable.” However, the deficiencies noted did not involve Grievant’s clinical nursing skills. Concerns focused on attendance, patient scheduling, and administrative record keeping (not patient medical records) for the clinic. In the 2009 evaluation, Ms. Reed noted, “[Grievant] has excellent clinical skills, triage skills and intuition regarding patient needs.” (exhibit 2, page 4).

5. In 2011, Grievant received an oral counseling from Ms. Reed on October 11, 2012 which was memorialized in a memorandum of the same date. (exhibit 4). Grievant was also counseled by Ms. Reed in December, 2011 which was moralized in a memorandum dated December 14,
Neither of these counselings of Grievant expressed concerns about Grievant’s clinical skills. Both addressed administrative issues in the clinic such as stocking and organizing examination rooms, recording inspections of clinic equipment, and processing lab reports.

6. Grievant received a second formal performance evaluation on April 24, 2012 also completed by Ms. Reed. (exhibit 5). This evaluation found Grievant met standards for her position. During this time, Grievant was again counseled by Ms. Reed for issues involving administration of the clinic including, organization and stocking of examination rooms, inspection of clinic equipment, and processing of lab reports. (exhibit 6). No deficiency of Grievant’s clinical skills in noted in the 2012 evaluation or counseling note.

7. Grievant was counseled again on May 29, 2012, by Ms. Reed. This counseling addressed essentially the same administrative issues as before, but also included documentation errors concerning patient records. Other than the patient record issue, this counseling did not address Grievant’s clinical skills.

8. APSU has a progressive discipline policy (Policy Number 5:053) which provides, “Normally, the basis of disciplinary action is for the purpose of correcting an individual’s conduct and to warn that repetition of this or similar behavior can result in discharge.” The progressive discipline policy provides for: 1) Oral Counseling, 2) Written Counseling, 3) Probation, 4) Time Off Without Pay, and finally, 5) Termination.

9. Grievant has never been disciplined for the type of conduct or similar conduct alleged in this case. There is no indication Grievant was ever disciplined or counseled by anyone other than Ms. Reed at the clinic.

10. Nurses at APSU’s health clinic are required to administer injections to patients. On average Grievant administers 1,000 injections per year including allergy injections.
11. Allergy injections are unique. Patients with allergies are provided increasing concentrations and dosages of medication until a maintenance level is reached. The patient’s doctors supplies the medication to the clinic with directions for administering it. The vials, which must be refrigerated, have color coded tops signify the order of use. The color of the vial indicates the concentration of the medication. There is no standard for this color coding and doctors can and frequently do use different color systems. Additionally, the patient is provided increasing dosages of the medication from each vial. Once the prescribed regime of a vial is completed, the clinic keeps the vial in case the patient has a reaction and must return to a lower dose.

12. The patient who is the subject of this disciplinary action is on the faculty at APSU. The patient treated for allergies to mold, grass, trees, dogs and cats. The patient’s doctor provided the clinic with vials of medication to be administered to the patient in the following order: silver, blue, green, gold and finally red. The patient was to be injected first with medication from the silver vial a prescribed number of times in increasing dosages. If there is no reaction, then the patient advances to the blue vial and so forth. If there is a reaction to a particular vial, then the patient’s doctor would typically return the patient to a lower concentration and/or dose. Therefore, previous vials are not discarded until the patient reaches the maintenance concentration and dosage. That is the red vial in this case.

13. On November 21, 2012, the patient at issue came to the clinic for her routine injection. The patient was to receive an injection every seven days until the maintenance dose was attained from the red vial, then she was to receive an injection ever two to three weeks. (exhibit 8). The patient previously received two injections from her red vial. The patient should have been
injected with 0.2 cc from the red vial. Grievant mistakenly retrieved the patient’s gold vial from the refrigerator and administered 0.2 cc to the patient from it.

14. As the patient was leaving the clinic she told Ms. Reed that she thought she received an injection from the wrong vial. Ms. Reed confirmed with Grievant that an error was made. Grievant acknowledged then and at the hearing that she gave the patient the correct dosage, but from the wrong vial.

15. Grievant was instructed by Ms. Reed to notify the patient’s doctor at Vanderbilt’s allergy clinic of the error. The doctor modified the patient’s injection regime to three injections from the gold vial then recommencement of injections from the red vial until the maintenance dose was reached. There is no evidence in the record that the patient suffered any ill effects or complained of the incident. She did not testify at the hearing. She continued to receive her allergy injections at the clinic. There was no evidence from the patient’s treating physician in the record.

16. APSU’s health clinic was provided “immunotherapy build up instructions” from the patient’s doctor at Vanderbilt. (exhibit 9). These instructions list the following potential reactions:

**LOCAL:** Excessive swelling, pain or inching
- Usually relieved by use of ice pack, oral antihistamines or Benadryl cream
- If wheal [swelling at the injection site] 0-15mm and/or erythema [discoloration] <30mm, continue on schedule
- If wheal 15-25mm and/or erythema <50mm, repeat last dose
- If wheal > 25mm and/or erythema >50mm, reduce by one dose

**SYSTEMIC:** Varying degree of itching (eyes, nose, palms of hand), cough, hives, swelling of eyelids, SOB, lightheadedness, scratch/itchy throat
- Administer Epinephrine (1:1000) 0.3ml IM followed by 0.2ml Sub Q at injection site. This does may be repeated after 5 minutes and then at 15 minute intervals
- After ANY systemic reaction, patient MUST be seen in the VASAP Clinic before any further injections can be administered
17. APSU’s health clinic was also provided a protocol if the patient missed scheduled injections. (exhibit 9). These protocols do not require any preventive measures until the patient has missed an injection for at least four weeks. The protocol provides as follows:

   If Patient has tolerated injection(s), but NO injection in last:
   • 2 weeks: repeat last dose
   • 4 weeks: decrease by 2 doses
   • 6 weeks: decrease by 1 concentration and start at 0.05ml.
   • 8 weeks: decrease by 2 concentrations and start at 0.05ml.
   • 10 weeks: start over

18. The patient at issue received injections on October 30, 2012, then nine days later on November 8, 2012, then 13 days later on November 21, 2012, then six days later on November 27, 2012, seven days later on December 4, 2012. (exhibit 8). If the patient received no injection on November 21, 2012, according to the protocol from the patient’s doctor set forth above, the clinic is instructed to ignore the 19 day lapse and the last dose. The protocol does not instruct the clinic to take any action until the patient missed her injections for four weeks or more.

19. Ms. Reed notified her superiors and of the Grievant’s medication error. Ms. Reed opined that Grievant’s error was severe because if the error was not discovered the patient would receive the normal dose on her next visit which could result in a life threatening reaction to the patient. Based on Ms. Reed’s opinion of the severity of Grievant’s error, Grievant was terminated by APSU. She properly appealed her termination prompting the instant hearing.

20. Ms. Reed’s opinion is inconsistent with the expected reactions described by the patient’s physician and noted above. Ms. Reed’s opinion is also inconsistent with the missed injection protocols set forth above. Ms. Reed’s opinion is that a lower concentrated dose creates a life threatening situation, when the patient’s doctor has instructed the clinic to ignore a missed dose (zero concentration) at a 19 day interval.
21. The record does not support a finding, by a preponderance of the evidence, that Grievant’s injection error at issue here created a substantial risk of harm to the patient.

22. Joanne Gordon, LPN was hired to fill the vacancy at the clinic when Grievant was terminated. While Ms. Gordon was still on her probationary period it was discovered that she committed a medication error when she administered the wrong medicine to a patient. If Ms. Gordon’s error was not discovered, the patient would have received a potentially dangerous medication for which no patient history was known, and additionally, would not have received the necessary medication for her medical condition. Oddly, Ms. Gordon, a probationary employee, was disciplined with an extension of her probation status and required to attend a medication safety course. Grievant, an 18 year employee of APSU, was terminated for what was a less severe error.

23. Grievant has shown, by a preponderance of the evidence, that her disciplinary action was not consistent with APSU’s progressive discipline policy, that her error did not create a significant risk of harm to the patient, and that APSU has punished similar but more severe conduct with minimal discipline. Grievant has shown, by a preponderance of the evidence, that her termination was improper.

24. Proper discipline for Grievant’s medication error was a 10 day suspension without pay and that she be required to complete a medication safety course similar to that completed by Joanne Gordon.

**CONCLUSIONS OF LAW**

1. Pursuant to T.C.A. §49-8-117, support staff employed by Tennessee’s state university and community college system are entitled to a hearing in compliance with the Administrative
Procedures Act (APA) concerning disciplinary actions including demotions, suspension without pay and termination for cause. The process is referred to as a grievance.

2. TBR policy places the burden of proof on the grievant in these cases. TBR Guideline P-111, “Subject: Support Staff,” section C. (c).

3. TBR policy establishes the procedure for hearing support staff grievance subject to the APA. This policy authorized the institution to designate an Administrative Law Judge with the Administrative Procedures Division to hear the case and issue an initial order subject to review by the president of the institution. TBR Policy 1:06:00:05, “Subject: Uniform Procedures for Cases Subject to the Tennessee Uniform Administrative Procedures Act.” APSU has also promulgated a policy addressing the procedure for employee grievances heard pursuant to the APA. APSU, Policies and Procedures Manual, Policy Number 5:059.

4. The Court of Appeals has explained that termination for cause as used in T.C.A. §49-8-117 means:

…[T]he termination is objectively reasonable. The types of “cause” that warrant an employee's termination include an employee's inattention to his or her duty to look after the employer's best interests or performance of an action inconsistent with the employer-employee relationship. Any action by an employee that injures or tends to injure the employer's business, interests, or reputation will justify ... dismissal. Actual loss is not essential; it is sufficient if, from the circumstances, it appears that the employer has been, or is likely to be, damaged by the acts of which complaint is made. ... [A]n employee has been terminated for cause if the employee's termination stems from a job-related ground. A job-related ground includes any act that is inconsistent with the continued existence of the employer-employee relationship. Thus, an employee has been terminated for cause if the termination stems from the employee's failure to follow a supervisor's directions, poor job performance, or failure in the execution of assigned duties. In contrast, an employee who has been terminated as part of a bona fide reduction in force has not been terminated for cause because the reason for the termination is unrelated to the employee's job performance. Lawrence, et al. v. Rawlins, et al., 2001 WL 76266 (Tenn.Ct.App.), at 4, internal citations and quotes omitted.

5. APSU has adopted a disciplinary policy intended to provide “consistent and equitable treatment of all professional/administrative and clerical/support employees”
at the university. This policy acknowledges that “the basis of disciplinary action is for
the purpose of correcting an individual’s conduct and to warn that repetition of this or
similar behavior can result in discharge.” APSU Policies and Procedures Manual,
Policy Number: 5:053.

6. APSU follows a policy of progressive discipline. The following types of
discipline are used:

A. Oral Counseling: If the problem was unintentional; caused by inattention or neglect;
or of minor significance, and the employee has not been reprimanded for other offenses
during the previous six (6) months, an oral warning is appropriate. The basic cause of
the incident should be clearly pointed out, suggestions made for its correction, and the
employee told what consequences to expect should future incidents occur. The
supervisor may administer an oral warning without prior approval and should record
the date of the warning and other pertinent information.

B. Written Counseling: If the problem was caused by apparent willful disregard of
instructions, a written warning or other disciplinary measure(s) including suspension or
discharge may be necessary. When the supervisor has reason to believe that the action
was impulsive or occurred under similar mitigating circumstances, as opposed to
premeditation, a written warning may be appropriate. Repeat occurrences require more
drastic action. A written warning shall also be given for less serious offenses if it
becomes necessary to reprimand an employee orally more than once during a six (6)
month period. If a written warning is decided upon, a record of the facts shall be made
by the supervisor. The written warning will be issued to the employee by their
supervisor and a copy will be forwarded to human resources to be placed in the
employee's personnel file.

C. Probation: When an employee has failed to respond to counseling or has committed
an offense so serious that termination is to be considered if performance or behavior
does not improve, the employee may be placed in a probationary status. Prior to putting
the employee on probation, the supervisor must consult with the division head and the
director of human resources or his/her representative. A written probation letter will be
issued to the employee outlining the change in status, the problems encountered, and
the desired corrective action.
A copy of the letter will be placed in the employee's personnel file. During the
probationary period, the employee may be terminated at any time without notice.

D. Time off Without Pay: This action may be taken to impress upon the employee the
serious nature of the action or offense. It may be imposed separately or in conjunction
with probation. This should be considered as a notice that the employee is facing
possible termination if his/her performance or behavior does not improve. The
supervisor will consult the appropriate division head and the director of human resources or his/her representative, and, if time off without pay is decided upon, the duration of the time off period will be determined through such consultation. In addition to the time off without pay, a letter of warning will be issued and a copy placed in the employee's personnel file. The division head will be the final approval authority for these actions.

E. Termination: …

IT IS CONCLUDED THAT Grievant has shown, by a preponderance of the evidence, that her termination was not proper. The record demonstrates that the proper discipline for Grievant’s medication error was a 10 day suspension without pay and completion of a medication safety course.

IT IS THEREFORE ORDERED that Grievant’s termination is reversed, and in lieu thereof, she is to serve a 10 day suspension without pay and complete a medication safety course.

This Order entered and effective this ________ day of ____________________, 2013.

______________________________
Steve R. Darnell
Administrative Law Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this ________ day of ____________________, 2013.

______________________________
J. Richard Collier
Director
Administrative Procedures Division