- DECISION -

Claimant:
JANE M HARRISON

Employer:
ANNE ARUNDEL MEDICAL CTR INC

Decision No.: 1854-BR-13

Date: May 17, 2013

Appeal No.: 1241745

S.S. No.:

L.O. No.: 64

Appellant: Claimant

Issue: Whether the claimant's separation from this employment was for a disqualifying reason within the meaning of the Md. Code Annotated Labor and Employment Article, Title 8, Sections 1002-1002.1 (Gross/Aggravated Misconduct connected with the work), 1003 (Misconduct connected with the work) or 1001 (Voluntary Quit for good cause).

- NOTICE OF RIGHT OF APPEAL TO COURT -

You may file an appeal from this decision in the Circuit Court for Baltimore City or one of the Circuit Courts in a county in Maryland. The court rules about how to file the appeal can be found in many public libraries, in the *Maryland Rules of Procedure, Title 7, Chapter 200.*

The period for filing an appeal expires: June 17, 2013

REVIEW OF THE RECORD

After a review of the record, the Board adopts the following findings of facts and conclusions of law. The hearing examiner's decision is reversed.

The claimant, a registered nurse, began working for the employer, Anne Arundel Medical Center on June 4, 2001. The claimant was discharged on October 18, 2012 after receiving three warnings for three separate incidents from October, 2011 through October, 2012.

In October, 2011, the hospital established a new duty for the unit nurses which was "signing off" for inspection of the "code cart" (also known as the "crash cart"). On October 17, 2011, the claimant failed to inspect the cart because the unit was extremely busy and she was attending to patients. The claimant, remembering that this was now part of her duties, later informed her supervisor of her failure to inspect the cart. The claimant was written up for this incident. Following this incident, the claimant never had another incident regarding the crash cart.

The second incident, in December, 2011, the claimant was written up for improperly dispensing narcotics. However, the claimant did not improperly dispense drugs, but instead, met the patient, scanned his armband, dispensed the narcotics as directed by the doctor. However the patient was not immediately brought to his room, so the claimant left the patient's medication in the room because she was trying to assist the nurse who was assisting the patient. The claimant and other nurses in the unit had previously handled the patients similarly. At no other time had any other nurses, nor the claimant been disciplined or written up for similar handling of medications.

The final incident occurred in October, 2012 when the claimant was written up for failing to inform the charge nurse while she left the floor to run an errand. Nurses are permitted to leave the floor as long as they inform another nurse of the status of their patients. The claimant did inform another nurse of her patients and the procedures and medications that they had administered. After this incident, the claimant was discharged.

The General Assembly declared that, in its considered judgment, the public good and the general welfare of the citizens of the State required the enactment of the Unemployment Insurance Law, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of individuals unemployed through no fault of their own. *Md. Code Ann., Lab. & Empl. Art., § 8-102(c)*. Unemployment compensation laws are to be read liberally in favor of eligibility, and disqualification provisions are to be strictly construed. *Sinai Hosp. of Baltimore v. Dept. of Empl. & Training, 309 Md. 28 (1987)*.

The Board reviews the record *de novo* and may affirm, modify, or reverse the findings of fact or conclusions of law of the hearing examiner on the basis of evidence submitted to the hearing examiner, or evidence that the Board may direct to be taken, or may remand any case to a hearing examiner for purposes it may direct. *Md. Code Ann., Lab. & Empl. Art., § 8-510(d)*; *COMAR 09.32.06.04*. The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.03(E)(1)*.

In a discharge case, the employer has the burden of demonstrating that the claimant's actions rise to the level of misconduct, gross misconduct or aggravated misconduct based upon a preponderance of the credible evidence in the record. *Hartman v. Polystyrene Products Co., Inc., 164-BH-83*; *Ward v. Maryland Permalite, Inc., 30-BR-85*; *Weimer v. Dept. of Transportation, 869-BH-87*; *Scruggs v. Division of Correction, 347-BH-89*; *Ivey v. Catterton Printing Co., 441-BH-89*.

> As the Court of Appeals explained in *Department of Labor, Licensing and Regulation v. Hider, 349 Md. 71, 82, 706 A.2d 1073 (1998)*, "in enacting the unemployment compensation program, the legislature created a graduated, three-tiered system of disqualifications from benefits based on employee misconduct. The severity of the disqualification increases in proportion to the seriousness of the misconduct."

Dept. of Labor, Licensing & Regulation v. Boardley, 164 Md. 404, 408 fn.1 (2005).

Section 8-1002 of the Labor and Employment Article defines gross misconduct as conduct of an employee that is a deliberate and willful disregard of standards of behavior that an employing unit rightfully expects and that shows gross indifference to the interests of the employing unit or repeated violations of employment rules that prove a regular and wanton disregard of the employee's obligations.

The term "misconduct" as used in the statute means a transgression of some established rule or policy of the employer, the commission of a forbidden act, a dereliction from duty, or a course of wrongful conduct committed by an employee within the scope of his employment relationship, during hours of employment or on the employer's premises, within the meaning of Section 8-1003 of the Labor and Employment Article. (*See, Rogers v. Radio Shack, 271 Md. 126, 314 A.2d 113*).

Simple misconduct within the meaning of *§ 8-1003* does not require intentional misbehavior. *DLLR v. Hider, 349 Md. 71 (1998)*. Misconduct must be connected with the work; the mere fact that misconduct adversely affects the employer's interests is not enough. *Fino v. Maryland Emp. Sec. Bd., 218 Md. 504 (1959)*. Although not sufficient in itself, a breach of duty to an employer is an essential element to make an act connected with the work. *Empl. Sec. Bd. v. LeCates, 218 Md. 202 (1958)*. Misconduct, however, need not occur during the hours of employment or the employer's premises. *Id.*

Without sufficient evidence of a willful and wanton disregard of an employee's obligations or gross indifference to the employer's interests, there can be no finding of gross misconduct. *Lehman v. Baker Protective Services, Inc., 221-BR-89*. Where a showing of gross misconduct is based on a single action, the employer must show the employee demonstrated gross indifference to the employer's interests. *DLLR v. Muddiman, 120 Md. App. 725, 737 (1998)*.

In determining whether an employee has committed gross misconduct, "[t]he important element to be considered is the nature of the misconduct and how seriously it affects the claimant's employment or the employer's rights." *Dept. of Econ. & Empl. Dev. v. Jones, 79 Md. App. 531, 536 (1989)*. "It is also proper to note that what is 'deliberate and willful misconduct' will vary with each particular case. Here we 'are not looking simply for substandard conduct…but for a willful or wanton state of mind accompanying the engaging in substandard conduct." *Employment Sec. Bd. v. LeCates, 218 Md. 202, 207 (1958)*(internal citation omitted); *also see Hernandez v. DLLR, 122 Md. App. 19, 25 (1998)*.

In *Andreski v. Crofton Convalescent Center, 1431-BR-93,* the claimant nurse was fired for an accumulation of job deficiencies. The claimant made none of these mistakes deliberately, and she was not

grossly negligent, but she was not as careful in her job duties as she should have been. Although mere incompetence is not misconduct, there was a degree of negligence in the claimant's conduct which amounts to misconduct.

In the instant case, the employer's case was substantially hearsay. While hearsay is admissible in an administrative proceeding, it is usually given less weight than credible, first-hand testimony. Although the hearing examiner may rely on hearsay evidence in making his determination, the hearing examiner must, "first carefully consider[] its reliability and probative value." *Travers v. Baltimore Police Dept., 115 Md. App. 395, 413 (1997)*; *also see Kade v. Charles H. Hickey School, 80 Md. App. 721, 725 (1989)* ("[e]ven though hearsay is admissible, there are limits on its use. The hearsay must be competent and have probative force.").

Although the hearing examiner may rely on hearsay evidence in making his determination, the hearing examiner must, "first carefully consider[] its reliability and probative value." *Travers v. Baltimore Police Dept., 115 Md. App. 395, 413 (1997).* "The Court has remained steadfast in reminding agencies that to be admissible in an adjudicatory proceeding, hearsay evidence must demonstrate sufficient reliability and probative value to satisfy the requirements of procedural due process." *Id. at 411. See also Kade v. Charles H. Hickey School, 80 Md. App. 721, 725 (1989)* ("[e]ven though hearsay is admissible, there are limits on its use. The hearsay must be competent and have probative force.").

One important consideration for a hearing body is the nature of the hearsay evidence. For instance, statements that are sworn under oath, see *Kade, 80 Md. App. at 726, 566 A.2d at 151, Eichberg v. Maryland Bd. of Pharmacy, 50 Md. App. 189, 194, 436 A.2d 525, 529*, or made close in time to the incident, see *Richardson v. Perales, 402 U.S. 389, 402, 28 L. Ed. 2d 842, 91 S. Ct. 1420 (1971)*, or corroborated, see *Consolidated Edison v. N.L.R.B, 305 U.S. 197, 230, 83 L. Ed. 126, 59 S. Ct. 206 (1938)* ("mere uncorroborated hearsay or rumor does not constitute substantial evidence"); *Wallace v. District of Columbia Unemployment Compensation Bd., 294 A.2d 177, 179 (D.C. 1972)*, ordinarily is presumed to posses a greater caliber of reliability. *Cited in Travers 115 Md. App. at 413. Also see Parham v. Dep't of Labor, Licensing & Reg[ulation], 985 A.2d 147, 155 (Md. Ct. Spec. App. 2009). Also see Cook v. National Aquarium in Baltimore, 1034-BR-91*(the employer offered not a single specific example of the alleged misconduct as observed by either of the employer's witnesses and no documents were introduced relating to any specific instance of misconduct. The employer offered only conclusory statements that the claimant engaged in a certain type of misconduct).

The hearing examiner made no such examination into the reliability of the hearsay evidence in his evaluation of the evidence in this case. As the Court of Appeals has noted, for a reviewing court to perform properly its examination function, an administrative decision must contain factual findings on all the material issues of a case and a clear, explicit statement of the agency's rationale. *Harford County v. Preston, 322 Md. 493, 505, 588 A.2d 772, 778 (1991).* A fully explained administrative decision also fulfills another purpose; it recognizes the "fundamental right of a party to a proceeding before an administrative agency to be apprised of the facts relied upon by the agency in reaching its decision *Id.*; *also see Mehrling v. Nationwide Ins. Co., 371 Md. 40, 56 (2002)*; *Fowler v. Motor Vehicle administration, 394 Md. 331, 353 (2006)*; *Crumlish v. Insurance Commissioner, 70 Md. App. 182, 187 (1987).*

In *Kade v. Charles H. Hickey School,* the Court of Special Appeals reversed a decision by an administrative agency for similarly relying on hearsay evidence without establishing the reliability of that evidence. In *Kade*, a school employee appealed his suspension by his employer for disrespectful conduct towards a fellow employee. At the hearing before the administrative agency, the superintendent of the school was the only witness for the employer. The superintendent testified that he was not present on the night of the incident and that all of the information he possessed was based on statements given to him. The Court found the agency's reliance on the hearsay statements submitted by the superintendent to be improper.

> Even though the statements were relevant, *there was no indication that this hearsay evidence was reliable, credible or competent*. The statements which were submitted by appellant's co workers are not under oath and do not reflect how they were obtained.... No reason was given as to why the declarants were unavailable.

The Court's rejection of the administrative agency's use of hearsay evidence in *Kade* applies with equal force to the hearing examiner and the Board in this case. The Board gives more weight to the claimant's first-hand testimony.

The employer argued that the claimant over a period of one year, on three occasions was neglectful of her duties. The employer witness testifying at the hearing did not observe, nor was she aware, personally of these incidents. The only evidence she presented was through three "incident" reports with narrative from other nurses, including supervising nurses, who were not present at the hearing. As claimant's counsel pointed out there are "multiple layers of hearsay" regarding the reporting of these incidents which then becomes one more layer when submitted as testimonial evidence in the hearing. The claimant, providing first hand testimony regarding each of the incidents gave credible testimony that was in conflict with the hearsay evidence from the employer witness.

The employer provided "policies" of the hospital but failed to point to any specific policy that the claimant violated regarding any of these three incidents. The claimant credibly testified that there are many differences between "policy" and practice regarding working on a busy floor as a nurse. Supervisors and staff understand that there is a fluidity regarding what needs to occur when handling patients and doctor's changing orders. The claimant stated that she always handled her patients with the utmost of care which was undisputed by the employer witness. There is no credible evidence that the claimant violated hospital policy.

The claimant worked for the employer as a Registered Nurse in her present unit for a period of eleven (11) years. The employer terminated the claimant, after this long period of service, for three incidents that occurred over a one year period. The claimant had many superior reports and meritorious raises during this 11 year term of employment.[1]

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[1] The claimant attempted to provide evidence to establish that during this term, including the one year period from the first incident in October, 2011 through to the third incident leading to her discharge in October 2012 that her employment record was exemplary. Claimant requested Lower Appeals to issue a

The claimant provided an entirely different credible explanation regarding the incidents leading up to her discharge. The claimant was neither negligent nor remiss in her duties on each and every occasion that she was written up for. The employer's testimony was entirely hearsay. None of the complaining witnesses who were present during each and every one of the three alleged incidents were present at the Lower Appeals Division hearing. The claimant disputed that she failed to follow the normal practices of her unit while she was working for the employer.

Unlike the facts in *Andreski v. Crofton Convalescent Center, 1431-BR-93* the claimant was not remiss in her job duties nor was she incompetent. The claimant was an excellent nurse who followed all the normal practices as directed by her unit as she had done for the nearly 11 years she worked for the employer. The claimant was discharged but not for any misconduct connected with the work.

The Board notes that the hearing examiner did not offer or admit the *Agency Fact Finding Report* into evidence. The Board did not consider this document when rendering its decision.

The Board finds based on a preponderance of the credible evidence that the employer has not met its burden of demonstrating that the claimant's actions rose to the level of gross misconduct within the meaning of *§ 8-1002*. The employer has also not met its burden of showing that the claimant's discharge was for misconduct within the meaning of *§ 8-1003*. The decision shall be reversed for the reasons stated herein.

DECISION

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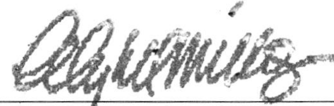
subpoena for her employment records in the custody and control of the employer, which was denied because it was untimely. During the hearing, claimant's counsel attempted to raise the issue of the claimant's exemplary record over the years and the hearing examiner shut down the testimony stating that the information was irrelevant to the employer's testimony regarding the three incidents which led to claimant's discharge. Claimant's counsel asked the employer's witness if she had copies of the claimant's evaluations with her. At which time the witness responded that she did. Counsel was then interrupted by the hearing examiner who stated that she "did not think that these evaluations are relevant" to the issue at hand. The hearing examiner was patently incorrect. The claimant's entire employment history is relevant to the issues, especially for a long term employee.

It is also important to note that the hearing examiner continually interrupted the testimony, counsel's questions and "restated" counsel's questions, which then become soliloquies, even when the questions and answers are quire clear. While the hearing examiner is required to be in control of the hearing, the hearing examiner must also allow the hearing to proceed naturally through testimony and questions. It is impossible to understand the case when the parties are continually interrupted by the hearing examiner who imparts her own "recap" of the question or the testimony of the parties.

It is held that the claimant was discharged, but not for gross misconduct or misconduct connected with the work, within the meaning of Maryland Code Annotated, Labor and Employment Article, Title 8, Section 1002 or 1003. No disqualification is imposed based upon the claimant's separation from employment with ANNE ARUNDEL MEDICAL CTR INC.

The Hearing Examiner's decision is reversed.



Clayton A. Mitchell, Sr., Associate Member

Donna Watts-Lamont, Chairperson

VD/mr
Copies mailed to:
JANE M. HARRISON
ANNE ARUNDEL MEDICAL CTR INC
JOYCE E. SMITHEY ESQ.
GAYLE TUREK
ANNE ARUNDEL MEDICAL CTR INC
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

JANE M HARRISON

SSN #

Claimant

vs.

ANNE ARUNDEL MEDICAL CTR INC

Employer/Agency

Before the:
Maryland Department of Labor, Licensing and Regulation
Division of Appeals
1100 North Eutaw Street
Room 511
Baltimore, MD 21201
(410) 767-2421

Appeal Number: 1241745
Appellant: Employer
Local Office : 64 / BALTOMETRO CALL CENTER

January 29, 2013

For the Claimant: PRESENT, JOYCEE. SMITHEY, ESQ.

For the Employer: PRESENT, GAYLE TUREK, EVELYN ROCHLIN

For the Agency:

ISSUE(S)

Whether the claimant's separation from this employment was for a disqualifying reason within the meaning of the MD Code Annotated Labor and Employment Article, Title 8, Sections 8-1001 (voluntary quit for good cause), 8-1002 - 1002.1 (gross/aggravated misconduct connected with the work) or 8-1003 (misconduct connected with the work).

FINDINGS OF FACT

Claimant, Jane M. Harrison, filed a claim for benefits establishing a benefit year beginning, November 11, 2012, and qualified for a weekly benefit amount of $430.00.

Claimant began working for employer, Anne Arundel Medical Center, on or about June 4, 2001. At the time of separation, claimant was working full time as a nurse in the short term stay and recovery room. Claimant last worked for employer on October 18, 2012 before being terminated for failure to comply with policies and procedures related to dispensing narcotic drugs; leaving the floor; and inspecting of emergency equipment.

The short term stay and recovery room shall be referred to in this decision as the "unit". In October 2011, the nurses in the unit were assigned the responsibility of checking the emergency code cart (the cart) daily to ensure that it was fully equipped. Each nurse was to initial the cart checklist on the day he/she inspected the cart.

Claimant was assigned to check the cart on October 17th and the 24th. Claimant did not initial the checklist on October 17th. She did initial the checklists for both October 17 and 24 on October 24th.

Medication was dispensed via a machine for which each nurse was given a code. Narcotic medication (narcotics) was not to be dispensed until the patient arrived in the unit and his/her identification was confirmed by scanning the patient's bracelet. Further, narcotics were never to be left unattended. The dispensing nurse had full responsibility for supervision of the medication.

On or about December 1, 2011, claimant obtained narcotics from the machine at 9:54 am for a patient who was not scheduled to arrive until 10:42 am. Claimant left the drugs unattended on a table in the patient's room.

If a nurse wanted to leave the floor for any period of time, she had to "report off". Report off required the nurse leaving the floor to ask another nurse to supervise her patients (supervising nurse) and to give the supervising nurse a briefing on the status of each patient.

On or about October 15, 2012, claimant asked one of the nurses to supervise her patients while she left the floor to run an errand. Claimant did not tell the supervising nurse about one of her patients who, while claimant was off the floor, had a reaction to a very strong antibiotic which had to be monitored closely. Consequently, claimant did not follow the reporting off procedure with respect to the patient.

The patient called the supervising nurse and complained about itching which was a known sign of the possibility of a more serious reaction. The supervising nurse was able to help the patient.

Claimant received written warnings for her signing the cart checklist retroactively on October 24, 2011, violation of policy regarding administration of narcotics on December 1, 2011, and failure to follow the proper report off procedure on October 15, 2012. The culmination of these three (3) incidents resulted in termination of claimant.

CONCLUSIONS OF LAW

Md. Code Ann., Labor & Emp. Article, Section 8-1003 provides for a disqualification from benefits where the claimant is discharged or suspended as a disciplinary measure for misconduct connected with the work. The term "misconduct" is undefined in the statute but has been defined as "...a transgression of some established rule or policy of the employer, the commission of a forbidden act, a dereliction of duty, or a course of wrongful conduct committed by an employee, within the scope of his employment relationship, during hours of employment, or on the employer's premises." Rogers v. Radio Shack, 271 Md. 126, 132 (1974).

Md. Code Ann., Labor & Emp. Article, Section 8-1002 provides that an individual shall be disqualified from receiving benefits where he or she is discharged or suspended from employment because of behavior which demonstrates gross misconduct. The statute defines gross misconduct as conduct that is a deliberate and willful disregard of standards that an employer has a right to expect and that shows a gross indifference to the employer's interests. Employment Sec. Bd. v. LeCates, 218 Md. 202, 145 A.2d 840 (1958); Painter v. Department of Emp. & Training, et al., 68 Md. App. 356, 511 A.2d 585 (1986); Department of Economic and Employment Dev. v. Hager, 96 Md. App. 362, 625 A.2d 342 (1993).

Md. Code, Ann., Labor & Emp. Article, Section 8-1002 provides that an individual shall be disqualified from receiving benefits when he or she was discharged or suspended from employment because of behavior that demonstrates gross misconduct. The statute defines gross misconduct as repeated violations of employment rules that prove a regular and wanton disregard of the employee's obligations.

EVALUATION OF THE EVIDENCE

The Hearing Examiner considered all of the testimony and evidence of record in reaching this decision. Where the evidence was in conflict, the Hearing Examiner decided the facts on the credible evidence as determined by the Hearing Examiner.

The employer had the burden to show, by a preponderance of the credible evidence, that the claimant was discharged for some degree of misconduct connected with the work within the meaning of the Maryland Unemployment Insurance Law. Ivey v. Catterton Printing Company, 441-BH-89. In the case at bar, that burden has been met with respect to gross misconduct.

Claimant engaged in gross misconduct when she dispensed and left unattended narcotics prior to the arrival of the patient and scanning the patient's bracelet; violated the report off procedure by not briefing the supervising nurse on a patient in her care; and retroactively signing the cart checklist.

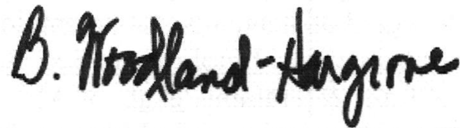
These incidents involved the quality of care key to the health and safety of patients. Claimant knowingly disregarded these standards of care and therefore, violated her professional obligation to the employer, her co – workers and patients.

I hold that the claimant's actions showed a deliberate and willful disregard of the standards the employer had a right to expect, showed a gross indifference to the employer's interests and therefore constituted gross misconduct in connection with the work. An unemployment disqualification shall be imposed based on Md. Code, Ann., Labor & Emp. Article, Section 8-1002 pursuant to this separation from this employment.

DECISION

IT IS HELD THAT the claimant was discharged for gross misconduct connected with the work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1002(a)(1)(i). The claimant is disqualified from receiving benefits from the week beginning October 14, 2012 and until the claimant becomes reemployed and earns wages in covered employment that equal at least 25 times the claimant's weekly benefit amount.

The determination of the Claims Specialist is reversed.



B H Woodland-Hargrove, Esq.
Hearing Examiner

Notice of Right to Request Waiver of Overpayment

The Department of Labor, Licensing and Regulation may seek recovery of any overpayment received by the Claimant. Pursuant to Section 8-809 of the Labor and Employment Article of the Annotated Code of Maryland, and Code of Maryland Regulations 09.32.07.01 through 09.32.07.09, the Claimant has a right to request a waiver of recovery of this overpayment. This request may be made by contacting Overpayment Recoveries Unit at 410-767-2404. If this request is made, the Claimant is entitled to a hearing on this issue.

A request for waiver of recovery of overpayment does not act as an appeal of this decision.

Esto es un documento legal importante que decide si usted recibirá los beneficios del seguro del desempleo. Si usted disiente de lo que fue decidido, usted tiene un tiempo limitado a apelar esta decisión. Si usted no entiende cómo apelar, usted puede contactar (301) 313-8000 para una explicación.

Notice of Right of Further Appeal

Any party may request a further appeal either in person, by facsimile or by mail with the Board of Appeals. Under COMAR 09.32.06.01A(1) appeals may not be filed by e-mail. Your appeal must be filed by February 13, 2013. You may file your request for further appeal in person at or by mail to the following address:

Board of Appeals
1100 North Eutaw Street
Room 515
Baltimore, Maryland 21201
Fax 410-767-2787
Phone 410-767-2781

NOTE: Appeals filed by mail are considered timely on the date of the U.S. Postal Service postmark.

Date of hearing: January 08, 2013
DAH/Specialist ID: RBA8U
Seq No: 001
Copies mailed on January 29, 2013 to:
JANE M. HARRISON
ANNE ARUNDEL MEDICAL CTR INC
LOCAL OFFICE #64
GAYLE TUREK