BEFORE THE MISSISSIPPI EMPLOYEE APPEALS BOARD

FILED
APR 23 2013
EMPLOYEE APPEALS BOARD

TAMMY BATES **APPELLANT**

VS. **CASE NO: 12-051**

MISSISSIPPI STATE HOSPITAL **APPELLEE**

ORDER OF HEARING OFFICER*CLARIFIED*

THIS CAUSE having come on to be heard on February 7, 2013, on Appeal by Tammy Bates, ("Bates") of the Written Reprimand she received on July 9, 2012, for a Group II Offense and her Administrative Transfer received the same day. Bates was represented by the Honorable Scherrie Prince. The Mississippi State Hospital ("MSH") was represented by the Honorable Gene W. Rowzee, Jr. and the Agency Representative present at the hearing was Katie Storr.

Prior to the testimony, the MSH Moved, *ore tenus,* to Dismiss this action for three reasons: First, MSH argues that there was no "adverse" employment action based upon Miss Code Ann. Section 25-9-131; Second, Mississippi Employee Appeals Board ("MEAB") Rule 8.3 and published policy of the Department of Mental Health ("DMH") prohibit this appeal; and Third, the Group II reprimand was not timely and properly grieved. Testimony was heard on these issues and the record was left open for 30 days for the parties to submit briefs.

FINDINGS OF FACT

Bates was employed at the MSH as a Charge Nurse in Building 83. At the DMH and MSH, Nurses are classified as I, II or III. A "charge nurse" is not a formal classification and a Nurse I, II, or III can be a charge nurse. The State of Mississippi, Personnel Board, classifies the Nurse III position as code 1855, with a set salary range and a set criteria for education and experience. As a Charge Nurse, Bates was in a supervisory capacity over all Registered Nurses,

Licensed Practical Nurses and Mental Health Technician's or Direct Care Workers, in building 83. As a Charge Nurse, Bates supervisor is the Director of Nursing ("DON").

On May 30, 2012, Bates ordered that a patient with an apparent neck injury be taken by ambulance to the clinic at the MSH. MDH and MSH policy requires that a licensed nurse accompany a patient with a neck injury when transferring to a clinic. Bates ordered two unlicensed staff members to escort the patient to the clinic. As a result, she was given a Group II Written Reprimand on July 9, 2012, for Insubordination for *inter alia* "resisting management directives through actions...and/or failure or refusal to follow supervisor's instruction, perform assigned work, or otherwise comply with applicable established written policy." MSPB Handbook Ch. 7, I, B, 1. (3/01/2010). Also on July 9, 2012, Bates was "administratively transferred from Building 83 to Building 81 to a Staff Nurse Position." The transfer had no effect on Bates' state pin number or rate of pay. She maintained the same accrued time. Her hours and days worked did change and she was moved from a managerial/supervisory position as a Charge Nurse to a Staff Nurse.

ANALYSIS

Section 25-9-131(1) of the Mississippi Code provides in part that "[a]ny employee in the state service may appeal his dismissal *or other action adversely affecting his employment* to the employee appeals board..." emphasis added. Miss Code Ann. Section 25-9-131(1). The question is whether or not the written reprimand, transfer of Bates from Building 83 to Building 81 and removal of her duties as a "Charge" nurse are actions adversely affecting her employment. State law in Mississippi on this issue is unclear therefore, opinions of the 5th Circuit Court of Appeals on the issues of "adverse employment action" in cases of Title VII acts of discrimination and First Amendment questions of retaliation are instructive. The 5th Circuit

has found this issue to be an objective inquiry. The focus is on the objective qualities of the position rather than the employees subjective preference for one position over another. See Alvarado v. Texas Rangers, 492 F. 3d 605,614 (5th Cir. 2007) and Forsyth v. City of Dallas, 91 F.3d 769. 774 (5th Cir. 1996). In this case, Bates' transfer resulted in her being "constructively" demoted from a Charge Nurse in Building 83 supervising all nurses except the DON, to a Staff Nurse, under the supervision of another Charge Nurse in Building 81. Although her pin, pay and benefits remained the same, her weekends worked increased by one per month. Therefore, the transfer of Bates to Building 81 and reduction in her supervisory duties was an action which "adversely affected her employment" over which the EAB has jurisdiction under Section 25-9-131 (1) and the MSH's Motion to Dismiss on this issue is OVERULLED.

The MSPB rules provide that a "transfer", "assignment" or "demotion" of an employee is not a grievable action. MSPB Handbook, Ch. 8.3, C and E. Likewise, the Department of Mental Health Addendum to the MSPB Handbook provides that "[t]ransfers are at the discretion of the agency." MDH Addendum Section I, M (August, 2008). However, a "permanent relocation of an employee as a disciplinary measure, and/or where the employee can present substantive evidence that the management decision to relocate the employee was arbitrary or capricious" is a grievable issue. MSPB Handbook 8.2, G. Therefore, the question becomes whether or not the decision to relocate Bates was arbitrary or capricious under MSPB rules. The evidence in this case indicates that it was not. Testimony by Bates' supervisor indicated that while Bates was an excellent nurse, she could not fulfill her duties as a charge nurse. These included problems with timely reporting and staff issues. Further, testimony was also clear that Bates' transfer to building 81 was not "permanent" as required by Section 8.2 G of the Handbook and she could possibly be transferred back to building 83 in the future. Id. Therefore, Bates appeal for the

transfer and demotion in and of itself is not grievable and the Motion of the MSH on this issue is SUSTAINED.

Written Reprimands are grievable issues. Id. at A. The MSH argues that this case should be dismissed because Bates did not timely file a grievance of the Written Reprimand she received on July 9, 2012, for insubordination arising from her ordering a patient with a spine injury to be transferred without a licensed practical nurse to accompany him. This argument is not well-taken. Bates initial grievance was filed on July 18, 2012, and amended grievance was filed on July 25, 2012. Neither pleading mentioned the written reprimand. In her Appeal to the EAB she did ask that the Written Reprimand be removed. As these pleadings all derive from the same actions, the subsequent relief requested in this Appeal relates back to the initial filing and will be considered; and a new trial ordered on the issue of the written reprimand. Also to be considered is whether or not the constructive demotion Bates received was punishment for the written reprimand as MSPB rules do not allow a demotion for one (1) written reprimand in a one year period. See MSPB Handbook Ch. 7, I, B.

IT IS THEREFORE ORDERED that this Appeal be set for hearing on the issue of removal of Bates Written Reprimand;

IT IS FURTHER ORDERED that the Appeal of Bates for the transfer and demotion alone is hereby DISMISSED, however, evidence will be heard on the issue of whether or not the demotion was punishment for the written reprimand as such is not allowed under MSPB rules.

SO ORDERED THIS THE 23rd DAY OF APRIL, 2013.

WESLA SULLIVAN LEECH