Health & Hospitals Corp. (Henry J. Carter Specialty Hospital) v. Savain

OATH Index No. 217/15 (Nov. 5, 2014)

Petitioner failed to prove that institutional aide was intoxicated on duty and failed to follow hospital protocol regarding a clock radio that she found after a patient had been moved to another floor. ALJ recommended that the charges be dismissed.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
HEALTH AND HOSPITALS CORPORATION (HENRY J. CARTER SPECIALTY HOSPITAL)
Petitioner
- against -
ISABEL SAVAIN
Respondent

REPORT AND RECOMMENDATION

ALESSANDRA F. ZORGNIOTTI, *Administrative Law Judge*

This employee disciplinary proceeding was referred by petitioner, the Health and Hospitals Corporation, pursuant to section 7:5 of the Personnel Rules of the Corporation. Respondent Isabel Savain, an institutional aide, is charged with: taking possession of patient property; failing to immediately alert a supervisor, hospital police, or the nursing department that she had found patient property; failing to make an effort to identify the owner of the found property; failing to return the property; and being intoxicated on duty (ALJ Ex. 1). Petitioner seeks respondent's termination from employment.

A hearing was conducted on October 15 and 17, 2014. Petitioner presented documentary evidence and the testimony of the patient's son, Karim Collett, and two of respondent's supervisors, Mr. Rivera and Mr. Watkins. Petitioner also brought to the hearing Mr. Morreale, respondent's other supervisor. When petitioner decided not to call Mr. Morreale, respondent called him. Respondent also presented documentary evidence, testified on her own behalf, and denied engaging in misconduct.

For the reasons below, petitioner failed to prove the charges by a preponderance of the credible evidence. Accordingly, the charges should be dismissed.

BACKGROUND

Except where noted, the facts are not in dispute. Respondent has been an institutional aide since 2004. During the relevant period, respondent was assigned to the Henry J. Carter Specialty Hospital ("Carter Hospital") which is a long-term patient care facility. Respondent is employed in the housekeeping unit and is responsible for cleaning public areas including patient rooms. Mr. Rivera is one of respondent's first-line supervisors. Mr. Morreale is the assistant director of housekeeping and Mr. Watkins is the director.

Respondent wears a uniform at work. As part of her duties, respondent uses a large plastic cleaning cart on wheels. The cart consists of three distinct areas. The front has a low platform for a bucket and mop. The middle has an open shelf on the bottom for chemicals and toilet brushes. Above that is a closed compartment that holds other cleaning supplies. On top of the compartment is an open tray. The back of the cart consists of a hanging garbage caddy with a flexible container that holds a plastic bag inside. On the outside of the flexible container is a compartment with a large upside down "U" shaped zipper. The cart is pushed from the garbage side (Pet. Ex. 4; Resp. Exs. A, B; Tr. 201).

Respondent testified that in May 2014, she was a floater but that her main assignment was the sixth and seventh floors on the east side (6 and 7 East) (Pet. Ex. 7; Tr. 184). Her hours were 7:30 a.m. to 3:30 p.m. Despite petitioner's efforts to show that on the date of the incident respondent went to 7 West when she was not assigned there (Tr. 18-23, 129-33; Pet. Ex. 7), it was undisputed that Mr. Rivera changed her assignment from 6 East to 7 West that morning (Rivera: Tr. 18, 25; Watkins: Tr. 155-56; Savain: Tr. 187). On 7 West, the patients had been moved and the entire area needed cleaning.

Respondent testified that 7 West was not her regular unit and that it was a mess because the patients had been moved to the fifth floor and the unit was empty. She had to sweep and mop the floors, remove the trash, and wipe down all of the surfaces (Tr. 188, 189). She went into room 7-126 on 7 West at 8:30 a.m. and found a patient's I-Pod dock/clock radio ("clock radio") that had been left behind (Pet. Ex. 2). Respondent testified that she had never seen one in

person before but that she knew what it was. Besides having an android phone that is incompatible with the I-Pod docking station on the clock radio, she maintained that she had no intention of keeping it for herself (Tr. 190-91, 210-12, 221).

Respondent testified that she put the clock radio aside while she was cleaning. She planned to bring it to Mr. Watkins in the housekeeping office on the first floor at the end of her shift (Tr. 188-89, 218). She placed the clock radio in a clean plastic garbage bag from her cart (Pet. Ex. 5) and wrapped the bag around it. She put the clock radio in the zipper compartment of the cart because it was the safest place. She did not want the clock radio near the chemicals or to leave it on the top of her cart (Tr. 199-202).

Respondent testified that when she took her 15 minute break at 9:30 a.m. she went outside to smoke a cigarette and did not think about the clock radio because all she wanted to do was smoke. When she took her one-hour lunch at 11:30 a.m. she was not thinking about the clock radio. She went to smoke a cigarette, then sat in a room and played games on her telephone, and before her lunch ended she smoked another cigarette (Tr. 191-93, 214, 234).

At all times relevant Mr. Collett's mother was a patient at the Carter Hospital. She was and still is in a coma. During her stay, family and friends have brought personal items to her room to make her comfortable including the clock radio that had been a gift from her goddaughter (Tr. 28-30; Pet. Ex. 2).

On April 9, 2014, Mr. Collett's mother was moved with her personal items to room 7-126 on the seventh floor due to renovations in her unit on the fifth floor. According to Mr. Collett, when his mother was moved, some items from her closet were not transferred. On the morning of May 9, 2014, Mr. Collett's mother was moved back to the fifth floor. When he arrived that day at approximately 1:45 p.m. to visit his mother, he saw that everything was piled in the corner and that the items from the closet as well as the clock radio were missing (Tr. 33-35, 84-85, 88-89). When he went to the nurse's station he was advised that the items from the closet had been placed in storage but that they did not know about the clock radio. Mr. Collett testified that everyone was "clueless" and gave him a "blank look" (Tr. 36, 86-87). He decided to go to the seventh floor to see if the clock radio had been left behind by accident (Tr. 37, 90; Pet. Ex. 6).

Mr. Collett testified that when he arrived on the seventh floor at 2:30 p.m. (Tr. 43), the floor was empty. He encountered respondent by a cleaning cart. She asked whether he needed

any help. Mr. Collett said no. Respondent asked again whether he needed help and added that there were no patients on Seven West. He said no. He entered room 7-126 and looked for the clock radio which had been plugged in by the window. When it was not visible, he searched the drawers and closet. Mr. Collett asserted that this was not the first time items had gone missing and that he was disappointed and angry. Respondent came in and asked whether he was looking for the clock radio and he said yes. Mr. Collett was surprised that respondent knew what he was looking for. Respondent told him she had put it aside and asked whether he wanted her to take him to it. Mr. Collett said yes (Tr. 37-39, 42, 90-92, 99-100; Pet. Ex. 6).

Respondent testified that when she saw Mr. Collett on 7 West she was walking towards 7 East. She told him that all patients had been moved and asked whether he needed any help. Mr. Collett shrugged her off and continued walking. Respondent found it weird that he was walking into the unit because no patients were there. She went to see what he was doing and found him in room 7-126 looking through the drawers and closets. She asked if she could help him with anything. Mr. Collett said he was looking for his mother's belongings. She told him that she had found a clock radio and he said that he had gotten it for his mother. She told him that she had put it on her cleaning cart and Mr. Collett started walking with her to the cart (Tr. 195-96).

Mr. Collett testified that as they exited the room, he was "shoulder to shoulder" with respondent and that he smelled alcohol on her breath (Tr. 43). In his written statement, Mr. Collett wrote that as they walked down the hall he smelled alcohol on her breath (Pet. Ex. 6). Respondent denied drinking any alcohol (Tr. 212). Respondent testified she left the room first and that Mr. Collett followed her (Tr. 203). Surveillance video shows respondent leaving the room several paces in front of Mr. Collett. Other video shows Mr. Collett following respondent down the hall a distance behind her (Pet. Ex. 3).

Mr. Collett testified that respondent first brought him to a closet, unlocked the door, and said that the clock radio was not there but that it was on her cart (Tr. 45, 54). Respondent then brought him to a cleaning cart on 7 East. When she got there she reached into a hidden space between the garbage caddy and the middle compartment and pulled out the clock radio wrapped in a plastic bag. Mr. Collett said thank you and respondent tried to explain that she was going to take it downstairs when she was done. Mr. Collett did not want to hear her explanations because

he was frustrated and her conduct looked suspicious. He went to re-check room 7-126 and then went to see his mother (Tr. 54-64, 110-12; Pet. Ex. 6).

Respondent testified that she brought Mr. Collett to her cart on 7 East and unzipped the compartment that was facing the middle of the cart. She reached for the clock radio from the side and gave it to him (Tr. 196, 200, 202). Mr. Collett thanked her and mentioned that other items had gone missing. Respondent told Mr. Collett that housekeeping is not responsible for patient moves and when she found the clock radio she figured that she would bring it to her supervisor so he could handle it. Mr. Collett said that she was the only person who had helped him and that he had been running around looking for things (Tr. 202-04).

After he returned to his mother's room, Mr. Collett was "bothered" by what had transpired and went to report the incident with respondent and that she had "the stench of alcohol" on her breath. Mr. Collett was eventually directed to Mr. Watkins who spoke to him at approximately 3:00 p.m. Mr. Collett described his general dissatisfaction with the hospital, his encounter with respondent, and stated that even though he does not drink, he smelled alcohol on her. Mr. Watkins said that he would investigate the matter (Collett: Tr. 64-71; Watkins: Tr. 133-42, 156; Pet. Ex. 6).

After this conversation, Mr. Collett went back to see his mother (Tr. 72). Mr. Watkins testified that when Mr. Collett left it was about 3:15 p.m., and he saw respondent who was at the end of her shift. Mr. Watkins asked her to come to the office and told her about his conversation with Mr. Collett. Respondent denied drinking and stated that she had planned to bring the clock radio to housekeeping at the end of her shift (Tr. 142-43). Mr. Watkins further testified that he stood close to respondent to see if he could detect alcohol on her breath. Respondent did not smell like alcohol or appear in any way to be under the influence (Tr. 159-62).

Respondent corroborated Mr. Watkins's testimony about their meeting and also testified that when Mr. Watkins told her that she was being accused of drinking, she asked for a Breathalyzer test in the hospital but that Mr. Watkins did not think that was necessary (Tr. 204-05). Mr. Watkins testified that he could not recall whether respondent offered to take such a test, and that he was unfamiliar with testing procedures at the time, but that he did not think a Breathalyzer was necessary (Tr. 150-51, 159-62).

After this meeting, respondent changed into her street clothes because her shift had ended and she went outside to smoke a cigarette (Tr. 205). While outside, she saw Mr. Collett. She approached him to ask why he said that she was drinking and expressed concern that she would lose her job (Collett: Tr. 72-75; Savain: Tr. 205-06).

Mr. Collett testified that he went back inside and spoke to Mr. Watkins to find out if he had followed up with respondent. Mr. Watkins told him that he needed to consult with his director because he had never had a situation like this before. Mr. Collett had the impression from Mr. Watkins that there had been other problems with respondent and Mr. Collett expected that prompt action would be taken (Collett: Tr. 75-79, 115).

Mr. Watkins testified that respondent has never been suspected of stealing patient property and that he did not make such an insinuation. He mentioned that there had been some general unrelated issues with respondent (Tr. 163). Respondent and Mr. Watkins testified that they were under the impression that Mr. Collett had gone inside to ask for leniency for respondent (Watkins: Tr. 148; Savain: Tr. 206).

The following week, respondent was interviewed by Mr. Driscoll from the disciplinary unit regarding the incident. Hospital security also opened respondent's locker in her presence. Only respondent's clothing was in the locker (Morreale: Tr. 173-74; Savain: Tr. 208-10).

Mr. Collett testified that, five or six weeks later, he was contacted by the hospital and asked to provide a written statement. Mr. Collett had written one for himself the day after the incident and he checked it and provided it to the hospital. He felt "insulted" that it had taken the hospital so long to get back to him (Tr. 80-83; Pet. Ex. 6). In the statement Mr. Collett described his mother's situation and the incident with respondent. Mr. Collett was dissatisfied with the hospital including: failing to give respondent a Breathalyzer test; failing to place respondent on immediate leave; and delays in handling the matter. He also expressed concern about his mother's safety and complained about blankets that had been lost during his mother's move to Carter Hospital from another facility.

Mr. Collett testified that he was frustrated with the hospital over a number of issues that had occurred, not just what happened on May 9, 2014 (Tr. 128). Mr. Watkins testified that a few weeks before the trial, Mr. Collett called him about the condition of his mother's room (Tr. 149).

Mr. Morreale also testified that he received a complaint from another family member regarding Mr. Collett's mother (Tr. 180).

ANALYSIS

Petitioner alleges that respondent: improperly took possession of patient property; failed to immediately alert a supervisor, hospital police, or the nursing department that she had found patient property; failed to make an effort to identify the owner of the found property; and failed to return the property. Petitioner also charges respondent with being intoxicated on duty.

In a disciplinary proceeding, petitioner has the burden of proving its case by a preponderance of the credible evidence. *Dep't of Correction v. Hall,* OATH Index No. 400/08 at 2 (Oct. 18, 2004). Preponderance has been defined as "the burden of persuading the trier of fact that the existence of the fact is more probable than its non-existence." *Richardson* on *Evidence*, § 3-206 (Lexis 2008) (citation omitted); s*ee also Dep't of Sanitation v. Figueroa*, OATH Index No. 940/10 at 11 (Apr. 26, 2010), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 11-47-A (July 12, 2011). Petitioner has failed to meet its burden on all of the charges.

In order to sanction a civil service employee for misconduct, there must be some showing of fault on the employee's part, either that she acted intentionally or negligently. *Dep't of Sanitation v. Banton*, OATH Index No. 336/07 at 3 (Dec. 1, 2006). Employees may only be disciplined for rule violations that they have notice of. *Taxi & Limousine Comm'n v. Kowal*, OATH Index No. 1614/10 at 7-8 (Mar. 16, 2010), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 11-26-A (May 4, 2011); *Dep't of Sanitation v. Shinnick*, OATH Index No. 1466/07 at 3 (June 29, 2007).

Petitioner failed to identify any rules in the petition that respondent violated (ALJ Ex. 1). Moreover, petitioner failed to put forward any witnesses or evidence regarding the policy to be followed when a patient's property is found. Petitioner's own witness, Mr. Watkins, testified that there is "no specific policy" (Tr. 139, 158). When asked by petitioner to verify that found property was covered at the annual MULTISTAR training for all employees, Mr. Watkins was unable to do so. He testified that the training is an on-line series of questions that covers safety codes and patient care in general (Tr. 149-50). Similarly, respondent testified that the MULTISTAR training is done on a computer and covers nursing care and fire safety. She did

not have any training on lost property. She further stated that the instructor sometimes wrote on a board but that the participants never received any materials to read (Tr. 222-23, 227, 230).

It was only during respondent's case that petitioner first sought to introduce a rule that was marked for identification as petitioner's exhibit 9. The exhibit purportedly came from page 65 of the manual used at the MULTISTAR training. The rule is entitled "Property Safety" and states: "Immediately report the loss or theft of property/equipment to your supervisor and Hospital Police." When petitioner showed respondent the exhibit on cross-examination, she testified that she had never seen it before (Tr. 230). Since there was no foundation laid, the document was not admitted into evidence.

Following respondent's case, petitioner moved to have the MULTISTAR trainer called as a rebuttal witness to lay a foundation for the entire MULTISTAR manual and to explain the topics in it. The application was denied as an improper use of rebuttal (Tr. 236-38).

A rebuttal case typically encompasses evidence tending to disprove some fact sought to be proved by the adversary, evidence sustaining the character of witnesses who have been impeached, or corroborating evidence which has been discredited. "[T}he opportunity to offer evidence in rebuttal does not permit counsel for the plaintiff or prosecution to hold back some evidence and then submit it to bolster his case after the defendant has rested." *See, e.g.*, Richardson on Evidence § 6-504 (Lexis 2008); *see also Marshall v. Davies,* 78 N.Y. 414, 420 (1879) ("No rule for the conduct of trials is more familiar than that the party holding the affirmative is bound to introduce all evidence on his side before he closes."). OATH rule § 1-46(b) gives the trial judge authority to limit the submission of rebuttal evidence. 48 RCNY § 1-46(b) (Lexis 2014); *Dep't of Sanitation v. Ambrosino*, OATH Index No. 208/01 at 13 (May 30, 2001) (use of rebuttal witnesses is within the discretion of the ALJ).

Here, the rebuttal evidence was being offered to prove an element of petitioner's *prima facie* case, namely, that respondent was on notice of a rule regarding patient property as presented at the MULTISTAR training. *Health and Hospital Corp. v. Pena (Segundo Ruiz Belris Diagnostic and Treatment Ctr.),* OATH Index No. 1961/04 at 4 n.1 (Oct. 14, 2004) (inappropriate for petitioner to call rebuttal witness when witness should have been called on its case-in-chief); *Dep't of Sanitation v. Edgar*, OATH Index No. 2228/01 at 12-13 (Dec. 3, 2001) (witness who was an obvious participant to the events in question, should have been called on

the petitioner's case-in-chief); *Dep't of Parks v. Waters*, OATH Index No. 1310/90 at 2-3 (Nov. 1, 1990) (request to call rebuttal witnesses denied where they were more properly witnesses for the petitioner's case-in-chief).

Moreover, respondent never affirmatively raised any new facts on her direct case that needed to be rebutted. She merely denied on cross-examination knowledge of the offered exhibit and corroborated petitioner's own witness who testified that there was no rule regarding lost property. *Dep't of Correction v. Bacchi*, OATH Index Nos. 265-66/90 at 12 (Mar. 29, 1990) (rebuttal is allowed when offered to deny an affirmative fact that the opposing party has attempted to prove and is not allowed when offered against an opponent's mere denial).

Petitioner failed to explain why a witness with knowledge of the offered rule and training was not called on its case-in-chief. Notably, Mr. Morreale, who was originally going to be petitioner's witness, testified that one of his duties was to ensure that hospital standards are in place including that appropriate training is done (Tr. 169). However, petitioner never explored this topic with him. Given Mr. Watkins's and respondent's consistent testimony that no training on this rule was provided, continuance of the trial to prove this fact was questionable.

Even if the MULTISTAR instructor had been allowed to offer the MULTISTAR manual into evidence and explain the topics in it, this would not have established that respondent was on notice of the rule. Petitioner never made an offer of proof that the instructor would testify that the rule was covered during the training or distributed to all participants in the training materials. Indeed, such proof would have rebutted petitioner's other witness who testified that the training was computer based and covered safety codes and patient care in general.

Finding respondent guilty of a rule violation that was unknown to Mr. Watkins, the director of her unit, would be an abuse of discretion. Moreover, his conclusion that respondent should have given the clock radio to a supervisor or nursing staff was insufficient to sustain misconduct (Tr. 139).

There can be no doubt that theft of patient property is a serious issue involving fraud that merits the most severe penalty of termination from employment. *See, e.g., Human Resources Admin. v. Townsend*, OATH Index No. 1325/11 (Feb. 28, 2011) (termination of employment for officer who failed to follow proper vouchering procedures after the arrest of an HRA client and attempted to cover-up that he had the property and deceived the client).

It is possible that respondent took the clock radio with the intention of keeping it and that when Mr. Collett appeared she returned it rather than be accused of theft, as suspected by him (Tr. 110-12). It is equally possible that respondent took the clock radio for safe keeping until she brought it to her supervisor at the end of her shift, as claimed by respondent. Although respondent failed to bring the item to housekeeping during one of her breaks, she never removed it from the seventh floor. More importantly, she affirmatively asked Mr. Collett if he was looking for the clock radio and immediately volunteered that she had put it aside. Generally, where the evidence is equally balanced the charges must be dismissed. *Rinaldi & Sons, Inc. v. Wells Fargo Alarm Service, Inc*., 39 N.Y.2d 191, 196 (1976); *Health & Hospitals Corp. (Metropolitan Hospital Ctr.) v. McCaskey*, OATH Index No. 2195/08 at 9 (Sept. 29, 2008). However, determination of this question is not necessary since respondent is not charged with stealing patient property. Nor is she charged with deceiving anyone or covering up her actions. Rather, respondent is charged with failing to follow protocol for returning found property.

The undisputed evidence shows respondent: took possession of a clock radio that was left behind by other staff during a patient move; placed the clock radio in a clean bag and put it in the zipper compartment of her cleaning cart; and told the patient's son that she had it when he came looking for it. Mr. Collett testified that from the time he saw respondent until he got the clock radio back was less than five minutes (Tr. 116).

There is no explanation by petitioner why respondent's taking possession of the clock radio as alleged in specification one was improper. Leaving it in an empty room could have exposed it to theft by another person and subjected her to a charge of neglect of duty. *See, e.g., Pena*, OATH 559/13 (housekeeping aide neglected his duties and failed to follow appropriate sanitary procedures by lying down on a previously cleaned stretcher in a patient clinic to make a telephone call and failing to perform required cleaning duties).

Expecting respondent to identify the owner of the clock radio as alleged in specification three is also unreasonable. This would have required respondent to abandon her post to look for an unknown patient on the fifth floor and could have subjected her to discipline. *See, e.g., Health & Hospitals Corp. (Bellevue Hospital Ctr.) v. Garces*, OATH Index No. 1617/08 (June 27, 2008), *modified on penalty*, Assoc. Exec. Dir. Dec. (Aug. 12, 2008) (housekeeping aide abandoned post where she left her area a few minutes early to clean up at the end of her shift);

Health and Hospitals Corp. (Elmhurst Hospital Ctr.) v. McKenzie, OATH Index No. 2043/06 (Nov. 3, 2006) (custodial assistant abandoned his post when he went to the employee lounge without permission).

Moreover, there was insufficient evidence that respondent knew the identity of the patient in room 7-126. Mr. Watkins's testimony that respondent should be familiar with the patients on the seventh floor (Tr. 129) was too vague to make a finding. Mr. Collett, who visits his mother daily, testified that he had never seen respondent before (Tr. 29, 74, 97-98). Finally, respondent credibly testified that 7 West was not her regular unit and that she did not know who the owner of the property was (Tr. 203, 235).

Specification four, that respondent failed to return the property, is factually incorrect.

The gravamen of the charges involves specification two. Petitioner argues that respondent did not use common sense when she took the clock radio and failed to notify anyone that she had it. This in turn caused the patient's son to spend time that he could have otherwise spent with his mother looking for the missing clock radio (Tr. 244-45). It would have been prudent for respondent to turn in the clock radio as soon as possible. However, respondent's credibly stated intention of bringing the clock radio to housekeeping at the end of her shift so that Mr. Watkins could deal with it was not so unreasonable that it should result in her discipline, let alone termination from employment as claimed by petitioner (Tr. 248-49). Respondent credibly testified that she wished she had known what the policy was for found property. Had she known that this situation would get so blown out of proportion, she would have brought the clock radio back right away or not even touched it (Tr. 212).

Mere errors of judgment, lacking in willful intent and not so unreasonable as to be considered negligence, are not a basis for finding misconduct. *Dep't of Environmental Protection v. Segarra*, OATH Index No. 2730/10 at 7 (Oct. 20, 2010), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 11-94-R (Dec. 20, 2011); *Dep't of Sanitation v. Rizzo*, OATH Index No. 1423/06 at 2 (Sept. 26, 2006), *adopted*, Comm'r Dec. (Oct. 13, 2006); *see also Dep't of Correction v. Messina*, OATH Index No. 738/92 at 16-17 (July 9, 1992) (officer cannot be penalized for a discretionary act because his judgment, in hindsight, turned out to be mistaken).

Since petitioner failed to establish a rule that required respondent to immediately report the found clock radio to her supervisor, the hospital police, or a nurse's station, and her decision

to bring the clock radio to housekeeping at the end of her shift was not so unreasonable as to be considered negligence, the four specifications relating to the patient property must be dismissed.

With regard to the charge of that respondent was intoxicated on duty, the only proof came from Mr. Collett who stated that he smelled alcohol on respondent's breath when they were walking shoulder to shoulder as they left room 7-126. However, Mr. Collett's testimony differed from his written statement where he stated that he smelled the alcohol while walking down the hall. In either event, petitioner's video evidence does not show Mr. Collett and respondent walking closely together at either time as claimed by Mr. Collett. Even if the video depicted this, Mr. Watkins testified that he saw respondent shortly after Mr. Collett and that he did not smell alcohol or otherwise suspect her of drinking. Respondent credibly testified that she offered to be tested for alcohol. No test was administered even though one was available, and respondent's supervisor testified that no test was necessary.

It is notable that petitioner failed to mention the intoxication charge in its opening or closing statement. When asked about this issue, petitioner lacked any conviction in its argument and stated that the question will be left to the tribunal to decide (Tr. 246-47). Based on petitioner's inconsistent proof, petitioner's failure to have respondent tested, and respondent's credible denial that she was drinking on duty, the intoxication charge should be dismissed.

It is understandable that Mr. Collett suspected respondent of misconduct and is unhappy about the time he spent on this issue while his mother was in a serious medical condition. It is also evident that Mr. Collett is upset with the hospital over a number of issues, not just what happened with respondent. These findings should in no way be construed as minimizing Mr. Collett's concerns. Patient care, safety, and comfort should be the number one priority of a hospital. However, disciplining respondent for misconduct that has not been established by a preponderance of the evidence would be improper.

FINDINGS AND CONCLUSIONS

1. Petitioner failed to demonstrate that respondent failed to follow hospital protocol as alleged in specifications 1 through 4.

2. Petitioner failed to demonstrate that respondent was intoxicated on duty as alleged in specification 5.

RECOMMENDATION

The petition should be dismissed.

Alessandra F. Zorgniotti
Administrative Law Judge

November 5, 2014

SUBMITTED TO:

ROBERT K. HUGHES
Executive Director

APPEARANCES:

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