PATRICIA PARKS, .

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Grievant, .

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v. . Docket No. 94-HHR-109

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WEST VIRGINIA DEPARTMENT OF HEALTH .

AND HUMAN RESOURCES/COLIN .

ANDERSON CENTER, .

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Respondent. .

D E C I S I O N

This is a grievance by Patricia Parks (Grievant), submitted directly to Level IV on March 15, 1994 in accordance with W. Va. Code § 29-6A-4(e). Grievant is challenging her demotion by the Respondent Department of Health and Human Resources (DHHR), Colin Anderson Center (CAC), from Health Service Worker, Pay Grade 4, to Food Service Worker, Pay Grade 2, effective March 16, 1994, due to an incident of patient abuse that allegedly occurred on January 22, 1994. A hearing in this matter commenced in the Board's office in Charleston, West Virginia, on June 16, 1994 and was continued to allow Grievant's representative an opportunity to examine documentary evidence produced by the Respondent. Thereafter, evidentiary hearings were held on August 1 and 2, 1994, with an additional hearing on August 23, 1994 to take testimony from a subpoenaed witness who was unable to attend the earlier hearings. Followingreceipt of timely post-hearing submissions from both parties, this case became mature for decision on October 5, 1994.

DISCUSSION

Several controverted facts are at issue in this grievance and, ultimately, the outcome in this matter hinges upon witness credibility and appropriate inferences drawn from pertinent contested and

uncontested facts. As of January 22, 1994 Grievant was employed as a Health Service Worker at Colin Anderson Center (CAC), which is located near St. Marys, West Virginia. CAC provides medical care and treatment for approximately 1000 developmentally disabled and mentally retarded patients. CAC is presently managed by a private corporation, Res-Care, Inc., under a limited management contract with DHHR. DHHR also contracts with the Legal Aid Society of Charleston, another private corporation, to perform advocacy services on behalf of the residents at CAC.

Clara Maidens is employed by Res-Care as a Residential Training Specialist (RTS) at CAC and is responsible for supervising direct care staff to ensure that established treatment plans are followed for each resident. Ms. Maidens has been an RTS for four years. She was previously employed by the State at CAC as a Health Service Worker (HSW) for approximately three years and as a supervisor for a year and a half. As an RTS, Ms. Maidens supervises approximately twenty-two HSW's at CAC on three shifts. Grievant is one of the HSW's under Ms. Maiden's immediate supervision.

The patient who was the alleged victim of physical abuse by Grievant will be identified as B.B., consistent with this Board'spolicy respecting the privacy of individuals under such circumstances. See, e.g., Edwards v. McDowell County Bd. of Educ., Docket No. 93-33-118 (July 13, 1994); Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994). Ms. Maidens described B.B. as a female, approximately twenty-two years old, partially paralyzed on one side and confined to a wheelchair. B.B. does not verbally communicate in any way and requires total assistance in being dressed, moved from her bed to her wheelchair, moved about the cottage in her wheelchair and feeding. She has been a patient at CAC for most of her life.

B.B. is housed in Harmony Cottage, one of five cottages at CAC where the staff attempts to provide a home-like environment for approximately twelve residents in a facility generally resembling a single family residence. This "group home" arrangement is intended to provide the least restrictive environment possible for the residents. Ms. Maidens indicated that she had previously worked with B.B. in Harmony Cottage for about a year and a half during her time as an HSW at CAC. The physical capabilities of the twelve residents in Harmony Cottage range from individuals with no physical capability who have to be manually turned from one position to another, to persons who are able to walk around without assistance. Thus, the living room area contains a mat table for exercising immobile patients, as well as standard furniture for ambulatory patients.

Ms. Maidens was the sole eyewitness whose testimony directly supported the physical abuse

charges eventually levelled againstGrievant. Thus, her testimony, as well as that of the other witnesses present, must be examined in considerable detail. Ms. Maidens testified that on January 22, 1994 she entered Harmony Cottage between approximately 4:30 and 4:35 p.m., proceeded down a hallway past the laundry room and stopped at the entrance of the living room. She found a patient, C.A., wandering about in the hallway by the laundry room with two empty pop cans dangling from her fingers, and removed the pop cans. As she entered the living room area, she observed B.B. sitting in her wheelchair facing toward the doorway with Grievant standing beside her. Joanne Ingram, a Staff Nurse, was on the mat table while two other HSW's, Pamela Taylor and Patricia Langsdorf, were sitting on a couch to the right of the doorway.

Ms. Maidens observed Grievant trying to put something in B.B.'s mouth. She assumed that B.B. had spit her pill out and Grievant was trying to readminister the pill. Ms. Maidens proceeded toward Grievant and B.B. and saw Grievant finish putting the pill in B.B.'s mouth and slap B.B. saying, "Oh no, you're not going to do that you little rip." At that point, Ms. Maidens was no more than two feet from B.B.'s wheelchair. Grievant had her back toward Ms. Maidens and slapped B.B. with her right hand across the cheek. Ms. Maidens described the slap, stating "it made a loud slapping noise" and "it was fairly forceful, in my opinion." Ms. Maidens indicated that B.B. responded to the slap by dropping her head and had a shameful look "as if your mom had slapped you" when you had done something wrong and been told not to do that again.

Under cross-examination, Ms. Maidens noted that you can read B.B.'s facial expressions and that B.B. either "really, really likes you or she doesn't like you" and that B.B. "doesn't like me." Ms. Maidens also acknowledged that B.B. can laugh and cry and, at times, will do so on appropriate occasions. Ms. Maidens indicated that B.B. would know the difference between a slap and a playful pat.

Ms. Maidens testified that, immediately after observing the slap, she touched Grievant on the shoulder and told her, "That is inappropriate, it is abuse and I will be contacting the Advocate." Ms. Maidens did not make specific reference to the slap. (Ms. Maidens noted that there is a policy at CAC against anyone except nurses administering medications to patients. Assuming Grievant was putting a pill in B.B.'s mouth, such conduct would constitute a violation of that policy.) Grievant responded to Ms. Maidens' "that is inappropriate" comment by saying, "I know," and then walked into the staff room. Ms. Maidens then signed herself into the cottage log book.

After signing in the log book, Ms. Maidens told the staff members sitting on the couch about finding C.A. standing unsupervised in the hallway by the laundry room with pop cans hanging from her fingers. Ms. Maidens then went in the staff room to report that the door alarm was not functioning. (The door alarm sounds to warn the staff that a resident is attempting to elope from the residence.) Ms. Maidens called Donna Clayton asking her to notify Security to replace a battery in the door alarm.

Ms. Maidens discussed an unrelated cottage matter with one of the staff members and then walked about four or five minutes to her office where she called the Patient Advocate, Martha Evans, to report the alleged abuse. Ms. Evans testified that she was called at approximately 4:45 p.m. and instructed the supervisor (Ms. Maidens) to get an Accident and Injury Report completed. Thus, while talking with Ms. Evans, Ms. Maidens asked Donna Clayton to have the nurse on duty in Harmony Cottage, Joanne Ingram, check patient B.B. for any visible injuries at approximately 5:15 to 5:30 p.m. Ms. Maidens claimed to have overheard Ms. Clayton's side of her conversation with Ms. Ingram, even though she was talking with Ms. Evans on another line at the same time. Following her conversation with Ms. Evans, Ms. Maidens called the Administrator on Call, Betty Barron, to get authority to suspend Grievant, pending investigation of the alleged abuse.

Donna Clayton testified that approximately three to five minutes following that conversation, she called Grievant and told her to bring her "things" to the scheduling office. Grievant came to the office and Ms. Maidens informed her that she was being suspended due to alleged patient abuse. Grievant indicated that she had already called for her ride and that they would pick her up in the Administration parking lot. Ms. Clayton testified that Grievant told her that she would frequently grab B.B. by the face and say "Oh, you little thing."

Ms. Clayton testified that she simply told Ms. Ingram to examine patient B.B. without telling her to look for evidence of aslap. Ms. Clayton said she knew not to lead the nurse examining the patient by telling her there was an allegation of a slap. Ms. Clayton also testified that she called Grievant before calling Ms. Ingram and that, in fact, Grievant was already in the office when she called Ms. Ingram to examine B.B. Ms. Clayton also testified that Ms. Ingram did not ask what to look for on patient B.B. although she did volunteer to Ms. Clayton, "I don't see anything." Martha Evans, Patient Advocate, testified regarding B.B.'s normal reactions to various situations based upon her dealings with B.B. over ten to twelve years while previously employed at CAC in positions involving direct patient care.

Ms. Evans stated:

> [B.B.] depends a great deal upon staff to do most of her things for her. [B.B.] responds to certain people better than what she does to others. If [B.B.] does something that she knows she shouldn't have, she'll drop her head, become somewhat shy towards you; she shows a lot of embarrassment if you walk up and scold her about a situation. If she wants your attention, she'll bang on the table or she'll make some gesture, yelling at you, not saying "look at me" or "do this for me" but she yells a lot; things you can't understand what she's saying. But she does have a lot of behaviors whereas she'll try to get your attention over one thing or the other. Like I say, she depends a great deal upon staff to do everything for her.

Ms. Evans noted that B.B. might not respond the same way each time to a certain event, depending on who was interacting with her. Ms. Evans opined that B.B. would have reacted to being slapped and scolded by Grievant by hanging her head in the manner described by Ms. Maidens. Of course, there was no evidence that Ms. Evans had ever observed Grievant, or anyone else, slap B.B. Under cross-examination, Ms. Evans noted that she interacted with B.B. on theday following this alleged incident and observed no change in her normal pattern of conduct.

Patricia Langsdorf, an HSW employed at CAC for the past six years, testified in behalf of Grievant. Ms. Langsdorf testified that she had worked with B.B. in Harmony Cottage for most of the past four years as well as for another period of approximately six months in another facility at CAC. Ms. Langsdorf indicated that B.B. can communicate with the staff using motions similar to sign language to indicate when she wants her clothes changed or she needs a shower. She testified that B.B. will laugh appropriately when she pulls one of her "pranks." Ms. Langsdorf further described how B.B. would indicate that she was experiencing pain by crying, hitting her tray table with her right hand, biting her hand, hitting herself in the mouth or screaming out loud. Ms. Langsdorf opined that B.B. would either scream, start hitting her tray table or flail her right arm, if someone were to smack her or speak harshly to her. Ms. Langsdorf's experience is that B.B. will "holler" if someone speaks harshly to her. Ms. Langsdorf expressed this same opinion to Ms. Maidens in Harmony Cottage on the evening of January 22nd after Grievant had been suspended and sent home.

When pressed for specifics on cross-examination, Ms. Langsdorf recalled B.B. crying and hitting her mouth with her hand when she was given a spray medication for a sore throat by one of the nurses. The nurse had indicated that the medication was likely to cause some minor discomfort. Ms. Langsdorf was adamant that "when you hurt [B.B.], she let's you know." Since Ms. Langsdorf

hasnever seen B.B. slapped, she could not state with certainty what B.B. would do if slapped. However, Ms. Langsdorf had observed B.B. "holler" when someone raised their voice and admonished her for knocking food out of the HSW's hands while feeding her. Ms. Langsdorf agreed that B.B. would be likely to hold her head down if she were embarrassed.

Ms. Langsdorf was sitting on the couch in the living room facing toward B.B. and Grievant when this incident allegedly occurred. Ms. Langsdorf neither saw nor heard Grievant slap B.B. although she was sitting approximately eight feet from B.B. and Grievant. She indicated that she believed she could have heard a slap if one had occurred and she most definitely could have heard B.B. cry out. She testified that had she heard a slap, she would have paid attention to the sound until she could determine if something out of the ordinary was going on.

Ms. Langsdorf did not recall what, if anything, Grievant might have said to B.B. while readministering the medication since she was not "paying attention." She acknowledged that she would pay more attention to her assigned patients than to B.B., who was then assigned to another HSW (Pamela Taylor). Indeed, Ms. Langsdorf simply observed Grievant give B.B. a pill that B.B. had spit out. Then, she saw Ms. Maidens come over and "laughingly" speak to Grievant. She also heard Grievant respond, "I know." R Ex 12. Contrary to her statement to the Patient Advocate, Ms. Langsdorf testified that she was not certain if Grievant admitted to her shortly after the incident that she told B.B. "I said take thislittle pill, you little rip" (R Ex 12.) or "you little rip-snorter." Ms. Langsdorf did recall that Grievant told her the latter version in a telephone conversation sometime after the Legal Aid investigation was completed. Ms. Langsdorf admitted recalling in her statement to the Patient Advocate that she had heard the door bell ring before Ms. Maidens appeared in Harmony Cottage, although she was not certain if she actually heard the bell or not. Ms. Langsdorf further testified that B.B. frequently spit up her pills as she had difficulty swallowing. Accordingly, some of the nurses would have an HSW tip back B.B.'s wheelchair and place a hand under her chin to steady her head while the nurse administered the pills. Apparently, this approach aided B.B. in swallowing her medication. However, it was generally necessary for the staff to restrain B.B.'s "good" arm while administering medication.

Ms. Langsdorf also testified on cross-examination that she overheard part of Joanne Ingram's telephone conversation with Donna Clayton. She heard Ms. Ingram ask, "for what?" Ms. Ingram then came out and told Grievant that she was being accused of abuse for slapping B.B. Up until that time,

Ms. Langsdorf and the others assumed that Grievant was being turned in for improperly giving medication to B.B.

Ms. Langsdorf explained her statement to the Patient Advocate, "I'm no back biter," by stating that while she would report another co-worker for abuse, she would also tell that person directly that she was reporting them to the appropriate supervisor. This explanation was consistent with the context of her discussion withMs. Maidens after Grievant had been sent home for alleged physical abuse on January 22nd. See R Ex 12 at 12.

Pamela Taylor, another HSW in Harmony Cottage at the time of the alleged incident, also testified in behalf of Grievant. Ms. Taylor has worked at CAC for a total of 12 years. She has been working in Harmony Cottage for the past year and a half. She has known Grievant for many years and described their relationship as "close friends." (Grievant, in her testimony, agreed that she and Ms. Taylor were "good friends" and generally worked the same schedule in Harmony Cottage.) Ms. Taylor testified that she was the HSW in charge of B.B. on the night in question. It was her job to know what B.B. was doing at all times.

At the time of the incident at issue, Ms. Taylor was sitting on the couch in the living room cutting out decorations for the upcoming Valentine's Day activities. She was looking directly toward B.B. who had been watching television before the nurse had begun administering her medications. As the nurse was giving B.B. her pills, Ms. Taylor heard B.B. gagging. She looked up and noticed that B.B. had spilled a glass of water on another nearby patient, M.L. Ms. Taylor did not recall M.L. responding to the water being spilled on her by screaming as described by Ms. Langsdorf. See R Ex 12 at 4.

Ms. Taylor observed that Ms. Ingram had attempted to administer pills to B.B. without assistance from an HSW while other nurses often called for assistance. Ms. Taylor had been told that only a "licensed person" could give pills to patients. Nonetheless, sheacknowledged that she had readministered medication to B.B. in the presence of a nurse and that on those occasions, after swallowing her pills, B.B. would appear "somewhat distraught" by "having her mouth open" and a "worried look about her face." Ms. Taylor also agreed that it was fairly common for B.B. to hang her head in such circumstances, when she was sitting in an upright position. Indeed, B.B. will sometimes strike herself in the face with her "good" hand after being administered medication against her will.

Ms. Taylor testified that she heard a pill strike the table on B.B.'s wheelchair. She thereupon told Grievant to get B.B.'s pill before it hit the floor. Ms. Taylor could see the pill was still on B.B.'s lap and

Grievant was closer to B.B. Also, Grievant did not have scissors in her hands. Ms. Taylor noted that it was fairly common for B.B. to spit out her medication. Ms. Taylor stated that although she could hear the pill hit B.B.'s tray table on her wheelchair, she did not thereafter hear a slap nor observe any unusual reaction by B.B. after Grievant had readministered her medication. Ms. Taylor did not watch Grievant put the pill in B.B.'s mouth. She did not hear Grievant say anything to B.B. Indeed, she did not even notice Ms. Maidens until she came over to sign into the log book. (Ms. Taylor indicated that she did not hear a door chime when Ms. Maidens entered the cottage as the chime was not functioning that day.)

Ms. Taylor acknowledged on cross-examination that there was a television on in the room but stated that it was "not very loud."

Ms. Langsdorf was sitting to Ms. Taylor's left, on the other end of the same couch. Ms. Taylor agreed that Grievant has a "boisterous voice." She further opined that if Grievant had done anything to hurt B.B., the patient would have responded in a noisy fashion.

Ms. Taylor recalled that Grievant told her she was being turned in to the Advocate for slapping B.B. sometime between the time Ms. Maidens left Harmony Cottage and the time Ms. Maidens returned to the cottage. Ms. Taylor also recalled overhearing Ms. Ingram state that she had to check B.B. but she could not recall if that was before or after Grievant's comments about being turned in to the Advocate. When Ms. Maidens left the cottage, Grievant was not visibly upset. However, when Grievant later told her that she was being suspended, as Grievant was getting ready to go home, Grievant was visibly upset.

Katrina Edwards, a CAC Health Service Assistant responsible for training in Apartment E, also testified in behalf of Grievant. She has worked at CAC for 12 years and recalled that aides often assisted the nurses in giving medications to certain patients. She indicated that she had heard CAC had a policy against HSW's giving medications but she had never actually seen the policy. However, providing training on administering medications is not included in Ms. Edwards' duties. She further acknowledged on cross-examination, that she was aware of a federal policy which prohibited HSW's from administering medications because they were not properly licensed health care providers. Nonetheless, she has previously observed HSW's in Harmony Cottage and elsewhere at CAC assisting ingiving medication but is not aware of any disciplinary action being taken as a result of any such policy violations.

Immediately after Grievant left the office to catch her ride home, Ms. Maidens returned to Harmony Cottage. There, she spoke privately with Pat Langsdorf who told Ms. Maidens that she thought she was "nit-picking" in regard to Grievant in that no one in Harmony Cottage had seen or heard Grievant slap B.B., although Grievant had told her that she did call B.B. "a little rip." Ms. Maidens proceeded to obtain written statements from all personnel assigned to the cottage at the time of the alleged incident, in accordance with standard procedure.

On the following day, Ms. Maidens was questioned by Martha Evans and Ed West, Patient Advocates. A transcript of that interview was admitted as an exhibit. (R Ex 1.) In her statement, Ms. Maidens noted that she had taken the two empty pop cans from patient C.A. in the hallway before entering the living room. R Ex 1 at 5. (Ms. Edwards opined that, based on her dealings with C.A., that patient would have slapped herself loudly if someone were to take something away from her.) Ms. Maidens indicated that, before walking into the living room, she was already disturbed by the fact that the door chime was not working and a client with a history of elopement, C.A., was standing unattended in the hallway with pop cans dangling from her fingers. (The record does not indicate which HSW was directly responsible for C.A. at that point in time.) Immediately after the incident, Ms. Langsdorf discussed "ordering shirts for the blizzard" with Ms. Maidens in the Nurse's Station,an unrelated subject that Ms. Maidens perceived as an effort to divert her attention from the abuse incident. R Ex 1 at 5. Donna Clayton, a Shift Supervisor at CAC, testified that Ms. Maidens came to the Scheduler's Office on January 22nd and told her that she had seen Grievant slap patient B.B. Ms. Clayton testified that after Ms. Maidens called Martha Evans, Ms. Maidens directed her to have Grievant report to the office. Ms. Clayton called Grievant at Harmony Cottage and told her to bring her "things" and come up to the Scheduling Office. Ms. Clayton recalled telling Joanne Ingram to fill out an Accident and Injury Report based on guidance from Martha Evans. Ms. Clayton denied telling Ms. Ingram that there was an allegation of a slap.

Grievant elected to waive her rights under W. Va. Code § 29-6A-7 and testified under oath, subjecting herself to extensive cross-examination by Respondent's representative. Grievant has been employed as an HSW for over 14 years. Her mother has worked at CAC for over 18 years. Grievant had been working in Harmony Cottage for approximately three years at the time of the alleged incident. She normally works the afternoon shift.

Grievant indicated that it was not unusual for one HSW to help out with another HSW's patient, as

when Ms. Taylor asked her to put B.B.'s pill back in her mouth. Grievant assumed that the nurse, Ms. Ingram, was aware that she was readministering B.B.'s medication since she was close by on the mat table on the opposite side of B.B.'s wheelchair. She has worked with B.B., "off and on," for the entire time she has worked at CAC. Grievant testified thatB.B. had struck her on prior occasions but that B.B. had never "upset" her. Grievant stated that she has never hit B.B. and that had she either struck B.B. or talked harshly to her, B.B. would have probably yelled, screamed, or hit her table top or mouth with her hand to let Grievant know that she didn't like it. Grievant has observed B.B. being hit by another patient and, on those occasions, B.B. became very upset, yelling, biting her own hand and hitting her table top to let people know something had happened to her.

Grievant noted that B.B. was difficult to give medication to as she gags a lot and appears to have a very sensitive "gag reflex." She may hit her tray or knock things out of a staff member's hand unless someone restrains her good hand. "She just does not care to take her pills." Grievant believes that it is easier for B.B. to take her pills without water. The nurses frequently ask for help in administering medication to B.B.

Grievant further testified that B.B. was sitting in her wheelchair facing toward the staff office in Harmony Cottage. Grievant had put the pill back in B.B.'s mouth and was holding her chin to keep her from spitting at the pill. Grievant told her, "Oh, come on you ornery little rip-snorter, you take that" and B.B. swallowed the pill without crying out or indicating any displeasure with what had happened. On cross-examination, Grievant explained that her grandfather had told her that the term "rip-snorter" was used to describe a "roaring laugh" and he commonly used the term to describe someone who was being "ornery." Grievant stated she waspositive that she did not use the term "you little rip" in speaking to B.B. and indicated that "rip" meant someone of loose morals who was not a nice person to be around. Grievant also agreed that "rip-snorter" was probably not an appropriate word to describe a client at CAC although she did not consider it "abusive."

Grievant acknowledged that she "patted" B.B. on the side of the face with her right hand as B.B. swallowed the pill but that her pat was intended as "an endearment." Grievant insisted that what she did could not be interpreted as a slap. Grievant further noted that she "adored" B.B. and consistently enjoyed an excellent working relationship with her. Respondent offered no evidence to contradict Grievant's testimony regarding the cordiality of her normal dealings with B.B.

Grievant testified that she was not aware of Ms. Maidens' presence in Harmony Cottage until Ms.

Maidens "touched her on the shoulder and said that it was inappropriate." Ms. Maidens did not tell Grievant what was inappropriate. Grievant assumed that Ms Maidens was referring to giving B.B. her pill as being "inappropriate" since she was aware that CAC "frowns on" HSW's giving medication. Grievant recalled that she was asked to put the pill back in B.B.'s mouth by Ms. Taylor and readily admitted to doing that. She noted that HSW's do not set up, pass or chart medications. However, they do assist the nurse with difficult patients and may readminister medications when asked by the nurse.

Grievant stated that she was not aware she was being charged with physical abuse until Ms. Ingram informed her after havingreceived a phone call sometime around 4:45 to 4:50 that afternoon. She then came out of the office and told the other HSW's present, "I'm being accused of slapping [B.B.]." Grievant stated, "I couldn't believe that I was being brought up on abuse charges." A minute or two later, Grievant was called by Donna Clayton and told to come to the office. Grievant testified that she asked Ms. Clayton if she was being sent home as she needed to call for a ride. By the time Grievant met Ms. Maidens at the office, she was well aware that she was being suspended for alleged patient abuse.

Grievant indicated that she had dealt with various "aggressive" patients over the years and had suffered several injuries as a consequence. (Grievant noted that her file at CAC would reflect these injuries.) However, she stated that you have to take into consideration that these individuals are handicapped, that they are not intentionally hurting anyone and you have to maintain your composure and continue with your duties. This was the first time Grievant had been written up for responding toward a patient with any sort of violence. Grievant agreed that she had no reason to slap B.B. and that the way to get B.B. to do something is to "baby her, you coddle her, you tease with her."

Grievant testified that she was not interviewed by the Patient Advocate until February 18, 1994. Grievant stated that she received letters advising her that her initial 20-day suspension was being extended pending completion of an investigation.

The final witness, Joanne Ingram, was subpoenaed by both parties and provided corroborative evidence which was critical tothe outcome of this grievance. Ms. Ingram is a Registered Nurse (RN) employed as a Staff Nurse at CAC. She has been an RN since 1953. She usually works only on weekends and was working in Harmony Cottage at the time of the incident at issue. On January

22nd, Ms. Ingram was responsible for dispensing medications in two cottages. She reported for work at 2:30 p.m. and went to Faith Cottage before going to Harmony Cottage.

At approximately 4:45 p.m., Ms. Ingram had already given medication to C.A. and was administering medications to B.B., following her usual practice of proceeding alphabetically through the patients in each cottage. B.B. was in the living room in her wheelchair in front of the mat table. She gave B.B. multiple pills, one at a time, with a little bit of water. Ms. Ingram noted that B.B. is hard to give medications to because she throws her arm around spilling medicine and spits out pills.

B.B. threw up her hand, knocking the glass of water out of Ms. Ingram's hand. Some of the water splashed on another patient, M.L., who was lying nearby on the mat table. She noted that M.L. "started fussing a little bit because her leg was wet." Ms. Ingram walked into a nearby bathroom off the staff office to get paper towels to clean up the water in M.L.'s area.

As Ms. Ingram came out of the bathroom, she observed B.B. spit out a pill and Grievant pick the pill up and put it back in B.B.'s mouth. Ms. Ingram then walked over and cleaned up the water that had been spilled by B.B. in the vicinity of M.L. After cleaning upthe water, Ms. Ingram walked back and got more water for B.B. She came back and gave the water to B.B.

By this time, Ms. Maidens had entered the room and Ms. Ingram had heard Grievant say something to B.B., "you ornery kid" or "you little brat" or "something of that order; just something like you would say about your own children." On cross-examination, Ms. Ingram indicated that she thought whatever she heard Grievant say to B.B. was "brusque" but not abusive. Ms. Ingram wondered if Ms. Maidens had overheard Grievant's comment to B.B. since CAC discourages employees from even using terms of endearment such as "honey" in dealing with the patients. Likewise, she wondered if Ms. Maidens observed Grievant give the pill to B.B. since only nurses are supposed to give pills. However, there was no doubt in Ms. Ingram's mind that the pill belonged to B.B. as she had seen it come out and it had lodged on B.B.'s person without hitting the floor. Ms. Ingram thereafter continued to give medications to the remaining patients without thinking any more about the matter.

A few minutes later, Ms. Ingram received a phone call from Ms. Clayton who instructed her to prepare an Accident Report on B.B. Ms. Ingram testified that she told Ms. Clayton, "I don't know what you're talking about, what kind of an Accident Report?" According to Ms. Ingram, Ms. Clayton replied, "that incident that Clara reported." Ms. Ingram again said, "I don't know what you're talking about."

This time, Ms. Clayton responded, "Clara says that Patty [Grievant] slapped [B.B.]. Just look at her face and see ifyou see any red marks and make out an Accident Report." Ms. Ingram then went in and examined B.B. finding no visible marks.

Immediately after examining B.B., Ms. Ingram privately called Grievant into the staff room and said to her, "Patty, do you know what they're accusing you of?" Grievant replied, "no." Ms. Ingram then told Grievant, "they're accusing you of slapping B.B." She then prepared a "CAC Incident Report" stating "no injury" under "Description of Injury" and "It was reported that [B.B.] was slapped by a HSW. No marks or injury noted." under "Description of Accident or Incident." R Ex 18. Further, Ms. Ingram stated "Examination done - no marks noted" under "Action Taken By Reporting Persons." She also charted the same information into B.B.'s patient record in accordance with standard procedure. Ms. Ingram testified that she referred back to B.B.'s "chart" and found that she recorded her examination of B.B. at approximately 5:00 p.m., rather than 5:30 p.m. as she had stated during her interview by the Patient Advocate.

DHHR attempted to challenge Ms. Ingram's version of her telephone conversation with Ms. Clayton on cross-examination. Ms. Ingram produced a hand-written statement she had prepared immediately after the incident (consistent with verbal instructions from Ms. Maidens) in which she stated, "I was later told [B.B.] was supposed to have been slapped. I did not see this nor was I aware it was supposed to have happened until I was told so by Donna Clayton. She asked me to examine [B.B.] which I did and found no red marks." J Ex 1. As Ms. Ingram stated under questioning by theundersigned, "if she [Donna Clayton] didn't tell me, I wouldn't have known to look for a red mark."

Ms. Ingram also testified that she had given medications to B.B. "hundreds of times" during her years at CAC and "dreaded" giving her medicine as she was "difficult." However, she confirmed Ms. Langsdorf's observation that it was highly unlikely that someone could hurt B.B. without B.B. making some oral or physical response that would bring her discomfort to the attention of others.

As previously noted, Ms. Maidens was questioned on the following day. This questioning was conducted in the course of an investigation into this incident performed jointly by Martha Evans and Ed West, Patient Advocates employed by the Legal Aid Society of Charleston. The Advocates also questioned Grievant. A transcript of that interview was admitted at the hearing (R Ex 14) and is generally consistent with Grievant's testimony at the hearing. They provided their completed findings to Rick Hendrickson on February 4, 1994. R Ex 6. Mr. Hendrickson testified that he is employed by

Res-Care as the Administrator at CAC. Mr. Hendrickson stated that he was notified of the incident by Betty Barron through a phone call to his residence on the grounds at CAC. Ms. Barron is the State Assistant Administrator of CAC in charge of personnel. While Res-Care manages CAC, personnel matters involving state employees are worked through Ms. Barron and the Division of Personnel in Charleston. Accordingly, on January 25, 1994, Ms.Barron issued a letter to Grievant notifying her of her suspension as follows:

> Allegations of your having participated in acts of physical abuse on January 22, 1994 in Harmony Cottage have been reviewed.
>
> Based on this review, it is my decision that you should be suspended without pay for a period not to exceed twenty (20) calendar days pending the conclusion of our investigation of the aforementioned allegations. Once the allegations have been fully investigated, you will be informed of any action the Colin Anderson Center shall take regarding your employment. Your suspension from employment will be effective January 22 (1/2), 1994 and end at the conclusion of our investigation which will be not later than February 11 (1/2), 1994.
>
> Further, the nature of the allegations, create suspicion with reference to your ability and integrity in discharging the duties and responsibilities of your position. Considering that your position is one of public trust, I believe the public interest can only be best served by suspending you from employment, without pay, until these allegations are resolved. To preserve the integrity of any evidence which will prove your innocence or the validity of the allegations, I am instructing you not to discuss this matter with other employees or individuals without prior permission from me. Any deviation from this directive may be construed as an effort on your part to impede or interfere with our investigation (sic) may be grounds for dismissal.
>
> You may respond to the matters of this letter, either in writing or in person, provided your response is submitted to me within ten (10) working days of the date of this letter. As an employee of the State of West Virginia you may file a grievance pursuant to WV Code § 29-6A-1 et seq. within ten (10) working days of the effective date of this action. Your grievance should be forwarded to the Education and State Employee Grievance Board, 808 Greenbrier Street, Charleston, West Virginia 25311.

R Ex 9.

As previously noted, the report from the Legal Aid Society was received on February 4, 1994. Thereafter, a series of discussions took place between Mr. Hendrickson, Ms. Barron, attorneys from

theAttorney General's Office and staff in the Division of Personnel, regarding the appropriate disciplinary action to be taken in regard to this incident. A series of letters was issued to Grievant extending her suspension. (These suspension letters were not made a part of the record in this matter.) Once a decision was ultimately reached to demote Grievant, Ms. Barron issued the following notice on March 11, 1994:

> This is to inform you that we have concluded the investigation referred to in your letter of suspension without pay dated January 25, 1994 followed by extension letters dated February 18, 1994, and February 24, 1994, and the final extension ending March 14, 1994. A summary of the investigation is shown below:
>
> On January 22, 1994 you were assigned to perform Health Service Worker duties in Harmony Cottage. At approximately 4:30 p.m. Clara Maidens, RTS, entered the living area of the cottage without notice. At the time of her entry, medications were being dispensed. Ms. Maidens stopped momentarily in the entry way of the living area. She observed you standing over patient B.B. who was confined to a wheel chair. At this time you were placing medication in pill form in Patient B.B.'s mouth, she, however, spit out the medication. Ms. Maidens was standing approximately two (2) feet behind you and observed you slapping the Patient B.B. and overheard you saying, "Oh no, your (sic) not going to do that you little rip." Ms. Maidens placed her hand on your shoulder and stated, "Patty, you need to know that's inappropriate, it is abuse and I will be contacting the Advocate." You replied, "I know." Ms. Maidens then telephoned Betty Barron, Acting Assistant Administrator to determine if she had the authority to remove you from the unit. You were then called to the ECHO Office, told to bring your "things" and informed that you were being suspended pending an investigation of patient abuse. You replied that you had already contacted your sister-in-law to pick you up as you were aware that you were being charged with patient abuse and would be suspended from work pending an investigation. Although you denied slapping the patient, stating that you merely patted her on the cheek, I believe, however, Ms. Maiden's (sic) statement is more credible.
>
> Based upon the investigative report on this incident, I have concluded that you did, in fact, slap Patient B.B. It is unreasonable for me to conclude that Ms. Maidens falsely accused you of this abusive action. Your action of contacting your sister-in-law so that she would transport you to your residence prior to being notified of your suspension from work is proof that you were aware of your actions and contrary to your denial.
>
> As the Administrator having the responsibility for patient safety I cannot ignore this incident and not take reasonable action to prevent additional occurrences of patient abuse. To the contrary, I am required to take action when I believe patient abuse has occurred and prevent possible reoccurrences.
>
> I am presently seeking a vacancy to which I can transfer you and remove you from direct patient care. This would allow me to employ another individual in your position

> who could provide the required care to our patients.
>
> We have a vacancy action presently pending and if I can obtain approval, a vacancy will exist for a Food Service Worker in the Dietary Department. If I am unable to obtain approval for such vacancy transfer I will, however, have no other recourse than to dismiss you from your employment. It is for these reasons I am offering you opportunity to return to work from your present status as suspended without pay pending investigation. Upon your return you may then request to use your annual leave or request a personal leave of absence without pay until I receive approval for a vacancy transfer to a non-direct care position.
>
> If I am unable to obtain the required approval, and since it is believed your conduct warrants dismissal, I must then dismiss you from your employment.
>
> Accordingly, please contact me to discuss this matter so that we may arrive at a decision as to what action is necessary to meet the agency, patients and your needs as well. Please contact my office for an appointment on March 15, 1994 to discuss this matter.
>
> Permanent classified employees have appeal rights granted under the West Virginia Code & (sic) 29-6A-1 et seq, Grievance Procedure for State Employees. If you choose to exercise your appeal rights, you must submit your appeal to your immediate supervisor within ten (10) working days of the effective date of this action.

R Ex 10.

Shortly thereafter, on March 25, 1994, the following letter was sent under Mr. Hendrickson's signature as "Administrator" of CAC:

> This letter is to confirm that we have concluded the investigation referred to in your letter of suspension without pay dated January 25, 1994 followed by extension letters dated February 18 and February 24, 1994. On March 15, 1994 you were contacted and directed to return to work on March 16, 1994 as a Food Service Worker in the Dietary Department.
>
> I am informing you of my decision to demote you from your present position of Health Service Worker, PG-4 to a Food Service Worker PG-2. This demotion for cause is effective March 16, 1994, (noon) and is taken in accordance with Section 11.04 of the Division of Personnel's Administrative Rule.

I believe there is sufficient evidence warranting your removal from your position requiring direct patient care. After the incident of patient abuse you were then called to the ECHO Office, told to bring your "things" and informed that you were being suspended pending an investigation of patient abuse. You replied that you had already contacted your sister-in-law to pick you up as you were aware that you were being charged with patient abuse and would be suspended from work pending an investigation. Although you denied slapping the patient, stating that you merely patted her on the check (sic), I believe, Ms. Maiden's (sic) statement is more credible.

Based upon the investigative report on this incident, I have concluded that you did, in fact, slap Patient B.B. It is unreasonable for me to conclude that Ms. Maidens falsely accused you of this abusive action. Your action of contacting your sister-in-law so that she would transport you to your residence prior to being notified of your suspension from work is proof that you were aware of your actions and contrary to your denial.

As the Administrator having the responsibility for patient safety I cannot ignore this incident and not take reasonable action to prevent additional occurrences of patient abuse. To the contrary, I am required to take action when I believe patient abuse has occurred and prevent possible reoccurrences. I have concluded that your conduct has violated the public trust of providinga safe environment for the therapeutic care of the individuals in Harmony Cottage at Colin Anderson Center. Individuals of the facility need a sense of security, as any other person, even though they have been institutionalized because of their mental capacity, which prevents them from caring for themselves. Your continued presence in Harmony Cottage constitutes a threat to the patients physical and emotional well-being.

You have an opportunity to either meet with me in person or present me a written explanation as to why you think this action is unwarranted. If you choose to meet with me, or to write to me, please contact my secretary for an appointment or deliver to me your written explanation within eight (8) calendar days of receipt of this letter.

For any appeal rights you may have, refer to West Virginia Code S (sic) 29-6A-4(e), Expedited Grievance Process. If you choose to exercise your appeal rights, you must submit your appeal directly to the Education and State Employees Grievance Board at 808 Greenbriar (sic) Street, Charleston, WV 25311, within ten (10) working days of the effective date of this action. Copies of your appeal should be forwarded to me and the Director of Personnel.

R Ex 11.

Mr. Hendrickson indicated that he determined that it was necessary to place Grievant in a position

that did not involve direct patient care as a result of this incident of "proven" patient abuse. Mr. Hendrickson further testified that once it was determined that Grievant was to be demoted rather than dismissed, she was given back pay as an HSW to cover the time she had been suspended in accordance with guidance from the Division of Personnel. (However, the suspension letter dated January 25, 1994 remains in Grievant's personnel record as a de facto suspension with pay.)

It is abundantly clear that if Grievant treated B.B. as alleged in Ms. Maidens' testimony and the disciplinary letters ofMarch 11th and March 25th, Grievant committed prohibited patient abuse. Moreover, if Grievant committed patient abuse as alleged, her demotion to a position that does not involve direct patient contact was fully warranted. As previously noted, there are significant conflicts in the testimony of various witnesses to these events requiring assessments of the credibility of each witness generally and, to a certain extent, credibility of each witness as to certain critical facts.

In assessing credibility of the various witnesses whose testimony is at issue, the undersigned finds that the testimony of Ms. Langsdorf was generally credible. There was no indication that Ms. Langsdorf had any particular affinity toward Grievant nor any hostility toward Ms. Maidens. Indeed, Ms. Maidens testified that Ms. Langsdorf took exception to Ms. Maidens' conclusions on the same day as the alleged incident. Moreover, Ms. Langsdorf did not appear evasive or calculating in her testimony, readily responding to questions without regard to whether the answers were beneficial or detrimental to Grievant's position.

While there was evidence that Ms. Taylor and Grievant were "close friends" there was nothing apparent in her testimony to indicate that this friendship influenced her responses on either direct or cross-examination. To the contrary, Ms. Taylor answered questions without hesitation in a matter-of-fact tone of voice and did not appear to shade her responses to protect Grievant. For example, she acknowledged that she would probably not have a heard a "soft slap" of B.B. although a "soft slap" would still constitutepatient abuse. Accordingly, Ms. Taylor's testimony is found to be generally credible.

Ms. Ingram's testimony appeared both candid and forthright. Moreover, she stood her ground on her recollection of events despite a barrage of confusing questions on cross-examination. Indeed, in regard to the single event which the Respondent most strongly contested in Ms. Ingram's testimony, the time of day when Ms. Clayton had Ms. Ingram examine B.B. and prepare an accident report, Ms. Ingram's version was corroborated by her prior written statement recorded immediately after the

events. Moreover, this document was in DHHR's possession (See footnote 1) (although counsel had apparently not seen it prior to the hearing) and it was further corroborated by entries in B.B.'s patient records which Ms. Ingram testified to without objection. Since this document was not in Ms. Ingram's possession when she was questioned by the Patient Advocate and no effort was made to check B.B.'s medical record (chart), despite the significance of this factual issue to Respondent's theory of guilt, an adequate explanation for the error in Ms. Ingram's testimony to the Patient Advocate was provided. Finally, there was no evidence that Ms. Ingram had any motive to protect Grievant or any animosity toward Ms. Maidens. Accordingly, Ms. Ingram's testimony on pertinent issues is fully credited.

Grievant's testimony was generally consistent and credible. DHHR's attempt to impeach her testimony based upon an allegation of sleeping on the job "several years ago" where no substantiated disciplinary action resulted was totally ineffective. Grievant readily admitted that she was accused on a prior occasion but denied any wrongdoing. As no evidence in support of this allegation was presented by Respondent, Respondent is bound by Grievant's response.

Respondent's theory, suggesting that this event could have transpired as described by Ms. Maidens without any notice being taken by Ms. Ingram, Ms. Langsdorf or Ms. Taylor, is quite improbable and only barely plausible. The credible evidence suggests that it is more probable that the event transpired substantially as described by Grievant. Neither Grievant nor any of her fellow workers has ever claimed that the actions which Ms. Maidens allegedly saw Grievant take in regard to B.B. were acceptable. Indeed, Grievant agrees that "slapping" B.B. would be unwarranted and has steadfastly maintained that no slap ever occurred. The other witnesses, except Ms. Maidens, have consistently maintained that they saw and heard nothing consistent with a forcible slap and are unanimously in doubt that such an event could have transpired without some unusual commotion being created. Based upon the credited testimony from Ms. Langsdorf and Ms. Ingram, B.B.'s reaction to the supposedly forceful slap described by Ms. Maidens is not consistent with normal expectations. Ms. Langsdorf's dealings with B.B. were more extensive than Ms. Maidensand more recent than Ms. Evans. Ms. Ingram's observations regarding B.B.'s behavior under similar circumstances was thoroughly candid and unrehearsed. Accordingly, the preponderance of the evidence indicates that it is more likely than not that B.B. would have reacted through some vocal or physical expression had she been subjected to the "fairly forceful" slap described by Ms. Maidens.

Ms. Maidens looked at B.B.'s face immediately after the incident she supposedly observed and saw no visible mark on B.B.'s face. Likewise, Ms. Ingram, an RN, gave B.B. a drink of water immediately after the alleged incident and subsequently examined B.B. a short time later without observing any marks. While it is not necessary that the victim have some visible marks in order to prove that physical abuse took place, in these particular circumstances, the lack of any observable marks results in a failure to corroborate Ms. Maidens' testimony that she observed a "fairly forceful slap" that made a "loud slapping noise." This is particularly so when other credible witnesses did not hear the alleged slap, even though as veteran health service workers or nurses in this particular environment, they are normally attuned to hearing such sounds when patients are abusing themselves so that they can take immediate action to protect the patients.

Respondent cites Grievant's actions in calling someone to come and pick her up prior to being told by Ms. Clayton to come to the office and bring her "things" as an admission of wrongdoing or an acknowledgment that she had engaged in the improper conduct alleged. This factor was specifically noted in both the March 11and March 25 letters to Grievant. R Ex 10 & 11. The testimony of Ms. Ingram was directly in conflict with the testimony of Ms. Clayton on what Ms. Clayton told Ms. Ingram in regard to preparing an accident report on B.B. In addition to the fact that Ms. Ingram's testimony was exceptionally candid and direct, it is noted that Ms. Ingram's version of these events is consistent with Ms. Langsdorf's observations, as well as Grievant's testimony. Moreover, Ms. Ingram's version of what she was told by Ms. Clayton was fully consistent with what she recorded on the Incident Report. See R Ex 18.

Accordingly, the credible evidence indicates that Ms. Ingram told Grievant that she had been instructed to examine B.B. for injuries from a slap before Grievant reported to the office and told Ms. Maidens that she had already summoned her ride home. Given the extensive training on patient abuse procedures that Grievant had been given according to the Respondent's evidence, it is not surprising that Grievant recognized that an automatic suspension would be forthcoming, regardless of the merits of the charge.

Grievant attempted to collaterally attack Ms. Maidens' credibility through testimony by Ms. Edwards that taking pop cans away from patient C.A. would have resulted in C.A. forcibly slapping herself, conduct that was not heard or observed by Ms. Maidens or others. However, unlike the testimony relating to B.B.'s typical behaviors under certain circumstances, the opinion testimony of

Ms. Edwards was not supported by a solid foundation,nor was it significantly corroborated by any other witness. In any event, this evidence was insufficient to directly impeach Ms. Maidens.

The "conclusion" reached by the Legal Aid Society of Charleston was not considered by the undersigned in determining whether or not Grievant committed the offense charged. Although this investigation was admitted without objection at the Level IV hearing, it contains a patent hearsay opinion of guilt that merits no weight when compared with the testimony of live witnesses taken under oath in a hearing providing for examination and cross- examination by both parties.

DHHR argues in its post-hearing submission that Grievant committed "negligence, carelessness, and abuse." However, Grievant was demoted for physical abuse to a specific patient. None of the letters notifying Grievant of the basis for her suspension and demotion make reference to either negligence or carelessness. It is clear from the totality of this record that the gravamen of the offense which Grievant is alleged to have committed is the physical abuse of patient B.B. by slapping her on the face. Although the verbal comments which Grievant uttered at the time might constitute actionable verbal patient abuse in their own right, the Respondent has relied on the physical abuse as its basis for taking disciplinary action against Grievant, referring to the verbal abuse simply as part of the res gestae of the physical act. Accordingly, the Respondent may not now revise the charges to fit the evidence that was developed at the Level IV hearing.

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

FINDINGS OF FACT

1. Grievant has been employed by the Respondent Department of Health and Human Resources as a Health Service Worker at Colin Anderson Center (CAC) for over 14 years.

2. On January 22, 1994 Grievant was working the afternoon shift in Harmony Cottage, a facility at CAC which houses 12 patients in a home-like environment.

3. At approximately 4:30 p.m. on January 22 Grievant's immediate supervisor, Clara Maidens, entered Harmony Cottage without any notice as the door chime which alerts the staff to personnel entering or departing the residence was not functioning at that time.

4. As Ms. Maidens entered the living room area in Harmony Cottage, she observed Grievant giving patient B.B. a pill which had been previously administered by a Staff Nurse, Joanne Ingram,

shortly before Ms. Maidens entered the room.

5. B.B. is a profoundly mentally retarded patient who was then sitting in a wheelchair facing toward Ms. Maidens while Grievant leaned over with her back toward Ms. Maidens.

6. B.B. spit up a pill that had been given to her by Ms. Ingram and Grievant recovered the pill from B.B.'s lap or chest area before it hit the floor.

7. As Grievant gave the pill to B.B. she said, "take that, you little rip-snorter," or some similar comment to that effect, asshe cupped B.B. on the chin with her left hand and patted B.B. on the cheek with her right hand.

8. Neither Ms. Maidens nor Ms. Ingram, a Registered Nurse who gave B.B. a drink of water immediately after Grievant gave her the pill and examined B.B. for injuries within the next half-hour, observed any red marks on B.B.'s face.

9. Neither Ms. Ingram nor two Health Service Workers seated on a nearby sofa, one of whom was assigned direct responsibility for B.B., heard or observed any activity consistent with a "forceful slap" of B.B. by Grievant as claimed by Ms. Maidens.

CONCLUSIONS OF LAW

1. In disciplinary matters, the burden of proof is upon the employer and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; Brown v. W. Va. Dept. of Commerce, Labor & Envtl. Resources, Docket No. 92-T&P-473 (Apr. 8, 1993).

2. Respondent failed to demonstrate by a preponderance of the evidence that Grievant engaged in physical abuse of a patient at Colin Anderson Center as alleged in the suspension notice dated January 25, 1994 and the demotion notices dated March 11 and March 25, 1994.

Accordingly, this Grievance is **GRANTED**. The Respondent, Department of Health and Human Resources, is hereby **ORDERED** to reinstate Grievant to her previous position as a Health Service Worker at Colin Anderson Center, with full backpay, and to expungeany record of the suspension and/or demotion arising out of the incident in Harmony Cottage on January 22, 1994.

Any party may appeal this decision to the "circuit court of the county in which the grievance occurred," 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 Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

Administrative Law Judge

Dated: October 31, 1994

Footnote: 1 This fact is significant in refuting any implication that this document was somehow "fabricated" after Ms. Ingram had seen the statements of the witnesses questioned by the Patient Advocates which were provided to Grievant's representative at the initial hearing in this matter on June 16, 1994.