DEBRA SEESE, .

Grievant, .

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v. . Docket Number: 93-HHR-520

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WEST VIRGINIA DEPARTMENT OF HEALTH .

AND HUMAN RESOURCES .

at COLIN ANDERSON CENTER, .

Respondent. .

D E C I S I O N

Procedural History

Grievant, Debra Seese, formerly an employee at the Colin Anderson Center in St. Mary's, West Virginia, was dismissed from her employment with the Respondent, Department of Health and Human Resources (hereinafter Health) effective December 24, 1993, for having allegedly physically abused a patient under her direct care on October 28, 1993. She filed an appeal of this adverse action with this Grievance Board pursuant to the provisions of the Grievance Procedure for State Employees, West Virginia Code §§29-6A-1, et seq., on December 12, 1993. The case was received by this office and set for hearing on January 27, 1994, by Notice of Hearing dated December 29, 1993. Thereafter, the Undersigned wasnotified by Health that criminal charges had been brought against Grievant based upon her alleged misconduct of October 28, 1993, and it was proposed that the case be held in abeyance pending the outcome of the criminal proceedings. The criminal charges

were eventually dismissed and Grievant's representative, by letter dated June 17, 1994, requested that the case proceed to hearing at level four. After numerous continuances were granted for good cause, an evidentiary hearing was held on March 2, 1995, at this Board's office in Charleston, West Virginia. The case became mature for decision on April 14, 1995, after receipt of the parties' post-hearing briefs.

Discussion

Grievant was employed by Health as a Health Service Worker until her dismissal effective December 24, 1993. She was dismissed for having physically abused a patient who was under her care while an inpatient at Camden Clark Memorial Hospital. The following discussion of the relevant and material facts is based upon a thorough review of the evidence presented on behalf of both parties and shall be supplemented by appropriately made findings of fact.

On October 22, 1993, D.B., a resident of the Colin Anderson Center (hereinafter CAC), was admitted to the Camden Clark Memorial Hospital for treatment of a large right labial hematoma. The patient received various examinations and minor surgery was ultimately performed. D.B. suffers from severe mental retardation, cerebral palsy and anemia. She is neither ambulatory nor verbal, and normally requires complete daily care. For this reason, HealthService Workers from CAC were assigned to provide her care at the hospital, during all three shifts, for the period of her stay. Naturally, nurses and other professionals employed by the hospital also attended to D.B.'s medical needs.

Health presented the testimony of Tammy Reynolds, R.N., who stated that on October 28, 1993, at approximately 10:00 a.m., while she and the CAC employee were attempting to bathe D.B., the CAC employee hit D.B. on her back and on the back of her head with an open hand while saying that it was time for her (D.B.'s) "thump therapy." Ms. Reynolds stated that D.B. was struck more than once on her back. Ms. Reynolds recalled that she told the helper "we don't do that here, you'll have to stop." Ms. Reynolds notified her supervisor of the incident on that day. She further stated that she did not believe D.B. was injured and later, that a physician also examined her and found no injury as a result of the striking. At the hearing in this matter, Ms. Reynolds was not able to identify Grievant as the individual who struck D.B.

Ms. Reynolds continued to testify that she also remarked to another CAC Health Service Worker

that she had observed D.B. being hit the previous day. At some point, Carol Statler, Resident Director at CAC was notified of this incident and, shortly thereafter, an investigation was conducted by the Legal Aid Society of Charleston into the matter. On November 10, 1993, Grievant was temporarily assigned to the Dietary Department of CAC pending the conclusion of this investigation. By letter dated December 9, 1993, Grievant was notified that her employment was to beterminated effective December 24, 1993, for having physically abused D.B.

Health contends that the evidence establishes by a preponderance of the evidence that Grievant physically abused D.B. as described by Ms. Reynolds. Even though Ms. Reynolds could not identify Grievant as the individual who struck D.B., it offered into evidence records to substantiate that Grievant was the Health Service Worker from CAC assigned to the hospital on the day and at the time in question. It argues that the nature of Grievant's contact with D.B. can be categorized as physical abuse under its applicable Clinical Policy #3311, and therefore, it had just cause to dismiss her from employment. Grievant's position is that she neither physically abused D.B. nor made physical contact with her as described by Ms. Reynolds. Grievant did not present testimony on her own behalf.

Although there was no evidence offered to contradict Ms. Reynold's testimony, Grievant contends that she is not a credible witness. This argument is based, almost entirely, on the following facts which Grievant deems relevant: 1) Ms. Reynolds could not identify her at the hearing in this matter as the worker who hit D.B.; 2) The hospital did not perform a formal investigation of the incident nor was there an incident report prepared; 3) While being interviewed by the Legal Aid Society Advocate, Ms. Reynolds stated that she told another CAC employee that D.B. had been "patted" on her head and back. Interestingly, Grievant also points to the testimony of Health Service Worker Gloria Forrester who testifiedthat the Health Service Workers are taught to perform "thump therapy" (a form of physical therapy) in order to help the residents expel congestion from their lungs. Grievant points out that Ms. Forrester testified she had witnessed D.B. being given this form of therapy in the past.

Based upon the uncontroverted evidence of record, it is determined that Health has met its burden or proof in this case. First, it must be accepted that Grievant was present in D.B.'s room on the day and at the time in question. No evidence was given to contradict the CAC's records. Curiously, Grievant contends that she did not physically touch D.B. but then relies upon the testimony of Ms. Forrester to corroborate that "thump therapy" is authorized to be performed at CAC. There would be

no other reason to rely upon Ms. Forrester's testimony in this regard other than to argue that Health's assessment of her actions was unfounded. Grievant simply contends that Ms. Reynold's testimony should not be deemed credible; however, her own arguments tend to contradict themselves based upon the facts established.

Ms. Reynolds appeared to be a credible witness. Her testimony was largely consistent with the statement she had formally given to the Legal Aid Society advocate back in 1993, even though it is clear that she had reviewed the statement prior to being questioned. More importantly, however, no argument or evidence was given to support in any manner that Ms. Reynolds was biased against Grievant or that she had any motivation to fabricate her story. It is accepted that Ms. Reynolds witnessed Grievant strike D.B., insome manner, even though she could not readily identify Grievant at the hearing which occurred approximately one and one-half years later.

The inferences Grievant's representative has attempted to draw from the facts presented to establish that Ms. Reynold's testimony was not credible are neither consistent with the facts as presented nor sufficiently compelling to support a different characterization of the facts. First, the fact that Ms. Reynolds did not take any further steps to communicate to Health that Grievant allegedly abused D.B., other than to notify her supervisor, is not sufficient to warrant a finding that she fabricated the story. It is accepted that Ms. Reynolds, after having witnessed the striking and determining that no immediate harm had occurred, took all of the steps she believed she needed to take, i.e., she notified her immediate supervisor. Second, the fact that the hospital did not conduct a formal investigation consistent with the type of investigation performed under Health's applicable patient abuse policy, does not, in and of itself, support a finding that the staff at the hospital discounted Ms. Reynold's allegations. Finally, that Ms. Reynolds could not identify Grievant as the person whom she witnessed abuse D.B. is understandable given that she worked with other Health Service Workers from CAC during D.B.'s stay, that D.B. was not her only patient, and also given the time which it has taken to have the level four hearing in this matter.

Further, with regard to her opinion testimony that this striking was abusive or unnecessary, she testified as to her many years of experience both as a licensed practical nurse and as a registered nurse. And based upon her background, her opinion that Grievant's conduct was abusive must be given weight absent any other evidence to the contrary from a person who actually witnessed the incident. Finally, given that Grievant's argument is that she never struck D.B. at all, it is not accepted

that Grievant was attempting to administer some form of physical therapy to D.B., and thereafter, her actions were misconstrued by Ms. Reynolds, even considering the testimony of Ms. Forrester.

Health's Clinical Policy 3311 states, in pertinent part, that "Physical Abuse is the use of physical force, body posture/gesture or body movement that inflicts or threatens to inflict pain on a client." Grievant's conduct of October 28, 1993, can easily be classified as conduct which threatened to inflict pain on D.B. Therefore, is was proper for Health to have characterized her actions as physical abuse. Although Grievant does not contend that Health abused its discretion in deciding to dismiss her from employment based upon its interpretation of the facts of the case, it is still noted that a civil service employee may not be dismissed from employment unless just cause, i.e., misconduct of a substantial nature which affects the rights and interests of the public, is established. Guine v. Civil Service Commission, 149 W.Va. 461, 468, 141 S.E.2d 364, 369 (1965). Given the facts aspresented, it is determined that Health had just cause to terminate Grievant's employment.

The foregoing discussion of the case is hereby supplemented by the following appropriately made findings of fact and conclusions of law.

Finding of Fact

On October 28, 1993, Grievant was attending to the direct care of patient D.B. while an inpatient at Camden Clark Memorial Hospital. Grievant physically abused D.B. by striking her on the back and on the back of the head.

Conclusion of Law

Health has established by a preponderance of the evidence just cause supporting Grievant's dismissal under its applicable Clinical Policy 3311 defining physical abuse of a client.

Therefore, this grievance is hereby **DENIED**

Any party or the West Virginia Division of Personnel 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 thecivil action number so that the record can be prepared and transmitted to the appropriate court.

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ALBERT C. DUNN, JR.

Administrative Law Judge

May 9, 1995