MARY McFADDEN, .

.

Grievant, .

.

v. . Docket No. 94-HHR-428

.

WEST VIRGINIA DEPARTMENT OF HEALTH .

AND HUMAN RESOURCES/COLIN .

ANDERSON CENTER, .

.

Respondent. .

D E C I S I O N

Mary McFadden (Grievant), submitted this grievance directly to Level IV on August 16, 1994 under W. Va. Code § 29-6A-4(e). Grievant challenges her suspension without pay and subsequent dismissal, effective August 8, 1994, as a Health Service Associate at Colin Anderson Center (CAC), near St. Marys, West Virginia. A hearing in this matter was held in this Board's office in Charleston, West Virginia, on September 29, 1994, with additional hearings at CAC on November 16 and December 9, 1994, completing the evidentiary record in this matter. Following receipt of timely post-hearing submissions from both parties, this case became mature for decision on January 9, 1994. Consistent with W. Va. Code § 29-6A-4 and the practice of this Grievance Board, this disciplinary action has been advanced on the docket for an expedited decision.

DISCUSSION

This disciplinary action arose out of an incident on July 21, 1994, where Grievant was alleged to have engaged in client abuse. Grievant was initially suspended in accordance with the following August 5, 1994, notice from Rick Hendrickson, Administrator at CAC:

> Pursuant to our conversation of August 4, 1994, I am suspending you from employment at Colin Anderson Center for a period of five (5) calendar days, or until such time as a decision can be rendered regarding allegations of abuse. Further investigation into this matter is needed to clarify critical aspects of the incident occurring 7/21/94.
>
> This suspension, without pay, is pursuant to WV Civil Service Rules and Regulations 29-6, Series I, Section 13.03. Since you have appeared personally before me, please be advised that your rights also include the right to reply in writing to me regarding this matter.
>
> I will respond with a written decision no later than August 10, 1994.
>
> Permanent classified employees have appeal rights granted under the West Virginia Code 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 4.

By letter dated August 8, 1994, Mr. Hendrickson advised Grievant of her dismissal from CAC in the following terms:

> In accordance with Section 13.02 of the Division of Personnel Rules and Regulations of West Virginia, you are hereby dismissed from your duties as a Health Service Associate. Due to the fact that the charge, or one of the charges, for your dismissal is that of gross misconduct, this dismissal is effective immediately, the 15 day notice period being hereby waived.
>
> The charge for your dismissal is client abuse. The specific reasons for the above charge are that:
>
> (1) On July 21, 1994 you physically and verbally abused a resident of Colin Anderson Center in the presence of eight (8) witnesses;
>
> (2) An independent investigation of the incident, and subsequent administrative

review, conclude that the abuse charge is substantiated;

(3) Your immediate termination of employment is authorized, due to violation of facility, State and Federal guidelines covering client abuse.

You shall be given an opportunity to present me with an explanation of the reason why you think the facts and grounds contained in this letter are in error and why you may think this action is inappropriate, providing you do so during this notice period. If you choose to write me, please contact my secretary or deliver to me your written explanation on or before August 18, 1994.

Any questions you might have regarding this dismissal should be directed to myself. Pursuant to WV Code Chapter 29-6A-4(e), dismissals are grievable directly to the WV Education and State Employees Grievance Board, 240 Capitol Street, Suite 515, Charleston, WV 25301, within ten (10) working days of the effective date of the dismissal.

R Ex 5.

During the course of the Level IV hearing in this matter, Grievant asserted an affirmative defense that Mr. Hendrickson lacked proper authority to take dismissal action against Grievant or any other state employee at CAC. While the employer has the burden of proving the essential elements of a disciplinary matter by a preponderance of the evidence (W. Va. Code § 29-6A-6; Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992)), an employee asserting an affirmative defense must establish such defense by a preponderance of the evidence. Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1991), aff'd, No. 22252 (W. Va. Sup. Ct. Dec. 16, 1994); Morris v.W. Va. Dept. of Health, Docket No. 91-DHS-112 (June 25, 1991). See also Parker v. Defense Logistics Agency, 1 M.S.P.B. 489 (1980). As will hereinafter be explained, the undersigned finds that Grievant has met that burden in the circumstances of this particular case.

The evidence adduced at hearing in regard to Mr. Hendrickson's authority in personnel matters, or lack thereof, was primarily derived from the testimony of Mr. Hendrickson and Betty Barron, CAC's Personnel Officer. Mr. Hendrickson is employed by Res-Care Health Services, Inc. (Res-Care), a Kentucky corporation under contract with the Respondent West Virginia Department of Health and

Human Resources (DHHR) to provide "limited management services" in the operation of CAC. G Ex 4. He has been employed by Res-Care as the designated "Administrator" at CAC since October 1993.

Mr. Hendrickson testified that as the Administrator he had authority to hire, fire, terminate and promote state employees at CAC. However, he noted that in order to hire an individual as a state employee at CAC, it would be necessary to go through the "state procedures and paperwork." Mr. Hendrickson further stated that he complied with the requirement to coordinate the disciplinary actions taken against Grievant with the "Division of Personnel" through his staff personnel officer, Betty Barron. In particular, he stated that Ms. Barron had advised him that she had obtained approval from Mr. McCabe in DHHR's Personnel Division to terminate Grievant. Mr. Hendrickson acknowledged that his failure to follow the applicable procedures would mean that he lacked authority to take the actions in issue.

Under cross-examination, Mr. Hendrickson indicated that he did not review prior punishments meted out to CAC employees for client abuse prior to his arrival in 1993. See G Ex 10. He also acknowledged that he did not review Grievant's records so that he was not aware that Grievant had no prior accusations of patient abuse. Mr. Hendrickson was aware that Grievant had been employed at CAC for twenty-three years. He further testified on re-direct examination that he deliberately refrained from looking at Grievant's past disciplinary record since it "might prejudice" his actions in the instant matter.

Grievant introduced an affidavit which Mr. Hendrickson had executed before a Notary Public on July 1, 1994. This affidavit was prepared in relation to unrelated civil litigation in which Res-Care had been named as a defendant by a party allegedly injured in an accident involving a CAC employee driving a state vehicle on official business. Portions of the affidavit pertinent to the matters at issue include:

> 1. I am employed by Res-Care, Inc. as Administrator at the Colin Anderson Center in St. Mary's, (sic) West Virginia.
>
> * * *
>
> 5. Res-Care, Inc. entered into a contract with the West Virginia Department of Health and Human Resources to provide legitimate management services at its Colin

Anderson Center.

6. There are 37 Res-Care employees working at the Colin Anderson Center.

7. The limited management duties of Res-Care and its employees at the Colin Anderson Center include setting staffing and budget requirements and participating in day-to-day decisions regarding limited management of the facility.

8. There are 342 civil service employees at the Colin Anderson Center, employed by the State through the West Virginia Department of Health and Human Resources.

9. The West Virginia Department of Health and Human Resources retains control of personnel and finance, which includes hiring, firing, discipline, payroll, the purchasing of equipment, and these areas are not affected by the limited management contract with Res-Care.

10. Betty Barron is the civil service employee appointed by the Department of Health and Human Resources as State Assistant Administrator in charge of personnel and is responsible for personnel decisions regarding the civil service employees.

* * *

12. All final decisions regarding the work of the civil service employees are left to the discretion of the West Virginia Department of Health and Human Resources.

13. Res-Care has merely a result-oriented interest in the work of the civil service employees at this facility with its focus upon achieving high quality, cost efficient care of the residents.

* * * *

G Ex 6 (emphasis added).

Betty Barron testified that she is employed at CAC as an Administrative Assistant and currently serves as Acting Assistant Administrator of CAC. While Ms. Barron has been an Administrative Assistant for the last three years, she previously served at CAC as its Personnel Officer beginning in 1974. In both positions she has had extensive experience with personnel matters, including disciplinary actions.

The Administrative Rules of the West Virginia Division of Personnel define Appointing Authority as "[t]he executive oradministrative head of an agency who is authorized by statute to appoint employees in the classified or classified-exempt service. By written notification to the Director of Personnel, the appointing authority may delegate specific powers authorized by these Rules." W. Va. Div. of Personnel Administrative Rules, Series I (Amended), § 3.8 (1993) (hereinafter "Rules"). The Rules define dismissal as "[t]he separation from employment of an employee by an appointing authority." Rules, § 3.30 (emphasis added). The Rules further provide regarding dismissals:

> The appointing authority, fifteen (15) calendar days after notice in writing to a permanent employee stating specific reasons therefor, may dismiss any employee for cause. The employee shall be allowed a reasonable time to reply to the dismissal in writing, or upon request to appear personally and reply to the appointing authority or his deputy. The reasons for dismissal and the reply, if any, shall be filed with the Director of Personnel. Fifteen days notice is not required for employees in certain cases when the public interests are best served by withholding the notice, and is at the discretion of the appointing authority for employees in any case when the cause of dismissal is gross misconduct.

Rules, § 12.02.

An additional pertinent provision states: "In dismissals for cause and other punishments, like penalties shall be imposed for like offenses." Rules, § 12.05.

Also pertinent to this issue is DHHR Policy Memorandum 2104, Progressive Discipline, which includes the following provision relating to "implementation" of dismissal actions:

> The office director/facility administrator must review the documentation to substantiate the charges and make any inquiry deemed advisable before recommending action to be taken. If appropriate, the dismissal letter (along with supporting documentation) must be forwardedfor signature to the bureau commissioner or designee with proper signature authority.

G Ex 7 at 9 (emphasis added).

Ms. Barron testified that "signature authority" normally refers to a person delegated authority by the State to obligate money through signing various documents, including personnel transactions relating to hiring and firing. Ms. Barron indicated that she has had "signature authority" at CAC for the past six years. According to Ms. Barron, Mr. Hendrickson, unlike prior Administrators at CAC who were state employees, has never been issued "signature authority." To Ms. Barron's knowledge, the employees whom the Commissioner had delegated "signature authority" in regard to CAC were Mr. McCabe in the Department's Personnel Division and herself.

Ms. Barron's testimony directly contradicted Mr. Hendrickson in that she indicated that, within her knowledge, neither the West Virginia Division of Personnel nor the Department of Health and Human Resources participated in Mr. Hendrickson's decision to dismiss Grievant. In particular, there was no corroboration of Mr. Hendrickson's hearsay testimony that Ms. Barron coordinated Grievant's dismissal with Mr. McCabe in DHHR's Personnel Division. (Mr. McCabe was not called as a witness by either party). She further indicated that she did not participate in the decision to discipline Grievant or the selection of penalty. However, had she been consulted, consistent with DHHR's policy on progressive discipline (G Ex 7) and Grievant's prior work record over more than twenty years, she would have recommended a three-day suspension and"some retraining" as the appropriate penalty. While Ms. Barron signed a Personnel Action Form, WV-11, on August 12, 1994, denoting Grievant's suspension and dismissal for "payroll purposes," she explained that her action was not intended as a ratification of Mr. Hendrickson's decision. R ex 9.

It is well-settled law that "[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syllabus Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977); Bailey v. W. Va. Dept. of Transp., Docket No. 94-DOH-389 (Dec. 20, 1994).

DHHR argues that Mr. Hendrickson's authority in personnel matters is derived from W. Va. Code § 27-1-7(a) which provides:

> (a) The administrator of a state-operated treatment facility shall be its chief executive officer and shall have the authority to manage and administer the financial, business and personnel affairs of such facility. All other persons employed at the state-operated treatment facility shall be under the jurisdiction and authority of the administrator of the treatment facility who need not be a physician.

Because Res-Care's contract with DHHR specifically calls for the contractor to provide an Administrator (See G Ex 4, § VI(D) at 3 [Page 2 of the "Contract for Limited Management of Colin Anderson Center]), and Mr. Hendrickson has been duly designated by Res-Care to serve as CAC's Administrator, DHHR contends that Mr. Hendrickson has explicit authority in personnel matters.

While Mr. Hendrickson has apparent authority as Administrator under § 27-1-7(a) and the "limited management" contract between DHHR and Res-Care to take disciplinary action against State employees at CAC, that authority is tempered by the applicablerules and regulations of DHHR and the West Virginia Division of Personnel. Mr. Hendrickson acknowledged that he was obligated to follow applicable procedures when proceeding to discipline State employees and indicated that he believed he had complied with those procedures in this matter.

Despite Mr. Hendrickson's apparent authority as the person filling the shoes of the Administrator under § 27-1-7(a), the evidence of record indicated that he was never delegated the requisite "signature authority" mandated by § II-E of DHHR Policy Memorandum 2104. Ms. Barron, as CAC's long-time Personnel Officer, credibly testified that this authority was not extended to Mr. Hendrickson. Not only was her testimony unrebutted, it is substantially consistent with Mr. Hendrickson's explanation of the limits of his authority in his earlier affidavit. G Ex 6. Thus, a preponderance of the evidence indicates that the specific procedures set forth in DHHR Policy Memorandum 2104 were not followed in regard to Grievant's suspension and dismissal.

Notwithstanding this demonstrated procedural error, it is appropriate to make further inquiry as to whether Grievant suffered significant harm as a result. Simply stated, if the same result was inevitable, regardless of which official in DHHR took the action, Grievant has not suffered harm from the identified procedural error. See Parker v. Defense Logistics Agency, 1 M.S.P.B. 489 (1980). Although Mr. Hendrickson lacked specific authority to initiate suspension and dismissal actions, this circumstance would not necessarily result in a violation ofGrievant's right to procedural due process. See Greene v. McElroy, 360 U.S. 474 (1959).

By Mr. Hendrickson's own testimony, when determining the appropriate penalty for Grievant's alleged offense, he failed to consider Grievant's prior disciplinary record, or lack thereof, in a career of over twenty years at CAC, in violation of DHHR Policy Memorandum 2104 governing "Progressive Discipline." In addition, Mr. Hendrickson did not consider prior punishments for like offenses meted out to CAC employees over the past seven years, a violation of § 12.05 of the Division of Personnel's

Rules relating to dismissals. This latter error was specifically noted by this Grievance Board in an earlier decision involving a dismissal action taken by one of Mr. Hendrickson's predecessors at CAC. Miller v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR-070 (June 11, 1993).

Ms. Barron, a State employee who had proper signature authority to take disciplinary action on CAC employees including Grievant, testified that she would have imposed a three-day suspension and some form of retraining as an appropriate penalty for the client abuse alleged. Ms. Barron's penalty assessment included appropriate reference to Grievant's prior record under DHHR's progressive discipline policy, as well as consideration of the penalties imposed for like offenses as required by the Division of Personnel. See Rules § 12.05. Thus, Grievant established by a preponderance of the evidence that a different result would likely have occurred if an employee with proper authority had consideredthe penalty to impose against her. Accordingly, Grievant demonstrated that "harmful error" occurred as a result of the substantiated procedural error in this matter.

Based upon the foregoing holding in regard to Grievant's affirmative defense, it is not necessary to determine whether Grievant committed the offenses charged or whether the penalty imposed was warranted. Inasmuch as this disciplinary action is being reversed on procedural grounds, rather than on its merits, the Respondent is not precluded from re-initiating disciplinary action as deemed appropriate by a properly designated official.

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 was employed by the Respondent Department of Health and Human Resources (DHHR) as a Health Service Associate at Colin Anderson Center (CAC) near St. Marys, West Virginia.

2. Rick Hendrickson is employed by Res-Care Health Services, Inc. (Res-Care), and serves as the designated Administrator of CAC under a "limited management" contract between DHHR and Res-Care.

3. On July 22, 1994, an employee at CAC reported an incident of client abuse allegedly committed by Grievant against a patient, C.H. (See footnote 1) , in the swimming pool area during the

previous afternoon.

4. Following an investigation by the Patient Advocate at CAC (See footnote 2) , and personal interviews with witnesses to the alleged incident, on August 5, 1994, Mr. Hendrickson initiated a five-day suspension without pay against Grievant.

5. On August 8, 1994, Mr. Hendrickson dismissed Grievant from employment at CAC based upon an alleged incident of client abuse on July 21, 1994.

6. Betty Barron is employed by the State of West Virginia as an Administrative Assistant at CAC and has served as Acting Assistant Administrator at CAC for the past three years.

7. Ms. Barron is the only employee at CAC delegated formal "signature authority" regarding personnel and payroll actions, including disciplinary matters.

8. In an affidavit dated July 1, 1994, (G Ex 6.) Mr. Hendrickson stated:

> Betty Barron is the civil service employee appointed by the Department of Health and Human Resources as State Assistant Administrator in charge of personnel and is responsible for personnel decisions regarding the civil service employees.

9. Penalties imposed on ten CAC employees for separate incidents of alleged client abuse between 1987 and 1994 included a three-day suspension, a five-day suspension, an eight-day suspension, a five-day suspension, a fifteen-day suspension, dismissal, a five-day suspension, a three-day suspension, a ten-day suspension and a demotion. G Ex 10.

10. Prior to July 21, 1994, Grievant had not been the subject of any disciplinary action during over twenty-three years of employment at CAC

11. In determining the appropriate penalty to be imposed on Grievant for the alleged incident of client abuse on July 21, 1994, Mr. Hendrickson did not consider Grievant's prior work record, including the absence of any prior disciplinary actions, nor did he consider the penalties previously imposed on CAC employees for other incidents involving patient or client abuse.

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); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). 2. An employee raising an affirmative defense must establish such a defense by a preponderance of the evidence. Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1991), aff'd, No. 22252 (W. Va. Sup. Ct. Dec. 16, 1994). See also Parker v. Defense Logistics Agency, 1 M.S.P.B. 489 (1980).

3. "An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syllabus Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977); Bailey v. W. Va. Dept. of Transp., Docket No. 94-DOH-389 (Dec. 20, 1994).

4. Grievant established, by a preponderance of the evidence, that Rick Hendrickson, a Res-Care employee designated as the Administrator of Colin Anderson Center under a limited management contract between Res-Care and DHHR, was not delegated appropriate "signature authority" by DHHR to impose disciplinary actions, including suspensions and dismissals, upon State employees at CAC, as required by DHHR Policy Memorandum 2104.

5. Grievant established, by a preponderance of the evidence, that Mr. Hendrickson failed to properly consider Grievant's work record, and to properly evaluate the penalties meted out to other CAC employees for like offenses, contrary to DHHR Policy Memorandum 2104 and the West Virginia Division of Personnel Administrative Rule, respectively. Rules § 12.05. See Miller v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR-070 (June 11, 1993). Thus, Grievant established that "harmful error" was committed by the Respondent in regard to the procedural error found in Conclusion of Law No. 4. See Parker v. Defense Logistics Agency, 1 M.S.P.B. 489 (1980).

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 Associate at Colin Anderson Center, with full backpay, and to expunge any record of the suspension and/or demotion arising out of the incident on July 21, 1994, consistent with the foregoing decision. However, the Respondent is not precluded from re-initiating disciplinary action, as deemed appropriate by a properly designated official.

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: February 17, 1995

Footnote: 1 The patient who is the alleged victim in this matter will be identified only by her initials, consistent with this Board's policy respecting the privacy of individuals in such circumstances. See Parks v. W. Va. Dept. of Health & Human Resources, Docket No. 94-HHR-109 (Oct. 31, 1994); Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994).

Footnote: 2 The Legal Aid Society of Charleston serves as the Patient Advocate at CAC under a separate contract with DHHR.