MARY K. GRUESER, .

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Grievant, .

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v. . DOCKET NO. 95-RS-084

.

WEST VIRGINIA STATE BOARD OF .

REHABILITATION, DIVISION OF .

REHABILITATION SERVICES, .

.

Respondent. .

D E C I S I O N

This is a grievance by Mary K. Grueser (Grievant), submitted directly to Level IV in accordance with W. Va. Code § 29-6A-4(e), challenging her dismissal from employment with the Respondent Division of Rehabilitation Services (DRS) on March 3, 1995. An evidentiary hearing in this matter was conducted at the West Virginia Rehabilitation Center in Institute, West Virginia, on March 24, 27, 30 and 31, 1995. Upon receipt of post-hearing briefs from the respective parties, this matter became mature for decision on May 8, 1995.

Grievant was employed by DRS as a Licensed Practical Nurse (LPN) in the Treatment Unit of its hospital at Institute. By letter dated February 17, 1995, DRS Director William C. Dearieninformed Grievant of his decision to dismiss her, citing the following particulars:

> I am informing you of my decision to dismiss you from your position as a Licensed Practical Nurse with the West Virginia Division of Rehabilitation Services. Your dismissal is effective at the end of your shift on Friday, March 3, 1995, providing you with a fifteen (15) -day notice of termination. During the fifteen (15) -day notice period you will be reassigned to a non-direct patient care area. So that you may discern in retrospect the reason for this personnel action, I offer the following chronology of your continuing disruptive unprofessional behavior and insubordinate conduct.

1. You were informed by memorandum from Steve Hill, Assistant Administrator, that there are limits as to how many times your unacceptable behavior will be brought to your attention, and any future problems with your behavior will result in disciplinary action of a more severe nature.

You were also informed by letter dated December 4, 1992, from John Panza, Director, that you were suspended without pay not only for your continued failure to work as scheduled, but also for the following incidents of your unacceptable behavior. Mr. Panza informed you that: On April 19, 1992, it was documented that you left your shift early stating that you were ill. Your leaving the worksite came shortly after an error on your time card had been corrected by Ethel Pollis, RN. You verbalized to several people how upset you were about the time card correction having been made. **You stated that you were leaving before you knocked the hell out of someone and at the time you were blaming Betty Harding, LPN, for the time card being corrected.** Mr. Panza brought to your attention that making indirect threats to other staff is very unacceptable behavior. The Director stated that he had also been informed that during your 3:00 p.m. to 11:00 p.m. shift on April 29, 1992, you were very angry and upset and accused some of your co-workers of conspiring to get you fired. It was further reported that you told an individual that if they contacted Ms. Betty Boso, RN, Director of Nurses, about this episode and **Mrs. Boso came to the Center that you would "set Betty Boso on her ass."**

2. On October 31, 1994, you received a warning memo from Mrs. Boso, RN, Director of Nursing, for your unprofessional conduct. The reason for your written warning was, on a client's medication administrationrecord you changed the section, Allergic to **"Penicillin"** to read, **"Penicillin and soap & water."**

3. One of the more recent occurrences of your outrageous conduct that I consider the most singularly reprehensible and for which I believe warrants your dismissal is:

On January 17, 1995, your assignment was administration of medication and treatments on the men's end of the Treatment Unit. Your assignment was made at the beginning of the 3:00 p.m. to 11:00 p.m. shift by Ms. Lester, RN, the Charge Nurse.

You were informed about 10:00 p.m. by Chris Barker, HSW, that a client needed his treatment performed. **You responded that you were smoking a cigarette and he can wait.** You then asked Mr. Barker to play cards with you.

Approximately ten minutes later, a second staff member, Mike Myers, informed you that your client was waiting for his treatment but **you did not respond.** Later, a third staff member, J. R. McDaniel, told you that the client was still waiting. **Again, you failed to respond.**

> Finally, when the client became upset, Clarence McDaniel reported your conduct to Ms. Lester, RN. Ms. Lester proceeded to Room 214 where you were playing cards and directed you to attend to your client's care. **You told her you would go when you finished your card game.** Ms. Lester, RN, informed you that you were required to obey orders when directed.
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> Several staff members, Chris Barker, Doris Lynch, Deeidra Gravely, Clarence McDaniel, Mike Myers, and Madge Edgell, reported that you stated **you were "going to slap Ms. Lester's fucking head off and called Ms. Lester "a fucking bitch."** You then stated they can fire me if they want to, and I'll collect two years of unemployment. Later during the shift, you stated to Clarence McDaniel, "you better watch yourself, Gracie (Ms. Lester) is wild and **I'm going to knock her in the head."**

R Ex 12 (emphasis in original).

As indicated by the forgoing notice, Grievant's dismissal was triggered by the events of January 17, 1995, with the documented prior disciplinary actions primarily bearing on the propriety ofthe penalty assessed. (See footnote 1) Grievant challenged nearly all of the allegations set forth above, contending that certain events did not transpire at all, other events were taken out of context, and the entire episode was misconstrued to make Grievant appear irresponsible when she was simply performing her duties in a competent and professional manner. Moreover, Grievant waived her right to silence under W. Va. Code § 29-6A-6, electing to testify extensively at the hearing.

In disciplinary matters, W. Va. Code § 29-6A-6 places the burden of proof on the employer. Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). Where, as here, the existence or nonexistence of contested material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Pine v. W. Va. Dept. of Health & Human Resources, Docket No. 95-HHR-066 (May 12, 1995). See Harper v. Dept. of the Navy, 33 M.S.P.R. 490 (1987). Accordingly, it is necessary to reconstruct events during the evening in question in considerable detail.

Grievant obtained her LPN license in 1981 and has been employed in the Treatment Unit of DRS' Hospital at Institute since November 1989. On January 17, 1995, Gracie Lester, a Registered Nurse (RN), was the Charge Nurse for the 3:00 p.m. to 11:00 p.m. shift. Grievant was one of two LPN's working that evening, the other being Madge Edgell. Betty Boso, Director of Nursing, explained that

although she supervises all nurses, a Charge Nurse makes assignments and directs the day-to-day work of the personnel assigned to each shift, including RN's, LPN's and Health Service Workers (HSW's).

As of January 17, 1995, there were six female patients and nine male patients in the Treatment Unit. At the beginning of the shift, Ms. Lester assigned responsibility for completing treatments and medications for female patients to Ms. Edgell, while Grievant was assigned the male patients. In addition, Ms. Lester agreed to assist Grievant with some of the treatments. During her testimony, Grievant stated that she had "volunteered" to perform the mens' treatments, while Ms. Edgell did the women.

Because Ms. Lester agreed to take care of two male patients, D.M. and J.L., Grievant was assigned to perform treatments on four patients, R.R., F.C., D.A., and M.W. (See footnote 2) Shortly after these assignments were made, Grievant spoke with R.R. and F.C., who advised herthat they wanted their dressings changed after they returned from a trip to the Towne Center Mall. Grievant took her dinner break around 5:30 p.m.

At 8:30 p.m., Grievant started a twenty-minute foot soak treatment on D.A. See G Ex 4. After completing D.A.'s treatment, Grievant testified that she started passing out medications around 9:00 p.m. Ms. Lester discussed the treatments remaining to be done with Grievant around 9:20 p.m. R Ex 1. Grievant stated that she located the last patient requiring medication, M.W., and gave him his medicine around 9:45 or 9:50 p.m. Meanwhile, according to the credited testimony of Faye Peterson and Ron Markley, and certain business records (R Ex 3 - 6), the vehicle in which F.C. and R.R. went to the mall was checked in at 9:37 p.m. Mr. Markley, who accompanied the patients to the mall and back, estimated that F.C. was unloaded at approximately 9:30 p.m. in the parking area outside the Treatment Unit. Because F.C. had a motorized wheel chair, he was allowed to proceed into the building at his leisure. However, inasmuch as F.C. had experienced a leaking colostomy bag, it is unlikely that he dallied very long outside before going in to get cleaned up.

Christopher Barker, an HSW on the Treatment Unit, recalled assisting F.C. in getting a shower and changing his clothes when he returned to the unit "a little after nine." Mr. Barker noted that F.C. needed to change his colostomy bag before a clean dressing could be applied and further opined that F.C. could do this by himself in approximately five minutes.

Grievant completed charting her medications and took a treatment cart to F.C.'s room. Grievant

recalled looking at her watch when she first went to F.C.'s room and it was then 10:00 p.m. When she looked in his room, F.C. told her he was not ready to have his dressing changed as he had experienced a problem with his colostomy. Grievant waited in the hallway for a "couple of minutes" and then noticed R.R. sitting in the hallway. She spoke to R.R. who indicated he was ready to go to bed so she could do his dressings. Grievant was aware that it generally took 15 to 20 minutes for the HSW's to get R.R. into his bed. She then spoke with F.C. and he indicated that he would be another 10 to 15 minutes changing his colostomy. Grievant asked F.C. if it would be all right if she went to smoke a cigarette and take her break and he indicated that would be acceptable. She told F.C. she would be back in 10 to 15 minutes.

Grievant stated that she heard Ms. Lester in D.M.'s room and assumed that she was doing his colostomy treatment and "didn't want to be bothered." She did not advise Ms. Lester that she was going on a break, rationalizing that patients were generally sensitive about privacy during colostomy treatments. Grievant signed R.R. in at the nurse's station and went outside to the smoking area to smoke a cigarette.

Mr. Barker testified that, once F.C. was ready for his dressing, he went to Ms. Lester to find out which nurse was assigned to F.C. Ms. Lester advised him that Grievant was responsible for F.C.'s treatment that evening. Mr. Barker foundGrievant in the smoking area smoking a cigarette and told her, "You probably don't want to hear this now, but [F.C.] is ready for his dressing." Grievant replied, "He can wait a minute. I'm going to finish my cigarette." Grievant then invited Mr. Barker to play a hand of cards. Grievant recalled that when Mr. Barker told her that F.C. was ready for his dressing, she told him, "It's his turn to wait." She explained that she was "only kidding" because Mr. Barker was in F.C.'s room when F.C. told her to wait for him.

Grievant believed F.C. would have no problem with her finishing her break since she had told him she would return in 10 to 15 minutes. Moreover, Grievant was only expecting to give a Vapo-steam treatment to M.W., give medication and apply dressings to R.R., put a clean dressing on F.C., and complete charting of these actions before her shift ended at 11:00 p.m. Grievant finished her cigarette and went in the staff lounge, room 214, with Mr. Barker, where they began playing spades with two HSW's, Deeidra Gravely and Doris Lynch. Ms. Edgell was also sitting in the lounge at that time. Ms. Edgell recalled entering the lounge about 10:00 p.m. after finishing her charting for the evening. This corroborates Grievant's claim that she came in the lounge after 10:00 p.m. Another

HSW, Michael Myers, assisted Mr. Barker in changing F.C.'s clothes after the patient's return to the unit. He later saw F.C. sitting in the doorway of his room without a shirt. Mr. Myers asked F.C. what he was waiting for and F.C. indicated that he was waiting for a dressing change. Mr. Myers then went to the lounge and told Grievant that F.C. was waiting to have his dressingchanged. Grievant testified that she asked Mr. Myers if R.R. was in bed and he indicated that he did not know. Neither Mr. Myers nor any of the other employees in the lounge recalled this question being asked. Having advised Grievant that F.C. was waiting, Mr. Myers left the lounge to do some other work.

On her way to D.M's room to perform his colostomy care, Ms. Lester observed F.C. sitting in the hallway in his wheel chair. Based on her prior experience with F.C. as a patient, Ms. Lester opined that he would go out in the hallway when he was getting "aggravated" waiting for a nurse to do his treatment.

At about this time, another HSW, Clarence McDaniel, Jr., was returning a wheel chair after putting D.M. in bed. He passed F.C. and asked him why he was sitting in the hall with his shirt off. F.C. indicated that he was waiting for his dressing. According to Mr. McDaniel's testimony, F.C. did not appear agitated and he did not register a complaint with Mr. McDaniel. Nonetheless, after returning the wheel chair to the shower room, Mr. McDaniel returned to D.M.'s room and told Ms. Lester that F.C. was ready for his dressing. Ms. Lester replied that she was going to do D.M.'s colostomy care and that he should tell Grievant that F.C. was ready for his dressing.

On his way to the staff lounge, Mr. McDaniel encountered Mr. Myers by the nurse's station. Mr. Myers mentioned that he had previously informed Grievant that F.C. was ready for his dressing. Mr. McDaniel then went to the lounge where he found Grievant playing cards. He told Grievant that F.C. was ready for hisdressing. Mr. McDaniel expected that Grievant would get up and take care of the dressing since he knew that Mr. Myers had already told her F.C. was ready. However, Grievant responded by asking him if R.R. was in bed yet. He indicated that he did not know. (Mr. McDaniel was not assigned to R.R. and would not have been aware of R.R.'s status except by coincidence.)

Ms. Lynch testified that Mr. McDaniel came in about 10 to 15 minutes after Mr. Myers and appeared "very upset" and was "visibly shaking" while stating that F.C. was "getting upset." Ms. Edgell recalled that Mr. McDaniel said that F.C. was "upset" and that he had been in the hallway for "over an hour."

Mr. McDaniel returned to D.M.'s room and advised Ms. Lester that he had told Grievant that F.C.

was ready for his dressing and he was still sitting out in the hall with his shirt off. He went by D.A.'s room and D.A. told him that he had already had his treatment. Mr. McDaniel then passed F.C. and told him to go in his room as Grievant was on her way back to do his dressing. Mr. McDaniel then went out the exit door to smoke a cigarette.

Ms. Lester testified that Mr. McDaniel told her that he was the third person who had asked Grievant to do F.C.'s dressing and she still had not complied. Ms. Lester then went to the lounge and told Grievant, "Kathy, [F.C.] is ready for his dressing to be done. I've been told by J.R. McDaniel that you've been asked three times." Grievant replied, "We are almost through with this hand of cards. I would like to finish it and then I will go." Believing that it would take 10 to 20 minutes to play a hand of cards andthat Grievant was approximately halfway through the hand, Ms. Lester replied, "No, you need to go and do it now." Grievant again stated, "I want to finish this hand of cards. I don't see any reason why he can't wait just a few minutes."

Ms. Lester stepped back out of the room and, not hearing any motion toward ending the card game, reopened the door and said, "Kathy, I would like for you to do the dressing now. [F.C.] has been waiting." Grievant said, "He's only been waiting five minutes." Ms. Lester responded, "Five minutes is too long. Three persons have asked you."

Mr. Myers testified that he had returned to the lounge "a few minutes" after advising Grievant that F.C. was waiting and found Grievant still playing cards. He sat down and watched them playing cards, waiting for a call. He was not present when Mr. McDaniel came and went but he was present when Ms. Lester came in and asked Grievant to change F.C.'s dressing. He recalled that after Grievant told Ms. Lester that she would take care of it "in a minute," Ms. Lester came in the door a second time and said in a louder voice, "I want it done now." He recalled that Grievant and the others finished playing cards before leaving the room. Mr. Myers estimated that F.C. waited 30 minutes from the time he first observed him waiting for a dressing change.

Ms. Gravely's recollection of this scene was that Ms. Lester came to the door and said the client had been waiting and Grievant needed to do his dressing. Grievant told Ms. Lester, "We're almost done, just let us finish this hand." Ms. Lester responded, "No, itneeds to be done now." Grievant said, "I'm coming, just let me finish" and continued playing cards. Ms. Lester said, "No Kathy, it needs to be done now," or words to that effect, in a "firm tone of voice," and walked off. Grievant then laid down her cards and left the room to talk to Ms. Lester.

Ms. Edgell recalled Grievant's response to Ms. Lester's initial request as "I will, as soon as I finish this hand." According to Ms. Edgell, Ms. Lester could not have gotten more than two steps into the hallway before she returned to the doorway and told Grievant, "I want you to do it now." Ms. Edgell specifically recalled that Ms. Lester asked Grievant to perform F.C.'s treatment while asking her to answer the phone at the nurse's station. Ms. Edgell proceeded to the nurse's station, noting that the clock then indicated 10:15.

Mr. Barker recalled that Mr. Myers came in "near the end of the first hand" and told Grievant that F.C. was ready for his dressing. Each time someone came to tell Grievant that F.C. was waiting for his dressing, Grievant would indicate that she wanted to finish the hand of cards. Ms. Gravely's recollection was that Grievant told both Mr. Myers and Mr. McDaniel, "I'll be there in a minute," or words to that effect. In Grievant's version, Mr. Myers came in "about halfway" through the second hand.

After performing colostomy care on D.M., Ms. Lester encountered Grievant in the hallway near the nurse's station. Grievant told Ms. Lester, "You don't ever put me down in front of my peers again and tell me that I have to go do something right now." Ms.Lester replied, "Yes, I will Kathy. I'll tell you anytime I need to and I have to." Grievant then told Ms. Lester, "I do my treatments whenever they're assigned to me. You can't say that I don't do my work. I was on my way down there. I had it scheduled with these persons when it was to be done." When Ms. Lester told Grievant that F.C. had asked for his dressing to be changed, Grievant responded by saying, "You don't have to scream at me."

Ms. Lester explained to Grievant that she was not screaming, but Grievant was being paid to treat patients rather than play cards and that she intended to report the matter to the Director of Nursing, Ms. Boso. Grievant then walked toward an exit to the outside where the staff is permitted to smoke, saying loud enough for Ms. Lester to hear, "I don't care who you report this to. I will write up my side of the story too." Ms. Lester didn't hear any derogatory or threatening comments directed at her by Grievant. F.C. also testified during the hearing, recalling that he and R.R. returned from a trip to the mall sometime before 10:00 p.m. He noted that Mr. Myers and Mr. Barker assisted in cleaning him up following a problem with his colostomy. Grievant appeared about this time and asked to do his dressing. He told her that she would have to wait until he did his colostomy change. Grievant told F.C. that she was going on a break and would return to do his dressing. F.C. got his colostomy

changed sooner than usual and waited in the hallway with R.R. He next observed Grievant and Ms. Lester arguing by the nurse's station. He estimated that it can take up to twenty minutes to change his colostomy bag and that on that occasion ittook about ten minutes. F.C. agreed that the nurse's note which indicated that Grievant did his dressing at 10:15 p.m. appeared correct. He made no complaint to Mr. McDaniel or anyone else about the time he had to wait for Grievant to change his dressing.

Ms. Boso described F.C.'s wound as a decubitus that resulted from rubbing against his wheel chair. She testified that the purpose of applying a dressing was to protect the wound from further injury or exposure to germs. Treating F.C.'s wound simply required cleansing his back with alcohol, applying bacitracin (an antibacterial ointment), and taping a sterile pad over the wound. This treatment needed to be performed by an LPN or RN, but a preponderance of the evidence indicates that it did not constitute a medical "emergency."

Grievant testified that she was "surprised" that Ms. Lester was "flustered" and she did not have an opportunity to explain that she was on her break and had previously made arrangements with the clients to perform their treatments at the end of her break. Grievant testified that she "attempted to tell Ms. Lester that I was on break." Ms. Lester told her that F.C. had "waited long enough." When Ms. Lester told her to go do F.C.'s treatment "now," she laid down the cards and went to perform her remaining treatments. She recalled a "discussion" with Ms. Lester in front of the nurse's station while M.W.'s Vapo-steam was heating in the microwave. Grievant stated that she asked Ms. Lester why she had spoken to her the way she had and asked her not to do it again as it was "embarrassing." Grievant stated that she elected to speakwith Ms. Lester there because no one was around at that time, and that any problem between her and Ms. Lester was no one else's business. Grievant recalled asking Ms. Lester "why she had yelled at me." She simply confronted Ms. Lester about the way she had spoken to her in front of the other employees. She did not make any threats to Ms. Lester.

Grievant proceeded to F.C.'s room and did his dressing first as she could see that R.R. was just being lifted into bed as she went past the door of his room. Grievant made an entry in F.C.'s nurse's notes indicating she changed his dressing at 10:15 p.m. This took 10 to 15 minutes. She then told Mr. McDaniel that Ms. Lester was "on a roll" and that "maybe somebody ought to knock her in the head" in a joking manner. She then performed the required treatments on R.R. with assistance from

another HSW, Scott Schuman, at 10:35 p.m.

Ms. Gravely testified that after Grievant left the lounge, the people who had been playing cards went outside to smoke. From where she was standing, Ms. Gravely overheard part of Grievant's conversation with Ms. Lester at the nurse's station. She heard Grievant tell Ms. Lester, "Don't talk to me like that in front of other people." Ms. Gravely further recalled that Grievant came out to smoke with the others about ten minutes later. Grievant appeared angry and stated, "She'd better leave me alone or I'll smack that old bitch and collect two years' unemployment."

Ms. Lynch, who was in the smoking area with Ms. Gravely, recalled that after Grievant had been required to perform thetreatment on F.C., Grievant said, "she's a bitch" and "I'm going to knock her fucking head off," in apparent reference to Ms. Lester. She further recalled Grievant stating, "she can't fire me. Just let her try and I'll collect unemployment for two years." These comments were made in the presence of Ms. Gravely, and possibly others.

Ms. Edgell testified that she was still at the nurse's station when she heard Grievant state that she was "going to knock her fucking head off, she is nothing but a fucking bitch" and "they can fire me and I'll draw unemployment for two years." She understood these comments as referring to Ms. Lester although Grievant's words were directed toward the people who had been playing cards. Ms. Edgell recalled that Grievant told Ms. Lester, "You better not ever talk to me like that in front of a group of people again." Ms. Lester simply responded by telling Grievant, "I am in charge here."

Grievant testified that she did not smoke another cigarette before she ended her shift that evening as she was "too busy." She was unable to explain how Ms. Gravely or others could have heard the comments attributed to her against Ms. Lester. Grievant admitted that she was "upset" that Ms. Lester addressed her in the way she did but claimed that she was "shocked" and "surprised" rather than "angry." Grievant admitted that she had been angry before, but she was not angry on this occasion.

Grievant's testimony is in direct conflict with that of Ms. Gravely, Ms. Lynch and Ms. Edgell in regard to the specific comments which they attribute to her. Her claim that she was "toobusy" is also inconsistent with Ms. Lester's testimony that she observed her walking toward the smoking area after finishing with F.C.'s treatment. In assessing credibility of the respective witnesses, it is noted that the employer's witnesses were generally consistent in regard to what was said without being so identical as to indicate that they had fabricated the incident. Indeed, the employer's presentation of the

testimony of the three witnesses to Grievant's comments was so haphazard, their testimony appeared completely unrehearsed, even though all acknowledged being interviewed by Respondent's counsel prior to the hearing. Additionally, their testimony is corroborated by other evidence of record. In particular, Mr. McDaniel, who otherwise appeared to be sympathetic toward Grievant during his testimony, recalled that after her confrontation with Ms. Lester, Grievant told him, "Madge [Edgell] has been sitting on her fucking ass all night." Mr. McDaniel acknowledged that he refrained from bringing this up during Ms. Boso's investigation as it would have "only added fuel to the fire." The undersigned concludes that Mr. McDaniel's candid recollection paints an accurate picture of Grievant's demeanor at the time of these contested events, and that demeanor is generally consistent with the comments attributed to Grievant by her co-workers.

While the testimony of Mr. McDaniel, Ms. Gravely, Ms. Lynch and Ms. Edgell establish the comments attributed to Grievant by a preponderance of the evidence, DRS presented additional credible testimony and documentary evidence to establish a pattern andpractice by Grievant involving similar indirect threats toward supervisors and co-workers. (See footnote 3) In particular, it was documented in a previous disciplinary action that Grievant stated she was leaving before she "knocked the hell out of someone" in reference to Betty Harding, LPN, and in another instance Grievant told an employee that she "would set Betty Boso on her ass" if Ms. Boso came to the work area that evening. See R Ex 11 at 2.

Diana Withrow, another HSW assigned to the Treatment Unit, testified that she had been threatened by Grievant on at least one previous occasion. She also recalled that Grievant had once referred to her Charge Nurse, Ms. Lester, stating, "She better not fuck with me or I'll smack her." On another occasion, she heard Grievant state, "I'll set her on her ass." Ms. Withrow believed Grievant was referring to Ms. Boso. Another HSW, Patrice Moore, testified that she heard Grievant say, "that fucking bitch," immediately after ending a phone conversation with Ms. Boso. Patricia Johnson, RN, recalled Grievant referring to her supervisors and co-workers as "fucking bitches." Ms. Lynch likewiserecalled that Grievant had made comments at other unspecified times in regard to her supervisors or co-workers such as, "I'm going to knock her on her ass" and "I'll mop the floor up with her."

Accordingly, a clear preponderance of the evidence indicates that Grievant indirectly threatened Ms. Lester in the presence of one or more co-workers under the supervision of Ms. Lester, by stating

that she was "going to slap her fucking head off" and that Ms. Lester was a "fucking bitch," or similar words to the same effect. Grievant was previously advised in a May 27, 1992, memo from Steve Hill, Assistant Administrator, that making indirect threats was unacceptable behavior. R Ex 13. This expectation was further emphasized to Grievant in the December 4, 1992 letter from Director Panza imposing a five-day suspension. R Ex 11.

Grievant was charged with "continuing disruptive unprofessional behavior and insubordinate conduct." R Ex 12. These charges involve two separate but related matters: (1) Grievant's alleged failure to provide treatment to F.C. in a timely fashion; and (2) Grievant's alleged threatening statements uttered in the presence of her co-workers. The latter charge will be addressed first.

THREATENING STATEMENTS

This Grievance Board has previously recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988), citing Weber v. Buncombe County Bd. of Educ., 266 S.E.2d 42 (N.C. 1980). In Sexton, the Administrative Law Judge noted that insubordination had been shown through an employee's "blatant disregard for the authority" of his second-level supervisor. Sexton, supra at 10.

This approach is consistent with the treatment accorded to insubordination by arbitrators in the private sector. The scope of insubordination as an offense was addressed extensively in Burton Manufacturing Co. v. Boilermakers Local 590, 82 Lab. Arb. (BNA) 1228 (1994) (Holley, Arb.). There, Arbitrator Holley noted:

> **In general, if an employee refuses to obey an order or defies the authority of Management, he is guilty of insubordination. This is a serious offense and may justify disciplinary measures, including discharge. An employee may be charged with insubordination not only if he willfully disobeys an order, but also if he . . . uses abusive, threatening, or profane language in speaking to Management; or assaults a representative of Management. (Burton, supra, at 1234, citing Trotta, Arbitration of Labor-Management Disputes 282-283 (1974).)**

Consistent with the theme sounded in Burton and Sexton, Grievant's profane threatening comments toward Ms. Lester, in the presence of other employees who are expected to follow Ms. Lester's orders, constitute insubordination. Not only would such comments tend to

undermine the authority of a supervisor, they were made in apparent defiance of prior directives from the Assistant Director and Director to cease and desist from such activity. Moreover, because the Grievant's comments referred to her shift supervisor, they are readily distinguishable from profanities which are occasionally uttered in the presence of co-workers.

Grievant was also alleged to have stated to Mr. McDaniel, "you better watch yourself, Gracie [Lester] is wild and I'm going to knock her in the head." Both Grievant and Mr. McDaniel testifiedthat Grievant made a similar statement, but Mr. McDaniel interpreted the comment as a "joke," and Grievant testified that she was simply advising Mr. McDaniel to exercise caution in his dealings with Ms. Lester because she was upset with Grievant. During cross-examination by Grievant's counsel, Ms. Gravely recalled hearing Grievant state, "Gracie is wild and I'm going to have to knock her in the head." Ms. Gravely was not questioned by either party in regard to Grievant's demeanor at the time or other circumstances surrounding this statement.

In the context presented here, the undersigned is unable to conclude that Grievant's statement in regard to Ms. Lester being "on a roll" and that someone needed to "knock her in the head" constitutes insubordinate conduct. While Mr. McDaniel demonstrated considerable reluctance to say anything adverse to Grievant, thus making his credibility suspect, Respondent's charge must nonetheless fail, as the only employee to whom the comment was directed did not take Grievant seriously, and there is enough ambiguity in the language employed to support Grievant's version of this particular event.

FAILURE TO PROVIDE TREATMENT TO F.C.

The remaining charge to be examined involves Grievant's alleged failure to apply a clean dressing to F.C. until directly ordered to do so by Ms. Lester. Grievant's primary defense to this charge is that she had planned the treatments that needed to be performed during her shift, just as she had been encouraged to do by her employer, and she was on a 15-minute break when F.C. becameready for his dressing. At a minimum, Grievant established that F.C. was not unhappy with the delay in applying his dressing, and that she had communicated with F.C. in advance to let him know that she was going to take a break to smoke a cigarette. Nonetheless, Grievant's conduct falls below expected professional standards, regardless of

the patient's subjective satisfaction with the treatment received.

DRS clearly established that the "official" policy in effect at the time permitted employee card playing only on weekends, when the patient population was minimal, and then only with the permission of the Charge Nurse. See R Ex 20 & 21. Ms. Lester testified that she did not grant permission to play cards that evening, a Tuesday, and Grievant does not purport to have obtained Ms. Lester's permission.

Mr. Barker testified that he "assumed" Grievant had obtained Ms. Lester's permission to play cards. Ms. Lynch testified that Grievant told her the Charge Nurse had granted permission to play cards that evening. Ms. Edgell testified that although she did not play cards with Grievant, she had been playing cards in the staff lounge earlier that evening. While denying that anyone had requested permission to play cards that evening, Ms. Lester mentioned at another point in her testimony that she had seen some people playing cards in the lounge before she came to speak to Grievant.

Because Ms. Lester took no action to suspend card playing which was occurring in plain view, and Grievant was not chargedwith violating any rule by playing cards, it must be concluded that card playing was condoned by management, notwithstanding the employer's written policies prohibiting such activities on a weekday evening. Accordingly, the fact that Grievant was playing cards does not, standing alone, constitute insubordination or any other offense charged in this action. Nonetheless, the employer's evidence demonstrates that Grievant placed her card playing above the needs and welfare of her patient, F.C.

There was considerable evidence that Grievant had a history of ending her shift without completing some portion of her work. Ms. Johnson, who worked with Grievant on the 3-11 shift from September to December 1993, noted that Grievant would not complete her assigned work by the end of her shift and would delay performing treatments so that Ms. Johnson or another nurse would have to perform the work. This happened with sufficient frequency that Ms. Johnson found it necessary to constantly check behind Grievant to verify that her assigned tasks had actually been completed. Carolyn Underwood, another RN who served at times as Grievant's Charge Nurse before January 17, 1995, similarly testified that Grievant postponed performing treatments on patients for at least 15 to 20 minutes, on various occasions when she was playing cards. Additionally, this deficiency was specifically

addressed in Mr. Hill's May 27, 1992, memo to Grievant concerning her job performance. See R Ex 13.

Grievant's claim that she was on a break when F.C. became ready for his dressing is simply not supported by the record. There is overwhelming unrefuted evidence that Grievant failed to complete her assignments on a number of previous occasions. On the evening in question, Grievant claimed that she did not want to interrupt Ms. Lester to tell her she was taking a break, ostensibly out of regard for D.M.'s privacy. However, this did not prevent two HSW's from telling Ms. Lester that F.C. was ready for a clean dressing. (See footnote 4) **Further, Ms. Boso testified that she worked the 3 to 11 shift in place of Ms. Lester on the previous evening. In her opinion, the workload was light enough that employees such as Grievant had ample opportunity to take multiple breaks during their shift.**

Within a few days of the incident, Grievant voluntarily provided a 7-page hand-written statement setting forth her version of the events of the evening of the 17th. R Ex 2. While Grievant states that R.R. and F.C. were to let her know when they were both ready for their treatments, nowhere in this document does Grievant make any reference to being on her authorized 15-minute break when F.C. was ready for his dressing.

Instead, the statement emphasizes how "rude and very unprofessional" Ms. Lester was, alleging that she "screamed" at her when she told Grievant to do F.C.'s dressing. R Ex 2 at 2. Moreover, when she confronted Ms. Lester in front of the nurse's station and told her "not to yell at me like that in front of the other staff members," Grievant alleges that Ms. Lester "began screaming at meagain," and complains that Ms. Lester "should have taken me aside, not screamed at me in front of staff, dorm students and clients alike like a banshee." R Ex 2 at 2-5. Significantly, nearly every witness who overheard any part of Grievant's confrontation with Ms. Lester indicated that Grievant's voice was the loudest, and no one else indicated that Ms. Lester was screaming at Grievant.

Grievant also complained in her statement about the uneven distribution in work load, and that she "had 6 treatments all due at once." Clearly, this latter claim of being overworked is not supported by the evidence. Instead, what the evidence most vividly demonstrates is that Grievant displayed a thoroughly unprofessional attitude toward her nursing responsibilities on the evening in question. When Mr. Barker came to let her know that F.C. was ready for his

dressing, Grievant simply said, "It's his turn to wait." Having full knowledge that F.C. was then waiting, she began playing cards with Mr. Barker and two other HSW's. When Mr. Myers came in the lounge sometime during the second hand of cards to advise that F.C. was waiting (not knowing that Mr. Barker had already provided that information), Grievant simply indicated that she wanted to finish that hand. Understandably, Mr. McDaniel appeared apprehensive when he came to tell Grievant that F.C. was still waiting. He indicated in his testimony that Ms. Lester did not want patients to have to wait for their dressings to be applied. Thus, despite Grievant's question regarding R.R.'s present status, Mr. McDaniel's immediate response was to return to Ms. Lester and advise her that Grievant had not yet left the card game to change F.C.'s dressing. Even when Ms. Lester provided Grievant with her fourth notice that F.C. was ready for his dressing, Grievant's initial response was "just a minute" or "let me finish this hand."

Grievant testified at the Level IV hearing that Ms. Lester did not give her an opportunity to explain that she was on her break. However, when she spoke to Ms. Lester at the nurse's station, Grievant made no effort to explain the situation and resolve what she now claims was a simple misunderstanding. Instead, she took this opportunity to chastise Ms. Lester for embarrassing her in front of her peers. Even in her 7-page written statement, this explanation is not forthcoming.

As between Grievant and Ms. Lester, Ms. Lester's version of their conversations in the lounge and around the nurse's station is clearly the most credible. Although several witnesses indicated varying amounts of animosity toward Grievant for various reasons, it was generally accepted that Ms. Lester was one co-worker with whom Grievant consistently maintained a professional relationship. Ms. Lester's testimony was generally consistent with her prior written statement (R Ex 1), and there was no indication that she slanted her testimony against Grievant.

It is difficult to ascertain just how long F.C. waited for his dressing. Most of the witnesses, except for Ms. Edgell, were simply giving rough estimates of the time that elapsed. This is not surprising since HSW's are not generally expected to note the time when certain events take place, unlike RN's and LPN's who are tasked with accurately recording events in patient records. Thus,various witnesses indicated that F.C. waited anywhere from 10 minutes to an

hour. At minimum, 10 minutes elapsed from the time Mr. Barker advised Grievant that F.C. was ready until Grievant started to apply his dressing. Grievant acknowledged that she did not chart the treatments she performed on F.C. and R.R. until after her confrontation with Ms. Lester. Thus, Grievant's entry in F.C.'s nursing notes that she began his treatment at 10:15 p.m. is suspect as a self-serving statement. Moreover, Grievant's admitted failure to sign in F.C., or note his return from the mall in the nursing notes casts, further doubt on the accuracy of these records.

In any event, the exact amount of time F.C. waited for his treatment is not a paramount issue. DRS established by a preponderance of the evidence that Grievant failed to respond to the needs of her patient for reasons of her own convenience. Significantly, this lack of professionalism was displayed in front of several HSW's and one LPN who were part of the health service team in the Treatment Unit. Accordingly, although Grievant ultimately performed F.C.'s treatment after being directed to do so by Ms. Lester, Grievant's conduct exhibits such indifference toward the performance of her assigned duties that she was also insubordinate. See Sexton, supra.

The judicial standard in West Virginia requires that "dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting rights and interest of the public, rather than upon trivial or inconsequentialmatters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 2, Buskirk v. Civil Service Comm'n, 332 S.E.2d 579, 581 (W. Va. 1985); Oakes v. W. Va. Dept. of Finance and Admin., 264 S.E.2d 151 (W. Va. 1980); Guine v. Civil Service Comm'n, 141 S.E.2d 364 (W. Va. 1965). The public clearly has a significant interest in the effective and efficient conduct of the state's business by state employees while on duty. It is not necessary for misconduct to take place in the presence of a member of the general public for the public's rights and interests to be directly affected. Grievant's insubordinate comments which undermine the authority of her shift supervisor in the presence of three or more co-workers, and her protracted indifference to the needs of her patient in the presence of several co-workers, constitute misconduct of a substantial nature affecting the rights and interests of the public. See Payne v. W. Va. Dept. of Transp., Docket No. 93-DOH-454 (Apr. 29, 1994).

In Buskirk v. Civil Service Commission, 332 S.E.2d 579 (W. Va. 1985), the West Virginia

Supreme Court of Appeals stated that "the work record of a long time civil service employee is a factor to be considered in determining whether discharge is an appropriate disciplinary measure in cases of misconduct." Id. at 585. Grievant's most recent Job Performance Evaluation, covering the period from July 1, 1993, to June 30, 1994, was introduced into evidence. (R Ex 14) This evaluation rated Grievant a "2" or "weakness" in three areas: working with others, judgment and initiative. One area, dependability, was rated a "1" or "majorweakness." The remaining six categories were rated a "3" or "adequate performance," resulting in an overall rating of 2.5.

In addition, DRS established that Grievant was issued a 5-day suspension in December 1992, primarily for failure to work as scheduled. Further, Ms. Boso issued a warning memo on October 31, 1994, for a single incident of unprofessional conduct. Finally, Mr. Hill put Grievant on notice in his memo of May 27, 1992, that making indirect threats to other staff was unacceptable behavior. Given these documented incidents during less than six years of employment with DRS, as well as the seriousness of the misconduct proven in this action, Respondent has met the Buskirk test for justifying Grievant's dismissal. Likewise, Grievant's proven insubordinate and unprofessional actions on January 17, 1995, constitute "gross misconduct," one of the grounds for dismissal enumerated in Respondent's personnel regulations. See G Ex 2.

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 had been employed by the Division of Rehabilitation Services (DRS) as a Licensed Practical Nurse (LPN) in the Treatment Unit of its medical facility at Institute, West Virginia, since November 1989.

2. On January 17, 1995, Grievant worked the 3:00 p.m. to 11:00 p.m. shift, under the immediate supervision of Gracie Lester, a Registered Nurse (RN) who was assigned as Charge Nurse for the evening shift.

3. At the beginning of the shift Grievant was assigned to perform required treatments on four male patients, including F.C., who required a new dressing over a decubitus wound

before going to bed. Another LPN, Madge Edgell, was assigned responsibility for the female patients.

4. Sometime before Grievant's dinner break at 5:30 p.m., F.C. advised Grievant that he wanted his dressing changed after he returned from a trip to the mall in Charleston.

5. F.C. returned from the mall shortly after 9:30 p.m. As he experienced an accident with a leaking colostomy, he was not ready to have his dressing changed when Grievant came to his room for that purpose sometime around 10:00 p.m.

6. Grievant spoke with F.C., and he agreed that she could return in 10 or 15 minutes to change his dressing after taking a break to smoke a cigarette. Grievant also informed R.R. that she would perform his treatment when she returned to take care of F.C., as R.R. still needed to be lifted into bed by two or more Health Service Workers (HSW's).

7. Approximately 5 to 10 minutes later, while Grievant was still smoking her cigarette, Chris Barker, an HSW, informed Grievant that F.C. had completed his colostomy care and was ready for his dressing. Grievant responded by telling Mr. Barker, "it's his turn to wait" and invited Mr. Barker to play cards.

8. Grievant and Mr. Barker went in Room 214, the staff lounge, and proceeded to play cards with Deeidra Gravely and Doris Lynch, both HSW's.

9. At least 5 to 10 minutes later, while they were playing their second hand of cards, another HSW, Michael Myers, came by the lounge to advise Grievant that F.C. was waiting for his dressing. Grievant responded by stating, "I'll be there in a minute, as soon as I finish this hand of cards," or similar words to the same effect.

10. Another HSW, Clarence McDaniel, Jr., observed F.C. waiting in the hallway outside his room and, after consulting with Ms. Lester, determined that he was waiting for Grievant to change his dressing. While on his way to the staff lounge, he encountered Mr. Myers and learned that Grievant had already been advised that F.C. was waiting.

11. Mr. McDaniel proceeded to inform Grievant that F.C. was still waiting for his dressing. Grievant continued to play cards and Mr. McDaniel returned to report the situation to Ms. Lester.

12. Ms. Lester proceeded to the staff lounge and asked Grievant to take care of F.C.'s dressing. Grievant responded by stating, "we are almost through with this hand of cards. I

would like to finish it and then I will go," or similar words to the same effect.

13. Ms. Lester briefly closed the door to the lounge and then stepped back inside, telling Grievant, "F.C. has waited long enough, you need to do it now," in a firm tone of voice.

14. Grievant threw down her cards and went to perform the treatment on F.C. sometime between approximately 10:15 and 10:35 p.m.

15. While near the nurse's station on her way to F.C.'s room, Grievant chastised Ms. Lester for "yelling" at her in front of her co-workers.

16. As Grievant did not inform Ms. Lester that she was going to take a break before she began playing cards, did not explain to Ms. Lester that she had been on a break when discussing the matter with her that evening, and made no mention of an authorized 15-minute break in the 7-page hand-written statement she submitted to Ms. Boso later that week, a preponderance of the evidence indicates Grievant was not on an authorized break around 10:00 p.m.

17. After her confrontation with Ms. Lester, Grievant stated to Mr. McDaniel that "Madge [Edgell] has been sitting on her fucking ass all night."

18. Within hearing of Ms. Edgell, Ms. Lynch and Ms. Gravely, Grievant stated that she was "going to slap her fucking head off" in apparent reference to Ms. Lester and that Ms. Lester was a "fucking bitch," or similar words to the same effect.

19. Grievant's most recent job performance evaluation on September 18, 1994, contained an overall rating of 2.5 on a scale where a 3 represents "adequate performance." R Ex 14.

20. By letter dated December 4, 1992, Grievant was suspended without pay for five days, primarily for failure to work as scheduled. R Ex 11.

21. On October 31, 1994, Grievant received a written warning from the Director of Nursing, Ms. Boso, in regard to her unprofessional conduct in making an inappropriate comment on a patient's medication record.

CONCLUSIONS OF LAW

1. In disciplinary matters, the burden of proof is upon the employer. W. Va. Code §29-6A-6. Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992).

2. Dismissal of a civil service employee must be for "good cause, which means misconduct of a substantial nature affecting rights and interest of the public, rather than upon

trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 2, Buskirk v. Civil Service Comm'n, 332 S.E.2d 579, 581 (W. Va. 1985).

3. The offense of insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988), citing Weber v. Buncombe County Bd. of Educ., 266 S.E.2d 42 (N.C. 1980).

4. Grievant's statements in the presence of several HSW's working under the direction of Gracie Lester, Charge Nurse, that she was "going to slap her fucking head off" in reference to Ms. Lester, and that Ms. Lester was a "fucking bitch," or similar words to that effect, constituted insubordinate conduct. See Payne v. W. Va. Dept. of Transp., Docket No. 93-DOH-454 (Apr. 29, 1994).

5. By playing cards with three HSW's for at least 10 minutes after being advised that a patient for whom she was directlyresponsible was waiting to have a dressing applied, Grievant engaged in unprofessional behavior and exhibited such indifference toward completion of her assigned duties as to be insubordinate. See Sexton, supra.

6. Having proven by a preponderance of the evidence that Grievant committed insubordination and engaged in unprofessional behavior, DRS demonstrated good cause for Grievant's dismissal, given Grievant's relatively short tenure with the agency and her generally negative work record which included a previous 5-day suspension and a substandard evaluation. See Buskirk v. Civil Service Comm'n, 332 S.E.2d 579 (W. Va. 1985).

Accordingly, this Grievance is DENIED.

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: June 29, 1995

Footnote: 1

In its post-hearing brief, DRS argued that the incident where Grievant wrote on a patient's medication record that the patient was allergic to "penicillin and soap & water" constituted part of the charges which had been proven, thus warranting Grievant's dismissal. However, both the context of the dismissal notice and Ms. Boso's testimony regarding this matter suggest that the incident was closed by Ms. Boso's warning letter of October 31, 1994. Thus, this incident relates to a "stale" charge referenced in the dismissal letter without indication that it represented anything more than part of Grievant's employment record to be considered in determining if the sustained charges warrant the penalty imposed. See Heffron v. United States, 405 F.2d 1307 (Ct. Cl. 1969).

Footnote: 2

The patients who were involved in this matter will be identified by their initials, consistent with this Board's policy 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).

Footnote: 3

In addition to relevant evidence of prior indirect threats toward her superiors, DRS contended that a prior incident where Grievant allegedly threatened Donald Johnson, an HSW, with a shotgun, was consistent with her actions on the evening in question. In addition, the employer argued that an incident where Grievant inadvertently brought a handgun on the premises in her purse, as witnessed by Robert Toothman, "corroborated" the earlier threat against Mr. Johnson. Neither of these events was documented at the time. The undersigned finds that these allegations have no bearing on the present charges and has not considered them in arriving at a decision in this matter. Similarly, evidence that Grievant refused to perform colostomy care on a patient on one or more earlier occasions, which were not documented at the time, has been disregarded as it is not relevant to the instant charges.

Footnote: 4

Mr. McDaniel apparently went in D.M.'s room twice, the second time to advise that three people had informed Grievant that F.C. was ready for his dressing and she was still playing cards.