CLAUDETTE FRANTZ,

Grievant,

v. **Docket No. 99-HHR-096**

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, HOPEMONT HOSPITAL,

Respondent.

D E C I S I O N

On September 8, 1998, Claudette Frantz (Grievant) initiated a grievance pursuant to W. Va. Code §§ 29-6A-1, et seq., challenging a written reprimand she received from her employer, Respondent Department of Health and Human Resources, Hopemont Hospital (DHHR), for an "inappropriate and unprofessional verbal exchange" with a patient. The grievance was denied at Level I on September 16, 1998. Grievant appealed to Level II on September 23, 1998, and a decision denying the grievance was issued on October 2, 1998. Grievant then appealed to Level III where an evidentiary hearing was conducted on October 23 and December 15, 1998, continuing on January 19 and 20, and February 1, 1999. After the grievance was denied at Level III by Jonathon D. Boggs, Commissioner of DHHR's Bureau for Behavioral Health and Health Facilities on February 16, 1999, Grievant appealed to Level IV where a Level IV hearing was conducted in this GrievanceBoard's office in Morgantown, West Virginia, on May 12, (See footnote 1) and August 23, 1999. (See footnote 2) At the conclusion of that hearing, the parties agreed on a briefing schedule. Following receipt of the parties' written post-hearing arguments on September 29, 1999, this matter became mature for decision on October 13, 1999, upon receipt of the completed Level IV hearing transcript.

DISCUSSION

Grievant is employed by DHHR as a Licensed Practical Nurse (LPN) at DHHR's Hopemont Hospital. On August 31, 1998, Hospital Administrator Alice Westfall issued the following written

reprimand to Grievant.

This is to serve as a formal reprimand and written warning for your inappropriate and unprofessional verbal exchange with a Hospital resident, which borders on verbal abuse.

On August 21, 1998, you were in the Dining Room, in the proximity of Resident #2467, who was inappropriately handling food trays. When you directed the resident to wait, as the staff would assist him, he stated “fuck you.” By your own admission, you replied “you’d like to”. The resident replied “no, you’re too ugly”.

On August 26, 1998, Nancy Harsh, Advocate, contacted you for the purpose of investigating an alleged incident of verbal abuse and allowing you an opportunity to provide “your side of the story”. You informed Ms. Harsh that ” **resident 2467 was in the food trays and you told him to wait and staff would assist him in getting his tray**. **The resident # 2467 replied “fuck you” and you reported that you mumbled under your breath “you’d like to” and he replied “no you are too ugly”.** I have considered your explanation and have concluded that reprimand is appropriate.

Hopemont Policy entitled **Verbal, Physical, Sexual, Psychological Abuse Policy** and the Department of Health and Human Resources **Policy Number 8000** **Resident Grievance** defines Verbal Abuse as *“the use of language, tone or inflection of voice that would likely be construed by an impartial observer as a threat, harassment, derogation or humiliation of a resident”.* The policy further describes Verbal Abuse of residents by example(s) including (A. 1 .e). *“Teasing, pestering, deriding, harassing, mimicking or humiliating a resident.”* Your statement to Resident #2467 comes very close to constituting verbal abuse. Furthermore, as a Licensed Practical Nurse, you are expected, to act as a role model for Hospital residents. Engaging in such banter with residents constitutes positive reinforcement of inappropriate behavior a[s] well as a total disregard of the respect and dignity of the resident entrusted in your care.

Be advised that this behavior has been reported to the Office of Health Facility and Licensure and the West Virginia Board of Examiners for Licensed Practical Nurses.

Sherri Snyder, RN, MSN, Director of Nursing will be contacting you for the purpose of arranging supplemental inservice training on appropriate interaction with residents, Policy 8000 and Resident Rights. Please be aware that any future incidents of this type will result in more severe disciplinary action, including dismissal.

You may respond to this reprimand, in person or in writing, provided you do so within eight calendar days. Please let me know if you have any questions.

J Ex 1 at L IV (emphasis in original).

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). More particularly, the employer has the burden of proving each element of a disciplinary action by a preponderance of the evidence. Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Miller v. W. Va. Dep't of Health & HumanResources, Docket No. 96-HHR-501 (Sept. 30, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

The basic facts surrounding the events which resulted in this reprimand are largely undisputed. On the morning of August 21, 1998, Grievant encountered a patient in the dining hall who was attempting to help himself to breakfast by taking another patient's tray out of a serving cart. Grievant was not responsible for this particular patient, and was not aware of his particular diagnosis and infirmities, but nonetheless properly approached him and told him it was not yet time for breakfast, and that was not his breakfast he was taking from the cart. The patient's response to this admonishment was “fuck you.” Grievant responded by stating, “you would like to.” The patient responded to this comment by stating, “you're too damn ugly.”

A short time later, during a break, Grievant described the forgoing incident to a co- worker, Shirley Wiles. Grievant was aware that Ms. Wiles was familiar with that patient and asked if the patient had a current behavior plan. (See footnote 3) Ms. Wiles indicated that the patient in question did not have a behavior plan, and Grievant asked Ms. Wiles to bring that up when she attended a meeting to update and develop behavior plans later that day. Ms. Wiles did as she was requested, and that is how this incident came to the attention of hospital management, through personnel who attended that meeting. Nonetheless, Grievant challenges the written reprimand she was issued for unprofessional and inappropriate behavior (See footnote 4) on several grounds. Grievant contends this disciplinary action was not initiated in a timely manner. The incident which generated this reprimand occurred on August 21, 1998, a Friday. Grievant told Ms. Wiles about the incident shortly after it occurred. Ms. Wiles mentioned the incident in a staff meeting to discuss patient behavior plans held later that day. Nancy Harsh, Patient Advocate at Hopemont Hospital, was in attendance at that meeting. On the following Monday, August 24, 1998, Ms. Harsh reported the incident, as described

during that meeting, to the Hospital Administrator, Ms. Westfall. Pursuant to Ms. Westfall's direction, on Wednesday, August 26, 1998, Ms. Harsh conducted an informal inquiry into the incident by questioning Grievant. Grievant essentially confirmed the incident as previously described by Ms. Wiles. The challenged reprimand was issued on the following Monday, August 31, 1998.

Apparently, the incident was not reported to the Office of Health Facility Licensure and Certification (OHFLAC) within the time frame required by agency regulations. However, Grievant has not cited any law, policy, rule, or regulation applicable to state employees which requires a written reprimand to be initiated sooner than 10 days following the offense. Although the employer must take appropriate disciplinary action within a reasonable time after learning of employee misconduct, there has been no showing that the delay in initiating this reprimand was unreasonable. Indeed, Grievant simultaneouslysuggests that DHHR should have conducted a formal investigation in accordance with Policy 8000, DHHR's internal policy governing complaints concerning any aspect of a resident's treatment. Had such an investigation been conducted, it would have inevitably delayed initiation of disciplinary action. In any event, no formal investigation was required under the terms of Policy 8000, because Grievant substantially conceded the facts surrounding the incident, thus providing all the information DHHR needed to proceed with disciplinary action.

On September 4, 1998, Grievant submitted a written response to the reprimand. Grievant did not dispute that the remarks had been made as alleged, but claimed that she had muttered them under her breath. She conceded that her response to the patient was “inappropriate,” but argued that a written reprimand was too harsh a penalty, given her prior unblemished record. She also contended that she was being punished when similar conduct by other staff members was overlooked. A Ex 10 at L III.

It is clear the patient heard Grievant's remark, because he responded to it. Indeed, it appears the patient's response to Grievant illustrates the precise reason why hospital staff personnel are trained not to react to inappropriate patient behavior by responding “in kind.” As an LPN with over 30 years' experience, including over 22 years' experience dealing with patients with behavior problems at Hopemont Hospital, it is inconceivable that Grievant was unaware that such behavior is considered impermissible and unprofessional.

In the course of her written response to the reprimand, as well as a complaint to the West Virginia State Board of Examiners for Licensed Practical Nurses, Grievant appears to blame the

patient, alleging that he previously engaged in similar conductrepeatedly, but “he has been allowed to talk to staff in this manner with no consequence.” G Ex 2 at L IV. A preponderance of the evidence indicates the patient suffers from a condition which contributes to the conduct exhibited. There was no probative evidence that this behavior could be readily corrected, or that the incident Grievant encountered could have been prevented by merely changing the staff behavior plan for dealing with that patient's particular behavior. A preponderance of the evidence presented in the record indicates Grievant should have ignored the patient's initial comment, or sought assistance from nursing personnel with primary responsibility for caring for that patient, as they would be more familiar with the appropriate course of action to take in dealing with that patient's behavior.

Grievant's primary contention appears to be that she was singled out for disciplinary action by the Hospital Administrator. An employer is not permitted to selectively apply rules governing employee conduct, arbitrarily punishing some employees for the same infractions which are overlooked when committed by others. See Bennett v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-378 (Apr. 27, 1999). The employer provided evidence that other employees have been reprimanded for similar unprofessional behavior. Therefore, Grievant failed to establish by a preponderance of the evidence that she was singled out for disciplinary action when comparable misconduct by other employees was routinely overlooked.

Grievant also alleged that Ms. Westfall's decision to issue a written reprimand for this incident constituted discrimination and favoritism in regard to the penalty imposed on other Hopemont Hospital employees for similar infractions. Discrimination is defined inW. Va. Code § 29-6A-2(d), as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." This Grievance Board has determined that a grievant, seeking to establish a prima facie case (See footnote 5) of discrimination under Code § 29-6A-2(d), must demonstrate the following:

(a) that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

Once a grievant establishes a prima facie case of discrimination, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show that the offered reasons are pretextual. Hickman v. W. Va. Dep't of Transp., Docket No. 94- DOH-435 (Feb. 28, 1995). See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981);Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995). Favoritism is similarly defined by W. Va. Code § 29-6A-2(h), as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." In order to establish a prima facie showing of favoritism, a grievant must establish the following:

(a) that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded her;

and,

(c) that the difference in treatment has caused a substantial inequity to her and that there is no known or apparent justification for this difference.

Blake v. W. Va. Dep't of Transp., Docket No. 97-DOH-416 (May 1, 1998). See McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). As with discrimination, if a grievant establishes a prima facie case of favoritism, a respondent may rebut this showing by articulating a legitimate reason for its action. However, a grievant can still prevail if she can

demonstrate that the reason proffered by respondent was mere pretext. See Burdine, supra; Frank's Shoe Store, supra; Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990). Grievant focused much of her presentation on one particular incident involving Ms. Harsh, the Patient Advocate.

According to a preponderance of the credible evidence of record, Ms. Harsh was called to advise staff about dealing with a particularly problematic patient. She stated to a group of staff members in the hallway near the nurse's station that she did not care for the patient, that the patient was not one of her favorite people, and she understood theirreluctance to deal with such a patient. Ms. Harsh did not mention the patient by name, as she and the staff knew the individual being discussed.

Based upon a staff complaint, an informal inquiry was conducted. Ms. Harsh admitted the comments made and agreed they were inappropriate. Based upon this information, Ms. Harsh's supervisor, Ralph Raybeck, Director of Resident Services and Human Resources, issued a verbal warning to Ms. Harsh. At the time he issued the verbal warning, Mr. Raybeck was not aware that the patient in question, though out of Ms. Harsh's line of sight, was in the hallway and was close enough to the point where Ms. Harsh was standing, she could have overheard the conversation. However, there was no evidence the patient actually heard this conversation.

The undersigned finds that Grievant established a prima facie case of discrimination and favoritism because Grievant and Ms. Harsh are both professionals working in the same hospital who engaged in unprofessional behavior, and Grievant received a more severe punishment than Ms. Harsh. However, the employer had legitimate, job-related reasons for treating Grievant more harshly in that her conduct involved a direct conversation with a patient, while Ms. Harsh was only speaking in general terms to staff members, and Ms. Harsh was not aware the patient was within earshot at the time she was speaking to the staff. While it might have made an impact on Mr. Raybeck's action if he had known that the patient was close enough to hear Ms. Harsh's comments, given the nature of the complaint, DHHR conducted a reasonably adequate investigation of the facts to support his determination as a good-faith effort to take appropriate action. Grievant did not show that the reasons offered by DHHR for treating Grievant differently from Ms. Harshwere pretextual. Therefore, Grievant did not establish that she was subjected to unlawful discrimination and favoritism by the terms of her punishment for unprofessional conduct. Grievant also complains that she was treated differently from a Health Service Worker who reportedly engaged in similar conduct on a prior occasion. As an

LPN, Grievant is considered a professional staff member. It is not unreasonable to hold an LPN or Registered Nurse to a higher standard of conduct than employees who have received less specialized training, and who do not have to meet certain minimum requirements for professional licensure. Therefore, Grievant has not established a prima facie case of discrimination or favoritism in regard to alleged disparate treatment of Health Service Workers, and it is not necessary to further analyze the details of an earlier incident involving a particular Health Service Worker.

Grievant also argues DHHR violated its internal policy on progressive discipline as set forth in DHHR Policy Memorandum 2104, because it did not impose a verbal reprimand for a first offense, as opposed to a written reprimand. However, prior decisions by this Grievance Board have noted that Policy Memorandum 2104 constitutes a permissive, discretionary policy that does not create a mandatory duty to follow a progressive disciplinary approach. Ferrell v. W. Va. Dep't of Health & Human Resources, Docket No. 97-HHR-526 (Apr. 30, 1998); Artrip v. W. Va. Dep't of Health and Human Serv., Docket No. 94-HHR-146 (Sept. 13, 1994). While progressive discipline is encouraged when employees commit infractions of agency rules, serious infractions do not necessitate use of this approach. Ferrell, supra; Thompson v. W. Va. Dep't of Health and Human Resources, Docket No. 94-HHR-254 (Jan. 20, 1995). Grievant similarly asserts that it was arbitrary and capricious to issue a written reprimand for an initial infraction, given her lengthy period of satisfactory, if not exemplary, service. Although a written reprimand is considered to be more severe than a verbal reprimand, either penalty must be documented in the employee's personnel file. In any event, an allegation that a particular disciplinary measure is disproportionate to the offense proven or otherwise arbitrary and capricious is an affirmative defense, and the grievant bears the burden of demonstrating that the penalty was clearly excessive or reflects an abuse of agency discretion, or an inherent disproportion between the offense and the personnel action. Hunt v. W. Va. Bureau of Employment Programs, Docket No. 97-BEP- 412 (Dec. 31, 1997); Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96- HHR-501 (Sept. 30, 1997). Accord, Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Thompson v. W. Va. Dep't of Health & Human Services, Docket No. 94-HHR-254 (Jan. 20, 1995). See Martin v. W. Va. State Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989); Schmidt v. W. Va. Dep't of Highways, Docket No. DOH-88-063 (Mar. 31, 1989).

Generally, an agency's action is arbitrary and capricious if the agency did not rely on the factors

that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Shull v. Dep't of Health & Human Resources, Docket No. 97-HHR-417 (Jan. 26, 1998); Sheppard v. W. Va. Dep't of Health & Human Resources, Docket Nos. 97-HHR-186/187 (Dec. 29, 1997). See generally Bowman Transp., Inc. v. Arkansas-Best Freight System,Inc., 419 U.S. 285 (1974). Moreover, the arbitrary and capricious standard of review does not permit an administrative law judge to simply substitute his judgment for that of the employer. See Bedford County Memorial Hosp. v. Health & Human Serv., 769 F.2d 1017 (4th Cir. 1985); Staton v. Wyoming County Bd. of Educ., 184 W. Va. 369, 400 S.E.2d 613 (1990). Because reasonable people may honestly differ over whether a written or verbal reprimand is the proper penalty for the incident at issue in this grievance, the undersigned administrative law judge is unable to conclude that the penalty imposed was arbitrary and capricious, or an abuse of the supervisor's discretion to take appropriate corrective action to insure patient rights were properly protected. See Wiley v. W. Va. Div. of Natural Resources, Docket No. 96-DNR-515 (Mar. 26, 1998).

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

FINDINGS OF FACT

1. Grievant is employed by Respondent West Virginia Department of Health and Human Resources (DHHR) at Hopemont Hospital as a Licensed Practical Nurse (LPN).

2. Hopemont Hospital provides long-term care to elderly patients, including a number of patients with behavior problems who are not accepted for care in private nursing homes. L IV HT, 5/12/99, at 13-14. 3. Grievant has been employed as an LPN at Hopemont Hospital for over 22 years. Prior to the incident which gave rise to this contested disciplinary action, she had not previously been disciplined by her employer for any reason. (See footnote 6)

4. On August 21, 1998, Grievant approached a patient who was attempting to take another patient's breakfast from a serving cart in the Dining Room. When she directed the patient to wait until it was his turn to eat breakfast, the patient responded, “fuck you.” Grievant said, “you'd like to,” and the patient replied to that comment, saying, “no, you're too ugly.”

5. Following an informal inquiry conducted pursuant to DHHR Policy 8000, Grievant was

issued a written reprimand for the “inappropriate and unprofessional verbal exchange” with a patient by Hopemont Hospital Administrator Alice Westfall. Grievant also received additional training on patient abuse as a preventive measure.

6. Sometime in 1997, Nancy Harsh, Patient Advocate, spoke to staff members in the hallway regarding their concerns about a problematic patient, stating “she is not one of my favorites,” and “I have never liked that patient,” or words to that effect.

7. Following an informal inquiry pursuant to DHHR policy 8000, Ms. Harsh was verbally reprimanded by her supervisor, Ralph Raybeck, Hopemont Hospital's Director of Resident Services and Human Resources.

CONCLUSIONS OF LAW

1. Pursuant to W. Va. Code § 29-6A-6, the burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Wellman v. W. Va. Dep't of Health & Human Services, Docket No. 93-HHR-079 (Oct. 18, 1993); Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988).

2. "Discrimination" is defined by W. Va. Code § 29-6A-2(d) as “

> any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.”

3. W. Va. Code § 29-6A-2(h) defines favoritism as “unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.”

4. A prima facie case of discrimination or favoritism requires the grievant to prove the following:

(a) that she is similarly situated, in a pertinent way, to one or more other employees;

(b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Sharifpour v. W. Va. Div. of Highways, Docket No. 99-DOH-089 (July 28, 1999); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). 5. If a grievant establishes a prima facie case of discrimination or favoritism, the employer can offer legitimate reasons to support its actions. Thereafter, the grievant may show that the offered reasons are pretextual. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986).

6. Although Grievant established a prima facie case of discrimination and favoritism in regard to the penalty she received for unprofessional and inappropriate conduct, the employer established legitimate reasons for the differences in treatment which were not shown to be pretextual. See Burdine, supra; Davis v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-435 (July 30, 1999).

7. An allegation that a particular disciplinary measure is disproportionate to the offense proven or otherwise arbitrary and capricious is an affirmative defense, and the grievant bears the burden of demonstrating that the penalty was clearly excessive or reflects an abuse of agency discretion, or an inherent disproportion between the offense and the personnel action. Thompson v. W. Va. Dep't of Health & Human Services, Docket No. 94-HHR-254 (Jan. 20, 1995).

8. The written reprimand issued to Grievant for an inappropriate and unprofessional conversation with a patient was not a disproportionate or excessive punishment for the offense.

Accordingly, this grievance is **DENIED**.

Any party, or the West Virginia Division of Personnel, may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: November 18, 1999

Footnote: 1

For administrative reasons, this matter was reassigned to the undersigned Administrative Law Judge after the May 12 hearing.

Footnote: 2

Grievant was represented by a co-worker, Ronda C. Smith. Respondent was represented by Assistant Attorney General Dennise Smith-Kastick.

Footnote: 3

A behavior plan essentially involves developing a multi-disciplinary approach for dealing with various behaviors exhibited by patients.

Footnote: 4

Grievant's contention that she was not guilty of "verbal abuse" or "patient abuse" will not be addressed. A fair interpretation of the reprimand indicates that there is no allegation of misconduct, other than an observation that such a violation could be argued. Because the employer did not charge verbal abuse, it is not necessary to decide if that offense was established by a preponderance of the evidence.

Footnote: 5

A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th ed. 1968).

Footnote: 6

Prior incidents which DHHR attempted to rely upon to justify the penalty imposed were never documented, Grievant was not given any prior due process in regard to those incidents, and the incidents were not referenced in the written reprimand, suggesting that they were raised as an afterthought once Grievant challenged this disciplinary action.