BRENDA BROWN,

Grievant,

v. **Docket No. 04-HHR-216**

DEPARTMENT OF HEALTH AND HUMAN

RESOURCES/PINECREST HOSPITAL,

Respondent.

D E C I S I O N

Grievant, Brenda Brown, was employed as a Health Service Worker at Pinecrest Hospital. On June 3, 2004, she filed this grievance asserting she was unjustly terminated, and the allegations of verbal and physical abuse were untrue. She seeks as relief to be reinstated and transferred.

As this grievance concerned a termination, Grievant filed directly to Level IV following her dismissal from Pinecrest Hospital. W. Va. Code §29-6A-4(2)(e). A Level IV hearing was held on August 3, 2004, and this case became mature for decision on September 28, 2004, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant was employed as a Health Service Worker for at least five years at Pinecrest Hospital, a long-term care facility. 2. On May 14, 2004, Charge Nurse Teresa Brinkley reported verbal and physical abuse of a resident, GH, by Grievant. (See footnote 2) GH is full-grown male who is mentally retarded. He has a history of hitting, slapping, and pulling the hair of care givers.

3. Ms. Brinkley reported that Grievant was "yelling at Resident and shaking him in Merry - Walker in dining room @ . 1:10 p.m." Ms. Brinkley reported this behavior to Patty Hurst, the

House Supervisor, at approximately 2:45 p.m. Ms. Brinkley was directed to change Grievant's assignment immediately and to write Andrea Saunders, the Resident Advocate, notifying her of the incident.

4. Grievant was suspended on May 14, 2004, pending an investigation.

5. An "Immediate Fax Reporting of Allegations to OHFLAC" form was completed and sent to OHFLAC on May 14, 2004, and an investigation was begun that day. (See footnote 3) Grievant was suspended until the investigation was completed.

6. Grievant was interviewed twice on May 14, 2004, at 3:20 p.m. and at 5:15 p.m. Grievant reported another Health Service Worker had asked her to care for GH that day, because he had hit her the day before. Grievant agreed. Grievant noted GH was aggressive after he got up around 10:30 a.m., and hit her before lunch. In the lunch room, GH refused to eat his food, wiggled out of his seat, and kept trying to steal food from other residents. Grievant talked loudly to GH and got him to sit in his Merry Chair. (See footnote 4) Once in theMerry Chair, GH still kept trying to steal food from the other residents. Grievant screamed at GH and repeatedly told him she was not going to let him do this. Grievant also told GH she was not going to let him beat her up. Grievant kept pulling GH back from the tables, wrestling with him and shaking him in his Merry Chair, as his head lolled from side to side. Grievant was very angry at GH during these events.

7. Grievant admitted in her interview that she does "get a little rough," and when GH hit her, she pushed him back in his Merry Chair. (See footnote 5) She agreed her behavior was inappropriate, but stated, "Just because it was inappropriate, doesn't mean it is wrong." Resp. No. 2.

8. Grievant has been reported for resident abuse before, and she complained because Ms. Brinkley did not tell Grievant she was going to report her this time, like she did the time before. (See footnote 6)

9. Grievant explained no one wanted to care for GH, and there was frequently not enough help on the unit, as GH requires one-on-one care.

10. After the investigation was completed, Grievant was notified by letter dated June 3, 2004, that she was dismissed immediately.

11. The reason for this dismissal was the verbal and physical abuse of GH on May 14,

2004. Grievant's behavior was viewed as inappropriate and unprofessional and in violation of the resident's rights. HHR noted Grievant had screamed at GH, shook his Merry Chair, grabbed him by his shirt, and pushed GH when he hit her. 12. Respondent was notified by a letter from Adult Protective Services dated June 14, 2004, that this reported case would not be opened for services, and the file would be closed.

Discussion

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. W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

State employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the 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. 1, Oakes v. W. Va. Dep't of Finance & Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); See also Section 12.2 and .3, Administrative Rules, W. Va. Div. of Personnel.

I. Credibility

The first issue to address is one of credibility, as Grievant testified she did not do the things of which she was accused, and the testimony of others is incorrect. In situations where the existence or nonexistence of certain material facts hinges on witness credibility,detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Res., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health & Human Res./Huntington

State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. (See footnote 7) See Holmes v. Bd. of Directors/W. Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.

Respondent presented the testimony of several witnesses and placed multiple statements into the record to support its assertions that Grievant was guilty of gross misconduct. The testimony of Respondent's witnesses was credible. Their statements were believable and clear, basically consistent with each others', internally consistent, and consistent with previously signed documents. Additionally, there was no demonstration of bias. Grievant did not perceive the events as others did. "[A] [f]actor to be considered in making and explaining credibility determinations is [the] possibility that [the] witness is biased and may consciously or unconsciously shade his or her testimony for or against one of the other witnesses or parties." Chin v. Dep't of Treasury, 44 M.S.P.R. 201 (1990). The undersigned Administrative Law Judge finds Grievant has not correctly assessed her behavior during this incident. She viewed her behavior as inappropriate, but not wrong. Grievant's testimony is not credible.

II. Gross misconduct

The charge against Grievant is gross misconduct, as Respondent asserts Grievant verbally and physically abused GH. The issue before the undersigned Administrative Law Judge is whether Respondent met its burden of proof and demonstrated by a preponderance of evidence that Grievant is guilty of these allegations.

The "term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991) (citing

Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985)). See Evans v. Tax & Revenue/Ins. Comm'n, Docket No. 02-INS-108 (Sept. 13, 2002). W. Va. Code § 9-6-1deals with social services for adults and defines abuse as "the infliction or threat to inflict physical pain or injury on or the imprisonment of any incapacitated adult or facility resident."

Respondent has met its burden of proof. Grievant's actions demonstrated a clear disregard for the resident's rights, and her employer's policies. Her actions could also havecreated a liability for her employer. Her behavior was not "trivial", "inconsequential", or "technical". The reasons for Grievant's dismissal meet the requirements outlined in Oakes, supra. Grievant agrees she was upset with GH, he had hit her, and she was having problems controlling his behavior. In this difficult situation, Grievant acted in an inappropriate and callous manner toward GH - shaking him, grabbing him and screaming at him. In retrospect, Grievant agreed she did not handle the situation well, but she failed to call her treatment of GH what it was - abuse.

III. Mitigation/Severity of Penalty

The argument Grievant's termination is excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

"When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997). Mitigation of a penalty is considered on a case by case basis. Conner v. Barbour County Bd. of Educ., Docket No. 95-01-031 (Sept. 29, 1995); McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness

and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. Pingley v. Div. of Corrections, Docket No. 95-CORR-252 (July 23, 1996). This Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute her judgement for that of the employer. Tickett v. Cabell County Bd. of Educ., Docket No. 97-06-233 (Mar. 12, 1998); Huffstutler v. Cabell County Bd. of Educ., Docket No. 97-06-150 (Oct. 31, 1997).

The undersigned Administrative Law Judge cannot find that a termination for abusing a mentally retarded resident was excessive.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code § 18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). 2. "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as

sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.; See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

3. State employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the 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. 1, Oakes v. W. Va. Dep't of Finance & Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); See also Section 12.2 and .3, Administrative Rules, W. Va. Div. of Personnel.

4. The "term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard ofstandards of behavior which the employer has a right to expect of its employees." Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991) (citing Buskirk v. Civil Serv. Comm'n, 175 W. Va. 279, 332 S.E.2d 579 (1985)). See Evans v. Tax & Revenue/Ins. Comm'n, Docket No. 02-INS-108 (Sept. 13, 2002).

5. Respondent has met its burden of proof and demonstrated Grievant was guilty of gross misconduct. Grievant was terminated for misconduct of a substantial nature directly affecting rights and interests of the public. Oakes, supra.

6. 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 the employer's discretion, or an inherent disproportion between the offense and the personnel action. Conner v. Barbour County Bd. of Educ., Docket No. 94- 01-394 (Jan. 31, 1995). See Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

7. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other

employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997).

8. "Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is soclearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996).

9. Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute her judgement for that of the employer. Tickett v. Cabell County Bd. of Educ., Docket No. 97- 06-233 (Mar. 12, 1998); Huffstutler v. Cabell County Bd. of Educ., Docket No. 97-06-150 (Oct. 31, 1997).

10. Given the charge proven against Grievant, the penalty is not disproportionate or excessive, nor is the penalty arbitrary and capricious. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994); Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991).

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 suchappeal 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: October 15, 2004

Footnote: 1

Grievant represented herself, and Respondent was represented by Robert Miller, Assistant Attorney General.

Footnote: 2

In keeping with Grievance Board's policy, initials are used instead of names when discussing residents in the state's care. Additionally, by agreement of the parties, the undersigned Administrative Law Judge redacted the documents submitted by Respondent.

Footnote: 3

This acronym stands for Office of Health Facility Licensure and Certification.

Footnote: 4

A Merry Chair is an ambulatory device that appears to resemble a child's walker. The device has a seat, the seat is surrounded by metal, and a resident may walk in the device or sit.

Footnote: 5

In her post hearing submissions, Grievant admitted she was aware of Pinecrest's abuse policy.

Footnote: 6

This prior incident was not explained further, and Grievant did not submit any regulation that required her to be notified before alleged abuse is reported to the proper supervisor.

Footnote: 7

The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984).