THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

SHIRLEY AYERS,

Grievant,

v. **Docket No. 06-HHR-103**

DEPARTMENT OF HEALTH AND HUMAN

RESOURCES/PINECREST HOSPITAL,

Respondent.

D E C I S I O N

Grievant, Shirley Ayers, was employed as a Health Service Worker for Department of Health and Human Resources at Pinecrest Hospital. On February 8, 2006, 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 with all back pay and benefits and to have her name cleared with the Nurse Aide Registry. While Grievant admits she made some mistakes, she believes her prior record should keep her from being terminated.

As this grievance concerned a termination, Grievant filed directly to Level IV following her dismissal. W. Va. Code § 29-6A-4(2)(e). A Level IV hearing was held on May 15, 2006, and this case became mature for decision on June 13, 2006, after receipt of the HHR's proposed findings of fact and conclusions of law. Grievant represented herself, and Respondent was represented by Jennifer Akers, Assistant Attorney General.

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

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Findings of Fact

1. Grievant was employed as a Health Service Worker for approximately seven years at Pinecrest Hospital, a long-term care facility. Prior to her termination, Grievant had not been subjected to any disciplinary action.

2. On January 25, 2006, Charge Nurse Dell Jones reported verbal and physical abuse of a resident, RB, by Grievant. (See footnote 1) RB is mentally retarded. He has a history of slapping and grabbing care givers when he is anxious and around new people.

3. Ms. Dell reported RB became agitated during morning care and a dressing change. (See footnote 2) He grabbed at Grievant, slapped her, and tried to bite her. Grievant: 1) slapped RB's hands; 2) yelled at him, stating "My four year-old acts better than this;" 3) put his own hand in front of his face, and said, "If you want to bite something, bite this;" and 4) attempted to put a piece of tape over his mouth. Grt. Exh. 5. Kara James was also present during the incident, and she completed a statement on January 25, 2006, which noted the same actions by Grievant. Respondent. Exh. 6.

4. Grievant's actions were reported to Angela Booker, CEO, and she instructed Ms. Dell to send Grievant home until she was contacted by Aimee Bragg, Human Resources Manager. The required report of suspected abuse was completed and sent to the Nurse Aide Registry that same day. Respondent. Exh. 2. 5. Grievant was called and told to report later that same day for a meeting with Ms. Booker and Ms. Bragg. During that meeting, Grievant admitted she had told RB to bite his hand, said a four year old didn't act this bad, had attempted to put RB's hand toward his mouth and tapped and/or slapped his hands. She stated the incident with the tape was just a joke. Grievant agreed she had "messed up," and what she had done was wrong. Respondent. Exh. 3.

6. Grievant was suspended pending further investigation.

7. Grievant has had three recent training sessions on how to care for difficult patients. Respondent. Exh. 5.

8. After the investigation was completed, Grievant was notified by letter dated January 30, 2006, that she was dismissed immediately.

9. The reasons for dismissal were the verbal and physical abuse of RB on January 25,

2006. Grievant's behavior was viewed as "uncaring" and "unprofessional," and Grievant had failed to follow the proper standard of conduct expected of a Health Service Worker. HHR noted Grievant had slapped at RB, demeaned him verbally, tried to get RB to bite himself, and attempted to place tape on his mouth. Respondent. Exh. 5.

10. Respondent notified the Nurse Aide Registry on January 31, 2006, that Grievant had been terminated for patient abuse. When this Registry is notified of patient abuse, the aide's name is placed on the Nurse Aide Abuse Registry unless a hearing is requested, and the individual's name is cleared. Grt. No. 6; Resp. No. 4.

11. Grievant asked for a hearing before the Nurse Aide Registry, and she is currently allowed to work until her case was decided. This determination by the Nurse Aide Registry did not change HHR's decision to dismiss Grievant. Grt. Exh. 6.

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 Res., 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.

The charge against Grievant is essentially gross misconduct, as Respondent asserts Grievant verbally and physically abused RB. 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 this allegation.

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." Graleyv. 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 § 9-6-1 deals 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 did verbally and physically abuse RB. Grievant's actions demonstrated a disregard for the resident, her employer's policies, and could have resulted in harm. Her behavior was not "trivial," "inconsequential," or "technical." See Brown v. W. Va. Dep't of Health and Human Res., Docket No. 04-HHR- 216 (Oct. 15, 2004). The reasons for Grievant's dismissal meet the requirements outlined in Oakes, supra.

Grievant argues her termination was excessive given the facts of the situation and no prior problems. This assertion 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. ofEduc., 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 Corr., 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 unless the disciplinary measure is clearly excessive. 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 Grievant's termination for verbally and physically abusing a mentally retarded resident was excessive. The factthat Grievant had not had any prior disciplinary action for resident abuse does not change this decision.

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

Conclusions of Law

1. 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.

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 equallysupports 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 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).

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, the employer, and the resident. 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, orreflects 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. "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).

8. 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 unless the disciplinary measure is clearly excessive. 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).

9. Given the charges 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 thegrievance 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.

JANIS I. REYNOLDS

SENIOR ADMINISTRATIVE LAW JUDGE

Dated: June 30, 2006

Footnote: 1

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

Footnote: 2

RB was being prepared to go by ambulance to the hospital.