**THE WEST VIRGINIA PUBLIC EMPLOYEES**

**GRIEVANCE BOARD**

**JUDITH WARNER,**

**Grievant,**

**v.**

**DOCKET NO. 07-HHR-409**

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/LAKIN HOSPITAL,**

**Respondent.**

## DECISION

This grievance was filed at level two of the grievance procedure (See footnote 1) by Grievant, Judith Warner, on April 25, 2007, after she was dismissed from her position with Respondent, the Department of Health and Human Resources/Lakin Hospital, as a Health Service Assistant, because Respondent determined that charges of resident abuse by Grievant had been substantiated. The statement of grievance reads:

> Unlawful discharge after sexual harassment charges were filed by grievant along with seven others.

The relief sought by Grievant is "[r]einstatement to job position and recovery of lost wages." The grievance was denied at level two. After appealing to level three, Grievant advised that she wished to

proceed to level four, and the grievance was dismissed from level three on November 15, 2007. A level four hearing was held before Administrative Law Judge Thomas J. Gillooly in the Grievance Board's Charleston office, on July 23, 2008. Grievant represented herself, and Respondent was represented by Jennifer K. Akers, Assistant Attorney General. This matter became mature for decision upon receipt of Respondent's Proposed Findings of Fact and Conclusions of Law on August 27, 2008. Grievant did not submit any written argument. Because Administrative Law Judge Gillooly is no longer employed by the Grievance Board, this matter was reassigned to the undersigned Administrative Law Judge on September 17, 2008.

## Synopsis

Grievant was dismissed from her employment as a Health Service Assistant at Lakin Hospital for resident abuse. No witnesses to the alleged resident abuse were called to testify in this proceeding. The only evidence of abuse was the testimony of the investigator, and her report summarizing her interviews with staff and residents. This is hearsay. Under the circumstances presented here, this hearsay is entitled to no weight. Respondent did not prove the charges against Grievant.

## Procedural Issues

During the level four hearing, Grievant asked that five exhibits be marked and admitted into evidence. These five exhibits relate to the investigation of the allegations of resident abuse, and final determination, by Adult Protective Services and the Office of Health Facility Licensure and Certification (“OHFLAC”), which are both offices or divisionswithin the Department of Health and Human Resources. The exhibits were marked, but Respondent objected to their admission. No ruling was made at the hearing on the admission of the exhibits.

Grievant's Exhibit 1 is the OHFLAC “Nurse Aide Registry Investigative Report” of the allegations of abuse. Grievant's Exhibit 2 is a series of letters regarding an investigation of the allegations by Adult Protective Services. Grievant's Exhibit 3 is a letter from Social Services Supervisor Kellie Roberts, Department of Health and Human Resources, Bureau for Children and Families, dated October 2, 2007, stating that “the substantiated [Adult Protective Services] findings against [Grievant] will be reversed.” Grievant's Exhibit 4 is the February 28, 2008, Final Administrative Order of Martha Yeager Walker, Secretary, Department of Health and Human Resources, in the OHFLAC

proceedings, Docket No. 07-CNA-066, stating that Grievant's name “shall **not** be placed on the Nurse Aide Abuse Registry for abuse of a resident.” (Emphasis in original.) Grievant's Exhibit 5 is the Recommended Decision of the Hearing Examiner in Docket No. 07-CNA-066.

Respondent objected to the admission of Grievant's Exhibits 1 through 5, on the grounds that Respondent was not a party to the proceedings, the legal standard in the OHFLAC proceedings was different, with the burden of proof being greater than by a preponderance of the evidence, and Respondent was not prepared to defend the OHFLAC investigation. Grievant's Exhibit 4 is the conclusion made by the Secretary of the Department of Health and Human Resources. While Lakin Hospital was not “a party,” these proceedings were conducted by the Department of Health and Human Resources. As to the difference in the burden of proof, this certainly should be kept in mind, but the exhibits presented by Grievant are relevant to this grievance, particularly since nowitnesses to the alleged abuse, or victims of alleged abuse testified in this grievance proceeding, while such testimony was given, under oath, in the OHFLAC proceedings. Grievant's Exhibits 1 through 5 are ORDERED ADMITTED into evidence. (See footnote 2)

The following Findings of Fact are made based upon the record developed at level four.

## Findings of Fact

1. Prior to her dismissal, Grievant was employed by the Department of Health and Human Resources (“HHR”), as a Health Service Assistant at Lakin Hospital. (See footnote 3) She worked the evening shift on the Behavioral Unit, and was required to be licensed as a Certified Nurse Aid.

2. Lakin Hospital is a long-term care facility, with a little over 100 residents.

3. On April 1, 2007, Grievant and a co-worker, Rhonda Kearns, became involved in an argument at Lakin Hospital. Because of this argument, Grievant and Ms. Kearns were required to meet with Ruth Upton, RN Supervisor, and Carolyn Nelson, RN Supervisor, that evening. During this meeting, Grievant made a claim of sexual harassment against co-worker William Foster, who was Ms. Kearns' boyfriend. This claim of sexual harassment was reported to Harriett Fitzgerald, HHR's Director of Employee Relations and Risk Management, and an investigation of the complaint was begun. 4. On April 5, 2007, Ms. Kearns met with Wanda Smith, Human Resources Director at Lakin Hospital, and reported that Grievant had abused residents of Lakin Hospital. Ms. Kearns claimed she had personally observed Grievant leaving two residents unattended in bath water or the

whirlpool tub, and that other residents had told her they had been abused by Grievant.

5. Ms. Kearns did not report the abuse at the time it was alleged to have occurred, and she could not state when the incidents of abuse occurred.

6. Ms. Kearns did not testify at the level four hearing.

7. Stephanie Click, Social Service Supervisor, was assigned by HHR to investigate the report of resident abuse for Lakin Hospital. Ms. Click interviewed several residents of Lakin Hospital, the staff assigned to work with Grievant on the evening shift at Lakin Hospital, and Grievant.

8. Two of the residents were interviewed twice by Ms. Click. These two residents are incapacitated and have been assigned conservators. Both are over 60 years of age. Ms. Click interviewed these residents twice because of their mental condition, to check the consistency of their statements. One of these residents told Ms. Click that Grievant had slapped her more than once, and had screamed at her, “you pissed yourself,” when she had urinated on herself. The other told Ms. Click that Grievant had slapped her on the hand and on the face when she tried to take a washcloth off the linen cart. One of these residents told Ms. Click the second time she spoke with her, that Ms. Kearns had seen Grievant slap her. Ms. Kearns did not tell Ms. Click she had witnessed this. Both of these residents told Ms. Click they had witnessed the argument between Grievant and Ms.Kearns on April 1, 2007, that Grievant had said she was going to get Ms. Kearns fired, and that they were upset by this argument.

9. Bonnie Denny, a Health Service Worker at Lakin Hospital, told Ms. Click she had seen Grievant leave the supply room door open, and one of the residents entered the supply room. She then saw Grievant grab the resident by the arm, pull him out of the supply room, and push him into a chair. Ms. Denny told Ms. Click she had seen Grievant, on another occasion, pull a resident out of a wheelchair and throw him into a recliner. She also told Ms. Click she had seen Grievant grab a resident by the arm, forcing the resident to walk on tiptoe while she pulled her across the hallway and put her in a chair. Ms. Denny did not report these observations to anyone at the time they occurred.

10. None of the residents interviewed by Ms. Click gave statements which supported the allegations made by Ms. Denny, nor had any other employee witnessed this.

11. None of the residents interviewed by Ms. Click gave statements which supported the allegations by Ms. Kearns that Grievant had left residents unattended during baths or in the whirlpool, nor had any other employee witnessed this.

12. Ms. Click prepared a report of her investigation, dated April 9, 2007. This report summarizes her interviews with residents and staff of Lakin Hospital. Ms. Click did not, as part of her investigation, require witnesses to provide their own written, signed statements, nor did she have any witness sign a statement she prepared summarizing what they had told her.

13. Ms. Click found the charges of resident abuse to be substantiated. 14. None of those who were interviewed by Ms. Click were called to testify at the level four hearing.

15. OHFLAC and Adult Protective Services also investigated the complaints of resident abuse.

16. Several of those interviewed during all three investigations stated that Grievant had a good relationship with residents, and was good to the residents.

17. Adult Protective Services concluded that most of the charges of residents abuse were not substantiated, but two of the charges were substantiated. On October 2, 2007, Grievant was notified that the findings by Adult Protective Services that the charges were substantiated would be reversed.

18. The two residents who told Ms. Click that Grievant had slapped them testified under oath at a hearing conducted by OHFLAC. Both denied at the hearing that Grievant had slapped them. One of the residents testified she may have been coerced into saying otherwise. The other testified she “was coerced by a person who no longer works at the facility but she has come to the conclusion that she has to tell the truth.” Grievant's Exhibit 5.

19. Ms. Click interviewed the two residents identified in Finding of Fact 18, after the OHFLAC hearing. One of these residents told her she had lied when she gave her testimony during the OHFLAC proceedings, but she did not explain why she would do so. Ms. Click did not find any evidence that either resident had been bribed by anyone.

20. Grievant was suspended without pay from her employment on April 6, 2007, during the investigation. 21. Grievant was notified that she was being dismissed from her employment by HHR by letter dated April 18, 2007. The dismissal letter states Grievant is being dismissed for resident abuse, and violations of HHR “Policy 2108, 'Employee Conduct;' DHHR Clinical Policy #3311 - [']Verbal and Physical Abuse of Residents,' and DHHR Clinical Policy #8000 - [']Resident Grievance Procedure.' (See footnote 4) The effective date of the dismissal was May 4, 2007. The dismissal letter states that 17 allegations of abuse were reported, and 10 of those were found to be substantiated. The substantiated allegations were listed as follows:

> (1) A verbal confrontation between you and Rhonda Kearns occurred in the presence of residents on April 01, 2007, and caused the residents to become upset. (2) You

> have slapped three (See footnote 5) residents. (3) You have said to residents who have urinated on themselves, “You pissed yourself.” (4) You grabbed a resident inappropriately causing the resident to ask you to stop; and (5) You inappropriately handled three residents by throwing them into chairs on [sic] the hallway.

## 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*. The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989). "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 interests 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*, [175 W. Va. 279, ___,] 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir. W. Va. State College,* Docket No. 93-BOD-436 (Dec. 30, 1994).

Grievant denied she had abused residents of Lakin Hospital. She pointed out that Ms. Kearns had made the allegations of abuse only after Grievant had claimed Ms. Kearns' boyfriend had sexually harassed her. She also noted that the two residents who had told Ms. Click that Grievant had slapped them, had testified under oath at the OHFLAC hearing that this never happened. Finally, Grievant pointed to the fact that she was known by her co-workers to have a good relationship with the residents of Lakin Hospital.

The undersigned has been presented with a unique situation. The charges against Grievant are serious and damaging. Certainly, if Grievant has abused residents, she should not be returned to her

employment. However, the only evidence offered by Respondent to support the charges against Grievant was the testimony of the investigator, Ms. Click, and her investigative report which summarizes what she was told by those sheinterviewed. Ms. Click's report, and her testimony regarding what she was told, is hearsay, and as such, the undersigned must determine how much weight it can be given in this proceeding.

The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. (See footnote 6) *Gunnells v. Logan County Bd. of Educ.,* Docket No. 97-23-055 (1997); *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-8-115 (June 8, 1990).

HHR did not call Ms. Kearns or Ms. Denny to testify, both of whom were employees of HHR at the time they were interviewed, (See footnote 7) and did not offer any explanation for the failureto call these two witnesses. Neither gave a signed, written statement, sworn or otherwise, which was presented into evidence, no explanation was given for the failure to obtain signed, written statements, their statements to Ms. Click were not routinely made, the allegations of abuse made by both were not reported at the time the abuse was alleged to have occurred, and Ms. Kearns was not a disinterested witness, rather, she made the allegations of resident abuse only after Grievant accused her boyfriend of misconduct. Neither the allegations by Ms. Kearns that Grievant had left residents unattended in the bathtub and whirlpool, nor Ms. Denny's allegations that Grievant had grabbed residents and thrown them into chairs, were verified by any resident, or by any other staff member. Ms. Click's summary of the interviews of Ms. Kearns and Ms. Denny is unreliable hearsay, which cannot be considered by the undersigned in this proceeding.

While it is understandable that HHR would not want to call residents of Lakin Hospital to testify, Ms. Click's summary of what the residents told her likewise cannot be given any weight. HHR did not

present actual resident statements, signed by the residents; rather, Ms. Click summarized her interviews in short paragraphs containing only the basic facts. The interview summaries do not reflect when the abuse was alleged to have occurred. Both residents who told Ms. Click that Grievant had slapped them gave a different statement when placed under oath in the OHFLAC proceedings. There also exists a question of the mental capacity of both residents, and both stated under oath that they had been coerced into stating that Grievant had slapped them. One of the residents added new information to her statement when Ms. Click interviewed her a second time, telling her that Ms. Kearns had witnessed Grievant slapping her. Ms. Kearns, however, did not state she had witnessed this. As to the residents' statements that they had witnessedthe argument between Ms. Kearns and Grievant, both stated Grievant said during the argument that she was going to get Ms. Kearns fired, while the summary of Ms. Kearns' statement does make any reference to such a statement.

The statements given by the two residents to Ms. Click also cannot be considered because they are not credible. 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 and 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 Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD- 216 (Dec. 28, 1999); *Perdue, supra*. Once the two residents testified under oath that Grievant had not slapped them, this obviously damaged their credibility. HHR presented no evidence to restore the credibility of these residents.

The following Conclusions of Law support the Decision reached.

## **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).

2. The employer must also demonstrate that misconduct which forms the basis for the dismissal of a tenured state employee is of a "substantial nature directly affecting rights and interests of the public." *House v. Civil Serv. Comm'n*, 181 W. Va. 49, 380 S.E.2d 226 (1989). "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 interests 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*, [175 W. Va. 279, ___,] 332 S.E.2d 579, 581 (W. Va. 1985); *Oakes v. W. Va. Dept. of Finance and Admin.*, [164 W. Va. 384,] 264 S.E.2d 151 (W. Va. 1980); *Guine v. Civil Service Comm'n*, [149 W. Va. 461,] 141 S.E.2d 364 (W. Va. 1965)." *Scragg v. Bd. of Dir. W. Va. State College*, Docket No. 93- BOD-436 (Dec. 30, 1994).

3. Respondent failed to prove the charges against Grievant.

Accordingly, this grievance is **GRANTED.** Respondent is **ORDERED** to reinstate Grievant to her position as a Health Service Assistant at Lakin Hospital, and to pay her all backpay to which she is entitled from the date her employment was terminated, and backpay for the period of time she was suspended without pay, plus interest, and restore all benefits, as though she had not been dismissed.

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. *See* W. Va. Code § 29-6A-7 (*See Footnote 1*). Neither the West Virginia Public 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 Grievance Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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**BRENDA L. GOULD**

**Administrative Law Judge**

**Date: November 18, 2008**

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Footnote: 1

*In 2007, the Legislature abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.*

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Footnote: 2

*Grievant also asked that the record be left open after the hearing, to allow her to submit the transcript of the OHFLAC proceedings. Grievant was unable to submit this transcript.*

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Footnote: 3

*The record does not reflect how long Grievant had been employed by HHR.*

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Footnote: 4

*None of these policies was introduced into evidence or discussed by any witness.*

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Footnote: 5

*The record reflects that Grievant was accused of slapping two residents, not three.*

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Footnote: 6

*The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing hearsay. See Borninkhof v. Department of Justice, 5 MSBP 150 (1981).*

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Footnote: 7

*The record does not reflect whether some disciplinary action was taken against Ms. Kearns and Ms. Denny for their failure to report abuse when it was alleged to have occurred, although Grievant's Exhibit 5 contains a statement that Ms. Kearns was terminated "over this incident."*