THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

MARY ANGELIA HARDBARGER,
Grievant,

v. **Docket No. 2009-0643-MAPS**

DIVISION OF VETERAN'S AFFAIRS,
Respondent.

DECISION

Grievant, Mary Angelia Hardbarger, was employed as a Health Service Worker for the Division of Veteran's Affairs at the Veterans Nursing Facility in Clarksburg, West Virginia. On November 5, 2006, she filed this grievance asserting she was unjustly terminated, and the allegations of physical abuse were untrue. She seeks as relief to be reinstated to her job without harassment.

As this grievance concerned a termination, Grievant filed directly to level three following her dismissal. W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held before the undersigned Administrative Law Judge on March 6, 2009, at the Grievance Board's office in Westover, West Virginia. Grievant represented herself and Respondent was represented by Christie S. Utt, Deputy Attorney General. This matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on April 6, 2009.

Synopsis

Grievant engaged in physical abuse of a facility resident. In particular, Grievant failed to meet proper service worker standards by failing to follow the attending physician's orders and failed to follow the Nursing Facility policy concerning the transfer of residents.

Respondent proved Grievant engaged in this misconduct of a substantial nature and the dismissal is upheld. This grievance is denied.

After a careful review of the entire record of this grievance, the undersigned makes the following findings of fact:

Findings of Fact

1. Grievant was employed as a Health Service Worker ("HSW") from October 16, 2007, to October 14, 2008, at the West Virginia Veteran's Nursing Facility. Prior to her termination, Grievant had only been subjected to the suspension which lead to this dismissal; no other disciplinary action against Grievant appears in the record.

2. On October 14, 2008, Charlene Sellaro, the daughter of resident John Barberio, filed a complaint with a nurse on duty regarding Grievant's conduct in moving Mr. Barberio from his wheelchair to his bed.

3. Rosetta Heston, the Unit Manager, was notified of the complaint and returned to the Nursing Facility to interview Mrs. Sellaro. She provided a written statement memorializing the events leading up to the lift, the way the lift was accomplished, and allegations of previous improper conduct by Grievant.

4. On the day of the incident, Mr. Barberio, an eighty-six-year old WWII veteran, had just returned from physical therapy that was undertaken as a result of a stroke which he had suffered. Mr. Barberio requested to go to the restroom. Grievant indicated that she was busy and Mr. Barberio would have to wait until she could assist with the restroom visit. While being taken out of the restroom, Mr. Barberio expressed a fear of falling and grabbed the handle close to the toilet. Grievant instructed Mr. Barberio to remove his hand from the handle so that he could be placed in his wheelchair. Mr. Barberio was then

hurriedly lifted by Grievant and another HSW from his wheelchair to his bed without assistance from Mr. Barberio. This movement was done without the use of the mechanical lift that was ordered by his physician to be used when Mr. Barberio could not lift himself. As a result of the lift, Mr. Barberio suffered pain and discomfort.

5. Unit Manager Heston placed Grievant on suspension the day of the incident pending an investigation into the complaint.

6. James George, the HSW who assisted Grievant, confirmed that a lift was not used, and that Mr. Barberio was lifted under his arms. He indicated that Mr. Barberio was tired and too weak to stand. Mr. George also reported that Grievant told Mr. Barberio to let go of the handles in the bathroom in a loud voice.

7. Pam Campbell, another HSW who assisted Grievant, confirmed that Mr. Barberio was lifted up into his bed under his arms. Ms. Campbell also reported that Grievant instructed Mr. Barberio to remove his grip from the handles in the bathroom, and the HSWs had to support his full weight prior to moving him to his bed.

8. In addition, Mr. Barberio confirmed to Ms. Heston that he had received “a lot” of rough treatment from Grievant. Mr. Barberio was reluctant to report Grievant’s conduct because he did not want to get anyone in trouble.

9. Mr. Barberio continued to suffer from pain and discomfort. He was sent to the facility’s ER for x-rays, which noted a change in the joints of the shoulder area.

10. When Ms. Heston came on duty the following morning, Mr. Barberio was still upset and had been upset for most of the night. He was having significant chest pain and was sent to the ER for an evaluation. Mr. Barberio was diagnosed with angina, or secondary chest pain. In addition, Mr. Barberio’s physical therapy was discontinued for a

few days. Upon his return to physical therapy, the therapist reported that Mr. Barberio never regained his previous improvement and momentum.

11. Mr. Barberio's physician order and nursing records reflect that an order was dated September 11, 2008, one month prior, recommending the use of a stand up lift or Hoyer Lift for transfer if [the patient] is unable to stand or bear his weight. Four days later, on September 15, 2008, Mr. Barberio was ordered to wear a sling for his left shoulder which was paralyzed as a result of the stroke.

12. Proper procedure for a lift when a resident wears a sling is either a gait belt or lift. HSWs are responsible for knowing the care plans for the residents. The Nursing Facility has a no-lift policy for making transfer of residents so that neither the resident nor the HSWs are injured.

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. *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 & 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.*

Permanent 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 and 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).

Grievant was notified by Dr. Kevin Crickard, Nursing Facility Administrator, by correspondence dated October 22, 2008, of her dismissal. This correspondence provided, in pertinent part, the following:

> The following is a summary of the investigation that led me to the decision of dismissal. On October 14, 2008, Rosetta Heston, Unit Manager received reports that you "slammed the resident into bed by his arms and did not use the mechanical lift." Reports were taken from all individuals involved, and you and the other alleged perpetrator were placed on an investigatory suspension. Numerous eyewitness statements were taken in writing, and each witness was verbally interviewed.
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> A predetermination conference was held on October 21, 2008 to discuss this with you. In the conference you admitted that you knew that the resident should not have been manually transferred if he wasn't able to bear weight. Contrary to two other eyewitness accounts, you state that the resident did bear weight during the transfer. The preponderance of the evidence indicates otherwise. The resident clearly had a physicians [sic] order to use a mechanical lift during a transfer if the resident was not weight-bearing, and you clearly violated this order. Additionally, failure to use a gait belt or mechanical lift is a clear violation of our "No Lift" policy.

In the instant grievance, Respondent has met its burden of proving that Grievant's conduct was of a substantial nature directly affecting the rights and interest of a patient residing at Respondent's facility. The Respondent has established just cause for Grievant's termination by proving that she failed to adhere to the physician's order and the no-lift policy, causing harm to a resident, Mr. Barberio. Grievant failed to properly lift Mr. Barberio, despite knowing that he was tired, and was having difficulty supporting his weight

prior to the transfer to his bed. Mr. Barberio's paralyzed shoulder and his fatigue should have made Grievant well aware of her obligation to utilize the mechanical lift.

Grievant insisted she was busy because it was a "crazy" day, and she did not have the time to properly lift Mr. Barberio. By failing to properly lift the resident, Mr. Barberio was injured, requiring further medical attention. Following the incident, Mr. Barberio suffered angina, attributed to the stress of the event. Grievant engaged in a substantial disregard for the physician's directives, and the lifting policy of the facility, jeopardizing the safety of a resident. Grievant presented no evidence to rebut or explain her failure to use the lift in accordance with the physician's orders and the Nursing Facility policy. Despite clear indication that Mr. Barberio was tired and afraid he would fall, Grievant used the quickest and most convenient means to make the transfer into the bed. The evidence supports Mrs. Sellaro's assertion that Grievant was "just too much of a hurry to take time to do it the right way." Level three hearing recording, March 6, 2009. In fact, Grievant's fellow HSWs indicated that not only was it easier to lift Mr. Barberio than to use a mechanical lift, but that type of mechanical transfer would have taken a substantial amount of time because there was not a lift pad underneath Mr. Barberio. Grievant knowingly took the shortcut approach to this essential function of her job at the expense of a resident's well-being. This simple undisputed fact speaks volumes in this case.

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. *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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. Permanent 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 and 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).

3. Respondent has proven by a preponderance of the evidence that Grievant's employment was terminated for good cause.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. 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 Civil Action number should be included

so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: May 7, 2009

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Ronald L. Reece
Administrative Law Judge