THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

RONALD LEE MORRIS,
Grievant,

v. **Docket No. 2010-1240-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/WILLIAM R. SHARPE, JR. HOSPITAL,
Respondent.

DECISION

Ronald Lee Morris ("Grievant"), employed by the Department of Health and Human Resources ("DHHR") as a Health Service Worker at the William R. Sharpe, Jr. Hospital, filed an expedited grievance to level three, as is permitted by W. VA. CODE § 6C-2-4(a)(4), following the termination of his employment, effective April 23, 2010. Grievant seeks reinstatement and to be made whole, including lost pay, benefits, tenure and interest. An evidentiary hearing was conducted before the undersigned Administrative Law Judge in the Grievance Board's Westover office on August 17, 2010. Grievant appeared in person and by his representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. DHHR was represented by Assistant Attorney General Heather L. Laick. The grievance became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on October 14, 2010.

Synopsis

Respondent failed to prove by a preponderance of the evidence that Grievant engaged in patient abuse by grabbing a patient by the arm, and pushing the patient while working in the dining room of the hospital. Based on the credible testimony of several

witnesses in a position to observe any such patient abuse and credibility determinations regarding the testimony of Grievant versus the statements of the patient and the supposed eye witness, it was concluded that the incident did not occur as alleged. Respondent did meet its burden of proof in establishing the charge of verbal abuse by Grievant, a ten-day period of suspension was appropriate discipline, and termination of employment was excessive given the proven charge. Accordingly, this grievance is granted in part, and denied in part.

After a thorough review of the record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant was employed as a Health Service Worker for eight years at William R. Sharpe, Jr. Hospital, a psychiatric facility operated by the West Virginia Department of Health and Human Resources located in Weston, West Virginia.

2. Grievant was terminated from his position on April 23, 2010, based upon a charge of verbal and physical abuse of a patient.

3. Respondent alleges that on February 28, 2010, Grievant, while in the dining room, inappropriately grabbed a patient by the arm and spoke to her in an unnecessarily loud voice. Respondent was terminated after an initial unpaid suspension that began on March 3, 2010.

4. At the time of the alleged incident, there were as many as three other staff members in the dining room. None of these employees reported witnessing any physical abuse, but did acknowledge that Grievant spoke in a loud tone.

5. The only witness reporting physical abuse was Barbara Norman, while no

longer employed at the hospital she had worked as the head cook for over a year.

6. Ms. Norman reported that she observed Grievant's interaction with the patient on February 28, 2010, as she was standing behind the serving line at the cook's station in the kitchen area. Ms. Norman indicated that the patient was getting coffee when Grievant grabbed her by the arm and demanded in a loud voice that she return to the table area and sit down.

7. Louise Quinn, Food Service Worker, was present on February 28, 2010, and reported that she did not see any physical abuse committed by Grievant. She did witness many patients trying to get coffee at one time, and that was the reason that Grievant instructed them to sit down. The patients were blocking other patients from coming through the line to get their trays. Grievant kept telling the patients to sit down and to get their coffee when they were served their meals.

8. Ms. Quinn agreed that Grievant was loud, but indicated that you had to be loud with the patients because they did not hear very well due to the fact that most patients in this unit of the hospital were elderly. Ms. Quinn also pointed out that Grievant was loud in his normal pattern of speech.

9. The patient reported to investigators, some amount of time after the date of the alleged abuse, that the Grievant had grabbed her by the arm. The patient reported that "she went for a cup of coffee when a man grabbed their [sic] right arm and he said to not get it yet. The man then pushed her, and said he was going to beat the shit out of them. Ms. L responded she was going to call the law, and the man said go ahead. Ms. L reported the man grabbed and twisted her arm, and then pushed her down in a chair. Later that same meal Ms. L went up to get silverware, and the man responded not till your

turn, sit down and shut up you little F-word, and B-word." Respondent's Exhibit 2. Adult Protective Service Report as authored by Caryn Woofter, Advocate, Legal Aid of West Virginia.

10. Another investigation reports that the patient "came up beside Ron to get a coffee cup and caught him unaware. Ron took the cup and told her to please have a seat. Ron said he get's loud sometimes because he is male. When Ron got back to the unit he was told by his supervisor, Archie Poling, that the dining room had called and said Ron was abusive. Ron was asked if he was loud in the cafeteria and he said he got loud when he was telling them to have a seat . . . [w]hen asked how he grabbed V's arm, Ron said he did not physically grab her arm, he grabbed the cup. Ron denies pushing V, Ron has worked with the elderly patients at Sharpe for three years and has been at Sharpe for a total of 8 years."

11. When questioned by nurse Archie Poling immediately after returning to her unit from the dining room as to whether or not she had been grabbed, the patient indicated that she had not. When the patient was examined, there were no marks or other signs to indicate that she had been hurt or grabbed by the arm.

12. Jerry Able, Charge Aide on the ward and twenty-three year employee of Respondent, indicated that the patient in question needed continual redirection, was not stable, and constantly wanted to drink coffee.

13. Mr. Able established that any patient getting coffee would not be visible to food service workers on the kitchen side of the serving line due to the ice machine blocking their view. The ice machine was sitting next to where Grievant would stand to pass out trays, and it stands more than six feet off the floor. Food service workers would not be able

to see a patient at the coffee server while standing behind the hot trays. This is the location that Mrs. Norman reported witnessing the physical abuse.

14. Patty Workman, a sixteen-year Health Service Worker on the same unit as Grievant, indicated that Grievant was good with the patients, and does not seem to get frustrated or impatient with them. Ms. Workman opined that, based on the layout of the dining room, a food service worker standing behind the counter could not see in the corner of the dining room.

15. Grievant admitted that he used a loud voice with patients at times, and may have over reacted in this situation due to the particular stressors of the day.

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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

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).

Several controverted facts are at issue in this grievance and, ultimately, the outcome in this matter hinges upon witness credibility and appropriate inferences drawn from pertinent contested and uncontested facts. As of April 23, 2010, Grievant was employed as a Health Service Worker at William R. Sharpe, Jr. Hospital, which is located in Weston, West Virginia. This hospital is a psychiatric facility operated by the West Virginia Department of Health and Human Resources.

The patient who was the alleged victim of physical and verbal abuse by Grievant will be identified as V.L., consistent with the long-standing policy of this Board respecting the privacy of individuals under such circumstances. *See*, *e.g.*, *Edwards v. McDowell County Bd. of Educ.*, Docket No. 93-33-118 (July 13, 1994); *Bailey v. Logan County Bd. of Educ.*, Docket No. 93-23-383 (June 23, 1994). V.L. is described as a female, elderly patient, who is small, thin, and somewhat frail. V.L. is located on Grievant's Unit. V.L. is in need of constant redirection and constantly wants to drink coffee, hence she is on coffee restrictions.

Barbara Norman was employed as a Head Cook at Sharpe Hospital and was working in the dining room on February 28, 2010. Ms. Norman was the sole eyewitness whose testimony directly supported the physical abuse charge eventually leveled against

Grievant.[1] During the course of the level three hearing, Grievant was able to call into question the veracity of Ms. Norman's account of witnessing the alleged physical abuse.

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 Resources,* 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*.

The undersigned does not find the testimony of Ms. Norman, as it relates to the charge of physical abuse, to be credible. Based upon the seemingly undisputed facts of this grievance, Ms. Norman would not have had the opportunity to observe the alleged act

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[1]Physical abuse is defined as the "use of physical force, body posture or gesture that inflicts or threatens to inflict pain on a client." 64 C.S.R. 59 § 3.13.

of physical abuse made against the Grievant. In addition, the plausibility of Ms. Norman's account of what took place calls into question the credibility of the account. Two different witnesses, Jerry Able and Betty Workman, with twenty-three and sixteen years of work experience at the hospital, testified that a patient getting coffee would not be visible to an employee working in the kitchen area on the other side of the serving line. This is because of the ice machine that, at more than six feet off the floor, blocks the view of the coffee maker which sits on the other side of the ice machine. Respondent argues that this testimony is not relevant since they were not present on the day in question, which is true; however, no one called into question the fact that the layout of the dining room was other than the same on the day in question as it was the day before or after, the date on which the fact witnesses did work.

The other obvious concern is the plausibility of the account. The reports of the investigation which Terry Small, Acting Chief Executive Officer, relied upon when making her decision to terminate Grievant's employment, were completed sometime after the incident. It was conveyed to Ms. Small that V.L. reported that Grievant grabbed her by the arm, pushed her around, and took her to a chair and pushed her down into it. However, when questioned by nurse Archie Poling immediately after returning to her unit from the dining room as to whether or not she had been grabbed, V.L. indicated that she had not. When the patient was examined, there were no marks or other signs to indicate that she had been hurt or grabbed by the arm.

There were three other staff members in the dining room at the time of the alleged incident, none of these employees reported seeing Grievant grab the patient's arm, turn her around, shove her, take her to a chair and push her down into the chair. This all

occurring at a time when Grievant acknowledged that he was being very loud and was conspicuously located at the front of the dining room. There is no credible evidence in the record to establish that Respondent has met its burden of proof as it relates to the charge of physical abuse.

The remaining charge is that Grievant committed verbal abuse against V.L.[2] Grievant admitted that he used a loud voice with the patients because it was something that he felt was necessary. Grievant also admitted that he made a statement to the effect that you had to let the patients know who was the boss. In addition, it is undisputed by all the witnesses testifying in this matter that Grievant's tone would likely be construed by an impartial observer as threatening in nature. This testimony and Grievant's admissions demonstrates that Respondent did meet its burden of proof in establishing a charge of verbal abuse. Grievant could have made better choices in this situation, but his conduct did not demonstrate good cause to justify his dismissal. *Oakes*, *supra*. However, discipline is appropriate for the proven verbal abuse.

In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995). Grievant has been a good employee for eight years. His supervisor and his co-

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[2]Verbal abuse is defined as the "use of language, tone or inflection of voice that would likely be construed by an impartial observer as a threat to or harassment, derogation or humiliation of a client." 64 C.S.R. 59 § 3.17.

workers agreed that Grievant was a good worker who followed directions and was dependable. In addition, the record established that Grievant was usually good with the patients, and that he does not get frustrated or impatient with them. For the reasons set out above, dismissal is too harsh a penalty for Grievant's conduct. Given the nature of the offense and Grievant's work history a suspension of ten working days is reasonable.

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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

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 proved that Grievant committed verbal abuse of a patient.

4. Respondent did not prove that Grievant committed physical abuse of a patient.

5. Given the facts and the standard set out in *Oakes supra*, the dismissal of

Grievant was clearly excessive and disproportionate to his conduct. A suspension of ten working days without pay is appropriate under the circumstances of the grievance in its entirety.

Accordingly, this grievance is **GRANTED IN PART**, **AND DENIED IN PART**. Respondent is **ORDERED** to reduce Grievant's dismissal to a ten-day suspension without pay, and to reinstate Grievant to his position as a Health Service Worker, and to pay him back pay and restore all benefits he would have earned had his employment not been terminated, including annual leave, sick leave, and retirement, from ten days after the date of his dismissal.

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: December 29, 2010

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Ronald L. Reece
Administrative Law Judge