THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

LARRY M. FURR,
Grievant,

v. **Docket No. 2011-0988-CONS**

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

DECISION

Grievant, Larry Furr, filed this grievance on December 13, 2010, against the Respondent, Department of Health and Human Resources, challenging the termination of his employment at the William R. Sharpe, Jr. Hospital. Grievant seeks to be made whole including all back pay with interest and all benefits restored. Grievant filed this action directly to level three. A level three hearing was conducted before the undersigned Administrative Law Judge on October 11, 2011, at the Grievance Board's Westover office location. Grievant appeared in person and by his representative, Gordon Simmons, UE Local 170 West Virginia Public Workers Union. Respondent appeared by its counsel, Jennifer K. Akers, Assistant 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 November 1, 2011.

Synopsis

Grievant was dismissed from his employment as a licensed practical nurse at the William R. Sharpe, Jr. Hospital. This action by Respondent was based upon allegations

that Grievant engaged in patient abuse. Respondent attempted to meet its burden to establish the charges by offering testimony at level three that lacked credibility, and by offering reports that contained both hearsay and exculpatory evidence. Respondent did not meet its burden of proof in this grievance based upon the record offered in support of Grievant's termination.

The following findings of fact are based upon the record developed at level three.

Findings of Fact

1. Grievant was employed as a licensed practical nurse (LPN) by William R. Sharpe, Jr. Hospital, a psychiatric facility operated by the West Virginia Department of Health and Human Resources.

2. Grievant was dismissed from employment on December 13, 2010, after an investigation related to three Adult Protective Service (APS) reports filed in October 2010. The charges allege rough or inappropriate use of force, towels placed over a patient's face, use of vulgar language, and the choking of patient "D.M."

3. On October 21, 2010, Jodie Puzio-Bungard, Director of Social Work at the hospital, completed an APS Reporting Form. The report alleged that Grievant had bullied patient D.M. and had been rough when giving D.M. an injection. Ms. Puzio-Bungard based her report on the account of another staff member.

4. On October 25, 2010, Veralynn Stauffer, Registered Nurse, completed an APS Reporting Form alleging that Grievant placed a towel over patient D.M.'s face and punched him in the face with his fist.

5. On October 25, 2010, Delores McVay, Health Service Assistant, completed an APS Reporting Form alleging that Grievant choked patient D.M. from behind, dragged him to his room, and threw him onto the bed.

6. Grievant was suspended on October 26, 2010, pending the outcome of an investigation into the allegations.

7. D.M. is six foot six inches tall, and obese, weighing 350 lbs. He suffers from schizophrenia.

8. The APS Reports give no dates of the incidents.

9. The three reports were investigated by Becky Berlin, Grants Director, and Jo Knotts, Patient Advocate, Legal Aid Society.

10. Ms. Berlin filed one investigative report and concluded that all three complaints were substantiated.

11. Ms. Knotts filed three separate reports of the allegations, concluding that both the first and third allegation could be substantiated. The second, which contained the allegation of placing a towel on D.M.'s face and hitting him, could not be substantiated. Ms. Knott's conclusion for the second allegation states that D.M. "had made several allegations around this period of time and I think he may have become confused." Respondent's Exhibit Nos. 1, 2, and 3.

12. Marilyn Utter, a witness to the alleged choking and dragging of D.M. onto his bed, indicated that Ms. McVay was not present at the time of the alleged incident.

13. Ms. Utter indicated that D.M. reached out toward her head, at which time the Grievant stuck his hand between D.M. and Ms. Utter. D.M. turned around and went into

his room and sat on his bed. Grievant went with him and asked him if he was going to be alright, to which D.M. responded yes.

14. Ms. Utter specifically denied that Grievant put D.M. in a choke hold and denied the allegation that Grievant dragged him into his room.

15. D.M. was a difficult patient, but Grievant had proved capable of redirecting D.M. on several occassions.

16. Chris Borchert, Health Service Worker, familiar with the patient, indicated that Grievant would not be able to drag D.M. in any way by himself. Mr. Borchert reported that he had not seen any marks or bruising on D.M. that would have been caused by choking or a blow to the face.

17. Grievant gave D.M.'s injections in the manner in which he was trained, using a dart technique, with no intentional roughness.

18. The Health Service Workers complaining of the manner in which the shots were administered are not trained to give injections.

19. The investigation of the allegations against Grievant by Michelle Tenney, Protective Services Worker, Bureau for Children and Families, West Virginia Department of Health and Human Resources, did not substantiate that any charge of abuse and/or neglect had occurred.

20. Terry Small, Respondent's Assistant CEO, acknowledged that the administration did not consider this investigation that was in conflict with Respondent's in-house investigation. She also acknowledged that the administration would have looked more closely at their reports had they read Ms. Tenney's investigation.

21. Grievant remains an LPN and has not been placed on the registry of abuse and neglect maintained by Respondent.

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).

Grievant's termination letter indicates that "the investigation of the three allegations of verbal and physical abuse of patient D.M. has been concluded. The findings of the investigation have substantiated that both verbal and physical abuse did occur. The

findings indicated that 'rough' or inappropriate use of force has occurred; that towels have been placed over the patient's face during at least some of his instances of spitting while under restraint which is not accepted procedure; that inappropriate, vulgar language has been used when redirecting patients; and that patient D.M. had been choked."[1]

Factual accounts 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. Grievant was employed as a LPN 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 is identified as D.M., 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). D.M. is described as a male, six foot six inches tall, weighing approximately 350 lbs., and suffering from schizophrenia. He is a difficult patient that requires constant redirection and his behavior can be unpredictable and physical.

Delores McVay is employed as a Health Service Worker at Sharpe Hospital and was working in the unit with Grievant during one of the three alleged acts of abuse toward D.M. Ms. McVay was one of two eyewitnesses whose testimony directly supported the physical

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[1]Respondent's Exhibit No. 11.

abuse charge eventually leveled against Grievant.[2] During the course of the level three hearing, Grievant was able to call into question the veracity of Ms. McVay'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. McVay, as it relates to the charge of physical abuse, to be credible. During her rambling testimony at level three, Ms.

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[2]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.

McVay did report, consistent with her APS report, that she witnessed Grievant choke D.M. from behind, drag him to his room, and throw him onto his bed. However, she fails to note on her reporting form the date of the incident. She indicates that the date is unknown. In fact, she did not report the alleged incident for months after it was supposed to have happened. One other listed witness to the alleged abuse, Marilyn Utter, LPN on duty in Grievant's Unit, indicated at level three that Ms. McVay was not present. In addition, Chris Borchert, Health Service Worker, worked with Grievant, and he testified that Grievant would not have been able to single handedly move the patient as alleged. The record of this grievance also established that D.M. had made several allegations around this period of time and may have become confused. Ms. McVay's testimony carries no weight.

Veralynn Stauffer testified in support of the allegation that Grievant had placed a towel over the patient's head and struck the patient in the head. Ms. Stauffer testified at level three that she based her report on the basis of the patient's complaint. Again, no date of the incident was provided. The record established that the patient was difficult and was prone to spit on employees. Grievant conceded that he used a towel on occasion to block the attempt to spit on him; however, he did not place the towel over the patient's head and did not strike the patient. The evidence at level three indicated that the patient did not have any signs of abuse in regard to a blow to the head. The undersigned concludes that it is more likely than not that Grievant was merely trying to block attempts to spit on him.

Susan Flanigan, Health Service Worker, testified that she witnessed Grievant strike the patient in the head with his closed fist while the patient was in restraint. However, another Health Service Worker, Jason Heath, directly contested this account by reporting

that he had never seen Grievant strike any patient. Again, Mr. Borchert testified that he did not witness any evidence to support a conclusion that D.M. had been struck in the face by Grievant. Ms. Flanigan also reported that Grievant was rough in giving D.M. shots. Grievant gave D.M.'s injections in the manner in which he was trained, using a dart technique, with no intentional roughness. The Health Service Workers complaining of the manner in which the shots were administered are not trained to give injections. This evidence carries no weight toward meeting Respondent's burden of proof.

The balance of the evidence at level three consisted of hearsay reports of investigation offered through two witnesses with no first-hand knowledge of the allegations. Under the statutes and procedural rules relating to grievances, the formal rules are not applicable in grievance proceedings, except for the rules of privilege recognized by law.[3] The issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings. Accordingly, an administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. *Weik v. Div. of Natural Resources*, Docket No. 2011-1270-DOC (Dec 7, 2011); *Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (Mar. 11, 2010); *Warner v. Dep't of Health and Human Resources*, Docket No. 07-HHR-409 (Nov. 18, 2008)*; Miller v. W. Va. Dep't of Health and Human Resources*, Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ.*, Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996).

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[3]*See generally* W. VA. CODE § 6C-2-4(a)(3).

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.[4] *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).

One D.M. Investigative Report was authored by Becky Berlin. It is a troubling read. It manages to contradict its finding of abuse within the very same report. It states on the first page that "people were interviewed; several staff state that they saw and or heard nothing at any time, or cannot remember situations, and that they have never seen any patients mistreated by staff."[5] Nevertheless, based primarily upon the statement of Deloris McVay and Susan Flanigan, Ms. Berlin concludes that abuse had occurred. She does

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[4]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).

[5]Respondent's Exhibit No. 7.

acknowledge that mandatory reporting time lines were not observed. The Respondent cannot meet its burden of proof in this grievance based solely upon this hearsay evidence.

The same analysis holds true for Respondent's Exhibits 2 and 3.[6] Notwithstanding conflicting reports of the staff on the allegations, and taking liberty to exclude exculpatory statements on the charges in one report, the two reports concluded that Grievant had choked D.M., used inappropriate language, and been rough with the patient. It should be noted that this conclusion was based upon a statement of a witness that did not testify at level three. The reports authored by Ms. Knotts are not convincing. They are based primarily on the statement of the patient and a witness that Grievant was able to discredit at level three. The Respondent cannot meet its burden of proof in this grievance based solely upon this hearsay evidence.

The reports of the investigation which Respondent relied upon when making her decision to terminate Grievant's employment were completed months after the incidents. In addition, the decision to terminate Grievant's employment did not take into consideration its own investigation by Michelle Tenney, Protective Services Worker, Bureau for Children and Families, West Virginia Department of Health and Human Resources, which did not substantiate that any charge of abuse and/or neglect had occurred.[7] This is perplexing to the undersigned, especially in light of the fact that Terry Small, Respondent's Assistant CEO, acknowledged that the administration did not consider this investigation that was in conflict with Respondent's in house investigation. She also acknowledged that the

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[6]Ms. Knott's investigation into the allegation concerning Grievant striking D.M. was not substantiated. This is reflected in Respondent's Exhibit No. 3.

[7]Grievant's Exhibit No. 1.

administration would have looked more closely at their reports had they read Ms. Tenney's investigation. In conclusion, there is simply insufficient credible evidence in the record to establish that Respondent has met its burden of proof as it relates to the charge of patient abuse contained in the letter of termination.

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. 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).

4. 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*.

5. An administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. *Weik v. Div. of Natural Resources*, Docket No. 2011-1270-DOC (Dec 7, 2011); *Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (Mar. 11, 2010); *Warner v. Dep't of Health and Human Resources*, Docket No. 07-HHR-409 (Nov. 18, 2008)*; Miller v. W. Va. Dep't of Health and Human Resources*, Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ.*, Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996).

6. 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. *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)

7. Respondent failed to prove by a preponderance of the evidence the charges contained in Grievant's termination letter dated December 13, 2010.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to reinstate Grievant to his position, and to pay him all back pay to which he is entitled from the date his employment was terminated, and back pay for the period of time he was suspended without pay, plus interest, and restore all benefits, as though he had not been dismissed.

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 (eff. July 7, 2008).

Date: December 7, 2011

Ronald L. Reece
Administrative Law Judge