**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**FREDRICK D. DEAN,**

**Grievant,**

**v.** **Docket No: 2012-1230-DHHR**

**DEPARTMENT OF HEALTH AND**
**HUMAN RESOURCES/**
**MILDRED MITCHELL-BATEMAN HOSPITAL,**

**Respondent.**

**DECISION**

Grievant, Fredrick Dion Dean, filed this grievance against his employer, Mildred Mitchell-Bateman Hospital, on April 25, 2012, at level three of the grievance procedure. The statement of grievance reads:

> The undersigned [Grievant] is being wrongfully terminated, effective 5/2/12 for several allegations of gross misconduct, including patient abuse. These allegations are the result of an incident occurring on 3/5/12, at which time, the undersigned [Grievant] prevented a co-worker from being punched in the face by a patient. The resulting scuffle required the patient to be taken to seclusion and in the process, both the patient and undersigned [Grievant] staff member fell. Injuries sustained by the patient were completely unintentional, and strictly the result of his own out of control behavior. The undersigned [Grievant] was placed under investigation on 3/16/12 and cleared of any misconduct by Patient Advocates Office. During his predetermination meeting, the undersigned

> [Grievant] expressed regret over the patient's injury. However, he was later notified of termination by phone, prior to receiving letter by mail. The undersigned [Grievant] maintains he used appropriate measures of intervention to prevent harm to his self [sic], and others on the unit. The undersigned [Grievant] is requesting a closer look into management's decision to terminate him, in spite of being cleared of misconduct by Patient Advocates Office. The undersigned [Grievant] is also requesting reinstatement with compensation for lost wages, and impartial examination of page 2 in his letter of termination.

A third level hearing on the merits convened on October 12, 2012. Grievant was represented therein by Mr. Gordon Simmons, Steward, UE Local 170, West Virginia Public Workers Union and Respondent was represented by Michael E. Bevers, Assistant Attorney General.

The grievance became mature on November 13, 2012 after receipt of the parties' proposed Findings of Fact and Conclusions of Law.

**Synopsis**

Respondent met its burden by a preponderance of the evidence in proving that there was good cause to terminate Grievant's employment for gross misconduct when Grievant violated Respondent's policies on the physical restraint of patients. A patient suffered physical injury directly related to Grievant's action. Respondent did not abuse its [substantial] discretion to determine the penalty in this situation in that the misconduct is of a substantial nature directly affecting the rights and interest of the public, is not a

trivial or inconsequential matter, nor is it a mere technical violation of a statute. Respondent did not violate its progressive discipline policy. There are no mitigating circumstances that would warrant a reduction in Grievant's punishment of termination.

## Findings of Fact

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

1. Grievant was employed as a Health Service Worker ("HSW") at Mildred Mitchell-Bateman Hospital, a long-term psychiatric care facility operated by the Department of Health and Human Resources.

2. Staff at Mildred Mitchell-Bateman Hospital deal regularly with verbal assaults and physical aggression due to the nature of the illnesses being treated there.

3. Grievant began working for Respondent in 2006.

4. In the six years of his employment with Respondent, Grievant had no record of disciplinary action and good ratings on his employee performance appraisals.

5. Upon hire, per hospital policy, Grievant received training on Non-violent Crisis Prevention and Intervention (NVCPI) which instructs on the use of de-escalation when interacting with aggressive patients. *See* Respondent Ex. 3. NVCPI training is mandatory for direct care providers and provides a framework for dealing with verbal and physical threats without utilizing physical restraint, including how to avoid being struck by a patient. *Id*. NVCPI training also teaches approved methods for physical restraint, to be used as a last resort after all other de-escalation methods have been utilized. NVCPI also instructs on restraint methods not to use on adults, including the children's control

method. *Id., see also* Respondent Ex. 9.

6. After his initial hire, Grievant, per hospital policy, attended mandatory annual[1] NVCPI refresher training.[2] *See* Respondent Ex. 2.

7. Grievant attended NVCPI refresher training on July 15, 2011, approximately six months before the incident in question. *See* Respondent Ex. 2 at 3.

8. On March 5, 2012, Grievant was working in his role as a HSW at Mildred Mitchell-Bateman.

9. On that day, B.B. [3], a 67 year old male patient in the unit in which Grievant was assigned, was on fall precaution and using a wheelchair to aid in mobility. Patient B.B. has impulse control issues and is known to be verbally abusive.

10. During Grievant's shift, at evening snack time, patient B.B. became agitated because he was given a fruit cup, due to dietary restrictions, while other patients received ice cream.

11. Grievant was in the next room (a television room) and heard a commotion in the dining area. He, along with LPN Kathy Wilson, went to the dining area, a small area located off the television room. Ms. Wilson entered the dining area first and saw B.B. throw a fruit cup at the staff member handing out snacks.

12. Ms. Wilson attempted to de-escalate the situation by verbally addressing B.B., however, B.B. struck Ms. Wilson.

13. Grievant placed himself between Ms. Wilson and B.B.

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[1] Grievant did not, however, have NVCPI refresher training in 2010. *See* Respondent Ex. 2.
[2] Grievant also attended trainings on Patients Rights as well as on Understanding The Risks Of Restraints. *See* Respondent Ex. 2.
[3] The patient will be referred to throughout this Decision as B.B. to protect his identity.

14. Grievant spoke to B.B. but he did not immediately calm down, instead B.B. attempted to strike Grievant. Grievant then picked up B.B. from behind. Grievant physically restrained B.B. in an improper restraint called children's control method[4], which appears much like a bear hug, and began maneuvering him out of the dining room in an attempt to take him to a side room for seclusion.

15. Ms. Wilson, stunned into inaction, did not attempt to assist Grievant in using a two person NVCPI approved physical restraint technique.

16. There is a surveillance video with different angles showing the event which led to Grievant's termination.

17. A copy of the surveillance video offered into evidence is under seal in the Grievance Board's physical file in this matter.

18. While Grievant was maneuvering B.B. through the recreational area, utilizing the children's control method, the two tripped and fell over a chair. Grievant, who is significantly larger than B.B., landed on top of B.B.

19. After a brief period of time, Grievant picked up B.B. and, again, physically restraining him with a children's control method, maneuvered him down the hall to a side room.

20. A staff member assisted Grievant in a two person physical restraint in maneuvering B.B. into the side room. It is unclear at what point the staff member began assisting Grievant in that this is not one of the staff members seen on the video before or after the fall in question.

[4] This method of physical restraint is called children's control method because it should be used only for the physical restraint of a child.

21. There was adequate staff located in the vicinity of the original incident in the dining area and after the fall to utilize a NVCPI approved two person physical restraint.

22. Grievant and the unidentified staff member placed B.B. on the bed, rather brusquely in the undersigned's opinion, in the side room.

23. Respondent hospital's staff training program (NVCPI) instructs that a children's control method is an improper physical restraint technique for an adult.

24. Specific techniques deemed proper for physical restraint are contained in two manuals used to teach the NVCPI staff training classes.

25. Grievant did not follow hospital policy when he utilized this unapproved physical restraint method to maneuver B.B. to the side room.

26. On the night of the incident, upon complaints of pain to the physician on call, B.B. was taken to Cabell Huntington Hospital and was diagnosed as having a Right Intertrochanteric Femur Fracture, *i.e.* a broken hip. *See* Respondent Ex. 4 at 2. B.B. also injured his head in the recreational room fall and had a "punk knot"; he did not, however, lose consciousness.

27. When a sentinel event involving, for example, patient injury or patient death occurs, Respondent forms a Root Cause Analysis Committee to conduct an internal investigation.[5]

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[5] There were three simultaneous investigations of the incident. One investigation was initiated by someone designated by the director of nursing, an employee of the hospital, to initially establish the facts of what happened. The Legal Aid Patient Advocacy Project and Adult Protective Services also conducted an independent investigation of the event, which substantiated physical abuse. The Legal Aid Patient Advocacy Project is unaffiliated with the hospital but uses a hospital employee as part of its investigation team. According to Kimberly Mannon, the Director of Quality Assurance, Performance Improvement, and Staff Development and Training, she then reported the results of the investigations to the Joint Commission for Hospital Accreditation. The hospital's internal investigations involved witness interviews, an interview with Grievant, a review of Grievant's personnel file including disciplinary history and employee performance

28. On March 16, 2012, Grievant was suspended pending the internal investigation.

Respondent Ex. 13.

29. Respondent's internal investigation focused on three staff members involved in the incident.

30. The internal investigation concluded that B.B. was both verbally abusive and physically violent toward staff members during the incident in question.

31. The internal investigation concluded there was abuse, as defined by state statute and hospital policy, on the part of the three staff members involved.

32. Respondent terminated two of the staff members involved in the incident upon the conclusion of its internal investigation, including Grievant on April 16, 2012. Respondent Ex. 14.

33. Grievant's termination letter, signed by Kieth Anne Worden, Respondent's Director of Human Resources of twenty years, stated:

> The investigation has substantiated multiple allegations of gross misconduct including patient abuse, failure to comply with the policy MMBHC078, *Nonviolent Physical Crisis Intervention*, MMBHE009, *Behavioral Health Patient Rights Rule*, and MMBHE018, *Patient Abuse/Neglect or Exploitation*.
>
> . . .
>
> Based on all the information provided, it is my decision that the allegation of your failure to follow policies designed to keep our patients and staff safe is substantiated and I have decided to proceed with your dismissal from employment.

Respondent Ex. 14 at 1, 2.

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evaluations, and review of the surveillance video of the incident in question.

34. Grievant timely filed this expedited third level grievance challenging his termination as a HSW at Mildred Mitchell-Bateman Hospital.

## Discussion

The burden is on the employer to prove that the action taken in this matter was justified. Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence. Procedural Rules of the W.Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008). "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.*

In dismissal cases involving classified employees, the burden of proof is upon the employer to establish the charges relied upon by a preponderance of the evidence and to establish good cause for dismissing an employee. W.Va Code § 29-6A-6; *Davis v. W. Va. Dept. of Motor Vehicles,* Docket No. 89-DMV-569 (Jan. 22, 1990); *Broughton v. W. Va. Div. of Highways,* Docket No. 92-DOH-325 (Dec. 31, 1992). "[G]ood cause" means "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. West Virginia Department of Finance and Administration*, 164 W.Va 384 (1980); *Guine v. Civil Service Commission*, 149 W.Va 461 (1965).

In the April 16, 2012, letter of termination issued Grievant, HR Director Worden cited several hospital policies that were violated and determined that the violation of such policies amounted to gross misconduct. Respondent Ex. 14 at 1. The policies cited therein are MMBHC078, *Nonviolent Physical Crisis Intervention*, MMBHE009, *Behavioral Health Patient Rights Rule*, and MMBHE018, *Patient Abuse/Neglect or Exploitation*.

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 Resources/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 cannot substitute her judgment for that of the employer. *Jordan v. Mason County Bd. of Educ*., Docket No. 99-26-080 (July 6, 1999); *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).

Respondent Policy MMBHC078, *Nonviolent Physical Crisis Intervention*, is a policy establishing that the Department of Health and Human Resources requires that clinical, direct care and security staff in state operated facilities be trained and certified annually in Nonviolent Physical Crisis Intervention and that the Respondent shall provide such training to appropriate staff. Grievant received such training upon his hire and participated in annual refresher courses during his employment thereafter. *See* Respondent Ex. 2. The *Nonviolent Physical Crisis Intervention* Policy also requires that Respondent shall have written plans (policies and procedures) defining the expectations for staff interventions in crisis situations, which comply with departmental policies.

To that end, Respondent has adopted as Policy MMBHE009, Behavioral Health Patient Rights Rule, which is a reiteration of Title 64, Legislative Rule Department of Health and Human Resources, Series 59, Behavioral Health Clients Rights. The legislature, in 64 C.S.R. 59 § 3.13, establishes that, "Physical abuse includes, but is not limited to: unnecessary use of physical restraint; use of unnecessary force in holding or restraining a client; *improper use of physical or mechanical restraints*. . . ." (Emphasis added.) The legislature further set forth in 64 CSR 59-18.2, a subsection of that section entitled "Employee Responsibilities," that "[n]o employee shall verbally or physically abuse, or neglect any client." Violation of Respondent Policy MMBHE018, *Patient Abuse/Neglect or Exploitation*, is the third policy cited by Respondent as grounds for a finding of gross misconduct by Grievant. This policy also defines physical abuse and follows verbatim the statutory definition of physical abuse set forth in 64 CSR 59-3.13 and adopted in Respondent Policy MMBHE009, *Behavioral Health Patient Rights Rule*, set forth more fully herein, *supra*.

Grievant utilized an improper physical restraint, in violation of statute and Respondent's policy, a one person physical restraint method known as children's control method, a hold resembling a bear hug. In the annual training that Grievant received, staff members were instructed that such a physical restraint is not to be used in that it is a restraint intended for children. This is so because when the children's control method is used on an adult, it prohibits the person utilizing the restraint from being able to see obstacles that may cause a fall such as occurred here. Mannon Level Three Hearing Testimony; *see also* Respondent Ex. 2.

Another policy adopted in compliance with Respondent Policy MMBHC078, *Nonviolent Physical Crisis Intervention, supra,* is Policy MMBHF080, *Mildred Mitchell-Bateman Hospital Guidelines for: Seclusion/Restraint*. This policy sets forth that "any form of Restraint shall be used only in clinically appropriate situations when less restrictive alternative methods have been tried and found insufficient to protect patients or others from imminent danger of injury." Respondent Ex. 9 at 1. The policy further sets forth that "any [physical] restraint should only be used as a **last resort** after all less restrictive measures have been utilized and shall follow all guidelines of patient safety using Non-Violent Crisis Intervention (NVCPI) methods." (Emphasis in original.)

At the Level Three Hearing before the grievance board, Grievant indicated that at the outset of the incident he briefly spoke to B.B. but almost immediately placed him in the [improper physical restraint] children's control method hold and began to physical remove him from the dining area.[6] He does not deny that B.B. suffered a broken hip as a result of his actions. Grievant further testified that he does not recall ever being told not to hold patients in the children's control method restraint. The undersigned finds Grievant's testimony unreliable as to his recollection on training received. Some factors to consider in assessing the credibility of a witness include the witness's demeanor, opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the fact finder should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of the

[6] At the level three hearing, Grievant asserted that other staff members pick up patients in the [improper physical restraint] children's control method and that no other staff has been disciplined for the use of such, though he produced no evidence to support this assertion.

witness' information. *Massey v. W. Va. Public Serv. Comm'n*, Docket No. 99-PSC-313 (Dec. 13, 1999).

The undersigned finds Grievant's testimony unreliable as to training received because he contradicts himself in his testimony. Grievant testified that he does not deny that he did anything wrong but that had he not acted in the manner that he did other people, both patients and staff, would have been hurt. He also reflected that "hindsight is 20/20" but that his actions were necessary to prevent injury to others.

Respondent's Behavioral Code of Conduct sets forth its employment expectations for its employees:

> This policy is designed to define expectations of behavior for each employee . . The leadership of Mildred Mitchell-Bateman Hospital expects that its employees *will* . . .adhere to all DHHR, BHHF, and Mildred Mitchell-Bateman Hospital policies. . . strictly adhere to safety policies and procedures and report safety violation [sic] to the appropriate level of leadership . . . .

Respondent Ex. 8 (Emphasis in original).

Based upon his actions during the incident in question, Grievant was terminated for gross misconduct which "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." *Vickers v. Board of Directors/W. Va. State College*, Docket No. 97-BOD-112B (Aug. 7, 1998) (*quoting Graley v. W. Va. Parkways Economic Dev. and Tourism Auth*., Docket No. 91-PEDTA-225 (Dec. 23,1991)).

Grievant clearly violated Respondent's policies when he physically restrained B.B. in the children's control method and B.B. suffered a broken hip as a result thereof. See Respondent Exs. 6, 7, and 9. Grievant received training on multiple occasions, training

which provided alternative less restrictive methods to respond to the incident in question. Mannon Level Three Hearing Testimony; *see also* Respondent Ex. 2. Grievant did not adhere to the approved methods in which all direct care staff members are trained. *See* Surveillance Video. Respondent has a right to expect that its employees will adhere to its policies on approved, and unapproved, physical restraint. Respondent provides necessary mental health services to an already disenfranchised segment of the population, a segment of the population that is prone to outbursts of verbal and physical aggression. Mannon Level Three Hearing Testimony. Both Ms. Wilson and Grievant acknowledge that the verbally and physically aggressive behavior demonstrated by B.B. which led to the incident in question was not unusual and that he has a history of out-of-control behavior. When dealing with such a segment of the population, safety, of both staff and patient, is paramount. Respondent has a right to expect its employees to adhere to its policies and their training on such policies when confronted with verbal or physical aggression, particularly when such is the norm for the patient base served. Grievant's reflection that "hindsight is 20/20," regretfully, is not sufficient in this instance, not when situations such as that that occurred in the dining room on March 5, 2012, could occur at any given moment at Respondent's hospital.

Rather than being progressively disciplined, Grievant was immediately terminated for gross misconduct after Respondent's internal investigation found substantiation of abuse. Respondent Ex. 14. Respondent has a policy outlining *Progressive Disciplinary Action*, MMBHC015. Respondent Ex. 12. That policy sets forth that any employee may be dismissed for cause and that in dismissals for cause like penalties shall be imposed for

like offenses. *Id.* Policy MMBHC015 cross-references DHHR Policy Memorandum 2104, *Guide to Progressive Discipline*, which sets forth that "separation from employment may be issued when . . . an employee commits a singular offense of such severity warranting dismissal." *See* Department's [Respondent's] Proposed Findings of Fact and Conclusions of Law, Appendix. Grievant violated policy and did not adhere to NVCPI training when he physically restrained B.B. with the children's control method and Grievant broke B.B.'s hip in the process. Respondent's internal investigation took into account witness interviews, Grievant's interview, Grievant's work history, and a review of the videotape of the incident in question. Worden Level Three Hearing Testimony. The undersigned finds that Respondent did not abuse its discretion in not instituting lower levels of punishment available under its progressive discipline policy rather than terminating Grievant.

Grievant asks that this tribunal mitigate the punishment of termination. "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. of Educ.*, Docket No. 97-20-089 (May 22, 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).

Going to the first prong of the analysis, Grievant has a good work history with no history of disciplinary action and good Employee Performance Evaluations, factors considered by Respondent; however, as to the second prong of the analysis, the penalty is not clearly disproportionate to the offense proven. For the third prong of this analysis, Grievant did not affirmatively prove that other employees have been guilty of a similar offense and treated differently and as to the fourth prong of the analysis, Respondent's policies, vis-a-vis written policy and staff training, clearly prohibit Grievant's March 5, 2012 conduct.

Thus, the undersigned finds that Respondent met its burden by a preponderance of the evidence in proving that there was good cause to terminate Grievant's employment for gross misconduct when Grievant violated Respondent's policies on the physical restraint of patients. The undersigned further finds that Respondent did not abuse its [substantial] discretion to determine the penalty in this situation in that the misconduct is of a substantial nature directly affecting the rights and interest of the public, is not a trivial or inconsequential matter, nor is it a mere technical violation of a statute. As such, the undersigned Administrative Law Judge cannot substitute her judgment for that of the Respondent in immediately terminating Grievant for gross misconduct after substantiated patient abuse and, as such, finds that Respondent did not violate its progressive discipline policy. Furthermore, the undersigned finds that there are no mitigating circumstances that would warrant a reduction in Grievant's punishment of termination.

## Conclusions of Law

1. The burden is on the employer to prove that the action taken in this matter was justified. Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence. Procedural Rules of the W.Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008). "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.*

2. In dismissal cases involving classified employees, the burden of proof is upon the employer to establish the charges relied upon by a preponderance of the evidence and to establish good cause for dismissing an employee. W.Va. Code § 29-6A-6; *Davis v. W. Va. Dept. of Motor Vehicles,* Docket No. 89-DMV-569 (Jan. 22, 1990); *Broughton v. W. Va. Div. of Highways,* Docket No. 92-DOH-325 (Dec. 31, 1992). "[G]ood cause" means "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. West Virginia Department of Finance and Administration*, 164 W.Va. 384 (1980); *Guine v. Civil Service Commission*, 149 W.Va. 461 (1965).

3. 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 Resources/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 cannot substitute her judgment for that of the employer. *Jordan v. Mason County Bd. of Educ*., Docket No. 99-26-080 (July 6, 1999); *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).

4. Respondent Policy MMBHC078, *Nonviolent Physical Crisis Intervention*, is a policy establishing that the Department of Health and Human Resources requires that clinical, direct care and security staff in state operated facilities be trained and certified annually in Nonviolent Physical Crisis Intervention and that the Respondent shall provide such training to appropriate staff. The *Nonviolent Physical Crisis Intervention* Policy also requires that Respondent shall have written plans (policies and procedures) defining the expectations for staff interventions in crisis situations, which comply with departmental policies.

5. The legislature, in 64 C.S.R. 59 § 3.13, establishes that, "Physical abuse includes, but is not limited to: unnecessary use of physical restraint; use of unnecessary force in holding or restraining a client; *improper use of physical or mechanical restraints*. . . ." (Emphasis added.) The legislature further set forth in 64 CSR 59-18.2, a subsection of that section entitled "Employee Responsibilities," that "[n]o employee shall verbally or physically abuse, or neglect any client."

6. Respondent Policy MMBHE018, *Patient Abuse/Neglect or Exploitation*, defines physical abuse and follows verbatim the statutory definition of physical abuse set

forth in 64 CSR 59-3.13 and adopted in Respondent Policy MMBHE009, *Behavioral Health Patient Rights Rule*, set forth more fully herein, *supra*.

7. Respondent Policy MMBHC078, *Nonviolent Physical Crisis Intervention, supra,* is Policy MMBHF080, *Mildred Mitchell-Bateman Hospital Guidelines for: Seclusion/Restraint*. This policy sets forth that "any form of Restraint shall be used only in clinically appropriate situations when less restrictive alternative methods have been tried and found insufficient to protect patients or others from imminent danger of injury." The policy further sets forth that "any [physical] restraint should only be used as a **last resort** after all less restrictive measures have been utilized and shall follow all guidelines of patient safety using Non-Violent Crisis Intervention (NVCPI) methods." (Emphasis in original.)

8. Respondent's Behavioral Code of Conduct sets forth its employment expectations for its employees:

> This policy is designed to define expectations of behavior for each employee . . The leadership of Mildred Mitchell-Bateman Hospital expects that its employees *will*. . .adhere to all DHHR, BHHF, and Mildred Mitchell-Bateman Hospital policies . . . strictly adhere to safety policies and procedures and report safety violation [sic] to the appropriate level of leadership . . . .

9. Gross misconduct "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." *Vickers v. Board of Directors/W. Va. State College*, Docket No. 97-BOD-112B (Aug. 7, 1998) (*quoting Graley v. W. Va. Parkways Economic Dev. and Tourism Auth*., Docket No. 91-PEDTA-225 (Dec. 23,1991)).

10. Respondent has a policy on progressive discipline entitled *Progressive*

*Disciplinary Action*, MMBHC015. This policy cross-references DHHR Policy Memorandum 2104, Guide to Progressive Discipline, which sets forth that “separation from employment may be issued when . . . an employee commits a singular offense of such severity warranting dismissal.”

11. "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. of Educ.*, Docket No. 97-20-089 (May 22, 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).

12. Some factors to consider in assessing the credibility of a witness include the witness's demeanor, opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the fact finder should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of the witness' information. *Massey v. W. Va. Public Serv. Comm’n*, Docket No. 99-PSC-313 (Dec. 13, 1999).

Accordingly, the 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* West Virginia 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 West Virginia 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).

**December 28, 2012**

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**Heather D. Foster Kittredge**
**Administrative Law Judge**