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**WEST VIRGINIA EDUCATION AND  
STATE EMPLOYEES GRIEVANCE BOARD**

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Governor

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KENNETH RAY WORDEN

v.

Docket No. 89-H-204

WEST VIRGINIA DEPARTMENT OF HEALTH/HUNTINGTON STATE HOSPITAL

D E C I S I O N

On May 12, 1989, Kenneth Ray Worden, a former employee of Respondent West Virginia Department of Health (DOH), initiated the following grievance pursuant to W.Va. Code §29-6A-4(e):

I was dismissed from my job as a Health Service Worker [(HSW)] on May 5, 1989 after a 2-week suspension that began on April 26. The dismissal is charged as gross misconduct, that is, the physical abuse of a patient of Huntington State Hospital [(HSH)]. I wish to get my job back with complete back pay.

A Level IV hearing was conducted at HSH on June 9, 1989. Both parties have submitted proposed findings of fact and conclusions of law, and the matter is ripe for resolution.<sup>1</sup>

The following facts are unrefuted. Kevin Myers is an individual with a history of public intoxication and attendant short detentions at HSH. In February 1989, an altercation occurred between Grievant and Myers during one of his HSH stays. On April 22, 1989, Myers, again drunk, was delivered to HSH by law enforcement officers. At some point after he arrived in the admissions area on this occasion, Myers was placed in four-point restraints, isolating and securing his hands, arms and feet from all but the grossest movements.<sup>2</sup> HSW's James A. Church, Ron Pullen, and Kenneth Worden escorted Myers from Admissions to Ward 4, to which he had been assigned. Once on the ward, Myers was taken to the "seclusion room," or side room, where Licensed Practical Nurse (LPN) Mary McClain, with the assistance of at least

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<sup>1</sup> The parties originally requested until June 30 to make their submissions, but were later granted an extension, upon Grievant's motion, into early July.

Grievant has charged no procedural impropriety on Respondent's part in the processing of his dismissal, and none is apparent to the undersigned. See Resp. Ex. 1 (DOH Clinical Policy 8000, Patient Grievance Procedure); Resp. Ex. 2 (Memorandum to HSH Administrator from Patient Rights Committee in re Kevin Myers-Kenneth Worden 4/22/89 incident); Resp. Ex. 3, 4 (letters of suspension and dismissal); Resp. Ex. 5 (DOH Personnel Procedure 2750, guidelines for suspensions and dismissals); W.Va. Code §29-6A-4(e).

<sup>2</sup> Four-point restraints were demonstrated at the Level IV hearing.

the three aforementioned HSW's, administered an anesthetic injection. Myers slept in the seclusion room for several hours and then "eloped," or left HSH without authorization to do so.<sup>3</sup> Sometime in or around May 1989, Myers was the subject of another involuntary detention at HSH.<sup>4</sup>

HSW Church's testimony at Level IV was as follows. On April 22, Myers was already in four-point restraints when he, Church, arrived at Admissions. Myers was begging not to be taken to Ward 3 because he feared for his physical well-being. Just before or as the four men were entering the elevator to Ward 4, Grievant hit Myers in the back, knocking him to the elevator floor.<sup>5</sup> After the doors closed, Grievant kicked, stomped and punched Myers as he lay there, before he, Church, and Pullen could intervene, which they did. Myers' mouth was "bleeding a little." Once at Ward 4, Church and Pullen carried Myers to the seclusion room with Grievant following, and as they were leaving, Grievant pushed Myers' head up against the wall two or three times. Church and Pullen "calmed things down" and again

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<sup>3</sup> Myers also has a history of elopement from HSH.

<sup>4</sup> The actual date of this detention was never established, save that it was after Grievant's suspension. For clarity, it will be referred to as "the May detention" in this Decision.

<sup>5</sup> According to Church, Grievant was not supposed to be escorting Myers to Ward 4, and the three men were not aware that Grievant had accompanied them until Myers was attacked.

prepared to exit the room with Grievant. LPN McClain then informed them she needed assistance giving Myers a shot. Church, who noticed a knot on Myers' head and blood on the bedspread, was positioned at Myers' side, Pullen at his feet and Grievant at his head while the injection was administered. During this time, Church heard Grievant punching Myers in the side of the head. As they were all exiting the room, Church and Pullen "reported" the incident, including what happened on the elevator, to McClain, who had also observed Grievant hitting Myers and who told Church and Pullen she did not like personal vendettas. Back on the elevator immediately thereafter, Grievant advised Church that he "had better keep his mouth shut." At no time on this evening was Myers violent or troublesome in any way.

The testimony of HSW Pullen was generally corroborative of that of Church. He added that, in Admissions, he heard Grievant, referring to Myers, say he was going to "beat his ass," and heard Myers fearfully repeat this threat to a physician. Pullen continued that on the elevator Myers was begging for Grievant to stop beating him, and that Myers' eye was "swollen closed" as a result of this altercation by the time they got him to the seclusion room. In that room, according to Pullen, Grievant was issuing "cheap shots" immediately after the injection by ramming his elbow into Myers' back. He said Church, not he, was at Myers' feet in the room and that he was at the side, and he did not mention Grievant's shoving Myers' head into the wall. He said he

did not observe Myers offering to bite or injure anyone. He related that within thirty minutes of the incident, Grievant told him and Church that "neither of us had better open our mouth."

LPN McClain stated Myers had been her patient before April 22 and she knew him to be "mean" when inebriated, explaining she had "see him whip several people here at the Hospital." She said that the HSW's who delivered Myers to Ward 4 that night had told her he was due an injection, and after she gave it and prepared to leave the seclusion room, she heard noises and turned around. She related that the sound was coming from Grievant hitting Myers in the back with his elbow. She stated she immediately reported this to her supervisor, and, about fifteen minutes thereafter, returned to check on Myers. According to McClain, she then removed the restraints and noted his bloody lip and his plea, "don't let anyone hit me anymore." She said that it was only at this point that Church realized she was upset and they discussed the matter, and that no one told her what had happened on the elevator that evening. She added that she "waited a bit" and asked Grievant about the matter, and that his response was, "That was the son-of-a-bitch that bloodied my nose the last time he was here." She admitted that she had not witnessed anyone hitting Myers' mouth and had no idea how his lip injury had occurred.

Patient Care Coordinator/Registered Nurse Lou Hammond testified that in the late morning of April 23 she received

a telephone call from Myers, with whom she was familiar.<sup>6</sup> She related that Myers claimed a male HSW had beaten him on the elevator and in the seclusion room the previous evening while he was "in cuffs." She said that Myers identified the culprit as Grievant, "the same one" with whom he had had a fight in a HSH hallway some time before. On April 24, Hammond noted this phone call in a written "report of contact" which was admitted into evidence at Level IV as Respondent's Exhibit 6.

HSW's Jim Roberts, Bob Ferguson, Dennis Artrip and Larry Lanham all testified about Myers' May 1989 HSH detention. They agreed that on the occasion Myers was at least somewhat intoxicated and agitated and that he kept alleging that "Church" had broken his nose. They continued that Myers confused both Artrip and HSW Chuck Butcher with "Church" and threatened them verbally, and Artrip stated at Level IV that Myers was accusing "everyone" that evening of having hurt him. Ferguson said around that four o'clock in the afternoon a few days later, he met Myers by chance outside HSH, who declared to him that Grievant had never touched him. Ferguson characterized Myers as sober, explaining "he had just bought ...a six-pack."

LPN Kathy Ross testified that she, too, was in the seclusion room with Church, Pullen, Myers, McClain and

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<sup>6</sup> By this time, Myers had eloped from HSH.

Grievant on April 22. She stated she saw no injuries on Myers at that time and she neither observed nor heard any hitting, although she noticed Myers' swollen eye the next morning.<sup>7</sup>

Grievant testified that Myers had possibly broken his, Grievant's, nose at HSH during February 1989.<sup>8</sup> He stated that he did not hold a grudge since "this is my job." He denied assaulting Myers on April 22 and opined that Church and Pullen were mistaken in their testimony. He did admit that, in the elevator, he had held Myers away when he attempted to bite him.<sup>9</sup> He also added that he had placed the four-point restraints on Myers that evening in Admissions, based on his knowledge of Myers' propensity for extreme physical combativeness.

HSH Director of Nursing Betty Lucente appeared and testified she was "generally familiar," through reports, of the February 1989 incident. She described it as having

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<sup>7</sup> No other witness mentioned Ms. Ross' presence in the seclusion room.

<sup>8</sup> Grievant did not seek medical assistance and thus was unwilling to swear that his nose was actually broken. It is accepted that Myers inflicted some injury to Grievant's nose in February 1989. There was some testimony suggesting that Myers may have also suffered a nose injury on this occasion.

<sup>9</sup> It is noted that Grievant told the HSH Patient Rights Committee, which investigated this incident in-house, that he had "pushed" Myers in response to the attempted bite, and that "he may have 'overreacted' since he was scared of the patient after a previous incident in which this patient struck Ken Worden and caused facial damage." Resp. Ex. 2.

occurred in the context of an attempted elopement by Myers. She said that, following her review of Myers' most recent HSH detention records, she was unaware of any altercations in which he was involved save the two with Grievant. Lucente explained that HSW's are HSH Nursing Department personnel and that Grievant, as a HSW, had been given specific training in the appropriate way to deal with difficult patients. Lucente added that Myers has been diagnosed as a substance abuser and alcoholic.

Kevin Myers was subpoenaed by both parties but did not appear at Level IV.<sup>10</sup> However, Grievant presented a videotape of Myers, which was produced on May 20, 1989, at Grievant's home. Respondent vehemently objected to the introduction of this tape for a number of reasons, including the lack of opportunity for cross-examination and the circumstances under which the recording was made, e.g., the location, Myers' apparent intoxication, his not being under oath and his reading from a script handwritten by Grievant. Grievant testified that Myers was not drunk and that the two of them had written and gone over the script together before

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<sup>10</sup> Neither Grievant nor Respondent sought enforcement of these subpoenas. Efforts to obtain Myers' deposition, for post-hearing submission, were unfruitful and abandoned by the parties.



the filming. The script, which is reproduced below, and videotape were accepted into evidence.<sup>11</sup>

Hello--my name is Kevin Myers. On the evening of April 22, 1989 I was patient 7474. I am here to tell the truth about what happened when I was detained by Huntington State Hospital on April 22, 1989 at about 6:00 p.m. First of all, I was mad. I understand why I was put into 4 way restraints. I was taken up to ward 4 in the elevator by 3 men. They were Kenneth Worden, Ron Pullen, and Jim Church. I tried to bite Kenneth Worden but he only held me away from him on the mat. Kenneth Worden never laid a hand on me in the side room. Kenneth Worden never hit me. I believe that Kenneth Worden stopped Jim Church and Ron Pullen from hurting me. I was not drunk and I know exactly what happened and everybody involved. I escaped the next day. I Kevin Meyers [sic] swear that Kenneth Worden never hit me in the face or anywhere else, at any time, on April 22. The reason I am taping this is because if you people are going to fire somebody then fire the right person, not Kenneth Worden. This is my testimony for the defense of Kenneth Worden. I wish I could do this in person but I have to[o] many problems with the cops.

Although the testimony of Church, Pullen and McClain is not totally consistent, most discrepancies involve relatively minor particulars. The statements of these witnesses are generally credible and persuasive; in fact, the incongruities tend to make them more so, in that there is no appearance of collusion. It is clear that Myers was the victim of inappropriately-administered brute force at some point on the evening of April 22, 1989, at HSH and that the

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<sup>11</sup> Gr. Ex. 1 and 2, respectively. Gr. Ex. 1 is signed on each page, purportedly by Kevin Myers. Myers made a brief statement at the end of Gr. Ex. 2, the videotape, that apparently was totally ad lib.

perpetrator of that force was Grievant. No one has presented any noteworthy evidence to the contrary save Grievant himself, in the form of self-serving declarations.<sup>12</sup> Respondent's concerns about the script and videotape are all well-taken and no weight has been afforded those exhibits, except to the extent they demonstrate Myers' confusion, when inebriated, about the evening, e.g., during the brief ad lib portion of the videotape, see n.9, he lay total blame for the April 22 incident upon Ron Pullen. This confusion was verified particularly by the testimony of the HSW's who aided Myers during his May HSH intoxication detention.

The only record instances of Myers' possibly being sober were offered by Lou Hammond and HSW Bob Ferguson.<sup>13</sup> Hammond positively identified Myers as the man who called her on the morning of April 23, immediately after Myers' elopement from HSH and reported he was assaulted by Grievant. Hammond shortly thereafter reduced this conversation to written record, Resp. Ex. 6. Ferguson's statement, that he saw Myers outside HSH late one afternoon in May and that Myers then told him Grievant was innocent, is not worthy of as much credence. First of all, Ferguson's contact with Myers was further removed in time from the

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<sup>12</sup> Kathy Ross' testimony, while generally credible, is not inconsistent with Grievant's culpability.

<sup>13</sup> Grievant's testimony that Myers was not drunk during the taping is totally rejected.

April occurrence. Also, since Myers has a diagnosis of substance abuse, it is quite likely that he may have had alcohol intake by this time of day. Finally, it is unclear from the record whether or not this encounter was before or after May 20 but there is at least the strong possibility that Grievant had discussed the entire matter with Myers before Myers saw Ferguson.

It is the conclusion of the undersigned that Grievant carried a grudge against Myers over their February run-in and sought revenge through his actions on April 22.<sup>14</sup>

The remainder of this Decision will be presented as formal findings of fact and conclusions of law.

#### FINDINGS OF FACT

1. Grievant was employed as a Health Service Worker by Respondent West Virginia Department of Health and assigned to Huntington State Hospital (HSH) until his dismissal May 5, 1989.

2. His dismissal and an earlier suspension were based on an incident of April 22, 1989, during which Grievant

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<sup>14</sup> The information concerning Grievant's "keep your mouths shut" threats to Church and Pullen, his "he was the son-of-a-bitch who bloodied my nose" comment to McClain, and his "I'm going to beat his ass" statement in Admissions, while not necessary to this Decision, certainly lend credence to its outcome.

unjustifiably assaulted HSH detainee Kevin Myers, i.e., engaged in "patient abuse."

#### CONCLUSIONS OF LAW

1. In disciplinary matters such as the one within, the employer has the burden of proving, by a preponderance of the evidence, the charges upon which action taken against an employee is based. Schmidt v. W.Va. Dept. of Highways, Docket No. DOH-88-063 (March 31, 1989); W.Va. Code §29-6A-6.

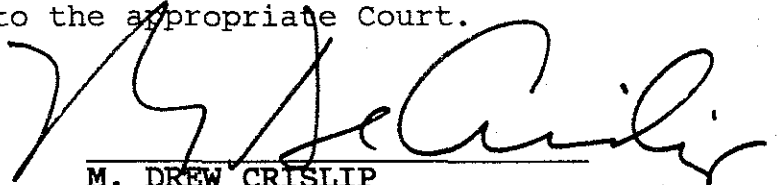
2. Respondent has established, by that standard, that Grievant was guilty of gross misconduct by abusing patient Kevin Myers on April 22, 1989. See Buskirk v. CSC, 332 S.E.2d 579 (W.Va. 1985).<sup>15</sup>

Accordingly, this grievance is **DENIED**, and Grievant's suspension and dismissal upheld.

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<sup>15</sup> Respondent is charged by the State of West Virginia with the protection of mental patients housed at its facilities. W.Va. Code §27-5-9; E.H. v. Matin, 284 S.E.2d 232 (W.Va. 1981). Abuse of such persons by hospital staff has been condemned by the courts and found a reasonable basis for employment termination, e.g., Buskirk.

Either party or the West Virginia Civil Service Commission may appeal this decision to the Circuit Court of Cabell County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.

  
M. DREW CRISLIP  
HEARING EXAMINER

Dated: August 10, 1989