

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**MICHAEL CHIDESTER,
Grievant,**

v.

Docket No. 2017-2225-CONS

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

DECISION

This consolidated expedited grievance was initially filed on or about April 18, 2017, by Grievant, Michael Chidester, for an indefinite suspension without good cause or a predetermination meeting. Grievant seeks to be made whole including back pay with interest and benefits restored. On April 25, 2017, Grievant filed another expedited grievance for a suspension without good cause. Grievant again asked to be made whole including back pay with interest and benefits restored. On May 17, 2017, Grievant filed another action challenging his dismissal from employment at the William R. Sharpe, Jr. Hospital.

A Level Three evidentiary hearing was conducted before the undersigned on September 14, 2018, at the Grievance Board's Westover office. Grievant appeared in person and by his representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, Katherine A. Campbell, Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on October 29, 2018.

Synopsis

Grievant was a Health Service Worker with the Department of Health and Human Resources at Sharpe Hospital for approximately two years. Grievant was charged with abuse of hospital patients while performing his duties. Respondent met its burden of proof and demonstrated by a preponderance of the evidence that Grievant's termination was for good cause. Accordingly, this grievance is denied.

The following Findings of Fact are based upon the record of this case.

Findings of Fact

1. Grievant was employed as a Health Service Worker with the Department of Health and Human Resources at Sharpe Hospital for approximately two years.
2. Shawna Huddle, Survey Coordinator, is a licensed registered nurse, and she has been in her current position for about one and a half years. Ms. Huddle acts as the liaison between the regulatory and accrediting agencies and Sharpe Hospital.
3. Ms. Huddle was tasked by Pat Ryan, Chief Executive Director, to conduct an internal investigation into an Adult Protective Services report that had been initially found to be unsubstantiated by Sharpe Hospital and Legal Aid of West Virginia Advocates.
4. Ms. Huddle explained that the Adult Protective Services report had alleged that Grievant had shoved a male patient causing him to fall and break his clavicle. This event was stated to have occurred on March 26, 2016, outside of the male patient's room.
5. The first investigation of patient abuse was completed by Sharpe Hospital's

Director of Nursing. The record indicates that the incorrect dates were viewed by the Director of Nursing making it impossible to find the incident in question.

6. Sharpe Hospital was cited by the Office of Health Facility Licensure and Certification in this matter and, as part of the correction plan, the investigation was reopened by Sharpe Hospital.

7. Upon completion of interviews and reviewing the video captured in the span of approximately two hours on the evening of March 26, 2016, Sharpe's internal investigation was unable to substantiate any physical abuse by Grievant which resulted in a broken clavicle.

8. Ms. Huddle was able to substantiate physical abuse by Grievant upon the same male patient in the Day Break room after Grievant invaded the patient's personal space as shown in the video.

9. The male patient appeared threatened and scared as he cowered when Grievant was in his personal space and he was backed into a corner.

10. Ms. Huddle indicated that the video showed the male patient being taken out of the medication line where he had yet to be dispensed his medication, but instead directed to his room. Ms. Huddle further indicated that Policy prohibits verbal and physical abuse of a patient.

11. Ms. Huddle reported that Grievant placed his hand on a female patient's shoulder and neck and redirected her from the Day Break room to her room. Grievant's hand remained on her shoulder and neck while directing her to her room, and once at her room door he kicked open the door directing her inside.

12. Ms. Huddle explained when the Grievant placed his hand on the female patient he prevented her from doing what she wanted and this is an unnecessary physical restraint.

13. Ms. Huddle substantiated the Adult Protective Services report filed against the Grievant for his actions in the Day Break room against the male and female patients on March 26, 2016. Legal Aid also substantiated the Adult Protective Services report as well.

14. The two patients involved in this matter are both Intellectually and Development Disability patients. The female patient is low functioning and the male patient is low to moderately functioning.

15. Mr. Ryan indicated that Sharpe Hospital's mission is to protect the welfare and safety of all the patients, and even though the patients may not be the most pleasant individuals, patient safety is tantamount.

16. Mr. Ryan placed Grievant on a non-disciplinary suspension pending investigation due to the serious nature of the charges against Grievant.

17. Mr. Ryan confirmed that the male patient did suffer a broken clavicle; however, there is no video of any incident which would explain how the male patient suffered this injury.

18. Mr. Ryan indicated that Grievant was dismissed, without progressive discipline, because there were two reports of patient abuse against Grievant who are Intellectually and Development Disability patients. In addition, in both incidents, neither of the patients were aggressive towards staff or the Grievant and both were intentional acts by Grievant.

19. The Original and Amended Dismissal letters note that a predetermination conference was held on May 9, 2017, regarding the dismissal.

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 (2018); *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 was a Health Service Worker at Sharpe Hospital. Health Service Workers are tasked with direct patient care ensuring that patients are safe. Grievant failed to ensure the safety of two patients on March 26, 2016, in the Day Break room at Sharpe

Hospital, but instead abused the patients. The abuse inflicted upon these two patients was not committed by accident, but instead with intention by Grievant. Sharpe Hospital substantiated two acts of physical abuse upon two separate patients by Grievant. Sharpe Hospital substantiated an incident with a male patient in the Day Break room in which the Grievant was in a male patient's personal space by getting in his face, taking him out of the medication line before he had received his medication and directed him back to his room. The video showed the male patient cowering and attempting to get away from Grievant who had backed him in a corner.

Besides finding this physical abuse leveled against a male patient, the investigation revealed another incident of abuse. The other allegation of physical abuse occurred with a female patient in the Day Break room, and at the same approximate time as the other incident of physical abuse against the male patient. Grievant placed his hand on the female patient's shoulder and neck area directing her to her room and kicking the room door open with his foot. The female patient was not being aggressive at the time of the interaction; however, Grievant places his hand on the female patient directing her to her room.¹

¹Physical abuse is the use of physical force, body posture or gesture or body movement that inflicts or threatens to inflict pain on a patient. Physical abuse includes, but is not limited to:

- Unnecessary use of physical restraints
- Use of unnecessary force in holding or restraining a patient
- Improper use of physical or mechanical restraints
- Use of seclusion without proper orders or cause
- Slapping, kicking, hitting, pushing, shoving, choking, hair pulling, biting, etc.
- Inappropriate horseplay
- Raising a hand or shaking a fist at a patient
- Crowding or moving into a patient's personal space
- Inappropriate removal from treatment programs

Grievant's explanation of these events is that he was given a directive to re-direct these two patients and his training taught him to re-direct in the manner shown on the video. When Mr. Ryan was questioned as to what the Grievant was to do when instructed to re-direct these patients, he explained the Grievant was not dismissed for attempting to re-direct the patients, but was dismissed for the manner in which he re-directed these two patients which amounted to physical abuse as set out in the Policy on Investigating and Reporting Verbal and Physical Abuse. The undersigned agrees with Respondent that given the nature of these two Adult Protective Services reports and the Health Service Worker's responsibility in the protection of the patients, it was reasonable to proceed directly to termination of Grievant's employment. The record of this case has proven by a preponderance of the evidence that Grievant's actions violated Sharpe Hospital's policy on Investigating and Reporting Verbal and Physical Abuse.

Respondent is mandated to protect and care for a segment of the mentally challenged population of West Virginia. As a Health Service Worker within Sharpe Hospital, Grievant is responsible for the care and protection of the residents. The misconduct was of such a nature to justify Respondent's decision to terminate Grievant's employment.

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 (2018); *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 has met its burden of proving that Grievant’s conduct was of a substantial nature directly affecting the rights and interest of the residents in question at Respondent’s facility. Grievant was dismissed for good cause.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. See *also* 156 C.S.R. 1 § 6.20 (2018).

Date: November 14, 2018

Ronald L. Reece
Administrative Law Judge