

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**MARY MYERS,**

**Grievant,**

**v.**

**Docket No. 2017-2498-CONS**

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

**Respondent.**

**DECISION**

Grievant, Mary Myers, filed two expedited level three grievances against her employer, Respondent, Department of Health and Human Resources (“DHHR”), Mildred Mitchell-Bateman Hospital (“MMBH”). The first is dated April 24, 2017, and states as follows: “[s]uspension without good cause.”<sup>1</sup> As relief, Grievant asks “[t]o be made whole including back pay with interest and benefits restored.” This grievance was initially assigned the docket number 2017-2118-DHHR. The second grievance is dated May 11, 2017, and states as follows: “[d]ismissal without good cause.” As relief sought, Grievant asks “[t]o be made whole in every way including backpay with interest and benefits restored.” This grievance was initially assigned the docket number 2017-2168-DHHR. The two grievances were consolidated by Order entered October 17, 2017.

Grievance 2017-2168-DHHR was originally scheduled for level three hearing on August 9, 2017. On that date appeared Grievant by her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union, and Respondent, by counsel, Harry C. Bruner, Jr., Esq., Assistant Attorney General. Also appearing as the

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<sup>1</sup> This grievance was received at the Grievance Board on April 25, 2017, by hand-delivery.

agency representative for Respondent was Craig Richards, CEO, Mildred Mitchell-Bateman Hospital. Grievant did not appear in person. At which time, counsel for Respondent raised the issue of patient confidentiality with respect to a video he intended to introduce as evidence. Counsel for Respondent contended that the video could not be redacted to blur the patients' faces, and as such, a copy could not be given to Grievant's representative. Respondent's counsel, however, did not have an issue with playing the video in the proceeding or providing the ALJ an unredacted copy of the same. Grievant's representative objected. The ALJ ordered the hearing continued and ordered the parties to submit briefs outlining the legal authority for their positions. At that time, the parties advised the ALJ that Grievant had a second grievance, Docket No. 2017-2118-DHHR, that was currently set for hearing on September 25, 2017, but that it might now be resolved. The ALJ set September 25, 2017, as the new hearing date.

Thereafter, the parties submitted briefs. In its brief, Respondent's counsel stated that the Attorney General's Office was obtaining software that could be used to blur the faces of any patients in the video, and that such should resolve the issue. On September 11, 2017, counsel for Respondent moved to continue the September 25, 2017, hearing as he was leaving employment with the Attorney General's Office and relocating out of state.

The ALJ convened a telephonic hearing on September 12, 2017, to address the video confidentiality issue and the Motion to Continue. Both counsel for Respondent and Grievant's representative appeared. Counsel for Respondent confirmed that the video confidentiality issue had been resolved by the software obtained by the Attorney General's Office. As such, there was no need to rule on that issue. The parties confirmed

that Grievant's other pending grievance, Docket No. 2017-2118-DHHR had not settled. As reflected in the Order entered on October 17, 2017, the ALJ ordered the two cases consolidated, and for good cause shown, Respondent's Motion to Continue was granted.

The level three hearing on the consolidated grievance was conducted on February 5, 2018, before the undersigned administrative law judge at the Grievance Board's Charleston, West Virginia, office. Grievant did not appear in person at the level three hearing, but appearing was her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by counsel, Brandolyn N. Felton-Ernest, Assistant Attorney General. As Grievant was not present at the level three hearing, the ALJ continued the hearing at the conclusion of Respondent's case in chief, leaving the record open, to allow Grievant's representative the opportunity to consult with Grievant to decide if she wanted to present any further evidence. By letter dated that same day, Grievant's representative informed the ALJ that Grievant did not intend to present any further evidence in this matter and rested her case. Grievant's representative further requested that the matter be assigned a date for the submission of proposed Findings of Fact and Conclusions of Law. This matter became mature for decision on March 27, 2018, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

### **Synopsis**

Grievant was employed by Respondent as a Health Service Worker ("HSW") at Mildred Mitchell-Bateman Hospital. Respondent dismissed Grievant for engaging in conduct toward a patient in violation of policy and the applicable state regulations constituting physical abuse. Grievant denies Respondent's claims. Respondent proved

by a preponderance of the evidence that Grievant engaged in physical abuse of a patient in violation of policy, and that such warranted dismissal. Therefore, the grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

### **Findings of Fact**

1. Grievant was employed by Respondent as an HSW at Mildred Mitchell-Bateman Hospital, a psychiatric facility operated by the Department of Health and Human Resources.

2. In March 2017, Cheryl Williams was a Nurse Manager and acting Director of Nursing at Mildred Mitchell-Bateman Hospital (MMBH). On or about March 27, 2017, when she arrived at work, Ms. Williams found two type-written statements in her mailbox regarding a Code 4 that occurred on Unit 2 during the night before.<sup>2</sup> The statements, dated March 26, 2017, were nearly-identical. Neither statement was signed, but type-written at the bottom of one statement was the name Paula Bogard, CNA, and on the other statement, Oscar Bickerstaff, CNA.

3. The statement purportedly from Paula Bogard states as follows:

3/26/17

To Whom It May Concern:

There was a code 4 called on Unit A2 at around 8:30 to which I responded. Mary Myers, HSW, had the face check board and Mary approached a male patient and stated, "I'll just hide behind you for this code so you can protect me". Then, she proceeded to get in from of him and wiggle her buttocks,

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<sup>2</sup> The ALJ does not know what a Code 4 is because the parties provided no explanation during their presentation of evidence.

saying, "My son can protect me". Then the male patient started rubbing her shoulders and patting her on the back. This whole incident occurred in front of the desk where the face check chair is located.

The following witnessed this occurrence:

Oscar Bickerstaff, CNA, Unit A5  
Sheena Butcher, CNA, Unit A3  
Raquel Pennix, CNA, Unit A6  
And Unit A2 staff in hallway

Paula Bogard, CNA<sup>3</sup>

4. The statement purportedly from Oscar Bickerstaff states as follows:

3/26/17

To Whom It May Concern:

At around 8:30, there was a code 4 called on Unit 2. When I got there, Mary Myers, HSW, had the face check board. She proceeded to redirect all the patients away from the Code 4 incident except for a certain male patient. I saw her approach this male patient, laughing and stating, "I'll just hide behind you so you can protect me". Then, instead of getting behind him, she proceeded to get in front of him and wiggle her buttocks, staying, "My son can protect me". Then the male patient smiled and started rubbing her shoulders and patted her on the back. This whole incident occurred in front of the desk where the face check chair is located.

The following witnessed this occurrence:

Paula Bogard, CNA, Unit A6  
Sheena Butcher, CNA, Unit A3  
Raquel Pennix, CNA, Unit A6  
And Unit A2 staff in hallway

Oscar Bickerstaff, CNA<sup>4</sup>

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<sup>3</sup> See, Respondent's Exhibit 2, Investigation Packet. This is a direct quote. The typographical errors included herein are present in the document.

<sup>4</sup> See, Respondent's Exhibit 2, Investigation Packet. This is a direct quote. The typographical errors included herein are present in the document.

5. Ms. Williams was not at work when the incident involving Grievant occurred. Sherry Cox was the Nurse Manager on duty at that time. According to Ms. Williams, she spoke to Sherry Cox about the incident, and Nurse Manager Cox gave a witness statement. However, no such witness statement was included in the Investigation Packet, and such was not presented as evidence in this matter. Ms. Williams explained that Ms. Cox gave a statement during the “internal investigation,” and that Ms. Cox was part of that investigation. Sherry Cox was not called as a witness at the level three hearing.<sup>5</sup>

6. It is unclear from the record as to who conducted the internal investigation, the purpose of the same, who was involved, and what was the outcome. Further, it is unclear as to when this investigation occurred.

7. At some point on March 30, 2017, Ms. Williams obtained and reviewed the security camera video footage of the incident on March 26, 2017.<sup>6</sup> This video has no audio. The video shows a woman identified by both parties as Grievant<sup>7</sup> approach a male patient. She then moves in close to him, with her back to him, so that he is facing her back. She is next seen moving back and forth in front of him for several seconds. Then the patient is seen placing his hands on Grievant’s shoulders and moving his hands as if massaging her shoulders. The patient then appears to pat Grievant on the back. Grievant appears to be smiling or laughing. Given the angle of the camera, a viewer cannot see if

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<sup>5</sup> See, testimony of Cheryl Williams.

<sup>6</sup> It is unclear from the evidence presented the order in which Ms. Williams reviewed the video, spoke to people involved, and completed the required forms. All that is clear is that she took such actions on March 30, 2017.

<sup>7</sup> The undersigned has not seen Grievant as she has not appeared at either hearing in this matter.

Grievant's back was touching the patient's front. Also, a viewer cannot see Grievant's backside.

8. Based upon what she saw on the video, Ms. Williams completed an Adult Protective Services Mandatory Reporting Form, a Patient Grievance Form, and a Preliminary Investigative Report of Allegations of Verbal Abuse, Physical Abuse, or Neglect concerning the alleged interaction between Grievant and the male patient that occurred on or about March 26, 2017. Collectively, these documents are referred to as the Investigation Packet.<sup>8</sup>

9. At some point before Ms. Williams completed the MMBH Preliminary Investigation Report of Allegations of Verbal Abuse, Physical Abuse, or Neglect, someone spoke with the patient involved in the incident with Grievant. The patient reportedly stated that no one had "spoken or physically touched him inappropriately."<sup>9</sup> Such is included in the Investigation Packet. It is unknown who spoke with the patient. There was no documentation or testimony regarding the identity of this person.

10. Pursuant to the MMBH Nursing Department Guidelines for Reporting Allegations of Patient Abuse/Neglect, on or about March 30, 2017, Ms. Williams emailed the Investigation Packet, along with the statements of Mr. Bickerstaff and Ms. Bogard, to CEO Richards, Dr. Bobby Miller, Clinical Director Peg Moss, and Patient Advocate Michelle Woomeer.<sup>10</sup>

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<sup>8</sup> See, testimony of Cheryl Williams; Respondent's Exhibit 2, Investigation Packet.

<sup>9</sup> See, Respondent's Exhibit 2, Investigation Packet.

<sup>10</sup> See, Respondent's Exhibit 2, Investigation Packet; Respondent's Exhibit 12, MMBH Nursing Department Guidelines for Reporting Allegations of Patient Abuse/Neglect; Respondent's Exhibit 13, Email from Cheryl Williams.

11. Ms. Williams testified that she spoke with Mr. Bickerstaff, Ms. Bogard, Sheena Butcher, and Raquel Pennix during her investigation. There are no statements from Ms. Butcher or Ms. Pennix included in the Investigation Packet. Further, neither Ms. Butcher nor Ms. Pennix were called as witnesses at the level three hearing.

12. After reviewing the video, Tamara Kuhn, Director of Human Resources at MMBH requested through DHHR's Office of Human Resources Management (OHRM) that Grievant be suspended pending investigation.<sup>11</sup> Either Charity Weakley or Pat Franz at OHRM made the decision to grant Ms. Kuhn's request and suspended Grievant pending investigation.

13. On March 30, 2017, Ms. Williams telephoned Grievant regarding the incident. Ms. Williams made handwritten notes regarding the conversation. In her notes, Ms. Williams states, in part, that "Mrs. Myers stated [patient] patted her on the shoulders [illegible] stating, 'I've got your back.'" There is nothing in the handwritten notes about Grievant wiggling her buttocks in front of the patient.<sup>12</sup> During this conversation, Ms. Williams informed Grievant that she was suspended pending the outcome of the APS investigation. Ms. Williams noted that Ray Brillantes was present during her telephone conversation with Grievant.

14. Cheryl Williams assigned Ray Brillantes, Nurse Manager, and Jami Boykin, Nurse Manager In Training, to investigate the allegations made against Grievant. Patient Advocate Woomer also served as an investigator.

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<sup>11</sup> See, Respondent's Exhibit 13, Email from Cheryl Williams; testimony of Tamara Kuhn.

<sup>12</sup> See, Respondent's Exhibit 2, Investigation Packet.



15. The investigation was conducted while Grievant was suspended. The investigators received the Investigation Packet and the video recording. Ms. Woomer and Ms. Boykin interviewed Sheena Butcher. However, Mr. Brillantes, Ms. Boykin, and Ms. Woomer did not interview Paula Bogard, Oscar Bickerstaff, Raquel Pennix, or Sherry Cox. Nothing in the record indicates that the investigators interviewed Grievant. Grievant signed a typewritten statement that appears to have been faxed to and received by MMBH Human Resources on April 13, 2017. It is unknown if such a statement was requested by anyone at MMBH, or whether the investigators considered the same. This statement is not included in the Investigation Packet.

16. At the conclusion of the investigation, Ms. Woomer prepared a report that was sent to CEO Richards. This report is dated April 25, 2017. The investigators concluded that the allegation that Grievant “wiggled her buttocks in front of a male patient [patient initials]” was substantiated for physical abuse as defined by “Title 64 CSR 59-3.13.”<sup>13</sup>

17. The investigators relied heavily on the video recording in making the decision to substantiate the allegation of physical abuse.<sup>14</sup> The investigators and hospital administration also relied heavily on the written statements of Paula Borgard and Oscar Bickerstaff that were included in the Investigation Packet.

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<sup>13</sup> See, Respondent’s Exhibit 4, Investigation Report.

<sup>14</sup> See, testimony of Ray Brillantes; testimony of Michelle Woomer; testimony of Jami Boykin.

18. By letter dated April 3, 2017, signed by CEO Richards, Grievant was officially informed of her suspension without pay pending investigation into the March 26, 2017, incident.<sup>15</sup>

19. By letter dated April 27, 2017, Ms. Kuhn notified Grievant that her predetermination conference was scheduled to be held on May 2, 2017, to address her alleged violation of DHHR Policy 2108—Employee Conduct. The letter further stated that, “Mildred Mitchell-Bateman has been advised that the APS investigation into this matter has substantiated charges of inappropriate horseplay on the part of the employee. The investigation also substantiated that the employee was crowding or moving into a client’s personal space as to indicate a provocative advance.”<sup>16</sup>

20. By letter dated May 1, 2017, Ms. Kuhn notified Grievant that her predetermination conference had been rescheduled for May 5, 2017. As did the first notice, this notice stated that the meeting was to address her alleged violation of DHHR Policy 2108—Employee Conduct. The letter further stated that, “Mildred Mitchell-Bateman has been advised that the APS investigation into this matter has substantiated charges of inappropriate horseplay on the part of the employee. The investigation also substantiated that the employee was crowding or moving into a client’s personal space as to indicate a provocative advance.”<sup>17</sup>

21. Grievant’s predetermination conference with conducted on May 5, 2017, by telephone. Attending were Grievant, Grievant representative Gordon Simmons, Tamara

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<sup>15</sup> See, Respondent’s Exhibit 3, April 3, 2017, Suspension Letter.

<sup>16</sup> See, Respondent’s Exhibit 5, Predetermination Conference Notice.

<sup>17</sup> See, Respondent’s Exhibit 6, Predetermination Conference Notice—Notice of Rescheduled Meeting.

Kuhn, and Cheryl Williams. During this meeting, Grievant denied ever being provocative with any patient.<sup>18</sup>

22. By letter dated May 9, 2017, Grievant was informed that she was dismissed from her employment at MMBH effective May 25, 2017, and stated, in part, as follows:

[y]our dismissal is the result of the conclusion of an investigation regarding the allegation that you exhibited inappropriate behaviors in front of a male patient on unit A2, specifically, On (sic) March 30, 2017, you were suspended pending an investigation in to (sic) allegations of exhibiting inappropriate behaviors in front of a male patient on unit A2. On March 24, 2017, it was reported a Code 4, *General Assistance*, was called on unit A2 and you redirected all patients away from the code incident except for a certain male patient. You then approached the male patient laughing and stating, "I'll just hide behind you so you can protect me." You proceeded to get in front of the patient and wiggle your buttocks saying, "My son can protect me." The male patient smiled and started to rub your shoulders and patting you on the back.

This is in violation of 64 CSR 59, which provide: section 3.13 Physical abuse "inappropriate horseplay; raising a hand or shaking a fist at a client, *crowding or moving into a client's personal space*; or physical sexual abuse, i.e., any physical or *provocative advance*, such as caressing or fondling, sexual intercourse, etc." and MMGHE018-MMBH Patient Abuse/Neglect or Exploitation Policy, which provides: section 1, part b Physical abuse includes but not limited to *inappropriate horseplay* or any physical sexual abuse, i.e. any physical or *provocative advance*."<sup>19</sup>

Emphasis included in the original document.

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<sup>18</sup> See, testimony of Tamara Kuhn; Respondent's Exhibit 14, Meeting Notes of Tamara Kuhn.

<sup>19</sup> See, Respondent's Exhibit 7, May 9, 2017, Dismissal Letter. This is a direct quotation which contains the typographical errors present in the original document.

23. Respondent called no eyewitnesses to the incident at the level three hearing in this matter. Instead, Respondent called Ms. Williams, the investigators, Ms. Kuhn, and CEO Richards.

24. Grievant did not appear at either hearing in this matter. There is no sworn testimony from Grievant. However, a typewritten statement signed by Grievant dated April 13, 2017, was submitted into evidence. Grievant offered no witnesses at the level three hearing. Grievant's representative questioned each of Respondent's witnesses.

### **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. W.VA. CODE ST. R. § 156-1-3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "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.*

Respondent argues that it properly terminated Grievant's employment due to her inappropriate behaviors toward a patient which were later substantiated as physical abuse in violation of W.VA. CODE ST. R. § 64-59-3.13. Respondent also asserts that Grievant violated DHHR Policy 2108 Employee Conduct by engaging in physical abuse of a patient. Grievant denies doing anything provocative in front of the patient, and asserts that Respondent lacked good cause for suspending her and for terminating her employment.

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).

“Physical abuse” is defined as follows:

The use of physical force, body posture or gesture or body movement that inflicts or threatens to inflict pain on a client. 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; 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 client, crowding or moving into a client’s personal space; intentional inflicting of pain; punitive measures of any kind, including the use of corporal punishment, withholding meals for punitive reasons, inappropriate removal from treatment programs, restricting communication, or withdrawal of rights or privileges; or physical sexual abuse, i.e., any physical or provocative advance such as caressing or fondling, sexual intercourse, etc.

W.VA. CODE ST. R. § 64-59-3.13. This same definition is found in Respondent’s Policy MMBHE018, “Patient Abuse/Neglect, or Exploitation.”<sup>20</sup> DHHR Policy Memorandum 2108, “Employee Conduct,” Section VIII. “Policy and Procedures” states, in part, as follows: “[e]mployees are expected to: comply with all relevant Federal, State and local laws; comply with all Division of Personnel and Department policies; comply with all

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<sup>20</sup> See, Respondent’s Exhibit 11, Policy MMBHE018, “Patient Abuse/Neglect, or Exploitation.”

applicable State and Federal Regulations governing their field of employment; follow directives of supervisors; conduct themselves professionally in the presence of residents/patient/clients, fellow employees and the public . . . avoid physical abuse, harassment or intimidation of residents/patients/clients or fellow employees . . . .”<sup>21</sup> Respondent asserts that Grievant’s behavior toward the patient on March 26, 2017, constituted physical abuse in violation of MMBH Policy MMBHE018, DHHR Policy Memorandum 2108, “Employee Conduct,” and W.VA. CODE ST. R. § 64-59-3.13.

Respondent called no witnesses to the incident to testify at the level three hearing. Largely, Respondent has built its case on the video and hearsay, such as the unsigned statements of Ms. Bogard and Mr. Bickerstaff, and the Investigation Packet prepared by Ms. Williams. The investigators relied almost entirely on the video in coming to their conclusions. The investigators interviewed only one witness, Ms. Butcher. They did not even bother to speak with Mr. Bickerstaff or Ms. Bogard. Grievant introduced what is purported to be the transcript of this interview, which is also hearsay. The statements reflected in this document do not support the allegation that Grievant wiggled her buttocks in front of the patient. Instead, Ms. Butcher’s statements therein indicate that Grievant inappropriately hugged the patient, and that the patient then massaged Grievant’s shoulders. Ms. Butcher’s statements are largely contradicted by the video evidence. It is unknown who prepared this transcript and it bears no certification. Ms. Butcher was not called as a witness.

Under the statutes and procedural rules regarding the grievance process, the formal rules of evidence are not applicable in grievance proceedings, except as to the

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<sup>21</sup> See, Respondent’s Exhibit 9, DHHR Policy Memorandum 2108, “Employee Conduct.”

rules of privilege recognized by law. See W. VA. CODE § 6C-2-4(a)(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, that is to be accorded hearsay evidence in a disciplinary proceeding. See *Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (March 11, 2010), *aff'd*, Kan. Co. Cir. Ct., Civil Action No. 10-AA-73 (June 9, 2011); *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).

The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with firsthand 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. See *Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (March 11, 2010), *aff'd*, Kan. Co. Cir. Ct., Civil Action No. 10-AA-73 (June 9,

2011); *Gunnells v. Logan County Bd. of Educ.*, Docket No. 97-23-055 (Dec. 9, 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-H-115 (June 8, 1990).

The bulk of the evidence presented concerning the incident itself, such as the statements of Ms. Bogard and Mr. Bickerstaff, would be assigned little weight. They are not sworn statements, or formal incident reports, they are not signed, and Ms. Bogard and Mr. Bickerstaff were not called as witnesses to the proceeding. However, this case is unusual. The video recording from the facility clearly shows the incident and the conduct at issue. Grievant has made no objection to the authenticity of the recording. The recording shows a woman identified by both parties as Grievant approach a male patient. She then moves in close to him, with her back to him, so that he is facing her back. She is next seen moving back and forth in front of him for several seconds. Then the patient is seen placing his hands on Grievant's shoulders and moving his hands as if massaging her shoulders. The patient then appears to pat Grievant on the back. Grievant appears to be smiling or laughing. There was no hug captured in this recording. Given the angle of the camera, a viewer cannot see if Grievant's back was touching the patient's front. Also, a viewer cannot see Grievant's backside.

Respondent has shifted its position on how the interaction between Grievant and the patient amounted to patient abuse as defined in policy and the state rules. Respondent has alternately asserted that the interaction constituted inappropriate horseplay, that it was a provocative advance, and that it was crowding or moving into a client's personal space. From the evidence presented, it appears that the Grievant's



actions at least constitute inappropriate horseplay and crowding or moving into a client's personal space which meets the definition of physical abuse of a patient. Respondent has met its burden of proving the charges against Grievant.

The issue now becomes whether Grievant's actions constitute good cause for her employment to be terminated. Respondent points to its Progressive Discipline policy in support of terminating Grievant's employment. There was no evidence presented to suggest that Grievant had received any prior discipline. The progressive discipline policy, Policy Memorandum 2104, Section VIII(B)(7)(v)(a) states that "[s]eparation from employment may be issued when infractions/deficiencies in performance and/or behavior continue after the employee has had adequate opportunity for correction, or an employee commits a singular offense of such severity that dismissal is warranted. . . ."<sup>22</sup> In this case, Respondent has proved that Grievant's conduct toward a patient meets the definition of physical abuse. Given the type of facility and the nature of Grievant's conduct, Grievant's singular offense is severe and constitutes good cause warranting dismissal. Grievant did not argue that her discipline should be mitigated. Therefore, the same will not be addressed herein. For the reasons set forth herein, this grievance is denied.

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. W.VA. CODE ST. R. § 156-1-3 (2008); *Ramey v. W. Va.*

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<sup>22</sup> See, Respondent's Exhibit 8, Policy 2104, "Progressive Correction and Disciplinary Action."

*Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). “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).

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. “Physical abuse” is defined as follows:

The use of physical force, body posture or gesture or body movement that inflicts or threatens to inflict pain on a client. 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; 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 client, crowding or moving into a client's personal space; intentional inflicting of pain; punitive measures of any kind, including the use of corporal punishment, withholding meals for punitive reasons, inappropriate removal from treatment programs, restricting communication, or withdrawal of rights or privileges; or physical sexual abuse, i.e., any physical or provocative advance such as caressing or fondling, sexual intercourse, etc.

W.VA. CODE ST. R. § 64-59-3.13; Policy MMBHE018, “Patient Abuse/Neglect, or Exploitation.”

4. DHHR Policy Memorandum 2108, "Employee Conduct," Section VIII. "Policy and Procedures" states, in part, as follows: "[e]mployees are expected to: comply with all relevant Federal, State and local laws; comply with all Division of Personnel and Department policies; comply with all applicable State and Federal Regulations governing their field of employment; follow directives of supervisors; conduct themselves professionally in the presence of residents/patient/clients, fellow employees and the public . . . avoid physical abuse, harassment or intimidation of residents/patients/clients or fellow employees . . . ."

5. Respondent proved by a preponderance of the evidence that Grievant engaged in inappropriate conduct toward a patient constituting physical abuse as defined by, and in violation of W.VA. CODE ST. R. § 64-59-3.13, Policy MMBHE018, "Patient Abuse/Neglect, or Exploitation," and DHHR Policy Memorandum 2108, "Employee Conduct," and that such constituted good cause to terminate Grievant's employment.

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 (eff. July 7, 2008).

**DATE: May 9, 2018.**

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**Carrie H. LeFevre**  
**Administrative Law Judge**