

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

HISEL BAILEY,

Grievant,

v.

Docket No. 2019-1137-DHHR

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

Respondent.

DECISION

Grievant, Hisel Bailey, filed an expedited level three grievance against his employer, Respondent, Department of Health and Human Resources ("DHHR"), Mildred Mitchell-Bateman Hospital ("MMBH"), on or about February 14, 2019, stating as follows: "[i]ndefinite suspension without good cause." As relief sought, Grievant seeks "[t]o be made whole in every way including back pay with interest and all benefits restored." On March 15, 2019, Grievant, by his representative, asked to amend his statement of grievance to include that he is also grieving his dismissal from employment. There were no objections by Respondent. Accordingly, by Order entered March 20, 2019, Grievant's request to amend his grievance was granted.

The level three hearing on the consolidated grievance was conducted on June 10, 2019, and on July 17, 2019, before the undersigned administrative law judge at the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person and by representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by counsel, Katherine A. Campbell, Esquire, Assistant Attorney General. Also appearing in person was Tamara Kuhn, Director of Human Resources at MMBH, who served as Respondent's representative. On August 8, 2019, Grievant, by

representative, filed a “Motion to Include Further Exhibits,” serving the same on counsel for Respondent. This ALJ denied this motion on August 13, 2019, as the record of this grievance was closed on July 17, 2019, following two days of hearing. The Grievance Board informed the parties of this decision *via* email on that same date. This matter became mature for decision on August 22, 2019, upon receipt of the last of the parties’ Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a Registered Nurse at Mildred Mitchell-Bateman Hospital. Respondent dismissed Grievant charging him with physical abuse of a patient and use of improper restraint techniques. Grievant denied all of Respondent’s claims. Respondent failed to prove by a preponderance of the evidence that Grievant engaged in physical abuse of a patient. Respondent also failed to prove any improper restraint or that there was good cause for Grievant’s dismissal. Therefore, this grievance is GRANTED.

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 a Registered Nurse at Mildred Mitchell-Bateman Hospital (MMBH), a psychiatric facility operated by the Department of Health and Human Resources. Grievant had been so employed for about six years. During his tenure at MMBH, Grievant had been a CCG (Crisis Consulting Group) instructor. Also, Grievant consistently received good performance reviews and had no history of discipline.

2. Michelle Woomer is a Behavioral Health Advocate employed by Legal Aide of West Virginia. Ms. Woomer is assigned to work in an office at MMBH. She has been so employed for more than four years. As part of her job, she investigates allegations of patient abuse made at MMBH. The record of this grievance is silent as to Ms. Woomer's full duties and responsibilities, and who, if anyone, supervises her work. However, based upon the evidence presented, she is assigned to Unit 6 and has regular interactions with patients in that unit.¹

3. At the times relevant herein, Krista Menchaca was employed by Respondent at MMBH as a Health Services Worker. Based upon the evidence presented, it appears that Ms. Menchaca had been employed at MMBH for less than one year when the incident in question occurred.²

4. Ms. Menchaca was subpoenaed to testify at day two of the level three hearing; however, she failed to comply with that subpoena. When this ALJ and other Grievance Board staff attempted to contact her at a verified cell phone number, she answered once, but immediately hung up. Thereafter, Ms. Menchaca did not answer calls from the Grievance Board. This ALJ and Grievance Board staff left Ms. Menchaca voicemail messages directing her to call the Grievance Board. Ms. Menchaca failed to comply. Grievant opted to proceed on the evidence presented and did not wish to attempt to enforce this subpoena in the Circuit Court of Kanawha County, West Virginia.

5. At the times relevant herein, Cheryl Williams was employed by Respondent as the Director of Nursing (DON) at MMBH. Upon information and belief, DON Williams

¹ See, Grievant's Exhibit 2, audio recording of January 30, 2019, Menchaca interview.

² See, Grievant's Exhibit 2, audio recording of January 30, 2019, Menchaca interview.

retired from MMBH before the June 10, 2019 level three hearing. She was not called as a witness by either party.

6. While she was not called to testify in this matter, Sue Shields was identified as a Nurse Manager at MMBH in documents submitted as evidence in this matter.³ There has been no suggestion that Ms. Shields was unavailable on the dates of the level three hearing.

7. Craig Richards is the CEO of MMBH. Tamara Kuhn is employed by Respondent as the Director of Human Resources at MMBH. Mr. Richards testified at the level three hearing in this matter. Ms. Kuhn did not testify at the level three hearing, but was present throughout as MMBH's representative.

8. M.C.⁴ is an IDD (Intellectual Development Disorder) patient at MMBH. He has cerebral palsy which causes him to have an unsteady gait. However, he walks without assistance. The record is silent as to how long M.C. has been a patient at MMBH. From the testimony of Ms. Woomer and Grievant, it was established that M.C. was not new to MMBH and had been there for an extended period of time. M.C. has a known history of self-harm and self-mutilation. Grievant had been involved in codes with M.C. in the past, and he had witnessed past injuries M.C. had inflicted upon himself.⁵

9. On January 7, 2019, Grievant and Ms. Menchaca walked M.C. and a group of patients down to the cafeteria for dinner. On the way down, M.C. began to talk about his wanting to beat and kill his mother. Ms. Menchaca and Grievant both attempted to

³ See, Respondent's Exhibit 7, letter dated March 11, 2019.

⁴ The patient's name will not be included herein to protect his privacy. Also, all efforts have been made to redact his name from the documents presented as evidence in this matter. The patient's identity is not necessary to decide this grievance.

⁵ See, testimony of Michelle Woomer; testimony of Hisel Bailey.

redirect his behavior by asking him to stop. M.C. continued to speak about his desire to beat and kill his mother. Again, they told him to stop. Before getting to the doors to the cafeteria, M.C. got mad and punched the wall which caused his knuckle to bleed. Thereafter, M.C. stated that he liked to see his own blood and that he would bite himself. M.C. then raised his forearm up toward his mouth. M.C. was standing directly across the hallway from Grievant with his back against the wall. Grievant intervened to stop M.C. by placing his hand on M.C.'s raised arm and moved it down, away from M.C.'s mouth. A struggle ensued. Grievant and M.C. fell to the floor entangled.

10. While on the floor, Grievant continued to try to keep M.C. from biting himself and struggled to get M.C. restrained and under control. M.C. fought against Grievant striking him and kicking him. At some point, M.C. grabbed Grievant's testicles and squeezed them hard, causing Grievant a lot of pain. Ms. Menchaca attempted to assist once, but she did not know what to do.

11. After Grievant and M.C. were on the floor, Ms. Menchaca called a code, and people began to arrive to assist Grievant.⁶ Four people acting as the code team assisted Grievant in restraining M.C. so that he could get free. Grievant got up to his knees in the floor beside them, and eventually to his feet. The four members of the code team remained on the floor trying to get M.C., who was still fighting them, under control. The four code team members remained on the floor with M.C. for several minutes until he was calm enough to get up and return to his unit.

⁶ While the members of the code team and others in the video were not identified by Respondent, Grievant testified that the following people responded to the incident on January 7, 2019, as shown in the video: Cam Edwards; Jessica Pleasant; Brenda Simmons; Mark Poff, and others. None were called as witnesses.

12. During this incident, M.C. sustained an injury to his forehead, just above one of his eyebrows. The injury consisted of a small, raised bump with a small opening like a cut just above M.C.'s eyebrow. Grievant escorted M.C. back upstairs to his unit following the incident where he was medically examined. A band-aid was placed on the place above his eyebrow.⁷

13. On January 11, 2019, while she was making rounds on Unit 6, Ms. Woomer saw M.C., and noted that he had a black eye, or bruising around his eye. Ms. Woomer asked M.C. how he got the black eye, and M.C. first told her that Grievant had thrown him against the wall and banged his head on January 9, 2019. M.C. later told her that Grievant threw him to the floor and banged his head. M.C. also told Ms. Woomer that another patient, L.M., was present when it happened.

14. Ms. Woomer talked to L.M., but L.M. could not recall the facts and could not recall seeing anything wrong happening.⁸ L.M.'s condition is unknown. L.M. was only mentioned by Ms. Woomer at the level three hearing.

15. Without having been officially assigned to do so, and going on her "intuition" and a feeling inside "her being" that something was wrong, Ms. Woomer began to investigate the matter of M.C.'s black eye. She requested security camera video from the date he gave her, and reviewed the Careview nursing notes, including Grievant's report,⁹ regarding M.C. in the computer system. Ms. Woomer was aware that M.C. "lost a level" of privileges because of poor behavior.

⁷ See, testimony of Grievant; Grievant's Exhibit 2, audio recording.

⁸ See, testimony of Michelle Woomer.

⁹ This report and the nursing notes were not presented as evidence in this matter.

16. Ms. Woomer found a medical record in the Careview computer system entered by Joni L. Cockrel, RN, dated January 7, 2019, that indicated an incident occurred on that date during which Grievant placed M.C. in “brief physical restraint.” The record further indicates that the physical restraint was initiated at 5:27 p.m. and ended at 5:32 p.m. The record notes no injury to M.C., and that he was stable and resting in his room.¹⁰

17. The January 7, 2019, Careview note states the following as a “Brief Description of Situation Leading to Brief Physical Restraint:” “[p]t was verbalizing negative thoughts about his family. Redirection was attempted and then pt began hitting a wall, then biting himself.” The “Patient’s Response to Brief Physical Restraint” states “[p]t bit a male staff member and grabbed him inappropriately.” This record indicates that Grievant initiated the physical restraint.¹¹

18. From this Careview note, Ms. Woomer was able to conclude that the incident had occurred on January 7, 2019, not January 9, 2019, as M.C. had stated. She found there was no mention of the black eye, or photographs of the same, in the Careview system.

19. Ms. Woomer requested the security video for the correct date, January 7, 2019. Ms. Woomer then viewed the video with John Koeber, former Safety Director at MMBH. Pursuant to her investigation report, she viewed the video again with Mr. Koeber, LAWV Advocate Teri Stone, Sue Shields, and CEO Richards on January 28, 2019.

¹⁰ See, Respondent’s Exhibit 10, medical record dated January 7, 2019, patient’s name redacted, admitted under seal, and subject to a protective order.

¹¹ See, Respondent’s Exhibit 10, medical record dated January 7, 2019, patient’s name redacted, admitted under seal, and subject to a protective order.

20. Based upon her review of the security video, Ms. Woomer filed an Adult Protective Services (APS) referral after reviewing the video on or about January 16, 2019. APS started an investigation as a result. No evidence pertaining to the details of the APS investigation, or any conclusions therefrom, was presented in this matter.

21. DON Williams filed patient Grievance Forms for M.C. Separate from the APS investigation, MMBH began its own investigation into the incident. CEO Richards assigned Ms. Woomer to investigate the incident along with Sue Shields as the MMBH staff investigator. It is unclear from the record of this grievance as to exactly when they were assigned, how it was assigned to them, and when the official investigation began.

22. By letter dated January 17, 2019, CEO Richards informed Grievant in writing of his suspension pending investigation stating, in part, as follows:

Mildred Mitchell-Bateman has received allegations that you physically abused a patient and determined that an investigation into the matter [is] warranted. During this investigation, you will be suspended without pay; however, you may elect to use accrued Annual Leave. This action serves to preserve the integrity of any evidence verifying your innocence or the truthfulness of the allegations, and to ensure your safety, as well as that of the public.

On January 16, 2019, allegations were reported that you banged his head while in the hallway outside the cafeteria causing him to receive a black eye.

On January 16, 2019, Cheryl Williams discussed this matter with you and informed you that you were being suspended pending investigation. When presented with the allegation, you stated "The guy was trying to eat himself; bit his fingers off and now I am being targeted for trying to keep him from self-injurious behavior."¹²

¹² See, Respondent's Exhibit 6, January 17, 2019, letter.

23. DON Williams requested a written statement from Grievant for the APS investigation. He provided her the same by email dated January 21, 2019. DON Williams forwarded Grievant's emailed statement to someone named "Robin D. Roberts" on January 22, 2019, noting that such was regarding APS #190114. DON Williams copied Teri Stone, Michelle Woomer, Tamara Kuhn, Cindy Parsons, and Olivia [Sue] Shields on this email. It is unknown who Robin Roberts is. She was not called to testify at the level three hearing. Teri Stone is the other Legal Aide patient advocate at MMBH. It is unknown who Cindy Parsons is. She was not called to testify at the level three hearing.

24. In his statement dated January 21, 2019, Grievant stated the following:

Myself and HSW was transporting pt's to dinner. MC (Pt) started talking about beating and killing his mother. HSW redirected him several times without success. When we reached the door to line up to receive the trays the door wasn't opened as of yet. We were waiting for it to open to start receiving trays. Pt continued to speak about how he wanted to kill and beat his mother. This began to upset the other pt's and HSW again redirected without success. I then explained to the pt if his behavior continued he would be taken back upstairs. Then Pt walked over to the opposite side of the hall and punched the wall causing one of his knuckles to bleed. HSW redirected pt and stated, "now your hand is bleeding." Pt then stated, "I like the sight of my blood. I will bit the fuck out of myself!" I attempted to redirect pt when I observed him raising his arm to his mouth to bite himself. With knowing his long history of self abuse I reacted trying to keep his arm away from his mouth knowing this pt has a brutal history of ripping his own flesh off by biting himself. We struggled but pt managed to get his Lt hand I believe in his mouth and began biting down on his fingers. I was attempting to get him against the wall when we ended up in the floor and I continued to struggle with the pt to keep from biting himself Pt began striking me with closed fist and began violently banging his head against the floor. The struggle, continued now both trying to keep him from biting himself, banging his head against the floor and being struck by an array of closed fist punches. When I would attempt to keep his head safe he would strike me with close hand punches. When I tried to

shield myself from the punches he then would attempt to bite me which he successfully done so by biting my right forearm. As I was dealing with him biting me, trying with my free hand, I felt this burning pain in my groin. Pt had reached down and grabbed ahold of my testis (sic) and violently was squeezing and twisting. I was unable to get the pt to let go until the code team arrived and help pry his hand off my testicular area. I was unaware that a code was called. I then moved away from the pt and sit on my knees dealing with the pain in my testicular region. When I attempted to, I began to become nauseous and began throwing up from the pain in my groin. Pt continued fighting with the code team and eventually calmed down enough to walk him back upstairs. I assessed the pt noting an injury to his Lt index finger where he had bitten himself and a cut above his right eye with a small raised area. P[t] became tearful and apologized over his actions and attacking this writer.¹³

25. There has been no suggestion that Grievant reviewed the January 7, 2019, video before writing his statement.

26. Ms. Woomer and Ms. Shields interviewed only patient M.C. and Krista Menchaca during their investigation. The investigators did not interview Grievant, the other patient, L.M., or any of the other ten people who can be seen in the video (four unidentified men, four unidentified women, a female nurse wearing light blue scrubs, and a man wearing a dark blue scrub shirt holding a clipboard, who appears to be a nurse) during the incident.

27. Ms. Woomer and Ms. Shields interviewed Ms. Menchaca on January 30, 2019, after they had reviewed the security video.¹⁴ The audio of Ms. Menchaca's interview was recorded by Ms. Woomer. There is no video of the interview. M.C.'s interview was not recorded.¹⁵

¹³ See, Respondent's Exhibit 2, Grievant's January 21, 2019, written statement.

¹⁴ See, Grievant's Exhibit 2, audio recording of Menchaca interview.

¹⁵ See, testimony of Jami Boykin.

28. Ms. Menchaca had drafted a handwritten statement regarding the incident dated January 16, 2019, which was prepared as part of the APS referral. It is unclear from the record who requested this statement. This was not a sworn statement, and it was not notarized. This statement reads as follows:

[illegible] we was going to meals down pt. M.C. was talking about his mother the whole way down. When we got to the double doors he started talking about beating her up, and killing her. I asked him to stop, he continued. So hisel again asked him to stop or he's going to go back upstairs. M.C. then punched the wall and hurt himself. I told him to stop, and he said he likes to hurt himself and to make his-self bleed. Hisel said not on my watch I can't let you do that. M.C. then tried to bite himself on the arm. Hisel steps in and tries to stop him, in the process M.C. began to fall and hisel went down with him. I then called a Code 3 in Dinning (sic) area. M.C. would not calm down and began to try to hit and kick hisel so I was behind hisel on hand an his thigh to hold it down so he couldn't kick and another on his wrist like they do in CCG by his side. M.C. then gets a hold of hisel's testicles, and does not let go. Me and hisels both try to get him to let go. The Code team then shows up, I get up as others begin to assist. I then proceed to take pts to dinner.¹⁶

29. Ms. Woomer submitted her investigation report concluding that the allegations of physical abuse of a patient against Grievant were substantiated to CEO Richards on or about February 25, 2019. Nowhere in this report does Ms. Woomer mention M.C.'s known history of self-harm and self-mutilation. Also, she never mentions that both Grievant and Ms. Menchaca stated that the incident began when M.C. attempted to bite himself after becoming agitated and telling them that he liked the sight of his own blood.

¹⁶ See, Grievant's Exhibit 1, January 16, 2019, Menchaca statement.

30. In her investigation report, Ms. Woomer states the following with respect to her interview with Ms. Menchaca:

Krista Menchaca, HSW, was interviewed by Michelle Woomer, LAWV Advocate, and Sue Shields, RN/Staff Investigator, on January 30, 2019. She was introduced to the investigation team and oriented to the nature of the investigation. Krista Menchaca stated during her investigation interview that when Hisel Bailey took the patient to the floor she heard the patient's head hit the concrete floor, She also conveys that proper CCG tactics were not applied and that the alleged perpetrator Hisel Bailey did not ask for her assistance before he approached the patient that ended with staff Hisel Bailly (sic) landing on top of patient-[M.C.]. Krista Menchaca states in her interview that the patient did not have a black eye prior to the incident, but he did have a black eye the following day.¹⁷

31. According to the investigation report, CEO Richards personally participated in the investigation. On page two of the investigation report, Ms. Woomer states as follows:

A Video Review was conducted, Monday, January 28, 2019 in the office of the Safety Director, Jon Koeber[.] The following were present: LAWV Advocate Michelle Woomer, LAWV Teri Stone, MMBH Administrator/Staff Investigator-Sue Shields; MMBH Safety Director-Jon Koeber, MMBH CEO-Craig Richards.

A review of the video footage relating to investigation #190114-MC was conducted by the above parties on Monday, January 28, 2019 with the purpose of determining if MMBH staff, Hisel Bailey's actions toward patient [name redacted] met the Title 61 criteria for physical abuse and whether he adhered to proper CCG techniques. The Investigation Team invited Mildred Mitchell Bateman Hospital's CEO Craig Richards, who is also a trained CCG instructor, to review and offer expertise on the proper application of CCG as demonstrated by the alleged perpetrator, staff-Hisel Bailey. *CEO, Craig Richards summary upon review of the video is that, "CCG was not used in accordance with the trained*

¹⁷ See, Respondent's Exhibit 1, Investigation Report dated February 25, 2019.

tactics.” It is the determination of the investigation team and *all parties in attendance* at the video review, that trained CCG techniques were not utilized by either MMBH staff members at the time of this event involving Unit 6 patient-[name redacted]. (Emphasis added).¹⁸

32. A predetermination conference for Grievant was held on or about March 6, 2019. The purpose of this meeting was to inform Grievant that Respondent was contemplating discipline against him, and to allow him to tell his side of the story. In attendance were Tamara Kuhn, Jennifer Rose, Nurse Manager, Kim Mannon, Interim CEO, Sue Shields, Nurse Manager, Grievant, and, by telephone, Grievant’s representative, Gordon Simmons. CEO Richards was not in attendance.

33. Based upon the investigation report, CEO Richards had determined before the March 6, 2019, conference that Grievant had used improper CCG techniques during the incident.

34. By letter dated March 11, 2019, CEO Richards informed Grievant that he was dismissed from his employment for physical abuse of a patient, effective that same date, and stated, in part, as follows:

The purpose of this letter is to advise you of my decision to dismiss you effective March 27, 2019[,] from your employment with the Department of Health and Human Resources, Mildred Mitchell-Bateman Hospital. . .

Your dismissal is the result of a substantiated Legal Aid investigation, which states that you banged a patient’s head cause (sic) him to receive a “black eye”. (sic) Specifically, on January 17, 2019, you were suspended pending investigation regarding allegations that while trying to redirect a patient, you utilized an inappropriate CCG hold, and the patient’s head was banged and caused the patient to receive a black eye.

¹⁸ See, Respondent’s Exhibit 1, Investigation Report dated February 25, 2019, pg. 2.

This is in violation of Title 64CSR59 Section 3.13 and MMBH Policy Number MMBHE018, which provide:

Physical Abuse-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. . .

After considering the results of the investigation and your response, I have decided your dismissal was warranted. This action complies with the Department of Health and Human Resources (DHHR) Memorandum 2104, *Progressive Correction and Disciplinary Action* and Section 12.2 of the West Virginia Division of Personnel, *Administrative Rule*, W. Va. Code R. § 143-1-1 *et seq.* . . .¹⁹

35. The security video relied upon in this matter is from a camera that faces the hallway outside the doors to the cafeteria. Most of the incident involving Grievant and M.C. is captured on this security video. The video has no sound and it is of poor quality, as indicated by the fact that seconds at a time are skipped throughout, and people appear to move in a stop-and-go manner. Their movements are not smooth. These problems with the video have been described as “glitchy,” “choppy,” “lags,” and “buffering” by hospital administration and employees.²⁰ For instance, the video does not show the moments of Grievant and M.C. falling to the floor. It shows them both standing, and then, in the very next frame on the video, they are entangled on the floor without seeing how

¹⁹ See, Respondent's Exhibit 7, March 11, 2019, letter.

²⁰ See, testimony of CEO Craig Richards; testimony of John Koerber.

they got there. The video counter goes from 18:19:38, when they are both standing, to 18:19:42, when they are on the ground. As such, there are about 3-4 seconds missing from the video here. There are many other examples of the video skipping seconds, including near the end of the video when Grievant can be clearly seen standing in the middle of the hallway following the incident, then he disappears entirely. Looking at the counter on the bottom of the screen, here the video skips from 18:26:22 to 18:26:28, about six seconds.²¹

36. A review of the video also reveals that there were many eyewitnesses to the incident. At the commencement of the interactions between Grievant and M.C., Ms. Menchaca and two unidentified women, who appear to be wearing scrubs, are standing against the wall on either side of M.C., although they appear to be standing several feet from M.C. Ms. Menchaca and these two unidentified women were present throughout the entire incident. It is noted that these two unidentified women did not attempt to assist, intervene, or otherwise aid Grievant, Ms. Menchaca, or patient M.C. despite being right there. They did move down the hall to get further away from Grievant, M.C., and Ms. Menchaca during the incident, but they remained in the video frame. It is unknown whether these women are employees or patients.

37. An unidentified patient, presumably, L.M., is seen in the video during the incident. However, that patient walked out of the frame shortly into the video. That patient returns, unescorted, toward the end of the video, and walks around those in the floor and toward the two unidentified women.

²¹ See, Respondent's Exhibit 3, unredacted security video on CD, admitted to evidence under seal, and subject to a protective order.

38. In the video, Ms. Menchaca can be seen at times trying to assist, but mostly she stands and watches Grievant and M.C.²² Ms. Menchaca called the code, which is like a call for help, for the incident after they were down in the floor.²³ In response to the code, four unidentified men walk into the frame, one at a time, seconds apart, and get on the floor and begin assisting Grievant. Two additional unidentified women and a man with a clip board, and a woman who appears to be a nurse arrive within minutes. For the most part, only the four unidentified men offer hands-on assistance. The others largely stand by and watch. They could be speaking, but such is unknown as there is no sound.²⁴

39. With the four unidentified men restraining M.C. with hands on, Grievant is freed and is helped first to his knees. He is then helped to his feet by two of the unidentified women, an African-American woman wearing scrubs, and a white woman with long, dark hair, and glasses. Grievant can be seen walking with assistance with one of the unidentified women and Ms. Menchaca away from the crowd on the floor, and down the hall a short distance to stand near the wall. During this entire time, patient M.C. is still in the floor being restrained by the four unidentified men. Grievant can be seen bending over, placing his hands on his knees, turning his back toward the camera, again bending at the waist with his hand on his knees, as if he were going to vomit. Grievant is not seen vomiting in the floor in the video. However, he can be seen going into a restroom after

²² See, Respondent's Exhibit 3, unredacted security video on CD, admitted to evidence under seal, and subject to a protective order.

²³ See, Grievant's Exhibit 2, audio recording of January 30, 2019, Menchaca interview.

²⁴ See, Respondent's Exhibit 3, unredacted security video on CD, admitted to evidence under seal, and subject to a protective order.

this at 18:23:26. He comes out of the restroom at 18:23:55, and returns to this spot down the hallway, still in the video frame.²⁵

40. Grievant can be seen talking to the man with the clip board, who Grievant identified as Mark Poff during his testimony at level three, while both are observing M.C. and the four unidentified men.²⁶ At 18:25:01, Grievant points to M.C. By 18:25:45 the four unidentified men have put on latex gloves. At 18:25:45, one of the four unidentified men can be seen gently touching a spot on M.C.'s forehead just above M.C.'s eye, and he appears to be pointing to an injury. However, given the quality of the video, it is not clear.²⁷ Around this time, Grievant can be seen showing the back of his forearm to Mark Poff, the man with the clip board, suggesting an injury.²⁸

41. At 18:26:16 three of the unidentified men get M.C. up from the floor, and with each having hands on M.C., escort him toward the camera and out of the frame. The fourth unidentified man was in front facing them when M.C. was helped to his feet.²⁹

42. Patient M.C. was on the floor from 18:19:42 until he was helped to his feet at 18:26:16. Therefore, M.C. was on the floor for about seven minutes total. Grievant was on the floor with M.C. without assistance for a little over one minute from 18:19:42 until 18:20:58 when the first unidentified man arrived. Grievant had separated from M.C.

²⁵ See, Respondent's Exhibit 3, unredacted security video on CD, admitted to evidence under seal, and subject to a protective order.

²⁶ Mr. Poff's position at MMBH is unknown, and it is also unknown as to whether he is still employed there.

²⁷ See, *Id.*

²⁸ Grievant's written statement notes that M.C. bit him during the incident, as does the one Careview note that was admitted to evidence.

²⁹ See, *Id.*

and the four unidentified men at 18:22:20. Grievant was on the floor with M.C. for nearly three minutes.³⁰

43. The second unidentified man arrived on the scene at 18:21:19 and immediately got into the floor with Grievant and the first man, and also placed hands on M.C. At 18:21:22 a woman with long, dark hair and glasses arrived on the scene. Then at 18:21:44 the African-American woman wearing scrubs arrived on scene. Neither places hands on M.C. The third unidentified man arrived at 18:21:47, and got on the floor and placed hands on M.C. The fourth unidentified man arrived at 18:21:55 and began assisting the other three men and Grievant.³¹

44. The entire time M.C. is in the floor, he appears to be resisting and fighting the staff members. All four unidentified men had hands on M.C. the entire time they were on the floor with him.

45. It is unknown whether other records are contained in the MMBH computer system pertinent to the January 7, 2019, incident, or the treatment or care M.C. received on that date or between January 7, 2019, and January 11, 2019. The Careview note was the only medical record pertaining to M.C. presented as evidence in this matter. However, there was evidence presented to suggest that photographs of M.C. were taken following the incident, that M.C. was examined following the incident and received treatment for a small injury above his eye, and that Grievant entered a report into the system.³²

³⁰ See, *Id.*

³¹ See, *Id.*

³² See, testimony of Grievant; Grievant's Exhibit 2, CD of audio recording of interview with Krista Menchaca; Respondent's Exhibit 3, unredacted security video on CD, admitted to evidence under seal, and subject to a protective order.

46. No photographs of M.C. were introduced as evidence in this matter. The only images of M.C. introduced as evidence were those captured on the security video. The only evidence of the black eye presented was the testimony of Ms. Woomer, the Investigation Report drafted by Ms. Woomer, the January 17, 2019, suspension letter, and the March 11, 2019, dismissal letter. It is noted that Ms. Menchaca stated during her recorded interview with investigators that she thought she first saw M.C.'s black eye on January 8 or 9, 2019, whichever was the next day she worked following the incident.

47. No documentation regarding the APS investigation into Ms. Woomer's referral was presented as evidence in this matter. The record is largely silent as to that investigation, as well as its conclusions, if any. Ms. Woomer noted in her February 25, 2019, Investigation Report to Mr. Richards in the Summary section, that "APS is responsible for completing their own investigation and submitting their own report. You may contact their office at 304-528-5800 for confirmation of acceptance of the report as well as their activities and conclusions."³³ Despite this, all the witnesses asked about the APS investigation at the level three hearing testified that they had no information about, or knowledge of, the same.

48. No one from APS was called to testify in this matter.

49. Joni Cockrel was not called as a witness at the level three hearing. Ms. Cockrel was not interviewed during the MMBH investigation, and she is not known to have provided a written statement.

50. The patient did not testify at the level three hearing. No statement drafted by the patient, or on his behalf, was presented as evidence in this matter. Ms. Woomer

³³ See, Respondent's Exhibit 1, Investigation Report dated February 25, 2019.

interviewed the patient. A summary of statements attributed to the patient are included in the Investigative Report. Ms. Woomer's interview with the patient was not recorded.³⁴

51. No patient grievance forms were introduced as evidence in this matter.

52. No evidence was presented to suggest that Grievant's nursing license was affected by the allegations discussed herein or his dismissal from MMBH.

53. There has been no evidence to suggest that any of the people who were present in the hallway at any point during the January 7, 2019, incident, other than Grievant and Ms. Menchaca, prepared written statements or incident reports, or were asked to provide the same. Further, the investigators interviewed no witnesses other than Ms. Menchaca and M.C., and none were called to testify at the level three hearing.

54. The security camera video introduced as evidence in this matter was a segment of the video footage filmed by that particular security camera on January 7, 2019. The evidence presented suggests that the camera operates continuously. Therefore, someone selected and digitally copied only that portion of the video starting just prior to Grievant intervening to stop the patient from biting his arm, and ending after the patient was walked from the frame, and presented the same as evidence in the matter. A portion of the interactions among Grievant, Ms. Menchaca, and M.C. leading up to that point is not included in the video.³⁵

55. It is unknown what, if any, discipline Ms. Menchaca received stemming from the January 7, 2019, incident.

³⁴ See, testimony of Michelle Woomer.

³⁵ See, testimony of Grievant; Respondent's Exhibit 2, Grievant's written statement; Grievant's Exhibit 1, Menchaca written statement; Grievant's Exhibit 2, audio recording of Menchaca interview; and, Respondent's Exhibit 3, security camera video footage.

Discussion

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). “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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Respondent argues that it properly dismissed Grievant from employment for the physical abuse of a patient in violation W.VA. CODE ST. R. § 64-59-3.13 and MMBH Policy MMBHE018. Specifically, Respondent asserts that Grievant banged the patient's head during the January 7, 2019, incident while using improper CCG techniques, and such caused the patient to receive a black eye. Grievant denies Respondent's claims. Grievant argues that he intervened to stop a patient from biting himself, a struggle ensued, and they somehow fell to the floor. While on the floor, Grievant asserts that he continued to try to keep the patient from biting himself, but the patient began hitting him, and then the patient grabbed his testicles and began to squeeze and twist them. Grievant asserts that he could not get up because of this and was only able to get free with the assistance of the four-member code team. Grievant denies banging the patient's head. Grievant asserts that at one point, the patient began to bang his own head against the floor. Further, Grievant contends that the patient did not receive a black eye during the incident. Grievant argues that the patient sustained a small bump above his eyebrow with a small opening that required a band-aid and he had bloodied a knuckle just prior to the incident.

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 has been charged with physical abuse of patient M.C. “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.

Grievant’s actions during the January 7, 2019, incident are disputed. Therefore, credibility determinations must be made. In situations where “the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required.” *Jones v. W. Va. Dep’t of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res.*,

Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

On January 16, 2019, Cheryl Williams asked Ms. Menchaca to provide a written statement regarding the January 7, 2019, incident for the APS referral, and Ms. Menchaca complied. Ms. Woomer and Ms. Shields later interviewed Ms. Menchaca on January 30, 2019. Ms. Menchaca was the only person they interviewed for their investigation besides M.C. Although she was subpoenaed by Grievant to testify at the level three hearing, Ms. Menchaca refused to appear, either in person, or by telephone. Therefore, the only evidence from the one identified eyewitness to the entire incident, besides Grievant and patient M.C., is her written statement and the audio recording of her interview with Ms. Woomer and Ms. Shields. Ms. Woomer included a very brief summary of some of the statements Ms. Menchaca made during their interview in her investigation report. The written statement, the audio recording, and those statements attributed to Ms. Menchaca in the investigation report constitute hearsay.

“Hearsay evidence is generally admissible in grievance proceedings. 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.” *Gunnells v. Logan County Bd. of Educ.*, Docket No. 97-23-055 (Dec. 9, 1997). The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. *Id.*; *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).

Ms. Menchaca's written statement is signed and dated, but is not a sworn statement, and it was not notarized. Ms. Menchaca's interview was recorded by Ms. Woomer. This interview was also not a sworn statement. However, Ms. Menchaca's written statement and her statements recorded during the interview with Ms. Woomer and Ms. Shields are overall consistent. It is noted that the audio recording of Ms. Menchaca's interview was not produced by Respondent until after the first day of the level three

hearing. Therefore, Grievant and Grievant's representative were not given the opportunity to review this recording before Grievant testified.

During the interview, Ms. Menchaca addressed some issues not mentioned in her written statement because of the investigators' questions. This does not make the two statements inconsistent. Even though Ms. Menchaca's recorded interview with the investigators was forty-one minutes long, Ms. Woomer selected only a few of her statements for inclusion in the investigation report. Also, some of those statements attributed to Ms. Menchaca therein are not entirely accurate. In the recorded interview, Ms. Menchaca does not say that Grievant "took" M.C. "to the floor." Ms. Menchaca told the investigators that Grievant and M.C. fell to the floor, but that because everything happened so quickly and it was unexpected, she did not know exactly what happened. Ms. Menchaca told investigators that she heard the patient's head hit the floor. However, she did not say that she saw M.C.'s head hit the floor, or that she saw Grievant bang M.C.'s head on the floor. The evidence presented demonstrates that, at some point during the January 7, 2019, incident, M.C. received a bump on his forehead, just above his eye. M.C. did not have a black eye before the incident, and he did not have one immediately afterwards. It is possible that a black eye developed later because of the bump on M.C.'s head; however, whether this occurred is unknown. The first reported sighting of the black eye was by Ms. Menchaca the next day she worked, which was either January 8, 2019, or January 9, 2019.

In both her statement and in her interview, Ms. Menchaca corroborated Grievant's claims that M.C. had punched a wall, was trying to bite himself, had struck and kicked Grievant, that M.C. and Grievant had somehow got to the floor, and that M.C. was

squeezing Grievant's testicles while the two were on the floor. When asked why Grievant just did not get up out of the floor and away from M.C., Ms. Menchaca answered in her interview that she did not think that Grievant could get up because of M.C.'s hold on his testicles. When this statement was disputed by investigators, Ms. Menchaca replied that Grievant was in "a lot of pain" and mentioned Grievant screaming. This is consistent with Grievant's account of the incident. Ms. Menchaca also stated during her interview with investigators that when she went upstairs following the incident, M.C. was in the examination room, and he had a band-aid on his forehead above his eyebrow. This, too, is consistent with Grievant's testimony at the level three hearing and his January 21, 2019, written statement. Ms. Woomer did not include in her report anything about M.C.'s history of self-abuse, him grabbing Grievant's testicles, or that Ms. Menchaca had corroborated Grievant's account in her written statement and during her interview with investigators.

Ms. Woomer testified at the level three hearing. Ms. Woomer was calm and her demeanor was appropriate. She answered the questions asked of her and did not appear evasive. She was a bit short with Grievant's representative during cross examination, but answered his questions. As Ms. Woomer initiated the complaint against Grievant that resulted in his dismissal, and because she conducted the MMBH investigation that concluded abuse was substantiated, she could be viewed as having an interest in this matter, and a bias against Grievant. She also drafted the investigation report upon which Mr. Richards relied in making his decision to dismiss Grievant. Ms. Woomer stated during her recorded interview with Ms. Menchaca that she was assigned to M.C.'s unit and that she had personally witnessed the black eye. She made statements during the interview and during her level three testimony indicating that she was familiar with M.C.'s medical

condition and physical abilities. She also made statements indicating she had observed M.C. and had worked with him in some manner at MMBH. These comments suggest some type of personal bond, or relationship, with M.C., which could bias her against Grievant, and could make it difficult for her to be impartial. Ms. Woomer also testified that she first began looking into M.C.'s black eye on her own because of a feeling "in her being" and her "intuition" that something wrong had occurred. Her connections with M.C. and these comments further suggest bias and interest, and diminish Ms. Woomer's credibility. Additionally, Ms. Woomer failed to include in her investigation report any of the exculpatory evidence. Such omissions are certainly indicative of bias against Grievant.

Grievant testified at the level three hearing. He appeared calm and professional during his testimony. Grievant displayed the appropriate demeanor and attitude toward this action. Grievant answered the questions asked of him, and he was not evasive. Grievant appeared to have a good recollection of what occurred on January 7, 2019, and his statements regarding the same have been consistent. Grievant has an interest in this matter as he is seeking reinstatement to his position which could be a motive to be untruthful. Nonetheless, Grievant was credible.

CEO Craig Richards testified at the level three hearing. He appeared calm and displayed the appropriate demeanor toward the action. He answered the questions asked of him, and he was not evasive. Mr. Richards appeared professional and knowledgeable about the hospital policies and the CCG training. Mr. Richards made the decision to recommend Grievant's dismissal, which was later approved by DHHR's Office of Human Resources Management (OHRM). As such, Mr. Richards could be viewed as having an

interest in this matter, or a bias against Grievant, which could be a motive to be untruthful. However, Mr. Richards was a credible witness.

Mr. Richards was not an eyewitness to the January 7, 2019, incident. However, he testified that he connected the patient's black eye with the January 7, 2019, incident, and that he agreed with the investigators that there was physical abuse. He testified that he based his decision on his review of the security camera video, the investigation report, and the conclusions of the investigators. Mr. Richards testified that he had also reviewed Grievant's January 21, 2019, written statement. Mr. Richards did not meet with Grievant, and he does not appear to have listened to Ms. Menchaca's interview recording. He also did not indicate that he had reviewed her written statement. As he relied on the investigator's report to make his decision, he likely considered only those statements attributed to Ms. Menchaca in the same, which were incomplete and not entirely accurate. Ms. Menchaca's written statement and the statements she made during the interview are consistent, and many corroborate Grievant's statements. Also, if he relied on the investigation report, he did not consider any exculpatory evidence. Mr. Richards did not attend Grievant's predetermination conference, and it is unknown what information from that conference, if any, he considered in making his decision.

Patient M.C. did not testify at the level three hearing; therefore, his credibility cannot be assessed. There are no known written statements from M.C. The investigative report contains statements purportedly made by M.C. regarding the January 7, 2019, incident. However, such is hearsay, as well as double hearsay. His interview with investigators was not recorded.

A review of the evidence presented in this matter reveals that there are many problems with the investigation itself, as well as with the video. These problems place the conclusions of the investigators in question. The video does not show the entire event. Grievant and Ms. Menchaca's statements indicate that the incident began on their way down to dinner, and that along the way M.C. began talking about beating and killing his mother, and they each tried to redirect M.C. without success. Both have also stated that M.C. got mad and punched the wall before the incident in the hallway between Grievant and M.C. began. This is not on the video presented. This video was a segment of a larger, continuous recording from that camera on that date. The segment of the video presented starts in the hallway just moments before Grievant approached M.C. and placed his hand on M.C.'s arm. It looks like someone found the spot on the video where Grievant and M.C. began their struggle standing in the hallway, and then went back a few seconds before to get what he or she believed was the whole exchange. Ordinarily, this would be sufficient. However, here, it is likely a portion of the video was left out inadvertently. Such would be an easy mistake because the video has no sound and only covers the one area outside the cafeteria doors. It is also possible that a portion of the events leading to the incident may not have been captured on this camera as they were walking through the building to the cafeteria when they occurred. The verbal interactions between M.C., Grievant, and Ms. Menchaca are very important. Grievant and Ms. Menchaca have indicated it all began with M.C.'s verbalizations and escalated.

The video contains a very telling event that corroborates the statements of Ms. Menchaca and Grievant. At 18:19:30-31, after what looks to be a verbal confrontation between M.C. and Grievant, M.C. can be seen raising his right forearm up toward his

mouth. At 18:19:32, Grievant approaches M.C. and stands close to M.C., directly in front of him. Grievant then places his hand on M.C.'s raised forearm and pulls it down away from M.C.'s mouth. Grievant can then be seen putting his left hand on M.C.'s left arm and also pulling it down away from his mouth. It appears that Grievant is trying to stop M.C. from putting his forearm in his mouth. Then, the video skips from 18:19:33 to 18:19:38, missing about four seconds in between. It then skips again from 18:19:38 to 18:19:42, missing another three seconds. So, an important part of Grievant and M.C.'s interactions before going to the floor is missing from the video. The video is also missing those crucial seconds during which Grievant and M.C. travel to and land on the floor. In the video, they are seen standing in one frame, and in the very next, they are lying entangled in the floor without showing how they got there. The video counter goes from 18:19:38, when they are both standing, to 18:19:42, when they are on the floor. Accordingly, there appears to be about three or four seconds missing from the video here. The video skips like this, seconds at a time, throughout.

During her recorded interview with Ms. Menchaca, and in her investigation report, Ms. Woomer stated that Grievant "took the patient to the floor." No part of the video shows Grievant taking M.C. to the floor; it does not show them going to the floor. Ms. Woomer testified that this is the video she reviewed during her investigation, and Mr. Koerber testified that this is the video he reviewed with Ms. Woomer and pulled from the camera, and that he did not edit it in. Given this testimony and the video, as presented, Ms. Woomer could not have seen Grievant "take M.C. to the floor." She could not have seen how they got to the floor at all. As such, Ms. Woomer's testimony and report is

inaccurate with respect to this issue and assumes facts that are not supported by the evidence.

Despite Ms. Woomer's assertions that she did not need to interview any other witnesses because "the video speaks for itself," the parties agree that the quality of the video is poor. It is very choppy, the picture is a bit dark, and fine details cannot be discerned. For example, when Grievant and M.C. are on the floor together, Grievant's back is to the camera at times, facing the camera, at others, and his body blocks parts of M.C.'s body from view. This makes it difficult to see what each of them is doing. During the time on the floor before the code team arrives, it appears that Grievant is trying to restrain M.C.'s arms and hands. However, sometimes the viewer cannot see their hands clearly just because of their positioning. Also, the video color is grayish which makes it darker and difficult to see finer details, especially when Grievant and M.C. are entangled on the floor. It is hard to discern where their hands are at times. The camera angle also makes it difficult to see everything that is happening between Grievant and M.C. on the floor. The camera appears to be mounted high near the middle of the wall and faces outward, looking over the hallway. Because of this angle, when Grievant and M.C., as well as the code team when they arrive, are in the floor together, they are in the lower left corner of the video screen, to the side of the camera rather than in front. Also, at times, M.C. is partially obscured by members of the code team, and at others, Grievant is.

The investigation itself is also flawed. First, it is noted that other than Ms. Woomer's testimony and one statement Ms. Menchaca made during her recorded interview, there has been no evidence presented to prove that M.C. sustained a black eye either as a result of the January 7, 2019, incident, or otherwise. There have been no

photos of the black eye presented as evidence, nor medical records regarding it. In fact, no medical records regarding M.C.'s bump on his head or his examination following the incident were introduced as evidence. Grievant has been specifically charged with giving M.C. a black eye and no documentary evidence of such was presented by Respondent.

Further, in the recorded interview with Ms. Menchaca on January 30, 2019, Ms. Woomer does not sound like an impartial fact finder. Many of the statements she makes during the interview suggest that she had already determined that improper CCG techniques were used by both Ms. Menchaca and Grievant, and that Grievant had physically abused M.C. Ms. Woomer sounds angry and/or defensive during much of the recording. She raises her voice, and her tone, at times, sounds snide, accusatory, condescending, impatient, and even exasperated.³⁶ She alternates between lecturing and quizzing Ms. Menchaca about CCG techniques. Ms. Woomer did not question Ms. Menchaca in a calm, professional manner. She also displayed a negative attitude regarding Grievant all through her interview. Her tone and demeanor suggest that she was trying to intimidate Ms. Menchaca. For instance, instead of asking one question and allowing Ms. Menchaca to answer, Ms. Woomer would frequently ask two or three questions in direct succession without stopping between them to allow Ms. Menchaca time to answer. Ms. Woomer frequently raised her voice to talk over, and interrupt, both Ms. Menchaca and Ms. Shields. At one point, Ms. Woomer suggested that Ms. Menchaca, who had been speaking in a quiet voice, was not being honest in her answers, despite Ms. Menchaca's statements being consistent with her earlier written statement. Ms. Woomer can be heard telling Ms. Menchaca that she could tell that she [Menchaca]

³⁶ At one point, Ms. Woomer can be heard making a noise like "urrghhh."

was “holding back a little bit” and that she had to “instruct her [Menchaca] to tell the truth.” A few times, Ms. Menchaca cannot be heard giving an answer to a question, but in some, the interviewers’ responses suggest that she was nodding or shaking her head. A few times, Ms. Menchaca responded that she did not know the answers to questions, but not excessively. She does not sound evasive. Ms. Woomer’s instruction to tell the truth was unwarranted, and sounds like an intimidation tactic.

At times during the recorded interview, Ms. Menchaca sounds like she disagreed with some of the statements Ms. Woomer made, especially those that pertained to whether Grievant could get up off the floor and away from M.C. For example, Ms. Menchaca answered that she did not think he could get up because M.C. had ahold of Grievant’s testicles. Ms. Woomer argued with Ms. Menchaca about that, giving rise to one of the most unprofessional parts of the interview. During this part, Ms. Shields had asked Ms. Menchaca if she thought Grievant could have got up with M.C. “squishing” his testicles, and she answered that Grievant could not move and that he wasn’t moving at all. Ms. Woomer then immediately interjected saying something to the effect of “well, in the video he is moving. He was moving all over the place. He was all _ over _ the _ place.” Then as Ms. Menchaca was trying to respond, Ms. Woomer began talking over her in a loud voice saying something to the effect of “they went from here to here to here” Because Ms. Woomer was talking over Ms. Menchaca, her response cannot be understood.³⁷ Ms. Woomer’s behavior was entirely uncalled for.

Additionally, most of Ms. Woomer’s questions were leading and suggested conclusions during her questions, as well as the answers she was wanting. For example,

³⁷ See, Grievant’s Exhibit 2, at 19:42.

in one question, Ms. Woomer asked Ms. Menchaca if she had ever seen Grievant be “this physically aggressive” with any other patients. That question states within it the conclusion that Grievant was aggressive toward M.C. That is disputed. Ms. Menchaca had not suggested that Grievant was aggressive toward M.C. This type of question shows definite bias. Also, in other questions, Ms. Woomer made negative comments about Grievant and suggests that he was generally abusive and intimidating. Ms. Menchaca told the investigators that Grievant did not intimidate her at all. Ms. Menchaca also stated that Grievant was in a lot of pain and that he was screaming because M.C. had ahold of his testicles. When asked by Ms. Woomer if Grievant was angry or out of control during the incident, Ms. Menchaca answered that Grievant was “kinda-more in a lot of pain; more so than anger.” After that, Ms. Woomer asked if Grievant was in control of himself, and Ms. Menchaca answered, “I think he was in control of himself. Yes, I do.”

Also, problematic is that Ms. Woomer and Ms. Shields did not interview Grievant, or any other witness to the incident besides Ms. Menchaca. In the video, at least ten unidentified people can be seen at one point. Some of these people witnessed the entire incident, and others, only portions. Nonetheless, some of these unidentified people witnessed aspects of the incident that are now disputed in this grievance. Ms. Woomer testified that she did not need interview any other witnesses and the video spoke for itself. However, given its poor quality and its missing parts, it does not. Ms. Woomer and Ms. Shields did not interview any member of the code team even though they would have had up-close views of Grievant and M.C. entangled on the floor and of what each was doing. The investigation report also lacked photographs of the alleged injury and the written statements that Ms. Woomer knew that Ms. Menchaca and Grievant had provided.

The purpose of the investigation was to determine if there had been abuse and whether Grievant gave M.C. a black eye. From Ms. Woomer's statements and demeanor during the recorded interview with Ms. Menchaca, her failure to review the video recording closely enough to see that it was missing crucial sections, her lack of evidence, and her incomplete investigation demonstrate that this investigation was flawed and incredibly insufficient. Further, Ms. Woomer's apparent relationship with M.C., along with her demonstrated bias, taints the investigation. She should not have been allowed to investigate this incident.

Moreover, Ms. Woomer bringing CEO Richards into the investigation also tainted the investigation. According to her investigation report, CEO Richards reviewed the video with the investigators and others present on January 28, 2019. The investigation report goes on to say that “*CEO, Craig Richards summary upon review of the video is that, “CCG was not used in accordance with the trained tactics.’* It is the determination of the investigation team and *all parties in attendance* at the video review, that trained CCG techniques were not utilized by either MMBH staff members at the time of this event involving Unit 6 patient.” (Emphasis added). As CEO Richards is the person who ultimately decides what, if any, discipline is to be recommended, he should have had no role in the investigation. It may have been permissible for Mr. Richards to review the video with the investigators. However, he should not have been involved in any discussions and he should not have made any conclusions about the incident before reviewing all the evidence. While he is a CCG instructor and could have answered any of the investigators' questions about CCG, CEO Richards himself testified at level three that there were a “host” of people trained at CCG at MMBH. If Ms. Woomer needed an

opinion, she had a “host” of others, who had no role in deciding whether discipline should be imposed, to ask. Mr. Richards was to act based upon the evidence presented to him. Here, he reviewed the report, Grievant’s statement, Grievant’s evaluations, and the video. However, he also previously reviewed the video with a group of people who all discussed and concluded at that time that improper CCG, was used well before Ms. Woomer even interviewed the one witness with whom the investigators spoke.³⁸

Ms. Woomer and CEO Richards testified that the size difference between Grievant and M.C., along with M.C.’s physical limitations, played a part in their decision to substantiate abuse. However, this, too, is flawed. Ms. Woomer stated several times that M.C. was small, frail, and could not get around very well, but that Grievant was much bigger. The video shows that M.C. was fighting against Grievant and even though Grievant is bigger, he is having difficulty getting M.C. under control. Ms. Menchaca stated that M.C. was fighting Grievant and trying to kick him, along with grabbing his testicles. It makes no sense whatsoever if M.C. were so frail and weak it took four large men on the code team to get M.C. restrained and calmed down. These code team members were also on the floor with M.C. about one minute longer than Grievant had been.

The events as described by Grievant in his written statement match most closely with what is shown in the video. He was struggling with M.C. in the floor attempting to keep him safe, and only because of the code team intervened he was able to get up from the floor. He first came up to his knees and then he got to his feet, at which time he starts bending over like he is heaving before he goes to the bathroom. This is entirely consistent with what he wrote in a written statement. Ms. Woomer testified that in the video she did

³⁸ See, Respondent’s Exhibit 2, Investigation Report.

not see M.C. have ahold of Grievant's testicles. Given Grievant's and M.C.'s positions, it would be difficult to see such in the video. However, an eyewitness saw it, Ms. Menchaca, but Ms. Woomer appears to have discounted that. Also, some of the code team members may have been able to speak to this issue because of their location. Ms. Woomer did not interview any of them. Ms. Woomer testified that she saw no evidence of Grievant throwing up on the video, but he can be seen bending forward at the waist like he is heaving, and then he goes to the restroom. This contradicts Ms. Woomer's testimony. She also testified that she did not see M.C. punch the wall, but according to the statement and interview of Ms. Menchaca and Grievant's written statement, such happened in the minutes before the video segment presented starts.

Lastly, Ms. Woomer and CEO Richards appeared to place a significant amount of weight in their abuse conclusion on the fact that M.C. cannot be seen moving, or advancing, toward Grievant before Grievant intervenes and places hands on M.C. They contend that because M.C. did not move toward Grievant, placing hands on M.C. was inappropriate. This ignores Grievant's and Ms. Menchaca's statements that M.C., who Ms. Woomer acknowledged had a self-abuse and self-mutilation history, had threatened to bite himself and can be seen raising his forearm up toward his mouth just before Grievant intervenes. Ms. Woomer testified that M.C. was only "getting ready" to raise up his arm, but it did not happen. The video shows that M.C. was raising his arm when Grievant intervened and stopped M.C.'s arm from going up to his mouth.

Grievant and Ms. Menchaca both stated that the immediate danger was M.C.'s threat to bite his own arm and then his raising his arm in an attempt to carry out that threat. Grievant testified that he had seen M.C. mutilate himself in the past and wanted

to prevent that from happening. This is consistent with the video recording and Ms. Menchaca's statements. The evidence further demonstrates that Grievant and M.C. most likely went to the floor unintentionally. There is no evidence that Grievant "took M.C. to the floor." Ms. Menchaca told Ms. Woomer that she could understand how M.C. could have lost his balance while Grievant was pulling his arm down away from his mouth. This is plausible. If M.C. had known issues with his balance, and he started trying to fight and resist Grievant's intervention to prevent self-harm, it is likely he could have lost his balance, leading the two of them to fall to the floor.

The evidence presented demonstrates that M.C. was attempting to mutilate his own arm, which was an immediate danger. Grievant then quickly intervened to prevent the same, not expecting M.C. to resist and fight him, and they somehow fell to the floor. Grievant did not ask for Ms. Menchaca to assist him when he approached M.C. Grievant needed to act fast to prevent M.C. from hurting himself. Grievant testified that he did not anticipate the reaction he received from M.C. because he had had a good rapport with him. Grievant did not sit on top of M.C., he did not strike M.C., and cannot be seen obstructing M.C.'s airway. Grievant can be seen briefly on top of M.C. when they are first seen on the floor, likely because of their fall, but Grievant moves so that most of his body is lying on the floor next to M.C., and he is trying to restrain M.C.'s arms, while M.C. resisted. Unfortunately, it appears Ms. Menchaca, who was a relatively new employee and inexperienced, who had never fully participated in a code, froze because she simply did not know what to do.³⁹

³⁹ See, Grievant's Exhibit 2, January 30, 2019, Menchaca interview recording.

No use of unnecessary restraint or unnecessary force in holding or restraining M.C. can be observed. Further, no improper use of physical or mechanical restraints can be observed in the video recording. There has been no evidence produced to suggest that Grievant intentionally inflicted any pain on M.C. It is certainly possible that M.C.'s own actions could have caused a black eye. M.C. fought against all who tried to restrain him. It took four men other than Grievant to restrain M.C. on the floor after Grievant was able to get away. The four men held M.C. in restraint on the floor for several minutes before he was raised to his feet and returned to his unit.

This case is somewhat reminiscent of *Rees v. DHHR/Mildred Mitchell-Bateman Hospital*, Docket No 2016-0357-DHHR (Jan. 18, 2017). In that case, while the grievant and others were trying to disarm a patient who had a knife and bring him under control, the patient grabbed the grievant's testicles began biting the grievant's arm causing him extreme pain. The grievant wound up striking the patient on the back of his head with a closed fist. The grievant was charged with patient abuse. The Grievance Board found that given the extreme pain the grievant was in, the respondent did not prove that good cause existed to terminate the grievant's employment citing *Barnette v. Division of Juvenile Services*, Docket No. 2013-0086-MAPS (Jan. 8, 2013). Grievant was ordered reinstated to his position. It is noted that not only did Grievant testify as a witness in that case, but also Ms. Woomer was involved as the investigator who had found in her investigation that abuse was substantiated.

Unlike the grievant in *Rees*, Grievant did not strike the patient who was gripping and squeezing his testicles. Instead, Grievant has been accused of using an improper CCG hold and banging the patient's head causing the patient a black eye. The evidence

presented does not prove by a preponderance of the evidence that Grievant banged the patient's head or caused the patient a black eye. The patient certainly may have banged his head, but the evidence presented does not demonstrate that Grievant did the banging. Further, the video shows no evidence of physical abuse as defined in W.VA. CODE ST. R. § 64-59-3.13. The suspension and dismissal letters do not state what specific hold or technique was deemed improper, but Ms. Woomer and Mr. Richards suggested that Grievant's initial approach toward M.C. and his placing his hands on M.C.'s arms were improper. Ms. Woomer also alleged during the level three hearing that Grievant was on top of M.C. in the floor and that such was improper.

No CCG training materials or policies were introduced as evidence in this matter. The only evidence presented regarding CCG rules, training, techniques, and procedure was the testimony of Grievant, Mr. Richards, and Ms. Woomer. Both Grievant and Mr. Richards are certified CCG instructors. Ms. Woomer is not an instructor, but had received a portion of the CCG training and Grievant was her instructor. Both Ms. Woomer and Mr. Richards testified that because M.C. did not move toward Grievant, there was no need for Grievant to place hands on him, and that such was improper. Despite knowing of M.C.'s history of self-harm and self-mutilation, Ms. Woomer discounted the notion that M.C. had threatened to bite himself, and ignored the fact that M.C. was raising his forearm toward his mouth when Grievant intervened. Mr. Richards did not indicate that he knew of M.C.'s history of self-harm and self-mutilation. He testified that he knew of some of M.C.'s medical issues, but there was no mention of self-harm or mutilation. It is unknown whether Mr. Richards was informed that Grievant and Ms. Menchaca had stated that M.C.

had threatened to bite himself just prior to the intervention. There is no mention of the threat in the investigation report.

The evidence demonstrates that based upon his knowledge of M.C.'s history, hearing his threat, and seeing M.C. then raise his arm toward his mouth, Grievant recognized the immediate danger of M.C. harming himself. That is why he intervened. This is certainly plausible and is consistent with the video and Ms. Menchaca's written statement and recorded interview. Grievant pointed out during his testimony at level three that had he not intervened when he did, knowing of M.C.'s history and hearing his threat, his failure to intervene would have been considered neglect. This ALJ agrees. Further, Respondent introduced no CCG policies or procedures as evidence in this matter. Without such information, there is no way to determine if CCG was violated. Even if Grievant had violated CCG at some point during incident on the floor, before the code team arrived, Grievant had been in extreme pain from M.C. squeezing his testicles. The *Rees* decision demonstrates that a violation of patient protocol, including the striking of an attacking patient, does not always constitute good cause to terminate a grievant's employment. However, unlike *Rees*, despite his pain, Grievant did not strike, or attempt to strike, M.C.

It is evident that the investigation performed by Ms. Woomer was biased, incomplete, and significantly flawed. Ms. Woomer had concluded that Grievant physically abused M.C. before she started her investigation. Ms. Woomer was not acting as a fact finder. She relied only on evidence that supported her position, and included only that in her report. Mr. Richards relied on this report to make his decision. Mr. Richards had also been a part of the investigation and had reached a conclusion on Grievant's actions

before he ever heard from Grievant. There is simply no reliable evidence to suggest that Grievant behaved as charged. As the video has no sound, and as it does not include the entire incident, the activity can easily be taken out of context and misconstrued. M.C. cannot be seen engaging in self-mutilation in the video because, fortunately, Grievant intervened and prevented it. Ms. Woomer's logic would seem to require the patient to have mutilated himself, or otherwise caused himself harm, before a staff member could intervene and place hands on the patient.

Accordingly, Respondent has failed to prove by a preponderance of the evidence that Grievant physically abused the patient at any time during the January 7, 2019, incident. Respondent has also failed to prove by a preponderance of the evidence that Grievant banged the patient's head causing him a black eye during the incident or that he violated CCG procedures. As such, Respondent has failed to prove that there was good cause for Grievant's dismissal. Therefore, this grievance is GRANTED.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

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: “[t]he 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.

4. In situations where “the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required.” *Jones v. W. Va. Dep’t of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res.*, Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981).

In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

5. "Hearsay evidence is generally admissible in grievance proceedings. 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." *Gunnells v. Logan County Bd. of Educ.*, Docket No. 97-23-055 (Dec. 9, 1997). The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their

statements. *Id.*; *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).

6. Respondent has failed to prove by a preponderance of the evidence that Grievant physically abused the patient at any time during the January 7, 2019, incident. Respondent has also failed to prove by a preponderance of the evidence that Grievant banged the patient's head causing him a black eye during the incident or that he violated CCG procedures. As such, Respondent has failed to prove that there was good cause for Grievant's dismissal.

Accordingly, this Grievance is **GRANTED**. Respondent is **ORDERED** to reinstate Grievant to his registered nurse position, and to pay him back pay back to the date of his suspension, plus interest, and to restore all benefits that he would have earned had his employment not been terminated, including annual leave, sick leave, retirement, and tenure. All references to the January 2019 suspension and dismissal **SHALL** be removed from Grievant's record, as if it never occurred. Further, all references to Grievant being accused of physical abuse of a patient arising from the events occurring on January 7, 2019, are **ORDERED REMOVED** from Grievant's personnel file and any and all other administrative records, or files, maintained by Respondent, as if the suspension and dismissal did not occur.

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, 2018).

DATE: November 19, 2019.

Carrie H. LeFevre
Administrative Law Judge