

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

FRANCIS DUMAS,

Grievant,

v.

Docket No. 2019-0507-DHHR

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

Respondent.

DECISION

Grievant, Francis Dumas, is employed by Respondent, Department of Health and Human Resources/William R. Sharpe, Jr. Hospital. On October 21, 2018, Grievant filed this grievance against Respondent stating, "Indefinite suspension without due process. Grievant charged annual leave without his request or consent." For relief, Grievant seeks, "To be made whole in every way including cessation of coerced leave charges during suspensions."

Grievant filed directly to level three of the grievance process.¹ On December 2, 2018, Grievant requested permission to amend his grievance to include his subsequent dismissal from employment. His dismissal resulted from the same allegations of physical abuse that formed the basis of his originally grieved suspension. On December 11, 2018, the request was granted. A level three hearing was held before the undersigned at the Grievance Board's Westover office on July 10, 2019.² Grievant appeared in person for part of the hearing and was represented by Gordon Simmons, UE Local 170, West

¹West Virginia Code § 6C-2-4(a)(4) permits a grievant to proceed directly to level three of the grievance process when the grievance deals with the discharge of the grievant.

²After being continued from March 11, 2019.

Virginia Public Workers Union. Respondent appeared by Patrick Ryan, CEO of Sharpe Hospital, and was represented by Katherine Campbell, Assistant Attorney General. At Grievant's request, the record was left open for recordings of eyewitness interviews.³ This matter became mature for decision on November 8, 2019. Only Respondent submitted written proposed findings of fact and conclusions of law.

Synopsis

Grievant was employed as a Health Service Worker at Sharpe Hospital. Respondent fired Grievant for hitting a patient. Grievant contends he did not strike the patient, but simply diverted the patient's head to stop him from spitting on, biting, and headbutting staff. Respondent proved by a preponderance of evidence that Grievant intentionally hit the patient in retaliation for being spit on. This was good cause for dismissal. Accordingly, 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 had been employed as a Health Service Worker at William R. Sharpe, Jr., Hospital (Sharpe), a psychiatric facility operated by the West Virginia Department of Health and Human Resources (DHHR), hereinafter "Respondent", since 2016.
2. Grievant was accused of striking patient A.P.⁴ with a closed fist on October 14, 2018.

³These recordings were made by Sharoon Reed, a Behavioral Health Advocate with Legal Aid of West Virginia, during her independent investigation of the incident.

⁴Only the patient's initials will be used to protect his privacy.

3. On October 16, 2018, Respondent sent Grievant a letter notifying him of his suspension pending investigation. (Respondent's Exhibit 5)

4. On October 16, 2018, Grievant provided Respondent the following written statement of the incident: "During support call I was enforcing staff holding the patient while he was struggling the Patient threatened to Bite so Staff Put a pillow Between the wall and his head The patient Started spitting on The Staff So I Reached up Quickly to Try to Divert his head from Being able to Spit and Bite." (Respondent's Exhibit 6)

5. On November 28, 2018, Sharpe CEO Patrick Ryan sent Grievant a letter informing him of his dismissal. (Respondent's Exhibit 6)

6. CEO Ryan stated therein that Adult Protective Services (APS) had substantiated physical abuse and went on to reason that "[a]fter reviewing your response and having considered all the information made known to me, I have decided that your dismissal is warranted." (Respondent's Exhibit 6)

7. CEO Ryan reviewed the findings of the internal investigation led by Shawna Huddle, Chief Compliance Officer at Sharpe, and the independent investigation by Legal Aid of West Virginia (LAWV). (CEO Ryan's testimony)

8. LAWV's independent investigation was conducted by Sharoon Reed, a LAWV Behavioral Health Advocate stationed at Sharpe. (Respondent's Exhibit 3)

9. Both the internal and LAWV investigations substantiated that Grievant struck patient A.P. (Respondent's Exhibit 1 & 3)

10. CEO Ryan dismissed Grievant due to the substantiation of physical abuse. (CEO Ryan's testimony)

11. The legislative rule establishing the rights of patients at State operated behavioral health facilities defines “physical abuse” 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 (1995).

12. Sharpe also abides by DHHR’s APS Policy, which defines abuse as “the infliction or threat to inflict physical pain or injury on or the imprisonment of any incapacitated adult or facility resident.” (Respondent’s Exhibit 2)

13. Sharpe does not intermingle its internal investigations with any other investigation, including those done by LAWV. (Ms. Huddle’s testimony)

14. The internal investigators reviewed video of the hallway outside patient A.P.’s room and the statements made by numerous witnesses. (Ms. Huddle’s testimony)

15. Randall McDaniel, the Infection Control Coordinator at Sharpe, assists in internal investigations of patient abuse.

16. The incident in question occurred primarily in patient A.P.’s room. (Mr. McDaniel’s testimony)

17. There are no video cameras in patient rooms. (Mr. McDaniel's testimony)
18. While a number of individuals on the scene either stated that Grievant did not strike patient A.P. or that they did not see anything, three confirmed the physical abuse. All individuals in the former category knew Grievant, whereas the three who confirmed the abuse did not know Grievant. (Ms. Huddle's testimony)
19. The three individuals confirming the abuse diverged in their accounts, including the number of strikes by Grievant and whether the strikes were open or closed fist. (Ms. Huddle's testimony)
20. Darla Altabello and Grievant were the only ones present during the incident to testify at the level three hearing.
21. Darla Altabello was a Registered Nurse (RN) at Sharpe and began working there two weeks prior to the incident. At the time of the incident, Ms. Altabello was observing workers as part of orientation. (Ms. Altabello's testimony)
22. Workers at Sharpe are taught to gain control of unruly patients through Crisis Prevention Intervention (CPI) and CCG holds. These holds entail controlling each limb. (Ms. Altabello's testimony)
23. When Grievant encountered patient A.P. in the hallway, numerous staff already had A.P. in a CPI hold against the wall. (Ms. Altabello's testimony)
24. Patient A.P. was very upset and was using foul language. Staff tried to calm A.P. and lead him to his room. As he was being led to his room, A.P. got into a physical altercation with another patient. (Ms. Altabello's testimony)

25. As patient A.P. spit, kicked, and struggled, Grievant intervened. Grievant got behind A.P. and assisted other staff in placing him in a CPI hold against the wall in his room.

26. While in this hold, patient A.P. spit on Grievant.

27. Grievant pulled his arm back all the way back and struck patient A.P. with a closed fist in the base of his neck. (Ms. Altabello's testimony)

28. A.P. responded with some variation of "You hit me" or "Why did you hit me." (Ms. Altabello's testimony)

29. After striking patient A.P., Grievant walked away with a look of disgust while wiping spit from his face and arm. (Ms. Altabello's testimony)

30. Sharpe trains employees that it is never appropriate to strike a patient. (Ms. Altabello's testimony)

31. During the course of an independent investigation, Ms. Reed conducted recorded interviews with eyewitnesses who confirmed the abuse. These eyewitnesses were Darla Altabello, Lisa Yarbrough, and Rico Washington.

32. Ms. Reed also conducted recorded interviews with Grievant and patient A.P.

33. While Grievant denied striking patient A.P. and stated that he put his hand up to prevent A.P. from turning to spit and headbutt, none of the other information provided in the recordings of Ms. Reed's interviews exonerated Grievant.

34. The strike of patient A.P. by Grievant was not an acceptable hold or physical restraint.

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 contends that it properly dismissed Grievant from employment for physically abusing a patient in violation W.VA. CODE ST. R. § 64-59-3.13. Specifically, Respondent asserts that Grievant struck patient A.P. in the back of his neck with a closed fist in retaliation for being spit on. Respondent contends that this constitutes misconduct and is good cause for dismissal. Grievant denies intentionally hitting patient A.P., but asserts he may have accidentally done so as he reached up to prevent A.P. from turning to spit on, bite, and headbutt staff.

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). “The term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which

the employer has a right to expect of its employees.” *Graley v. Parkways Econ. Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991) (citing *Buskirk v. Civil Serv. Comm’n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) and *Blake v. Civil Serv. Comm’n*, 172 W. Va. 711, 310 S.E.2d 472 (1983)); *Evans v. Tax & Revenue/Ins. Comm’n*, Docket No. 02-INS-108 (Sep. 13, 2002); *Crites v. Dep’t of Health & Human Res.*, Docket No. 2011-0890-DHHR (Jan. 24, 2012).

Grievant was charged with physically abusing patient A.P. “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.

Whether Grievant intentionally hit patient A.P. is at issue. 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).

Grievant and Ms. Altabello were the only eyewitnesses to testify. In the course of both internal and independent investigations, investigators Huddle, McDaniel, and Reed also interviewed other eyewitnesses and conveyed this hearsay at the level three hearing. "Hearsay" is "a term applied to that species of testimony given by a witness who relates, not what he knows personally, but what others have told him, or what he has heard said by others." BLACK'S LAW DICTIONARY 722 (6th ed. 1990). "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).

While some eyewitnesses told investigators that Grievant struck patient A.P., most said he did not or that they did not see him do so. All in the latter category knew Grievant, whereas none of the three eyewitnesses who confirmed the allegations knew Grievant. Ms. Reed interviewed and recorded only those eyewitnesses who confirmed the abuse, as well as patient A.P. and Grievant. These recordings were submitted into evidence. The eyewitnesses confirming the allegations varied in their accounts, including the number of strikes and whether strikes were open or closed fist. Presumably, these individuals were available to testify but were not called. Due to the inconsistency of these accounts and the inability of the undersigned to make credibility determinations, the undersigned will discount this hearsay testimony.

In determining the credibility of Grievant and Ms. Altabello, not all the credibility factors are in play. The relevant factors are bias and consistency of prior statements. The undersigned notes Grievant's obvious bias resulting from his interest in this case. Ms. Altabello lacked bias, as she was a new employee at the time of the incident, did not

know Grievant, no longer worked for Respondent or the State, and had already moved out of the area when she testified. Her demeanor was appropriately confident. Ms. Altabello's story remained consistent throughout the investigations. She testified with certainty that she observed Grievant pull his arm all the way back, as if he were shooting an arrow, and release it with a closed fist into the base of A.P.'s head and neck. She testified that Grievant walked away from A.P. agitated, while wiping his face and arm. Ms. Altabello did not see A.P. spit on Grievant and did not jump to that conclusion. She simply testified to what she observed: that Grievant wiped his face and arm as if spit was on them. She also testified that Grievant may have struck A.P. a second time, but that she could not say for sure. Ms. Altabello had worked as a nurse for over three decades and seemed versed in medical observations. While Grievant confirmed Ms. Altabello's suspicion that A.P. spit on him, Grievant's story seemed self-serving in also stating that Grievant reached up to A.P.'s head to stop him from turning to spit on and headbutt staff. Grievant was inconsistent and seemed to be hedging his story when he told independent investigator Reed that he may have accidentally hit A.P. while attempting to stop Grievant from spitting again. In his interview with Investigator McDaniel, Grievant did not state that he may have accidentally hit A.P., but did admit that he was mad and agitated after A.P. spit on him.

The legislative rule does not allow for hitting a patient under any scenario, and implicitly permits only the necessary use of physical holds and restraints. Grievant's acquiescence to the possibility that he accidentally struck A.P. adds further credibility to Ms. Altabello's testimony that she saw Grievant strike A.P. Due to Grievant's admission and the credibility of Ms. Altabello's testimony in this regard, all that remains for

determination is whether Grievant intended to strike patient A.P. Ms. Altabello credibly testified that Grievant pulled his closed fist back like an arrow before releasing it into the base of A.P.'s head and that Grievant walked away from A.P. with a look of disgust while wiping his face and arm as if spit upon. Combined with Grievant's testimony that A.P. spit on him, Ms. Altabello's testimony shows that it was more likely than not that Grievant acted with retaliatory intent when he hit patient A.P.

Respondent proved that Grievant showed a willful disregard of Sharpe's interest through his actions, and a wanton disregard of its standards of behavior. Thus, Respondent proved that its dismissal of Grievant was not arbitrary and capricious. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998). In light of these factual and legal determinations, Respondent acted appropriately in terminating Grievant's employment. Respondent proved by a preponderance of evidence that Grievant physically abused patient A.P.

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. The legislative rule establishing the rights of clients of State-operated behavioral health facilities defines “physical abuse” 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.

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 witnesses’: 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. Respondent proved by a preponderance of evidence that Grievant physically abused patient A.P. by intentionally hitting him with a closed fist in the back of his neck.

Accordingly, the grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* 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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: December 13, 2019

Joshua S. Fraenkel
Administrative Law Judge