

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JENNIFER J. HOBACK,

Grievant,

v.

Docket No. 2019-0264-CONS

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

Respondent.

DECISION

Grievant, Jennifer J. Hoback, filed two expedited level three grievances against her employer, Respondent, Department of Health and Human Resources (“DHHR”), Mildred Mitchell-Bateman Hospital (“MMBH”). The first is dated July 6, 2018, and states as follows: “[f]alse allegation of verbal/physical abuse towards pt. on June 15, 2018, made by Sherrie Cox—Nurse Manager. I had a meeting with Cheryl Williams—CNE on April 20, 2018 regarding fear of retaliation regarding being interviewed by Charleston back in December 2017 regarding Sherrie Cox-bullying and promoting a toxic workplace. As of today, July 6, 2018 I have not been cleared of this allegation. Please investigate and clear.” No other relief is requested in this grievance. This grievance was originally assigned the docket number 2019-0041-DHHR. The second grievance is dated July 30, 2018,¹ and states as follows: “[t]ermination based on false allegation of physical abuse of patient. Grievant had previously complained about treatment by her supervisor who made false report of abuse in retaliation.” As relief sought, Grievant seeks “[r]einstatement, back pay and all other relief legally available.” This grievance was

¹ This grievance was received by the Grievance Board on August 1, 2018. However, as the envelope was postmarked July 31, 2018, such is considered the filing date.

initially assigned the docket number 2019-0168-DHHR. The two grievances were consolidated by Order entered August 20, 2018.

The level three hearing on the consolidated grievance was conducted on November 11, 2018, before the undersigned administrative law judge at the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person and by counsel, Scott H. Kaminski, Esquire, Kaminski Law, PLLC. Respondent appeared by counsel, James "Jake" Wegman, Esquire, Assistant Attorney General. This matter became mature for decision on December 26, 2018, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a Registered Nurse at Mildred Mitchell-Bateman Hospital. Respondent dismissed Grievant charging her as having engaged in physical and verbal abuse of a patient. Grievant denies Respondent's claims, arguing that she was accused of this misconduct and dismissed in retaliation for making complaints about her supervisor's behavior. Respondent failed to prove by a preponderance of the evidence that Grievant engaged in physical abuse of a patient or verbal abuse of a patient. Respondent failed to prove that there was good cause for Grievant's dismissal. Therefore, the 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 five years.

2. Sherrie Cox is a registered nurse and is employed by Respondent as a Nurse Manager (NM) at MMBH. At the times relevant herein, NM Cox was Grievant's direct supervisor.

3. Cheryl Williams is employed by Respondent as the Chief Nurse Executive (CNE) at MMBH.² NM Cox reported directly to CNE Williams. While CNE Williams was not Grievant's direct supervisor, she was in Grievant's chain of command.

4. At all times relevant herein, Kiki Bullock was employed by Respondent as a contract Health Service Worker (HSW) at MMBH. Scott Jacobs was also employed by Respondent as an HSW at MMBH. JoAnne Beals was employed by Respondent as a Licensed Practical Nurse (LPN) at MMBH. Sherrie Cox was the direct supervisor for each of these employees.

5. Jami Boykin is employed by Respondent as a registered nurse and is employed as a Nurse Manager.

6. Terri Stone is employed by Legal Aid of West Virginia as a Patient Advocate. She works from an office at MMBH and provides advocacy services for patients there. The record of this grievance is silent as to Ms. Stone's full duties and responsibilities, and who, if anyone, supervises her work. However, Ms. Stone is

² The witnesses in this matter also refer to CNE Williams as the Director of Nursing, or DON.

apparently assigned to conduct investigations regarding allegations of abuse toward patients at MMBH. The record is also silent to Ms. Stone's training and education, or if any other people are employed at MMBH as Patient Advocates.

7. Craig Richards is the CEO of MMBH. Tamara Kuhn is employed by Respondent as the Director of Human Resources at MMBH.

8. Sherrie Cox became the nurse manager for Unit 3, where Grievant worked, in March 2018. However, it had been announced in or about November 2017, that Cox was selected for the position. After learning that NM Cox had received the nurse manager position, several staff members on Unit 3 sought, and were granted, transfers to other units at MMBH.³ NM Cox was aware of these transfer requests. According to NM Cox's own testimony, because of an EEO investigation that was at least in part about allegations of bullying and racism made against her by other employees, MMBH delayed placing NM Cox in the nurse manager position for Unit 3 until March 2018.

9. After Grievant learned that NM Cox had received the nurse manager position, she wrote an anonymous letter to CEO Richards explaining her concerns about NM Cox and her fear that NM Cox would retaliate against her once in the manager position. Grievant sent this letter to CEO Richards through interdepartmental mail.⁴ It is unknown what, if anything, happened to this letter. CEO Richards testified that he had no recollection of receiving the anonymous letter.

³ See, testimony of Joseph Gardner; testimony of Jackie King; Grievant's Exhibit 1, transfer request of Jackie King; testimony of Shanice Jones; Grievant's Exhibit 5, transfer request of Shanice Jones.

⁴ See, testimony of Grievant; testimony of Craig Richards.

10. On or about the day after Grievant mailed her anonymous letter, Carlotta Gee and/or Dawn Adkins arrived at MMBH to conduct an EEO investigation and began interviewing employees. Given the timing, Grievant believed her letter had something to do with the investigation. However, according to Carlotta Gee, Grievant's letter had nothing to do with this investigation, and that another EEO complaint about working conditions at MMBH caused the investigation.⁵ It is unknown who filed that EEO complaint or what it alleged.

11. Grievant never filed a complaint with the EEO office about NM Cox. However, NM Cox believed that Grievant, and possibly others, had. NM Cox was aware that other staff members had complained about her behavior. It is unknown if NM Cox assumed that the EEO investigation was primarily about her conduct, or if she was informed of this.

12. Grievant was interviewed by Carlotta Gee, investigator for the EEO, at MMBH, along with many other employees. During Grievant's interview, Ms. Gee specifically asked about NM Cox. Grievant had another conversation with Ms. Gee sometime later during which Ms. Gee again asked about NM Cox.

13. Carlotta Gee and/or Dawn Adkins interviewed around fifty employees, including Grievant, NM Cox, and NM Boykin, during their investigation.⁶ Several of the witnesses who testified at the level three hearing had been interviewed during the EEO investigation and had been asked about NM Cox.

⁵ See, testimony of Carlotta Gee.

⁶ See, testimony of Carlotta Gee, testimony of Grievant; testimony of Sherrie Cox; testimony of Jami Boykin.

14. Despite the number of witnesses who testified that they were interviewed as part of the EEO investigation by “people from Charleston,” no one, including CEO Richards, appeared to know the results of the investigation. CEO Richards did not receive a copy of any report from that investigation, nor did he know the conclusions of such, if any. CEO Richards explained that DHHR’s Office of Human Resources Management (OHRM) handled with such matters. No one from OHRM was called to testify. NM Cox did not receive any discipline as a result of the investigation.

15. Given NM Cox’s testimony about the delay of MMBH to place her in the Nurse Manager position after she was selected for the job while the EEO investigation was pending, it would appear that someone in administration was informed something about the investigation. NM Cox suggested in her testimony that the delay was related to the EEO investigation.

16. CNE Cheryl Williams was not called as a witness at the level three hearing, nor was Tamara Kuhn. CNE Williams was NM Cox’s direct supervisor at the time, and Ms. Kuhn, as HR Director, is regularly in contact with OHRM regarding personnel issues.

17. Grievant and NM Cox had worked together for between two and three years when NM Cox was placed in the Nurse Manager position for Unit 3 in March 2018. It was common knowledge that they did not get along very well. NM Cox had yelled at Grievant in front of many coworkers once when Grievant had just started working there, and NM Cox made snide comments about Grievant. NM Cox had been heard referring to Grievant as “that stupid hick nurse,” “stupid hillbilly,” or “dumb ass hillbilly.”⁷

⁷ See, testimony of Joseph Gardner.

18. In or about April 2018, Grievant spoke with CNE Williams to express her concerns about Cox being her supervisor and her fears of retaliation. Someone informed NM Cox about Grievant's complaint to CNE Williams.⁸ Grievant continued to work on Unit 3 under NM Cox. Grievant did not seek a transfer.

19. On June 7, 2018, NM Cox had conducted a "coaching session" with Grievant. NM Cox gave Grievant a "coaching session" document, which appears like a write-up, stating the following:

It was determined that on April 20, 2018, you did not ensure that the following was completed during a face check/security check:

- 0700 Outgoing signature(s) not noted for First & Last rounds
- 1900 Incoming/outgoing signature(s) not noted for First & Last rounds
- No initials or times noted for licensed spot checks for 1000 hour through 1800 hour
- No initials or times noted for licensed spot checks for 2300 hour through 0200 hours.⁹

20. The coaching session was issued over a month after the alleged conduct occurred which was about a month after Cox was promoted to nurse manager. On the coaching session sheet, NM Cox wrote the following comments: "Spoke [to] staff about expectations. Staff voiced concerns about time frames and time constraints for various reason unable to complete rounds as required." Grievant wrote in the "Employee's Comments" section as follows:

To begin with, without looking back at documentation I can only imagine that there were 3 treatment teams going on different floors (ie. A-4); not to mention psych emergencies on admission unit (A-3). Not comfortable with signing off [on]

⁸ See, testimony of Sherrie Cox.

⁹ See, Grievant's Exhibit 3, "Coaching Session" document, June 7, 2018.

round I did not actually make do (sic) to time constraints and traveling Treatment Team. I am fully aware of the comings and goings of the unit and have faith in the face check individual and staff assigned.(Emphasis in original).¹⁰

21. Despite NM Cox's testimony that many of these coaching documents were distributed to other employees, and that she was not the source of them, Grievant was the only staff member NM Cox called into her office to deliver this document and coach her on the issue. Grievant asked her coworkers if any of them had received one of these coaching documents/coaching sessions, and found that none of them had.

22. On June 15, 2018, eight days after the coaching session, Grievant worked her regular shift at MMBH on Unit 3. Grievant's shift began at 6:30 a.m. and was to end at 7:00 p.m.

23. Sometime during the morning of June 15, 2018, one of Grievant's patients started being loud, disruptive, and combative, and Grievant called the patient's doctor to inform him. The patient had been behaving in this manner for a couple of hours and it was escalating.¹¹ The doctor ordered the patient be given an injection of medication to calm her down. Such is common at MMBH.¹²

24. Grievant, along with four other MMBH staff members, went to the patient's room to administer the injection. The five staff members filed into the room together. The staff members with Grievant were NM Cox, LPN JoAnne Beals, HSW Kiki Bullock, and HSW Scott Jacobs. When they got to the room, the patient was still screaming and being

¹⁰ See, Grievant's Exhibit 3, "Coaching Session" document, June 7, 2018.

¹¹ See, testimony of JoAnne Beals.

¹² See, testimony of Jami Boykin; testimony of JoAnne Beals.

verbally abusive, had retreated to her bathroom, and was in the shower. The patient got in the shower in an attempt to avoid getting the injection of medication.

25. Grievant and HSW Bullock went into the bathroom first to ask the patient to get out of the shower so that the injection could be administered. HSW Jacobs and NM Cox came into the bathroom behind them. LPN Beals remained in the bedroom area of the patient's room for safety reasons because she had the two syringes that would be used to administer the injection of medication.

26. The bathroom was a very small, confined space. The patient was naked and in the shower with the water running. The patient was screaming repeatedly that she "did not want the shot." The patient was extremely loud. Grievant and HSW Bullock held up blankets and/or towels in order to provide the patient some privacy when she got out of the shower as HSW Jacobs was present. However, instead of stepping out of the shower, the patient lunged at Grievant and attacked her. Throughout the attack the patient continued to scream and cursed at Grievant, calling her a "bitch." The patient struck Grievant and scratched Grievant's arms.¹³ The patient was still wet from the shower and so was the floor. Grievant and the patient wound up slipping and falling. They ended up on the floor and, at least somewhat, wound up lying across the toilet.¹⁴

27. HSW Jacobs and HSW Bullock intervened to try to help gain control of the patient, and to get patient up and off of Grievant.¹⁵ HSW Jacobs and HSW Bullock got the patient up and under control, then escorted her back to her bed. The patient was still

¹³ See, Grievant's Exhibit 7, photographs of Grievant's injuries.

¹⁴ See, testimony of Grievant; testimony of Kiki Bullock.

¹⁵ See, testimony of Kiki Bullock; testimony of Scott Jacobs.

aggressive and combative. When the patient was back at her bed and restrained, LPN Beals administered the two injections as ordered by the doctor.

28. The entire incident, including both the patient's attack in the bathroom and the administering of the injection, lasted only a few minutes. The patient was not injured in any way during the entire incident. There has been no claim that any marks were left on the patient's body or face. It has not been suggested that the patient was taken for examination or medical care following the incident. It is undisputed that the patient left a number of large red scratch marks on Grievant's forearms.

29. After LPN Beals administered the injection, Grievant, LPN Beals, NM Cox, HSW Bullock, and HSW Jacobs filed out of the patient's room, just as they had entered the room earlier.¹⁶ They all returned to their regular duties. Thereafter, Grievant continued to work on Unit 3 with this patient for at least five more hours.

30. Sometime after the incident with the patient, NM Cox reported to CNE Williams that during the incident Grievant engaged in physical and verbal abuse of the patient. NM Cox alleged that during the incident Grievant attacked the patient, slapped and cursed the patient, put her hand across the patient's face and pushed down on it, and antagonized and cursed at the patient while the medication was being administered. NM Cox alleged that Grievant called the patient a "piece of shit," a "bitch," and a "little bitch." NM Cox also alleged that during the incident she and the others directed Grievant to leave the patient's room to de-escalate the situation several times, but Grievant would only leave the room briefly then return to further antagonize the patient.

¹⁶ See, testimony of Grievant; testimony of Jami Boykin.

31. Based upon NM Cox's allegations, CNE Williams completed a "Patient Grievance Form" and the matter was referred to administration for investigation. On the "Patient Grievance Form," CNE Williams wrote the following to describe the problem being grieved: "During the administration of an IM PRN the patient attacked RN J.H. It was reported that J.H. RN attacked the patient after being attacked. Also calling the patient a piece of shxx and a bxxch."¹⁷ Despite this form being completed by CNE Williams, she did not sign the same. In fact, the signature line on the form bears no signature whatsoever.

32. According to the testimony of Sherrie Cox, patients normally complete their own patient grievance forms, unless they cannot write. In such circumstances, she knew of HSWs assisting patients in completing the paperwork.

33. The patient did not sign the Patient Grievance Form and there is no mention in the form of the patient lodging a complaint. There is no indication from the Patient Grievance Form that any statements thereon were made by the patient. Further, no evidence was presented to suggest that CNE Williams or NM Cox met with the patient before completing this form. It is also unknown why a "Patient Grievance Form" was filed in this situation.

34. CNE Williams also completed an Adult Protective Services (APS) referral as a result of the incident, but little, if any, documentation relating to such was presented at the level three hearing. The only mention of the APS referral was in the testimony of NM Cox, LPN Beals, and Grievant, and in the Investigation Summary section of the Investigation Report. CNE Williams had Grievant, HSW Bullock, HSW Jacobs, LPN

¹⁷ See, Joint Exhibit 3, unnumbered page 2, "Patient Grievance Form."

Beals, and NM Cox draft written statements about the incident for the APS referral.¹⁸ The written statements drafted by LPN Beals and NM Cox were presented as evidence at the level three hearing. The statements drafted by Grievant, HSW Jacobs, and HSW Bullock were not introduced.

35. At or about 2:30 p.m. on June 15, 2018, CNE Williams personally informed Grievant that an allegation of patient abuse had been made against her, and advised Grievant that she was suspended pending investigation of the incident. Thereafter, Grievant clocked out and left MMBH. Until that time, Grievant had worked on Unit 3 since the time of the incident. Grievant cared for patients, including the patient who attacked her, as she normally would. She was not pulled from the floor.

36. By letter dated June 18, 2018, CEO Richards informed Grievant in writing of her suspension pending investigation stating, in part, as follows:

Mildred Mitchell-Bateman Hospital has received allegations that you physically and verbally abused a patient and determined that an investigation into the matter [is] warranted. During this investigation, you will be suspended without pay .
..

On June 15, 2018, allegations were reported that while trying to administer a PRN to a patient [initials redacted], when entering the patient room the patient was in the shower and began screaming and cursing the staff then came out of the shower and lunged toward staff at which time you came at the patient, pushing and cursing at her with the patient falling backwards across the toilet and slapped the patient while she was lying across the toilet. While in a level two CCG hold you put your right arm and hand forward and covered/pushed on the patient's mouth with the flat of your hand. Even after being redirected by the other staff on the code, you continued to taunt the patient. When the code escalated to a Level 3 hold while medication was being administered, you were at the

¹⁸ See, Joint Exhibit 3, Investigation Report, unnumbered pg. 4, "Investigation Summary;" testimony of Sherrie Cox.

head of the patient calling the patient a “bitch, little bitch and a piece of shit.” Also, you were heard tell the patient a few times “you don’t/can’t talk to your mother like that.”

On June 15, 2018, Cheryl Williams, Director of Nursing, discussed this matter with you and informed you that you were being suspended pending investigation. When presented with the allegation, you had no response. . .

Upon conclusion of the investigation, you will be advised of any action that may be contemplated regarding the outcome and your employment with the Department. If the allegations are determined to be unfounded, you will be compensated for the period of the suspension not otherwise covered by Annual Leave, any Annual Leave used will be credited back to your leave balance, and your personnel file will be purged of any documentation thereof. If, however, it is determined that the allegations are true, disciplinary action up to and including dismissal, may be taken. . . .¹⁹

37. Terri Stone and Jami Boykin were assigned to investigate the incident. Ms. Stone and NM Boykin were considered co-equals in this investigation. However, it was normal practice for Ms. Stone to take the lead on the investigation and draft the investigation report. NM Boykin participated in every witness interview. It is unclear from the record of this grievance as to when they were assigned to investigate this matter, who assigned it to them, and how it was assigned to them. Nonetheless, they started their investigation on June 19, 2018, by viewing a security camera recording of the hallway in front of the patient’s room.²⁰

¹⁹ See, Joint Exhibit 1, June 18, 2018, letter.

²⁰ See, Joint Exhibit 3, unnumbered pg. 4, Investigation Report, purportedly drafted by Terri Stone. It is noted that this video was not presented as evidence at the level three hearing.

38. NM Boykin had worked on investigations such as this at MMBH about five other times when she was assigned to this one. NM Boykin had also worked with Ms. Stone before.

39. The security camera recording that Ms. Stone and NM Boykin reviewed showed the doorway to the patient's room at the time of the incident, but there was no video from inside the room. They reviewed the video recording before interviewing witnesses. The security video showed the staff members going into the patient's room together to administer the medication, and leaving afterward filing out of the room, exiting one after the other, only seconds apart.²¹ The security camera recording shows Grievant entering the room once and exiting the room once.²²

40. Ms. Stone and NM Boykin interviewed the following witnesses to the incident: NM Cox, LPN Beals, Grievant, HSW Jacobs, and the patient. The investigators did not interview HSW Bullock, who had witnessed the entire incident. HSW Bullock was at work when interviews were conducted, and the investigators had her contact information. HSW Bullock left employment at MMBH on her own volition at the expiration of her contract on or about June 29, 2018, and relocated to another state. NM Boykin was aware that June 29, 2018, was HSW Bullock's last day at work.

41. The interviews of the staff members were recorded, which is a standard practice. It is unknown if the patient's interview was recorded.²³ None of the recordings were introduced as evidence in this matter. Further, there has been no suggestion that transcripts of the recordings were prepared.

²¹ See, Joint Exhibit 3, unnumbered page 5, Investigation Report.

²² See, testimony of Jami Boykin.

²³ See, testimony of Jami Boykin.

42. The investigators reviewed the handwritten statements that Grievant, NM Cox, LPN Beals, HSW Jacobs, and HSW Bullock as part of the APS referral.²⁴

43. At the conclusion of their investigation, Ms. Stone stated to NM Boykin that they had to find the allegations of physical and verbal abuse unsubstantiated because “it would not hold up in a court of law.”²⁵ NM Boykin agreed with Ms. Stone. Based upon the evidence presented, it appears that this occurred on or about Friday, June 29, 2018.

44. Neither Ms. Stone nor NM Boykin conducted any further investigation into the matter on the days between Friday, June 29, 2018, and Tuesday, July 2, 2018.

45. Four days later, on Tuesday, believed to be July 2, 2018, Ms. Stone informed NM Boykin by phone that she had changed the investigation report to reflect that the allegations of abuse against Grievant were substantiated. Ms. Stone did not explain why she changed the conclusion. NM Boykin objected and informed Ms. Stone that she would not sign off on the report because it was contrary to the evidence and the decision they had made. Ms. Stone informed her that she would submit the report without her signature.

46. NM Boykin discussed her objection to the investigation report with CNE Williams and Tamara Kuhn. NM Boykin informed CNE Williams that finding the allegations of abuse against Grievant substantiated was not right. She also told Ms. Kuhn that she “could not play a part in doing people this way,” referring to Grievant.²⁶ Ms. Kuhn told NM Boykin that she understood and that NM Boykin did not have to sign anything.

²⁴ See, testimony of Jami Boykin.

²⁵ See, testimony of Jami Boykin.

²⁶ See, testimony of Jami Boykin.

Ms. Kuhn also stated that there was nothing that she could do, but she would send NM Boykin a copy of the report when she received it.

47. Ms. Stone submitted the investigation report concluding that the allegations of physical and verbal abuse of a patient against Grievant were substantiated to CEO Richards on or about July 3, 2018. The report does not mention Ms. Stone's decision to change the conclusion of the investigation from unsubstantiated to substantiated, NM Boykin's disagreement with that decision, or NM Boykin's refusal to sign.²⁷ NM Boykin was never provided a copy of the report and as of the date of the hearing, she has never read the report.²⁸

48. Terri Stone and CNE Williams were not called to testify at the level three hearing. Neither party asserted that they were unavailable. Ms. Kuhn was present during the throughout the level three hearing serving as Respondent's representative, but she was not called to testify.

49. Respondent presented no evidence to refute NM Boykin's claims about Ms. Stone changing the investigation conclusion, or to explain why Ms. Stone changed the conclusion without additional evidence or NM Boykin's input.

50. On or about June 24, 2018, while Grievant was suspended pending the investigation, a coworker, Darlene Barry, sent her a message through Facebook telling Grievant that her supervisor, Tim, told her that Grievant was returning to work, but would be assigned to a unit other than Unit 3. Given this, Ms. Barry thought that the investigation had been resolved in Grievant's favor.²⁹

²⁷ See, Joint Exhibit 1, unnumbered pg. 4, Investigation Report dated July 3, 2018.

²⁸ See, testimony of Jami Boykin.

²⁹ See, Grievant's Exhibit 6, screen shot of Facebook message.

51. On July 13, 2018, Grievant received an iMessage from another coworker informing Grievant that she had heard a rumor that the case against Grievant had been closed and that she was supposed to return to work on Unit 5. However, when NM Cox learned of this, she found someone in APS to reopen the case because she was trying to get Grievant fired.³⁰

52. A predetermination conference for Grievant was held on or about July 18, 2018. The purpose of this meeting was to inform Grievant that Respondent was contemplating discipline against her, and to allow her to tell her side of the story. In attendance were Tamara Kuhn, NM Cox, Kim Mannon, Director of Quality Advancement/Performance Improvement, Grievant, and her attorney, Scott Kaminsky.³¹ CEO Richards did not participate in the predetermination. This was the first time NM Cox participated in a predetermination conference.

53. Following the conference, Ms. Kuhn went to CEO Richards to discuss the predetermination conference, Grievant's conduct on June 15, 2018, and possible discipline. CEO Richards relied solely on the information provided by Ms. Kuhn in making his decision about what, if any, disciplinary action was appropriate. CEO Richards had previously reviewed the investigation report for this matter. As the investigation had substantiated abuse, CEO Richards decided to dismiss Grievant from employment.³²

54. By letter dated July 18, 2018, CEO Richards informed Grievant that she was dismissed from her employment for gross misconduct, specifically physical and verbal abuse of a patient, effective that same date and stated, in part, as follows:

³⁰ See, Grievant's Exhibit 9, screen shot of iMessage.

³¹ See, Joint Exhibit 2, Letter dated July 18, 2018, Dismissal letter.

³² See, testimony of Craig Richards.

Your dismissal is the result of the substantiated conclusion of an investigation regarding the allegation that you attacked a patient after the patient attacked you and calling the patient a piece of shit and a bitch. Specifically, on June 15, 2018, you were suspended pending investigation regarding allegations were (sic) reported that while trying to administer a PRN to patient [initials redacted], when entering the patient room the patient was in the shower and began screaming and cursing at staff then came out of the shower and lunged toward staff at which time you came at the patient, pushing and cursing at [him/her] with the patient falling backwards across the toilet and slapped the patient while she was lying across the toilet. While in a level two CCG hold, you put your right arm and hand forward and cover/pushed on the patient's mouth with the flat of your hand. Even after being redirected by the other staff on the code, you continued to taunt the patient. When the code escalated to a Level 3 hold while medication was being administered, you were at the head of the patient calling the patient a "bitch, little bitch and a piece of shit[.]" Also, you were heard telling the patient a few times "you CNE't/can't talk to your mother like that". . .

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) Policy Memorandum 2104, *Progressive Corrective 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.* . . .³³

55. At the same time Ms. Stone and NM Boykin were conducting this investigation, Ms. Stone was teamed with NM Cox to conduct an investigation at MMBH into a separate, unrelated matter.³⁴ NM Cox had previously worked with Ms. Stone on five or six other investigations.³⁵

³³ See, Joint Exhibit 2, Letter dated July 18, 2018, Dismissal letter.

³⁴ See, testimony of Jami Boykin.

³⁵ See, testimony of Sherrie Cox.

56. In the four years Grievant was employed at MMBH, she had not received any APS referrals regarding her conduct until the one filed following the June 15, 2018, incident.

57. At least three witnesses testified about the filing of an APS referral following the June 15, 2018, incident. Respondent also introduced copies of two handwritten statements that were completed as a part of that APS referral. However, the APS referral itself was not presented at the level three hearing. Additionally, no APS forms, reports or any documents regarding an investigation by APS, or any conclusions from such, were presented. No one from APS was called to testify in this matter. APS is not mentioned in either party's proposed Findings of Fact and Conclusions of Law. It is unknown what, if any, conclusion was reached on the APS referral.

58. The patient did not testify at the level three hearing. No statement drafted by the patient, or on her behalf, was presented as evidence in this matter. The investigators interviewed the patient and a summary of statements attributed to the patient are included in the Investigative Report.

59. At the time of the level three hearing, Grievant was unemployed. No evidence was presented to suggest that Grievant's nursing license was affected by the allegations discussed herein or her dismissal from MMBH.

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 due to her inappropriate conduct toward a patient which was later substantiated as physical and verbal abuse in violation W.VA. CODE ST. R. § 64-59-3.13 and 3.17. Grievant denies abusing the patient in any way, and denies engaging in any misconduct. Grievant argues that NM Cox made false allegations of abuse against her in order to get her dismissed from employment in retaliation for Grievant having made complaints about NM Cox.

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).

Respondent asserts that Grievant’s conduct during the incident on June 15, 2018, constitutes physical abuse in violation of W.VA. CODE ST. R. § 64-59-3.13, as well as verbal abuse in violation of W.VA. CODE ST. R. § 64-59-3.17. Specifically, Respondent asserts that after the patient attacked Grievant, she attacked the patient. Respondent alleges that Grievant struck the patient, and also placed her hand across the patient’s face and squeezed, or somehow applied pressure to it. Respondent further alleges that Grievant called the patient names, used profanity toward the patient, and verbally

antagonized and taunted the patient during the administration of the injection despite being directed to leave the room. “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. “Verbal abuse” is defined as follows:

[t]he use of language, tone or inflection of voice that would likely be construed by an impartial observer as a threat to or, harassment, derogation or humiliation of a client. Verbal abuse includes, but is not limited to: the use of a threatening or abusive tone or manner in speaking to a client; the use of derogatory, vulgar, profane, abusive or threatening language; verbal threats; teasing, pestering, deriding, harassing, mimicking or humiliating a client; derogatory remarks about the client, his or her family or associates; or sexual innuendo, sexually provocative language or verbal suggestion.

W.VA. CODE ST. R. § 64-59-3.17.

Grievant’s actions during the June 15, 2018, incident are the central issue of this grievance, and most of the facts regarding the same are disputed. In most of the cases before the Grievance Board in which abuse or neglect of a patient, resident, or other similarly institutionalized individual has been alleged, a video recording from facility security cameras which shows an incident, or a portion thereof, is routinely presented as

evidence at the level three hearing.³⁶ In many of those cases, the video recording is the key piece, and is used by the ALJ to make findings of fact. In this case, neither party presented as evidence the video recording that was considered during the investigation.

Many of the witnesses called to testify at the level three hearing gave contradictory testimony. 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).

³⁶ *See, Garner v. Dep’t of Health & Human Res./Jackie Withrow Hospital*, Docket No. 2016-0883-DHHR (June 8, 2016); *Myers v. Dep’t of Health & Human Res./Mildred Mitchell-Bateman Hospital*, Docket No. 2017-2498-CONS (May 9, 2018); *Davis v. Dep’t of Health & Human Res./Jackie Withrow Hospital*, Docket No. 2016-1597-CONS (Nov. 17, 2016); *Chidester v. Dep’t of Health & Human Res./William R. Sharpe, Jr. Hospital*, Docket No. 2017-2225-CONS (Nov. 14, 2018).

Given that several people who appear to be key witnesses did not testify at the level three hearing, much of the evidence presented was hearsay, or contained hearsay in some degree. "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).

NM Cox testified at the level three hearing. NM Cox was calm, somewhat quiet, and appeared knowledgeable about her training and her work at MMBH. She answered the questions asked of her and did not appear evasive. As NM Cox initiated the complaint against Grievant that resulted in Grievant's dismissal, she could be viewed as having an

interest in this matter. Also, as NM Cox has not had a very good working relationship with Grievant, NM Cox can certainly be seen as being, at least somewhat, biased against Grievant. This bias could also be a motive to be untruthful. NM Cox testified that she was aware Grievant had made complaints against her, and that she believed the EEO investigation concerning her conduct was a result of that complaint, at least in part. This, too, could be seen as further bias against Grievant, or motive to be untruthful. It is noted that NM Cox was aware that other staff members had complained about her and had requested transfers when they found out she was going to be their nurse manager. All of these factors could be viewed as providing NM Cox a motive to be untruthful, and they somewhat diminish her credibility.

Much of NM Cox's testimony about the events prior to the patient attack were substantially similar to that of most other witnesses. However, her account of the events during the patient attack on Grievant and Grievant's actions thereafter does not correlate entirely with that of the other witnesses. However, it was most consistent with LPN Beals' testimony, even though their testimony differed some as well. NM Cox testified that the initial attack occurred in the bathroom, during which Grievant slapped the patient, and yelled at and cursed the patient. No other witness testified that Grievant slapped the patient at any time or that Grievant yelled and cursed at the patient. NM Cox testified that after the patient was in the bedroom, Grievant cursed and antagonized the patient, and placed her hand over the patient's face and pushed on the patient's face "aggressively," "hyperextending the patient's neck." NM Cox further testified that she redirected Grievant away from the patient several times, but that Grievant would leave then come right back to further verbally abuse the patient. Much of NM Cox's testimony was credible.

However, her testimony with respect to Grievant's conduct during the June 15, 2018, incident is not.

During her testimony, LPN Beals appeared calm and knowledgeable about her position at MMBH. LPN Beals is not known to have had any problems working with Grievant in the past. LPN Beals answered the questions asked of her and was not evasive. She appeared to demonstrate the appropriate demeanor toward the action. LPN Beals is still employed at MMBH and NM Cox is her direct supervisor. NM Cox and LPN Beals are known to be friends. They have worked together for a number of years, are friends on Facebook, and socialize outside of work. This relationship could be considered bias in favor of NM Cox and a motive to be untruthful. LPN Beals did not agree with NM Cox on all of the details of the incident. LPN Beals testified that she could not see into the bathroom because the four other staff members were in there and because she was in the patient's bedroom at that time. LPN Beals acknowledged that the initial assault began in the bathroom. However, as she was not in the bathroom, and would not have been able to see that happen. LPN Beals further testified that the patient attacked Grievant in the bedroom after getting out of the shower while heading to the bed. This is not consistent with other witness testimony. LPN Beals made no mention of Grievant and the patient falling and winding up across the toilet, or that HSW Jacobs or HSW Bullock had placed their hands on the patient to escort her back to her bed. LPN Beals further testified that Grievant grabbed the patient's face when they were in the bedroom while all of the staff members were present. LPN Beals testified that she did not hear Grievant verbally abuse the patient, and she did not allege verbal abuse in her written statement to CNE Williams. LPN Beals' testimony was fairly consistent with the

handwritten statement she submitted to CNE Williams, and was substantially similar to that of NM Cox.

Grievant appeared calm and professional during her testimony. Grievant displayed the appropriate demeanor and attitude toward this action. Grievant answered the questions asked of her, and she was not evasive. Grievant appeared to have a good recollection of what occurred on June 15, 2018. Grievant has an interest in this matter as she is seeking reinstatement to her position which could be a motive to be untruthful. She appeared to be knowledgeable about the patient's condition and about the treatment of mental health conditions. Grievant displayed no animosity toward the patient. Grievant appeared to be sympathetic toward the patient and to feel sorry for her. Grievant admitted having a poor working relationship with NM Cox, and that she had complained to CNE Williams about NM Cox. Grievant has alleged that NM Cox made up the story of her abusing the patient to get her fired in retaliation for her complaints. This suggests bias toward NM Cox, and can be viewed as a motive to be untruthful. This diminishes Grievant's credibility some. However, most of Grievant's testimony was corroborated by several other witnesses. Grievant was overall credible.

HSW Bullock testified telephonically at the level three hearing. While the ALJ could not observe her as she testified, HSW Bullock sounded confident in her recollections. She answered the questions asked of her and was not evasive. She was calm and demonstrated the appropriate demeanor. She recalled the incident and the details of such easily without hesitation. HSW Bullock no longer works at MMBH and does not live in West Virginia; therefore, she does not appear to have any reason to be concerned that testifying in this grievance would affect her job. She appears to have no interest in this

matter, or any bias. HSW Bullock is not known to have been a friend of Grievant's outside of work. HSW Bullock was credible.

During his testimony, Scott Jacobs appeared calm and demonstrated the appropriate demeanor toward the action. Mostly, he testified in a matter-of-fact manner. He was not rude or curt. He seemed somewhat guarded when he spoke, and his tone when testifying about the patient suggested that she was exhausting and troublesome to deal with. HSW Jacobs is not known to have any interest in this matter. HSW Jacobs is not known to be friends with Grievant, or any other witnesses, outside of work. He is not known to have any bias toward Grievant, or NM Cox. NM Cox is his direct supervisor, which has the potential to influence his testimony. HSW Jacobs stated during his testimony that there were a number of things that he could not remember. For example, he did not recall who went along with Grievant, NM Cox, HSW Bullock and him to administer the injection to the patient. HSW Jacobs also testified that "it all happened so fast" he could not remember much of what occurred after the patient attacked Grievant. He testified what he remembered most was that he and HSW Bullock intervened to get the patient off Grievant and to get the patient back to her bed. He did not mention anyone else being involved with getting the patient back to her bed, or any trouble or chaos in administering the injection to the patient.

Some of HSW Jacobs' poor recollection could be explained by the passage of time. Also, HSW Jacobs played an important role during the incident because he and HSW Bullock put hands on the patient in order to gain control of the situation and prevent others from getting injured. Given the descriptions of what happened, it is completely reasonable that he might not have noticed or seen where everyone was or what they were doing at

that time. However, he testified confidently that he never told Grievant to leave the room, and that he did not witness Grievant physically or verbally abuse the patient. HSW Jacobs also testified that Grievant left the room before the others and that he did not remember her coming back in.

A troubling aspect of HSW Jacobs' testimony was that he testified that he had told the investigators during his interview that "tempers flared" during the attack, but he would not explain exactly what he meant by that, other than saying that "tempers erupted." This was somewhat evasive. HSW Jacobs' statement that tempers flared and erupted could suggest that Grievant and/or other staff were angry and that this anger was displayed in some way, but that would be inconsistent with his other statements. HSW Jacobs also acknowledged he told the investigators if the patient had attacked him like that, he "would have laid her out." He testified that he understood such was improper. Given all of this, HSW Jacobs' credibility is somewhat questionable.

Jami Boykin testified in person at the level three hearing. She was the only one of the two investigators to testify at the level three hearing. She appeared calm and testified in a matter-of-fact manner. She was not curt or rude. NM Boykin was professional and demonstrated the appropriate demeanor toward this action. NM Boykin answered the questions asked of her and she was not evasive. NM Boykin appeared to have a good recollection of the actions she and Ms. Stone took during the investigation, and the evidence they gathered. While NM Boykin never got to read the investigative report, her recollections of statements the witnesses made during their interviews substantially match that written in the report. She was knowledgeable about the investigation process and the standard practices and procedures followed at MMBH. NM Boykin did not

supervise Grievant or any of those present during the incident. She had worked with both Grievant and NM Cox in the past. No evidence of bias was presented. She is not known to have any interest in this matter, or motive to be untruthful. In fact, testifying as she did was against her own interest. NM Boykin testified that the position she has taken on this matter has made things awkward for her at work as she still works with NM Cox, CNE Williams, and Ms. Kuhn. NM Boykin was emotional during some of her testimony on this topic. It was apparent that testifying in this matter and taking the position she has with respect to the June 15, 2018, incident and Grievant's discipline have made things more difficult for her. NM Boykin was a credible witness.

Joe Gardner testified at the level three hearing. Mr. Gardner is employed as a recreation specialist at MMBH. He had previously worked as an HSW with Grievant and NM Cox. He appeared calm and confident in his statements. He spoke in a matter-of-fact manner during his testimony. He answered the questions asked of him and was not evasive. Mr. Gardner is not known to have any interest in this matter. He is not known to be a friend of Grievant's outside of work. Mr. Gardner testified that he had problems with NM Cox when he worked with her. He was one of the employees who sought and was granted a transfer when NM Cox received the nurse manager position. Such is evidence of bias against NM Cox, and could be seen as a motive to be untruthful. Nonetheless, Mr. Gardner appeared credible.

Barry Maynard testified at the level three hearing. Mr. Maynard is an admissions clerk at MMBH. Previously, he had worked as an HSW on Unit 3, and had worked with Grievant and NM Cox. However, Mr. Maynard noted that he had no problems at all with NM Cox, and that when he was an HSW he usually did not work the same shift as she

did. He testified that he and Grievant worked together for several years on Unit 3. He also testified that he was generally aware that there was conflict between Grievant and NM Cox, but he had not personally witnessed it. However, he testified that, in passing, he had heard other employees make the comment that, “Sherrie was going to get Jenny [Grievant] fired before Jenny could get her fired.” Mr. Maynard did not identify which coworkers had made this comment, but he testified that he heard it around the time NM Cox received the nurse manager position. Mr. Maynard was calm and displayed the appropriate demeanor at the hearing. He was respectful and seemed a somewhat nervous. Mr. Maynard is not known to have any interest in this matter. He is also not known to be a friend of Grievant’s outside of work. Mr. Maynard was credible, but the statement he repeated is hearsay,³⁷ and as he gave no specifics about who made this comment, when, or how he came to hear it, the evidence is unreliable.

The investigative report is assigned little weight because the drafter was not called as a witness, and the other investigator who testified had never been allowed to see the report as written before it was submitted to CEO Richards. The only portions of the report given any substantial weight are those identifying the date the investigation began, the witnesses interviewed, and when the report was submitted to CEO Richards. As NM Boykin disputes the conclusion of the report, and credibly testified that Ms. Stone inexplicably unilaterally changed the conclusion, any analysis and the conclusions set forth therein are being assigned no weight. Further, the drafter appears to have

³⁷ “Hearsay includes any statement made outside the present proceeding which is offered as evidence of the truth of the matter asserted.” BLACK’S LAW DICTIONARY 722 (6th ed. 1990).

summarized statements made by each person interviewed. There were no transcripts of the recorded interviews and no sworn statements presented. It does not appear that the witnesses were granted the opportunity to review the summaries for accuracy. For these reasons, the summaries as drafted in the investigative report are entitled to little, if any, weight.

The only things disputed in this matter are Grievant's actions during and after the patient attack. It comes down to whether the incident occurred as NM Cox and LPN Beals testified, or as Grievant, HSW Jacobs, and HSW Bullock have testified. For the most part, NM Cox and LPN Beals agree as to what occurred during the incident. However, LPN Beals testified that she did not hear Grievant verbally abuse the patient. All eyewitnesses agree that the patient was screaming throughout the incident. Grievant, NM Cox, HSW Bullock, and HSW Jacobs agree that the patient attacked Grievant, and that Grievant and the patient wound up on the bathroom floor and across the toilet during the attack. Grievant, NM Cox, LPN Beals, HSW Bullock, and HSW Jacobs also appear to agree that the patient was naked and in the shower with the water running when the incident began. These five people were the only ones present, besides the patient, when the incident occurred. The patient's credibility cannot be assessed herein as she did not testify. Further, it is unknown how, if at all, her condition may impact truthfulness, and the statements attributed to her in the investigative report are hearsay, if not, double hearsay. As the drafter of the investigative report, who purported therein to have spoken with the patient on the telephone before the investigation began, was not called to testify, and as NM Boykin was did not participate in the telephone call, no weight is being given that portion of the investigative report. No statements written by the patient or made by the

patient while under oath were introduced. It is also unknown whether she would be capable of providing any kind of reliable account of what occurred due to her condition.

Looking at the testimony of HSW Bullock and HSW Maynard, their account of the attack, Grievant's conduct toward the patient, and getting the patient back to the bed for the injection was largely the same. Such also largely correlates with the testimony of Grievant. As to Grievant's actions during and after the patient attack, both testified confidently that Grievant did not strike, physically abuse, or verbally abuse the patient. They disagree as to whether Grievant was directed to leave, or did leave, the room. HSW Bullock was present for the entire incident. She was in the bathroom with Grievant and the patient before the attack, during and after.

NM Cox testified that Grievant struck the patient while they were in the bathroom and cursed at her. NM Cox was the only witness to testify to this. LPN Beals was not in the bathroom when the attack occurred. She was the only one to remain in the patient's bedroom area when everyone else went to the bathroom. It is undisputed that the patient was returned to her bed following the attack, and LPN Beals gave the patient the injections. Both LPN Beals and NM Cox testified that Grievant put her hand across the patient's face and somehow applied pressure to it. NM Cox testified that Grievant was aggressive in this action and pushed down on the patient's face, hyperextending the patient's neck back. LPN Cox testified that Grievant squeezed the patient's face. She said nothing about hyperextending or aggressiveness. No other witness' testimony corroborates these allegations. It is undisputed that Grievant was left with numerous large red scratch marks, and the patient was not injured in any way during the incident.

Based upon the testimony of Grievant, HSW Bullock, NM Cox, and HSW Jacobs, it is certain that Grievant and HSW Bullock were the first in the bathroom and closest to the patient. HSW Jacobs and NM Cox were behind them, closest to the door. HSW Jacobs and NM Cox were the furthest from the patient when the attack occurred. As such, it is plausible that they did not, or could not, see or hear everything that happened. Grievant, HSW Jacobs, and HSW Bullock were each adamant that Grievant did not strike or otherwise physically abuse the patient, and the patient was not injured in any way. It does not appear from the evidence that it was even considered a possibility that the patient was injured during the incident as there has been no evidence to suggest that she was taken for a medical examination following the incident. While HSW Jacobs testified that tempers flared at the beginning of the attack, none of the other witnesses indicated this. However, all agree that the patient was angry and combative.

NM Cox's testified that while they were trying to administer the injection to the patient, Grievant called the patient a "bitch," "a little bitch," and a "piece of shit." She also testified that she directed Grievant to leave the room, but that Grievant left the room a couple of times, but kept coming back to continue to verbally abuse and antagonize the patient. NM Cox even testified that Grievant went up to the patient's head while the patient was restrained to get the injection and taunted the patient and whispered in her ear. Contrary to NM Cox's testimony, LPN Beals, HSW Jacobs', and HSW Bullock testified that they never witnessed Grievant verbally abuse the patient. NM Cox is the only eyewitness to the incident to claim Grievant verbally abused the patient. LPN Beals concurred with NM Cox that Grievant was told to leave the room by NM Cox, HSW Jacobs, HSW Bullock, and herself, but Grievant kept coming back. Again, HSW Jacobs

denies telling Grievant to leave the room; however, he testified that she did leave, but did not come back. Grievant and HSW Bullock testified that Grievant was not told to leave the room by anyone and that she did not leave the room before the others.

From the evidence presented, it is certain that it was very loud in the room for the duration of the incident. The patient was yelling throughout, and the staff members were trying to communicate with one another, care for the patient, and gain control of the situation for the safety of the patient, other patients, and themselves. The scene described by all witnesses was chaotic, at best, and all of the staff members were trying to focus on the individual jobs they had to do. Given all of this, along with the passage of time, it makes sense that people have somewhat different recollections of minor details or the sequence of certain events. However, if Grievant were verbally abusing the patient and antagonizing her when they were trying to administer the injection, as described by NM Cox, it would seem reasonable that all of them would have noticed it given how close they were, and how unusual and inappropriate it would have been.

The determination of what actually happened during the June 15, 2018, incident largely appears to turn on whether Grievant exited the room more than once and reentered the patient's room. Both NM Cox and LPN Beals have painted a picture of Grievant as repeatedly being told to leave the room while they were trying to give the patient the injection, but that Grievant would only leave briefly only to come right back to curse and antagonize the already combative and aggressive patient. HSW Bullock and Grievant testified that no one told Grievant to leave the room during the incident, and that Grievant did not leave the room. Grievant testified that after the injection was administered the staff left the patient's room as a group, just as they had entered the

room. The witness whose testimony is determinative on this issue is NM Jami Boykin, the staff member investigator.

NM Boykin is an experienced investigator in patient abuse and neglect matters and had worked with Ms. Stone on investigations in the past. NM Boykin testified that she and Ms. Stone reviewed the security video from the hallway outside the patient's room at the beginning of their investigation. She testified credibly that the security video showed Grievant enter the patient's room with the four other staff members. NM Boykin testified that the security video showed that the five staff members left the patient's room one at a time, with only seconds in between their exits. NM Boykin further testified that, pursuant to the video, Grievant exited the room only once and did not reenter. This corroborates the testimony of Grievant and HSW Bullock, and contradicts that of NM Cox and LPN Beals, and part of HSW Jacobs' testimony. The parties did not present the security video as evidence at the level three hearing, and there was no suggestion that it no longer existed. Respondent made no mention of the video in its case-in-chief or in its proposed Findings of Fact and Conclusions of Law. Respondent did not attempt to dispute the existence of the video or what it showed. As the parties chose not to call Ms. Stone to testify at the hearing, NM Boykin is the only witness *known* to have reviewed the security video.

Lastly, Grievant, HSW Jacobs, and HSW Bullock all testified that the whole incident with the patient took only a few minutes. NM Boykin's testimony supports this because according to her testimony, she reviewed about 12 minutes of the security video, including a few minutes before the five staff members went into the room to administer the injection, and in that time, she saw the staff enter the room and exit the room after the

injection was administered. It would seem that the events as described by NM Cox and LPN Beals would have taken much longer from start to finish.

It appears more likely than not that NM Cox made the physical and verbal abuse complaints against Grievant in retaliation for the complaints she believed Grievant had made against her. Moreover, it appears that when the investigation was concluded and Grievant was going to be cleared, someone likely intervened to get the investigative report changed to find the abuse substantiated, thereby setting Grievant up for dismissal. Further, it is highly suspicious that the report does not mention that the initial conclusion was different or that the investigators disagreed as to the conclusion. It would seem reasonable that if Ms. Stone had changed her mind, she would have at least noted it in the report and noted that NM Boykin did not agree with the stated conclusion. It would also appear reasonable that the neutral investigators would want to provide CEO Richards with an accurate and complete report and conclusion on which to base his decision, especially if the investigators disagreed as to the conclusion.

It is noted that Grievant has made a retaliation claim in this grievance. However, Grievant does not appear to be alleging the claim of retaliation, or reprisal,³⁸ as defined by the grievance statutes. Instead, Grievant only argues that NM Cox initiated the complaint against her in retaliation for Grievant's complaints to CNE Williams and/or the

³⁸ "No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination." W.VA. CODE § 6C-2-3(h). Reprisal is defined as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." W.VA. CODE § 6C-2-2(o).

EEO investigators. Grievant has not addressed reprisal or any law pertaining to it in her proposed Findings of Fact and Conclusions of Law. Grievant has not alleged participation in the grievance process or other protected activity before the instant action. Also, Grievant did not file an EEO complaint against NM Cox. Accordingly, any claim of reprisal raised by Grievant is deemed abandoned and will not be addressed further herein.

Based upon the evidence presented, Respondent has failed to prove by a preponderance of the evidence that Grievant verbally abused the patient at any time during the June 15, 2018, incident. Further, Respondent has failed to prove by a preponderance of the evidence that Grievant physically abused the patient at any time during the June 15, 2018, incident. As such, Respondent has failed to prove that there was good cause for Grievant's dismissal. Accordingly, there is no need to address the issue of whether a finding of patient verbal or physical abuse against an employee may justify dismissal from employment when a policy violation has also been alleged, but no policy was presented at the level three hearing. However, as Respondent noted in its proposed Findings of Fact and Conclusions of Law, this Grievance Board has previously ruled that it may. 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. “Verbal abuse” is defined as follows: “[t]he use of language, tone or inflection of voice that would likely be construed by an impartial observer as a threat to or, harassment, derogation or humiliation of a client. Verbal abuse includes, but is not

limited to: the use of a threatening or abusive tone or manner in speaking to a client; the use of derogatory, vulgar, profane, abusive or threatening language; verbal threats; teasing, pestering, deriding, harassing, mimicking or humiliating a client; derogatory remarks about the client, his or her family or associates; or sexual innuendo, sexually provocative language or verbal suggestion.” W.VA. CODE ST. R. § 64-59-3.17.

5. 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).

6. “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).

7. Respondent has failed to prove by a preponderance of the evidence that Grievant verbally abused the patient at any time during the June 15, 2018, incident. Respondent has further failed to prove by a preponderance of the evidence that Grievant physically abused the patient at any time during the June 15, 2018, incident. 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 her registered nurse position, and to pay her back pay back to the date of her suspension, plus interest, and to restore all benefits that she would have earned had her employment not been terminated, including annual leave, sick leave, retirement, and tenure. All references to the July 2018

dismissal **SHALL** be removed from Grievant's record. Further, all references to Grievant being accused of physical or verbal abuse of a patient arising from the events occurring on June 15, 2018, are **ORDERED REMOVED** from Grievant's personnel file and any and all other administrative records, or files, maintained by Respondent.

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: March 7, 2019.

Carrie H. LeFevre
Administrative Law Judge