THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CURT TAYLOR,
Grievant,

v. **Docket No. 2020-0862-CONS**

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

DECISION

Grievant, Curt Taylor, was employed by Respondent, Department of Health and Human Resources ("DHHR"). He was assigned to Mildred Mitchell-Bateman Hospital ("MMBH") as a Health Service Worker. Mr. Taylor filed an expedited grievance to level three[1] dated December 26, 2019, alleging that he was suspended indefinitely without due process. He seeks reinstatement with back pay and interest as well as restoration of benefits. Mr. Taylor filed a second grievance form to level three, related to the suspension dated January 29, 2020. He noted that more than thirty days had passed since he was initially suspended and sought a similar remedy. On February 4, 2020, Grievant filed a third grievance form at level three contesting the termination of his employment. Again, he seeks reinstatement with back pay, plus interest and reinstatement of benefits. The three grievances were consolidated for a level three hearing and decision by order dated March 13, 2020.

[1] *See* W. VA. CODE § 6C-2-4(a) (1).

A level three hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance Board on June 25, 2020.[2] Grievant Taylor personally appeared and was represented by Scott H. Kaminski, Esquire. Respondent appeared by Tamara Kuhn and was represented by James "Jake" Wegman, Assistant Attorney General. This matter became mature for decision on August 7, 2020, upon receipt of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was dismissed from employment as a Health Service Worker for verbal abuse of a patient when he told the patient to "get his lazy ass to changing his bed" after the patient had urinated in the bed. Respondent proved that the incident occurred, and discipline was appropriate. Grievant proved that the misconduct was neither willful nor substantial enough to justify termination of a permanent classified employee with a good performance record.

Given the totality of the circumstances, mitigation of the punishment is appropriate. The dismissal is reversed and reduced to a ten-day suspension.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant, Curt Taylor, was employed by Respondent, Department of Health and Human Resources ("DHHR"). He was assigned to Mildred Mitchell-Bateman Hospital ("MMBH") as a Health Service Worker. He has worked at the hospital for three years.

[2] Due to the Covid-19 pandemic, only one witness and Grievant testified in person. The remaining witnesses testified by use of a conference telephone.

Prior to working for DHHR, Grievant was employed as a Correctional Officer at a juvenile detention facility.

2. On December 21, 2019, Grievant was assigned to work “one on one” with patient D.H.

3. A patient is assigned “one on one” care when he or she is in danger of causing harm to himself or others if he or she in left unattended. In such cases, a staff member must always be in proximity with the patient, even when the patient is sleeping.

4. Staff members attempt to rotate time when they are serving one on one with a patient during a shift. Ideally, a staff member will serve this duty in hour-long intervals and then receive a break to perform other duties.

5. D.H. had been transferred from another unit to Unit 2 which has all male patients because he had grabbed at female staff and patients inappropriately and was combative with other patients.

6. D.H. was known to be manipulative and had a history of making false accusations against staff in an effort to get his way. He was capable of doing his daily living activities, such as cleaning, grooming, feeding and dressing himself as well as taking care of his space. However, he did not want to do these things and often tried to get the staff to do them for him.[3]

7. The HSWs were instructed to coax and encourage D.H. to do daily tasks he was capable of doing on his own to prepare him for independent living. D.H. was often resistant and would verbally abuse the staff frequently.

[3] All these behaviors were consistent with the patient’s diagnosed illness.

8. At the start of his shift on December 21, 2019, Grievant reviewed the RN's notes from the previous shift and was instructed that D.H. was not completing his daily life tasks. The HSW was to encourage D.H. to do these tasks rather than do them for him.

9. During the last half hour of Grievant's two-hour "one on one" assignment with D.H., who was sleeping, the patient urinated in his bed. Grievant calmly, told D.H. to wake up, rinse himself off and change his bed linens.

10. D.H. was quite capable of completing these tasks and had done so in the past.

11. D.H. responded by saying "F#%k You!" to Grievant and said he was going to sleep.

12. Grievant waited five or ten minutes and told D.H. that he had soiled his bed and he needed to get up and change the sheets. Grievant looked out the door of the room to see if there was any staff nearby who could help him get D.H. to cooperate but saw none.

13. D.H. once again said he would not, and that he wanted to continue sleeping. Grievant repeated this process after another five to ten-minute period, with the same response.

14. Grievant waited a short time and then spoke sternly to D.H. that he needed to get up and change the bed because he was tired of asking.

15. Shortly thereafter, LPN Daniel Adkins entered the room and saw D.H. standing by the bed crying and heard Grievant tell D.H. to get his "lazy ass on making that bed" because he wasn't going to help him make it.

16. LPN Adkins intervened by telling Grievant that he was there to relieve Grievant and Grievant should just go ahead and leave.

17. Grievant agreed and left the room to assume his other duties. LPN Adkins helped D.H. finish making the bed. D.H. then got into the bed, fell asleep and slept through the night with no further incidents.

18. In a general meeting, LPN Adkins mentioned the incident to the Nurse Supervisor, Timothy Denny, RN. Nurse Supervisor Denny instructed LPN Adkins to make a report od the incident which he did on the computer. His statement read:

> At approximately 12:55 a.m. earlier this morning, I enter Room 209 and heard Curt Taylor tell the patient that is currently in that room to get his "lazy ass on making that bed" because he wasn't going to help him make the bed. He also told the patient if he didn't get it made, he wouldn't be able to go to bed. I took over CCO at 1:00 a.m. and helped the patient make the bed. The patient then laid down and was asleep in a few minutes.[4]

19. On December 22, 2019, Nurse Supervisor Denny met with Grievant and told him about the allegation. He asked Grievant to write out a statement regarding the incident. Grievant wrote a statement, folded it, and placed it in an envelope provided by Nurse Denny, who did not read the statement. Grievant's statement read:

> On 12/21/19 while sitting with [the patient] during the 0100 hour, the patient urinated on himself and refused to get up to clean himself up and change the bed linens. After many promptings to do so I told the patient finally that he needed to get up and change, I was tired of asking. [5]

Grievant was verbally suspended pending an investigation.

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[4] Joint Exhibit 9. Legal Aide Investigation Report. The statements written by LPN Adkins and Grievant were attached to the report.
[5] *Id.*

20. On December 22, 2019, Nurse Supervisor Denny filed a patient grievance on behalf of D.H. with Adult Protective Services ("APS") and Legal Aid of West Virginia ("LAWV"). The grievance alleged:

> On 12/21/19 at approximately 0100 LPN overheard HSW Curt T. state to the patient 'get your lazy ass on it and make the bed' after the patient had urinated on the bed. [6]

The written statements of Grievant and LPN Adkins were provided with the grievance.

21. By letter dated December 23, 2019, Grievant was suspended while an investigation into the allegation against him was being conducted. MMBH Chief Executive Officer, Craig Richards cited as the reason for the suspension and investigation as an allegation of abuse of a patient and specifically:

> On December 22, 2019 allegations were reported that while you were sitting 1:1 with a patient, the patient wet the bed and you told the patient "get your lazy ass up and make your bed."
>
> On December 22, 2019, Tim Denny, Nursing Supervisor, discussed this matter with you and informed you that you were being suspended pending investigation. When presented with the allegation, you stated that you did say that to the patient.

22. APS is part of DHHR. LAWV is separate from DHHR and provides independent protection for patients at the state mental hospitals. Each of these entities are charged with investigating allegations of abuse and neglect of patients and issuing separate findings. The investigators may cooperate in the collection of evidence.

23. No evidence related to an APS investigation or finding related to the allegations against Grievant were submitted at the hearing.

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[6] *Id.*

24. LAWV Patient Advocate, Teri Stone, conducted an investigation into the patient grievance to determine if Grievant had committed verbal abuse in the incident with D.H. (Joint Exhibit 9)

25. Advocate Stone read the two written statements,[7] the patient grievance submitted by Mr. Denny, the APS reporting form and reviewed the definition for verbal abuse of a patient found in the Code of State Rules which defines verbal abuse in the mental hospital setting as:

> The 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 a client, his or her family or associates; or sexual innuendo, sexually provocative language or verbal suggestion.[8]

W. VA. CODE ST. R. § 64-59-3.17.

26. Based upon her investigation Advocate Stone found:

> Based on the completion of the interviews and the preponderance of all associated information and documentation by Legal Aide Advocate Teri Stone, the incident of "On 12/21/19 at approximately 0100 LPN overheard HSW Curt T. state to the patient 'get your lazy ass on it and make the bed' after the patient had urinated on the bed" is substantiated for verbal abuse by Curt Taylor.

(Joint Exhibit 9)

[7] LAWV Advocate Stone did not personally interview anybody as part of her investigation.
[8] This same language is used to define "verbal abuse" in the Mildred Mitchell-Bateman Hospital Policy Number: MMBHE018: Patient Abuse/Neglect, or Exploitation. (Joint Exhibit 5)

27. Grievant was sent a Predetermination Conference Notice dated January 2, 2020. A predetermination conference was held on January 8, 2020. Grievant attended and was accompanied by co-worker, Melissa Martin. The following MMBH employees also attended: Tamara Kuhn, Director of Human Resources; Jennifer Rose, Nurse Manager; and, Jami Boykin, Assistant Director of Nursing. HR Director Kuhn told Grievant the nature of patient grievance and that an allegation of verbal abuse had been substantiated. During the meeting Grievant was asked by HR Director Kuhn if he made the alleged statement to the patient and Grievant responded that he did not say "lazy" but you did tell the patient to get their ass up and make their bed.

28. Following the predetermination conference, Craig Richards, Chief Executive Officer, issued Grievant a dismissal letter dated January 9, 2020. The reasons for the dismissal were stated as follows:

> Your dismissal is the result of a substantiated Legal Aid investigation, which states that you told a patient to get their lazy ass on it and make their bed after the patient had urinated in the bed. The investigation was substantiated for verbal abuse.
>
> This in violation of Title 64CSR59, [Section 3.17 related to verbal abuse].
>
> The Mildred Mitchell-Bateman Employee Code of Conduct MMBHC038 states the following: The Leadership of Mildred Mitchell-Bateman Hospital expects that employees will:
>
> • Demonstrate integrity, honesty, and fairness in carrying out their duties. The leadership of Mildred Mitchell-Bateman Hospital expects that employees will not:
>
> • Curse, shout, yell, or scream, or use abusive, vulgar, sexually explicit or mocking speech or language in the presence of, or in such a place as this speech can be overheard by any patient, visitor, or volunteer or employee at any time.

> Your behavior also violates DHHR Policy 2108 Employee Conduct, which states that employees are expected to comply with all relevant Federal, State, and local laws, and conduct themselves professionally in the presence of patients and fellow employees.

(Joint Exhibits 2 & 4)

29. Grievant had not received any discipline or counseling prior to this incident. All his prior performance appraisals were satisfactory.

30. Prior to this, Grievant would not have been surprised if another HSW been disciplined for saying "ass" to a patient.[9]

31. Grievant, like all HSWs at MMBH, received training related to patient abuse and neglect and received periodic refresher training. HSWs are trained not to argue with the patients because it can set back their treatment progress.[10]

31. All employees at MMBH are required to report suspected abuse or neglect of a patient to their supervisor who must report the event to Adult Protective Services.

Discussion

As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018).

> . . . *See* [*Watkins v. McDowell County Bd. of Educ.,* 229 W.Va. 500, 729 S.E.2d 822] at 833 (The applicable standard of proof in a grievance proceeding is preponderance of the evidence.); *Darby v. Kanawha County Board of Education,* 227 W.Va. 525, 530, 711 S.E.2d 595, 600 (2011) (The order of the hearing examiner properly stated that, in disciplinary matters,

[9] Testimony of Grievant.

[10] Testimony of Jennifer Rose, RN, Unit Manager for unit two. Manager Rose testified that "[I]t was inappropriate to say what he said but people do make mistakes."

> the employer bears the burden of establishing the charges by a preponderance of the evidence.). *See also Hovermale v. Berkeley Springs Moose Lodge,* 165 W.Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980) ("Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence."). . .

W. Va. Dep't of Trans., Div. of Highways v. Litten, No. 12-0287 (W.Va. Supreme Court, June 5, 2013) (memorandum decision). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant was a permanent State employee in the classified service. 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). *See also Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004) (per curiam). "*Oakes v. W.Va. Dept. of Finance and Administration*, *supra*, requires that a violation sufficient to support a dismissal be of a substantial nature and that if it involves a violation of a statute or official duty it must be done with wrongful intent." *Serreno v. West Va. Civil Serv. Comm'n*, 169 W. Va. 111, 115, 285 S.E.2d 899, 902 (1982) (per curiam). "'Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. West Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988).

Respondent dismissed Grievant after a LAWV investigation substantiated that he verbally abused a patient pursuant to the definition of verbal abuse found in the WEST VIRGINIA CODE OF STATE RULES.[11] The sole basis for the dismissal as set out in the dismissal letter was that the LAWV investigation substantiated the charge of verbal abuse because "you told a patient to get their lazy ass on it and make their bed after the patient had urinated in the bed." The testimony from Respondent's witnesses focused almost entirely upon the inappropriate use of the word "ass" and Grievant arguing or "yelling" at the patient. Grievant admits to using the word "ass" but denies calling D.H. "lazy." Grievant admits that he was frustrated with D.H. and he spoke sternly with the patient but denies yelling at him. Grievant argues that the investigation was insufficient to ascertain the facts with any degree of certainty and that Grievant's action did not amount to verbal abuse. Grievant testified that the whole incident was overblown.

The investigation conducted by the LAWV patient advocate was cursory at best. There was no independent questioning of the parties involved. The advocate relied on the brief statements given by LPN Adkins and Grievant to determine the facts. The statements differed particularly on the issue whether the Grievant said "lazy ass" or just "ass." Advocate Stone adopted the written statement of LPN Adkins over Grievant's written statement. Yet when questioned, she could not articulate a reason for finding that Mr. Adkin's version of the fact was more credible than Grievant's. Additionally, she did not interview the patient. While he has a history of falsely accusing staff of abuse, it would have been helpful to at least see if his version of the event coincided with either of the

[11] Specifically, W. VA. CODE ST. R. § 64-59-3.17.

statements.[12] This is certainly not the type of investigation employees would expect and perhaps deserve when their jobs are on the line. Respondent recognizes the investigation's shortcomings, but argues that there is sufficient evidence to demonstrate verbal abuse considering Grievant's admission to telling the patient to "get [his] ass to making the bed."

The main discrepancy between the statement of LPN Adkins and Grievant is whether Grievant used the word "lazy" when addressing D.H. and whether Grievant yelled at the patient. In situations such as this, where the existence or nonexistence of certain material facts hinges on the credibility of conflicting witness testimony, 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); *Pine v. W. Va. Dep't of Health & Human Res.,* Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ*., Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp*., Docket No. 93-HHR-050 (Feb. 4, 1994).

The Grievance Board has applied the following factors to assess a witness's testimony: (1) demeanor; (2) opportunity or capacity to perceive and communicate; (3) reputation for honesty; (4) attitude toward the action; and (5) admission of untruthfulness. Additionally, the administrative law judge 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'

[12] If there is a policy, practice, or other reason for not interviewing patients generally, or D.H. specifically, none was offered at the hearing.

information. *Yerrid v. Div. of Highways*, Docket No. 2009-1692-DOT (Mar. 26, 2010); *Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth.,* Docket No. 2009-1583-DOT (Dec. 1, 2009); *Elliott v. Div. of Juvenile Serv.,* Docket No. 2008-1510-MAPS (Aug. 28, 2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999).

Grievant has a clear bias in this matter in that he wants to overturn his dismissal. He had a reasonable demeaner and attitude toward the proceeding but struggled occasionally in answering questions. He denied using the term “lazy” and said he spoke sternly with D.H. but did not yell at him.

LPN Adkins was calm and composed while testifying, his testimony was consistent with the facts, and he had no apparent reason for deception. His statement that Grievant used the word “lazy” is consistent with the phrasing of Grievant’s statement. It is more likely that not than Grievant did use that word when addressing D.H. However, that finding is of little consequence since both the patient advocate and Respondent focused on the use of the vulgar term “ass” as the basis for the finding of verbal abuse.

The allegation of yelling at the patient is more troubling. The term “yelling” is susceptible to a variety of meanings and severity. To some, the mere act of correcting their conduct is considered yelling even if the speaker does not raise his or her voice. In this case, LPN Adkins ultimately testified that Grievant’s instruction were loud enough for him to hear as he entered the room. This is consistent with speaking sternly but not shouting or yelling. It is more likely than not that Grievant was speaking sternly with D.H. but not yelling at him with a seriously raised voice.

As set out in the investigation report the controlling definition of verbal abuse is:

> The 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 a client, his or her family or associates; or sexual innuendo, sexually provocative language or verbal suggestion.[13]

Respondent argues that Grievant's statement is threatening and the word "ass" is vulgar and profane. Respondent's training instructs employees that the use of profanity is prohibited and arguing with patients is counterproductive to patient treatment. Respondent concludes that Grievant's conduct therefore meets the definition of verbal abuse justifying the termination of Grievant's employment.

The LAWV report found the statement containing "ass" was verbal abuse and Advocate Stone testified that it was also verbal abuse when Grievant told the patient that he was tired of telling D.H. to get up. Respondent cited only the "ass" statement. Neither of these sentences contain a threat or harassment. However, the use of the word "ass" in this context could reasonably be construed as vulgar language. Given the strictest interpretation the sentence uttered by Grievant in a harsh tone meets the definition of verbal abuse. But it is a very mild example of abuse to be sure.

Respondent cites three cases which are argued to be similar to the matter at hand where the Grievance Board has upheld the dismissal of an employee for patient abuse: *Garner v. Dep't of Health & Human Res.,* Docket No. 2016-0883-DHHR, (Jun. 8, 2016);[14]

[13] W. VA. CODE ST. R. §§ 64-59-3.17 and Mildred Mitchell-Bateman Hospital Policy Number: MMBHE018: Patient Abuse/Neglect, or Exploitation. (Joint Exhibit 5)
[14] Occurring at Jackie Withrow Hospital.

Myers v. Dep't of Health & Human Res., Docket No. 2017-2498-CONS (May 9, 2018);[15] and *Chidester v. Dep't of Health & Human Res./Sharpe Hosp.*, Docket No. 2017-2225-CONS (Nov. 14, 2018).[16] All three involved an encounter by a staff member with a patient at a State Hospital.

Garner involved a finding of physical abuse. It started with a physical altercation where Grievant was protecting himself from a perceived attack by a patient. Grievant and the resident wound up falling to the floor, at which time Grievant sat on the resident restraining the resident's arms. Grievant sat on the resident restraining him for several minutes. After which, the resident calmed down and the two separated without further incident. As a result of the Grievant's restraint, the resident received red marks on his back, likely from the rug they were on. Grievant was dismissed for improperly restraining a patient in a dangerous way, for an extended period of time.

Myers occurred when a dangerous situation was subdued. Thereafter, Ms. Myers approached a male patient, laughing and stating, "I'll just hide behind you so you can protect me". Then, instead of getting behind him, she proceeded to get in front of the patient and wiggle her buttocks, saying, "My son can protect me". Then the male patient smiled and started rubbing her shoulders and patted her on the back. HSW Myers was dismissed for making provocative sexual gestures with the patient and inappropriate physical contact which was found to be abuse.

Chidester involved an employee who was also dismissed for physical abuse. The employee was dismissed, without progressive discipline, because there were two reports

[15] Occurring at MMB Hospital
[16] Occurring at Sharpe Hospital

of physical abuse of patients who are Intellectually and Development Disability patients. In both incidents, neither of the patients were aggressive towards staff and both were intentional acts by the grievant. One of the incidents resulting in a patient falling and breaking his clavicle.

These cases are much different than the present case. All involve allegations of physical abuse, resulting in one case of serious injury and one minor. The additional case involved an act of sexual teasing which led to improper physical conduct by the male patient to the female staff. All the cases were found to constitute physical abuse with serious consequences for patients.

In the case before us, the patient was known to be manipulative and would regularly try to get staff to perform his daily living activities for him. Grievant was instructed to avoid this manipulation and encourage the patient to do daily activities on his own. There is no dispute by any of the witnesses that D.H. was capable of changing his wet bedding. Instead of doing so he engaged in his usual practice of refusal and attempting to get Grievant to do it for him. After several efforts to encourage D.H. to get up and change his bed, Grievant admittedly spoke sternly to the patient that he "needed to get his lazy ass to changing the bed." The use of a stern tone and one vulgar word were improper and LPN came in the room to see D.H. crying while trying to change the bed.[17] LPN Adkins helped D.H. change his bed the patient got in it and slept through the night. Unlike the three cases cited by Respondent, there was no physical conduct, the verbal instruction was improper but not particularly serious and the patient quickly forgot about the encounter once he got the help he wanted.

[17] Crying appeared to be part of the patient's manipulative behavior.

As stated above, the West Virginia Supreme Court of Appeals has stated that it's decision in "*Oakes v. W.Va. Dept. of Finance and Administration*, *supra*, requires that a violation sufficient to support a dismissal be of a substantial nature and that if it involves a violation of a statute or official duty it must be done with wrongful intent." *Serreno v. West Va. Civil Serv. Comm'n*, 169 W. Va. 111, 115, 285 S.E.2d 899, 902 (1982) (*per curiam*). "'Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. West Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988).

"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 spoke sternly to the patient, using a vulgar term, out of momentary frustration. There is no evidence that he acted with a wrongful intent or willful disregard of public interest in his actions. He was attempting to get D.H. to do daily activities the patient was capable of performing. While his method was inappropriate, he was not attempting to harass, derogate or humiliate the patient which would be signs of wrongful intent sufficient for dismissing an employee with a reasonably long and successful tenure. Consequently, this is an appropriate case for mitigating the punishment.

"Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case-by-case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995); *Crites v. Dep't of Health & Human Ser.*, Docket No. 2011-0216-DHHR (Nov. 16, 2011).

Grievant has been employed at MMB Hospital for three years. He has no prior history of discipline and his performance has always been rated as satisfactory. Grievant's tone and statement toward D.H. were improper but certainly not a willful or wanton disregard of the standard of behavior. It was an isolated instance of poor judgement brought on by frustration. Further, there was no indication that it had any lasting impact on the patient who went to bed and slept peacefully after the incident. Unit Manager Jennifer Rose may have best summed up the matter when she testified that "it was inappropriate [for Grievant] to say what he said but people do make mistakes."

Grievant's conduct was not sufficiently willful or substantial to constitute good cause of dismissal of a permanent classified State employee. While discipline is justified the termination of Grievant's employment was clearly excessive and disproportionate to his misconduct. Mitigation of the penalty is justified. A ten-day suspension without pay is much more in line with the misconduct when Grievant's work record is taken into consideration. Accordingly, the grievance is **GRANTED in part and DENIED in part.**

Conclusions of Law

1. As this grievance involves a disciplinary matter, Respondent bears the burden of establishing the charges by a preponderance of the evidence. Procedural

Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018). Where the evidence equally supports both sides, a party has not met its burden of proof. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. Permanent State employees in 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). *See also Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004) (*per curiam*).

3. "*Oakes v. W.Va. Dept. of Finance and Administration*, *supra*, requires that a violation sufficient to support a dismissal be of a substantial nature and that if it involves a violation of a statute or official duty it must be done with wrongful intent." *Serreno v. West Va. Civil Serv. Comm'n*, 169 W. Va. 111, 115, 285 S.E.2d 899, 902 (1982) (*per curiam*). "'Good cause' for dismissal will be found when an employee's conduct shows a gross disregard for professional responsibilities or the public safety." *Drown v. West Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988).

4. Verbal abuse is defined as:

> The 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 a 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. Respondent proved by a preponderance of the evidence that Grievant technically committed verbal abuse of a patient as defined in W. VA. CODE ST. R. § 64-59-3.17.

6. "Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case-by-case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995); *Crites v. Dep't of Health & Human Ser.*, Docket No. 2011-0216-DHHR (Nov. 16, 2011).

7. Grievant's conduct was not sufficiently willful or substantial to constitute good cause of dismissal of a permanent classified State employee. While discipline is justified, the termination of Grievant's employment clearly excessive and disproportionate to his misconduct. Mitigation of the penalty is justified.

Accordingly, the grievance is **GRANTED in part, and DENIED in part.**

Respondent is **ORDERED** to immediately reinstate Grievant to his prior position of employment with MMB Hospital with a ten working day suspension without pay. Respondent is also **ORDERED** to pay Grievant backpay from ten working days after he was dismissed until the date of his reinstatement with statutory interest and to restore all his benefits.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named.

However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2018).

DATE: August 29, 2020.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE