

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**DORA ADKINS,
Grievant,**

v.

Docket No. 2021-2039-CONS

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

DECISION

Grievant, Dora Adkins, is employed by Respondent, Department of Health and Human Services ("DHHR") as a Health Service Worker assigned to Mildred Mitchell-Bateman Hospital. ("MMBH"). Ms. Adkins filed a grievance dated December 15, 2020, alleging that she had been unjustly suspended pending an investigation. She sought to be returned to work, paid for lost time with interest, and restoration of her benefits. She filed a second grievance dated December 28, 2020, alleging "unjustified termination" of her employment. She continues to seek restoration to her job with back pay and interest as well as lost overtime. Both grievances were properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). The grievances were consolidated for hearing and decision by order dated January 14, 2021.

A level three hearing was conducted on March 26, 2021, via the Zoom video conference format. Grievant appeared and was represented by Samantha Crockett, UE Local 170. Respondent appeared through Tamara Kuhn, MMBH Director of Human Resources and was represented by Katherine Campbell, Assistant Attorney General. This matter became mature for decision on July 13, 2021, upon receipt of the last Proposed Findings of Fact and Conclusions of Law submitted by the parties.

Synopsis

Grievant was dismissed from employment after an investigation was conducted regarding her interaction with a patient. The investigation concluded that Grievant had committed verbal abuse of a patient by making loud statements using “an inappropriate tone of voice” . . . “in a manner interpreted as threatening/abusive toward the patient.” Grievant argues that she always speaks loudly, and the patients do not seem to mind. She also claims she was not threatening the patient and the witnesses misunderstood what she was saying. Respondent proved the allegations by a preponderance of the evidence. Further, Grievant had been previously disciplined for similar issues. Accordingly, the grievance is denied.

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, Dora Adkins, is employed by Respondent, Department of Health and Human Services (“DHHR”) as a Health Service Worker assigned to Mildred Mitchell-Bateman Hospital (“MMBH”). She had been in that position for over three years.

2. Mildred Mitchell-Bateman Hospital is an Adult Psychiatric Acute Care Hospital. All patients treated at the hospital have been committed through the legal system. They make up a very vulnerable population.

3. On December 9, 2020, a mock survey was being conducted at MMBH. Mock surveys are periodically conducted at mental health hospitals to assist facilities to spot and remediate problems prior to official surveys by state and federal agencies. They

also assist with performance improvement plans, which are sometimes imposed on upon facilities by regulatory agencies.

4. On that day, the mock survey was being conducted by Candy Sanchez. Ms. Sanchez has been employed by the Arnett Carbis Toothman, LLP accounting firm, to conduct such surveys for three years. She is a Registered Nurse (“RN”) and has 25 years of experience in health care.

5. At approximately 7:00 a.m. Ms. Sanchez took the elevator to Unit 3 of the hospital. She was accompanied by Christy Harless,¹ RN, and Marlise Tyler², RN, who is a Survey Coordinator.

6. While exiting the elevator to Unit 3, the three heard Grievant addressing a patient in a loud and aggressive manner. While they could not make out all that was being said they all heard Grievant say “Do it now” and “I told you that if I come back at 8 am . . .” In her written statement, Ms. Sanchez described the employee’s tone as “very loud and appeared rude, demanding, and aggressive.” Nurses Harless and Tyler used similar words to describe what they heard. Ms. Sanchez told Ms. Tyler that this was a serious matter. In her opinion, Grievant’s tone of voice was not consistent with patients’ rights.³

7. Licensed Practical Nurse (“LPN”) Maria Lucas was down the hall in a patient’s room. She heard Grievant yell “I told you twice to get out of bed.”⁴

¹ Nurse Harless holds a BA in Psychology in addition to her Nursing degree. She has been employed a MMBH since 2011 and has worked as an RN for 24 years. She has previously worked at Highland Hospital and Thomas Memorial Hospital.

² Nurse Tyler has been an RN for sixteen years. She holds a BA in Business Administration, and a BA in Mortuary Science. She has been a Quality Assurance and Performance Improvement (“QAPI”) Survey Coordinator for three years.

³ Testimony of the three nurses and surveyors and their written statements made to the LAWW investigator.

⁴ LPN Lucas statement given to the LAWW investigator.

8. Nurse Tyler immediately recognized that the shouting was coming from Grievant, who was standing at the door outside a patient's room. She told Nurse Harless to intervene.

9. Nurse Harless approached Grievant and tapped her on the shoulder, told her to "bring it down" and that there were others on the floor. Grievant responded "I don't care" and moved away.

10. Nurse Harless reported the incident to her supervisor, Sabrina Hall, Interim Nurse Manager. Nurse Manager Hall directed Nurse Harless to complete an Adult Protective Services ("APS") report and an incident report.

11. Nurse Harless completed and submitted an APS Mandatory Reporting Form, a Patient Grievance Form, and a MMBH Incident Report. All the forms are dated December 9, 2020. The reports describe that Grievant was heard giving a patient direction in a very loud and demanding tone.⁵

12. Nurse Tyler and Surveyor Sanchez met with Nurse Manager Hall and Tamara Kuhn, MMBH Human Resources Director to report and discuss the incident. Ms. Sanchez did not submit a separate report or include the incident in her final report because it had already been reported and dealt with on that day.

13. Nurse Supervisor Hall met with Grievant regarding the incident. Grievant refused to give a written statement but told Ms. Hall that she raised her voice at the patient to get her attention but denied making the statement "I told you if I come back at 8:00 . . ." (Respondent Exhibit 1).

⁵ Respondent Exhibit 1, LAWV investigation report completed by Teri Stone and Staff Investigator, Jonathon Kelly, RN.

14. By letter dated December 10, 2020, HR Director Kuhn suspended Grievant pending investigation based upon the incident reports she had seen. (Respondent Exhibit 4).

15. The incident reports had been given to LAWW Advocate Teri Stone for investigation along with Jonathon Kelly, RN, a staff investigator. Ms. Stone interviewed: Sabrina Hall, RN; Maria Lucas, LPN; Candy Sanchez, RN/Surveyor; Marlise Tyler, RN; and Matthew Christian, HSW. She did not interview Grievant because Grievant had previously refused to give a written statement. Investigator Stone believed she has sufficient information to make a finding.

16. Teri Stone, MA, submitted a written report of the investigation dated December 14, 2020. Ms. Stone concluded that, "Ms. Adkins used an inappropriate tone of voice and made statement in a manner interpreted as threatening/abusive toward the patient, the preponderance of the evidence supports the allegation of verbal abuse." (Respondent Exhibit 1).

17. The West Virginia Code of State Rules defines verbal abuse as follows:

Verbal Abuse – 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 of 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 (1995).

18. Grievant received a written notice for a predetermination conference dated December 15, 2020. The reason for the conference was to allow Grievant to "contribute

evidence or information to assist us in the resolution” of the incident which occurred on December 9, 2020.

19. The predetermination conference took place on December 21, 2020. Grievant attended the conference with a representative, Erin Conner. Grievant was informed of the result of the investigation and the possible charges against her. Grievant stated that she used a stern voice trying to wake the patient up so she would use the bathroom. She stated that she was a loud person, she did not raise her voice, it was just stern.

20. By letter dated December 22, 2020, Grievant was notified that she was dismissed from employment with MMBH. The dismissal was based upon verbal abuse as defined by W. VA. CODE ST. R. § 64-59-3.17 and violation of MMBH Employee Code of Conduct Policy MMBHC038 which states that employees will: “[d]emonstrate integrity, honesty, and fairness in carrying out their duties”; and will not; “[c]urse, 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.” *Id.*

21. Grievant received a coaching dated April 15, 2020, regarding dress code and behavior. Grievant was reminded that Policy MMBHC038 requires that an employee will not “[c]urse, 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.” (Respondent Exhibit 7).

22. Grievant received a verbal reprimand dated June 2, 2020, for “making insulting comments against a patient.” Grievant was advised that: “[a]t no time is

disrespectful behavior tolerated nor is it an accepted behavior.” The same provision of MMBHC038 was cited. (Respondent Exhibit 8).

23. On October 15, 2020, Grievant’s supervisor made a written Staff Situation Report to the Director of Nursing regarding Grievant’s failure to call-in prior to her shift informing her supervisor that she had an appointment that would require her to miss her shift. (Respondent Exhibit 10).

24. On November 11, 2020, a fellow employee filed a Staff Situation report to her supervising nurse regarding Grievant. The supervising nurse explained to Grievant that “her voice tone was at times more emotional than necessary and [Grievant] agreed to take more care in her communications with others.” (Respondent Exhibit 11).

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, 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.

Grievant, as a permanent state employee in the classified service, could 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).

Grievant was dismissed after a charge of patient verbal abuse was substantiated by an internal investigation. She was also charged with violating the MMHB Employee Code of Conduct policy MMBHC038 by shouting and using threatening language at a patient in such a place as this speech was overheard by staff and visitors. "Verbal abuse" is defined as follows:

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 of 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 (1995).

Grievant counters that she was not shouting at or threatening the patient. She states that she was using a stern tone to tell the patient to get out of bed. Grievant claims she is always loud, but she was not shouting. Finally, Grievant alleges that she was not threatening the patient when the witnesses heard her saying, "I told you if I come back at 8:00 . . ." Rather she was just advising the patient that she would be returning at 8:00 a.m. to give her a shower. She denies that she used an abusive or threatening tone with the patient.

Contrary to Grievant's assertions, Maria Lucas, LPN, wrote in her statement that she was working down the hall and heard Grievant yelling at the patient, "I told you twice to get out of bed." She said that Grievant was yelling other things about getting out of the room.⁶ Additionally, Candy Sanchez, RN/Surveyor; Marlise Tyler, RN; and Christy Harless RN testified that Grievant's voice was so loud that it could be heard above the normal business environmental noise created in a mental hospital unit. They all described Grievant's tone as very loud, rude, demanding, and aggressive. They all agreed that the statement about returning at 8:00 a.m. was threatening.⁷

⁶ Respondent Exhibit 1.

⁷ The witnesses did not use exactly the same words but their testimony was consistent with this description.

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' 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 was calm and appropriate in delivering her testimony. She was not evasive in her answers. Grievant has a clear bias in this matter because she wants reinstated to her position. This could provide an incentive to be less than truthful or candid. She states that her voice was stern and loud, as usual, but not aggressive or threatening.

Grievant also avers that she was merely informing the patient that she would be back to help her shower at 8:00 a.m. and her statement was not a threat. Her description of her voice and demeanor with the patient is at odds with four other witnesses, which raises a significant problem with her credibility. Additionally, she had been counseled twice and received a verbal reprimand for similar behavior in the seven months leading up to this incident. Grievant's testimony is not credible.

On the other hand, the three nurses who heard Grievant's exchange with the patient gave consistent testimony regarding Grievant's volume and tone while interacting with the patient. They all described Grievant's tone as very loud, rude, demanding, and aggressive. They all agreed that the statement about returning at 8:00 a.m. was threatening. The testimony of Candy Sanchez, RN/Surveyor was particularly compelling. She is not employed by Respondent and has no personal interest in the outcome of this case. Her demeanor was professional and appropriate. She has a great deal of experience in the hospital setting and her present position is to help state mental hospitals comply with state and federal regulations. She testified that Grievant's threatening tone and volume was not consistent with patient rights. She felt the matter constituted verbal abuse and warranted immediate reporting, which occurred. Her testimony was consistent with that of the other witnesses and was very credible.

Respondent proved by a preponderance of the evidence that Grievant was guilty of verbally abusing a patient as that term is defined in W. VA. CODE ST. R. § 64-59-3.17 (1995). She addressed a patient in a voice that was so loud that it could be heard by witnesses on the floor above the regular din of the floor. Her words and tone were threatening and abusive.

Grievant points to W. VA. CODE ST. R. § 64-59-20.2.9 which states that "Upon receipt of an abuse/neglect grievance, the advocate shall immediately interview the client and review the situation." (Grievant's Exhibit 1) Grievant argues that the investigation which led to the finding of verbal abuse was flawed because Advocate Stone did not interview the patient/client as set out in this rule. Ms. Stone points out that there was no need to interview the patient because she had consistent statements from credible witnesses. Additionally, since this incident occurred during the height of the pandemic, her access to the hospital was severely limited.

Technically, Advocate Stone's failure to interview the patient/client is not consistent with the requirements of an investigation conducted under this rule. Having found that an error occurred it must be determined what impact it had on the ultimate findings. "In addition to demonstrating that the error actually occurred, it must also be shown that the error influenced the outcome. Otherwise, if the same result would have inevitably been reached, the procedural violation will be treated as 'harmless error.' *Bradley v. Cabell County Bd. of Educ.*, Docket No. 99-06-150 (Sept. 9, 1999); *Dadisman v. W. Va. Div. of Rehabilitation Serv.*, Docket Nos. 98-RS-023/040 (Mar. 25, 1999). See generally *Parker v. Defense Logistics Agency*, 1 M.S.P.B. 489 (1980). *Martin v. Pleasants County Bd of Educ.*, Docket No. 2008-0197-PleED (Jan. 31, 2008)." *De lauder v. Dep't of Health & Human Res.*, Docket No. 07-HHR-326 (Jan. 28, 2009).

In this situation, the patient has diminished capacity due to her/his mental illness. Whether he/she perceived Grievant's words or actions to be threatening is not dispositive. Verbal abuse occurs when the employee uses language, tone or inflection of voice that would likely be construed by an impartial observer as a threat. W. VA. CODE ST. R. § 64-

59-3.17 (1995). In this situation, there were three credible witnesses who construed Grievant's language, tone, and inflection to be threatening and abusive. This was sufficient for a finding of verbal abuse. Interviewing the patient/client would not have changed the report findings and conclusions. Consequently, in this particular instance, the failure to interview the patient/client was harmless error.

Grievant also argues that Respondent failed to follow DHHR Policy Memorandum 2104 *Progressive Correction and Disciplinary Action*. (Grievant's Exhibit 2) She notes that Grievant has not received a written reprimand or a suspension for her conduct prior to her dismissal, as set out in the policies progressive continuum of discipline.

Policy 2104 specifically states:

However, due to the sensitive and essential nature of services the Department must provide the public, and the standards of services required in many program areas, **there may be instances when more severe levels of discipline are initially imposed for some infractions.** This policy provides a guidance for non-disciplinary corrective actions and progressive levels of discipline. **It is not intended to diminish the authority of supervisors or managers to exercise discretion when attempting to correct performance and/or behavior.** (emphasis added)

Verbal or physical abuse of a patient in a mental health facility is a serious violation of the rights of this particularly vulnerable population. Generally severe discipline is justified on the first such offence. In this situation, Grievant had been previously warned and coached about her tone and volume in addressing patients and staff. Respondent did not violate DHHR Policy Memorandum 2104 by dismissing Grievant from employment. Accordingly, the Grievance is **DENIED**.

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).

2. Grievant, as a permanent state employee in the classified service, could 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. “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” of a patient is defined as follows:

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 of 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 (1995).

5. Respondent proved by a preponderance of the evidence that Grievant was guilty of verbally abusing a patient as that term is defined in W. VA. CODE ST. R. § 64-59-3.17 (1995).

6. Advocate Stone's failure to interview the patient/client is not consistent with the requirements of an investigation conducted under W. VA. CODE ST. R. § 64-59-20.2.9.

7. "In addition to demonstrating that the error actually occurred, it must also be shown that the error influenced the outcome. Otherwise, if the same result would have inevitably been reached, the procedural violation will be treated as 'harmless error.' *Bradley v. Cabell County Bd. of Educ.*, Docket No. 99-06-150 (Sept. 9, 1999); *Dadisman v. W. Va. Div. of Rehabilitation Serv.*, Docket Nos. 98-RS-023/040 (Mar. 25, 1999). See generally *Parker v. Defense Logistics Agency*, 1 M.S.P.B. 489 (1980). *Martin v. Pleasants County Bd of Educ.*, Docket No. 2008-0197-PleED (Jan. 31, 2008)." *Delauder v. Dep't of Health & Human Res.*, Docket No. 07-HHR-326 (Jan. 28, 2009).

8. Considering all the evidence, in this particular instance the failure to interview the patient/client was harmless error.

9. Respondent proved it had good cause to terminate Grievant's employment for verbal abuse of a patient.

Accordingly, the Grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of

the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. See also 156 C.S.R. 1 § 6.20 (2018).

DATE: July 23, 2021


WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE