

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LATOSHA GREENE,

Grievant,

v.

Docket No. 2019-1271-CONS

**DEPARTMENT OF HEALTH AND HUMAN
RESOURCES/JACKIE WITHROW HOSPITAL,**

Respondent.

DECISION

Grievant, LaTosha Greene, filed three level one grievances and one expedited level three grievance against her employer, Respondent, Department of Health and Human Resources (DHHR), Jackie Withrow Hospital (JWH). The first grievance is dated August 23, 2018, was assigned docket number 2019-0299-DHHR, and stated as follows: "Grievant not paid correct increment." As relief sought, Grievant stated, "[t]o be made whole in every way including back pay with interest." The second grievance is dated March 15, 2019, was assigned docket number 2019-1256-DHHR, and stated as follows: "Grievant had assigned shift changed based on an allegation and differential pay was lost. Grievant also falsely charged as no call no show when hospitalized." As relief sought, Grievant stated, "[t]o be made whole in every way including back pay with interest." The third grievance is dated May 1, 2019, was assigned docket number 2019-1564-DHHR, and stated as follows: "Grievant charged unauthorized leave despite medical slip." As relief sought, Grievant stated, "[t]o be made whole in every way including back pay with interest and benefits restored." The expedited level three grievance is dated June 6, 2019, was assigned docket number 2019-1725-DHHR and stated as follows: "Dismissal without good cause." As relief sought, Grievant stated, "[t]o be made whole in

every way including back pay with interest and benefits restored.” By Corrected Order of Consolidation entered November 18, 2019, these grievances were consolidated at level three and assigned docket number 2019-1271-CONS.

A level three hearing was conducted in Charleston, West Virginia, on July 17, 2020, August 20, 2020, November 23, 2020, and December 4, 2020, by the video conferencing platform, Zoom.¹ This ALJ, the parties, and their representatives appeared from separate locations. Grievant appeared by her representative, Gary DeLuke, UE Local 170, West Virginia Public Workers Union. Respondent appeared by counsel, Brandolyn Felton-Ernest, Esquire, Assistant Attorney General. At the commencement of the level three hearing, Grievant, by her representative, withdrew three of the pending grievances leaving the dismissal grievance the only remaining claim to be addressed in this matter. This grievance became mature for decision on February 26, 2021, upon the receipt of the last of the parties’ proposed Findings of Fact and Conclusions of Law.

Synopsis

Respondent dismissed Grievant from employment, charging her as having engaged in abuse and neglect of a resident and violating DHHR Policy 2108, Employee

¹ This matter appears to have been delayed at level one of the grievance procedure as a result of scheduling issues and the filing of additional grievances, which were eventually consolidated in order to be heard together at level three. This matter was then scheduled for hearing on November 19, 2019. That hearing was continued at the Grievant’s request. The matter was next delayed in early 2020 by the world-wide COVID-19 pandemic which halted the in-person operations of the Grievance Board. This grievance was rescheduled for hearing on July 17, 2020. However, the parties were unable to finish the presentation of evidence on that day. The second day of hearing was scheduled on August 20, 2020, and such was commenced as scheduled. However, this ALJ had to abruptly continue the proceeding that morning due to a medical emergency in her family. The hearing was rescheduled for November 23, 2020, but again, the parties were unable to finish the presentation of evidence on that day. The final day of hearing was held on December 4, 2020.

Conduct. Grievant denies Respondent's allegations. Respondent proved by a preponderance of the evidence that Grievant engaged in abuse and neglect of a resident and violated the DHHR Policy 2108, Employee Conduct. Respondent proved that there was good cause for Grievant's dismissal and that such was justified. Therefore, the grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant was employed by Respondent as a health service worker at Jackie Withrow Hospital. Grievant had been so employed by Respondent for approximately nine years.

2. On the date at issue, May 28, 2019, Grievant worked the night shift, and was in the process of working a sixteen-hour shift. She began her shift at 12:00 a.m. on that date.² At that time, HSWs were typically assigned nine to ten residents to care for during a shift.³

3. Jackie Withrow Hospital is a state-owned nursing home operated by the Department of Health and Human Resources.

4. Angela Booker is employed by Respondent as the CEO of Jackie Withrow Hospital.

5. Frances Allen-Henderson is a psychologist contracted to work at JWH. She has worked in this contract position for about three years.

² See, testimony of Latosha Greene; testimony of Angela Booker; Respondent's Exhibit 6, interview transcripts.

³ See, testimony of Judy Wills, LPN.

6. On May 28, 2019, Ms. Allen-Henderson was working at JWH and went to a room to conduct a consult with a new resident, M.K.⁴ When Ms. Allen-Henderson arrived at M.K.'s room, Grievant was there working with the resident's roommate, C.S. Ms. Allen-Henderson was familiar with C.S. and had worked with C.S. before.

7. While Ms. Allen-Henderson was in the residents' room, she witnessed Grievant's interactions with C.S. At that time, only Ms. Allen-Henderson, Grievant, C.S., and M.K. were present.

8. Ms. Allen-Henderson had not worked with Grievant before May 28, 2019; however, she had seen Grievant around JWH.

9. After witnessing Grievant working with C.S. on that date and her comments toward M.K., Ms. Allen-Henderson reported to Teresa Croy that Grievant had used a "loud" and "abrasive" tone in addressing C.S., and had said things like C.S. could do things for herself, and also said "you smell" and "you're a mess." Ms. Allen-Henderson also reported that in response, C.S. became upset and started crying. Ms. Allen-Henderson also reported that in response to a question she asked about M.K., Grievant replied that M.K. was "just plain mean," "mean, mean, mean." M.K. was present when Grievant made the comments and she could hear the same. At that time, M.K. was sitting on the edge of her bed, and was rocking side to side. Both residents seemed to be upset by Grievant's comments, but calmed down after Grievant left the room.

10. Afterward, Ms. Allen-Henderson went to Ms. Croy because she believed Grievant's statements to C.S. and M.K. were verbal abuse. Ms. Croy asked Ms. Allen-Henderson to draft a statement about what she witnessed.

⁴ Residents will be identified by their initials to protect their privacy.

11. Ms. Allen-Henderson drafted a statement as requested, which stated as follows:

On May 28, 2019[,] at approximately 10:00am, I entered a resident's room to complete a consult when a HSW, Latosha Green[e], was assisting another resident. The HSW was abrasive with the resident [C.S.] she was attempting to clean up-stating to her that she could walk, and she could clean herself up (even though the resident was getting upset and crying saying she could not and that her feet hurt). She rushed the resident and handed her a diaper to clean herself in addition to refusing to give her a wipe to clean herself after the resident requested by stating to her that there are cloths and water at the sink, and she could walk to the sink. At one point she told her that she "smelled" and was a "mess." I interrupted at some point to ask about the roommate in an effort to calm the situation and make her aware that I was hearing and watching what was going on. She stated to me that the resident I was seeing was "just plain mean". (sic) I attempted to explain that she was perhaps scared, and she was adamant about the issues saying over and over that she was "mean" and looking at the resident directly and making the statement in a loud voice. The HSW left the room and both residents calmed down-in particular the resident I was seeing layer (sic) on her bed. The resident C.S. asked me if I was "from Charleston" after the HSW left the room. I introduced myself and my position to her and she seemed calmed and satisfied. I came back upstairs and reported the incident to Teresa Croy, and she asked me to write a statement.⁵

12. Ms. Allen-Henderson, accompanied by Ms. Croy, took the written statement to Tammy Foster, a social worker, in the Social Work Department at JWH. Ms. Allen-Henderson believed that social workers investigated such reports.

13. Upon receiving Ms. Allen-Henderson's written statement, April Collins, Director of Social Services at JWH, spoke to Ms. Booker, then completed the necessary

⁵ See, Respondent's Exhibit 1, written statement, signed by Frances Allen-Henderson, Licensed Psychologist #927.

forms to report Ms. Allen-Henderson's allegations with respect to C.S. and M.K. to Adult Protective Services (APS) and to the Nurse Aide Registry. As required, Ms. Collins sent copies of the APS Reporting Forms to OHFLAC and the Ombudsman.⁶

14. Sometime after Ms. Collins spoke to Ms. Booker after receiving Ms. Allen-Henderson's written complaint, Kathy Parnell, the Director of Nursing (DON) and Grievant's supervisor that day, pulled Grievant off the floor.

15. On the APS form with respect to C.S., Ms. Collins wrote the following description of the incident:

It was reported that staff witnessed Latosha speaking abusively to C.S. C.S. had a BM and needed assistance cleaning herself up. Latosha told her that there was washclothes (sic) and water at the sink to walk over and clean herself up. C.S. was asking for wipes and a clean brief, despite C.S. crying and stating that she could not walk because her feet hurt, Latosha continued to tell C.S. that she could walk and clean herself up. At one point, Latosha told C.S. she was a "mess" and that she "smelled"(sic) Latosha finally gave C.S. some wipes and a brief to get cleaned up with. Latosha did not assist in cleaning up C.S.⁷

16. On the APS form with respect to M.K., Ms. Collins wrote the following description of the incident:

Psychologist was in M.K.'s room while HSW, Latosha, was with the room mate (sic). Psychologist asked HSW how [M.K.] was and Latosha stated "she is just plain mean" (sic) Psychologist advised the HSW that maybe she was just scared and HSW continued to state "she is mean, mean, mean.["] All of this occurred in front of [M.K.]⁸

⁶ See, testimony of April Collins; Respondent's Exhibit 2, Adult Protective Services Reporting Form regarding C.S.; Respondent's Exhibit 3, Nurse Aide Registry Reporting Form regarding C.S.; Respondent's Exhibit 4, Adult Protective Services Reporting Form regarding M.K.; Respondent's Exhibit 5, Nurse Aide Registry Reporting Form regarding M.K.

⁷ See, Respondent's Exhibit 2, APS Reporting Form.

⁸ See, Respondent's Exhibit 4, APS Reporting Form.

17. Ms. Collins wrote the same descriptions of the incident on the forms submitted to the Nurse Aide Registry for M.K. and C.S.⁹

18. Ms. Collins met with Ms. Booker right after she completed and sent the forms to the respective reporting offices/agencies.

19. Once Ms. Booker was made aware of the allegations against Grievant on May 28, 2019, she made the decision to have Grievant pulled off the floor so that she would have no contact with the residents. It is unclear at what time Grievant was pulled off the floor, but it would appear to have been sometime between 10:00 a.m. and 10:30 a.m.¹⁰ Shortly thereafter, Ms. Booker and Ms. Collins met with Grievant and interviewed her about her interactions with C.S., M.K., and Ms. Allen-Henderson.

20. During her interview with Ms. Booker and Ms. Collins, Grievant admitted that on May 28, 2019, she had told Ms. Allen-Henderson that M.K. was mean and that M.K. was present and heard the comment. However, Grievant denied telling C.S. that she smelled or that C.S. was a mess. To some extent, Grievant denied refusing to help C.S. that day, but asserted that she was not supposed to work with C.S. anymore and this was at C.S.'s request. Grievant also denied telling C.S. to go to the sink and clean herself up.

21. At the end of their interview with Grievant, Ms. Booker suspended Grievant pending investigation into the allegations made against her, and she was told to leave the

⁹ See, Respondent's Exhibits 3 and 5, Nurse Aide Registry Reporting Forms.

¹⁰ See, Respondent's Exhibit 1, Statement of Frances Allen-Henderson; testimony of Frances Allen-Henderson; Respondent's Exhibit 6, interview transcripts; and testimony of Angela Booker.

facility at that time.¹¹ It appears that Grievant left sometime around 12:00 p.m. or 12:30 p.m. Grievant was not allowed to return to her floor following the interview.

22. It appears that Grievant was off the floor for about two hours before she was sent home from the facility on May 28, 2019.

23. Ms. Booker and Ms. Collins began their investigation into Ms. Allen-Henderson's report on May 28, 2019, the same day the report was received. They concluded their investigation sometime prior to June 5, 2019. However, the last known interview was conducted on May 31, 2019.

24. During their investigation, Ms. Booker and Ms. Collins interviewed Grievant, Caroline Rose, C.S., and Donna Carter. However, they did not interview Ms. Allen-Henderson, who had reportedly witnessed the interaction between Grievant and C.S. and M.K. and made the initial report. Also, they did not interview M.K., DON Parnell, Nicole Jones, another HSW who was at work at the time at issue, Judy Wills, an LPN who had supervised Grievant and who was also at work at the time at issue, Mike Lawson, who was Grievant's supervisor on the date in question, or any other employee who worked with Grievant on May 28, 2019, or who worked on her floor/unit.

25. These interviews were recorded by audio tape. The audio recordings of these interviews were not offered into evidence. Transcripts of the interviews drafted by Ms. Collins were offered into evidence. Ms. Collins is not a certified court reporter.

26. After Grievant left the facility that day, Ms. Booker, DON Parnell, the "Activities Director" made "compliance rounds" on Grievant's assigned unit and

¹¹ See, Respondent's Exhibit 9, May 28, 2019, Notice of Suspension Pending Investigation Letter.

discovered three residents who they found had not been provided appropriate care. One resident, J.T. was found lying with his/her head against the bed's siderail and J.T.'s clothing and bed linens were wet. Also, food from breakfast and uneaten food items from the 10:00 a.m. snack were still in J.T.'s room. Ms. Booker, DON Parnell, and the Activities Director found dirty linens left in the floor of resident R.B.'s room. Another resident, D.B. was found in bed with a lift sling behind him/her and he/she had fallen over and had his/her head lying against the bed siderail.

27. No one came to replace Grievant when she was pulled off the floor earlier in the morning. So, the floor where Grievant had been working was short-handed after she was sent home on suspension.¹²

28. Grievant was pulled from her duties on her floor around 10:00 a.m. to 10:30 a.m. around the time morning snacks were passed out to the residents. Caroline Rose passed the snacks to the residents that morning.¹³ Grievant was interviewed by Ms. Booker and Ms. Collins until around 12:30 p.m., and she was not permitted to return to her floor after the meeting. Therefore, she was not allowed to return to complete any incomplete tasks.

29. Ms. Booker, Ms. Collins, and DON Parnell re-interviewed Grievant on May 30, 2019. This interview was also recorded by audio tape. Again, no audio recordings were introduced as evidence, but transcripts of the interview were. During this interview, Grievant was asked about the residents found lacking appropriate care during Ms. Booker's compliance rounds after Grievant had left the facility on May 28, 2019.¹⁴

¹² See, testimony of Nicole Jones.

¹³ See, testimony of Grievant.

¹⁴ See, Respondent's Exhibit 6, interview transcripts.

30. During the May 30, 2019, interview, Grievant admitted that she cared for J.T. around breakfast on May 28, 2019, and that such was around 6:00-6:30 a.m., and that she did not go back to check on him again that morning before she was pulled off the floor at around 10:00-10:30 a.m. Therefore, she did not perform the required checks on him every two hours. Grievant also admitted that she put the lift sling behind D.B. on the morning of May 28, 2019, to get her up to clean her. However, Grievant thought that she had got her up, and was surprised to hear that she was still in the bed at or about 12:30 p.m. Grievant admitted that she forgot to go back to D.B. Given the time Grievant was pulled off the floor, D.B. likely remained in the same position in bed for more than two hours. Further, Grievant admitted to leaving the linens in the floor of R.B., but explained she was required to stop and pass breakfast trays to the residents and then was pulled off the floor and was not able to get back to finishing her work in that resident's room.

31. There was no evidence presented to establish whether APS Reporting Forms were completed and/or submitted to APS or any other agency regarding J.T., R.B., and D.B.

32. On May 31, 2019, Ms. Booker completed "Nurse Aide Registry Five Day Follow-Up Reports" for the May 28, 2019, incident involving Grievant and C.S. and the incident involving Grievant and M.K. Both of these reports state that mental abuse and neglect was substantiated following their investigation. It is noted that on these reports, Ms. Booker has described C.S.'s mental capacity as "alert/incapacitated," and M.K.'s as "confused." These reports were purportedly faxed to the Nurse Aide Registry on May 31, 2019.¹⁵

¹⁵ See, Respondent's Exhibits 7 & 8, "Nurse Aide Registry Five Day Follow-Up Reports."

33. On May 31, 2019, Ms. Booker conducted a predetermination conference for Grievant. In attendance were Ms. Booker, Grievant, and Grievant's representative, Johnny Taylor. Ms. Booker discussed Grievant's interactions with C.S. and M.K. on May 28, 2019, and the conditions of J.T., R.B., and D.B. discovered after Grievant had left the facility. Grievant denied the claims Ms. Allen-Henderson and C.S. made against her regarding C.S. Grievant admitted that she called M.K. mean while M.K. was present, and that M.K. could understand Grievant's comments.

34. By letter dated June 5, 2019, Grievant was notified that she was dismissed from her employment effective June 20, 2019, for resident abuse and neglect in violation of W.VA. CODE ST. R. § 69-6-1, *et seq.*, and DHHR Policy 2108 Employee Conduct in that she made derogatory statements to M.K.; she told C.S. that she smelled and that she was a mess, thereby making C.S. cry, and refused to provide care to C.S.; left a soiled brief in M.K.'s room after changing her early that morning, which was found hours later; left soiled linens in the floor of R.B.; failed to provide appropriate care to J.T. as she did not perform regular two-hour checks on him resulting in his being left in wet clothing and linens; when discovered, J.T. was also lying with his or her head resting against the bed's siderail; failed to remove J.T.'s breakfast tray and left uneaten food in J.T.'s room for hours; and left D.B. in bed and had left the lift swing behind this resident indicating the Grievant forgot to get D.B. up, when discovered D.B. had fell over in the bed and D.B.'s head was resting against the bedrail.¹⁶

35. Following the July 17, 2020, hearing date, as requested by Grievant's representative, to which there was no objection from Respondent, Ms. Booker contacted

¹⁶ See, Respondent's Exhibit 11, June 5, 2019, Dismissal Letter.

Joy Winters, Raleigh County Bureau of Children and Families (BCF), to find out what, if anything, APS had done upon receiving the May 28, 2019, reports. Ms. Winters confirmed via email that the two APS reports were not accepted by APS for investigation.¹⁷ Ms. Booker testified that she was informed that the two reports/referrals were “screened out.” However, when Ms. Booker asked Ms. Winters for a definition of “screened out” in the emails, Ms. Winters did not reply therein with a definition.¹⁸ No one offered a definition of the term “screened out” into evidence during this grievance.

36. Ms. Winters provided Ms. Booker two undated documents entitled “West Virginia Department of Human Services Bureau for Children and Families Disposition of Referral/Investigation Report” which state that the referral made to APS regarding M.K. on May 28, 2019, was “Not Assigned for Investigation” and the “Explanation: Does not meet APS Criteria.” The second document addressed the report/referral made with respect to C.S. on May 28, 2019, also stated, “Referral Not Assigned for Investigation;” “Explanation: Does not meet APS Criteria.”¹⁹ These two documents do not explain how the reports did not meet APS criteria, or what said criteria were. The person who made the decisions is not identified on the documents.²⁰

¹⁷ See, Respondent’s Exhibit 19, emails between Angela Booker and Joy Winters dated July 17, 2019, to July 29, 2019.

¹⁸ See, Respondent’s Exhibit 19, emails between Angela Booker and Joy Winters dated July 17, 2019, to July 29, 2019.

¹⁹ See, Respondent’s Exhibit 19, “West Virginia Department of Human Services Bureau for Children and Families ‘Disposition of Referral/Investigation Report.’” It is noted that the agency is not identified as the “West Virginia Department of Health and Human Resources” on these forms.

²⁰ See, Respondent’s Exhibit 19, “West Virginia Department of Human Services Bureau for Children and Families ‘Disposition of Referral/Investigation Report.’”

37. There was no evidence as to what, if any, action, or investigation, APS, the Ombudsman, the Nurse Aide Registry, or OHFLAC conducted upon receipt of the APS Reporting Forms Ms. Collins submitted to them on May 28, 2019.

38. As of the last day of the level three hearing, Grievant's Nurse's Aide license was valid, and current. No action had been taken against her license as a result of anything that happened between May 28, 2019, and June 5, 2019. Further, as of the time of the level three hearing, Grievant was employed elsewhere as a Nurse's Aide.

39. At no time did OHFLAC, the Ombudsman's office, APS, or the Nurse Aide Registry contact Grievant about the reports submitted on May 28, 2019.

40. Neither party called Joy Winters, DON Kathy Parnell, Caroline Rose, Teresa Croy, or Tammy Foster to testify as a witness at the level three hearing.

41. Neither party called anyone from APS, the Nurse Aide Registry, OHFLAC, or the Ombudsman's office to testify at the level three hearing.

42. Grievant attempted to call Mike Lawson as a witness at the level three hearing and this ALJ issued a subpoena for him to appear at the proceeding to testify. This ALJ allowed Grievant to call this witness to testify telephonically. However, when this ALJ called the number provided, Mr. Lawson answered and stated that he refused to testify and said not to call him again. Mr. Lawson then abruptly hung-up. Grievant, by her representative, stated that Grievant would not avail herself of the opportunity to seek enforcement of the subpoena in the Circuit Court of Kanawha County.

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. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Permanent state employees who are in the classified service can only be dismissed "for good cause, which means 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); *Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004) (*per curiam*). See also W. VA. CODE ST. R. § 143-1-12.2.a. (2016). "Although it is true that dismissal is inappropriate when the employee's violation is found to be merely a technical one, it is also true that seriously wrongful conduct can lead to dismissal even if it is not a technical violation of any statute. . . . The test is not whether the conduct breaks a specific law, but rather whether it is potentially damaging to the rights and interests of the public." *W. Va. Dep't of Corr. v. Lemasters*, 173 W. Va. 159, 162, 313 S.E.2d 436, 439 (1984). "'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. W. Va. Civil Serv. Comm'n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988) (*per curiam*).

Respondent dismissed Grievant for resident abuse and neglect pursuant to W.VA. CODE ST. R. § 69-6-1, *et seq.*, and for violating DHHR Policy 2108, Employee Conduct.

Specifically, Respondent asserts that Grievant, using a loud, “abrasive” voice, told C.S. that she smelled and that she was a mess which made C.S. cry. Respondent also asserts that Grievant refused to provide care for C.S., and that she verbally abused M.K. by stating that M.K. was “just plain mean,” “mean, mean, mean” to Ms. Allen-Henderson while in M.K.’s presence. Respondent also asserts that she refused care to C.S. during the May 28, 2019, incident. Additionally, Respondent asserts that after Grievant neglected several other residents who were also assigned to her on May 28, 2019, by failing to provide them appropriate care in a number of ways.

Grievant has freely admitted to telling Ms. Allen-Henderson that M.K. was “mean” while they were in the presence of M.K. Grievant has not agreed that she said it repeatedly, or that M.K. was “plain old mean.” Grievant asserts that her statements to Ms. Allen-Henderson do not constitute any type of abuse. Grievant, however, denies saying that C.S. “smelled” and was a “mess.” Grievant also denies refusing to provide care to C.S. Grievant asserts that she was not supposed to work with C.S., that such was recorded in some type of book, and that DON Parnell, Mike Lawson, and Ms. Booker had told her not to work with C.S. With respect to the other allegations of patient neglect purportedly discovered after Grievant left the facility on May 28, 2019, Grievant asserts that she was not allowed to complete the work she was doing at that time because she was pulled off the floor by Ms. Booker and she was not allowed to go back to finish. Therefore, it was not neglect on her part.

“Abuse” is defined as “[t]he willful inflection of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish. Abuse also includes the deprivation by an individual, including a caretaker, of goods or services

that are necessary to attain or maintain physical, mental, and psychological well-being. This presumes that instances of abuse of all residents, even those unaware that harm has occurred of those in a coma, cause physical harm, or pain or mental anguish. Abuse includes emotional abuse, physical abuse, sexual abuse, verbal abuse and involuntary seclusion.” W.VA. CODE ST. R. § 69-6-2.1. “Neglect” is defined as “[t]he failure to provide goods and services necessary to avoid physical harm, or the significant threat of physical harm, mental anguish, or mental illness unless such actions are beyond the nurse aides’s control. Failure to report an incident or failure to appear in response to a subpoena, or both shall be considered neglect.” W.VA. CODE ST. R. § 69-6-2.8. “Emotional Abuse” is defined as “[s]ubjecting or exposing a resident to behavior that may result in psychological trauma or injury. Emotional abuse includes: humiliating, harassing, teasing or threatening; unreasonably restricting a resident’s contact with family, friends or other residents; unreasonably ignoring a resident’s requests; threats of punishment or deprivation; or willfully violating a resident’s rights, including confidentiality. Emotional abuse may also be referred to as psychological abuse, mental abuse, or psychosocial abuse.” W.VA. CODE ST. R. § 69-6-2.4. “Verbal Abuse” is defined as “[t]he use of oral, written or gestured language that willfully includes disparaging and derogatory terms to residents or their families, or within their hearing distance, regardless of their age, ability to comprehend, or disability. Examples of verbal abuse include, but are not limited to, threats of harm; saying things to frighten a resident, such as telling a resident that he or she will never be able to see his or her family again; intimidation; humiliation; threats of hostility, or vulgarity.” W.VA. CODE ST. R. § 69-6-2.17. DHHR Policy 2108, “Employee Conduct”, Section VIII. “Policy and Procedures” states, in part, as follows: “Employees

are expected to . . . conduct themselves professionally in the presence of residents/patients/clients, fellow employees and the public”²¹

Many of the facts in this grievance are disputed. 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). This ALJ considered the testimony of all the witnesses called to testify at the level three hearing in making this decision. However, credibility determinations are being limited to only those witnesses whose testimony is most relevant to deciding the outcome of this grievance.

Ms. Allen-Henderson testified at the level three hearing. She was calm and professional. She demonstrated the proper demeanor and answered the questions asked

²¹ See, Respondent’s Exhibit 16, DHHR Policy 2108, “Employee Conduct.”

of her. She was not evasive. Ms. Allen-Henderson had a copy of her written statement from May 28, 2019, with her when she testified. However, she did not read from it as she testified. She did not appear to have any animosity toward the Grievant. In fact, there are no known connections between Ms. Allen-Henderson and Grievant. There is no evidence of prior interactions or disagreements between the two. Ms. Henderson testified that she had not worked with Grievant before that date and had only seen her around the hospital. Grievant did not dispute this. Ms. Allen-Henderson has no known interest in this matter. However, given that it was her report that resulted in Grievant's dismissal, such could be viewed as a motive to be untruthful. Despite this, Ms. Allen-Henderson's testimony did not appear untruthful. Her recollection of the events was good, and she was confident in her answers. Ms. Allen-Henderson was a credible witness.

Grievant answered the questions asked of her and was not evasive. At times during her testimony, Grievant seemed angry and/or offended. However, given the nature of the allegations in this matter, and as she was dismissed from her employment, such is understandable and does not affect her credibility. Largely, Grievant demonstrated the appropriate demeanor during the hearing. Grievant certainly has an interest in this matter because she is seeking reinstatement to her position at JWH and such could provide a motive to be untruthful. Grievant's statements during her interviews with Ms. Booker and Ms. Collins, as set forth in the transcripts, coupled with her testimony at level three, demonstrate that she does not get along very well with C.S. and that she does not think highly of C.S. That alone is not abuse. However, the evidence suggests that her exchange with C.S. was loud, that C.S. was crying, and that Grievant was likely frustrated, if not annoyed, with C.S.'s behavior. Given this and their history, it is likely Grievant's

tone was “abrasive” as Ms. Allen-Henderson stated, even if Grievant did not intend for it to be. Also, this was somewhat of a fast exchange, and with Grievant being frustrated and C.S. crying, Grievant could have easily said some things that she does not quite remember, such as that C.S. smelled or that C.S. was a mess. Ms. Allen-Henderson, however, was not emotionally invested in the exchange and was a bystander. As such, her recollection of the incident is likely more reliable.

Grievant was adamant that she was told by her superiors not to work with C.S. and that it was written in a book. Grievant uses this to justify her refusal to assist C.S. with cleaning up on the morning of May 28, 2019, and offering to go find someone else to do it. However, Grievant admits to offering to bathe C.S. and talking to C.S. about going to the sink to wash up with washcloths and towels instead of using wipes. This makes no sense if she was not supposed to care for C.S. Also, instead of just going to get someone else, Grievant appears to have stayed in the room bickering with C.S., engaging with C.S. by handing her a clean brief, and continuing to talk about C.S. getting cleaned up. That is when Ms. Allen-Henderson interjected to “defuse” the situation, as she described it. Grievant has acknowledged that Ms. Allen-Henderson asked her about M.K., the resident she was working with, and Grievant replied that M.K. was mean. Grievant acknowledges that C.S. was crying during their exchange, but has asserted that C.S. is always crying. This comment minimizes C.S.’s feelings and well-being, and demonstrates Grievant’s lack of concern.

Grievant appears to place all the blame for the incident, and possibly her dismissal, on C.S. Grievant’s reasoning is flawed, though, because Ms. Allen-Henderson is the one who made the report after witnessing the exchange between Grievant and C.S.

and Grievant's comments about M.K. while in his/her presence. Grievant has made no claim that Ms. Allen-Henderson does not like her, or that Ms. Allen-Henderson is biased against her.

Ms. Booker demonstrated the appropriate demeanor toward the proceeding. As Ms. Booker served as the investigator, made the determination that Grievant had engaged in wrongdoing, and was responsible for recommending and imposing discipline, she can be viewed as having bias, and having an interest in the outcome of this grievance because her decisions are being questioned. Such could be a motive to be untruthful. Ms. Booker had a decent recollection of her actions and the interviews she conducted during the investigation. However, her testimony about her knowledge of the investigation procedure for APS, or lack thereof, was unconvincing. It seems implausible that a long-time CEO of a state-run, long-term care facility who has years of experience and training would know so little about the process. She also contradicted herself at one point by testifying that she never received APS reports following the completion of their investigations, but later said that she did receive these reports. This diminishes her credibility. Her judgment in her role as lead investigator is also troublesome. Ms. Booker made the choice not to interview Ms. Allen-Henderson despite her being an eyewitness to the alleged conduct and the person who made the initial report of abuse. Her reasoning was that they had her written statement, so an interview was not necessary. This reasoning, at the outset, assumes that everything in the report is true. Perhaps, had they spoken to Ms. Allen-Henderson to start with, the investigation itself would have been different. Ms. Booker also made the choice not to interview any of Grievant's supervisors and only one of Grievant's coworkers who was working on May 28, 2019. They were all

potential witnesses. Ms. Booker's testimony served mostly to highlight weaknesses in the investigation and to raise more questions about the investigative process than it answered.

April Collins appeared calm and professional. She seemed knowledgeable about the reporting process for claims of abuse and neglect and the requirements of the same. She answered the questions asked of her, and she was not evasive. She appeared to have a good recollection of Ms. Allen-Henderson's statement and what she did upon receiving it. As Ms. Collins was integral in the reporting of Ms. Allen-Henderson's allegation and she assisted Ms. Booker with the JWH investigation into the matter, Ms. Collins could be seen as having a bias against Grievant, which could be a motive to be untruthful. Nonetheless, Ms. Collins did not appear untruthful. Ms. Collins appeared to be a credible witness.

Ms. Collins contradicted Ms. Booker's testimony about whether APS investigated the two reports. Ms. Collins testified that she "did clarify to make sure that APS did investigate, and it was investigated by an APS worker."²² She testified that she remembered "them" coming to the facility and asking questions about the incident, however, she could not remember which APS worker it was. She also testified that she "knew for certain" that "they" came in to do their investigation. Ms. Collins testified that earlier that same morning before testifying, she had confirmed with Joy Winters, the APS supervisor for Raleigh County, by email that the two reports of abuse were "investigated" and "appropriate action was taken." Ms. Collins added, "that was all [Ms. Winters] would

²² See, testimony of April Collins.

tell me.”²³ That email was not presented as evidence in this matter. This testimony directly contradicts Ms. Booker’s testimony, and the emails exchanged between Ms. Booker and Ms. Winters in July 2020 following the first day of hearing on July 17, 2020.

C.S. was interviewed by Ms. Booker and Ms. Collins. Ms. Collins typed the transcript of the recorded interview. C.S. was not under oath during this interview, and there has been no suggestion that she signed a sworn affidavit. C.S. was not called to testify at the level three hearing. Therefore, the transcript and the testimony of Ms. Booker and Ms. Collins regarding the interview with C.S. is entirely hearsay. “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).

“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

²³ See, testimony of April Collins.

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).

It is unknown whether C.S. has any medical condition that would affect cognition or memory. However, Ms. Booker described C.S.'s mental capacity as "alert/incapacitated." Ms. Booker and Grievant have acknowledged that C.S. has complained about Grievant before, along with several other staff members, and that C.S. has had a history of making allegations that were found to be false. Further, as C.S. is the subject of one of the allegations of abuse, she is an interested party, which would serve as a motive to be untruthful. Given all of this, the interview of C.S. is entitled to no weight in deciding this grievance.²⁴

Given the evidence presented, it is more likely than not Grievant behaved as described in Ms. Allen-Henderson's statement. Grievant was loud and spoke to C.S. in a disrespectful, abrasive tone, insulting C.S., and did not get her the care she needed with respect to getting cleaned up for the day, whether it be doing it herself, or getting someone else to help her at that time. Grievant also made derogatory statements about M.K. to Ms. Allen-Henderson in front of M.K., who was a new patient. This was unprofessional, as was her conduct and statements to C.S. If Grievant wanted to warn or inform Ms. Allen-Henderson about M.K.'s known behavior, she should have done it

²⁴ It is noted that as Caroline Rose was not called to testify at the level three hearing, and as the transcript of Ms. Booker's and Ms. Collins' interview with Ms. Rose is hearsay and is entitled to no weight, and is not being considered in deciding this grievance.

privately, and not in front of M.K. Grievant's comments upset M.K., as demonstrated by M.K. starting to rock side to side. Soon thereafter, Grievant left the room. Ms. Allen-Henderson remained in the room with C.S. and M.K. and tried to calm them down before she left to report the incident. Grievant's conduct with respect to C.S. and M.K. meets the definition of abuse, verbal abuse, and/or emotional abuse, despite there being no such investigation or conclusion by APS. Further, Grievant's failure to provide C.S. help in getting cleaned up, whether it be doing it herself or getting someone else to come and do it if she could not, meets the definition of neglect.

Grievant failed to provide appropriate care to J.T., D.B., and M.K. on May 28, 2019, and such meets the definition of neglect. Grievant cleaned up J.T. at around 6:30 a.m. and had not returned to him once as of 10:00 a.m. Grievant failed to check on him in over three hours and failed to remove his breakfast tray, leaving uneaten food and trash in his room. Even if she was prevented from finishing her duties with her assigned residents that morning because of being pulled off the floor sometime between 10:00 a.m. and 10:30 a.m., she should have been back to care for J.T. before then. With respect to D.B., Grievant left him/her sitting in the bed with the lift sling behind her/him without a bath, then forgot to return. Grievant thought she had already got D.B. cleaned up and had him/her sitting in a chair, but D.B. was found still sitting in the bed with the lift sling still behind him/her at or around 12:30 p.m. With respect to D.B., Grievant's actions meet the definition of neglect. Grievant cleaned up M.K. early on the morning of May 28, 2019, and left a soiled brief in M.K.'s room. The brief was found after 12:30 p.m. Even if Grievant had accidentally left it early in the morning, Grievant was back in that room before she was pulled off the floor at around 10:30 a.m. because that is where the

incidents Ms. Allen-Henderson reported occurred, and Grievant could have cleaned it up then. This also meets the definition of neglect. With respect to R.B., Respondent did not provide the charges of abuse or neglect against Grievant because she was prevented from going to get the soiled linens off the floor because she was pulled off the floor for two hours and not allowed to return after her meeting with Ms. Booker and Ms. Collins. The evidence demonstrates that no one was sent to fill in for Grievant when she was pulled off the floor. Such was a contributing factor in the residents being in the conditions they were when Ms. Booker did her compliance rounds after Grievant was suspended and sent home.

Respondent has proved that Grievant violated DHHR Policy 2108 by engaging in unprofessional behavior, and that she violated W.VA. CODE ST. R. § 69-6-1 *et seq.*, by engaging in acts of abuse and neglect of residents on May 28, 2019, even though there was no such investigation or conclusion by APS. The next issue is whether Grievant's conduct justifies her dismissal. An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*,

Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

“[T]he “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).” Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). “While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer].” *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff'd* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

While Respondent had the authority to dismiss Grievant for her conduct, Respondent was not required to do so. However, Respondent has discretion as to the discipline to be imposed upon an employee, and this ALJ cannot substitute her judgment for that of the employer. Given that Respondent has proved the charges of abuse and neglect of a resident, as well as violation of the Employee Code of Conduct, there was good cause for Grievant's dismissal. This ALJ cannot conclude that Respondent's decision to dismiss Grievant from employment was unreasonable, or otherwise arbitrary and capricious. Accordingly, this grievance is DENIED.

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. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. "Abuse" is defined as "[t]he willful inflection of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish. Abuse also includes the deprivation by an individual, including a caretaker, of goods or services that are necessary to attain or maintain physical, mental, and psychological well-being. This presumes that instances of abuse of all residents, even those unaware that harm has occurred of those in a coma, cause physical harm, or pain or mental anguish. Abuse includes emotional abuse, physical abuse, sexual abuse, verbal abuse and involuntary seclusion." W.VA. CODE ST. R. § 69-6-2.1.

3. "Neglect" is defined as "[t]he failure to provide goods and services necessary to avoid physical harm, or the significant threat of physical harm, mental anguish, or mental illness unless such actions are beyond the nurse aides's control. Failure to report an incident or failure to appear in response to a subpoena, or both shall be considered neglect." W.VA. CODE ST. R. § 69-6-2.8.

4. "Emotional Abuse" is defined as "[s]ubjecting or exposing a resident to behavior that may result in psychological trauma or injury. Emotional abuse includes:

humiliating, harassing, teasing or threatening; unreasonably restricting a resident's contact with family, friends or other residents; unreasonably ignoring a resident's requests; threats of punishment or deprivation; or willfully violating a resident's rights, including confidentiality. Emotional abuse may also be referred to as psychological abuse, mental abuse, or psychosocial abuse." W.VA. CODE ST. R. § 69-6-2.4.

5. "Verbal Abuse" is defined as "[t]he use of oral, written or gestured language that willfully includes disparaging and derogatory terms to residents or their families, or within their hearing distance, regardless of their age, ability to comprehend, or disability. Examples of verbal abuse include, but are not limited to, threats of harm; saying things to frighten a resident, such as telling a resident that he or she will never be able to see his or her family again; intimidation; humiliation; threats of hostility, or vulgarity." W.VA. CODE ST. R. § 69-6-2.17.

6. 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).

7. “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).

8. “Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible

that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 789 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996).” *Trimboli v. Dep’t of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. See *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *Id.* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

9. “While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education.” See generally, *Harrison v. Ginsberg*, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982).” *Trimboli v. Dep’t of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997).

10. Respondent proved by a preponderance of the evidence that Grievant’s conduct on May 28, 2019, meets the definition of abuse and neglect and violated DHHR Policy 2108, Employee Code of Conduct, and that the same justifies Respondent’s decision to dismiss her from employment.

Accordingly, this 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 (eff. July 7, 2018).

DATE: April 9, 2021.

Carrie H. LeFevre
Administrative Law Judge