

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CHAD ARTHUR,
Grievant,

v.

Docket No. 2021-2120-DHHR

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

DECISION

Grievant, Chad Arthur, was employed by Respondent, Department of Health and Human Resources, at Mildred Mitchell-Bateman Hospital. On January 26, 2021, Grievant, by representative, filed this grievance against Respondent protesting his termination from employment. For relief, Grievant seeks “[t]o other wise be made whole including reinstatement of his job with full back pay including statutory interest.”

The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held on November 4, 2021, before the undersigned at the Grievance Board’s Charleston, West Virginia office via video conference. Grievant was represented by Erin Conner, Steward, UE Local 170. Respondent was represented by counsel, Katherine A. Campbell, Assistant Attorney General. This matter became mature for decision on January 3, 2022, upon final receipt of the parties’ written Proposed Findings of Fact and Conclusions of Law (“PFFCL”).¹

¹ At Respondent’s request and with the agreement of Grievant the parties’ time to file PFFCL was enlarged beyond twenty days to December 21, 2021. The time to file was further extended to December 29, 2021, at Grievant’s request and without objection by Respondent.

Synopsis

Grievant was employed by Respondent as a Health Service Worker at Mildred Mitchell-Bateman Hospital. Grievant was terminated from his employment for patient abuse after Grievant struck a patient while Grievant was being attacked. Respondent proved it had good cause to terminate Grievant's employment for striking a patient in violation of the state administrative rule even if Grievant did not have any intent to harm the patient. Accordingly, the grievance is denied.

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

Findings of Fact

1. Grievant was employed by Respondent as a Health Service Worker at Mildred Mitchell-Bateman Hospital and had been so employed for approximately eight months.
2. Mildred Mitchell-Bateman Hospital is state-operated mental health facility subject to federal and state law regarding patient abuse and neglect.
3. On December 25, 2020, a patient became agitated and began cursing and punching the walls and fixtures. The patient had a history of aggression and attacking staff members.
4. The nearest staff member was Kristie Harless, R.N. Ms. Harless called Grievant over to assist her in attempting to de-escalate the situation as Grievant had previously had a good rapport with the patient.

5. Grievant approached the patient and attempted to calm him, as he had done in the past, but in this instance the patient reacted aggressively and immediately began punching Grievant.

6. Grievant backed down the hall, attempting to disengage with the patient but the patient continued to follow him, aggressively punching and grabbing at Grievant, ripping at his shirt and scratching Grievant's back.

7. Grievant grappled with the patient for several seconds but was finally able to escape the patient's grip and flip the patient to the ground to attempt to restrain him.

8. Ms. Harless initially froze and did not assist Grievant but after a few seconds called down the hall for other staff to assist.

9. The patient continued to punch and kick, knocking off Grievant's glasses and injuring his face.

10. After a few more seconds, another male staff member arrived. Grievant and the male staff member attempted to restrain the patient's arms. The patient then kicked Grievant in the face, twice, while Ms. Harless attempted to grab the patient's leg.

11. After the second kick to the face, Grievant was briefly able to get to his knees over the patient, who was on his back with the other male staff member at the patient's head attempting to restrain his arm. While the patient continued to struggle, Grievant drew back his arm and, with a closed fist, punched down at the patient's chest, making contact, while otherwise continuing to grapple with the patient.

12. The patient continued to struggle, also kicking Ms. Harless in the face and kicking another female staff member. Eventually the four staff members were able to restrain the patient.

13. Most of the incident was captured on video surveillance footage, although the incident begins off screen. While the video is not crisp, the video does not stutter or skip and is clear enough to determine hand positioning.

14. The patient made a verbal complaint of verbal and physical abuse against Grievant and an Incident Report, Patient Grievance Form, and Adult Protective Services Mandatory Reporting Form were completed on December 26, 2020.

15. An investigation was conducted by Legal Aid of West Virginia Patient Advocate Teri Stone. Ms. Stone investigated the incident by reviewing the video recording of the incident. She did not interview any witnesses and only spoke to Grievant when he reached out to her by telephone.

16. Ms. Stone issued her report of the investigation on December 30, 2020. Ms. Stone did not substantiate the allegation of verbal abuse. Ms. Stone substantiated the allegation of physical abuse based on the video.

17. Grievant was verbally suspended without pay the same day and a written notice of suspension pending investigation was issued by Craig Richards, Chief Executive Officer, on January 4, 2021.

18. On January 11, 2021, Human Resources Director Tamara Kuhn conducted a pre-determination conference with Grievant and his representatives. Grievant denied striking the patient and stated that he was in pain and afraid for his life.

19. Craig Richards, Chief Executive Officer, terminated Grievant's employment by letter dated January 19, 2021, citing the substantiated Legal Aid investigation and the video evidence that Grievant struck the patient. Mr. Richards found that Grievant's action violated the Code of State Rules and Respondent's policies and warranted his dismissal.

20. Grievant had no history of discipline prior to the termination of his employment.

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," 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 W. VA. CODE ST. R. § 143-1-12.02 and 12.03 (2012).

In its PFFCL, Respondent asserts it was justified in terminating Grievant's employment due to his violation of policy and regulation by physically abusing the patient by raising his arm to strike the patient, invading the patient's personal space, and failing to use proper CCG² techniques. As the dismissal letter does not cite invading the

² "CCG" refers to Crisis Consultant Group the copyright holder of the "Calm Every Storm" de-escalation training Respondent's employees are required to follow.

patient's personal space or failing to use proper CCG techniques as grounds for the termination those allegations will not be further discussed. Grievant denies the allegation of physical abuse and asserts that the investigation was improper.

Patients in state-operated mental health facilities are afforded certain rights pursuant to federal and state law, including the right to be free from abuse. "No employee shall verbally or physically abuse or neglect any patient." W. VA. CODE ST. R. § 64-59-

18.2. "Physical abuse" is defined as follows:

Actions of omission or commission within the meaning of W. Va. Code §9-6-1(2), that violate 42 C.F.R. § 482.13, or that constitute a breach of the applicable standard of care. Physical abuse includes, but is not limited to, the infliction or threat to inflict physical pain or injury on, or the imprisonment of any patient, including pain associated with mental abuse, verbal abuse, sexual abuse, involuntary seclusion or any physical or chemical restraint not required to treat the patient's clinical symptoms, regardless of the patient's ability to understand or recognize the abuse or the willful infliction of injury, unreasonable confinement, intimidation, or punishment, with resulting physical harm, pain, or mental anguish, including staff neglect or indifference to infliction of injury or intimidation of one patient by another.

W. VA. CODE ST. R. § 64-59-3.13. Although Respondent also alleged Grievant violated policy, Respondent failed to enter the policy into evidence so that allegation will not be further discussed.

In this case, the majority of the incident was captured on video, including the striking of the patient. The video is of sufficient quality to determine the events. While the video is not crisp, the video does not stutter or skip and is clear enough to determine hand positioning. The video shows the patient aggressively attacking Grievant, Grievant backing away, and Grievant only engaging with the patient once the patient grabbed Grievant such that Grievant could no longer retreat. At that point, Grievant took the

patient to the ground. During the entire incident, it appears the patient had a clear intent to harm Grievant and Grievant was harmed with significant scratches to his back and injury to his face. Although for the majority of the incident Grievant was appropriately attempting to get the patient under control, after Grievant was repeatedly kicked in the face, the video clearly shows that Grievant drew his arm back with a closed fist and struck the patient in the chest. It does not appear Grievant had an intent to harm the patient and the patient was not harmed; however, the definition of physical abuse does not require harm or the intent to harm.

Respondent proved it had good cause to terminate Grievant's employment for striking the patient in violation of the above state administrative rule even if Grievant did not have an intent to harm the patient. While Grievant was undoubtedly placed in a difficult situation by the aggression of the patient and was injured as a result, his momentary lapse in striking the patient is still misconduct of a substantial nature and more than a technical violation of his duty. Respondent cannot permit actions that fall under the definition of physical abuse of a patient even under difficult circumstances or with no intent to harm. Whether the investigation was improper as Grievant alleges is irrelevant in the face of the video evidence that clearly shows the conduct of which Grievant was accused.

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. 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 W. VA. CODE ST. R. § 143-1-12.2.a. (2016).

3. "No employee shall verbally or physically abuse or neglect any patient." W. VA. CODE ST. R. § 64-59-18.2.

4. "Physical abuse" is defined as follows:

Actions of omission or commission within the meaning of W. Va. Code §9-6-1(2), that violate 42 C.F.R. § 482.13, or that constitute a breach of the applicable standard of care. Physical abuse includes, but is not limited to, the infliction or threat to inflict physical pain or injury on, or the imprisonment of any patient, including pain associated with mental abuse, verbal abuse, sexual abuse, involuntary seclusion or any physical or chemical restraint not required to treat the patient's clinical symptoms, regardless of the patient's ability to understand or recognize the abuse or the willful infliction of

injury, unreasonable confinement, intimidation, or punishment, with resulting physical harm, pain, or mental anguish, including staff neglect or indifference to infliction of injury or intimidation of one patient by another.

W. VA. CODE ST. R. § 64-59-3.13.

5. Respondent proved it had good cause to terminate Grievant's employment for striking a patient in violation of the state administrative rule even if Grievant did not have an intent to harm the 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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: February 16, 2022

Billie Thacker Catlett
Chief Administrative Law Judge