THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TERRELL COLEMAN,
Grievant,

v. **Docket No. 2021-2426-CONS**

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

DECISION

Grievant, Terrell Coleman, was employed by Respondent, Department of Health and Human Resources at Mildred Mitchell-Bateman Hospital ("MMBH") as a probationary employee. On February 10, 2021, Grievant filed a grievance, assigned docket number 2021-2189-DHHR, stating, "Grievant suspended without justifiable cause." On April 14, 2021, Grievant filed a second grievance, assigned docket number 2021-2349-DHHR, stating, "Termination of employment without justifiable cause." For relief, Grievant seeks "[t]]o be made whole in every way, including back pay with interest, and benefits."

The grievances were properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). The grievances were consolidated into the above-styled action by order entered May 19, 2021. A level three hearing was held on April 18, 2022, before the undersigned at the Grievance Board's Charleston, West Virginia office via video conference. Grievant was represented by Michael Hansen, UE Local 170. Respondent was represented by counsel, Brittany Ryers-Hindbaugh, Assistant Attorney General. This matter became mature for decision on May 20, 2022, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a probationary Health Service Worker. Respondent terminated Grievant's probationary employment for patient abuse. Respondent proved Grievant committed physical abuse against a patient. Respondent failed to prove Grievant committed verbal abuse. Respondent's termination of Grievant's probationary employment for patient abuse was not arbitrary and capricious. Grievant failed to prove mitigation of the punishment is warranted. 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

Grievant was employed by Respondent as a probationary Health Service Worker ("HSW") at Mildred Mitchell-Bateman Hospital ("MMBH").

Grievant first became employed as a temporary employee in August 2020. Grievant was hired as a full-time employee on October 10, 2020. Grievant was still within his probationary period when he was terminated from employment.

MMBH is a state-owned psychiatric hospital and, as such, is subject to federal and state law regarding patient neglect and abuse.

On February 9, 2021, Grievant was involved in several incidents regarding the same patient.

The patient was actively psychotic and was particularly aggressive towards women. Grievant had been assigned to provide one-to-one supervision to the patient. When the patient had first arrived, he had been assigned two-to-one

supervision but that had been removed. Grievant was still concerned about the patient's aggression and had requested two-to-one supervision but that request had been denied.

While Grievant was supervising the patient, a female HSW, Savannah Scaggs, entered the patient's room where he was sitting in a chair and handed the patient a bottle of water. The patient grabbed Ms. Scaggs' hand with the water and squeezed and Ms. Scaggs asked the patient to let go. While the patient was still holding Ms. Scaggs' hand, Grievant came up behind the patient where he was sitting in the chair and picked the patient up out of the chair. Grievant dragged the patient across the floor over to the bed and slung him down, instructing the patient to sit and not move.

On the same day, HSW Morgan Black also saw Grievant shove the same patient back onto the bed while the patient was trying to get up off the bed and heard Grievant tell the patient "sit down and don't move, you understand."

On the next day, both Ms. Scaggs and Ms. Black separately reported these incidents and made signed, written statements.

A patient grievance form was filed on February 10, 2021. The patient grievance form was not submitted as evidence and it is unclear who filed the form.

On the same date, Grievant's supervisor, Nurse Manager Jonathan Kelly, RN orally suspended Grievant pending investigation.

By letter dated February 22, 2021, MMBH Chief Executive Officer Craig Richards provided Grievant written notice of the suspension pending investigation of the allegation of physical and verbal abuse.

Legal Aid Advocate Teri Stone received the patient grievance form and conducted the investigation. Ms. Stone's investigation consisted only of reviewing a "pre-investigation packet," written witness statements, and interviewing Grievant over the telephone.

Ms. Stone issued a report of her investigation on February 25, 2021. Ms. Stone substantiated physical and verbal abuse under the Respondent's legislative rule definition concluding: "he used improper physical action to move the patient to his bed and instructed him to sit there. The patient was not in personal danger at the time of the incident, requiring a one-on-one intervention for his protection. The patient was not posing an imminent threat to the other staff involved which would have required a CCG-approved intervention and/or this intervention was not called for by the staff involved. Per the witness' statement, Mr. Cleman's words to the patient were interpreted by the witness as inappropriate and abusive."

Tamara Kuhn, Director of Human Resources, Jami Boykin, Assistant Director of Nursing, and Jonathan Kelly, Nurse Manager, conducted a pre-determination conference with Grievant and his representative, Samantha Farley, on March 10, 2021. During the conference Grievant asserted he moved the patient and told him not to move because of safety concerns for the patient.

By letter dated March 15, 2021, CEO Richards dismissed Grievant from his probationary employment. CEO Richards determined Grievant had failed to satisfactorily adjust to the demands of his position and failed to meet the required standards of work based on the Legal Aid investigation, which substantiated

abuse. CEO Richards determined Grievant's actions violated Respondent's legislative rule and MMBH's Policy Number MMBHE018.

Respondent failed to enter into evidence Policy Number MMBHE018 or any other policy or procedure relating to patient abuse or patient restraint.

Grievant signed a MMBH Health Service Assistant/Heath (sic) Service Worker/Health Service Trainee Competency Checklist on September 26, 2020, indicating that restraint procedures had been discussed with him.

Discussion

If a probationary employee is terminated on the grounds of misconduct, the termination is disciplinary, and the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *See Cosner v. Dep't of Health and Human Resources/William R. Sharpe, Jr. Hospital*, Docket No. 08-HHR-008 (Dec. 30, 2008); *Livingston v. Dep't of Health and Human Res.,* Docket No. 2008-0770-DHHR (Mar. 21, 2008). *See also* W. VA. CODE ST. R. § 156-1-3 (2018). *See also Lott v. Div. of Juvenile Serv.*, Docket No. 99-DJS-278 (Dec. 16, 1999). When a probationary employee is terminated on grounds of unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the burden of proof is upon the employee to establish that his services were satisfactory. *Bonnell v. W. Va. Dep't of Corrections*, Docket No. 89-CORR-163 (Mar. 8, 1990); *Roberts v. Dep't of Health and Human Res*., Docket No. 2008-0958-DHHR (Mar. 13, 2009). "However, the distinction is one that only affects who carries the burden of proof. As a practical matter, an employee who engages in misconduct is also providing unsatisfactory performance." *Livingston v. Dep't of Health and Human Res*., Docket No. 2008-0770-DHHR (Mar. 21,

2008) (citing *Johnson v. Dep't of Transp./Div. of Highways*, Docket No. 04-DOH-215 (Oct. 29, 2004)).

"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). If the evidence is equally balanced, the party with the burden of proof has not met that burden. *See Leichliter v. W. Va. Dep't of Health and Human Res.,* Docket No. 92-HHR-486 (May 17, 1993).

Respondent alleges Grievant committed patient abuse in violation of Respondent's legislative rule and MMBH policy. As Respondent failed to submit the policy into evidence, the policy will not be further discussed. Grievant disputes the testimony of Respondent's witnesses, argues that his contact with the patient does not constitute abuse, and alleges that the investigation was improper.

The Division of Personnel's administrative rule discusses the probationary period of employment, describing it as "a trial work period designed to allow the appointing authority an opportunity to evaluate the ability of the employee to effectively perform the work of his or her position and to adjust himself or herself to the organization and program of the agency." W. VA. CODE ST. R. § 143-1-10.1.a. (2016). The same provision goes on to state that the employer "shall use the probationary period for the most effective adjustment of a new employee and the elimination of those employees who do not meet the required standards of work." *Id*. A probationary employee may be dismissed at any point during the probationary period that the employer determines his services are unsatisfactory. *Id*. at § 10.5(a). Therefore, the Division of Personnel's

administrative rules establish a low threshold to justify termination of a probationary employee. *Livingston v. Dep't of Health and Human Res.*, Docket No. 2008-0770-DHHR (Mar. 21, 2008).

> A probationary employee is not entitled to the usual protections enjoyed by a state employee. The probationary period is used by the employer to ensure that the employee will provide satisfactory service. An employer may decide to either dismiss the employee or simply not to retain the employee after the probationary period expires.

Hammond v. Div. of Veteran's Affairs, Docket No. 2009-0961-MAPS (Jan. 7, 2009) (citing *Hackman v. W. Va. Dep't of Transp.*, Docket No. 01-DMV-582 (Feb. 20, 2002)).

"[W]hile an employer has great discretion in terminating a probationary employee, that termination cannot be for unlawful reasons, or arbitrary or capricious. *McCoy v. W. Va. Dep't of Transp.*, Docket No. 98-DOH-399 (June 18, 1999); *Nicholson v. W. Va. Dep't of Health and Human Res.*, Docket No. 99-HHR-299 (Aug. 31, 1999*)." Lott v. W. Va. Div. of Juvenile Serv.*, Docket No. 99-DJS-278 (Dec. 16, 1999). 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 & 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 & 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 & 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).

Grievant disputes Ms. Bragg's characterization of the incident and alleges that Ms. Black could not have seen what she described. Accordingly, the undersigned must make credibility determinations. 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).

Ms. Black's demeanor was serious and appropriate. Although Ms. Black occasionally paused slightly in answering questions, her pauses did not appear to indicate avoidance of questions but more indicated a desire to be clear in her answers. Ms. Black's testimony was consistent with her written statement of the incident. Grievant alleges that Ms. Black has a motive to lie due to a previous incident between them. Grievant alleges that he was previously reprimanded for an unrelated incident and during that investigation he disclosed that Ms. Black had failed to relieve him because she and another "Rhonda" took a two-hour lunch. Grievant asserts Ms. Black and "Rhonda" had a vendetta against him since that time. Grievant presented no other evidence regarding this allegation and did not question Ms. Black regarding the allegation. Grievant did not assert that Ms. Black had been disciplined for her alleged long lunch. Even if this incident occurred, it does not seem likely that Ms. Black would be motivated to lie under oath because of this incident.

Grievant also alleges Ms. Black could not have seen the incident she describes and asserts it could not have taken place when she said it did. It appears Ms. Black is describing an incident after Grievant had moved the patient from the chair to the bed, or possibly, a second incident at another time that day. The incident Ms. Black describes would not have taken much time and Grievant would not necessarily have been in a position to see Ms. Black and know she was there. Grievant's assertion that Ms. Black could not have seen what she said she saw because she was doing face checks is not correct. Even if Ms. Black was doing face checks, she could have seen what she said

she saw while doing the face checks. Regardless, Grievant did not question Ms. Black regarding whether or not she was doing face checks. As to Grievant's assertion that the incident did not take place in the evening as Ms. Black testified; this may be true. It may be that Ms. Black, testifying a year after the fact, became confused about the time. It may also be that Ms. Black was describing an incident completely separate from the one that Ms. Scraggs and Grievant described during snack time. Regardless, Ms. Black's testimony about what she saw happen is consistent with her written statement made the day after it happened. Ms. Black is credible.

Ms. Skaggs' demeanor was serious, appropriate, and forthright. Her testimony was consistent with her prior written statement. Ms. Skaggs appeared genuinely upset regarding the incident. Grievant alleges Ms. Skaggs is biased against him because she had previously complained to Mr. Kelly that Grievant had hurt her feelings. However, Grievant did not question either Mr. Kelly or Ms. Skaggs regarding this allegation. Even if this incident did happen, it does not appear to be a sufficient motive to lie under oath. Ms. Skaggs is credible.

Grievant's demeanor was serious and professional. His testimony was detailed and Grievant answered questions in a forthright manner without hesitation. However, Grievant's explanation for his actions does not make sense. Grievant states that he picked the patient up out of the chair and moved him to the bed for the patient's safety because he was a fall risk but he also said that he was moving the patient so housekeeping could clean up the mess on the floor. Grievant said that he, himself, slipped getting the patient to the bed. The patient was not in danger of falling while he was in the chair. It was Grievant that placed the patient in danger of falling by forcibly

moving the patient from the chair through the mess on the floor to the bed. Grievant's statement is also inconsistant with Ms. Scraggs' credible testimony that Grievant picked the patient up right after the patient had grabbed Ms. Scraggs' hand with the drink. Grievant was not credible.

In addition, both parties have attempted to present hearsay[1] evidence. "Hearsay evidence is generally admissible in grievance proceedings. The issue is one of weight rather than admissibility."[2] *Gunnells v. Logan County Bd. of Educ.,* Docket No. 97-23-055 (Dec. 9, 1997). *See Stewart v. W. Va. Bd. of Exam'rs for Registered Prof'l Nurses*, 197 W. Va. 386, 475 S.E.2d 478 (1996). "Generally, written statements, even affidavits, may be discounted or disregarded unless the offering party can provide a valid reason for not presenting the testimony of the persons making them. *See Simpson, supra; Cook v. W. Va. Div. of Corrections*, Docket No. 96-CORR-037 (Oct. 31, 1997)." *Comfort v. Reg'l Jail and Corr. Facility Auth.*, Docket No. 2013-1459-CONS (Apr. 18, 2013).

The Grievance Board has applied the following factors in assessing hearsay: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether

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[1] "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).

[2] "Although W.Va. Code, 6C-2-4(a)(3) [2008], states that 'formal rules of evidence and procedure do not apply' to Level One grievance hearings, neither that statute nor the West Virginia Code of State Rules § 156-1-1 [2008], et seq., address whether formal rules of evidence apply to Level Three hearings. However, two predecessor statutes, W.Va. Code, 29-6A-6(e) [1998], concerning State employees, and W.Va. Code, 18-29-6 [1992], concerning education employees, indicate that formal rules of evidence do not apply to grievance hearings. *See* syl. pt. 3, in part, *University of West Virginia Board of Trustees v. Fox*, 197 W.Va. 91, 475 S.E.2d 91 (1996) (Formal rules of evidence do not apply to grievance procedures under *W.Va. Code*, 18-29-6.)." *W. Va. DOT v. Litten*, 231 W. Va. 217, 222, 744 S.E.2d 327, 332 n.6 (June 5, 2013).

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).

Respondent has offered the investigation report and Grievant has offered pictures of the statements of two witnesses. Ms. Stone's written investigative report itself is merely her summary and opinion and is entitled to no weight and was not considered. While the undersigned agrees with Grievant's assertion that the investigation was flawed, as the investigation report is being given no weight and the decision is being made based on the testimony and statements of the witness, any flaws in the investigation are not relevant to the grievance decision. The signed written statements of Ms. Skaggs and Ms. Black that were collected in the investigation were confirmed by Ms. Skaggs and Ms. Black during their testimony and are entitled to consideration and weight in conjunction with their credible testimony. The pictures of the alleged signed statements of witnesses offered by Grievant are entitled to no weight. Grievant provided no explanation why the witnesses were not available to

testify nor why the original signed statements were not available to be offered. Although the statements appear to be signed, they are not sworn.

Grievant admits that he lifted the patient up from his chair, took him to the bed, placed him on the bed, and told him, "Sit down. Don't move." As discussed above, Grievant's assertion that this was necessary for the patient's safety is not credible and Ms. Skaggs and Ms. Black's version of events is more credible. Therefore, Respondent has proven it is more likely than not that Grievant lifted the patient up from his chair from behind, forcibly moved him to the bed, forced him down on the bed, and emphatically told him not to move. Respondent proved it is more likely than not that when the patient attempted to get up from the bed, Grievant prevented the patient from getting up by pushing him back down on the bed, again telling him to sit down and not move.

Patients in state-operated mental health facilities are afforded certain rights pursuant to federal and state law. "Persons with behavioral health problems are more likely to have their human and civil rights denied because of their condition. Consequently, special attention and effort are required to assure that these human and civil rights are exercised and protected in all behavioral health services." W. VA. CODE ST. R. § 64-59-5.1 (1995). "No employee shall verbally or physically abuse, (sic) or neglect any client." W. VA. CODE ST. R. § 64-59-18.2. "Physical abuse" is defined as follows:

> The use of physical force, body posture or gesture or body movement that inflicts or threatens to inflict pain on a client. Physical abuse includes, but is not limited to: unnecessary use of physical restraint; use of unnecessary force in holding or restraining a client; improper use of physical or mechanical restraints; use of seclusion without proper orders or cause; slapping, kicking, hitting, pushing, shoving, choking, hair pulling, biting, etc.; inappropriate horseplay; raising a hand or shaking a fist at a client, crowding or moving into a client's personal space; intentional inflicting of

> pain; punitive measures of any kind, including the use of corporal punishment, withholding meals for punitive reasons, inappropriate removal from treatment programs, restricting communication, or withdrawal of rights or privileges; or physical sexual abuse, i.e., any physical or provocative advance such as caressing or fondling, sexual intercourse, etc.

W. VA. CODE ST. R. § 64-59-3.13.[3] 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 in speaking to a client; the use of derogatory, vulgar, profane, abusive or threatening language; verbal threats; teasing, pestering, deriding, harassing, mimicking or humiliating a client; derogatory remarks about the client, his or her family or associates; or sexual innuendo, sexually provocative language or verbal suggestion.

W. VA. CODE ST. R. § 64-59-3.17.

It does appear that Grievant's actions in picking the patient up bodily from his chair, forcibly moving him, forcibly placing him on the bed, and preventing the patient from getting up would constitute "unnecessary use of physical restraint." Grievant's action of picking the patient up constitutes "crowding or moving into a client's personal space." Sometime on the same day, Grievant again restrained the patient's movements by refusing to let him up off the bed and pushing him back on the bed. Pushing the patient was specifically forbidden by the rule. None of this was required for the patient's safety and actually increased the risk of the patient falling. Therefore, Respondent

[3] In its Proposed Findings of Fact and Conclusions of Law, Respondent cites the incorrect definitions of physical and verbal abuse. Respondent cites the definitions contained in the current legislative rule, which was effective April 30, 2021. This grievance is governed by the legislative rule in effect at the time of Grievant's misconduct as cited above.

proved Grievant committed physical abuse. However, it does not appear that Grievant's statements to the patient were a threat, harassment, derogation, or humiliation. Therefore, Respondent failed to prove Grievant committed verbal abuse. Although it does not appear Grievant had any intention of harming the patient, intent to harm is not a required element to find patient abuse.

Patient abuse is a serious offense that justifies the termination of even a permanent employee, much less a probationary one. Even if Grievant's actions did not rise to the level of patient abuse, his actions certainly did not provide satisfactory service. Grievant did not assert that he was confused about what to do or that he had not received enough training. He has simply refused to acknowledge that his actions were problematic in any way. It was not arbitrary and capricious for Respondent to terminate Grievant's probationary employment under these circumstances.

Grievant alternately argues that his punishment should be mitigated. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994); *Cooper v. Raleigh County Bd. of Educ.*, Docket No. 2014-0028-RalED (Apr. 30, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

Grievant provided no evidence regarding his work history or evaluations and had been a full-time employee of Respondent just under six months. Grievant has not

alleged that he was treated differently than other employees or that he was unaware that his conduct was prohibited. Grievant appears to only argue that, because he was so close to the end of his probationary period and because MMBH was at fault for failing to continue two-to-one supervision of the patient, he is entitled to mitigation. Neither of these arguments would entitle Grievant to mitigation of the punishment. As discussed above, patient abuse is a serious offence for which termination of employment is justified. Grievant has failed to prove mitigation of the punishment is warranted.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. If a probationary employee is terminated on the grounds of misconduct, the termination is disciplinary, and the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *See Cosner v. Dep't of Health and Human Resources/William R. Sharpe, Jr. Hospital*, Docket No. 08-HHR-008 (Dec. 30, 2008); *Livingston v. Dep't of Health and Human Res.,* Docket No. 2008-0770-DHHR (Mar. 21, 2008). *See also* W. VA. CODE ST. R. § 156-1-3 (2018). *See also Lott v. Div. of Juvenile Serv.*, Docket No. 99-DJS-278 (Dec. 16, 1999).

2. When a probationary employee is terminated on grounds of unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the burden of proof is upon the employee to establish that his services were satisfactory. *Bonnell v. W. Va. Dep't of Corrections*, Docket No. 89-CORR-163 (Mar. 8, 1990); *Roberts v. Dep't of Health and Human Res*., Docket No. 2008-0958-DHHR (Mar. 13, 2009).

3. Grievant "is required to prove that it is more likely than not that his services were, in fact, of a satisfactory level." *Bush v. Dep't of Transp.,* Docket No.

2008-1489-DOT (Nov. 12, 2008). If the evidence is equally balanced, the party with the burden of proof has not met that burden. *See Leichliter v. W. Va. Dep't of Health and Human Res.,* Docket No. 92-HHR-486 (May 17, 1993).

4. "However, the distinction is one that only affects who carries the burden of proof. As a practical matter, an employee who engages in misconduct is also providing unsatisfactory performance." *Livingston v. Dep't of Health and Human Res*., Docket No. 2008-0770-DHHR (Mar. 21, 2008) (citing *Johnson v. Dep't of Transp./Div. of Highways*, Docket No. 04-DOH-215 (Oct. 29, 2004)).

5. "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). If the evidence is equally balanced, the party with the burden of proof has not met that burden. *See Leichliter v. W. Va. Dep't of Health and Human Res.,* Docket No. 92-HHR-486 (May 17, 1993).

6. The Division of Personnel's administrative rules establish a low threshold to justify termination of a probationary employee. *Livingston v. Dep't of Health and Human Res.*, Docket No. 2008-0770-DHHR (Mar. 21, 2008).

> A probationary employee is not entitled to the usual protections enjoyed by a state employee. The probationary period is used by the employer to ensure that the employee will provide satisfactory service. An employer may decide to either dismiss the employee or simply not to retain the employee after the probationary period expires.

Hammond v. Div. of Veteran's Affairs, Docket No. 2009-0161-MAPS (Jan. 7, 2009) (citing *Hackman v. W. Va. Dep't of Transp.*, Docket No. 01-DMV-582 (Feb. 20, 2002)).

7. "[W]hile an employer has great discretion in terminating a probationary employee, that termination cannot be for unlawful reasons, or arbitrary or capricious. *McCoy v. W. Va. Dep't of Transp.*, Docket No. 98-DOH-399 (June 18, 1999); *Nicholson v. W. Va. Dep't of Health and Human Res.*, Docket No. 99-HHR-299 (Aug. 31, 1999*)." Lott v. W. Va. Div. of Juvenile Serv.*, Docket No. 99-DJS-278 (Dec. 16, 1999). 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 & 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 & 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).

8. "'[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 & 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).

9. "Persons with behavioral health problems are more likely to have their human and civil rights denied because of their condition. Consequently, special attention and effort are required to assure that these human and civil rights are exercised and protected in all behavioral health services." W. VA. CODE ST. R. § 64-59-5.1 (1995).

10. "No employee shall verbally or physically abuse, (sic) or neglect any client." W. VA. CODE ST. R. § 64-59-18.2.

11. "Physical abuse" is defined as follows:

> The use of physical force, body posture or gesture or body movement that inflicts or threatens to inflict pain on a client. Physical abuse includes, but is not limited to: unnecessary use of physical restraint; use of unnecessary force in holding or restraining a client; improper use of physical or mechanical restraints; use of seclusion without proper orders or cause; slapping, kicking, hitting, pushing, shoving, choking, hair pulling, biting, etc.; inappropriate horseplay; raising a hand or shaking a fist at a client, crowding or moving into a client's personal space; intentional inflicting of pain; punitive measures of any kind, including the use of corporal punishment, withholding meals for punitive reasons, inappropriate removal from treatment programs, restricting communication, or withdrawal of rights or privileges; or physical sexual abuse, i.e., any physical or provocative advance such as caressing or fondling, sexual intercourse, etc.

W. VA. CODE ST. R. § 64-59-3.13.

12. 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 in speaking to a client; the use of derogatory, vulgar, profane, abusive or threatening language; verbal threats; teasing, pestering, deriding, harassing, mimicking or humiliating a client; derogatory remarks about the client, his or her family or associates; or sexual innuendo, sexually provocative language or verbal suggestion.

W. VA. CODE ST. R. § 64-59-3.17.

13. Respondent proved Grievant committed physical abuse against a patient. Respondent failed to prove Grievant committed verbal abuse.

14. Respondent's termination of Grievant's probationary employment for patient abuse was not arbitrary and capricious.

15. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994); *Cooper v. Raleigh County Bd. of Educ.*, Docket No. 2014-0028-RalED (Apr. 30, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

16. Grievant failed to prove that mitigation of the punishment is warranted.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Intermediate Court of Appeals.[4] Any such appeal must be filed within thirty (30) days of receipt of this decision. 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

DATE: July 7, 2022

Billie Thacker Catlett
Chief Administrative Law Judge

[4] On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over "[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]" W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.