WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JAMIE WORKMAN,
Grievant,

v. **Docket No. 2020-0891-CONS**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
WILLIAM R. SHARPE, JR. HOSPITAL,
Respondent.

DECISION

Grievant, Jamie Workman, was employed by Respondent, the Department of Health and Human Resources, at Sharpe Hospital. On December 26, 2019, Grievant filed a grievance, assigned docket number 2020-0735-DHHR, alleging indefinite suspension without due process or good cause. On January 9, 2020, Grievant filed a second grievance, assigned docket number 2020-0784-DHHR, contesting Respondent's refusal to reinstate. On February 5, 2020, Grievant filed a third grievance, assigned docket number 2020-0865-DHHR, protesting her termination. These grievances were properly filed directly to level three pursuant to W. Va. Code § 6C-2-4(a)(4). They were consolidated by order on February 20, 2020. For relief, Grievant seeks reinstatement, benefits, and back pay with interest.

A level three hearing was held online before the undersigned on September 10, 2021. Grievant appeared and was represented by Stanley Heflin, Esq., Flaherty, Sensabaugh & Bonasso, PLLC. Respondent was represented by James "Jake" Wegman, Assistant Attorney General. The matter matured for decision on November 15, 2021.[1] Each party submitted Proposed Findings of Fact and Conclusions of Law.

[1]The parties agreed to extend the original mature date of October 12, 2021.

Synopsis

Grievant was employed at Sharpe Hospital when dismissed for insubordination, patient neglect, physical abuse, and verbal abuse. Sharpe alleges that Grievant defied orders to bring Unit G1 patients to the Christmas tree lighting ceremony, disregarded her duty to read emails about the ceremony, ignored patients who told her the tree lighting portion was in the lobby rather than the gymnasium, mouthed "bitch" in the direction of RN Snead, and questioned patients as to who reported her. Grievant denies these allegations. Due to a late dinner, Unit G1 patients made it to the gymnasium with only minutes remaining in the tree lighting portion of the ceremony. Patients chose not to go to the tree lighting but still attended the reception portion of the ceremony. Regardless, Grievant was never directed to bring patients to the ceremony but volunteered at the last minute to accompany coworkers. Grievant was the only employee disciplined or investigated. Some employees even allowed patients to stay on their units during the ceremony but were not questioned. In conducting an initial investigation into why Unit G1 patients were not brought to the tree lighting, RN Snead only pursued Grievant and ignored her coworkers. Grievant proved discrimination. Respondent was unable to overcome a hearsay and credibility analysis and failed to prove that dismissal was justified. Accordingly, the grievance is GRANTED.

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, Jamie Workman, was employed at Sharpe Hospital (Sharpe) by Respondent, the Department of Health and Human Resources (DHHR), as a Health

Service Assistant “Programmer” at the time of her dismissal.

2. Sharpe is a State-owned psychiatric hospital operated by DHHR and houses patients suffering from mental illness, some of whom are being held for violent crimes.

3. As a Programmer, Grievant had many duties including transporting patients and ensuring they were in the correct location. (Respondent’s Exhibit 9 & testimony of Sharpe CEO Pat Ryan).

4. Programmers are often assigned to perform patient care tasks normally associated with Health Service Workers.

5. Programmers have no supervisory role over Health Service Workers.

6. A tree lighting ceremony was scheduled as an event for the public and patients at 6:00 p.m. on December 10, 2019, in Sharpe’s lobby and adjacent gymnasium.

7. On the morning of December 10, 2019, Sharpe sent an email to all employees, stating: “All patients will be eating their evening meal on their unit at 5:00 today. This will permit enough time for the patients to be available in the lobby at 6:00 for the Christmas Tree Lighting Ceremony.” This is the only evidence of communications from management to all employees regarding the ceremony. (Respondent’s Exhibit 2)

8. Grievant read the email and thus knew about the ceremony but was never ordered to attend.

9. Grievant had never been to the tree lighting ceremony in her six years at Sharpe.

10. Grievant was scheduled to work a twelve-hour shift until 8:30 p.m. on December 10, 2019 but was not scheduled to fill in as a Health Service Worker or to

transport patients to the tree lighting ceremony. (Grievant's Exhibit 1 & 2 and Grievant's testimony)

11. Health Service Worker (HSW) Brenda Murphy was tasked with transporting Unit G1 patients to the tree lighting ceremony and asked Grievant on the spur of the moment to assist her. Grievant agreed to accompany HSW Murphy and then asked HSW Jasen Carter to come along to ensure compliance with patient supervision requirements. (Grievant's testimony)

12. Even though the December 10, 2019 email advised employees that dinner was scheduled for 5:00 p.m. to allow patients time to finish before the tree lighting ceremony at 6:00 p.m., dinner was not served on Unit G1 until as late as 5:45 p.m., leaving Unit G1 patients with as little as 10 minutes to eat if they were to reach the ceremony on time. Further, Unit G1 patients were not served drinks with their meal. Consequently, the patients were upset, and the transporters were concerned about the temperament of the patients. (Testimony of Grievant and HSW Carter)

13. Grievant did not have the authority to take patients away from their meal prematurely so they could get to the tree lighting ceremony on time and could have been disciplined if she had done so. (Behavior Health Advocate Reed's testimony)

14. Patients at Sharpe were given the option of staying on their units instead of going to the ceremony. Some patients, including some on Unit G1, chose to stay. This did not result in any allegation of impropriety against any employee. (Respondent's Exhibit 2)

15. The lobby at Sharpe has a sign on its door stating, "No Patients Beyond This Point."

16. In an email dated September 30, 2019, Sharpe emphasized the importance of this policy, instructing employees that "patients are not to be in the lobby under any circumstances." (Grievant's Exhibit 3)

17. Grievant interpreted the purpose of this policy as public safety because some patients have a history of violence. CEO Ryan had a different interpretation of the purpose of this policy.

18. Grievant was not involved in checking the 13 patients out of Unit G1 on December 10, 2019 but did accompany them on their journey towards the lobby for the ceremony. (Grievant's testimony)

19. Grievant, HSW Murphy, and HSW Carter bypassed the lobby and brought the patients directly to the gymnasium for the second part of the ceremony, arriving at 6:06 p.m. Patient HG[2] spoke up and said the tree lighting portion of the ceremony was in the lobby. One of the employees asked Patient HG if he wanted to attend and he responded "hell no." HSW Murphy asked the patients if they wanted to attend the ceremony but none chose to go. (Grievant's and HSW Carter's testimony)

20. Neither HSW Murphy nor HSW Carter raised any concern during this conversation about bypassing the ceremony in the lobby. (Testimony of Grievant and HSW Carter)

21. At about 6:15 p.m., 9 minutes later, attendees from the tree lighting in the lobby arrived at the gymnasium for the recreational and refreshment portion of the ceremony. Grievant, HSW Murphy, and HSW Carter remained there with the Unit G1 patients until this portion of the ceremony concluded 45 minutes later.

[2]Initials are used to protect a patient's identity.

22. Director of Nursing, Ms. Allen, asked RN Snead to investigate why patients from Unit G1 did not go to the tree lighting. (Respondent's Exhibit 2)

23. On or about December 11, 2019, RN Jennifer Snead questioned Grievant as to why she did not bring the patients to the tree lighting. (Grievant's testimony)

24. RN Snead did not question HSW Carter or HSW Murphy.

25. On or about December 11, 2019, Grievant and employee Brittany Stackpole walked past a conference room where RN Snead, RN Linda Carpenter, and other nurses were sitting.

26. The conference room table faces a glass window looking out to the hallway. The nurses in the conference room could not hear the conversation between Grievant and Brittany Stackpole. Nevertheless, RN Carpenter testified that it appeared that Grievant said "bitch" in the direction of RN Snead based on the way Grievant's lips moved. RN Carpenter testified that she could not be sure of this and is not a lip reader. (RN Carpenter)

27. The next day, December 12, 2019, Adult Protective Services (APS) received an incident report that Grievant did not take patients to the tree lighting ceremony and that Grievant said to Patient HG, "who the hell reported that I didn't take you to the tree lighting?" (Respondent's Exhibit 3)

28. The only written accusation in the APS incident report was from RN Snead and was dated that same day. RN Snead wrote therein that Patient HG said that Grievant asked "who the hell reported that I didn't take you to the tree lighting." RN Snead wrote that Grievant was trying to see which patient reported her after being questioned about not taking patients to the lobby for the tree lighting. (Respondent's Exhibit 3)

29. Leann Kerns is the Director of Health Information Management at Sharpe. Vinessia Skinner is the Discharge Follow-up Representative. They are part of Sharpe's investigative team and were assigned to investigate the APS report.

30. Director Kerns and Ms. Skinner interviewed Grievant, RN Snead, Patient HG, and Patient GB. (Director Kerns testimony and Respondent's Exhibit 1)

31. Director Kerns completed Sharpe's investigation report documenting these interviews on December 18, 2019. (Respondent's Exhibit 1)

32. Patients at Sharpe often make stuff up. (Director Kerns' testimony)

33. Director Kerns testified that she interviewed Patient GB. She testified and wrote in her report that Patient GB[3] said that Grievant asked him "who the hell ratted me out?"

34. Director kerns wrote in her report that RN Snead said that Patient HG told her he heard Grievant say, "who the hell ratted me out."

35. Director Kerns did not testify that Patient HG told her whether Grievant asked who reported her. However, Director Kerns did write in her report that during the investigative interview, Patient HG[4] was asked if Grievant questioned patients as to who reported her and replied that he "knew nothing about this."

36. Nevertheless, Sharpe's investigation report concluded that Grievant asked patients "who the hell ratted me out" based on interviews with Patient GB and RN Snead.

[3]"GB" is visible in the report through an attempted redaction.
[4]"HG" is visible in the report through an attempted redaction.

37. Director Kerns recorded her interviews but did not provide the recordings or transcripts thereof to Respondent. (Director Kerns' testimony at level three hearing, recording position 50:00)

38. There is no indication that Respondent attempted to obtain these recordings or transcripts thereof for use in the grievance proceeding.

39. In preparing the report, Director Kerns testified that she assumed Grievant was the only employee responsible for transporting Unit G1 patients to the tree lighting ceremony. Director Kerns testified that she did not know that HSW Murphy or HSW Carter were involved in transporting Unit G1 patients. (Recording position 53:24 to 55:40)

40. Neither HSW Murphy nor HSW Carter was disciplined or even investigated for failing to bring patients to the tree lighting ceremony.

41. Grievant did not have a supervisory role over HSW Murphy or HSW Carter.

42. Director Kerns testified that she does not know which duties were assigned to HSW Murphy or HSW Carter the evening of December 10, 2019 but does know that Grievant was assigned the duty of bringing patients to the tree lighting ceremony. Director Kerns did not know for sure how she knew this but thought it was on the assignment sheet. (Recording position 58:00)

43. The assignment sheet does not show that Grievant had a duty to bring patients to the tree lighting ceremony. (Grievant's Exhibit 2)

44. Sharpe's investigation report concluded that Grievant engaged in neglect and verbal abuse by making little effort to allow Unit G1 patients to attend the tree lighting ceremony and by asking them, "Who the hell ratted me out."

45. Sharoon Reed is one of two Behavioral Health Advocates employed by Legal Aid of West Virginia and stationed at Sharpe in conjunction with State Code requiring that mental health hospitals house independent advocates. Once an APS Mandatory Reporting Form is filed, the Behavioral Health Advocates also receive a copy, triggering an investigation independent of the one conducted by Sharpe.

46. Advocate Reed was the Behavioral Health Advocate assigned to conduct the independent investigation after receiving the APS reporting form on December 12, 2019. In investigating allegations that Grievant did not bring patients to the tree lighting and that Grievant questioned patients about reporting her, Advocate Reed interviewed Grievant, RN Snead, and ten patients from Unit G1, including Patient KJ, Patient GB, Patient HG, Patient JDM, Patient BM, and Patient JK. (Respondent's Exhibit 2)

47. Advocate Reed recorded all witness interviews. Yet, she did not provide these to Respondent even though she had them on her computer. (Advocated Reed's testimony, recording position 1:37:37)

48. There is no indication that Respondent attempted to obtain these recordings or transcripts thereof for use in the grievance proceeding.

49. Advocate Reed did not know at the time she prepared her report that the September 30, 2019 email to employees stated that the policy prohibiting patients from the lobby did not allow for any exceptions. (Advocate Reed's testimony)

50. Advocate Reed testified that she knew that two other employees had accompanied Grievant and Unit G1 patients to the recreational room during the tree lighting, but that she did not know the names of these coworkers. Yet, Advocate Reed mentioned HSW Carter by name in her report. She made no attempt to interview either

HSW Carter or HSW Murphy even though she knew they could have first-hand knowledge of at least some of the allegations against Grievant. (Advocate Reed's testimony)

51. Advocate Reed testified that feedback from these coworkers had no relevance because a video of the incident was sufficient to figure out what happened, even though it had no sound. The video was not submitted into evidence.

52. Neither RN Snead nor any patient testified.

53. RN Snead told Advocate Reed that she was escorting patients to work at 8:30 a.m. on December 11, 2019, the day after the ceremony, when they told her they did not get to go to the tree lighting. RN Snead told Advocate Reed that Patient HG said this was not fair and that "according to the patients, [Grievant] made that decision." RN Snead also told Advocate Reed that the issue was discussed with the treatment team and during the nurses' meeting, and that the Director of Nursing, Ms. Allen, asked her to investigate to determine why patients from Unit G1 did not go to the tree lighting ceremony. (Respondent's Exhibit 2)

54. Later that same day, Grievant and coworker Stackpole walked by the room of Nurse Managers. RN Carpenter testified that Grievant mouthed "bitch" towards RN Snead.

55. RN Snead told Advocate Reed that she followed up with Patient HG the next day, December 12, 2019, because RN Snead had been directed to investigate. RN Snead told Advocate Reed that Patient HG told her that while Grievant was escorting Patient HG, Patient KJ, Patient GB, and Patient JDM, earlier that day, Grievant asked them, "Who's ratting me out, who's telling staff that I didn't take you guys to the tree lighting?" (Respondent's Exhibit 2)

56. When Advocate Reed interviewed the four named patients, three of them (Patient KJ, Patient GB, and Patient JDM) did not say that Grievant questioned them or that Grievant said anything to them after the ceremony. (Respondent's Exhibit 2)

57. Of the four patients allegedly present, only Patient HG confirmed to Advocate Reed the allegation, saying that Grievant said, "I just wondered who turned me in." Patient HG told her, however, that he could not recall if Grievant cursed. Patient HG said he was not disturbed by this incident but that he was offended that Grievant called him "short." (Advocate Reed's testimony and Respondent's Exhibit 2)

58. Advocate Reed did not express concern over the fact that only one of the four patients from RN Snead's version of events confirmed to Advocate Reed that Grievant questioned them about reporting her.

59. There is no evidence that Advocate Reed even asked Patient GB, Patient KJ, or Patient JDM about this allegation.

60. Advocate Reed's report documents that some patients made exculpatory statements about Grievant. In response to Advocate Reed asking Patient JK if Grievant said something equivalent to, "Who the hell told on me?", Patient JK said "No." Patient JK also told Advocate Reed that someone called out, "How come we aren't out there?" and that Grievant responded, "If you want to go out there, I'll take you out there" but that Patient JK figured "it was likely the ceremony was almost over." Patient HG told Advocate Reed the patients were "still on the unit at 6:05 (p.m.) because of our food," that not seeing the tree lighting "didn't really bother me," that Grievant may have given them the option of going to the lighting, and that he did not hear any patients grumble about not going. Patient BM told Advocate Reed that before they went downstairs, each patient was asked

if they wanted to go to the tree lighting and all said no, that in the gymnasium Grievant asked if anyone wanted to go to the ceremony but all said no, and that he likes Grievant because she is honest with patients. (Respondent's Exhibit 2)

61. On January 31, 2020, Sharpe CEO Pat Ryan sent Grievant a letter of dismissal. (Respondent's Exhibit 4)

62. The dismissal letter cites the following allegations:

- On December 10, 2019, you were to escort 13 patients to the Annual Tree Lighting Ceremony. You acknowledged receiving the emails concerning the ceremony but did not read them. This ceremony was the ninth annual ceremony, the last six of which you were employed at [Sharpe]. You failed to read your emails which is in violation of Employee Conduct Policy 34.305,[5] paragraph 3: "Follow directives of his/her supervisor". You did not take the patients to the tree lighting ceremony, instead taking them to the multipurpose room. When it was pointed out that they should be in the front lobby you did not make an attempt to verify this or escort the patients to the ceremony, thus in violation of [Sharpe] Employee Conduct policy 34.305, paragraph 3: "Follow directives of his/her supervisor." Once informed by the patients that they were likely not in the proper place, you were inattentive to the responsibilities associated with your job assignment also violating the same Employee Conduct Policy, paragraph 12: "Be ethical, alert, polite, sober, and attentive to the responsibilities associated with his/her job."

- On December 11th, 2019 at approximately 1:30 pm, you and Brittany Stackpole, HAS, were walking by the glass conference room on the second floor of [Sharpe] when you allegedly looked into the room which was occupied by Nurse Managers and mouthed or said "Bitch" in a threatening manner. This was witnessed by several of the nurse managers. You admitted to this in your predetermination hearing. This is in direct violation of the [Sharpe] Employee Conduct Policy 34.305, paragraph 15 "Refrain from using profane, threatening or abusive language towards patients, fellow employees, visitors and the public" and also paragraph 10, "Avoid physical abuse, harassment, exploitation or intimidation of patients or fellow employees."

- On December 12th, 2019 an [APS] complaint was filed on behalf of a patient of [Sharpe] against you alleging verbal abuse and neglect. It was alleged that you stated to several patients "Who the hell reported that I

[5]Respondent's Exhibit 10.

> didn't take you to the tree lighting?" Two separate investigations were conducted due to the APS complaint, one investigation on the behalf of the hospital by the Sharpe Hospital Investigation Team and another by Legal Aid of West Virginia.

63. Later in the dismissal letter, CEO Ryan qualified the admission attributed to Grievant with, "When asked about mouthing the word 'Bitch' to a Nurse Manager, you stated you did say 'Bitch' but not to her." No indication was given as to the identity of the individual who apparently heard this admission.

64. In his testimony, CEO Ryan repeated this alleged admission but said he was not at the predetermination meeting. He did not indicate that he heard this from anyone who attended the predetermination meeting. No one else testified to this apparent admission.

65. The dismissal letter states, "Both investigations substantiated the claim of verbal abuse and neglect by you." It cites Sharpe policy 45.034,[6] which mandates that staff protect patients from verbal abuse, physical abuse, and neglect. The letter provides the relevant portion of the definition of "verbal abuse" as "the use of derogatory, vulgar, profane, abusive or threatening language" and "teasing, pestering, deriding, harassing, mimicking or humiliating a patient." The letter provides the relevant portion of the definition of "physical abuse" as "withdrawal of rights or privileges" and states that Grievant did so "by not allowing the 13 patients that she was escorting to have the privilege of attending the tree lighting ceremony."

66. Sharpe policy defines "neglect" as "any negligent, reckless, or intentional failure to meet the needs of a patient…". (Respondent's Exhibit 12)

[6]Respondent's Exhibit 12.

67. The dismissal letter attempts to justify Grievant's dismissal under progressive discipline policy, DHHR Policy Memorandum 2104 and the Division of Personnel's Administrative Rule. It cites prior corrective action against Grievant which "has included four (4) counseling sessions on December 20, 2018, February 4, 2019, May 28, 2019, and September 9, 2019, a verbal reprimand on September 26, 2019, and a written reprimand on May 29, 2018."

68. CEO Ryan deemed the apparent questioning of patients by Grievant to be more egregious than not bringing them to the tree lighting and his primary area of concern due to the power imbalance. CEO Ryan found that this questioning of patients rendered dismissal appropriate. (CEO Ryan's testimony)

69. Grievant denies the allegations against her.

70. Grievant is not currently employed but worked contract jobs on and off until around May 2021. These jobs were similar in pay and hours to her compensation at Sharpe. (Grievant's testimony)

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). "'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 purported infractions emanating from five alleged incidents. Grievant denies all allegations. CEO Ryan testified that the incident which rendered Grievant's conduct worthy of dismissal was asking patients "who the hell" reported her. The veracity of this allegation will determine whether Respondent was justified in dismissing Grievant. However, the allegations preceding this must first be considered.

The first allegation is that Grievant disregarded her duty to read emails about the ceremony and that this amounted to insubordination. Respondent cites Sharpe's Employee Conduct Policy mandating that employees "follow directives of his/her supervisor." Further, insubordination "at least includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued by the school board or by an administrative superior. . .This, in effect, indicates

that for there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd./Shepherd Coll*., 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). As for willful neglect of duty, it "encompasses something more serious than 'incompetence,' … The term 'willful' ordinarily imports a knowing and intentional act, as distinguished from a negligent act." *Bd. of Educ. of the County of Gilmer v. Chaddock*, 183 W.Va. 638, 640, 398 S.E.2d 120, 122 (1990).

Respondent only referenced one email. This was sent to all employees the morning of December 10, 2019. The email stated: "All patients will be eating their evening meal on their unit at 5:00 today. This will permit enough time for the patients to be available in the lobby at 6:00 for the Christmas Tree Lighting Ceremony." Respondent contends that Grievant told Advocate Reed she did not read this email. Yet, the evidence shows that Grievant knew about the ceremony and manifested knowledge of the email by accompanying Unit G1 patients to the gymnasium for the second portion of the ceremony.

This ties into the second allegation; that Grievant defied orders to bring Unit G1 patients to the Christmas tree lighting ceremony. Respondent contends this constitutes neglect, physical abuse, and insubordination. Sharpe's policy mandates that employees follow directives. It defines "physical abuse" as "withdrawal of rights or privileges" and "neglect" as "negligent, reckless, or intentional failure to meet the needs of a patient…." This allegation is rooted in the transformation of an email about an early dinner into a directive that patients be brought to the tree lighting ceremony. However, this email

simply notified employees that patients were being served dinner early and on their own units (rather than in the cafeteria) so they could get to the tree lighting on time.

The email does not direct Grievant or anyone else to bring patients to the tree lighting. The disingenuousness of Respondent's contention to the contrary is evident in the fact that employees widely gave patients the option of staying on their unit during the ceremony, that some patients chose to stay, and that no employee was disciplined or even investigated for leaving patients behind during the ceremony. It is noteworthy that Respondent applied this phantom order only to Grievant even though she was not assigned to transport Unit G1 patients to the ceremony and had simply agreed on the spur of the moment to assist a coworker.

There is no evidence that Grievant was ever instructed to bring Unit G1 patients to the ceremony. Nor did she have a supervisory role over coworkers she assisted that evening. It is telling that neither of these coworkers were disciplined, investigated, or even questioned. Also, Grievant was reticent about bringing patients directly to the lobby because the lobby door had a sign stating, "No Patients Beyond This Point." Sharpe emphasized the importance of this restriction in its September 30, 2019 email instructing employees that "patients are not to be in the lobby under any circumstances." Grievant had never been to the tree lighting ceremony and was concerned that she could be disciplined for violating the policy. Further, dinner was scheduled for 5:00 p.m. but served up to 45 minutes late at 5:45 p.m. There is no evidence that Grievant was at fault for the late dinner. Grievant would have faced discipline had she prematurely brought patients to the ceremony before they had time to finish dinner.

The caravan of Unit G1 patients and employee transporters got to the gymnasium at 6:06 p.m., halfway through the tree lighting portion of the ceremony. The patients were given the option of attending the tree lighting portion of the ceremony but opted not to go. Nevertheless, they did attend the 45-minute second portion of the ceremony starting nine minutes after their arrival. Ultimately, Respondent did not show that Grievant was ordered to bring patients to the tree lighting portion of the ceremony, let alone that she refused to follow an order to do so. Without the prerequisite order and refusal to obey, there cannot be willful refusal. Respondent failed to prove that Grievant disobeyed any order to bring patients to the tree lighting portion of the ceremony and thus failed to prove the first and second allegations.

The third allegation is that Grievant ignored patients who told her she was in the wrong place. Respondent cites the Employee Conduct Policy mandating employees to "be ethical, alert, polite, sober, and attentive to the responsibilities associated with his/her job." This allegation also emanates from Respondent's contention that the email notifying employees of the early dinner time on December 10, 2019, actually directed employees to bring patients to the ceremony. As previously discussed, Grievant and her coworkers acted reasonably when they chose not to enter the tree lighting portion of the ceremony with 9 minutes left and instead waited for the second part of the ceremony in the gymnasium. Whether patients told Grievant that the tree lighting was in the lobby is irrelevant. Grievant knew the tree lighting was in the lobby. All patients were asked if they wanted to go. No patient chose to go. Respondent failed to prove that Grievant was inattentive to the responsibilities of her job.

The fourth and fifth allegations are that Grievant mouthed "bitch" to coworkers and asked patients "who the hell" reported her. Respondent cites the Employee Conduct Policy admonishing employees to "refrain from using profane, threatening or abusive language towards patients, fellow employees, visitors and the public" and to "avoid physical abuse, harassment, exploitation or intimidation of patients or fellow employees." Respondent points to the definition of "verbal abuse" as "the use of derogatory, vulgar, profane, abusive or threatening language" and "teasing, pestering, deriding, harassing, mimicking or humiliating a patient."

Respondent alleges that Grievant mouthed "bitch" to a room of Nurse Managers, including RN Snead and RN Carpenter, when she and her coworker, Brittany Stackpole, walked by on December 11, 2019. Grievant disputes that she mouthed "bitch." The only first-hand testimony Respondent presented to the contrary was from RN Carpenter. RN Carpenter testified that it appeared from the way Grievant's lips moved that Grievant said "bitch" in the direction of RN Snead. RN Carpenter conceded that neither she nor any of the other nurses could hear the conversation between Grievant and Ms. Stackpole so could not be sure that Grievant mouthed "bitch" since she is not a lip reader. Given that Respondent likely knew that none of the nurses heard Grievant's voice, it is surprising that it did not attempt to subpoena Ms. Stackpole. The only other evidence Respondent presented on this allegation was CEO Ryan's testimony that Grievant admitted during the predetermination meeting that she said "bitch." However, CEO Ryan testified that he was not at the predetermination meeting. He did not indicate who, if anyone, told him of this apparent admission. Thus, Respondent failed to prove that Grievant mouthed "bitch" to the room of Nurse Managers.

While this allegation at first glance seems disconnected from the others, closer scrutiny shows that RN Snead's likely perception that Grievant called her a "bitch" is linked to the fifth and most egregious allegation. This final allegation is that Grievant confronted a group of Unit G1 patients and asked them "who the hell reported that I didn't take you to the tree lighting?" The only evidence provided by Respondent on this issue is hearsay.[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.

[7]"Hearsay includes any statement made outside the present proceeding which is offered as evidence of the truth of matters asserted therein." BLACK'S LAW DICTIONARY 722 (6th ed. 1990).

90-H-115 (June 8, 1990).

Regarding a hearsay analysis of the final allegation, it is important to first determine the individuals purportedly present when Grievant apparently questioned patients as to who reported her. The only statement as to the identity of the individuals present is from RN Snead. RN Snead did not have personal knowledge as to the persons present but purportedly repeated what she was told by Patient HG. RN Snead was not called to testify. Thus, RN Snead's statement to investigators in this regard is double hearsay. RN Snead told investigators that Patient HG informed her that Grievant questioned a group of patients, including Patient HG, Patient KJ, Patient GB, and Patient JDM.

In his statement to investigators, Patient HG did not allege that anyone was present when Grievant questioned him. Patient HG was not called to testify. If he had been compelled to testify, Grievant could have cross examined him on relevant details. This magnifies the significance of the failure by Director Kerns and Advocate Reed to ask Patient HG whether anyone else witnessed the incident. A hearsay analysis ensures that when Respondent has access to a primary source who will not be called to testify, it will at least attempt to obtain information directly from the source to avoid double hearsay. Director Kerns and Advocate Reed could have explored with Patient HG whether anyone else was present before they relied on RN Snead's statement as to what Patient HG apparently told her.

The investigators did not indicate whether they asked all four patients identified by RN Snead if they heard Grievant ask who reported her. Further, Advocate Reed documents in her report that Patient JK told her he never heard Grievant ask who reported her. This statement is only exculpatory if Patient JK was with Grievant at the relevant

time. Patient JK was not one of the four patients mentioned by RN Snead. Yet, Advocate Reed did not indicate that she explored foundational information with Patient JK. This would have entailed at least asking Patient JK if he was with Grievant on the day and time of the alleged incident. Without proper questioning, a potentially exculpatory eyewitness who denies an allegation is unlikely to convey information needed to support the denial. The investigators botched their investigative interviews by not properly exploring potentially exculpatory information. Advocate Reed even failed to ask some of the patients named by RN Snead any questions about whether they heard Grievant ask who reported her. HSW Carter testified that he never heard Grievant question whether anyone reported her. Investigators failed to interview HSW Carter. In not providing credible evidence as to who was present when Grievant purportedly asked who reported her, Respondent not only placed an unfair burden on Grievant but also deprived her of the benefit of potentially exculpatory statements.

Respondent provided no reason for failing to call RN Snead to testify. While RN Snead's statement in the APS reporting form was signed, her only statement regarding the presence of the four identified patients was not in written form or signed. Significantly, RN Snead's statement to Advocate Reed was recorded, but the recording was not provided at the hearing. There is no first-hand corroborating evidence of this allegation, but there is contradictory evidence in Advocate Reed's report. This report omits any mention of whether the remaining three apparent eyewitnesses told Advocate Reed anything about the incident. While Patient GB later told Director Kerns that the incident did occur, there is no indication that Patient GB mentioned this to Advocate Reed.

Most importantly, there are credibility concerns regarding RN Snead and her role

in investigating and pushing this allegation. Everything RN Snead did in furtherance of this investigation and everything she told investigators after it was alleged that Grievant mouthed "bitch" to her is tainted and renders her biased, thus affecting her credibility.[8] This includes statements by RN Snead that Patient HG told her that he, Patient KJ, Patient GB, and Patient JDM were present when Grievant asked who told on her. Thus, RN Snead's statement to investigators cannot be afforded any weight under a hearsay analysis.

Nevertheless, the undersigned will do a hearsay analysis of any statements purportedly made by Patient HG, Patient KJ, Patient GB, and Patient JDM to investigators. While these apparent eyewitnesses were available to testify, Respondent contends it did not call any patient due to HIPPA concerns, avoidance of dual relationships, the general practice of psychiatric facilities, and guidelines ensuring that facilities protect patients. Even if true, Respondent knew that patients frequently make stuff up. Respondent could have attempted to navigate hearsay considerations by

[8]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). Not every factor is necessarily relevant to every credibility determination. In this situation, the relevant factors include demeanor, motive, opportunity to perceive, attitude toward the action, the consistency of prior statements, and plausibility.

submitting video evidence, recordings/transcripts of the interviews, and signed statements of eyewitnesses it would not call to testify.

Advocate Reed talked with all four patients who were supposedly present for the last incident. Director Kerns only interviewed Patient HG and Patient GB. Director Kerns testified and wrote in her report that Patient GB told her that Grievant asked, “who the hell ratted me out.“ Yet, neither Patient GB, Patient JDM, nor Patient KJ confirmed to Advocate Reed that the incident occurred. Concerningly, Advocate Reed did not indicate whether she even asked Patient GB, Patient JDM, or Patient KJ about this allegation. While Director Kerns testified that RN Snead said that Patient HG told her he heard Grievant ask, “who the hell ratted me out,“ Director Kerns wrote in her report that Patient HG told her he “knew nothing about this.” On the other hand, Advocate Reed reported that Patient HG told her he heard Grievant say, “I just wondered who turned me in”.

It is concerning that Patient HG went from overtly denying the allegation with Director Kerns to affirming it with Advocate Reed. Even when Patient HG changed his story and affirmed the allegation, it was still inconsistent with the story provided by Patient GB. There are also inconsistencies between the statement attributed to Patient HG by RN Snead and that attributed to him by Advocate Reed. Patient HG diminished the allegation by telling Advocate Reed he could not recall if Grievant cursed and said he was not disturbed by the incident. Curiously, Patient HG said he was offended that Grievant had called him “short,” which could provide motive to fabricate since it bothered him enough to tell Advocate Reed. The inability to cross examine Patient HG deprived Grievant of the opportunity to delve into motive and question how a seemingly innocuous comment may have played on someone with Patient HG’s diagnosis. Ultimately, the

statements provided by these patients to investigators cannot be accorded any weight.

Thus, Respondent failed to prove by a preponderance of evidence any of its allegations against Grievant or that Grievant engaged in misconduct of a substantial nature directly affecting the rights, interest, and safety of the public, or that her conduct was a gross disregard of professional responsibilities.

Grievant also claims discrimination. Grievant contends that Respondent did not discipline or even investigate coworkers HSW Murphy and HSW Carter for failing to bring Unit G1 patients to the tree lighting. "'Discrimination' means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove: (a) that he or she has been treated differently from one or more similarly-situated employee(s); (b) that the different treatment is not related to the actual job responsibilities of the employees; and, (c) that the difference in treatment was not agreed to in writing by the employee. *Frymier v. Higher Education Policy Comm'n*, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp*., Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant was treated differently from coworkers HSW Murphy and HSW Carter because only she was investigated for failing to bring Unit G1 patients to the tree lighting. This difference in treatment was unrelated to the job responsibilities of these employees and was not agreed to in writing. Grievant was similarly-situated to HSW

Murphy and HSW Carter in that they all transported Unit G1 patients to the ceremony on December 10, 2019, they were all performing the task of a Health Service Worker on this occasion, and they did not have a hierarchical relationship.

While Respondent ultimately dismissed Grievant for questioning patients as to who ratted her out, RN Snead made initial inquiries of Patient HG based on Grievant's apparent failure to bring patients to the tree lighting. RN Snead did not appear to have any interest in asking patients if there were other employees who accompanied them that day. Advocate Reed's report indicates that RN Snead knew other employees had accompanied the Unit G1 patients. The report documents that RN Snead stated that "according to the patients, [Grievant] made that decision." RN Snead said that the matter was discussed with the treatment team and during the nurses' meeting, and that the Director of Nursing, Ms. Allen, asked her to investigate to determine why patients from Unit G1 did not go to the tree lighting ceremony. RN Snead was acting on behalf of Sharpe in investigating the failure to bring Unit G1 patients to the tree lighting. She had some indication that other employees were involved in transporting Unit G1 patients. Yet, she did not interview these employees or care to get their names, but only pursued Grievant. Thus, Grievant proved discrimination by a preponderance of the evidence.

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. "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).

3. 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). "'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*).

4. Respondent did not prove by a preponderance of evidence any of its allegations against Grievant, that Grievant engaged in misconduct of a substantial nature directly affecting the rights, interest, and safety of the public, or that Grievant's conduct was a gross disregard of professional responsibilities.

5. "'Discrimination' means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d).

6. Grievant proved discrimination by a preponderance of the evidence.

Accordingly, the grievance is GRANTED. Respondent is ORDERED to reinstate Grievant and to provide her back pay from the date of her dismissal to the date she is reinstated, minus all wages she earned in the interim, plus interest at the

statutory rate; to restore all benefits, including seniority; and to remove all references to the dismissal from Grievant's personnel records maintained by Respondent.

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: January 4, 2022

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Joshua S. Fraenkel
Administrative Law Judge