THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

CATHERINE M. WILT,
Grievant,

v. **Docket No. 2010-0728-CONS**

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

DECISION

Catherine M. Wilt, Grievant, filed this grievance against her employer, William R. Sharpe, Jr. Hospital, on October 22, 2009, grieving her three-day suspension without pay effective October 19, 2009. Grievant seeks as relief to be made whole including back pay with interest, lost benefits and tenure restored. This grievance was filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). A level three hearing was conducted before the undersigned Administrative Law Judge on March 15, 2010, and on May 20, 2010, at the Grievance Board's office in Westover, West Virginia. Grievant appeared in person and by her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by Heather L. Laick, Assistant Attorney General. This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on July 23, 2010.

Synopsis

Grievant is employed by Sharpe Hospital as a Health Service Assistant. On September 14, 2009, a female patient filed a complaint against Grievant alleging physical and verbal abuse. The patient's charges were investigated by Respondent and the results

of the investigations were reported to the administration as credible. Respondent proved by a preponderance of the evidence the charges against Grievant and demonstrated that the three-day suspension was appropriate. Therefore, this grievance is denied.

The following Findings of Fact are based upon the record developed at level three.

Findings of Fact

1. Grievant has been employed for the past eight years at Sharpe Hospital as a Health Service Assistant in Lewis County, West Virginia.

2. On September 14, 2009, a female patient filed a complaint against Grievant with Caryn Woofter, a West Virginia Legal Aid Advocate situated at Sharpe Hospital.

3. The patient reported that on September 13, 2009, Grievant physically and verbally abused her by grabbing her hair, pulling and holding her head back by her hair, stating that the patient was "full of shit," and telling the patient that if she wanted to kill herself to do it at home. The patient also reported that Health Service Worker, Jackie Butler, was in the room at the time and witnessed the abuse committed by Grievant.

4. On September 14, 2009, Ms. Woofter notified Melanie McGhee, Unit Nurse Manager, of the complaint submitted by the patient and informed her that Jackie Butler had witnessed the incident.

5. Ms. McGhee met with Jackie Butler on September 14, 2009, and questioned her about the incident. Ms. Butler indicated that Grievant had grabbed the patient's hair and pulled her head backwards in an attempt to stop the patient from hitting her head against the wall.

6. The patient's complaint initiated investigations by Mandy Weirich of Adult Protective Services, Jo Knotts of Legal Aid, and Jodie Puzio-Bungard, Social Worker for

Sharpe Hospital. On September 14, 2009, Grievant was suspended without pay pending the outcome of the investigations.

7. Over the next four days, Ms. Puzio-Bungard and Ms. Knotts conducted interviews of the patient, Jackie Butler, and Grievant.

8. The patient reported to Ms. Puzio-Bungard that Grievant had grabbed her by the hair to stop her from hitting her head against the wall and Grievant told her she was "full of shit."

9. Jackie Butler reported to Ms. Puzio-Bungard that Grievant grabbed the patient's hair and told the patient she was "full of shit." Ms. Butler demonstrated Grievant's action by grabbing her own hair on the back of her head and pulling. Ms. Butler's account of what happened between Grievant and the patient was very similar to the patient's version of the events.[1]

10. On September 19, 2009, Ms. Puzio-Bungard submitted her report to Kevin Stalnaker, than CEO of Sharpe Hospital. She substantiated the allegations of abuse and concluded that Grievant committed both physical and verbal abuse against the patient. Ms. Puzio-Bungard reported that "I believe physical abuse occurred when Ms. Wilt pulled CM's hair as a means of keeping her from hitting her head. I believe verbal abuse occurred when Ms. Wilt used profanity and threatening language towards [sic] CM." Respondent's Exhibit 6.

11. Ms. Knotts indicated that both Jackie Butler and the patient explained to her

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[1]When testifying at level three on May 20, 2010, Ms. Butler had trouble recalling the events of September 13, 2009; however, when presented with her statement taken two days after the incident she acknowledged that Grievant had grabbed the patient's head and her hand had become entangled in the patient's hair.

that Grievant had grabbed the patient's hair and held her head back from the wall for approximately two minutes. The patient reported that it hurt when Grievant pulled her hair and that Grievant told her over and over that she was "full of shit."

12. On September 23, 2009, Ms. Knotts submitted her report to Mr. Stalnaker. Ms. Knotts reported that the "preponderance of the evidence collected substantiates both physical abuse, pulling CM's hair to control her head, and verbal abuse, telling CM several times she was 'full of shit.' Ms. Wilt's statement of not usually getting mad enough at patients to curse them, to me, was an admission that if angry enough at a patient she would use profanity and she clearly indicated to me she had problems with CM." Respondent's Exhibit 1.

13. On October 23, 2009, Mandy Weirich, Adult Protective Services, issued a report finding that the allegations of abuse against Grievant could not be substantiated. Notwithstanding this conclusion, the report stated that Grievant, in an attempt to prevent the patient from banging her head against the wall, had pulled the patient's hair and that Grievant was angry could be verified as events that had taken place. Respondent's Exhibit 2.

14. Kay Marks, Nurse Educator, indicated that grabbing a patient's hair to hold their head and stop them from banging their head against the wall is not a proper Crisis Prevention Intervention Technique, and is not a safe way to restrain a patient.

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees

Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

The charge against Grievant is essentially gross misconduct, as Respondent asserts Grievant verbally and physically abused a patient of the hospital. The issue before the undersigned Administrative Law Judge is whether Respondent met its burden of proof and demonstrated by a preponderance of evidence that Grievant is guilty of this allegation.

The "term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991) (*citing Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985)). *See Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sept. 13, 2002).

Respondent has met its burden of proof. While Grievant attempted to down play her actions in this case, the record demonstrates that Grievant did verbally and physically abuse the patient in question. In fact, Grievant made the statement that she did not usually

get mad enough at a patient to curse them, which indicates to the undersigned that Grievant had, in fact, been using profanity toward the patient. Grievant's actions demonstrated a disregard for the resident, and could have resulted in harm.

The undersigned has no doubt that Grievant's work can be extremely stressful on occasion; however, Respondent is mandated to protect and care for a segment of the mentally challenged population of West Virginia. As a Health Service Assistant within Sharpe Hospital, Grievant is responsible for the care and protection of the residents. The misconduct was of such a nature to justify Respondent's decision to suspend Grievant without pay for three days.

Grievant seems to argue that this punishment was excessive since she had no previous allegation of abuse. "The argument a disciplinary action was excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was 'clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989)." *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

In assessing the penalty imposed, "[w]hether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995) (citations omitted). The Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there

is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). "Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge shall not substitute her judgement for that of the employer. *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997)." *Meadows*, *supra*.

The undersigned cannot find that Grievant's three-day suspension for abusing a mentally challenged resident was excessive. The fact that Grievant had not had any prior allegations of resident abuse does not change this decision.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

2. The "term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of

standards of behavior which the employer has a right to expect of its employees." *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991) (*citing Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985)). *See Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sept. 13, 2002).

3. Respondent has met its burden of proof and demonstrated Grievant was guilty of resident abuse as a result of gross misconduct.

4. "[M]itigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996).

5. "Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge shall not substitute her judgement for that of the employer. *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997)."

6. Given the charges proven against Grievant, the penalty is not disproportionate or excessive.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA.

CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: September 21, 2010

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Ronald L. Reece
Administrative Law Judge