THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JOHN PAUL LUNSFORD,
Grievant,

v. **Docket No. 2010-1386-CONS**

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

DECISION

John Paul Lunsford ("Grievant"), employed by the Department of Health and Human Resources ("DHHR") as a Health Service Worker at the William R. Sharpe, Jr. Hospital, filed an expedited grievance to level three, as is permitted by W. VA. CODE § 6C-2-4(a)(4), following the termination of his employment, effective April 12, 2009. Grievant seeks reinstatement and back pay, in addition to treble damages for the alleged failure to pay Grievant all wages owed within seventy-two hours of discharge. An evidentiary hearing was conducted before the undersigned Administrative Law Judge in the Grievance Board's Westover office on August 3, 2010, and August 17, 2010. Grievant appeared in person and by his representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. DHHR was represented by Assistant Attorney General Heather L. Laick. The grievance became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on October 5, 2010.

Synopsis

Respondent proved by a preponderance of the evidence that Grievant engaged in physical and verbal abuse of a patient when he grabbed the patient by the arm and shoulder area, forcing the patient onto his bed, and verbally threatening him. Three separate entities investigated the allegations and all substantiated the allegations of both physical and verbal abuse. In fact, Grievant acknowledged that he made physical contact with the patient during a heated exchange with another employee. Accordingly, the penalty of dismissal was not shown to be an abuse of agency discretion under the circumstances. This grievance is denied.

The following facts have been derived from a preponderance of the evidence.

Findings of Fact

1. Grievant was employed for more than three years as a Health Service Worker at William R. Sharpe, Jr. Hospital, a psychiatric facility operated by the West Virginia Department of Health and Human Resources located in Weston, West Virginia.

2. Grievant was terminated from his position on April 12, 2009, based upon a charge of verbal and physical abuse of a patient.

3. The charge against Grievant was based on an incident initially reported by Health Service Trainee Janelle Cumberledge. On February 19, 2010, Ms. Cumberledge was in the process of checking on a patient who was upset, shouting at Ms. Cumberledge, and threw a pop bottle at her. Grievant then entered the patient's room and intervened. The patient raised his hand to point his finger at Ms. Cumberledge. Grievant grabbed the patient by the wrist and shoulder area, and then pushed him onto his bed. Grievant told

the patient if he ever saw him do that again that he would hurt him and Grievant did not care if it cost him his job. Grievant also told the patient that if he wanted to hit someone, to hit him.

4. Ms. Cumberledge reported that she was not within the patient's reach and she did not feel threatened by the patient when he became upset and threw the pop bottle. It was common for him to behave in this fashion.

5. Ms. Cumberledge reported the incident two days later to Lynne Strawn, the Registered Nurse on duty. Ms. Cumberledge did not report the incident on the day it occurred because she was uncertain what to do at first. Ms. Cumberledge completed a written statement regarding the incident at the request of Ms. Strawn.

6. Since Grievant was accused of both physical and verbal abuse and because there was an eyewitness, the decision was made to suspend the Grievant until the outcome of the investigation.

7. Jodie Puzio-Bungard, Director of Social Work, conducted an investigation by interviewing several people, including Ms. Cumberledge, the patient, and the Grievant. Both Ms. Cumberledge and the patient verified that Grievant had twisted the patient's arm, pushed him onto the bed, and threatened the patient. Ms. Puzio-Bungard substantiated the complaint of physical and verbal abuse against Grievant based on the interviews.

8. Caryn Woofter, Behavioral Health Advocate for Legal Aid at Sharpe Hospital, reported that the patient complained that Grievant grabbed his arm, twisted it, forced him onto the bed, and threatened to hit him. Ms. Woofter interviewed several staff members, including Ms. Cumberledge, the patient, and the Grievant. Ms. Woofter concluded that the

patient's allegations were credible, primarily because he gave the same account of events as Ms. Cumberledge.

9. Mandy Weirich, Adult Protective Service Worker, investigated the complaint filed by the patient and substantiated the allegation. Ms. Weirich believed the patient's allegation was true due in large part to the fact that Grievant made several statements during the course of the investigation admitting to placing his hands on the patient and physically placing the patient on his bed. Ms. Weirich concluded that, based on the consistency of the statements and the statement that Grievant gave the Legal Aid Advocates acknowledging the conduct, it could be verified that Grievant did grab the patient's arm and push him onto the bed by his shoulders. Ms. Weirich also observed that Grievant was upset that the patient would attack a female. Ms. Weirich concluded that Grievant used inappropriate restraint measures and did not follow proper non violent crisis intervention.

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. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92- HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965).

Grievant was employed by DHHR as a Health Service Worker at William R. Sharpe, Jr. Hospital in Weston, West Virginia. Sharpe Hospital is a state-operated mental health facility. By letter dated April 12, 2010, Acting Chief Executive Officer Terry Small informed Grievant of her decision to dismiss him, citing, in pertinent part, the following:

> This is to inform you that the investigation of the allegation of verbal and physical abuse of patient M.J. has been concluded. The findings of the investigation substantiated that both verbal and physical abuse occurred.
>
> Based on the findings of this investigation, completed by three separate entities, it is my decision to dismiss you from your position as a Health Service Worker here at William R. Sharpe, Jr. Hospital.[1]

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*

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[1]Respondent's Exhibit 4.

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. Grievant did verbally and physically abuse the patient in question. Grievant's admitted actions demonstrated a disregard for the resident, his employer's policies, and could have resulted in harm. The reasons for Grievant's dismissal meet the requirements outlined in *Oakes*, *supra*.

Grievant seems to downplay his actions by suggesting that Ms. Cumberledge instigated the patient's violent acting out, that she continued to deliberately escalate his reaction, and that Grievant, having a known rapport with the patient, was trying to redirect the patient away from Ms. Cumberledge. Redirection is appropriate in this scenario; however, Grievant utilized an inappropriate physical hold to maintain the patient. In addition, based upon the record, it is more likely than not that Grievant angrily made verbal threats to the patient.

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 terminate Grievant's employment. The fact that Grievant had not had any prior disciplinary action for resident abuse does not change this decision.[2]

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[2]DHHR's policy on progressive discipline provides for a system that begins with a verbal reprimand, followed by a written reprimand, suspension and then dismissal. However, the policy also specifically states that it should be followed in most cases, but that decisions as to the severity of disciplinary action will be made on a case-by-case basis.

Finally, some amount of time was spent by both parties at level three concerning an alleged violation of W. VA. CODE § 21-5-1, *et seq*. In particular, Grievant claims that Respondent failed to pay Grievant's final wages within seventy-two hours of notifying him of his termination. Grievant seeks treble damages. The scope of the authority of the Grievance Board is limited to that set forth in the Grievance statutes.[3] The Grievance Board does not have the authority to grant the requested relief in this grievance.[4] Grievant may prosecute his claim pursuant to W. VA. CODE § 21-5-12. This issue need not be addressed further.

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. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or

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DHHR Policy Memorandum 2104.

[3] *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997).

[4] *See generally Roberts/Roberts v. Ohio County Bd. of Educ.*, Docket No. 91-35-140 (Sept. 30, 1991).

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).

3. Respondent has met its burden of proving that Grievant's conduct was of a substantial nature directly affecting the rights and interest of the resident in question at Respondent's facility. Grievant was dismissed for good cause.

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: December 8, 2010

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Ronald L. Reece
Administrative Law Judge