THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

ALEXANDER A. STUMP, JR.
Grievant,

v. **Docket No. 2011-0127-MAPS**

DIVISION OF VETERANS AFFAIRS,
Respondent.

DECISION

Grievant, Alexander A. Stump, Jr., filed this grievance on August 2, 2010, challenging his dismissal from the employment of Respondent following a complaint of alleged resident abuse made against him on July 16, 2010. Grievant seeks to be made whole, including lost wages, interest, benefits, and tenure. This grievance was filed directly to level three. A level three hearing was conducted before the undersigned Administrative Law Judge on August 25, 2011, and November 30, 2012, at the Grievance Board's Westover office location. Grievant appeared in person and by his representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by Mary M. Downey, Assistant Attorney General, and by Doren Burrell, Senior Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on February 5, 2013.

Synopsis

The record of this grievance established that Grievant engaged in abuse of a resident at Respondent's nursing facility. Respondent met its burden of proof and established by a preponderance of the evidence that Grievant had been rough to a

resident, mishandled him, and engaged in loud and confrontational behavior. Grievant engaged in misconduct of a substantial nature and the dismissal is upheld.

The following findings of fact are based upon the record developed at level three.

Findings of Fact

1. Grievant was employed as a Health Service Worker at the West Virginia Veterans Nursing Facility, operated by the West Virginia Division of Veterans Affairs. Grievant's duties involved direct care for residents; such as, tending to the residents' needs for meals, assisting in moving the residents, changing clothes, and other personal services.

2. Grievant was dismissed from employment on July 21, 2010, after an investigation by Respondent of a complaint that Grievant had been rough to a resident, manhandled the resident, and spat in his face.

3. The resident making the complaint is housed on the floor where the Grievant was assigned. The resident is an elderly veteran and was ninety years old at the time of the incident. When he is not in bed, the resident uses a wheelchair to move around due to a prior hip fracture, and his history of falling when he is not assisted.

4. The resident prefers to remain in his bed most of the day and frequently sleeps through the day after his lunch and through the evening after his dinner. This is his routine of choice and he can become irritable when he is required to get out of bed for physical therapy, a check or change of his clothes, or to go to the dining room.

5. The resident's bed alarm had gone off an unspecified number of times on the evening of July 16, 2010. Another Health Service Worker, Sharon Greenlief, went to the resident's room and discovered that he wanted his dentures.

6. Ms. Greenlief gave the resident his dentures. Thereafter, Ms. Greenlief told him that she was going to check his clothing for wetness. Ms. Greenlief asserts that the resident kicked her when she pulled down his sheets.

7. Ms. Greenlief did not prepare an Incident Report concerning this allegation of physical violence, nor did she report it to anyone in management.

8. Later that day, there was another call to the resident's room, either from the bed alarm or the call button. Grievant answered the call and discovered that the resident wanted his dentures. The resident attempted to put his dentures in his mouth, but each time he put them in the wrong way. Grievant grew impatient with the resident and raised his voice.

9. At some point that evening, Grievant returned to the resident's room. Grievant had some water with him and, according to the resident, took the water into his mouth and spit in the resident's face.

10. The resident became upset about the treatment and used his call button to get assistance in getting out of bed and into his wheelchair. Grievant returned in answer to this call and was told by the resident that he wanted to go to the nurses' station and make a complaint.

11. The resident spoke to Patricia Bock, LPN, and told her he wanted to speak to the commander in chief. Ms. Bock explained that the administrator had left for the day, but that she was in charge and could talk about the matter.

12. The resident told her that two workers had been rough with him, that he had been manhandled, and that one worker had spit in his face. When the Grievant came into view, the resident pointed at him and indicated that he was the culprit.

13. Ms. Bock memorialized the complaint and submitted it to the Charge Nurse for the shift.

14. The following day the complaint was forwarded to Tom McVay, Acting Director of Nursing. Mr. McVay in turn notified Dr. Kevin Crickard, Executive Director of the facility. Dr. Crickard instructed Mr. McVay to inform the Grievant that he would be suspended from work during the course of the investigation into the complaint.

15. Mr. McVay interviewed the resident on this day as well, the resident described how the workers had handled him roughly, and how the man had spit in his face. The resident's account of the events was consistent with what he had communicated to Nurse Bock the previous night.

16. Dr. Crickard requested that Pamela Hedrick and Pat Kilkowski interview the resident to confirm his report and his recollection of the incident. The resident recounted the events of that evening in similar detail and with similar wording as the initial reporting.

17. Approximately six weeks after the incident, the resident's son again asked him if he remembered the incident with the worker. The resident was able to repeat his account of the events with the same detail and description that he had given to those involved in the investigation shortly after the event.

18. During the pre-determination meeting scheduled by Dr. Crickard, the Grievant admitted that he was angry with the resident for kicking Ms. Greenlief and for repeatedly using the call button that evening. Grievant also acknowledged that he was loud with the resident, and that he had tried to tone it down but was unable to do so.

19. Grievant has demonstrated a fast temper and aggressive behavior through other instances at the facility. Complaints from other employees have been made

concerning allegations of bullying, cursing and giving orders to nursing staff outside of his responsibilities. Grievant has used loud and inappropriate language when speaking to his superiors.

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 asserts that the Respondent cannot meet its burden of proof based upon hearsay evidence.[1] The balance of the evidence at level three consisted of hearsay

[1]Grievant cites as authority the undersigned's ruling in *Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (Mar.11, 2010) (affirmed by the Circuit Court of Kanawha County, June 9, 2011).

reports of the resident's complaint against the Grievant. Under the statutes and procedural rules relating to grievances, the formal rules of evidence are not applicable in grievance proceedings, except for the rules of privilege recognized by law.[2] 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. Accordingly, an administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. *Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (Mar. 11, 2010); *Warner v. Dep't of Health and Human Resources*, Docket No. 07-HHR-409 (Nov. 18, 2008)*; Miller v. W. Va. Dep't of Health and Human Resources*, Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ.*, Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996).

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

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[2]*See generally* W. VA. CODE § 6C-2-4(a)(3).

statements.[3] *Gunnells v. Logan County Bd. of Educ.*, Docket No. 97-23-055 (1997); *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. 90-8-115 (June 8, 1990).

Using the above factors, the resident's hearsay statements do withstand scrutiny and are entitled to be given credibility and weight in this proceeding. Because of his health condition, the resident was not fit for travel to a hearing. The record reflects that the resident understood that he was making a formal complaint to Ms. Bock. Even though the resident did not have access to a copy of his report, his subsequent accounts to other staff members and family remained consistent and he used the same language to describe the events. The resident identified the Grievant as the worker that abused him, and the resident pointed him out to the nurse at the time of the initial complaint. Nurse Bock testified that the resident was clearly upset when he spoke to her. On three different occasions the resident described the abuse committed by the Grievant. These consistent statements carry sufficient weight to conclude, by a preponderance of the evidence, that the Grievant did commit the acts as the resident described.

By contrast, the Grievant offered various accounts of the events of July 16, 2010, and he changed his story on many occasions. When he first spoke to Dr. Crickard about the resident's complaint, he denied that he was present and denied that he was the correct worker. As he was confronted with evidence that showed the incident occurred on his floor, during his shift, with a resident in his care, and that the resident had identified him,

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[3]The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing hearsay. *See Borninkhof v. Department of Justice*, 5 MSBP 150 (1981).

the Grievant began to acknowledge that an incident had occurred with the resident. Grievant acknowledged that he was angry with the resident and that he was upset that the resident could not properly wear his dentures.

In addition, Grievant's initial narrative did not mention any claim that the resident had kicked Ms. Greenlief and did not mention any problems with the resident's dentures. Two days later, in the pre-determination meeting, Grievant then explained that he had become angered because the resident had kicked Ms. Greenlief. This was also the first time he raised the issue of the dentures. Grievant also provided inconsistent statements concerning the times that Ms. Greenlief was present, particularly with regard to the attempts to put dentures in the resident's mouth.

As noted above, the reports of the resident remained consistent when he recounted them to several different people at several different times. Even six weeks after the event, the resident was able to explain how a staff member had been rough with him. The resident understood that he had reported this to the management and that they had taken action against the worker he identified. The record established that the Grievant was abusive toward this resident, and, therefore, should not be permitted to have the residents of the facility in his care. Respondent has proven its allegations of misconduct 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, 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 Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 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 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. An administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. *Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (Mar. 11, 2010); *Warner v. Dep't of Health and Human Resources*, Docket No. 07-HHR-409 (Nov. 18, 2008); *Miller v. W. Va. Dep't of Health and Human Resources*, Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ.*, Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996).

4. 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. *Gunnells v. Logan County Bd. of Educ.*, Docket No. 97-23-055 (1997); *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. 90-8-115 (June 8, 1990).

5. Respondent proved by a preponderance of the evidence the charges contained in Grievant's termination letter dated July 22, 2010.

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: March 8, 2013

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Ronald L. Reece
Administrative Law Judge