WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

KIMBERLY REED,
Grievant,

v. **Docket No. 2012-1130-CONS**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
JACKIE WITHROW HOSPITAL,
Respondent.

DECISION

Grievant, Kimberly Reed, is employed by Respondent, the Department of Health and Human Resources ("DHHR"), at Jackie Withrow Hospital ("Hospital"). She sustained a work-related injury while working as a Health Service Worker ("HSW") for the Hospital. She returned to modified duty as a HSW and took some approved leaves of absence from her position. This decision addresses four grievances filed by Ms. Reed, consolidated herein at Docket No. 2012-1130-CONS. The first grievance was filed on March 30, 2012, at *Reed v. DHHR/Jackie Withrow Hospital,* Docket No. 2012-1026-DHHR. The statement of grievance is: "Reprimand without good cause." As relief, Grievant seeks, "Withdrawal of reprimand and otherwise made whole." The second grievance was also filed on March 30, 2012, at *Reed v. DHHR/Jackie Withrow Hospital,* Docket No. 2012-1027-DHHR. The statement of grievance is: "Shift changed without notice." As relief, Grievant seeks, "Consultation and notification of tenured employees when changing assigned shifts and otherwise made whole." These grievances were consolidated at *Reed v. DHHR/Jackie Withrow Hospital,* Docket No. 2012-1130-CONS by Order of Consolidation dated April 16, 2012. A level one hearing was held, via telephone conference, concerning these grievances on May 31, 2012.

Grievant appeared with her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union, and Respondent Jackie Withrow Hospital appeared by Angela Booker, CEO of Jackie Withrow Hospital. These grievances were denied at level one by decision dated June 22, 2012 and proceeded to level two on January 22, 2013.

Grievant's third grievance was filed on June 4, 2012, at *Reed v. DHHR/Jackie Withrow Hospital,* Docket No. 2012-1373-DHHR. The statement of grievance is, "Grievant falsely informed that she could [no] longer have reasonable accommodation as a health service worker; and that, if in 120 days she could not be off restrictions, she would be dismissed from her health service worker position." As relief, Grievant seeks, "To be made whole including back pay with interest and benefits restored." A level one hearing was held, via telephone conference, concerning this grievance on September 11, 2012. Grievant appeared with her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union, and her co-representative, the Hospital's Steward, Ms. Nola Lily. Respondent Jackie Withrow Hospital appeared by Angela Booker, CEO of Jackie Withrow Hospital and the Hospital's Assistant CEO, Aimee Bragg. This grievance was denied at level one by decision dated October 2, 2012. This grievance proceeded to level two on March 13, 2013.

Grievant's fourth grievance was filed on July 16, 2013, at *Reed v. DHHR/Jackie Withrow Hospital,* Docket No. 2014-0062-DHHR. The statement of grievance is, "Discharged without good cause." The relief sought is, "To be made whole in every way including all back pay with interest and benefits restored." The grievance, originally filed at Docket No. 2014-0062-DHHR, was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). By agreement of

the parties, the foregoing grievances were consolidated for a Level Three hearing at Docket No 2012-1130-CONS, by Order of Consolidation dated August 15, 2013. A level three hearing was conducted concerning these four grievances before the undersigned Administrative Law Judge on August 19, 2013, at the Raleigh County Commission on Aging in Beckley, West Virginia. Grievant appeared with her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union, and her co-representative, the Hospital's Steward, Ms. Nola Lily. Respondent Jackie Withrow Hospital appeared by Harry C. Bruner, Jr., Assistant Attorney General. The parties requested admission of the lower level records in the first three grievances as a part of the record in this matter and the undersigned admitted the same. At the conclusion of the hearing, the parties agreed to submit Proposed Findings of Fact and Conclusions of Law, the last of which was received by the West Virginia Public Employees Grievance Board on October 2, 2013. This matter became mature for decision on that date.

Synopsis

Grievant asserts she was terminated from her position as a Health Service Worker at Jackie Withrow Hospital because the Hospital and the Office of Human Resources Management at DHHR provided her with contradictory information concerning whether she had been terminated. Respondent responds that Grievant misunderstood its communications and the Hospital did not terminate Grievant. The evidence demonstrated that Grievant believed, for a limited period of time of approximately three weeks, that she had been terminated, based upon the contradictory information she received. However, Respondent demonstrated Grievant was not terminated and that Grievant was unequivocally informed of this fact by the Hospital on July 30, 2013.

Grievant further asserts that she was issued a written reprimand without good cause following an incident in which she restrained a combative/agitated resident. The Hospital demonstrated that Grievant violated various provisions of DHHR Policy Memorandum 2108 - “Employee Conduct” and Abuse and Neglect policies because she physically restrained a resident and witnessed other staff members doing the same, but did not report the actions of the other staff. Issuing a written reprimand was disciplinary action consistent with Respondent's progressive discipline policy.

Grievant also asserts that she was entitled to notice from the Hospital when Hospital administration changed her shift after she returned from leave. Grievant failed to prove any obligation on the part of the Hospital to provide advance notice to its employees of shift/schedule changes, or that her assigned shift change was arbitrary or capricious.

Additionally, Grievant was given accommodations/less than full duty work by the Hospital for 120 days after a work-related injury, based on her medical/physical restrictions, and asserts that she is entitled to accommodation beyond those 120 days. Respondent responds that it properly applied West Virginia Division Of Personnel Administrative Rule 143 C.S.R. 1 § 14.4(h) in accommodating Grievant upon her return to work after her medical leave of absence. Grievant was given approximately four months of accommodations by the Hospital. Grievant did not establish that she was entitled to additional modified duty/accommodations by the Hospital.

Grievant further asserts that she was discriminated against because the Hospital allowed another Health Service Worker to have six months of modified duty and Grievant only had four months. Grievant did not prove discrimination

under W. VA. CODE § 29-6A-2-2(d) because she failed to demonstrate that the other Health Service Worker was “similarly situated” to her, with respect to physical limitations.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant, Kimberly Reed, is employed by Respondent, the Department of Health and Human Resources ("DHHR"), at Jackie Withrow Hospital ("Hospital"). She is a Health Service Worker (“HSW") for the Hospital.

2. On March 10, 2012, in the Hospital’s dining room, resident AC became upset and combative.[1] AC was in a wheel chair and has dementia. Grievant was nearby at the time, feeding another resident. Grievant assisted in moving the resident whom she was feeding away from AC. Grievant observed that staff member KP was bleeding and holding AC’s wrist.[2] KP was bleeding because AC struck her. Another employee was restraining AC’s other hand. Grievant instructed KP to clean up the blood. While KP did so, Grievant restrained one of AC’s hands, while another staff member held AC’s chin to prevent her from spitting and biting. Registered Nurse, Kim Goodwin, entered the dining room and instructed Grievant and other staff holding AC to "Let go," or "Hands off." They released AC. Nurse Goodwin then removed AC from the dining room, by wheeling her out.

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[1] The resident will be referred to throughout with the initials AC to protect his/her privacy.

[2] This staff member will be referred to throughout as KP as her identity is irrelevant to this decision.

3. The Hospital has a “restraint free” facility, meaning that residents may not be restrained absent a doctor's order. Grievant was trained that restraining an agitated resident will likely cause him/her to become even more agitated.[3] In addition, the Hospital specifically instructed Grievant on how to properly manage an agitated or combative resident by: speaking softly to the resident; removing other residents for protection; giving the resident space away from others and; approaching the resident again later.

4. The Hospital conducted an investigation into the March 10, 2012, incident.

5. On March 16, 2012, Assistant CEO Amy Bragg, Director of Nursing ("DON") Carla Lewis and Ms. Booker held a predetermination meeting with Grievant concerning the events of March 10, 2012.

6. On March 22, 2012, Ms. Booker issued a written reprimand to Grievant, pursuant to DHHR Policy Memorandum 2104 - “Guide to Progressive Discipline” for Grievant’s failure to adhere to DHHR Policy Memorandum 2108 - “Employee Conduct,” and the abuse/neglect policies of the Hospital, during the incident of March 10, 2012.

7. DHHR Policy Memorandum 2108 - “Employee Conduct,” states:

> "Employees are expected to comply with all relevant Federal, State and local laws; comply with all Division of Personnel and Department policies … exercise standard client management techniques; avoid physical abuse, harassment or intimidation of

[3] Level One hearing of grievances *Reed v. DHHR/Jackie Withrow Hospital,* Docket No. 2012-1026-DHHR and *Reed v. DHHR/Jackie Withrow Hospital,* 2012-1027-DHHR, consolidated at *Reed v. DHHR/Jackie Withrow Hospital,* Docket No. 2012-1130-CONS, testimony of RN Donna Ortiz and Ms. Rebecca Marsh, who completes "reportable" investigations and conducts abuse and neglect training at the Hospital.

residents/patients/clients or fellow employees, exercise safety precautions; and be ethical …"

8. The term "neglect" is defined, in the nursing facility setting, as "failure to provide goods or services necessary to avoid physical harm, mental anguish, or mental illness unless such action is beyond the Nurse Aide's control." 69 CSR 6 § 2.4.[4]

9. DHHR Policy Memorandum 2104 - "Guide to Progressive Discipline" provides, "Written reprimand/warning may be issued when minor infractions/deficiencies continue or when a more serious infractions/deficiency is discovered."

10. No eyewitness testimony was offered at the Level One Hearing regarding Grievant's conduct during the incident.[5]

11. Grievant restrained AC with her hands.[6]

12. Grievant did not report the actions of the other staff members who restrained AC.

13. Grievant sustained a work-related injury on or about December 7, 2011, when two Hospital residents attacked her. Grievant's injuries included pain, inflammation, and swelling and soft tissue damage to her ribs, neck and shoulder.

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[4] Respondent did not produce the Abuse and Neglect policy/policies referred to in the written reprimand, but Ms. Marsh defined "neglect" at the Level Three hearing.

[5] However, transcripts of Grievant's recorded statements were offered, in addition to her testimony at Level One hearing of grievances *Reed v. DHHR/Jackie Withrow Hospital,* Docket No. 2012-1026-DHHR and *Reed v. DHHR/Jackie Withrow Hospital,* 2012-1027-DHHR, consolidated at *Reed v. DHHR/Jackie Withrow Hospital,* Docket No. 2012-1130-CONS.

[6] *Id.* at Respondent's Exhibit Nos. 2 and 3 - Transcripts of recorded statements by Grievant during interviews with Hospital.

14. After sustaining these injuries, sometime prior to December 23, 2011, Grievant submitted Physician's Statements, on the “DOP/3" Form, to the Hospital, stating that Grievant’s medical condition required accommodation/modified duty as an HSW.[7]

15. Respondent accommodated Grievant's restrictions in early December of 2011, by assigning Grievant to work on Unit 3C, on Grievant's usual/evening shift, from 3:00 PM to 11:00 PM.

16. Between December of 2011, and April of 2012, Grievant submitted documentation from her physician placing numerous restrictions on her work as a HSW. Work as a “monitor,” would have accommodated her physical restrictions because monitors sit with/observe residents to make sure that they/other residents are safe. Grievant wished to work as a monitor on the 3:00 PM to 11:00 PM shift on Unit 3C. However, in April 2011, there were already three other HSWs on modified duty or working as monitors on that shift/unit and the Hospital could not use Grievant on that shift. Therefore, the Hospital accommodated Grievant by moving her to the 11:00 PM to 7:00 AM shift, to work on a Unit with mental health residents, who required less physical assistance than other residents. This placement allowed Grievant to continue working as a HSW, with modified duties.[8]

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[7] The Physician's Statements were not provided at the Level One hearing in *Reed v. DHHR/Jackie Withrow Hospital,* Docket No. 2012-1026-DHHR and *Reed v. DHHR/Jackie Withrow Hospital,* 2012-1027-DHHR, consolidated at *Reed v. DHHR/Jackie Withrow Hospital,* Docket No. 2012-1130-CONS. In addition, specific details, such as when the shift changes occurred, were not provided.

[8] The testimony concerning whether Grievant ever worked as a monitor or was simply given accommodations in her position as a HSW was convoluted and confusing at best, as was the testimony about the work of the three HSWs who were working modified duty when Grievant return to work in April 2012.

17. When HSWs and monitors are interviewed/hired by the Hospital, they are not promised any particular shift; but are specifically informed that they may be "pulled" to other shifts to allow the Hospital to fully and properly staff its operations. The shift changes are communicated to the employee when the changes are found to be necessary.

18. Grievant remained on modified duty for approximately 120 days/4 months, from December 7, 2011, until April 9, 2012. During this period of time, Grievant submitted numerous Physician's Statements which greatly restricted her work as a HSW. For example, Grievant's DOP/3 dated January 29, 2012, specified that Grievant could not bend/stoop, push/pull with her left arm, reach with her left arm, lift/carry with her left arm and had limited manipulation of her left arm. Grievant was allowed to sit, stand and walk without restrictions.[9]

19. West Virginia Division Of Personnel Administrative Rule 143 C.S.R. 1 § :14.4(h) ("DOP Administrative Rule 14.4(h)") provides:

> Return At Less Than Full Duty-
> 1. The appointing authority may permit an employee to work or return to work from sick leave… or medical leave of absence at less than full duty for no more than thirty (30) days, provided that the terms of the return shall be in writing. An employee may request to continue to work at less than full duty beyond the period permitted by the appointing authority. The request must be submitted to the appointing authority at least five (5) days before the end of the period. The appointing authority shall consider the request in the same manner as the original request.
> 2. *The appointing authority,* after receiving approval of the Director, *may deny a request to return to work at less than full duty under conditions including, but not limited to, the following:*
> (a) *the employee cannot perform the essential duties of his or her job without accommodation;*

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[9] Level One Hearing in *Reed v. DHHR/Jackie Withrow Hospital,* Docket No. 2012-1373, Respondent's Exhibit No. 6-Physician's Statement, dated 1/29/2012.

> (b) the nature of the employee's job is such that it may aggravate the employee's medical condition;
> (c) a significant risk of substantial harm to the health or safety of the employee or others cannot be eliminated or reduced by reasonable accommodation; or,
> (d) the approval of the request would seriously impair the conduct of the agency's business. " *(Emphasis added.)* [10]

20. Shortly before April 9, 2012, Ms. Booker, Ms. Aimee Bragg, Assistant Administrator of Human Resources ("HR") and Ms. Carla Lewis, Director of Nursing, met with Grievant to discuss her progress. Because Grievant had been on modified duty for more than 120 days, and her condition did not seem to be improving, they informed Grievant that she could take a medical leave of absence ("MLOA") to allow her to more fully recover from her injuries. Grievant's physician recommended that she should take MLOA from April 9, 2012, through July 1, 2012. Grievant agreed and took the full medical leave of absence, as advised.

21. In connection with taking this MLOA, Respondent never told Grievant that she would be dismissed from her employment.

22. On June 29, 2012, Grievant submitted a DOP-3 to the Hospital, signed by Dr. Chris Grose, which released Grievant to return to her full duties as a HSW.

23. From July 1, 2012, through approximately July 8, 2012, Grievant returned to her full duties as a HSW, which apparently exacerbated her injuries, causing her to be absent from work.

24. In early July of 2012, the Hospital received a "Plan of Care" signed by Dr. Chris Grose, which stated that Grievant, "will no longer be able to continue

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[10] *Id.*-Respondent's Exhibit No. 4.

at her current job duties," due to her injury on December 7, 2011. Grievant did not return to work after July 8, 2012.[11]

25. On March 27, 2013, Mr. Andrew Garretson, the Disability Manager for the Office of Human Resources Management ("OHRM") at DHHR, sent a letter to Grievant stating that Grievant had been on personal leave of absence ("PLOA") since July 8, 2012, and that this leave would expire on April 10, 2013.[12] Grievant was, therefore, expected to return to work on April 11, 2013, and submit a current Physician's Statement stating whether she was permitted to return to work at full or less than full duty. The letter referred to the last Physician's Statement submitted by Grievant, received by the Hospital on July 6, 2012, which stated that Grievant could no longer perform the "essential elements" of her position.[13] Therefore, Mr. Garretson enclosed an application for Grievant to complete, to determine whether there was another position for which Grievant qualified based upon her experience, training, education and restrictions. Finally, the letter advised that, "If you fail to return to duty, provide the enclosed forms or provide in advance, satisfactory reasons why you are unable to return by for [sic] mentioned date [,] The West Virginia Administrative Rule § 14.8 D 3 states;

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[11] To return to work, the Hospital has requested Grievant to provide it with a Physician's Statement stating whether she can perform the essential duties of a HSW.

[12] On August 15, 2012, Ms. Serena Hamm sent a letter to Grievant enclosing a Physician's Statement, requesting Grievant to complete it and return it to the facility within 15 days of receipt of the letter or Grievant's absence would be considered unauthorized leave. However, Mr. Garretson referred to Grievant's leave at that time as a PLOA, as opposed to a MLOA, which does not require submission of a DOP/3. The testimony of some of Respondent's witnesses and the documentary evidence offered shows that there was considerable confusion on the part of the Hospital concerning whether/when Grievant was given/on PLOA or MLOA.

[13] Grievant actually provided a "Plan of Care," rather than a Physician's Statement, to the Hospital from Dr. Chris Grose, stating that she was unable to perform the duties of a HSW.

“Failure of the employee to report to work promptly at the expiration of a leave of absence without pay, except for satisfactory reasons submitted in advance to and approved by the appointing authority, is cause for dismissal."

26. On May 2, 2013, Mr. Garretson sent a letter to Grievant referring to an April 18, 2013, letter to Grievant from Respondent that provided a list of positions within the “Agency” for which Grievant would qualify, based upon her education, experience and job restrictions. The letter stated that Mr. Garretson previously notified Grievant (in the April 18, 2013 letter) that Grievant did not qualify for any of the positions the Hospital had available. The letter further stated that, per Grievant's request, Mr. Garretson had contacted the Bureau of Children and Families and the Bureau of Child Support Enforcement in Wyoming County, West Virginia, to determine whether those entities had any positions open for which Grievant qualified, but there were none. Mr. Garretson also offered Grievant up to 90 days of continued PLOA and requested Grievant to return a DOPL/2 form requesting same to the Hospital, no later than May 9, 2013, if Grievant wanted additional PLOA. Finally, the letter informed Grievant that at the end of her additional PLOA, she would be separated from her employment with the Hospital.

27. By letter dated May 20, 2013, Mr. Garretson granted Grievant's request for a PLOA through July 8, 2013. The letter stated, "You will be expected to return on your next normal scheduled day of work. If for some reason you cannot return to work on your next scheduled day, please notify your supervisor accordingly." This letter made no reference to dismissal or termination.

28. At Grievant's request, Ms. Cook, Payroll Assistant at the Hospital, signed a West Virginia Public Employees Retirement System Employer

Verification Form ("Retirement Verification Form") for Grievant, dated July 8, 2013, stating:

> "The last monthly retirement report on which this member will have contributions withheld, including any adjustments that may affect the member's contributions already on file, will be 7/31/13. Additionally, I certify that this employee held the job title of Hlth. [Health] Serv. [Service] Wkr. [Worker] on the last day of employment."

29. On July 16, 2013, Grievant filed for unemployment benefits with Workforce West Virginia, and submitted the May 20, 2013, letter from Mr. Garretson to obtain those benefits.

30. On July 30, 2013, Grievant, accompanied by Ms. Nola Lily, the Hospital Steward, met with Ms. Anita Henley, Office Assistant III in Human Resources, at the Hospital. Grievant asked Ms. Henley to provide her with a letter from the Hospital verifying that she was still employed there, so that she could obtain other benefits from a state office/agency. During this meeting, at Grievant's request, Ms. Henley called the Payroll Department to ask whether that Department could "print something out … stating that she [Grievant] was still on payroll."[14] It could not. Ms. Henley informed Grievant that she could not provide such a letter. Instead, Ms. Henley instructed Grievant to have the agency contact the Hospital to verify Grievant's employment there, according to the usual practice of the Hospital**.**

31. Ms. Henley explicitly informed Grievant at the July 30, 2013, meeting, that she had not been discharged by the Hospital.[15] Ms. Henley specifically discussed the contents of the May 20, 2013, letter from Mr. Garretson

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[14] Level Three Hearing-Respondent's Exhibit No. 1-Memo from Anita Henley to Angela Booker dated July 30, 2013.

[15] Level Three testimony of Grievant, Ms. Henley and Ms. Lily.

with Grievant and advised Grievant to refer to it. She gave Grievant another copy of the letter to take with her.

32. Ms. Bragg related Grievant's history of failing to communicate with her employer. Grievant failed to timely provide her DOP/3 forms to the Hospital and had to be contacted and reminded to provide them**.**

33. In Ms. Henley's position in HR, she is responsible to process all personnel separations and she never processed a separation of Grievant.

34. Ms. Booker, as CEO of the Hospital, has exclusive authority to terminate employees. Mr. Garretson is not in her chain of command, and does not have authority to terminate employees of the Hospital. Rather, he acts as an advisor to the State Hospitals.

35. When the Hospital dismisses an employee, it sends a letter of termination, which explicitly states that the employee is being dismissed and the reasons for dismissal. Grievant did not receive a termination letter.

36. Respondent's records indicate that Grievant has been continually employed at the Hospital and that her HSW position has been held open for her, to allow her return after her leave of absence, which expired on July 8, 2013.[16]

37. Respondent is waiting for Grievant to provide a Physician's Statement stating whether she is able to return to her full duties as a HSW at the Hospital.

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[16] Level Three Hearing-Respondent's Exhibit No. 2-"PIMS Record," dated July 31, 2013. This record is produced monthly and provides position, increment pay and total salaries of employees. The record shows that Grievant was a HSW, but was not receiving salary at the time.

38. Ms. Tammy Roberts, a HSW at the Hospital, was given approximately six months of modified duty following an injury. Ms. Roberts improved and returned to full duty after approximately six months.

Discussion

Termination:

The undersigned will first address the issue of whether Respondent terminated Grievant. As this is a disciplinary matter, the burden of proof 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 Employee 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). "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). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.,* Docket No. 92-HHR-486 (May 17, 1993).

Grievant asserts that she was wrongfully discharged from her position as HSW at the Hospital. In support of this contention, Grievant cites to letters Mr. Garretson sent to her, the first dated May 2, 2013, which explicitly stated, “At the end of your PLOA, *you will be separated from your employment* with Jackie Withrow Hospital.” *(Emphasis added.)* Mr. Garretson’s subsequent letter of May 20, 2013, stated that Grievant was expected to return to work after her PLOA expired on July 7, 2013, and further instructed, "If for some reason you cannot

return to work on your next scheduled day, please notify your supervisor accordingly." These two letters are contradictory in that the May 20, 2013, letter allowed a return to work, and the May 2, 2013, letter did not. Grievant contends that these letters demonstrate she was terminated.[17] Also, Grievant asserts that receipt of the Employer Verification Form from the Payroll Department was further confirmation that she had been dismissed.

Respondent contends that Grievant has not been terminated, but is still on its employment roll. In support of its contention, Hospital Administration maintains that it always provides a specific “letter of termination” required under the DOP Administrative Rule to the employees it discharges, which Grievant did not receive. In addition, Ms. Henley testified that it is her duty to process separations of employment and she did not do this for Grievant. Finally, when Grievant met with Ms. Henley at the Hospital on July 30, 2013, Ms. Henley unequivocally informed Grievant that she had not been terminated.

The Hospital further asserts that it could have dismissed Grievant on or about July 9, 2013, for her failure to provide a Physician's Statement stating whether she could return to her position as a HSW, either at full duty or with restrictions. However, Ms. Booker testified that because Grievant communicated with the Hospital, by calling HR on July 8, 2013, and by meeting with Ms. Henley on July 30, 2013, Hospital Administration chose not to dismiss her. As of the date of the Level Three hearing, Respondent stated that it was still waiting for Grievant to provide a Physician’s Statement stating whether she is able to return

[17] At the Level Three hearing, Grievant alternately referred to the May 2, 2013, and May 20, 2013, letters as justification for her belief that she had been discharged. The May 2, 2013, letter would appear to be the real cause of confusion.

to her full duties as a HSW at the Hospital. The undersigned notes that neither of the aforementioned letters from OHRM mentioned the requirement to provide a DOP/3. Rather, an earlier letter, dated March 27, 2013, from Mr. Garretson to Grievant, requested the DOP/3.

The contradictory letters from OHRM were undoubtedly confusing to Grievant. Moreover, the Hospital asserts that it was, and still is, waiting for a DOP/3 from Grievant, yet Respondent did not ask Grievant to provide the DOP/3 in its last two letters to her. Therefore, this requirement of the Hospital was not plainly communicated to Grievant. Additionally, the fact that the Payroll Department issued the Retirement Verification Form to Grievant only served, understandably, to further confuse her as to her employment status. This form was obviously provided in error. These failures in communication by the Hospital caused Grievant to believe, for a short period of time, that she was discharged as of July 8, 2013. However, Grievant acknowledged in her testimony that Ms. Henley told her, on July 30, 2013, that she was still employed by the Hospital as of that date. Ms. Nona Lily confirmed this fact as well. Based upon the foregoing, Respondent has proved by preponderance of the evidence that the Hospital did not terminate Grievant.

Reprimand without good cause:

In addition, Grievant asserts that she was reprimanded without good cause, relating to the incident with resident AC on March 10, 2012. As this is a disciplinary matter, the burden of proof 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 Employee

Grievance Board, 156 C.S.R. 1 § 3 (2008); *Ramey, supra.* "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, supra.* Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter, supra.*

Respondent contends that Grievant's actions on March 10, 2012, involving resident AC and other staff violated Employee Conduct Policy 2108, which provides that employees are to " … exercise standard client management techniques; avoid physical abuse, harassment or intimidation of residents/ patients/clients or fellow employees, exercise safety precautions; and be ethical …" The Hospital is a "restraint free" facility. Accordingly, Grievant was trained not to restrain residents of the facility, absent a doctor's order, and was instructed on how to properly manage an agitated or combative resident. During the Hospital's investigation of the above incident, in an interview with Hospital Administration, Grievant explained that she moved other residents away from AC to prevent them from possible harm. This action was appropriate and consistent with Hospital policy. However, Grievant admitted that after the other residents were moved, she, " … sat down long enough to hold [resident AC's] hand while [another staff member] was getting her face cleaned up because of the blood." In her interview with Hospital Administration after the incident, when Grievant was asked why Nurse Goodwin was successful in removing AC from the scene without restraining her, Grievant described Nurse Goodwin's interactions with AC as "authoritative … maybe the tone in her voice or the take charge attitude … [or] it might be something from her [Nurse Goodwin] working down on the

behavior unit." The methods Nurse Goodwin used to calm AC and remove her from the scene comported with proper client management techniques and were entirely consistent with the no-restraint policy. Because AC was in a wheelchair, Nurse Goodwin was able to remove AC from the dining room in her chair without any apparent difficulty following the incident. It is unclear to the undersigned why Grievant did not immediately remove AC from the situation after the other residents were moved. Respondent established that Grievant violated the Hospital's restraint free policy; failed to "exercise standard client management techniques" to calm combative residents; and failed to follow safety procedures as required by Employee Conduct Policy 2108.

Respondent also contends that Grievant violated the Abuse and Neglect Policy when she failed to report conduct by other staff involved in the incident with AC, which conduct may have constituted abuse or neglect. The West Virginia statutes and policies related to long-term care facilities require an employee to immediately report suspected abuse or neglect to her supervisor. Specifically, 69 C.S.R. 6 § 3.1.a. states:

> Any employee of a facility, or anyone who provides services to a resident of a facility on a regular or intermittent basis, who suspects that a resident in a facility has been abused or neglected or that the resident's property has been misappropriated shall immediately report the incident to the facility administration and Adult Protective Services as required by W. Va. Code §9-6-9.

"Neglect" is defined as, "The unreasonable failure by a caregiver to provide the care necessary to assure the physical safety or health of an incapacitated adult." W. Va. Code § 9-6-1(3). DHHR Policy Memorandum 2108 - "Employee Conduct," states that, "Employees are expected to … avoid physical abuse, harassment or intimidation of residents/patients/clients or fellow

employees, exercise safety precautions …" Grievant was admittedly uncomfortable about the way another staff member held resident AC by her chin/neck area to keep AC from biting and head butting. However, she failed to report this conduct. Respondent established that Grievant's failure to report the actions of the staff during the incident constituted a violation of the Abuse and Neglect Policy at 69 C.S.R. 6 § 3.1.a. 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). "As the employer has substantial discretion to determine a penalty, the undersigned Administrative Law Judge shall not substitute her judgement for that of Respondent." *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)." DHHR Policy Memorandum 2104-"Guide to Progressive Discipline" provides, "Written reprimand/warning [m]ay be issued when minor infractions/deficiencies continue or when a more serious infraction/deficiency is discovered." Grievant's actions constituted a "more serious infraction" under the Progressive Discipline policy, because she restrained a wheelchair-bound resident who was suffering from dementia, rather than employing behavioral techniques to calm the resident, and failed to report fellow staff member(s) who restrained the resident around the chin/neck. Giving a written reprimand to Grievant under the circumstances was consistent with Respondent's progressive discipline policy.

Shift Change:

Grievant also asserts that when she returned from a MLOA, her shift was "improperly changed," that she was not consulted about or given notice of the

change. As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.,* Docket No. 89-DHS-72 (Nov. 29, 1990). 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, supra.* Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

Essentially, Grievant contends that she is entitled to notice from the Respondent of a shift change. When HSWs and monitors are interviewed/hired by the Hospital, they are not promised any particular shift; but are specifically informed that they may be "pulled" to other shifts to allow the Hospital to fully and properly staff its operations. The shift changes are communicated to the employee when the changes are found to be necessary. Therefore, the Hospital has not obligated itself to its employees to provide advance notice of shift/schedule changes.

The Grievance Board does not have authority to substitute its judgment for agency management in such matters as determining the unit assignment for employees. *See Rodeheaver v. Dep't of Health and Human Res./Hopemont Hospital*, Docket No. 00-HHR-312 (July 31, 2001); *See Skaff v. Pridemore*, 200 W.Va. 700, 490 S.E.2d 787, (1997) (*per curiam)*. *Board v. Dep't of Health and Human Res./Lakin Hospital,* Docket No. 99-HHR-329 (Feb. 2, 2000). It is management's prerogative to determine the needs of the institution. *See James Sell v. Dep't of Health and Human Res./Hopemont Hospital,* Docket No. 06-HHR-444 (June 26, 2007). Such management decisions are evaluated pursuant to the

arbitrary and capricious standard. *See Miller v. DHHR/BHHF/Welch Community Hospital,* Docket No. 07-HHR-077 (Apr. 30, 2008). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be described to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.,* 769 F2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Death and the Blind,* Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.,* Docket No 93-HHR-322 (June 27, 1997).

The Hospital's judgment/decision to reassign Grievant's shift/unit must stand unless its decision was arbitrary or capricious. The evidence demonstrates that the change in Grievant's shift in April of 2012 was necessitated by the fact that the 3:00 PM to 11:00 PM shift on Unit 3C already had three HSW staff who needed accommodations, and the unit could not operate efficiently if Grievant, who also required an accommodation, was added to it. Grievant produced no evidence that it was arbitrary or capricious of the Hospital to change her shift as it did. Rather, the evidence presented demonstrates that the Respondent made an entirely reasonable decision to change Grievant's shift, because that change met the Hospital's staffing needs, and allowed Grievant to continue to work on modified duty.

Reasonable Accommodations:

In addition, Grievant contends that she was "falsely informed that she could [no] longer have reasonable accommodation as a HSW and, if she could not go off restrictions in 120 days, she would be dismissed from her health service worker position." As this grievance does not involve a disciplinary matter,

Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell, supra.* 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, supra.* Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

Under the Federal Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12111, *et seq.,* an employer must provide "reasonable accommodations" to an employee with a disability so that the employee can perform the essential duties of her job. 42 U.S.C. § 12101, *et seq*. The Grievance Board has determined that it does not have authority to determine liability for claims that arise under the West Virginia Human Rights Act ("WVHRA") W. VA. CODE §§ 5-11-1, *et. seq*., including a claim of handicap discrimination, or the ADA. Nevertheless, the Grievance Board has authority to provide relief to employees for "discrimination," "favoritism," and "harassment," as those terms are defined under W. VA. CODE § 29-6A-2-2(d), which includes jurisdiction to remedy discrimination that would also violate the Human Rights Act. "Discrimination," under W. VA. CODE § 29-6A-2-2(d), is defined as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees. To prove discrimination, an employee must demonstrate:

> (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, 221 W. Va. 306, 655 S.E.2d 52, (2007); *Harris v. Dep't of Transp.,* Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant contends that she was treated differently than HSW, Ms. Tammy Roberts; that favoritism was shown to Ms. Roberts because she was given approximately six months of modified duty by the Hospital after an injury, as compared with Grievant's four months. However, the nature of Ms. Robert's injuries and the limitations on her ability to perform the essential duties of her position were not explained in any detail. Therefore, the undersigned is unable to determine whether Grievant's injuries and restrictions were comparable to Ms. Roberts, i.e., whether this employee was "similarly situated," yet treated differently. *Chapman v. Dep't. of Health and Human Res./Margaret Mitchell-Bateman Hospital*, Docket No. 2009-0769-DHHR (July 9, 2010); *Baker v. Div. of Highways,* Docket No. 2010-0552-DOT (Jan. 28, 2011). However, to the extent that the injuries/restrictions of Ms. Roberts were explained, it was evident that while on modified duty she was improving and able to perform more of the essential elements of her position as time passed, until she returned to full duty after six months.

In further support of her assertion that she was "falsely informed that she could no longer have reasonable accommodation as a HSW," Grievant cites to *Martin v. Dep't. of Health and Human Res./Jackie Withrow Hosp.,* 2011-1590-DHHR (May 8, 2012) and *Adkins v. Dep't. of Health and Human Res./Bureau for Children and Families,* 2011-1392-DHHR (December 22, 2011). Those grievances are readily distinguished from this grievance in several critical ways.

Firstly, in those cases, grievants were terminated. Grievant has not been terminated.

Moreover, in *Martin, supra,* grievant requested an accommodation to work no more than eight hours per day, 40 hours per week, i.e., to have overtime excluded. Grievant could not work mandatory overtime due to a documented medical condition, even though she was able to fully perform all of the nineteen other responsibilities and duties of her FSW position.[18] Respondent denied grievant her requested accommodation and terminated her. Because grievant could fully perform all of "essential duties" of her position for 40 hours per week, the Grievance Board found that the Hospital wrongfully terminated her. In addition, the Grievance Board determined that Respondent wrongfully relied upon DOP Administrative Rule 14.4(h) in discharging grievant because the rule specifically applies only to employees who have been on sick leave or a MLOA and grievant had never taken either. In contrast, in the instant grievance, DOP Administrative Rule 14.4(h) is clearly applicable because Grievant was returning to modified duty after a work-related injury/MLOA. Moreover, unlike the grievant in *Martin*, Grievant never proved or communicated to the Hospital that she was able to come back to regular, full-time employment as a HSW. Nonetheless, the Hospital chose not terminate her.

In *Adkins, supra.,* the Grievance Board addressed whether grievant was wrongly terminated for job abandonment when she did not return at the

[18] In *Martin,* grievant's ongoing medical condition, edema, restricted her from being on her feet for more than 40 hours per week. For approximately three years, from 2008-2011, respondent had an Accommodation Agreement with grievant which excluded overtime. But mandatory overtime was added to grievant's FSW classification specification in 2011.

expiration of an approved MLOA. The Grievance Board found that grievant timely provided a Physician's Statement to her employer, which indicated she needed to be absent from work for approximately 16 additional days after expiration of the MLOA. Termination, under those circumstances, was deemed wrongful. *Adkins* concerns, *inter alia,* whether Respondent properly applied DOP Administrative Rules 14.8C and 14.8D, relating to grievant's MLOA, in terminating grievant. Those rules are inapplicable in this grievance.

The applicable rule in this grievance, which was properly applied by Respondent, is DOP Administrative Rule 14.4(h). This rule allows the employer to refuse to permit the employee to return to work at less than full duty. *Channell v. Div. of Corrections,* Docket No. 01-CORR-50 (May 30, 2002); *Griffon v. Dep't of Transportation/Motor Vehicles,* Docket No. 2008-1271-DOT (Aug. 17, 2009). For four months, the Hospital accommodated Grievant's considerable physical restrictions by placing her in positions in which she did not have to bend/stoop, push/pull, lift/carry or reach with her left arm. Grievant was only permitted to sit, stand and walk without restrictions. Grievant then took a two-month MLOA from her position at the Hospital, during which time she filed this grievance.[19] In this instance, in accordance with DOP Administrative Rule 14.4(h)2.(a), the Hospital did not allow Grievant to continue to work with accommodations, because even with those accommodations, she could not perform the "essential duties" of her position, according to the medical documentation she submitted. In addition, DOP Administrative Rule 14.4(h) makes no provision that employees are entitled to an accommodation in the workplace for any specified/particular period of time.

[19] This grievance was filed on June 4, 2012, therefore the actions of Respondent after that date will not be considered with respect to this grievance.

DOP Administrative Rule 14.4(h) states that the "appointing authority *may* allow an employee to return to work at less than full duty, after sick leave or medical of leave of absence, *for thirty days*, and that additional modified duty *may* be requested by the employee beyond the 30 days." (*Emphasis added*.) Grievant did not establish that she is entitled to modified duty/work with the Hospital for an additional period of time under DOP Administrative Rule 14.4(h) or any other rule, regulation, statute or policy.

The following Conclusions of Law support the decisions 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 the preponderance of the evidence. Procedural Rules of the W.Va. Public Employees Grievance Board, 156 C.S.R. § 1-3; *Ramey v. W. Va. Dep't. of Health*, Docket No. H-88-005 (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 and Human Resources,* Docket No. 92-HHR-486 (1993). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter, supra.*

2. Respondent demonstrated by a preponderance of the evidence that Grievant was not terminated.

3. 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). "As the employer has substantial discretion to

determine a penalty, the undersigned Administrative Law Judge shall not substitute her judgement for that of Respondent." *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)."

4. Respondent proved by preponderance of the evidence that Grievant violated the applicable Abuse and Neglect policies and various provisions of DHHR Policy Memorandum 2108 - "Employee Conduct."

5. Respondent demonstrated that the written reprimand it issued to Grievant for her violations of the Hospital's restraint free policy and DHHR Policy Memorandum 2108 - "Employee Conduct," was appropriate in light of those violations and consistent with DHHR Policy Memorandum 2104, Guide to Progressive Discipline.

6. The Grievance Board does not have authority to substitute its judgment for agency management in such matters as determining the unit assignment for employees. *See Rodeheaver v. Dep't of Health and Human Res./Hopemont Hospital*, Docket No. 00-HHR-312 (July 31, 2001); *See Skaff v. Pridemore*, 200 W.Va. 700, 490 S.E.2d 787, (1997) (*per curiam)*. *Board v. Dep't of Health and Human Res./Lakin Hospital,* Docket No. 99-HHR-329 (Feb. 2, 2000). It is management's prerogative to determine the needs of the institution. *See James Sell v. Dep't of Health and Human Res./Hopemont Hospital,* Docket No. 06-HHR-444 (June 26, 2007). Such management decisions are evaluated pursuant to the arbitrary and capricious standard. *See Miller v. DHHR/ BHHF/Welch Community Hospital,* Docket No. 07-HHR-077 (Apr. 30, 2008). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a

manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be described to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.,* 769 F2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Death and the Blind,* Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.,* Docket No 93-HHR-322 (June 27, 1997).

7. Grievant failed to demonstrate that she was entitled to notification of a shift change by Respondent or that the shift change was arbitrary or capricious on the part of Respondent.

8. The fact that a grievance may also state a claim under the West Virginia Human Rights Act does not deprive the Grievance Board of jurisdiction. *See, Vest v. Bd. of Educ. of County of Nicholas,* 193 W.Va. 222, S.E.2d 781 (1995). For the Grievance Board to possess jurisdiction, however, the grievance must state a claim under the grievance statutes, in this case, W. VA. CODE 6C-2-2(d). It is beyond this Board's power to determine an employer's liability under the Human Rights Act, Syllabus Point 1, *Vest, supra*, even when the grievance alleges discrimination of the sort the Human Rights Act prohibits. Discrimination is defined as "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). To establish a claim of discrimination, 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).

9. Grievant failed to establish a claim of discrimination.

10. Grievant failed to prove that she was entitled to additional modified duty/accommodation from the Hospital under West Virginia Division of Personnel Administrative Rule 143 C.S.R. 1 § :14.4(h) "Return At Less Than Full Duty" or any other statute, law, rule or regulation.

Accordingly, this consolidated grievance is **DENIED.**

Any party may appeal this Dismissal Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Dismissal Order. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance the 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/ the Grievance the Board. The appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: December 10, 2013

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SUSAN L. BASILE
ADMINISTRATIVE LAW JUDGE