WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CHARLES E. MOODY,
Grievant,

v. **Docket No. 2012-1160-CONS**

DEPARTMENT OF HEALTH
AND HUMAN RESOURCES/
MILDRED MITCHELL-BATEMAN
HOSPITAL,
Respondent.

DECISION

Grievant, Charles Moody, was employed by the Respondent, Department of Health and Human Resources (DHHR), and worked at Mildred Mitchell-Bateman Hospital (Hospital) as a Health Service Worker. Mr. Moody filed a level one grievance form dated April 9, 2012, stating that he was "being investigated without just cause for an incident involving elopement on 3/30/12."[1] As relief, Grievant sought "an end to [the] unjustified investigation and some measure of accountability for unjust, biased, decisions made by Supervision concerning this matter." Mr. Moody filed a second grievance form, dated April 18, 2012, in which he alleged that he had been suspended from employment without good cause. As relief, he stated that he wished, "to be made whole including all back pay with interest & benefits restored." By Order entered April 23, 2012, the two grievances were consolidated for purposes of hearing and decision. The parties agreed that the grievances should go directly to level three since they involved a suspension without pay. *See* W. VA. CODE § 6C-2-4(a) (4).

Mr. Moody filed a third grievance dated April 24, 2012, alleging that his employment at the Hospital was terminated without good cause. Grievant seeks "to be

[1] The full statement of grievance is in the file and a part of the record. In this instance, "elopement" means an attempt by a patient to leave the Hospital ward without authorization.

made whole including all back pay with interest & benefits restored. Because the investigation, suspension and termination were all related to the same incident, this grievance was consolidated with the prior two grievances by Order entered May 1, 2012.

A level three hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board on September 20, 2012. Grievant appeared at the hearing with his representative Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by Anne B. Ellison, Assistant Attorney General. Both parties submitted Proposed Findings of Fact and Conclusions of Law, the last of which was received by the West Virginia Public Employees Grievance Board on November 5, 2012. This mature became mature for decision on that date.

Synopsis

Grievant was suspended and ultimately dismissed from employment for allegedly using unnecessary force to restrain a patient in violation of Hospital policy. Grievant argues that he was forced to restrain the patient and he used the least amount of force necessary under the circumstances. Respondent proved that Grievant used excessive force and failed to follow proper Hospital procedures in restraint of a patient. Accordingly, the grievance is DENIED.

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 was initially employed at the Hospital as a Health Service Worker Trainee on August 3, 2009. He was eventually promoted to Health Service Worker.

2. Mildred Mitchell-Bateman Hospital is a psychiatric hospital. The patients housed in the facility suffer from a variety of mental illnesses. Some of the patients present a danger to themselves or others and require constant one-on-one service by the staff.

3. On March 30, 2012, Grievant Moody was assigned to patient WC[2] on Unit A4 of the Hospital. This was not Grievant's usual wing and he was unfamiliar with patient WC.

4. Grievant's assignment was to be one-on-one and stay within an arm's length of WC because WC was at risk to fall and he was a risk for elopement. Specifically, WC would become fixated with getting on the elevator in the unit in an effort to leave the hospital. Earlier that morning Dr. Davenport had ordered that it was' "OK to do brief physical restraint to keep patient [WC] from entering the elevator."

5. All Hospital direct care staff members, including Grievant, are given "Non-Violent Crisis Prevention and Intervention ("NVCPI"). This is a nationally recognized training program that teaches individuals to safely and therapeutically interact with patients if hands-on methods must be used to redirect a patient, safely move a patient, and to maintain the safety of the staff person.

6. Grievant was given an eight-hour certification course in NVCPI principles in which employees are taught to first verbally redirect patients before making any physical contact. Employees are taught to block and get away from an attack and safe restraint holds. Additionally, employees are taught to first call for help, then use the appropriate hold to stabilize the patient in a standing, bent over position until help

[2] The patient's initials are used rather than his name to protect his privacy.

arrives. There are no instances in the training where it is appropriate to throw a patient to the floor.

7. From the beginning of the shift, WC had made two attempts to get on the elevator. Grievant was able to verbally redirect WC each time.[3]

8. On a third occasion, Grievant was standing about five feet in front of the elevator door when the door opened. WC moved toward the elevator and Grievant stepped in front of him. WC attempted to step around Grievant to get to the elevator and grievant extended his arms to the front of WC's shoulders and was keeping him from moving to the elevator. WC moved forward and to the left in an effort to get by Grievant. Grievant then raised his right arm to the base of WC's neck and threw WC to the floor across on WC's right side. This action was quick and violent, causing WC to hit the floor with significant force. Grievant then stood over WC while he rubbed his neck and slowly got up from the floor. WC moved toward the elevator door again. Another staff person arrived to help Grievant move WC away from the elevator door.[4]

9. Grievant did not call for assistance before throwing WC to the floor. WC was trying to push past Grievant, but he was not striking or attacking Grievant. The action Grievant took to stop WC is not consistent with any non-violent technique of the NVCPI program. If WC had made it on to the elevator he would not have been able to leave the Hospital because the elevator is controlled by a key held by a staff member.

10. Ray Brilliantes is a Nurse Manager at the Hospital, and at the time of the incident giving rise to this grievance, he was the Nurse Manager in charge. Nurse

[3] WC is a big man, over six feet tall, and weighting more than 200 pounds. Grievant is similar in stature but more physically fit.

[4] The entire incident was recorded on video by three different cameras located on the unit, which gave a clear view of the event. The recordings are included in the record as Respondent's Exhibit 4.

Manager Brilliantes received a report from a Hospital employee who stated that Grievant Moody may have abused patient WC.

11. Upon receipt of this report, Nurse Manager Brilliantes filled out a patient grievance form and an incident report. He also filled out an Adult Protective Services Mandatory Reporting Form which goes to Legal Aid of West Virginia ("LAWV"); the group that serves as patient advocates at the Hospital. These reports were completed and received by Hospital management on April 4, 2012. The Hospital management initiated an investigation of the incident by a team made up of a member of Hospital management staff[5] and a patient advocate employed by LAWV.[6]

12. Grievant was suspended without pay pending the results of the investigation into the allegation of misconduct by letter dated April 11, 2012.

13. The investigators interviewed all staff who witnessed the incident, Grievant and the patient. They also viewed the video of the incident from the three security cameras stationed in the hallway.

14. When interviewed, Grievant stated that WC rushed at him to get on the elevator. Grievant stated that he placed his hands in front of his face to protect his head and WC ran into him and the wall which caused WC to fall. This statement was not supported by the statements of others or the video evidence.

15. Grievant met with Keith Anne Worden, Director of Human Resources; Patricia Ross, Director of Nursing; and Cheryl Williams, Nurse Manager; on April 17, 2012, to discuss the incident and for Grievant to explain what happened. Later that day,

[5] Terrie Collins, RN, Staff Investigator/Nurse Manager. Respondent's Exhibit 6.
[6] Cynthia Kirkhart, MS, MBA Patient Advocate. Respondent's Exhibit 6.

a letter was issued to Grievant terminating his employment at the Hospital. Respondent's Exhibit 5.

15. The investigators issued a report finding that the allegation of patient abuse through the use of hands in an intervention by Grievant Moody was substantiated. Respondent's Exhibit 6.

Discussion

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Nicholson v. Logan County Bd. of Educ*., Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ*., Docket No. 89-41-232 (Dec. 14, 1989). "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); *Leichliter v. W. Va. Dep't of Health and 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.*

Grievant was a permanent state employee in the classified service. 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). *See also Sloan v. Dep't of Health & Human Res.*, 215 W. Va. 657, 661, 600 S.E.2d 554, 558 (2004) (per curiam).

Grievant was dismissed from employment for violating the Hospital policy prohibiting patient abuse, MMBHE018, and for throwing a patient to the floor rather than utilizing interventions required by the Nonviolent Physical Crisis Intervention principles required by policy MMBHC078. Respondent proved that Grievant Moody had been initially certified in the use of NVPCI techniques and participated in two refresher courses in a period of three and a half years. He had also been trained in patient rights including being free of abuse, neglect and exploitation by staff.[7]

The Hospital policy defines "physical abuse" as:

> The use of physical force, body posture or gesture or body movement, that inflicts or threatens to inflict pain on a patient. Physical abuse includes, but is not limited to: use of unnecessary force in holding or restraining a patient; . . .[8]

The NVPCI procedures are used to allow the staff to protect themselves and the patients by using restraint methods that are the least restrictive necessary and specifically avoid inflicting unnecessary pain. Kimberly Mannon is the Respondent's Director of Quality Assurance and Staff Development. She is a Certified Instructor for the Crisis Prevention Institute which provides NVCPI training. She testified that staff is taught that when a patient exhibits hostile or aggressive behavior to first call for help. If the patient is fighting there are therapeutic holds are expected to use but employees should never take the patient to the floor due to the risk of injury. Ms. Mannon viewed the video of the incident involving WC and Grievant. She did not believe any restraint of

[7] Respondent's Exhibit 9, Grievant Moody's training confirmation record.
[8] Respondent's Exhibit 8, Policy MMBHE018.

WC was warranted. While WC was clearly trying to get past Grievant to the elevator, he was not showing any aggression toward Grievant or others. It was Ms. Mannon's opinion that WC could have been redirected. She also noted that there was no indication on the video that Grievant called for help from other staff even though there were others present. Mannon noted that the video demonstrated Grievant put his arm around WC's neck area and forced Grievant to the floor with some force. WC hit the floor with enough force that the noise drew the attention of all the staff. This action was not consistent with any technique taught in NVCPI and in Ms. Mannon's view constituted an unnecessary use of force to restrain a patient that amounted to abuse as defined in the Hospital policy.

Ms. Mannon's description of the video was accurate. Grievant quickly and forcefully threw WC to the floor and then stood over him while WC rubbed his neck and slowly got up with the help of another staff person. It was clear from the video that this action was painful to WC. Grievant stated that WC fell after he ran into WC and Grievant had his hands in front of his face to protect himself. This conflict in perceptions of the same event requires a credibility determination. The Grievance Board has applied the following factors to assess a witness's testimony: (1) demeanor; (2) opportunity or capacity to perceive and communicate; (3) reputation for honesty; (4) attitude toward the action; and (5) admission of untruthfulness. Additionally, the administrative law judge should consider (1) the presence or absence of bias, interest or motive; (2) the consistency of prior statements; (3) the existence or nonexistence of any fact testified to by the witness; and (4) the plausibility of the witness' information. *See Gramlich v. Div. of Motor Vehicles,* Docket No. 2010-0929-DOT (June 14, 2010);

Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth., Docket No. 2009-1588-DOT (Dec. 1, 2009); *Elliott v. Div. of Juvenile Serv.,* Docket No. 2008-1510-MAPS (Aug. 28, 2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999).

In this instance, the credibility determination was aided by the existence of the video cameras in the hall where the incident occurred. Respondent's Exhibit 4. The video clearly showed that Grievant's rendition of the events in error. At the level three hearing Grievant acknowledged that he put his hands on WC, but denied throwing him to the ground. He explained that the incident occurred quickly and he wasn't sure how the action happened when he gave his first statement. After having time to process the incident he testified at level three that:

> [The patient] "came up all on me that, I just wanted to get him off me. . . I pushed. I tried to get him off me because I'm not didn't know what he was going to do. Because there are patients who have hit staff . . . You have to protect yourself from these patients because they can hurt you.[9]

Grievant went on to say that he did not push WC down and the only reason he fell was because WC was a fall risk. Again, this rendition is simply not supported by the video evidence. Indeed, Grievant Moody's memory may have been faulty due to the nature of the incident. For whatever reason, his account of the incident was not consistent with the clear video evidence and therefore was not credible. His credibility was not helped when he testified that he is "not the type to run" and "nonviolence really doesn't work, it really doesn't work."[10]

Respondent proved, by a preponderance of the evidence, that Grievant used excessive force with patient WC to the extent that it constituted "abuse" as defined by

[9] Level three testimony of Grievant Moody.
[10] *Id.*

Policy MMBHE018. Respondent also proved that Grievant failed to use the Nonviolent Crises Prevention and Intervention procedures required by the Hospital to handle aggressive patients. Accordingly, the Grievance is denied.

Conclusions of Law

1. As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Nicholson v. Logan County Bd. of Educ*., Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ*., Docket No. 89-41-232 (Dec. 14, 1989).

2. The Mildred Mitchell-Bateman Hospital policy defines "physical abuse" as:

> The use of physical force, body posture or gesture or body movement, that inflicts or threatens to inflict pain on a patient. Physical abuse includes, but is not limited to: use of unnecessary force in holding or restraining a patient; . . .

Hospital Policy MMBHE018.

3. Mildred Mitchell-Bateman Policy requires that all staff use Nonviolent Physical Crisis Intervention when working with patients through the use of Nonviolent Crises Prevention and Intervention procedures which are taught to all direct care staff including Grievant.

4. Respondent proved, by a preponderance of the evidence, that Grievant used excessive force with patient WC to the extent that it constituted "abuse" as defined by Policy MMBHE018. Respondent also proved that Grievant failed to use the Nonviolent Crises Prevention and Intervention procedures required by the Hospital to handle aggressive patients.

Accordingly, the 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 21, 2013

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE