THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

MARILYN J. TROUTMAN,
Grievant,

v. **Docket No. 2013-0630-DHHR**

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

DECISION

Grievant, Marilyn Troutman, filed this grievance on October 9, 2012, against her employer, William R. Sharpe, Jr. Hospital, alleging the following in her Statement of Grievance:

> On September 29, 2012, while working as a uniformed nurse, I was attacked and injured by a patient at Sharpe Hospital. The same patient, who was known to be dangerous and the perpetrator of previous attacks on others, had also attacked and injured a male nurse on August 10, 2012. Sharpe Hospital made no attempt to improve employee safety after the August 10 attack thereby directly contributing to the attack on me on September 29.

For relief, Grievant seeks the following:

> Improved employee safety and protection from violent patients at Sharpe Hospital as well as compensation for my current injuries and for possible, as yet unknown, long term effects of this attack on me.

This grievance was denied at level one by Decision dated November 27, 2012, and authored by Christina M. Bailey, Respondent's Grievance Evaluator. A level two mediation session was conducted on February 13, 2013. Grievant perfected her appeal to level three on February 19, 2013. Thereafter, on March 21, 2013, the parties notified the Grievance Board that they desired to submit the grievance on the level one record. The Grievance

Board received a “Notice of Appearance” on March 28, 2013, indicating that Erika Kile Kolenich, Esquire, was appearing as counsel of record for Marilyn Troutman. The Grievance Board contacted Ms. Kolenich shortly after this notice and inquired if she intended to honor the previous agreement to submit the case on the record established at level one. Ms. Kolenich responded that she wanted to submit the case on the record developed below and waive a level three hearing. Respondent appears by its counsel, Harry C. Bruner, Jr., Assistant Attorney General. The undersigned Administrative Law Judge considers the matter mature for consideration on April 5, 2013, on or about the date Ms. Kolenich indicated her continuing agreement to submit the matter on the record. Neither the Grievant nor the Respondent filed proposed findings of fact and conclusions of law.

Synopsis

Grievant is employed as a Licensed Practical Nurse at the William R. Sharpe, Jr. Hospital. On September 29, 2012, she was attacked by a patient and suffered serious injuries. Grievant maintains that Sharpe Hospital fails to provide employees with a safe working environment. Grievant argues that Sharpe Hospital fails to equip staff members with appropriate training. Grievant seeks a tort-like damage award as compensation for her injuries. Respondent does not dispute that this was a tragic, traumatic incident involving an aggressive patient. However, the record did not establish that the management decisions complained of in this grievance were arbitrary and capricious. In addition, the undersigned does not have authority to award tort-like or punitive damages.

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

Findings of Fact

1. Grievant has been employed as a Licensed Practical Nurse at Sharpe Hospital for five years.

2. On September 29, 2012, a patient at Sharpe Hospital attacked Grievant, repeatedly hitting Grievant on her head, neck and face.

3. Grievant suffered a right orbital floor fracture, hematoma of her right hand, injuries to her neck, back, shoulders and bruising on her left side.

4. The patient attacked another Licensed Practical Nurse on or about August 10, 2012. During the attack, the patient hit the nurse repeatedly in the face and head. Both attacks seemed to be without provocation. The patient claimed to be hearing voices that told him to attack the nurses.

5. After the initial attack in August, the patient was placed on Close Constant Contact, meaning that the patient was always to be in view of a staff member assigned to watch the patient. In addition, the patient was placed on 15-minute checks, meaning that the staff member assigned to the patient must view the patient at least every 15 minutes.

6. Dr. Wanhong Zheng, Respondent's attending psychiatrist, opined that the behavior of patients cannot always be predicted. Dr. Zheng explained that after the patient attacked the nurse on August 10, 2012, the treatment team changed the patient's medication in an additional effort to control the patient's aggressive behavior.

7. After the incident, Grievant reported the matter to the West Virginia State Police. The patient was arrested and remains incarcerated with pending charges of assault and battery.

8. Sharpe Hospital is in the process of establishing an employee-operated, Post-Traumatic Stress Disorder support group for employees who have suffered attacks such as the Grievant and other employees. Grievant acknowledged that this type of group would be helpful.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the 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). *See also 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). "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).

Respondent concedes that this grievance arose from a tragic, traumatic incident involving an aggressive patient. Respondent attempted to control the patient using medication, reduction in therapeutic level, which indicates that the patient is restricted to the unit, Close Constant Contact, and 15-minute checks. Grievant suggested that Respondent should have assigned two male employees to supervise the patient at all times after the attacks. Sharpe Hospital does not have adequate staffing to cover such an assignment. The creation and posting of positions is a management decision that rests with the employer and the West Virginia Division of Personnel.

Concerning other management decisions such as training, or hiring additional employees, to deal with patients that possess violent and aggressive behavior, the undersigned is without authority to order any meaningful change. As noted in *Bennett v. W. Va. Dep't of Health and Human Resources/Bureau for Children and Families*, Docket No. 99-HHR-517 (Apr. 26, 2000), the undersigned does not have authority to second guess a state employer's employment policy, to order a state agency to make a discretionary change in its policy, or to substitute his management philosophy for that of the Department of Health and Human Resources. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997), *Kincaid v. W. Va. Div. of Corrections*, Docket No. 98-CORR-144 (Nov. 23, 1998). An agency's determination of matters within its expertise is entitled to substantial weight. *Princeton Community Hosp. v. State Health Planning*, 174 W. Va. 558, 328 S.E.2d 164 (1985). In this administrative setting, the limited record did not establish that the management decisions complained of in this grievance were arbitrary and capricious.[1]

Finally, Grievant requests compensation for her injuries. The Grievance Board does not award tort-like or punitive damages. The Grievance Procedure allows for fair and

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[1]"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 ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf 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). A [g]rievant's belief that his supervisor's management decisions are incorrect is not a grievable event unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with his effective job performance or health and safety." *Ball v. Dep't of Highways*, Docket No. 96-DOH-141 (July 31, 1997); *Rice v. Dep't of Transp./Div. of Highways*, Docket No. 96-DOH-247 (Aug. 29, 1997).

equitable relief, which has been interpreted by the Grievance Board to encompass such issues as back pay, travel reimbursement, and overtime, but not to include punitive or tort-like damages for pain and suffering.[2]

In conclusion, Grievant failed to demonstrate that Respondent's actions in this matter were contrary to applicable law, policy, or regulations. The relief requested is unavailable from this tribunal. The undersigned does agree with the level one evaluator in stating that Grievant is not foreclosed from pursuing claims for her injuries in other legal forums.

The undersigned conclusions of law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the 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). *See also Holly v. Logan*

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[2]*W. Va. Code* § 29-6A-5(b) allows for the provision of "fair and equitable" relief which has been interpreted by the Grievance Board to encompass such issues as back pay, travel reimbursement, and overtime, but not to include punitive or tort-like damages for pain and suffering. *Spangler v. Cabell County Bd. of Educ.,* Docket No. 03-06-375 (Mar. 15, 2004); *Walls v. Kanawha County Bd. of Educ.*, Docket No. 98-20-325 (Dec. 30, 1998); *Hall v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-433 (Sept. 12, 1997); *Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997); *Miker v. W. Va. Univ.*, Docket No. 06-HE-133 (July 18, 2006).

[A]n administrative law judge may "provide such relief as is deemed fair and equitable in accordance with the provisions of this article . . .". *W. Va. Code* § 18-29-5(b). This Grievance Board has applied this *Code* Section to encompass such issues as back pay, travel reimbursement, seniority, and overtime, to make grievants whole. It has not utilized this Section to award "tort-like" damages for pain and suffering, and will not choose to do so in this case. *Accord, Vest v. Bd. of Educ. of County of Nicholas*, 193 W. Va. 222, 225, 227 n.11 (1995). *Snodgrass, supra*.

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. Unless the Grievant presents sufficient evidence to demonstrate that Respondent's management decisions are clearly wrong, inappropriate, or the result of an abuse of discretion, the undersigned must give deference to Respondent and uphold the actions. *Smith v. Parkways Economic Development and Tourism Auth.*, Docket No. 97-PEDTA-484 (Apr. 17,1998); *O'Connell v. Dep't of Health and Human Resources*, Docket No. 95-HHR-251 (Oct. 13, 1995); *Farber v. Dep't of Health and Human Resources*, Docket No. 95-HHR-052 (July 10, 1995).

3. Grievant did not establish by a preponderance of the evidence that Respondent's management decisions were clearly wrong or the result of an abuse of discretion.

4. The Grievance Board does not award tort-like or punitive damages. *Riedel v. W. Va. Univ.*, Docket No. 07-HE-395 (Feb. 24, 2009).

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: April 26, 2013

Ronald L. Reece
Administrative Law Judge