THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ROBERT FELDER,
Grievant,

v. **Docket No. 2013-2241-CONS**

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

DECISION

Grievant, Robert Felder, is employed by Respondent, Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital. On March 14, 2013, Grievant filed a grievance against Respondent stating, "Suspension without good cause." For relief, Grievant sought "[t]o be made whole including all back pay with interest & all benefits restored & removal of all resulting discipline." On March 19, 2013, Grievant filed a second grievance against Respondent stating he had been dismissed without good cause. For relief, Grievant sought "[t]o be made whole including all back pay with interest & all benefits restored." Both grievances were properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4).

A level three hearing was held on August 5, 2013, before the undersigned at the Grievance Board's Charleston, West Virginia office. The undersigned determined that the two actions should be consolidated and heard immediately. Grievant was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by counsel, Michael E. Bevers, Assistant Attorney General. An order consolidating the two matters into the above docket number was entered on September 23, 2013. This matter became mature for decision on

September 18, 2013, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was dismissed from employment as a Health Service Worker for resident neglect and abuse. Respondent proved by a preponderance of the evidence Grievant physically abused a resident, but did not prove Grievant neglected a resident. Respondent had good cause to dismiss Grievant for physical abuse. Mitigation of the penalty is not warranted despite Grievant's work history, due to the seriousness of the offense. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant was employed by Respondent as a Health Service Worker at Mildred Mitchell-Bateman Hospital ("Bateman") for more than ten years. Bateman is a psychiatric hospital.

2. Prior to his termination, Grievant had no prior discipline related to resident care, but had a previous suspension for behavior involving a co-worker. Grievant had good employee performance appraisals.

3. On February 13, 2013, Grievant was assigned to one-on-one supervision of resident B.B[1], who was a fall risk. One-on-one supervision is ordered when a physician has concerns regarding a resident and the employee assigned to supervise

[1] To protect their privacy, residents will be referred to by only initials throughout this decision.

must stay within arms-length of the resident. Despite the requirement that he remain at arms-length from B.B., Grievant left B.B. in the TV room to engage with resident J.L.

4. Grievant was very familiar with J.L., who had been a resident the entire time Grievant had been employed with Respondent. J.L. had been both verbally and physically aggressive with Grievant in the past, and had hit Grievant during the previous two incidents Grievant had had with J.L.

5. On a previous shift, Grievant had instructed J.L. to do laundry so that J.L. would have clean clothes for an outing planned for February 13, 2013. When Grievant saw that J.L. was still wearing dirty clothes on February 13, 2013, he left his assigned resident B.B. to confront J.L.

6. Surveillance video shows Grievant and J.L. walking down the hallway towards the seclusion room. J.L. was walking with the assistance of a walker, but video of before, during, and after the incident shows that he walked very quickly with the walker, walked without the assistance of the walker at times, and did not appear weak or frail. No other residents or staff members were close to Grievant and J.L. As Grievant reached into his pocket for keys to the seclusion door and turned towards J.L, J.L. aggressively stepped or leaned towards Grievant. Grievant immediately stepped aggressively into J.L. Although there is no sound on the video, it is apparent from head movement and body language that there was a heated verbal exchange between the two. Grievant then with one hand shoved J.L. down onto the seat of the walker, causing the walker to roll back into the wall so that J.L's back was to the wall. Grievant remained closely engaged with J.L., and when J.L moved as if to get up and shoved at Grievant's chest with one hand, Grievant slammed J.L. into the wall with his forearm

and held him there. Grievant leaned forcefully into J.L., and continued to hold him against the wall even after two other staff members responded.

7. Although several employees appeared to witness at least part of the exchange, no one reported Grievant's behavior to hospital administrators. Patricia Hamilton, Director of Nursing ("DON"), later received an allegation that Grievant had breached his duty to supervise B.B. DON Hamilton reviewed surveillance footage for the date in question and saw the incident between Grievant and J.L., which she believed to be inappropriate.

8. On February 20, 2013, Grievant was suspended pending an investigation. The investigation was conducted by a representative from Bateman and a representative from Legal Aid. The investigation team reviewed the footage and interviewed Grievant, J.L., and other staff members. The team issued a report[2] on February 27, 2013, concluding that Grievant had not neglected B.B., but substantiating physical abuse of J.L. The report makes no mention of seclusion of B.B.

9. Following a pre-determination meeting on March 7, 2013, by letter dated March 18, 2013, Grievant was dismissed from employment due to substantiated patient neglect and abuse. The letter states that leaving B.B. alone in the TV area was neglect and that leaving B.B. alone when he was unable to move by himself was considered seclusion, which is abuse. Regarding Grievant's interaction with J.L. the letter states:

> You left your assigned patient to interact with another patient. When taking this second patient to go into the seclusion room, the patient became verbally loud and

[2] The Investigation Report was admitted into evidence. However, none of the information contained in the report was verified by affidavit, nor were the investigators or witnesses called to testify. Therefore, none of the factual allegations in the report were considered as evidence.

> aggressive toward you. The patient leaned into you, in a probable attempt to intimidate you. You then initiated contact with this patient (who is medically fragile, requires the use of a walker to ambulate and [is] also at risk of falling) by shoving him back against the wall. That shove resulted in him falling back into the seat of his walker. You then held him in the seat forcibly against the wall with your forearm against his chest and throat for several minutes. Two other staff came to see the commotion and assist, if needed. Although he was not struggling to get up or to assault you or the other staff, you only released this patient when your Nurse Manager joined you.

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. W. VA. CODE § 29-6A-6; *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); *See also* W. VA. CODE ST. R. § 143-1-12.02 and 12.03 (2012).

Grievant asserts that his concern was that J.L. not miss his planned outing. He intervened with J.L., even though he was assigned to another resident, because J.L. would not be allowed to go on the outing if he remained in his dirty clothes. Further, based on Grievant's experience with J.L., he believed J.L. was going to become violent, and, if he did, he would not be allowed to go on the outing. Grievant defends his actions as necessary and not excessive. It is, therefore, necessary to assess the credibility of Grievant. In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ 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's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Although there was nothing in Grievant's demeanor to indicate he was not credible, his version of the incident is not consistent with the clear evidence on the surveillance video. It is possible that Grievant's intentions were actually good, as he asserts, but what physically transpired between Grievant and J.L. was more serious and forceful than what Grievant admits. Neither Grievant nor any other person was in danger from J.L. While it is clear that J.L. took the first aggressive action towards Grievant, Grievant chose to escalate the situation by stepping further into J.L. and continuing a verbal altercation. Grievant was not trapped. His back was to the empty

hallway and he would have been able to simply step away from J.L. and attempt verbal redirection in a less intimidating manner. Even if Grievant was attempting verbal redirection, stepping into J.L. aggressively negates that redirection. J.L. did not lunge at Grievant as he asserts, and once J.L. had been shoved onto the seat, J.L.'s movement does not indicate an attempt to hit Grievant, but, rather, an attempt to shove him away. Grievant pinning J.L. to the wall is not consistent with Grievant's assertion that he was warding off a blow from J.L. or simply preventing J.L. from striking him. It is clearly a forcible restraint of J.L., which, again, does not seem necessary. Grievant did not need to protect himself or others as no one else was near J.L. and Grievant still could have stepped back from the seated J.L., placing himself out of range of being struck. Grievant's assertions do not excuse or explain what clearly transpired on the surveillance video.

Respondent asserts that Grievant's behavior with B.B. and J.L. constituted neglect, seclusion, and physical abuse. Regarding behavior health clients, neglect, seclusion, and physical abuse, are defined, in pertinent part, as follows. Neglect is [a]ny negligent, reckless or intentional failure to meet the needs of a client . . . including but not limited to: lack of needed supervision. . . ." W. VA. CODE ST. R. § 64-59-3.12 (2013). Seclusion is [t]he placement of any client alone in a room or enclosed space with closed doors which the client cannot open from inside." *Id.* at 3.14. Physical abuse is defined as "[t]he use of physical force, body posture or gesture or body movement that inflicts or threatens to inflect pain on a client. Physical abuse includes, but is not limited to: unnecessary use of physical restraint; use of unnecessary force in holding or restraining

a client; improper use of physical or mechanical restraints . . . or crowding or moving into a client's personal space . . . ." *Id.* at 3.13.

Respondent was incorrect in concluding that Grievant had secluded B.B. The Rule requires that for seclusion to occur the client must be placed in an enclosed space, with closed doors, alone. B.B. was not in an enclosed space as he was in an open TV area. Grievant's action in leaving B.B. alone would only possibly meet the definition of neglect, since B.B. required one-on-one supervision and Grievant left him. However, Respondent's own investigators had determined that no actual neglect of B.B. took place since B.B. was alone for such a short time.

However, there is ample evidence that Grievant physically abused J.L. When the verbal exchange escalated and J.L. moved aggressively towards Grievant, Grievant purposefully stepped further into J.L.'s space. He then forcefully shoved J.L. down into the seat, continuing in J.L.'s space, and forcefully pinned J.L. against the wall. He continued to hold J.L. pinned against the wall for some time, even when other staff members responded. Physical restraint of J.L. was not necessary, and also unnecessarily forceful. Although J.L. was not injured, he very easily could have been injured. Even though the other charges against Grievant were not proven, physical abuse of a patient is a serious enough offence to warrant dismissal of Grievant on its own. Respondent had good cause to dismiss Grievant.

"When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the

employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ*., Docket No. 93-45-105 (Mar. 31, 1994). *See Austin v. Kanawha County Bd. of Educ.*, Docket No. 97-20-089 (May 22, 1997). Mitigation of a penalty is considered on a case by case basis. *Conner v. Barbour County Bd. of Educ.,* Docket No. 95-01-031 (Sept. 29, 1995); *McVay v. Wood County Bd. of Educ.,* Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. *Pingley v. Div. of Corrections*, Docket No. 95-CORR-252 (July 23, 1996).

Grievant had been employed by Respondent for more than ten years and had received good personnel evaluations. He had not been disciplined previously for any issue of patient care, but had received a suspension for behavior relating to a coworker. He provided no evidence that Respondent's instructions regarding force and restraint were in any way unclear, or that other employees had received lesser penalty in similar situations. Dismissal was not disproportionate to Grievant's offense. Grievant's actions clearly constituted physical abuse, and physical abuse is a very serious offense, especially when Grievant believes there was nothing wrong with his actions. Grievant's length of service and lack of significant disciplinary history do not outweigh the seriousness of Grievant's offense. Mitigation is not warranted in this case.

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. W. VA. CODE § 29-6A-6; *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.*

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); *See also* W. VA. CODE ST. R. § 143-1-12.02 and 12.03 (2012).

3. Physical abuse is defined as "[t]he use of physical force, body posture or gesture or body movement that inflicts or threatens to inflect pain on a client. Physical abuse includes, but is not limited to: unnecessary use of physical restraint; use of unnecessary force in holding or restraining a client; improper use of physical or mechanical restraints . . . or crowding or moving into a client's personal space . . . ." *Id.* at 3.13.

4. Respondent proved by a preponderance of the evidence that Grievant physically abused a resident. Respondent had good cause to dismiss Grievant for the serious offense of physical abuse of a resident.

5. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ*., Docket No. 93-45-105 (Mar. 31, 1994). *See Austin v. Kanawha County Bd. of Educ.*, Docket No. 97-20-089 (May 22, 1997). Mitigation of a penalty is considered on a case by case basis. *Conner v. Barbour County Bd. of Educ.,* Docket No. 95-01-031 (Sept. 29, 1995); *McVay v. Wood County Bd. of Educ.,* Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. *Pingley v. Div. of Corrections*, Docket No. 95-CORR-252 (July 23, 1996).

6. Although Grievant had more than ten years of service, good evaluations, and limited disciplinary history, the seriousness of the offence outweighs those considerations, and mitigation is not warranted.

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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: October 4, 2013

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Billie Thacker Catlett
Administrative Law Judge