THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KATHY WILSON,
Grievant,

v. **DOCKET NO. 2012-1269-DHHR**

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

DECISION

Grievant, Kathy Wilson, filed this grievance against her employer, Mildred Mitchell-Bateman Hospital, on May 9, 2012. The grievance claims that Grievant was wrongfully terminated "due to allegations involving gross misconduct and noncompliance with policy for crisis intervention." *See* Grievance Form for Levels 1, 2, and 3, Attachment 1, Filed May 19, 2012. Grievant seeks to be made whole, including reinstatement with back pay, and restoration of all benefits. Because Grievant was contesting her termination, she filed directly to level three. *See* West Virginia Code § 6C-2-4(a)(4).

An evidentiary hearing was conducted before the undersigned contract Administrative Law Judge on November 28, 2012, at the Board's Charleston office location. The hearing was continued and reconvened on February 22, 2013. Grievant appeared in person at both hearings and with her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by its attorney, Michael E. Bevers, Assistant Attorney General. The Grievant requested and the undersigned Administrative Law Judge granted, to the extent available and relevant, the addition to the record in this matter that record from *Frederick D. Dean v.* DHHR,

Docket No. 2012-1230-DHHR. The instant matter became mature for consideration upon receipt of the parties' proposed findings of fact and conclusions of law on April 4, 2013.

Synopsis

Grievant was charged with failure to adhere to hospital policies while performing her duties as a Licensed Practical Nurse at Respondent Mildred Mitchell-Bateman Hospital. Respondent met its burden of proof demonstrated by a preponderance of the evidence that Grievant's discharge was for good cause.

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, Kathy Wilson, was employed as a Licensed Practical Nurse ("LPN") with Mildred Mitchell-Bateman Hospital ("Hospital"), a psychiatric facility operated by Respondent West Virginia Department of Health and Human Resources ("WVDHHR"). At the time the grievance was filed, Grievant had been employed with the Hospital approximately two (2) years.

2. While employed, Grievant had no record of disciplinary action and good ratings on her employee performance appraisals.

3. Pursuant to Hospital policy, upon hire, Grievant received training on Non-violent Crisis Prevention and Intervention ("NVCPI") techniques, intended to teach human service professionals how to de-escalate "disruptive, assaultive, and out-of-control individuals" in their care. *See* Respondent Ex. 2 and Ex. 9, p. 6. NVCPI training is mandatory for direct care providers at the Hospital and provides a framework for

dealing with verbal and physical threats without utilizing physical restraint, including how to avoid being struck by a patient. *Id*.

4. Included in the NVCPI training are approved methods for the physical restraint of patients, which are to be used only after all less-restrictive methods of intervening have been exhausted and the individual presents a danger to self or others. *Id*, p. 15. NVCPI also instructs on methods of physical restraint that are not intended for use on adults but are only appropriate for children or individuals considerably smaller than the direct care provider. *Id.*, p. 16.

5. After her initial hire and in accordance with Hospital policy, Grievant attended mandatory annual NVCPI refresher training. *See* Respondent Ex. 2. Grievant also received training in De-escalation, Patients' Rights, Risks of Restraints, and *Guidelines for Seclusion/Restraint*. *Id.*; *see also* Respondent Ex. 8.

6. The Hospital Staff Development Nursing Orientation acknowledgement sheet also shows that Grievant read and understood the Hospital Policy on *Patient Abuse, Neglect, and Exploitation*. *See* Respondent Ex. 3.

7. Similarly, all Hospital staff members are trained on the Hospital's Policy governing *Nonviolent Physical Crisis Intervention*. *See* Respondent Ex. 5. This policy provides that all clinical, direct care, security, and admissions personnel must be trained and certified annually in Nonviolent Crisis Intervention.

8. According to the Hospital Policy on *Behavioral Health Patient Rights* and the Legislative Rule establishing the rights of clients of state-operated behavioral health facilities, "neglect" is "[a]ny negligent, reckless or intentional failure to meet the needs of a client, or applicable statutory or regulatory requirements, including, but not limited to:

lack of needed supervision, nutritional deprivation, or failure to implement or update a treatment plan." *See* Respondent Ex. 6; 64 C.S.R. § 59-3.12. "Physical abuse" includes, "but is not limited to: unnecessary use of the physical restraint; use of unnecessary force in holding or restraining a client; [and] improper use of physical or mechanical restraints." *See* Respondent Ex. 6, p.3.

9. A similar definition of "physical abuse" is found in the Hospital Policy on *Patient Abuse, Neglect, and Exploitation* and includes "the use of physical force, body posture or gesture or body movement that inflicts or threatens to inflict pain on a patient." *See* Respondent Ex. 2, p. 2.

10. Hospital staff actions are also governed by the Hospital's Policy on *Patient Seclusion and Restraint*, which defines "physical restraint" as physically restricting a patient, without the patient's permission, using only human touch. *See* Respondent Ex. 8, p. 2. The use of physical restraint by staff is only allowed as a last resort *and* after a physician's order is obtained. *Id*. (Emphasis added). This Hospital policy states that

> [a]ny restraint should only be used as a last resort after all less restrictive measures have been utilized and shall follow all guidelines of patient safety using Non-violent Crisis Prevention and Intervention (NVCPI) methods.

Id.

11. On March 5, 2012, Grievant was working in her role as a LPN at the Hospital and was assigned to complete an additional shift because a Health Service Worker ("HSW") called off work. Two other LPNs were regularly scheduled for the extra shift Grievant was assigned to work, Essie Pierce and Nick Shifflett, and both were present on the unit. Level Three Hearing Testimony.

12. On that date, Patient BB[1], a 67 year old male patient in the unit to which Grievant was assigned, was using a wheelchair to aid in mobility. Patient BB was known to the Hospital staff as having impulse control issues and being verbally abusive.

13. During Grievant's shift, as evening snacks were served, Patient BB became agitated because he was given a fruit cup rather than the ice cream received by other patients.

14. Grievant was in a television room of the unit and heard a commotion in the adjacent dining area. Grievant, as well as HSW Fredrick Dean, left the television room and went to the dining area. Grievant witnessed Patient BB throw a fruit cup at the staff member distributing snacks.

15. Grievant attempted to de-escalate the situation by verbally addressing Patient BB; however, Patient BB struck the Grievant.

16. HSW Dean placed himself between Grievant and Patient BB but the patient did not calm down. Patient BB then attempted to strike HSW Dean.

17. HSW Dean then picked up Patient BB from behind. He physically restrained the patient in an improper restraint referred to as the "children's control position,"[2] which appears much like a bear hug. Once restrained, HSW Dean began to maneuver Patient BB out of the dining room and into a seclusion room which was also adjacent to the dining room.

18. While holding Patient BB, HSW Dean fell on top of the patient then picked him up and continued moving toward a seclusion room.

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[1] Because the patient's actual identity is not necessary to the issues herein, his initials are used rather than his name to protect his privacy.

[2] The "children's control position" is designed to be used with children and possibly other individuals who are considerably smaller than the direct care provider. *See* Respondent Ex. 2, p. 16.

19. Grievant Wilson was stunned by Patient BB's aggression and did not attempt to assist HSW Dean in using a two-person, approved NVCPI physical restraint technique.

20. There is a surveillance video from the Hospital unit which shows different angles of the March 5, 2012 event involving Patient BB. At the hearing, Respondent offered the video through Hospital Safety Director Daniel Persinger, who participated in the investigation of the March 5, 2012 incident.

21. A copy of the surveillance video was accepted into evidence and is under seal in the Grievance Board's physical file in this matter.

22. There was adequate staff located in the vicinity of the original incident in the dining area and after Patient BB's fall to utilize a NVCPI approved two-person physical restraint.

23. Following the incident, Patient BB complained of pain to the physician on call and was transported to Cabell Huntington Hospital where he was diagnosed as having a Right Interochanteric Femur Fracture, *i.e.*, a broken hip. *See* Respondent Ex. 11. The patient was later discharged to Bateman Hospital. *Id*.

24. When a Hospital event results in patient injury or death, the Hospital administration forms a Root Cause Analysis Committee to conduct an internal investigation.[3]

[3] There were a couple investigations into the incident involving Patient BB. One investigation was initiated by the Director of Nursing to initially establish the facts surrounding the event. The Legal Aid Patient Advocacy Project and Adult Protective Services also conducted an independent investigation of the event, which substantiated physical abuse. The Hospital's internal investigation included witness interviews, an interview with Grievant, review of Grievant's personnel file including disciplinary history and employee performance evaluations, and a review of the surveillance video of the incident.

25. Patricia Hamilton is the Director of Nursing for the Hospital and testified at the hearing. She was one of the individuals who investigated the incident involving Patient BB and substantiated the allegations, on behalf of Patient BB, that Grievant failed to follow Hospital policy which resulted in injury to the patient.

26. Hamilton specifically testified to the March 5, 2012 incident as shown on the surveillance video including that Patient BB stood up out of wheelchair and HSW Dean grabbed the patient to take him to a side room. She noted that Grievant was also present and that HSW Dean and Patient BB tripped on a chair and fell to the floor, with HSW Dean landing on top of the patient. Hamilton further noted that Grievant picked up the chair and Patient BB's hat and allowed HSW Dean to pick up the patient and continue to the seclusion room.

27. Ms. Hamilton testified that another person, identified as HSW Mary Perry, helped escort Patient BB into the seclusion room where he was placed on the bed. All Hospital employees left the room. LPN Shiflett handed Grievant an alcohol swab and an injection, Grievant administered the injection, and LPN Shiflett handed Patient BB an ice bag. *See* Respondent Ex. 1; Hamilton Hearing Testimony.

28. The surveillance video does not show that Grievant assessed Patient BB, cleaned and bandaged any wound, or checked his vital signs. *See* Respondent Ex. 1.

29. Ms. Hamilton testified that Grievant should have used the NVCPI techniques on which she was trained. She explained that Grievant should have stopped HSW Dean from using a bear hug, or "children's control position," to restrain Patient BB. Instead, Ms. Hamilton testified that Grievant should have helped HSW Dean to control and escort the patient.

30. Ms. Hamilton further stated that, because Patient BB stopped struggling after the fall, Grievant should have prevented HSW Dean from picking him up. According to Ms. Hamilton, the patient should have only been picked up off the floor if the patient was in imminent danger. Ms. Hamilton identified as another option that Grievant and HSW Dean could have left Patient BB on the floor until the on-call physician arrived.

31. Regardless, Ms. Hamilton stated that Grievant should have immediately assessed the patient after the fall because he had a forehead injury that was later discovered. She also testified that, once in the seclusion room, Grievant should have assessed Patient BB before administering the injection. Finally, Ms. Hamilton explained that the patient should not have been left alone in the seclusion room.

32. Respondent Exhibit 1, the video recording of the incident from various angles which was played at the hearing, confirmed the material aspects of the incident to which Ms. Hamilton testified.

33. Kimberly J. Mannon, the Hospital Staff Development and Training Director, also testified at the hearing in this matter and substantiated the testimony of Ms. Hamilton. Ms. Mannon reached the same conclusion as Ms. Hamilton; that is, on March 5, 2012, physical abuse and neglect occurred which resulted in a serious injury to Patient BB.

34. With respect to the NVCPI training program manual used for staff training, Ms. Mannon testified that Grievant was trained on the techniques identified in the manual. She further testified that on each page of the manual identifying a “bear hug,” or “children’s control position,” a large red “X” was added so that staff, including

Grievant, would know such a technique is not approved for use with Hospital patients. Ms. Mannon stated that the Hospital began adding the red "X" to the NVCPI manuals approximately four (4) years ago and that it is not likely any employee trained since that time received a manual without the red "X". Mannon Hearing Testimony; *see also* Respondent Ex. 9, p. 16; Respondent Ex. 10, p. 14.

35. By letter dated March 16, 2012, Grievant was suspended without pay pending the outcome of the investigation into her alleged misconduct as to Patient BB. *See* Respondent Ex. 19.

36. By letter dated April 16, 2012, Grievant's Hospital employment was terminated effective May 2, 2012. *See* Respondent Ex. 20. The grounds for dismissal included the following: a) that the investigation substantiated multiple allegations of gross misconduct, including failure to ensure compliance of a HSW with Hospital policy numbers MMBHC078 (*Nonviolent Physical Crisis Intervention*), MMBHE009 (*Behavioral Health Patient Rights* rule), and MMBHE018 (*Patient Abuse/Neglect or Exploitation*); b) that Grievant allowed a HSW to use an improper restraint technique on a patient who had become aggressive, permitting the HSW to pick up the 67-year-old patient in a "bear hug" and proceed to toward a seclusion room, which resulted in the HSW tripping and falling with the patient and the patient sustaining a broken hip; c) that Grievant failed to perform her duty as an LPN by failing to assess the patient after his fall and once he was in the seclusion room; failing to recognize the patient was in pain from a fractured hip; failing to take the patient's vital signs; and administering an injection drawn by another LPN in violation of medication administration practice; and d) that

Grievant gave conflicting information about the incident from what is shown on video surveillance. *Id*.

37. Essentially, Grievant's actions (or lack thereof) were found to play a significant part in Patient BB's injury. Hospital administrators investigating the incident, including Director of Human Resources, Kieth Anne Worden, concluded that dismissal was warranted. *Id.*

38. Ms. Worden testified that after considering the outcome of investigations, the facts were clear that Grievant failed in her responsibility to ensure the safety of Patient BB.

39. According to the Hospital's *Progressive Discipline Action Policy* ("PDAP") Number MMBHC015, Grievant may be suspended without pay for any cause involving misconduct of an appropriately serious nature. *See* Respondent Ex. 17; *see also* Respondent Ex. 18, *Policy Memorandum 2104, Guide to Progressive Discipline*. The policy states that allegations involving patient safety issues may result in suspensions without a notice period pending the outcome of an investigation. *See* Respondent Ex. 17, p. 2. The policy further provides that any employee may be dismissed for cause. *Id.*, p. 2; *see also* Respondent Ex. 18, p. 5.

40. Grievant timely filed this third level grievance challenging her termination as a LPN at Mildred Mitchell-Bateman Hospital.

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 a 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, 558 (2004) (per curiam).

In the April 16, 2012 letter of termination issued to Grievant, HR Director Worden cited several Hospital policies that were violated as well as instances in which Grievant failed to perform her duty as an LPN. *See* Respondent Ex. 20. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation. *See Overbee v. Dep't of Health and Human*

Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge cannot substitute her judgment for that of the employer. *Jordan v. Mason County Bd. of Educ.*, Docket No. 99-26-080 (July 6, 1999); *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).

Hospital Policy MMBHC078, *Nonviolent Physical Crisis Intervention*, is a policy establishing that the Department of Health and Human Resources requires that all clinical, direct care, and security staff in state operated facilities be trained and certified annually in *Nonviolent Physical Crisis Intervention* and that the Hospital shall provide such training to appropriate staff. Grievant received such training upon hire and participated in annual refresher courses during her employment thereafter. *See* Respondent Ex. 2, Ex. 3, and Ex. 5. The *Nonviolent Physical Crisis Intervention* policy also requires that the Hospital have written plans (policies and procedures) defining the expectations for staff interventions in crisis situations and that these plans comply with departmental policies.

To that end, Respondent adopted as Policy MMBHE009, *Behavioral Health Patient Rights Rules*, which reiterates Title 64, Legislative Rule Department of Health and Human Resources, Series 59 § 3.13, and establishes that "[p]hysical 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…." The legislature further set forth in 64 CSR 59 § 18.2, a

subsection entitled "Employee Responsibilities," that "[n]o employee shall verbally or physically abuse, or neglect any client." Violation of Respondent Policy MMBHE018, *Patient Abuse/Neglect or Exploitation*, is the third policy cited by Respondent as grounds that Grievant committed gross misconduct. This policy also defines physical abuse and follows verbatim the statutory definition of physical abuse set forth in 64 CSR 59 § 3.13 and adopted in Hospital Policy MMBHE009, *Behavioral Health Patient Rights Rule*, set forth more fully herein, *supra*.

Grievant, an LPN, failed to ensure that a HSW complied with applicable law and Hospital policy when the HSW utilized an improper physical restraint on a 67-year-old patient. The method of restraint, a one-person technique intended to control children or very small individuals, resembles a bear hug. In the initial and annual training Grievant received, Hospital staff members were instructed that such a physical restraint is not to be applied to adult patients because the person utilizing the restraint is unable to maintain balance and effectively control the patient, as with a two-person method. *See* Respondent Ex. 9 and Ex. 10.

Another policy adopted in compliance with Respondent Policy MMBHC078, *Nonviolent Physical Crisis Intervention, supra*, is Policy MMBHF080, *Mildred Mitchell-Bateman Hospital Guidelines for Seclusion/Restraint*. This policy sets forth that "any form of Restraint shall be used only in clinically appropriate situations when less restrictive alternative methods have been tried and found insufficient to protect patients or others from imminent danger of injury." Respondent Ex. 8, p. 2. The policy further sets forth that "any [physical] restraint should only be used as a **last resort** after all less

restrictive measures have been utilized and shall follow all guidelines of patient safety using Non-Violent Crisis Intervention (NVCPI) methods." *Id.* (Emphasis in original).

Grievant does not deny that Patient BB suffered a broken hip as a result of the March 5, 2012 incident. At the hearing before the grievance board, Grievant testified that she does not recall ever being told not to hold patients in the children's control method of restraint. Grievant also represented that a NVCPI training manual or participant workbook with which she was familiar did not have the children's control method of restraint marked through with a large red "X," as Respondent claims.[4] *See* Respondent Ex. 9.

The undersigned finds Grievant's testimony unreliable as to her recollection on the training received. Some factors to consider in assessing the credibility of a witness include the witness's demeanor, opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the fact-finder should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of the witness's information. *Massey v. W. Va. Public Serv. Comm'n*, Docket No. 99-PSC-303 (Dec. 13, 1999). The undersigned finds Grievant's testimony unreliable as to the training she received because Hospital documentation, the typical NVCIP manual utilized for training, and the testimony of the nursing director and one staff nurse <u>all</u> contradict Grievant's position.

[4] At the hearing, Grievant's Representative used a copy of a Nonviolent Crisis Intervention Training Program Participant Workbook, similar to Respondent Exhibit 9, while questioning a witness. The copy did not have the children's control method of restraint marked through with a large red "X," as does Respondent Exhibit 9 and testified to by Ms. Mannon. However, the workbook referenced by Grievant was not authenticated or offered as evidence in Grievant's case and its source is unknown.

Respondent's Behavioral Code of Conduct sets forth its employment expectations for its employees:

> This policy is designed to define expectations of behavior for each employee … The leadership of Mildred Mitchell-Bateman Hospital expects that its employees *will* adhere to all DHHR, BHHR, and Mildred Mitchell-Bateman Hospital policies. … strictly adhere to safety policies and procedures and report safety violation [sic] to the appropriate level of leadership….

Respondent Ex. 15 (Emphasis in original).

Based upon her actions during the incident in question, Grievant was terminated for gross misconduct which "implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." *Vickers v. Board of Directors/W. Va. State College*, Docket No. 97-BOD-112B (Aug. 7, 1998) (*quoting Graley v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991)).

Grievant's failure to prevent a HSW from physically restraining Patient BB using an unapproved, children's control method resulted in the patient suffering a broken hip. *See* Respondent's Ex. 11. An LPN, Grievant was skilled in patient care and was specifically trained on alternative, less restrictive methods of responding to patients who become aggressive. Hamilton and Mannon Hearing Testimony; *see also* Respondent Ex. 2. Grievant did not adhere to the approved methods in which all direct care staff members are trained. *See* Respondent Ex. 8. Respondent is entitled to expect its employees to adhere to its policies on approved and unapproved physical restraint because the Hospital provides necessary mental health services to patients who are prone to outbursts of verbal and physical aggression. Hamilton Hearing Testimony.

Both Grievant and HSW Dean acknowledge that the verbally and physically aggressive behavior demonstrated by Patient BB, which led to the incident at issue, was not unusual and that he has a history of out-of-control behavior. When dealing with such a segment of the population, the safety of both patient and staff is paramount. Respondent rightfully expects its employees to adhere to its policies and their training on such policies when confronted with verbal or physical aggression, particularly when such is the norm for the patient base served. Incidents like the one involving Patient BB can occur at any given moment at Respondent's Hospital.

Rather than being subjected to progressive discipline, Grievant was immediately terminated for gross misconduct after the Hospital's internal investigation substantiated patient abuse. *See* Respondent Ex. 20. The Hospital has a policy outlining *Progressive Disciplinary Action*, MMBHC015, which plainly states that any employee may be dismissed for cause and that in dismissals for cause, like penalties shall be imposed for like offenses. *See* Respondent Ex. 17. Policy MMBHC015 cross references DHHR Policy Memorandum 2104, *Guide to Progressive Discipline*, which sets forth that "separation from employment may be issued when … an employee commits a singular offense of such severity warranting dismissal." *See* Respondent Ex. 17 and 18. Grievant violated Hospital policy and did not adhere to NVCPI training when she allowed a HSW to physically restrain Patient BB with the children's control method which resulted in the HSW breaking the patient's hip in the process. Respondent's internal investigation considered witness interviews, Grievant's interview and written statement, Grievant's work history, and a review of the surveillance videotape of the incident. Worden Hearing Testimony; *see also* Respondent Ex. 13. The undersigned

finds that Respondent did not abuse its discretion in not instituting lower levels of punishment available under its progressive discipline policy rather than terminating Grievant.

Conclusions of Law

1. The burden is on the employer to prove that the action taken in this matter was justified. Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008). "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. In dismissal cases involving classified employees, the burden of proof is upon the employer to establish the charges relied upon by a preponderance of the evidence and to establish good cause for dismissing an employee. W. Va. Code § 29-6A-6; *Davis v. W. Va. Dept. of Motor Vehicles*, Docket No. 89-DMV-569 (Jan. 22, 1990); *Broughton v. W. Va. Div. of Highways*, Docket No. 92-DOH-325 (Dec. 31, 1992). "[G]ood cause" means "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 Administration*, 164 W. Va. 384 (1980); *Guine v. Civil Service Commission*, 149 W. Va. 461 (1965).

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 Resources/Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge cannot substitute her judgment for that of the employer. *Jordan v. Mason County Bd. of Educ.*, Docket No. 99-26-080 (July 6, 1999); *Ticket 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 Policy MMBHC078, *Nonviolent Physical Crisis Intervention*, is a policy establishing that the Department of Health and Human Resources requires that clinical, direct care, and security staff in state operated facilities be trained and certified annually in Nonviolent Physical Crisis Intervention and that Respondent shall provide such training to appropriate staff. The *Nonviolent Physical Crisis Intervention* Policy also requires that Respondent shall have written plans (policies and procedures) defining the expectations for staff interventions in crisis situations, which comply with departmental policies.

5. The legislature, in 64 C.S.R. 59 § 3.13, establishes that, "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*…." (Emphasis added). The legislature further set forth in 64 C.S.R. 59 § 18.2, a subsection of that section entitled 'Employee Responsibilities," that "[n]io employee shall verbally or physically abuse, or neglect any client."

6. Respondent Policy MMBHE018, *Patient Abuse/Neglect or Exploitation*, defines physical abuse and follows verbatim the statutory definition of physical abuse set forth in 64 C.S.R. 59 § 3.13 and adopted in Respondent Policy MMBHE009, *Behavioral Health Patient Rights Rule*, set forth more fully herein, *supra*.

7. Respondent Policy MMBHC078, *Nonviolent Physical Crisis Intervention*, *supra*, is Policy MMBHF080, *Mildred Mitchell-Bateman Hospital Guidelines for: Seclusion/Restraint*. The policy sets forth that "any form of Restraint shall be used only in clinically appropriate situations when less restrictive alternative methods have been tried and found insufficient to protect patients or others from imminent danger of injury." The policy further sets forth that "any [physical] restraint should only be used as a **last resort** after all less restrictive measures have been utilized and shall follow all guidelines of patient safety using Non-Violent Crisis Intervention (NVCPI) methods." (Emphasis in original.)

8. Respondent's Behavioral Code of Conduct sets forth its employment expectations for its employees:

> This policy is designed to define expectations of behavior for each employee … The leadership of Mildred Mitchell-Bateman Hospital expects that its employees *will* … adhere to all DHHR, BHHF, and Mildred Mitchell-Bateman Hospital policies … strictly adhere to safety policies and procedures and report safety violation [sic] to the appropriate level of leadership….

(Emphasis in original.)

9. Gross misconduct "implies a willful disregard of the employer's interest or wanton disregard of standards of behavior which the employer has a right to expect of its employees." *Vickers v. Board of Directors/W. Va. State College*, Docket No. 97-

BOD-112B (Aug. 7, 1998) (*quoting Graley v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991)).

10. Respondent has a policy on progressive discipline entitled *Progressive Disciplinary Action*, MMBHC015. This policy cross-references DHHR Policy Memorandum 2104, Guide to Progressive Discipline, which sets forth that "separation from employment may be issued when … an employee commits a singular offense of such severity warranting dismissal."

11. Some factors to consider in assessing the credibility of a witness include the witness's demeanor, opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the fact finder should consider the presence or absence of bias, interest, or motive, the consistency or prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of the witness' information. *Massey v. W. Va. Public Serv. Comm'n*, Docket No. 99-PSC-313 (Dec. 13, 1999).

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 the receipt of this Decision. *See* West Virginia 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 West Virginia 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).

June 7, 2013

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Stephanie L. Ojeda
Administrative Law Judge