FEDERAL MEDIATION AND CONCILIATION SERVICE

Proceedings before

James M. Paulson, Arbitrator

In the matter of: **AFGE, LOCAL 2430** and **DEPARTMENT OF VETERANS AFFAIRS**	Case No. 50731-3 Employee Removal Grievance

DECISION

PRELIMINARY STATEMENT

Matthew Milledge, Esq., Office of General Counsel, AFGE, represented AFGE, Local 2430.

Thomas R. Kennedy, Esq., Office of Regional Counsel appeared on behalf of the Department of Veterans Affairs.

The Department of Veterans Affairs, hereinafter the "VA", and the AFGE, Local 2430, hereinafter the "Union", are covered under a Master Agreement[1] between the United States Department of Veterans Affairs and the American Federation of Government Employees, hereinafter the "Agreement", which provides for the arbitration of unresolved grievances. The grievance[2] in this matter involves the removal of employee Mr. Employee. The parties agreed that James M. Paulson was selected to arbitrate the matter and that his decision would be final and binding as described in the Agreement.

On May 11, 2010, a hearing was held at the VA Pueblo Community Living Center in Pueblo, Colorado. At the hearing the parties were each permitted to present testimony and documentary evidence and to examine and cross examine witnesses. The VA called as its witnesses: VA Police Investigator John R. Glidewell, Jr.; Mary J. Salas, LPN; Sara E. Kelley, NP;

[1] Joint Exhibit No. 1.
[2] Joint Exhibit No. 8.

Sharon K. Devine, Nursing Director for Geriatrics and Extended Care; and Lynette A. Roff, Director of the Veterans Administration, Eastern Colorado Health Care System. The Union called as its witnesses: Peggy L. Messick, RN; Mr. Employee, NA and grievant; Henry Durga, RN (retired); Paul Doherty, Local Union 2430, AFGE, President.

The parties submitted their Briefs on August, 13, 2010. Once the Briefs were received by the Arbitrator, the hearing was closed. The Arbitrator's Decision and Award will be issued to the parties on or before September 15, 2010.

STATEMENT OF THE ISSUES

The parties stipulated[3] that the issue(s) to be decided are:

> Was the removal of the grievant on September 1, 2009 for just and sufficient cause? If not, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

ARTICLE 13-DISCIPLINE AND ADVERSE ACTION

Section 1 - General

The Department and the Union recognize that the public interest requires the maintenance of high standards of conduct. No bargaining unit employee will be subject to disciplinary action except for just and sufficient cause. Disciplinary action will be taken only for such cause as will promote the efficiency of the service. * * *

Section 2 – Definitions

For purposes of this Article, the following definitions are used:

A. For Title 5 employees:

1. A disciplinary action is defined as an admonishment, reprimand, or suspension of fourteen (14) calendar days or less and

2. Adverse actions are removals, suspension of more than fourteen (14) calendar days, reduction in pay or grade, or furloughs of thirty (30) calendar days or less.

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[3] Tr. 6.

Section 8 – Processing Suspensions, Adverse Actions, and Major Adverse Actions

A. An employee against whom a suspension, adverse action, or major adverse action is proposed is entitled to thirty (30) days advance written notice, except when the crime provisions have been invoked. The notice will state specific reasons for the proposed action. * * *

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Section 10 – Investigation of Disciplinary Actions

B. Disciplinary investigations will be conducted fairly and impartially, and a reasonable effort will be made to reconcile conflicting statements by developing additional evidence. In all cases, the information obtained will be documented. * * *

ARTICLE 16 – EMPLOYEE RIGHTS

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Section 4 – Use of Recording Devices

No electronic recording of any conversation, between a bargaining unit employee and VA official may be made without mutual consent except for Inspector General investigations or other law enforcement investigations. When a recording is made, the employee will be given the opportunity to review the transcript for accuracy and will be provided with a copy of the tape and the transcript if one is made. Information obtained in conflict with this Section will not be used as evidence against any employee.

ARTICLE 21 – INVESTIGATIONS

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Section 2 – Investigations

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C. Investigations should consider all facts, circumstances, and human factors. An investigation shall be conducted in an expeditious and timely manner.

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E. * * * The employee will also be informed of the nature of the allegation(s). * * *

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J. An employee's representative shall receive a complete copy of all evidence used to support the Department's action. This includes, but is not limited to, copies of all tapes, testimony/transcripts, recommendation and/or findings, and photographs. * * *

STATEMENT OF FACTS[4]

Background Facts

The VA runs the Pueblo Community Living Center in Pueblo, Colorado. This facility houses elderly veterans in various stages of disability—both physical and mental. Many need care in handling their basic needs, such as personal hygiene.

Mr. Employee was a Nursing Assistant at the Center. Mr. Employee had worked for the VA in this capacity at the Center and Fort Lyons facility for a total of approximately 15 years.[5] His job required him, among other things, to attend to the basic needs of the patients, such as changing adult diapers. He is also a veteran, having served two years in the military.[6] Prior the incident in this matter, he had never been disciplined and his performance had always been rated as successful or better. No complaint of patient abuse had ever been lodged against Mr. Employee by anyone—care giver or patient.[7]

Incident Giving Rise to Removal

On October 30, 2007 Mr. Employee was working the day shift at the Center. Among other patients, he was assigned to care for the patient, Mr. Patient. Mr. Patient was a veteran in his mid-sixties who had both physical and mental disabilities. He was a large and strong man even though he was a "high fall risk" and had an "unsteady gate".[8] While he tried to walk from time to time, he was normally confined to a wheelchair for moving about the center. He was, apparently, incontinent and needed to wear adult diapers. From time to time his diapers needed to be changed by the staff. He was not always cooperative in this process.

By October 30th, Mr. Patient had also become violent and aggressive and had been so for at least ten days.[9] This apparently was a result of his mental illness and the changing of his medication.[10] The evening before the incident, he had assaulted and injured two caregivers.[11]

At approximately 8:15 a.m. on the 30th, Mr. Employee went to Mr. Patient's room to change his diaper. Mr. Patient was uncooperative. He created a commotion. LPN Mary Salas heard the commotion and came into the room. Ms. Salas testified that she saw the two men in a "kicking match" and that Mr. Employee was bending Mr. Patient's thumbs back in an effort to

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[4] This Statement of Facts is based primarily on the undisputed facts. Disputed facts and factual conclusions will be discussed later in this Decision.

[5] Tr. 220-221.

[6] Tr. 221-222.

[7] Tr. 255.

[8] Union Exhibit No. 2.

[9] *Ibid*.

[10] Agency Exhibit No. 1. p. 5.

[11] Agency Exhibit No. 8, p. 6.

get him to lie on the bed to change his diaper.[12] Mr. Employee has stated that he did not kick Mr. Patient and was holding his hands (not bending his thumbs back).[13] Mr. Patient eventually lay on the bed and Ms. Salas changed his diaper while Mr. Employee held his hands.

Once Mr. Patient's diaper was changed, he requested to go to the bathroom. Mr. Employee followed the patient as he went into the bathroom. Thinking that Mr. Patient was losing his balance, Mr. Employee put his hand on Mr. Patient's shoulder. Mr. Patient, apparently, took offense to this by taking a swing at Mr. Employee and grabbing him by the shirt. Mr. Employee then grabbed Mr. Patient's thumb to release his grip from the shirt. Ms. Salas testified that Mr. Employee taunted Mr. Patient by urging him to "bring it on."[14] Mr. Employee denied taunting Mr. Patient.[15] Eventually, Mr. Employee and Ms. Salas were able to get Mr. Patient into a wheelchair and move him outside the area.

Reporting and Investigation of the Incident

Reports and Investigation the Day of the Incident

After reflecting on the interaction between Mr. Employee and Mr. Patient, Ms Salas decided to report the incident as one of patient abuse. About 10:00 a.m., Ms. Salas told the Charge Nurse, Peggy Messick that Mr. Employee had kicked Mr. Patient and was "pulling his fingers back". RN Messick wrote up Ms. Salas's report and then spoke with Mr. Employee, who was upset. Mr. Employee was then moved to another area in the facility.[16] Ms. Messick gave her report to Sara Kelley, NP, who was the Coordinator of the Center.

About 10:45 a.m. Ms. Kelley called VA Police Officer John Glidewell and "informed [him] of possible patient abuse reported by employee Mary J. Salas" that morning. Officer Glidewell arranged for interviews the next day.[17]

About 11:00 a.m. Coordinator Kelley met with Mr. Patient, who was being assisted by Ms. Salas. Mr. Patient volunteered that he had been "fighting with a guy". When he was asked if his fingers had been bent back he "moved his thumbs." Upon further questioning, he said that he had asked the person to "stop" and that the person had been "mean" to him.[18]

At about 12:15 p.m. on the 30th, Ms. Salas wrote up a Report of Contact on the incident. She reiterated her earlier description of Mr. Employee kicking Mr. Patient and bending his thumbs back. She also added that she told Mr. Employee he should have walked away and that

[12] Tr. 59-61.
[13] Agency Exhibit No. 8, pp. 23 & 25.
[14] Tr. 60.
[15] Tr. 247.
[16] Agency Exhibit No. 6.
[17] Agency Exhibit No. 1.
[18] Agency Exhibit No. 5.

he said that he was just protecting both of them. She later gave this report to Coordinator Kelley.[19]

About 12:17 p.m. Coordinator Kelley interviewed Mr. Employee with the presence of Local Union President Doherty by telephone. She read Ms. Messick's Report of Contact to Mr. Employee and asked him to respond. He began by describing that Mr. Patient had aggressive and assaulted staff the night before. He then recited that he had asked Mr. Patient to "change his clothes" and he refused. Mr. Employee told Ms. Kelley that he was holding Mr. Patient's hands "so he wouldn't" hit." Mr. Employee stated that he and Mr. Patient "weren't kicking each other" and that he had never "assaulted a patient." Mr. Employee did report that Ms. Salas did say in response to his statement that he was only trying to protect them that "'you went way beyond what was necessary." Mr. Employee then said that he had talked to Mr. Patient later and asked if he was hurt and he said no. The remainder of the interview with Mr. Employee involved his description of the problems with Mr. Patient's medication and his assaultive behavior.[20]

Officer Glidewell's Investigation and Report

At approximately 10:30 a.m. on October 31st, Officer Glidewell arrived at the Center to conduct his investigation. He first spoke with Coordinator Kelley. She gave him the documentation that she had accumulated. She then went on to complain about the old employees being resistant to her efforts to improve the care at the Center and their focus on filing grievances and bringing in the Union.[21]

Officer Glidewell then interviewed LPN Laura Montanez and asked her to describe both Mr. Patient and Mr. Employee. She said that Mr. Patient can be difficult and his medications are being adjusted. She had seen Mr. Employee be "gruff" with patients but not "abusive". She said that the older staff (coming from the Fort Lyons facility) including Mr. Employee were not very patient with the residents. She further complained that every time you questioned the ethics of the older staff they "threatened to report you to the Union, and get you fired." As to a direct question she responded that she did not think that Mr. Employee would "intentionally" hurt a patient.[22]

Officer Glidewell next interviewed Ms. Salas. She first explained that Mr. Patient had become difficult with the adjustments to his medication. She stated that she had asked Mr. Employee if he needed help in changing Mr. Patient. He said no. She then heard a commotion and went into the room where she observed the two men kicking each other. She stated that Mr. Employee was kicking Mr. Patient in an offensive (as opposed to a defensive) manner. She also stated that Mr. Employee bent Mr. Patient's thumbs backward and pinned him to the bed. She then described Mr. Patient grabbing Mr. Employee's shirt. She stated that Mr. Employee then broke Mr. Patient's grip on the shirt by grabbing his thumb. She further said that Mr. Employee taunted Mr. Patient by saying "bring it on." Ms. Salas did express concern about retribution for

[19] Agency Exhibit No. 4.
[20] Agency Exhibit No. 3.
[21] Agency Exhibit No. 1, p.3.
[22] *Ibid*, p. 4.

reporting the incident. She also expressed to Officer Glidewell the same feelings that Ms. Montanez had about the older staff—describing them as lazy and not caring about the residents which resulted in their frustration and gruff handling of the residents.[23]

In his interview with Charge Nurse Messick Officer Glidewell wrote that she was "emphatic" in saying that she had never seen Mr. Employee lose "his cool with any of the residents." She emphasized that Mr. Patient's aggressive behavior was caused by his medication adjustment. Finally, Ms. Messick said that she felt that Mr. Employee was "defending himself" and that Ms. Salas "was blowing it out of proportion."[24]

In the company of Coordinator Kelley, Officer Glidewell then interviewed Mr. Patient. Officer Glidewell noted that Mr. Patient "did not appear to be very lucid" and was "difficult to follow in conversation." Officer Glidewell observed Mr. Patient's hands and legs and stated there "appeared" to be finger marks by the "bruise" on Mr. Patient's hand and there "appeared" to be a "new bruise and scrape marks" that "could have been sustained from a kick as described by SALAS." Officer Glidewell then questioned Mr. Patient about how he obtained his injuries and got vague answers.[25]

Officer Glidewell's last interview was Mr. Employee. Local Union President Doherty was present by telephone. Officer Glidewell asked Mr. Employee "what happened." Mr. Employee first explained that Mr. Patient was being difficult because of his medications change. Mr. Employee recalled Ms. Salas's offer of assistance with Mr. Patient but rejected it because he had never had trouble with Mr. Patient "in the past." Mr. Employee described taking Mr. Patient to the bathroom and having to peel his hand off by grabbing his thumb. Mr. Employee said that Ms. Salas was behind him and could not have seen anything. When asked about the "kicking match", Mr. Employee denied that he had kicked Mr. Patient. He said that Mr. Patient had tried to kick him but that he had not retaliated. Upon further questioning, Mr. Employee allowed for the possibility that he "could have made incidental contact" with Mr. Patient in defending against his kicks. He again stated that Ms. Salas could not have seen anything since she was standing behind him. Mr. Employee asked if he was going to lose his job. He asserted that he had never been in trouble or abused a patient and that he was defending himself against a physically aggressive patient. Upon specific questioning, Mr. Employee said the physical contact occurred in the shower area. Officer Glidewell concluded that Mr. Employee was "evasive" in his answers. He "looked up and around searching for what to say and avoided the kicking incident in the bedroom" thereby denying that "any kicking took place in direct conflict with LPN SALAS's detailed statement." At Officer Glidewell's request Mr. Employee showed him the area where the incident took place. Pictures were taken and the interview ended.[26]

[23] *Ibid,* pp. 4-5.
[24] *Ibid,* p. 5.
[25] *Ibid,* pp. 5-6.
[26] *Ibid,* pp. 6-7.

Before leaving Officer Glidewell again met with Coordinator Kelley and noted her frustration in dealing with the "two very different philosophies with the staff." This referred to the old Fort Lyons staff as opposed to the new staff.[27]

Officer Glidewell noted in his report that the following day he had asked that Mr. Patient be examined by a physician to determine if Mr. Patient's injuries "were from [a] fall or assault." The Doctor concluded that her "exam was indeterminate as to whether there is underlying trauma either accidental or assault."[28]

Officer Glidewell concludes his report by stating that: "I believe that EMPLOYEE assaulted PATIENT." He goes on to support his conclusion by crediting Ms. Salas's "detailed and descriptive account" and stating that Mr. Patient's injuries are consistent with her account. He also notes that Mr. Employee was "slow and very careful during his interview" and further concludes that his "statements were wandering and not consistent." Finally, Officer Glidewell observes that this incident is not the first to come up at the Center. Another report also shows "gruff, impatient and non caring treatment of residents by old FT Lyons staffing."[29]

Local Pueblo Authorities

The VA Police, in consultation with the Assistant United States Attorney, decided to turn the matter over the Pueblo District Attorney's Office.[30] Mr. Employee was charged with third degree assault on an at risk adult, a class six felony.[31]

On September 8, 2008 Deputy District Attorney Stephen Jones moved to dismiss the criminal charges against Mr. Employee because based on the investigative facts uncovered by his office "the charges against Mr. Employee could not be proven beyond a reasonable doubt." The Motion contained an analysis of the evidence adduced in the investigation including, *inter alia*, a possible self-defense claim by Mr. Employee, the lack of proof of injury caused by Mr. Employee, the lack of competence of Mr. Patient to testify, the lack of any prior discipline against Mr. Employee, the supportive statements for Mr. Employee and the nature of the testimony of Ms. Salas.[32] The criminal charges were dismissed.

Administrative Action

Administrative action by the VA was deferred pending the conclusion of the criminal proceedings.[33] On October 1, 2008 an Administrative Board of Investigation was requested by the Director of the Eastern Colorado Health Care System to look into the complaint of patient abuse against Mr. Employee. The Board considered many of the documents referenced earlier in

[27] *Ibid*, p.7.
[28] *Ibid*, p. 7.
[29] *Ibid*, p. 7.
[30] *Ibid*, p. 7.
[31] Joint Exhibit No. 5.
[32] *Ibid*.
[33] Tr. 24-25.

this Statement as well as took sworn testimony from several witnesses including Mr. Employee and Ms. Salas.[34]

The Board filed its Report to the Director on December 4, 2008. The Board concluded that Mr. Employee "kicked and pulled the thumbs back on resident Mr. Patient."[35] To support its conclusion the Board essentially did not accept the account of Mr. Employee and credited that of Ms. Salas. Further, the Board accepted the apparent testimony of Instructor David Good that the technique used by Mr. Employee to remove Mr. Patient's hand from his shirt was never taught by him as an acceptable technique. The Board recommended that "corrective action" be taken against Mr. Employee as outlined in VA handbook 5021.[36]

Disciplinary Action

On April 17, 2009 Mr. Employee's removal from his employment with VA was proposed by Sharon Devine, Nursing Director, Geriatrics and Extended Care. Essentially, Mr. Employee was charged with patient abuse because of three specific actions: (1) He kicked Mr. Patient. (2) He bent Mr. Patient's thumbs backwards causing bruising. (3) He taunted Mr. Patient with the words "bring it on."[37] Written and oral responses to the proposal were submitted by the Union and Mr. Employee.[38] On September 1, 2009 Director Roff sustained the charges and accepted the proposal of Ms. Devine. Specifically, the Director credited Ms. Salas's version of events over that of Mr. Employee. Mr. Employee was removed from his employment with the VA effective September 6, 2009.[39]

CONTENTIONS OF THE PARTIES[40]

VA Contentions

Applicable Legal Principles

The VA begins by laying out the Merit Systems Protection Board's methodology for resolving credibility disputes[41]. This involves identifying the factual issues in dispute, a summary of the evidence on each issue, a determination of which version is credited and an explanation of the fact finder's factual conclusion. Seven general factors are then identified as needing to be considered in making a credibility resolution.

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[34] Agency Exhibit No. 9, p.1.
[35] *Ibid,* p. 2.
[36] *Ibid*. pp. 2-3.
[37] Joint Exhibit No. 2.
[38] Joint Exhibit No. 3 and Agency Exhibit No. 10.
[39] Joint Exhibit No. 4.
[40] This summary of the contentions of the parties are drawn largely from their post hearing Briefs.
[41] *Hillen v. Dept. of the Army*, 35 MSPR 453, 458 (1987).

The Merits

The VA next argues that Ms. Salas's version should be credited over that of Mr. Employee because hers is more consistent. After citing her testimony as being consistent in initial reports, the AIB testimony and the arbitration hearing, the VA then attacks Mr. Employee's testimony in those same venues as being different.

Next, the VA defends the Union attacks on her reputation for truthfulness and her character. It notes that in two of the four complaints that she had brought against other employees, two were credited by the VA and the Union as well. The VA then points out that the two Union witnesses who attacked Ms. Salas's honesty also were biased against her because she had reported them for job deficiencies.

The VA then observes that Ms. Salas's testimony was that she could clearly see Mr. Employee engaged in a kicking match with Mr. Patient. Mr. Employee's testimony that by her position in the room she could not have seen the incident must have referred to the later incident in the shower and was, therefore, not in conflict with her testimony regarding the diaper changing incident.

The employer next argues that Ms. Salas's demeanor was straight forward and honest--pointing out that she was emotional in her recitation of events. This was due to her fear of reprisal that was overcome by her need to report patient abuse of a mentally ill person. The VA also argues that the photographs of Mr. Patient are consistent with the events as reported by Ms. Salas. It is then argued that Mr. Taggart, by contrast, exhibited evasive demeanor in his often inconsistent testimony. Finally, it is noted that Mr. Employee testimony is inconsistent with that of other Union witnesses.

The Penalty

The VA then turns to the matter of the appropriateness of the penalty meted out to Mr. Employee. The testimony of Director Roff is referenced to establish how serious a matter patient abuse is. It is argued that notwithstanding Mr. Employee's fourteen years of service and having received no prior discipline, removal is the appropriate penalty for such a serious offense.

Union Contentions

Applicable Law

The Union begins by describing its view of the applicable law to be followed by the Arbitrator in this case. The Supreme Court has determined that when an arbitrator reviews an adverse action by an agency, he is to follow the substantive law of the MSBP. The Union also points out that VA has the burden of proof as to the charges against the employee. The VA must prove every element of each charge by a preponderance of the evidence. If it sustains that burden, it must prove the reasonableness of the penalty. The so-called "Douglas Factors"[42] are

[42] *Douglas v. Veteran Administration*, 5 M.S.P.R. 280, 305-306 (1981).

used to examine the appropriateness of the penalty. The Union further notes that the arbitrator is free to use reasoned judgment and experience in assessing the agency imposed penalty. The agency must also prove a nexus between the discipline meted out and the efficiency of the federal service. A failure of the agency to carry its burden also establishes a violation of the just cause provision of the collective bargaining agreement thereby creating additional authority for an arbitrator to overturn an agency decision.

The Merits

The Union asserts that Mr. Employee did not engage in patient abuse. It urges that Mr. Employee was a credible witness because his version is consistent with the statement from the patient and the physical evidence. Ms. Salas is not credible because her story has changed and is not consistent with the patient's statements or the physical evidence.

The Union recites specific pieces of evidence to establish its contention that Mr. Employee's version is credible. The Union then contends that the investigation was sloppy and began with a presumption of guilt. In this regard, an analysis is made of the investigation of Officer Glidewell in that he made a very weak effort to determine what happened and whose version of events was credible. Among other things, the Union claims that Officer Glidewell failed to adequately question witnesses and his blind acceptance of Ms. Salas's version of what happened. The Union then goes on to argue that the AIB's investigation continued a presumption of guilt. The AIB's conclusion that Mr. Employee was "evasive" is particularly criticized.

The Union then turns to an examination of the physical evidence. First, the testimony of Officer Glidewell on cross examination is reviewed. He could not say that the injuries to Mr. Patient's left knee were caused by the alleged kicking incident. Reference is then made to the testimony of Union President Doherty and the decision of the District Attorney that the pictures do not establish a bruise (as opposed to an age spot) is on the back of Mr. Patient's hand. Additionally, none of the patient's records reflect these injuries. The injuries could have been caused by any of the many other violent activities engaged in by the patient. The testimony of Ms. Salas at the hearing showed that Mr. Patient would have been hit in the shin with the kicks yet the pictures show no injuries to the shins. Moreover, Ms. Salas's testimony that both of Mr. Patient's thumbs were bent back would have meant that the alleged bruises on his hands would be on both hands and not just one.

The Union makes a detailed analysis of Ms. Salas's testimony and concludes that it is entitled to no weight. Specifically, the Union points to the evidence from others that Ms. Salas is not trustworthy and she is a frequent accuser of other employees. Her actions after the alleged incident are not consistent with the gravity of the matter as she has described it. She has offered different reasons for why she did not immediately report the incident. The Union then recites facts intended to show that Ms. Salas has changed her testimony and notes that the District Attorney was concerned about her testimony wavering. Finally, the Union argues that Ms. Salas's testimony of Mr. Employee engaging in physical and verbal abuse of patients in the past was a belated fabrication.

The Penalty

Essentially, the Union argues that since the VA failed to meet its burden of proving the charges, no discipline is warranted. Finally, the Union deals with the VA's assertion of evenhanded treatment by noting that Mr. Employee did not engage in patient abuse.

DECISION

Applicable Law and the Issues

Both parties concur that an arbitrator's review of an agency adverse action is controlled by substantive case law decisions of the MSBP[43]. What is not clear is whether Mr. Employee's rights in this case spring from federal statutory law or the contractual provisions of the collective bargaining agreement or both. The parties' stipulated statement of the issues only references the collective bargaining agreement and the concept of just and sufficient cause. Normally, stipulations of counsel are binding on their clients yet both parties refer to federal law as interpreted by the MSBP as controlling the decision of the Arbitrator. On the other hand, the collective bargaining agreement does not specifically reference a standard of review for an adverse action as it does for a disciplinary action[44]. This may be because the parties intended that the statutory standard of review for an adverse action was to be applied in such a case. Possibly the issue stipulation should have also included a reference to federal statutory law. In any event, the Arbitrator will apply the review analysis for an adverse action as articulated by federal law and the MSBP with the assumption that the standard of just and sufficient cause is subsumed in the federal law principles.

Federal Regulations and case law referenced by the parties require that the agency must prove the charges against the employee by a preponderance of the evidence.[45] The charge against Mr. Employee as specified in the proposed removal memorandum of Nursing Director Devine was patient abuse. The specific actions supporting this charge were that Mr. Employee: (1) kicked Mr. Patient; (2) bent his thumbs backwards causing bruising; and (3) taunted him with the words "bring it on".[46] A major part of the review of these charges is a credibility analysis of the two major witnesses—the accuser, Ms. Salas and the accused, Mr. Employee.

The MSBP has laid out its methodology for performing a credibility analysis.[47] The Arbitrator will refine that analysis as he reviews the facts in this case. More specifically, in *Hillen*, the MSBP makes the assertion that a fact finder must, *inter alia*, "summarize all the evidence on each disputed fact;" "state which version he . . . believes;" and then "explain in

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[43] *Cornelius v. Nutt*, 472 U.S. 648 (1985)

[44] Counsels' stipulated statement of the issues appears to be an extension of the "just and sufficient cause" standard of review for disciplinary actions to adverse actions.

[45] 5 CFR §1201.56(a); Abbot *et al v. Dept. of Transportation*, 17 MSPR 591, 592 (1983); *Navelrod v. U.S. Dep't of Justice*, 50 M.S.P.R. 456 (1991).

[46] Joint Exhibit No. 2.

[47] *Hillen v. Dept. of the Army*, *supra.*

detail why the chosen version was more credible than the other version or versions of the event."[48] The analysis, unfortunately, does not account for the reality that *neither* version may be believed to be entirely or even substantially credible. Over forty years of experience by this Arbitrator in observing and questioning hundreds, if not thousands, of witnesses and academic study[49] indicates that eye witness testimony is often suspect. Moreover, many factors, including the personal bias and interest of the witness in the outcome of the proceedings[50] frequently colors recollection of events. More accurately stated, *the question before an arbitrator is whether the version of the facts put forward by the party with the burden of proof is supported by a preponderance of the evidence; that is, is it more likely than not true*. Part of that determination is based on an analysis of the credibility of the witness put forward by each side. In other words, *the arbitrator does not have to choose a version of the facts*. He has to determine if the version put forward by the witness(s) of the agency is credible enough to pass the test of being more likely than not true. The fact finder does not have to determine if the version put forward by the party not bearing the burden of proof is more likely than not true. He looks to that version to determine if it has sufficiently weakened the opposing version such that the version of the party with the burden of proof has failed to meet its burden. With this refinement, the Arbitrator will examine the credibility of witness testimony as well as other relevant evidence.

Assuming that the Arbitrator sustains the charge of patient abuse, he is to apply the

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[48] *Supra*, p. 458.

[49] "It is crucial for investigators and attorneys evaluating an eyewitness account to recognize that what they are evaluating is an example of *trace evidence*. Eyewitness memory can be difficult to recover and easy to contaminate. To make things even more difficult, if an eyewitness's memory is contaminated by, for example, post-event information, the contamination will not show up (as it would in blood or saliva evidence) in any lab test, and the eyewitness will be very unlikely to be aware that contamination has happened." Elizabeth F. Loftus, James M. Doyle & Jennifer E. Dysart, *Eyewitness Testimony: Civil and Criminal*, (LexisNexis 4th Ed.), Ch. 5 Evaluating the Eyewitness Case, §5-3, p. 116. (Emphasis in the original).

[50] "In a hypothetical case presented to lawyers during a continuing education seminar, a woman named Louise Duncan watched in horror as her four-year-old daughter Mary Lou was hit by a car. Officers at the scene tried to interview Louise, who was hysterical. She kept saying, 'My God, there was nothing he could do.' Later at the hospital, she was calmer and related her story about the accident. She recalled the driver was going 'a mite fast.' Yet she added that it was hard to tell the speed because she was paying attention to her daughter. One year later, during a deposition, Louise Duncan would remember that the car was 'coming like a bat out of hell.' There was no evidence of any post event suggestion during the interview with Louise. ***

"One plausible reason for Louise's new 'recollection' is that her own internal thoughts, wishes, and desires intruded into her memory. *It is common for a witness's thoughts to bend in a direction that would be self-advantageous.* The strong influence of one's wishes and desires can be quite unconscious. In this case, Louise was suing the driver of the car, and it was in her best interest to 'remember' that the driver was speeding." *Supra,* Ch. 3 Factors Determining Retention and Retrieval of Events, §3-7 Self Distortions in Memory, pp. 66-67. (Emphasis added).

"Douglas standards"[51] to determine if the penalty of removal is reasonable and promotes the efficiency of the federal service. If the Arbitrator does not sustain the charge, he will rescind the removal and not apply the "Douglas standards" as there will be no need to do so.

Analysis of the Evidence in Support of the Charge of Patient Abuse

Testimony of the Key Witnesses

Mary Salas, LPN

The case of the VA rests almost entirely on the recollection of Ms. Salas. The only evidence of Mr. Employee's alleged misconduct constituting patient abuse comes from her recollection of events as stated through various reports and testimony before the AIB and at the arbitration hearing. The evidence involving her testimony has been summarized earlier in the Statement of Facts[52] portion of this Decision. The VA has relied on the following portions of her testimony to establish the charge of patient abuse: She reported and testified that she saw and heard Mr. Employee: (1) Kick Mr. Patient "with force" in his bedroom; (2) Bend back Mr. Patient's thumbs in his bedroom to force him to lie down so that his diaper could be changed and; (3) Taunt Mr. Patient in the shower area to "bring it on."[53]

First, as to Ms. Salas's ability to observe[54], she testified that she could clearly see the "kicking" match between Mr. Employee and Mr. Patient. While the Union tried to demonstrate that her view of the "bedroom" incident was obstructed, she maintained that she had stepped into the room and had a good view.[55] Whether she had a good view of what transpired in the "shower" area is more in doubt. On the other hand, there is no question that she could have heard what Mr. Employee may have said to Mr. Patient. The key fact relied on by the VA as to the shower incident is the alleged taunt from Mr. Employee to "bring it on." Based on the foregoing, the Arbitrator concludes that Ms. Salas was physically able to see and hear the material aspects of what she claims happened in the incident.

Second, as to Ms. Salas's demeanor[56] on the stand, she was quite confident and appropriately emotional. On the other hand, since the incident in October, 2007, she had given her version of what happened both "on the record" and "off the record" many times. She knew the importance of being emotionally upset by the incident to enhance her credibility. Undoubtedly, she was well rehearsed by counsel before she took the stand at the arbitration hearing. The foregoing does not mean that she was not being truthful. It only means that her demeanor on the stand did not affect the Arbitrator's conclusion as to her credibility one way or the other[57].

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[51] *Douglas v. Veterans Administration, supra.*

[52] Pp. 4-8.

[53] Tr. 58-62.

[54] *Hillen v. Dept. of the Army, supra*, pp. 458-459.

[55] Tr. 72.

[56] *Hillen v. Dept. of the Army, supra*, p. 462.

[57] "By the time an eyewitness case comes to trial, the eyewitness is confident that his or her testimony on direct examination is in fact 'the whole truth and nothing but the truth.'

Third, as to Ms. Salas's consistency[58] with her previous report and later testimony, the Arbitrator concludes that while there are discrepancies, there are no major inconsistencies which, in and of themselves, substantially diminish her credibility. On the other hand, she did add more detail and specifics to her version of the incident as matters proceeded.[59] Indeed, Ms. Salas remarked at the arbitration hearing[60] that her "memory" of the incident was "clearer" at the time of her testimony than it was three years earlier when she wrote her Contact Report.[61] This Arbitrator's experience as well as academic study[62] is such that this contention is implausible. What Ms. Salas may have actually been saying is that her ability to relate what she *presently believes* happened is better now than what her actual memory was three years ago. Of course, what the VA has the burden of proving is what actually happened three years ago and not what a witness presently believes happened.

Fourth, as to Ms. Salas's personal bias[63], the Arbitrator finds that there is substantial evidence supporting the Union claim that she had a previous bias against Mr. Employee—at least by virtue of the fact he was part of the "old staff". This bias goes not to Mr. Employee personally but to the style of treatment he gave to the patients by virtue of his being part of the "old staff." The key piece of evidence is the Report[64] of Officer Glidewell[65]. According to the Report, Ms. Salas endorsed the feelings of Nurse Montanez that the old Fort Lyon staff treats the residents more like they were in a prison than a nursing home. She went on to add that the old

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"This fact presents a special problem in an adversary system that relies heavily on 'demeanor' evidence to reveal inaccurate testimony. Normally if a witness is lying, concealing facts, or stretching the truth, the adversary system expects that, when confronted by a skilled lawyer, the witness will display a wealth of gestures, pauses, hesitations, and tones that demonstrate to the jurors that the witness is dissembling. * * * In an eyewitness case the demeanor that aggressive probing provokes is that of a sincere, truth-telling witness." Loftus, Doyle & Dysart, *supra*, Ch. 12 Cross-examination: Strategies and Tactics, §12-1(a) Witness Sincerity, p. 292.

[58] *Hillen v. Dept. of the Army, supra*, p. 459.

[59] The Union carefully documented these "embellishments" in its Brief. Pp. 16-18.

[60] Tr. 89.

[61] Agency Exhibit No. 4.

[62] "The number of people whose recollection is distorted increases with longer as opposed to shorter intervals between an event and subsequent recollection. Put another way, *changes in recollection appear to be more likely as the original memory fades with the passage of time*." Loftus, Doyle & Dysart, *supra*, Ch. 3 Factors Determining Retention and Retrieval of Events, §3-6 Factors Affecting Memory Distortion, p. 65. (Emphasis added).

[63] *Hillen v. Dept. of the Army, supra*, pp. 459-460.

[64] Agency Exhibit No. 1.

[65] Officer Glidewell clearly accepted the view of staff members Kelley, Montanez and Salas that the old Fort Lyon staff inappropriately treated the residents, were lazy and ran to the Union routinely when there were clashes between the "old" and "new" staff. By his report, he "empathized" with Coordinator Kelley's situation of trying to "raise the standard of care" while "the older VA employees seem to be resistive and 'sic' the Union on her every chance they get, burdening her time with fact findings and grievances instead of taking care of residents, . . ." *Ibid*, p. 3. Officer Glidewell did not appear to be objective by the time he got to his interview with Mr. Employee.

staff was "lazy" and "did not care about the residents and this exacerbated their frustration and gruff handling of residents." The Union produced the testimony of former Nurse Henry Durga in a conversation with Ms. Salas and Ms. Montanez in which they said they were going to get rid of at least some of the old staffers, including specifically Mr. Employee, and they did not "care what they had to do" to accomplish that objective.[66] While Ms. Salas denied ever having this conversation, the testimony of Mr. Durga[67] does, at least, underscore the animosity felt by both sides; that is, the old staff and the new staff of which Ms. Salas is a member. The Arbitrator also notes that the VA did not call Ms. Montanez to rebut Mr. Durga's testimony.

Fifth, as to Ms. Salas's character[68], the Union put forward the testimony of both former Charge Nurse Durga[69] and Charge Nurse Messick[70] that Ms. Salas had a "very poor reputation for honesty."[71] The VA did not rebut or counter this evidence; that is, there were no "character" or similar statements as to her honesty or truthfulness. Additionally, Ms. Messick recounted[72] the details of Ms. Salas falsely[73] charging her with abandoning her post. Again, the VA did not rebut or counter this evidence other than a very quick, but unconvincing, general denial[74] by Ms. Salas. This false reporting of alleged misconduct of a fellow employee is particularly significant as that is what the Union and Mr. Employee allege here.

Sixth, as to Ms. Salas's testimony being either contradicted by or being consistent with other evidence,[75] the VA presented the Report of Officer Glidewell in which he stated that the bruises as shown in the photographs[76] of Mr. Patient's legs and hand constituted physical evidence appearing[77] to support Ms. Salas's version. The Arbitrator finds, as did the District Attorney[78], that the photographs do not establish physical evidence of an injury caused by Mr. Employee. First, at the hearing the Union was able on cross examination of both Officer

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[66] Tr. 262-264.

[67] The VA somewhat countered Mr. Durga's testimony by establishing that he had been accused by Ms. Salas of abandoning his post. Clearly, he was upset with Ms. Salas and, apparently, her with him. Tr. 262, 269.

[68] *Hillen v. Dept. of the Army, supra*, p. 459.

[69] Tr. 266-267.

[70] Tr. 209.

[71] The Board in *Hillen, supra,* p. 459, cites its earlier decision in *Pedersen v. Dept. of Transportation,* 8 MSPB 535, 9 M.S.P.R. 195, 198-199 (1981) as establishing that a poor reputation for truthfulness diminishes a witness's credibility.

[72] Tr. 214-215. See also, Nurse Messick's Statement in Joint Exhibit No. 5.

[73] Also in *Hillen, supra,* p. 459, the Board cites its previous decision in *Stewart v. Office of Personnel Management,* 7 MSPB 746, 8 M.S.P.R. 289, 297 (1981) as standing for the proposition that a previous falsification by a witness diminishes her credibility.

[74] Tr. 103.

[75] *Hillen v. Dept. of the Army, supra*, p. 460. The Arbitrator incorporates in this analysis the factor of the inherent improbability. *Ibid*, p. 461.

[76] Agency Exhibit No. 2.

[77] Agency Exhibit No. 1, p. 5.

[78] "The pictures of the patients hands were grainy and unclear and do not demonstrate any actual bruising. The pictures of the patient's lower extremities reveal some left knee scraps." Joint Exhibit No. 5, District Attorney's Motion to Dismiss, ¶5.

Glidewell[79] and Ms. Salas[80] to show that the alleged kicking of Mr. Patient was as his mid-shin level. The pictures show no injuries on Mr. Patient at his mid-shin. Second, as to the alleged bruise on back of Mr. Patient's hand, Officer Glidewell conceded that the "bruise" could have been an age spot.[81] Additionally, Local Union President Doherty testified[82] that he saw the back of Mr. Patient's left hand a few months later that there was an age spot as shown in photograph. Moreover, there was no corresponding "bruise" on the back of Mr. Patient's right hand. From the foregoing analysis, the Arbitrator concludes the physical evidence did not show injuries that should have been present if Ms. Salas's version of the facts was accurate. She testified that Mr. Employee kicked Mr. Patient with full force at least five times[83]. This most likely would have left injuries on his shins. Accordingly, the physical evidence contradicts Ms. Salas's version of the incident. This diminishes Ms. Salas's credibility.[84]

Mr.l Employee, Nursing Assistant

The primary defense of the Union to the charge of patient abuse is the testimony of Mr. Employee. He denies that he kicked Mr. Patient, that he bent his thumbs back and that he taunted him. Obviously, Mr. Employee could observe and hear what he was doing and saying. The following is an analysis of further *Hillen* factors regarding his testimony.

First, as to Mr. Employee's demeanor on the stand, the Arbitrator finds that he appeared sincere and forthcoming in his answers. He was not evasive[85]. As with Ms. Salas, however, he has told his version many times off and on the record over the past three years. His testimony was also probably well rehearsed with counsel. Accordingly, the Arbitrator does not find that his demeanor on the stand affects his credibility one way or the other.

Second, as to Mr. Employee's consistency, the Arbitrator finds that any inconsistencies

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[79] Tr. 32.

[80] Tr. 73.

[81] In response to a direct question as to whether he could tell the difference between a bruise and an age spot, he stated: "Most times, yes. Sometimes they can be confusing." Tr. 54.

[82]Tr. 282.

[83]Tr. 74.

[84] The Board in *Hillen, supra,* p. 460, asserts the following principle: "Contradiction rests on the inference that if a witness is mistaken about one fact, he or she may be mistaken about more facts and therefore his or her testimony is untrustworthy." (Citation omitted).

[85] Officer Glidewell found in his report that Mr. Employee was "evasive" in his answers. The Arbitrator discounts the conclusion of Officer Glidewell, in part, because of his bias (as described earlier) as well as his failure to preserve and/or produce the audio recording of his interview with Mr. Employee. This clearly would have been the best evidence to gauge Mr. Employee's response to the charges twenty-fours later. Moreover, Article 16 of the Agreement appears to require that Mr. Employee be given a copy of the tape and that, if he is not, evidence obtained from it may "not be used in evidence against" him. Joint Exhibit No. 1, p. 46.

The AIB's conclusion that he was evasive in his testimony before it is not evident to the Arbitrator from reading the transcript. Agency Exhibit No. 8. Moreover, Local Union President Doherty testified that Mr. Employee was not evasive in his AIB testimony. Tr. 281.

from his previous testimony and his testimony at the hearing to be minor and not such as to affect his credibility.

Third, as to Mr. Employee's personal bias, the Arbitrator finds that he, quite naturally, has a strong bias in favor of reciting a version of the facts which will exonerate him. This bias comes from both a desire to get his job back as well as a need to restore his reputation among the public, his co-workers, his friends and family. This is a natural bias but still one that will likely color his recollection of events.

Fourth, as to Mr. Employee's character, the Arbitrator finds that there is substantial evidence to credit his character. The Union submitted in the grievance procedure statements from co-workers, some of whom had known him for many years, attesting to his character and devotion to the patients at the various facilities where he had worked. At the hearing Mr. Durga testified that he had worked with Mr. Employee for twelve years and he was courteous and he never received a complaint of patient abuse from a caregiver or patient.[86] Moreover, the VA has acknowledged that he has no prior disciplinary record (over a fourteen year period). He has always had satisfactory or better performance reviews. No evidence was submitted by the VA that in any way diminishes his integrity or reputation for honesty. Mr. Employee's character enhances his credibility.

Fifth, as to whether Mr. Employee's version of the facts is supported by or contradicted by other evidence, the Arbitrator concludes that it is supported by the physical evidence. Again, the photographs of Mr. Patient's legs and hand do not show physical injuries which would have been the case if Mr. Employee had engaged in the misconduct for which he is charged. Under the circumstances, this enhances his testimony.

Factual Conclusions in Light of the Preponderance of the Evidence Standard

The Arbitrator reaches the overall conclusion that the VA did not prove the charge of patient abuse against Mr. Employee by a preponderance of the evidence. Neither Ms. Salas nor Mr. Employee convinced the Arbitrator that their respective versions of the events were completely correct. The Arbitrator believes that probably something in between the two versions is where the truth lies. Nonetheless, the VA has the burden of proof and where neither party proves its version the party with the burden of proof does not prevail.

It is clear that there were two factions at the facility with respect to the whole approach to patient care, including the appropriate technique in handling unruly patients. The friction between these factions was substantial. In this context and where Mr. Employee has a virtually perfect record for approximately fourteen years together with outstanding references as to his character, there must be something more than contested eye witness testimony to prove the very serious charge of patient abuse[87]. Normally, one would expect some corroborating evidence to support eye witness testimony. Yet here, the physical evidence does not support the version of the accuser. It appears to support the version of the accused. The Arbitrator also considers the

[86] Tr. 267-268.

[87] If the charge had been sustained, removal was the appropriate remedy.

number of injuries the photographs show Mr. Patient exhibited. The examining physician could not determine the cause of the injuries. Moreover, neither Ms. Kelley nor Ms. Salas even tried to point to specific injuries and assert that Mr. Employee caused them. This underscores the Arbitrator's doubt as to the version put forward by the VA.

CONCLUSION

For the reasons set forth above, the Arbitrator finds that the VA did not prove the charge of patient abuse against Mr. Employee by a preponderance of the evidence. Therefore, the removal of the grievant on September 1, 2009 was not for just and sufficient cause. According, his removal is rescinded and he shall be made whole in all respects, including back pay less interim earnings. The Arbitrator retains jurisdiction for a period sixty days to resolve any disputes the parties may have with respect to remedy implementation and also the Union's request for attorney's fees.

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James M. Paulson, Arbitrator

September 7, 2010