

FRANK GREUBEL

v.

VETERANS ADMINISTRATION

DOCKET No.

SL07528110037

OPINION AND ORDER

Appellant was removed from his position of nursing assistant by the Veterans Administration (agency) based on a charge of patient abuse in its Knoxville, Iowa Medical Center. On appeal to the Board's St. Louis Regional Office,¹ the presiding official reversed the agency action, finding that the agency failed to sustain its charge by a preponderance of the evidence. The agency now disputes, in its petition for review, the presiding official's conclusion that there was insufficient evidence to sustain the charge.

The record reveals that appellant was involved in an altercation with Donald Klein, a patient in the acute psychiatric ward of the medical center. The altercation commenced when Klein attacked and struck appellant in the face, knocking off and breaking his eyeglasses, and slightly injuring his nose. Appellant and the other nursing assistant who was present in the ward at the time of the incident attempted to restrain Klein. In the ensuing struggle, Klein fell to the floor after bumping some chairs. Klein was subsequently carried to a "quiet" room and placed in restraints. As a result of the scuffle, Klein sustained bruises on several parts of his body as well as a lacerated lip. Based on these injuries and the results of its investigation, the agency concluded that appellant must have gone beyond using reasonable care in restraining the patient and thus he had committed patient abuse.

During the course of its investigation, the agency interviewed numerous employees and psychiatric patients. Several patients stated that Klein unequivocally had attacked appellant but that appellant had used more force than necessary in subduing him and that they saw him strike Klein on the head. Appellant and the nursing assistant who came to his aid denied that unreasonable force was used. This nursing assistant also denied seeing appellant strike the patient, although he was absent from the scene of the incident for a short period of time.

In addition, appellant denied striking Klein, but noted that it might have appeared to observers that he was striking him, in that arms were flailing during the struggle and Klein was kicking and attempting to bite him. Furthermore, Klein admitted that he was

¹Appellant waived his right to a Board hearing.

attempting to get out of appellant's grasp and that he was thrashing about on the floor and bouncing his head from side to side. The presiding official determined that appellant's explanation of the incident deserved more weight than the statements of the psychiatric patients. Therefore, he concluded that it was just as likely true as not true that Klein's injuries resulted from the scuffle, his attempts to free himself, his fall to the floor, and attempts by hospital personnel to restrain him. Accordingly, the presiding official reversed the agency action.

In its petition for review, the agency argues that although the patient witnesses differed somewhat in verbalizing the event, their testimony was generally consistent in relating that appellant intentionally struck Klein on the head. Moreover, the agency claims that there is no reason to believe that the patient witnesses colluded against appellant, and that the ward staff, as well as members of the medical center's investigating board, had determined that such patients could give reliable statements.

However, we agree with the presiding official that the agency failed to meet its burden of establishing by a preponderance of evidence its charge against appellant. We find that the statements of the patients who witnessed the incident fail to rebut appellant's explanation of the event.² No other hospital employee contradicted any aspect of appellant's explanation of the incident. The statements of the psychiatric patients as to whether appellant's use of force in restraining Klein was excessive are not sufficient to outweigh appellant's explanation of the incident. In view of appellant's statement that Klein was attempting to bite him, appellant's hand may have struck Klein's head, leaving the patients with the impression that they saw a blow or blows being struck against Klein during the course of the struggle. However, this does not establish that appellant used excessive force in these circumstances. Moreover, the physical examinations of Klein failed to establish that his injuries resulted from any use of excessive force. Therefore, we agree with the presiding official's finding that appellant's explanation was of a probative value sufficient to resolve the factual dispute regarding the use of excessive force in his favor.

The Board, having fully considered the agency's petition for review of the initial decision, and finding that it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, hereby DENIES the petition.

Accordingly, the agency is hereby ORDERED to cancel the removal. Proof of compliance with this Order shall be submitted by

²In regard to appellant's credibility, we note that he has nine years of service as a nursing assistant, has no record of patient abuse, and, in fact, received an outstanding rating less than two years prior to the date of the incident.

the agency to the Office of the Secretary of the Board within 20 days of the date of issuance of this opinion. Any petition for enforcement of this order shall be made to the St. Louis Regional Office in accordance with 5 C.F.R. § 1201.181(a).

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. § 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

WASHINGTON, D.C., *May 17, 1982*