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STATE OF MONTANA
Case Number: DA 20-0206

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0206

BRENT YAGER,

Petitioner and Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRY, UNEMPLOYMENT INSURANCE APPEALS BOARD, STATE OF MONTANA, DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES,

Respondents and Appellees.

RESPONSE BRIEF OF APPELLEE DPHHS

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, The Honorable James P. Reynolds, Presiding

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ISSUE PRESENTED

Whether Appellee Unemployment Insurance Appeals Board's determination that Appellant was discharged due to misconduct and that he was thus disqualified from receiving unemployment benefits was supported by substantial evidence in the record and was correct as a matter of law.

STATEMENT OF CASE

On October 19, 2018, Appellee and Respondent Montana Department of Public Health and Human Services (the Department) terminated Appellant Brent Yager's (Yager) employment at the Montana Developmental Center (MDC) "because of [his] continued failure to comply with MDC policy and procedures," D.C. Doc. 2, Administrative Record (hereinafter AR), Hearing Exhibit (Hr'g Ex.) 18, and his "repeated failure to perform essential functions of [his] position" regarding the care, treatment and safety of MDC's clients, AR, Ex. 19, including but not limited to Yager's neglect of two MDC clients, Client 2054 and Client 2038, on September 5, 2018. (AR, Hr'g Exs. 18-19[1].)

[1] The Hearing Exhibits consist of the file of the Montana Department of Labor and Industry Unemployment Insurance Division, Documents 1 through 56; the Department's Exhibits 57, 58, and 60; and Yager's Exhibit 59. All of these documents were admitted into evidence without objection during the January 24, 2019, evidentiary hearing discussed below. (AR, Hearing Officer's April 9, 2019, Decision (attached hereto as Appendix A (hereinafter App. A) at 1.)

Yager filed an application for unemployment insurance benefits with the Montana Department of Labor and Industry Unemployment Insurance Division (UI Division). After an investigation, on December 11, 2018, the UI Division issued a Notice of Determination, in which it concluded that Yager was disqualified from receiving unemployment insurance benefits under Mont. Code Ann. §§ 39-51-201(19) and -2303 because he was discharged for misconduct. (AR, Hr'g Exs. 53-54.)

Yager protested the decision on December 13, 2018. (AR, Hr'g Exs. 55-56.) On December 18, 2018, the UI Division issued a notice of redetermination of benefits, in which it reaffirmed its decision that Yager was discharged for misconduct and disqualified from receiving unemployment insurance benefits.[2] (AR, Hr'g Exs. 1-2.)

[2] Contrary to Yager's assertion, the UI Division did not deny his request for unemployment benefits because he was "terminated for cause" by his employer. (*See* Appellant's Br. at 3.) Whether Yager was "terminated for cause" or for "good cause" or for "just cause" or "wrongfully" or in compliance with a collective bargaining agreement is not at issue in an unemployment benefits proceeding. *See, e.g., Cartwright v. Scheels All Sports, Inc.*, 2013 MT 158, 370 Mont. 369, 310 P.3d 1080 (explaining that the issue decided in an administrative hearing regarding unemployment benefits is not identical to the issues surrounding a wrongful discharge claim or the good cause standard). The UI Division, and subsequently the hearing officer and the Board, concluded only that Yager was discharged for *misconduct* as defined in Mont. Code Ann. § 39-51-201(19), and, thus, disqualified from receiving unemployment benefits under Mont. Code Ann. § 39-51-2303. (*See* AR, Hr'g Ex. 1; App. A at 8, 9-10; *see also* AR, June 6, 2019 Decision of the Board, attached hereto as Appendix B and hereinafter App. B.)

Yager, who was self-represented at the time, filed an untimely request for appeal of that decision on December 31, 2018. (App. A at 1; AR, Exs. 3-4.) Steven A. Wise, Hearing Officer with the Department of Labor and Industry Office of Administrative Hearings, held an evidentiary hearing by telephone on January 24, 2019. (App. A at 1; AR, Audio Recording of Jan. 24, 2019 Evidentiary Hr'g (hereinafter Hr'g.) Yager was represented by counsel at the hearing. (*Id*.) On January 31, 2019, Hearing Officer Wise issued a written decision denying and dismissing Yager's appeal as untimely and without good cause for the late filing. (App. A at 1.) The Hearing Officer did not reach the merits of the disqualification issue. (*Id*.)

Yager timely appealed that decision to Appellee Montana Department of Labor and Industry, Unemployment Insurance Appeals Board (the Board).[3] (App. A at 1.) On March 7, 2019, the Board heard oral argument on the timeliness issue only. (AR, Audio Recording of Mar. 7, 2019 Board Review.) The Board reversed Hearing Officer Wise's decision, concluding that Yager had shown good cause for

[3] The Board filed a notice of nonparticipation in the district court proceeding below, D.C. Docs. 3-4, and indicated in its motion to supplement the record filed in this Court that it does not intend to participate in this appeal either.

his untimely appeal request, and remanded the case for a determination on the merits of the disqualification issue.[4] (App. A at 1.)

On March 22, 2019, Hearing Officer Wise conducted a telephone conference, during which counsel and the hearing officer agreed that the existing factual record was sufficient for a decision on the merits. (App. A at 2.) On April 9, 2019, Hearing Officer Wise issued a written decision affirming the UI Division's redetermination that Yager was disqualified from receiving benefits because he was discharged for misconduct. (App. A at 9.) The hearing officer found that Yager was aware that under MDC's policies, "he was to conduct a nursing assessment when a client sustains an injury or is suspected of being injured, including when a client falls, and was to document the assessment." (App. A., FOF ¶ 3.) The hearing officer further found that Yager observed one of MDC's clients, Client 2054, catch his heel on a seizure mat, stumble, and lose his balance while being backed into his room by Yager's girlfriend, Christine McCabe, and that Client 2054 did not just voluntarily sit down prior to his ending up on the mat on the floor next to his bed. (App. A at 8.) The hearing officer further found

[4] Yager misrepresents the nature of the Board's remand order. Contrary to his assertion, the Board did not remand for a determination "whether Yager had been properly terminated from employment for misconduct." (*See* Appellant's Br. at 4.) Whether Yager was "proper[ly] terminated" was not at issue in this administrative unemployment benefits proceeding; the only issue was whether he was terminated for misconduct.

that "as a nurse with an obligation to protect clients from harm, Yager was obligated to do a nursing assessment to determine if Client 2054 sustained any injury as a result of him stumbling, catching his heel, or losing his balance," and "to document that assessment and what happened." (App. A at 8.) Yet, the hearing officer found Yager did not say anything in his report regarding what happened in Client 2054's room. (App. A at 8.) Thus, the hearing officer concluded Yager violated his employer's known policies for conducting and documenting incidents involving an injury or suspected injury, or engaged in negligence or carelessness in failing to conduct a nursing assessment and document the incident. (App. A at 8.) The hearing officer further concluded Yager engaged in the "willful or wanton disregard of the rights, title and interests of the employer, including violations of a company rule if the rule is reasonable and if the claimant knew of its existence." (*See* App A. at 8.) Alternatively, the hearing officer concluded Yager's failure to conduct a nursing assessment or to document the incident constituted "carelessness or negligence of a degree . . . to show an intentional or substantial disregard of the employer's interest." The hearing officer, thus, concluded Yager was discharged for misconduct under Mont. Code

Ann. § 39-51-201(19), and that he was accordingly disqualified from receiving unemployment benefits.[5] (*See* App. A at 8.)

Yager appealed the Hearing Officer's decision to the Board.[6] (AR, Appeal Request dated 04-29-2019.) The Board held oral argument on June 5, 2019. (App. B at 1.) The Board concluded the hearing officer's factual finding that Client 2054's fall was substantial enough to require a nursing assessment under MDC's policies was supported by substantial evidence in the record and that the hearing officer correctly concluded that Yager's failure to conduct and document a nursing assessment constituted misconduct under Montana law. (App. B at 2.)

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[5] Here, Yager incorrectly asserts that the hearing officer further concluded that the other reasons that MDC provided for terminating Yager's employment "were without merit." (*See* Appellant's Br. at 6.) Again, whether MDC's reasons for terminating Yager's employment had merit, or were proper, or were sufficient, are not at issue in this unemployment benefits case. The only issue is whether MDC discharged Yager for misconduct.

[6] Yager contends he filed a "narrow appeal to the Board, challenging the hearing examiner's finding regarding" his failure to conduct and document a nursing assessment only because he "concurred with the hearing examiner's findings regarding items 2 through 4, in that no wrongdoing was attributed to Mr. Yager." (Appellant's Br. at 6.) Again, the hearing officer made no such finding or conclusion. The hearing officer concluded the Department failed to show Yager engaged in "deliberate misconduct or negligence equaling deliberate misconduct in culpability" regarding the other reasons for his termination. (App. A at 9.) Although the Department argued below that this conclusion was in error and that the denial of unemployment benefits could be affirmed on an alternative ground, the Department does not make that argument in this appeal. In doing so, the Department does not concede that the other reasons for Yager's termination were without merit, or insufficient, or improper in any way, or that Yager did not engage in "wrongdoing."

Yager timely filed a petition for judicial review of the Board's final agency decision in Montana First Judicial District Court, Cause No. ADV-2019-899. (D.C. Doc. 1.) On March 12, 2020, the district court issued an order, in which it concluded that the "there is substantial evidence to support the Board's decision and that the Board did not err in its interpretation and application of the pertinent statutes." (D.C. Doc. 13 (attached hereto as Appendix C and hereinafter App. C) at 9.)

Yager timely appealed that decision.

STATEMENT OF FACTS

Prior to November of 2018, the Department operated MDC as a residential treatment facility for individuals with severe developmental disabilities under a court order of commitment. (App. A, Finding of Fact (FOF) ¶ 1.) Montana law guarantees MDC clients certain rights, including "the right to dignity, privacy, and humane care," Mont. Code Ann. § 53-20-142(1), and "the right to receive prompt and adequate medical treatment for any physical . . . ailments or injuries . . . ." Mont. Code Ann. § 53-20-142(9). Mistreatment, abuse, and neglect of residents is strictly prohibited, Mont. Code Ann. § 53-20-163(1), and MDC must ensure that each client is not subjected to abuse, sexual abuse, neglect, exploitation or punishment. Admin. R. Mont. 37.106.2115(1)(e). "Facility staff must report all

known or suspected incidents of client abuse, sexual abuse, neglect or exploitation to the facility administrator." Admin. R. Mont. 37.106.2118(2).

Consistent with these laws, MDC adopted policies and procedures prohibiting employees from using physical, verbal, sexual, or psychological abuse against clients and requiring them to take steps to prevent mistreatment, exploitation, neglect and abuse. (*See* App. A, FOF ¶ 2; AR, Hr'g Ex. 20, ¶ II.A.-B.) To that end, MDC staff were required to report all allegations of client mistreatment, neglect, abuse, and injuries to a supervisor. (App. A, FOF ¶ 2; AR, Hr'g Ex. 20, ¶ II.E.) Neglect included the failure to provide services necessary to avoid physical or psychological harm to a client. (App. A, FOF ¶ 2; AR, Hr'g Ex. 22, ¶ III.A.f.)

Yager worked as a registered nurse at MDC from 2002 until the Department terminated his employment on October 19, 2018. (App. A, FOF ¶¶ 1, 33; AR, Hr'g Exs. 5, 18.) As a nurse, Yager had "an overriding duty and responsibility to ensure that the physical health of clients is maintained," and he was informed of that duty in writing. (AR, Hr'g Ex. 14; *see also* AR, Hr'g Exs. 42, 45.) Specifically, Yager understood that MDC policies required him to conduct a nursing evaluation whenever a client sustained an injury or was suspected of being injured, including but not limited to when a client fell, and he was required to photograph the suspected injury site and document the incident. (App. A, FOF ¶ 3;

Audio Recording of Jan. 24, 2019 Evidentiary Hearing (Hr'g), Testimony of Brent Yager (Yager Test.) at 2:03:40 – 2:04:20; *see also* Ex. 45.) If the client refused to consent to such an examination, Yager was aware that he nonetheless was required to document the incident that could have resulted in injury and the fact that the client refused to consent to an evaluation and treatment. (App. A, FOF ¶ 3; AR, Hr'g Ex. 45; AR, Hr'g, Testimony of Christy Modrow (Modrow Test.) at 3:30:40 - 3:31:15.)

On the evening of June 25, 2018, Client 2054, a severely developmentally disabled male client of MDC, became aggressive with other clients and staff members. Client 2054 had been aggressive and had harmed other clients and staff members in the past. Yager and other staff members were aware of this history. (App. A, FOF ¶¶ 7-8; AR, Hr'g, Yager Test. at 1:.) Yager administered a chemical restraint to Client 2054, and at first, he appeared to calm. (AR, Hr'g, Yager Test. at 1:44:20 – 1:45:25.) However, Client 2054 later became physically aggressive again, he stopped responding to staff members' attempts at redirection, and he tactically avoided efforts to use body positioning and the Mandt system to control his behaviors. (App. A, FOF ¶ 8; AR, Hr'g, Yager Test. at 1:45:30 – 1:47:30.) Yager ordered staff to push the panic button and retrieve a restraint chair. (App. A, FOF ¶ 8; AR, Hr'g, Yager Test. at 1:48:00 – 1:48:15.) At that point, Client 2054 retreated to his room. (App. A, FOF ¶ 9; AR, Hr'g, Yager Test. at 1:48:40 –

1:48:50.) By the time the chair arrived, Client 2054 was lying quietly on his bed and was calm. (App. A, FOF ¶ 9; AR, Hr'g, Yager Test. at 1:49:00 – 1:49:05; AR, Hr'g, Buck Test. at 1:22:00 – 1:22:20.) Yet, Yager and several other staff members entered Client 2054's room and physically carried him out to the common room where the restraint chair was located. (App. A, FOF ¶ 10; AR, Hr'g, Yager Test. at 1:50:00 – 1:51:35; *see also* AR, Hr'g, Buck Test. at 1:20:30 – 1:23:00.)

After an investigation was conducted, Yager was given a three-day suspension for violating MDC policies prohibiting staff from entering a client's room absent an imminent risk of harm to the client or others and prohibiting use of the restraint chair absent an imminent risk of harm. (App. A, FOF ¶ 11; AR, Hr'g Exs. 12-13.) MDC also found Yager's conduct constituted abuse and neglect of Client 2054, and Yager was warned that if he engaged in similar policy violations in the future, he could be disciplined or terminated. (App. A, FOF ¶ 11; AR, Hr'g Ex. 13.)

Two months later, during the early morning hours of September 5, 2018, Client 2054 exited his bedroom and was making loud siren-like noises in the common room of the unit, awakening other clients and disrupting their sleep. (*See* App. A, FOF ¶ 13; AR, Hr'g, Yager Test. at 1:58:30 – 1:59:20; *see also* AR, Hr'g Ex. 51.) Client 2054 failed to take redirection to return to his room. (*Id*.) Soon

thereafter, Client 2054 attempted to enter another client's bedroom. After staff physically prevented him from doing so, Client 2054 attacked a staff member, knocking his glasses off and scratching his face. (App. A, FOF ¶ 14; AR, Hr'g, Yager Test. at 2:00:35 – 2:01:00.)

What occurred next was disputed. Modrow testified that she was not present at MDC on September 5, 2018, but that she viewed MDC's video recordings of the incident as part of the ensuing investigation. (AR, Hr'g, Modrow Test. at 3:29:40 – 3:30:20.) Modrow testified the recordings showed that DSP Christine McCabe, Yager's girlfriend, *see* AR, Hr'g, Christine McCabe Testimony (McCabe Test.) at 3:06:00 -3:07:00 and AR, Hr'g Ex. 35, pushed Client 2054 backwards into his bedroom, causing him to fall and hit his side on the wooden box on which his mattress sat. (AR, Hr'g, Modrow Test. at 3:30:30 – 3:30:40, 3:31:50 – 3:33:15.) Modrow testified it was "obvious" from the video that Client 2054 fell and that Yager, as the nurse on duty that night, was required to evaluate Client 2054 for injuries and document the incident and any actual injuries or potential injury sites. (*Id*.)

McCabe testified she used body positioning to direct Client 2054 backwards towards his room. She denied that she had her hands on Client 2054. She testified

that she stopped at his doorway, but Client 2054 continued to go backwards into his room and then sat down on the foam seizure mat placed next to his bed. (FOF ¶¶ 12, 15-16; AR, Hr'g, McCabe Test., at 3:06:00 – 3:09:00.)

Throughout the course of the investigation of this incident and the administrative proceedings below, Yager provided several accounts of what he observed that morning. On September 21, 2018, in response to DPHHS's first due process letter, Yager wrote:

> First, from my viewing position, while on the phone, #2054 *lost his balance while backing into his room*, pivoted, and sat on his bedside mat, provided for his safety, due to a seizure diagnosis. There was no wincing, moaning, groaning, guarding or complaint of injury, pain, or discomfort of any kind.

(AR, Hr'g Ex. 57, *cited in* App. A at 8.) (Emphasis added.)

On November 13, 2018, in response to an inquiry from the Unemployment Insurance Division, Yager stated:

> He just sat down on his seizure mat. He did not fall from my perspective. He was showing aggression towards other clients. *A DSP, Christine, who is also my girlfriend, was backing him into a room and he was backing up and he caught his heel on the foam edge of the mat* that is placed on floor at his bedside in case he was to fall out when having a seizure and he just sat down on the mat. I was behind someone and I was on the phone and he has the right to refuse care from me and he would not acknowledge my existence when I tried to speak with him.

(AR, Hr'g Ex. 35, *cited in* App. A at 8.) (Emphasis added.)

On December 14, 2018, in his request for appeal of the redetermination decision, Yager wrote:

> I was also behind the person that was body positioning him into his room, do you know what a seizure mat is? The one's they're using now are compressed foam and have a beveled edge. *If you were walking back and stumbled on that it could cause you to lose your balance. That's what it looked like, like he was backing up, lost his balance.*

(AR, Hr'g Ex. 56, *cited in* App. A at 8.) (Emphasis added.)

During the January 24, 2019, evidentiary hearing, Yager testified he was on the phone with a psychiatrist for MDC when McCabe was body positioning Client 2054 back into his room. (AR, Hr'g, Yager Test. at 2:01:10 – 2:01:30, *cited in* App. A at 8; *see also* App. A, FOF ¶ 17, App. A at 8.) He stated he was directly behind McCabe, and, from his perspective, it appeared that as Client 2054 was walking backwards into his bedroom at McCabe's direction,

> *he caught his heel on the differentiating mat*, which is a seizure mat because he has a seizure diagnosis and that's at his bedside. *He caught his heel on that.* He had, it looked like he pivoted to me, put his arm up, set it on top of his mattress, and sat on the seizure mat. *He also frequently walks on the heels of his pajamas, so I don't know if that was a contributing thing, I don't know if that was occurring, but I do know that he does that frequently because he is pretty short in stature, and, at that time, his clothing weren't tailored to his size*.

(AR, Hr'g, Yager Test. at 2:01:30 – 2:02:40, *cited in* App. A at 8; *see also* App. A, FOF ¶ 17.) (Emphasis added.)

When asked by his counsel, "From your recollection, did he trip, lose his balance, what happened with him?", Yager responded, "*I believe he lost his*

balance and then he just pivoted and sat down." (AR, Hr'g, Yager Test. at 2:02:40 -2:03:05; *see also* App. A, FOF ¶ 17 and App. A at 8.) (Emphasis added.)

Yet, Yager did not ask Client 2054 if he was all right or hurt; did not ask if he fell; did not ask if he could examine Client 2054; and did not complete a nursing evaluation or skin wound assessment. He did not document that Client 2054 had "caught his heel on the seizure mat," or "lost his balance," or "stumbled," or otherwise went down on the mat. He did not document anything about how Client 2054 ended up back in his room or what happened once he was inside of his room. (App. A, FOF ¶ 19; AR, Hr'g, Yager Test. at 2:05:25 – 2:06:20, 2:30:00 – 2:30:40; AR, Hr'g Exs. 50-51.)

On November 13, 2018, when asked why he did not examine Client 2054 for injuries, Yager stated, "He did not fall *and I tried to address it with him and he would not acknowledge me*." (Doc. 35.) (Emphasis added.) During the evidentiary hearing, Yager testified Client 2054 was not cooperative and would not respond to Yager over the course of the evening. (AR, Hr'g, Yager Test. at 2:04:25 – 2:04:35.) However, at about the same time, Yager documented that he administered a PRN to Client 2054 at 4:47 a.m., presumably with the client's consent. (*See* AR, Hr'g Ex. 51.) But Yager did not document anywhere that he had asked to examine or evaluate Client 2054 or that he "tried to address" whether he was injured or not with him. Nor did he document that Client 2054 refused a

request to conduct a nursing evaluation, or refused to "address" whether he was injured or not with Yager. (*See* Docs. 50-51.)

After an investigation, Yager's employment was terminated on October 19, 2018, in part, as a result of his "neglect of Client 2054 in not performing a nursing assessment after a client had fallen." (AR, Ex. 18; *see also* App. A, FOF ¶ 33.)

STANDARD OF REVIEW

On judicial review, the findings of the Board "as to the facts, if supported by evidence and in the absence of fraud, are conclusive and the jurisdiction of the court is confined to questions of law." Mont. Code Ann. § 39-51-2410. "'Supported by the evidence' means supported by substantial evidence, which is 'something more than a scintilla of evidence, but may be less than a preponderance of the evidence.'" *Potter v. Dept of Labor & Ind.* 258 Mont. 476, 479, 853 P.2d 1207, 1209 (1993) (quoting *Gypsy Highview Gathering System, Inc. v. Stokes*, 221 Mont. 11, 14, 716 P.2d 620, 623 (1986)); *see also Somont Oil Co. v. King*, 2012 MT 207, ¶ 10, 366 Mont. 251, 286 P.3d 585 ("If supported by substantial evidence, [the Board's] findings of fact are conclusive, even if a preponderance of the evidence weighs to the contrary.")

> The court is not permitted to balance conflicting evidence in support of and in opposition to the [Board's] findings of fact, nor to determine which is the more substantial evidence, nor to consider where the preponderance of evidence lies; for to do so would be to substitute the

> Court's view of the evidence for that of the [Board], and effectively nullify the conclusive character of the [Board']s findings of fact as provided by statute.
>
> Thus, the reviewing court must decide whether substantial evidence supports the Board's decision and not whether on the same evidence it would have arrived at the same conclusion.

Ward v. Johnson, 242 Mont. 225, 228, 790 P.2d 483, 485 (1990) (internal quotation marks and citations omitted.) *See also Johnson v. Western Transp., LLC*, 2011 MT 13, ¶ 18, 359 Mont. 145, 247 P.3d. 1094 ("It is impermissible for the reviewing court to balance conflicting evidence in support of and in opposition to the [Board's] findings, determine which is the more substantial evidence, or consider where the preponderance of the evidence lies.")

SUMMARY OF ARGUMENT

The Board's relevant findings of fact the Yager violated a known policy or, at a minimum, acted negligently or carelessly, were based on Yager's own version of the facts as set forth in his testimony during the evidentiary hearing in this matter and his prior admissions. Yager admitted he observed Client 2054 catch his heel on his seizure mat, stumble, lose his balance, pivot, come into contact with his bed, and ***then*** end up on his behind on the floor next to his bed. He also admitted he was aware that MDC's policies required him to conduct a nursing assessment whenever an injury was suspected. Thus, the substantial evidence in the record

supported the Board's finding that Yager knew or at least should have known that as a nurse with an overriding duty to protect MDC's clients from harm and to provide care to them when injured, he was required to conduct a nursing assessment and document as much under these circumstances because the incident may have resulted in an injury. At a minimum, the substantial evidence supported the Board's finding that Yager's failure to do so constituted carelessness or negligence with respect to MDC's interests. Because those findings of fact are supported by substantial evidence in the record, they are conclusive and cannot be altered by this Court on appeal.

Based on those findings, the Board correctly concluded as a matter of law that Yager was terminated for misconduct because he violated a reasonable company policy of which he was aware, or should have been aware, signifying a willful or wanton disregard of MDC's interests in protecting its clients from harm and in protecting itself from liability. Alternatively, the Board correctly concluded Yager's willful blindness to, or willful disregard of, the natural consequences of Client 2054 tripping and losing his balance and MDC's substantial interests that were implicated by that incident, constituted, at best, gross negligence and something far beyond ordinary negligence. His failure to exercise even slight care in performing his duties as a nurse that morning constituted misconduct.

Although Yager objected to the admission of the video recordings of the incident into evidence or the hearing officer viewing the video recordings at a later date, he cites to no portion of the record where he objected to any testimony by MDC's employees regarding what they saw on the videos or what actions they took in response to viewing the videos. As such, he has waived any right to do so on appeal. Moreover, his briefing of this issue on appeal is inadequate under the appellate rules because it fails to cite to pertinent portions of the record or to state which findings of fact he contends must be reversed due to any alleged error in the admission of this evidence. As such, this Court should decline to address this argument on appeal.

Even if this Court were to ignore these procedural deficiencies, the record shows the Board did not rely on any allegedly inadmissible testimony regarding the substance of the video recordings when making its findings of fact. Rather, the Board's final agency decision and the hearing officer's decision on which it was based both rely almost exclusively on Yager's own testimony to establish what took place in Client 2054's bedroom on September 5, 2018. Thus, as discussed above, the findings of fact are supported by substantial evidence and conclusive in this Court, and any alleged error in the admission of the evidence would be harmless as it did not affect Yager's substantial rights.

Accordingly, this Court should affirm the Board's final agency decision concluding Yager is disqualified from receiving unemployment benefits on the ground that he was terminated for misconduct.

ARGUMENT

I. Substantial evidence in the record supports the Board's decision, and the Board correctly concluded as a matter of law that Yager's behavior constituted misconduct under Montana law.

An employee who has been discharged for misconduct is not qualified to receive unemployment insurance benefits. Mont. Code Ann. § 39-51-2303.

> "Misconduct" includes but is not limited to the following conduct by an employee:
>
> (i) willful or wanton disregard of the rights, title, and interests of a fellow employee or the employer, including
>
> . . . .
>
> (G) violations of a company rule if the rule is reasonable and if the claimant knew or should have known of the existence of the rule;
>
> . . . .
>
> (iv) carelessness or negligence of a degree or that reoccurs to a degree to show an intentional or substantial disregard of the employer's interest.

Mont. Code Ann. § 39-51-201(19).

Misconduct does not include inadvertent or ordinary negligence in isolated instances or good faith errors in judgment or discretion. Mont. Code Ann. § 39-51-201(19)(b)(i), (iii).

"Whether an employee has 'disregarded standards of behavior, been careless or negligent, or violated company rules' are factual questions, which [are] review[ed] for substantial evidence." *Somont Oil*, ¶ 10 (quoting *Hafner v. Mont. Dep't of Labor & Indus.*, 280 Mont. 95, 99-100, 929 P.2d 233, 236 (1996)); *see also* Mont. Code Ann. § 39-51-2410(5).

Whether the facts found by the Board "demonstrate misconduct requires interpretations and application of the Administrative Rules of Montana and is a legal conclusion reviewable by this Court" for correctness. *Somont Oil*, ¶ 11 (internal quotation marks omitted).

A. The Board's factual findings that Yager violated MDC's policies and acted carelessly or negligently are supported by substantial evidence in the record.

The Board adopted the findings of the hearing officer that Yager violated his duty under MDC's policies to conduct a nursing assessment and document any incidents involving a suspected injury, and that his failure to do so under the circumstances constituted at least carelessness or negligence. The evidence supporting these factual findings came almost exclusively from Yager's own testimony and prior admissions. As Yager himself testified, he, as an RN, was

required under MDC policies to conduct and document that he conducted a nursing assessment whenever a client sustained an injury or was suspected of being injured, including but not limited to when a client "fell":

> COUNSEL: Let's ask this, if there was a suspected injury, are you required to chart that?
>
> YAGER: I am.
> COUNSEL: Is it part of your job description?
>
> YAGER: Yes, and, I don't believe they've ever put it in the job description, but what we do as policy is we would ask them to remove their clothing and take photos of any injury.
>
> COUNSEL: If injuries were observed or suspected, would it be, it would become necessary to document those, would that be correct?
>
> YAGER: Yes, if they're cooperative with it. They have a right to refuse that.

(AR, Hr'g, Yager Test. at 2:03:40 – 2:04:20.)

In addition, Yager repeatedly acknowledged that Client 2054, while being body positioned by Yager's girlfriend backwards into his bedroom after a physical altercation with staff, caught his heel on the seizure mat on the floor next to his bed, stumbled, and lost his balance right before he pivoted around, made contact with the bed with his arm, and then ended up on the floor:

> First, from my viewing position, while on the phone, #2054 *lost his balance while backing into his room*, pivoted, and sat on his bedside mat, provided for his safety, due to a seizure diagnosis. There was no

wincing, moaning, groaning, guarding or complaint of injury, pain, or discomfort of any kind.

(AR, Hr'g Ex. 57, *cited in* App. A at 8.) (Emphasis added.)

> He just sat down on his seizure mat. He did not fall from my perspective. He was showing aggression towards other clients. *A DSP, Christine, who is also my girlfriend, was backing him into a room and he was backing up and he caught his heel on the foam edge of the mat* that is placed on floor at his bedside in case he was to fall out when having a seizure and he just sat down on the mat. I was behind someone and I was on the phone and he has the right to refuse care from me and he would not acknowledge my existence when I tried to speak with him.

(AR, Hr'g Ex. 35, *cited in* App. A at 8.) (Emphasis added.)

> I was also behind the person that was body positioning him into his room, do you know what a seizure mat is? The one's they're using now are compressed foam and have a beveled edge. *If you were walking back and stumbled on that it could cause you to lose your balance. That's what it looked like, like he was backing up, lost his balance.*

(AR, Hr'g Ex. 56, *cited in* App. A at 8.) (Emphasis added.)

> *[H]e caught his heel on the differentiating mat*, which is a seizure mat because he has a seizure diagnosis and that's at his bedside. *He caught his heel on that.* He had, it looked like he pivoted to me, put his arm up, set it on top of his mattress, and sat on the seizure mat. *He also frequently walks on the heels of his pajamas, so I don't know if that was a contributing thing, I don't know if that was occurring, but I do know that he does that frequently because he is pretty short in stature, and, at that time, his clothing weren't tailored to his size*.

(AR, Hr'g, Yager Test. at 2:01:30 – 2:02:40, *cited in* App. A at 8; *see also* App. A, FOF ¶ 17.) (Emphasis added.)

When asked by his counsel during the evidentiary hearing, "From your recollection, did he trip, lose his balance, what happened with him?", Yager

responded, "*I believe he lost his balance* and then he just pivoted and sat down." (AR, Hr'g, Yager Test. at 2:02: -2:03:05; *see also* App. A, FOF ¶ 17 and App. A at 8.) (Emphasis added.)

Although Yager contends the hearing officer took these statements out of context or misconstrued their meaning, Yager did not simply "speculat[e]" that someone might or could trip on the seizure mat, *see* Appellant's Br. at 20. Rather, Yager admitted directly and repeatedly that he personally observed Client 2054 catch his heel on the seizure mat and lose his balance right before he ended up on the floor. (*See, e.g.*, AR, Hr'g Ex. 56 ("If you were walking back and stumbled on that it could cause you to lose your balance. *That's what it looked like, like he was backing up, lost his balance.*).) In other words, Yager believed that Client 2054 tripped on his seizure mat moments before he landed on it.[7]

Nor did the hearing officer ignore Yager's assertion that he believed that, after Client 2054 caught his heel, stumbled, and lost his balance, he simply sat down on the seizure mat, or his belief that Client 2054 did not appear to Yager to

[7] Whether Client 2054 actually tripped, or was pushed by McCabe as the Department contended during the hearing, is irrelevant to this argument on appeal because the hearing officer found Yager's testimony that he did not see McCabe touch Client 2054 credible and he based his decision on Yager's perception of what occurred prior to Client 2054 ending up on the floor, *i.e.*, Yager's observations that Client 2054 caught his heel, stumbled, and lost his balance. As discussed below, neither the hearing officer nor the Board based any of the findings in this case on any testimony of MDC witnesses regarding the substance of the video recordings of the incident.

have been injured in the process. (*See* App. A, FOF ¶ 17, stating these facts.) The hearing officer, instead, found under Yager's own explanation, it is simply not true that "Mr. Yager did not believe or perceive that client 2054 ever did anything but sit down on the mat next to his bed," as Yager argues on appeal. (*See* Appellant's Br. at 28.) Rather, Yager observed Client 2054 catch his heel, stumble, and lose his balance, and pivot around before his allegedly sat on the floor. Notably, Yager also saw Client 2054's arm come into contact with his bed—which was a wooden box with a mattress on top—as he was going down to the ground. (AR, Hr'g, Yager Test. at 2:01:30 – 2:02:40.) That is, Yager admitted that Client 2054 did not walk into his room voluntarily; he did not walk into his room face forward; he did not choose to sit down on his bed, although it was right there; and he did not simply voluntarily choose to sit on the floor next to his bed, as Yager would have this Court believe. The hearing officer simply found that Yager, "as a nurse with an obligation to protect clients from harm," could not turn a blind eye to or ignore the consequences of what preceded Client 2054 ending up on the mat.

Thus, there is more than a scintilla of evidence to support the hearing officer's finding that Yager was obligated to do a nursing assessment to determine if Client 2054 sustained any injury *as a result of him stumbling, catching his heel or losing his balance*," i.e., as a result of what preceded him ending up on the mat, regardless of whether Client 2054 "fell" or "sat down" on the mat. (App. A at 8.)

No reasonable person, let alone a nurse with a duty to protect Client 2054 from harm, would fail to understand that an incident occurred that *may have resulted* in an injury to Client 2054. Certainly, if Client 2054 fell to the seizure mat involuntarily, he may have suffered an injury. But even if he did not involuntarily land on the floor next to his bed, any reasonable person, let alone any reasonable nurse, would have understood that he may have sustained an injury *when he caught his heel, stumbled, and lost his balance*—regardless of whether he went to the ground or not—*or when he pivoted around and came into contact with his bed*.

That Yager testified that he did not subjectively believe Client 2054 was injured is irrelevant. Any reasonable person in Yager's shoes would have understood that MDC's policy required Yager to assess Client 2054 for potential injuries and provide necessary medical care under these circumstances. A potentially injury-causing incident occurred. Yager could not simply ignore that fact and move on. And any reasonable person would have further understood the need to document the incident in order to inform facility managers of a potentially unsafe situation, *e.g.*, a tripping hazard, or a potentially dangerous practice, *e.g.*, the use of body positioning to direct a client to walk backwards toward hard or sharp objects, and to protect MDC from future litigation regarding the client's *potential* injury. Yet, Yager took none of these steps.

Nor is it persuasive, let alone determinative, that nothing in the record indicates that Client 2054 actually suffered an injury that night. (*See* Appellant's Br. at 28-29.) The lack of documentation of an injury does not mean that no injury occurred. Indeed, it is huge part of the problem, because neither of the two people who witnessed the incident—Yager and his girlfriend McCabe—bothered to check if Client 2054 was injured *and document the alleged lack of an injury for the record*.

Notably, although Yager contends nothing of consequence occurred in Client 2054's bedroom that required him to intervene, he previously asserted that he did, in fact, "try to address" the situation with Client 2054. When asked by the investigator for the UI Division, "Why did you not examine the client for injuries?," he responded, "He did not fall *and I tried to address it with him and he would not acknowledge me*." (AR, Hr'g Ex. 35.) That is, Yager seems to admit that he recognized at the time of the incident that it was serious enough to inquire about. Yet, Yager admittedly documented nothing regarding Client 2054 losing his balance and ending up on the floor mat while he was being body positioned backwards into his bedroom by Yager's girlfriend, or regarding Yager's alleged attempts to "address it with" Client 2054. Yager cannot have it both ways: he cannot now claim that he did not believe that anything of consequence had occurred that required him to conduct an assessment and document the incident,

while also acknowledging that he tried to address the situation with Client 2054, but he refused. If he tried to address it, he should have documented that fact and Client 2054's refusal to cooperate. He did none of this.

In short, the substantial evidence in the record supports the finding that Yager, as a registered nurse tasked with protecting the safety and health of Client 2054, knew or should have known that his failure to conduct a nursing assessment of Client 2054 and document what occurred in his bedroom was a direct violation of MDC policies requiring a nurse such an assessment whenever an incident occurs that might result in an injury. And even if MDC had not explicitly required such action, his failure to do so in this case constituted fell below the standard of care and constituted negligence or carelessness, as no reasonable employee, let alone any reasonable nurse, would not have inquired about the tripping incident and documented it. As such, those findings are conclusive in this Court.

B. The Board correctly concluded Yager's behavior constituted misconduct as a matter of law.

The Board correctly concluded Yager's failure to conduct a nursing assessment and to document the incident in Client 2054's bedroom rose to the level of misconduct under Mont. Code Ann. § 39-51-201(19)(a)(i)(G) or (iv). Yager knew that his overriding duty as a nurse was to protect MDC's clients from harm, and that MDC policies required him to conduct and document a nursing assessment whenever a client might have suffered an injury. Yager contends his

failure to do so in this case is excused because he did not subjectively believe that Client 2054 fell or was injured. He is wrong. A nurse cannot check his common sense at the door and fail to acknowledge the natural consequences that flow from a person catching his heel on a mat, stumbling, losing his balance, pivoting around, and coming into contact with a mattress on top of a wooden box, regardless of whether the nurse subjectively believed the person "fell" to the floor or chose to sit down after tripping on the mat. Doing so is a violation of MDC's reasonable policy requiring nurses to conduct and document incidents where a client may have suffered an injury, and thus is conduct signifying a willful or wanton disregard of MDC's interests underlying the policy. *See* Mont. Code Ann. § 39-51-201(19)(a)(i)(G). The Board correctly concluded that Yager violated a an employer's reasonable policy of which he was aware or should have been aware. That is misconduct.

Even if such behavior did not constitute a direct violation of a company policy under Mont. Code Ann. § 39-51-201(19)(a)(i)(G)—which MDC contests—Yager's conduct nonetheless constituted willful blindness the facts before him, and conduct that signified a willful or wanton disregard of MDC's interests. *See* Mont. Code Ann. § 39-51-19(a)(i) (misconduct includes willful or wanton disregard of the employer's interests "including," but not limited to a violation of a known and reasonable policy). At a minimum, Yager's failure to conduct a nursing

assessment and document the incident constituted carelessness or negligence of such a degree as to show a substantial disregard of MDC's interests under Mont. Code Ann. § 39-51-201(19)(a)(iv). Pursuant to Yager's own description of what he observed, Client 2054, while being body positioned backwards into his room after a physical altercation with staff, caught his heel on a mat, stumbled, lost his balance, pivoted around making contact with his bed, and then ended up on the floor next that bed. Yet, Yager took no action to ensure Client 2054 was not hurt, and did not document the potentially dangerous incident for his employer—even though he was certain to document Client 2054's belligerent behavior that evening in not one, but two different communications to management. (AR, Hr'g Exs. 50-51.) Under the circumstances, Yager did not exercise even a slight degree of care when he failed to take any action to protect Client 2054 and his employer from harm by conducting an assessment and documenting the incident. *Weber v. State*, 2015 MT 161, ¶ 14, 379 Mont. 388, 352 P.3d 8 (defining gross negligence). Yager's "thoughtless disregard of the consequences [of his actions and omissions] without the exercise of any effort to avoid them" constituted something beyond ordinary negligence or carelessness, or a good faith error in judgment. *See Liston v. Reynolds*, 69 Mont. 480, 497, 223 P. 507, 511 (1923) (same). The Board properly concluded the incident in Client 2054's room was "substantial enough" to require Yager to take action to protect his employer's interests and that, as a matter

of law, Yager's failure to do so was serious enough to constitute misconduct disqualifying him from receiving unemployment benefits under Montana law. This Court should affirm that decision.

II. Yager's argument regarding the admission of testimony about the video recordings of the incident in Client 2054's bedroom was not preserved, is not adequately briefed on appeal, and does not constitute reversible error in any event.

On appeal, Yager seems to contend the hearing officer erred in admitting into evidence and the hearing officer and the Board erred in relying on the testimony of MDC employees regarding what they observed on the facility's video recordings of the events of September 5, 2018. Yager's argument fails because he did not preserve this issue for appeal, and even on appeal, he has not identified what evidence he believes was improperly admitted or explained how such testimony affected the hearing officer's or the Board's final decision in this case. Regardless, any error in admitting the testimony was harmless because neither the hearing officer nor the Board relied upon the video evidence or the testimony regarding it in deciding this case and, even if they did, Yager's own admissions and the documentary evidence entered in the record without objection, and not contested on appeal, constitute substantial evidence to support the Board's findings of facts and conclusions of law.

A. Yager waived any argument about the admissibility of testimony regarding the video recordings by failing to contemporaneously object.

This Court has repeatedly held that a "complaining party must make a timely objection or motion to strike and state the specific grounds for its objection in order to preserve an objection to the admission of evidence for purposes of appeal." *Siebken v. Voderberg*, 2015 MT 296, ¶ 19, 381 Mont. 256, 359 P.3d 1073 (internal quotation marks and citations omitted). "Broad, general objections do not suffice." *Id*. (internal quotation marks and citations omitted). This Court will not reverse a decision when the initial decisionmaker was not given an opportunity to correct the error alleged. *See id*.

Yager has not cited anywhere in the record where he objected to any of the MDC witnesses' testimony regarding the video recordings. Although Yager objected to the admission of, or the hearing examiner's viewing of, the video recordings themselves, *see* Appellant's Br. at 26, he did not ask the hearing officer to limit MDC's witnesses' testimony in any way. In fact, by the time that discussion took place, Yager's counsel had consented to the admission into evidence of MDC's disciplinary letters to Yager regarding the events of September 5, 2018, which indicated that his termination was based, in part, on management's review of the video recordings of the events of September 5, 2018. (*See* App. A at

1; AR, Hr'g Exs. 14, 16, 18-19.) And when his supervisor, Christy Modrow, testified specifically regarding what she observed on the videorecording of the incident, he offered contemporaneous no objection. (*See* AR, Hr'g, Modrow Test. at 3:29:40 – 3:30:40, 3:31:50 – 3:33:15.)

Rather than contemporaneously objecting to any testimony regarding the video recordings, Yager's counsel adopted the strategy of trying to undercut the credibility of MDC's witnesses' testimony by focusing on the fact that they, unlike McCabe and Yager, were not present at the facility on the night in question. (*See* Appellant's Br., Ex. 9.) Having made that strategic decision during the hearing, he cannot now fault the hearing officer for not excluding and/or striking the testimony instead. Yager has, thus, waived any objection to the admission of any testimony regarding the videos, and this Court should decline to address this issue on appeal.

B. Yager's briefing on this issue here fails to identify what testimony he believes was improperly admitted, or which findings of fact need to be "reversed" because they were based on allegedly inadmissible evidence.

Pursuant to Mont. R. App. P. 12(1)(d), the Appellant's Opening Brief must contain a "statement of facts relevant to the issues presented for review, with references to the pages or the parts of the record at which material facts appear." Similarly, the argument must contain the contentions of the appellant with citations to the record relied upon. Mont. R. App. P. 12(1)(g).

As explained above, Yager did not object to any witness testimony on the ground that it was based on the witness's viewing of the video recordings of the September 5, 2018, incident. Nor has Yager identified in his opening brief what testimony he believes was improperly admitted or provided any citations to the record where that evidence was admitted. (*See* Appellant's Br. at 4-5, 23-27.) Although he argues that MDC's "entire case" was based upon information from the video recordings, that is simply not true. Many of the documents provided by MDC to the UI Division and entered into evidence in this proceeding without objection, as well as much of the testimony of MDC staff members admitted into evidence during the hearing—again, without objection—was related to the substance of MDC's policies and procedures that applied to Yager as the registered nurse on staff that evening, his knowledge of those policies and procedures, his failure to provide any information about what occurred in Client 2054's room in his written and oral reports and statements regarding that events of September 5, 2018, and the reasons provided by MDC for his termination.

More importantly, he has not identified which of the hearing officer's or the Board's findings of fact are allegedly "based upon the unseen video(s)" and should therefore be reversed.[8] (Appellant's Br. at 27.) It is not the responsibility of the

[8] Yager actually faults the district court for "failing to reverse any finding based upon the unseen video(s)" without identifying any such findings. (Appellant's Br. at 27.)

Appellee—or this Court—to determine exactly what evidence Yager contends was improperly admitted or how it affected the underlying decision in this case. This Court should refuse to address this issue as Yager has violated the rules of appellate procedure and not adequately briefed it for appeal.

C. In any event, neither the hearing officer nor the Board relied upon testimony from MDC's witnesses regarding what the witnessed on the video recordings.

Again, Yager insists that "any finding based upon the unseen video(s)" must be reversed, Appellant's Br. at 27, but he identifies none. That is because the hearing officer's decision, and the Board's decision affirming it, do not discuss or rely on any witness testimony regarding the substance of the video recordings. The hearing officer based his findings of fact on the testimony of Yager and McCabe, Yager's prior admissions and statements regarding the incident, and the documentary evidence regarding MDC's policies and procedures that was admitted without objection. Specifically, the hearing officer made no findings regarding whether McCabe pushed Client 2054 before he fell, and did not base his decision on any testimony indicating that she had. Rather, the hearing officer found that "Yager testified credibly that he did not see McCabe put her hands on the client when he moved backward into his room and his testimony was collaborated by McCabe." (App. A at 7.) Similarly, the Board's decision is devoid of any mention of the video recordings or the testimony regarding them. (*See* App. B.) To the

contrary, the written decisions show the hearing officer and the Board relied exclusively on Yager's own witnesses' testimony and prior statements regarding the incident. That Yager testified in his own case instead of being called as a witness by MDC is irrelevant. That testimony was still before the hearing officer—as were Yager's prior admissions in the documents entered into the record without objection.

And, as discussed above, there was substantial evidence in the record to support the Board's findings of fact without reference to any video recordings. And that is exactly what the district court concluded: "The . . . statements from Yager himself satisfy the standard for review of a decision by the Board. These statements are more than a scintilla of evidence in support of the Board's findings, *not counting other testimony the Board considered that McCabe may have shoved Client 2054 into his room*, causing him to stumble backward and land on his mat." (App. C at 8-9.) In other words, the district court concluded the admission of the testimony regarding the video recordings, even if in error, was harmless and did not affect Yager's substantial rights. Should this Court choose to address this unpreserved issue, it should do the same and affirm the Board's decision.

CONCLUSION

Based on the foregoing, DPHHS respectfully requests that this Court affirm the Board's decision that Yager is disqualified from receiving unemployment benefits because there is substantial evidence in the record supporting the Board's decision and the Board correctly concluded that Yager was discharged for misconduct connected with his work.

Respectfully submitted this 4th day of August, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 8,949 words, excluding certificate of service and certificate of compliance.

/s/ Tammy A. Hinderman
TAMMY A. HINDERMAN

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0206

BRENT YAGER,

Petitioner and Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRY, UNEMPLOYMENT INSURANCE APPEALS BOARD, STATE OF MONTANA, DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES,

Respondents and Appellees.

APPENDICES

CERTIFICATE OF SERVICE

I, Tammy Ann Hinderman, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 08-04-2020:

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