

**WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**DON CREMEANS,**

**Grievant,**

**v.**

**Docket No. 2023-0564-CONS**

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

**Respondent.**

**DECISION**

Grievant, Don Cremeans, was employed by Respondent, Department of Health and Human Resources/Mildred Mitchell Bateman Hospital. On September 27, 2022, Grievant filed a grievance (assigned Docket No. 2023-0258-DHHR) against Respondent over a verbal reprimand issued on September 26, 2022. The grievance stated, "Unjustified reprimand, Harassment, Hostile Work Environment." As relief, Grievant requested, "To be made whole in every way including removal of reprimand, cessation of harassment and cessation of Hostile Work Environment."

On December 6, 2022, Grievant filed a second grievance (assigned Docket No. 2023-0457-DHHR) against Respondent directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). It stated, "Unjustified Termination." For relief, Grievant sought, "To be made whole in every way including but not limited to return with Payment for anytime lost with interest, as well as any applicable benefits and tenure accrual." These grievances were consolidated into the current action on January 18, 2023, and proceeded directly to level three.

A Level three hearing was held before Administrative Law Judge (ALJ) Carrie LeFevre at the Grievance Board's Charleston office on March 1, 2023. Grievant appeared in person and was self-represented. Respondent appeared by Ginny Fitzwater and was

represented by Steven R. Compton, Deputy Attorney General. This matter became mature for decision on March 31, 2023, upon the receipt of each party's proposed findings of fact and conclusions of law. On April 25, 2023, this matter was reassigned to ALJ Joshua Fraenkel for administrative reasons.

### **Synopsis**

Grievant was employed by Respondent, DHHR/Bateman Hospital. Grievant was dismissed due to policy violations for disclosing a coworker's location to someone the coworker had a protective order against and then discussing the subsequent investigation with coworkers. Respondent proved good cause for dismissal. Accordingly, the grievance is **DENIED**.

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

### **Findings of Fact**

1. Grievant was employed as a Building Maintenance Mechanic at Mildred Mitchell Bateman Hospital (Bateman), a psychiatric facility operated by the West Virginia Department of Health and Human Resources (DHHR), hereinafter "Respondent."
2. On September 9, 2022, at 8:00 a.m., Grievant was directed by his supervisor, Harry Dunfee, to paint two door frames.
3. Five and a half hours later, Mr. Dunfee directed Grievant to spackle holes in rooms that needed to be painted. Grievant responded that he was still painting the door frames. Grievant never followed the directive to spackle the holes.
4. On September 26, 2022, Mr. Dunfee issued a verbal reprimand to Grievant for failing to follow an order.

5. The verbal reprimand and Mr. Dunfee's subsequent discussion with Grievant were documented as follows: Grievant "sits in his office about all day," "[i]t does not take all day to paint two door frames," Mr. Dunfee told Grievant that "he needs to use his time more wisely and get more accomplished," and Grievant refused to sign the verbal reprimand and repeatedly stated that spackling is "not his job."

6. The job description for Building Maintenance Mechanic specifically includes painting and provides, in part, "reads work order or receives instructions from supervisor regarding painting[,] Fills nail holes, cracks and joints with caulk, putty, plaster or other filler[,] and "paints surfaces with brushes, spray gun, or paint rollers."

7. Grievant had previously been upset that he was not chosen for another position that was limited only to painting. Whereupon Grievant became a member of a private Facebook chat group called "Fighting Back." This group consisted of both current and former employees of Bateman Hospital. The group was created by a former employee named Linda Jenkins who was dismissed by Bateman Hospital for policy violations. See *Jenkins v. DHHR*, Docket No. 2020-0896-CONS (July 20, 2022).

8. Tammy Kuhn, HR Director for Bateman Hospital, obtained a protective order against Ms. Jenkins for threats and threatening behavior towards her by Ms. Jenkins.

9. On November 16, 2021, Ms. Jenkins and others on "Fighting Back" engaged in a group chat regarding a hearing that had been scheduled that same day for Ms. Kuhn's protective order against Ms. Jenkins. During the chat, someone asked if Ms. Kuhn had shown up for the hearing. In response, Grievant wrote to the group, "car still here."

10. A few months later, Ms. Kuhn received a copy of the group chat from an employee who had contacted her with concern for her safety. Ms. Kuhn contacted the authorities. An investigation was initiated by the Office of Inspector General (OIG).

11. Grievant was interviewed by Robert Lane, Deputy Director of OIG. During that interview, Grievant admitted that he suspected at the time that Ms. Kuhn had a protective order against Ms. Jenkins. However, Grievant claimed that his text ("car still here") was in reference to Mr. Dunfee and another employee being off hospital property and their personal cars still in the parking lot. Grievant claimed he was directing the text by group chat to Union Representative Samantha Crockett.

12. Mr. Lane informed Grievant that the investigation and the investigative interview were confidential and that he was not permitted to discuss them with anyone else.

13. Grievant subsequently violated this directive when he told coworker Steven Day about the investigation. Mr. Day informed investigators.

14. Grievant was brought in for another interview with Mr. Lane. Whereupon Grievant admitted that he had discussed the interview with coworkers Randall Black (Otis) and Hailey Swann (Grievant's girlfriend) but denied that he had discussed it with Mr. Day. Grievant continued to deny that his text ("car still here") was about Ms. Kuhn and stated that he did not even know what kind of car she drove.

15. The OIG investigation determined that Grievant intentionally provided false statements to investigators about the group chat. It also determined that Grievant's explanation of the text ("car still here") was not credible and that his comment could have placed Ms. Kuhn in danger. Grievant admitted to investigators that he violated policy by discussing the investigation with coworkers.

16. A predetermination meeting was held November 14, 2022. Grievant continued to deny that the text was about Ms. Kuhn or her car. He claimed that "there was no reason to divulge information about a Bateman employee's vehicle to a former employee." However, Grievant did admit that, in addition to discussing the investigation

with Mr. Black and Ms. Swann, he had discussed the investigation with Mr. Day. He also admitted, after initially keeping this information from Mr. Lane, that he had discussed the investigation with coworker “Don the Pastor” to determine his rights.

17. Grievant had previously received progressive discipline. On September 18, 2020, Grievant received a verbal reprimand for smoking on hospital grounds, recording the meeting without prior permission, playing the recording for a coworker, and posting information about the meeting on Facebook. On March 12, 2021, Grievant received a written reprimand, for making threatening comments towards the hospital CEO and the head of security.

18. As a result of his recent conduct and progressive discipline, Grievant was dismissed from his employment, effective December 13, 2022, by letter dated November 28, 2022.

19. The letter gave the following reasons for dismissal:

[Y]ou provided the location of a fellow employee, Tamara Kuhn, Human Resources Director for Mildred Mitchell Bateman, who was under court ordered protection for her safety, via a private Facebook Group Chat in which you shared information stating, “car is still here”, to the former employee, Linda Jenkins, that the court order protection was against, which potentially placed Ms. Kuhn in danger. You compromised the integrity of the investigation by discussing the investigation after being provided specific instructions not to do so.

20. The letter went on to specify the following policy violations:

DHHR Policy Memorandum 2108 Employee Conduct, which provides; Employees are expected to; Comply with all relevant federal, state, and local laws; Comply with all Division of Personnel, Department, and Agency policies; Conduct themselves professionally in the presence of residents, patients, clients, fellow employees, and the public; Employees are prohibited from; Engaging in illegal acts while on state

property or while conducting activities related to their employment.

DHHR Policy Memorandum 2123, Hostile Work Environment, which provides; It is the responsibility of Employees as a condition of employment/service with DHHR to: protect the rights of others; not place others at risk to their safety, health, and welfare; not participate in bullying or any type of harassment at work. DHHR prohibits behaviors which contribute to the creation of a Hostile Work Environment. The types of behaviors prohibited include but are not limited to: Intrusion – pestering, spying or stalking.

Mildred Mitchell Bateman Hospital Behavior Code of Conduct, which provides employees will demonstrate integrity, honesty, and fairness in carrying out their duties; report any condition or infraction of law, safety standard, etc. to appropriate level of leadership; protect the confidentiality, safety and dignity of patients, visitors, and co-workers; and adhere to all DHHR, BHHR, and Mildred Mitchell Bateman Hospital policies.

21. The letter reiterated Grievant's response at the predetermination conference to the allegations against him:

[T]hat you had no knowledge about the car and thought it was about a car Harry bought, however, you couldn't explain when asked why if you thought the conversation was about Harry, your response in the group chat of "Car still here" was directly in response to Samantha Crockett's question "Did she show". You stated that you didn't know there was a court order and that you wouldn't do anything to knowingly hurt anyone. You responded when questioned that you were aware that Linda Jenkins, Samantha Crockett, and Cindy Parsons (who participated in the group chat) were no longer employees of Mildred Mitchell Bateman Hospital at the time of the conversation (November 16, 2021), and that there was no reason for you to divulge a Bateman Employee's vehicle location to any former employees. You advised that you had discussed the investigation with "Don the pastor" to find out about your rights. ... You had not advised the OIG investigator that you spoke with Mr. Scott. You did admit that you talked to Otis in Maintenance, and to Steve Day, who was sitting there when you talked to Otis. You also admitted that you discussed the investigation with your girlfriend and stated that you don't believe in keeping secrets from you "sufficient other".

22. The letter detailed Grievant's history of progressive discipline:

You are reminded that repeated attempts have been made to correct your conduct. Prior to this, corrective action has included a verbal reprimand on September 18, 2020, for smoking on hospital grounds, and you recorded the meeting with your supervisor and Ms. Kuhn without prior permission and played the recording for a co-worker and posted information about the meeting on Facebook; and a written reprimand on March 12, 2021, for making threatening comments directed toward the hospital CEO and the head of security. After reviewing your response and having considered your previous disciplinary actions, and all the information made known to me, I have decided that your dismissal is warranted.

23. DHHR Policy Memorandum 2108 states in section E, in relation to investigations and witness testimony, that "Employees are expected to cooperate fully with any...investigation (E.1.) and "are expected to answer all questions openly and honestly as proper stewards of the public trust." (E.1.b.). Section E.2. states that "Employees are expected to keep all information related to an investigation or hearing in strictest confidence" and Section E.3. states that "Employees are expected not to discuss the nature of any questions asked during an investigation." DHHR Policy Memorandum 2123 further states that "Employees who fail to provide truthful information and/or cooperate fully with investigators may be subject to disciplinary action up to and including dismissal."

24. During the level three hearing, Grievant admitted on cross examination that his text ("car still here") was about Ms. Kuhn and was in response to the group chat over whether Ms. Kuhn had gone to the hearing.

### **Discussion**

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W. VA. CODE ST. R. § 156-1-3 (2018). “The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Permanent state employees who are in the classified service can only be dismissed “for good cause, which means misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.” Syl. Pt. 1, *Oakes v. W. Va. Dep’t of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm’n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *Sloan v. Dep’t of Health & Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004) (*per curiam*). See also W. VA. CODE ST. R. § 143-1-12.2.a. (2016). “‘Good cause’ for dismissal will be found when an employee’s conduct shows a gross disregard for professional responsibilities or the public safety.” *Drown v. W. Va. Civil Serv. Comm’n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988) (*per curiam*).

Grievant grieves his verbal reprimand and dismissal. Grievant was dismissed for various DHHR and Bateman Hospital policy violations related to revealing the location of Ms. Kuhn’s vehicle in a group chat on Facebook and then lying to investigators. DHHR Policy Memorandum 2108, Employee Conduct, provides in part, “Employees are expected to comply with all Division of Personnel, Department, and Agency policies.”



DHHR Policy Memorandum 2123, Hostile Work Environment, provides in part, “It is the responsibility of Employees as a condition of employment/service with DHHR to: protect the rights of others; ***not place others at risk to their safety, health, and welfare*** and not participate in bullying or any type of harassment at work.”

Mildred Mitchell Bateman Hospital's Behavior Code of Conduct further provides that “employees will demonstrate integrity, honesty, and fairness in carrying out their duties; report any condition or infraction of law, safety standard, etc. to appropriate level of leadership; ***protect the confidentiality, safety and dignity of patients, visitors, and co-workers; and adhere to all DHHR, BHHF, and Mildred Mitchell Bateman Hospital policies.***”

DHHR Policy Memorandum 2108 states in section E, in relation to investigations and witness testimony, that “Employees are expected to cooperate fully with any...investigation (E.1.) and “are expected to answer all questions openly and honestly as proper stewards of the public trust.” (E.1.b.). Section E.2. states that “Employees are expected to keep all information related to an investigation or hearing in strictest confidence” and Section E.3. states that “Employees are expected not to discuss the nature of any questions asked during an investigation.” DHHR Policy Memorandum 2123 further states that “Employees who fail to provide truthful information and/or cooperate fully with investigators may be subject to disciplinary action up to and including dismissal.”

Grievant claims that he was not aware of the protective order at the time he sent the text. Therefore, credibility determinations must be made. In situations where “the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required.” *Jones v. W. Va. Dep’t of Health &*

*Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res.*, Docket No. 2009- 0540-DOC (Nov. 13, 2009); See also *Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) Demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. *Harold J. Asher & William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board*, 152-153 (1984). Additionally, the ALJ should consider: 1) The presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Grievant's credibility is questionable. He was not fully cooperative or truthful in the investigation and predetermination meeting. Despite opportunities to correct his statements, Grievant maintained that the text in the group chat was not about Ms. Kuhn's car. It was only after cross examination at the level three hearing that he finally admitted that he knew his text in the group chat was about Ms. Kuhn's car being at the hospital. Grievant also denied speaking to Mr. Day during the OIG interview but later admitted during the predetermination meeting that he did talk to Mr. Day about the investigation. Grievant failed to disclose until later that he also spoke to "Don the pastor" about the investigation.

A review of Grievant's texts in the group chat reveals that the conversation was about the protective order hearing involving Ms. Jenkins and Ms. Kuhn. Ms. Kuhn testified that there was a protective order hearing scheduled that day and that it was commonly

known that Ms. Jenkins had made threats which led to the protective order. The Facebook chat group was created by Ms. Jenkins and contained various employees and former employees of the Bateman Hospital. Thus, the whereabouts of another employee should not have been discussed in this forum and, under the circumstances, potentially put Ms. Kuhn at risk. Grievant had motive to not be forthright. Thus, his contention that he was not aware of the protective order or the situation between Ms. Kuhn and Ms. Jenkins is not credible.

As discussed above, it is undisputed that Grievant did not fully cooperate or provide truthful answers during the investigation. Grievant, admittedly, did not hold the investigation in strict confidence when he discussed the investigation with multiple coworkers. Grievant had been instructed by Mr. Lane not to discuss the investigation and knew it was a violation of policy to do so, as demonstrated by his signed acknowledgment of policy.

Respondent proved that dismissal of Grievant was reasonable and not arbitrary and capricious. An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). “Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996).”

*Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), aff'd Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

“[T]he “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).” Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). “While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer].” *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), aff'd Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), aff'd Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), appeal refused, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003). Considering the seriousness of Grievant's conduct and history of progressive discipline, Respondent acted reasonably in dismissing Grievant. Respondent proved by a preponderance of the evidence that Grievant's actions justified his dismissal.

As for his verbal reprimand, Grievant was told by his supervisor at 8 a.m. to paint two door frames. By 1:30 p.m., Grievant had not completed that task. Grievant was told to finish painting and to spackle holes so the rooms could be painted. Grievant failed to follow this directive. Respondent was reasonable in expecting Grievant to complete these tasks in a timely manner. Respondent proved that Grievant should have painted the door frames in less than five and a half hours and that Grievant refused to spackle the holes. Grievant offered no reasonable explanation for the delay in painting and for refusing to spackle the

holes. The tasks of painting and filling holes are within Grievant's job description. A verbal reprimand is the lowest form of discipline and is utilized to advise and correct the performance or conduct that fails to meet expectations. Thus, Respondent acted reasonably in issuing the verbal reprimand.

Lastly, because the dismissal is upheld, Grievant's claims of harassment and hostile work environment are moot. "Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." *Burkhammer v. Dep't of Health & Human Res.*, Docket No. 03-HHR-073 (May 30, 2003) (*citing Pridemore v. Dep't of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996)). Thus, this grievance is **DENIED**.

The following Conclusions of Law support the decision reached.

### **Conclusions of Law**

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W. VA. CODE ST. R. § 156-1-3 (2018). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. Permanent state employees who are in the classified service can only be dismissed "for good cause, which means misconduct of a substantial nature directly

affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.” Syl. Pt. 1, *Oakes v. W. Va. Dep’t of Finance and Admin.*, 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm’n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *Sloan v. Dep’t of Health & Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004) (*per curiam*). See also W. VA. CODE ST. R. § 143-1-12.2.a. (2016). “‘Good cause’ for dismissal will be found when an employee’s conduct shows a gross disregard for professional responsibilities or the public safety.” *Drown v. W. Va. Civil Serv. Comm’n*, 180 W. Va. 143, 145, 375 S.E.2d 775, 777 (1988) (*per curiam*).

3. Respondent proved its allegations by a preponderance of evidence and good cause to dismiss Grievant.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Intermediate Court of Appeals.<sup>1</sup> Any such appeal must be filed within thirty (30) days of receipt of this decision. W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal

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<sup>1</sup>On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over “[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]” W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.

petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

**Date: May 9, 2023**

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**Joshua S. Fraenkel**  
**Administrative Law Judge**