THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BRANDI DAVIS,
Grievant,

v. **Docket No. 2025-0628-DHF**

DEPARTMENT OF HEALTH FACILITIES/
MILDRED MITCHELL BATEMAN HOSPITAL,
Respondent.

DECISION

Grievant, Brandi Davis, was employed by Respondent, Department of Health Facilities ("DHF"), at Mildred Mitchell-Bateman Hospital ("MMBH"). On April 29, 2025, Grievant filed this grievance against Respondent, with a detailed statement, regarding her termination based upon allegations of failing to collect vital signs and entering falsified vital signs into the patients' digital record. For relief, Grievant is "requesting a formal review of my termination and an investigation into the conduct of the unit manager regarding this situation. I am seeking either reinstatement to my position or appropriate remedial action for the unjust and retaliatory nature of my dismissal."[1]

The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held on September 3, 2025, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant appeared in person and was self-represented. Respondent appeared by Tamara Kuhn, Director of Human Resources, and was represented by counsel, Assistant Attorney General, James Wegman. This matter became mature for decision on October 1, 2025,

[1] Grievant's request for investigation of the unit manager is not within the jurisdiction of the Grievance Board and, thus, will not be addressed.

upon receipt of Respondent's written Proposed Findings of Fact and Conclusions of Law. Grievant did not submit a written proposal.

Synopsis

Grievant was employed as a Health Service Worker for the Department of Health Facilities at Mildred Mitchell Bateman Hospital. Respondent terminated Grievant's employment for Grievant's neglect of patients by failing to obtain vital signs and documenting false vital signs into the patients' digital records. Respondent proved by a preponderance of the evidence that it had good cause to dismiss Grievant for insubordination due to her failing to accurately complete her duties, failing to abide by MMBH policies, and falsifying an official agency record. Respondent did not violate any law, rule, or policy or act in an arbitrary and capricious manner by terminating Grievant's employment. Grievant failed to prove discrimination or mitigation. 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 a permanent employee for the Department of Health Facilities ("DHF") as a Health Service Worker at Mildred Mitchell Bateman Hospital ("MMBH").

2. Mildred Mitchell Bateman Hospital is an acute care psychiatric hospital operated by the DHF.

3. Grievant's duties and expectations as a Health Service Worker included "[k]nowledge of the policies and procedures of the department, facility or service entity" and "[t]akes and records temperature, blood pressure, pulse and respiration rates, and

food and fluid intake and output, as directed into computerized patient records," Grievant signed the "Functional Job Description" document on April 23, 2023, attesting that she had received the opportunity to review and discuss its contents. Respondent Ex. 2.

4. Grievant previously received coaching or corrective action by Respondent on five occasions—already four infractions in 2025, including two for poor attendance. Most significantly, on January 30, 2025, Grievant was coached for her failure to obtain and chart patients' vital signs. Respondent Ex. 1, 12, 13, 14, 15, and 16.

5. On March 4, 2025, Grievant and a coworker were assigned to the assessment of vital signs for all patients on Unit 2 for the hours of 7:00 a.m. to 8:00 a.m. Respondent Ex. 3.

6. Grievant and the coworker were expected to use the necessary medical equipment to determine and record the patient's temperature, pulse, respiration, blood pressure, and oxygen saturation in the vital signs book and the patient's digital record. Respondent Ex. 2, 3.

7. On March 5, 2025, Grievant received a verbal reprimand for two infractions. On March 4, 2025, Grievant refused to assist a nurse to get a patient out of bed, because she claimed to be charting vital signs, which violated MMBHC038 Behavioral Code of Conduct. The supervisor's documentation of the verbal reprimand recited that, over the prior two weeks, Grievant had been observed numerous times laying in empty beds using her cellphone, in violation of MMBHC017 Personal Electronic Device Use. Respondent Ex. 16.

8. The investigation of the verbal reprimand regarding Grievant's refusal to assist the nurse on March 4, 2025, prompted Respondent to monitor the video

surveillance footage for Unit 2. That investigation led to the instant allegations of neglect against Grievant and two coworkers. For any allegation of abuse or neglect, MMBH suspends the employee during the investigation. T. Kuhn testimony.

9. Grievant was suspended without pay during the investigation into the events of March 4, 2025. T. Kuhn testimony.

10. Three employees, Grievant, J. Jones, and J. Dillon, were suspended pending the investigation regarding patient neglect. T. Kuhn testimony.

11. An investigation was initiated by the Patient Grievance Review Committee ("PGRC") on March 17, 2025, and a complaint of neglect for each patient on Unit 2 was lodged with Adult Protective Services, Department of Human Services. T. Kuhn testimony.

12. An independent investigation was also conducted and substantiated by third party, Legal Aid of West Virginia ("LAWV"), which provides advocacy for patients of MMBH. T. Kuhn testimony.

13. The results of the investigation by Adult Protective Services, Department of Human Services, are not often provided to MMBH and do not affect the findings of MMBH. T. Kuhn testimony.

14. Dana Early, registered nurse and safety specialist with Quality Assurance Performance Improvement, was assigned to investigate the allegations against Grievant in her capacity as a member of the PGRC. In that capacity, Ms. Early watched and assessed the surveillance video of all related areas of Unit 2 for the relevant time periods on March 4, 2025, and did not see J. Jones or Grievant collect vital signs from any patients on Unit 2. D. Early testimony.

15. On April 3, 2025, the PGRC completed a resolution form for each patient on Unit 2, regarding their investigation. The PGRC summarized the issue as "Reported neglect of patient due to not completing vital signs as assigned and falsification of documentation attesting to their completion," and determined "[e]vidence does support the allegations of neglect by staff. To be referred to Human Resources for progressive discipline." Respondent Ex. 18.

16. The resolution further states, "Vital signs equipment obtained and seen sitting on desk between both staff, never utilized. Staff observed writing in vital signs book and entering information in computer." This statement was included on the form for each of the nineteen patients. Respondent Ex. 18.

17. The PGRC investigation substantiated the allegations against Grievant regarding the events of March 4, 2025. T. Kuhn and D. Early testimony.

18. Tamara Kuhn, Human Resources Director at MMBH, watched and assessed the surveillance video of all related areas of Unit 2 for the relevant time periods on March 4, 2025. She did not see J. Jones or Grievant collect vital signs from any patients on Unit 2. She saw J. Jones writing in the vitals book and Grievant typing at the computer. T. Kuhn testimony.

19. Grievant was given notice of the predetermination conference by letter of April 7, 2025, which advised Grievant of the allegations against her and the corresponding sections of the policy violations. The letter included a statement that Grievant could have a representative attend with her. Respondent Ex. 17.

20. Ms. Kuhn, Carla Hutchinson, and Jami Boykin, participated in the predetermination conference on April 14, 2025, to inform Grievant that disciplinary action

was being considered and provided the opportunity for Grievant to explain the circumstances. Respondent Ex. 1.

21. At the predetermination conference, Grievant admitted that she was assigned the task of vital signs for the 7:00 a.m. to 8:00 a.m. slot on March 4, 2025. Grievant admitted receiving training and that she had been doing vital signs since she came to MMBH. When asked if she took vital signs on March 4, Grievant stated, "I don't recall what happened or whatever, but I'm pretty sure." Ms. Boykin reminded Grievant that she admitted, during another meeting, that she did not complete the vitals. Respondent Ex. 1.

22. In the level three hearing, Grievant admitted that she did not take the vital signs of the patients and falsified the vital signs in the patients' digital record. Grievant testimony.

23. The female coworker, J. Jones, also assigned to vitals during the 7:00 a.m. to 8:00 a.m. shift was terminated for documenting falsified vital signs data into the vital signs book. T. Kuhn testimony.

24. The male coworker, J. Dillon, who was also assigned to vital signs, was not terminated but received coaching to verify accuracy in the future. He repeatedly asked J. Jones about taking the vital signs. He did not record any false vital signs, but he took no action to verify that vital signs had been checked. T. Kuhn testimony.

25. Based on the substantiation of the allegations by the Patient Grievance Review Committee, the decision was made to terminate Grievant's employment. T. Kuhn and D. Early testimony.

26. Due to the seriousness of falsifying patient vital signs in the patient record, policy did not require progressive discipline. The behavior was “egregious enough” for immediate dismissal. T. Kuhn testimony; Respondent Ex. 11.

27. By letter dated April 16, 2025, Respondent notified Grievant that her employment was terminated for patient neglect, violation of policy, and insubordination. The dismissal letter recites the conversation on April 14, 2025. Based on the Grievant’s action and responses in that predetermination conference, Respondent determined that dismissal was warranted. The letter lists the policies violated by Grievant and prior corrective action, stating “Despite these management interventions, you have failed to meet reasonable expectations.” Respondent Ex. 1.

28. The dismissal letter specifically references detailed examples of reasons for disciplinary actions which apply to Grievant’s actions: failure to accurately complete duties; failure to abide by policies and procedures; and falsifying an official agency document or record. Respondent Ex. 1 and 11.

29. Falsifying vital signs is considered by Respondent to be “neglect” of the patient, which requires a complaint of neglect to be lodged with Adult Protective Services, Department of Human Services, for each individual patient. T. Kuhn testimony; Respondent Ex. 9.

30. Grievant did not take the vital signs of the patients and falsified the vital signs in the patients’ digital record.

31. Grievant failed to participate in the investigation, in violation of Office of Shared Administration Employee Conduct Policy OSA-PM-2108. T. Kuhn testimony; Respondent Ex. 1 and 8.

32. MMBH Policy MMBHC038 Code of Conduct requires all employees to adhere to all DHF and MMBH policies and demonstrate integrity, honesty, and fairness in carrying out their duties. Respondent Ex. 1 and 5.

33. MMBH Policy NURf42 VI. B. requires that responsibility for vital signs shall be assigned to staff for each shift. Respondent Ex. 1 and 6.

34. MMBH Policy NURc19 mandates that "[d]ocumentation by nursing staff members will be concise, accurate, and thorough." Section VII. M. requires staff to "[d]ocument procedure after you have performed them, never in advance." Section VII. P. says, "Document only the care you provided." Respondent Ex. 1 and 7.

35. Office of Shared Administration Employee Conduct Policy OSA-PM-2108 at 2.2.3 requires employees to comply with all policies; 2.2.4 requires employees to be thorough and accurate when completing business records; 2.2.6 requires employees to follow directives of their management personnel; 2.3.7.a defines direct insubordination as the intentional refusal to comply with a rule or directive of a superior; 2.6.3.b requires employees to answer all questions openly and honestly as proper stewards of the public trust. T. Kuhn testimony; Respondent Ex. 1 and 8.

36. MMBH Policy MMBHE018 defines "neglect" as actions of omission or commission within West Virginia Code § 9-6-1(4), which is "the unreasonable failure by a caregiver to provide the care necessary to maintain the safety or health of a vulnerable adult…" and violates the patient's rights in 42 CFR § 482.13.[2] Respondent Ex. 1 and 9.

[2]MMBH Policy MMBHE018 definition of "neglect" contains inaccurate references to W. Va. Code § 9-6-1(3) which is the definition of "abuse" and incorrect statements attributed to 42 CFR 482.13, which relates to patient's rights. However, this inconsistency does not affect the undersigned's application of said policy in this grievance.

37. Persons with mental illness are vulnerable and have the right to be free from neglect and abuse. Respondent Ex. 9.

38. MMBH Policy MMBHF084 requires nursing staff to provide necessary observation of patients to maintain safety and security. Respondent Ex. 1 and 10.

39. MMBH Policy MMBHC015 provides the system of progressive discipline for employees. Good cause for initiation of disciplinary measures is described as "[a]ny action that reflects discredit … and is a direct hindrance to quality patient care and/or a direct hindrance to the effective performance of departmental functions…." Section I, paragraphs 4, 5, 10, and 13 respectively, include "[f]ailure to accurately complete duties, as assigned," "[f]ailure to abide by … policies and procedures," [i]nsubordination…," and "[f]alsifying any official agency document or record." Further, Section II. E. allows dismissal for cause with a written notice to the employee which states detailed reasons for dismissal. Respondent Ex. 1 and 11.

40. Respondent routinely dismisses employees when Human Resources is notified and an APS complaint is filed. T. Kuhn testimony.

41. Grievant asserted that nurses routinely cut and paste patient notes with no repercussions. Although Ms. Kuhn agrees that cutting and pasting could constitute falsifying documentation in a patient record, she was not aware of any specific instances that had been presented to the office of Human Resources but such an offense could result in disciplinary action. T. Kuhn testimony.

42. Grievant asserted that her work environment became hostile and uncomfortable. She further states, "this incident was used as a pretext for termination in retaliation for my earlier written response. If I had not submitted that statement

challenging the original write-up, I do not believe this incident would have been pursued in the same manner. The selective enforcement and inconsistent application of policies, … demonstrate a clear bias and unfair treatment."

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. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

Grievant was a permanent state employee in the classified service. Thus, she can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin*., 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* W. VA. CODE ST. R. § 143-1-12.2.a (2022).

Respondent asserts Grievant was properly terminated from employment based upon findings that she neglected nineteen patients on Unit 2 by failing to obtain and document each patient's vital signs as assigned to her and required by specific MMBH policies and constituted insubordination. Although Grievant admits that she did not obtain each patient's vital signs and entered false data in the patients' digital records, Grievant

counters that Respondent discriminated against her and should not have terminated her. Grievant asserts that other MMBH employees have not been terminated for similar violations of policy.[3]

On March 4, 2025, Grievant was assigned to the hourly assessment of vital signs for all patients on Unit 2 for the hours of 7:00 a.m. - 8:00 a.m. As a health service worker, Grievant routinely "[t]akes and records temperature, blood pressure, pulse and respiration rates, and food and fluid intake and output, as directed into computerized patient records." In the predetermination conference, Grievant stated that she has performed this task since she started at MMBH. However, although she understood the assignment and possessed the knowledge to perform the task of vital signs, Grievant admits that she failed to take patient vital signs and documented false vital signs for each patient on Unit 2 on March 4, 2025.

"'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's actions portrayed blatant disregard for Respondent's interest and the wellbeing of the patients. Moreover, Grievant ignored known policies of MMBH and violated the patients' right to be free from neglect.

"'Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions.' *Reynolds v. Kanawha-Charleston Health Dep't,* Docket No. 90-H-128 (Aug. 8, 1990). "[F]or there to be 'insubordination,'

[3] Grievant also alleged retaliation and hostile work environment but presented no evidence to prove those claims. Therefore, those claims will not be further addressed.

the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd*., 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). The Grievance Board has further recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988), *aff'd*, *Sexton v. Marshall Univ.*, 182 W. Va. 294, 387 S.E.2d 529 (1989).

Grievant was assigned the task of assessing vital signs and refused to complete the assignments, effectively neglecting the nineteen patients on Unit 2. Although the patients are generally stable, vital signs must be monitored multiple times each day. The patients receive medications. Those medications can impact vital signs by causing changes in blood pressure, respiration, or pulse, which could indicate an urgent medical emergency. Despite Respondent's clear and specific instruction, Grievant committed insubordination when she willfully failed to perform this very important task which she had been previously trained to perform. Thus, Respondent had good cause to dismiss Grievant for her failure to accurately complete these duties, failure to abide by policies and procedures; and falsifying an official agency document or record.

Grievant believes that Respondent acted in an arbitrary and capricious manner, because she should not have been terminated. 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). Respondent has a duty to ensure that employees of a psychiatric hospital comply with laws and rules established to protect patients. Dismissal of Grievant was necessary to reinforce the public's interest in the protection of vulnerable persons with mental illness. The substantiation of neglect at the

hands of Grievant warranted termination. There was nothing arbitrary or capricious about Respondent's action.

While Grievant admits the falsification of the vital signs into the patients' digital chart, she claims that she was treated differently than other employees who have committed similar offenses. "Discrimination," for purposes of the grievance process, means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d) (2024). Although she presented no proof, Grievant argued that nurses routinely copy and paste into a patient's records. Ms. Kuhn denied any knowledge of other employees being coached or disciplined for copy and paste, but she agreed that copy and paste could be a violation of policy. Nevertheless, the copy and paste of repetitive medical notes is not the same as Grievant's failure to take vital signs and addition of fictional vital signs to a patient's records. Also, Grievant is not similarly situated to nurses, who hold a different job classification and have unique duties. On the other hand, Respondent dismissed Grievant's coworker, J. Jones, who was similarly situated to Grievant, for her failure to take vital signs and falsification of vital signs into the patients' digital record on March 4, 2025. Thus, Grievant failed to prove discrimination.

Further, Grievant does not believe that she deserved termination and mitigation of the punishment was warranted. "Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's

assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp.*, Docket No. 96-HHR-183 (Oct. 3, 1996). An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995). *See Martin v. W. Va. State Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994); *Cooper v. Raleigh County Bd. of Educ.*, Docket No. 2014-0028-RalED (Apr. 30, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

Grievant was coached regarding a very similar offense in January 2025; thus, Grievant was fully aware of the procedure and importance of collecting the patients' vital signs. Moreover, Grievant was corrected twice in 2025 for poor attendance. Then, Respondent determined that failure to obtain vital signs and falsification of patients' vital signs was egregious enough to justify termination of Grievant—the same as termination

of J. Jones.[4] Immediate dismissal was certainly not disproportionate for this insubordination and betrayal of the public trust. Grievant failed to prove the penalty was excessive. For these reasons, mitigation was not warranted.

Vital signs are important for every patient in MMBH. Clearly, Grievant put the welfare of the patients at risk by not monitoring vital signs as directed. The termination of Grievant's employment was not arbitrary and capricious or in violation of any law, rule, or policy. Respondent proved by a preponderance of the evidence that Grievant's misconduct and insubordination constituted good cause for her dismissal.

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. W. Va. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

2. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1,

[4] J. Dillon received a lesser punishment because he did not record false vital signs on a patient record. He believed J. Jones had obtained the patients' vital signs and did not knowingly acquiesce in misconduct

Oakes v. W. Va. Dep't of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* W. VA. CODE ST. R. § 143-1-12.2.a. (2022).

3. "Although it is true that dismissal is inappropriate when the employee's violation is found to be merely a technical one, it is also true that seriously wrongful conduct can lead to dismissal even if it is not a technical violation of any statute. . . The test is not whether the conduct breaks a specific law, but rather whether it is potentially damaging to the rights and interests of the public." *W. Va. Dep't of Corr. v. Lemasters*, 173 W. Va. 159, 162, 313 S.E.2d 436, 439 (1984). "'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*).

4. "The term gross misconduct as used in the context of an employer-employee relationship implies a willful disregard of the employer's interest or a wanton disregard of standards of behavior which the employer has a right to expect of its employees." *Graley v. Parkways Econ. Dev. & Tourism Auth*., Docket No. 91-PEDTA-225 (Dec. 23, 1991) *(citing Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) and *Blake v. Civil Serv. Comm'n*, 172 W. Va. 711, 310 S.E.2d 472 (1983)); *Evans v. Tax & Revenue/Ins. Comm'n*, Docket No. 02-INS-108 (Sep. 13, 2002); *Crites v. Dep't of Health & Human Res*., Docket No. 2011-0890-DHHR (Jan. 24, 2012).

5. "'Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions.' *Reynolds v. Kanawha-Charleston Health Dep't,* Docket No. 90-H-128 (Aug. 8, 1990). "[F]or there to be

'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd*., 212 W. Va. 209, 212, 569 S.E.2d 456, 459 (2002) (*per curiam*). The Grievance Board has further recognized that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." *Sexton v. Marshall Univ.*, Docket No. BOR2-88-029-4 (May 25, 1988), *aff'd*, *Sexton v. Marshall Univ.*, 182 W. Va. 294, 387 S.E.2d 529 (1989).

6. 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).

7. "'[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).

8. "Discrimination," for purposes of the grievance process, means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d) (2024).

9. "Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996). An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. *Conner v. Barbour County Bd. of Educ*., Docket No.

94-01-394 (Jan. 31, 1995). *See Martin v. W. Va. State Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994); *Cooper v. Raleigh County Bd. of Educ.*, Docket No. 2014-0028-RalED (Apr. 30, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015).

10. Respondent proved by a preponderance of the evidence that Grievant's patient neglect, violation of policy, and insubordination constituted good cause for dismissal. The termination of Grievant's employment was not arbitrary and capricious or in violation of any law, rule, or policy.

11. Grievant failed to establish that the termination of her employment was improper due to discrimination.

12. Grievant failed to prove mitigation of the punishment was warranted.

Accordingly, the grievance is **DENIED.**

"The decision of the administrative law judge is final upon the parties and is enforceable in the circuit court situated in the judicial district in which the grievant is employed." W. VA. CODE § 6C-2-5(a) (2024). "An appeal of the decision of the administrative law judge shall be to the Intermediate Court of Appeals in accordance with §51-11-4(b)(4) of this code and the Rules of Appellate Procedure." W. VA. CODE § 6C-2-

5(b) (2024). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such an appeal and should not be named as a party to the appeal. However, the appealing party must serve a copy of the petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b) (2024).

DATE: November 18, 2025

_____

Kimberly D. Bentley
Administrative Law Judge