

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**DEBRA SUE SPARKS,**  
**Grievant,**

**v.**

**Docket No. 2019-1750-CONS**

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

**DECISION**

Grievant, Debra Sue Sparks, is employed by Respondent, Department of Health and Human Resources at Mildred Mitchell-Bateman Hospital. On April 11, 2019, Grievant filed a grievance against Respondent alleging she had been suspended without good cause, which was assigned docket number 2019-1411-DHHR. On May 10, 2019, Grievant filed a second grievance protesting her termination from employment, which was assigned docket number 2019-1600-DHHR. The grievances were properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). The grievances were consolidated at the joint request of the parties by order entered June 14, 2019. For relief, Grievant seeks reinstatement and back pay.

A level three hearing was held on July 30, 2019, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by counsel, James "Jake" Wegman, Assistant Attorney General. This matter became mature for decision on September 11, 2019, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law, following several extensions of the time to file made by the agreed requests of the parties.

## **Synopsis**

Grievant was employed by Respondent as a Health Service Worker and grieves her suspension and subsequent termination from employment for patient neglect. Grievant was terminated for failing to perform face checks when she documented that she had done so. Respondent proved Grievant failed to perform face checks and falsely documented that she had done so. This is substantial misconduct for which termination of employment is warranted. 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 by Respondent as a Health Service Worker at Mildred Mitchell-Bateman Hospital ("MMBH") and was so employed since 2013.
2. MMBH is a psychiatric hospital which requires heightened levels of security for its patients.
3. MMBH Policy NUR35, Unit Face Checks/Security Checks, requires that "face checks" be done on each patient every fifteen minutes.
4. The purpose of a face check is to account for the presence and well-being of each patient.
5. The staff member performing the check must visually confirm the location and well-being of each patient. If a patient is in bed the staff member must enter the room and confirm "signs of life."
6. The performance of face checks is documented on a form. The form covers a twenty-four-hour period beginning at 7:00 a.m., dated that day and continuing

until 6:59 a.m. the next day. The form lists each patient by room number. The form has a column for each 15-minute check.

7. The staff member performing the check is to record the location of each patient, using the provided codes on the form, and initial at the bottom of the column for each time-period.

8. On April 3, 2019, at 5:01 a.m., video surveillance shows that a female patient, M.S., entered the room of a male patient where she remained for forty-five minutes. The video surveillance shows no staff member performing face checks during this time.

9. On April 3, 2019, Grievant had been assigned to conduct face checks beginning at 5:15 a.m. through 6:45 a.m.

10. The relevant face check form for this time period is dated April 2, 2019, as it begins at 7:00 a.m. that day and runs through 6:59 a.m. on April 3, 2019.

11. Grievant certified on the face check form that M.S. was in bed in her assigned room, 401A, while M.S. was actually in the room of the male patient.

12. On the same date, a *Patient Grievance Form* was filed on behalf of M.S. stating that face checks were not completed between the hours of 4:00 a.m. and 6:00 a.m. which resulted in patient M.S. being in a male patient's room unsupervised for forty-five minutes.

13. The incident was also reported to Adult Protective Services.

14. M.S. was particularly vulnerable as she was psychotic and was confused and disoriented.

15. Grievant had received training on face check procedure on June 17, 2018.

16. Grievant, along with all hospital staff, had received additional coaching regarding face checks on March 5, 2019.

17. By letter dated April 10, 2019, CEO Richards suspended Grievant without pay pending investigations into the allegation that she committed patient neglect by not performing face checks.

18. MMBH policy, MMBHE018 prohibits patient neglect and defines the same as “Any negligent, reckless or intentional failure to meet the needs of a patient, or applicable statutory or regulatory requirements, including but not limited to: lack of needed supervision, nutritional deprivation, or failure to implement or update a treatment plan.” This is the same definition contained in the Department of Health and Human Resources administrative rule, W.VA. CODE ST. R. § 64-59-3.12 (1995).

19. Terri Stone, MA, Legal Aid of West Virginia Advocate, and Sherrie Cox, RN, MMBH Staff Investigator, conducted an investigation that substantiated the allegation of patient neglect based on the face check forms and the surveillance video evidence. In addition to Grievant, neglect was substantiated for two other staff members who had certified that face checks had been completed, and against a staff member who saw M.S. out of bed and entering the other patient’s room and did not alert anyone.

20. Based on substantiated patient neglect in the Legal Aid investigation, on May 6, 2019, a predetermination conference was held. Present were Grievant, her representative, Director of Human Resources Tamara Kuhn, and Director of Nursing Sue Shields. Grievant stated that she had not completed the face checks because she

had been reassigned and that her signature appeared on the face check form because she signs the forms beforehand.

21. By letter dated May 8, 2019, CEO Richards terminated Grievant from employment for failure to complete the face checks in violation of the Code of State Regulations § 64-59-3.12, hospital policy MMBHE018, and DHHR Policy 2108.

22. The employment of the other involved staff members was also terminated.

23. Grievant's employee performance appraisals have all had an overall score within meeting expectations.

### **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 does not dispute that she did not perform the face checks or that she initialed the form for the relevant hours. Instead, Grievant asserts she was not required to perform face checks because she had been reassigned to another duty and that her initials appear on the form because she places her initials on the form at the beginning of her shift. Grievant argues that Respondent did not have good cause to terminate her employment as Grievant committed no intentional misconduct. Grievant also cites in her PFFCL that Grievant has a property interest in her employment and is entitled to

procedural safeguards. However, Grievant provided no explanation what procedural safeguards she failed to receive so that issue will not be further addressed. Respondent asserts Grievant was assigned to do face checks, failed to do them, and falsified the face check record.

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).

Nurse Manager Delores Maynard was credible. Nurse Manager Maynard’s demeanor was calm and professional. Her memory appeared good and she maintained good eye contact. There is no allegation of any bias, prejudice or interest that would undermine her credibility. Nurse Manager Maynard confidently testified that, when Grievant was questioned about the face checks, she assured Nurse Manager Maynard

she had done them. Nurse Manager Maynard's testimony was sufficiently detailed and plausible.

Grievant was not credible. Although Grievant's demeanor was appropriate, Grievant's explanations are not supported by the evidence or plausible. Grievant presented an assignment sheet dated April 3, 2019, showing she was assigned to trash duty from 5:00 a.m. to 6:00 a.m. However, that assignment actually occurred on April 4, 2019. Due to the 24-hour nature of hospital staffing and the workday starting at 7:00 a.m., the hospital's forms for the relevant time period are dated April 2, 2019. They cover the 24-hour period from 7:00 a.m. on April 2, 2019 through 6:59 a.m. on April 3, 2019. Therefore, the assignments and face checks for the relevant hours in the early morning of April 3, 2019 appear on the forms dated April 2, 2019. The time Grievant asserts she was reassigned from face check duty is actually the day after the incident. The correct assignment sheet for the incident shows Grievant was assigned to do face checks.

Further, Grievant's assertion that she places her initials on the form at the beginning of her shift before she actually performs the checks is simply not plausible. It makes no sense for Grievant to place her initials on the form before she performs the duties that her initials certify she has performed. Even though the policy does not specifically instruct that the staff member place their initials on the form only after the face check is performed, it is quite obvious that is the intent. Therefore, it is more likely than not that Grievant falsified the record and has concocted her explanation in an effort to save her job.

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*).

Patient neglect is defined and prohibited by both the administrative rule and MMBH policy. Grievant’s failure to perform the face checks and falsification of the record concealing that face checks had not been done is patient neglect. M.S. was placed in actual danger due to Grievant’s behavior. Grievant had been trained and understood her duties, chose not to perform them, falsified the record stating she did perform them, and lied about her failure when questioned. This is not a simple mistake but substantial misconduct and her efforts to conceal her misconduct demonstrates there is no prospect of rehabilitation.

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, 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 Grievant failed to perform face checks and falsely documented that she had done so. This is substantial misconduct for which termination of employment is warranted.

Accordingly, the grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See 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 so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* W. VA. CODE ST. R. § 156-1-6.20 (2018).

**DATE: October 21, 2019**

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**Billie Thacker Catlett**  
**Chief Administrative Law Judge**