

Case Name:

**Credit Valley Hospital v. Canadian Union
of Public Employees, Local 3252
(Brathwaite Grievance)**

**IN THE MATTER OF an Arbitration
Between
Credit Valley Hospital ("the Hospital"), and
Canadian Union of Public Employees
and its Local 3252 ("the Union")
AND IN THE MATTER OF the Grievance of
N. Brathwaite Grievance #2010-19**

[2012] O.L.A.A. No. 29

214 L.A.C. (4th) 227

109 C.L.A.S. 95

No. MPA/Z101635

Ontario
Labour Arbitration

Panel: Randy L. Levinson (Arbitrator)

Award: January 9, 2012.

(23 paras.)

Labour arbitration -- Discipline and discharge -- Grounds -- Breach of trust.

The grievor was a part-time Environmental Service Representative assigned by the employer hospital. After an outpatient jumped to his death from a parking garage, the grievor was assigned to assist in the cleanup of the scene. The grievor was subsequently terminated for taking pictures of the scene and posting them on his Facebook page. The employer took the position that the grievor violated its Code of Conduct and breached the confidentiality of patient, employee and corporate information. The union submitted that the grievor did not engage in culpable misconduct, as the

employer's policies about confidentiality did not apply to the specific facts in the case. Therefore, discharge was an excessive disciplinary response.

HELD: Grievance dismissed. The grievor engaged in culpable misconduct. The Code of Conduct applied to his actions. He posted two pictures on his Facebook page of the scene with comments about the patient's suicide on Hospital property that others viewed. By so doing, the grievor publicized and disseminated confidential patient information on the internet about this tragic event. It was not just and reasonable in all the circumstances to substitute another penalty for the discharge. The grievor had a checkered disciplinary record, was not remorseful, and did not fully accept responsibility for his misconduct.

Appearances:

For the Hospital: **Robert W. Little (Counsel), Robert Church (Student-at-Law), Diane Zdybal (General Manager, Service Department), Carolyn Nancekivell (Human Resources Manager), Roslyn Bacchus (Supervisor).**

For the Union: **Tracey Pinder (National Representative), Joe Ricci (Local Union President), Cathy DiMauro (Chief Steward), Laird McLeod (Secretary-Treasurer), Denise Murdock (Steward).**

AWARD

Introduction

1 In September 2010, a tragedy occurred at the Hospital. An adolescent outpatient who attended at the Hospital for an appointment with a physician for mental health treatment jumped to his death from one of the multilevel parking garages. Mr. Brathwaite, a part-time Environmental Service Representative (ESR) was assigned to assist with the cleanup of the scene. During his time there, Mr. Brathwaite took two pictures of the scene with his cell phone. He then posted them on his Facebook page, with a caption under each picture. One day later, he deleted the posted pictures. The posted pictures were brought to the Hospital's attention. An investigation followed. Mr. Brathwaite "admitted" that he took one picture of the scene. However, he denied posting it on Facebook. After completing its investigation, the Hospital concluded that Mr. Brathwaite posted two pictures and comments regarding the incident, that he violated its Code of Conduct ("*Code*") and that he breached the confidentiality of patient, employee and corporate information. On September 27, 2010, the Hospital terminated Mr. Brathwaite's employment.

2 The parties disagree about whether Mr. Brathwaite engaged in culpable misconduct. If he did, they further disagree about whether it is just and reasonable in all the circumstances to substitute another penalty for the discharge. I will briefly set out the basic thrust of the parties' arguments. The Hospital submitted that Mr. Brathwaite engaged in a clear and very serious breach of its policies about confidentiality, warranting his termination. The Hospital argued that I should not substitute another penalty for the discharge, given the seriousness of the misconduct, Mr. Brathwaite's poor disciplinary record and his lack of candour throughout. The Hospital further argued that general deterrence should be given a priority, in this case. The Union submitted that Mr. Brathwaite did not engage in culpable misconduct, as the Hospital's policies about confidentiality do not apply to the specific facts here. In that regard, the Union submitted that the incident occurred in a public area, the individual was not identified at the time as a patient at the Hospital, and Mr. Brathwaite was unaware of that fact. The Union submitted that he was at most guilty of poor judgment that was not culpable. The Union argued that Mr. Brathwaite's actions were a momentary aberration, and were not malicious or calculated, as he did not make any slanderous or disrespectful comments about the incident. Alternatively, if Mr. Brathwaite is found to have engaged in culpable misconduct, the Union argued that I ought to substitute another penalty for the discharge. While Mr. Brathwaite was not a perfect employee, the Union submitted that he is committed to improving his work performance. The Union argued that although Mr. Brathwaite lied during the investigation, he was scared, he is remorseful, and he now accepts responsibility. After carefully considering the evidence adduced and the parties' submissions, I conclude that Mr. Brathwaite engaged in culpable misconduct, and that it is not just and reasonable in all the circumstances to substitute another penalty for the discharge.

The facts

3 In June 2005, the Hospital hired Mr. Brathwaite as an ESR. On June 29, 2005, he signed an Employee/Volunteer Confidentiality Form acknowledging the Confidentiality Policy ("*Policy*") of the Hospital. It reads, in part, as follows:

The relationship The Credit Valley Hospital has with patients, staff members and the community it serves is based on trust and respect. It is a reasonable expectation for every patient and staff member that personal information will be treated in complete confidence.

Every employee/volunteer in the performance of his/her duties, at some time, has the opportunity to gain knowledge of personal patient/staff & corporate information. Every employee is expected to respect the confidentiality of all patient/staff & corporate information learned at the Hospital. It should be understood that confidential information includes verbal, written and electronic data concerning patients, staff and hospital business.

The Hospital views the disclosure of confidential patient/staff & corporate information by any employee/ volunteer, without proper authorization, as a violation of the individuals [sic] employment/volunteer obligation and will result in disciplinary action up to and including dismissal.

I acknowledge that I have reviewed the excerpts from the Hospital's Confidentiality Policy set out above.

I understand that I will be bound by this policy and that I will be obliged to respect the confidentiality of any information pertaining to any patient/staff member or the corporation which I learn as a result of my service with The Credit Valley Hospital.

4 On February 6, 2009, Mr. Brathwaite signed an acknowledgment of the *Code*. The acknowledgment and attached *Code* relating to confidentiality read, in part, as follows:

I acknowledge that I received, read, and understood the terms of the Code of Conduct Policy and the Code of Conduct/Workplace Issues Procedure of The Credit Valley Hospital. As an employee or volunteer of The Credit Valley Hospital, I agree to be bound by the terms and conditions contained in the Code of Conduct Policy and any amendments thereto.

...

Confidentiality

- * Maintaining confidentiality of all personal health information and other confidential Hospital information both on and off duty.
- * Taking all reasonable measures to ensure that personal, patient and corporate information is collected, used and disclosed only in circumstances necessary and authorized for patient care, research, or education, or is necessary in the conduct of the business of the Hospital.
- * Divulging, obtaining and using confidential information only as needed by employees to perform their duties.

Inappropriate conduct and behaviour includes, but is not limited to, that which

interferes in the Hospital's ability to achieve its goals, reduces productivity, or is negligent or insubordinate and includes without limitation:

Breach of Confidentiality

- * Unauthorized disclosure or access of confidential patient or personal health information or confidential Hospital information.
- * Discussion of confidential information in a public area.
- * Misuse or failure to safeguard confidential information including user codes or passwords.

5 On the date of the incident, Mr. Brathwaite was working the afternoon shift. He was called to the scene of the incident in the parking lot to assist with the cleanup. When he arrived there with his cart and cleaning supplies, there were many people present, including the police, who were investigating at the time. Mr. Brathwaite was advised to wait, until being called. According to Mr. Brathwaite, he sat and waited on a bench between 20 and 30 minutes. He then called Damian Baird, Environmental Team Leader, about continuing with his other duties. He was told to stay for another 20 to 30 minutes. Mr. Brathwaite went back to the bench and texted someone. After that, he used his cell phone to take a picture of the crowd at the scene. Mr. Brathwaite said that everyone had their back turned to him, except for a police officer. After Mr. Brathwaite waited for that second period of time, he called Mr. Baird again. He was told to return to his scheduled work, and that he would be called, when needed. Around 7:00 or 7:30 p.m., Mr. Brathwaite was called to assist with the cleanup. He had never been involved with a similar situation. By that point, the body had been removed. Mr. Brathwaite assisted with the cleanup. He took another picture of the scene. He said it included a glove, gauze, what he described as "absorption" on the ground, and rubbish.

6 After completing the cleanup, Mr. Brathwaite went on his break. He uploaded and posted the pictures on his Facebook page. Mr. Brathwaite said that he was all emotional, and that he got caught up in the moment. He testified that under the first picture, he wrote a comment: "Mother pleads with kid not to jump off PRCC side of the parking lot but did anyways poor thing." When asked how he knew this, Mr. Brathwaite said he heard everyone talking about it, when he first went out to the scene. Mr. Brathwaite testified that under the second picture, he wrote a comment: "This is what I have to clean up". Mr. Brathwaite then returned to work and completed his shift. He said he did not know whether the suicide victim was a patient, or what he looked like, and that he just heard that a kid jumped off the garage. Mr. Brathwaite testified that if he knew the suicide victim was a patient, he would not have taken pictures of the scene. In cross-examination, Mr. Brathwaite admitted that he did not take any steps to find out whether the suicide victim was a patient. But, he said that he [the suicide victim] was in a public area on Hospital property, and that he was not told he [the suicide victim] was not a patient.

7 Annalecia Cox is a security guard at the Hospital. She was on shift the date of the incident, and she spoke with Mr. Brathwaite that day. She also saw pictures that Mr. Brathwaite posted on his Facebook page. She then spoke with Mr. Brathwaite about them. The details of the foregoing are contained in a signed statement of her interview with management on September 21, 2010. It reads, in part, as follows:

On the [date omitted] of September, I was one of the Security guards attending to the incident where the boy jumped off the [details omitted] parking deck.

I seen [sic] Nicholas Brathwaite there as well and he had his phone out and I told him "you don't want your phone out right now"

On Thursday night [the day following the incident] on my shift I accessed facebook on my phone and then later from a computer in the Security Office. I had an invitation to be a friend from Nicholas Brathwaite and so I accepted. When I joined these pictures popped up:

1. A caption said that "a 14 year old kid jumped off the CVH parking lot". The picture showed me, talking to Mark [last name omitted]. It also showed Pat [last name omitted], Ingrid and John walking with Police Officers. The direction of the picture was from the PRCC entrance doors looking towards the initial scene.
2. The second picture showed the paper and the gauze on the ground after the body was removed. The caption at this picture was "I had to clean this up".

I was very upset by this. I called Nicholas's boss Damian, so I could get his phone number, but they would not release it to me. Instead Damian told Nicholas to call Annalecia in Security. He called me and I said to him "what the fuck are you posting pictures of the suicide on facebook for" I told him he was being an idiot and to take them off right away.

8 Mr. Brathwaite acknowledged receiving a telephone call from Ms. Cox, the day following the incident. However, Mr. Brathwaite took issue with some of the information contained in Ms. Cox's signed statement. He said that Ms. Cox did not tell him, "you don't want your phone out right now" on the date of the incident. He said Ms. Cox's description of the first picture was inaccurate because everybody's back was turned to him, except for the police officer. Mr. Brathwaite said Ms. Cox's description of the second picture was accurate, but that there was absorption on the ground, as well.

Mr. Brathwaite said that when Ms. Cox spoke with him, she did not say "what the fuck are you posting pictures of the suicide on facebook for" or call him an idiot. Rather, he said she was more concerned with how she looked because she was in her uniform. That day, Mr. Brathwaite said he removed the pictures and comments he posted on Facebook. In cross-examination, he was asked why he took them down. Mr. Brathwaite said he did so because it was causing too much commotion, and before there would be more problems. Mr. Brathwaite said there were six posted comments about the pictures on his Facebook page. The following day, while at work, Mr. Brathwaite said a co-worker wanted to become a friend on Facebook and asked him about the pictures. The co-worker told him that she heard that he had pictures on Facebook about the incident. Mr. Brathwaite also said that he received three or four requests from people he knew at the Hospital to become friends on Facebook. He did not accept these friend requests.

9 On September 20, 2010 ("September 20"), the Hospital interviewed Mr. Brathwaite about the incident. He "admitted" taking one picture of "paper and stuff" that was on the ground. When questioned about whether he posted pictures on his Facebook page, Mr. Brathwaite denied doing so. Mr. Brathwaite explained that he was scared about losing his job. He said that he did not want to admit to something he did not do. In cross-examination, he said he thought the Hospital may have had some different kind of picture, or believed that he took a picture of a body. Mr. Brathwaite also admitted that he knew at that time that Ms. Cox and others had seen the pictures he posted on Facebook. However, Mr. Brathwaite said he did not know what the Hospital had, as they were not being specific, during the interview.

10 On September 23, 2010 ("September 23"), the Hospital spoke again with Mr. Brathwaite. Mr. Brathwaite apologized for taking a picture. However, he again told the Hospital that he did not put it on Facebook and told the Hospital "I promise you that I never put any pictures of anyone on Facebook." In cross-examination, Mr. Brathwaite was asked why he did not tell the truth, given that he had time to think about it. Mr. Brathwaite admitted that he had an opportunity a number of times, but that he did not take it. At the conclusion of his testimony, Mr. Brathwaite was asked why he lied. Mr. Brathwaite said that he would have told the truth, but by the time he went to Human Resources on September 20, there were so many rumours, that he did not know what the Hospital had, and the Hospital did not tell him what they had. He was scared, and he was not going to admit to taking a picture of something that he did not take. Mr. Brathwaite was further asked at the hearing why he has decided to tell the truth. He testified because he got fired, and he knew that he did not breach anything, and he knew that in his heart.

The decision

11 The first issue is whether Mr. Brathwaite engaged in culpable misconduct. The parties disagree about whether the Hospital's confidentiality policies apply here, and justify the imposition of some discipline. One basis of the Union's argument that Mr. Brathwaite's conduct fell outside the ambit of the Hospital's confidentiality policies was that they do not meet one of the long-recognized requirements for unilaterally introduced rules established in *Re Lumber & Sawmill Workers'*

Union, hoc. 2537 and KVP Co. Ltd. (1965), 16 L.A.C. 73 (Robinson). In that regard, the Union contends that the Hospital's *Policy* and *Code* do not meet the third requisite of being clear and unequivocal. More particularly, the Union maintains that the *Policy* and the *Code* relating to confidentiality are unclear, as they do not specifically provide that an employee who takes a photograph of the parking lot at the Hospital and posts it on Facebook will be terminated. The often quoted portion from page 85 of *Re Lumber & Sawmill Workers' Union, hoc. 2537 and KVP Co. Ltd.* (supra) reads, in part, as follows:

A rule unilaterally introduced by the company, and not subsequently agreed to by the union, must satisfy the following requisites:

1. It must not be inconsistent with the collective agreement.
2. It must not be unreasonable.
3. ***It must be clear and unequivocal***
4. It must be brought to the attention of the employee affected before the company can act on it.
5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.
6. Such rule should have been consistently enforced by the company from the time it was introduced, [emphasis added]

12 For ease of reference, the relevant provisions of the signed *Policy* read, in part, as follows:

The relationship The Credit Valley Hospital has with patients, staff members and the community it serves is based on trust and respect It is a reasonable expectation for every patient and staff member that personal information will be treated in complete confidence.

Every employee/volunteer in the performance of his/her duties, at some time, has the opportunity to gain knowledge of personal patient/staff & corporate

information. *Every employee is expected to respect the confidentiality of all patient/staff & corporate information learned at the Hospital. It should be understood that confidential information includes verbal, written and electronic data concerning patients, staff and hospital business.*

The Hospital views the disclosure of confidential patient/staff & corporate information by any employee/ volunteer, without proper authorization, as a violation of the individuals [sic] employment/volunteer obligation and will result in disciplinary action up to and including dismissal.

I acknowledge that I have reviewed the excerpts from the Hospital's Confidentiality Policy set out above.

I understand that I will be bound by this policy and that I will be obliged to respect the confidentiality of any information pertaining to any patient/ staff member or the corporation which I learn as a result of my service with The Credit Valley Hospital, [emphasis added]

13 For ease of reference, the relevant provisions of the signed *Code* read, in part, as follows:

Confidentiality

- * Maintaining confidentiality of all personal health information and other confidential Hospital information both on and off duty.
- * *Taking all reasonable measures to ensure that personal, patient and corporate information is collected, used and disclosed only in circumstances necessary and authorized for patient care, research, or education, or is necessary in the conduct of the business of the Hospital.*
- * Divulging, obtaining and using confidential information only as needed by employees to perform their duties.

Inappropriate conduct and behaviour includes, but is not limited to, that which interferes in the Hospital's ability to achieve its goals, reduces productivity, or is negligent or insubordinate and includes without limitation:

Breach of Confidentiality

- * ***Unauthorized disclosure or access of confidential patient or personal health information or confidential Hospital information.***
- * Discussion of confidential information in a public area.
- * Misuse or failure to safeguard confidential information including user codes or passwords, [emphasis added]

14 In my view, the foregoing highlighted provisions in the Hospital's *Policy* and *Code* clearly set out and underscore the critical significance of the well-known, the well-understood and the all-encompassing notion of the confidentiality of patient information, a cornerstone in the present health care context. The Hospital's *Policy* also specifies the potential disciplinary consequences for the unauthorized disclosure of confidential patient information. The *Policy* provides, in part, that: "The Hospital views the disclosure of confidential patient . . . information by any employee . . . without proper authorization, as a violation of the individuals [sic] employment . . . obligation and will result in disciplinary action up to and including dismissal." Having regard to the well-known, the well-understood and the all-encompassing fundamental employee obligation not to disclose confidential patient information, it is unnecessary for the Hospital to particularize in writing every single possible violation of this obligation to satisfy the third requisite in ***Re Lumber & Sawmill Workers' Union, Loc. 2537 and KVP Co. Ltd.*** (supra) that a rule must be clear and unequivocal. In the present health care context, that requisite has been satisfied by the foregoing highlighted provisions in the Hospital's *Policy* and *Code* which set out in sufficiently clear detail the broad ambit of the scope of an employee's obligation regarding the nondisclosure of confidential patient information.

15 The Union maintained that the Hospital's *Policy* and *Code* do not apply here in any event, as the incident occurred in a public area, the affected individual was not identified at the time as a patient at the Hospital, and Mr. Brathwaite was unaware of that fact. Mr. Brathwaite acknowledged the self-evident impropriety of his actions, albeit with the proviso, if he had known the suicide victim was a patient. In that regard, Mr. Brathwaite testified that if he knew the suicide victim was a patient, he would not have taken pictures of the scene. On balance, I find that Mr. Brathwaite was aware that the suicide victim was a patient on the date of the incident. Mr. Brathwaite was not forthright with the Hospital during its investigation at the September 20 interview, or when they spoke on September 23. He stated several reasons for this. They included the following. He was scared about losing his job. He did not want to admit to something he did not do or admit to taking a picture of something that he did not take. He thought that the Hospital may have had some different kind of picture or believed that he took a picture of a body, when he went to Human Resources on September 20. There were so many rumours. He did not know what the Hospital had, and the

Hospital did not tell him what they had. In my view, there is no credible reason to account satisfactorily for Mr. Brathwaite's lack of candour with the Hospital on September 20 or 23. A number of these stated notions do not make much sense. For example, Mr. Brathwaite could not be genuinely concerned about something he did not do, or about a picture he did not take. I accept that he was scared about losing his job, but find this was because he was aware of the gravity of the situation, given he was aware on the date of the incident that the suicide victim was a patient. If Mr. Brathwaite genuinely did not know that, one would reasonably expect him without hesitation to raise this fact with the Hospital at the September 20 interview, or when they spoke on September 23. However, that was not the case, and Mr. Brathwaite did not credibly account for his failure to do so. Mr. Brathwaite's deliberate attempts to mislead the Hospital during its investigation inescapably lead to the conclusion that he was aware that the suicide victim was a patient on the date of the incident.

16 Even if Mr. Brathwaite had not been expressly told or did not hear on the date of the incident that the suicide victim was a patient, I would not find this to exonerate Mr. Brathwaite from culpability, in these circumstances. In that regard, Mr. Brathwaite must be deemed to have constructive knowledge on the date of the incident that the suicide victim was a patient. To maintain the integrity of the confidentiality of patient information, Mr. Brathwaite ought to have acted with reasonable diligence, which he did not do. He ought to have conducted himself by acting on the presumption that the suicide victim was a patient, given the context of what occurred, and the clarity of the surrounding circumstances. This includes the tragedy occurring on Hospital property, and Ms. Cox's statement to him at the scene "you don't want your phone out right now" before he took the pictures, against the backdrop of the well-known, the well-understood and the all-encompassing fundamental obligation on employees to maintain the confidentiality of patient information. Consequently, Mr. Brathwaite cannot take any solace from the fact that he did not take any steps to find out whether the suicide victim was a patient, or the fact the suicide victim was in a public area on Hospital property outside the Hospital building, or that he was not told the suicide victim was not a patient.

17 In my view, the Hospital's *Policy* and *Code* clearly apply to Mr. Brathwaite's actions, which must be viewed in their totality. He posted two pictures on his Facebook page of the scene with comments about the patient's suicide on Hospital property that others viewed. By so doing, Mr. Brathwaite has publicized and disseminated confidential patient information on the Internet about this most tragic event. This includes his comment that Ms. Cox observed under the first picture, namely "a 14 year old kid jumped off the CVH parking lot". Overall, I found Ms. Cox to be a credible witness. On this point, I find her evidence to be clear, given forthrightly and to be unshaken in cross-examination. Mr. Brathwaite's posted comment disclosed information about the circumstances surrounding the patient's death, including the age, and the location. The fact Mr. Brathwaite did not specifically name the patient does not fundamentally change the nature or character of his culpable misconduct by disclosing confidential patient information, as he did. Even had I accepted Mr. Brathwaite's testimony about the comment he posted under the first picture, it would not exculpate him. In that regard, he testified it was: "Mother pleads with kid not to jump off

PRCC side of the parking lot but did anyways poor thing." That comment would have disclosed information about the circumstances surrounding the patient's death, namely the location, and details about the mother's involvement in the tragedy.

18 Having found the Hospital proved that Mr. Brathwaite engaged in culpable misconduct, the remaining issue is whether it is just and reasonable in all the circumstances to substitute another penalty for the discharge. In my view, it is not just and reasonable to do so. By his actions, Mr. Brathwaite has engaged in very serious misconduct. I consider this characterization to be consistent with the following cited cases. In *Re Municipality of Chatham-Kent and Canadian Auto Workers, Local 127 (Clarke)* (2007), 159 L.A.C. (4th) 321 (Williamson), the arbitrator upheld the discharge of an employee in part because the grievor breached a confidentiality agreement by disclosing residents' personal information on a blog accessible to the public. In *Re Vancouver Hospital and Health Sciences Centre and H.E.U. (Khan)* (1995), 39 C.L.A.S. 432 (Munro) (Aurora Ont; Canada Law Book), the arbitrator upheld the discharge of an employee who he found had a telephone conversation with someone to whom she imparted confidential medical information about a resident.

19 In seeking to mitigate the seriousness of Mr. Brathwaite's misconduct for the purpose of substituting a lesser penalty, the Union submitted that his actions should be characterized as a momentary aberration, and referred to *Re Wm. Scott & Company Ltd. and Canadian Food and Allied Workers Union, Local P-162*, [1977] 1 C.L.R.B.R. 1 (P. Weiler). In that case, the British Columbia Labour Relations Board ("B.C.L.R.B.") in reviewing an arbitration decision referred to the frequently cited decision in *Re United Steelworkers of America, Local 3257 and The Steel Equipment Co. Ltd.* (1964), 14 L.A.C. 356 (Reville), that catalogued a number of factors to consider when determining whether to mitigate a disciplinary action. One factor was whether the offence was committed on the spur of the moment as a result of a momentary aberration, due to strong emotional impulses, or whether the offence was premeditated. At paragraph 14 of its decision, the B.C.L.R.B. listed what it considered to be the most important factors when determining whether to mitigate a disciplinary action. This included "Was the grievor's conduct premeditated or repetitive, as opposed to a momentary aberration, or was it provoked by someone else (for example, in a fight between two employees)?"

20 Mr. Brathwaite said that he was all emotional, and that he got caught up in the moment, when he uploaded and posted the pictures on his Facebook page. Viewed objectively in their entirety, Mr. Braithwaite's actions cannot be properly characterized as being a momentary aberration, or being spur of the moment. While his actions had some element of being spur of the moment, they were mainly premeditated. In that regard, the first picture ostensibly appeared to be spur of the moment. However, the second picture was premeditated, given the passage of time between when the two pictures were taken. Further, Mr. Braithwaite's posting of the pictures with captions on his Facebook page had the hallmarks of premeditation, given the passage of time between when the pictures were taken and when they were posted, and the fact that Mr. Brathwaite posted them while he was on break. Given the foregoing time-line and chronology, Mr. Brathwaite had sufficient time

for reflection before taking his second picture, and before posting both pictures on his Facebook page with comments. By his actions of taking the pictures and posting them on his Facebook page with comments that others viewed, Mr. Brathwaite without any justification has put his own self-interest and feelings ahead of the well-known, the well-understood and the all-encompassing fundamental obligation on employees to maintain the confidentiality of patient information. Consequently, I do not find Mr. Brathwaite's ostensible spur of the moment decision to take the first picture to be a sufficiently compelling factor to form part of a principled basis to mitigate the penalty.

21 On the whole, the evidence compels the significant finding that Mr. Brathwaite was not truly remorseful or contrite, and that he did not truly and fully accept responsibility for his misconduct. The Union argued that although Mr. Brathwaite lied during the investigation, he was scared, he is remorseful, and he now accepts responsibility. Mr. Brathwaite repeatedly lied to the Hospital on September 20 and 23, during its investigation. At the conclusion of his testimony at the hearing, Mr. Brathwaite was asked why he has decided to tell the truth. He testified because he got fired, and he knew that he did not breach anything, and he knew that in his heart. This rather remarkable testimony militates against a finding that he is truly remorseful or contrite. It militates against a finding that he truly and fully accepts responsibility for his misconduct. This testimony further undermines the notion that Mr. Brathwaite has positive rehabilitative prospects.

22 Another factor tipping the scales against reinstatement is Mr. Brathwaite's somewhat checkered disciplinary record for work performance issues, to which I have not previously referred. On June 20, 2006, Mr. Brathwaite was given a written warning for work performance issues. On December 5, 2006, he was suspended for one day for a work performance issue. On November 7, 2007, Mr. Brathwaite was given a written warning for a work-related issue. In August 27, 2008, Mr. Brathwaite he was given a written warning for not meeting expectations of his job. On May 19, 2009, he was given a written warning for a work-related performance issue. Lastly, from a deterrence perspective, a clear message must be sent to employees that disclosing confidential patient information without authorization is totally unacceptable and will not be tolerated. In the present circumstances, Mr. Braithwaite's reinstatement would send the wrong message or a mixed message about the gravity of employee misconduct for disclosing confidential patient information without authorization.

23 To summarize, I conclude that Mr. Brathwaite engaged in culpable misconduct, and that it is not just and reasonable in all the circumstances to substitute another penalty for the discharge. Before concluding, I would like to thank Ms. Pinder and Mr. Little for ably, thoughtfully and expeditiously presenting this matter.

DATED at Ancaster, this 9th day of January, 2012.

RANDY L. LEVINSON, ARBITRATOR

qp/s/qlspi/qlhcs