ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 632

OCB GRIEVANCE NUMBER: 23-07-891122-0832-02-11

GRIEVANT NAME: MOORE, MARY A.

UNION: 1199

DEPARTMENT: MENTAL HEALTH

ARBITRATOR: FULLMER, JERRY

MANAGEMENT ADVOCATE: SPENCER, RUTH

2ND CHAIR: SAMPSON, RODNEY

UNION ADVOCATE: MARGEVICIUS, MARIA

ARBITRATION DATE: JUNE 25, 1991

DECISION DATE: JULY 9, 1991

DECISION: GRANTED

CONTRACT SECTIONS
AND/OR ISSUES: TWO DAY SUSPENSION FOR INSUBORDINATION

HOLDING: "CHANGES IN THE CHARGES" VIOLATE THE STANDARDS OF JUST CAUSE. THE CHARGE DISCUSSED AT THE PRE-D WAS "NEGLECT OF DUTY" BUT EMPLOYEE'S SUSPENSION NOTICE CITED "INSUBORDINATION". TWO VERY DIFFERENT DEFINITIONS APPLY AND PUT THE EMPLOYEE TO A DISADVANTAGE WHEN PRESENTING HER DEFENSE AT THE PRE-D.

COST: $937.63

IN THE MATTER OF ARBITRATION)
)
Between)
)
STATE OF OHIO,)
DEPARTMENT OF MENTAL HEALTH) OPINION AND AWARD
)
The Employer) Mary A. Moore
)
-and-) Two Day Suspension
) Grievance
OHIO HEALTH CARE EMPLOYEES UNION)
DISTRICT 1199, WV/KY/OH) 23-07-89-11-22-0832-02-11
NATIONAL UNION OF HOSPITAL)
AND HEALTH CARE EMPLOYEES,)
SEIU, AFL-CIO)
)
The Union)

#632

Heard 6/25/91

APPEARANCES

For the Employer:

Ruth E. Spencer
Advocate, Cleveland Psi. Inst.

Rodney Sampson, Asst. Chief, Arb. Servs.
2d Chair
Nell Cobbs, R.N., Director of Nursing
Verdelle Hart, R.N., CNO Supervisor

For the Union:

Maria Margevicius, Organizer
Advocate

Marry Anne Moore, R.N. Grievant
Virginia Burroughs, R.N., Delegate

JERRY A. FULLMER
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This case[1] concerns a claim by the Grievant, Mary A. Moore, that her two day suspension on October 11 and 12, 1989 for insubordination was without just cause.

I. FACTS

A. Background Facts

The Employer operates the Cleveland Psychiatric Institute ("CPI") in Cleveland, Ohio to provide care for psychiatric patients. Among the employees represented by the Union are the registered nurses (hereafter referred to simply as "nurses"). One of them is the Grievant, Mary A. Moore, who has been employed at the CPI for some 6 and 1/3 months. The Grievant is classified as a Head Nurse. Her duties include the "twenty-four hour supervision and planning of the care given by staff on the assigned area for all 3 shifts."

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[1] The State of Ohio (hereafter referred to as "the Employer" and Ohio Health Care Employees Union, District 1199, WV/KY/OH National Union of Hospital and Health Care Employees, SEIU, AFL-CIO (hereafter referred to as "the Union"), are parties to a collective bargaining agreement (Jt. Ex. 1) providing in Article 7 for settlement of disputes through a grievance and arbitration procedure. A dispute has arisen between the parties concerning a claim by the Grievant, Mary A. Moore, that her two day suspension on October 11 and 12, 1989 for insubordination was without just cause

The grievance (Jt. Ex. 3), (27-26-(2/27/90)-076-02-12) concerning this matter was dated October 14, 1989. It was submitted to arbitration before this arbitrator who serves on the parties' permanent arbitration panel. A hearing was held on the merits of the case on June 25, 1991 in the Office of Collective Bargaining in Columbus, Ohio. Both advocates made opening and closing statements and presented and cross-examined witnesses.

The CPI is organized on the basis of floors and wards. There are two wards to each floor, one "Right" and one "Left". Thus a given ward is referred to as, for example, "6L" or "3R". There are both stairs and elevators between the floors. Under optimum conditions one nurse is assigned to each ward. As of August, 1989 the Grievant's usual assignment was to the 5R ward on the day shift.

Optimum conditions do not always occur. Nurses sometimes call in absent. It is then necessary for supervision to take one or more of the following steps to assure that the ward of the absent nurses is covered:

1. Call in an outside nurse from a contract agency.

2. Call in a PSI nurse on overtime.

3. Schedule one of the already reported nurses to cover a ward additional to that for which she is already scheduled (hereafter referred to as a "double").

B. The Facts Leading to the Grievance

The Grievant reported to work as usual at about 6:50 a.m. on the morning of August 14, 1989. She started in on her customary duties on ward 5R. Ten other nurses were scheduled to work that morning. Of the ten, six called in absent. This caused problems in achieving coverage.

Among the nurses calling in absent was the one assigned to ward 6R, the ward immediately above the Grievant's 5R ward. The Grievant was eventually assigned by Nursing Supervisor Hart to work what is called a "vertical double", i.e. taking the assignment for both 5R and 6R. The Grievant did not want to take the assignment.

Conversations followed between the Grievant and Nursing Supervisor Hart. In general the Grievant took the position that she was willing to work a "horizontal double" including assignment to the adjacent 5R and 5L wards, but that the vertical 5R/6R double was too dangerous. The danger was said to arise from the separation of the two wards by stairs/elevators and the inability of a nurse on one floor to hear what was going on in the other ward. There is a dispute as to whether the Grievant claimed at the time that her working the vertical double might result in proceedings to take her nursing license. The Grievant maintains that she did so claim. Nursing Supervisor Hart maintains she did not raise the subject.

Nursing Supervisor Hart did not want to assign the Grievant to the 5R/5L horizontal double because the 5L ward had a higher rate of acuity, i.e. more problematical patients, than the 6R ward and thus would be harder to manage on a double.

The Grievant stuck by her position and indicated that she would rather go home than take the vertical double. Eventually the Grievant left a note which stated:

> "8-14-89
>
> I refuse to cross cover on 6R. My regular ward is 5R and to cross over on another floor is to risk having adequate nursing care for the patients on both 5R & 6R. Rather than take a risk of pts having inadequate care I will go home after having a phone conversation w/ Mrs. Cobbs.
>
> Mary Anne Moore" (Employer Ex. G.)

The Grievant went home 7:50 a.m..

The Grievant's departure added to the shortage of nurses. A CPI nurse, Miskell, had been called in to cover the 5L ward. She

was asked to cover the 5R ward left uncovered by the Grievant's departure. Another CPI nurse, Burns, was called in from home to cover 6R. Nurse Smith was asked to watch over 6L where an Orientation Nurse, Richards, was holding forth.

C. The Pre-Discipline and Grievance Proceedings

On August 23, 1989 the Employer issued a Notice of Pre-Disciplinary Conference. In that Notice it was stated that:

> "You have been charged with: Neglect of Duty"
>
> "This is based on the following information: Refused job assignment on 8/14/89."

There followed a seemingly undated Order of Suspension. It indicated that:

> "This is to notify you that you are hereby Suspended from the position of Psychiatric Nurse 2 for a total of Two days. This will take effect on 10/11/89 through 10/12/89. You are to return to your regularly scheduled duties during your regular shift on 10/13/89. The reason for this action is that you have violated hospital policy by Insubordination. This specifically is an infraction of Refusing job assignment on 8/14/89....."[2]

On October 14, 1989 the grievance at issue was filed. It stated:

> "Employee was given 2 day suspension for insubordination, which is a first incident of its kind, does not warrant more than a verbal reprimand under the principle of progressive discipline" (Jt. Ex. 2)

The grievance was duly processed through the steps of the grievance procedure to arbitration.

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[2] Both quotations are taken from Joint Exhibit 2. The non-underlined portions of the quotes are taken from the printed form. The underline portions are the parts typed in on the form.

II. APPLICABLE CONTRACT PROVISIONS

ARTICLE 8 - DISCIPLINE

Section 8.01 Standard

Disciplinary action may be imposed upon an employee only for just cause.

Section 8.,02 Progressive Discipline

The principles of progressive discipline shall be followed. These principles usually include:

A. Verbal Reprimand
B. Written Reprimand
C. Suspension
D. Demotion or Removal

The application of these steps is contingent upon the type and occurrence of various disciplinary offenses.

Section 8.03 Pre-Discipline

Prior to the imposition of a suspension of more than three (3) days, demotion or termination, the employee shall be afforded an opportunity to be confronted with the charges against him/her and to offer his/her side of the story. This opportunity shall be offered in accordance with the "Loudermill Decision" or any subsequent court decisions that shall impact on pre-discipline due process requirements."

III. ISSUE

Was the two-day suspension given the Grievant for October 11/12, 1989 imposed for just cause? If not, what shall be the remedy?

IV. POSITIONS OF THE PARTIES

The Employer Position

The Employer emphasizes that the Grievant was given an

assignment, that she initially accepted it and then said that she couldn't accept it. This was said to be based on her fears that her license would be in jeopardy and on ethical considerations. But, Supervisor Hart, who was also an R.N. and who had had much more experience than the Grievant, testified most strongly that there was no validity to such fears. If the Grievant's claimed concerns were real, she had ample opportunity to pursue the matter through administrative channels and/or file a grievance under the labor agreement.

The situation on August 14, 1989 was crucial because half the nurses had called off. The Grievant threw gasoline on the fire by herself leaving the scene, despite being directed to take the assignment in question and despite the pleas of the Director of Nursing that the Grievant was "really needed". Under the circumstances a 2 day suspension was warmly deserved even in the absence of a prior verbal reprimand or written reprimand. In a similar case, Ohio Civil Service Employees Association AFSCME Local 11 and Department of Rehabilitation and Correction, State of Ohio (No. G 86-259; Arb. Harry Graham; February 5, 1987) the arbitrator imposed a two week suspension despite the absence of prior discipline. The grievance should be denied in its entirety.

The Union Position

The Union first raises a point concerning the procedural deficiencies of the pre-disciplinary investigation. The Union notes, as described above, that the Notice of Pre-Disciplinary Conference dated August 23, 1989 specified that the Grievant was

being charged with "Neglect of Duty". The conference was held on September 6, 1989 on that basis and the Grievant was thereafter suspended for two days on the basis of "Insubordination". The two offenses are quite different. The Oxford American Dictionary is cited. There is also emphasis upon an arbitration case The State of Ohio and district 1199, SEIU, AFL-CIO; (No. 23-08-900312-0397-02-11; Grievant Joyce Barnett; Arb. Joyce Goldstein; July 9, 1990)

On the merits, the Union emphasizes the lack of progressive discipline in the case. Even if the Grievant committed an offense it is undisputed that it was a first offense and that there was no previous verbal reprimand and/or written reprimand. This is in clear violation of the progressive discipline requirements of Section 8.02 of the parties' agreement.

In any event it is clear that there was not a violation. The assignment made by the Employer of the vertical double was clearly unsafe. The Grievant sincerely believed that if she accepted the assignment her nursing license might be put in jeopardy and the health and safety of the patients and staff would be put in jeopardy. The Grievant is not a shirker and she was willing to accept a horizontal double of 5R and 5L. This would have been safe because the two wards are within hearing distance of each other. The Employer claimed this would have been unsafe but then made exactly the same assignment 1/2 hour after the Grievant left!

The suspension of the Grievant was without just cause. It should be rescinded by the arbitrator and the Grievant awarded the appropriate back pay and the expungement of the suspension from her

record.

V. DISCUSSION

A. Introduction

Several sub-issues are presented in this case. The first is whether claimed irregularities in the Notice of Pre-Disciplinary Conference invalidate the suspension. Assuming they do not, the remaining issues on the merits concern whether the evidence establishes that the Grievant in fact committed an offense and, if so, whether the imposition of a two day suspension violated the progressive discipline provision of Section 8.02. We turn to those issues in the order stated.

B. The Irregularities in the Notice of Pre-Disciplinary Conference.

As discussed above, the Notice of Pre-Disciplinary Conference dated August 23 did specify an offense of "Neglect of Duty" and the eventual Notice of Suspension did specify an offense of "Insubordination". The arbitrator agrees with the Union's contention that these are separate and distinct offenses. Neglect of duty is concerned with inattention or laziness with respect to the employee's duties. Insubordination is concerned with the refusal of an employee to carry out the orders of his/her supervisor.

The subject of "Adequacy of the Charges" has been previously considered by Arbitrator Joyce Goldstein in a case between the

present parties.[3] The case concerned a charge of "patient abuse/neglect" and an eventual suspension for "patient rights abuse and ethics violation." The Union claimed that these were two different charges. After quoting Section 8.03 of the parties' agreement, Arbitrator Goldstein stated:

> "The Supreme Court in Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), noted that the pretermination hearing `need not be elaborate', but must give the employee `oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.'"

Eventually Arbitrator Goldstein held that:

> "There is no doubt that the Grievant did not receive accurate charges to defend against at her pre-disciplinary hearing. Indeed, even the suspension letter from Ms. Torvik sent after the pre-disciplinary hearing fails to clearly identify the specific provisions which the Grievant allegedly violated. Ms. Torvik's letter broadly cites a statute and ethics code without citing the relevant aspects of either of those rules.
>
> Applying the definitions offered by the Employer, `patient abuse' is clearly distinguishable from `patient's rights abuse'. `Patient abuse' involves physical or sexual injuries, property deprivation, or insulting or coarse language or gestures subjecting a patient to humiliation or degradation. `Patients rights abuse' includes everything from race discrimination, to revealing confidential information, to having a financial conflict of interest.
>
> The changes in the charges did prejudice the Grievant because had she known the proper charge she might have chosen to testify at the pre-disciplinary conference or to have raised other defenses."

Eventually Arbitrator Goldstein sustained the grievance on the "Notice of Charges" ground as well as others.

Under familiar principles the cited decision of Arbitrator

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[3] See citation, supra.

Goldstein becomes part of the parties' agreement and will be applied by subsequent arbitrators to similar fact situations. There are at least three questions as to the whether the fact situations are similar:

1. The Barnett case involved a suspension of six days. The present case involves a suspension of two days. Section 8.03 of the parties' agreement (the section relied upon by Arbitrator Goldstein) covers only suspensions of more than three days, demotions and terminations. In applying the provisions of Article 8.03 the Employer might well have a valid contractual argument that it was not required to afford employees the "opportunity to be confronted with the charges against him/her". But, it undertook to afford the Grievant in this case a "Pre-Disciplinary Conference" even though the eventual suspension was only two days. Having undertook to provide the conference it does not seem unfair to require the Employer to provide the employee with adequate notice of the charges. The arbitrator concludes that the 6 day/3day distinction does not provide an adequate justification for disregarding the Goldstein decision.

2. The Barnett case involved a disparity between the charges and the suspension which moved from the more serious to the less serious, i.e. "patient abuse/neglect" to "patient rights abuse and ethics violation". The present case involves a

change from what would usually be considered the less serious to the more serious, i.e. "neglect of duty" to "insubordination".[4] But, it would appear to the arbitrator that it is more prejudicial to an employee to escalate the charges between the Notice and the suspension than the opposite. The problem is that the employee may be lulled by the lesser charges in the Notice. The arbitrator concludes that this factor also provides no adequate justification for disregarding the Goldstein decision.

3. In the Barnett case the grievant did not testify at the pre-disciplinary conference. Arbitrator Goldstein was able therefore to squarely conclude that "the changes in the charges did prejudice the Grievant." (emphasis added) because she might have otherwise chosen to testify. In the present case the Grievant apparently did testify at the hearing and even Union witnesses conceded that the Notice of Pre-Disciplinary Conference did indicate that the "Neglect of Duty" charge was based upon the claim that she "Refused job assignment on 8/14/89". Nevertheless it seems clear that a fundamental error was made in the formulation of the original charges. By framing it in terms of "Neglect of Duty" the Employer put the Grievant and the Union in the situation where

[4] The arbitrator is aware that there can indeed be quite serious cases of neglect of duty, e.g. Captain Joseph Hazlewood and the Exxon Valdez. But, we are speaking here of neglect of duty and insubordination as generic classes of cases.

it entered the hearing with a certain set of assumptions as to the nature of the offense and the possible penalties. To assume that this would have made no difference is to indulge in an assumption against the party which was the victim of the error rather than the perpetrator. It seems to the arbitrator that the opposite assumption should be made and the arbitrator concludes that this factor also provides no adequate justification for disregarding the Goldstein decision.

For the reasons stated the arbitrator concludes that the Goldstein decision in the Barnett case is applicable to the present case. Under that authority it is held that the two day suspension given to the Grievant was a violation of the just cause standard of Article 8.01 of the parties' agreement.[5]

VI. AWARD

Grievance sustained. The suspension of the Grievant on October 11 and 12, 1989 is rescinded. Records of the suspension shall be removed from the Grievant's personnel records. The Grievant shall be paid back pay at her normal rate of pay for the days of October 11 and 12, 1989.

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[5] This conclusion makes it unnecessary for the arbitrator to reach either the issue of "progressive discipline" or the issue of whether the Grievant's actions on August 14, 1989 constituted insubordination. Nothing in the decision should be read as impugning the Employer's right to direct the work force or should be read as sanctioning insubordination by the Grievant. These issues have simply not been reached because of the holding on the procedural point.

Jerry A. Fullmer, Arbitrator

Made and entered this
9th day of July, 1991
at Cleveland, Ohio