

ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 655

OCB GRIEVANCE NUMBER: 23-13-901101-0324-02-11

GRIEVANT NAME: HARRIS, STEWART

UNION: 1199

DEPARTMENT: MENTAL HEALTH

ARBITRATOR: LOVE, ANDREW

MANAGEMENT ADVOCATE: RAUCH, JOHN

2ND CHAIR: DUCO, MICHAEL P.

UNION ADVOCATE: FOGT, JEFF

ARBITRATION DATE: MARCH 28, 1991

DECISION DATE: AUGUST 28, 1991

DECISION: MODIFIED

CONTRACT SECTIONS

**AND/OR ISSUES: SIX DAY SUSPENSION FOR RELEASING CONFIDENTIAL
INFORMATION REGARDING A PATIENT TO THE PRESS**

**HOLDING: ARBITRATOR FINDS THAT GRIEVANT WAS GUILTY OF
NEGLIGENCE IN ASSUMING THAT THE PATIENT'S MOTHER WAS HER GUARDIAN
WHEN HE SPOKE TO HER ABOUT AUTHORIZATION TO RELEASE THE
INFORMATION. SIX DAY SUSPENSION IS TOO HARSH AND IS REDUCED TO A
ONE DAY SUSPENSION.**

COST: \$600.00

ARBITRATION

#655

IN RE:

STEWART HARRIS, M.D.

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CASE NO. 23-13-90-11-0324-02-11

FOR GRIEVANT: Jeff Fogt

FOR THE STATE OF OHIO
DEPARTMENT OF MENTAL HEALTH: John Rauch

This grievance was heard on March 28, 1991 involving a six-day suspension of the grievant failure of good behavior for releasing confidential information of a patient to the Cincinnati Post newspaper. This matter is properly before the arbitrator to decide the two issues involved in this grievance, to wit: Was the six-day suspension of the grievant for just cause; if not, what shall the remedy be?

STATEMENT OF THE GRIEVANCE

The Ohio Department of Mental Health (hereinafter "ODM") asserts that the grievant, an employee of the Pauline Warfield Lewis Center, received a six-day suspension for failure of good behavior due to his releasing confidential patient information to the Cincinnati Post newspaper without authority from the Director of said center. It should be noted that the Lewis Center is part of ODM. An article appearing in the Cincinnati Post indicated purported statements made by the grievant about a specifically named "former mental patient." This article was a manifestation of some considerable outcry by the closing of the Rollman Psychiatric Institute and the subsequent transfer of many patients from there to the Lewis Center.

In the article, the patient's mother was interviewed by the Cincinnati Post reporter, who claimed that her daughter "was dumped" out of Rollman in preparation of its closing at merger with the Lewis Center. The patient's mother went on to elaborate in the article that the patient (her daughter) would be home and would be abusive toward her children. The patient's mother further stated that she was advised by Rollman officials that her daughter was not ill enough to go to the Lewis Center. The article paraphrased the grievant's statement that he refused to send the patient home due to her failure to successfully participate in a number of community programs. Hence, it was the Grievant's opinion that the patient remain at Rollman and then be transferred to the Lewis Center.

ODM argues that this interview by the grievant constituted improper disclosure of patient information in violation of R.C. Section 5122.31 (the Lewis Center Directive A77; and Rollman Psychiatric Institute rules and directives as well. ODM also considered these statements as a violation of the State Employee's Code of Ethics and of the ethics of the medical profession.

ODM also states that the Grievant, who transferred from Rollman to the Lewis Center in 1990, was well aware of the requirements of confidentiality of patient records.

The grievant asserts that R.C. Section 5122.31 is not applicable in the determination as to whether there is a violation by the grievant in that this section lists only guidelines of conduct. Furthermore, the grievant asserts that the Cincinnati Post had a certain bias against the closing of the Rollman Center

and tailored any articles, including paraphrasing the statements of the grievant, to suit its own agenda. Additionally, the grievant asserts that he obtained permission in writing from the patient before consenting to any interview. Therefore, the grievant states that he has violated no rules and no codes of ethics.

WITNESS TESTIMONY

Rita Surber, Personnel Manager at the Lewis Center, described her duties as being responsible for health benefits, orientation, and information regarding rules of conduct and ethical behavior. She testified that the grievant was originally employed at Rollman beginning in 1983. He went to the Lewis Center on or about August 1, 1990.

Prior to the transfer from Rollman, employees were given an orientation. This orientation program was held in June, 1990, wherein the Grievant attended on June 7. The orientation also discussed the effects of the consolidation of the two centers, a tour of the Lewis Center, and the making available of manuals which included the work rules of the Lewis Center and its policies. The orientation lasted for two days. The witness did not state whether the grievant was present on the first day of the orientation, which was June 6, 1990. The work rule of the Lewis Center is nearly identical to the Rollman's directive. The latter directive was one with which the grievant was familiar, having worked there since 1983 prior to his transfer to the Lewis Center in August, 1990. Both directives state, in pertinent part, the following:

The resident's medical record is the property of the State of Ohio. [The Center] is the legal custodian while in possession of [the Center]. Medical records are created and maintained for the benefit of the resident, staff, and the hospital. The facility and its employees assume responsibility for protecting the record against loss, defacement, tampering or use by unauthorized persons. Information contained in the clinical record belongs to the resident, and the resident is entitled to the protected right of information. All clinical information shall be regarded as confidential and available only to authorized users. . .

No information about a resident, including admission and discharge information, shall be released without proper written authorization. All requests for copies of information in the medical record must be referred to the Medical Records Department.

The same ethics and laws related to privacy, confidentiality and privilege apply whether the records are paper charts or electronic files.

Both policies were, in effect, prior to consolidation of the two centers. Moreover, the code of ethics at both the Lewis Center and Rollman were distributed to their employees via paycheck in 1986. This code of ethics states, at Number 4:

Make every effort to insure that no employee discloses confidential information acquired in the course of his/her official duties or use such information to further his/her personal interest or to damage the interests or reputations of others.

Ms. Surber referred to the disciplinary action for a first offense of providing access to confidential information about patients to anyone who is not allowed by law to receive it. This is entitled "Failure of Good Behavior," Division D. The disciplinary action proposed in Division D is a six-day suspension or removal.

On cross-examination, Ms. Surber allowed that disclosure of patient information can be given to unauthorized persons, provided that there is consent, specifically the Lewis Center's Institution Directive A-77, dated May 11, 1987, states at IX that medical information shall never be released verbally, written, or by personal review of records by unauthorized persons or the resident unless written consent for information release has been obtained from the resident (patient) and/or the resident's legal guardian, and that only the specific information requested may be released. Ms. Surber stated that if an employee follows the policy as written, there should be no disciplinary action. The witness also stated that confidential information can be released with consent via Rollman's policy no. LIN011-MR-RPI Rules and Regulation Insuring Confidentiality of such records and governing the disclosure of information from such records. Specifically, at page 8 of these rules, "disclosure will be made following receipt of valid authorization for release of information signed by the patient or guardian. No fee is charged for this service, when the information is needed for continued treatment."

On redirect, Ms. Surber referred to Institution Directive A-77, wherein it refers to disclosures made with consent of the resident or the guardian. For example, this portion states that when relatives desire access to patient records that an authorization must be obtained. Such authorization must come from the resident or guardian.

Joseph Zisler, formerly the Security Consultant with ODM, described his duties as investigation of various hospitals and prisons. Mr. Zisler stated that he investigated the grievant's statements in the Cincinnati Post, and this article his primary focus. Mr. Zisler interviewed the grievant on September 6, 1990. He stated that the grievant denied giving the patient's diagnosis to the reporter, but attests to the accuracy of other statements in the news article attributed to him. In Mr. Zisler's opinion, the grievant violated the rules of confidentiality.

Charles Feuss, Jr., Medical Director at the Lewis Center, testified that he was the medical director at Rollman until September, 1990, where he assumed the same position at the Lewis Center. He stated that he was aware of the article in the Cincinnati Post identifying the grievant as making statements regarding a patient at Rollman. He further stated that the patient's name was used in the paper, and such disclosure is a violation of the previous stated work rules. As a result of the article, Mr. Feuss recommended disciplinary action. He stated that the name or identification of a patient is never to be released. Furthermore, the method of treatment of a patient can be released only to the patient and authorized personnel. The grievant was aware of the work rules at Rollman, which were not different from the work rules at the Lewis Center. He stated that the work rules at the Lewis Center were made available at a medical staff meeting at that Center. In respect to the release of the patient's medical records, the grievant would have known or should have known who

that patient's guardian was, because the guardian would be named in the patient's medical chart.

Sondra Jenkins, CEO at the Lewis Center, stated that she has been employed by that center since 1979. She identified the Lewis Center as a psychiatric in-patient hospital with out-patient services.

Ms. Jenkins issued a six-day suspension to the grievant effective November 20, 1990, for breach of confidentiality in that he disclosed confidential patient information. In reference to Institutional Dire, A-77, Ms. Jenkins testified that an employee cannot release medical information to a newspaper unless the patient or guardian agrees. In the absence of a guardian, no employee can release such information. If the patient is competent, he or she can sign a release. If the patient is incompetent, the guardian over the person must sign such a release.

Ms. Jenkins was referred to an Authorization for Release of Information regarding the patient in question, which was prepared and signed by her mother and dated October 19, 1990. She stated that this authorization was not timely filed. There was no indication that the patient's mother was her guardian. On cross-examination, Ms. Jenkins stated that the Cincinnati Post newspaper did a series of articles regarding the consolidation of Rollman and the Lewis Center. She opined that the Cincinnati Post was very much in favor of saving Rollman. The witness supported her opinion about the newspaper's posture by stating that the patient's mother's comments regarding the patient's discharge were presented

in a pro-Rollman light.

The grievant, a staff psychiatrist at the Lewis Center since August 1, 1990, stated that he had expressed concerns about the merger of Rollman and the Lewis Center while he was employed at Rollman. When he was called into Dr. Feuss' office on September 6, 1990, he met with Mr. Zisler, the investigator. He could not remember the particulars of the patient in question. The grievant later received a notice of disciplinary action.

The grievant stated that a Cincinnati Post reporter called him regarding a patient being "dumped" out of Rollman. The grievant stated that he advised the reporter that he would call back to verify authorization pursuant to Institutional Directive A-77 outlining the policy for releasing medical information. The grievant later called the patient and her mother regarding a telephone request to release said information in accordance with the stated policy for releasing such information. The grievant then discussed the adequacy of the discharge plan for the patient to the newspaper reporter. The grievant referred to a letter provided by the newspaper reporter dated March 25, 1991, which was intended to clarify the role of the grievant in the reporter's article on August 22, 1990. The reporter's letter stated that the patient's mother contacted him and alleged that Rollman had prematurely and unlawfully released her daughter to her, and further alleged that the release was part of ODM's plan to empty the hospital so that it could be closed. The reporter accepted an invitation to interview the patient and her mother, at which time

the patient's mother detailed the patient's medical history and the problems surrounding the patient being sent home. Both the patient and her mother identified the grievant as her psychiatrist and part of her treatment team. The reporter further stated in his letter that his only interest in speaking to the grievant was to ask about the grievant's reaction to the release of this particular patient. In that the grievant was a union representative, the reporter felt that the grievant could speak to that issue. The reporter stated that the grievant, after consenting to be interviewed, offered no information on matters of the patient's treatment or diagnosis at Rollman. The grievant stated that since the time of the patient's discharge from Rollman, she was incarcerated.

The grievant stated that he never showed the reporter any record or allowed access to records.

On cross-examination, the grievant stated that he was not made aware that the patient's mother was not the legal guardian of the patient, and was not her legal guardian until later. The grievant asserted that he had been given verbal consent to disclose medical information from the patient, pursuant to the Institutional Directive at Section VIII B and Section IX B.

When asked about the October 9, 1990 authorization for release of information, the grievant said that he obtained this authorization at this late date, because he felt that the Lewis Center was engaging in a "witch hunt." The written authorization was designed to show further proof, according to the grievant, that the patient was competent to give such a release.

DECISION AND AWARD

Several factors need mentioning regarding this grievance. First, the evidence shows that the person initiating the article bringing to attention a specific patient to the newspaper reporter was the patient's own mother. It was she who lamented the discharge of her daughter from Rollman and concluded that her daughter was a pawn in the effort to close Rollman and consolidate those remaining patients with the Lewis Center. It was she who identified her daughter by name and stated to the reporter the nature of the patient's illness. Second, the grievant, after obtaining verbal approval from the patient, who was discharged, did not provide any medical records for the reporter to see. Rather, the grievant related his concerns about the patient's discharge from Rollman, in spite of the patient's inability or failure to successfully participate in community-based programs on an outpatient basis. He stated to the reporter that it was his opinion that the patient needed to continue on an in-patient basis. Third, the grievant, for whatever reason, did not know that the patient's mother was not a guardian until later. Fourth, this arbitrator has considered the nature of the testimony presented in the context of what was clearly a volatile period in respect the merging of the two hospitals. The newspaper coverage by the Cincinnati Post was deemed to be, in the words of Sondra Jenkins, in favor of keeping Rollman open and, further, seemed to support the notion that ODM was insensitive to the dislocation or discharge of patients to accommodate this merger. Fifth, the testimony

revealed that the grievant has long been a vocal critic of the closing of Rollman. Sixth, was the patient competent to give authorization of any medical information to the grievant to present to unauthorized persons? On the one hand, the staff at Rollman must have thought so, because the patient was released. On the other hand, the grievant felt that she was incompetent to be released. ODM relies on its directives, its code of ethics, and R.C. Section 5112.31 in support of proper procedures where medical information was released. The grievant relies on aspects of the institutional directive as well as what he believes to be his duties are as a doctor to his patient.

Taking all of these factors into consideration, this arbitrator finds that just causes existed for disciplinary action for one reason and one reason alone: that the grievant was negligent in obtaining permission from someone he assumed to be the patient's guardian. He instead went to the mother with the belief that she was the patient's guardian. This finding for disciplinary action is based on the grievant's status as an employee of the State of Ohio, and he must therefore abide by the requirements imposed for disclosure of patient information. The grievant felt that the patient herself was not competent to authorize disclosure, even though he spoke with her about such authorization. He then consulted with the patient's mother, who happened not be the guardian. In fact, there was no guardian appointed for the patient.

As to the issue of appropriate remedy, this arbitrator finds that the six-day suspension is far too harsh, and under the circumstances, out of line with what had transpired with the release of certain information of the patient. The newspaper article, which gave rise to this action, reveals that the person who provided the name of the patient and her condition was the patient's mother. Much of the statement of the grievant to the reporter centered around his opinion regarding the impact of the closing of Rollman. Since his patient's name was already mentioned, the grievant acknowledged that she was discharged from Rollman. He further stated his opinion that the patient should not have been discharged. The only evidence of medical information that was released to the newspaper was the grievant's statement that the patient had failed a number of community programs. Given the paucity of information supplied by the grievant to the newspaper, the fact that the patient's name and nature of her illness was revealed by the patient's mother, and the lack of any previous discipline against the grievant, this arbitrator determines that the appropriate disciplinary action to be taken should be a one-day suspension. This arbitrator believes that the finding regarding appropriate discipline is progressive in light of all of the factors to be considered.

Accordingly, the grievance is denied, but the suspension is reduced from the six days to one day.



ARBITRATOR

ARBITRATION

IN RE:

STEWART HARRIS, M.D.

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FOR GRIEVANT: Jeff Fogt

FOR THE STATE OF OHIO
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In the article, the patient's mother was interviewed by the Cincinnati Post reporter, who claimed that her daughter "was dumped" out of Rollman in preparation of its closing at merger with the Lewis Center. The patient's mother went on to elaborate in the article that the patient (her daughter) would be home and would be abusive toward her children. The patient's mother further stated that she was advised by Rollman officials that her daughter was not ill enough to go to the Lewis Center. The article paraphrased the grievant's statement that he refused to send the patient home due to her failure to successfully participate in a number of community programs. Hence, it was the Grievant's opinion that the patient remain at Rollman and then be transferred to the Lewis Center.

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that patient's guardian was, because the guardian would be named in the patient's medical chart.

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Ms. Jenkins was referred to an Authorization for Release of Information regarding the patient in question, which was prepared and signed by her mother and dated October 19, 1990. She stated that this authorization was not timely filed. There was no indication that the patient's mother was her guardian. On cross-examination, Ms. Jenkins stated that the Cincinnati Post newspaper did a series of articles regarding the consolidation of Rollman and the Lewis Center. She opined that the Cincinnati Post was very much in favor of saving Rollman. The witness supported her opinion about the newspaper's posture by stating that the patient's mother's comments regarding the patient's discharge were presented

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The grievant stated that a Cincinnati Post reporter called him regarding a patient being "dumped" out of Rollman. The grievant stated that he advised the reporter that he would call back to verify authorization pursuant to Institutional Directive A-77 outlining the policy for releasing medical information. The grievant later called the patient and her mother regarding a telephone request to release said information in accordance with the stated policy for releasing such information. The grievant then discussed the adequacy of the discharge plan for the patient to the newspaper reporter. The grievant referred to a letter provided by the newspaper reporter dated March 25, 1991, which was intended to clarify the role of the grievant in the reporter's article on August 22, 1990. The reporter's letter stated that the patient's mother contacted him and alleged that Rollman had prematurely and unlawfully released her daughter to her, and further alleged that the release was part of ODM's plan to empty the hospital so that it could be closed. The reporter accepted an invitation to interview the patient and her mother, at which time

the patient's mother detailed the patient's medical history and the problems surrounding the patient being sent home. Both the patient and her mother identified the grievant as her psychiatrist and part of her treatment team. The reporter further stated in his letter that his only interest in speaking to the grievant was to ask about the grievant's reaction to the release of this particular patient. In that the grievant was a union representative, the reporter felt that the grievant could speak to that issue. The reporter stated that the grievant, after consenting to be interviewed, offered no information on matters of the patient's treatment or diagnosis at Rollman. The grievant stated that since the time of the patient's discharge from Rollman, she was incarcerated.

The grievant stated that he never showed the reporter any record or allowed access to records.

On cross-examination, the grievant stated that he was not made aware that the patient's mother was not the legal guardian of the patient, and was not her legal guardian until later. The grievant asserted that he had been given verbal consent to disclose medical information from the patient, pursuant to the Institutional Directive at Section VIII B and Section IX B.

When asked about the October 9, 1990 authorization for release of information, the grievant said that he obtained this authorization at this late date, because he felt that the Lewis Center was engaging in a "witch hunt." The written authorization was designed to show further proof, according to the grievant, that the patient was competent to give such a release.

DECISION AND AWARD

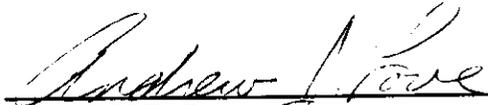
Several factors need mentioning regarding this grievance. First, the evidence shows that the person initiating the article bringing to attention a specific patient to the newspaper reporter was the patient's own mother. It was she who lamented the discharge of her daughter from Rollman and concluded that her daughter was a pawn in the effort to close Rollman and consolidate those remaining patients with the Lewis Center. It was she who identified her daughter by name and stated to the reporter the nature of the patient's illness. Second, the grievant, after obtaining verbal approval from the patient, who was discharged, did not provide any medical records for the reporter to see. Rather, the grievant related his concerns about the patient's discharge from Rollman, in spite of the patient's inability or failure to successfully participate in community-based programs on an outpatient basis. He stated to the reporter that it was his opinion that the patient needed to continue on an in-patient basis. Third, the grievant, for whatever reason, did not know that the patient's mother was not a guardian until later. Fourth, this arbitrator has considered the nature of the testimony presented in the context of what was clearly a volatile period in respect the merging of the two hospitals. The newspaper coverage by the Cincinnati Post was deemed to be, in the words of Sondra Jenkins, in favor of keeping Rollman open and, further, seemed to support the notion that ODM was insensitive to the dislocation or discharge of patients to accommodate this merger. Fifth, the testimony

revealed that the grievant has long been a vocal critic of the closing of Rollman. Sixth, was the patient competent to give authorization of any medical information to the grievant to present to unauthorized persons? On the one hand, the staff at Rollman must have thought so, because the patient was released. On the other hand, the grievant felt that she was incompetent to be released. ODM relies on its directives, its code of ethics, and R.C. Section 5112.31 in support of proper procedures where medical information was released. The grievant relies on aspects of the institutional directive as well as what he believes to be his duties as a doctor to his patient.

Taking all of these factors into consideration, this arbitrator finds that just causes existed for disciplinary action for one reason and one reason alone: that the grievant was negligent in obtaining permission from someone he assumed to be the patient's guardian. He instead went to the mother with the belief that she was the patient's guardian. This finding for disciplinary action is based on the grievant's status as an employee of the State of Ohio, and he must therefore abide by the requirements imposed for disclosure of patient information. The grievant felt that the patient herself was not competent to authorize disclosure, even though he spoke with her about such authorization. He then consulted with the patient's mother, who happened not be the guardian. In fact, there was no guardian appointed for the patient.

As to the issue of appropriate remedy, this arbitrator finds that the six-day suspension is far too harsh, and under the circumstances, out of line with what had transpired with the release of certain information of the patient. The newspaper article, which gave rise to this action, reveals that the person who provided the name of the patient and her condition was the patient's mother. Much of the statement of the grievant to the reporter centered around his opinion regarding the impact of the closing of Rollman. Since his patient's name was already mentioned, the grievant acknowledged that she was discharged from Rollman. He further stated his opinion that the patient should not have been discharged. The only evidence of medical information that was released to the newspaper was the grievant's statement that the patient had failed a number of community programs. Given the paucity of information supplied by the grievant to the newspaper, the fact that the patient's name and nature of her illness was revealed by the patient's mother, and the lack of any previous discipline against the grievant, this arbitrator determines that the appropriate disciplinary action to be taken should be a one-day suspension. This arbitrator believes that the finding regarding appropriate discipline is progressive in light of all of the factors to be considered.

Accordingly, the grievance is denied, but the suspension is reduced from the six days to one day.



ARBITRATOR