

## **In The Matter of the Arbitration Between**

OHIO DEPARTMENT OF MENTAL HEALTH :  
TOLEDO MENTAL HEALTH CENTER,

: **OPINION AND AWARD**  
: **OF**  
: **ARBITRATOR GIBSON**

Employer,

and

:  
Case No. 23-17-951024-1136-  
02-11

DISTRICT 1199 HEALTH CARE AND :  
SOCIAL SERVICE UNION, SERVICE :  
EMPLOYEES INTERNATIONAL UNION, :  
AFL-CIO :

Union.

### **Appearances:**

#### **For the Employer:**

Wendy F. Clark, Labor Relations Specialist, Office of Collective Bargaining  
Rodney Sampson, Labor Relations Specialist, Office of Collective Bargaining  
Malleri Johnson-Myricks, Labor Relations Officer, Department of Mental Health  
Brenda Smith, Administrative Assistant

#### **For the Union:**

Kent M. Woodward-Ginther, Administrative Organizer, District 1199/SEIU, AFL-  
CIO  
Gayle Stinson, Delegate/Steward, Toledo Mental Health Center

## **OPINION**

### **A. Introduction**

Pursuant to Article 7 of the 1994-1997 labor contract, Rankin M. Gibson was selected from a panel of arbitrators to hear and determine Grievance No. 23-17-951024-1136-02-11 protesting the imposition of a six day suspension upon C.E. for neglect of duty and patient neglect. Having exhausted the grievance procedure the grievance was referred to arbitration for a final and binding decision.

A hearing was held in Toledo, Ohio at the Toledo Mental Health Center also known as Northwest Psychiatric Hospital on December 19, 1996, before the undersigned

arbitrator, between the hours of 9:00 a.m. and 5:30 p.m. Ample opportunity was afforded both parties to offer proofs. Both parties submitted written closing statements the latter of which was received on January 6, 1997.

**B. Background Facts**

Pursuant to certification of the State Employment Relations Board in 1985 the Employer, by Article 2 of the Contract, recognizes District 1199 as the sole and exclusive bargaining agent for all employees employed in the classifications listed in Appendix A of the contract with respect to all matters pertaining to wages, hours, terms and other conditions of employment.

On October 20, 1995, C.E., an employee of the Ohio Department at TMHC for 28 years, was suspended for 6 working days from her position as Psychiatric/MR Nurse Coordinator for patient neglect and neglect of duty, as follows:

October 26, 1995 - Suspension Day	October 31, 1995 - Suspension Day
October 27, 1995 - Suspension Day	November 1, 1995 - Suspension Day
October 28, 1995 - Regular Day Off	November 2, 1995 - Suspension Day
October 29, 1995 - Regular Day Off	November 3, 1995 - Regular Day Off
October 30, 1995 - Suspension Day	

The letter of suspension also contained a warning, reading as follows:

"Warning: This action is not intended to be a punishment but rather it is intended to reinforce the commitment that needs to be made on your part to correct the presently unacceptable behavior related to your job performance and absenteeism. The desired performance is that you bring your actions into line with expectation as given in hospital policy. Should you continue to act inappropriately and/or violate these policies and procedures again, the disciplinary action taken will be more severe .... "

On October 21, 1995, the Union filed Grievance No. 23-17-951024-1136-02-11 on behalf of C.E., which reads in pertinent part:

"Contract Article(s) and Section(s) allegedly violated: Including but not limited to Article - 8.0

Resolution Requested: Six day suspension to be dropped. Time and wages be reinstated to grievant. Ms. \*\*\*[C.E.] to be made whole in every way."

The Employer's Third Step Answer, dated January 30, 1996, reads part:

**"Issue:** Was the grievant disciplined for Just Cause?

**Discussion:** The grievant, a Psych/MR Nurse at Northwest Psychiatric Hospital, was given a six day suspension for Neglect of Duty and Patient Neglect. These charges arose out of three separate incidents. The grievant was charged with pattern abuse for habitually using sick leave or leave in lieu of sick leave before and after regular days off and on weekends. On August 16, 1995 the grievant arrived at treatment team [meeting] 25 minutes late which was considered Neglect of Duty. Finally the grievant was charged with Patient Neglect for failing to ensure that assignment and observation logs were initiated according to doctor's orders.

[A] The grievant stated that for all the dates cited in the pattern abuse she had doctors excuses or prior approved vacation time. The grievant stated that she doesn't work a Monday thru Friday schedule therefore she has a greater risk of calling off on a day that is connected to her day off, weekend or holiday than an employee who works Monday thru Friday. [B] As for the second charge the grievant states that a doctor, nurse and social worker must be present in order to hold a treatment team meeting. She doesn't feel that she delayed the meeting because the social worker had not yet arrived for the meeting and she was trying to contact him. She feels that it is unfair to discipline her for failing to come to the treatment team meeting on time when the social worker has been late on many occasions. [C] With regards to the final charge of Patient Neglect the grievant stated that her shift was over when the doctor arrived to leave a file and therefore it was another nurse's responsibility to carry out the doctor's order. The grievant stated that she was mandated to work overtime on another unit on that day and that she gave report to the oncoming nurse on her ward at approximately 3:20. As she was preparing to leave the unit the doctor arrived and gave her a chart on a new patient. She states that she took the chart and handed it to the oncoming nurse and did not read it. The grievant claims that when the doctor gave her the chart he did not tell her anything about wanting the client to be placed on one-to one. She states that after she handed to chart to the other nurse she left the unit to go to her next assignment. She feels that it was the second shift nurses responsibility to check the chart and carry out the doctor's orders.

The union and the grievant feel that she was not disciplined for Just Cause in accordance with Article 8.01 and request that the discipline be removed from her file and that she receive six days back pay.

**Decision:** The grievant was given a six day suspension based on three charges. As for the charge concerning the grievant being late for treatment team it would appear that others have delayed the meeting and not been

charged with Neglect of Duty therefore the grievant would be correct in her assumption that she should not have been disciplined for this instance. But as for the remaining charges, Just Cause does exist in accordance with Article 8 of the agreement. The grievant has demonstrated a pattern concerning the days of her absences. With regards to the final and most serious charge, Patient Neglect, the grievant herself admits that she accepted the chart from the doctor. The nurse who was coming on duty denies that he was given the chart and there is no evidence to the contrary. The grievant accepted responsibility for the chart when she accepted it from the doctor and therefore should have checked for any orders that may have needed to be carried out. The charge of Patient Neglect in this case alone is enough to warrant a six days suspension. Based on the above the grievance is denied in its entirety."

The parties agree that the issues to be determined by the arbitrator are:

(1) Was the grievant \*\*\*[C.E.] suspended for just cause; and (2) If not, what will the remedy be?

### **C     Analysis - Management Rights**

At common law, the owners of a private business enterprise and their managers have rights that were and are based substantially upon their ownership of property. However, the rights and powers of public employers are based upon the consent of the governed as delegated by their elected representatives to Congress, the General Assembly, the City Council, the Board of Education, etc. In each case, there are numerous limitations by law, and sometimes by contract, upon the exercise of so-called "management rights."

The General Assembly of Ohio in enacting the Public Employees Collective Bargaining Law in 1983 set forth extensive "management rights" of a public employer in R.C. §4117.08. That such rights are not unlimited, see Lorain City School District Board of Education v. State Employment Relations Board, et al., 40 Ohio St.3d 257, 533 N.E.2d 264 (1988).

Acting pursuant to the foregoing authority the State of Ohio on behalf of the Department of Mental Health negotiated an agreement with the Union containing Article 5, entitled "Management Rights", reading as follows:

"Except to the extent modified by this Agreement, the Employer reserves, exclusively, all of the inherent rights and authority to manage and operate its facilities and programs. The exclusive rights and authority of management include specifically, but are not limited to, the rights expressed in Section 4117.08(C)(1)-(9) of the Ohio Revised Code, and the determination of the location and number of facilities; the determination and

management of its facilities, equipment, operations, programs and services; the determination and promulgation of the standards of quality and work performance to be maintained; the determination of the management organization, including selection, retention and promotion to positions not within the scope of this agreement; the determination of the need and use of contractual services; and the ability to take all necessary and specific actions during emergency operational situations. Management will not discriminate against any employee in the exercise of these rights or for the purpose of invalidating any contract provision. (Emphasis added.)

More specifically with respect to discipline the parties in Article 8 entitled "Discipline" provide:

**"8.01 Standard**

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

**8.02 Progressive Discipline**

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

- A. Verbal Reprimand
- B. Written Reprimand
- C. A fine in an amount not to exceed two (2) days pay for discipline related to attendance only; to be implemented only after approval from OCB [Office of Collective Bargaining]
- D. Suspension
- E. Removal

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

The employees authorization shall not be required for the deduction of a discipline fine from the employee's paycheck.

**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 charge 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."

The employee was afforded ample opportunity to be confronted with the charges against her and to offer her side of the story in accordance with the "Loudermill Decision". Thus, the basic issue, as stipulated by the parties and in accordance with §8.01 is whether the six day suspension imposed was for "just cause".

The term "just cause" has no fixed meaning. The best an arbitrator can do is to determine what a reasonable person, mindful of the habits and customs of industrial life and the standards of justice and fair dealings prevalent in the community ought to have done under similar circumstances. See Arbitrator Platt in Riley Stoker Corp., 7 LA 764; Arbitrator McGoldrick in Worthington Corporation, 24 LA 1; Arbitrator Harris in RCA Communications, Inc., 29 LA 567.

Work rules frequently give meaning to "just cause" by setting forth standards of conduct and schedules of sanctions applicable when a rule is broken. Human Resources Policy 37, issued in 1990, under the subject of "Work Rules" provides in pertinent part:

"Employees are expected to abide by and observe those ODMH and State Rules which govern our operation as a mental health facility and all Hospital and Departmental Policies and Procedures of Toledo Mental Health Center and to perform the job requirement as specified in each individual employee's position description."

"Behaviors and actions which violate these work rules may result in disciplinary action as described in TMHC-HR Policy 31. Such violations include, but are not limited to the following:

#### DISHONESTY

\* \* \*

#### NEGLECT OF DUTY

\* \* \*

- 4) Abuse of sick leave rules; late call in; excessive absenteeism, or tardiness.

\* \* \*

#### PATIENT ABUSE OR NEGLECT

- 1) Includes any act or failure to act which is inconsistent with rights of a client or is degrading to client or which might result or did result in psychological or physical injury to client."

D. **Analysis - Sick Leave Misuse And Abuse**

The Employer notes that Human Resource Policy 16 dated August 15, 1991, entitled "Sick Leave", treats "Sick Leave Misuse and Abuse" as follows:

Sick Leave Misuse occurs whenever an employee uses a sick leave for reasons other than which sick leave was intended as specifically stated in this policy.

Sick Leave Abuse is determined by identifying pattern setting. Patterns may include, but not be limited to repeated use of sick leave in any of the following:

- Before and/or after holidays
- Before and/or after regular days off
- After pay days
- Any one specific day
- After overtime worked
- Half days
- Continued use upon accumulation

Any of the above examples of Unauthorized Use of Sick Leave, Sick Leave Misuse and/or Sick Leave Abuse shall be construed as "unauthorized absence" and subject to disciplinary action. Additionally, a physicians verification will not necessarily excuse an employee's absence if sick leave misuse/abuse is suspected. (Emphasis added.)

Without reviewing the details of the grievant's use of sick days, bereavement days, and any medical leave act days during the first six months of 1995, it is sufficient to note that the grievant secured approval of leave for 9 days missed. In several of the cases, requests for leave were supported by certificates of her physicians. The record also shows that the grievant called off on 19 days from January 1, 1995 thru July 27, 1995 without presenting a physician's certificate.

Absenteeism is a critical problems in the labor-management relationship. According to the Labor Relations Yearbook of 1977 (BNA, 1978), p. 50, time lost due to injury, illness and personal or civic activities amounted to 82,000,000 hours or 3.5% of scheduled work time. Absenteeism in manufacturing is higher than in the economy as a whole. Incidents of absenteeism are higher among women than among men.

Employment entails an obligation to attend work. Disruption of work schedules because of the necessity to replace absent workers places a serious burden upon the employer. Absenteeism also places a burden on fellow employees who must cover for the absentee.

By statute public employees of the state and most political subdivisions are granted sick leave under various circumstances. As indicated by Human Resources Policy 16, misuse and abuse of sick leave presents a substantial problem. However, in this arbitrator's opinion it is unreasonable to charge an employee with a pattern of misuse or abuse. Simply, "if such leave misuse/abuse is suspected, notwithstanding a physician's verification". The Employer has ample authority to require proof that the employee's absence was, in fact, due to illness. Human Resources Policy 16 under Physician's Documentation provides that when a pattern of sick leave use would seem to indicate abuse "an employee is required to provide a physician's statement, personally signed by the physician, explaining the nature of the employee's condition justifying their absence from their job and the dates involved regarding the absence." Further, §13.06 of the contract provides that "Falsification of either a signed statement [of employee] or a physician's certificate should be grounds for disciplinary action". No evidence that the Employer sought to confirm or verify the grievant's application for sick leave or the medical certificates was adduced.

#### **E. Analysis - Patient Abuse Or Neglect**

As to "patient neglect", lodged against the grievant, Human Resource Policy 37 defines patient abuse or neglect as including "any act or failure to act which is inconsistent with rights of a client or is degrading to client or which might result or did result in psychological or physical injury to the client". To support such charge against the grievant, the Employer relies upon Medical/Clinical Policy 4, effective August 15, 1992, entitled "Intensive Care for Suicidal Patients". The Policy classifies suicidal tendencies of patients as "high risk", "moderate risk" and "minimal risk". Based on the assessed level of risk, the nursing staff may be required to give "constant observation", or "intermittent observation". If constant observation is required the assigned staff member provides the patient with constant observation at a distance of 10 feet or less, as determined by the safety needs of the patient. "Intermittent observation" is a preventative procedure and "means that the patient shall be observed on a schedule specifically ordered by a physician to provide necessary monitoring of the patient. Such orders may be, for example, once every fifteen minutes (i.e., Q 15 minutes)".

In this case, Dr. Turkmani interviewed a new patient, M.G., for admission and placed her on a Q-15 observation for suicidal ideation. He then took a chart with a folded Q-15 order to the nursing office shortly after 3:00 p.m., when the nurse shift was occurring. The grievant, C.E., was going off duty and Nurse Ackerman was coming on duty. At the same time, RN Coordinator Supervisor D.R. was in the nursing office to collect overtime slips. C.E., who was scheduled for overtime on the second shift, was filling out her overtime form. Dr. Turkmani testified that he told the grievant that the patient should be observed every 15 minutes. However, the grievant denies receiving such an oral instruction and says that the doctor merely said he had to leave to go to another floor for an emergency case. Nurse Supervisor D.R., who was talking to the grievant, testified that she did not hear Dr. Turkmani say there were any special



instructions. Nurse Ackerman testified that he had received the report for the shift ending and that he had been given the key to the drug cart. He then left to care for two patients who were having seizures. He testified that the grievant told him that there was a new patient whom the doctor was still interviewing. The grievant testified that she handed the new patient chart with folded instruction attached to Nurse Ackerman. The grievant then left to go to another floor for her mandatory second shift.

At about 4:50 p.m., when patients were assembled in the dining room, it was discovered that the new patient M.G. was missing. Nursing Supervisor D.R. went to Unit A-100 and handed Nurse Ackerman an observation sheet she had created for the patient, indicating that the patient was on Q-15. Nurse Ackerman raced to the Nurses Station looking for M.G. He and other staff then went looking for the patient, who had crawled into the ceiling of her room from a night stand. The patient was extracted safely from the ceiling area. Dr. Turkmani then placed her on one-on-one constant observation.

Several nurses, including the Nursing Supervisor, testified that in accordance with common hospital and industry practice, once a shift report has been delivered and the keys to the medicine cabinet are delivered, the Title of Charge Nurse transfers from the offgoing nurse to the oncoming nurse. Nurse Supervisor D.R. testified that Dr. Turkmani physically handed the chart to the grievant. The grievant denies that the chart was physically handed to her. The Union contends that it is immaterial whether the doctor gave the chart to the grievant, since the responsibility of Charging Nurse had been transferred to Nurse Ackerman. The Union also contends that it was the doctor's responsibility to inquire as to who was the Charge Nurse. Supervising Nurse Ryan testified that Dr. Turkmani and Nurse Ackerman entered the nurses station simultaneously and that the doctor said he was leaving to respond to an emergency call. She denies hearing the doctor say that he wanted the patient put on a Q-15 watch. The grievant denied that the doctor made such a statement. Nurse Ackerman did not hear the doctor make such a statement. Nurse Stinson corroborated that the responsibility and title of charge nurse transferred to Nurse Ackerman when he received the shift report and the keys to the medicine cabinet. Thus, the grievant was no longer responsible for the A-100 Unit or its patients even though she was still physically there picking up her belongings.

Under the circumstances as established by the evidence, the arbitrator believes and finds that the Dr. Turkmani failed to determine who the charge nurse was before he handed in the new patient chart with folded written instructions, and that the grievant gave the new patient's chart to Charge Nurse Ackerman before she left the unit for her mandated second shift assignment. There is no evidence to show the new patient suffered any psychological or physical injury during the period of approximately 3:35 p.m. to 4:55 p.m. on July 16, 1995. There is no proof that the failure to observe the new patient every 15 minutes interfered with her patient's rights or was degrading to her.

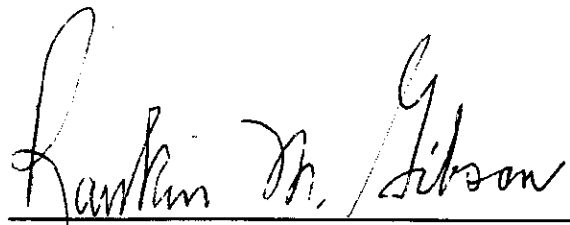
The Employer contends that a charge of "patient neglect" defined as any act or failure to act which is inconsistent with the rights of the patient or which might result in

physiological or physical injury to a patient is considered a "serious infraction". The Union agrees but contends that the Employer did not establish the elements of the offense by credible testimony. The arbitrator concurs.

### **AWARD**

For the reasons stated in the foregoing Opinion, it is the arbitrator's award -

- (1) That the grievance be allowed and that the grievant be compensated for the wages lost; and
- (2) That the arbitrator's fees and expenses be shared equally by the Employer and the Union.

  
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RANKIN M. GIBSON, ARBITRATOR

**DECIDED AND ISSUED AT** Columbus, Franklin County, Ohio this 23rd day of January, 1997.

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