

#1286

IN THE MATTER OF THE ARBITRATION BETWEEN: *

Ohio Department of Mental Health

Grievance No. 23-08-970519-

*** 1488-02-11**

-and-

*** Grievant: Elizabeth Robbins**

Service Employees International Union, District 1199

ARBITRATOR: Mollie H. Bowers

APPEARANCES:

For the State:

Malleri Johnson-Myricks, Ohio Department of Mental Health

Lou Kitchen, Second Chair, Office of Collective Bargaining

Nadine Colegate, RN, Nursing Supervisor

Bonnie S. Marshall, RN, Nurse Educator

Carolyn Petty, Director of Nursing

Jeff Fogt, Labor Relations Officer

For the Union:

Matt Mahoney, Organizer, Service Employees International Union

Judy Creamer, Delegate, Service Employees International Union

District 1199 of the Service Employees International Union (the Union) brought this matter to arbitration challenging the termination of Elizabeth Robbins, RN, (the Grievant) from service as a Psychiatric/MR Nurse Coordinator at the Dayton Mental Health Center (the Center/the Employer) on May 16, 1997. The charge was patient abuse and neglect.

The Hearing was held on April 21, 1998, at 9:00 a.m. The parties stipulated the case is properly before the Arbitrator. Both parties were represented and had a full and fair opportunity to present evidence and testimony in support of their case, and to cross-examine that presented by the opposing party. At the conclusion of the Hearing, the parties presented oral closing arguments.

ISSUE

Did the Employer have just cause to terminate the Grievant?

If not, what shall the remedy be?

PERTINENT CONTRACT LANGUAGE

Article 8 - DISCIPLINE

Section 8.01 Standard

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

Section 8.02

The principles of progressive discipline should be followed. . . .

BACKGROUND

The Grievant was employed by the State of Ohio Department of Mental Health at the Dayton Mental Health Center, beginning on February 12, 1990, as a Psychiatric Nurse/MR Coordinator. She received her formal nursing education at Kettering College of Medicine and Art and, in 1988, she worked at Wayne Hospital for six months as a labor and delivery staff nurse. Her duties there included managing labor, assessing dilation and contraction, pain management, intravenous therapy, etc., and assisting in delivery. In the course of these duties, the Grievant took vital signs of patients, performed cervical checks, and administered IV's and enemas.

At the Center, the Grievant was a Psychiatric Nurse in a facility where mental health services are provided to clients in an in-patient environment. Her annual Employee Performance Reviews from 1990 through February of 1996, showed that the Grievant met and occasionally exceeded the expectations on critical performance dimensions. Under the dimension "PROBLEM SOLVING/DECISION MAKING - Identifies, analyzes and interprets problems and determines alternate solutions", the Grievant always received a "meets" rating, generally accompanied by a narrative statement like, "Continues to have good assessment skills [with] appropriate interventions. Attempts to maintain a safe and therapeutic environ[ment]"

On March 5, 1997, the Grievant worked the second shift (2:00 to 10:00 p.m.) and, in addition to the approximately 11 patients on Unit B who were her regular responsibility, she was assigned to cover the 14 patients on forensic Unit C. At 8:00 p.m., patient H reported that she was having abdominal pain and cramping. The Grievant (and an unnamed Attendant) responded, checked the patient's abdomen, took vital signs, performed a cervical check, and tried to calm the patient. The Grievant was aware that the patient was pregnant. The progress notes the Grievant wrote about this even indicated patient H was complaining of abdominal and pelvic pain in the lower left quadrant, there was "no vag[inal] bleeding. Cervix tight closed. Instructed to remain in be [with] feet elevated. Watch for bleeding". No other entries were places in the progress notes by the Grievant this shift.

The Grievant then called Dr. Patalinghug regarding patient H's condition and told her what she had observed and done. According to the Grievant's unrebutted testimony, Dr. Patalinghug was in the middle of a code yellow (i.e., a psychiatric emergency), said what the Grievant had done "was fine", and said she would get back to her; which the Doctor never did. In a written statement Dr. Patalinghug signed on April 14, 1997, she acknowledged receiving a report regarding patient H from the Grievant on the evening of March 5. The Doctor further stated, "I requested for bed rest, observe for bleeding and vitals [every] shift. She also reported that patient was alright and no further complaint".

About 15 minutes before the end of her shift, the Grievant said she checked patient H, found she was asleep, did not wake her, and did not check for vital signs or bleeding. At the shift change, the Grievant's testimony is unrebutted that she met with the incoming Nurse, Terry Moles, and described patient H's situation to her. The Grievant made no entry, however, in the

progress notes for patient H about any information imparted to her by Dr. Patalinghug on the evening in question.

On March 6, 1997, at 9:00 a.m., patient H was transported to a general hospital where she underwent surgery for an ectopic pregnancy. She remained in the hospital until March 12, 1997.

On March 20, 1997, Marily Rivir, RN, Assistant Director of Nursing, requested disciplinary action against the Grievant, noting among other things, that "No progress notes were entered the next 2 hours" after the 8:00 observation; "The Doctor on duty was not notified"; and

- 1) Nurse Robbins performed an internal (**pelvic**) exam on a pregnant patient. She acted independently of **all hospital policies, procedures**, and the patient's best interests. Nurses do not do pelvic exams. Her exam could have caused bleeding or early labor. A psychiatrist would not do a pelvic exam, but would send patient to a general hospital for diagnosis and care.
- 2) Nurse Robbins wrote in her entry on the progress note to watch for bleeding, however, she did not check for bleeding the next two hours she was on duty.
- 3) A nurse's function is provide nursing care and report to a Doctor any change in a patient's condition. Nurse Robbins did not notify a Doctor that a pregnant patient was complaining of pain.

Nurse Robbins' actions are patient abuse and neglect. She acted by doing a **pelvic exam** and failed to act by not notifying the Doctor and not checking patient for the next two hours. Her actions were inconsistent with the rights of a client (For proper care) which might have resulted in psychological or physical injury to client. (emphasis added)

A pre-disciplinary conference, as provided under Article 8, Section 8.03 of the collective bargaining Agreement, was held on April 14, 1997. The charge set forth therein is "**Patient Abuse & Neglect**", based among other things, on the allegation that the Grievant performed "an internal (**pelvic**) exam on a pregnant patient". (emphasis added) Subsequently, an undated Letter of Removal was issued to the Grievant. That letter states, in pertinent part, "After consideration

of testimony, documentation and recommendations, you have been found guilty of the charge of **Patient Neglect**, as defined in Hospital Policy AD:P-33 Corrective Action Policy and Administrative Rule 5122-3-14". (emphasis added) There is no dispute the Grievant was removed from her position on May 14, 1997. On May 16, 1997, she filed a timely grievance at Step 3, in accordance with Article 7 - GRIEVANCE PROCEDURE, Section 7.06 of the Agreement.

At the Hearing, Jeff Fogt testified the Grievant is charged with **patient neglect**. He acknowledged that she did contact the Doctor on March 5, but said the **pelvic** exam she performed and her failure to check vital signs and for bleeding any time after 8:00 p.m. were offenses egregious enough to warrant termination.

Bonnie Marshall testified she is responsible for nursing orientation, competency testing, training, and retraining. According to Marshall, Nurses at the Center are apprised of what they are and are not allowed to do through the orientation and training processes, and through Center Directives. It was Marshall's testimony that "Nurses [at the Center] are not allowed to perform any procedure on which they haven't been tested for competency". Marshall said "pelvic examinations" are not part of the Center's general nursing practice and Nurses are not trained (or tested for competency) there to perform such examinations. She added that the Grievant was the only Nurse she was aware of who had performed a "pelvic examination" at the Center.

Nadine Colgate corroborated Marshall's testimony that Nurses at the Center do not do "pelvic exams", saying "We're not up to snuff on this, so we're not to be doing them". She, too, knew of no other Center Nurse who had performed a pelvic exam on a patient. Colgate also explained the processes of transcribing and charting Doctors' orders when given over the telephone. This witness also gave testimony that the Grievant told her that she went, on a yearly

basis, to Kettering Hospital, to maintain a competency to perform pelvic exams and that she had performed a "pelvic exam" on a patient at the Center. When asked, on cross-examination what she did with this information, Colgate responded, "I probably told my boss [Dianne McCormick] about it".¹

Carolyn Petty testified that the purpose of competency assessments is "to ensure that especially nurses in clinical services are qualified and competent to perform services associated with their duties at the facilities", and that such assessments are made on "an annual basis at least". She further stated that there is a "very limited" need for an OB/GYN specialty at a psychiatric hospital and that the procedures carry "a significant risk". Petty is part of a state-wide Nurse Executive Committee that continuously reviews nursing practices and needs assessments at mental health hospitals. Her testimony is un rebutted that one purpose of the reviews is to make available staff training that is needed to carry out the mission of these hospitals. Petty agreed that Center Nurses are allowed to perform certain invasive procedures, such as administration of douches and enemas, but they "must have a doctor's order" even then.

The Grievant pointed out that Nurses receive training, during nursing school, to perform pelvic and cervical examinations. She also emphasized the experience she had had in obstetrics at another hospital. It is undisputed the Grievant was given an opportunity to provide documentation of her competency certification to perform pelvic and cervical examinations, she alleged existed at the time of her pre-disciplinary conference. The Grievant did not provide such certification. At the Hearing, she was asked to explain why she had not done so. The Grievant responded, "Because I had never been taught to provide a pelvic exam" and "because the

¹McCormick was not presented as a witness in this proceeding.

individual I was training with every year [for cervical exams] refused to provide it [competency certification] because she did not want to lose her job”.

The grievance was process in accordance with the parties’ Agreement, however, no mutually acceptable resolution was reached. The case was, therefore, advanced to arbitration for decision.

POSITIONS OF THE PARTIES

Center Position:

The Employer contends the Grievant was terminated for just cause based on charges of patient abuse or neglect. The neglect was the administration of a pelvic (or cervical) examination to a pregnant patient, failure to enter physician’s orders in the patient’s progress notes after the Grievant contacted a physician, and failure to check vital signs and evidence of bleeding after the physician had ordered such. According to the Employer, the violations noted above are very serious breeches of hospital policy and procedures, and of sound nursing practice which might have caused physical or psychological injury to the patient. The Employer also emphasizes that this is the second incident in approximately two years in which the Grievant substituted her judgment for that of a physician and, thus, could have exposed the Center to serious liability and loss of advantage in a competitive marketplace.

It is the Employer’s position that the Grievant’s actions and inactions fit the definition of patient neglect and that discharge is the appropriate penalty for this offense. The Employer rejects the notion that progressive discipline should have been applied, yielding a more lenient penalty than discharge. In so doing, the Emloyer again notes the Grievant already had received a

2-day suspension for incompetency in 1995. Her behavior on March 5, 1997, was even more egregious, the Employer maintains, because the Center has neither training nor policy which permits certification of competency in invasive gynecological procedures.

Based upon evidence and credible testimony, the Employer asks that the Grievant's discharge be upheld and that the grievance be denied.

Union Position:

The Union maintains the Grievant was discharged without just cause. Its position is that the Grievant had been trained and was experienced in doing cervical examinations. Further, the Union argues that the Grievant did not perform a "pelvic" examination, but merely touched the patient's cervix to check for dilation as part of an assessment necessary to properly apprise the physician of the patient's condition. The Union contends the Grievant provided good patient care, using standard nursing practice and technique.

Additionally, the Union asserts no 'orders' were ever provided to the Grievant by Dr. Patalinghug on the evening of March 5. What the record shows, the Union stresses, is that the Doctor affirmed the techniques used by the Grievant to assess patient H, and the recommendations she made to alleviate her distress.

The Union is equally adamant that the Grievant has been improperly charged with failure to check the patient's vital signs and for bleeding between 8:00 and the end of her shift at 10:00 p.m. As support for this claim, the Union points out, first, that Dr. Patalinghug's 'requested' that vital signs and bleeding be check each shift; a request which the Grievant had complied with at or about 8:00 p.m. Second, there were mitigating circumstances on March 5, which prevented the Grievant from spending more time with the patient. That is, the Union points out, the Grievant

was assigned the 14 patients on Unit C, in addition to the 11 she normally supervised on Unit B. According to credible testimony from the Grievant and from management witnesses, the Union contends that preparation and distribution of medications would have taken the Grievant longer than usual on March 5. Third, it is understandable, and in accordance with good nursing practice that the Grievant did not wake patient H at 9:45 p.m., when she looked in on her before the end of the shift.

The credible evidence and testimony of record shows, the Union maintains, there is no Center policy prohibiting nursing staff from performing a cervical check on patients. It also shows the Center failed to prove the Grievant behavior was indicative of patient abuse and/or neglect. The Union therefore asks that the grievance be sustained and that the Grievant be returned to work with back pay and benefits, and be made whole in every way.

ANALYSIS

It is evident from the record that it took management some time to determine the appropriate and supportable basis for the charge(s) it would use to justify the Grievant termination. The primary basis for this case is the Grievant's discharge after both written and verbal admissions against interest that she performed an invasive examination on pregnant patient H by checking her cervix for dilation and, thus, the Center purports, the Grievant was guilty of patient neglect.

Marshall, Colgate, and Petty all confirmed that "pelvic examinations" are not performed at the Center, that there is no Nurse competency assessment for pelvic examinations, and that Psychiatric Nurses do not do such examinations because they are not trained in such techniques,

there is little demand for their application, and they are risky. While the Arbitrator had no reason to doubt the credibility of this testimony, it was given no weight in deciding the outcome of this proceeding. The reason is there is not one sintilla of evidence to show that the Grievant performed a "pelvic examination" on patient H.

What the Grievant readily acknowledged that she did on March 5, was perform a cervical check on patient H. Such a check is distinguished from a cervical examination, and certainly from a pelvic examination in several respects. The pertinent distinction here is from a cervical examination in which, according to Joint Exhibit 22, Fundamentals of Nursing: The Art and Science of Nursing Care:

A speculum is used to visualize the cervix and vagina. They are inspected for color, position, size, and lesions and discharge. A specimen for a cervical Papanicolaou smear is ordinarily obtained at this time. (P. 311)

There is no evidence a speculum was used by the Grievant in assessing patient H, thus, the characterization 'cervical check' is an accurate description of the invasive procedure she performed on patient H.

The credible testimony of record clearly indicates that cervical checks and other gynecological examinations are neither taught nor assessed for the competency of the Nursing staff at the Center. The Grievant countered these facts by stating that OB/GYN techniques are taught in Nursing school and that she served a six month stint in an OB/GYN nursing capacity shortly after she graduated from school. The Arbitrator gave no weight to the Grievant's response because there was no showing that she had a current competency certification in OB/GYN. Further, her explanation that the person she claimed to train with annually on cervical

examinations declined to provide evidence of such training for fear of losing her job was both self-serving and disingenuous.

The Union countered by stressing there is no policy at the Center which prohibits a Nurse from performing a cervical check on a patient. The Union is correct, however, factual accuracy did not prevent an adverse decision where the Grievant is concerned. That is, the Grievant had been employed as a Psychiatric Nurse/MR Nurse Coordinator at the Center for approximately 7 years when the incident in question occurred. Since there are invasive procedures which are condoned, with a Doctor's order, and since the testimony of Center witnesses is credible that invasive gynecological procedures has neither been condoned nor competency assessed at least during the Grievant's tenure there (if not before), the Arbitrator must conclude the Grievant knew or should have known that a cervical check was not an assessment technique approved by the Center.

Now comes the question of the appropriate definition of this offense. The Center acknowledged at the Hearing that the charge it finally rests its case with is patient neglect. The Standard Guide for Disciplinary Action defines "Neglect of Duty" as "Verbal or physical action or inaction toward public and/or clients where safety and health are endangered. Penalties are specified for this offense. The Arbitrator rejected, as unproven, the Center's claim that the Grievant engaged in "Neglect of Duty" on March 5. There were three essential elements which led to this conclusion.

First, while the Arbitrator does not condone the Grievant's performance of a cervical check on patient H, there is no evidence that her conduct endangered the health and safety of the patient. Instead, as the Center so accurately described, this was a second offense of incompetency

in which the Grievant demonstrated willful intent to substitute her judgment for that of a physician. Under the Standard Guide for Disciplinary Action, "Incompetency" is defined as "Performance at sub-standard levels whereby safety, health or rights of patients are endangered; failure to complete assignments in an appropriate manner, thereby endangering rights, safety or health [of] patients". The Grievant's cervical check of patient H was an act of incompetency; the second of same in approximately a two year period.

In determining the charge and the penalty, the Arbitrator also considered whether evidence existed that Dr. Patalinghug gave "orders", via telephone, to the Grievant regarding the care of patient H on the evening of March 5, 1997. This was a difficult determination to make since Dr. Patalinghug was not presented as a witness at the Hearing and neither party asked that the record be held open until she returned from Africa. This means that the Arbitrator must be guided by the evidence of record which is Dr. Patalinghug's written statement, dated April 14, 1997, that she "requested" bed rest, observe the patient for bleeding, and check vital signs on each shift. The credible evidence and testimony of record confirms that the Grievant complied with all these "requests" before she even spoke with Dr. Patalinghug.

Furthermore, the Grievant's defense for not recording Dr. Patalinghug's "request" was that she did not believe 'orders' had been provided, but rather, in essence, that her assessment of the patient and her recommendations to ease the patient's discomfort had been confirmed by the Doctor. While it may be true that it is better to err on the side of excessive documentation, under the circumstances of this case, there is no evidence that the Grievant failed to document 'orders' from the Doctor. Finally, it was noted that the Grievant was diligent in sharing patient H's condition with on-coming Nurse Moore, so that she would be fully apprised of what the Grievant had done

and observed on her shift, and of what Dr. Patalinghug had "requested" be done on each shift.

Therefore, the outcome of this case now turns on a determination of what the appropriate penalty is for the offense proven. In making this determination, the Arbitrator took judicious note that this was the second offense where the Grievant substituted her judgment for that of a physician in a two year period. While the Standard Guide for Disciplinary Action provides for a 6 day suspension or removal for a second offense of incompetency, the Arbitrator considered that the guidance provided is not mandatory. Based upon a damage assessment in the instant case, the fact this is a second offense of incompetency for the Grievant, the potential liability attendant therewith, but given the mitigating circumstance that the Grievant was responsible for two units on March 5, the Arbitrator has determined that her conduct, while egregious, is not so egregious as to warrant termination or so inconsequential as to follow strictly the guidance provided in the disciplinary grid. Rather, the appropriate discipline and award ordering same is as follows:

AWARD

The Center failed to prove that termination was the appropriate discipline for the Grievant's offense(s) proven. The termination shall be rescinded, with the Grievant's time off, as of the date of this award, serving as a suspension. The Grievant shall be returned to work with her seniority in tact, but she is not awarded back pay or health benefits for the period of the suspension.

Date: May 17, 1998

Mollie H. Bowers
Mollie H. Bowers, Arbitrator