

IN THE MATTER OF THE ARBITRATION BETWEEN

GRIEVANCE NO.: 33-00-20101021-0064-01-04

The Ohio Civil Service Employees
Association, AFSCME Local 11

GRIEVANT: JENNIFER GRIMES

AND

Ohio Veterans' Home Agency

OPINION AND AWARD

ARBITRATOR: Meeta Bass Lyons

AWARD DATE: September 15, 2011

APPEARANCES FOR THE PARTIES

MANAGEMENT:

Jessie Keyes Office of Collective Bargaining, First Chair

Aimee Szczerbacki, Office of Collective Bargaining, Second Chair

Donna Green, OVH Labor Relations Officer

UNION:

Deborah Bailey, Ohio Civil Services Employees
Association, AFSCME Local 11,
First Chair

Connie Logan, Union Steward

Julie Ferrar, Chapter President

Grievant, Jennifer Grimes

PROCEDURAL HISTORY

The Veterans' Home Agency is hereinafter referred to as "Employer". The Ohio Civil Service Employees Association, AFSCME, Local 11 is hereinafter referred to as "Union". Jennifer Grimes is the Grievant.

Grievance No. 33-00-2010-1021-0064-01-04 was submitted by the Union to Employer in writing on October 21, 2010 pursuant to Article 24 of the parties' collective bargaining agreement. Following unsuccessful attempts at resolving the grievance it was referred to arbitration in accordance with Article 25, Section 25.03 of the 2009-2012 Collective Bargaining Agreement.

Pursuant to the collective bargaining agreement between the Union and Employer, the parties have designated this Arbitrator to hear and decide certain disputes arising between them. The parties presented and argued their positions on July 27, 2011 in Sandusky, Ohio. During the course of the hearing, both parties were afforded full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral arguments. Witnesses were sequestered during the hearing. The hearing and the record was closed on July 27, 2011.

The parties stipulated that the grievance and arbitration were properly before the Arbitrator. The parties did stipulate to the issue as follows: Was the Grievant, Jennifer Grimes, removed from her position of Licensed Practical Nurse for just cause? If not, what shall the remedy be?

PERTINENT PROVISIONS OF THE 2009-2012 AGREEMENT

ARTICLE 24

24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action...

24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

- a. One (1) or more oral reprimand(s) (with appropriate notation in employee's file);
- b. One (1) or more written reprimand(s);
- c. One (1) or more working suspension(s). A minor working suspension is a one (1) day suspension, a medium working suspension is a two (2) to four (4) day suspension, and a major working suspension is a five (5) day suspension. No working suspension greater than five (5) days shall be issued by the Employer. If a working suspension is grieved, and the grievance is denied or partially granted and all appeals are exhausted, whatever portion of the working suspension is upheld will be converted to a fine. The employee may choose a reduction in leave balances in lieu of a fine levied against him/her.
- d. One (1) or more day(s) suspension(s). A minor suspension is a one (1) day suspension, a medium suspension is a two (2) to four (4) day suspension, and a major suspension is a five (5) day suspension. No suspension greater than five (5) days shall be issued by the Employer;
- e. Termination.

24.04 – Investigatory Interview

An employee shall be entitled to the presence of a Union steward at an investigatory interview upon request

24.05 – Pre-Discipline

An employee has the right to a meeting prior to the imposition of a suspension, a fine, leave, reduction, working suspension or termination...

24.06 – Imposition of Discipline

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment...

Union and Employer did not argue or defend any violations of Article 24.04 and 24.05. Union and Employer argued and defended the Just Cause Standard and Progressive Discipline found in Article 24.01 and 24.02.

BACKGROUND

Set forth in this background is a summary of undisputed facts and evidence regarding disputed facts sufficient to understand the parties' positions. Other facts and evidence may be noted in the discussion below to the extent knowledge of either is necessary to understand the Arbitrator's decision.

Grievant is a sixteen (16) year employee with the State of Ohio at the Veterans' Home Agency. Grievant was hired in 1995 as a Nursing Assistant, and became a Licensed Practical Nurse (LPN) in 2006. On September 9, 2011 Employer received a complaint from nursing assistants on the unit. The nursing assistants felt that Grievant had inappropriately administered Ativan to a resident because they heard the resident crying, screaming, and refusing to take the medication. An investigation was initiated. Although no abuse was substantiated, it was discovered that all the required documentation was not completed to demonstrate the need to administer the medication to ensure resident safety.

Employer has established several rules known as working instructions to document patient care. Grievant attended training on documentation on April 6, 2011. Working Instruction: Pharm 4-11 states that medications are passed from Medication Administration Record (MAR) and initialed at the time given. The nurse must report drug effects on patients, and note interactions or complications. It is not disputed that Grievant did not document her care of patient in accordance with form guidelines. Working Instruction: Nrsg 16-2 makes the nurse who prepares the medication also responsible for administering and documenting the medication. The same nurse is then responsible for recording its administration immediately after it is given in accordance with form guidelines on the Administration Charting Record and Nursing PRN notes, and before the next patient's medicines are administered. Grievant did not record the administration of the Ativan

immediately after the injection but later documented that she administered PRN meds in nurses' progress notes. Grievant did not identify the medication, and the date and time she administered the medication. The date and time of the entry is automatically recorded by the computer. There was no evidence that she failed to document before the next patient's medicines were administered. Working Instruction 4-7 Medication Refused requires the nurse to initial in the appropriate block and circle for medications that are being refused by using (R), to state on the MAR reasons for not administering medication, and to chart that possible complications have been explained. Grievant did not complete this form.

Working Instruction: Pharm 4-18 requires the administering nurse to document the time when a PRN is administered, and to complete specific data on the reverse side of the supplemental PRN note sheet. Grievant did not complete this document. Grievant completed the Certificate of Disposition of Narcotics, the document used to withdraw narcotics dispensed from the pharmacy for the resident. This form also lists the date, time, and identifies the medication and administering nurse. But, it is a separate form from the required PRN medication sheet. Working Instruction: Nrsg 5-1 requires the nurse to document the behavior of the resident in the clinical record and record the behavior on the Behavior Tracking Form of the resident who is prescribed an anti-psychotic medication. Grievant did not document any behaviors on this form. She wrote zero as a response to how many times the resident exhibited certain targeted behaviors. Grievant then documented in the progress notes that the resident was yelling, attempting to slide out of chair, and swinging at staff. The attempts to assist the resident were without success, and the resident was placed in an area alone to calm down without success.

Employer removed Grievant from employment on October 18, 2010 for violations of OVH Corrective Action Standard: AN-06 Failure to follow policy/procedure (resident related) (e.g., failure to follow a policy, procedure, or program which was implemented specifically for resident safety or well being; failure to report abuse). Her prior grievance record consisted of one-day working suspension for exceeding sick leave balances, a two-day fine for late notification and failure to follow policy (resident related) and a five-day working suspension for late notification of an absence. The Union filed its grievance on October 21, 2010 alleging a violation of Article 24 and any other applicable articles of the Collective Bargaining. The grievance was not resolved within the procedure established by the collective bargaining agreement, and was properly advanced to arbitration.

POSITION OF EMPLOYER

Employer contends that Grievant violated OVH AN-06. It is not disputed that Grievant failed to properly document her duties inclusive of the administration of medication and behavior of a resident in accordance with form guidelines and policy. The failure of Grievant to appropriately document the care and behaviors of the resident placed the safety of the resident at risk. Grievant had participated in the in-service training on documentation on April 6, 2010. The conduct of Grievant was unsafe and neglectful in spite of her sixteen (16) years of experience and training. There is just cause for the removal.

Employer contends that even though the Board determined that education on documentation was the appropriate remedy to resolve the nursing complaint, the violation is considered a major infraction according to the parties' collective bargaining agreement. The Board of Nursing is a separate entity from Employer. Grievant had an active five (5) day suspension and the next level of discipline is removal. The practice of the Employer is to move forward progressively through the disciplinary grid without repeating any level of discipline.

Employer contends that no disparate treatment exists. Other nurses have been disciplined for improper documentation. Other nurses may have received a different level of discipline for the same or similar infraction but this was due to their individual disciplinary record. Due to her disciplinary record, there is just cause for the removal.

Employer requests that Grievance No. 33-00-2010-1021-0064-01-04 be denied.

POSITION OF UNION

Union contends Grievant properly performed her nursing care of the resident, but made clerical mistakes. Even though there was not total documentation compliance, Grievant provided enough information on the necessary documents to ensure the safety of the resident. The discipline was not commensurate with the offense. There was no just cause for removal.

Union contends there is a pattern of poor documentation, no documentation and late documentation at the facility without employee discipline. Grievant was not afforded the opportunity to correct her behavior. Her work record contains suspensions for sick leave related issues connected to her personal medical condition. Grievant is a sixteen year employee of the Employer. Employer is unwilling to extend a last chance agreement resulting in a removal for a minor offense. The discipline imposed was excessive and used solely for punishment.

Union contends that the Board of Nursing recommended education on documentation as an appropriate remedy in these circumstances. The RN manager testified that education on documentation is a sufficient remedy for bad, late or no documentation cases dependent on the disciplinary record of the worker. Employer did not consider education as an appropriate remedy in this case. The removal of Grievant was excessive, severe and punitive.

Union requests that Grievance No. 33-00-2010-1021-0064-01-04 be sustained, and Grievant be reinstated to her former position as an employee of the Ohio Veterans' Home with full back pay and all rights and benefits. Grievant be made whole.

DECISION

The determination of whether just cause exists is a two step process. First, it must be established that the employer has proved that Grievant is guilty of the misconduct. Grievant is charged with violation of OVH Corrective Action Standard: AN-06: Failure to follow policy/procedure (resident related)(e.g. failure to follow policy, procedure or program which was implemented specifically for resident safety or wellbeing; failure to report abuse.) Grievant poorly documented her care and treatment of a resident contrary to form guidelines and policy. The evidence clearly establishes, and Grievant does not deny, the violation of the policy.

Having found that Grievant committed the offenses with which she is charged, it must next be determined whether the penalty assessed is just under all the circumstances to satisfy the Just Cause Standard. Just cause requires that an employer administer discipline even handedly. The essence of disparate treatment is differently disciplining similarly situated employees. The Union maintains that other workers have not been removed for failure to properly document. In support of its position, the Union introduced testimony of an interoffice email regarding other workers who had been disciplined for failure to properly document, but not removed from their position. Management explained that yes other workers have been disciplined for similar offenses. However, the level of discipline was dependent upon the record of the individual worker. The Corrective Action Standards for Employer provides for written reprimand to removal for the first infraction for the failure to policy(resident related), five-day working suspension or fine to removal for a second infraction, and removal for a third infraction. Administering different punishments to differently situated employees is not disparate treatment. The Arbitrator finds that the claim of disparate treatment is without merit.

Removal is the most severe penalty that can be imposed under the parties' collective bargaining agreement. The Union argues that the removal in these circumstances is not reasonably related to the misconduct of Grievant. The documentation completed by Grievant provided sufficient information on the administered medication and the behaviors of the resident to ensure the safety of the resident. Further, the misconduct of Grievant could have been corrected by a less severe discipline, education. Grievant did not have an opportunity to correct her behavior when in fact she is a sixteen year employee; her prior disciplinary record contains suspensions for sick leave related issues connected to her personal medical condition.

The Just Cause Standard requires that the discipline imposed upon an employee be just, fair and commensurate with the offense. The traditional factors to consider in the assessment of reasonableness of the discipline are the nature of the offense, prior disciplinary record, length of service, performance and management fault, if any. The Nursing Board is a separate entity; the Employer is not bound to accept its remedies as its own for discipline.

This grievance involves poor documentation of the resident's medical records. It is not disputed that Grievant did not complete certain forms. It is the position of Employer that proper documentation is critical to patient care. The danger was not in the administration of the medicine but by the failure to document. The lack of documentation does not allow for thorough communication, monitoring, and follow through from the health care team for a resident. When a nurse fails to properly document, she does not allow for the staff that follows to go back to review progress and effect on the resident. Additionally, there is a risk that a duplicate dose could be given because the first dose was not recorded.

When all the documents are reviewed in their entirety, there was sufficient notice of the patient care and treatment provided to address the legitimate concern of Employer. The nurses' notes indicate a late entry regarding the resident's behavior and that a PRN medication was given. Late entries are not in accordance with policy. RN Manager admitted that late entries which are appropriate, in compliance with policy in all other aspects that are not subject of complaints are not investigated. The RN Manager acknowledged that the behaviors and interventions indicated would have justified the injection. Although Grievant did not complete the required PRN medication sheet for the resident, Grievant did complete the Certificate of Disposition of Narcotics. This form lists the date, time, identifies the medication administered and administering nurse.

Progress notes are read by other RNs, LPNs, managers and social services. The frequency of reading these notes is dependent upon the circumstances of the resident. A resident maybe on shift to shift charting, sometimes only charted on a weekly basis. If medication is given, then it must be charted. It is the opinion of the RN manager that most nurses read the progress notes when there is a need to do so or when they are making an entry and will normally then review the prior entry. Progress notes are read for anything that happens where a need exists to learn information about a resident. In her opinion, a nurse would first look to the progress notes, and then the other documents to gather as much information as possible on the resident. The progress notes for the resident from 09-05-10 thru 09-11-10 indicate that on 09-07-10 at 10:28p.m. Grievant made the following log:

Late entry resident yelling attempting to slide out of chair.
Swing at staff. Attempts to assist resident without success.
Resident places in area alone to calm down without
success. Resident given PRN meds. Will continue to monitor.

These behaviors and interventions are not indicated on the Behavioral Tracking Form of the resident. Grievant marked zero for responses. But, so did the first shift LPN or RN. Grievant and union witness, another LPN who was on duty for that shift, testified that staff informed them at the end of their shift that the resident had been acting out for almost one hour. First, second and third shift staff all recorded zero as a response to how many times the resident exhibited certain targeted behaviors that day. The union witness explained that was the manner the form was completed but staff would verbally advise the incoming shift of the residents' behaviors and other need to know information. She also acknowledged that this practice was contrary to policy. Had Grievant not been the subject of the unsubstantiated resident complaint, the RN Manager testified the documentation issue would probably not have surfaced.

The Just Cause Standard includes principles of progressive discipline. Progressive Discipline provides for a corrective approach of the employee's unacceptable behavior through written reprimands, fines, suspensions and ultimately termination. Employers impose some lesser penalty than discharge to reinforce the expectations of the employer and the seriousness of the behavior and afford the employees an opportunity to improve their behavior without loss of employment. Removal occurs for both serious offenses and for repeated misconduct.

Grievant has been working for Employer for sixteen years. She started as a nurse's aide, and later went back to school to become a licensed practical nurse. There was no evidence of prior evaluations. Her prior grievance record consisted of one-day working suspension for exceeding sick leave balances for 2/10/08, a two-day fine for late notification and failure to follow policy (resident related) for 08/05/08 and a five-day working suspension for late notification of an absence for 06/28/10. Contrary to the

assertions of Union there is one performance related discipline for a similar charge to the charge in issue. Neither Management nor Union knew the nature of the offense, and it was combined with a second infraction for attendance related matters. There was no opportunity for corrections on performance because of the nature and number of attendance infractions, dissimilar offenses. There was no evidence of Employer's consideration of mitigation. The Labor Relations Officer testified that she did not participate in discussions of the last change agreement assessment because the grievance involved nursing performance; she is responsible for attendance. She did state that the practice of Employer is to move forward progressively through the disciplinary grid without repeating any level of discipline.

For the above-stated reasons, the Arbitrator finds that removal was excessive, and sustains the grievance in part.

In summary, the evidence persuades the Arbitrator that Grievant violated Ohio Veteran's Home Corrective Action Standards AN-06, as alleged in Employer's letter of October 18, 2010, and there is just cause to discipline. Removal, however, was excessive as a punishment as to be beyond the Employer's managerial prerogatives. The Arbitrator must therefore sustain in part Grievance no. 33-00-2010-1021-0064-01-04.

AWARD

After a full review and consideration of all documents and arguments presented, as well as the testimony of witnesses, and the closing arguments of the parties, Grievance No 33-00-2010-1021-0064-01-04 is sustained in part. There is just cause discipline the Grievant, and the appropriate remedy is a five (5) day suspension.

Grievant is reinstated to her position as an LPN, and is awarded back pay less the period of suspension, no overtime, premium pay for missed holidays, less earning or other compensation, less normal deductions and union dues, and restoration of her seniority, benefits and health insurance. All leave balances be restored, including those that would have been accrued or restored to date.

September 15, 2011

____/s/____ Meeta Bass Lyons
Meeta Bass Lyons, Arbitrator
Steubenville, Ohio