

ARBITRATION PROCEEDING

In the matter of arbitration between:)	DRC-2019-01033-11
)	Gr. Nancy Greathouse
STATE OF OHIO, DEPARTMENT OF)	
REHABILITATION & CORRECTION))	
)	
and)	Award: February 24, 2020
)	
SERVICE EMPLOYEES INTERNATIONAL))	
UNION, DISTRICT 1199)	

Before Mitchell B. Goldberg, Arbitrator

OPINION AND AWARD

Appearances:

For the Union:

Josh Norris,	Executive Vice President
Nancy Greathouse,	Grievant
Teddi Anderson,	Registered Nurse
Tamara Holmes,	Registered Nurse
Leticia Kelley,	Registered Nurse
Donna Baker,	Retired Case Manager
Delphine Fomenky,	Registered Nurse

For the Employer:

Allison Vaughn,	Assistant Chief, LRAI
Victor Dandridge,	Labor Relations Administrator
Beth Hogon,	Chief, LRA2
James Hogon,	LRO
Anita Carr,	Program Administrator
Karen Stanforth,	Assistant Chief Inspector, Medical
Wendy Clary,	Observer
Marisso Palumbo,	Observer

I. Introduction and Background.

This is a labor arbitration proceeding conducted under the terms and conditions of the parties' collective bargaining agreement ("CBA") covering the term from 2018 - 2021. The parties selected the undersigned as the arbitrator of this grievance in accordance with the procedures set forth in Article 7, Section 7.07 A.

The Ohio Department of Rehabilitation and Correction ("ODRC") is the State agency that houses convicted felons who have been adjudicated to its care and custody pursuant to law. The Union represents a bargaining unit consisting of medical service providers that provide medical services to the inmates within the 26 institutions throughout the State. The Grievant, Nancy Greathous, is a licensed registered nurse who provides nursing services to inmate patients at the Franklin Medical Center ("FMC"). Moreover, the Grievant at all relevant times with respect to this proceeding served as a Union Delegate or Representative at the FMC for bargaining unit members.

Joint Stipulations

The subject grievance (filed on March 11, 2019) is properly before the Arbitrator and there are no procedural objections. The Grievant was terminated (removed) from her employment at FMC effective March 25, 2018 for allegedly inappropriately accessing and sharing medical records of inmates [REDACTED], in violation of SOEC Rules 21, 37 and 50. The Grievant's seniority date began in 7/07 with over 12 years of active service with ODRC.

The Grievant, at the time of her removal, had an active written reprimand from 2017, that was grieved to the extent allowed by the CBA. The reprimand was not a result of allegations of a similar nature (to the incident that gave rise to her removal).

Grievant served as a duly elected Union Representative with SEIU District 1199 for the past 10 years. On October 11, 2017, the Grievant was at her place of work, FMC, using a state

issued computer. She was on approved Union release time functioning as a delegate at the time she accessed the files in question in the instant grievance. The Grievant was provided a copy of the pre-disciplinary packet of SEIU member Teddi Anderson by management on or about August 8, 2017. The Grievant was an authorized user of the ODRC ECW records system on October 11, 2017 in accordance with ODRC policy.

The parties agree that the issue before the arbitrator is whether the Grievant was terminated for just cause under the provisions of the CBA. If it is found that the termination was without just cause, the Arbitrator shall provide the appropriate remedy for the Employer's CBA violation.

The Grievance/Arbitration Process

The Employer denied the grievance throughout each grievance step and the matter proceeded to arbitration on December 11, 2019 at the Union's offices. A reporter transcribed the proceeding and prepared the official record. The parties offered testimonial evidence and they submitted joint and party documentary exhibits. Witnesses were examined and cross-examined. Post-hearing briefs were filed after all of the evidence was received.

II. The Charges and Alleged Rule Violations.

The Notice of Disciplinary Action, and the Pre Disciplinary Conference Notice list the following charges of misconduct: Rule #21, Unauthorized use, release or misuse of information; #37, Any act or failure to act that could compromise or impair the ability of an employee to effectively carry out his/her duties as a public employee; #38, Any act, or failure to act, or commission not otherwise set forth herein which constitutes a threat to the security of the facility, staff, any individual under the supervision of the Department, or a member of the general public; #41, Unauthorized actions or a failure to act that could harm any individual under the supervision of the Department; and #50, Any violation of ORC 124.34 ... and for

incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the Director of Administrative Services or the commission, or any failure of good behavior, or any other acts or misfeasance, malfeasance, or nonfeasance in office.

III. The Investigation Leading to the Charges of Misconduct.

An investigative report of the Grievant's actions on October 11, 2017 was prepared by witness Karen Stanforth on November 1, 2018. She found and confirmed that the Grievant "inappropriately" accessed the medical records of two inmates, [REDACTED]. The Grievant's actions were found by witness Anita Carr, a Health Planning Administrator 3, while she was reviewing electronic record documentation in preparation for a pending arbitration case involving another employee.

The Grievant, at all relevant times, admitted that she was on a scheduled leave on October 11, for the purpose of working on Union business related to discipline matters involving other bargaining unit members. She further admitted that she accessed the records of [REDACTED]. The Grievant admitted that she was not at the time providing medical, nursing or other related services for these two inmates.

Ms. Stanforth set forth in her report the applicable federal and state laws related to the confidentiality of patient medical records. She further set forth in detail the OCRC policies and protocols for nurses when they access patient medical records in the electronic system. Nurses, such as the Grievant, who enter the ECW system are expected to refrain from engaging in any IT related activities outside of their job duties. Licensed nurses, such as the Grievant are subject to practice standards that protect the privacy and confidentiality of patient medical information and records.

Ms. Stanforth interviewed the Grievant as part of her investigation. The Grievant acknowledged that she was subject to the above, laws, policies and license standards regarding patient confidentiality. The Grievant, however, stated as she did in this hearing, that there are circumstances related to her duties and work when she is permitted to access inmate medical records for patients that are not her patients at the time she is accessing and reviewing their records. The Grievant explained to Ms. Stanforth that she accessed the records of [REDACTED] specifically for the purpose of providing Union assistance to Nurse Teddi Anderson in preparation for the disciplinary proceedings she was facing. She stated that medical information regarding patients is often contained in the pre-disciplinary meeting packet of information disclosed to her by the administration so that she can be prepared for the meeting. The following report statements form the basis of Ms. Stanforth's findings that the Grievant breached her confidentiality obligations in violation of the above laws, policies and professional standards:

It should be emphasized, the DRC Bureau of Labor Relations maintains confidential patient information cannot be provided to union delegates, however, if management does find it necessary to rely upon evidence from confidential patient information in the employee discipline process, specific steps are put in place to ensure the security and confidentiality of patient information is maintained. A union delegate may solicit patient information in the form of a written request pursuant to a pre-disciplinary meeting. There is no special form or document used for this purpose and information is only released when specific steps are put in place to ensure the security and confidentiality of patient information is maintained.

As she was asked a second time if she had ever requested information in the past [the Grievant] could not remember, however, when shown past letters, she herself had submitted (and those of other 1199 Union Reps) provided by the DRC Bureau of Labor Relations, [the Grievant] verbalized she did recall the process. . . . [The Grievant] also verbalized, "It's been my experience the last couple of years, info is not forthcoming. I've asked for records and get a response nearly a year later. I need information for representation. I'm not going to put this info out, I don't think I've asked for patient info." . . .

* * *

When questioned why she did not use the information request process she had used in the past to seek information [the Grievant] responded,

"I looked at it as doing union time." She further explained, "A nurse will access a medical record because the note hasn't been locked ... I'm not caring for a patient if I lock a note. What is misuse is printing a patient's chart. That is misuse or unauthorized use. I accessed a patient flowsheet. I was representing someone." ...

* * *

At the closure of the interview [the Grievant] began to rationalize her actions stating, "I did have a reason to look at the chart ... especially if someone was treated wrongfully. When I go to mediation I'm going to do everything I can to defend that person. This has been a practice for years. Now all of sudden it's a[n] issue but wasn't a week later when a Nurse accessed a patient record and printed out multiple copies." ...

IV. Applicable CBA Provisions.

Article 5 - MANAGEMENT RIGHTS states that the Employer retains the right to "suspend, discharge and discipline employees for just cause." Article 6 - NON-DISCRIMINATION states that the Employer shall not discriminate against bargaining unit members on the basis of "union affiliation." Just cause is the fundamental principle for employer imposed discipline. It is a well defined principle that is accepted in both arbitrations and in the courts. It requires employers to comply with due process procedures, adequate investigations of misconduct, progressive or corrective discipline except in the most serious cases, and proportional and reasonable penalties after the charges of misconduct are proven by the existing evidentiary standards. The anti-discrimination prohibitions are judged under the disparate treatment standards, that in effect, require employers to apply like penalties to employees who violate laws, rules and policies as those provided to other similarly situated employees, without regard to their union affiliation.

V. Union Representation and Related Duties.

The Prior Authorization Issue

The Grievant's rights as a Union representative, whose duties include the right to represent bargaining unit members who are being investigated for misconduct that is subject to

discipline, representation at disciplinary meetings or hearings, and representation at mediations and arbitrations are firmly embedded within their “duties for Union work” set forth in Article 3 - Union Rights, and Section 3.02. The Obligation to provide representation includes the legal obligation and duty to provide “fair representation.” Moreover, the Employer has a legal interest in not interfering with the Union’s right to provide fair representation to its members.

Specifically, in a discharge case, the employer could find itself as a defendant in a SERB ULP proceeding, or in a hybrid court claim that alleges the Union’s failure to fulfill its duty of fair representation. The member may sue the Employer to reverse the discharge decision as being without just cause, in addition to suing the Union for breaching its duty of fair representation and seriously damaging the arbitration process.¹ Grievant’s work in investigating the charges of misconduct against her member Nurse Anderson was both within her contractual rights under the CBA, and her legal rights under law.

The appropriate issue is not whether the Grievant could access the medical records of [REDACTED] for the purpose of providing her assistance to Nurse Anderson -- clearly she could do so. The more important issue is whether the Grievant violated the rules and laws for access by not obtaining prior authority from [REDACTED] or from the Employer.

The Grievant’s Failure to Obtain Prior Authorization

The Employer acknowledges the Union’s right under Section 7.06 of the CBA to obtain all relevant and pertinent records, papers, data and names of witnesses to facilitate the resolution of grievances, but the sharing of the records is subject to the confidentiality restraints and patient confidentiality protections provided by HIPAA.² The essence of the Grievant’s

¹ *Vaca v. Sipes*, 386 U.S. 171 (1967); *But see Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976) (An exception that involved an unrelated issue.) Under Ohio law, the Union would commit an unfair labor practice by failing to fairly represent all public employees in the bargaining unit. Section 4117.11(6).

²Employer Brief, pp 7-8.

alleged rule and law violations is the contention that she should have requested the information from the Employer under Section 7.06 before accessing the medical records of [REDACTED]. She also could have made a Public Records Act request under Chapter 149, ORC. The Employer is not under any obligation to “unconditionally” disclose employee confidential information of the type protected by HIPAA.³ However, when it comes to complying with a request for confidential information, the Employer must offer a facially reasonable accommodation to the union in order to meet its information production obligation.⁴

The Union’s Defenses

The Union states that the Grievant had actual authorization to access the subject medical records. She received the actual authorization for unlimited access on her date of hire through the SYSTEM ACCSS Request form that was approved by ODRC. The Policy permits access as needed when acting in the Nurses’ course of their specific duties. The Union contends that the Grievant’s specific duties on the date in question were those in her capacity as a Union delegate. The Employer disagrees with this broad interpretation of the Grievant’s specific duties, and contends that the Grievant’s access was strictly confined to her duties as a nurse related to [REDACTED] medical care.

The Union further argues that the information obtained by the Grievant at that point in time was no longer unauthorized confidential information because it was already provided to her when the Employer gave her the unredacted Pre-D packet of Nurse Anderson on August 11, 2017 that was supplied for the Grievant’s preparation for the November 28, 2017 mediation session. Included in the submission were unredacted STNA flow sheets for the two inmates.

³*Detroit Edison Co., v. NLRB*, 440 U.S. 301 (1979) (Psychological aptitude tests and scores).

⁴*E.W. Bushman Co. v. NLRB*, 820 F.2d 206 (6th Cir. 1987) (Employer offered reasonable conditions for producing financial information under confidentiality agreement); *East Tennessee Baptist Hosp. v. NLRB*, 6 F.3d 1139 (6th Cir. 1993) (Employer offered reasonable alternative to the request).

The medical record information reviewed by the Grievant, according to the Union, was the same exact information provided to her in the packet. The Grievant was merely checking the accuracy of the packet information to verify that she had the correct information to argue in Nurse Anderson's behalf. The charge against Nurse Anderson was that she failed to place required documentation into the record system, which resulted in missing patient ECW records. The Union's defense was that there were problems with data losses in the records system, unrelated to any omissions on the part of Anderson.

The Employer, however, contends that the Grievant accessed not only the STNA flow sheets, which are in fact medical records, but also the progress notes of the two inmates, which are clearly confidential records not previously disclosed to the Grievant in the Pre-D packet.⁵ If the Grievant merely wanted to compare the STNA sheet provided in the Pre-D packet in the confidential database, she could have clicked only on the flowsheet link instead of the progress notes. Nurse Carr, the administrator and Record Clinical Specialist, testified that the access log shows that the Grievant accessed the progress notes and not just the flowsheets. One can access the flowsheet just from the patient hub by not going into the progress note itself. Once the progress note shows up on the access log, it means that the searcher obtained access to the information in the progress notes.⁶

Reasonable Accommodations For Requests/Conditions For Production

The charge against Nurse Anderson was her alleged failure to properly document her data on the STNA sheet, specifically meal percentages for the patients.⁷ Her defense as to why her data was missing was that the system would lose data after it was entered. If this were the case, the data in the inmates' records might not reflect what was

⁵ A progress note is a description written by the physician. It discusses the patient's treatment plan, and the patients compliance with the plan. Stanforth, Tr. 112.

⁶ Carr, Tr. 74-75.

⁷ Greathouse, Tr. 267.

contained on the STNA sheet that was provided to the Union in the Pre-D packet. Nurse Anderson told her supervisor that she entered data, but it was later missing.⁸ The Grievant made notes of her findings after reviewing the records of the two inmates. She found that the information obtained on her review matched what was given to her in the Pre-D packet.⁹

Once it is found that the Grievant had a reasonable basis for entering into the inmates medical records for purposes of investigating the charges against Nurse Anderson, one must focus on the fact that the Grievant and others in the past found it necessary to make formal written requests for needed information. Ms. Stanforth showed the Grievant past written requests that she made to DRC Bureau of Labor Relations.¹⁰ One must then ask why the Grievant did not follow that procedure in this instance? She told Ms. Stanforth that when she made these types of requests in the last couple of years, the responses were not forthcoming, or not produced within a reasonable period of time, or in enough time to permit her to prepare for the Pre-D hearings or for grievance hearings.

The exhibits contain examples of public records requests to the Employer from Union representatives, including the Grievant. These requests, however, are for public records unrelated to specific requests to enter into inmate confidential medical records. The absence in this record of past specific information requests by the Grievant and other Union representatives to view inmate medical records indicates that when medical record information was needed to represent bargaining unit members, the requests were either not made to management, were orally made, or were not made on any formal basis. The Employer's decision to enforce the

⁸ Id. at 270.

⁹ Id. at 271.

¹⁰ The examples provided in the record are Union requests for information, other than requests to gain access into inmate medical records. There are requests for Employer investigations, employee time records, leave requests and overtime records.

authorization process should have been communicated to the Union so that compliance would occur before any discipline was issued.

There is no evidence in this record that contradicts the Grievant's statement that the Bureau was not acting in a reasonable manner by delaying its responses to the Union requests for authorization to examine public records. Moreover, the Grievant's complaint was also that the Bureau was declining the information requests.¹¹

The Grievant was one of five nurses who were investigated for gaining access into inmate medical records without prior authorization. All five, including the Grievant were terminated. Ms. Stanforth testified that the circumstances involving two of the terminated nurses were nearly identical to the Grievant's circumstances.

One of the nurses, a Union delegate, accessed a medical record during a grievance mediation hearing. It was shown that she did this without gaining prior authorization.¹² The second Union delegate nurse accessed a medical record of a patient that was not under his care.¹³

The evidence shows that Union representatives at the other locations accessed inmate medical records on their own without following any formal request process. Ms. Stanforth, nor anyone else in the administration investigated whether access to medical records occurred in the past by other Union representatives as part of their representation duties.¹⁴ It is reasonable to conclude that the three Nurse Union delegates were operating under the same understanding that they could access inmate medical records as part of their grievance investigations. There is no specific rule or policy that prohibits Union delegates from accessing inmate medical records as part of their representation duties. The absence of any prior specific requests for

¹¹Stanforth, Tr. 122-23.

¹² Tr. 128-29.

¹³ Id. at 129.

¹⁴ Id. at 137.

access to medical records, as opposed to other document requests indicates that the Grievant did not have the requisite intent to violate any rule or policy. Three separate Union delegates engaged in the same type of access to inmate medical records at three separate locations while they were performing their union representation duties.

Findings

The evidence in this record supports the finding that the Grievant exceeded her implied authority to review the medical records of [REDACTED] for purposes of assisting Nurse Anderson in her grievance proceeding. Her implied authority permitted the Grievant to examine the same material that was supplied to her in her Pre-D packet that was issued to her by management.¹⁵ The Grievant, however, went beyond her authorization by viewing the progress notes.

VI. Penalty Considerations.

The arbitration principle of just cause involves more than a review of due process standards, and the determination of whether the Grievant violated one or more of charges made against her. The principle also mandates a review of the discipline issued by management. The Employer's chosen level of discipline itself must be just. The discipline level must be proportional with the proven offense. Factors include (1) the nature and consequences of the employee's offense; (2) the clarity or absence of rules; (3) the length and quality of the employee's work record, and (4) the practices of the parties in similar cases. The discipline must bear some reasonable relation to the seriousness or the frequency of the offense. These factors are embodied in Article 8, which states that disciplinary action may be imposed "only for just cause."

¹⁵ Ms. Stanforth testified that she was unaware that the Grievant was furnished with the Pre-D packet, or whether the Grievant had prior authorization to receive the information in the packet that mirrored what was in the medical records of [REDACTED]. Tr. 145-46.

Article 8 also incorporates the principle of progressive or corrective discipline, which requires warnings before suspensions and suspensions before removal. Section 8.02 further states that the progress “is contingent upon the type and occurrence of various disciplinary offenses.” I interpret this to mean that all but the most serious offenses are subject to progressive or corrective discipline. Certain offenses sometimes referred to as “capital offenses,” are so serious that a discharge or removal might be justified even for a first offense. I find that an unwarranted invasion by a Nurse into the private medical records of an inmate for improper purposes, could under certain circumstances, justify a removal even for a first offense. An arbitrator must in each case weigh any aggravating and mitigating factors that should be considered by the Employer before issuing its penalty decision.

Nature of the Offense

The Employer did not prove that the Grievant’s access to the inmates’ progress notes was an offense serious enough to warrant a discharge. There is insufficient evidence to support any finding of the Grievant’s “release or misuse” of information after she reviewed or accessed the inmates’ progress notes (Rule #21). She did not compromise or impair the ability of any employee to effectively carry out their duties (Rule #37). Her actions did not constitute any threat to the security of the facility, staff or any individual under the supervision of the Department or member of the general public (Rule #38). She did not harm any individual under the supervision of the Department (Rule #41). Moreover, the evidence is insufficient to establish that the Grievant violated ORC 124.34. The record does not establish the Grievant’s dishonesty (she admitted her actions), immoral conduct, or any neglect of duty or failure of good

behavior that would be considered misfeasance.¹⁶, malfeasance¹⁷ or nonfeasance¹⁸ of a public professional employee.

The Grievant's Work Record

The Grievant had a good work record, with the exception of an active reprimand that was issued in 2017 for a matter that is unrelated to the charges against her in this proceeding.

Corrective and Progressive Discipline

There is insufficient proof that the Grievant knew or should have known that her access to the medical records of [REDACTED] for the purpose of assisting Nurse Anderson was a prohibited act within her overall right to investigate Nurse Anderson's grievance. The evidence is insufficient to find that the Grievant would not conform to exercise her Union duties in the manner now more formally required by the Employer with respect to her requests to review inmate medical records for the purposes of providing quality representation of her members in disciplinary matters. She should now make formal written requests for this information. If responses are not forthcoming, she should bring her requests to the mediators, arbitrators and others involved in the disciplinary proceedings. If she is required to review inmate medical records to obtain relevant evidence and her requests are denied or ignored after reasonably exhausting her efforts, she should proceed with her investigation and document her findings. She should produce her findings and represent that she did not access the information for any purpose other than to assist in her defense of a disciplinary proceeding against her member.

Discipline Issued To Employees For Like Conduct

¹⁶ Excessive negligence of a public professional employee. Black's Law Dictionary, 8th Ed., p. 1021 (2004).

¹⁷ A wrongful or unlawful act requiring intent. Id. at p.976.

¹⁸ The failure to act when duty requires an act. Id. at 1080.

The Grievant was one of three Union delegates who were discharged for improperly accessing inmate medical records while engaging in their Union representation duties. These discharges occurred at relatively the same time. There is no evidence in this record that any other Union delegates were discharged or even disciplined in the past for similar actions or conduct. The Grievant should have received clear or better notice from management that her Union duties were limited insofar as access to inmate medical records, unless she received prior formal authorization for such access.

VII. Award.

The grievance is substantially sustained for the above reasons. The discharge or removal from her employment shall be vacated, and the discipline shall be removed from the Grievant's employment or personnel records. The Grievant shall instead receive a form of documented constructive counseling for not disclosing to her supervisors or managers that she accessed the progress notes in the medical records of [REDACTED] while representing Nurse Anderson in her disciplinary proceeding.

The grievant shall receive a make whole remedy for the Employer's issuance of a removal from her employment without just cause under the CBA. She shall recover her lost seniority and she shall be reinstated to her former position. She shall recover any and all lost pay and benefits, less her interim earnings, and any unemployment compensation benefits that she received. Jurisdiction is hereby reserved to resolve any and all issues that may arise by reason of this remedy.

Date of Award: February 24, 2020

Mitchell B. Goldberg
Mitchell B. Goldberg, Arbitrator

CERTIFICATE OF SERVICE

This Opinion and Award was served upon the following persons or entities on this 24th day of February, 2020 by electronic mail:

Allison Vaughn, Labor Relations Administrator, Bureau of Labor Relations, ODRC:
Allison.v Vaughn@odrc.state.oh.us

Joshua D. Norris, Executive Vice President, SEIU, District 1199:
jnorris@seiu1199.org

Cassandra.Richards@das.ohio.gov

Mitchell B. Goldberg
Mitchell B. Goldberg

