

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 150, SERVICE & HOSPITAL	:	
EMPLOYEES' INTERNATIONAL UNION,	:	
AFL-CIO,	:	
	:	
Complainant,	:	Case XIII
	:	No. 17053 Ce-1503
vs.	:	Decision No. 12141-A
	:	
APPLETON MEMORIAL HOSPITAL,	:	
	:	
Respondent.	:	
	:	

Appearances:

Mr. Gary Robinson, Director of Field Services, appearing on behalf of the Complainant.
Quarles, Herriott, Clemons, Teschner & Noelke, Attorneys at Law, by Mr. Laurence E. Gooding, Jr., appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

A complaint of unfair labor practices having been filed with the Wisconsin Employment Relations Commission in the above entitled matter; and the Commission having appointed Sherwood Malamud, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Statutes; and hearing on said complaint having been held at Appleton, Wisconsin on September 21, 1973, before the Examiner; and the Examiner having considered the evidence, oral and written arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Local 150, Service & Hospital Employees' International Union, AFL-CIO, hereinafter referred to as the Complainant, is a labor organization with offices at 135 West Wells Street, Milwaukee, Wisconsin.
2. That Appleton Memorial Hospital, hereinafter referred to as the Respondent, is a private, nonproprietary hospital having its facilities at 1818 North Meade Street, Appleton, Wisconsin.
3. That at all times material herein, the Respondent has recognized the Complainant as the exclusive bargaining representative of certain of its employes; that in said relationship the Respondent and the Complainant have been, at all times material herein, signators to a collective bargaining agreement covering wages, hours and conditions of employment of such employes; and that said agreement provides that grievances may be presented to the Wisconsin Employment Relations Com-

mission as an alleged violation of said agreement in a complaint of unfair labor practices, and said agreement does not provide for final and binding arbitration.

4. That the aforesaid collective bargaining agreement in part provides as follows:

"ARTICLE II
Nondiscrimination

Neither the Hospital nor the Union may discriminate against any employee for reasons of race, religion, sex, age, national origin, or Union status.

No employee shall be discharged or disciplined without just cause.

. . .

ARTICLE XVIII
General Provisions

. . .

Section 8. Union Steward: A current list of authorized Union Stewards shall be presented to the Hospital by the Union. Authorized Stewards shall have the authority to gather pertinent facts, assist employees in the processing of grievances in accordance with the terms, procedures, and limitations provided in this agreement when requested by the employee who initiates the grievance.

A grievance or alleged grievance occurs only when interpretation and application of this Agreement or the Rules and Regulations of the Hospital are at issue.

. . .

ARTICLE XIX
Grievance Procedure

Section 1. The Hospital agrees to meet with duly accredited officers and committees of the Union upon grievance matters pertaining to the meaning or application of this contract. Grievances shall be dealt (sic) with first through the immediate supervisor, then through the head of the department, and in case of failure to resolve the grievance within five (5) working days thereafter, then the grievance shall, within the next succeeding three (3) working days be put in writing and promptly submitted to the Administrator or, in his absence, the Assistant Administrator. If the matter is not satisfactorily adjusted at this level within seven (7) days from the time it is presented to the Administrator or Assistant Administrator, then the party wishing to carry the matter further may present the matter to the Wisconsin Employment Relations Board as an unfair labor practice for violating the terms of a collective bargaining agreement pursuant to the provisions of Chapter 111 of the Wisconsin Statutes, and this shall be the sole and final remedy of the aggrieved party."

5. On March 8, 1973, Elayne Lastofka, hereinafter referred to as the Grievant, was suspended from her duties as a nurses' aide, a position she has held since February, 1968, pending investigation of certain charges; on March 17, 1973, Grievant was discharged effective March 8, 1973; Respondent based its decision on the following grounds: (a) insubordination; (b) rough treatment of patients; (c) lack of cooperation with co-workers. The Employer also relied on the fact that in April of 1972 the Grievant received a disciplinary suspension for rough treatment of patients, sleeping while on duty, not carrying her proper share of the work load, not working well with co-employees, and showing no understanding for patient needs and requirements.^{1/}

6. The following events occurred on the evening of March 7 and the morning of March 8, 1973: Grievant reported for work. Mrs. Steger, the Night Supervisor, found that Grievant's pants and blouse uniform did not match, and consequently Mrs. Steger sent Grievant home to change her uniform. Grievant returned home, changed her uniform, and reported back to work as she was told.

7. At approximately 3 a.m., on March 8, 1973, Grievant and Kathy Brockman, a Licensed Practical Nurse, at Respondent's Hospital, were turning an elderly woman, Mrs. H., who frequently complained of pain when she was turned; both Grievant and Brockman assisted one another and both were engaged in turning Mrs. H.; however, after Mrs. H. was turned it was discovered that she was at the edge of the bed. Mrs. Brockman suggested that Mrs. H. be moved to the center of the bed; before Mrs. Brockman could take any action to move Mrs. H., the Grievant had moved the patient by herself. At this point, the patient complained that the aides were rough. Immediately, upon leaving the patient's room, Mrs. Brockman reported Grievant's "rough treatment" of the patient to the Charge Nurse, Ms. Lux; she, in turn, reported the incident to the Night Supervisor, Mrs. Steger.

8. At approximately 4 a.m., Mrs. Steger phoned Ms. Lux and asked her to send Grievant down to the Night Supervisor's office; Grievant was standing near Ms. Lux when the call arrived. As soon as Ms. Lux advised Grievant that she was to proceed to Mrs. Steger's office, the Grievant took the phone and inquired of Mrs. Steger the reason for and purpose of the meeting. Grievant asked Mrs. Steger to pin a note to her time card stating the reason for the meeting; the Night Supervisor refused to advise Grievant of the purpose of the meeting; Grievant then advised Mrs. Steger that a Union steward should be present at this meeting, and, at that hour, no steward was on duty. Mrs. Steger hung up. Between 4 a.m. and 7 a.m., Mrs. Steger interviewed Mrs. H. and a Mrs. S. who had also complained of rough treatment by the nurses' aides on duty; both gave descriptions of the aide but did not refer to the aide by name. The Union steward arrived at the Hospital at approximately 7:45 a.m. Grievant asked for and received permission from the Charge Nurse to leave the floor in order to speak to the Night Supervisor. When Grievant presented herself to Mrs. Steger at 7:45 a.m., the Night Supervisor indicated that she would not speak with Grievant at that time, because she wanted to speak to Grievant at 4 a.m. Mrs. Steger believed that Grievant had

^{1/} See Appleton Memorial Hospital, Decision No. 12082, 8/73.

left the floor without permission, and in her report of the incidents of March 7 and 8, she included an item relating to Grievant's leaving the floor without permission.

9. On March 8, sometime after 4 a.m., Grievant was heard stating that she did not wish to work with Mrs. Brockman because Mrs. Brockman had reported Grievant to supervision. However, the Grievant at no time either prior to or after March 8, 1973 refused to perform any assignment with any of her co-workers.

10. Following the suspension of Grievant, Mrs. Byer, the Director of Nursing, and Mrs. Steger conducted an investigation into Grievant's treatment of patients by asking her co-workers if they knew of any other incidents of "rough treatment" of patients by Grievant. As a result of this investigation, two employes, a nurses' aide and an LPN (Licensed Practical Nurse), each reported an incident in which Grievant had turned a patient, in one case, a critical patient, by herself, while the other employe was present for the specific purpose of assisting the turning of the patient. Both employes had mentioned it to a Registered Nurse; however, nothing further was done and Grievant was never reprimanded for these incidents. However, these incidents were used by Respondent in making its final determination to discharge Grievant.

11. Grievant was aware of the practice prevalent at Appleton Memorial Hospital to the effect that when two employes are available and present for turning a patient, the patient should be turned by two employes; an employe should not, under those circumstances, turn a patient by herself.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

That the violation of Respondent's practices was not of a degree as to justify discharge of Elayne Lastofka; Respondent Appleton Memorial Hospital did not have "just cause" when it discharged Elayne Lastofka on March 8, 1973, it thereby violated Article II of the collective bargaining agreement. Therefore, Respondent committed, and is committing in that regard, an unfair labor practice within the meaning of Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes the following

ORDER

IT IS ORDERED that Respondent, Appleton Memorial Hospital, its officers and supervisors immediately take the following affirmative action, which the Examiner finds will effectuate the policies of the Wisconsin Employment Peace Act:

- (a) Offer to Elayne Lastofka reinstatement to a position with Respondent at her former or equivalent wage classification with full rights of seniority as accrued to March 8, 1973, and for the period from May 8, 1973,

to the date of reinstatement; and make Elayne Lastofka whole for any loss of pay which she may have suffered by reason of the discharge, by Respondent Appleton Memorial Hospital for the period from May 8, 1973, to the date of reinstatement, by making payment to her of a sum of money equal to that which she would normally have earned as wages from the date of her discharge to the date of the unconditional offer of reinstatement, less any earnings which she may have received during said period, and less the amount of unemployment compensation, if any, received by her during said period, and in the event that she received unemployment compensation benefits, reimburse the Unemployment Compensation Division of the Wisconsin Department of Industry, Labor and Human Relations in such amounts.

- (b) Since the Examiner has determined that Elayne Lastofka shall sustain a disciplinary layoff for the period commencing on March 8, 1973, up to but not including May 8, 1973, Appleton Memorial Hospital shall not pay any wages to Elayne Lastofka for the period of March 8, 1973, up to but not including May 8, 1973, nor shall Respondent reimburse the Unemployment Compensation Division of the Wisconsin Department of Industry, Labor and Human Relations for any benefits paid during said period.
- (c) Notify the Wisconsin Employment Relations Commission in writing, within twenty (20) days from receipt of a copy of this Order as to what steps it has taken to comply herewith.

Dated at Madison, Wisconsin, this 13th day of May, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Sherwood Malamud, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT
CONCLUSION OF LAW AND ORDER

Introduction

In its complaint Local 150 alleges that Elayne Lastofka, a nurses' aide was discharged without proper cause in violation of Article II of the collective bargaining agreement existing between the parties and consequently, violated Section 111.06(1)(f) of the Wisconsin Employment Peace Act. Article XIX, the Grievance Procedure, provides as its final step, the filing of a complaint of unfair labor practices under the Wisconsin Employment Peace Act. Although the matter herein is an unfair labor practice in form, in substance it is similar to an arbitration, therefore the Examiner has proceeded to a determination much in the manner of an arbitrator.

Since the instant matter is a complaint case, the Examiner ruled that Complainant had the burden of going forward; however, in order to shift the burden to Respondent, Complainant had only to submit evidence that Grievant's seniority was terminated and that a collective bargaining agreement existed which required just cause as a basis for the discharge. The Complainant presented a prima facie case, thus shifting the burden to the Respondent. Therefore, Respondent was required to demonstrate that it had discharged Elayne Lastofka for just cause.

Testimony and Evidence

The grounds for the discharge, as alleged by Respondent, were insubordination, "rough treatment" of patients, lack of cooperation with co-workers, and prior administration of discipline against Grievant. The Examiner, discusses below the quality and weight of the evidence presented in support of each of the above counts. Each of the above violations occurred on March 7 and 8, unless otherwise specified.

Lack of Cooperation With Co-workers

The Employer relies on Grievant's statement made on March 8, 1973 after Mrs. Brockman reported Grievant to supervision, to the effect that Grievant did not wish to work with Mrs. Brockman. However, the record is clear that the Grievant did not act upon that statement. She never refused an assignment with a co-worker either before or after the incidents of March 8. The evidence does not sustain the allegation that the Grievant failed to cooperate with her co-workers.

Insubordination

Insubordination is more readily defined in the context in which it occurs. However, it may be said that insubordination involves a refusal by an employe to obey a direct order of supervision. Certainly, an employe must have notice, direct or constructive, that his refusal to obey the order will be considered insubordination and subject to disciplinary action. It is readily ascertainable from the facts of the case whether the Employer warned Grievant that her refusal to come to a meeting would be considered insubordination.

Both the Night Supervisor, Mrs. Steger, and the Grievant testified at the hearing. The record is clear that Mrs. Steger did not tell Grievant her refusal to come to the meeting would constitute insubordination. Mrs. Steger did not advise Grievant of the purpose of the meeting, but Mrs. Steger was advised by Grievant that she wanted a Union steward present at the meeting. Even after Mrs. Steger was advised that Grievant wanted a Union steward present, the Night Supervisor did not advise Grievant that continued refusal to come to the meeting would be treated as insubordination. The Examiner need not decide whether Grievant had a contractual or statutory right to have a Union representative at the proposed meeting. See Quality Mfg. 79 LRRM 1269 (NLRB Dec.); Reversed in part 4th Circ. C.A. 83 LRRM 2817, (U.S. Sup. Ct. Cert' granted Ladies Garment Workers Union vs. Quality Mfg. Co., 42 U.S.L. Week 3610, 4/74). This failure to alert Grievant that her actions would be treated as insubordination removes from the incident the "defiance" of an order from supervision necessary for insubordination. Therefore, the Examiner found that Grievant was not insubordinate.

The Night Supervisor's report of March 8, 1973, contained a charge that at 7:45 a.m. Grievant left her floor without permission. Ms. Lux, the Charge Nurse testified that Grievant asked for and received permission to leave the floor in order to speak with the Night Supervisor, Mrs. Steger.

"Rough Treatment" of Patients

The only evidence indicating that Grievant mistreated the patient, Mrs. S., is the interview conducted by the Night Supervisor of that patient on the morning of March 8. The patient did not refer to the Grievant by name and the description supplied by Mrs. Steger on the basis of her conversation with the patient is at best rank hearsay. It was not given any weight by the Examiner.

Unlike the Mrs. S. incident, there is direct testimony on the manner in which Mrs. H. was treated by Grievant. Mrs. Brockman, the LPN, who was to assist the Grievant in turning Mrs. H. testified at the hearing on September 21, 1973, that Grievant turned Mrs. H. by herself before Brockman had an opportunity to participate in the turning. However, in a written statement composed by Mrs. Brockman within one or two days of March 8, 1973, she describes the Mrs. H. incident as follows:

"At 4:00 Elayne and I went to change Mrs. (H's) position. Mrs. (H) is a rather large person and it takes two people to turn her, although she tries to help as much as she can. After we had turned her on to her side, I told Elayne she was too close to the edge of the bed and we should move her shoulders back further into the bed. Before I could get my arms under Mrs. (H's) shoulders to help move her back in the bed, Elayne had already done it. Then Elayne proceeded to put a pillow between her legs and this is when Mrs. (H) complained of it hurting her. I then went out to tell D. Lux, RN, that Mrs. (H) complained." (Mrs. Brockman referred to the name of the patient in her statement; the Examiner used the patient's initial.)

The Examiner has given greater weight to Mrs. Brockman's written statement, rather than her testimony, because her statement was prepared when her memory of the incident was fresh. The statement re-

veals that Mrs. Brockman and Grievant both turned Mrs. H. Grievant moved Mrs. H. from the edge of the bed to the center of the bed by herself. The Examiner concluded that a violation of Respondent's practices had occurred.

As part of the allegation of "rough treatment", Grievant purportedly failed to relay a patient's request for medicine to the Charge Nurse. Ms. Lux, testified that within a three-day period prior to the March 8 incident, Mrs. Vistae inquired if a patient, Mr. L. had received the medicine he requested. Ms. Lux was not aware that Mr. L. had requested any medicine. At which point Mrs. Vistae informed Ms. Lux that Grievant and Vistae had heard the request and that Grievant had told Vistae that Grievant would transmit the message to Ms. Lux. Ms. Lux had no direct knowledge of the request by the patient or the statement by the Grievant that she would transmit the message. Mrs. Vistae testified at the hearing. However, no one asked her about this incident. In the absence of direct testimony concerning that incident, the Examiner gave little weight to this allegation.

The investigation initiated by the Director of Nursing, Mrs. Byer, "uncovered" two other incidents in a one-week period immediately preceeding March 8 in which Grievant turned two patients by herself when another nurses' aide or LPN was present in the room for the purpose of participating in turning the patient. Both co-workers, Mrs. Scheuren and Mrs. Buelow, testified at the hearing and both stated that they had related the incident soon after it occurred to a Registered Nurse. Grievant was never reprimanded nor were these incidents called to her attention. To permit an employer to employ violations and infractions of rules and practices by an employe where the employer was aware of the incident at the time it happened and did nothing at that time to bring the infraction to the attention of the employe would be to undermine the very purpose of a grievance procedure.

The justification for Respondent's action rests, in the final analysis, on the Mrs. H. incident. No competent medical testimony was presented as to the consequence of Grievant's action. The infraction committed by Grievant in moving Mrs. H. to the center of the bed by herself does not impress the Examiner as being so serious an infraction as to merit discharge. The Director of Nursing testified that the Grievant had been counseled concerning the practice of turning patients. However, she did also testify that under certain circumstances a nurses' aide could turn a patient by herself.

Remedy

Since the Examiner has found that the infraction demonstrated in this case does not warrant a discharge, the Examiner must now consider the appropriate remedy.

The Grievant had received prior discipline for infraction of Hospital rules and Hospital practice including the practice of the Hospital in the method of turning patients. The Examiner is aware that "rough treatment" of patients can cause serious injury to patients and expose Respondent to costly law suits. The Examiner is also aware of the difficult task facing Respondent when it must prove that one of its employes is rough with patients. It is clear to the Examiner that Grievant did violate the practice of the Hospital concerning patients. And what is even more disturbing to the Examiner is the posture which

Grievant took during the hearing. Grievant maintained that as a normal course of business one person could turn a patient. Respondent's concern with the manner in which patients are turned is justified. A hospital is not an industrial plant where the mistakes of an erring employe can be caught at some point in the production line without serious consequence to the employer. In a hospital an employe's mistakes can be fatal to a patient, and the danger to human life cannot be lightly regarded. Respondent has determined the manner in which the patients should be turned. Employes should not be permitted to second-guess the employer. However, the record also reveals that the Employer was thorough in its investigation after the fact, yet its supervision was lax prior to March 8. Responsibility for the incident must be borne by both Employer and employe. Therefore, the Examiner finds that the appropriate discipline for Grievant is a two (2) month disciplinary suspension without pay. However, Grievant should be reinstated with back pay from May 8, 1973, to the date of reinstatement less income earned or unemployment compensation received during the period from May 8 to the date of reinstatement.

Dated at Madison, Wisconsin, this 13th day of May, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Sherwood Malamud
Sherwood Malamud, Examiner