BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

BAY AREA MEDICAL CENTER EMPLOYEES
UNION LOCAL 3305, AFSCME, AFL-CIO

and

BAY AREA MEDICAL CENTER

Case 16
No. 52547
A-5359

Appearances:

Mr. David A. Campshure, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1566 Lynwood Lane, Green Bay, Wisconsin 54311, appearing on behalf of the Union.

von Briesen & Purtell, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin 53202-4470, by Mr. Daniel T. Dennehy, appearing on behalf of the Employer.

ARBITRATION AWARD

Bay Area Medical Center Employees Union, Local 3305, AFSCME, AFL-CIO, hereinafter referred to as the Union, and Bay Area Medical Center, hereinafter referred to as the Employer or Center, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Union made a request, with the concurrence of the Employer, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance. The undersigned was so designated. Hearing was held in Menominee, Michigan, on July 27, 1995. The hearing was not transcribed, the parties filed post-hearing briefs, and the record was closed on October 19, 1995.

ISSUE:

The Employer frames the issue as follows:

1. Did Bay Area Medical Center ("Bay Area") properly discipline Michael Madsen when, in accord with Sec. 5.02 of the collective bargaining agreement between Bay Area and the Bay Area Medical Center Employees Union, Local 3305, Wisconsin Council 40, AFSCME, AFL-CIO (the "Union"), Bay Area imposed upon him a two-day

suspension for repeatedly engaging in inappropriate and unprofessional conversation while performing duties?

2. Does the arbitrator have jurisdiction to decide the propriety of the length of time taken to schedule a two-day suspension when there is no guideline or requirement regarding timeliness of discipline in the contract and grievances brought by the Union or an employee are limited to those "pertaining to the employee's work or working conditions" and those "pertaining to the meaning or application of the Agreement"?

3. If the arbitrator has jurisdiction to decide the timeliness of the discipline, did Bay Area's imposition of the two-day suspension of Michael Madsen three weeks after notice of the suspension and five weeks after the misconduct, to accommodate Bay Area's tight staffing schedule, constitute an improper delay?

The Union frames the issue as follows:

Did the Employer discipline the Grievant for just cause?

If so, what is the appropriate remedy?

The undersigned adopts the Union's statement of the issue.

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE 5 - DISCIPLINARY ACTION

Employees shall not be disciplined, except for just cause.

5.01 **Dismissal:** Employees may be discharged without warning or notice for the following offenses:

a.) Unauthorized and deliberate disclosure of any confidential information pertaining to the patients; personal, medical or financial records.

b.) Deliberate refusal or failure to perform work assigned by a supervisor, or to comply with supervisors' verbal or written instructions;

c.) Falsifying, or assisting in falsifying, personnel and/or other records, including medical records, employment applications, and time cards;

d.) Reporting to work or working while under the influence of alcohol or drugs;

e.) Unauthorized use of, or unauthorized possession of, drugs;

f.) Stealing or concealing in one's locker or on one's person any property belonging to the Center, employees, or patients;

g.) Malicious conduct, including damaging or destroying any property belonging to the Center, employees, or patients;

h.) Fighting on Center premises;

i.) Abuse of patients, employees, or visitors;

j.) Sexual harassment of patients, employees, or visitors;

k.) Unauthorized absence from work on any three (3) days within a 365-day period;

l.) Use of abusive or threatening language toward another person while on duty.

Discharged employees, with the exception of probationary employees, will receive written notice of the reasons for discharge. A copy of the notice will become part of the employee's personnel record. A copy also will be sent to the Union.

Discharged employees, with the exception of probationary employees, may appeal the action by presenting written notice to their steward and their department manager or head nurse within

fourteen (14) calendar days after dismissal. Such appeals shall go directly to arbitration.

5.02 **Other Offenses:** For all other offenses, the progression of disciplinary action will be:

a.) Written reprimand

b.) Suspension, not to exceed five (5) scheduled working days;

c.) Dismissal

The order of this progression may be altered depending on the severity of the offense. Generally, however, an employee will not be subject to suspension without having received a written warning on a prior occasion. Also, an employee will not be subject to dismissal without having been suspended on a prior occasion. These do not have to be for the same reason.

Progressive disciplinary action taken by the Center against an employee will be reduced to writing, with the document stating the reason for the disciplinary action. The individual employee and the Union shall be given copies of the document and a copy will be placed in the employe's personnel file. Documentation will not be used for disciplinary matters after the passage of two (2) years.

Employees have the right to have any disciplinary matter placed in arbitration.

. . .

BACKGROUND:

Michael Madsen, the Grievant, began his employment as a Phlebotomist on January 18, 1993. On February 24, 1993, the Grievant's supervisor, David Drebert, had a discussion with the Grievant in which he advised the Grievant that Drebert had been contacted by one of the Grievant's fellow employes and that this fellow employe told Drebert that the Grievant had made personal remarks which made the employe uncomfortable. In a memo concerning the employe complaint, Drebert stated that "It is important that we all be careful in the comments we make to coworkers and patients, especially when they are of a personal nature" and instructed the Grievant to refrain from making any personal comments to the fellow employe and to be thoughtful about how comments to others might be perceived. The Employer considered the conversation of

February 24, 1993, to be a verbal reprimand.

On June 7, 1993, the Grievant received a written reprimand which included the following:

> This is the second time I have had to talk with you about being overfamiliar. A third time will require your dismissal. I find this a painful situation for both of us, but I feel I have no choice but to take a strong position on this in order to encourage a high degree of professionalism and protect the hospital from potential liability.
>
> I expect that there will be no deliberate physical contact with hospital employes or patients, outside of what is required by your job. Further, I expect that staff and patients will be treated with a high degree of respect and professionalism. Personal comments are usually unnecessary, and must be made with the greatest of care and sensitivity as to how they will be received.

On October 8, 1993, Drebert met with the Grievant to discuss the Grievant's work performance. During this discussion, Drebert advised the Grievant that Drebert has received several complaints about the Grievant's behavior. Drebert further advised the Grievant that the Grievant was expected to treat other workers with respect, not to use inappropriate language to his coworkers, and that the Grievant was to present a professional impression.

On December 2, 1993, the Grievant received a verbal reprimand for performance problems. The memo documenting the verbal reprimand included the following:

. . .

> While relations with other phlebotomists appeared to improve shortly after we last spoke, conditions seem to be reverting to former unacceptable conditions. You indicated that you wanted to resolve this problem yourself, and would involve me if you could not come to agreement with coworkers.
>
> You indicated to an Outpatient that you thought one of your coworkers should be fired. This was an inappropriate remark to make, showing lack of support for your coworkers, the lab and the hospital. The impression left with the Outpatient was very poor, and degrades the credibility of the hospital if this patient encounters

the employee again.

These incidents are indications of sloppy work habits and poor relations with other staff. I am concerned that your work

> performance in these areas continues to be marginal, despite earlier discussions. You should therefore consider this a verbal warning, as defined in AFSCME contract disciplinary policy.
>
> . . .
>
> We will review your performance again in six weeks.

On January 21, 1994, the Grievant was discharged. The discharge letter advised the Grievant that, on January 20, 1994, a fellow employe had complained of behavior/remarks made to the employe and that the Employer concluded that the Grievant had "sexually harassed this person by making unwelcome sexual advances through verbal comments which created an intimidating and offensive working environment" for the employe.

On October 21, 1994, a grievance arbitrator issued an Award in which the arbitrator found "that while the grievant was guilty of sexual harassment, that discharge was too severe for his misconduct." The arbitrator reinstated the grievant without back pay, effectively imposing a nine-month suspension without pay. The January 20, 1994 incident giving rise to the discharge was described by the arbitrator as follows:

> The grievant approached Eggener near Room 106 where she was working and said "Hi, gorgeous." Eggener stated to him that she did not take compliments well. The grievant also stated: "You could be the centerfold in Housekeeping magazine." Eggener reported that a week before this incident in the main hallway of the first floor he asked her: "What's that on your neck, a hickey? It better not be because when I divorce my wife, you better be there for me." On prior occasions the grievant had made comments to her, such as: "Why don't you date a real man some time?" and "Hi, gorgeous. You made my day."

The Grievant returned to work in November of 1994. On January 13, 1995, the Grievant received a written reprimand for unprofessional behavior, which includes the following:

> I received a letter from Jeff Oleck complaining of comments that you made in the ER that made him appear incompetent in the presence of a patient and physician.

> According to Jeff, he was assisting Dr. Cole in doing a catheterization when you made a comment to the effect "Be careful what you are doing with the catheter, it is sterile, don't contaminate it". At the time there was no danger of breaking the sterile field.
>
> I realize that you feel the comment was meant in jest, but the appearance to the patient and the physician was that Jeff did not know what he was doing. It reduces the patient's confidence in his health care provider and the hospital.
>
> Professional behavior requires that you introduce yourself, indicate to the patient what you are going to do, and offer some words of comfort if the patient appears distressed by it. Questions can be asked in a straightforward manner. Gratuitous comments are unnecessary.
>
> I am disappointed that this is yet another instance where you have displayed unprofessional behavior. You need to realize that you have had verbal and written warnings. We consider your break in employment to be a disciplinary suspension. While I do not feel that this particular incident is egregious enough to warrant dismissal, you need to realize that <u>any</u> further incidents could result in your termination.

On March 2, 1995, the Grievant received a written notice of a two (2) day suspension. The notice stated, <u>inter alia</u>, the following:

> Your are continuing to make unprofessional comments while performing your duties in the hospital (see attached). This cannot continue. Further violations of this nature will result in discharge.

Attached to the suspension notice was the following:

KATHY BRADLEY'S STATEMENT

> On Tuesday, February 14 Kathy Bradley completed her pre-employment physical with Bonnie Krueger and proceeded to the Lab to have her blood drawn. Mike Madsen was the Phlebotomist who was working in Outpatient Lab that day. Kathy's conversation with Mike follows:

Mike: "Are you new here?"

Kathy: Yes."

Mike: "Where do you work?"

Kathy: "Rehab."

Mike: "What's Rehab?"

Kathy: "Physical Therapy."

Mike: "What will you be doing?"

Kathy: "I am the new director."

Mike: "No, you're not."

Kathy: "Yes, I am."

Mike: "Well, you don't look like a director."

Kathy: "That's the whole point, isn't it?"

Mike: "I would have guessed you worked in the kitchen."

As Mike made several attempts to draw Kathy's blood, he continued . . .

Mike: "Where are you from?"

Kathy: "Vermont."

Mike: "Oh, great - another northeasterner. My boss is from the northeast. He doesn't like me and I don't like him."

Mike had difficulty getting any blood. Kathy did not see any blood in the tube.

Kathy: "Did you get any?"

Mike: "Yeah. I got enough to do what I have to do."

A person came into the Outpatient room and told Mike that another patient was waiting. Kathy heard a child crying in the waiting area.

Mike: "How would you like to put up with this all day."

On Thursday, February 16, Kathy Bradley returned to Bonnie Krueger to have her TB skin test read. Brenda Field in Occupational Health handed Kathy a slip and told her to go back to Lab to have her blood drawn again because "they" said it coagulated.

Mike approached Kathy in the Outpatient Lab.

Mike: "Oh, no! Are you sure you want me to draw your blood?"

Kathy: "Do I have any choice?"

Mike: "You do, but you'd have to wait."

Kathy: "I have full confidence in you that you'll do just fine today."

Mike: "I do have a partner but she's never around."

Kathy: "Where is she?"

Mike: "At the end of the day when they ask where she's been, she says she's been here and there and they say that's fine."

Mike had a successful blood draw and that completed Kathy's labwork.

General conversation took place during blood draw.

The attached statement was signed by Bradley and dated February 28, 1995.

The grievance dated March 13, 1995 states, inter alia, as follows:

Employes shall not be disciplined, except for just cause. Disciplinary action included an open ended suspension. Employee is going to be suspended for 2 days not yet determined.

> Remove suspension from employee file. Make employee whole for lost wages should suspension be served.

The grievance was denied and, thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES:

Employer

The Grievant has acknowledged that the written statement of Ms. Bradley is substantially accurate and that his comments were inappropriate and unprofessional. Prior to the incident with Ms. Bradley, the Grievant had been disciplined for engaging in unprofessional conduct. Additionally, the Grievant had received a written memorandum which expressly detailed the scope and requirements of professional conduct. The Employer has just cause to issue the two-day suspension to the Grievant for making unprofessional comments to Ms. Bradley during the performance of his duties.

The agreement does not contain any restriction upon the Employer's right to schedule discipline and the arbitrator does not have any authority to add to the agreement. Accordingly, the Arbitrator does not have jurisdiction to decide the propriety of the length of time taken to schedule the two-day suspension.

The Grievant received timely notice of the suspension and the suspension was scheduled to accommodate staffing schedules. The decision to schedule the suspension for March 27 and 28, 1995 was not improper and does not invalidate the suspension.

The grievance is without merit and should be dismissed.

Union

As the Grievant stated at hearing, Ms. Bradley's written statement takes his comments out of context and does not take into consideration the tone of his remarks. The comments recalled by Bradley were not sexual in content, obscene, vulgar, abusive or indecent, or malicious in character. It is not evident that the comments were overheard by any patient, client, physician or a fellow employe. Nor is it evident that the comments affected the morale and work quality of employes or harmed any individual. The Grievant's conduct on February 14 and 16, 1995, does not merit disciplinary action.

Neither the language of the contract, nor arbitral precedent, supports the conclusion that

progressive discipline means that each disciplinary action must necessarily be more severe than the preceding one. Rather, the degree of penalty must reflect the severity of the offense. Assuming arguendo, that the Grievant has engaged in misconduct, then a two-day unpaid suspension is too severe.

As Drebert stated at hearing, the Grievant's work performance is "very good"; the Grievant received two memos from an outside client commending the Grievant's work; and the Grievant has never received a complaint of inappropriate or unprofessional conduct by the Grievant from any physician or patient, including the physician and patient referred to in the January 10, 1995 written reprimand. The lack of complaints from physicians and patients suggests that certain employes and supervisors have conspired against the Grievant.

Unprofessional conduct is not defined in any provision of the contract, rule or policy. To permit the Employer to define unprofessional comments or behavior on the basis of "I know it when I see it" provides the Employer with a license to discriminate.

As the Grievant testified, he told Drebert of an incident in which a co-worker "cussed" the Grievant "up one-side and down the other," using language which the Grievant considered to be unprofessional. Although the Grievant did not know whether or not the co-worker was disciplined, both Wicklund and Drebert testified that they were unaware of any other bargaining unit employe being disciplined for unprofessional conduct.

Clearly, Drebert is applying a double standard. The suspension that the Grievant received in this case, as well as the written reprimand that the Grievant received in January, 1995, are retaliatory and evidence the Employer's displeasure with the prior arbitration award which overturned the Grievant's discharge.

The Grievant was not informed of the alleged infractions until fifteen days after the February 14th incident. The Employer waited another 26 days to impose the suspension. The delay in the notification and implementation of the suspension was not reasonable and, thus, fails to meet the requirements of the "just cause" standard.

The Employer violated the parties' labor agreement when it suspended the Grievant for two days without just cause. The grievance should be sustained and the Grievant should be made whole in all respects, including back pay and interest.

DISCUSSION:

Jurisdiction

Article 5.02 contains the following language: "Employees have the right to have any

disciplinary matter placed in arbitration." This language provides the undersigned with jurisdiction to decide if the Employer violated the just cause standard by unreasonably delaying the notification and imposition of the Grievant's two-day suspension.

Did the Employer have just cause to discipline the Grievant?

The Grievant claims that remarks attributed to the Grievant by Bradley, in her written statement of February 28, 1995, are taken out of context. The record, however, demonstrates that the written statement of February 28, 1995, is accurate.

By remarking that Bradley looked like she worked in the kitchen, the Grievant denigrated Bradley's position as a health professional and department head. The Grievant's remarks about northeasterners suggested that there was something wrong with northeasterners, such as Bradley. By exclaiming "Oh, no!" when Bradley returned to the lab, the Grievant indicated dismay that Bradley had returned as a patient. The Grievant's remarks about his "partner" denigrated a co-worker by implying that the co-worker was not performing assigned duties and denigrated the Employer by implying that the Employer was unable, or incapable, of managing its employes. These comments of the Grievant were unprofessional.

In January, 1995, approximately one month before the Grievant's first conversation with Bradley, the Grievant received a written reprimand which included the following statement: "Professional behavior requires that you introduce yourself, indicate to the patient what you are going to do, and offer some words of comfort if the patient appears distressed by it. Questions can be asked in a straightforward manner. Gratuitous comments are unnecessary." 1/ Prior to receiving this written reprimand, the Grievant was repeatedly instructed and warned that it was not appropriate to make remarks to patients and/or co-workers which were personal in nature and/or which denigrated co-workers and/or the Employer.

The Grievant knew, or should have known, that his comments were unprofessional. By making unprofessional comments during the performance of his duties, the Grievant provided the Employer with just cause to discipline the Grievant.

Does the Employer have just cause to discipline the Grievant by suspending the Grievant for two days without pay?

Despite the Union's assertions to the contrary, it is not evident that the Employer's decision to suspend the Grievant was motivated by any factor other than the Grievant's misconduct. Since the record does not demonstrate that any other employe has engaged in similar misconduct, the undersigned rejects that Union's argument that the Grievant's two-day suspension involves disparate or discriminatory treatment.

1/ At hearing, the Grievant challenged the validity of the written reprimand of January, 1995. The Grievant waived his right to challenge this written reprimand when he failed to grieve the written reprimand.

The Grievant's unprofessional comments served no purpose other than to offend Bradley, a patient under his care, and to undermine Bradley's confidence in the Employer as a health care provider and as an employer. Given the nature of the remarks, as well as the prior imposition of discipline for making inappropriate and unprofessional comments to patients and/or fellow employes, the two-day suspension is not too severe.

The Employer has complied with the progressive discipline requirements of Sec. 5.02 of the collective bargaining agreement. The Employer does have just cause to suspend the Grievant for two days without pay.

Was there an unreasonable delay in the notification and imposition of the two-day suspension?

On February 16, 1995, Bradley told Perry Tonn, Director of Occupational Health, that she thought that the Grievant had made inappropriate comments. At that time, Tonn advised Bradley to report the incident to Personnel. Bradley reported the incident to Personnel on February 20, 1995, Bradley's first date of employment. Bradley signed her written statement on February 28, 1995. It was not unreasonable for the Employer to delay its investigation of Bradley's complaint until such time as the Employer received Bradley's signed written statement.

The Employer reviewed Bradley's written statement with the Grievant on March 1, 1995. During this review, the Grievant acknowledged that Bradley's statement was substantially correct. On March 2, 1995, the Employer informed the Grievant of its decision to suspend the Grievant for two days without pay. The Employer did not unreasonably delay either its decision to suspend the Grievant, or the Grievant's notification of this decision.

Lab employes, such as the Grievant, are assigned a monthly work schedule. At the time that the Employer made the decision to suspend the Grievant, the March, 1995 work schedule was in effect.

The Grievant received notification of the dates of the suspension and served the suspension in March, 1995, 2/ during the work schedule which was in effect at the time that the Employer

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2/ On March 2, 1995, the Grievant knew that he would be serving a two-day suspension, but did not know the dates of the suspension. The delay in selecting the dates of the suspension was due to the Employer's desire to schedule the suspension at a time in which

made the decision to suspend the Grievant. Accordingly, the Employer did not unreasonably delay either the notification of, or the scheduling of, the two-day suspension.

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the Employer could provide adequate coverage and avoid the payment of overtime. When the Employer determined that it could not meet both of these goals, the Employer scheduled the suspension for March 27 and 28, 1995.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

1. The Employer disciplined the Grievant for just cause.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 29th day of March, 1996.

By Coleen A. Burns /s/
Coleen A. Burns, Arbitrator

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