BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

FEDERATION OF NURSES AND HEALTH PROFESSIONALS LOCAL 5001, AFT, AFL-CIO

and

MILWAUKEE COUNTY

Case 424
No. 54226
MA-9591

Appearances:

Ms. Carol Beckerleg, Field Representative, Federation of Nurses and Health Professionals Local 5001, AFT, AFL-CIO, appearing on behalf of the Union.

Mr. Timothy Schoewe, Deputy Corporation Counsel, Milwaukee County, appearing on behalf of the County.

ARBITRATION AWARD

The Union and the County named above are parties to a 1994-96 collective bargaining agreement that provides for binding arbitration of certain disputes. The parties asked that the Wisconsin Employment Relations Commission appoint an arbitrator to hear and resolve the grievance of Iona Whittley. The undersigned was appointed and held a hearing on October 2, 1996, in Milwaukee, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties filed briefs by November 11, 1996.

ISSUE:

The issue is:

> Did the County have cause to suspend the Grievant, Iona Whittley, for incidents which occurred in January and February of 1996? If not, what shall the remedy be?

BACKGROUND:

The parties' collective bargaining agreement provides under Section 1.05 that management has the right to suspend, discharge, demote or take other disciplinary action, subject to civil service procedures. The Civil Service Rules for Milwaukee County state in Rule VII, Section 1, that nothing in that section shall limit the power of the department head to suspend a subordinate for a reasonable period not exceeding 10 days. Section 2(2) of Rule VII provides that the complaint shall state specifically the facts alleged to constitute cause for the suspension, demotion or discharge. Section 2(4) provides that the commission shall determine whether or not the charge is well founded.

The Grievant is Iona Whittley, a registered nurse who worked for the County at the Mental Health Division-City Campus when the incident that led to discipline occurred. The City Campus has since been closed and all employees are now located at the Mental Health Complex or MHC in Wauwatosa. The Grievant was given a one-day suspension to be served on April 29, 1996, for an error in transcribing a physician's orders of medication for a patient.

The Grievant was given a disciplinary hearing where there were several allegations of misconduct. The notice of suspension stated:

> Violation of Civil Service Rule VII, Section IV(i) Violation of rules or practices relating to safety, (l) Refusing or failing to comply w/departmental work rules, policies or procedures, (t) Failure or inability to perform the duties of assigned position and (u) Substandard or careless job performance.

Rodney Maybin was the Administrator-City Campus and the hearing officer in the disciplinary hearing. He determined that the only violation that could be substantiated was under paragraph (t) and recommended a one-day suspension. Maybin's decision states in part:

. . .

> The materials and statements submitted did not clearly demonstrate a disregard to nursing standards of practice related to resident assessment, care and documentation. The potential for negative resident outcome was evident due to a documented med error. It was conveyed during this hearing that the medication of Haldol to resident R.S. was never given, therefore the med error could not be determined to be

> significant.
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> Documentation submitted for review during the hearing were: Wisconsin Administrative Code Board of Nursing Standards of Practice for RN's Chapter N6; MHD-Nursing Standards of Care; MHD-LPN Job Description; Nursing Performance Appraisal for Iona Whittley dated 2/14/96.
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> . . .
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> It is my recommendation that to correct the violation of (t) that Mrs. Whittley be given a one (1) day suspension and not to work any overtime during this period. This suspension will be given at the discretion of nursing administration. Further violation of Civil Service rules, policies or procedures may result in disciplinary action, which may include suspension or recommendation to terminate employment.

The facts are not in dispute. The Grievant was worked on the geriatric unit at City Campus in February of 1996. At the end of the month, she signed orders for the end of the month medication review, which checks physician's orders against new orders typed by the pharmacy and orders from physicians that are transcribed to a record for the patient. The RN's job is to check for the accuracy of the orders, and her signature verifies that she has done the final check. The Grievant signed orders at the end of the month that included an inaccurate transcription of the drug Haldol for a patient.

The treating physician, Dr. Mary Gavinski, brought the error to the attention of the Grievant's immediate supervisor, Heidi Staszak. Dr. Gavinski had written .5 milligrams TID (or three times a day), which would be a total of 1.5 milligrams each day. The Grievant transcribed the prescription as 5 milligrams TID, which would be 15 milligrams a day or 10 times the dosage prescribed. The drug Haldol is an antipsychotic medication that affects mood and behavior.

A so-called "med-error" is not rare. It happens to many RN's or LPN's during their careers in nursing. The Chief Steward, Joanne Belich, is a full-time RN and has had two or three med errors in 13 years of practice. She has not been disciplined for those errors. Staszak admitted that other RN's had med errors, and the usual procedure at MHC was to give the employee some counseling. Counseling is not called a reprimand. Staszak does not make the decision to discipline herself, but believes that the level of discipline that might be imposed would be related to the severity of the error and the effect on the patient. When a med error is found, a variance form is filled out and given to the nursing

administration. The treating physician is notified, and if the patient received the incorrect medication, that patient would be monitored for some period of time. The family of the patient may be notified in some cases. If the patient did not receive the incorrect medication, the supervisor and the RN sit down for a counseling session.

When Staszak approached the Grievant about the med error, the Grievant's response was that since the medication had not been given, no harm was done. The Grievant did not deny making the med error.

The med error occurred close to the time of the Grievant's performance evaluation. She had been given a poor result in that evaluation and was denied an increment in salary. A performance improvement plan was also developed for her. The Grievant had refused to sign her performance evaluation. Staszak was aware that the Grievant had a prior reprimand in 1995 but was not aware of what it was for.

When Maybin heard the disciplinary matters brought by the nursing department against the Grievant, the nursing department had requested that the Grievant be terminated due to multiple charges. However, Maybin found that many of the charges could not be substantiated and some rested on hearsay matters. Since the Grievant acknowledged the med error, he determined that this error fell within the Civil Service Rule VII(t) of the inability to perform duties.

In determining the level of discipline, Maybin's primary concern was the potential for harm to MHC and to the patient. The facility has licensing and certification concerns. If a state or federal surveyor found the error, there potentially would be monetary citations, and certain matters could end in decertification and the loss of the license, which shuts down the facility. Maybin looked at the Grievant's performance evaluation which she did not sign and looked at letters of recommendation given by other RN's, many of which supported the Grievant. He was aware of the prior reprimand or counseling in her personnel file. He based his decision of the one-day suspension solely of the Grievant's performance. Maybin had heard approximately 25 to 50 cases in his two years as a hearing officer but had no other cases of med errors.

The parties agree that for the most part, progressive discipline is used. However, the County reserves the right to skip over progressive disciplinary steps depending on the severity of the case. The parties also agree that the performance improvement plan in place for the Grievant did not contain more formal steps or standards that are in place now as a result of joint discussions on those plans.

THE PARTIES' POSITIONS:

The County:

The County points out that the facts of the case are not in dispute, as Staszak and Maybin testified without contradiction and the Grievant did not testify or deny any of the allegations. The employee's side of the case seemed to center upon an unstated assertion that the discipline was somehow too harsh for the circumstances.

However, the County argues, Maybin already took into consideration the fact that the Grievant had received a written reprimand the previous November, had recently been given a negative performance evaluation, had been denied a salary merit increment, and had been placed in an improvement plan. In consideration of all those factors as well as mitigating petitions submitted on the Grievant's behalf, Maybin determined that a one-day suspension was appropriate. The only witness for the Grievant was Belich who was unaware of anyone similarly situated to the Grievant in terms of addressing the severity of discipline.

The County submits that the disciplinary decision was reasonable under the facts of this case. It suggests that the Arbitrator may wish to consider imposing a more severe penalty, but anything less than the one-day suspension would be unreasonable.

The Union:

The Union asserts that the County has over reacted to the med error, because the usual response to such an error is a verbal counseling unless there is a negative patient outcome associated with the error or there is a history of repeated errors. Staszak was aware of other RN's who made med errors but had only counseled those employees, and she indicated that she would look at whether there was any negative patient outcome in determining how to deal with med errors.

The Chief Steward, Belich, testified that none of the other employees who had made med errors was disciplined. Maybin even noted in his written response that since the medication was never given, the med error was not significant. The Union finds it hard to comprehend how an error that he termed insignificant could result in a one-day suspension. Although the Grievant had been put on a performance improvement plan, there were concerns about these improvement plans and discussions were later held with management to define goals and standards, but that occurred after the Grievant was put on a plan.

The Union asks the Arbitrator to rule in favor of the Grievant and to rescind the discipline and make the Grievant whole for any losses incurred as a result of this action.

DISCUSSION:

If one were to view the med error made by the Grievant as an isolated event, or an

event unrelated to the Grievant's job performance, the Union would be correct in stating that the Grievant should be treated as others have been treated for the same error -- that is, a verbal counseling with no disciplinary consequences. However, the med error occurred at a time that the Grievant was being viewed through management's eyes as having troubles on the job, as shown by the poor performance evaluation and denial in salary merit increment, as well as the job performance plan and a previous reprimand on record.

In determining the appropriate level of discipline or corrective action for this med error, the Employer was certainly entitled to view the Grievant's record as a whole. While the parties did not disclose what the previous reprimand was for, the Employer does not necessarily have to follow a certain pattern of an oral reprimand and then a written reprimand for the same or similar offense before imposing a one-day suspension. The Employer could properly determine that in light of all the performance based problems the Grievant had, an oral reprimand or verbal counseling would not be sufficient to get her to correct her behavior and that a one-day suspension might better get her notice.

When it is once determined that there is cause for discipline, arbitrators are hesitant to second guess the degree of discipline imposed. An arbitrator should not substitute his or her judgment for that of management unless the penalty is excessive, unreasonable, arbitrary, capricious, or management has abused its discretion. I do not find any of those elements present in under the circumstances of this case. The County held a fair investigation, the various factors such as the Grievant's overall record and the institution's interests were weighed and considered, and the County's ultimate decision was not excessive or unreasonable.

AWARD

The grievance is denied.

Dated at Elkhorn, Wisconsin this 20th day of November, 1996.

By Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator