

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**LOCAL 1667, AFSCME, AFL-CIO**

and

**VERNON COUNTY (VERNON MANOR)**

Case 139

No. 63585

MA-12639

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Appearances:

**Mr. Daniel R. Pfeifer**, Staff Representative, Wisconsin Council 40, AFL-CIO, appearing on behalf of the Union.

Parke O'Flaherty, LTD, Attorneys at Law, by **Ms. Dawn Marie Harris**, appearing on behalf of the County.

**ARBITRATION AWARD**

The Union and County are parties to a collective bargaining agreement that provides for final and binding arbitration of grievances. Upon request of the Union and with the concurrence of the County, the Wisconsin Employment Relations Commission designated a staff member to hear and decide a grievance. The undersigned was so designated and held a hearing on June 21, 2004 in Viroqua, Wisconsin. The hearing was not transcribed and the record was closed on August 12, 2004, upon confirmation that the parties were not filing reply briefs.

**STIPULATED ISSUE**

Did the County violate the collective bargaining agreement by terminating the employment of the Grievant?

If so, what is the appropriate remedy?

## **BACKGROUND**

The County operates a licensed nursing home called Vernon Manor. On August 16, 2003, D. G., hereafter the Grievant, an LPN with fifteen years of Manor employment, was responsible for passing medications to certain residents of the Manor. On that date, she removed three punch cards of Lortab, a controlled substance, from a locked cupboard. The controlled substances placed in this locked cupboard are no longer prescribed, *e.g.*, the physician has discontinued the medication; the patient has died or been discharged, and are to remain in the cupboard until they are destroyed, with appropriate documentation, in the presence of two nurses.

The Grievant removed the label from one card and handwrote the word "stock." After she had finished passing her medications, the Grievant placed the Lortab punch cards in the PRN section of her medication cart, where they were subsequently found by another nurse.

Following a report by this nurse, Manor management investigated the incident and, on August 18, 2003, discharged the Grievant for failing to perform her duties properly. The Union grieved this discharge. The grievance was denied by the County. Thereafter, the grievance was submitted to grievance arbitration.

## **DISCUSSION**

The parties' collective bargaining agreement contains a just cause standard for discipline, including discharge. The Union asserts that the County did not have just cause to discharge the Grievant. The County responds that the Grievant's discharge was not only warranted by the egregious nature of her misconduct, but also, was consistent with her prior progressive disciplines.

At the time of her discharge, the Grievant was provided with notice that she was being discharged for failure to perform her duties properly and that this failure involved removing the three Lortab punch cards from the locked medication cupboard; removing a residents name from one of these punch cards; relabeling this punch card as "stock;" and leaving these punch cards in the PRN section of her medication cart, without any accompanying audit sheet.

Prior to her discharge and at hearing, the Grievant acknowledged that she engaged in the activities for which she was discharged. The Grievant also acknowledges that her actions were contrary to established procedures for handling controlled substances.

By failing to follow established procedures for handling controlled substances, the Grievant engaged in misconduct which provided the County with just cause to discipline the Grievant. The undersigned turns to the issue of whether or not the County had just cause to discipline the Grievant by terminating her employment.

Under the just cause standard, the level of discipline imposed must be consistent with the seriousness of the misconduct. On August 16, 2003, the Grievant violated established procedures for handling controlled substances. The effect of the Grievant's conduct was to violate the law that prohibits the use of such medication for another patient; to adversely impact the Manor's ability to accurately account for a significant amount of a controlled substance; and to potentially jeopardize patient safety.

The Grievant's conduct on August 16, 2003 involved serious misconduct. The seriousness of this misconduct is not mitigated by either the Grievant's claim that she intended to use some of the controlled substance as "stock" for another patient that had been prescribed this medication; or by her claim that she had intended to destroy the remaining Lortabs.

The just cause standard embraces the principle of progressive discipline. The function of progressive discipline is to impose the level of discipline reasonably necessary to correct employee behavior.

On April 5, 2002, the Grievant received a verbal warning for inappropriate communication in the presence of two residents. On December 2, 2002, the Grievant received a written warning for failure to perform duties properly, *i.e.*, turning off an alarm without checking to see if a patient had exited, with the result that a patient with dementia exited the building without being noticed.

On January 8, 2003, the Grievant received a three day suspension without pay for "Failure to perform duties properly, failure to follow directions from MD & Supervisor putting the safety of residents at risk." The specific conduct that gave rise to the discipline was a failure to use sterile technique as ordered on one patient; a failure to follow medical orders regarding dressing changes on another patient; and pouring morphine that had been prescribed for one resident, who was deceased, into a bottle of another resident, rather than destroying the morphine in accordance with facility policy. At the time of the suspension, the Grievant was counseled regarding the need to follow the established medication policies.

On May 18, 2003, the Grievant received a verbal warning for "Refusal to follow directions – disrespect to supervisors." None of the disciplines were grieved. Notwithstanding the Union's argument to the contrary, the imposition of a verbal warning on May 18, 2003 does not mean that the progressive discipline process has been restarted, or that the County may not rely upon the Grievant's prior warnings and suspension.

Had there been no intervening disciplines, the undersigned could accept the Union's claim that the April, 5 2002 discipline was stale. The Union argues that the prior disciplines are unrelated to the conduct that gave rise to the Grievant's termination. The undersigned disagrees. The prior disciplines received by the Grievant evidence a series of escalating

performance problems, with the majority evidencing the same type of misconduct that gave rise to the discharge, *i.e.*, a failure to follow directions and/or established procedures. Most significantly, the three day suspension that was imposed in January of 2003 involved a failure to follow established procedures regarding the use of controlled substances and, like the misconduct of August 16, 2003, adversely affected the Manor's ability to accurately account for its controlled substances.

Within the eighteen month period prior to her discharge, the Grievant received two verbal warnings; one written warning; and one three day suspension, but continued to have performance problems. The Grievant's prior disciplinary record indicates that it is not likely that the Grievant's behavior would be corrected by the imposition of a lesser discipline than discharge.

Under the just cause standard, it is appropriate to consider mitigating circumstances. As the Union argues, the Grievant is a fifteen year employee. The evaluations presented at hearing indicate that, initially, the Grievant was rated as "outstanding" or "exceeds standards," but that beginning with 2001, her rating fell to "meets standards," with the June 15, 2003 evaluation noting that, at times, the Grievant continues to challenge charge nurse directions and established rules.

To be sure, as the Union argues, the Grievant has experienced significant personal problems, as well as physical problems. As the Union further argues, many of these problems occurred during the period in which the Grievant began having performance problems. The Union argues that the County should be faulted for not making an effort to assist her with her personal problems. It is not evident, however, that the Grievant sought such assistance from the County.

In January of 2003, in response to receiving her three day suspension, the Grievant consulted a physician regarding symptoms of anxiety and stress. The physician prescribed medication for this anxiety and stress, which medication the Grievant continued to take until her time of discharge, and advised the Grievant to consider other employment. In January of 2003, the Grievant also had two sessions with a psychotherapist, reporting symptoms of anxiety and job-related stress.

The Union argues that the Grievant could be returned to work upon proper medical certification. At no time prior to her discharge, or during the processing of this grievance, did the Grievant provide the County with medical documentation indicating that there was a treatment that would resolve her performance problems. The evidence of mitigating circumstances does not suggest that a lesser form of discipline will correct the performance problems that lead to the Grievant's discharge.

In conclusion, I find that the Grievant engaged in the misconduct for which she was discharged. I further find that the County has just cause to discharge Grievant.

Based upon the above, and the record as a whole, the undersigned issues the following

**AWARD**

1. The County did not violate the collective bargaining agreement by terminating the employment of the Grievant.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 22nd day of November, 2004.

Coleen A. Burns /s/

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Coleen A. Burns, Arbitrator

