BEFORE THE ARBITRATOR

In the Matter of a Dispute Between

AFSCME LOCAL 1155

and

ASHLAND MEMORIAL MEDICAL CENTER

Case ID: 452.0002
Case Type: A

AWARD NO. 7918

Appearances:

Erika Dinkel-Smith, for the Union.

Joseph J. Roby, Jr., for the Employer.

ARBITRATION AWARD

The Wisconsin Employment Relations Commission assigned me to serve as an arbitrator of two grievances filed under a 2014 – 2017 contract between AFSCME Local 1155 and the Ashland Memorial Medical Center. A hearing was held in Ashland, Wisconsin, on October 12, 2015. The hearing was not recorded. The parties thereafter filed written argument, the last of which was received on November 6, 2015.

ISSUE

The parties were not able to reach an agreement on a statement of the issue or issues to be resolved by this Award but did agree that I could frame the issues after considering their respective positions. Having done so, I conclude the issues are best stated as:

> Did the Employer violate the 2014 – 2017 contract when it did not take action upon learning of the allegations against the grievant, and, if so, what remedy is appropriate?

Did the Employer have just cause to discharge the grievant, and, if not, what remedy is appropriate?

DISCUSSION

The grievant was hired by the Employer as an Environmental Services Technician in September 2014 and worked in that capacity until his discharge on February 27, 2015. As a new employee, the grievant received HIPAA and sexual harassment training.

It is undisputed that while at work the grievant made various comments to a female co-worker that were of a sexual nature. Based on his comments, the co-worker became more and more uncomfortable interacting with the grievant to the point that she would hide in the workplace to avoid him. She ultimately mentioned the problem to her immediate supervisor who recommended that she speak to the Union or to Human Resources (HR). She chose to pursue the matter with HR and met with the Employer's HR Director on February 9, 2015, approximately ten days after her initial contact with her immediate supervisor.[1] During that meeting, she described the remarks and other behavior that concerned her, and HR indicated that it would interview other co-workers who may have heard / observed the remarks / behavior in question. HR asked if she felt safe or needed a schedule change while the investigation was underway. She responded by indicating no action was needed and that she would continue to avoid interacting with the grievant.

The Union contends that the Employer violated the contract by failing to take action as soon as a supervisor learned of the allegations against the grievant or at least as soon as HR met with the co-worker. Indeed the Union alleges that given the widespread knowledge of the grievant's conduct among co-workers, the Employer knew or should have known of the issue even before a co-worker approached management. The Union asserts that such action could have provided the grievant with an opportunity to change his behavior and would have protected the co-worker from additional negative behavior. Ultimately, the Union is

[1] On Union Exhibit 1 completed February 9, 2015, the co-worker wrote that the gap in time was one and one-half months. She testified at the October 12, 2015 hearing that she approached HR one and one-half weeks after her contact with her immediate supervisor. It can well be argued that the co-worker's recollection in February is more reliable than her recollection in October. On the other hand, it seems unlikely that after finally deciding to raise the issue with a management representative, she would have waited another one and one half months before approaching HR. Therefore, I conclude that one and one-half weeks is the most accurate timeframe.

arguing that the behavior in question could not have been that bad or the Employer would have taken immediate action.[2]

Assuming for the sake of argument that there are contractual provisions which would compel the Employer to take action against the grievant in some circumstances, such circumstances are not present here. The co-worker did not ask the Employer to take any immediate action. More fundamentally, until the Employer conducted an investigation into the allegations, it did not know if misconduct had occurred or the extent / severity of any misconduct that it would ultimately conclude had occurred. In this regard, the evidence presented does not support a claim that the Employer knew or should have known of the grievant's conduct well before it was brought to management's attention. Therefore, particularly where, as here, there were no allegations of workplace violence or sexual assault, the Employer had no contractual obligation to act until its investigation was completed.

Turning to the issue of whether there was just cause for discharge, the grievant was discharged for: (1) making sexual comments to a co-worker; (2) attempting to view protected healthcare information; and (3) use of profanity in the workplace.

The grievant admits to making many of the sexual comments in question. However, the Union argues that the grievant did not know the comments were unwelcome and would have stopped had he known how they were being viewed by the co-worker. I find the grievant's testimony in that regard to be credible. However, the grievant is wrong as to his assumption that his comments do not become inappropriate unless he is told to stop. To the contrary, the grievant took his chances by assuming that he was not being offensive. Thus, he is accountable for making the wrong assumption.

As to the attempts to view protected healthcare information, the grievant denies attempting to view computer screens that contained the names and other information of patients being admitted. However, the testimony of several co-workers persuades me that the grievant did make such attempts on multiple occasions. The Employer is correct in its assertions that the grievant's action ran contrary to HIPPA training and that, if the grievant had succeeded, HIPPA violations would have occurred.

As to the use of profanity, the grievant admits such use but contends that other employees do so as well.

---

[2] The Employer contends that the February 27, 2015 grievance raising this issue is both untimely and flawed by a failure to specify the contract provisions alleged violated. I conclude the grievance is timely because the grievant did not know the dates of the co-worker's contacts with supervisors or HR until his discharge on February 27, 2015 (the contractual time limits begin on the "date the employee could reasonably have known of said occurrence"). While contractual provisions allegedly violated were not specified in the February 27, 2015 grievance, said provisions were added on March 13, 2015 – a timeframe I find sufficient to put the Employer on notice as to the allegedly applicable provisions. Therefore, it is appropriate for me to address the merits of this grievance.

The combination of the grievant's sexual comments and his attempts to view protected patient information lead me to conclude that the Employer had just cause to discharge him. In reaching this conclusion, I reject the Union's contentions that the Employer's investigation was improper. Prior to the grievant's investigatory interview, the Union received copies of the statements provided to the Employer by various co-workers (including the co-worker on the receiving end of the sexual comments). Thus, the grievant had every reason to know the nature of the allegations against him and had a meaningful opportunity to respond.

In summary, the Employer did not violate the collective bargaining agreement by failing to take action once it learned of the allegations against the grievant and had just cause to terminate his employment.

Dated at Madison, Wisconsin, this 15th day of December 2015.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

_____

Peter G. Davis, Arbitrator