

**THE MATTER OF ARBITRATION BETWEEN**

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<b>Group Health Plan, Inc.</b>	)	<b>FMCS No. 08 – 02099</b>
<b>d/b/a Health Partners, Inc.</b>	)	
	)	<b>Issue: Ms. M. Disciplines</b>
<b>“Employer” or “Company”</b>	)	
	)	<b>Hearing Date: 07 – 24 – 08</b>
<b>and</b>	)	
	)	<b>Brief Filing Date: 09 – 02 – 08</b>
<b>Office and Professional Employees</b>	)	
<b>International Union, Local Union 12</b>	)	<b>Award Date: 10 – 30 – 08</b>
	)	
<b>“Union”</b>	)	<b>Mario F. Bognanno,</b>
	)	<b>Labor Arbitrator</b>

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**JURISDICTION**

The above-captioned matter was heard on July 24, 2008 in Minneapolis, MN. The parties appeared through their designated representatives. Pursuant to Article 24 of the Collective Bargaining Agreement (CBA), the parties stipulated that this matter was properly before the Arbitrator for a final and binding determination. (Joint Exhibit 1) The parties were afforded a full and fair opportunity to present their respective case. Witness testimony was sworn and cross-examined. Exhibits were introduced into the record. Timely post-hearing briefs were filed on September 2, 2008 and thereafter the matter was taken under advisement.

**APPEARANCES**

**For the Employer:**

Jan D. Halverson Attorney

Kristine M. Nycholat Attorney

LouAnn Thronberg (Subpoenaed)	Former Business Systems Supervisor for Employer's Eye Care Centers
Nancy Benegas	M.D., Pediatric Ophthalmologist, Eye Care Center
Jerry Jones	Labor Relations Consultant
Martha ("Marti") Orr	Ophthalmology Technologist, Eye Care Center
Nora Gould	Observer
Lynnelle Woods	Observer
<b>For the Union:</b>	
Emil Jalonen	Attorney
Anne Cullen	OPEIU, Local No. 12 Representative
Jennifer Burke	OPEIU, Local No. 12 Representative
Eric W. Larson ( <i>via</i> Teleconference)	M.D., PLLC (Psychiatry)
Margo Oldham (Subpoenaed)	R.N., Lead, Pediatrics Department
Ms. M.	Grievant

**I. BACKGROUND AND FACTS**

The Company operates approximately twenty (20) medical clinics, six (6) of which are Eye Care Centers. The Union represents the Company's office and clerical employees. At the time of her dismissal, Ms. M., the Grievant, was employed at the Eye Care Center, Bloomington Clinic, Bloomington, MN. The Center's health care professionals treat pediatric and adult patients with eye problems and they perform routine eye examinations.

The Grievant was hired on November 1, 1987, as a Receptionist at the Bloomington Clinic's Pediatric Department. In 2002, the Pediatric Department was merged with other departments and the Grievant's position as a Senior Receptionist was eliminated.<sup>1</sup> Subsequently, the Grievant "bumped" into a Medical Office Assistant II ("MOA2") position (i.e., the title of her reclassified Senior Receptionist position) located in the Bloomington Clinic's Eye Care Center. She worked at this Center until her dismissal on July 18, 2007.

As a MOA2, the Grievant's responsibilities included customer service, check-in and co-pay administration, computerized appointment scheduling, registration and verification, specialty appointment coordination, facilitating timely and accurate flow of communication within the clinic, maintenance of open communication with Appointment Center to ensure that patient and provider needs are met, among other general accountabilities. (Employer Exhibit 2) LouAnn Thornberg formally held the position of Supervisor, Eye Care Clinics. While in this position, she directed the Grievant and twenty-one (21) other MOA2 employees between 2005 and 2008. She testified that the MOA2 is the first employee with whom a patient has contact upon entering an Eye Care Clinic and, as such, in 2006, all MOA2 position holders were trained in the "LEAD" principles. The Employer summarized the LEAD principles on a laminated card, a copy of which it gave to relevant employees. The Grievant taped the card to her PC. (Employer Exhibit 14) That card states:

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<sup>1</sup> The Grievant's performance appraisals for the years 1991, 1992, 1995, 1996, 1997, 1998 and 1999 suggest that during these years she either met or exceeded existing expectations. (Union Exhibits 9, 10 and 11)

## **Our Service Recovery Process**

**Listen** fully to the customer's concern  
**Express** thanks for raising the concern  
**Apologize** for failing to meet expectations  
**Do** something to address the service failure promptly

(Employer Exhibit 3)

On March 13, 2003, the Grievant submitted a Family and Medical Leave Act of 1993 ("FMLA"), Certification of Health Care Provider. In relevant parts, it states that the:

1. "... [Grievant] has been diagnosed with Bipolar Disorder and has been experiencing unstable mood, depression, somatic symptoms, anxiety/panic and stress ..."

2. "... [Grievant's] condition has existed for several years, duration is indefinite (likely to be lifelong); incapacity should be affected by medication change and psychotherapy."

3. "... [Grievant's] level of functioning waxes and wanes..."

(Union Exhibit 5) Ms. Thronberg testified that (1) she had seen this FMLA document; (2) the Grievant had independently told her about the bipolar disorder; and (3) on one (1) occasion shortly after the Eye Care Center's office had been redecorated, the Grievant asked her for an "accommodation," namely: a screen for her PC monitor and a lamp, although in the end the Grievant decided against the screen. Ms. Thronberg testified that she did provide the requested lamp. Ms. Thornberg also testified that the Grievant did not ask for any other "accommodations," although she would take it upon herself to periodically ask the Grievant if everything was "O.K.," to which the Grievant invariably replied, in so many words, "I'm doing fine."

On March 21, 2006, Ms. Thronberg finalized a performance evaluation of the Grievant, concluding that she was a "Solid Performer." (Union Exhibit 4) Nevertheless, on October 27, 2006, Ms. Thornberg issued a written oral reprimand to the Grievant for "... inappropriate behavior at the work place." On October 23, 2006, the Grievant was observed "... sobbing and displaying distraught emotional behavior at the front desk in full view of patients and staff." The written oral reprimand stated that "[T]his type of behavior has a negative effect on patients as well as staff. It is unacceptable and will not be tolerated by this department." (Employer Exhibit 4) On cross-examination Ms. Thornberg testified that another employee had called her to suggest that the Grievant be relieved from duty, given her emotional state. She also testified that she then spoke with the Grievant, who stated that she could not continue working and, as a consequence, Ms. Thornberg sent her home. Further, Ms. Thronberg testified that the Grievant's bipolar disorder was not a part of their conversation. However, the next day, on October 24, 2006, Ms. Thornberg filled out a "Request For FMLA" form on behalf of the Grievant and gave it to her, but that the request form was never processed. (Union Exhibit 6) The written oral reprimand did state that subsequent behavioral issues could result in progressive discipline "up to and including termination." The reprimand was not grieved.

On November 29, 2006, Ms. Thornberg issued a five-day disciplinary suspension to the Grievant "... for violation of the Corporate Confidentiality for Patient Member Information – Employee Access and Use Policy, and inappropriate behavior." Specifically, this suspension letter states:

On November 6, 2006, you accessed the appointment scheduling system to make two eye appointments for [...]. You also used Health Partners system to go into the electronic medical record of [...]. You viewed both of her medical record numbers; you viewed the snapshot and other areas of her medical records. You also tried to influence a provider [staff M.D.] to write off charges and did not follow the correct protocol for having charges in question reviewed.

\* \* \*

Any additional performance and/or behavior-related issues may lead to further disciplinary action, up to and including discharge.

(Employer Exhibit 5) The five-day suspension was not grieved.

On January 8, 2007, Ms. Thornberg administered a 10-day disciplinary suspension to the Grievant for failure to follow patient scheduling procedures.

(Employer Exhibit 9) The following points are largely undisputed. First, on Friday, January 5, 2007 at around 5:00 p.m., Nancy Benegas, M.D., Pediatric Ophthalmologist, examined a ten (10) year old female patient with chronic eye problems (cataracts and band keratopathy), as well as a persistent iritis infection. Because the patient required systematic care, Dr. Benegas scheduled a return appointment for January 26, 2007 at 10:20 a.m., giving a copy of the "appointment slip" to both the child's parents and to her assistant, Martha Orr, Certified Ophthalmic Medical Technologist. Ms. Orr placed her copy of the appointment slip on the Grievant's desk for scheduling the following Monday, January 8, 2007 – the Grievant had already left work that day. She also left herself a reminder to confirm that the patient was scheduled, as Dr. Benegas had requested. On Tuesday, February 9, 2007 – Ms. Orr's next scheduled workday – she consulted Dr. Benegas' computerized schedule of appointments only to discover that the Grievant had scheduled the aforementioned child's revisit for

February 9, 2007, rather than January 26, 2007. Ms. Orr informed Dr. Benegas of the scheduling error, prompting Dr. Benegas to send a January 10, 2007 e-mail to Ms. Thronberg, complaining about the Grievant. Dr. Benegas stated in relevant part:

\* \* \*

The slip was filled out after 5 Friday, so I made a copy for the appointment to be put in on Monday a.m. Marti gave the slip to [the Grievant] and asked her to put it in the system. Instead, [the Grievant] booked the appointment for Feb. 9, and did not communicate this to anyone. Marti double checked that this was completed, found the error, and had [the Grievant] change it to the proper time. [The Grievant] told Marti I was not in that day, however if she had looked at my schedule in ERIC she would have seen a template, and could have also asked Marti or someone else if I was in or out. The medical problem [patient] has needs to be checked, over 1 month was inappropriate care. I do not understand why [the Grievant] would do this without checking with the tech first. Please discuss this with [the Grievant].

(Employer Exhibit 6) Regarding this matter, the following exchange took place between Ms. Thornberg and Ms. Orr occurred:

Thornberg: "What was [the Grievant's] response to you when you informed her that she did not schedule the patient where Dr. Benegas had stated on the reminder slip?"

Orr: "She said Dr. Benegas is not in on that day?"

Thornberg: "Did you ask [the Grievant] if she looked to see if the schedule was in?"

Orr: "Yes, and there was a schedule in for Dr. Benegas, [the Grievant] did not look because she assumed that this was not Dr. Benegas' normal day."

Thornberg: "Did you have [the Grievant] change the appointment to the correct date and time?"

Orr: "Yes I did."

Thornberg: "Did you ask [the Grievant] why she had not come to you or another Tech if there was a question as to the date and time?"

Orr: "Yes"

Thronberg: "What was [the Grievant's response?]"

Orr: "She didn't know."

(Employer Exhibit 7)

Second, on Monday, January 8, 2007 – the Grievant's next scheduled work day – she scheduled the juvenile patient's return visit for 11:10 a.m. on February 9, 2007, several days after the date specified by Dr. Benegas – a failure by the Grievant to initiate the appointment, as directed. In relevant part, the following exchange is taken from Ms. Thronberg's investigatory interview of the Grievant:

Thornberg: "Would there ever be a time when you would not comply with the request on the appointment reminder?"

Grievant: "No, if I didn't see it."

Thornberg: "By it what do you mean?"

Grievant: "If I didn't see that date on the slip."

Thornberg: "If you have a question about the date the provider put on the patient appt. skip, what would be the correct protocol?"

Grievant: "I would ask Marti or Dr. Benegas now."

Thornberg: "Would you at any time take it upon yourself to change the date of the appointment without speaking first with the Tech or provider?"

Grievant: "No!"

Thornberg: "Did you do that in this case with this patient?"

Grievant: "Boy, you know I could have, but that was after talking to Marti."

\* \* \*

Thornberg: "Do you have any other information that I should know about?"

Grievant: "About this?"

Thornberg: "Yes."

Grievant: "Only that I know that the child is very sick and I try to and that I goofed and made it 10 days past, but Marti was able to help me with it."

(Employer Exhibit 8) Based on this exchange, the Employer also charged the Grievant with failure to follow protocol when, for whatever reason, she – as the scheduler – could not follow the provider’s scheduling directions.

Third, the Employer charged that the Grievant’s scheduling error adversely affected the Employer’s ability to serve the patient. That is, Ms. Thornberg asked Dr. Benegas, *via* e-mail, whether the child’s medical condition could have been “jeopardized” by the scheduling error. Dr. Benegas replied that if the February 9, 2007 appointment had been left in tact, the youngster’s care would have been “compromised.” (Employer Exhibit 6)

It should be observed that the 10-day disciplinary letter also stated that additional performance and/or behavior-related issues may lead to further disciplinary action up to and including discharge. On January 26, 2007, the Union filed a grievance, contending that the January 24, 2007 10-day suspension was a violation of Article 25.01 in the CBA. (Employer Exhibit 10) On April 25, 2007 and October 11, 2007, respectively, the Employer sent its second and third grievance

step responses to the appropriate Union representatives, denying the grievance both times. (Employer Exhibits 11 and 12)

On May 15, 2007, the Grievant received another performance evaluation from Ms. Thornberg. Overall, the Grievant was again rated a "Solid Performer;" nevertheless, the performance evaluation did identify several areas where the Grievant "Needs Improvement," which includes the following: "Maintains service standards that supports and enhances customer service and cultural sensitivity;" "Maintains behaviors and attitudes that reflect professionalism;" "Promotes teamwork;" "Basket Communication Skills," and "Registration and Insurance Skills." (Union Exhibit 3)

With regard to the Grievant's future performance "goals," Ms. Thornberg specified:

Improve registration skills. Become more confident and knowledgeable regarding scheduling rules. More confidence when dealing with patients and staff.

(Union Exhibit 3) Finally, Ms. Thornberg wrote the following summary comments on the performance evaluation:

[The Grievant] tends to repeat the same mistakes over and over. Her demeanor at times lacks professional composure and needs improvement. [The Grievant] does not always abide by the scheduling rules and still has to ask questions about things that have not changed for many years. [The Grievant] needs to be more pro-active in communicating clinic wait times. [The Grievant] is a very nice lady with a big heart. Her co-workers enjoy working with her. She definitely keeps things interesting. Her professionalism can be variable when under stress. I have, however, in the recent months have seen growth both personal and professional. I would encourage [the Grievant] in the path. She brings flowers from her garden and shares them with all patients especially enjoy them.

(Union Exhibit 3)

On July 18, 2007, the Grievant was discharged for inappropriate workplace behavior. The incident leading to this outcome occurred on July 9, 2007. On that date the Grievant mismanaged a patient's scheduling call, causing the latter to formally complain to Ms. Thornberg. (Employer Exhibit 15) The patient-complainant called Ms. Thornberg on July 10, 2007 and, on that same day, Ms. Thornberg prepared the following note:

Patient states that she called the Bloomington clinic on Monday 7/9/07 around 1:00 pm to make an Eye Appt. with one of our Ophthalmologist who had been referred to her by her PCP at the AV clinic Dr. Libin Ho. When the MOA2 answered the phone the MOA2 said to her, "Good Afternoon thank you for calling Bloomington HealthPartners eye clinic I am assisting another patient are you okay to hold." Number one she spoke so slowly I thought that something must be wrong with her." I told her No do not put me on hold I called earlier and you took a message and no one returned my call. At which point she continued to interrupt me, not listening and then said to me "Well you[r] eye isn't falling out is it"! And than continued to tell me very rudely I have another patient that is on the phone that I need to help, it has taken you longer to tell me your story than it would have taken to help that patient and then get back to your phone call. At this point I asked her name and she told me [the Grievant] and then I asked her for her supervisors name and number and she gave me your name and phone number.

The entire conversation [the Grievant] acted like I was bothering her and rude, arrogant had an edge to her voice. Not helpful at all.

I have been with HealthPartners for a long time and I have never, never complained about anyone. I understand that people can have a bad day but, this was totally unacceptable. She should not be working with patients or the public. I have a re-current eye infection that Dr. Ho has referred me to an Ophthalmologist because we have tried several things and it is not helping. I need you to make an appointment for me.

I apologized to the patient and I made her an appointment at Bloomington with Dr. Carlson for the next day per her request.

(Employer Exhibit 13) On July 16, 2007, Ms. Thornberg interviewed the Grievant about this complaint. The Grievant admitted to the substance of the above-

quoted note. In particular, the Grievant admitted to possibly saying something to the effect that (1) "Well, your eye isn't falling out, is it?" and (2) "You have taken more of my time telling me this, than it would have taken to help the other patient on the phone and then get back to you." (Employer Exhibits 14 and 15) During this interview, the following exchanges took place:

Thornberg: "[Grievant] were you rude to this patient?"

Grievant: "Yes, that was rude what I said."

Thornberg: "[Grievant] were you helpful to this patient?"

Grievant: "I tried to be helpful but she wouldn't let me. I tried to be empathetic and offer apologies for the techs not returning her call. It was my fault that no one called her back and my fault that I had no openings. I take phone messages and then no one calls the patient back and then they jump on me."

Thornberg: "[Grievant] did you feel that you followed the LEAD principles with this patient?"

Grievant: "No!"

Thornberg: "... if you have any additional information that you would like me to know, please let me know as soon as possible."

Grievant: "I just want you to know the minute it happened I knew I was wrong. I have done really good in the last 5 months LouAnn you know that I have. I don't know what happened? I don't know why I would say that to a patient."

(Employer Exhibit 14)

On July 24, 2007, the Union filed a grievance, contending the July 18, 2007 discharge violated Article 25 of the CBA. (Employer Exhibit 16) On August 9, 2007 and October 11, 2007, respectively, the Employer issued its step two and step three grievance responses, denying it both times. (Employer Exhibits 17 and 18) The parties were unable to mutually resolve either the January 26, 2007 or

the July 24, 2007 grievance, which pertained to the 10-day disciplinary suspension and termination of employment, respectively and, therefore, the grievances were appealed to the instant arbitration for final resolution.

## **II. THE STATEMENT OF THE ISSUE**

The parties assented to the following statement of the issue:

Whether the Employer had just cause to (1) suspend the Grievant for ten (10) days on January 24, 2007, and (2) discharge the Grievant on July 18, 2007? If not, what is an appropriate remedy?

## **III. RELEVANT CONTRACT LANGUAGE**

### **ARTICLE 10 – LEAVES OF ABSENCE**

#### **10.03 Medical Leaves of Absence**

**A. Eligibility.** In the case of illness, injury or temporary disability that exhausts accumulated sick leave, an Employee shall be eligible for necessary additional medical leave up to a maximum of one (1) year, upon furnishing the Employer with a request accompanied by a physician's recommendation for said medical leave.

### **ARTICLE 25 – DISCIPLINE**

**25.01. Progressive Discipline.** The Employer shall discipline for just cause only. The Employer follows progressive discipline when disciplining its Employees. The normal sequence in oral warning, written warning, suspension, then discharge. However, the same level of discipline may be issued more than once before progressing to the next level of discipline. Serious offenses may require a higher level of discipline as an initial action.

### **ARTICLE 26 – TERMINATION OF EMPLOYMENT**

**26.01 Involuntary Termination.** Any Employee subject to the terms of this Agreement shall give a one (1) week written notice of his/her termination during the first six (6) months of employment, except in case of gross misconduct, for example, such serious offenses may include theft, intentional falsification of records and assault. In the event of discharge thereafter, the Employee shall be given a two (2) week written notice or two (2) weeks salary in lieu of notice except as noted above.

(Employer Exhibit 1)

#### **IV. EMPLOYER'S POSITION**

The Employer raises a number of arguments. First, the Employer contends that the Grievant's 10-day suspension and termination of employment were for just cause rooted in the Grievant's repetitive pattern of performance problems that were non-responsive to corrective discipline measures. Citing arbitration precedence, the Employer urges that long-term employees who are poor performers and who do not affirmatively respond to corrective disciplinary measures may be disciplined and dismissed provided that the performance expectations in question are reasonable and applied in a consistent manner. In this case, the Employer observes, the Grievant received a written oral reprimand (October 27, 2006), 5-day suspension (November 29, 2006), 10-day suspension (January 24, 2007) and her employment was terminated (July 18, 2007) – disciplinary steps that (1) establish the Employer's use of "progressive discipline" and (2) show that the Grievant was "on notice" that her job increasingly was being put in jeopardy.

Second, the Employer argues that there is no question that the Grievant is guilty of the identified deficiencies. Also, the Union failed to prove that the Company exhibited disparate treatment.

Third, citing scholarly research and arbitration precedence, the Employer contends that a disabled employee may be subject to the same performance standards as fully able employees and the employer is not required to employ a disabled employee who cannot carry out essential job duties. Next, the Employer observes that as a MOA2, the Grievant was expected to provide top flight

patient-oriented services, accurately scheduling patient appointments, checking-in patients and administering co-pay policies, answering telephone calls and responding appropriately to the caller, maintain clinic/patient communications and so forth. Yet – with respect to these job duties – the Employer observes that the (1) October 27, 2006 written oral reprimand was administered because the Grievant displayed emotional misbehavior at the front desk, resulting in a patient complaint and complaints from two (2) co-workers; (2) November 29, 2006 5-day suspension was administered for the serious offense of inappropriately accessing the medical records of a patient; (3) January 24, 2007 10-day suspension was administered for not properly scheduling a patient's appointment, a behavioral problem that could have compromised the patient's eyesight; and July 18, 2007 discharge was prompted by a patient complaint that the Grievant treated her in a "rude" and "arrogant" manner when she called the clinic to schedule an eye appointment. Thus, the Employer concludes, the Grievant has failed to adequately perform the essential functions of the MOA2 job and, accordingly, the Grievant's 10-day suspension and her dismissal were warranted.

Finally, the Employer urges that its actions in this case were for just cause, as discussed above, and that likely FMLA-related and Grievant-employability arguments that the Union might raise ought to be dismissed.

## **V. UNION'S POSITION**

Initially, the Union alleges that the Employer failed to (1) properly apply its own progressive discipline and just cause Guidelines, and (2) consider the Grievant's bipolar disorder in reaching its disciplinary determinations. (Union

Exhibit 1) Accordingly, the Union requests that the Grievant be (1) returned to employment status, (2) placed on a medical leave of absence and (3) made whole for both her 10-day suspension and for the time that has elapsed between the date of her dismissal and the date on which she is placed on a medical leave of absence.

The Union points out that Article 15, § 25.01, mandates that the Employer follow the steps of progressive discipline and, further, the Employer's "Discipline and Discharge Guidelines" provides for an informal, "pre-discipline" step – a "coaching" step – which did not occur in this case. (Union Exhibit 2) The Union also points out that the Guidelines indicate that disciplinary action may be taken for two (2) basic reasons, namely: "employee misconduct" and "inadequate work performance". In order to give an employee the opportunity needed to "correct the problem" – as envisioned by the Employer's Guidelines – the Union argues that the disciplinary actions falling under each of these two (2) categories for discipline should not be mixed together. Rather, the disciplinary actions related to each disciplinary reason ought to be placed on different progressive discipline tracts. In this case, for example, the Grievant was formally disciplined four (4) times, twice for "inadequate work performance" and twice for "employee misconduct". With respect to the latter, the Grievant was given a written oral reprimand for "sobbing" and she was discharged for mishandling a patient's "phone call". In essence, the Union argues, the Grievant was given a "warning" and then "out the door" she went for her "misconduct" – a two (2) step process. Accordingly, the Union concludes, the Grievant was denied the opportunity for

rehabilitation for “misconduct” and the integrity of the parties’ system of progressive discipline, as described in the Guidelines, was compromised. (Union Exhibit 1) In view of the Guidelines’ promise of rehabilitation, the Employer should have placed the Grievant on medical leave of absence, as provided in Article 10, § 10.03A. However, it chose not to do so, even though the Employer knew about the Grievant’s the bipolar disorder and knew that her episodes of “misconduct” were tied to said disorder.

Next, the Union contends that the Guidelines adopt Daugherty’s “7-Tests” for just cause and that each of these tests was not independently passed with regard to either the 10-day suspension or the discharge. Regarding the juvenile patient’s scheduling error and the subsequent 10-day suspension, the Union argues as follows: (1) the Grievant was not forewarned that discipline would follow faulty scheduling and she was not “coached” along these lines [Guidelines, Test #1]; (2) the suspension was not consistently applied, as previous episodes of faulty patient scheduling did not result in discipline [Guidelines, Test #5]; (3) the suspension was not reasonably related to the seriousness of the Grievant’s offense particularly since no harm befell the child [Guidelines, Test #6]; (4) the suspension was too long given the Grievant’s record of long tenure with the Employer [Guidelines, Test #6]; and (5) the Employer did not consider the Grievant’s bipolar disorder as a “mitigating or extenuating circumstance” [Guidelines, Test #7]. (Union Exhibit 2)

With respect to the Grievant’s mishandling of the “patient’s telephone call” and her subsequent discharge, the Union argues: (1) the discipline in question

was discriminatory, unequal and inconsistent [Guidelines, Test #5] because other employees who have been shown to be “rude or disrespectful” were not discharged (Union Exhibits 14 – 19 and 21); (2) the discharge was too “harsh” because the mishandled telephone call was only the Grievant’s second incident of “misconduct” and the discharge failed to consider Grievant’s 20-year service record with the Company and solid performance evaluations [Guidelines, Test #6]; and (3) in light of the Grievant’s mental health disorder, the discharge also violated Test #7 – the Guideline’s “mitigating and extenuating circumstances” test. (Union Exhibit 2)

Citing relevant sources, the Union contends that an employee’s mental health should and does affect arbitration outcomes. Specifically, the Union argues that in cases like this, the matter ought to be analyzed from a medical rather than a disciplinary perspective. In this regard, the Union suggests that the real issue in this case is not the Grievant’s behavioral shortcomings but rather her inability to perform the work and that her bipolar disorder condition should serve as an “exception to” or “prohibition to” a finding of just cause for discharge.

Finally, the Union argues that because the Employer (1) knew about the Grievant’s mental health problem (2) knew how this problem affected the Grievant’s workplace behaviors (3) never gave consideration to this mitigation and (4) given the emphasis the Guidelines give to “rehabilitation”, neither the 10-day suspension nor the Grievant’s dismissal were for just cause and, therefore, the grievances should be sustained, although the Union acknowledges that the Grievant is not currently able to return to work.

#### **IV. DISCUSSION AND OPINION**

The issue in this case is whether the Grievant's 10-day suspension and subsequent dismissal were for just cause, as prescribed by Article 25.01 of the CBA. The Grievant had a long, 20-year employment history with the Employer. In fact, the record evidence suggests that over these years whatever employee misconduct and inadequate work performance the Grievant may have exhibited, if any, were addressed informally until October 2006, when the Grievant's formal disciplinary problems began. Between October 27, 2006 and July 18, 2007 – a period of approximately eight (8) months – the Grievant was issued a written oral reprimand (October 27, 2006), 5-day suspension (November 29, 2006), 10-day suspension (January 24, 2007) and, lastly, her employment was terminated (July 18, 2007),

The Grievant's conduct that resulted in the Employer's disciplinary actions is not seriously contested. Indeed, only the 10-day suspension and the Grievant's dismissal were grieved. Thus, the undersigned readily concludes that the Employer proved that the Grievant is guilty of the misconduct and inadequate work performance allegations. Further, the Grievant's proven errors in judgments and misconduct did violate reasonable Company policies and/or legitimate business interests.

However, the Union showed that the Grievant has long suffered mental health problems: again a fact that is not contested. (Union Exhibits 5, 7 and 12) What is contested is the Employer's urging that the Grievant's bipolar disorder should not translate into a "free pass" from discipline and her disability should not

be a mitigating factor in this case. Whereas the Union urges that the Grievant is a “troubled employee” and should be exempt from the strict application of just cause standards because her mental health disability was a factor contributing to her misbehaviors: a factor over which she had no control.<sup>2</sup>

Before examining these divergent contentions, we begin by analyzing the Union’s arguments that both the Grievant’s 10-day disciplinary suspension and disciplinary discharge failed to pass some of the 7-Tests. First, the Union points out that the Employer’s “Discipline and Discharge Guidelines” identify “coaching” as an informal, pre-discipline step that may occur before the administration of formal, discipline steps. And, the Union asserts, the Grievant never received “coaching” and, thus, she was effectively denied progressive discipline. This argument is not persuasive for the following reasons: (1) the controlling disciplinary language in this case is Article 15 § 25.01 of the CBA, which makes no reference to “coaching”; and (2) without rebuttal, Ms. Thornberg credibly testified that before she issued the October 27, 2006 written oral reprimand she had “coached” the Grievant in regard to her mismanagement of a wheel-chair bound elderly female patient who had not “checked-in down stairs” and that “notes” of this coaching session are in her personal supervisory file, as recommended by the Guidelines, and not in the Grievant’s official personnel file.

Second, the Union points out that the Guidelines identify two (2) basic reasons for discipline, namely: “employee misconduct” and “inadequate work performance”. In this regard, the Union next argues that the Grievant was denied

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<sup>2</sup> *The Common Law of the Workplace: The Views of Arbitrators* (Washington, D.C.: Bureau of National Affairs, Theodore J. St. Antoine, ed., 2d ed. 2005), § 6.24.

progressive discipline because the Employer mixed the Grievant's episodes of "employee misconduct"<sup>3</sup> together with the Grievant's incidences of "inadequate work performance"<sup>4</sup> In essence, the Union is arguing that "employee misconduct" and "inadequate work performance" are separate and distinct branches (i.e., progressive discipline tracts) on the Employer's disciplinary tree and that to combined them significantly minimized the rehabilitative potential of progressive discipline. The problem with this argument is that the Company's Guidelines do not as much as hint at the idea of separate and parallel discipline tracts. Indeed, the Guidelines only reference to "progressive discipline" is akin to the description of "progressive discipline" in Article 25 § 25.01 of the CBA. Moreover, the Union did not show that historically – in past practice – the parties have come to accept and expect separate and distinct progressive discipline tracts for "employee misconduct" and "inadequate work performance" missteps.

Third, the Union claims that the Grievant had not been "forewarned" that scheduling mix-ups could result in discipline. It also claims that the Grievant's 10-day suspension and her discharge were too harsh and prohibitively discriminatory. And, last, the Union claims that the Employer failed to consider the Grievant's mental health status – a mitigating factor – when it issued the 10-day suspension and dismissal. The Union did not prove the above first two (2) claims and its last claim will be considered later. With respect to the matter of

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<sup>3</sup> Namely, the "sobbing and displaying distraught emotional behavior" (October 27, 2006 – written oral reprimand letter) and the mishandling of a patient's in-coming telephone call (July 18, 2007 – dismissal letter).

<sup>4</sup> Namely, the violation of the Employer's "Confidentiality" policy (November 29, 2006 – 5-day suspension letter) and the mishandling of the "scheduling of a patient" (January 24, 2007 – 10-day suspension letter).

“notice”, the Grievant had worked as a MOA2 in the clinic for nearly five (5) years; she knew that scheduling patients was a part of her job responsibilities; she admitted to having received Dr. Benegas’ written appointment slip and to having “goofed” up; and according to Dr. Benegas’ uncontroverted testimony, the latter had previously complained about the Grievant’s scheduling errors and she was told that the Grievant had been counseled in regard thereto. This array of facts causes the undersigned to conclude that the Grievant knew or should have known that she was to follow the scheduling orders of providers and failure to do so could result in discipline.

With respect to the “harshness” argument, the Grievant’s 10-day suspension and her discharge were disciplinary steps taken in response to her third and fourth occurrence of a “serious” and “significant” offense, respectively, and, therefore, these disciplinary actions were not too harsh within the frame of the parties’ progressive discipline agreement. Next, the Union claims disparate treatment and once again this claim is not supported by credible evidence. Union Exhibits 14 – 20 fail to establish that the Grievant was treated in a disparate manner. The employees referred in these exhibits (generally) held different position, had different tenures of employment, were at different steps on the progressive discipline ladder and their missteps did not threaten or compromise a patient’s medical wellbeing (i.e., a child’s eyesight).

1. Union Exhibit 14 pertains to a 13-year Group Billing Clerk who was given a 3-day suspension for directing a derogatory slur at a co-worker. Within the parties’ system of progressive discipline, this was a first-step level of discipline. Relatively speaking, the Grievant’s 10-day suspension and her dismissal were administered for her the third and fourth instances of disciplinary conduct. This is not proof of disparate treatment.

2. Union Exhibits 15 – 17 all pertain to a specific 8-year Pharmacy Technician. Sequentially, each of these exhibits reflects an elevated step of discipline for uniquely different offenses. Respectively, the three (3) exhibits document a written oral warning for being disrespectful to a co-worker, written warning for being unhelpful and rude to a patient and a 3-day suspension for being rude during a telephone interaction with a patient. These fact scenarios do not prove disparate treatment. The Grievant's second formal discipline – the 5-day suspension – was for the "serious" offense of violating the Employer's "confidentiality" policy; whereas, the referenced employee's second formal discipline – the written warning – was for a significantly less serious offense. Further, while being rude to the telephoning patient brought about the employee's 3-day suspension and the Grievant's dismissal, the former was at the third step of progressive discipline and the Grievant was at the fourth step.

3. Union Exhibit 18 refers to a different Pharmacy Technician (tenure not in evidence) who was issued a first-offense oral warning for poor customer service (i.e., being rude to patient during a telephone conversation) and failure to adhere to the Employer's customer-relations expectations. Like the Grievant, this employee was issued a written oral warning for her first formally disciplined offense; hence, this case does not demonstrate disparate treatment.

4. Union Exhibit 19 concerns a 2-year employee at the Employer's Appointment Center who was issued a 5-day suspension primarily for excessive absenteeism. While the employee had been the subject of "coaching" in regard to her attendance problem, this was the first time she had been formally disciplined. Again, this case does not somehow show disparate treatment.

5. Union Exhibit 21 has to do with a MOA2 (tenure unknown) who was issued a written oral warning for being rude to a patient and co-worker. Other than one (1) prior coaching, the employee had no prior disciplines. The employee, like the Grievant, received a written oral warning for her first formal disciplined misstep: again, this case does not establish unequal treatment.

Based on the foregoing analysis the undersigned concludes that the Employer met its just cause burden in regard to both the Grievant's 10-day suspension and her ultimate discharge from employment, the Union's 7-Tests arguments notwithstanding. However, the Union also argues that the Grievant is

a “troubled employee” whose mental health status explains her recent on-the-job mistakes, all of which were involuntary misbehaviors that should mitigate in this case. The Employer demurs, arguing that the Grievant is responsible for her on-the-job missteps and does not deserve a “free pass.” Does the Grievant’s bipolar disorder warrant an “exception” to proven “just cause”?

There is no doubt that the Grievant has suffered from bipolar disorder for a number of years. (Union Exhibit 5) Further, the Employer readily acknowledges that it has known about the Grievant’s condition since at least 2003. (Union Exhibit 5) In this regard, Ms. Thornberg credibly testified that she (1) was aware of the Grievant’s mental health condition; (2) had previously asked her if everything was “O.K.” and on that on the single occasion when the Grievant asked for “accommodations”, they were granted; and (3) personally filled out a FMLA request form, based on the Grievant’s health status, a few days before the Grievant was given the October 27, 2006 written oral reprimand, but the Grievant did not process it. (Union Exhibit 6)

Dr. Eric W. Larson, M.D., PLLC credibly testified that the Grievant suffers from “mood disorder” and has “chronic depression and recurrent but brief episodes of anger”. He also opined that the Grievant “... *symptoms of mental disorders where a significant factor in the problematic behaviors cited by her employer*” and that the Grievant is not “... *capable of performing any kind of competitive work at this point ...*” However, “... *that she will recover enough to become employed again if she receives adequate care.*” (Union Exhibits 7 and 8; emphasis added)

The Union relied on Dr. Larson's opinions when it argued that rather than discipline the Grievant, the Employer should have offered her "rehabilitation", as promised in the Guidelines and as enabled by Article 10 §10.03 of the CBA. After all, the Union contends, the Grievant's mental disorder was a factor contributing to her misjudgments and misconduct, creating an exception to the instant finding of just cause discipline. Simply put, she was "unfit for duty".

Offsetting the Union's analysis are the facts that the Grievant was aware of her mental health problems and she knew about her rehabilitation options under the CBA. Yet during 2006 and 2007 – when her mood disorder, episodes of anger and chronic memory and concentration problems were manifest, as pointed out by Dr. Larson – the Grievant apparently did not utilize her sick leave, FMLA leave and/or the Article 10 § 10.03 medical leave of absence options to have her deteriorating mental health condition treated. This was the case even though there is evidence that Ms. Thornberg was receptive to such an initiative. The record shows that in the advent of both her 10-day suspension and dismissal, the Grievant had accumulated approximated 781.82 of unused sick leave hours. (Union Exhibit 20)

With respect to the discharge step of progressive discipline, the Employer's Guidelines states: "Discharge should only come at the point where progressive discipline has failed and the employee cannot be rehabilitated." (Union Exhibits 2) The Guidelines do not define the term "rehabilitated". It is doubtful that the Employer's use of this word was intended to communicate a policy that required it to initiate medical care on behalf of an employee before it

may discharge that employee, as the Union suggests. Rather, the undersigned concludes that the intent of this statement was to advise that an employee ought not to be discharged until it is established that progressive discipline has failed to rehabilitate or to motivate behavioral modification on the employee's part.

Further, under the instant CBA it is the Grievant and not the Employer who carries the burden of initiating rehabilitation, as the term is used by the Union. That is, it is up to the employee to request and take rehabilitative medical leave – be it in the form of sick leave, FMLA leave or an Article 10 § 1.03 medical leave of absence. With respect to the latter, the governing contract language provides that to be eligible for a one (1) year medical leave the employee must “...furnish the Employer with a *request* accompanied by a physician's recommendation for said medical leave.” (Employer Exhibit 1; emphasis added)

The undersigned is cognizant of the fact that the Grievant has many winning characteristics, not the least of which is her willingness to work hard and the honesty she displayed at the hearing. At the same time, the undersigned concludes that Ms. Thornberg was in the awkward position of having to continually balance disciplinary action and clemency due to the Grievant's mental health status. Ultimately, Ms. Thornberg abandoned any hope that the Grievant's behaviors would improve. Nevertheless, the undersigned is persuaded that the nature of the Grievant's mental health status and the Employer's knowledge of same do serve to mitigate the earlier finding that the Employer proved just cause in this case and that, contractually speaking, the Grievant cannot be totally absolved of her responsibilities in this matter.

The Union demonstrated that the fundamental basis for discharge in this case had to do with a defect in the Grievant's mental capacity to perform her job and not with any conscious intention on her part to do wrong. Therefore, in the opinion of the Arbitrator, the standards of just cause discipline must take a backseat to the principle that the employee should have been given the opportunity to demonstrate that if given appropriate medical treatment she would be able to perform her job duties.

**VII. AWARD**

The Employer is directed to return the Grievant to employment status but only after she has presented to the Employer a competent psychiatrist's recommendation for an Article 10 § 10.03 medical leave of absence and regime of mental health care. Upon her return to employment status, the Grievant must subsequently demonstrate by medical documentation that she is work-ready and able to perform the duties of her (prospective) job. In the event that said demonstration does not occur within one (1) year from the date of her return to employment status the Employer may summarily terminate the Grievant's employment.

While on medical leave of absence the Grievant will be paid until her 781.82 hours of accumulated sick leave have been exhausted and, thereafter, the remainder of the leave shall be unpaid. Finally, the undersigned denies, the Union's sought after "make whole" remedy as applied to the Grievant's 10-day suspension and her termination of employment. As previously suggested, this is

a case of shared burden. Self-help was available to the Grievant but she chose not to act: shirking her responsibility.

The undersigned will retain jurisdiction over this matter until the end of the business day on Friday, December 5, 2008, for the sole purpose of overseeing the enforcement of this Award.

Issued and ordered on this 30<sup>th</sup> day of  
October 2008 from Tucson, AZ.

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Mario F. Bognanno, Labor Arbitrator