

IN THE MATTER OF ARBITRATION

OPINION & AWARD

-between-

Grievance Arbitration

A. F. S. C. M. E. COUNCIL NO. 5

Re: Employee Discipline

-and-

B.M.S. No. 09-PA-0459

**THE SILVER BAY VETERANS HOME
SILVER BAY, MINNESOTA**

**Before: Jay C. Fogelberg
Neutral Arbitrator**

Representation-

For the Employer: Joy Hargons, Principal Labor Rel. Representative

For the Union: Ryan Welles, Field Representative

Statement of Jurisdiction-

The Collective Bargaining Agreement duly executed by the parties provides, in Article 17, for an appeal to binding arbitration of those disputes that remain unresolved after being processed through the initial three steps of the procedure. A formal complaint was submitted by the Union on behalf of the Grievant on June 2, 2008, and eventually appealed to binding arbitration in September of last year when the parties were unable to resolve the matter to their mutual satisfaction during discussions at the intermittent steps. The undersigned was then selected as the Neutral

Arbitrator to hear evidence and render a decision from a panel provided to the parties by the Minnesota Bureau of Mediation Services. Subsequently, a hearing was convened in Duluth, Minnesota on July 13, 2009. There, the parties were afforded the opportunity to present position statements, testimony and supportive documentation. The hearing was then concluded on the same date. The parties have stipulated all matters in dispute are properly before the Arbitrator for resolution on their merits, and that the following constitutes a fair description of the issue.

The Issue-

Did the Employer have just cause to terminate the Grievant's employment? If not, what shall the appropriate remedy be?

Preliminary Statement of the Facts-

The adduced evidence indicates that the Grievant, Jon Bolen, was a Human Services Technician assigned to the Silver Bay Veteran's Home – a health care facility for veterans operated by the State (hereafter "Agency", "Employer" or "Administration"). As such, he is represented by the Minnesota State Employees Union, A.F.S.C.M.E. Council 5 ("Union" or "Local") who, together with the Administration has negotiated and

executed a labor agreement (Joint Ex. 1) covering terms and conditions of employment for the approximate seventy-five support personnel that comprise the bargaining unit.

Mr. Bolin was hired in June of 1996, and worked as a Health Service Technician ("HST") during the entire period of his employment at the facility. In that capacity he was responsible for assisting "...residents by providing personal and restorative care in the activities of (their) daily living" (Joint Ex. 4). He reported directly to whatever Charge Nurse who was on duty during the same shift. His daily tasks included assisting with the necessary personal and hygiene care of the residents as well as assisting with their feeding, fluid intake and following each of their individual care plans (*id.*, p. 4).

The facility at Silver Bay has an East and West arm where the residents are housed that flanks the main entrance/lobby. The evidence shows that on March 13, 2008, the Grievant was the only Tech assigned to bathe patients. While giving a bath to a resident in the East side of the facility, a Registered Nurse working the same shift, Sara Preston, asked Mr. Bolin whether he was planning on giving baths on the west arm that day as well. His response was that four different people had already asked him the same question and that he did not, ".....need you people telling me what to do" (Joint Ex. 6). After the Grievant grew angrier, raising his voice, Ms.

Preston contacted another R. N. Tim Turk who was at the service station on the west wing to inquire whether Bolin was performing the bathing duties on both wings that day. Turk, in turn, contacted the Grievant asking if he was doing baths on the east arm as well as the west. At that point, the evidence shows that Mr. Bolin again exhibited irritation with the question and proceeded to locate Ms. Preston yelling at her that he knew how to do his job and then "stormed off into the tub room" (Joint Ex. 6).

Shortly thereafter that morning, the Local Union President, Dorothy Miller, who was working at the facility, was approached by several HSTs who indicated that Mr. Bolin's anger was escalating and that they were "afraid of him when he got angry" (*id.*). Ms. Miller then sought out the Director of Nursing, Pat Smedstad to inform her of the complaints she was receiving from other Techs. Smedstad, in turn, located the Grievant in the tub room, and explained that she needed to talk to him right away. According to the Director, Mr. Bolin's voice became louder as he expressed his belief that he was "in trouble." After the supervisor told him that he was being placed on leave while the matter was being investigated, he raised his voice again. She recalled that it grew louder as they walked down the main hallway. Bolin denied that he had done anything wrong, and that he was being "stereotyped" (*id.*, at p. 6).

As Ms. Smedstad was escorting Bolin out of the building, they passed the Chief Administrator's office, Mike Bond, who heard the Grievant's voice being raised and became concerned. He then decided to accompany Smedstad as he was being escorted to the door.

Subsequently, the Administration interviewed twenty different employees who were working that morning or had worked with him in the past. They also obtained the Grievant's version of the incident, and made a record of all responses (Joint Ex. 6). The Employer determined the investigation demonstrated that "one or more employees became fearful of their safety in the workplace due to (Bolin's) verbal and non-verbal communications" that morning, and that prior attempts to alter his angry behavior had not produced the desired results (Joint Ex. 8). Accordingly, he was informed in a letter dated May 16, 2008, that his employment at the facility was being terminated (*id.*).

Thereafter the Union filed a formal complaint on behalf of Mr. Bolin, alleging that he had been separated from service for less than just cause in violation of Article 16 of the Master Contract (Joint Ex. 15).

Relevant Contractual & Policy Provisions-

From the Master Agreement:

Article 16 Discipline & Discharge

Section 1. Purpose: Disciplinary action may be imposed upon an employee only for just cause.

* * *

Section 3. Disciplinary Procedures: Disciplinary action or measures shall include only the following:

1. oral reprimand;
2. written reprimand;
3. suspension;
4. demotion; and
5. discharge

From the Employer's Operating Policy:

Objective-

To maintain an environment which is free from threats and acts of violence. The agency will not tolerate acts of violence of any type, from any source. This includes threatening or violent actions by or to employees, residents, their family members, volunteers or any guests on our campuses.

Definitions-

Violence: the abusive or unjust exercise of power, intimidation, harassment and/or the threatened or actual use of force which results in or has a high likelihood of causing hurt, fear, injury, suffering or death.

Workplace violence generally falls into three categories:

1. A violent act or threat (perceived or real) by a current or former employee.....or someone who has some involvement with a current or former employee, such as an employee's spouse, significant other, relative or another person who has had a dispute with an employee.

Positions of the Parties-

The **AGENCY** takes the position in this matter that the termination of the Grievant's employment was justified. In support, the Administration claims that on March 13th last year, Mr. Bolin became extremely angry, raising his voice in front of fellow employees and patients as well, and slamming his fist down in disgust, when he was asked to about the bathing schedule and later when requested to vacate the premises. In fact his behavior was so loud and unpredictable that the facility's Chief Administrator dropped what he was doing to assist in escorting him from the building that day. Further, the Employer maintains that Mr. Bolin has been the recipient of numerous counseling, coaching and training sessions over the past ten years in an effort to alter his behavior. This has included a recommendation that he attend anger management classes, and a written warning. They assert that Mr. Bolin has had multiple opportunities to comply with the published policies

on workplace violence (for which he has received training) but to no avail. Indeed, it had become such a problem at the Silver Bay facility that his fellow employees grew fearful of working with him, and supervisors leery of directing him. Such unpredictable and angry behavior also has a negative impact on the residents of the home, and their families as well. Moreover, since his termination, the work environment has improved markedly. For all these reasons then, they ask that the grievance be denied in its entirety.

Conversely, the **UNION** takes the position that Mr. Bolin's discharge from his position at Silver Bay is without just cause. In support of their claim, the Local contends that the Grievant has been a relatively long-term employee who has compiled a good overall record. Further, they assert that when he has been counseled or warned about his angry outbursts and the need to get this type of behavior under control, he has responded favorably. His annual job evaluations in 2006 and again in 2008 demonstrate that he met every expectation of management. Additionally, the Union notes that Mr. Bolin has sought help for anger management from the Veteran's Administration Clinic in Superior Wisconsin. As a veteran of the Gulf War, he suffers from post-traumatic stress disorder which manifests itself at times through angry outbursts. However, he has now learned to keep this under control. The Local contends that the Grievant, as a veteran who was injured

in the war, is in a superior position to identify with many of the residents at the Silver Bay facility. On March 13th last year he maintains that everyone was "on him" to perform the work of two HSTs, and that it simply became overwhelming as he would get conflicting directives from various supervisors. The Grievant maintains he was not made aware that he was the only employee giving baths that day, until he had been at work for approximately an hour. Accordingly, for all these reasons, the Local asks that their complaint be sustained, and that Mr. Bolin be returned to his former position and made whole.

Analysis of the Evidence-

In a disciplinary matter such as this, the employer is routinely assigned the initial burden of proof to demonstrate, in a clear and convincing fashion, that their decision was justified under the circumstances. It is widely held that management must first establish the accused employee is indeed guilty as charged. Should that be accomplished, they then need to show that the discipline administered was fair and reasonable when all relevant factors are considered (assuming, of course, that there is no language in the labor agreement that limits a neutral's authority to review the penalty imposed).

In this instance, following careful consideration of the testimony, supportive documentation and arguments presented, I conclude that the Agency has satisfied their primary evidentiary obligation – largely through the presentation of unrefuted facts.

While Mr. Bolin denied behaving in an angry manner on the morning in question or otherwise raising his voice, the documentation and testimony indicates otherwise. No fewer than nine witnesses called by the Employer testified without challenge to the events of March 13th, noting that the Grievant repeatedly shouted at his supervisors and fellow workers in front of some of the residents, while at times slamming his fist down to make a point. The evidence further indicates that a number of co-workers approached their Local Union Representative that same morning, telling her Bolin was “out of control,” and that they were concerned about their own safety and the safety of the residents. Their apprehension was so uniform and expressed in sufficient numbers that Ms. Miller sought out the Chief Administrator at the facility to advise him of what she had heard. Mr. Bond then witnessed for himself, the Grievant yelling as Director Smedstad attempted to escort him from the building. Indeed, Bond stated that he was concerned enough for Smedstad’s safety (and the safety of others)

that he left his office to accompany her as she walked with Bolin while he retrieved his coat and then exited the facility.

The Grievant's response to the charges were to deny making any violent gestures or otherwise raising his voice on the morning of March 13th last year. During his interview when the Administration was conducting their investigation, he also claimed that he was being "set up" by other employees, and that he had been "stereotyped" as a violent person (Joint Ex. 6). An examination of his employment history however, indicates otherwise.

Supervisor Tim Turk testified that he had worked with Bolin two or three times a week over a protracted period of time at the facility. During that time he observed the Grievant calling fellow employees "fucking idiots." Further, he observed his tirades at work characterizing them as exhibiting "volcanic anger," and noting that sometimes Mr. Bolin would be "overwhelmed with anger." Significantly, he noticed that at times this demonstration would take place in front of residents and visiting family members as well.

John Altmann, another RN Supervisor at Silver Bay, testified that he has worked with the Grievant since he began his employment at the facility in 1996. During that time he stated that he has observed Bolin's anger and

outbursts with some frequency. He commented that the Grievant's behavior would adversely affect the "work on the floor," and that his fellow employees would often avoid him altogether for fear of being a recipient of his anger. This witness testified that he is a friend of Mr. Bolin's outside of work, and has observed him on more than one occasion, bringing his anger into the Veterans' Home when he reported to work. Notably this witness added that he was "uncomfortable" testifying against Mr. Bolin, but believes the Administration's decision to terminate his employment was the "right thing to do" under the circumstances.

Yet another Supervisor, Larry Gomer, testified regarding the job evaluations the Grievant has received in the past – many of which make specific mention of the "need to control (his) emotions during changes in daily routines, so expected results are obtained" (Joint Ex. 12; p. 6). He explained that he had been involved in an incident in 1997 which ultimately resulted in Bolin receiving a written disciplinary warning for his failure to conduct himself in a professional manner. The triggering events again involved angry outbursts and "inappropriate behaviors" on his part (Joint Ex. 11).¹ Gomer added that during the investigative meeting with the Grievant at that time, he was so concerned that Bolin would "explode," he

¹ The action was not grieved by the employee.

positioned himself near a door to facilitate a quick exit should that become necessary.

Additional documentation submitted more than supports the Employer's contention that they have made numerous attempts to correct Mr. Bolin's angry and sometimes violent behavior in an effort to preserve his employment with the Agency. The evidence demonstrates that within two years of being hired at the facility, the Administration began to counsel him for "slamming a hamper lid" (Joint Ex. 9), "swearing and calling another HST a prick" (*id.*), "negative body language and tone of voice" (Joint Ex. 13), and "swearing loudly and throwing a chart book" (Joint Ex. 10). He was also directed to attend anger management training in 2007, and warned that further outbursts would lead to accelerated discipline (*id.*). Notably, Joint Exhibit 14 reflects the fact that since 2000, the Grievant has received extensive training in self-discipline and emotional control which included such topics as "Anger Management," "Workplace Violence" and "Stress Management." Moreover, under cross-examination Mr. Bolin allowed that over the years, Management has made an effort to work with him through counseling and training, "on my problems."

In spite of the Employer's rehabilitative efforts however, I am persuaded that the Grievant has continued to exhibit inappropriate

behavior that has caused both the Administration and his fellow employees continued concern for their safety and the safety of the residents as well. Mr. Bolin acknowledges the Agency's repeated efforts to work with him relative to his anger management. Yet, to this day he maintains the response from the Administration and his fellow workers has been "exaggerated," and that he still "does not think (he has) done anything wrong."

In light of the overwhelming documentation and testimony compiled in the record, I must respectfully disagree with the Grievant's assessment. The objective evidence is manifestly contrary to his assertions. It demonstrates that repeated efforts to counsel, coach and warn Mr. Bolin his behavior needed to be altered in order to preserve his employment, have been largely ignored. The dour reality of the situation is that the Employer has made a reasonable and justifiable decision in this instance, and that the record is void of sufficient countervailing evidence that would support a lesser penalty.

In *Bell Helicopter Textron*, 120 LA 1819 (2005), the arbitrator upheld a discharge of an employee where it was demonstrated he had engaged in threatening, abusive and intimidating behavior over a period of time, and where many employees refused to work with him. Similarly, in the instant

case, many of the Grievant's co-workers have come forward to express concern for their own safety when assigned to the same shift, to the extent it damaged morale in the past. Moreover, the Employer has asserted, without contravention, that other HSTs have indicated they would leave their jobs should he be returned. Finally, there is ample evidence that the work environment at the facility has improved noticeably since Mr. Bolin's departure.

Award-

The foregoing analysis has demonstrated to my satisfaction that the Employer has established a clear and repeated violation of their operation policies by the Grievant. Their expectations of behavior in the workplace – which include appropriate interactions with employees and residents alike – have not been met despite numerous and repeated attempts to rehabilitate this employee. While I am most sympathetic to Mr. Bolin's claim that he suffers from post-traumatic stress syndrome as a result of his service in the armed forces (a diagnosis however that was not documented on the record) this assertion must necessarily be contrasted with the balance of the evidence which has adequately proven that the decision to terminate

his employment was both justified and reasonable. Accordingly, the grievance is denied.

Respectfully submitted this 22nd day of July, 2009.

Jay C. Fogelberg, Neutral Arbitrator