

IN THE MATTER OF THE ARBITRATION BETWEEN

SERVICE EMPLOYEES HEALTHCARE)	FEDERAL MEDIATION AND
MINNESOTA, LOCAL 113)	CONCILIATION SERVICE
OF THE SERVICE EMPLOYEES)	CASE NO. 09-52340
INTERNATIONAL UNION,)	
)	
)	
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)	
Union,)	
)	
and)	
)	
)	
ST. FRANCIS REGIONAL MEDICAL)	
CENTER, A HOSPITAL OPERATED BY)	
ALLINA HOSPITALS AND CLINICS,)	DECISION AND AWARD
)	OF
Employer.)	ARBITRATOR

APPEARANCES

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On August 25, 2009, in Minneapolis, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer. The grievance alleges that the

Employer violated the labor agreement between the parties by discharging the grievant, Catherine E. Barstow. Post-hearing briefs were received by the arbitrator on October 29, 2009.

FACTS

The St. Francis Medical Center (hereafter, the "Employer" or the "Hospital") is a full-service hospital located in Shakopee, Minnesota, a suburb of Minneapolis. The Hospital is owned and operated by Allina Clinics and Hospitals. The Union is the collective bargaining representative of non-supervisory employees of the Employer who are described in the parties' labor agreement as "non-professional" employees, including those working in such classifications as Dietary Aide, Nursing Assistant and Pharmacy Technician.

The grievant was hired by the Employer in September of 2002, and she was discharged on September 16, 2008. During the time she was employed by the Employer, she worked as a Pharmacy Technician in the Hospital's pharmacy (the "Pharmacy").

On September 16, 2008, Margaret T. Schmidt, Manager of the Pharmacy, issued a Corrective Action Procedure to the grievant, discharging her and stating the following reason for the discharge:

Saturday - September 13, 2008 - [The grievant] was not scheduled to work. [She] entered the pharmacy, took four (4) tablets of the drug amitriptyline. [She] acknowledged to the manager and to HR that she did take these medications from the pharmacy. This is considered theft. In addition, the action is inappropriate access to medication as well as inappropriate documentation. St. Francis does not tolerate this behavior. As a result of the above behavior, St. Francis is terminating her employment effective today, September 16, 2008.

Article 6(A) of the parties' labor agreement is set out below:

JUST CAUSE: The Employer shall not initiate corrective action, discharge or suspend an employee without just cause. Employees who are under the influence of drugs and/or alcohol, bring drugs or alcohol on the premises, are dishonest or violate rules directly affecting patient comfort or safety shall be considered to have engaged in acts that are grounds for discharge.

In the following summary of the evidence, I describe the circumstances that led to the grievant's discharge. The grievant experiences severe, debilitating migraine headaches. For more than ten years, she has been taking fifty milligrams of Amitriptyline every day to reduce the incidence of migraine attacks. Below is set out a letter, dated January 16, 2009, from the grievant's treating physician, Steven D. Stein, a Neurologist, in which he describes the grievant's medical condition and the treatment he has prescribed:

I have been involved in the neurologic care of Ms. Barstow for many years. I have prescribed Amitriptyline as a medication that Ms. Barstow takes nightly as a preventive medicine for her headaches. She has been on this medication for well over ten years. She has been using 50 mg. at night. This medication is not a narcotic medication. It is in fact a relatively inexpensive generic medication that has been around for many years. It is my understanding that Ms. Barstow was recently terminated from her job because of a situation that arose where she had asked a pharmacist to give her a very small supply of the medication until she could have her own prescription refilled and picked up. It is my understanding that Ms. Barstow was understandably concerned about possible "withdrawal" symptoms that she may experience if she did not take the medication since she had been on a moderate dose for such a long period of time. [I omit the last two sentences of Dr. Stein's letter, which do not relate to the grievant's medical condition, but, instead, give his opinion about her culpability.]

The Pharmacy is not licensed as a retail pharmacy, i.e., one engaged in the sale of drugs to the public. Rather, it holds a Class B license from the Minnesota Board of Pharmacy, which permits it to furnish drugs only to patients of the Hospital, upon the prescription of Physicians treating them. The Employer staffs the Pharmacy with Pharmacists and Pharmacy Technicians. A Pharmacist's primary duty is to make sure of the accuracy of prescriptions filled, as ordered by Physicians. A Pharmacy Technician's primary duty is to assist the Pharmacists in the operation of the Pharmacy.

During her employment by the Employer, the grievant served as one of several Pharmacy Technicians working in the Pharmacy. I summarize the grievant's description of her duties in the Pharmacy as follows. She was responsible for loading, unloading and refilling Pyxis machines, which are machines stocked with drugs commonly used in the Hospital. They are accessible by Physicians and Nurses throughout the Hospital. In addition, the grievant prepared intravenous needles and tubing and prepared drugs for administration orally and intravenously. She performed these functions at the direction of Pharmacists. Before her employment by the Employer, the grievant has worked as a Pharmacy Technician in other non-retail pharmacies and in several retail pharmacies.

On Friday, September 12, 2008, as the grievant was working a day shift at the Pharmacy, she cut her finger. She lives near Waconia, Minnesota, at a distance from the Hospital. When she was at home that evening, the cut continued to bleed,

and she decided at about 6:00 p.m. to go to a hospital near Waconia to have it treated. While there, she was looking in her purse and noticed that, in her prescription bottle for Amitriptyline, there was only one dose (two twenty-five milligram pills) remaining. She takes this medication every night at about 10:30 p.m., before retiring. The grievant telephoned the pharmacy near her home where she fills her prescriptions, and learned that she could not have the prescription refilled until Monday, September 15. She testified that she made the decision at that time that she would take the last remaining dose that night and go without the Amitriptyline on Saturday and Sunday nights, September 13 and 14.

The grievant also testified that in the years that she has been taking Amitriptyline she has never missed a daily dose. She testified that she was uncertain what the consequence would be if she did not take it on Saturday and Sunday and that the label on the back of her prescription bottle, a copy of which was presented in evidence, has the following warning printed on it:

It is very important that you take or use this exactly as directed. Do not skip doses or discontinue unless directed by your doctor.

The grievant was not scheduled to work on Saturday, September 13. She testified that she drove her daughter to Minneapolis that morning and that she did errands there and decided to pick up some boxes at the Pharmacy, which was on her route home. She telephoned the Pharmacist on duty that day, Madeleine Paulson, and during her discussion with Paulson she

asked what would happen if she did not take the Amitriptyline. According to the grievant, Paulson asked her why she was taking it, and the grievant told her it was for her migraine headaches. Paulson then read in the "literature" and told the grievant that "it wouldn't be a good thing to stop it."

Several hours after the grievant's call to Paulson, she arrived at the Pharmacy. Paulson was the sole Pharmacist on duty, and she was working with two Pharmacy Technicians, Marissa Jensen and Tenzin Dhondup. The grievant testified that, when she arrived at the Pharmacy, she greeted Jensen and Dhondup and then had a brief discussion with Paulson, in which Paulson gave her permission to take two doses of Amitriptyline from the shelves where drugs are stored. The grievant went to the shelves, took four Amitriptyline pills of twenty-five milligrams each and came back to Paulson and showed her the four pills. She had a further brief discussion with Paulson and left with the pills and the boxes she came for. The grievant testified that her discussions with Paulson were in an open area visible to Jensen and Dhondup. She also testified that she thought that Paulson had authority to give her permission to take the pills and that, during the approximately six years of her employment by the Employer, she had observed Pharmacists authorize the dispensation of small doses of medications to Physicians and Nurses for their personal use about five or six times.

The evidence shows that Amitriptyline is a non-controlled medication in common usage for several therapies. The cost to the Employer of each of the four pills taken by the grievant was

less than five cents -- a total cost of less than twenty cents for the four pills.

Just before the start of the shift that began at 3:00 p.m. on September 13, 2008, the grievant, though not scheduled to work that shift, was called and asked to work, and she agreed to do so. She also volunteered to work a shift on the next day, Sunday, September 14.

Jensen testified that, when the grievant arrived at the Pharmacy on the morning of September 13, she went directly to the shelves where drugs are stored took something, put what she had taken in her pocket and went to Paulson and showed Paulson what she had taken. Jensen also testified that she had been employed at the Pharmacy for fourteen months and that, in training, she had been told that employees are not to distribute medications to Hospital employees. She acknowledged, however, that several times, she had been asked by Physicians or Nurses for medications for their personal use, but had referred such requests to the Pharmacist on duty.

I summarize Paulson's testimony as follows. She is a member of the Minnesota Nurses Association. She worked for the Employer in the Pharmacy for fourteen years. She resigned her position when she was informed that she would be discharged because she approved the provision of Amitriptyline to the grievant on September 13, 2008.

Paulson described her duties as a Pharmacist at the Hospital as including the verification of Physicians' orders, the oversight of drug therapy, being a resource for medication information, making clinical decisions, supervising Pharmacy

Technicians, directing workflow, and making sure of the accuracy of medications dispensed. The Employer's position description for the Pharmacist's classification, includes the statement, "supervises pharmacy staff and manages the department when in charge." Schmidt testified that on weekends when only one Pharmacist is on duty, that Pharmacist is in charge of the Pharmacy. The parties agree that a Pharmacist does not have authority to hire or discipline Pharmacy Technicians.

Paulson's testimony corroborated that of the grievant

- 1) that she gave the grievant permission to take two doses of Amitriptyline, four pills of twenty-five milligrams each, and
- 2) that the grievant showed her that she had taken that quantity.

Paulson testified that she gave the grievant permission to take the pills for two reasons -- because she was concerned about the grievant's health and because she wanted the grievant to be free of migraine if it became necessary to call her in for a weekend shift. She thought such a call-in possible because the Pharmacy was short staffed. Paulson testified that during the years she worked at the Pharmacy, Physicians have asked Pharmacists for the dispensation of medications for their personal use, but that that practice has declined in recent years. She also testified that she herself had approved such a dispensation once before the incident of September 13, 2008.

I summarize Schmidt's testimony as follows. She has been Manager of the Pharmacy for about four years, and, as such, she has general supervisory authority over its twenty-six employees -- Pharmacists and Pharmacy Technicians. The Pharmacy

is licensed by the Minnesota Board of Pharmacy (the "Board") as a hospital pharmacy, with authority to dispense medications for patients who are under the care of the Hospital, but, under that limited licensure, the Pharmacy has no authority to dispense medications to others, as it could do if it were licensed as a retail pharmacy. The Board could take action against the Pharmacy, the Hospital, Pharmacists or Pharmacist Technicians who dispense medications to non-patients. The Hospital has a policy that prohibits the dispensation of medications to Hospital employees, except for non-prescription pain relievers, such as Tylenol. Schmidt testified that Pharmacists do not have authority to allow Pharmacist Technicians or other Hospital employees to take prescription medications for their own use. Nevertheless, she testified as follows when asked whether Pharmacists and Pharmacy Technicians are "given any direction whether they are allowed to take prescription medication for their own personal use":

Nothing explicit. I've never felt the need to. I think that people who are employed in the pharmacy, they are licensed or registered with the Board of Pharmacy; they are knowledgeable of the [Board's] requirements and it's just common sense you don't take something without a prescription if it's a prescription medication.

Schmidt noted that Hospital staff, including Pharmacists and Pharmacy Technicians have general knowledge that medications in the Pyxis machines throughout the Hospital are to be used only for patients.

Schmidt testified that at about 9:00 a.m. on Monday, September 15, 2008, Jensen came to her and reported that on the previous Saturday she had seen the grievant come to the Pharmacy

and take something from the "A" section of the shelving where medications are stored and put what she had taken into her pocket. Schmidt then began an investigation, in which she interviewed the grievant and Paulson. They told her of their conduct on the previous Saturday morning -- descriptions consistent with their testimony before me, as I have summarized it above. According to Schmidt, both the grievant and Paulson told her 1) that the grievant telephoned Paulson before she came to the Pharmacy, 2) that they discussed the possible adverse medical consequence of omitting two doses of Amitriptyline, 3) that the grievant came to the Pharmacy, 4) that Paulson gave her permission to take four twenty-five milligram pills of that medication, and 5) that the grievant showed the pills to Paulson before she left. Schmidt also testified that, when she first heard about the incident from Jensen, she interviewed Paulson alone and that Paulson told her then that she knew it was "wrong" to have allowed the grievant to take the medication, but that she had had "a temporary lapse of judgment."

Schmidt testified that she thought the grievant could have obtained two doses of the medication elsewhere -- for example, by contacting her Physician who would probably telephone her local pharmacy and authorize such a temporary supply.

Schmidt testified that after completion of her investigation she determined that Paulson:

. . . had not followed pharmacist responsibilities in order to dispense medications to a patient. She didn't have a prescription to dispense that. We're not licensed to dispense to outpatients. She wouldn't have labeled it or had the means to label it appropriately, nor have the

means to have any type of compensation or payment for that prescription.

Schmidt testified that she formed a similar opinion about the grievant's conduct:

Yes, similar. She didn't have a prescription on file for it; she knows that the medication wasn't labeled for outpatient therapy, that she didn't pay for the prescription, and that she had taken it without authorization.

Schmidt testified that she did not think that Paulson's "involvement in the situation somehow mitigated [the grievant's] responsibility" for the incident "because independently they both knew that it was wrong, they were both responsible for following policies and procedures and the Board of Pharmacy rules and regulations."

On September 16, 2008, after Schmidt conferred with Anita K. Nystrom, Human Resources Generalist, and Ann Graves, who manages the Hospital's Human Resources Department, they decided to discharge the grievant. Schmidt testified that they did so "because it was theft of prescription medications and that was a violation" and that she considered it theft "because [the grievant] took the medications and we didn't have a prescription" and that it did not matter that she "consulted" with Paulson because the grievant was still responsible for her own actions. Upon further examination, Schmidt emphasized, as the cause for discharge, not that the grievant's action was theft, but that she knew or should have known that she could not take medication from the Pharmacy without a prescription and that, even if she had shown a prescription to Paulson, the grievant should have known that the Pharmacy could not fill it because the Pharmacy

did not have the proper license from the Board to dispense prescription medications to non-patients.

In their testimony, Nystrom and Graves emphasized that the grievant was discharged for theft and that, notwithstanding the low value of what was taken, "theft is theft," as Graves put it. Nystrom testified that, in making the decision to discharge the grievant, they thought her conversation with Paulson was irrelevant because Paulson did not have authority to give the grievant permission to take the Amitriptyline.

Schmidt testified that after the grievant was discharged, she found some prescription strength Prevacid in the grievant's locker, packaged in a form "consistent with what we have on our shelves," i.e., in a form "inconsistent with any kind of packaging for that medication that you would get from a [retail] pharmacy." The Union objects to consideration of this allegation, arguing that the Corrective Action Procedure that stated the basis for the grievant's discharge made no reference to it and that the Union was first made aware of the allegation by Schmidt's testimony during the hearing before me. I agree with the Union's argument that, because it had no notice of this allegation, it should not be considered as an additional basis for the grievant's discharge.

The following is a summary of the testimony of Patrick G. Landherr, a witness presented by the Union. He has worked as a Pharmacist for about twenty-three years, the last three of which he has been employed by the Employer at the Pharmacy. Before September 13, 2008, he had not been made aware by the Employer

of any policy that prohibited Pharmacists from providing medications to employees of the Hospital who might ask for a small amount while working. Since the grievant's discharge, he has been made aware by Schmidt that it is the policy of the Employer not to provide anything but Tylenol or other non-prescription pain relievers to employees.

The Union also presented the testimony of two Pharmacy Technicians -- Natalie Beane-Reeves, who has been employed in the Pharmacy since 2006, and Allison B. Korus, who has been employed in the Pharmacy since 2001. Beane-Reeves testified that since she has been employed at the Pharmacy there have been about ten occurrences when a Nurse has "called down" and asked her to provide a small amount of a prescription medication for personal use when the Nurse has said that she forgot to bring her medication from home. According to Beane-Reeves, she has referred all such requests to a Pharmacist, and the Pharmacist approved the request about three or four times. She testified that she was not aware of any written policy prohibiting the provision of medications to employees of the Hospital, but that, after the grievant was discharged, Schmidt held a meeting of Pharmacy employees at which she told them they were not to provide anything but Tylenol and other non-prescription pain relievers to employees of the Hospital.

Korus testified that until the incident of September 13, 2008, which led to the grievant's discharge, it was a "common occurrence" that Hospital staff, including Nurses and Physicians asked for and received small amounts of medication from the

Pharmacy, but she conceded that, since the grievant's discharge, that has not occurred -- except for the provision of Tylenol or other non-prescription pain relievers.

DECISION

The parties agree that the issue presented is whether the Employer had just cause to discharge the grievant. They also agree that they are bound not only by Section 6(A) of the labor agreement, which requires just cause for discharge, but by a Corrective Action Policy, which they have adopted jointly. That policy provides for the use of progressive discipline, but, as the Employer argues, it also states that "termination of employment is appropriate for more serious performance, conduct or policy issues." The Employer notes that the parties have executed a letter of understanding relating to the Corrective Action Policy, which provides:

Neither this Letter of Understanding nor the Corrective Action Policy will limit [the Employer's] right to discharge or otherwise discipline an employee for a single serious offense or repeated offenses, or to withhold employees from service with or without pay pending [investigation].

Thus, as described by the parties' arguments, the primary issue is whether the grievant, by taking the four Amitriptyline pills on September 13, 2008, committed "a single serious offense" that justifies her discharge without progressive discipline. She has no record of previous discipline. The Employer argues that the grievant's conduct was an act of theft and that, even though the pills were of slight value, "theft is theft" and, as theft, her conduct was such a single serious offense.

The Union argues that the grievant's conduct was not theft, because she took the pills with permission from Paulson, who, as the Pharmacist in charge of the Pharmacy had authority to allow her to take the pills. To this argument, the Employer responds that Paulson did not have actual authority to allow the grievant to take the pills and that, because Paulson did not have actual authority to do so, Paulson's grant of permission could have no effect.

I make the following rulings. A taking of property is not theft if the person taking it has permission to take it from the owner or from an agent of the owner who has authority -- either actual authority or implied or apparent authority -- to give such permission. I find that, when the grievant took the pills from the Pharmacy on September 13, 2008, she had a good faith belief that Paulson, as the Pharmacist in charge of the Pharmacy, was authorized to give her permission to do so.

The Employer did establish 1) that no express writing granted such authority to Pharmacists and 2) that, because the Pharmacy is not licensed to dispense medication to non-patients, the Employer could not make an express grant of such authority to Pharmacists. Nevertheless, the evidence supports a finding that the grievant and many other Hospital employees, including Pharmacists, Pharmacy Technicians, Nurses and Physicians, regarded Pharmacists as having apparent authority to dispense small amounts of medication for their personal use in circumstances similar to those in which the grievant found herself that morning, i.e., lacking a few inexpensive pills of

Amitriptyline to meet a temporary need. Even if I accept the Employer's argument that Paulson herself was doubtful about her authority to grant permission -- an argument supported only by the afterthought Paulson expressed to Schmidt that she had had a "temporary lack of judgment" -- nothing in the evidence shows that Paulson communicated any such doubt to the grievant. I find that the grievant thought that Paulson had authority to permit her to take the pills and that she thought so with good reason -- her knowledge of the practice that Pharmacists did permit similar small dispensations to Hospital employees, a practice that existed until Schmidt clearly informed Pharmacy staff, in meetings after the grievant's discharge, that they were to provide Hospital employees only with Tylenol or other non-prescription pain relievers.

Schmidt testified that the grievant and Paulson should have known that Paulson did not have authority to permit Hospital employees to take even small amounts of prescription medication because they knew or should have known that the Pharmacy was not licensed to dispense prescription medication to non-patients. As noted above, however, the evidence shows the existence of a contrary practice among Pharmacy employees and Hospital Physicians and Nurses, and for that reason I find that Hospital employees, even if aware of the limited nature of the license of the Pharmacy, believed that Pharmacists could overlook that limitation -- at least when the quantities given to employees were small and were given to accommodate a temporary need.

I note 1) that the Union has also argued that the Employer should not have selected discharge as the appropriate discipline for the taking of four pills of insignificant value, less than twenty cents, and 2) that the Employer has argued that the small value of the pills is irrelevant because "theft is theft." My disposition of this grievance is grounded on my ruling that what the grievant did was not a theft of any kind -- because she thought she had permission to take the pills from an authorized agent of the owner of the property taken, the Hospital. Even if the idea is conceded that "theft is theft," as expressed by witnesses for the Employer, irrespective of the insignificant value of the property taken, the small value of the pills is relevant to support the credibility of the grievant's testimony that she believed in good faith that Paulson had authority to give her permission to take them. If the grievant had taken medication of great value, her testimony that she believed in good faith that Paulson had authority to permit its taking would then be less credible because it would conflict with an implied limitation on the authority of Paulson or any other Hospital employee to allow the taking of valuable property.

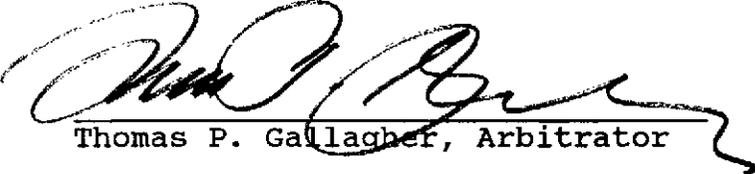
Because the grievant's conduct was not a theft of any kind, it was not a "single serious offense" that would justify skipping the progressive discipline sequence otherwise required by the parties' Corrective Action Policy. If, as the evidence shows, the grievant and other Hospital employees were unaware that the Pharmacy's limited license prevented Pharmacists from

permitting Hospital employees from obtaining small amounts of prescription medication to fill a temporary need, the proper progressive discipline of the grievant was to give her the same kind of counseling that other Pharmacy employees received after the grievant's discharge -- a clear notification that only Tylenol or other non-prescription pain relievers could be provided to non-patients.

AWARD

The grievance is sustained. The Employer shall reinstate the grievant to her employment, adjusting her record of discipline to show a counseling for the incident of September 13, 2008. The grievant's reinstatement shall be without loss of seniority and with back pay, reduced by the amount she may have received since the discharge from unemployment compensation and by the amount she has earned or should have earned in compliance with her duty to mitigate damages.

January 9, 2010


Thomas P. Gallagher, Arbitrator