

IN THE MATTER OF ARBITRATION BETWEEN

AFSCME, COUNCIL 5,)	ARBITRATION
)	AWARD
Union,)	
)	
and)	MCPHAIL DISCHARGE
)	GRIEVANCE
)	
STATE OF MINNESOTA)	
DEPARTMENT OF HUMAN SERVICES))	
)	BMS Case No. 10-PA-0523
Employer.)	
)	

Arbitrator: Stephen F. Befort

Hearing Date: April 13, 2010

Date of decision: May 7, 2010

APPEARANCES

For the Union: Bob Buckingham

For the Employer: Rebecca Wodziak

INTRODUCTION

The American Federation of State, County, and Municipal Employees, Council 5 (Union) brings this grievance as exclusive representative claiming that the State of Minnesota, Department of Human Services (Employer) violated the parties' collective bargaining agreement by discharging Patti McPhail from her LPN position with CARE of Carlton without just cause. The grievance proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of

witnesses and the introduction of exhibits. The parties decided not to submit post-hearing briefs.

ISSUES

1. Did the Employer have just cause to discharge the grievant?
2. If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 16 - DISCIPLINE AND DISCHARGE

* * *

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

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

* * *

Section 5. Discharge. The Appointing Authority shall not discharge any permanent employee without just cause. . . .

FACTUAL BACKGROUND

Patti McPhail, the grievant in this matter, has worked for CARE of Carlton as a licensed practical nurse (LPN) since 1997. CARE of Carlton is one of six Community Addiction Recovery Enterprise facilities operated by the Minnesota Department of Human Resources. The CARE of Carlton facility, which is situated in Carlton, Minnesota, provides chemical addiction treatment services to female clients in northeastern Minnesota.

As a LPN, Ms. McPhail provides direct nursing services to clients with chemical addiction problems under the direction of a registered nurse. A principal job duty of a LPN in this setting is to dispense prescribed medications to patients.

“Client A” was voluntarily admitted to CARE of Carlton for residential treatment on June 18, 2009. The intake assessment report indicated that she was addicted to opiates and had a history of benzodiazepine use. Dr. Kleinschmidt, client A's community physician, was refusing to prescribe any more medications for client A because she was "losing" too many of her prescriptions. On an intake drug screen, client A tested positive for a type of benzodiazepine for which she did not have a prescription. In addition, client A acknowledged that she sometimes ingested higher doses of the benzodiazepine Klonopin than her physician prescribed. RN Advanced Practice nurse Trudy Erlemeier, the highest ranking medical professional at the Carlton facility and the only one with authority to issue treatment orders, testified that under the circumstances she was concerned that client A had entered the CARE facility primarily to obtain a new prescription for drugs.

Client A was in withdrawal as she entered the facility and had a rough first day. Nurse Erlemeier consulted with Dr. Kleinschmidt who prescribed two medications for client A. One was Suboxone, a methadone-like substitute for opiates such as heroin that client A had been taking for the last several months. The second prescription was for Klonopin, a benodiazophine used to treat anxiety. The two drugs normally are not recommended for combined use, but they were jointly administered in this instance because of client A's heightened state of withdrawal and the perceived danger of a seizure.

On June 19, her second day in the facility, client A threatened to leave without authorization along with her newly prescribed medications. Nurse Erlemeier responded by issuing two orders on that same day. In the first, she stated that “if the client leaves, she is not to be given suboxone or klonopin.” The second order more broadly stated, “do not release any meds.” Client A left the facility for about two hours later on June 19, but then returned and continued her treatment program.

Client A eventually completed a month-long treatment program. During that time, her medications were adjusted, and the local pharmacy for some reason sent a large batch of Client A’s medications to the CARE of Carlton facility. The topic of client A’s discharge was discussed at a July 17 shift meeting. Ms. McPhail, who was responsible for overseeing the discharge, expressed the opinion that client A should be permitted to take her unused medications with her upon discharge. She asserted that Ms. Erlemeier’s “do not release any meds” order only pertained to the June 19 time frame. She also referenced Program Director Deb Rybos’s belief that clients should be able to take “their” medication with them when leaving the facility after completing a treatment program. Apparently other staff members disagreed with this assessment although it is unclear whether anyone expressly dissented from Ms. McPhail’s view during the meeting. Ms. Erlemeier was on vacation during this period and did not participate in the meeting.

Client A was discharged from CARE of Carlton on July 18, 2009. Ms. McPhail made the decision that client A could take her unused medications with her when leaving the facility. The records indicate that these medications included a one-month supply of Suboxone (43 units) and a three-month supply of Klonopin (174 units). At the time of

her discharge, client A had an appointment with a community physician scheduled for July 24.

At the arbitration hearing, Ms. Erlemeier testified that she was in a “state of shock” when she returned from vacation and learned of the medications given by Ms. McPhail to client A upon discharge. She testified that Ms. McPhail’s actions not only violated her prior “do not release any meds” order, but that the amount of medications presented a serious danger of overdose. Ms. Erlemeier testified that while the clinic sometimes permitted released clients to leave with a limited supply of medications as a bridge to a post-release doctor’s appointment, the provision of a three month’s supply of a highly addictive substance like Klonopin to a client with a history of abuse posed a substantial danger of respiratory cessation and death.

Deb Moses, Statewide Director of CARE, placed Ms. McPhail on investigatory leave in early August 2009, and asked Kimberly Murray, a RN Supervisor at the CARE site in Brainerd, to undertake an investigation into the underlying incident. Ms. Murray reviewed the pertinent chart documents and interviewed those individuals with knowledge of the incident. In her investigative findings, Ms. Murray concluded that Ms. McPhail had violated Ms. Erlemeier’s order by giving client A “her current supply of medications including Suboxone and Klonopin at the time of discharge on July 18, 2009.” The investigative report also included the following finding:

- 6) All team members did not share the same consensus about this client’s discharge plans and the specifics about her medications at discharge. Nursing staff had been taking direction from a non-medical Director on previous discharge medications at CARE of Carlton.

The Employer discharged Ms. McPhail on September 9, 2009 for violating the “do not release any meds” order. Director Moses, who ultimately made the discharge

decision, testified that she found Ms. McPhail's action to constitute not simply a medication error but a conscious scope of practice violation with potentially dire consequences.

The Union filed a grievance challenging the Employer's decision and the matter progressed through the grievance steps to this arbitration proceeding. At the hearing, the Union elicited testimony from Dawn Warneke who also works as a LPN at CARE Carlton. She testified that the clinic's usual practice was to permit clients who successfully completed an in-patient treatment program to take their available store of medications upon discharge. She also testified that the clinic has not provided any formal training as to the potential dangers of Suboxone and Klonopin.

POSITIONS OF THE PARTIES

Employer:

The Employer contends that it had just cause to discharge the grievant under the circumstances of this case. The Employer asserts that Ms. McPhail's actions violated the terms of an order which unequivocally stated "do not release any meds" to Client A. Even if Ms. McPhail had thought the terms of this order somehow were ambiguous, she had a duty to check with superiors to ensure that her conduct did not run afoul of that order. The Employer, in addition, argues that the extremely serious nature of this violation warrants the ultimate sanction of discharge. The Employer maintains that Ms. McPhail did not just make an innocent error in dispensing medications, but that she made a conscious and unwarranted decision beyond her legitimate scope of practice authority. Moreover, by providing such a large quantity of dangerous drugs to someone with a

history of abusing those same drugs, Ms. McPhail's conduct created a significant danger of overdose and death.

Union:

The Union argues that the Employer's discharge decision is not supported by just cause. Although the Union acknowledges that Nurse Erlemeier's order banned the dissemination of drugs to Client A on its face, it claims that Ms. McPhail reasonably believed that the order pertained only to the circumstances on June 19 when Client A was threatening to leave the facility without completing treatment. Moreover, the clinic's practice has been to permit clients who successfully complete a treatment regimen to take their remaining medications when released from the facility. The Union also contends that discharge is too severe a penalty in any event. The Union points out that Ms. McPhail had no significant prior disciplinary record and that the Employer had not provided any training with respect to the dangers of Suboxene and Klonopin.

DISCUSSION AND OPINION

In accordance with the terms of the parties' collective bargaining agreement, the Employer bears the burden of establishing that it had just cause to support its termination decision. This inquiry typically involves two distinct steps. The first step concerns whether the employer has submitted sufficient proof that the employee actually engaged in the alleged misconduct or other behavior warranting discipline. If that proof is established, the remaining question is whether the level of discipline imposed is appropriate in light of all of the relevant circumstances. *See* ELKOURI & ELKOURI, HOW ARBITRATION WORKS 948 (6th ed. 2003). Both of these issues are discussed below.

A. The Alleged Misconduct

The misconduct alleged by the Employer in this matter is Ms. McPhail's failure to abide by the order issued by Advanced Practice Nurse Erlemeier. The Employer submitted evidence that clearly establishes the basic elements of this allegation. This evidence shows that Ms. Erlemeier placed an order in client A's file that expressly stated "do not release any meds," and that Ms. McPhail nonetheless permitted client A to take a significant amount of medications with her upon release from CARE of Carlton.

While the Union does not disagree with these basic facts, it claims that the Employer has not engaged in conduct warranting discipline for two reasons. First, the Union maintains that Ms. McPhail reasonably believed that Ms. Erlemeier's order applied only to the period on June 19 when client A was threatening to leave the Carlton facility without authorization. Ms. McPhail testified that she understood the order to be a measure designed to prevent client A from simply checking in to the clinic and then immediately leaving with the desired medications. Second, the Union contends that Ms. McPhail was following CARE of Carlton's practice, as encouraged by former Program Director Deb Rybos, of permitting patients to take their remaining medications with them when completing a treatment program.

The shortcoming of these two assertions, however, is that neither alters the terms of the order issued by Ms. Erlemeier. That order clearly banned the dispensation of medications to client A and was not limited in duration. At a minimum, if Ms. McPhail thought that the order meant something other than that expressly stated, she should have consulted with one of her supervisors to clarify that understanding.

Ms. Erlemeier's testimony at the hearing also takes issue with the purported practice alleged by the Union. Ms. Erlemeier testified that the clinic occasionally would give a small supply of medications to a patient upon release to carry her over until the next scheduled doctor's appointment, but that the clinic never would give a three month supply of an addictive drug such as Klonopin. In addition, the Employer persuasively argues that the personal preferences of Ms. Rybos, who is not a medical professional, cannot take precedence over an order issued by an Advanced Practice Nurse.

For the above reasons, the weight of the evidence supports the conclusion that the Employer has adequately established that Ms. McPhail engaged in the conduct alleged as the basis for the discipline in question.

B. The Appropriate Remedy

The Union claims that two mitigating circumstances warrant a reduction in the penalty imposed on Ms. McPhail. First, the Union points out that Ms. McPhail has amassed a good work record at CARE of Carlton. During her twelve years of employment at the clinic, she generally received positive performance evaluations with only a single reprimand in terms of discipline. In addition, the Union submitted evidence establishing that the Employer provided no formal training to LPNs at CARE of Carlton concerning the dangers associated with either Suboxone or Klonopin.

While both of the Union's assertions are factually accurate, they are not sufficient to support a reduction in penalty given the grievous nature of Ms. McPhail's misstep in this instance. This misstep was not a simple negligent error in medication administration. It was conduct taken in disregard of an order not to dispense medications at all; a decision wholly beyond a LPN's scope of practice. Moreover, the potential danger flowing from

such an action was enormous. Client A was addicted to opiates and had a history of abusing benzodiazepines. By providing client A with such a large quantity of Suboxone and Klonopin, Ms. McPhail placed client A in a position in which overdose and death were very real potential consequences. Even with little prior discipline or formal training as to the properties of specific drugs, a LPN working with such an at-risk population should know that medical orders cannot be ignored or second-guessed. Under the circumstances, the Employer's decision that such conduct is not acceptable should be sustained.

AWARD

The grievance is denied.

Dated: May 7, 2010

Stephen F. Befort
Arbitrator