

STATE OF MINNESOTA
BUREAU OF MEDIATION SERVICES

IN THE MATTER OF GRIEVANCE ARBITRATION BETWEEN

MINNESOTA DEPARTMENT OF HUMAN
SERVICES,

EMPLOYER

ARBITRATOR'S AWARD

-and-

BMS Case No. 12-VP-0115

GRIEVANCE ARBITRATION

ANN L. O'CONNELL, DDS

GRIEVANT.

ARBITRATOR

Rolland C. Toenges

DATE OF GRIEVANCE

August 17, 2011

DATE ARBITRATOR NOTIFIED

September 21, 2011

DATE OF HEARING

November 22, 2011

DATE OF POST HEARING BRIEFS

January 6, 2011

DATE OF AWARD

January 27, 2011

ADVOCATES

FOR THE EMPLOYER:

Becky Wodziak, Prin. LR Representative
Minnesota Department
Of Human Services

FOR THE GRIEVANT:

Mark W Gehan, Attorney
Collins, Buckley, Sauntry
& Haugh, PLLP.

ISSUE¹

Did the Employer have just cause to discharge the Grievant?

If not, what shall be the remedy?

¹ The Parties stipulated to the Issue statement.

WITNESSES**FOR THE EMPLOYER:**

Dr. Judith Gundersen, Dental Director
State Operated Services

Lori Zook, Controller
State Operated Services

Jim Yates, Human Services Director
State Operated Services

Rod Kornrumpf, Administrator
State Operated Services

FOR THE GRIEVANT:

Ann L. O'Connell, Grievant

JURISDICTION

The matter at issue, regarding discharge of the Grievant, is before the instant arbitration proceeding pursuant to the "Commissioner's Plan." Said Plan is established under Minn. Stat. 43A.18, Subdivision 2, by Minnesota Management and Budget. Provisions of the Commissioner's Plan, relevant to the instant matter, appear under "M.S. 43A.33 GRIEVANCES:"

"Subdivision 1. Discharge, suspension, demotion for cause, salary decreases. Managers and employees shall attempt to resolve disputes through informal means prior to the initiation of disciplinary action. No Permanent employee in the classified service shall be reprimanded, discharged, suspended without pay or demoted, except for cause." [Emphasis Added]

"Subdivision 2. Just Cause. For purposes of this section, just cause includes, but is not limited to, consistent failure to perform assigned duties, substandard performance, insubordination, and serious violation of written policies and procedures, provided the policies and procedures are applied in a uniform, nondiscriminatory manner." [Emphasis Added]

"Subdivision 3. Procedures. Procedures for discipline and discharge of employees covered by collective bargaining agreements shall be governed by the agreements. Procedures for employees not covered by a collective bargaining agreement shall be governed by this subdivision and by the commissioner's and managerial plans.

“C. Within ten days of receipt of the employee’s written notice of appeal, the commissioner of the Bureau of Mediation Services shall provide both parties with a list of potential arbitrators according to the rules of the Bureau of Mediation Services to hear the appeal. The process of selecting the arbitrator from the list shall be determined by the plan. The hearing shall be conducted pursuant to the rules of the Bureau of Mediation Services. If the arbitrator finds, based on the hearing record, that the action appealed was not taken by the appointing authority for just cause, the employee shall be reinstated to the position, or an equal position in another division within the same agency, without loss of pay. If the arbitrator finds that there exists sufficient grounds for institution of the appointing authority’s action but the hearing record establishes extenuating circumstances, the arbitrator may reinstate the employee, with full, partial, or no pay, or may modify the appointing authority’s action. The appointing authority shall bear the cost of the arbitrator for hearings provided for in this section.” [Emphasis Added]

The Parties selected Rolland C. Toenges as the Arbitrator to hear and render a decision in the interest of resolving the disputed matter.

The arbitration hearing was conducted as provided by the terms and conditions of the Commissioners Plan and applicable statutory provisions. The Parties were afforded full opportunity to present evidence, testimony and argument bearing on the matter in dispute.

Witnesses were sworn under oath and were subject to direct and cross-examination.

The Parties stipulated that the disputed matter is properly before the instant arbitration proceeding and to the issue to be decided by the Arbitrator.

There was no request for a verbatim record of the hearing.

BACKGROUND

The Employer is an agency within State of Minnesota Government. This Agency is known as The Minnesota Department of Human Services (DHS). Among services

provided by the agency is dental care for institutionalized persons under the States care.

The Grievant is a Doctor of Dentistry, employed by the Department of Human Services, in the State Operated Services Dental Program (SOS). The Grievant provided dental care to mentally disabled patients for about five years at the Southern Cities Clinic, located in Faribault, Minnesota.

The Grievant is required by Minnesota Statutes and by DHS and SOS policies to hold a valid license to practice dentistry. The Minnesota Board of Dentistry requires dentists to obtain fifty credits of continuing dental educational every two years, as a condition of license renewal.

Until suffering injury in an auto accident on January 20, 2010, the Grievant worked from 8:00 a.m. to 4:30 p.m. Tuesday, Wednesday, Thursday and Friday each week. Due to extensive injuries suffered in the auto accident, the Grievant was in recovery and unable to perform her duties from the date of the accident until May of 2010. The Grievant worked a limited schedule until August 2010 when she resumed her regular work schedule.

In addition to trauma resulting from the auto accident, which included brain injury, the Grievant indicated she was experiencing emotional distress due to personal circumstances.

The Grievant, like all Dentists, is required to complete continuing educational credits, which is a condition of maintaining her license. The Grievant was audited by the licensing board in the fall of 2010 and found to be deficient in the number of educational credits required.² At that time, the Grievant lacked 43 of the 50 educational credits required to maintain her license.

² Employer Exhibit #B-1.

The Grievant's license renewal date was October 31, 2010. On December 16, 2010, the licensing board sent the Grievant a notice that she had not met professional development requirements and gave her a six-month extension, from the date of the notice, to bring her continuing education credits up to date.³ The notice advised the Grievant that failure to bring her credits up to date would result in automatic termination of her license/registration.

On June 20, 2011, the licensing board sent the Grievant notice that her license had been terminated effective June 16, 2011, for failure to complete the necessary continuing educational requirements.⁴ The Grievant continued to practice dentistry after revocation of her license from June 16, 2011 through June 30, 2011. During this period, the Grievant performed dental services on some 57 patients.⁵ The Grievant did not perform services after June 30, 2011, due to a shut down of state government from July 1, 2011 until July 20, 2011.

The Dentistry Board accepted continuing education credits the Grievant submitted on or about June 24, 2011 and reinstated her license on or about July 28, 2011.

The Employer, upon learning that the Grievant had practiced dentistry without a license on or about July 7, 2011, placed her on administrative leave effective 07/21/11, while the matter was being investigated. The SOS Dental Program was unable to bill some \$14,000 for services performed by the Grievant while not licensed.

On August 8, 2011, the Employer notified the Grievant of intent to discharge⁶.

³ Employer Exhibit #B-1.

⁴ Employer Exhibit #B-2.

⁵ Employer Exhibit #B-0.

⁶ Employer Exhibit #A-1.

Thereafter the matter was processed through the grievance procedure, but without resolution. Accordingly, the matter now comes before the instant arbitration proceeding for resolution.

EXHIBITS

JOINT EXHIBITS:

1. Stipulation of Issue.
2. Letter to Minnesota Board of Dentistry, dated 08/16/11.

EMPLOYER EXHIBITS:

- A-1. Notice of Intent to Discharge, dated 08/08/11.
- B-2. Letter from Board of Dentistry to Grievant, dated 12/16/10.
- A-2. Employer's Response to Grievant's Appeal of Discharge, dated 08/09/11.
- A-3. Grievant's Request for Appointment of An Arbitrator, dated 08/17/11.
- B-0. Investigative Report, Case #0136-07-11.
- B-1. Letter, Board of Dentistry to Grievant, dated 12/16/10.
- B-2. Letter, Board of Dentistry to Grievant, dated 06/20/11.
Letter, Redpenning to Grievant, re. Suspension, 07/21/11.
- B-3. Time records of Grievant, 06/16/11 through 06/30/11.
- B-4. Medical Staff By Laws, dated 09/30/09 and Ethics Policy for DHS.
- B-5. Grievant's Individual Progress Report – Past Due Course Completion.
- C-0. Grievant's Position Description, dated 10/29/09.
- D-0. Letter, Redpenning to Grievant, re. Suspension, dated 07/21/11.
- E-0. Schedule of Unreimbursed Patient Services, Due Unlicensed Grievant.
- F-0. Federal Register – Medicare/Medicaid & CHIP Rules & Regulations.
- G-0. MHCP – Provider Screening Requirements.

H-0. Multiple Examples (7) of Employee Discharges Due to Lack of Required License.

Addendum: Commissioners' Plan.

POSITION OF THE PARTIES

THE EMPLOYER SUPPORTS ITS POSITION WITH THE FOLLOWING:

- The Grievant's actions constituted deliberate and serious misconduct, which is just cause for discharge.
- The Grievant willingly and knowingly continued to practice after suspension of her license.
- A valid license is required as a condition of the Grievant's employment and is required by Minnesota Law and DHS/SOS policies.
- Licensure is such a critical part of the Grievant's job that it was assigned as ten percent of her work time.
- The Grievant had three years in which to complete the required educational credits, but failed to do so.
- Even after given a six-month extension to complete the credits and warned that failure to do so would result in termination of her license/registration, the Grievant failed to comply.
- The Grievant failed to timely inform her supervisor of the deficiency in her educational credits and that her license/registration had been terminated effective June 16, 2011.
- The Grievant's misconduct is exacerbated in that her patients are vulnerable adults with compound medical, mental and emotional disabilities, some needing to be treated while under general anesthesia.
- The Grievant's misconduct resulted in a financial loss to the employer of over \$14,000.00, which in itself is sufficient just cause for discharge.
- In addition to the financial loss, the Grievant's misconduct has been detrimental to the trust patients have in the SOS Dental Program.
- The Employer must be permitted to enforce its professional license requirement to operate in a safe, lawful and orderly manner.

- The Employer's requirement to maintain a valid license is reasonable and has been applied in a responsible manner.
- The Employer cannot operate its health care programs safely and legally if it cannot maintain essential licensure standards for medical professionals practicing on high-risk patients.
- The Employer employs literally thousands of people who are required to be licensed to perform their jobs.
- The Employer enforces its licensing requirements in a reasonable fashion and provided a number examples of employees discharged for failure to maintain the required licenses.
- There is no evidence that the Employer has been lax in enforcing licensing requirements or that the Grievant has been subjected to disparate treatment.
- The Grievant's auto accident injuries, however difficult, cannot be used to shield her from responsibility to refrain from practicing without a license.
- Neither can the Grievant's misconduct be dismissed as an honest mistake, for the Grievant has acknowledged practicing dentistry even after knowing that her license had been terminated.
- The Grievant's misconduct cannot be attributed to her injuries or be dismissed as inadvertent errors, caused by confusion or misinformation.
- The Employer cannot retain a medical professional who would disregard her professional obligations and commit such serious misconduct.
- Based on the foregoing, the Grievance must be denied.

THE GRIEVANT SUPPORTS HER POSITION WITH THE FOLLOWING:

- The two mistakes made by the Grievant (failure to accurately note the six-month extension end date and failure to promptly open the June 20, 2011 Board letter) do not add up to a willful violation of policies and procedures required by the statute.
- Having already earned the required credits on June 16, 2011, the Grievant had no motive to be mixed up on the due date for her credits.

- The Grievant thought the June 20, 2011 letter from the Board was a reminder of the pending extension end date, until she read the letter.
- When the Grievant did read the June 20, 2011 Board letter on June 29, she had no motive to practice without a license – she would have missed only a single day of work.
- The examples of employee terminations described in Mr. Kornrumpf's testimony, intended to show consistent discipline for lack of licensure, can be distinguished from the case of the Grievant:
 1. Dr. Nancy Kermath failed to renew a license, according to the testimony of James Yates.
 2. LPN, Jolene Oldenburg, was terminated because she failed to maintain her license, after being reminded on multiple occasions that it was about to expire. In addition, she had numerous performance related issues and a last chance warning.
 3. Lisa Richardson was terminated on July 30, 2009 because her driver's license, which was necessary to perform her job, had been revoked. Richardson obviously had notice of the revocation because in February 2009 she was issued a provisional license.
 4. Patrick McLafferty was notified of termination on January 7, 2011 because he had lost his driver's license. Even though McLafferty acknowledged that he knew it was suspended, he transported foster children. In addition, McLafferty had previous performance concerns.
 5. Laurie Helgeson was terminated on January 23, 2009 for failure to maintain a valid driver's license. Helgeson admitted she knew her license was not valid and was a necessary to perform her job.
 6. Sandra Ridenour was terminated on March 12, 2009 for lacking a valid driver's license, which she knew was requirement to perform her job.
 7. Marti Gilbertson was terminated on May 12, 2009 for failure to maintain a valid driver's license, which was a requirement for her job. Gilbertson continued to drive after knowing her license was suspended.
- The common thread in all of the other terminations discussed above is that the employees knew they did not have the necessary license required for the job. The conduct for which they discharged was willful and intentional. In fact these other termination cases are precisely opposite to the contention of Mr. Kornrumpf.

- It is not the purpose of this submission to argue that the Grievant should be exonerated. The Grievant recognizes the need to be licensed and practicing without a license is a violation of rules and regulations.
- Quite clearly, the Grievant's failure to maintain her license was the result of her own disorganization and negligence. This disorganization and negligence, however, is entirely different from the willful conduct exhibited by the seven other employees who were discharged for failure to maintain a license.
- Minnesota Statutes 43A.33, Subdivision 3, c. Specifically provides that the arbitrator may find that the record establishes extenuating circumstances, and that the arbitrator may modify the discipline imposed by the appointing authority.
- The extenuating circumstances in this case are multiple:
 1. Dr. O'Connell was in the process of recovery from a catastrophic injury, which obviously impaired her organizational abilities.
 2. Dr. O'Connell's family life was in turmoil because of difficulties with one of her children.
 3. Dr. O'Connell has had an honorable and trouble-free record as a dentist working for the Department of Human Services.
 4. Dr. O'Connell's mistakes were simply mistakes.
- It is respectfully requested that Ann O'Connell be reinstated to her position without loss of seniority or benefits. Instead of termination and in light of her negligence, her termination should be reduced to a 30-day suspension without pay.

DISCUSSION

As acknowledged by the Parties, the relevant facts of the instant matter are essentially not in dispute:

- The Grievant, being employed as a Doctor of Dentistry, is required to be licensed as a dentist by Minnesota Statutes and by DHS and SOS Policies.
- The Employer allocating 10% of the Grievant's work time to maintaining licensure underscores the importance of maintaining the required license.

- During the month of October 2010, which is the time of the Grievant's license renewal, the Board of Dentistry conducted an audit of the Grievant's status with respect to required continuing educational credits.
- The Grievant was notified by the Dentistry Board on December 16, 2010, that she was missing 43 of the 50 credit hours of required continuing education and given until June 16, 2011 to make up the missing hours.
- The December 16, 2010 Dentistry Board notice included a warning that failure to make up the missing hours by June 16, 2011, would result in automatic termination of the Grievant's license.
- The Dentistry Board notified the Grievant by letter dated June 20, 2011, that her license to practice dentistry was terminated June 16, 2011.
- Allowing for mail delivery, the June 20, 2011 notice from the Dentistry Board would have reached the Grievant on or about June 22, 2011
- The Grievant did not open the June 20, 2011 notice until June 29 or 30, 2011.
- The Grievant contacted the Board of Dentistry on or about June 30, 2011 and confirmed that her license had been terminated.
- The Grievant continued to practice dentistry for one or two days after acknowledging that she knew her license had been terminated.
- The Grievant did not consult with the Employer regarding this Circumstance.
- The Grievant did in fact practice dentistry from June 16 through June 30, 2011, which was after her license had been terminated.
- During the period the Grievant practiced dentistry without a valid license, 57 patients were treated and the Employer was unable to bill some \$14,000.00.
- The Grievant submitted evidence of completing the required education credits to the Dentistry Board on or about June 24, 2011.
- The Employer first became aware that the Grievant had practiced without a license during a conference on or about July 7, 2011
- The Grievant's license was reinstated on or about July 28, 2011.
- Following an investigation, the Employer gave the Grievant notice of intent to terminate on August 8, 2001.

- Thereafter, the Grievant filed a timely appeal and the matter is properly before the instant arbitration proceeding.

The grounds for the Grievant's termination, as stated in the Employers letter of August 8, 2011, was violation of policy and misconduct. More specifically the charges were:

- Failing to bring deficient continuing education credits up to date by June 16, 2011, even though having been warned six months earlier that failure to do so would result in automatic termination of the Grievant's dentistry license.
- Failing to open and read the Board of Dentistry letter of June 20, 2011, notifying the Grievant of her license termination, until June 29, 2011.
- Continuing to perform dentistry without a valid license, even after acknowledged termination of the license.
- Failing to inform the Employer of the Grievant's license status.
- Conduct and actions in violation of SOS Policy, Medical Bylaws and DHS General Ethics Policy

Without question, practicing dentistry without a license is a serious offense. It is a statutory violation as well as violation of DHS and SOS Policy.

The record shows that the Grievant was negligent in keeping up to date with continuing educational credits. With two years to complete the credits, the Grievant had completed only seven (7) of the 50 required by October 31, 2010, when her license was up for renewal. Even though it is understandable that the Grievant was incapacitated for some time in the second year, it indicates that the Grievant was not keeping current on the credits even before her accident in January of 2010. Had the Grievant been keeping current on the credits, she would have had completed at least one half of them by the time of her accident.

The Grievant was also negligent in paying attention to critical time deadlines. Even though she was given specific instruction in a written notice from the Dentistry

Board that her credits must be up to date by June 16, 2011, she assumed the deadline was June 30, 2011. Something as important as potential loss of a professional license would seem to demand careful attention to deadlines.

The Grievant was further negligent in not reading the Dentistry Board letter of June 20, 2011 on a timely basis. Considering the circumstances, that her license was at risk, receiving a letter from the Dentistry Board would seem to be something one would read as soon as time allowed.

UNIFORM & NONDISCRIMINATORY DISCIPLINE

The “Commissioner’s Plan” in M.S. 43A.33, Subdivision 2, defines “Just Cause”.

“For purposes of this section, just cause includes, but is not limited to, . . . serious violation of written policies and procedures, provided the policies and procedures are applied in a uniform, nondiscriminatory manner.”

[Emphasis Added]

The Employer introduced into evidence seven termination cases where employees failed to maintain the license required for their job. These cases, which all occurred during 2009, indicate the Employer uniformly terminates employees that lack the necessary license to perform their job. Two of the cases involved medical service professionals who failed to maintain their license. In several cases it is noted that the employee failed to inform their supervisor and continued to work without the required license.

The Grievant argues that the above referenced cases can be distinguished from that of the Grievant, because their conduct was willful and intentional. Although the Grievant, due to her own negligence, may not have known she was performing dentistry without a license for some of the time, she has acknowledged knowing on June 29 and June 30, 2011.

EXTENUATING CIRCUMSTANCES

The Commissioner's Plan, In Subdivision 3, c, provides for reinstatement of an employee based on extenuating circumstances:

"... If the arbitrator finds that there exists sufficient grounds for institution of the appointing authority's action but the hearing record establishes extenuating circumstances, the arbitrator may reinstate the employee, with full, partial, or no pay, or may modify he appointing authority's action. . . ." [Emphasis Added]

In the instant case, the Grievant argues that extenuating circumstances support a lesser degree of discipline than termination. The Grievant acknowledges failure to maintain her license was the result of her own disorganization and negligence, but it was not intentional or willful. The Grievant cites the following extenuating circumstances:

1. The Grievant was in the process of recovery from a catastrophic auto accident, which included a brain injury.
2. The Grievant was under severe emotional distress due to difficulties with a child suffering mental health problems.
3. The Grievant has had an honorable and trouble-free record as a dentist working for the Department of Human Services.
4. The Grievant's mistakes were simply mistakes, not intentional or willful.

. The Grievant testified that; "after the accident she tired more easily, had headaches, muscle discomfort and had difficulty concentrating, especially if on more than one thing." The Grievant testified that she; "felt capable as a dentist, but was disorganized on other aspects of her life."

The record shows that the Grievant suffers from long-standing chemical dependency and depression, which she describes as an ongoing part of her life. The

Grievant is under an HPSP requirement that includes random toxicology screens, monthly appointments with a psychiatrist and a psychotherapist and attendance at Dentists Concerned for Dentists monthly and weekly twelve step meetings. The Grievant states that she is currently active in her recovery and involved parties report to HPSP on a quarterly basis. The Grievant reported this information to the Dentistry Board on August 16 2011, in the event it was needed for her license reinstatement.⁷ This would indicate that the Grievant's chemical dependency has become a matter of interest to the Dentistry Board.

The record shows the Grievant completed the required continuing educational credits by mid June 30, 2011.⁸ She submitted them to the Board of Dentistry on or about June 24, 2011⁹. Confirmation that the Grievant's submissions brought her credits up to date is reinstatement of her license by the Dentistry Board on July 28, 2011.¹⁰

The Grievant's supervisor described her as a "good and competent employee."¹¹

The Grievant's reason for not informing the Employer of her lack of license, when she found out on June 29 or 30, 2011, was that she understood her supervisor was not available and she was too embarrassed to tell others.

FINDINGS

⁷ Joint Exhibit #2.

⁸ Testimony of Judith Gundersen, Dental Director

⁹ Testimony of Ann O'Connell

¹⁰ Joint Exhibit #1.

¹¹ Testimony of Supervisor Judith Gundersen.

The Grievant performed dentistry between June 16 and June 30, 2011, after her license was terminated and admits knowingly doing so on June 29 and June 30, 2011.

Practicing dentistry without a valid license is a violation of state law and Policies of the Department of Human Services and State Operated Services.

The Grievant's license to practice dentistry was terminated for failure to complete continuing educational credits necessary to qualify for license renewal and submit evidence of same to the Dentistry Board no later than June 16, 2011.

While practicing without a license, the Grievant treated some 57 patients and caused the Employer to forfeit some \$14,000.00 in non-collectable fees.

The Grievant failed to inform the Employer of the circumstance regarding her license until after the license had been terminated and she had worked knowingly without a license.

The Employer has a record of uniformly terminating employees who do not have the license required to perform their job and have continued to work without a valid license.

To what degree the Grievant's auto accident injuries, emotional stress and chemical dependency contributed to her failure to keep current on continuing educational credits and overlook notice of her license termination cannot be determined with any certainty. A matter of inquiry is whether the Grievant's failure to keep current on licensure/training requirements and give proper attention to timelines is a one-time occurrence or a pattern.

The record indicates that the Grievant was not keeping current on her continuing educational credits, even before her accident in January 2010. If she were keeping

current, the Grievant would have acquired at least one-half of 50 credits in the approximately 14 months of the two-year renewal period preceding her accident. The Grievant was also deficient in keeping current in classes required by DHS/SOS. The record shows that the Grievant was completing only about one-half of the required classes.¹² The record reveals a pattern of deficiency, not just an isolated incident due to her auto accident.

The Grievant's job required more than direct patient service for which she was described as competent. Her job also involved supervision of Dental Hygienists and Dental Assistants, for which the Grievant is expected to set an example. Ten percent of the Grievant's time was allocated to maintaining her licensure and complying with continuing education requirements.¹³ Although the Grievant was considered competent in patient care, the record shows her deficient in other aspects of her job.

The Arbitrator feels a high level of compassion for the Grievant, considering her personal circumstances. However, the Arbitrator's is charged under the statute and DHS/SOS policies to determine, based on the record, whether "... there exists sufficient grounds for institution of the appointing authority's action. . . ." The Arbitrator finds in the affirmative.

AWARD

The Grievance is denied. The Employer has just cause to terminate the Grievant in accordance with Minnesota Statutes 43A.33,

CONCLUSION

¹² Employer Exhibit #B-5.

¹³ Employer Exhibit #C-0.

The Parties are commended on the professional and thorough manner with which they presented their respective cases. It has been a pleasure to be of assistance in resolving this grievance matter.

Issued this 27th day of January 2012 at Edina, Minnesota.

ROLLAND C. TOENGES, ARBITRATOR