

IN RE ARBITRATION BETWEEN:

SEIU HEALTHCARE MINNESOTA

and

ALLINA HOSPITALS AND CLINICS – UNITED HOSPITAL

DECISION AND AWARD OF ARBITRATOR

FMCS # 131016-50480-3

JEFFREY W. JACOBS

ARBITRATOR

7300 Metro Blvd. #300

Edina, MN 55439

Telephone 952-897-1707

E-mail: jjacobs@wilkersonhegna.com

June 7, 2013

IN RE ARBITRATION BETWEEN:

SEIU Healthcare Minnesota,

and

DECISION AND AWARD OF ARBITRATOR
FMCS #131016-50480-3
Monique Shavers Grievance matter

Allina Hospitals and Clinics, United Hospital

APPEARANCES:

FOR THE UNION:

Justin Cummins, Cummins & Cummins
Monique Shavers, grievant
Elizabeth Schadt, ED PCA
Charyl Hoppe, ED PCA
Sandy Koski, Union Steward

FOR THE EMPLOYER:

Sara McGrann, Felhaber, Larson, Fenlon & Vogt
Samara Calderon, HR Generalist
Doug Schlangen, Former Mgr. of Emergency Department
Steve Horstmann, Director of Emergency Department
Lisa Gersema, Director of Pharmacy
Dr. Thomas Hennessey, Emergency Dep't Physician

PRELIMINARY STATEMENT

The hearing was held on April 23, 2013 at the FMCS Offices in Minneapolis, MN. The parties submitted post hearing briefs dated May 21, 2013 at which point the record was closed.¹

CONTRACTUAL JURISDICTION

Article 7 of the parties' labor agreement sets forth the grievance procedure. The arbitrator was selected from a panel provided by the FMCS. The parties stipulated that there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

RELEVANT CONTRACTUAL AND POLICY PROVISIONS

**ARTICLE 3
MANAGEMENT RIGHTS**

Except as specifically limited by the express provisions of this Agreement, the management of the Hospital, including but not limited to, the right to hire, lay off, promote, demote, transfer, discharge or discipline for just cause, require observance of reasonable Hospital rules and regulations, direct the working forces and to determine the materials, means and the type of service provided, shall be deemed the sole and exclusive functions of management. Joint Ex. 1, Article 3.

¹ There was a delay in receipt of the employer's brief in the matter due to technical reasons. The employer's brief was received on May 21, 2013 and the parties' respective briefs were exchanged electronically at that time.

**ARTICLE 6
CORRECTIVE ACTION AND DISCHARGE**

(A) 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. Article 6.)

**RELEVANT PORTIONS OF THE LETTER OF UNDERSTANDING (LOU) #1 TO THE
CONTRACT - IMPLEMENTATION OF CORRECTIVE ACTION POLICY**

[The employer] utilizes the Corrective Action Procedure for resolving employee performance and/or behavioral issues in a non-punitive fashion. *** [The employer] intends that managers and employees work together in a collaborative process which engages the individual in resolving the issue [and] intends to give employees reasonable opportunity to improve their performance whenever productivity, quality, efficiency or behavior is below an acceptable level. . . .

3. Neither this Letter of Understanding nor the Corrective Action Policy will limit Allina's right to discharge or otherwise discipline an employee for a single serious offense or repeated offenses . . .

The Corrective Action Procedure intends —to give employees reasonable opportunity to improve their performance. . . (Joint Ex. 8, at 1.)

If three (3) related conversations/action plans have been completed and the performance/behavior is repeated (thus establishing a pattern), corrective action will proceed to the next level regardless of the time between incidents.

ISSUE

Did the employer have just cause to terminate the grievant? If not what shall the remedy be?

EMPLOYER'S POSITION

The employer's position is that there was just cause for the termination and made the following contentions:

1. The employer pointed out that there is no dispute about the material facts of this case. The grievant is a PCA, Patient Care Assistant, and has been with United Hospital since 2005. She was repeatedly trained on the expectations and the core values and ethics of Allina Health System. These included the need to be honest and forthright at all times. These core values would include never altering documents or other records, including a prescription. The employer pointed out that altering a prescription for medication, especially a level 2 narcotic medication is both clear violations of the core values as well as a criminal act.

2. The employer asserted even though the grievant was well aware of these rules that is exactly what she did on March 23, 2012. She approached Dr. Tomas Hennessey after returning from a leave of absence due to surgery to get pain medications. Dr. Hennessey filled out the prescription for 15 Percocet tablets, Percocet is a well-known narcotic for which there are no refills allowed under law. The employer asserted that the grievant, as a long time health care worker, should have known this. Percocet is a Schedule II drug, which is known to have a high potential for addiction and thus is never automatically refilled, yet the grievant blatantly tried to add a refill in clear violation of policy and law.

3. The employer further asserted that the grievant filled out her name and date of birth but added the number “1” on the refilling – a clear alteration of the prescription and a clear violation of policy and law. The grievant admitted that she filled in the number “1” on the prescription form and the employer asserted that she was thus attempting to alter a prescription in order to gain access to more drugs than the doctor prescribed.

4. By altering the prescription, the grievant violated Allina’s shared values of integrity and trust, which had been given to her when she was hired, reviewed during performance evaluations, and reiterated during annual compliance training. Her conduct also corresponded with behavior labeled by United as “inappropriate” in a document entitled “Examples of Unacceptable Behaviors,” which is posted to the Hospital’s intranet and made available to all employees. The employer noted that along with statements of Allina’s core values is a clear statement of the types of behaviors that are unacceptable and will be severely punished. These include theft or inappropriate removal of employer property; theft or diversion of medications, falsification of time records or other records and intentionally untruthful or deceitful behavior. The employer asserted that the grievant's actions in falsifying the prescription ran afoul of several of these – notably falsification of records and intentional deceit. It asserted that it must be able to trust on all its employees and that someone who would intentionally attempt to get more medications in this manner cannot be trusted.

5. Moreover, the employer asserted that her conduct was both a clear violation of that policy as well as a violation of both state and federal law. The employer asserted that the fact that she was not arrested and charged criminally for this meant only that she was lucky.

6. When this was submitted to pharmacy the pharmacists caught the obvious error and declined to fill the prescription. Dr. Hennessey was called about this and apparently refilled the prescription but this time added the word “no” to the refill line in order to prevent further alteration of the prescription form. The pharmacy still declined to fill it citing the earlier attempt to alter the prescription.

7. The employer asserted that it conducted a full and fair investigation of this matter and determined that the attempt to alter the document was so egregious that termination, rather than some lesser form of progressive discipline was warranted.

8. The employer countered the union’s claim that this was a good faith misunderstanding and noted that the mere act of adding her name and other identifying information to the form was a far cry from attempting to get additional Percocet by altering the form to allow for a re-fill.

9. The employer cited its policy that allows for a deviation from the progressive discipline and asserted that this violation was so serious that immediate termination was warranted.

10. The employer also noted that it acted quite deliberately and engaged in a very thorough and thoughtful investigation of this matter before deciding what to do. Far from the rush to judgment as asserted by the union in this case, the employer asserted that it made certain that it gathered all the available facts before determining what to do.

11. The employer argued that all essential elements of discipline were present. The grievant certainly knew that altering a prescription is a serious matter – even potentially criminal - the rule against such intentional falsification, especially in a hospital is reasonable; there was a thorough investigation that proved the grievant’s guilt and the rule has been consistently applied. Moreover the policy allows for deviation from normal progressive discipline for egregious offenses.

12. The employer further asserted that it gave consideration to other less severe options and determined that the grievant's actions were intentional and blatant, that she admitted this only after it was clear she had been caught and that her actions cannot be tolerated. Accordingly, the grievance should be denied and the discharge upheld.

The employer seeks an award denying the grievance in its entirety.

UNION'S POSITION:

The union took the position that there was not just cause for the termination and in support of this the union made the following contentions:

1. The union noted that the grievant is a long term employee with an excellent work record that contains no discipline and many outstanding reviews of her performance. Further, there is no reason whatever to suppose that she would change a prescription for some nefarious purpose. Moreover, there is no question that she asked for the drugs from the on-call physician due to pain she was having as a result of a recent medical procedure. For the employer to assert that this was done for some ulterior purpose is both unfounded and preposterous. At best it was an honest mistake based on her belief that she could do this and not have to bother the physician, who was very busy, for a refill of the medication in case she needed it.

2. The union also pointed out that there was no question that the grievant had undergone painful surgery only a few weeks before this incident but that she returned to work at the employer despite that pain. It was for that reason and that reason only that she asked for some pain meds from the on-call doctor, Dr. Hennessey. The union introduced testimony that even the grievant's co-workers observed her to be in pain that day.

3. The union pointed out that this is a common practice at the emergency department and that hospital employees frequently ask for pain or other medications from the doctors there so they can continue working and not to take time off work to attend a medical appointments. The facility has no rule prohibiting this and the doctor quite freely wrote out a prescription medication for the grievant for Percocet. He even indicated that he has done this in the past for other employees.

4. The union noted that the doctor wrote the prescription but filled out only part of it, filling in only his signature, his medical ID number and “Percocet 5/325 – poq6h PRN for pain.” He left the rest of it blank, including the space for allergies, refills, the date and even the name of the person for whom this was prescribed. The union asserted that it was likely a technical violation to write out a prescription leaving so many important things blank. He simply gave it to the grievant and told her to fill out the rest. He never told her that there were no refills nor did he admonish her not to put anything in the blank for refills.

5. Further, the grievant indicated that she had no idea that Percocet was not to be refilled. She simply assumed it was acceptable to get a refill – since the original prescription was for only a very short time, and that she did not wish to bother the doctor again for pain meds the next day in case she still needed them. The doctor was quite busy and she was only trying to do her job without having to bother Dr. Hennessey again.

6. The union asserted that even after the pharmacy rejected the first prescription Dr. Hennessey wrote another one after talking to the pharmacy and indicating that it was OK to fill the second prescription. See, employer exhibits 2 & 3.

7. At no point did the grievant attempt to hide what she had done – in fact she was immediately and completely honest about it since she had no clue that this was even a rule violation much less one that might cost her her job.

8. The union further asserted that the grievant's actions demonstrate her innocent intentions. She filled out the prescription in the open in front of a supervisor (who did not inform her at all that she should not fill out the refill portion of it) and then sought to fill it at the employer's own pharmacy. Had she attempted to hide something or do something knowingly inappropriate she would certainly not have done that. At all points the grievant was entirely open about what she had done.

9. The union asserted that there was no notice of the rule the grievant allegedly violated and that the vague "honesty and integrity rules" did not place the grievant on notice of the conduct that would get her terminated on this record. Further, that the facts of this case show clearly that the grievant was told to "fill out the rest of the prescription" or words to that effect and was never placed on notice of any kind that this was a terminable offense. Indeed, the grievant's supervisor watched the grievant complete the first prescription yet never told her that what she was doing was a violation of anything, much less one that could result in discharge.

10. The union noted too that even though the doctor's actions here were not consistent with safe medical practice the employer chose not to discipline him yet they fired the grievant even though he wrote a second prescription and even though the first one was left blank in many important places. The union argued that at the very least this shows disparate treatment against the grievant in this case.

11. The union pointed to the employer's own rules that dictate that discipline is intended to be corrective, not punitive and asserted that this action can only be viewed as punitive, which is entirely contrary to the policy. That policy provides in relevant part as follows:

Allina utilizes the Corrective Action Procedure for resolving employee performance and/or behavioral issues in a non-punitive fashion. *** Allina intends that managers and employees work together in a collaborative process which engages the individual in resolving the issue.

12. The union also cited the progressive discipline policy and noted that this is the very first time the grievant has been formally disciplined and noted that the prior coaching for mislabeling of a urine specimen is explicitly non-disciplinary under the policy. Further, the union argued that this was hardly the sort of egregious offense that warrants a deviation from the normal progressive discipline steps and procedure. The union maintained that this was an overreaction by the employer.

The union seeks an award reinstating the grievant with full back pay and all accrued contractual benefits.

MEMORANDUM AND DISCUSSION

BACKGROUND

The salient facts of this case were largely undisputed. The grievant is a long term employee of United hospital who has a clean disciplinary record. There was evidence that she had been coached before for mislabeling a urine sample but that facts showed that this was non-disciplinary in nature and that there have been no repeats of this conduct. There was no evidence that the grievant does a poor job nor any evidence of conduct that would lead to the conclusion that she is dishonest in any way.

The operative facts occurred on March 23, 2012. The grievant had a surgery only a short time prior to that date and was in considerable pain due to the effects of that medical procedure. She testified credibly that even though she was in pain she went to work so her co-workers would not have to work short staffed. As the day progressed however the pain increased to the point where she felt the need to get prescription medications to deal with it.

Rather than waiting to see her own doctor the grievant asked Dr. Thomas Hennessey, a doctor in the emergency department, to write out a prescription for pain medications for her. There was evidence that this is not an uncommon practice and that the ER doctors have done this for other staff in the past.

Dr. Hennessey wrote a prescription for Percocet. The evidence showed that Percocet is a narcotic medication that has a potential for addiction and abuse. As a Schedule II drug, there are apparently no automatic refills. The evidence clearly showed however that the grievant had no idea this was the case. She is not a trained nurse nor was there any evidence whatsoever that anyone had ever told her or informed her that Percocet was a schedule narcotic or that it could not be refilled.

The doctor wrote the prescription but filled out only part of it. He wrote his name and DEA ID number on the form and wrote in the body of it "Percocet 5/325 – poq6h PRN for pain."² This was only to carry the grievant for a short time however and she was aware that this would only last for a day or so. He left the rest of the form blank and told the grievant to "fill it out herself" or words to that effect. The name, the date, any indication as to allergies and the refill spots were all left blank. Had the grievant wanted to fill this out with another person's name and undertake some more nefarious activity had she been faking her pain in order to get a prescription for narcotics she might likely have been able to do that given the doctor's lack of thoroughness.

Instead the grievant did exactly as she was told – she filled it out herself. She testified credibly that she did so in the open while a supervisor actually watched her do it and that she filled in "1" in the refill spot. She testified credibly that she did this solely for the purpose of getting another day of pain meds if she needed them the following day so she would not have to bother the doctor again. The grievant was credible when she indicated that she simply did not want to have to pester him again.

When the prescription was presented to the pharmacy at the employer's facility they noticed the refill spot had been filled in and would not fill the prescription. Pharmacy called to the floor and spoke to the doctor himself about this and informed him that the refill spot had been filled out.

² There was no evidence as to what these notations meant. The evidence showed only that the doctor intended the prescription to be for a short time – perhaps a day or so.

Quite obviously on this record, the doctor did not think this was a major problem and wrote yet another prescription after talking to the pharmacy and after having been informed that the first prescription had been inappropriately completed. See employer exhibit 3.

This time even though he must have known that the grievant had filled it out, he wrote a second one and again left some of it blank but wrote “no” in the refill spot. This was again submitted to pharmacy but for some reason as yet unexplained they would not honor it even though they had spoken directly to the doctor and even though he wrote a second prescription.

When questioned about this the grievant was completely honest and indicated just what she testified to at the hearing as noted above. On this record there was not a single shred of evidence that the grievant did this intentionally nor did she have a clue that she was on the edge of a terminable offense by doing what she did.

The employer relied heavily on its policy of integrity and honesty. These are certainly important and crucial in the medical setting. These did not provide an adequate basis for discipline much less termination on these unique facts. Certainly had there been evidence of intentional falsification of the prescription or that the grievant had some ulterior purpose this result would have been very different. The evidence here showed that these policies are designed to thwart inappropriate or dishonest behavior. However the grievant’s actions were unintentional and were, just as the union suggested: an honest mistake without knowledge of the consequences or gravamen of her actions.

The arbitrator is mindful of the need to maintain policies and a culture of honesty and integrity but cannot support a termination under these circumstances where the evidence showed both an unintentional and honest mistake made by an employee who truly was unaware of the nature or the consequences of her actions. Moreover, she apparently did this in the presence of a supervisor who said nothing. This was troubling and undercut the employer’s position here.³

³ This award should not be taken as condoning the alteration of a medical prescription. The question however is whether there was just cause in this case for discipline in this case. Under these unique facts there was not for the reasons stated herein. A future case under different facts may well be viewed differently.

Even more disturbing was the fact that the doctor who wrote this without so much as filling out the name of the patient, whether there were any allergies (it was not even clear if he asked about that which could potentially have been dangerous if the grievant had been allergic to this sort of medication) or the date, was not disciplined or coached in any way.

Frankly, it should have been incumbent on the doctor to have either filled this out completely himself⁴ but the import of these facts was that he trusted the grievant even after he discovered that the initial prescription had been altered. It was quite apparent that Dr. Hennessey believed that she had done this unintentionally and was willing to write a second prescription. There was no evidence that Dr. Hennessey was coached or disciplined on this record yet he was in the best position to admonish the grievant that there were no refills and failed to do so. While the result would not have been different even if the doctor had been disciplined in some way, given the clear evidence that the grievant had no idea what she was doing was wrong at the time, these facts undercut the claim that the grievant was wholly responsible for this incident.

On this record there was insufficient evidence thus to support the claim that there was adequate notice to the employee of the consequences of this action on this record. While the employer does not have to specifically warn every employee of every single action that might get them into trouble, this case demonstrates a scenario where the employee could well have been warned multiple times both by the doctor who wrote the prescription or by the supervisor who watched her complete it, that she was not to get a refill. Certainly if there had been evidence that the doctor had told her that this case would have been different but there was no such evidence.

⁴ Dr. Hennessey claimed that he did not fill out the grievant's name because he did not know how to spell it. This intractable problem could probably have been solved by asking the grievant to spell her 7 letter last name. The facts showed that he filled out what was essentially a blank prescription for a scheduled narcotic medication and left it to the patient to fill in critical information about it with no instructions whatsoever as to the refills.

Moreover, the grievant's honest and forthright response to questioning showed not only her intent but also that she is not a risk for such behavior in the future. While there was some thought given to reducing the level of discipline to a warning the evidence in this matter demonstrated that the grievant now understands that she was not allowed to do that but that she simply did not know it at the time.

Thus there was insufficient evidence of a reason to impose discipline in this instance given these facts. Obviously, different facts might yield a different result but on this record there was insufficient support for discipline and the grievant is reinstated with full back pay and contractual benefits.

The grievant testified that she is now working at another facility in a similar position but at a wage loss. The back pay award must thus be mitigated and reduced by the interim earnings the grievant has had since the date of termination as well as any other wage replacement benefits she received that she would not have been eligible for but for the termination in this instance.

The union and grievant shall provide any appropriate documentation of interim earnings or other income so the employer can calculate the appropriate back pay amount. The grievant is to be reinstated to her former position with the employer within 5 business days of this award with the back pay and benefits subject to mitigation as set forth above.

AWARD

The grievance is SUSTAINED. The grievant is to be reinstated to her former position with the employer within five (5) business days of this award with back pay and contractual benefits, subject to the mitigation discussion above.

Dated: June 7, 2013

Jeffrey W. Jacobs, arbitrator