

IN MATTER OF ARBITRATION

OPINION & AWARD

-between-

Grievance Arbitration

SEIU HEALTHCARE MINNESOTA

F.M.C.S. Case 13/51438

-and-

Re: Employee Discipline

**NORTH MEMORIAL HEALTH CARE
ROBINSDALE, MINNESOTA**

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

Representation-

For the Company: James M. Dawson, Attorney

For the Union: Justin Cummins, Attorney
Deborah Prokopf, Attorney

Statement of Jurisdiction-

The Collective Bargaining Agreement duly executed by the parties, provides in Article 2, for an appeal to binding arbitration of those disputes that remain unresolved after being processed through the initial two steps of the grievance procedure. A formal complaint was submitted by the Local on behalf of the Grievant on or about May 2, 2013, and thereafter appealed to binding arbitration when the parties were unable to resolve this matter to their mutual satisfaction. The under-signed was then selected as the Neutral Arbitrator from a panel provided to the parties by the Federal Mediation & Conciliation Service,

Office of Arbitration, and a hearing convened on September 11, 2014 in Minneapolis, Minnesota. Following receipt of position statements, testimony and supportive documentation, each side indicated a preference for submitting written summary arguments. These documents were received by the Arbitrator on October 22, 2014, at which time the hearing was deemed officially closed. At the commencement of the proceedings, the parties stipulated that this matter was properly before the Arbitrator for resolution based upon its merits, and that the following represents a fair description of the issue.

The Issue-

Was the Grievant, Dwight Neal, suspended for good cause? If not, what shall the appropriate remedy be?

Preliminary Statement of the Facts-

The record developed during the course of the proceedings indicates that SEIU Healthcare Minnesota (hereafter "Union," or "SEIU") represents all regular full-time and regular part-time non-professional employees working at North Memorial Hospital ("Hospital," "Employer," or "Management") an acute care facility located in Robinsdale, Minnesota. Together the parties have negotiated a labor agreement covering terms and conditions of employment for members of the bargaining unit (Joint Ex. 1).

The Grievant, Dwight Neal, is classified as an Environmental Services Aide

("ESA") at the Hospital. As such, he is a member of the Union and serves as one of their Stewards at the facility. Mr. Neal has been employed there for over 25 years, and has compiled a generally favorable work record during that time. His job assignment entails cleaning a section of the facility on a daily or weekly basis which includes offices, restrooms, conference rooms, staff lounges, laboratories, and control rooms (Employer's Exs. 13, 14, & 15). ESAs are given specific tasks to perform in their assigned area.

On April 1, 2013, at approximately 6:00 p.m. EEG Technician Chris Herren was in a lab located on the first floor of the Hospital and observed a Nursing Assistant, Angela Gregory, exiting the Medical Transcription ("MT") office located directly across the hall from where he was working, approximately four feet away. According to Mr. Herren, the MT office was dark at the time. Shortly thereafter, the witness saw the Grievant exiting the same office which had remained dark. A subsequent check of the video taken from a camera mounted in the nearby hallway identified first Ms. Gregory and then Mr. Neal walking away separately.

Herren stated that he did not recognize either employee but knew by their uniforms that the female was a Nurses Aide and that the male was an ESA. Believing that what he had observed was unusual – the MT office is normally cleaned by a member of the day shift – Mr. Herren subsequently reported the incident to Management.

The MT office contains confidential medical records that are protected

under federal privacy laws (HIPPA) and according to the Employer, no one is allowed to be in it without proper authorization. Cleaning the area is not one of Mr. Neal's normally assigned duties.

After being informed of Mr. Herren's observations, the Employer undertook an investigation into the incident. On April 10th Mr. Neal was interviewed by his Supervisor Herman Stewart. In the course of the inquiry concerning the allegation that he had been in the MTO without proper authorization, the Grievant denied the charge.

According to the supervisor, Mr. Neal's version of the incident "kept changing" and was not consistent with Ms. Gregory's. After further discussions with members of Management, he was again interviewed two days later. At the time, Mr. Stewart had prepared questions and recorded the Grievant's answers. Also present at the interview was Nurse Manager Jennifer Knight. Again, in Management's opinion, the Grievant changed his version of what had transpired on April 1st. At the meeting, they recall Mr. Neal first continuing to deny having any knowledge of the incident, but then abruptly changing his statement allowing that he had gone into the Medical Transcription office on occasion to pick up trash.

Following further consultaion, the Hospital concluded that Mr. Neal had been in an unassigned area without proper authorization on the night in question and moreover, that he had been untruthful in the course of the investigation that followed (Employer's Ex. 5). As a result, he was issued a three

day suspension effective April 25, 2013.

Thereafter, a formal complaint was submitted by the Union on behalf of Mr. Neal on May 2, 2013 alleging a violation of Article 9 of the Labor Agreement; charging that he had been suspended without just cause, and; seeking a revocation of the suspension along with a make whole remedy (Joint Ex. 2). Eventually, the matter was appealed to binding arbitration when the parties were unable to resolve the matter to their mutual satisfaction after considering it at the intermittent steps of the grievance procedure.

Relevant Contract & Policy Provisions-

From the Master Agreement:

Article 9
Discipline & Discharge

The Employer shall not discharge or suspend an employee without just cause *** dishonesty or infraction of the rules directly affecting patient comfort or safety shall be considered grounds for discharge.

* * *

5.03 The Company will normally follow progressive discipline. The Company reserves the right, however, to vary the discipline imposed depending upon the facts and circumstances of each offense.

From the Employer's Published Policies:

Employee Guidelines

* * *

Building Security

* * *

2. Never let anyone into your work area through locked doors....Unauthorized people are not allowed in your work area at any time, this includes friends, spouse, children, relatives, or employees from other departments.

* * *

5. Environmental Services aides are not to unlock any door for anyone at anytime. If someone needs access to a door please refer them to Safety & Security.

North Memorial Mission,
Vision & Values

* * *

Communication: Speak honestly without blame or judgment.

Accountability: Accept personal responsibility and account for one's actions.

Positions of the Parties-

The **EMPLOYER** takes the position in this matter that the three day suspension of the Grievant was for good and sufficient cause. In support of their claim, Management contends that Mr. Neal was in the MT office without proper authorization on the evening of April 1st last year which is a direct

violation of its published work rules and guidelines. In addition they charge that the Medical Transcription office contains confidential patient information protected under HIPPA and was not his area of responsibility to clean. Yet he used his access key to allow himself and a female co-worker into the office, which according to reliable witness information remained dark during the entire time it was occupied. Equally important, according to Management, were the contradicting and ever-changing answers Mr. Neal gave in the course of the two interviews as part of the investigation. First, he claimed he was not working on April 1st but subsequently changed his story saying that he was working but had never been in the MTO that evening either alone or with anyone else. Later he remembered that he had been assigned to clean the office on occasion. However, in the course of the second interview the Grievant suddenly changed his statement again, recalling that he might have been in the office to pick up trash on April 1, 2013. He further denied being with Ms. Gregory that evening, yet the NA admitted that she had been with Mr. Neal on the same night.

The totality of the Grievant's statements to Management over the course of the two interviews demonstrated to their satisfaction that he had been dishonest throughout the course of the investigation. This alone is sufficient grounds for termination under the published work rules. However, in the course of their deliberations, the Company contends that they took into consideration Mr. Neal's lengthy service and the fact that he had otherwise been a good

employee in determining the proper discipline to be administered. Accordingly, they issued the three day suspension which they claim was more than reasonable.

Conversely, the **UNION** takes the position that the suspension issued to the Grievant was not justified. In support, the Local maintains that Mr. Neal has been a twenty-five year employee with the Hospital who has never been suspended for any violation of a work rule. He has been a good employee often going out of his way to help others at work and has received commendations from patients and others. The SEIU points to the fact that Mr. Neal had been assigned a lead position within his job classification which is an indication that Management thought highly of his work ethic, performance and integrity. They note the unrefuted fact that he carried keys allowing him to enter the MT office is a further indication his presence in there was not prohibited. The Union urges there is no indication that the room has been designated as being restricted to "authorized personnel only" as Management claims. During the course of the initial interview, the Local argues, no one from the Hospital asked him if he had been in the MTO. Rather, the inquiry was far more vague, inquiring whether he had been in an "unauthorized area" during his shift that night. As the Grievant believed that he had not trespassed into any such area, he naturally denied it. It was not until the second interview that Management specifically identified the MTO and when they did, he responded truthfully that yes, he had been in that office to pick up trash.

Finally, the Local notes that Mr. Neal is a Union Steward and that the Employer's anti-union animus drove their decision to suspend him for three days when the other employee under investigation, Andrea Gregory, only received a one day suspension for the same alleged infraction. This constitutes desperate treatment and must be taken into consideration when examining the reasonableness of any discipline administered by an employer.

For all these reasons then they ask that the grievance be sustained and that the suspension issued to Mr. Neal be rescinded and he be made whole for all wages and benefits withheld as a consequence of Management's unjust actions.

Analysis of the Evidence-

The approach taken here when first analyzing the evidence surrounding a disciplinary dispute such as this closely parallels the procedures consistently followed in countless arbitral decisions. Management is routinely assigned the initial burden of proof, requiring them to demonstrate via competent, accurate and reliable evidence that the offense(s) which the employee has been accused of has in fact been committed by him or her and then, if established, whether the degree of discipline imposed is warranted. *Kroger Co.*, 71 LA 989; *Chemical Leaman Tank Lines*, 55 LA 435; *G. Heilman Brewing Co.* 54 LA 1.

The interoffice correspondence sent to Mr. Neal on April 24th of last year, in paragraph four, succinctly summarizes Management's charges and the

reasons that drove their decision to issue the three day suspension:

“Your actions that night (April 1, 2013) are a clear violation of company policies and department guidelines. You were not performing your designated duties during the work hours. You entered an office containing confidential patient information that is not in your area of responsibility. Area summaries have been given to you outlining what areas to clean. You used an access key to allow an unauthorized co-worker into the office.....You were not honest during the investigation” (Union's Ex. 4; Hospital's Ex. 5).

While the Grievant's alleged dishonesty *vis-à-vis* the two separate investigatory interviews remains in dispute, there is little question but that Mr. Neal and Ms. Gregory were in the Medical Transcription Office on April 1st without proper authorization. The Grievant denied the charge at the initial inquiry but claimed he was cleaning in the MT office as part of his normal duties, during the second interview with Supervisor Stewart and Nurse Manager Knight.¹ This testimony must necessarily be compared to the observations of EEG Lab Technician, Chris Herren. As previously noted, he was working in the lab that evening which is located directly across from the MT office a distance of approximately four feet. The door to the lab was open throughout the incident when he observed first Ms. Gregory and shortly thereafter the Grievant, exiting the office which was dark for the duration of the time in question. Mr. Neal, according to the witness, had no cleaning supplies or paraphernalia of any sort with him that evening. Nor was he pushing a cleaning cart or carrying

¹ The adduced evidence demonstrates that cleaning the MT office was not part of the “Area Summary” issued to him in February of 2013 and acknowledged he was not instructed to clean it during a walk through with the former employee responsible for the “Administration and 1st Floor Restrooms” (Steward testimony; Employer's Ex. 20).

any trash. Further, Cheryl Benson, an employee of the Hospital assigned to work in the MT office, testified that it was apparent to her the next morning someone had been in there after she left work the previous day. The recollections of both of these witnesses were not challenged to any significant degree. Their version of the incident has been credited where in conflict with Mr. Neal's. Both Mr. Herren's and Ms. Benson's observations have been consistent in the course of Management's investigation that followed and during their testimony at the hearing as well. There was no evidence proffered demonstrating that either witness had a motive to fabricate. This must be contrasted with the Grievant's version as he most certainly has a vested interest in the outcome.

While more ardently contested, I also favor the Hospital's version of what transpired in the two investigatory meetings conducted shortly after the event was reported to them. On the whole, the evidence supports the assertion that Mr. Neal equivocated throughout the course of the process. His answers shifted and lacked consistency between the first and second meeting. For example, on April 12th he indicated that he cleaned the Medical Transcription office from time to time, but could not recall specifically whether he did so on April 1st (Hospital Ex. 20). It was established on the record that when an ES Aide cleans an office, he/she is required to wear gloves and will have a cart with them to carry the necessary cleaning supplies. Yet both Mr. Herron and the surveillance video mounted in the hallway outside the MT office confirmed that the Grievant was not wearing gloves or pushing a cart when he was spotted in the

area. Moreover, the evidence reveals that the office had not been cleaned and that some of its contents (such as furniture) had been altered from the time it was locked up at 4:00 p.m. that day.

The Grievant, and his Union Representative Ty Hopkins, maintain that at no time during the initial interview did the Employer ever identify the MT office as being the “unauthorized area” they were inquiring about in spite of their repeated requests for Management to name the specific location in the Hospital. This, they claim, was the reason Mr. Neal denied ever being in “an unauthorized area” on the night in question. It was not until the second meeting, according to the Local, that the Employer specifically identified for the first time, the MT office in the course of their questioning.

The recollections of Management representative Stewart who asked the questions at the first meeting, as well as the written notes created immediately thereafter (Employer’s Exs. 19) indicate otherwise.² Both Stewart and Nurse Manager Knight signed off on the notes indicating that Mr. Neal was specifically asked about the Medical Transcription office and whether he was in it around 6:00 p.m. on April 1st (*id.*).

When evaluating the conflicting assertions, I have credited Management’s version. Not only is there documentation in the record indicating that the MT office was specifically addressed at the April 10th meeting, I find the Grievant’s stance to be a collision with logic lacking

² No written contemporaneous notes were offered into evidence by either the Grievant or his Union Steward from the meetings to support their claim.

credibility. Again there appears to be no reasonable explanation why two supervisors would fail to identify the particular area which Mr. Neal was being questioned about in the course of the investigation. Moreover, as the Employer has observed, it would require a leap of faith to believe that two experienced stewards such as the Grievant and Mr. Hopkins would not demand to be informed of the exact location of the restricted area where Mr. Neal was alleged to have been.

The evidence against the Grievant, when braided together, is deemed to be both competent and reliable, demonstrating that he was not performing his assigned duties at the time he was discovered exiting the MT office on April 1st contrary to his training, his knowledge of the job, and the relevant Hospital policies. Moreover, I find his behavior in the course of the investigatory meetings less than forthright. For these reasons then, the Employer was justified in imposing discipline.

The Union's argument gains some traction when the second issue addressing the reasonableness of the discipline imposed, is considered. While I find the assertion that the Grievant's three day suspension was driven in part by union animus to be largely unsupported by the evidence, their claim of desperate treatment is far more persuasive.

The singular fact that Mr. Neal is a Union Steward is insufficient to advance the Local's argument that Management was biased in their decision

to issue a three day suspension. The complaint issued by the National Labor Relations Board's Regional Office (Union's Ex. 7) does not demonstrate that after adjudication by the Board, a violation of the NLRA was found to have occurred by the Hospital involving anti-union conduct. A similar result is reached when considering Mr. Anderson's discharge. The Board's ruling in June of this year found that the basis for his termination was excessive tardiness in spite of the imposition of progressive discipline, not the fact that he was a Union Steward. Moreover, the Employer's Labor Relations Representative, George Wesman offered unrefuted testimony that in the past seven years, he has worked with over thirty Union Stewards at the Hospital, the vast majority of whom have never been punished for being a steward of the Local.

The Union's position gains altitude however when their contention of desperate treatment between the Grievant and Angela Gregory is taken into consideration. The unrefuted facts demonstrate that both employees exhibited dishonesty in each of the two investigatory interviews. Moreover, both were found to have been in an unauthorized area on the night in question, and both were not performing their designated duties as expected that evening when they were together in the MT office.

As previously noted, the letter of suspension issued to the Grievant, stated: "Your actions that night are a clear violation of company policies and department guidelines" (Hospital Ex. 5). Further, in the same letter, Management observed: "As you know, dishonesty in itself is cause for

termination” – a reference to Article 9, Section A in the parties’ Labor Agreement (*id.*). They concluded, however, that in lieu of discharge, Mr. Neal would receive the three day suspension which was to serve as a “...last and final warning for violation of policies and procedures.”

Management’s notice to the Grievant, when compared to the correspondence sent to Ms. Gregory informing her of the one day suspension, are markedly different in context and tone alike. In relevant part it states:

“Angela, in alignment with the North Memorial Medical Center values, throughout this investigation you did not demonstrate accountability when it comes to accepting personal responsibility for your actions. Also, not communicating honestly and sharing the correct information to minimize misunderstandings are qualities that are required to be upheld by all North Memorial Medical Center employees. The expectation is that you meet all the corporate values in your work and your behavior aligns with the expectations in your job description.

It is based on these expectations that you are receiving this Formal Performance Improvement – 1 Day suspension on Wednesday, May 1st. Please be advised that failure to demonstrate immediate and sustained improvement regarding the values mention (*sic*) above and your performance of your role may lead to the continuation of the Formal Performance Improvement process up to and including termination of employment” (Hospital’s Ex. 6; emphasis added).

Nowhere in the notice to Ms. Gregory is there any claim that being out of her assigned work area, in the restricted MT office with the lights off, were considered part of her misconduct. Nor that due to her lack of “accountability” she was going to be placed on a “last and final warning” as called for in the master contract. It is unrefuted that Management had concluded both Mr. Neal and Ms. Gregory were guilty of all three transgressions

based on their investigation, yet they failed to even cite two of the three in the latter's disciplinary letter. Moreover, as the Local has accurately observed, the letter to the Grievant was clearly couched in more punitive tones as opposed to Ms. Gregory's where the Hospital's stated "values" and "expectations" were emphasized and "accountability" was preferred over the more harsh term of "dishonesty" in reference to the answers she gave during the investigation. The clear message sent to the Nurses Aide was that the action taken was to be corrective in nature.

It is a well settled axiom of arbitral jurisprudence that employees who engage in the same or similar type of misconduct should be treated essentially the same.

Pared to its essentials, the singular difference between Mr. Neal's conduct and Ms. Gregory's is that the former carried a key that allowed these two employees access to the MT office. While this lone factor might reasonably be considered grounds for elevated discipline to be issued to the Grievant, there is present, in this instance, other mitigating evidence which bears directly upon the outcome of this dispute.

When evaluating the propriety of any penalty administered against an employee, their work record is almost always taken into account. See: Fairweather, *Practice and Procedure in Labor Arbitration*, 2nd Edition, p.301-302; Hill and Sinicroppi, *Evidence in Arbitration*, p. 34, BNA 1980; Elkouri and Elkouri, *How Arbitration Works* p 983, BNA 6th Ed.; Brand, *Discipline and Discharge in*

Arbitration, BNA 2nd Ed. p. 498. The theory consistently has been applied that a particular offense may be mitigated by a good work record or, conversely, aggravated by a poor one. Either way, an employee's past record is normally a major factor in the determination of the proper penalty for any offense.

The evidence shows that Management did take into consideration the Grievant's lengthy service to the Hospital. At the same time however, under cross-examination Mr. Wesman acknowledged that they did not reflect upon the near quarter century of Mr. Neal's very positive work history, which included numerous commendations and most favorable performance evaluations, when reaching their decision. Significantly, the most recent evaluation contained the following comment by the reviewer: "Dwight does accept responsibility for his own actions, and *learns from his mistakes*" (Local's Ex. 2; emphasis added).

This documentation is persuasive. When coupled with his excellent work record, it tells the reader that this employee is an excellent candidate for the imposition of progressive discipline as opposed to the more punitive "last and final warning" language expressed in the suspension notice to him. When the evidence regarding the desperate discipline issued to Mr. Neal and Ms. Gregory for mostly similar rule infractions is thrown into the mix, I conclude that the three day suspension is excessive.

Award-

Based upon the foregoing analysis of the evidence Mr. Neal's grievance is hereby denied in part and sustained in part. To the extent that he was proven guilty of violating the Employer's policies and guidelines on April 1, 2013, discipline was justified. At the same time however the three day suspension is excessive in my judgment, and more punitive than corrective given the disparity in the discipline imposed for the two employees involved. Accordingly, the Grievant's three day suspension is to be reduced to a 1 (one) day suspension without pay and benefits as was issued to Ms. Gregory, and the Employer is directed forthwith to reimburse Mr. Neal for wages, seniority and related benefits he may have lost, due to the two additional days he was suspended from work.

Finally, it is important that this award not be construed in any manner as an endorsement of Mr. Neal's misconduct. To the contrary, his behavior is most inconsistent with the work record he compiled prior to the event here under consideration. Hopefully, the suspension will be viewed and acted upon as a positive corrective measure, and that he will continue to be a valued employee of the Hospital.

Respectfully submitted this 2nd day of December, 2014.

/s/
Jay C. Fogelberg, Neutral Arbitrator