

**IN THE MATTER OF ARBITRATION  
BETWEEN**

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	) Issue: Discipline of R. C.
	)
Ely-Bloomenson Hospital and Nursing Home	) BMS Case No.: 06-RA-1059
	)
"Employer"	) Hearing Site: Ely, MN
	)
and	) Hearing Date: 08-24/25-06
	)
Minnesota Nurses Association	) Briefing Date: 09-25-06
	)
"Union"	) Award Date: 11-18-06
	)
	) Arbitrator: Mario F. Bognanno

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**Jurisdiction**

Pursuant to the relevant provisions in the parties' 2002-2005 Collective Bargaining Agreement, this case was heard on August 24 and 25, 2006 in Ely, Minnesota. The parties appeared through their designated representatives who waived the provisions in article 21, section C of the Collective Bargaining Agreement calling for a three person Board of Arbitration, and requiring an arbitrated award within 30-days of the close of the record.<sup>1</sup> (Joint Exhibit 1). Both parties stipulated that the matter was properly before the undersigned for a final and binding determination, and each side was afforded a full and fair opportunity to present its case. Witness testimony was sworn and cross-examined, and exhibits were introduced into the record.

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<sup>1</sup> At the hearing, the parties designated representatives indicated that they were the advocate members of the Board, and that either may request a Board meeting provided that he did so within seven days of the close of the record. Neither representative requested a Board meeting.

At the parties request, the Grievant is identified by initials only. On September 25, 2006, the parties filed post-hearing briefs, and the matter was taken under advisement. Finally, Mr. Richard J. Dunn attended the hearing as an arbitrator-intern under the auspices of the Bureau of Mediation Services' arbitrator-intern training program, and he prepared a mock draft of an award. The instant award was decided and drafted solely by the undersigned.

### **Appearances**

#### **For the Employer:**

Richard S. Rand, Designated Employer Representative

Becky Gaulke, Registered Nurse and Director of Nursing

John Fossum, Chief Executive Officer and Administrator

Debra Minier, Staffing Services Manager

Dr. Joseph Bianco, Medical Doctor

Tina Myers, Emergency Medical Technician

Barbara Garrison, Emergency Medical Technician

Steve Kamppi, Registered Nurse

#### **For the Union:**

Phillip J. Finkelstein, Designated Union Representative and Union Labor Counsel

Cheryl Lossing, Registered Nurse

Linnea Renner, Registered Nurse and Union Steward

Carolyn Loisel, Registered Nurse and Union Staff

R. C., Registered Nurse and Grievant

Galen Kayete, Registered Nurse

Carol Diemert, Registered Nurse and Union Staff

## **I. FACTS AND BACKGROUND**

The Ely-Bloomenson Community Hospital and Nursing Home, the Employer, is a small, 25-bed, critical access community hospital, located in rural Ely, Minnesota, near the Canadian border. Most of the Employer's patients are out-patient clients, and the Employer treats approximately 9,000 patients per year. Ms. R. C., the Grievant, was licensed as a Registered Nurse (R. N.) in 1974, and she has worked as a R. N. for the Employer since 1989.

On February 3, 2006, Becky Gaulke, Director of Nursing, disciplined the Grievant by (1) placing her on a three day unpaid suspension, and (2) revoking her Charge Nurse duties, "...until further evaluation can be done on a quarterly basis and as needed".<sup>2</sup> (Joint Exhibit 2). Under the terms of the Collective Bargaining Agreement Charge Nurses receive \$1.15 per hour as a pay differential. (Joint Exhibit 1, Salary Charts A & B). This suspension followed a written warning dated September 22, 2003; a verbal warning that was administered on March 4, 2003; and numerous counseling sessions between the Grievant and Director of Nursing throughout the 2003 – 2006 timeframe. (See: Employer Exhibits 1, 2 and 3, respectively). Each of these disciplinary actions is reviewed in more detail below.

### **A. Suspension/Loss of Charge Nurse Assignment – February 3, 2006**

The "Employee Discipline Record", Joint Exhibit 2, sets forth the grounds for Ms. Gaulke's February 3, 2006, disciplinary action:

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<sup>2</sup> A "Charge Nurse" or "Head Nurse" is a R. N. "... assigned to primarily coordinate the delivery of patient care and provide direct nursing care to patients/clients." (Joint Exhibit 1).

...ineffective approaches/communication skills to staff and family members of patients, ineffective professional nursing behavior, ineffective team work skills, ineffective anger management and ineffective leadership skills.

Ms. Gaulke testified that these grounds center mainly on the events of December 17, 2005, and December 29, 2005. Whereas, the Grievant and Union Steward Carolyn Loisel, R. N., asserted that Ms. Gaulke's disciplinary determination was prompted by the events of January 31, 2006, when the Grievant refused to accept a "primary" care assignment in O. B. Apparently, the Grievant has previously refused primary obstetric assignment without being disciplined because she was able to arrange substitute staffing. But a substitute staffer was unavailable on January 31, 2006. Thus, the Grievant testified that she believes that she had exhausted the Employer's patience, and that she expected to be suspended but not for three days.

**December 17, 2005.** The Grievant was assigned Charge Nurse duties on the morning of December 17, 2004, when a "code" patient's condition was in decline. Consequently, as Steven Kamppi, R. N. testified without contradiction, the attending physician, after conferring with family, decided to have the patient moved to Duluth, MN for intensive care, and to begin administering Dopamine, in advance of the transport team's arrival. The Grievant was reluctant to start the Dopamine. However, as the patient's vital statistics got worse, the attending physician ordered her to do so.

At this point, nurse Kamppi and another R. N. suggested to the Grievant that the patient should be moved to the ICU for the Dopamine IV and monitoring, but the Grievant rejected that idea in favor of moving him to the ER. As directed,

Mr. Kamppi and Tina Meyers, Emergency Medical Technician (EMT), moved the patient to the ER, and as Mr. Kamppi was starting the Dopamine drip, the Grievant entered the room, threw an empty clip board on a stretcher and said to him, "You can kiss my ass". Mr. Kamppi, Ms. Meyers, EMT Barbara Garrison, family members, and the patient heard this remark. Continuing, Mr. Kamppi testified that the patient's condition improved after the Dopamine infusion began, and the irritated Grievant said to him, "I hope you are happy. You got what you wanted." (Employer Exhibit 3, K). Ms. Meyers' testimony and Employer Exhibit 3, L, as well as the Grievant's testimony, serve to corroborate this account. In addition, nurse Kamppi testified that as he and the others waited for the transport team's arrival, the Grievant said to him, since "...I had started the infusion that he was now one-to-one care and if anything happened it was my problem." (Employer Exhibit 3, K).

**December 29, 2005.** On the afternoon of December 29, 2005, Mr. A. Johnson was to be transported by family to Duluth, MN, for surgery. His family was to pick him up at 2:30 p.m., but when they arrived he was not ready for the trip. That is, his belongings had not been packed, and he was not dressed for travel. Upon the family's arrival, the Grievant told them that they would have to make the necessary separation preparations, because the hospital's staff was 'too busy'. The family became irate. However, to contradict the Grievant, on December 30, 2005, Ms. Kendra Sandy, EMT, documented that she would have prepared Mr. Johnson for his departure, if asked; and that she "...would have

never asked the family to ‘Do it themselves because we were too busy!’” (Employer Exhibit 3, I).

Regarding this same incident, EMT Tina Myers proffered corroborating and uncontroverted testimony and documentation to the effect that during the afternoon of December 29, 2005, she noticed family members placing Mr. Johnson in a wheelchair, and when she went to help, one of his daughters yelled at her, complaining about the “horrible care” her father had received. Ms. Myers also stated that the daughter told her that the Grievant had told them that the EMTs were too busy to prepare their father for his departure. Ms. Myers apologized, and said that nobody had told them that Mr. Johnson was going to be picked up that afternoon. She also testified that the family was so angry that they would not let her assist in wheeling Mr. Johnson to the car or allow her to assist in moving him from the wheelchair to the car; and that Mr. Johnson’s other daughter told her that it infuriated them when the Grievant “...walked into the room and stated that they had better start getting Mr. Johnson ready to go...” Further, Ms. Myers states that she did not even know that Mr. Johnson was to have surgery. Finally, Ms. Myers told Mr. Johnson’s other daughter that if she and Ms. Sandy had known “...they would have been in there to get him ready.” (Employer Exhibits 3, J and 4).

Ms. Gaulke testified that the above two incidences, and to a lesser extent the Grievant’s prior written and verbal censures and counseling record, which are described below, led to the February 3, 2006, discipline. She also testified that the Grievant is loud, abrasive to others, including co-workers and patients, and that

her communicating and leadership manners are ineffective – behaviors unbecoming a professional. Mr. John Fossum, CEO and Administrator, concurred with this assessment.

**January 31, 2006.** On January 31, 2006, just three day before the Employer issued its notice of suspension, another incident occurred, involving the Grievant. The Employer maintains that this incident had no bearing on this instant matter; however, the Union disagrees, insisting that this incident was, wrongly, the reason for the Grievant's suspension. The elements of this incident are sketched below.

On January 31, 2006, the afternoon Charge Nurse, Prudence LaLone, asked the Grievant to assume primary care responsibility for an obstetrics patient. The Grievant refused. Although she had previously worked O. B. in a supporting role, she stated that she has long resisted the primary role because her obstetric skills were rusty, and she was woefully inexperienced. Consequently, the Grievant feared that such an assignment could place her O. B. patients and R. N. license at risk. (Union Exhibits 9 and 10). This explains why the Grievant found substitutes to fill her primary care assignments in O. B. Further, she testified that she and Ms. Gaulke had often conferred about her O. B. issues, and that she and other staff nurses have general concerns about the Employer's ability to practice obstetrics safely. (Union Exhibits 6 and 7).

After the Grievant's refusal to work the O. B. assignment, she proceeded to Ms. Gaulke's office, and later she was followed by the other nurses involved. The Grievant indicated that previously other nurses would exchange

assignments with her, so that she would not have to provide primary O. B. care. Not this time, however. Thus, she volunteered to “go home, without pay” to free-up her shift for another R. N. to work. A tense discussion ensued among the nurses in Ms. Gaulke’s presence. Ultimately, the Grievant took the day off without pay, Ms. LaLone ended up working with the O. B. patient in question, and another nurse was called in to work the Grievant’s vacated shift. Ms. Gaulke documented that when the Grievant was about to leave her office she stated that she was going to see her physician about getting a medical release from obstetric work. (Employer Exhibit 3, M). Accordingly, the Grievant immediately proceeded to see her physician, James S. Montana, M.D., and on February 2, 2006, he wrote to Ms. Gaulke, recommending that the Grievant not do obstetric work for health- and stress-related reasons. (Union Exhibit 8). Previously, three other female nurses had secured similar releases, and the record suggests that, in addition, the Employer’s four male nurses do not work obstetrics.

**B. Written Warning – September 22, 2003**

Ms. Gaulke meted out this discipline for the following reasons:

Many concerns have been brought to my attention from multiple individuals, most recently concerning the last weekend work on 9/12/03. Please note the following issues: 1. Poor/late/delayed documentation, 2. Unnecessary increased cost to the facility in O T as others had to stay over due to you refusing care to a patient, 3. Poor team player, 4. Late to work after having a wake-up call from our staff per your request and then a second call was also needed, 5. Putting work off on other staff, 6. Not performing all charge duty roles, 7. Unprofessional behavior, i.e.,: questionable honesty, bad attitude, short tempered and angry with co-workers, poor communication with co-workers, poor leadership skills.

(Employer Exhibit 2). This is a settled matter, and therefore the substance of this matter was not taken up at the hearing. However, it is relevant to note that this

warning resulted in the following action: "Removal of the charge role until further evaluation in one month can be done." (Employer Exhibit 2).

**C. Verbal Warning – March 4, 2003**

Ms. Gaulke meted out this discipline for the following reasons:

Due to Chris Stupica going home ill on 2-21-03, R. C. called in Katie Loisel on the 3-11 shift instead of Jean Nesheim-Hendrickson, who was scheduled by nursing service administration. Katie came in on a quick charge. The hosp. received a grievance from Jean to pay lost wages. This decision by R. C. cost the facility \$177.64. Also on this same shift it was reported from other staff members that R. C. was using her charge status inappropriately; .e.g., rudeness and derogatory remarks to co-workers and making poor staffing decisions. Please see attachments; the copies of the grievance and the cost report.

(Employer Exhibit 1). This too is a settled matter.

**D. Counseling Record: 2003 - 2006**

Ms. Gaulke's counseling records include informal notes about issues that have come to her attention, and that subsequently resulted in discussions with the Grievant. (Employer Exhibit 3, A, B, F, and H). They also include copies of "shift reports" that reference problems involving the Grievant, and that were followed-up with counseling. (Employer Exhibit 3, C, D, E, and G). Finally, the counseling records also include investigatory reports filed by co-workers who witnessed specific incidences, such as, the accounts appearing in the record as Employer Exhibit 3, I, J, K, L, and M.

On February 14, 2006, the Union grieved the Employer's February 3, 2006, disciplinary action. (Joint Exhibit 3). The parties were unable to settle the grievance, and the matter proceeded to the instant arbitration.

## **II. STATEMENT OF THE ISSUE**

The undersigned frames the issue as follows:

Whether the Grievant was disciplined for just cause? If not, what is an appropriate remedy?

## **III. RELEVANT CONTRACT PROVISIONS**

Article 26. Progressive Discipline:

The employer seeks to address or resolve conduct and performance problems through counseling, additional training or supervision, warnings, etc. To insure the equitable processing of disciplinary action, the Human Resources Director is responsible for coordinating and implementing the discipline procedure, including the assurance that employee rights are protected and that appropriate action is taken when circumstances warrant. Department head shall initiate disciplinary action when necessary.

No nurse shall be disciplined except for just cause.

A nurse participating in an investigatory meeting that reasonably could lead to disciplinary action shall be advised in advance of such meeting and of its purpose. The nurse shall have the right to request and be granted Minnesota Nurses Association representation at such meeting. At any meeting where discipline is to be issued, the Facility will advise the nurse of the right to have Minnesota Nurses Association representation at such meeting. If a representative is not available, the meeting will be rescheduled at a mutually agreeable time, not to exceed one week.

Except in cases where immediate suspension or termination is involved, the Facility will utilize a system of progressive discipline including:  
1) verbal warning, 2) written warning, 3) suspension without pay, and/or 4) dismissal.

If a verbal warning is given, it shall be confirmed in writing, identified as disciplinary action, and a copy shall be given to the nurse. The action shall specifically identify the corrective behavior required. This shall include a corrective action plan that includes the specific nature of the problem, the action/behavior, and expected outcome.

Verbal warnings, written warnings, and suspensions shall become invalid as a basis for proceeding to the next step in the progressive discipline

sequence when twenty-four (24) calendar months have elapsed and no further related disciplinary incidents have occurred.

(Joint Exhibit 1).

#### **IV. EMPLOYER'S POSITION**

The Employer initially points out that the Grievant's competency and qualifications as a R. N. are not in question. Rather, it is her unacceptable pattern of on-the-job behaviors that led to the discipline meted out on February 3, 2006. Pursuant to Article 26 in the Collective Bargaining Agreement, the Employer contends that Ms. Gaulke counseled the Grievant in regard to the following incidents:

- 2003 – For intimidating co-working nurses by maintaining “notes” on them, and for her inability to manage her “anger”. (Employer Exhibit 3, A and B);
- 2004 – A Charge Nurse's “shift report”, stating that the Grievant was being difficult, complaining about being “required to do O. B.”. (Employer Exhibit 3, C);
- 2005 – An “EBCH Progress Notes” filed by a co-worker nurse, stating that the Grievant, in spite of her “team player” rhetoric when working as Charge Nurse, did not helping clean and restock the O. B. room, and assist in the birthing procedure during a busy shift. (Employer Exhibit 3, D); and
- 2005 –Three different R. N. co-workers reported three separate incidences having to do with leaving work without proper authorization, failure to report to work without giving a reason, and

being inconsiderate toward co-workers. (Employer Exhibit 3, F, G, and H).

In addition, the Employer argues that the Grievant received a verbal warning on March 4, 2003, for an administrative mistake, and for being rude and derogatory toward co-workers; and a written warning on September 22, 2003, for record-keeping problems, poor teamwork, unprofessional behavior and so forth. (Employer Exhibits 1 and 2, respectively).

Finally, the Employer contends that the December 29, 2005, incident involving the mismanagement of EMTs, and cavalier treatment of Mr. Johnson and his family, and the December 17, 2005, "You can kiss my ass" remark directed at nurse Kamppi in the presence of others are all part of a continuing pattern of outspoken, ineffective and unprofessional conduct. (Joint Exhibit 2 and Employer Exhibits 3 I, J, K, and L).

Next, the Employer contends that the latter two events triggered the February 3, 2006, discipline, and that this discipline would have been issued even if the January 31, 2006, O. B. matter had not taken place. In fact, the Employer urges, that the O. B. incident raised by the Union is a "red herring", and that the Grievant took January 31, 2006, off as a "low need" day, which was contractually permissible, even though she was not medically certified to refuse said work on that date. Therefore, the Employer, argues, the Union's "retaliation" assertion is specious.

Further, the Employer contends that it dutifully followed the progressive discipline requirements found in article 26 in the Collective Bargaining Agreement

in spite of the Union's arguments to the contrary. The first paragraph in article 26 identifies "counseling" as a means of addressing performance problems, and the sixth paragraph notes that verbal warnings, written warnings and suspensions become invalid after twenty-four months, provided that "no further related disciplinary incidents have occurred". (Joint Exhibit 1). In this case, the Employer continues, several counseling meetings to deal with disciplinary incidences involving the Grievant occurred in 2004 and 2005, and these meetings had the effect of stopping the twenty-four month clock between September 22, 2003 (written warning), and February 3, 2006 (suspension) that otherwise would have invalidated the 2003 (oral and) written warning(s). Accordingly, the Employer argues, the February 3, 2006, suspension was correctly synchronized with the steps of progressive discipline as spelled out in article 26. (Employers Exhibit 3, C, D, E, F, G, and H). That is, the Employer avers, the Agreement's progressive disciplinary steps were followed in this case.

Finally, the Employer contends that its actions in this case were contractually compliant; that the Grievant's behaviors on December 17 and 29, 2005, are unacceptable and unprofessional forms of misconduct that were proven to have taken place; and therefore, that the grievance should be dismissed.

#### **V. UNION'S POSITION**

Initially, the Union argues that the Grievant's February 3, 2006, discipline was issued in "retaliation" for her January 31, 2006, objection to being assigned primary care responsibilities in O. B., and the February 2, 2006, letter from her

physician indicating that she should not be assigned to work in O. B. for health reasons. In this regard, the Union observes that for quite some time several nurses have urged the Employer to eliminate its “planned obstetrics” practice, including the Grievant. (Union Exhibits 6 and 7). Further, since 1999 staff nurses have filed three “Concern For Safe Staffing” forms with the Minnesota Nurses Association, each citing O. B. concerns. (Union Exhibits 1, 4, and 5). Finally, three nurses excluding the Grievant, had previously secured medical exemptions from working in O. B. (Union Exhibits 2 and 3). Consequently, the Union concludes, when the argument over the Grievant’s refusal to work in O. B. ensued on January 31, 2006, the Employer lost its patience, and disciplined the Grievant, who has long objected to performing primary O. B. nursing care.

Next, the Union maintains that the 2003 – 2006 counseling meetings between Ms. Gaulke and the Grievant are not contractually “disciplinary” measures under the terms of the Collective Bargaining Agreement. Pointing to article 26, the Union observes that discipline and, specifically, progressive discipline begins with a “verbal warning”, not “counseling”. Further, the Union notes that pursuant to article 26, paragraph 6, disciplinary actions are to be confirmed in writing, and a copy is to be given to the nurse in question. In this case, the Union points out that none of the counseling documents in Ms. Gaulke’s personal files were copied to the Grievant, and therefore, if these counseling documents are accepted as proof of discipline, then the Grievant’s due process rights have been abridged.

Continuing, the Union argues, since counseling meetings are not disciplinary meetings, the documented verbal and written warnings that Ms. Gaulke issued in 2003 cannot serve as a basis for proceeding to the suspension step of progressive discipline in this case. Clearly, the Union concludes, more than twenty-four months had elapsed between the September 22, 2003, written warning and the February 3, 2006, suspension and loss of the Charge Nurse assignments. *In arguendo*, the Union contends that in February 2003, the Grievant was at the verbal warning stage of progressive discipline, not the suspension step.

Further, the Union charges the Employer with being disparate in its meting out of discipline, as the record evidence shows that other nurses, like the Grievant, are at times loud and outspoken, and that foul language has been used by them as well.

Finally, based on the above, the Union asks that the Grievant's discipline be removed from her personnel file; that the Grievant be "made whole"; and that the Grievant be permitted to resume the responsibilities of a Charge Nurse.

## **VI. DISCUSSION AND OPINION**

This analysis is organized around two overarching questions, namely: "Whether the Grievant was disciplined for just cause?"; and "If not, what is an appropriate remedy?" Each question is taken up in the order presented.

### **Just Cause**

On February 3, 2006, the Grievant was suspended for three days without pay, and removed from the role of Charge Nurse "...until further evaluation can

be done on a quarterly basis and as needed.” (Joint Exhibit 2) This notice of discipline was introduced through its author, namely, Ms. Gaulke, Director of Nursing. Ms. Gaulke credibly testified about the notice’s observations about the Grievant’s dealings with an “...OB patient”, and continuing pattern of ineffective communications with staff, patients and families, team work skills, leadership skills, anger management, and professional behavior. (Joint Exhibit 2).

The Employer contends that the December 29, 2005, incident involving the mismanagement of EMTs, and cavalier treatment of patient Johnson and his family and, in particular, the December 17, 2005, “You can kiss my ass” remark directed toward nurse Kamppi in the presence of others are all part of a continuing pattern of outspoken, ineffective and unprofessional conduct, and the fundamental reasons for the discipline meting out on February 3, 2006. (Joint Exhibit 2 and Employer Exhibits 3, I, J, K, and L). In contradiction, the Union’s position is that the January 31, 2006, incident having to do with refusing O. B. work, was the real reason for the February 3, 2006, suspension.

A careful review of the record evidence supports the conclusion that the positions of both parties are correct, to some degree. As of February 3, 2006, Ms. Gaulke had concluded her investigation of the December 29, 2005 – Mr. Johnson – incident, as EMTs Kindra Sandy and Tina Myers had provided her with written reports at the end of their shift on December 30, 2005, and Mr. Fossum, CEO and Administrator, had given her an oral report of his investigatory conversations with members of the Johnson family. Mr. Fossum reported that the

December 29, 2005, behavior of the Grievant “evidenced indifference” to duty.<sup>3</sup> (Employer Exhibit 3, I and J).

However, by the time Ms. Gaulke administered the February 3, 2006, discipline, she had just completed her investigation of the December 17, 2005 – “You can kiss my ass” – incident, since it was not until February 2, 2006, that nurse Kamppi sent his e-mail report of this matter to Ms. Gaulke. (Employer Exhibit 3, K). Further, Ms. Gaulke documented her first-party self report of the January 31, 2006, incident on that same day, and on February 2, 2006, she received Dr. Montana’s letter opining that the Grievant ought not to be “...involved with obstetric patients...” (Employer Exhibit 3, M, and Union Exhibit 8). Clearly, the latter two incidents transpired late in the game.

Hence, it is reasonable to conclude that Ms. Gaulke considered this entire series of events when she issued her February 3, 2006, discipline. Moreover, regarding the January 31, 2006, incident, Ms. Gaulke’s self report states in relevant part, “... I stated to R. C. that I had other issues I needed to discuss with her that had come across my desk ...” (Employer Exhibit 3, M; Grievant’s name initialized and emphasis added). This quote implies that the January 31, 2006, incident, and the prior two December incidents, all would be the subject of further discussion. In addition, as noted above, Ms. Gaulke’s suspension record notes “...managing an OB patient”, which can only be a reference to the January 31, 2006, incident.

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<sup>3</sup> Ms. Gaulke received a February 8, 2006, written report about this matter from Mr. Fossum. (Employers Exhibit 4). This post-discipline report corroborates much of the evidence proffered by Ms. Sandy and Ms. Myers, and his testimony, but it was not *per se* a document that factored into Ms. Gaulke’s disciplinary determination.

However, none of this supports the Union's claim that the Grievant's discipline in this case was based exclusively on the January 31, 2006, incident, and is somehow a prohibited form of "reprisal". As previously concluded, all three of these incidents served as the basis for the discipline taken in this case. Moreover, the Grievant did in fact refuse to work in O. B. on January 31, 2006, and unlike the R. N.s who were authorized to refuse similar work for medical reason, the Grievant did not have such a medical release at the time. Which begs the question: "Reprisal for what?" The Employer maintains that on January 31, 2006, the Grievant was properly relieved of duty, and that this incident did not figure into its disciplinary determination. The undersigned agrees that the Grievant was properly relieved of duty on January 31, 2006, but he cannot accept the Employer's assertion that the O. B. incident did not affect the level of discipline meted out since Ms. Gaulke herself reports that the Grievant's behavior was objectionable to the extent that the timing of her refusal to work was regrettable. (Employer Exhibit 3, M). Nevertheless, this admission is not rooted in "reprisal".

Finally, it is opined that the Union's claim of disparate treatment is spurious, as it relates to the Grievant's refusal to work in O. B., or as it relates to the fact that other nurses on the Employer's staff are at times loud and outspoken, and that foul language has occasionally been used by them. Clearly, being loud, outspoken and occasionally using foul language are not the reasons for which the Grievant was disciplined in this case. It is clear from the testimonies of the Grievant, Linnea Renner, R. N., Cheryl Lossing, R. N., and other witnesses

who testified that the Grievant's alleged communications and behaviors in regard to the December 17 and 29, 2005, incidents were or could be perceived as being patently unprofessional. Still further, it is clear from the record evidence that the alleged December 17 and 29, 2005, and January 31, 2006, incidents did occur, as reported. Indeed, there is little in the Union's case to suggest that it would disagree with this conclusion.

In summation, with regard to the December 17, 2005 event, the Grievant's remark, "You can kiss my ass", as directed at a co-worker, and in the presence of other staff, the patient, and members of his family, was indeed derogatory and unprofessional, particularly for one in the role of Charge Nurse. Similarly, her handling of the Mr. Johnson event on December 29, 2005, proved to be an embarrassment to the Employer, and was a manifest portrayal of indifference, if not neglect of duty. These episodes of misconduct clearly warranted discipline, particularly since the Grievant cannot (and does not) contend that she did not know better, given her history of employment at the hospital. However, the January 31, 2006, incident did not warrant discipline, as the Employer concedes.

Next to be analyzed is the Union's defense that "counseling" is not "discipline" under article 26 of the Collective Bargaining Agreement; that more than twenty-four months elapsed between the verbal and written warnings issued in 2003, and the 2006 suspension; and, therefore, as of February 2006, the Grievant was not on the suspension step of the parties' system of progressive discipline.

To demur, the Employer arguing that article 26's first paragraph states that it may "...seek to address or resolve conduct and performance problems through counseling, additional training or supervision, warnings, etc." (Joint Exhibit 1, emphasis added). To the Employer this implies that counseling is, by mutual agreement, disciplinary in nature; and, therefore, that the 2004 and 2005 counseling sessions between Ms. Gaulke and the Grievant constitute "further related disciplinary incidents", preserving the validity of the verbal and written warnings, as provided in article 26, paragraph 6. Ultimately, after due consideration, the Employer's interpretation of article 26 is rejected.

Is counseling "discipline" per se? No! Article 26 in the Collective Bargaining Agreement does not define the terms "discipline" and "counseling". Helpful are Webster's definitions, where "discipline" is defined as, "to punish or penalize for the sake of discipline"; and "counseling" is defined as, "professional guidance of the individual by utilizing psychological methods ..." (*Webster's New Collegiate Dictionary*. Springfield, Massachusetts: G. & C. Merriam Company (1979), pp. 322 and 256, respective). These terms convey different messages, namely: to punish (discipline) and to guide (counseling). With these distinctive definitions in mind, paragraph 1's non-exhaustive list of actions that the Employer may take to correct employee conduct and performance is not punishing or penalizing in nature. Rather, the phrase "counseling, additional training or supervision, warnings, etc." appears to exemplify pre-disciplinary forms of employee guidance where, in this context, the term "warnings" is interpreted as little more than cautionary advisories. Second, in contrast, article 26, paragraph 4

clearly identifies actions that are “punish or penalize for the sake of discipline”, namely, verbal warnings, written warnings, suspensions and dismissals, with counseling conspicuously absent from this set of contractually agreed upon disciplinary measures. Third, if Ms. Gaulke intended her counseling meetings to be disciplinary, rather than pre-disciplinary, then she would have so advised the Grievant who in turn may have invited Union representation, as provided by article 26, paragraph 3. Nothing in the record suggests that Ms. Gaulke advised the Grievant that the counseling meetings were formally disciplinary. Finally, article 26, paragraph 5 requires that the Employer provide a disciplined employee with a written confirmation of any “verbal warning”, but is silent with respect to providing written confirmations of counseling sessions, which are also verbal in nature. This omission supports the undersigned’s interpretation that counseling, like supervision and additional training, is a pre-disciplinary measure. For these reasons, counseling is not interpreted to be “discipline” under article 26.

*Do the 2004 and 2005 counseling sessions constitute “further related disciplinary incidents”?* *No!* Article 26, paragraph 6 provides:

Verbal warnings, written warnings, and suspensions shall become invalid as a basis for proceeding to the next step of progressive discipline sequence when twenty-four (24) calendar months have elapsed and no further related disciplinary incidents have occurred.

(Joint Exhibit 1). The Employer argues that the 2003 verbal and written warnings are viable under this paragraph because the counseling episodes that took place in 2004 and 2005 essentially stopped the twenty-four month clock because of paragraph 6’s condition that “no further related disciplinary incidents have

occurred". In light of the above determination that counseling is not discipline, this logic does not follow. That is, counseling is not equivalent to "disciplinary incidents".

### **Remedy**

From the above, it is clear that the discipline administered on February 3, 2006, did not strictly conform to article 26's system of progressive discipline, as the Union argues, which invites an assessment of the discipline meted out in this case. In addition, although the Grievant's December 17 and 29, 2005, misconduct certainly warrants discipline, the fact that the Employer partially but wrongly relied on the January 31, 2006, incident to fashion that discipline also invites its assessment.

After careful consideration of all the facts and circumstances of this case, the undersigned will not upset the Employer's decision to remove the Grievant from the Charge Nurse role until a return to that role is merited based on future evaluations of her work. The undersigned is cognizant of the fact that on September 22, 2003, the Grievant had previously lost her Charge Nurse privileges. (Employer Exhibit 2). The December 17 and 29, 2005, incidents factually establish that the Grievant's capacity to lead is challenged. Thus, it is again incumbent on the Grievant to restore the Employer's confidence in her ability to fulfill the Charge Nurse duties.

However, for two reasons, the undersigned cannot sustain the Employer's decision to suspend the Grievant for three days without pay. First, there is the finding that the January 31, 2006, incident wrongly influenced Ms. Gaulke's

suspension decision; and, second, since the Employer wrongly construed the Agreement's progressive discipline language, it is reasonable to conclude that it did not consider any lesser forms of discipline. Technically, a verbal warning is an available form of discipline, as the Union implicitly urges. However, suspensions are also available under the article 26 language that permits an "... immediate suspension ..." in exceptional cases. (Joint Exhibit 1). In the opinion of the undersigned, the December 17 and 29, 2005, back-to-back episodes of misconduct involving the Grievant, do require a stern managerial response. Therefore, the undersigned finds that a just and contract-compliant level of discipline in this case is a one day suspension without pay.

**VII. AWARD**

As discussed above the grievance is sustained in part and modified in part. First, the Grievant is guilty of the events alleged to have occurred on December 17 and 29, 2005. Second, the Employer's decision not to assign the Grievant as a Charge Nurse, until future notice, is sustained. Finally, the Employer's decision to suspend the Grievant for three days without pay is reduced to a one day suspension without pay, and the Grievant shall be "made whole" for the relevant two days of lost pay.

To oversee the enforcement of this award, the undersigned shall retain jurisdiction over this case until December 15, 2006, at 5:00 p.m. CST.

Issued and ordered on the 18th day of November 2006, from Tucson, Arizona.

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Mario F. Bognanno, Labor Arbitrator