

IN THE MATTER OF ARBITRATION BETWEEN

Fairmont Medical Center) FMCS Case No. 070416-55719-3
)
“Employer”) Issue: Susan Mahoney Separation
)
) Hearing Site: Fairmont, Minnesota
)
and) Hearing Date: 08/08/07
)
) Brief Submission Date: 10/03/07
Minnesota Nurses Association)
) Award Date: 10/26/07
“Union”)
) Mario F. Bognanno,
) Labor Arbitrator

JURISDICTION

The above-captioned matter was heard on August 8, 2007 in Fairmont, Minnesota pursuant to article 25 – Grievance Procedure – of the parties’ 2006 – 2008 Collective Bargaining Agreement (CBA). At the hearing the parties jointly stipulated that the instant matter was arbitrable; and that the section 25 (D) provision calling for a decision within 30-days of the close of the record was waived. Moreover, the parties did not invoke the section 25 (D) provision calling for a Board of Arbitration. (Joint Exhibit 1)

Both parties were afforded a full and fair opportunity to present their respective cases; witness testimony was sworn and cross-examined; and exhibits were introduced into the record. In lieu of oral summations, the parties filed timely post-hearing briefs on or about October 3, 2007. Thereafter, the evidentiary record was closed and the matter was taken under advisement.

APPEARANCES

For the Employer:

James M. Dawson	Attorney at Law
Karla Boettcher, R.N.	Senior Director, Fairmont Medical Center
Marti Wolter, R.N.	Director, Nursing Department
Michele Storbeck, R.N.	Supervisor, Surgical Services
Marlis Brummond, R.N.	Director, Critical Care/Patient Care
Courtney Cutler,	Director, Human Resources

For the Union:

Phillip I. Finkelstein	Attorney at Law
Marsha Evans, R.N.	MNA Co-Chair
Valletta Krumwiede, R.N.	MNA Co-Chair
Lonna-Jean Schmidt, R.N.	MNA Staff Specialist
Lisa Hunwardsen, R.N.	Registered Nurse
Jan Palacios, R.N.	Registered Nurse
Marilyn Green, R.N.	Registered Nurse
Patricia Higgins, R.N.	Registered Nurse
Susan Mahoney, R.N.	Grievant

I. FACTS AND BACKGROUND

Hired on July 15, 1996, the Grievant, Susan Mahoney, was a .9 FTE registered nurse who worked 9 shifts every 2-week pay period: 5 shifts in the Procedure Room; 2 shifts in the Coronary Care Unit; and 2 shifts in the Patient Care Unit. She also was regularly scheduled “on-call” hours in the Procedure

Room every 6th weekend. The Grievant's employment was terminated on November 3, 2006, for not showing up to work her scheduled shifts "...on 10/20, 22, 24, 25, and 26..." and for not showing up to work her scheduled "... call weekend in the Procedure Room..." from 3:00 p.m. on 10/27 to 7:00 a.m. on 10/30. (Joint Exhibits 3 and 4)

The Employer argues that the Grievant's failure to work the referenced scheduled shifts was in violation of two (2) policies. First, the Grievant's no-shows were a violation of the Attendance Policy, which states in relevant part:

Failure to report an absence for 2 consecutive days will be considered job abandonment and a voluntary quit. No show/no call for less than 2 consecutive days will be grounds for immediate disciplinary action.

(Employer Exhibit 6) In light of this policy, Marti Wolter, R.N., Director, Nursing Department R.N., checked the option "Termination" on the Employee-Supervisor Conference form as the action being taken by the Employer and adjacent to that option penned the phrase, "voluntary resignation according to policy". (Joint Exhibit 3)

Second, the Employer contends that the Grievant's actions also violated the non-paid time off (PTO) provision in section 6 (C) of the CBA. In relevant part, this article states,

Nurses will be required under this provision to find their own replacement and get supervisory approval prior to taking the day(s) off.

(Joint Exhibit 1) There is no dispute that for the 2-week pay period, commencing on Friday, October 13, 2006 and ending on Thursday, October 26, 2006, the Grievant was scheduled to work on October 20, 21, 22, 23, 24, 25 and 26, 2006. And, that she was scheduled to be "on-call" over the weekend of 10/27/2006 –

10/29/2006. (Employer Exhibits 4 and 5) Further, there is no dispute that the Grievant did not work these scheduled shifts because on October 19, 2006, the Grievant left for a trip to England. Still further, the record establishes that before leaving for this trip, the Grievant only managed to secure section 6 (C) supervisor-approved replacements for her October 21 and October 23 scheduled shifts and that she failed to secure replacements for her other scheduled shifts, although she did attempt to do so. (Employer Exhibits 1 and 2) Finally, the record makes clear that in lieu of exercising her non-PTO rights under section 6 (C), the Grievant, in the alternative, could have requested PTO, using accrued vacation days, for example. However, any such request must have been tendered by September 4, 2006. In fact, the Grievant did not make a PTO request. (Employer Exhibit 3)

The Grievant is well-liked by her colleagues and she is characterized by them as being a hard-working, conscientious and dedicated registered nurse. (See the testimony of Valletta Krumwiede, R.N., for example.) In fact, on this point, the Grievant's supervisors agree. (See the testimony of Supervisor Michele Storbeck, R.N., for example; and the Grievant's annual 2000 – 2006 performance evaluations, Union Exhibits 1 – 7.)

On November 13, 2006, the Union filed a grievance challenging the Employer's decision to terminate the Grievant's employment. (Joint Exhibit 2) However, the parties were not able to resolve this matter through grievance negotiations and, ultimately, it was processed to arbitration for final resolution.

II. Statement of the Issue

The parties' jointly stipulated that the issue in this case is as follows:

1. Whether the Grievant's employment was terminated for just cause?
2. If not, what is an appropriate remedy?

III. Relevant Contract Language

2006 – 2008 Collective Bargaining Agreement

6. PAID TIME OFF (P.T.O.):

C. A nurse may take a day(s) off without using Paid Time Off provided the nurse maintains his/her posting as evaluated annually on the nurse's anniversary. If the nurse fails to maintain his/her posting, this will result in the nurse having their hours permanently reduced to the level of hours worked by that nurse the previous year. Nurses will be required under this provision to find their own replacement and get supervisory approval prior to taking the day(s) off.

15. SECURITY OF EMPLOYMENT:

A nurse will not be disciplined or discharged except for just cause.

(Joint Exhibit 1)

Fairmont Medical Center-Mayo Health System Policy Manual

Attendance Policy

PROCEDURE

4. Failure to report an absence for 2 consecutive days will be considered job abandonment and a voluntary quit. No show/no call for less than 2 consecutive days will be grounds for immediate disciplinary action.

(Company Exhibit 6)

IV. Position of the Employer

Initially, the Employer argues that the instant matter is accurately characterized as a "job abandonment" case. In this respect, the Employer points out that prior to leaving for England on October 19, 2006, the Grievant knew what

her non-PTO responsibilities where *per* section 6 (C) of the CBA. Indeed, the Employer observes that the Grievant readily admitted same at the arbitration hearing, and that she knew the established procedure for securing substitutes to work her scheduled hours. In addition, the Employer notes that the Grievant admitted that as of the end of her October 18th shift, she only had found approved replacements for her October 21st and October 23rd shifts.

Second, the Employer urges that the Grievant violated the Attendance Policy's "2 consecutive days" provision as she was a no-call/no-show on October 20, 22, 24, 25 and 26, 2006, and on the scheduled weekend call shift of October 27 through October 29, 2006: Evidence of "job abandonment." Further, the Employer indicates that the Grievant admitted to knowing about the "2 consecutive days" policy and, although she testified to knowing that its violation was "serious," she did not realize that it amounted to "job abandonment" or was a terminable offense. Finally, with respect to this testimony by the Grievant, the Employer concludes that the Grievant actually did know she could be terminated for her impending no-calls/no-shows, as revealed by the content of the October 18, 2006, 12:28 a.m. e-mail she sent to colleague Jan Palacios, R.N., which states:

This is the mumbo jumbo assistance I have gotten – I tried working with Michelle & the 1st time was no problem, the 2nd was 'Do I known about this?' & a brick wall – if I don't have a job when I get back, it has been nice knowing you – HA, HA, HA – Let me know how bad they talk about me next week, and no offense, but I will not be thinking about anyone here – HAHAAAAA.

(Employer Exhibit 2)

Third, the Employer argues that the Grievant was well aware of the procedure for covering non-PTO scheduled shifts. That is, pointing to Employer Exhibit 8, the Employer shows that with respect to a different non-PTO event that arose in mid-2005, Ms. Storbeck had advised the Grievant that under section 6 (C) it was she and not her supervisor who was responsible for filling her own shifts with supervisor-approval substitutes. (Employer Exhibit 8)

Finally, the Employer contends that this is a case of “job abandonment” and, as such, the Grievant voluntarily quit her position when she chose to absent herself from scheduled shifts without providing qualified substitutes under section 6 (C) of the CBA. For having abandoned several patients, coworkers and her job, and absent any proof of discrimination or disparate treatment, the Grievance should be denied.

V. Position of the Union

The Union argues that the Grievant’s termination was far too severe a penalty given the facts and circumstances of this case and, most specifically, that the Grievant is a dedicated and hard-working nurse who worked in several different areas of the hospital. In addition, the Union points out that the Grievant has a work history that is punctuated with positive performance evaluations, going back at least to the year-2000.

Next, the Union observes that the Grievant, a single mother, fulfilled a “lifelong dream” in visiting her daughter in England, where she was studying. Continuing, the Union urges that the Grievant made first mentioned of the instant trip to her supervisor on September 10th or 11th and that Ms. Storbeck

responded, "We can work this out." Based on this "affirmative" response, the Union notes that the Grievant proceeded to purchase a non-refundable airplane ticket on September 18, 2006.

Further, the Union contends that the Grievant, for the most part, successfully endeavored to find substitutes to work her scheduled October 21 – October 29 shifts. Indeed, the Union argues, the fact that the Grievant worked two-and-one-half shifts after returning from her holiday is evidence that the Employer did not equate her absences with "job abandonment," at least initially.

Finally, the Union asserts that the Employer's "2 consecutive days" policy has not been consistently enforced with respect to the Grievant and other RNs like Kristine Riley. (Union Exhibits 8 – 13) Thus, for these and the other reasons presented above, the Union begs that the Grievant's "mistake," while serious, arose out of a "misunderstanding;" that the Grievant's termination was not for just cause; and, therefore, that the Grievant should be returned to work with full back pay and benefits.

V. Discussion and Opinion

After carefully reviewing the relevant policies, facts and circumstances of this case, the undersigned concludes that the Employer met its burden of proving just cause for having terminated the Grievant's employment. The analysis that led to this conclusion is now discussed.

First, as the Grievant testified, on or about September 10th Ms. Storbeck did state that "We can work this out" in reply to the Grievant's declaration that she wished to visit her daughter in England. But the story does not end here. It is

uncontroverted that during this conversation, Ms. Storbeck asked the Grievant to email the specific dates of the shifts she wanted off and that Ms. Storbeck did not somehow suggest to the Grievant that she was absolved from filling her own scheduled shifts with supervisor-approved qualified substitutes. Moreover, it is uncontroverted that it was not until October 12th, nearly a month later, that the Grievant emailed Ms. Storbeck with preliminary names and dates of replacement RNs to cover her shifts. (Employer Exhibit 1) On October 13, 2006, by return email, Ms. Storbeck approved Ms. Palacios as the Grievant's October 23rd replacement, but not Cairne Eytcheson, R.N., who was willing to fill the Grievant's October 21st, 22nd and 25th shifts, because these would be overtime shifts, which disqualified her.¹ (Employer Exhibit 2) In a reply email sent on October 13th, the Grievant advised Ms. Storbeck:

I believe she [Ms. Eytcheson] has vacation during this time period – I will not be trying to replace myself further, either, & will be gone from Oct 19th until Oct 30th.

(Employer Exhibit 2) In an October 16, 2006 email, Ms. Wolter reinforced the overtime disqualifier; however, Ms. Eytcheson was ultimately approved to cover the Grievant's posted October 21st hours, provided that she did not use that day as a PTO vacation day. In addition, Ms. Wolter observed that Ms. Eytcheson was further disqualified as a Grievant-substitute because she was not "oriented" to work in the Procedure Room on October 25th. Finally, in the October 16th email, Ms. Wolter advised the Grievant to "...please let us know how you will be covering the 22nd and the 25th for sure..." (Employer Exhibit 2) On October 18, 2006, the Grievant emailed to Ms. Palacios the previously quoted "HA HA HA"

¹ That to be on overtime hours disqualifies a non-PTO replacements is not a point of contention.

email and the next day she left for England, with approved coverage for her October 21st and 23rd shifts, but without coverage for the October 22nd, 24th, 25th and 26th shifts and the scheduled 10/27/2006 – 10/29/2006 “on-call” shift.

From this scenario it seems clear that the Grievant did not fulfill her section 6 (C) obligation to cover her scheduled shifts before leaving for England. Further, the Grievant’s purchase of a nonrefundable airplane ticket neither mitigates the section 6 (C) violation nor the fact that application of the Attendance Policy’s “2 consecutive days” proviso was in order. Her decision to purchase the ticket was premature. To her detriment, the Grievant apparently was delayed in securing qualified replacements to work her posted shifts, even though her R.N. colleagues were willing to cooperate before and after the Grievant left for England.²

Responsibility for the Grievant’s apparent last-minute and failed scramble to identify replacements should not be laid at the Employer’s feet any more than is it the Employer’s fault that, in frustration, on October 13th she declared, “I will not be trying to replace myself further...” and that on October 18th she further declared, “If I don’t have a job when I get back, it has been nice knowing you, HA HA HA...” (Employer Exhibit 2) These emailed quotes from the Grievant are compelling evidence that she knew that it was her responsibility to fill her posted shifts and that she knew that her failure to work the posted shifts could result in serious discipline, possibly discharge. These conclusions are corroborated by the Grievant’s decade-long employment at the hospital and all of this serves to

² The record is replete with testimony about co-workers discussing coverage of the Grievant’s “on-call” shift. What is relevant in this respect is that the Grievant had not firmed up supervisor-approved coverage for this shift before leaving for England.

discount the significance of the Union's point that the Grievant was never warned that her departure to England could result in discipline. Simply put, she knew better.

Further, the Union's suggestion that the Grievant successfully found replacements to work her posted shifts cannot stand in the face of the record evidence. She had not found replacements. Her failure to work the scheduled shifts, without having found replacements, was a violation of section 6 (C) in the CBA. More seriously, her willful decision to absent herself does amount to "job abandonment," as defined by the Employer's Attendance Policy. In this respect, the undersigned is not persuaded that merely because the Grievant worked two-and-one-half shifts after returning from England implies that the Employer, at least initially, did not consider her behavior to be "job abandonment." Delays like this are not uncommon. As much as anything they are a fact of industrial life given the nature of large-scale organizational bureaucracies.

Still further, the Union claims inconsistent and disparate treatment in the administration of discipline under the Employer's Attendance Policy. Specifically, the Union cites the case of Kristine Riley, R. N. who the Union claims was a chronic no-call, no-show. The Union offered Union Exhibits 8, 9, 10, 12 and 13 in support of this claim, but these exhibits fail to support same. But Union Exhibit 11 appears to do so. On April 27, 28 and 29, 2007, Ms. Riley was a no-call, no-show for three consecutive days and, apparently, as the Union suggests, she was not disciplined or discharged. However, Marlis Brummond, R.N., Director, Critical Care/Patient Care, explained, without contradiction, that Ms. Riley was not

disciplined or discharged because she had “resigned” on April 26, 2007, after being advised that she would be dismissed “... if she failed to pay her MNA dues.” (Employer Exhibits 9, 10 and 11) Moreover, the Union’s claim that the Employer’s Attendance Policy previously had not been applied to the Grievant and to other RNs must be dismissed for lack of probative evidence.

Lastly, the undersigned gave consideration to the Union’s pleading that the Grievant is a good nurse who made a mistake and, therefore, her dismissal was too harsh of a punishment. Consideration was also given to the Employer’s argument that the Grievant knowingly engaged in self-help, abandoning her patients, co-workers and her job, and that such unprofessional conduct cannot be condoned in a hospital setting, which explains why the Employer’s job abandonment policy is so strict. But in the final analysis the undersigned’s decision in this case is guided by the fact that, as charged, the Grievant knowingly violated section 6 (C) of the CBA and in doing so she also became subject to the “2 consecutive days” standard for “... job abandonment and a voluntary quit” as set forth in the Employer’s Attendance Policy. Further, the Grievant’s longevity and Union’s claims of discriminatory or disparate treatment do not serve to mitigate the Employer-imposed penalty. Accordingly, the evidence supports a finding that the Employer’s actions in this case were for just cause. The Grievant’s good work record notwithstanding, the undersigned is not prepared to substitute a more lenient form of discipline for the Employer’s “voluntary quit” determination: There is no reason to believe that the Employer

would have treated any other R.N. with a good work record any differently than it treated the Grievant.

VI. The Award

As discussed above, the Employer had just cause for terminating the Grievant's employment: She abandoned her job. The grievance is denied.

Issued and ordered on this 26th day of
October 2007 from Tucson, Arizona.

Mario F. Bognanno, Labor Arbitrator