

**IN THE MATTER OF ARBITRATION
BETWEEN**

**AFSCME, AFL-CIO, MINNESOTA
COUNCIL No. 65**

Union

and

**FALLS MEMORIAL HOSPITAL,
INTERNATIONAL FALLS, MINNESOTA**

Employer

**ARBITRATION DECISION
AND AWARD
FMCS Case No. 071121-51479-5
(Dunn Suspension)**

Arbitrator: Andrea Mitau Kircher
Date and Place of Hearing: March 12 and 13, 2007
International Falls, MN
Date Record Closed: April 30, 2007
Date of Award: June 1, 2007

APPEARANCES

For the Union:

Teresa L. Joppa
Staff Attorney
AFSCME, Council 65
3911-7th Street South
Moorhead, MN 56560

For the Employer:

Brett A. Geary
Regional Manager
Clemans, Nelson & Associates, Inc.
411 W. Loveland Ave.
Loveland, Ohio 45140

INTRODUCTION AND JURISDICTION

The Falls Memorial Hospital (“Employer” or “Hospital”), located in International Falls, Minnesota, and the American Federation of State, County and Municipal Employees, AFL-CIO, Minnesota Council 65, (“Union”) are signatories to a labor agreement (“Contract”) effective through October 31, 2007. The Union represents all

Licensed Practical Nurses employed in the Hospital. Debra Dunn, LPN, (“Grievant”) is employed by the Hospital and is a Union member.

The Grievance was duly filed August 28, 2006. Both parties participated in the Grievance process, but were unable to resolve the dispute, and it was referred to arbitration in accordance with Article 18 of the Contract. The parties selected the undersigned arbitrator from a Federal Mediation and Conciliation Services list.

A hearing was held at the Falls Memorial Hospital on March 12 and 13, 2007. At the hearing, the arbitrator accepted exhibits into the record; witnesses were sworn and testimony was presented subject to cross-examination. The parties agreed to file briefs simultaneously on April 17, and later extended that date until April 30, 2007. The record closed upon receipt of the last submission on May 3, 2007.

FACTS

A. BACKGROUND.

The Hospital first hired the Grievant, Debra Dunn, L.P.N., in July 1974, and she has worked there continuously for thirty-two years. Prior to August 2006, her personnel record is devoid of disciplinary actions.¹ Her performance reviews and the testimony of her reviewing supervisor, Barbara Hell, show that the Grievant achieved a high degree of excellence in job performance.² The Grievant received commendations for her work from the Employer (“Employee of the Year in 2000, Union Exhibit 2) and many written thank you notes from patients.³

¹ Testimony (“T.”) of Supervisor, Barbara Hell.

² T., Barbara Hell, Joint Exhibits 6 F and H.

³ Union Exhibit 7, representative samples of thank you cards.

Nonetheless, some of her co-workers reported that they were intimidated, annoyed or otherwise upset by her communications style.⁴ The Grievant questioned supervisors and lead workers about their methods.⁵ When these communications were received unenthusiastically or ignored, the Grievant became frustrated, and tense.⁶ The Grievant believes that any brusqueness in her manner was caused by frustration with co-workers who did not take pride in their work, causing a declining level of patient care, and failure of supervisors to deal with these issues in a helpful manner.⁷

During a regular shift, patient care is done on a “team” basis. The team includes one R.N., one L.P.N. and one Certified Nursing Assistant (“C.N.A.”). The Grievant was insistent about meeting patient needs on a timely basis and was prone to undertaking the work of others when she perceived that they were not moving fast enough or were not paying sufficient attention to patient needs.⁸ She believes her job includes acting as a patient advocate so each patient can get the best care possible.

On August 26, 2006, the day on which the incidents leading to discipline arose, the R.N. on the Grievant’s team was a new employee, Justina Lehman, and “Nancy” was the C.N.A. Ms. Lehman, a young woman just out of Nursing School, had been working for about three months at the Hospital, and as R.N., was in charge of the patient care team including the Grievant. The two had known each other for years. In fact, the Grievant had helped in the obstetrical delivery of Ms. Lehman. Ms. Lehman was very eager to

⁴ Testimony (“T.”) of Kim Kucera, Director of Patient Services. T. Kristin Logdahl, R.N.

⁵ For example, the Grievant asked Wayne Guba, Supervising Nurse, why he had assigned another nurse to take care of a patient with a staph infection on August 26 when each team would otherwise have had responsibility for the same number of patients. He did not reply.)

⁶ Performance Reviews of 2005 and 2006, T. Grievant and Hell.

⁷ Memo from Grievant to her supervisor, dated Aug. 19, 2005, Exhibit 6 G.

⁸ T. Debra Dunn

learn new things, and “looked up to” Ms. Dunn”.⁹ Ms. Lehman also took every opportunity to try new and different tasks, sometimes in place of her assigned tasks, a fact that Kim Creed, R.N., had previously reported to Nursing Supervisor Guba.¹⁰ There is no evidence that Supervisor Guba took any action to redirect Ms. Lehman’s energy.

B. INCIDENTS OF AUGUST 26, 2006.

The Grievant’s description of the early part of her day on August 26, 2007, included the following observations: The C.N.A. was not doing vital signs as she should. Ms. Lehman was not going to patients’ rooms on a regular basis to assess the patients. The Grievant gave three baths. One should have been done by a different nurse, and two should have been done by the CNA. It was not the Grievant’s responsibility to tell the CNA to do these baths, so she did it herself because it needed to be done. It is the R.N.’s job to assign tasks. Thus, from the Grievant’s perspective, she was doing more than her fair share of the team’s patient care work and had no authority to do anything about it, because she was the L.P.N. on the team, not the R.N.

During the day, the Grievant was unable to locate Ms. Lehman when she needed her to authorize medication and communicated with her by e-mail. It was unusual for Ms. Lehman to be unavailable. All the patients are on one floor, and so is the ER and OB department. If Ms. Lehman was elsewhere, the Grievant believed she should have been informed. “It’s a matter of respect,” she testified.¹¹ Ms. Lehman felt that the e-mail communications demonstrated Ms. Dunn’s disapproval of her.¹²

⁹ T., Justina Lehman

¹⁰ Letter from R.N. Kim Creed to Nursing Director Kucera during investigation of grievance facts, August 28, 2006.

¹¹ T., Dunn

¹² T. Lehman

Both Ms. Lehman and the Grievant testified about the two unfortunate conversations between them on August 26. Their memories of the words spoken were substantially the same. Grievant said to Ms. Lehman either, “You aren’t on our team today,” or “We aren’t working as a team today.”¹³ The comment was made late in the morning in the “med room”, and in the presence of another LPN, Linda Salo. This criticism, which Ms. Dunn believed was made in a gentle manner, was heard by Ms. Lehman as a harsh criticism. She was very upset.

Later in the day, a second incident occurred between the two employees. Ms. Lehman was in an OB patient’s room educating her in the use of a bulb syringe. Ms. Dunn came into the room. Ms. Lehman introduced her to the patient by saying something to the effect of, “Here’s the guru of mom’s and babies. Do you [Ms. Dunn] have anything to add?” Ms. Dunn felt she was being put on the spot, which made her uncomfortable. So she replied, “I already showed her that yesterday.” Ms. Lehman took the rejoinder as an additional criticism. She left the room and called her Aunt Judy Junker, Director of Nursing at the local community college. Ms. Lehman was crying and very upset. She felt bullied, intimidated and incompetent. She felt sick to her stomach.¹⁴

Instead of advising her supervisor, Mr. Guba, that she was upset, she spoke to two older nurses, Kim Creed and Kristin Logdahl, to get their advice. She told Ms. Creed that the Grievant had “belittled her, berated her and made her feel incompetent” in front of a patient.¹⁵ Both nurses passed this information along to Mr. Guba. He interviewed Ms. Lehman who advised him she did not want him to do anything about her complaint, and

¹³ The Grievant said she had not intention of hurting Lehman’s feelings. “I wouldn’t hurt her feelings for the world”. T., Grievant.

¹⁴ T., Lehman

¹⁵ Creed’s notes, Exhibit 6 M

she did not wish to speak to Ms. Dunn any further. She refused to meet with the Grievant and instead, resigned her position by e-mail before her next shift, saying that she could not work in such a hostile atmosphere.¹⁶

That night, one of the nurses to whom Ms. Lehman had spoken at work, Kristin Logdahl, R.N., phoned Patient Services Director Kucera at home. Ms. Logdahl did not like the way the Grievant had treated her in the past. When she heard Ms. Lehman's story, it reminded her of her own experiences with the Grievant. She described the Grievant's behavior toward her as "harassing and needling." Ms. Logdahl strongly urged Ms. Kucera to do something about the Grievant's "intimidating and bullying" conduct. At the hearing, Ms. Logdahl stated that in her opinion, the Grievant is one of a group of bullies who try to intimidate others in the workplace.

C. THE ADMINISTRATIVE RESPONSE.

Director of Patient Services Kucera has worked at the Hospital for 17 years, but has been Director for only one year. She is an R.N. with a master's degree. Ms. Kucera oversees four nursing supervisors including Wayne Guba. Ms. Kucera investigated the complaint about the Grievant, signed the Written Warning with Suspension imposing the sanctions, and conducted the disciplinary meeting.

When Ms. Kucera received the phone call from Ms. Logdahl on August 26, she heard facts that led her to believe that Ms. Lehman should not have been treated as described. She called Mr. Guba to discuss the matter. He advised her that he had spoken to Ms. Lehman but not the Grievant. Ms. Kucera later interviewed Ms. Lehman, and Kim Creed, R.N. She asked Ms. Creed, who had spoken to Ms. Lehman first, to write up her recollections. Ms. Kucera did not talk to the Grievant to hear her side of the story.

¹⁶ T., Lehman and Kucera

She did not speak to Linda Salo, L.P.N., who had heard the first alleged critical comment. She did not interview the new mother who had heard the second alleged critical comment. She conferred with Laura Hopkins, Vice President of Patient Services to advise her of the Grievant's "continuing misconduct".¹⁷

Ms. Kucera stated that she had "frequently done verbal coaching" regarding the Grievant's communications with staff, but the Grievant did not recall such discussions, and there is no documentation of the alleged verbal coaching. The only written record of complaints about the Grievant's behavior were in forms called "360's" that were used in 2005 to get several co-workers' opinions of each other's performance. Employees were told these comments would not be used as a basis for discipline. Ms. Kucera stated that she did not rely on the 360's when she made the disciplinary decisions in August, 2006.

The written warning and suspension upon which this grievance is based states that the Grievant had "Failed to meet standards of performance for courtesy and respect." The Grievant had received Standards of Performance and other documents specifically stating that courteous behavior was required in the workplace. Ms. Kucera, on behalf of the Employer, explains in the document that the Grievant's tone of voice and body language accounted for the perceived severity of the violation.

The Grievant did not consider her comments discourteous and was shocked to learn for the first time at the disciplinary meeting that she had hurt Ms. Lehman's feelings and that she was being disciplined for the comments she made to Ms. Lehman. The Grievant believed that as a first step, someone in management should have brought the two of them together to try to work this out.

¹⁷ T., Kucera

After these events, the Grievant stated that she “had a melt down”. She couldn’t quit crying and couldn’t sleep; she has lost 20 pounds and missed three weeks of work as a result. She has gone to counseling and is on medication, but feels very insecure at work, as if she is “walking on eggshells.” She stated sadly that she does not feel like she is the “valued and esteemed co-worker” described by Laura Hopkins earlier in the hearing.

ISSUE

Did the Employer have just cause to issue a written reprimand and a one-day suspension to Debra Dunn on August 28, 2006?

RELEVANT CONTRACT PROVISIONS

ARTICLE 19

PROGRESSIVE DISCIPLINE

- A. No nurse shall be disciplined, suspended, or discharged except for just cause. It is understood that discipline will be constructive in nature with the objective of helping the nurse improve her or his performance. To this end, counseling shall be utilized as a continuing method of correcting performance problems.
- B. Except in cases involving serious misconduct, the Hospital will observe the following measures of progress [sic] discipline:
 - 1. Verbal warning;
 - 2. Written Warning;
 - 3. Suspension;
 - 4. Termination.
- C. Suspension for just cause shall be preceded by written warning. Discharge for just cause shall normally be preceded by a suspension. Written warnings and suspensions shall become invalid as a basis for proceeding to the next step in the progressive discipline sequence after twelve (12) calendar months have elapsed.

...

The Employer also relies on Article 22, the Management Rights clause:

ARTICLE 22
MANAGEMENT RIGHTS

Except as specifically limited by this Agreement, the management of the Hospital and the direction of the working forces shall be vested solely and exclusively in the Hospital. This provision shall include, but is not limited to: the right to hire; to determine the quality and quantity of work performed; to determine the number of employees to be employed; to layoff employees for cause; to assign and delegate work; to enter into contracts for the furnishing and purchasing of supplies; to maintain and improve efficiency; to require observance of Hospital rules, regulations, retirement, and other policies; to discipline or discharge employees for cause; to determine the number of hours to be worked; and to determine methods and equipment to be utilized and the type of service to be provided. The Hospital shall have the right to make work rules and policies, provided that changes in such rules shall be reduced to writing and furnished to the Union as soon as possible for its information and made available to employees and provided that they do not violate any provisions of this Agreement.

UNION POSITION

The Union argues that the Employer failed to show that the Grievant violated a specific rule or policy in making either or both of the remarks made to Ms. Lehman. The Union claims that the comments alleged did not rise to the level of “harassing behavior” as defined in Employer Exhibit 6C. The Union maintains that the two comments do not constitute a “continuing pattern of unwelcome behavior that unreasonably interferes with the employee’s job performance or creates a work environment that is intimidating, hostile or offensive.” The Union further alleges that the conduct did not amount to violation of the “teamwork” standard of performance because the Grievant was trying to encourage teamwork and professional courtesy rather than discourage it. Nor, the Union alleges, did the Grievant make negative comments about fellow employees in the presence of a patient in violation of the rules.

The Union argues that the investigation of this matter was defective, violating due process requirements, and the discipline was not progressive as required by the Contract. Further, the Union argues, if discipline is to be “constructive in nature with the objective of helping the nurse to improve her or his performance” then it should not have the effect of bewildering or demoralizing the nurse being disciplined. This discipline is unduly harsh for a 32-year employee with a clean record, the Union claims, and if the Employer views this as “offensive language”, it has been inconsistent in not punishing others for other incidents when offensive language has been used. The Union asks that the discipline against the grievant be reversed.

EMPLOYER POSITION

The Employer claims that it had just cause to write up and suspend the Grievant, because the evidence establishes that the Grievant behaved in a rude and intimidating fashion, rather than with “courtesy, dignity respect, and professionalism” as required by the Employee Handbook and standards of performance. Rude and intimidating verbal conduct is not conducive to a healthy work environment, and the Employer claims that this conduct was “serious misconduct” which overrides the need for earlier progressive discipline steps under the Contract. The employer argues that the written warning and one day suspension was an appropriate penalty given the severity of the offense and the continuing nature of the misconduct. The suspension serves as corrective action for the Grievant and sends a message to other employees that the Employer will not tolerate such inappropriate behavior.

DISCUSSION AND DECISION

As a general rule, an employer establishes “just cause” for a suspension when it demonstrates that it acted in a fair and reasonable manner in terms of due process and that its prior attempts to utilize progressive discipline have not been successful in changing the misconduct alleged. The professed goal of expecting courteous behavior among its employees is a worthy one, and the Employer argues that the Grievant has failed to meet that expectation.

The Employer did not show that the incidents of August 26 were sufficiently discourteous to warrant suspension of an employee with a clean work record. Ms. Lehman testified about two comments the Grievant made to her that upset her on August 26. The first was something to the effect of “You aren’t working on our team today.” This comment does not constitute discourteous behavior rising to the level of misconduct. Other employees testified that they had told someone that they weren’t performing well as a team on a particular day, and no disciplinary action resulted. Instead, the co-workers discussed the issue together or with a supervisor and the problem was corrected. Standing alone, such a comment is not normally resolved through the disciplinary process. The second comment, “I already showed her that yesterday” was made in front of a patient. This could have been said in a rude or abrupt way. Ms. Lehman testified that she felt “attacked” by this remark. Her extreme reaction to these comments was clear, but the mere fact that she felt such severe strain cannot be the basis for suspending the Grievant. Rather than focusing on the feelings of the person who receives the comments to determine a reasonable Employer response, the intent of the commentator has traditionally been the focus of inquiry when determining whether discipline meets

just cause standards in the area of discipline for derogatory comments. COMMON LAW OF THE WORKPLACE, Second Edition, BNA, (Theodore J. St. Antoine, Editor, 1999) at 209.

In reviewing the reasons for the severity of the Employer's response to the facts set out above¹⁸, it appears that the following circumstances may have unreasonably influenced the decision:

- Ms. Lehman called her Aunt Judy Junker, Director of the local college nursing program, to tell her how distraught she was on August 26. The Hospital had a working relationship with Ms. Junker and the nursing program. The Hospital may have wished to correct its image in the community through its response to Ms. Lehman's complaint.
- The Grievant had annoyed co-workers in the past, including Ms. Kucera who was charged with making a fair investigation and decision in this matter.
- Ms. Kucera's information about the incidents was received from Ms. Logdahl, who testified that she had difficulties with the Grievant's manner in the past. Ms. Kucera also spoke to Mr. Guba as part of the investigation, and he had only heard Ms. Lehman's side of the story as told by Ms. Creed, Ms. Logdahl and Ms. Lehman. At the hearing, his recollection of the incidents was substantially different from either of the actors involved, so his testimony is given little credence. (He recalled that the incident in the patient's room had to do with breast feeding, not the bulb syringe as both participants recalled, and that Ms. Lehman had said to the Grievant, "She still has some questions", to which the Grievant allegedly replied: "You're the RN. You show her.")

These factors may have influenced the nature and severity of the Employer's response to the detriment of the due process rights of the Grievant, discussed below.

Just cause for discipline requires the Employer to establish that due process safeguards were met. Due process requires fair warning to the Grievant that certain conduct must be corrected or discipline will result. Unfortunately, there is virtually no record of a continuous course of conduct addressed by progressive discipline to correct

¹⁸ The disciplinary document, Joint Exhibit 6 K, includes additional statements attributed to the Grievant, but the Grievant credibly denied making those remarks, they are not included in Ms. Creed's memo to Ms. Kucera, and Ms. Lehman did not mention them at the hearing.

that conduct. Ms. Kucera did not record the dates or content of any “counseling” sessions with the Grievant specifying which of her communications were considered rude or intimidating.¹⁹ There is no evidence that she told the Grievant that if she continued to make comments of this sort that disciplinary action would be taken.²⁰ The Grievant agreed that courteous behavior was necessary and did not appear to believe she had been discourteous. She believed she was being helpful to the patients.²¹

The only record of an attempt to bring a communications problem to the Grievant’s attention is in her 2005 performance evaluation, and that issue was cleared up within the year. In 2005, Ms. Hell, the responsible supervisor, indicated that, based on input from the 360 forms, the Grievant needed to improve her skills in methods of communicating with staff:

Debbie anticipates patient needs and at times feels discouraged when patient cares are not done in a timely manner, because of her commitment to excellence. Debbie needs to find a way to discuss this in a positive manner with the staff involved or the chain of commands.²²

This matter was discussed and the Grievant prepared a written response that explained that there were certain problems with the “team approach” that some supervisors had not addressed.”²³ She concluded that she gets frustrated when other team members do not do their part:

“I then, feel obligated to go beyond my duties as a medication nurse and take on more than is expected of me because our patient’s [*sic*] deserve the best care that we can provide.”²⁴

¹⁹ T., Kucera.

²⁰ Joint Exhibit 6 E provides that performance feedback sessions and verbal warnings should be documented.

²¹ T., Dunn

²² Performance Review, 2005; Joint Ex. 6 F.

²³ Joint Ex. 6 G.

²⁴ Joint Ex. 6 G.

In the 2006 performance review, Ms. Hell again addresses this area of concern, stating “Debbie has much improved on her communication style with co-workers when frustrated with the cares”, and gives her an over-all performance score of 92%. This review was signed on August 5, 2006. With such positive feedback the first week in August, by August 26 the Grievant could not possibly have been on notice that Hospital administrators considered her an employee with a continuing problem of misconduct in the area of communicating with her co-workers.

To justify its failure to employ earlier steps in the progressive discipline process, the Employer claims these comments constituted “serious misconduct”, an exception to the Article 19 requirement that the Employer will try to change unsatisfactory employee behavior by counseling and progressive discipline. “Serious misconduct” applies to disciplinary actions in cases where a sudden, serious turn of events occurs that is beyond the reach of step by step corrective measures. These cases usually involve conduct like theft, fraud, or physical violence. Otherwise, as in this Contract, the Employer is charged with notifying an employee that some aspect of her work is not acceptable or that certain conduct is inappropriate. The reason is that such problems are considered correctable through specific counseling and progressive discipline. It is not usually “serious misconduct” to make a critical, sarcastic or abrupt comment to a co-worker, or even two such comments in one day. That Ms. Lehman made inferences about Ms. Dunn’s intent in making these comments, became distraught, and quit her job are unforeseen results that do not transform the comments into serious misconduct. The Grievant believably testified that she liked Ms. Lehman and did not intend to hurt her feelings. The Grievant

was focused on improving the teamwork and efficiency of a new employee in the area of patient care.

The Employer claims that use of inappropriate language can be “serious misconduct.” Arbitration cases involving censure for using inappropriate language are usually about “threats, provocations, profanity and racial epithets.” Discipline and Discharge in Arbitration, Norman Brand, ed. BNA, 1998 at 277. The statements made by the Grievant are of a different nature. The Employer suspended the Grievant for using language that is neither inherently threatening, provocative nor profane. The Employer suggests that the statements were made more serious than they appear because of the Grievant’s body language or tone of voice.²⁵ No evidence established the specifics of this claim. At the hearing, the Grievant did not display an abrasive manner or lose her temper. She spoke in a quiet, contained voice. Yet even if we assume facts not in evidence, that Grievant glared or spoke in a loud voice, or raised her fist when she spoke to Ms. Lehman, these statements are not threats, or provocations, or in any sense serious misconduct that should exempt the Employer from its agreement with the Union to utilize progressive discipline. The loss of one new employee and the emotional collapse of another are the type of results that progressive, consistent discipline are designed to avoid.

The Employer did not meet its burden of establishing that the Grievant was suspended for a single incident of serious misconduct. Except in the most severe cases, the Contract requires progressive discipline in the form of oral and written warnings prior to a suspension. Here, issuing a written warning and a suspension the same day does not meet that requirement, because progressive discipline is designed to rehabilitate an

²⁵ Joint Exhibit 6 K

employee and she was given no opportunity to demonstrate whether the corrective written warning might have the desired effect.

In conclusion, the Employer failed to show that the Grievant was given fair notice of the specific behavior that would not be tolerated, because shortly before these incidents she received an excellent performance review advising her that she had corrected her communications problem. Additionally, the investigation of Ms. Dunn's alleged misconduct was defective. In a matter such as this, the investigator should have interviewed the Grievant before a disciplinary action was taken.

The evidence does not support the theory that the Grievant engaged in serious misconduct. If the Employer wishes to discipline employees for discourteous behavior, it must do so consistently and use the progressive discipline model agreed to in the Contract.

AWARD

The Grievance is sustained. The Grievant shall be reimbursed for the one-day suspension. The one day suspension without pay and the written reprimand shall be rescinded and all mention of the same shall be removed from Ms. Dunn's personnel files and any other files maintained by the Employer.

Dated: June 1, 2007

Andrea Mitau Kircher
Arbitrator