2005 WL 2977589 (Arb.)

IN THE MATTER OF ARBITRATION BETWEEN UNIVERSITY FOREST MANOR L.L.C. AND SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 2000, AFL-CIO
Arbitration Decision

August 5, 2005

DIRECT APPOINTMENT

M, GRIEVANT

BEFORE MARK W. SUARDI, ARBITRATOR

APPEARANCES:

For the Employer: **Andrew** J. **Martone**, Attorney at Law

For the Union: Anthony Condra, Legal Counsel

AWARD OF ARBITRATOR

This is a voluntary labor arbitration by and between UNIVERSITY FOREST MANOR L.L.C., hereinafter referred to as "Employer' and the SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 2000, AFL-CIO, hereinafter referred to as "Union.' The arbitration pertains to a grievance (Jt. 2) filed by Employee M, hereinafter referred to as "Grievant.' The grievance protests the Grievant's termination from employment by notice dated December 19, 2003 (Emp. 7).

The Notice of Termination prompted a grievance (Jt. 2) which proceeded, through the negotiated steps of the parties' Collective Bargaining Agreement (the "Agreement')(Jt. 1). The Employer's disciplinary action also prompted an unfair labor practice charge (Jt. 4).

Ultimately, the grievance came on for hearing before the undersigned Arbitrator, who was directly selected by the parties. The arbitration hearing was conducted at the offices of the Employer's counsel in St. Louis County, Missouri on May 23, 2005. At that time, each side presented its respective case through sworn and transcribed testimony, plus various exhibits. Following the hearing, each side submitted a capable brief.

BACKGROUND

At all times relevant, Grievant was a Certified Nurse's Aid (CNA) attached to the Employer's University Forest facility. She had previously transferred to University Forest from University Manor in October, 2002 (Emp. 5). Her scheduled shift was between 7:00 a.m. and 3:00 p.m.

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Grievant was also the principal caregiver for her daughter. Due to an unfortunate child abuse situation, the Missouri Division of Family Services was involved in her daughter's welfare. So far as appears, Grievant was frequently late to work due to the need to place her daughter on the bus, and for other reasons.

The parties dispute whether Grievant had blanket approval from Management to start her shift later than the scheduled 7:00 a.m. start time. Grievant does not deny being tardy on several occasions, including lengthy tardies in November and December, 2003 (Emp. 1). Grievant received written warnings on May 22 and May 23, 2003 for excessive absenteeism and improper conduct, respectively (Emp. 6).

Director of Nursing M began at the University Forest facility on September 27, 2003. Ms. M agreed that she saw a November 7, 2003 note drafted by the Grievant. The note indicated that she would not arrive at work until about 8:30 a.m. Ms. M denied seeing the note until she received it from the Unemployment Office. Ms. M agreed that Grievant had asked for a couple of weeks to clear up the issue of her attendance.

On December 16, 2003, various Union representatives, including Base Representative C and the Grievant, met with Administrator P to complain about a supervisor, S. Ms. P requested that the problem be put into writing. According to the Grievant, after this meeting Director of Nursing M began acting cold toward her.

On December 17, 2003, Ms. M and T met with Mr. C, Grievant and Ms. M. The memo of the meeting (Emp. 2) indicates that the employees were told they must work the scheduled 7:00 a.m. to 3:00 p.m. shift, and that tardies would be answered in accordance with the Employer's policy directives (Jt. 3).

Grievant was issued a three (3) day suspension for tardiness on December 19, 2003. Ms. M testified that she made the decision to discipline the Grievant, then asked for two co-workers (T and W) to witness the issuance thereof. The parties dispute whether Grievant asked for a Union steward at the commencement of the meeting. Grievant says she did. Ms. M says she did not. In any event, Grievant was issued the three (3) day suspension notice at that time (Emp. 3).

There is a wide divergence in testimony concerning what happened after the Grievant was issued the suspension notice. The two competing versions of the events, as articulated by Ms. M and the Grievant, are set forth below:

Ms. M

According to Ms. M, Grievant became extremely upset and belligerent, and she began swearing (i.e. "This is a bunch of bullshit and you're just picking on me "); she called Ms. M a "bitch,' and then Grievant requested a shop steward. Ms. M testified that she told Ms. W to let Grievant call Steward M, then Ms. M left. Ms. M agrees she did not immediately fire the Grievant at that time, even though Article 7.C of the Agreement would arguably have permitted such action.

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Ms. M testified that when she later saw the Grievant, Grievant resumed using profanity (i.e. "This is a bunch of fucking bullshit; you're picking on me '). Also, Grievant forcefully pushed Ms. M in front of patients and employees. Still later, at the reception desk, Grievant again used profanity, criticized Ms. M' hairstyle, and threatened her ("take this shit outside so I can kick your ass').

Ms. M ordered that the police be called. When the police arrived, Grievant was not arrested. Rather, she was allowed to wait outside for Steward M.

Grievant

According to the Grievant, Ms. M' animosity over the complaint about S, referenced above, resulted in retaliation in the form of the suspension and subsequent termination. Grievant recalled telling Ms. M about her prior agreement with former Administrator C concerning attendance and tardies. Grievant added that Ms. M herself had permitted Grievant to be late.

Grievant added that when the suspension was issued during the first meeting on December 19, she (Grievant) was denied a shop steward despite her request. Grievant stated she never cursed during the meeting. Grievant further denied ever cursing, threatening or hitting Ms. M. In fact, Ms. M gave Grievant "the finger,' which prompted the comment about Ms. M' hair.

Grievant denied that Administrator P ever inquired into the facts of the case during the second meeting on December 19. It was for these reasons, and because of her status as a Union steward, that Grievant filed the unfair labor charge referenced above.

ISSUE

Was the Grievant terminated for proper cause? If not, what shall the remedy be?

PERTINENT CONTRACT PROVISIONS

ARTICLE 6. MANAGEMENT

The Management of the facility and the direction of the working force, including the right to hire, promote, discipline, suspend, transfer or discharge for proper cause, and the right to schedule hours, schedule overtime work, and the right to relieve members from duty because of lack of work or for other reasons, is vested exclusively in the Employer.

ARTICLE 7. DISCIPLINE AND DISCHARGE

A. The Employer will only discipline or discharge employees with sufficient cause.

B. In disciplining and discharging employees, the Employer will utilize the tenants of progressive discipline. However, the level of progressive discipline to be used will depend on the severity of the misconduct.

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C. The following offenses will result in immediate termination. These things include, but are not limited to:

2. Gross insubordination;

4. Engaging in violent behavior or making threats of violence of any kind.

ARTICLE 8. GRIEVANCE PROCEDURE

Section 4. In arriving at a decision, the Arbitrator shall not have the power to delete from, add to, or in any way modify the provisions of this Agreement. The Arbitrator's decision will be final and binding upon both parties, providing the decision complies with the above and is confined to an interpretation or application of the express and specific terms and conditions of this Agreement.

EMPLOYER CONTENTIONS

The Grievant was discharged for just cause. Her insubordination involves serious misconduct. As a supervisor, Ms. M' recollection of events should be credited over the Grievant's self-serving testimony. Further, Ms. M was credible, while the Grievant was not.

Ms. M did not harbor ill will toward the Grievant, nor was she even involved in the grievance meeting concerning Ms. S. Even witnesses C and M testified that Ms. M did not retaliate as a result of the meeting about Ms. S. On the other hand, Grievant had a strong incentive to falsify her testimony, as M had suspended her for three days for tardiness.

Grievant's claim of retaliation is unfounded. Though familiar with the bargaining agreement, Grievant did not list retaliation on her grievance, nor did she contend that Ms. M had falsely accused her. In fact, the written grievance does not deny that the misconduct took place. Grievant's conjecture regarding a conspiracy is insufficient to support her claim. Moreover, Ms. M' testified that she understood stewards might go directly to Ms. P to discuss Union matters.

The Employer did not violate the Grievant's Weingarten rights. Ms. M testified she had already made up her mind to suspend the Grievant at the time of the initial meeting on December 19. Likewise, Ms. M credibly testified that the Grievant denied needing Union representation. It was only after the discipline was issued that Grievant requested a steward.

Management's reasonable attempt to curb Grievant's habitual tardiness resulted in her gross insubordination. She shoved and threatened Ms. M. She also yelled profanity in front of residents. Her testimony that she did not engage in the cited misconduct should be rejected.

The grievance should be denied.

UNION CONTENTIONS

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The Employer cannot prove the fact of misconduct, the fairness of its investigation, or the reasonableness of its choice of discipline. Under whatever standard of proof is applied, the Employer's case was procedurally unfair. Further, the Employer's witnesses are undeserving of belief.

The Grievant is a good employee. She is also an active Union steward. Ms. M knew of the Grievant's situation at home. There is nothing documented about any offer to allow Grievant to change her starting time. Rather, Grievant asked for a couple of weeks to accommodate the situation, which Ms. M approved. Grievant's difficulties had also been accommodated under Administrator C.

Ms. M' abrupt about-face toward the Grievant came immediately after the December 16, 2003 meeting, wherein the Union criticized a member of the supervisory staff. The Grievant's testimony that Ms. M treated her coldly from that point onward should be credited. Grievant's testimony also explains the retaliation and discriminatory treatment she experienced.

Grievant was denied a Union steward at the beginning of the first meeting on December 19. Her testimony that she asked for a steward makes sense and should be credited. Equally credible is the Grievant's denial that she used profanity or had any physical contact with Ms. M.

Ms. M' self-serving attempt to justify the improper discipline she imposed should be rejected. So, too, should the Employer's attempt to justify discipline because the police were called. The Employer's discipline is excessive. It violates the tenets of progressive discipline. It is also grounded on impermissible criteria.

The grievance should be sustained and the Grievant made whole.

DISCUSSION

It is commonplace for the principal witnesses in a disciplinary case to testify differently as to the facts. Rarely, however, are the differences as pronounced as those exhibited on this record. Indeed, it is the "what really happened' aspect of the case which in large measure controls its outcome. Fortunately, the following basic principles are not disputed:

a. Employees are normally expected to be at work on time, and they can be disciplined if they are not;

b. Adequate patient care and governmental compliance standards require that employees be at work on time in order to provide patient care;

c. Profanity in the presence of patients amounts to patient abuse and patient neglect; such conduct warrants immediate termination;

d. Gross insubordination provides another ground for immediate termination; and

e. Violent behavior directed to a supervisor also justifies immediate

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termination.

What testimony remains in dispute turns entirely on credibility. [FN1]

According to the Union, the Employer's case must fail because there was no testimony, other than that of Director of Nursing M, to the alleged profanity and insubordination that moved Grievant from a suspension to termination. The Arbitrator disagrees.

Every day, arbitrators are confronted with situations where they must credit only one of two competing witnesses. The fact there is little corroborating evidence to support one version or the other does not prevent a fact finder from making the credibility "call,' however. [FN2] Ultimately, the credibility of a particular witness depends on a variety of factors, all of which must be taken into account in a given case. [FN3] The Arbitrator has done so here.

An initial problem with the Union's position is that Grievant knew as early as December 17, 2003 that Management was going to begin paying closer attention to her attendance. The fact Administrator C may have been more lenient to the Grievant has been considered, but this fact by no means prevented Management from again insisting on promptness. Having placed Grievant on notice that it would do so, Management had the right to discipline the Grievant if her attendance did not improve. Unfortunately for her, it did not. It follows that by December 19, 2003, Management had the right to discipline the Grievant in the form of a three (3) day suspension, regardless of the earlier accommodations in her favor. [FN4] So far as appears, this charge upset the Grievant.

Director of Nursing M was credible in describing her encounter with the Grievant in the hallway. True, Grievant's blanket denial of wrongdoing would, if otherwise credible, be sufficient to overcome Ms. M' claim of verbal and physical contact. However, throughout extensive direct and cross examination, Ms. M was credible. She precisely described the Grievant's profanity, the nature of the push itself, and her fall against the railing. In a nutshell, Ms. M' testimony had the ring of truth. So, too, did her version of what happened at the reception desk. The fact M did not move to terminate Grievant immediately after the hallway incident has been considered, but it in no way detracts from her overall credibility.

Both sides acknowledge that a meeting took place later in the day on December 19. There were Union and Management representatives at the meeting. The Arbitrator is persuaded that Ms. P asked the Grievant "what happened' and the Grievant replied. There was no due process violation.

As for the Grievant's Weingarten rights, the unrebutted testimony is that Ms. M had already decided to discipline Grievant before the suspension meeting itself. Under these circumstances - - where the purpose of the meeting is simply to issue a discipline already decided-upon - - there is no right to Union representation, since there is no investigative interview which might place an employee at risk. [FN5] The Arbitrator credits Management's argument on this point. But even aside from this point, Ms. M credibly described the Grievant's reluctance to have a steward present because she thought she could handle the situation herself.

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Lastly, there is a paucity of evidence to indicate that the Employer's response to the Grievant (in general) or Ms. M' choice of discipline (in particular) was intended to inhibit concerted Union activity among the rank and file. Neither was the Employer's handling of the matter indicative of anti-union bias. The fact is Stewards C and M directly contradicted the likelihood of ill will or hostility on Management's part. Both stewards testified honestly and candidly that they had no prior problems with Director of Nursing M or Ms. P. Such testimony from the Grievant's fellow Union members undermines the Grievant's testimony that Ms. M suddenly began exhibiting actionable, anti-Union hostility toward her between December 16 and December 19, 2003.

Ultimately, even a zealous steward can lose the protection afforded by Union membership when he or she violates fundamental employer rules. In this case, there was no proof of anti-Union or anti-Grievant animus. It was Grievant's anger and outburst on December 19 which prompted the Employer's disciplinary decision. She will not be heard to complain that Management failed to act progressively or treated her illegally when it decided on termination.

AWARD

The grievance is denied. SO ORDERED.

FN1 The Arbitrator cannot accept Management's blanket assertion that a supervisor's testimony is inherently more credible than an aggrieved employee. Long ago, Arbitrator R eloquently expressed what the Arbitrator has found to be the better approach when dealing with matters of interest and testimonial "spin.' He said: "Being human, both sides might be subject to the unconscious influence of self-interest, personal predilection or antipathy. It is the province and duty of the one making the decision not to engage in all-encompassing, invariable generalities, but to examine the testimony of each witness on its own merits.' Poloron Products of Pa., Inc., 23 LA 789, 793 (1955).

FN2 United States v. S,547 F. 2d 1037, 1040 (8th Cir. 1977).

FN3 See, generally, Elkouri and Elkouri, How Arbitration Works, 6th ed., pp. 413-414 (BNA, 2003).

FN4 Cf., The Crowell Corporation v. PACE Local 2-0770, 2005 WL 736676*3 (D, 2005), where the Court upheld an award reinstating an employee who was terminated for violation of a no-fault attendance policy based on a supervisor's assurance that he would overlook the termination-triggering absence.

FN5 Anchortank, Inc. v. NLRB, 618 F. 2d 1153, 1168 (5th Cir. 1980), citing AAA Equipment Service Company, 598 F. 2d 1142, 1146 (8th Cir. 1979).

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