

IN THE MATTER OF THE ARBITRATION BETWEEN

THE HENNEPIN COUNTY ASSOCIATION
OF PARAMEDICS AND EMERGENCY
MEDICAL TECHNICIANS,

Union,

and

THE HENNEPIN COUNTY
MEDICAL CENTER,

Employer.

MINNESOTA BUREAU OF
MEDIATION SERVICES
CASE NO. 09-PA-1051

DECISION AND AWARD
OF
ARBITRATOR

APPEARANCES

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On September 17 and 22, 2009, in Minneapolis, Minnesota,
a hearing was held before Thomas P. Gallagher, Arbitrator, during
which evidence was received concerning a grievance brought by

the Union against the Employer. The grievance alleges that the Employer violated the labor agreement between the parties by suspending the grievant, Kyle C. Koelin, for one week without pay. Post-hearing briefs were received by the arbitrator on October 18, 2009.

FACTS

The Employer operates a large, full-service hospital (the "Hospital") in Minneapolis, Minnesota, serving the population of Hennepin County -- the county that includes Minneapolis and most of its suburbs. The Union is the collective bargaining representative of the non-supervisory employees of the Employer who are classified as Paramedics and Emergency Medical Technicians. Paramedics operate the Employer's ambulances, usually acting in two-member crews. Since January of 2001, the grievant has been employed by the Employer as a Paramedic.

The events that led to the grievant's discipline occurred in the early morning hours of December 16, 2008, when he and his crew partner, David Johnson, also a Paramedic, were operating Ambulance 419. At about 12:19 a.m., they received an emergency call dispatching them to the site of an automobile accident that had just occurred in the westbound lanes of Interstate Highway 94, just east of a bridge over the Mississippi river. At that location, the highway is ordinarily a heavily traveled urban route between Minneapolis and St. Paul, with three eastbound lanes and three westbound lanes. The weather was poor; the air temperature was about twelve degrees below zero Fahrenheit, and accumulating snow was causing slippery road surfaces.

The grievant and Johnson, operating Ambulance 419, were at the Hospital when they received the call dispatching them to the site of the accident, a few miles from the Hospital. They arrived at the site at about 12:24 a.m. There, a two-car accident had occurred when a car driven by a woman, (hereafter, "C.E." or the "patient"*) had collided with a car to her right, driven by Stephanie Fuller. Both cars had been moving in the westbound lanes, but the collision caused them to spin around on the slippery road surface. Fuller's car came to rest against a snowbank on the right shoulder of the westbound lanes, facing west. C.E.'s car ended in the center lane of the westbound lanes facing east.

By chance, Adry H. McConnell, an Emergency Medical Technician employed by Allina Hospital, a full service private hospital in Minneapolis, arrived at the site of the accident just after it occurred. He was driving an Allina ambulance in the westbound lanes of Interstate Highway 94, taking a passenger to Allina Hospital. He stopped to ask if anyone was injured and, as he testified, he was told by three people outside the car in the center lane of the highway (people whom he did not identify further) that they were not injured. Soon after this exchange, a Minnesota State Patrol car arrived at the scene with two State Troopers. They told McConnell that they would call an ambulance from the Hennepin County Medical Center to administer

* The parties agree that this driver should be referred to by her initials or merely as the "patient," to preserve her anonymity.

to the needs of C.E., who, according to Trooper Rachel Jurek, was seated in the driver's seat of her car. McConnell left for the Allina Hospital before the grievant and Johnson arrived in Ambulance 419. McConnell estimated that he was at the site of the accident for about two and one-half minutes. The grievant and Johnson arrived at the accident site soon after McConnell left, and they began to administer to the needs of C.E.

The discipline of the grievant here at issue arose out of allegations made by C.E. that he had mistreated her after he and Johnson removed her from her car and placed her in Ambulance 419. Thomas M. Myhre, a Duty Supervisor of Paramedics, conducted an investigation of her allegations, and, on April 6, 2009, Douglas J. Gesme, Manager of Operations for the Hospital's Emergency Medical Services, issued a disciplinary letter, setting forth the reasons for the grievant's discipline. Excerpts from the disciplinary letter are set out below:

This is a letter of suspension following the investigation of misconduct as reported on December 16, 2008. The facts regarding the investigation, our findings and actions are provided below:

EVENTS

On December 16, 2008, you were working as part of paramedic crew 419. Your partner was David Johnson. At [12:19 a.m.] you were dispatched to an emergency call for a "Personal Injury Accident" at 94 WB near the Mississippi River in Minneapolis ECN# 08062200.

At the time of the call, weather conditions were poor with below zero temperatures, and accumulated snow on the roadway. You arrived on the scene at [12:24 a.m.]. You noted two MN State Patrol Troopers were on scene and blocking traffic in the "left" and "center" lanes and traffic was allowed to pass in the open right lane. You noted the patient's car was spun around in the center lane of roadway and was facing east.

You noted upon approaching the Troopers, they advised you that the person in the center lane vehicle was reported to them to have been in the "middle of the traffic screaming" but when they had arrived, they had found the person sitting in her car, staring straight ahead and would not talk to them. You noted that the car had minor damage to the front and drivers-side rear and there did not appear to be any intrusion into the passenger compartments. You also noted that the vehicles glass was intact, no obvious damage to the steering wheel and the airbag was not deployed.

You noted that you tried repeatedly to interview that patient but she would not make eye contact or verbally respond to any questions. You also noted that due to the hazardous road conditions it was unsafe to remain on the freeway any longer than necessary. You and your partner returned to the ambulance to retrieve the ambulance stretcher. You noted that you told your partner at this time that the patient may be a diabetic and that you wanted to get a blood sugar when the patient was brought back to the ambulance.

Upon retrieving the stretcher and placing it next to the patient door, you noted the patient would not talk to you other than to say, "call my brother." You responded by saying that we could call her brother when we get to the hospital but not here on the freeway. You noted the patient did not respond back or appear to hear you. You noted that both you and the female Trooper tried to talk to the patient to assist you in removing her from the car and onto the stretcher. You noted that both you and the Trooper made statements to the effect that, "It's cold, let's go to the ambulance where it is warm and we can check you out," "It's dangerous to remain on the freeway, someone could get run over." You noted that the patient would not verbally respond and comply. At this point you stated that both you and the female Trooper tried to turn the patient's legs toward the driver's door but the patient actively resisted and grabbed the steering wheel. You stated one of the Troopers noted the patient's car was still running and this presented an additional hazard. You noted that the male Trooper went to the passenger side of the car to get the keys but the door was locked. You stated that you reached in through the driver side door, turned the car off and gave the keys to the Trooper.

At this point you asked the patient to "please try and help us get you out" or otherwise they would have to remove you forcefully. You noted that the patient then turned her head and looked at you but did not respond. The stretcher was lowered and the patient was lifted out of the driver seat with minimal resistance by you, your partner and the female Trooper. The patient was placed on the stretcher and moved to the ambulance.

Once in the ambulance, the patient continued to act confused. According to you and your partner's statements, the patient's coat was removed at this time. A blood glucose check was performed by your partner on the finger of the left hand while you applied a blood pressure cuff to the right arm. At this point the female Trooper opened the back door and asked your partner if he would be able to move the ambulance in order to allow access to the patient's car by the Tow Truck. Your partner then exited the back door of the ambulance and sat in the driver seat. The ambulance was moved forward to allow the Tow Truck access to the damaged car. Upon your partner putting the ambulance in park and exiting the vehicle, you began to take the patient's blood pressure. In your written statement, you noted at this point the patient appeared to close her fist and raise her arm suddenly towards your head. You stated that you had to pull your head back to avoid being struck. You stated that you reacted immediately and restrained the patient placing your L forearm over the patients R forehead, putting your leg or knee onto her R chest and holding her other arm down. You stated that neither your partner nor any of the Troopers were present during this time you needed to restrain the patient. You noted that your partner returned to the back of the truck <10 seconds after you began restraining the patient. Upon your partner entering the ambulance, you advised him that the patient had made a fist and attempted to strike you. Your partner then assisted you in restraining the patient's arms individually to the stretcher using handcuffs. At this time you stated to the patient something along the lines of, "I remember you, you're the crazy bitch I pulled off the Metro Transit bus." Your use of the term "crazy bitch" was corroborated by your partner and [the patient].

According to your partner's statement, at this point the patient became more oriented and responded back that she had never been on a metro transit bus and that she has a car. At this point you were able to obtain some pertinent information from the patient regarding her medications and history but had minimal interaction as the patient was reluctant to talk with you. You also noted that the patient's blood sugar was normal but forgot to include this on the run report. You noted that the ED staff was advised of her blood sugar reading.

After arrival at the [Hospital's Emergency Department], the patient was evaluated by the ED staff and asked to file a complaint against you. Supervisor Myhre was contacted by the ED staff and met with the [patient] while in the ED. The [patient] stated to Supervisor Myhre that you:

- Seemed angry at her from the moment you saw her in the car.
- That she was forcefully pulled from her car by you.
- Once in the ambulance you told her, "I remember this crazy bitch from the bus stop," or something similar to this.
- After the other paramedic left the back of the ambulance, assaulted her for no reason causing her injury to her R eye/cheek area and R upper chest.

Gesme's letter gives a further description of the disciplinary investigation of the grievant's conduct and cites the following provision of the Employer's discipline policy that covers conduct of employees in Emergency Medical Services:

Employees are expected, at all times, to behave in an ethical and professional manner, which positively reflects on the department. Conduct which is below the department standard, will result in discipline ranging from a Verbal Warning to Termination.

Gesme's letter states that, as a result of the completed investigation, "the findings are as follows":

- HCMC-Emergency Medical Services has not sustained the [patient's] allegation that you were angry from the time you made contact with the patient or that you forcefully pulled the patient from the [car] other than what may have been required under normal circumstances.
- HCMC-Emergency Medical Services has not sustained the [patient's] allegations that she was assaulted by you. Although there were no witnesses to the specific actions alleged by the [patient], (other than you and the patient), you reference that as you began taking the patient's blood pressure, the patient raised her R arm with a closed fist causing you to pull back your head to avoid being struck. At this point, your partner was not present in the back of the ambulance. Based on the [patient's] and your statements, you then reacted and placed your forearm across the patient R forehead holding her head down, placed your knee over the patients R chest and arm and held down the patients L arm until your partner arrived in the back of the truck <10 seconds later. At this time you advised your partner that the patient had closed her fist and had tried to take a swing at you. You and your partner then proceeded to restrain each of the

patient's arms via handcuffs to the stretcher. It appears that during this time, after your paramedic partner had returned to the back of the ambulance, that the derogatory statement in question was made.

- HCMC-Emergency Medical Services has sustained the [patient's] allegation that you called her a "crazy bitch" while in the back of the ambulance. During the investigation of the incident, you admitted to using these words and directing it towards the patient; your use of this language was verified by your paramedic partner, David Johnson, who was present at this time. HCMC-EMS believes your use of derogatory swear words directed at the patient was unprofessional and failed to meet department expectations.

Gesme's disciplinary letter suspends the grievant without pay for eighty working hours (two weeks). It also directs the grievant to contact the Employer's Employee Assistance Program and to complete an anger management program. On April 10, 2009, the Union brought the present grievance challenging the discipline. During grievance processing, the Employer reduced the period of suspension from eighty hours to forty hours (one week).

The Employer placed the grievant on an "administrative leave" during the period of its investigation -- from December 16, 2008, till April 6, 2009. During that time, the grievant received his regular wage rate for forty hours per week, but he did not receive 1) weekend shift differentials for the weekend shifts he would have been scheduled for if he had not been on administrative leave, 2) compensation for overtime work that, according to the Union, he would have been scheduled for if he had not been on administrative leave, or 3) holiday pay.

The patient also made a criminal complaint alleging that the grievant had assaulted her at the site of the accident. The investigation of that complaint by Minneapolis Police and the State Patrol was not completed until early April, 2009.

Below are set out excerpts from the Union's grievance of April 10, 2009:

On or about December 16, 2008, [the grievant] was wrongfully placed on administrative leave. Compensation on administrative leave represented a substantial reduction in compensation he would have received had he been on active duty. The Employer required the grievant to stay on administrative leave until April 6, 2009. The Employer had sufficient investigatory data to remove the grievant from administrative leave and place him back on active duty prior to April 6, 2009.

On April 6, 2009, the Employer presented the grievant with a disciplinary letter that contained false and defamatory allegations. The allegations the Employer alleged against the grievant failed to take into consideration the danger the grievant was in on December 16, 2008. The April 6, 2009, disciplinary suspension letter, the accusations of misconduct, and the suspension from April 6, 2009, to April 18, 2009 [the period of the original disciplinary suspension of eighty hours without pay] are based on false assumptions. The letter and the suspension fails to take into consideration the danger to the grievant on December 16, 2008. It fails to take into consideration the stress applied to the grievant on December 16, 2008. It fails to take into consideration the behavior of the patient on December 16, 2008, and the patient's attempt to assault the grievant.

[The April 6, 2009, discipline violates Article 33 of the parties' labor agreement in that 1) it was not based on just cause, 2) it was not administered uniformly and consistently, 3) it was not administered progressively, 4) it was not based on gross misconduct of the grievant, 5) the Employer did not make evidence available to the Union to support the disciplinary action taken against the grievant.]

[The letter and the suspension by the Employer do not take into consideration the "irrational behavior of the patient," "the patient's refusal to cooperate," "the violent behavior of the patient," "the patient's attempt to assault the grievant," or "the false statements made by the patient."]

The grievant was required to remain on administrative leave from December 16, 2008, till April 6, 2009, with no action being taken. Prior to April 6, 2009, the Employer had sufficient evidence of the patient's wrongdoing to place the grievant back on active duty. The grievant

lost substantial compensation from December 16, 2008, to April 6, 2009. The delay in placing the grievant back on active duty was a violation of the grievant's right to due process.

ADJUSTMENT REQUIRED. The written letter of April 6, 2009, should be ordered expunged from the grievant's personnel file. The grievant should receive the loss of compensation from December 16, 2008, to April 6, 2009, due to the administrative leave. The grievant should receive his loss of compensation and benefits to which he is entitled under the collective bargaining agreement due to the unjust suspension from April 6, 2009, to April 18, 2009. Any further relief the arbitrator determines is just and proper.

DECISION

Most of the evidence about the circumstances that led to the grievant's discipline consists of testimony given at the hearing and written statements taken during the Employer's investigation of those circumstances -- statements that were presented by stipulation or without objection as to their admissibility. I find that there is little conflict in the evidence about relevant facts -- though the parties in their arguments emphasize different evidence, mirroring the differences in emphasis shown in a comparison of the grievance to the disciplinary letter. Thus, the grievance does not allege facts that are substantially different from those alleged in the disciplinary letter, but, fairly read, the essential challenge made by the grievance is that the Employer did not consider given facts as reducing the seriousness of the grievant's misconduct.

The disciplinary letter itself disposes of many of the initial complaints made by the patient -- in its determinations 1) that, contrary to her allegations, the grievant was not angry

from the time he made contact with her, 2) that the grievant did not forcefully pull her from her car other than as may have been "required under normal circumstances" and 3) that he did not assault her. In addition, the disciplinary letter seems to accept the grievant's statement that "the patient raised her [right] arm with a closed fist causing you to pull back your head to avoid being struck."

Thus, the disciplinary letter itself bases the grievant's discipline solely on its finding that the grievant called the patient a "crazy bitch" while in the back of the ambulance. Accordingly, because the discipline at issue was based only on that conduct, I do not consider as relevant the allegations of assault or other physical mistreatment of the patient.

The Union concedes that the grievant should not have referred to the patient as a "crazy bitch" -- indeed, as the grievant has conceded. On December 16, 2008, at about 12:30 a.m., just after the incident occurred, the grievant prepared an Incident Report in which he gave the following description of that conduct:

. . . At this time [after Johnson moved the ambulance] my partner entered the ambulance from the rear door and, I stated to the pt. "you crazy bitch" and my partner handcuffed pt. right arm to the cott. . . .

One of the primary arguments of the Union is that, though this statement to the patient was misconduct subject to discipline, the Employer, in assessing the seriousness of the misconduct, should have imposed less severe discipline than a suspension without pay for forty hours, in recognition that the

the misconduct occurred in unusual, stressful circumstances. The Union urges that the penalty should have been reduced because the grievant found himself in extraordinary danger from weather conditions that put him and the patient at great risk on the highway -- danger that was increased by the patient's erratic behavior as she resisted treatment.

The evidence clearly establishes the existence of these difficult circumstances -- both the danger in which all of those on the highway that morning found themselves and the patient's uncooperative behavior, perhaps caused by her fear of that danger.** The evidence also shows that the statement made by the grievant was a statement he addressed directly to the patient, such as, "you crazy bitch," as he described it in his Incident Report written within minutes of the incident -- despite the grievant's later recollection that it may have been a comment not made directly to her, but one made about her as he spoke to Johnson in her presence.

The Employer presented evidence showing that the grievant was trained to de-escalate emotional and uncooperative patients, who are often encountered by Paramedics. The Employer argues that, notwithstanding the difficult circumstances in which the grievant's conduct occurred, he, as an experienced Paramedic, should not have engaged in insulting, unprofessional conduct

** I note that the Union suggests that the patient's behavior may have been influenced by prescribed medications that were found in her car. There is, however, no evidence that she had taken the medications, and, in any case, it is the erratic behavior itself, which is clearly shown by the evidence, that is relevant and not its cause.

toward the patient and that his statement made directly to her was serious misconduct requiring for its correction at least the one-week suspension that was eventually imposed.

The Union argues that, because the grievant's employment record was without discipline and showed good performance evaluations, the Employer should not have imposed either the original two-week suspension or the one-week suspension resulting from the Employer's reduction of the penalty during grievance processing.

That reduction was made in response to the Union's argument during grievance processing that the two-week suspension exceeded past discipline imposed on other Paramedics for similar misconduct. The Union argues here that even the one-week suspension imposed on the grievant for using admittedly inappropriate language to the patient was unusually severe when compared to the discipline selected in two recent cases. In one of those cases, a Paramedic who was dispatching Paramedics and other emergency personnel received a written reprimand for a radio conversation on October 26, 2008, in which he was heard saying over the radio (though he did not intend to be heard) with reference to a female Paramedic "Are you fuckin' kidding me? Fuckin' calling up and questioning me. Fuck her." In that case, the person disciplined had received a previous oral warning on June 6, 2008, and a previous written warning on August 31, 2008. In a second case, a Paramedic was suspended without pay for twenty-four hours (three days) for having said on November 17, 2007, "shut the fuck up" to an uncooperative

patient in the Emergency Department of the Hospital, after transporting the patient there. That Paramedic, who had no previous discipline on his record, reported his conduct to his supervisor.

I accept the Union's argument that the circumstances in the grievant's case are similar to those in the latter example. There, the Paramedic who was suspended for twenty-four hours (three days) addressed an inappropriate statement to a patient, just as did the grievant in the present case. Though that case did not occur in dangerous weather on a highway, it did include an extremely uncooperative patient, who spit at the Paramedic and offered him physical resistance. The Paramedic there reported his own misconduct, showing contrition similar to that of the grievant in this case, who readily disclosed his inappropriate statement in his Incident Report, written only minutes after the statement was made. Accordingly, I reduce the period of suspension from forty hours (one week) to twenty-four hours (three days).

The Union raises an additional issue. During the Employer's disciplinary investigation of the incident, the grievant was placed on administrative leave. The period of that leave was from December 16, 2008, till April 6, 2009. The grievant did not work during that time, but he was paid his regular wage rate for forty hours per week. The Union argues that, in addition to his regular wages, the grievant should have been paid the amounts he would have earned 1) for weekend shift differentials, 2) for overtime and 3) for holiday pay that he

would have earned if he had not been on administrative leave. The Union calculates those amounts at \$1,542.43. In addition, the Union seeks payment to the grievant of \$412.67, the amount he would have been paid for attendance at education classes he would have been required to attend if he had not been on administrative leave. The Union argues that the Employer's investigation was substantially complete almost immediately after the incident and that it could have and should have decided then what discipline to impose.

The Employer makes several responsive arguments, including the following. It argues that nothing in the labor agreement requires it to place an employee under disciplinary investigation on administrative leave with pay, but that the Employer (as did Hennepin County when the Employer was an agency of the County) has followed the practice of using administrative leave when an employee is under criminal investigation or is being investigated for serious misconduct -- as was the grievant in the present case. The Employer argues that such a practice by public employers has been noted and endorsed by the Minnesota Court of Appeals in Stephen v. Board of Regents of University of Minnesota, 614 N.W.2d 764 (Minn.Ct.App.2000).

The Employer argues that no precedent requires the payment of compensation beyond a regular wage rate when an employee is on administrative leave. The Employer notes that paid administrative leave is not discipline, but, rather, that its purpose is to remove an employee who may have committed a criminal act from contact with the public during a criminal investigation, yet to pay the employee his regular wage rate

during that time. The Employer argues that, in this case, the criminal investigation of the grievant was not completed until late March or early April of 2009 and that it acted promptly after it was informed that no criminal charge would be made against him, issuing the disciplinary letter within a few days thereafter.

The Employer also argues that the placement of the grievant on paid leave should be treated as a reassignment to a schedule that did not include shift differentials or overtime -- a schedule that benefited the grievant because it provided him with his full wage rate without an obligation to do any work. The Employer notes that, except for the requirement that the grievant appear for an investigatory interview on January 30, 2009, he was not required to do any work and, nevertheless, received his regular wages during the entire period of administrative leave.

I do not award recovery of the extra amounts the Union seeks for the period the grievant was on administrative leave. Though the Employer could have decided what discipline to impose before completion of the criminal investigation, it was not unreasonable to wait for its completion -- especially in the circumstance that the grievant was receiving his regular wage rate for his regular work shift of forty hours per week while doing no work. Nothing in the labor agreement or in practice requires the Employer to make such payments to an employee who is on a paid administrative leave during a disciplinary investigation.

AWARD

The grievance is sustained in part. The Employer shall reduce the grievant's discipline to a suspension without pay for twenty-four working hours (three eight-hour days). The Employer shall not be required to pay the grievant the extra compensation sought by the Union, as described above in the Decision, for the period he was on administrative leave.

December 19, 2009



Thomas P. Gallagher, Arbitrator