

**IN THE MATTER OF ARBITRATION
BETWEEN**

**UNITED STEEL WORKERS, AFL-
CIO-CLC, LOCAL UNION 9349**

and Union,

**RANGE REGIONAL HEALTH SERVICES –
FAIRVIEW MESABA CLINIC,**

Employer.

**ARBITRATION DECISION
AND AWARD
FMCS Case Number 11-52755
(Schol Discharge)**

Arbitrator: Andrea Mitau Kircher
Date and Place of Hearing: June 16, 2011; Hibbing, Minnesota
Date Record Closed: June 30, 2011
Date of Award: July 24, 2011

APPEARANCES

For the Union:	For the Employer:
George Dubovich Business Representative United Steelworkers District #11 2929 University Avenue SE, Suite 150 Minneapolis, MN 55414	Joseph J. Roby, Jr., Esq. Johnson, Killen & Seiler, P.A. 230 W. Superior St. Duluth, Minnesota 55802

INTRODUCTION

The United Steelworkers, AFL-CIO-CLC, on behalf of Local Union No. 9349, (“Union”) and Range Regional Health Services – Fairview Mesaba Clinic (“Employer” or “Clinic”) are parties to a Collective Bargaining Agreement (“Contract”), Joint Exhibit 1. The Contract was effective January 1, 2008 through December 31, 2010. The Union filed a grievance on November 3, 2010, which the parties were unable to resolve, and in accordance with the

Contract, the matter was referred to arbitration. The parties duly selected the undersigned arbitrator from a list provided by the Federal Mediation and Conciliation Service.

On June 16, 2011, the Arbitrator convened a hearing in Hibbing, Minnesota. During 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 by U.S. mail on June 30, 2011, and sent them electronically on June 30 as well. The record closed June 30.

ISSUE

Did the Employer terminate the grievant for just cause under the provisions of the Contract? If not, what is the appropriate remedy?

FACTS

Summary of Facts. The Grievant, Marlene Schol, was discharged from employment at the Clinic by a letter dated November 1, 2010. In that letter, the Employer states that the Grievant was discharged for “[p]ersistent bullying and creating an environment of hostility and fear in the workplace.” The Employer claims that the incident leading to discharge was the last in a series of on-going difficulties caused by the Grievant’s disruptive and intimidating behavior toward her coworkers. The Union claims that the Employer did not establish just cause for discharge and specifically did not comply with Article 13, Discipline and Termination of Employment. The Grievant denies responsibility for causing certain coworkers to feel frightened of her and does not believe she is a bully or disrespectful to others.

Background. The Fairview Mesaba Clinic is located in Hibbing. The ownership of the Clinic has changed at least twice during the Grievant’s tenure, and the current owner has been her employer only since approximately 2000. Local 9349 is a wall-to-wall unit and covers both

LPNs and RNs. The Clinic employs approximately 34 LPNs and 7 RNs. One RN, Mary Jo Nickila, is charged with managing all nursing staff, including daily supervision and performance evaluation. She also fills in for other nurses when necessary. Ms. Nickila has worked at the Clinic as nursing manager since 1998, and had previous nursing supervisor experience at another facility.

The Grievant, Marlene Schol, worked at the clinic as an LPN since approximately 1975. At the time of her discharge, her primary assignment was in the surgical unit on the second floor. Because she wanted to work more hours, she also filled in when other units needed help. The incident leading to Ms. Schol's discharge took place in the ENT unit on the first floor where she had been assigned to fill in for an LPN who was on vacation.

Incident leading to discharge (“Fredrickson complaint”). On October 18, 2010, when Ms. Schol was assigned to work in the ENT area, others working there included Christina Liesmaki, RN; April Nickila, RN; Beth Baldwin, LPN, a new employee; Marlo Emerson, RN; Tara Eskelson, Physician's Assistant; and Kristin Fredrickson, M.D. All of these employees testified at the hearing except Ms. Baldwin. These employees were much younger and less senior than the Grievant and had more advanced medical degrees.

Nurse manager Mary Jo Nickila learned of problems late in the day on October 18 through an email from Dr. Fredrickson, one of the “providers”¹ in the ENT unit. Dr. Fredrickson advised Ms. Nickila that she did not want Ms. Schol to work in her unit again because she essentially caused more trouble than she was worth. Dr. Fredrickson outlined two problems: 1) a patient had complained about Ms. Schol's rudeness; and 2) Ms. Schol had made critical comments about the other LPN, Beth Baldwin, saying at least once, “What the heck is Beth doing? She hasn't done a fucking thing all day!” This type of remark, involving loud criticism of

¹ Physicians and Physician's Assistants are referred to as “providers” at the Clinic.

a coworker and swear words, would violate the Employer's "Principles of Partnership."² Dr. Fredrickson learned of Ms. Schol's conduct from Ms. Eskelson and the nurses in the unit who were very upset by the Grievant's conduct. Dr. Fredrickson and the other regular employees in the unit believed that Beth was doing the work she had been asked to do, that she was not lazy, and that her morale as a new employee would be adversely affected by rude, antagonistic behavior by coworkers. When Ms. Schol described the same incident, she explained that she was frustrated because she believed the LPN duties had been unfairly divided and that while she was very tired from spending the morning "rooming" 20-25 patients for Dr. Fredrickson and Physician's Assistant Eskelson, Beth Baldwin had worked at a desk and did not appear very busy. Ms. Schol denied making the remarks alleged, but admitted her frustration. I find the other witnesses more believable than Ms. Schol for these reasons: 1) the Grievant had previously made loud critical remarks about coworkers and had a reputation in her workplace for doing so; and 2) the other witnesses have less to gain from false testimony than a discharged employee seeking reinstatement; and 3) the Grievant's admission of frustration with Beth is more consistent with testimony that she made a negative statement about Beth than it is with the Grievant's testimony that she did not.

In response to Dr. Fredrickson's email message, Mary Jo Nickila contacted Human Resources, and an investigation was conducted. During the investigation, Ms. Nickila and Ms. Kris Madich, a human resources generalist, interviewed approximately seven employees involved. They also interviewed the Grievant, meeting with her and her Union representative. During the interviews of the nurses in the ENT unit, Ms. Nickila noted that each of the three nurses most involved appeared angry, tearful and afraid to talk to the interviewers. They told her they felt frightened of the Grievant, that they thought she was intimidating, "not nice", that she

² Further explanation of the "Principles of Partnership" follows.

“crucifies” new LPNs, that she can “make your life a living hell”, and that they were fearful of coming to work because of dreading that Ms. Schol would retaliate in some way. During these interviews, the coworkers reported that Ms. Schol had said about Beth, “What the fuck did they hire her for?” and “She is fucking worthless,” a slight variation of the comment remembered by the witness at the hearing, but similar enough in content for credibility purposes.

Other factors considered before discharge. Since at least 2000, coworkers have complained to Mary Jo Nickila about Ms. Schol’s rude or unpleasant communications. Employees were reluctant to sign these complaints. Ms. Nickila spoke to Ms. Schol more than once about her conduct, but these problems were not treated as disciplinary actions under the Contract. A “Performance Improvement Plan,” Exhibit 3, is dated 8-18-00 and was admitted into evidence for the limited purpose of establishing that the Grievant had a history of counseling for issues best described as rudeness to coworkers.

In May 2008, the Grievant attended a workshop for Managing Conflict in the workplace, conducted by an outside consultant, Shirley Johnson. The reason for the Grievant’s attendance is disputed. The Grievant said she attended because she wanted to earn continuing education credits. The Employer claims she was directed to attend because she needed training in better methods of dealing with coworker conflict in the workplace.

In early October 2008, the Employer adopted a policy entitled “Principles of Partnership.” All employees including the Grievant attended training on the meaning of this nine-page policy prohibiting, among other things, disrespectful treatment of coworkers, profane language, and “abusive, threatening, belittling, berating” language and non-constructive criticism. The purpose of the new policy was: to promote harmonious and “collaborative”

relationships to “create a safe, healthy work environment where excellence can be achieved and care is optimized.”

In early November 2008, the Employer assigned Ms. Schol work assisting Physician’s Assistant Kathryn Clusiau, whom Ms. Schol did not like and with whom she did not want to work.³ Ms. Schol was so unhappy when she learned of this assignment that she asked three members of management, including the head of the Clinic, not to make this assignment, advising them that it would not work.⁴ Nonetheless, her wishes were ignored and she was given this work assignment. Thereafter, on November 11, the Employer issued Ms. Schol a three-day unpaid disciplinary suspension for severe disruptive behavior in direct violation of the Principles of Partnership. This suspension involved loud, uncooperative responses to the directions of PA Clusiau and disruptive conduct toward her and other coworkers.

The November notice of suspension is very specific about the Grievant’s statements and actions and the reasons that they violated the Principles of Partnership. The Employer labeled this conduct “...explosive, hostile and argumentative; [stating] that it instilled fear into the surrounding work force, even to the point of some staff feeling subject to physical retribution.” The letter warns that any further misconduct or work performance issues will lead to the Grievant’s discharge. Later, this suspension became the subject of a settlement agreement between the Union and the Employer. The agreement reduces the penalty to two days loss of pay and the discipline to a “second written warning.” Ms. Schol appended a letter stating that she had signed the agreement very reluctantly because she did not agree that there was just cause for discipline and she did not want the letter to remain in her file. By a further letter dated October 26, 2009, the Union representative confirmed to the Employer that the agreement was

³ Ms. Schol explained at the hearing that she knew Physician’s Assistant Clusiau from many years previously in high school. “We never liked each other. She always acted like she thought she was much better than I was.”

⁴ Testimony of Marlene Schol.

final despite Ms. Schol's dissatisfaction. As part of the agreement, the suspension letter remained in the file, and the settlement agreement included language directing Ms. Schol to refrain from:

...any intimidating, bullying, uncooperative (covert or overt) behavior directed toward coworkers (including providers). Should any of these circumstances arise, the grievant shall be subject to the next step of the discipline process which is a suspension or possibly discharge, depending on the seriousness of the disciplinary matter.

Employer personnel responsible for the disciplinary suspension had discussed discharge as the remedy for this conduct, but concluded that a three-day suspension would be more appropriate.

With regard to issuing a suspension instead of immediate discharge, which some of the decision-making group had favored, the November 11 letter stated:

Your actions have shown a serious disregard for your professional responsibilities as an LPN; your seniority has served as a reprieve; we expect no further misconduct from you in the future. You are expected to follow the Principles of Partnership Policy in all respects. If any further misconduct or work performance issues do occur, you will be subject to the next step of discipline, that being termination.

Within a year of the Union's letter reaffirming its position that the grievance settlement was final, the incident leading to the Fredrickson complaint occurred. The Employer decided that the Grievant's conduct had not improved as they had hoped, and terminated the Grievant's employment.

UNION POSITION

The Union argues that the Employer cannot discharge Ms. Schol for misconduct because it has failed in its duty to apply progressive discipline as set out in Article 13. There were no written warnings which could be grieved on Ms. Schol's behalf. The Union points out that Article 13 lists examples of "serious misconduct," for which steps of progressive discipline may be bypassed. The types of misconduct listed are much more serious than the incidents

underlying Ms. Schol's discharge. Her behavior does not merit skipping over steps in the process, and thus, the discharge was not for just cause.

The Union claims that the Employer should reinstate the Grievant because she has worked successfully for 36 years with hundreds of nurses, support staff and providers and assisted thousands of patients, and she has only one previous disciplinary action on record. That disciplinary action should be given little weight, the Union argues, because it was never formally established that the incidents occurred as alleged; the Grievant denied wrongdoing, and the suspension was resolved by an agreement rather than by an arbitrator after a hearing. The fact that the Grievant is opinionated and annoys some people is attributable to her strong desire to do things right, a quality that should not be punishable by discharge, the Union contends. The Union also questions the fairness of the investigation. Finally, the Union believes that the degree of discipline administered by the Employer is not reasonably related to the seriousness of the offense or the Grievant's work record.

EMPLOYER POSITION

The Employer argues that it discharged Ms. Schol because it was unable to correct her long-standing pattern of misbehavior; many of its employees were forced to cope with her misconduct, causing disruption in the Clinic's efforts to provide a safe, non-threatening workplace for its employees and therefore, smooth and efficient health care to its patients. The Employer acknowledges that standing alone, the Fredrickson incident was not serious enough to discharge the Grievant, but that the cumulative negative effect of her behavior was sufficiently serious to merit discharge. The Employer claims that she had been coached and counseled about how to avoid this result, sent to training about dealing with conflict among coworkers, and warned that continued outbursts, and rude and critical comments about her coworkers could

result in discharge, but that she was unwilling or unable to conform her behavior to the current standards applicable to employees at the Clinic.

DISCUSSION AND DECISION

Relevant Contract Provision and Progressive Discipline. Article 13, Discipline and Termination of Employment, does not differ in any significant way from the usual industrial standard of just cause for discipline. It provides in pertinent part:

Section 13.1 Discipline, Suspension, and Discharge. The Employer shall not discipline, suspend, or discharge any employee without just cause and unless progressive discipline steps have been followed. The steps include a first written warning, a second written warning, suspension of up to three (3) work days, and discharge...The Employer may bypass one or more steps of progressive discipline in cases of serious misconduct, including, but not limited to, abuse or neglect of a patient, violation of patient confidentiality, theft, assault, falsification of any business or medical record, use, sale, solicitation, possession, or transfer drugs or alcohol while working or while on any Employer premises, and reporting to or being at work under the influence of drugs or alcohol...First written warnings shall not be considered a part of the progressive disciplinary process after three years has expired from the date of the disciplinary action leading to discipline unless a recurrence of similar or related misconduct has occurred during that time period.

The Contract calls for progressive discipline. The purpose of progressive discipline prior to discharge is to provide employees with notice that they are doing something wrong and give them an opportunity to correct their behavior and thereby, avoid discharge. If the behavior is corrected, the employee retains the job; the employer retains a valued employee, and it need not invest in finding and training another.

The Employer argues that the Grievant engaged in a pattern of misconduct, that the pattern continued, and that the Fredrickson complaint was the “last straw.” This is not an uncommon reason for discharge and arbitrators have commented upon it as follows:

In cases commonly referred as “last-straw” discharges, an employee engages in some misconduct that would not, by itself be just cause for discharge. However, based on the accumulation of offenses, the employer decides termination is appropriate. This decision reflects the employer’s conclusion that past efforts at rehabilitation have failed and there

is no reasonable alternative to discharge. Arbitrators will uphold last-straw discharges when the employer has sufficient evidence to show that an employee's pattern of unsatisfactory conduct warrants discharge.⁵

The Grievant's Conduct.

The evidence established that the Grievant was responsible for a pattern of intimidating behavior that created an environment of hostility and fear in the workplace. Naturally, not all of her coworkers were affected the same way. Several long-term employees testified that the Grievant didn't bother them at all. They saw her as hardworking, knowledgeable, high-energy and outspoken. But the evidence also revealed that coworkers and even her supervisor went to great lengths not to aggravate her. For example, Ms. Nickila, the Nursing Manager, responded to numerous complaints from coworkers about the Grievant. Yet from her testimony and the files she kept, it appears that she (and others) may have minimized the nature of the bad conduct as a coping mechanism, treating it like bad weather that people must put up with. Three employees described the Grievant's conduct by saying, wryly, that she "liked to stir the kettle," or she is "on a rampage again."

Ms. Nickila testified about a document in her files dated August 27, 2010, containing notes that described a non-disciplinary meeting she had with the Grievant. The document, Employer's Exhibit 8, listed the topics discussed and contained notes about the discussion. This meeting occurred about two months before the "last straw" incident. Ms. Nickila pointed out specific incidents where the Grievant had been loud and critical of coworkers, in violation of the Principles of Partnership: 1) the previous day, the Grievant had exclaimed loudly to another employee in the corridor outside Nickila's office. "OSHA could shut this place down," because she perceived that certain Doctors were in violation of the dress code; 2) Seven or eight nurse coworkers and 3 providers had complained shortly before August 27, 2010, about the Grievant's

⁵ See, N. Brand, ed., *Discipline and Discharge in Arbitration*, (BNA 1999) at 70. (citation omitted.)

conduct in various settings. Some of these complaints and incidents were: 1) At meetings, she controlled the tone and direction of the meeting so that at least one other employee felt too intimidated to speak up; 2) In lunch room conversation she had made unpleasant remarks about a coworker and “controlled” the discussions; 3) In a public area, instead of in private, she criticized the Employer loudly, stating her “disgust” with a particular scheduling change.⁶ No disciplinary action was taken for this list of behavioral issues. Instead, Ms. Nickila “suggested maybe” the Grievant should call Shirley Johnson and discuss ways to improve her “approach with people”. This second attempt at retraining was suggested, not ordered. The Grievant did not take this suggestion as a direction and said she might review her notes of the previous seminar instead, and would like to deal with this in her own way. Ms. Nickila’s series of non-disciplinary, somewhat non-directive attempts to correct the Grievant’s behavior proved ineffective.

For reasons not articulated, the Employer issued no formal disciplinary action prior to November 11, 2008. Coworkers who were displeased enough with Ms. Schol’s behavior to write complaints to the nursing supervisor, a process set out in the Principles of Partnership, did not want their names disclosed to the Grievant.⁷ Nonetheless, the Grievant knew or should have known from meetings with her supervisor that other employees found her manner disturbing and intimidating. Where the Nursing Manager brought to the Grievant’s attention a number of instances of bad behavior, the Grievant is deemed to have notice, for purposes of progressive discipline, that her behavior needed improvement.

⁶ These employees were not the same employees as those involved in the Fredrickson complaint.

⁷ Mary Nadeau, LPN/Pediatrics “became extremely angry” during the investigation when her anonymity was not protected and refused to participate further. Nicole Anderson, LPN/Family Practice was upset to learn that her name was divulged to the Grievant during the investigative meeting with her. Employer’s Ex.13, Mary Jo Nickila, Nurse Manager, notes of investigation.

At the hearing, the Fredrickson complaint witnesses were subpoenaed and testified. Their demeanor demonstrated that they were more emotionally distraught and more anxious than most witnesses I have observed at a hearing, even among those required to testify against a coworker. When questioned about their fear of the Grievant, they admitted they were afraid of her and that during their tenure at the Clinic they went so far as to avoid going to the second floor of the Clinic because of her presence there. When asked on cross examination if their fear was of physical retribution, the witnesses paused, considered, and essentially denied a fear of physical harm. Several coworkers stated that they went out of their way to avoid her. Ms. Liesmaki, Ms. April Nickila, Ms. Emerson and Ms. Wiljanen, the health Unit coordinator to ENT, all testified that when they first started working at the clinic, someone (unnamed) had warned them about Ms. Schol. Ms. Wiljanen remembered that “a records clerk” had told her, “We have a couple of bullies around here. Watch out for them.” Ms. Schol was named as one of the bullies. Another employee testified that Ms. Schol is “rude and crude” and that she “stirred the pot a lot.” That employee stated, “I heard many stories over the years about things she had done to people that were not nice and were upsetting to others.”

The Contract requires progressive discipline with an exception for serious misconduct. Is it reasonable for the Employer to label this misconduct “serious”?

The question that is difficult to resolve in this case is whether Marlene Schol’s pattern of intimidating behavior, which many of her coworkers found disturbing, is the type of behavior for which the Employer can discharge her even though she previously had only one prior disciplinary action on record. The Contract specifies that when misconduct is serious, the Employer may bypass one or more steps of progressive discipline.

The Grievant's misconduct is unlike any of the listed examples of serious misconduct in Article 13. However, when employees are reduced to tears by a coworker, fear interaction with her, express anxiety about coming to work because of her, fear taking actions she will disapprove of; when new employees are warned to steer clear of her because of her reputation as a bully, are afraid to enter areas where that person is known to be working; when that person more than once disrupts an entire workday for others in a work unit by complaining and denigrating another employee, the Employer has a serious problem in the workplace.

CONCLUSION

The Employer discharged the Grievant for just cause even though her record included only one prior instance of formal discipline, the three-day suspension for similar misconduct, thereafter reduced to a second warning and two-day loss of pay. The Grievant's misconduct was serious because of its cumulative negative effect on many of the people she worked with. She was unwilling or unable to change her behavior despite being given many opportunities and tools to do so. In terms of fair notice, the Grievant was counseled and coached. The original notice of suspension specifically warned that repeated similar misconduct would lead to discharge, and a warning was included in the settlement agreement. The Employer's investigation of the Fredrickson complaint was reasonably thorough. Thus, the Employer did not ignore the factors that promote fairness in the progressive discipline process. Although it is always difficult to sustain the discharge of a long-term employee, the grievance must be denied.

AWARD

The Grievance is denied.

Dated: July 24, 2011

Andrea Mitau Kircher
Arbitrator