

THE MATTER OF ARBITRATION BETWEEN

SEIU LOCAL 113,)	
)	
Union,)	
)	
and)	WEIRENS INVESTIGATIVE
)	LEAVE GRIEVANCE
)	
ASPEN MEDICAL GROUP,)	
)	
Employer.)	FMCS Case No. 110131-52985-3
)	
)	

Arbitrator: Stephen F. Befort

Hearing Date: August 16, 2011

Post-hearing briefs received: September 26, 2011

Date of Decision: October 20, 2011

APPEARANCES

For the Union: Timothy J. Louris

For the Employer: Mark W. Schneider
Sara B. Kalis

INTRODUCTION

SEIU Local 113 (Union), as exclusive representative, brings this grievance claiming that Aspen Medical Group (Employer) violated the parties' collective bargaining agreement by failing to pay LPN Erin Weirens for two days of investigative leave that did not result in the imposition of discipline. The Union contends that by this action the Employer effectively disciplined Weirens without just cause. The Employer maintains that it is not obligated to compensate employees for non-disciplinary investigative leaves under the terms of the parties'

collective bargaining agreement. The grievance proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

ISSUES

Did the Employer violate the parties' collective bargaining agreement when it declined to pay the grievant for two days of investigative leave that did not result in the imposition of discipline? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 28 – DISCIPLINE/DISCHARGE/TERMINATION

28.01 The Employer shall not discharge or suspend an employee without just cause. A written notice of discharge, suspension, or written disciplinary action shall be given to the employee and a copy thereof sent to the Union.

28.02 Disciplinary suspensions shall not exceed fourteen (14) working days.

* * *

28.04 Investigative Suspensions. The Employer may suspend an employee without pay pending an investigation for no more than 7 calendar days. At the end of the 7 calendar days, the Employer must decide if they are going to discipline the employee or drop the issue.

FACTUAL BACKGROUYND

Allina Hospitals and Clinics is a non-profit health care provider with a home base in Minnesota. Aspen Medical Group, a business unit of Allina, operates a clinic in Bloomington, Minnesota that employs approximately 500 employees. The Union represents a unit of technical employees, including licensed practical nurses, who work at the Bloomington facility.

Erin Weirens, the grievant, has worked at the Aspen Medical Clinic as a Licensed Practical Nurse since April 2010. She reports to Nursing Supervisor Kate Fischer who oversees a nursing staff of approximately 30 employees.

This grievance arose from the Employer's placement of Weirens on investigative leave for the purpose of determining whether she may have made medical errors in administering medicine prescribed by a physician. The investigation conducted by the Employer determined that Weirens did not make a medical error and no discipline was imposed. Weirens, however, was not paid for the two days during which she was off work for the investigative leave. The Union contends that the Employer lacked just cause for the two-day suspension and seeks a back-pay remedy.

The first alleged medical error occurred on September 28, 2010. On that day, Dr. Eelkema gave Weirens a written order to administer a pediatric Hepatitis A vaccine. Because the patient was 18-years old, Weirens knocked on the door of an examination room and asked Dr. Eelkema whether an adult dosage should be administered instead. Dr. Eelkema verbally instructed Weirens to administer an adult dose, and Weirens complied.

A similar incident occurred on October 22, 2010. On this occasion, Dr. Eelkema provided a written order to administer a preservative-free tetanus shot to a patient. Since the clinic did not have any preservative-free vaccine in stock, Weirens again knocked on the door of an examination room and asked Dr. Eelkema whether a non-preservative free vaccine could be administered instead. Dr. Eelkema orally agreed to modify her medication order. Because Dr. Eelkema had not modified the written order, Weirens left a note for a co-worker at the end of her shift to remind Dr. Eelkema to revise the written medication order.

Nursing Supervisor Fischer, upon learning of the October 22 incident later that same day, consulted with Clinic Manager Molly Van Binsbergen about the appropriate response. Fischer testified that, due to the two alleged mediation errors, they decided to conduct an investigation and to place Weirens on investigative leave during the pendency of the investigation. Since Weirens had already finished her shift by this time, Fischer testified that she did not inform Weirens of the investigative leave until her next scheduled shift on Monday, October 25.

On October 25 Fischer interviewed Weirens (in the presence of a Union steward), Dr. Eelkema, and four other employees. Dr. Eelkema acknowledged that she had verbally overridden the written medication orders on both days in question. Fischer testified that by the end of October 25, she had determined that Weirens had not committed any medical errors and that Weirens should be reinstated back to work.

On October 26, Fischer met with Van Binsbergen and reviewed her investigatory findings. Fischer then spent the rest of the morning drafting a Corrective Action Report. Fischer received confirmation from Human Resources in the afternoon that Weirens could return to work, and Fischer then called Weirens with that news. In the end, the Employer determined that no discipline was warranted, but Weirens was counseled on the need to improve communications.

At the arbitration hearing, the Union elicited testimony to the effect that five other employees had been investigated for alleged medical errors since the adoption of the current collective bargaining agreement, but that none of those employees had been suspended during the investigation and suffered a loss of wages. In each of those instances, the Employer investigated the allegations while the employee in question remained on the job. The record indicates that the Employer did place another employee on investigative leave for an incident

that occurred prior to the adoption of the current agreement. On that occasion, the Employer completed the investigation within one day and terminated the employee.

POSITIONS OF THE PARTIES

Union

The Union contends that the Employer violated the parties' collective bargaining agreement by placing the grievant on investigative leave without just cause. The Union points out that Section 28.01 of the parties' agreement requires that the Employer have just cause in order to discharge or suspend an employee. The Union maintains that the plain language of this provision applies to suspensions for both disciplinary and investigative reasons. Applying this standard, the Union argues that the Employer has failed to show that just cause required the two-day suspension in this instance. The Union additionally asserts that the Employer acted disparately in deciding to place Weirens on investigative leave since it seldom has done so for other employees. Finally, the Union argues in the alternative, that even if the Employer initially had cause to suspend the grievant, the Employer unnecessarily delayed the grievant's return to work since the first day of the investigation revealed that Weirens had not committed a medical error, but the suspension nonetheless continued for an additional day. As a remedy, the Union seeks an order requiring the Employer to compensate Weirens with back pay for the two-day suspension.

Employer

The Employer relies on Section 28.04 of the parties' agreement which expressly states that the Employer "may suspend an employee without pay pending an investigation for no more than seven calendar days." The Employer further maintains that the just cause language of Section 28.01 applies to disciplinary suspensions, but not to the investigative suspension

imposed in this case. Relying on these two provisions, the Employer argues that the specific language of Section 28.04 should prevail over the more general language of Section 28.01, and that the Union is trying to obtain in arbitration what it failed to achieve during contract negotiations. The Employer alternatively contends that it had just cause to impose a two-day investigative suspension on Weirens, that it did not act disparately in imposing such a suspension, and that it reinstated her in a timely manner following the conclusion of the investigation.

DISCUSSION AND OPINION

The Contract Language

Both parties maintain that the plain meaning of the contract language supports their position. The Union relies on Section 28.01 which states that “the Employer shall not discharge or suspend an employee without just cause.” The Union argues that this language requires the Employer to have just cause in order to impose any type of suspension, whether disciplinary or investigative in nature.

The Employer, in contrast, cites to Section 28.04 which provides that the Employer “may suspend an employee without pay pending an investigation for no more than 7 calendar days.” The Employer maintains that this language means that it can require an investigatory suspension without either cause or pay.

The Union argues that these two provisions do not conflict. According to the Union, the Employer must have just cause to suspend an employee for any reason, but need not pay an employee who is placed on investigatory leave for a reason that comports with just cause. The Employer, on the other hand, contends that the Union’s interpretation of Section 28.01 is inconsistent with the plain meaning of Section 28.04. The Employer’s core argument is that

Section 28.04 underscores that an investigatory suspension is non-disciplinary in nature and never obligates the Employer to provide compensation if the leave period is less than seven calendar days in duration.

Interpretive Tools

Although the contract language fuels conflicting positions, two interpretive tools support the Employer's reading of the contract.

The first principle is that a party should not be able to obtain in arbitration what it failed to achieve at the bargaining table. During the most recent round of contract negotiations, the Union sought to obtain a provision obligating the Employer to provide pay for employees placed on investigative leave. Although such provisions are common in many collective bargaining agreements, the Employer resisted this proposal, and the Union ultimately agreed to a seven-day limit on investigative leave, but without pay. As the Employer argues, it is unlikely that the Union would have sought this proposal if the contract already restricted the Employer's ability to place an employee on investigative leave and obligated the Employer to provide pay for any period of leave imposed without just cause.

A second principle of construction is that specific contract language prevails over more general language in the event of a conflict. In this instance, while the language of Section 28.01 generally bars the Employer from imposing a suspension without just cause, Section 28.04 more specifically states that investigative suspensions are without pay. Giving precedence to the more specific language of Section 28.04 suggests that Section 28.01 should not be read to obligate the Employer to provide pay for some investigative suspensions when that result is expressly foreclosed by Section 28.04.

These two interpretive tools support the conclusion that Section 28.01 applies only to disciplinary suspensions but not investigative suspensions. That is, an Employer must have just cause to support a disciplinary suspension, and an employee is entitled to back pay if such a suspension is not based on just cause. On the other hand, an investigative suspension is not disciplinary in nature; rather the purpose of such leave is to determine whether a disciplinary sanction is appropriate in this first place. As such, an employee's entitlement to pay for an investigative leave is not dependent upon an absence of just cause, but on the terms of the parties' agreement. Here, the agreement clearly states that pay is not required for an investigative leave.

Arbitrariness and Disparate Treatment

While the Employer does not need to establish just cause in order to place an employee on investigative leave, it is not inconceivable that the Employer would run afoul of Section 28 if it placed an employee on unpaid investigative leave for a wholly arbitrary reason that is not related to a bona fide investigative need. Without deciding that such a limitation exists with respect to Section 28, it is clear that the Employer's decision to place Weirens on investigative leave does not offend such a standard. Although the record establishes that the Employer investigates most employees suspected of a medical error without placing the employee on investigative leave, the Employer had a rational basis in this instance to place Weirens on investigative leave due to the perception that she may have committed multiple medical errors. Although the investigation proved this perception to be unfounded, the Employer's concern for patient safety in undertaking such an investigation was not arbitrary in nature.

The Union additionally argues that the Employer suspended Weirens for longer than necessary for purposes of the investigation. The Union submitted evidence showing that the

Employer has placed one other employee on investigative leave and that investigation was completed in one day. The Union further points to the fact that the Employer in this matter had concluded all the employee interviews on the first day of leave, and that Nursing Supervisor Fischer had determined by the end of that first day that a disciplinary suspension was not warranted.

While the Union's contentions are accurate, they fall short of making out a case of disparate treatment. With respect to the employee who was subject to only a one-day investigation, the record establishes that the Employer terminated that employee following the one-day investigation. In this instance, in contrast, although Fischer completed her interviews of six employees on a single day, she testified that she still needed to discuss the matter with the Clinic Manager and to prepare an official progressive discipline report before having the authority to reinstate Weirens. Under these circumstances, the Employer's reinstatement of Weirens after only two days appears to be efficient and timely, rather than arbitrary and discriminatory.

AWARD

The grievance is denied.

Dated: October 20, 2011

Stephen F. Befort
Arbitrator