

IN THE MATTER OF ARBITRATION

OPINION & AWARD

-between-

Grievance Arbitration

A. F. S. C. M. E. COUNCIL NO. 5

B.M.S. Case No. 12PA0049

-and-

Re: Employee Termination

**HENNEPIN CO. MEDICAL CENTER
MINNEAPOLIS, MINNESOTA**

**Before: Jay C.Fogelberg
Neutral Arbitrator**

Representation-

For the Employer: Anthony de Sam Lazaro, Asst. County Attorney

For the Union: Chris Cowen, Field Representative

Statement of Jurisdiction-

The Collective Bargaining Agreement duly executed by the parties, provides in Article 7 for an appeal to binding arbitration of those disputes that remain unresolved after being processed through the initial three steps of the grievance procedure. A formal complaint was submitted by the Local on behalf of the Grievant on or about April 11, 2011, and thereafter appealed to binding arbitration when the parties were unable to resolve this matter to their mutual satisfaction. The under-signed was then mutually

selected as the neutral arbitrator by the parties, and a hearing convened on November 18 2011, in Minneapolis. Following receipt of position statements, testimony and supportive documentation, the parties agreed to submit written summary arguments. They were received on December 10, 2011, at which time the hearing was deemed officially closed.

At the commencement of the proceedings, the parties stipulated that this matter was properly before the Arbitrator for resolution based upon its merits, and that the following represents a fair description of the issue.

The Issue-

Did the Employer have just cause to terminate the Grievant's employment? If not, what shall the appropriate remedy be?

Preliminary Statement of the Facts-

The record developed during the course of the proceedings indicates that THE American Federation of State, County, and Municipal Employees, Local 2474 (hereafter "Union," "AFSCME" or "Local") represents, all technical and para-professional employees working at least either fourteen hours per week and more than sixty-seven days per calendar year at the Hennepin County Medical Center in Minneapolis ("HCMC," "Employer," or "Center")

Together, the parties have negotiated a labor agreement covering terms and conditions of employment for members of the bargaining unit (Union's Ex. 12; Employer's Ex. 1).

The Grievant, Elgin Carter, began his employment at the Center in 2006 as a Medical Assistant ("MA"). As such, he worked along side physicians and nurses in a support role, supplementing medical services administered to patients at the facility. At the time of his dismissal, he was assigned to the Pediatric Clinic ("Clinic") under the supervision of Beth Leaneagh. It was demonstrated that he also took direction from the various physicians he would be assigned to, as well as the Lead R.N.

Since beginning his employment at HCMC Mr. Carter has received two verbal reprimands and a written warning related to attendance issues, as well as one verbal and one written warning for unprofessional behavior. At the same time the record shows that he has received accolades from two former employers: the Columbia Park Medical Group, and the Riverside Medical Center (Union's Ex. 11).

The evidence is uncontested that on the day in question, leading to his termination at HCMC (March 16, 2011), Mr. Carter was on duty at the Clinic. At approximately, 11: 15 a.m., while standing in the hallway, his conversation with another Medical Assistant, Gertrude Cherry, was

overheard by Lead Nurse Meryl Speed, whose office was nearby. The subject of his discussion with Ms. Cherry concerned complaints he was having regarding his work schedule. What transpired subsequently, is in dispute, as each side has offered a different view of the relevant events.

According to the Administration, Ms. Speed - after hearing the Grievant use foul language and raising his voice regarding the RNs in the Clinic, and his supervisor as well - stepped into the hallway and "in a soft tone" asked that he keep his voice down as the patients (and their families) could hear him (Employer's Ex. 5). At that point, in Ms. Speed's view, the Grievant "erupted and started coming towards me in a very aggressive manner like he was going to strike me," while telling her to "mind your own damn business" (*id.*). Ms. Speed stated that she retreated to her office to call security when Ms. Cherry tried to calm the Grievant down, and lead him away. In this witnesses' view, Mr. Carter continued down the hall shouting negative things about the administration and, more particularly, his supervisors.

Speed testified that she then proceeded to Ms. Leaneagh's office to inform her of what had transpired. Shortly after her arrival, the Grievant also entered the supervisor's office and in a loud voice, accused the Lead RN of lying to management about him. Ms. Leaneagh asked him to close the

door to her office so that their conversation would not disturb others in the area. However, he departed abruptly.

Mr. Carter, on the other hand, recalls the events of March 16th quite differently. According to the Grievant, he remembers speaking with Ms. Cherry in the hall that morning, indicating to her that he was not happy with the most recent schedule changes that affected him. At the hearing he acknowledged that he was “unhappy about it.” He added however, he was not speaking in a loud voice that would have disturbed any of the patients in the area. Mr. Carter did indicate that when Ms. Speed approached and asked him to keep his voice down, he told her to “mind your own business,”¹ and allowed that, “I was getting a little angry.”

Ms Cherry, stated that she then encouraged the Grievant to move away (down the hall) as she thought Speed was trying to antagonize him, and she wished to de-escalate the situation.

The Grievant further stated that he believed that RN Speed was “out to get me,” so he proceeded to Supervisor Leaneagh’s office where he again encountered the Lead Nurse. He also recalls telling Leaneagh that Speed constantly lies about his conduct.

¹ Speed remembers the Grievant telling her to “mind your own *damn* business” (emphasis added).

On Friday, March 18th Ms. Leaneagh undertook an investigation into the matter, interviewing the Grievant, Speed and others who were in the area. Ten days later, Mr. Carter was informed that he was being suspended with pay but that the Center intended to terminate his employment, “based on your continued violations of HCMC policies and your pattern of unprofessional behavior...” (Union’s Ex. 2). On April 5, 2011, the Grievant was notified that his termination was effective that day (Union’s Ex. 3). Thereafter, on April 11th, the Union filed a formal complaint challenging management’s decision and alleging a violation of Article 33 of the parties’ Master Agreement (Union’s Ex. 4). Eventually, the matter was appealed to binding arbitration after the parties were unable to resolve the dispute to their mutual satisfaction at the intermittent steps of the process.

Relevant Contractual Provisions-

Article 33
Discipline

Section 1. The EMPLOYER will discipline employees in the classified service only for just cause.

Section 2. discipline, when administered, will be in one or more of the following forms and normally in the following order:

- A. Oral Reprimand
- B. Written Reprimand
- C. Suspension

D. Discharge or disciplinary demotion.

Positions of the Parties-

The **EMPLOYER** takes the position that their decision to terminate Mr. Carter's employment in April of this year was entirely proper and justified under the circumstances. In support of their claim, the Center maintains that the Grievant raised his voice and shouted at Lead Nurse Meryl Speed on March 16th of this year calling the nurses he worked with "lazy ass mother fuckers," using other profanity, and telling her to "mind your own damn business." His behavior frightened Ms. Speed to the point that she contemplated calling security. Moreover, there were no fewer than four patient rooms in the area that were occupied – all of which were within earshot of Mr. Carter's outburst. The claim is made that this is not the first time that the Grievant has been less than professional. His intimidating behavior has been consistent since he began at HCMC and a near constant disruption in the Clinic. While he got along with the patients, he failed to extend any respect to the nurses he worked with. Indeed, many staff members have indicated that they do not feel safe while working with the Grievant. The outburst that occurred in mid-March was not uncommon, as Mr. Carter constantly (and erroneously) believed he was being singled

out by management for desperate treatment. Finally, the administration notes that what occurred in March 16th may not have been grounds for dismissal standing alone. However, when Mr. Carter's entire work record is taken into consideration, there is ample justification for the decision that was made. His work record is anything but exemplary, and he has been disciplined repeatedly for excessive absenteeism and negative disruptive behavior in the Clinic. Accordingly, for all these reasons, they ask that the grievance be denied in its entirety.

Conversely, the **UNION** takes the position in this matter that Mr. Carter's termination was not justified under the circumstances. In support, the Local asserts that the Administration's investigation is flawed and incomplete. Had they been objective and thorough in their inquiry into the events of March 16th last year, they would have discovered that the Grievant did not raise his voice in the hallway that day as charged. Moreover, Ms. Cherry told management that she led the Grievant away before the matter could escalate, and further that Ms. Speed was the one behaving in a threatening manner, seeking to antagonize Carter that day. In addition, the Union urges that the Grievant has been a successful and popular MA with the patients in the Clinic, and has gotten along with most of his fellow employees. However, there is no question but that he was

frustrated with the manner in which work assignments in were being distributed and how he was treated by some members of management. Yet when he attempted to register his concerns, he was met with indifference and nothing was ever done to fix the problem. For all these reasons then they ask that the grievance be sustained and that he be returned to his former position and made whole.

Analysis of the Evidence-

Within the American system of industrial justice, a grievance that challenges the discipline imposed on an employee can normally be divided into two separate and distinct elements that need to be established by management. The first pertains to whether or not the accused can reasonably be held responsible for the wrongful act(s) that has been attributed to him or her. If it can be demonstrated that the grievant is in fact guilty of the misconduct alleged, then the second aspect concerns the penalty administered and whether it was unreasonable, arbitrary, or otherwise excessive when all of the relevant evidence has been evaluated (provided, of course, that there is no language in the labor agreement limiting the arbitrator's authority in this regard). *Leland Oil Mill, 91 LA 905.*

With regard to the initial requirement, it is clear that the pivotal event behind the Center's decision to terminate Mr. Carter's employment concerns the events of March 16, 2011. Indeed in a letter to the Grievant dated April 5th of last year, Sr. H.R. Consultant Laura Kieger wrote: "Your proposed dismissal is based on the findings of the department's investigation related to an incident which occurred on Wednesday March 16, 2011" (Union's Ex. 3).

In a disciplinary matter such as this, the standard of proof assigned to the employer normally requires a demonstration of clear and convincing evidence demonstrating that the accused was fairly charged with the misconduct that led to the penalty administered. Here the record identifies two distinctly different versions of the incident that occurred in the hallway outside Ms. Speed's office that morning and later in Supervisor Leaneagh's office; both of which have been described earlier.

Sorting through the evidence compiled in the record, it is clear that there exists an unequivocal and substantial conflict of testimony concerning the facts surrounding the pivotal event. In issues of credibility such as this, the guilt or innocence of the grievant culminates in the arbitrator's perception of who is telling the truth, after all of the relevant data and testimony has been examined. Credibility imparts a determination of who is

worthy of belief. In resolving the credibility issues in this case, I have been guided in part by those factors delineated in Arbitrator Jones' timeless thesis entitled "*Problems of Proof in Arbitration Proceedings*", taken from the 19th Annual Meeting of the National Academy of Arbitrators, January 1966, BNA 1967:

"Any conflict or contradiction in the evidence, or any inconsistency in the testimony of the grievant or witness are resolved by the arbitrator who is the sole judge of credibility of witnesses. One witness, if believed, is sufficient to sustain the position which the testimony supports. Corroborating evidence has been required by some arbitrators when addressing and resolving certain types of alleged and serious breaches of accepted employee conduct..." (p. 206-207).

After giving careful consideration to the documentation, the testimony of the witnesses and the accompanying arguments of each representative, I conclude that the Employer's version of the events should be credited where in conflict with the Grievant's.

The Local argues that Mr. Carter should not have had his employment terminated as the Administration took a very questionable approach to the use of the information compiled in the course of its investigation. More particularly they maintain that Lead Nurse Speed's version of the incident is not believable. The assertion is made that the Grievant had not raised his voice out in the hall that day and further, that Ms. Cherry did not restrain him but rather simply sought to move him down the hall to avoid any conflict

with Speed who she believed was going "to get into (Carter's) face" (Local's Ex. 8). Both Cherry and the Grievant testified that their conversation was not loud and that he (Carter) was not using profane language that morning.

These comments and recollections however must be contrasted with Ms. Speed's and Ms. Leaneagh's version of the incidents. The former was direct and consistent in the course of her testimony. She noted that she had worked with the Grievant since he began his employment in the Clinic and that "right from the start, he was confrontational."² She stated that the Grievant was complaining about not being able to run a personal errand that day because no nurse was willing to cover for him in his absence. Speed remembered him using foul language with some regularity in the past whenever he would exhibit one of his angry outbursts. His strident tone out in the hall that morning is what motivated her to approach him in the first place. This is what motivated her to leave her office, asking that the Mr. Carter keep his voice down as patients in the area could hear him. The witness recalled that his response was angry enough that she became frightened. She then retreated into her office and contemplated calling security until Ms. Cherry moved him away from the scene.

² This witness further allowed that in the past she has avoided giving Mr. Carter work assignments when possible because he would resist and call her degrading names under his breath. This is not consistent with Ms. Cherry's characterization of her as "antagonizing."

The Grievant does not deny telling Ms. Speed to “mind her own business,” and that he was “getting a little angry.” Moreover, he acknowledged that he was not happy that day after learning of a change in work schedules for the MAs. This evidence is more supportive of the Center’s version of the events than the Local’s. Further, I cannot credit Ms. Cherry’s testimony and recollection of the events when she claims that it was Speed who was trying to provoke the Grievant that day. When questioned further this witness claimed that neither she nor Mr. Carter were talking in a loud voice in the hall. Indeed, she maintains the Grievant had not raised his voice at all, but rather that they were “whispering” to one another.

Ms. Cherry’s version of the events however, strains credulity when paired with the uncontroverted facts. There would appear to be no logical reason for Ms. Speed to leave her office and approach the two employees in the hall asking them to keep their voices down if, as Ms. Cherry claims, they were only whispering. Further, “pushing” the Grievant down the hall to get him away from the Lead Nurse would seem far more reasonable if, as both Speed and Carter acknowledged, Carter was getting “a little angry.”³

³ In their Notice to Dismiss (Union’s Ex. 2) the Employer clearly credited Ms. Speed’s and Ms. Leaneagh’s version of the incident where in conflict with the Grievant’s and/or Ms. Cherry’s.

In addition, a review of the Grievant's work record is supportive of Speed's assessment of the events that day, as a number of employees have made similar comments regarding his outbursts and threatening behavior which left them feeling intimidated (HCMC Exs. 5 & 7). It was revealed that he has been counseled and disciplined for exhibiting such behavior in the past on a number of occasions (Employer's Exs. 8-10; 13).

Further evidence supporting management's version is found in the testimony of Supervisor Leaneagh at the hearing as well as in her contemporaneous notes compiled on March 16, 2011, in conjunction with the investigation (Center's Ex. 5). She recalled that the Grievant burst into her office shortly after the confrontation with Speed late in the morning on March 16th, interrupting her meeting, and accusing her (Speed) of lying. Again, she recalled his demeanor as assertive, loud and angry. In her notes, she remembers asking "...Elgin to close the door so we *don't disturb everyone else*, but he left..." (*id.*, emphasis added). Under cross-examination the witness stated that Ms. Speed (who was already in her office when the Grievant entered) "was scared, intimidated, and did not know what to do." She added that when she replaced Lynn Parish as the Practice Manager for the Clinic in October of 2010, she was unaware of Mr. Carter's work history as she did not review any of the employees' personnel

files. Rather she believed it better to start with a “clean slate.” It was not until the incident of March 16th and the investigation that followed, that she learned of his previous difficulties and the efforts of management to correct them.⁴ When she did, she remarked: “I got sick to my stomach – seriously,” adding that she “did not feel safe.”

Based upon the foregoing analysis, I find that the Employer’s view of what transpired on March 16th is most credible, establishing through clear evidence that Mr. Carter’s behavior was both disruptive and intimidating as well as contrary to the Center’s published policies regarding appropriate conduct for its employees. There remains then, the question of penalty and whether the decision of the HCMC was reasonable under the circumstances. Again, I concur with management’s assessment finding that the discipline imposed was justified.

When evaluating the propriety of any penalty administered against an employee, their work record is almost always taken into account. See: Fairweather, *Practice and Procedure in Labor Arbitration*, 2nd Edition, p.301-302; Hill and Sinicropi, *Evidence in Arbitration*, p. 34, BNA 1980; Elkouri and Elkouri, *How Arbitration Works* p 983, BNA 6th Ed.; Brand, *Discipline and Discharge in Arbitration*, BNA 2nd Ed. p. 498. The theory consistently has been

⁴ Ms. Parish, in the course of her testimony, stated that in dealing with the Grievant over time prior to her retirement, she attempted repeatedly to correct his behavior short of subjecting him to formal discipline as she believed he was otherwise a “talented M.A.”

stated that a particular offense may be mitigated by a good work record or, conversely, aggravated by a poor one. Either way, an employee's past record is normally a major factor in the determination of the proper penalty for any offense. In this instance the evidence demonstrates that Mr. Carter, over the course of his employment at the Center, had acquired a history of disciplinary problems which, as previously noted, included three verbal and two written warnings. Most recently, in March of 2010 he received a verbal warning for using foul language in a loud voice while expressing his displeasure with a work assignment (Employer's Ex. 8 & 9). Only a few months later, in May of that same year, he was issued a written warning for refusing a work direction. In that instance, as a consequence of his actions, a patient was forced to wait almost an hour prior to receiving treatment. The Grievant was found to have deliberately ignored a senior nurse's work order, and further complained to a co-worker that the nurse was "lazy."⁵ Additionally, his performance review was rated as "needs improvement" in 2009, where the reviewing supervisor specifically noted his failure to take responsibility for work assignments as well as his difficulty expressing himself without getting angry with co-workers (Center's Ex. 14). While there is little or no dispute but that Mr. Carter was a "talented M.A." as witness Parish noted,

⁵ While this discipline was grieved by the Union on behalf of the employee, it nevertheless remained unaltered (Employer's Ex. 5).

he constantly complained about being given an inordinate amount of work, and that his schedule was being altered more than anyone else in the Clinic with the same job classification. She noted however, that in response to his complaints, she conducted a study which demonstrated that his work load was “average” when compared to his fellow M.A.s.

I have also taken into consideration the statements of other employees who worked with Mr. Carter. They recalled instances of harassing and intimidating behavior which adversely affected their work (testimony of Gloria Borize and Rose Berg).

Additionally, I note the statements of the Grievant himself at the hearing. In spite of the considerable evidence proffered by the Employer demonstrating a pattern of anger, loud outbursts, distaste for many of the nurses with whom he had worked, and with management in general, at no time did Mr. Carter ever take responsibility for his own actions. Repeatedly, he proclaimed that his behavior was justified; that the fault lied with others – never his own. Such an attitude, in the face of the facts as established on the record, do little to suggest that the progressive discipline and coaching administered have had the desired effect.

In Article 33 of the Labor Agreement, *supra*, the parties have crafted language indicating that progressive discipline includes the imposition of a

suspension between a written reprimand and discharge. In this instance however, that “step” was considered but rejected by the Administration who felt that in light of Mr. Carter’s escalating misconduct, the safety risk he presented and the adverse effect on morale among his fellow workers warranted his removal. It is noted that Section 2 of the same article specifically states that the four steps of progressive discipline will “normally” be followed. The use of the adverb indicates that exceptions can be made. In this instance, while the Grievant’s talents as a medical professional are not being challenged, his disruptive behavior toward his fellow workers proved to have an adverse effect on morale and detracted from the Clinic’s ability to focus on its patients. Moreover, the steps taken by Management demonstrate little of the desired result was achieved. Under these circumstances then, I conclude that their decision to forego the intermittent step of suspension was warranted.

Award-

Accordingly, for the reasons set forth above, the grievance is denied.

Respectfully submitted this 30th day of December, 2011.

Jay C. Fogelberg, Neutral Arbitrator