

IN RE ARBITRATION BETWEEN:

**AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES,
AFSCME COUNCIL 5**

and

REGION'S HOSPITAL

DECISION AND AWARD OF ARBITRATOR

BMS # 15-HA-0560

JEFFREY W. JACOBS

ARBITRATOR

May 26, 2015

IN RE ARBITRATION BETWEEN:

AFSCME Council 5,

and

Region's Hospital.

DECISION AND AWARD OF ARBITRATOR
BMS #15-HA-0560
Rose DeLorme Grievance matter

APPEARANCES:

FOR THE UNION:

Matt Nelson, Union Representative
Rose DeLorme, grievant
Leola Banks, former employee of Regions
Troy Hoff, Pharmacist

FOR THE EMPLOYER:

Joan Quade, Attorney for the Employer
John Chilson, HR Investigator
Craig Harvey, Director of Pharmaceutical Services
Khrystine Vang, Former Pharmacy Finance and
Business Ops. Mgr
Brittany Ulrich, Outpatient Pharmacy Mgr.
Brian Howard, Former Inpatient Pharmacy Mgr.
Sheri Ober, Inpatient Pharmacy Mgr.
Lori Amborn, Former Mgr. of Pharmacy,
(By affidavit only)
Julie Vollmer Former Inpatient (Affidavit only)
Tanya Barnhart, Mgr. of Compliance and Clinical
Pharmacy

PRELIMINARY STATEMENT

The hearing in the above matter was held on April 2 & April 14, 2015 at the Bureau of Mediation Services in St. Paul, Minnesota. The parties submitted briefs dated May 4, 2015.

ISSUE PRESENTED

Did the Employer have just cause to terminate the grievant? If not, what shall the remedy be?

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from July 1, 2013 through June 30, 2015. Article 18 provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services. At the hearing the parties stipulated that there were no procedural or substantive arbitrability issues and that the matter was properly before the arbitrator.

EMPLOYER'S POSITION:

The employer's position was that there was just cause to terminate the grievant for her actions in forging another employee's signature and for signing her own name but falsely stating that she is a pharmacist. In support of this position the Employer made the following contentions:

1. The employer noted that the grievant has been with the hospital for 14 years and as such knows what certain initials mean. MD stands for medical doctor, RPH stands for Registered Pharmacist and RN stands for registered nurse. She is also well aware that these initials are reserved for use by those persons who have completed a certain course of education and passed a certification examination authorized by the State of Minnesota and that to use them when you do not have the requisite certifications and education credentials is fraud and a violation of law.

2. The employer further noted that as a medical assistant she is expected, as are all the employer's employees, to be honest and forthright in all their dealings with the hospital and suppliers. The grievant knew or should certainly have known that using the incorrect initials after her name was fraud and a clear violation of policy. The employer further noted that it expects the highest standards of professionalism from all its employees and that employees are told this and trained on this ethical requirement from the commencement of their employment. See Employer exhibit 6.

3. The employer relied on its Code of Conduct that read in relevant part as follows:

RECORD-KEEPING, RECORD RETENTION AND RECORD DESTRUCTION

You must be thorough, timely and truthful with medical and business records, whether paper or electronic. Records must be kept for the appropriate retention period, and then destroyed in the appropriate manner.

ACCOUNTABILITY AND DISCIPLINE

A violation of the standards described in this Code of Conduct - or in any Regions Hospital policy - can result in disciplinary action, up to and including discharge from employment or termination of your contract or staff privileges. Disciplinary action taken by the organization to uphold this Code of Conduct will be imposed fairly and consistently, commensurate with the violation in question and Regions Hospital discipline guidelines, and, if applicable, with terms of employment, medical staff bylaws and collectively bargained labor agreements.

4. The employer asserted the grievant's conduct was in clear violation of this policy and that it simply cannot continue to employ someone who would falsify these forms in such a brazen fashion and then blame someone else for it. The grievant's only response when it was discovered that she was signing her name as a pharmacist was that Ms. Banks told her it was OK to do this and that she was not aware it was a problem. The employer scoffed at the notion that anyone working in a hospital would not know not to sign a form to get drugs from a supplier as a pharmacist and not be aware of the serious ethical violation that is.

5. The employer noted that there was no dispute that the grievant admitted falsifying certain forms that were required to obtain free drug trials from the Invega Sustana Company. She both forged another employee's signature and added the initials "RPH" after her name on these forms. The employer indicated that the grievant should clearly have known better than to represent herself as a pharmacist when she is not.

6. The employer acknowledged that the grievant was working with Ms. Banks, who was the purchasing agent but that the agent did not have supervisory authority over her and could not have legitimately directed her to sign these forms in the manner in which she did. The employer noted though that as a purchasing assistant the grievant has the same responsibility as Ms. Banks, for knowing all state and federal regulations related to drug purchasing and must also ensure the integrity of that process, including record keeping. The employer cited to both state statutes and rule in support of its claim that the grievant was aware of the responsibilities and the limitations of her position – which included honesty but did not include fraudulently holding herself out as a registered pharmacist. See Minn. Stat. 151.01 subd. 15 and Minn. Rule 6800.3850. Further, Ms. Banks did not have the authority to change this or the authority to allow the grievant to sign Ms. Banks' name to official forms needed to re-order drugs or to hold herself out as a pharmacist.

7. Thus, the claim that Ms. Banks told her to do this should be rejected – the grievant should clearly have known better or at least should have asked her actual supervisor about this the very first time she was asked to do. The employer noted that employees are always allowed to ask if they are not sure. See Code of Conduct.

8. Further the employer noted that the grievant is familiar with the process of getting a pharmacist's signature on any form requiring such. They work in the same area and it would have been easy to simply walk a few steps to get a pharmacist's signature on the Invega forms. Instead she continued to fraudulently sign these forms and forge another person's signature. The employer introduced a massive exhibit with all of the relevant forms in it that showed that the grievant did this multiple times over many months. See Employer exhibit 12.

9. The employer further asserted that the grievant is simply being disingenuous when she asserted that she did not know that she was not supposed to sign these forms as a pharmacist. The form itself has the following language directly above the signature line that reads as follows: "I certify that I am a licensed pharmacist eligible to receive and dispense this product." There are other forms she signed that say similar things and it is simply incredulous that she "did not know" that only a licensed pharmacist was allowed to sign for this product.

10. In falsifying these forms the grievant could have placed the entire Invega Sustana product trial in jeopardy. Had they discovered that they were sending drugs based on forms that were false they could well have terminated the program, placing the patients at risk and jeopardizing the hospital and its staff. The employer noted that the pharmacists could well have been disciplined by the Board of Pharmacy since they are responsible for the conduct of those under their direction within the pharmacy.

11. The employer was quick to point out though that no one in management was ever aware of the grievant's and Ms. Banks' conduct; they never knew that they were signing off as pharmacists or that the grievant signed for Ms. Banks. Had they known that they would have put an immediate stop to it and taken appropriate disciplinary steps at that time. The employer noted that because the Invega Sustenna was a free program and involved no billing, the forms were not forwarded to accounting where the forms would have been reviewed. Thus, the illicit practice continued until it was finally discovered in 2014.

12. The grievant never asked how to fill in these forms properly even though the company occasionally sent them back; mostly because it did not know who she was and questioned the signatures and representation of her pharmacist status. Instead of checking with her direct supervisor, the grievant simply put the forms back in Ms. Banks' office. The employer further asserted that the claim that she simply "didn't think" about these forms is either disingenuous or displays a callous disregard for the importance of her job.

13. The employer also assailed Ms. Banks and noted that there was never any authorization for her to sign her name as a pharmacist and no authority for her to give the grievant permission to do so either. The employer also noted that there was no support for her claim that someone from the company or its supplier told Ms. Banks and the grievant to sign as pharmacists and that the arbitrator should reject that claim as well.

14. The employer regarded this as serious breach of trust and integrity. No one should sign as a pharmacist unless they are and the grievant knew this. She also should have known that no one has the authority to tell her to commit such a serious breach of protocol. She further knew that the forms needed to be signed off by a registered and licensed pharmacist yet she signed off on them falsely instead of walking the 10 feet to get a real pharmacist signature.

15. The employer further noted that it has treated dishonesty seriously in the past and has terminated people for very similar kinds of conduct; from stealing petty cash, falsifying time cards, or even cheating on a competency examination. Falsifying any document in a hospital/healthcare setting can be a major violation and could well pose a health risk to patients. While no patients were directly harmed the employer asserted that it cannot trust the grievant to fill out such forms in the future.

16. The employer also downplayed the Board of Pharmacy's dismissal of the complaint against the grievant and noted that it was simply dismissed "at this time" but could be reviewed later. The fact that Regions was involved in this has now undermined its reputation at the Board of Pharmacy and possibly with other licensing agencies.

17. The employer also rejected the union's "no harm no foul" theory of this case. Even though no patients were harmed and even though Invega did not terminate the free drug trial program, the grievant's actions placed all of that in jeopardy and could have done both. The employer asserted that the union misses the point entirely of this grievance – it was about trust in a person that needs to be trustworthy and honest in order to represent the hospital to the public, the licensing agencies and their suppliers of drugs and other material. The employer alleged that the grievant failed in all those respects.

18. The employer also cited other cases involving forging signatures and other forms of dishonesty where the arbitrators upheld the discharges under very similar theories as are being posited by the union here. The employer asserted that the seriousness of forging a signature and falsely holding oneself out as a licensed person is a violation of everything the hospital stands for.

19. The employer also cited *IBT #320 and ISD 625*, BMS Case No. 11-PA-0654 (Latimer 2011) and noted that the arbitrator upheld a discharge where the employee had falsely reported site visits and falsely submitted reports that were knowingly untrue. The arbitrator's theory was that this level of misconduct could not be minimized or overlooked and that the trust the District needed in that employee had been forever lost.

20. The employer asserted that all relevant elements of just cause were present here – the grievant had clear notice of her responsibility to be honest in filling out official forms like this, she was given training along with all other employees of the needs to be accurate and honest in all her dealings with the hospital, its staff, patients, and suppliers, she clearly knew she was not a pharmacist and not to hold herself out as one, there was a fair and thorough investigation that showed that she in fact falsified these forms. The mere fact that Ms. Banks told her to do this, even if that is true, is no excuse for her conduct.

21. The employer scoffed at the notion that the grievant did not know what the initials “RPH” meant. Her claim that it stood for registered pharmacy, versus registered pharmacist is not credible. This was not raised until the hearing, indeed the grievant acknowledged during the investigation that she understood what these initials meant and that she could not use those after her name, and must therefore be viewed as a last ditch effort to come up with something, anything to save her job, even to the point of making a ridiculous argument. The employer asserted that everyone in the pharmacy knows what those initials mean and that it is not believable that the grievant could have thought it stood for something else. The grievant admitted that she knew never to sign as an RN or MD; thus signing as a pharmacist is no different and should be treated seriously.

22. The employer similarly rejected the claim that the grievant was simply not trained or that she did not read the forms completely. The line that specifically says that only a registered pharmacist can sign the form is directly next to the signature line. The employer noted that Ms. Banks may well have told her to sign for her in her absence but never told her to sign as a pharmacist. Even if she had, the grievant’s lackadaisical attitude toward that advice demonstrates a completely cavalier view toward her job.

23. Further, the union's attempt to blame management for the grievant's misconduct should be similarly rejected as it was in *IBT #320 and ISD 625* matter discussed above. While management can be held accountable for some of the actions of its employees it should not be forced to reinstate an employee who has committed fraud in violation of policy and state law.

24. Finally, the employer noted that it considered lesser forms of discipline but insisted that termination is the only appropriate penalty here given the very serious and egregious conduct in this case. Despite the grievant's tenure and otherwise good record, trust in her honesty has been compromised and cannot be regained given what she did.

Accordingly the employer seeks an award of the arbitrator denying the grievance in its entirety.

UNION'S POSITION

The union's position was that there was not just cause to terminate the grievant. In support of this position the union made the following contentions:

1. The union noted that the grievant is a long-term employee with an excellent record. She has no disciplinary record prior to these charges and was well regarded by her supervisors. There were never any issues having to do with her honesty and integrity. In fact she scored very high in that regard.

2. The grievant is responsible for filling out many forms per day and there was never any issue of her adherence to proper protocol and procedure. Here while she acknowledged signing the forms for Ms. Banks and signing as an RPH, she was directed to do so by Ms. Banks who was above her on the organizational chart. She should have been allowed to rely on the person in that position and who did this every day. Ms. Banks filled the Invega forms out regularly; the grievant simply filled in for her on a very occasional basis and thus simply followed the advice she was given by Ms. Banks.

3. The union further argued that when the Invega free drug trial program was initiated there were no procedural safeguards put in place and very little training provided to the grievant on the way to fill out the forms. Thus she again relied on Ms. Banks to direct her work, as she was the person who performed this task on a regular basis.

4. The union asserted that the lack of protocol by the employer contributed to the events that led to the grievant's termination and noted that it was not even clear who was responsible for making sure that the forms necessary to get refills of the Invega drugs were properly filled out. The union pointed to Ms. Amborn's affidavit and noted that she passed the responsibility to the grievant's direct supervisor to make sure the protocols were in place to get the forms completed correctly. The union noted that this obviously did not happen as there was virtually no oversight of what Ms. Banks was doing nor any direct input by the grievant's supervisor between 2010 when the Invega program was instituted and when the grievant's actions were discovered.

5. The union also noted that even after Ms. Banks' actions were discovered, the grievant's direct supervisor never checked to see if the grievant's actions were in compliance with the protocol. This laxity of enforcement was a major point in the union's case and the union asserted that neither the direct supervisor nor the pharmacists themselves were watching what was going on. The union noted that neither Ms. Vang nor Mr. Harvey interceded to check on how these forms were being filled out nor did they provide any direction on how to do them.

6. Mr. Harvey admitted that he had nothing to do with the program from 2010 and left it to Ms. Banks to set the entire thing up. She testified that she spoke with the vendor of the Invega Sustana product, Janssen Pharmaceuticals, personnel responsible for this program and that they told her to simply put her name at the top of the form as an RPH – so she followed their instructions. After this went on for years without apparent issue or difficulty, she assumed that it was acceptable to both Invega as well as Regions. Accordingly, she told the grievant to do the same thing – just as she had been instructed.

7. The union pointed out that no one from Invega was called to testify at this hearing and the employers case is thus speculative to the extent it claims that no one told Ms. Banks to put the initials RPH at the top of the form. Ms. Banks indicated that she had been told to do this by the vendor, Janssen, as noted herein.

8. The union noted that the pharmacists shared considerable blame here as the drugs were clearly coming into the pharmacy and were being dispensed yet no one was checking to see how they were getting there or to make sure the forms were being filled out correctly. The union noted that licensed pharmacists are responsible for what goes on in their pharmacy yet none of them were disciplined even though several indicated that it was their license at risk. They should have checked on where these drugs were coming from and made sure the forms were being filled out correctly.

9. The union blamed management for this lack of oversight and for its lax enforcement of its supposedly crucial protocols. The union pointed to the management rights clause that allows and even mandates that the employer controls “all operations and services” and determining the methods and means of delivering those services. The employer retained that right yet did nothing to actually do that. The union asserted that had the employer done its job correctly none of this would have occurred.

10. The union questioned the timing of the discovery of this and noted that Ms. Vang discovered Ms. Banks had been signing the forms incorrectly yet never checked the grievant’s forms or told her not to sign as RPH. The grievant had no idea she was doing anything wrong.

11. The union vehemently maintained that signing Ms. Banks name was not forgery as the employer claimed since she had specific permission from Ms. Banks to do so in her absence. The union pointed out too that the only time the grievant would fill these kinds of forms out was when Ms. Banks was unavailable and she did exactly as she had been instructed. There were no problems in the few times the grievant filled these forms out except when she inadvertently placed the incorrect number on the form and another when Janssen called asking who the grievant was since they were not used to seeing her name on the forms.

12. The union noted that Ms. Banks had been signing as “RPH” for years without apparent difficulty and that the grievant simply followed that format. The union noted too that she had done this some 42 times in 2014 and the grievant did it perhaps 4 times total, See employer exhibit 12.

13. The union asserted that if reinstated the grievant would never do this again and that now, finally, procedural safeguards have been put in place to make sure a licensed pharmacist signs the forms. In fact it is done on line so there is no chance that the grievant would ever do this again.

14. The union asserted that given her tenure at the hospital since 2002 and her excellent work record and the fact that there is little if any chance such a thing will recur, termination is far too harsh a penalty. The grievant did just as she was instructed for almost 5 years without anyone ever telling her she was doing anything incorrectly.

15. The union characterized this case as ludicrous and asserted that the grievant never intentionally held herself out as a pharmacist. All the employer needed to do was to tell her how to fill these out correctly and she would have done so.

The union seeks an award of the arbitrator sustaining the grievance, reinstating the grievant with full back pay and accrued contractual benefits.

DISCUSSION

FACTUAL BACKGROUND

The Hospital is an acute care facility located in St. Paul, Minnesota. It has a pharmacy department responsible for dispensing drugs pursuant to prescriptions by the doctors at the facility. The evidence showed that there are registered and licensed pharmacists working at this facility. Their licenses are subject to the jurisdiction of the Minnesota Board of Pharmacy. Both parties acknowledged that to hold oneself out as a licensed pharmacist one must be properly educated and licensed by the State of Minnesota.

The grievant is a purchasing assistant whose job is to fill out forms to re-fill needed medications and other supplies for the hospital pharmacy. She is not a licensed pharmacist. By all accounts she has been an excellent worker. Her evaluations show that she is exceptional. There was no evidence that she has never knowingly been deceptive or intentionally filled out required forms falsely prior to the instant case.

Starting in 2010 Regions was selected for a free drug trial by the Invega Sustenna Company. There was apparently also a vendor for this called Janssen but no one from either company was called to testify at this hearing. The program was designed to give a short trial of a particular drug to patients who may benefit from the product. As with all drugs, this drug had to be prescribed by a medical doctor and dispensed from the pharmacy as with other drugs. There was no billing for these however so the accounts department did not review the forms necessary to re-fill these drugs from the company. The forms were filled out and sent to the vendor and the drugs were re-filled. It went that way for several years without apparent incident or problem.

Two forms were required for Regions to receive free product: an order form on which a pharmacist certified that he or she was licensed and that the product was dispensed appropriately, and a picking list on which a pharmacist or authorized person acknowledged receipt of the product. The evidence showed that the drugs were in fact coming into the pharmacy on a regular basis pursuant to the forms that the grievant and Ms. Banks completed to get re-fills of the product. While in most cases the pharmacists were responsible for signing off on such requests they did not on these. It was frankly somewhat curious to note that these drugs were regularly appearing in the pharmacy and were being dispensed yet the pharmacists never checked on how they got there or where they were coming from. No one ever audited the forms nor ever inquired as to how these drugs were getting into the pharmacy. This will be discussed more below but that was never completely explained other than for the employer to simply note that there are many forms and it is a large department and the pharmacists cannot monitor every action of every person in the pharmacy.

The grievant worked with Ms. Leola Banks. Ms. Banks was the purchasing agent; the grievant was the purchasing assistant. It was clear that the grievant did not work with the Invega forms often whereas Ms. Banks did. The evidence also showed that while Ms. Banks was not the grievant's direct supervisor, she frequently directed her work and told her what to do when filling out the Invega forms, as the grievant did not regularly work with these forms and at one point expressed some concern about her lack of familiarity with them and wanting to make sure she did not make any errors

As discussed more below, there was considerable dispute about the propriety of signing off on these forms. It was clear that Ms. Banks told the grievant how to complete the various forms referred to above and told her that if she needed to, the grievant was authorized to sign Ms. Banks' name on the form in order to continue to receive the product.

Ms. Banks was apparently told by someone from Invega's vendor, Janssen, that it was acceptable to sign the form as a Registered Pharmacist, RPH. That person was not called to testify but the parties acknowledged that Ms. Banks would testify that she had been told that.

There was also no dispute that both Ms. Banks and the grievant signed these forms and placed the initials RPH after their names at various points. There was also no dispute that on occasion, the grievant signed Ms. Banks' name on the forms. The grievant testified credibly that she had been told to do so by Ms. Banks if she were unavailable.

The evidence showed that between January 2014 and August 2014 there were some 65 Invega Sustenna forms completed. The grievant signed 17 of these for Ms. Banks as a pharmacist. See, Employer exhibit 12, at 1, 2, 26, 29, 36, 49, 50, 51, 52, 53, 54, 55, 57, 62, 63, 64 and 65. The grievant signed her own name on five of the relevant documents and wrote "RPH" as her professional designation. For each of the dates that the grievant signed as Ms. Banks, she was covering for her, since Ms. Banks was out on paid- time-off.

The evidence showed that the grievant did not perform this work often and would complete the Invega forms only when Ms. Banks was unavailable or on vacation, etc. A review of the extensive record showed that while she did fill out these forms incorrectly and signed off as an RPH this was a relatively infrequent occurrence. There was no evidence of any harm that occurred to any patients as the result of these misrepresentations nor was there any evidence that the drug company discontinued the drug program. The Board of Pharmacy was notified of these facts and investigated the allegation that the grievant and Ms. Banks had falsely represented themselves as pharmacists when they were not. The Board dismissed the allegations and took no further action.

The employer made much of the fact that the allegations were dismissed “at this time” and asserted that these allegations could be brought up in the future. That however was something of an exaggeration. The licensing Boards at the State frequently investigate allegations of misconduct and have the power to impose various types of penalties on those under their jurisdiction. They also have the authority to dismiss allegations if a Board does not feel that disciplinary action is warranted. Those actions can be brought up again but generally only if there are further allegations at a future time.

The evidence also showed that the grievant frequently filled out a multitude of different forms for re-fills of drugs and other supplies and that when those forms called for a pharmacist’s signature she followed protocol and got the appropriate signatures. It was also shown that getting the pharmacists’ signature was easily done as they worked a few feet from the grievant and Ms. Banks’ offices. There was no evidence that the grievant ever signed her name falsely or forged another person's signature on any other form. Neither was there any evidence that she gained anything from her actions here.

The evidence also showed that Ms. Banks regularly worked with the Invega forms and that she frequently signed her name as an “RPH.” This was also clearly false since Ms. Banks is not a licensed pharmacist either.

These facts came to light in August 2014 when Ms. Banks was on PTO and Ms. Vang, the supervisor found the Invega forms in a folder in Ms. Banks office. At that time the focus of the investigation was on Ms. Banks. It was not until a few weeks later that the grievant's conduct was discovered and called into question.

The union made much of the fact that even after Ms. Vang discovered the discrepancies in the forms and had the file; she continued to allow the grievant to fill them out incorrectly and never said anything to her about it. This record showed that Ms. Vang was simply not aware of the grievant's actions with regard to these forms until a few weeks later. When she did actually notice that the grievant too had filled out the forms incorrectly, she contacted the HR department to conduct an investigation. Thus on this record there was insufficient evidence to show that Ms. Vang was complicitous in this or somehow knowingly allowed the grievant to continue her actions.

Upon completion of the investigation and completion of the massive exhibit 12 showing all of the Invega forms, or most of them anyway, the employer terminated both Ms. Banks and the grievant for their actions. The union grieved this matter and it was processed through the appropriate steps of the grievance procedure in a timely fashion. It is thus against that factual backdrop that the analysis of the matter proceeds.

FORGING MS. BANKS SIGNATURE

The termination letter of November 8, 2014 did not specifically refer to the fact that on occasion the grievant would sign for Ms. Banks but the parties discussed this at some length during the two days of hearing in this matter. It was very much a part of the employer's case here and must be dealt with in this discussion.

There is no question that on occasion the grievant signed Ms. Banks' name. Ms. Banks knew about it though and gave her specific permission to do so. While this was inaccurate there was no evidence that the grievant ever signed for anyone else on any other forms or official documents

The employer cited American Arbitration Association, AAA LEXIS 727 (2009) involving a firefighter who falsely claimed that he had completed certain skill and forged his preceptors' signatures. That case showed that the employee sought to gain something for himself – certification of having attained certain skills by forging a person's signature without their consent or knowledge.

This situation was different in that Ms. Banks not only knew about the fact that the grievant was signing for her on occasion but also specifically directed her to do so. Further, there was no suggestion that the grievant sought to gain anything for herself as the result of this. While this was very poor judgment it represents a very different sort of case.¹

The employer also cited *IBT #320 and ISD 625*, BMS Case No. 11-PA-0654 (Latimer 2011) where the arbitrator upheld a discharge for falsely filling out time sheets. That case was reviewed in some detail and revealed a different situation in that the falsification there was shown to be quite intentional and was done frankly to avoid work. Here while the grievant should clearly have known not to hold herself out as a pharmacist and this was a serious violation, the overall record did not establish that her trustworthiness was so compromised that she could never be trusted again, as the employer suggested. Here while this whole episode was a fiasco on many levels, there was no evidence that the grievant ever falsified any of other forms – and there were a multitude of them – that she submitted on any other issue. Further, even her evaluations over the course of many years demonstrated a high degree of trust in her work and her ethics.

There was also a clear element of intent in the *IBT 320 and ISD 625* case. There the employee was well aware that she was falsely claiming time whereas here the mistake was based more on naiveté and carelessness in assuming all was OK with these forms rather than any sort of intent to defraud or deceive anyone.

¹ It should be noted that falsifying a document is still serious and that the fact that the grievant did not gain anything as the result of it is not the sole factor to be considered. It is a factor used here though to determine the appropriate result. This result is very much limited to these unique facts and based on the credible assertion by the grievant and the union that the grievant was incredibly naïve but had no nefarious intent and will never commit anything like this type of error again.

This conclusion is further bolstered by the clear fact that the grievant never did anything like this with any other form. There was for example, no evidence whatsoever that she put the initials RPH after her name on any other form. Moreover, when she was instructed to get a pharmacist's signature on a particular form, she always did that, with the exception of these forms. While the grievant's conduct can in no way be condoned or minimized, it is clear that something was radically different about these forms in that the grievant's story about being told how to fill them out by others whom she assumed, perhaps wrongly, were in authority, was more than plausible.

Thus, while the grievant should have checked with someone in actual authority to determine if it was acceptable to sign Ms. Banks' name on the forms, this misstep did not on these unique facts demonstrate an offense so opprobrious as to warrant termination. The next and more serious charge was that she signed as an RPH when she was not.

SIGNING AS AN RPH

There was no real dispute here that the grievant signed as an RPH on some of these forms. Her defense was really that she was told to do it by someone she trusted and whom she knew had done these forms many times. She assumed it was acceptable. She clearly should not have done that. Anyone who works in a healthcare facility knows not to sign as an RN or MD if they are not one and the grievant should have known not to do this either. Her claim that she did not know precisely what those initials meant was unpersuasive. First, it is simply unlikely that a person working in a pharmacy with pharmacists on a daily basis getting them to sign a multitude of forms with those initials on them would not know what they meant.

Second, there is the specific statement within an inch of the signature line that states that the person signing these forms is a registered pharmacist. These facts conspire to render the grievant's claim of abject ignorance ring hollow. There is no question that she was told to sign these forms in this way by Ms. Banks but that alone does not excuse her actions.

It was a clear breach of the duty to fill out the forms as accurately as possible. The remaining leg of the analysis is to determine the appropriate penalty based on a just cause analysis.

THE APPROPRIATE PENALTY

In any just cause analysis there is the question of whether the penalty is appropriate given the offense committed. Certainly, signing as an RPH is a serious breach of trust and while the union claimed that the grievant never held herself out as a pharmacist, those initials do exactly that. The union's point was that she did not do so on any other form nor is she ever likely to do this again.

The grievant was quite contrite at the hearing and simply relied on the fact that a more experienced employee told her what to do and that this practice went on for years without anyone in true authority noticing it, questioning it or checking the forms even though the drugs were coming into the pharmacy on a regular basis and were being dispensed as well.

The troubling part of this entire case is that no one in management or in the pharmacy department ever took the time to check on these forms even though the product was clearly coming in and was being properly dispensed. The pharmacists never checked to see how the drug was coming in or whether the forms that ordered it were being filled out. One must of course be careful not to blame management for the transgressions of lower level employees when they do something wrong – unless of course there was some obligation to watch over them. Here, the other troubling part is that the grievant was regarded as so trustworthy no one thought to check on these forms – simply because she was so trustworthy. That stark fact undercut the employer's claim that the grievant can "never be trusted again."

While an employer cannot monitor all of its employees all the time, especially where they are not acting correctly there should have some protocol in place to make sure that these forms were being processed correctly. As noted above, the drugs kept coming and they were presumably being dispensed by the pharmacists pursuant to medical orders for them yet no one in authority ever questioned where they were coming from or how they got there.

While this does not in any way excuse the grievant's conduct in signing her name as a pharmacist – she certainly knew not to do that even though Ms. Banks told her it would be OK to do so – yet it does undermine the claim that the grievant can never be trusted again. The overall record showed that everyone involved was simply complacent here and since there were no bills due to the free trial program, people assumed everything was fine. There is an old adage about assumption and it was never more accurate than it was shown to be here.

The employer also noted that one of its pharmacists has threatened to quit if the grievant is allowed to return. That may or may not be true but just cause analysis is not governed by the threatened actions of other employees to quit if someone is reinstated.²

Further the stated reason for the threat to quit was that the pharmacist in question would not work for a place that allowed this conduct due to the potential for discipline on her license. While this sentiment is understandable it demonstrates the union's point that the employer, and the pharmacists themselves, bore some responsibility for all of this. Someone should have been checking this and apparently no one was, including the pharmacist who has now threatened to quit due to the events in question.

The grievant should have known better than to sign off as an RPH – indeed she acknowledged that she would not sign as an RN or MD even if someone told her to. The grievant's conduct in signing as a pharmacist is a very serious violation of ethics and possibly statute but her conduct was seemingly condoned by a more experienced and a higher level employee. Further it had gone on for months, even years before anybody noticed it leading the grievant to believe that someone in real authority must have seen these forms (they were not intentionally hidden and they could easily have been reviewed by anyone in the pharmacy presumably).

² While there may be some instances, such as harassment or threats of violence where that claim is relevant, under these circumstances it was not.

The obvious import here is that the pharmacists bore some responsibility for all this that was not shared in the disciplinary consequences meted out to the grievant and Ms. Banks. While that in no way condones their conduct it does render the discharge on somewhat shakier logical ground.

As many arbitral commentators have opined, length of service prior record and the chances that the offending conduct will recur if the grievant is reinstated are relevant factors. Several options were considered. Termination outright was indeed considered. Signing as a pharmacist under these circumstances is a major transgression and no formal policy against it is really necessary – everyone in a hospital should know that intuitively.

Discharge was rejected due to the grievant's record, her contrition at the hearing and during the investigation. There was no evidence that she ever tried to hide what she did or to deceive anyone. The record revealed that she told the truth throughout this process. Finally, significantly there was the fact of her exceptional work record including statements regarding her trustworthiness and honesty.

Reinstatement with a short suspension was also considered but rejected due to the seriousness of the offense of signing as an RPH. While there likely was no true forgery in signing as Ms. Banks, that too was troubling but did not equate with falsifying a time record or other pertinent document for secondary gain. Accordingly, the most reasonable option here is to order reinstatement to the position the grievant had at the time of her termination but without back pay or contractual benefits.

AWARD

The grievance is **SUSTAINED IN PART AND DENIED IN PART**. The grievant is to be reinstated to her former position within 10 business days of this award but without back pay or other contractual benefits.

Dated: May 26, 2015

Jeffrey W. Jacobs, arbitrator