

IN THE MATTER OF THE ARBITRATION BETWEEN

GRIEVANCE NO.: 27-19-20101014-0286-01-04

1087

The Ohio Civil Service Employees

Association, AFSCME Local 11

GRIEVANT: Amy Parker

AND

Ohio Department of Rehabilitation & Correction

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AUG 24 2011

DCSEA-OFFICE OF
GENERAL COUNSEL

OPINION AND AWARD

ARBITRATOR: Meeta Bass Lyons

AWARD DATE: August 23, 2011

APPEARANCES FOR THE PARTIES

MANAGEMENT:

Venita S. White, Labor Relations Officer 3, First Chair

Jackie Milsom, Office of Collective Bargaining, Second Chair

UNION:

Mike Hill, Ohio Civil Services Employees
Association, AFSCME Local 11,
First Chair

James Adkins, Ohio Civil Service Employees Association, Second Chair

Grievant, Amy Parker

PROCEDURAL HISTORY

The Ohio Department of Rehabilitation and Correction is hereinafter referred to as "Employer". The Ohio Civil Service Employees Association, AFSCME, Local 11 is hereinafter referred to as "Union". Amy Parker is the Grievant.

Grievance No. 27-19-20101014-0286-01-04 was submitted by the Union to Employer in writing on October 20, 2010 pursuant to Article 24 of the parties' collective bargaining agreement. Following unsuccessful attempts at resolving the grievance it was referred to arbitration in accordance with Article 25, Section 25.03 of the 2009-2012 Collective Bargaining Agreement.

Pursuant to the collective bargaining agreement between the Union and Employer, the parties have designated this Arbitrator to hear and decide certain disputes arising between them. The parties presented and argued their positions on June 9, 2011 in Columbus, Ohio. During the course of the hearing, both parties were afforded full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument. Witnesses were sequestered during the hearing. Parties agreed to submit written closings on or before July 8, 2011.

The parties stipulated that the grievance and arbitration were properly before the Arbitrator. The parties did stipulate to the issue as follows: Was the Grievant, Amy Parker, removed for just cause; if not, what shall the remedy be?

PERTINENT PROVISIONS OF THE 2009-2012 AGREEMENT

ARTICLE 24

24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by ORC Section 3770.02(1).

24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

- a. One (1) or more oral reprimand(s) (with appropriate notation in employee's file);
- b. One (1) or more written reprimand(s);
- c. One (1) or more working suspension(s). A minor working suspension is a one (1) day suspension, a medium working suspension is a two (2) to four (4) day suspension, and a major working suspension is a five (5) day suspension. No working suspension greater than five (5) days shall be issued by the Employer.

If a working suspension is grieved, and the grievance is denied or partially granted and all appeals are exhausted, whatever portion of the working suspension is upheld will be converted to a fine. The employee may choose a reduction in leave balances in lieu of a fine levied against him/her.

- d. One (1) or more day(s) suspension(s). A minor suspension is a one (1) day suspension, a medium suspension is a two (2) to four (4) day suspension, and a major suspension is a five (5) day suspension. No suspension greater than five (5) days shall be issued by the Employer;

- e. Termination.

Disciplinary action shall be initiated as soon as reasonably possible, recognizing that time is of the essence, consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process. ...

24.06 – Imposition of Discipline

The Agency Head or designated Deputy Director or equivalent shall make a final decision on the recommended disciplinary action as soon as reasonably possible after the conclusion of the pre-disciplinary meeting.

ODRC Standards of Employee Conduct, Rule 48

Failure to obtain, maintain and/or keep current any certification, license, etc., that is required to perform the duties of the position or to meet the minimum qualifications of the position.

BACKGROUND

Set forth in this background is a summary of undisputed facts and evidence regarding disputed facts sufficient to understand the parties' positions. Other facts and evidence may be noted in the discussion below to the extent knowledge of either is necessary to understand the Arbitrator's decision.

Grievant commenced employment with the State of Ohio at the Ohio Department of Rehabilitation & Correction on October 15, 2007 as a licensed Practical Nurse (LPN). Minimum qualifications for employment as a LPN is a license to practice nursing as a licensed practical nurse issued by Ohio Board of Nursing pursuant to Section 4723 Ohio Revised Code and proof of an approved course in medication administration. LPNs who administer dialysis treatment must possess Certification in IV therapy pursuant to Section 4723.17 Ohio Revised Code. The job classification requires biennial renewal of Licensure as a practical nurse, and requires the practical nurse to obtain and maintain certification in CPR. LPNs are required to obtain and maintain certification in C.P.R., and shall have first aid training. Grievant worked at Belmont Correctional Institution. Grievant subsequently transferred to the Ohio Reformatory for Women in February 2009.

On September 15, 2010 the compliance officer at the Ohio Reformatory for Women conducted the annual license audit for medical staff. The compliance officer discovered that the license of Grievant was listed as lapsed as of August 31, 2010. Grievant was contacted at home, and notified of the audit findings. Grievant was instructed to have her license renewed prior to returning to work; Grievant renewed her license the next day. Grievant had worked seven (7) days from September 1st through September 15, 2010 caring for patients. On September 15, 2010, Employer placed Grievant on Administrative leave.

On September 17, 2010, the pre-disciplinary meeting was conducted. At the meeting Grievant presented several documents to support her mitigation claim. These documents were not transmitted to the director for consideration of the appropriate remedy. Employer removed Grievant from employment on October 14, 2010 for violations of ODRC Standards of Employee Conduct, Rule 48: Failure to obtain, maintain and/or keep current any certification, license, etc., that is required to perform the duties of the position or to meet the minimum qualifications of the position. Her prior grievance record for performance-based conduct contained a written reprimand for violation of ODRC Standards of Employee Conduct, Rule 8: Failure to carry out work assignment or the exercise of poor judgment in carrying out an assignment.

The Union filed its grievance on October 20, 2010 alleging a violation of Article 24 and any other applicable articles of the Collective Bargaining. The grievance was not resolved within the procedure established by the collective bargaining agreement, and was properly advanced to arbitration.

POSITION OF EMPLOYER

Employer contends that the Grievant violated ODRC Standards of Employee Conduct (DRC SOEC), Rule 48: Failure to obtain, maintain and/or keep current any certification, license, etc., that is required to perform the duties of the position or to meet the minimum qualifications of the position. Grievant is employed as a LPN. The classification and position of Grievant requires that Grievant have and maintain her LPN licensure for her position as an LPN. Grievant failed to renew her license with the Ohio State Nursing Board as of August 31, 2010, and her license was placed on inactive status. Grievant continued to work her normal schedule and/or perform her duties

from September 1st through September 15th, 2010. There is just cause to discipline.

Employer contends that it is the responsibility of Grievant, and not Employer, to maintain her licensure with the State Board. Grievant cannot shift her responsibility to avoid disciplinary action. Again, the classification and position of Grievant requires that Grievant have and maintain her LPN licensure for her position as an LPN for DRC; Grievant failed to maintain her license from September 1st through September 15th, 2010. There is just cause to discipline.

Employer contends Grievant was dishonest in her investigatory interview. The question was posed to Grievant "has this happened before", and Grievant responded "no." According to information on the website of the State Nursing Board, the license of the Grievant had lapsed in 2008 for two days. Grievant was therefore not truthful during the investigatory process.

Employer maintains that it did have just cause to remove the Grievant from her position for violation of DRC SOEC Rule 48. The discipline for violation of Rule 48 for the first offense is removal due to the seriousness of the offense. LPNs provide medical care to patients under the direction of registered nurses, physicians and so forth, and must be licensed. Employer cannot have an LPN in its employment that is not licensed; there is a liability factor. Employer followed the SOEC rule, disciplinary grid and issued discipline. The discipline imposed was neither arbitrary nor capricious.

Employer requests that Grievance No. ##27-19-20101014-0286-01-04 be denied.

POSITION OF UNION

Union contends that Grievant had maintained her accreditation for the biennial period. Grievant failed to pay the renewal fee which caused her license to be placed on inactive status. The failure to pay was an oversight because Grievant was involved with extensive court obligations and appearances concerning her juvenile son. Pursuant to the Ohio Revised Code, the Board of Nursing cannot impose sanctions for failure to renew. The State Nursing Board only charged grievant a penalty. Failure to timely pay renewal fees is a minor violation, and should not be treated as a major infraction with Employer to warrant removal.

Union contends that management shares in any liability resulting from Grievant treating patients while her license was inactive status. While Grievant is responsible for the maintenance of her license, Employer is responsible for internal licensure compliance. The last day to renew nursing licenses is August 31st of each and every year. Employer did not conduct an audit of its nursing staff until September 15, 2010. But for Employer not conducting a timely audit of its nursing staff, Grievant would have become aware of her nonpayment of renewal fees prior to September 15th, and minimize the number of days worked in inactive status. Further, the compliance officer was not disciplined.

Union contends that the discipline imposed by Employer was excessive. Employer asserts that it has a zero tolerance policy for violation of Rule 48, and the rule calls for removal on the first offense due to liability to the institution and the State of Ohio. The position of Employer is contrary to the provisions of the Collective Bargaining Agreement. The parties have agreed under its Collective Bargaining Agreement that disciplinary action shall not be imposed upon an employee except for just cause. The just cause

standard requires a consideration of mitigation. The Union cites, The State of Ohio ODOT vs OCSEA # 31-07-(90-05-14)- 0037-01-06, in support of its position. Grievant submitted police statements, court documents, selected provisions of the Ohio Revised Code; these exhibits were not in the disciplinary file at DRC Central Office. The Deputy Director therefore did not review evidence of mitigation before making the decision to remove Grievant. Since the employer did not weigh the individual circumstances and mitigation in this case, there was no just cause for removal.

Union contends that the discipline was not progressive and was not commensurate with the offence. Work rules must be reasonably applied. Grievant failed to timely pay her renewal fees in 2008 and arrangements were made with her employer, Belmont Correctional Institution, for renewal without discipline imposed. Grievant had a written reprimand for performance on her record at the time of incident. The nonpayment of a renewal fee does not warrant removal.

Union requests that Grievance No. #27-19-20101014-0286-01-04 be sustained, and Grievant be reinstated to her position and awarded back pay, lost overtime, premium pay for missed holidays and restoration of her seniority and benefits. All leave balances be restored, including those that would have been accrued or restored to date. Union further requests that Grievant not suffer from any lapse in medical coverage for herself and her family. Lastly, the employer reimburses union dues owed for the time Grievant was removed.

DECISION

Grievant is charged with a violation of ODRC Standards of Employee Conduct Rule 48: Failure to obtain, maintain and/or keep current any certification, license, etc., that is required to perform the duties of the position or to meet the minimum qualifications of the position. Grievant acknowledged notice of the rule. It is not disputed that Grievant failed to renew her license on August 31, 2010. It is not disputed that Grievant maintained her accreditation for the biennial period. It is not disputed that the nursing license was placed on inactive status solely due to the nonpayment of renewal fees, and her license was reinstated September 16, 2010. Grievant continued to work her normal work schedule until she was placed on administrative leave on September 15, 2010. Employer has demonstrated a violation of Rule 48; Grievant in fact failed to maintain her license. The argument of union that Employer is at fault for failure to remind her of her obligation is without merit. It is the responsibility of Grievant to maintain her license not her Employer.

Article 24.01 of the 2009-2012- Collective Bargaining Agreement provides in pertinent part that "Disciplinary action shall not be imposed upon an employee except for just cause." The just cause standard of review requires consideration of whether an accused employee did in fact violate or disobey a rule or order of management. If a violation is proven, a decision must be made on the reasonableness of the discipline imposed in light of the nature, character and gravity of the situation, the employee's prior record and factors, if any, mitigating the employee's proven guilt. If the predicates for just cause are proven, then the penalty imposed by Employer is entitled to arbitral deference.

Union correctly asserts that the Warden does not have the authority to remove an OCSEA member; the Collective Bargaining gives that authority to

the ODRC Director or no less than an ODRC Deputy Director. Article 24.06 of the Collective Bargaining Agreement, Imposition of Discipline, states that the Agency Head or designated Deputy Director or equivalent shall make a final decision on the recommended disciplinary action as soon as reasonably possible after the conclusion of the pre-disciplinary meeting.

On September 29, 2010 the Warden issued a memorandum to the Director of the Department of Rehabilitation and Correction regarding the discipline of Grievant. The memorandum provided in pertinent part: "Attached is a Notice of Disciplinary Action on Amy Parker, LPN. Due to the seriousness of the rule violation, I am requesting that Amy Parker be removed from her position as an LPN. A removal is necessary due to the seriousness of the violation. She is charged with violations of Standard of Employee Conduct Rule 48... Please refer to just cause worksheet for Amy Parker's history. Her hire date is October 15, 2007." The just cause worksheet utilized by Employer restates what is known as the seven tests for just cause. It is generally thought that the answer should be yes to all seven questions.

The union draws exception to the response to Question 4 on the worksheet. Question 4 asks: Was the Employer's investigation conducted fairly and objectively? What mitigating/aggravating circumstances has the Employer considered? Employer response is "Yes, all parties indicated they had presented all pertinent information." The pertinent information included police statements, a delinquency complaint filed on August 16, 2010, notice of hearing for a court appearance on August 30, 2010, and so forth. Said verification provided verification of her state of mind during the month of August 2010 when her renewal fee became due. But this information was not indicated in the response, and was not provided to the Director for consideration for the final decision on discipline. The state advocate

indicated that the mitigation documents were not in the disciplinary file at DRC Central Office. Therefore the Director did not have the relevant information to consider whether mitigating factors existed in the assessment of just cause.

Employer conducted an investigatory interview on September 17, 2010. Grievant and her representative were present. The investigator asked the following questions:

Question 1: Ms. Parker are you aware of the requirements to maintain an active license while practicing as an LPN?

Answer: Yes.

Question 2: Why have you not renewed your LPN license?

Answer: It slipped my mind.

Question 3: Are you aware that sanctions can be placed on you by the Board for practicing without an active license?

Answer: Yes

Question 4: Has this ever happened before?

Answer: No.

Employer argued that Grievant was dishonest in her response. The investigator indicated in his report that "one aggravating circumstance was Nurse Parker's denial that this behavior had not happened in the past. However, confirmation provided by Ms. Sander indicates this was not an isolated event." The investigator did not question Grievant about the other lapsed renewal in the investigatory interview.

Prior to her transfer to Ohio Reformatory for Women, Grievant worked at the Belmont Correctional Institution. The compliance officer in that institution gave reminder notices for renewal of licenses. Grievant, who lived in Columbus and travelled to Belmont County, expressed concerns to her employer prior to August 31, 2008 that she did not have sufficient time to renew her license, and then travel from the Nursing Board office to the

institution to report to work in accordance with policy. Her supervisor accommodated the work schedule of Grievant to have her license renewed before she returned to work. Employer did not impose any discipline even though she was employed at the institution while her license was placed on inactive status.

Question 4 is simply poorly worded. Grievant testified that she thought the investigator meant the entire situation. The evidence indicates that her license did lapse on August 31, 2008. She advised her employer prior to the occurrence and arrangements were made. Grievant was not disciplined. Grievant had not been disciplined for inactive license prior to this incident. An invalid assumption was made, and reported as an aggravating circumstance. In applying discipline imposed by the grid, Employer must consider the factors in just cause, specifically mitigation.

Management echoes the response of Grievant, that the renewal deadline "slipped her mind" in support of its decision of removal. Grievant is a single parent with a teenaged son. Grievant informed her Employer and verified by supporting documentation the pending delinquency action facing her son. For these reasons the focus of Grievant were diverted to family matters. Grievant further testified that she did not receive any renewal notices from the state nursing board. A glitch arose in the system due to a residential move by Grievant and she did not receive her renewal notices.

Summary discharge in lieu of corrective discipline of the employee is deemed appropriate for serious offenses. The job classification of an LPN states that the purpose of the practical nursing occupation is to administer medications and treatment to patients, observe for reactions and chart progress of patients in order to maintain quality and consistent medical care under the direction of a registered nurse, licensed physician, and so forth. Employer argues the unlicensed performance of her duties exposed Employer and the State of Ohio at certain level of risk and to liability for the

unlicensed treatment of patients. Exposure to liability based upon the conduct of an employee is a consideration in the analysis of the appropriate penalty. Thankfully nothing happened in the seven days that Grievant treated patients.

Union argues that the claim of Employer regarding concerns of liability "rings hollow." Employer hired another employee with restrictions to her license, and then ignored those restrictions resulting in a greater risk of liability which Employer is willing to assume.

Nursing is also a regulated profession. The purpose of licensure is to protect the public by assuring minimum nursing competence, and tracks those persons practicing as nurses. Licensure process is twofold. The process involves continuing education class to keep a practitioner current on technology, and any new developments in the nursing field as well as renewal fees, the monetary cost in practicing the profession. The action giving rise to this grievance is nonpayment of licensing renewal fees which is considered a minor violation in accordance with regulations of the state nursing board. The argument of Employer to the exposure to risk of liability due to the failure to pay a renewal fee to a competently trained nurse is de minimis.

Employer has the right to establish its own rules and standard of conducts independent of the state nursing board. Employer has a legitimate interest in its employment of licensed individuals. However in the administration of discipline the Collective Bargaining Agreement requires just cause for discipline. Even when removal is imposed for a first offense violation, Employer must consider mitigation before a decision to impose removal rather than corrective action. It is evident through the grievance trail, testimony and arguments that Employer simply ignored the mitigating circumstances because the disciplinary grid provides for removal for a first time offense for violation of Rule 48. More importantly, Employer failed to

certify the entire disciplinary packet to the Director to assess just cause inclusive of the issue whether or not the justifications of Grievant for her late renewal were satisfactory evidence of mitigation or a simply plea for mercy.

In summary, the evidence persuades the Arbitrator that Grievant violated the work rule 48, as alleged in Employer's letter of October 14, 2010, and there is just cause to discipline. Removal, however, was excessive as a punishment as to be beyond the Employer's managerial prerogatives. The Arbitrator must therefore sustain in part Grievance no. 27-19-20101014-0286-01-04.

AWARD

After a full review and consideration of all documents and arguments presented, as well as the testimony of witnesses, and the post hearing briefs of the parties, Grievance No 27-19-20101014-0286-01-04 is sustained in part. There is just cause discipline the Grievant, and the appropriate remedy is a three (3) day suspension.

Grievant is reinstated to her position as an LPN, and is awarded back pay less the period of suspension, no overtime, premium pay for missed holidays, less earning or other compensation, less normal deductions and union dues, and restoration of her seniority, benefits and health insurance All leave balances be restored, including those that would have been accrued or restored to date.

August 23, 2011

/s/Meeta Bass Lyons
Meeta Bass Lyons, Arbitrator
Steubenville, Ohio