

## **Glazer # 13**

### **FEDERAL MEDIATION AND CONCILIATION SERVICE**

### **IN THE MATTER OF THE VOLUNTARY ARBITRATION BETWEEN**

Employer

-and-

Union

GRIEVANT: Employee 1

\* \* \* \* \*

### **ARBITRATION OPINION AND AWARD**

\* \* \* \* \*

#### **ISSUES**

1. IS THERE SUBSTANTIVE ARBITRABILITY?
2. WAS A CONTRACT VIOLATION ESTABLISHED, AND IF SO, WHAT SHOULD BE THE REMEDY?

On January 7, 2000, the Employer proposed to remove RN Employee 1 for endangering the safety or causing injury through carelessness and negligence, and for making a false report of the incident. Employee 2, the chief of patient care, wrote:

1. It is proposed to discharge you from employment with the ER based on the following reasons:
  - a) Charge: Endangering the safety of or causing injury to personnel through carelessness or negligence.

Specification: On November 11, 1999, a patient Person 1, has a 2 minute period of severe

bradycardia with a widening QRS complex prior to a systole. During this time there were audible alarms. You were sitting at the monitor but did not look at or respond to the monitor alarms for at least 2 minutes (until the systole - no heart rate - was noted). The patient was resuscitated but expired at a later time.

b) Charge: Intentional falsification, misstatement, or concealment of material fact in connection with employment or any investigation, inquiry or other proper proceeding; or willfully forging or falsifying official Government records or documents.

Specification: On November 24, 1999, when questioned by your supervisor regarding the report submitted by the charge nurse, you stated you were at the desk alone and "Rob was coming out of the room when she looked at the monitor and noted a systole on patient Person 1." In your report of contact received November 29th, you stated "Employee 3 was also at the desk working with his charts." Your previous report and reports submitted by fellow workers indicate this is not true.

Thereafter, on March 8, 2000, the proposal to discharge was rescinded. Instead, Employee 2 decided to move the Grievant from a midnight to a day tour for 90 days, along with an educational review. Employee 2 wrote on March 24, 2000:

1. A notice dated March 8, 2000 informed you that effective March 27th you would be assigned to the day tour of duty for ninety days to enable us to monitor your clinical performance and professional judgment and to perform an educational review of any deficiencies noted.
2. This decision has been made because of my responsibility to ensure that patients are cared for in a caring, safe and appropriate manner. As you recall, you have received disciplinary actions and counselings in the past for leaving your intensive care unit inadequately staffed placing patients at risk while you went outside to smoke; again leaving the unit inadequately staffed while you and another employee were in the utility room smoking (again endangering the patients by leaving them unattended and placing them at risk with smoking in an intensive care unit); displaying rude and uncooperative behavior when police officers were called; possible failure to

adequately respond to a patient in a life threatening situation; placed on medical certification for excessive use of unplanned leave; inappropriate interactions with co-workers and patients (both patient and co-workers report obscene and inappropriate language).

3. My concern is with your apparent unwillingness to follow medical center policies and use good judgment when caring for this facility's most vulnerable patients. I will allow you to return to an off tour (where supervision may not be as visible) when you have demonstrated appropriate decision making to your supervisor and I am assured that the patients at this facility are not at risk.

This action was grieved by the Union on April 24, 2000 because it felt that the Grievant was subject to a disciplinary action without just cause. It notes that the discharge had been rescinded because of lack of evidence. The Employer responded that the 90 day assignment was made to monitor the Grievant's clinical performance. Following the end of the tour, the Grievant was returned to her regular shift.

An arbitration hearing under the auspices of the FMCS was held on July 13, 2001. Testifying was Employee 1, Grievant. Briefs were submitted by the parties.

## **BACKGROUND**

The initial charges against the Grievant were based upon allegations of a co-worker, Employee 4, RN. He made the following written statement on November 22, 1999, concerning an event on November 11, 1999:

On November 11, 1999 I worked the midnight shift on Telemetry along with Employee 5. That tour three staff were assigned to MICU: Employee 1, Employee 3, and Employee 6. I am not sure at what time but during the shift I heard audible monitor alarms coming from MICU. As I was eating in the break room, I leaned over to look at the monitor and saw Employee 1 sitting near it. What seemed to be several minutes had passed and the audible monitor alarms continued non-stop. Again, I leaned over to see the

monitor and Employee 1 was still sitting near the monitor, intently reading a book, at which time she looked up at the monitor and stated, "Rob is that patient really in a systole?" Later, I learned that Person 1 had become bradycardic then gone into a systole.

Employee 1 requests the following damages and attorney fees:

To Employer:

Here is a list of damages that you have requested.

I was placed on the day shift, eight hour shifts for a total of fourteen weeks. My normal tour of duty is the night shift, twelve hour shifts.

My usual work pattern has been six twelve hour shifts and one eight hour shift each pay period. I have been on this work schedule for the past seven years.

14 weeks @ \$50/week for day care expenses	\$700
Extra fuel cost. Three days per pay period @13.50/day	\$300
X 7 pay periods	
Total 64 hours of weekend premium pay lost	\$465
One Holiday worked, 4 hours of lost pay	\$225
24 hours/week X 14 week loss of income from secondary job	\$10,080
Medical expenses from illness due to stress	\$150
Attorney fees	\$2,696.20

Please feel free to contact me concerning the above information if you have any questions.

Employee 1 works in telemetry and ICU on the midnight tour. The Grievant testified that on the day in question, she responded within two seconds of noting an a systole on her monitor for the patient. An a systole means that the patient has essentially a flat line and is without a heartbeat. She denies that Nurse Employee 4 was anywhere near her at the time of the patient

alarm. The Grievant further notes that the telemetry for the patient fails to show that the patient was bradycardic prior to becoming a systole as claimed by Employee 4. The Grievant contends that the records show that there was a code within twelve seconds of the a systole. Employee 1 adds that after two minutes of a systole, a patient's heart could not be restored, yet the patient survived in this case.

The Grievant has a previous seven day suspension from 1999 for patient care issues. She indicated that she was reassigned for 90 days in this matter, and as a result she lost premium pay, wages from a second job, and other related expenses. The Grievant also indicated that the reassignment produced stress for her.

### **POSITION OF THE EMPLOYER**

It is asserted that as a Title 38 employee, the Grievant was not subject to discipline in this matter, since she did not lose a component of base pay. Further, it is maintained that the Grievant was not “transferred” so as to be subjected to discipline. Article 13, Section 2(B) says:

B. For Title 38 employees:

1. A disciplinary action is defined as an admonishment or reprimand taken against an employee for misconduct and
2. A major adverse action is a suspension, transfer, reduction in grade, reduction in basic pay, or discharge taken against an employee for misconduct.

The Employer also argues that the action involving the Grievant concerns “professional conduct or competence such as patient care or clinical competence”, and that it is therefore barred from the grievance process. Article 42(C) say:

C. Under Title 38 Section 7422, the following exclusions also apply:

1. Any matter or question concerning or arising out of professional conduct or competence such as direct patient care or clinical competence.

The Backpay Act is said to preclude the Grievant's request for damages related to anything except back pay. Attorney fees are also said to be inappropriate under the facts of this case.

### **POSITION OF THE GRIEVANT**

It is argued that the Grievant was sent to the afternoon tour because of a prior incident, and it is maintained that this decision was therefore disciplinary. Further, it is asserted that there wasn't a showing that a grievance was properly precluded under Article 42, Section C.

The Grievant asserts that Article 13, Section 4 prohibits reassessments being used as a form of discipline without appropriate procedures. The Grievant further notes that she received a successful performance appraisal. It is maintained that the Grievant was, under Article 16, Section 1(B) and (C) improperly harassed and intimidated.

### **DISCUSSION**

The jurisdictional issues will first be considered. Article 13, Section 1 on discipline and discharge states:

#### Section 1 - General

The Department and the Union recognize that the public interest requires the maintenance of high standards of conduct. No bargaining unit employees will be subject to disciplinary action except for just and sufficient cause. Disciplinary actions will be taken only for such cause as will promote the efficiency of the service. Actions based upon substantively unacceptable performance should be taken in accordance with Title 5, Chapter

43 and will be covered in Article 26 Performance Appraisal System.

The Grievant is a Title 38 employee. Discipline and major adverse actions are defined for her in Section 2(B) of Article 13 as follows:

B. For Title 38 employees:

1. A disciplinary action is defined as an admonishment or reprimand taken against an employee for misconduct and
2. A major adverse action is a suspension, transfer, reduction in grade, reduction in basic pay, or discharge taken against an employee for misconduct.

Insofar as the Employer decided not to proceed with removal, and the Grievant's base pay was not reduced, the only relevant category to determine if there was a major adverse action was whether the Grievant was subject to a "transfer". *Roberts' Dictionary of Industrial Relations* defines a transfer as :

The shifting or movement of an employee from one job to another. Generally the new assignment carries the same pay and privileges as the old. Transfers may be on a temporary basis, as when the work is in short supply, or on a permanent basis when an individual seeks a job in another department or operation of the organization.

I am persuaded that the temporary assignment of the Grievant to the day shift constitutes a "transfer" within the meaning of Section 2(B) of Article 13. The Grievant was placed in a different working environment than that which she faced on midnights. The length of the shift and the number of employees and supervisors was also different on days. Accordingly, the Employer's action meets the definition of a "transfer", and as a result, a major adverse action occurred.

The Employer, however, argues that the Grievant's transfer is not grievable, and that jurisdiction is prohibited by Article 42, Section 2(C). Article 42 is the grievance procedure, and

provides for an exception for the grievance process as follows in Section C.1:

C. Under Title 38 Section 7422, the following exclusions also apply:

1. Any matter or question concerning or arising out of professional conduct or competence such as direct patient care or clinical competence.

The Grievant's clinical competence was clearly of concern to the Agency. However,

Note 2 to paragraph C states:

Note 2: The language in Paragraph C in this Section shall only serve to preclude a grievance where the Secretary, or a lawfully appointed designee of the Secretary (currently the Under-Secretary for Health), determines in accordance with 38 USC 7422 that the grievance concerns or arises out of one or more of the three (3) items listed above. Any determination under this language by the Secretary or the Secretary's designee is subject only to judicial review pursuant to 38 USC 7422(c).

There was no indication on the record that the secretary or his designee determined that the grievance in this matter pertained to professional conduct or competence under Section C.1. As a result, Note 2 requires that the grievance in this matter be considered.

Section 4 of Article 13 requires that the Grievant's reassignment follow correct procedures. It says:

Section 4 - Administrative Reassignment Administrative reassessments will not be used as discipline against any employees, unless appropriate procedures are followed:

Employee 1 was the only witness who testified in this proceeding, and the record fails to support that she engaged in any type of conduct that would have required her temporary transfer

to the day shift. The principal witness against her didn't testify, and the evidence supports her version of the facts. Accordingly, the Agency when it moved the Grievant to the day shift acted contrary to Article 13, Section 4.

Remaining is the question of damages. The applicable Backpay Act., Title 5, USC, Section 5596 states: (b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of an employee—

- (A) Is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect—
  - (1) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and
  - (2) reasonable attorney fees related to the personnel action, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, or under chapter 11 of title I of the Foreign Service Act of 1980, shall be awarded in accordance with the standards established under section 7701(g) of this title...

Employee 1 is out-of-pocket for the weekend differential in the amount of \$264.00. Additionally, she lost \$192.00 for a holiday. Therefore, her out-of-pocket damages are \$456.00, which are compensable under the Backpay Act.

The Grievant additionally seeks consequential damages in the amount of \$4,297.00 for such matters as additional child care expenses and lost of income from a second job. These potential damages are not compensable under the language of the Backpay Act. Further, the Federal Relations Authority said in Department Treasury, The National Treasury Employees' Union, Chapter 247, 44 F.L.R.A., 1306 (May 27, 1992):

**“Consequential damages”** are traditionally defined as damages that do not flow directly and immediately from an act but arise from the intervention of special circumstances not ordinarily predictable. Black’s Law Dictionary (5th Ed.) 352. The Backpay Act only allows an Agency to pay to an aggrieved employee amounts which would take the place of his salary which he would have earned during the relevant time period. The Backpay Act does not allow for the payment of incidental expenses. National Labor Relations Board and NLRB Union, 36 FLRA 743 (1990); 63 Comp. Gen. 170 (1984) (travel expenses to replacement jobs); 61 Comp. Gen. 578 (1982) (moving and storage expenses).

Federal employees have often attempted to expand the types of relief available from the government but consistently have been turned down by the courts. National Labor Relations Board and NLRB Union, *supra*. The courts assert that any additional amounts are in the nature of punitive damages which the government is not allowed to pay. The rationale behind these rulings is sovereign immunity. The federal government [\*91] has waived its sovereign immunity to the full extent of the Backpay Act, but has not waived sovereign immunity for other **consequential damages**. See Rathjen v. OPM, 1991 U.S. App. Lexis 2114 (unpublished decision of Federal Circuit, 2/12/91).

Therefore, the Backpay Act permits the Grievant to receive only \$456.00 in damages. Remaining is the question of attorney fees under the Backpay Act. Section 7701(g)(1) provides for the payment of attorney fees as follows:

(g)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an

employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be, determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

The Employer's initial action was based upon an apparent complaint by the Grievant's coworker. It then rescinded the removal, and placed the Grievant on a day shift, to apparently allow her to be more closely monitored.

Based upon the record, it cannot be said that the interests of justice required the payment of attorney fees. While the Employer's action in this case was not supported by the evidence, it was not established that a decision to move the Grievant to the day shift for observation for 90 days was made for any reason other than concern over patient care. Accordingly, the interests of justice do not require the payment of attorney fees in this case.

## **AWARD**

For the foregoing reasons, the Grievant's assignment for 90 days to the day shift was not supported based upon the evidence presented. She shall be made whole pursuant to the Backpay Act for compensable damages in the amount of \$456.00. Her consequential damages are not compensable under the Backpay Act and attorney fees are not required pursuant to the Act under the particular facts of this case.

Mark J. Glazer Arbitrator  
September 14, 2001