

Jacobs #1

AMERICAN ARBITRATION ASSOCIATION

VOLUNTARY LABOR ARBITRATION

In the Matter of:

Union,

-and-

Employer.

Grievant: EMPLOYEE 1

Issue: Discharge

ARBITRATOR'S OPINION AND AWARD

This arbitration was originally convened on November 13, 2001, to hear testimony regarding the discharge of Employee 1. The Union was not able to produce Employee 1 on that date, and so the matter was adjourned until May 09, 2002. At the November 13, 2001, hearing, the Arbitrator took the testimony of Employer 1, a clinical coordinator in the Hospital's emergency department, who appeared as a voluntary witness. Employer 1 testified that the Employee 1 was a licensed EMT with prior military experience, who had the ability to start an IV.

Employer 1 testified that she conducted an investigation as a result of receiving an anonymous letter in the mail accusing Employee 1 of refusing treatment to a male patient in the emergency room, and also using discriminatory remarks toward the patient.

Employer 1 testified that her investigation showed that the Employee 1 discriminated against the male patient because of the patient's alternative lifestyle. The patient had required a Foley catheter be inserted in his urethra, and it is policy for persons of the same sex to administer a Foley catheter.

However, in this instance, according to Employer 1, the Employee 1 made derogatory statements and did not insert the Foley catheter. In fact, it was later inserted by his co-worker, Nurse Employee 2.

Based upon Employer 1's investigation and consultation with Employer 2, Vice President, Nursing and Support Services, a letter dated February 02, 2001, was sent to Employee 1 notifying him that his suspension pending discharge investigation was converted to a discharge effective January 08, 2001. The reasons being given were as follows:

1. Failed to immediately follow directives from R.N.s to fulfill the physician's order and inappropriately delayed patient care.
2. Made discriminatory and unacceptable remarks to staff regarding a patient which were offensive in nature.

Thus, the hearing ended on November 13, 2001.

The hearing on May 09, 2002, commenced with the testimony of Employee 3, a paramedic who was on duty on the night in question. Employee 3 testified that she holds the same classification as Employee 1, has had the same orientation regarding insertion of a Foley catheter, e.g. whenever possible same sex catheterization is the procedure. She also testified that there is a training manual on patient rights located in the emergency room.

Employee 3 described the two sides of the emergency room: the "A" side and the "0" side. She was working on the "A" side on the night in question. This is the busier side, and the usual custom is to try to close the "0" side down at night. She expressed her dissatisfaction and unhappiness over the fact that the Employee 1 was not pulling his fair share as she said. She complained to Employee 2 and Employee 4, both RNs both working the emergency room on the night in December.

Employee 3 stated that the Employee 1 said "F the faggot, F him. They can put it in on the floor." Employee 2, the Staff Nurse who was working directly with Employee 1 testified that the patient rights manuals are kept in the emergency room near the emergency phone at the communications center. She remembered the patient census on the evening of December 20/21, 2000, and remembered that the emergency room was very busy that evening. She also remembered a male foreign exchange student complaining of appendicitis. She stated that his order sheet directed that a Foley catheter be inserted. The resident told her it was because of pain in the bladder, and he ordered the Foley catheter at 1:00 a.m., and placed an arrow beside the

order. This arrow meant to her that it was very important, and was a priority matter. It was later discussed at the hearing that priority matters always have the word "stat" beside the order, and it was later argued that the arrow did not have the same urgency as the word "stat."

Employee 2 stated that the Employee 1 was laughing; that they were both joking; and he was making gestures indicating that the male foreign exchange student maintained an alternative lifestyle. She could see that he was not comfortable with inserting the Foley catheter in the patient, so she sent Employee 1 away to retrieve a can of soda pop for her. Employee 2 then inserted the Foley catheter. She also remembered a lot of complaining going on in the "A" area. Employee 3 in particular was complaining about too much work.

On cross-examination, Employee 2 testified that both she and the Employee 1 were in the Pyxis room, so that no one could have overheard their private conversation or seen the Employee 1's hand gesture. She denied that the Employee 1 ever used any derogatory words. (Note: the Pyxis room is the room in which supplies are ordered and recorded via the computer.) Employee 2 continued, stating "we exchange duties if someone is not comfortable doing a procedure. Sending the Employee 1 for soda pop was a fair exchange."

On redirect she stated that she didn't recall the Employee 1 calling the patient any names, and in fact the Employee 1 did set the IV and take blood from the patient in question.

Nurse Employee 4 testified that she was working the "A" side with Employee 3 on the night of December 20/21, 2000, and remembered Employee 2 asking the Employee 1 to put a Foley catheter in a patient. She seemed to think that the Employee 1 told the patient that inserting the Foley catheter would hurt like hell, whereas the proper protocol is to tell the patient there will be some pressure, and the patient will feel uncomfortable.

Employer 2, Vice President of Nursing and Patient Support Services described the two areas of the nursing room: the "A" area being the acute side, and the "O" area being the observation side. She said that it was possible to overhear in the emergency room from one side to the other, and that it was even possible to hear through the curtains separating one patient bed from another. Employer 2 stated that the Hospital had received a report from an agency regarding a slur allegedly made by the Employee 1, and that the slur amounted to inappropriate sexual remarks.

She believed that because of what she felt were untoward remarks, and the delay in inserting in Foley catheter for an hour and fifteen minutes from the time it was ordered was not appropriate. It was definitely inappropriate in her opinion to state to the patient that the procedure would be painful. In her opinion the Employee 1 was insubordinate, nurse Employee 2 was frustrated, and that is why she sent the Employee 1 off to retrieve a soda pop for her while she inserted the Foley catheter. On cross-examination, while sticking to her position that a Foley catheter should be inserted by a person of the same sex, she said there was no same sex policy, and that the training teaches the paramedics and the nurses to treat both genders. She also confirmed that the doctor writes "stat" if his orders (Ire an emergency, and she stated that the surgical resident's orders for this patient did not contain the word "stat." Employer 2 also confirmed that sometimes it takes a while to convince a patient to allow a Foley catheter to be inserted.

The Employee 1 testified that the patient's room had a door. He testified that the doctor wrote a patient assessment about 11:20 p.m. on December 20, 2000. At 1: 10 a.m., December 21, 2000, Employee 1 established an IV for the patient, and was later told by Employee 2 that the patient was assigned to a room. She said the doctor wrote that a Foley catheter was needed for

the patient. At about 1:20 a.m., the Employee 1 testified that he packaged the patient for the floor. He also stated that he is not permitted to do any written orders unless the nurse tells him, and that the nurse did not tell him to insert a Foley catheter when she told him to do the IV. When Employee 1 later was told to insert the Foley catheter, he explained to the patient what needed to be done, and the patient expressed concerns. The patient asked if he could refuse, and stated that he did not want the Foley catheter. The Employee 1 then reported this to Employee 2. Employee 2 sent him back to see if the patient would consent, and the patient agreed at about 1:45 a.m., at which time the Employee 1 went through a ten-minute more detailed explanation with the patient. The Employee 1 denied that he called the patient a faggot, or used any anti-lesbian language. In fact, he stated that Employee 4 was on the "A" side, and couldn't possibly have heard him, with all the emergency room noise. He added that no one was at the opening to the Pyxis room when he and Employee 2 were speaking and Employee 2 was obtaining the Foley kit.

On cross-examination the Employee 1 stated that his first employment after discharge was on June 01, 2001. He was then shown a document which proved that he, Employee 1, not Employee 2, took out the Foley supplies from the Pyxis room. Employee 1 concluded his testimony by stating that he denied telling Employee 2 that the patient was gay.

Twice questioned by the Arbitrator as to what he was seeking through the grievance procedure, Employee 1 carefully explained that he did not want to return to work at Hospital. What he wanted were wages, vacation and sick time from the date of termination to June 01, 2001. In addition, he sought an apology from Employer 3, the Labor Relations Manager for Hospital.

What is so very interesting is that the patient himself never complained about Employee 1. There was this anonymous letter complaining about the Employee 1, which caused the investigation, and which caused the Employee 1 to be terminated. But the letter was unsigned, and the patient never personally alleged any discrimination or ill treatment by the Employee 1 or the Hospital. The letter was not admitted into evidence. The Employee 1 had no opportunity for cross-examination.

Employee 1's co-worker Employee 2 knew there was some problem, and resolved it in a very professional manner. She understood that the Employee 1 was not most anxious to insert the Foley catheter in the male patient on the evening in question, but she made no big deal of it. She sent him away to retrieve her a can of soda pop. The Employee 1 and Employee 2 were both working the "0" side of the emergency room. It can be imagined that the emergency room is sometimes hectic, especially as it was described on the evening of December 20121, 2000. The "A" side was particularly hectic and full of patients, while the "0" side was actually in the process of being closed down, and the "0" side personnel being transferred to the "A" side. Only Employee 3 heard the Employee 1 allegedly use the "F" word, but that is neither here nor there.

No other patient in the vicinity complained of hearing the "F" word or seeing the Employee 1 make a hand gesture indicating that the male patient who required the Foley catheter practiced an alternative lifestyle.

We really don't know what the Employee 1 said to the patient. If, for argument sake, the Employee 1 told the patient that the insertion of the Foley catheter would be painful, then he was merely telling the truth. If the patient then did not want the Foley catheter to be inserted as the Employee 1 stated, it was the patient's decision to delay the insertion of the Foley catheter until

he could reconsider. Something happened on that night which caused the Employee 1 not to insert the Foley catheter as indicated on the surgical resident's notes. The Employee 1's contention is that there was nothing of an emergency nature about the order to insert the Foley catheter, there being no insertion of the word "stat" on the order. The Employee 1 thus felt that the patient could be sent to the floor, and the catheter inserted there. This may or may not have been the better practice, but it certainly doesn't solve the question of whether or not the patient was belittled and had knowledge of being belittled, in violation of Hospital policy, by the Employee 1.

The person who worked directly with the Employee 1 and who had nothing to fear by telling the true: because Employee 1 is no longer employed at the Hospital, denied that the Employee 1 used any foul language in expressing his feelings toward the patient. The Employee 1, however, even though he felt that the catheter could have been inserted on the floor, knew full well when he was sent for a can of soda pop that Nurse Employee 2 was going to insert the catheter in the emergency room. Thus, the Employee 1 definitely shirked his responsibility that evening because he knew full well, even though he was trained as were all the others, to be able to insert a Foley catheter on both genders, that the preferred procedure is for persons of the same sex to insert the Foley catheter.

The Employee 1's actions were not entirely beyond reproach; however, they did not rise to the level of termination. If there was a need for sensitivity training, then merely posting some rules on the wall in the emergency room could hardly be stated to be adequate in terms of sensitivity training. If the Employee 1 needed to be further instructed to not tell the patient the truth as to the pain associated with the insertion of a Foley catheter, then he might have needed

further instruction along those lines. I find the Employee 1 to be wrong in terms of not inserting the Foley catheter, and leaving it to Nurse Employee 2.

Since the Employee 1 should not have been terminated, and since he does not seek reinstatement, I believe the proper conclusion to this matter should be that the grievance is sustained in part and denied in part. There will be no reinstatement of the Employee 1, and the Employee 1's request for pay and benefits from the date of termination until the date of his employment on June 01, 2001, will be diminished by two months' pay for his failure to perform his duties. The Employee 1 is to receive four months back pay, including vacation and benefits. There is no basis for the Employee 1's request for an apology from Mr. Desk. The request is out of order.

AWARD

The Grievance is GRANTED IN PART and DENIED IN PART. The Employee 1 shall not be reinstated, inasmuch as he does not seek reinstatement. The Employee 1 shall be awarded four months back pay and benefits.

Dated: July 8, 2002



L. JACOBS