Wright #1

VOLUNTARY LABOR ARBITRATION TRIBUNAL

Opinion and Award by Peter S. Wright. Arbitrator

This arbitration hearing was held on June 4, 1997. It was closed with closing arguments by the parties on the same date.

Statement of the Case

The grievant, Employee 1, was hired on February 27, 1995. She was employed as an Inmate Care Aide from February 27, 1995 until her termination on March 19, 1996. The duties of an Inmate Care Aide are summarized on Exhibit 1:

> "Provides one-to-one surveillance of acutely mentally ill Jail inmates and interacts with inmates in therapeutic activities, under the direction of the mental Health Department Administrator."

In the normal course of their duties, Inmate Care Aides, of whom there are about thirty, are expected to work in the jail wards (referred to as the rock) with inmates. The length of time spent in the wards is about six hours per day. Working with inmates is the central and primary purpose of the Aide position.

In early 1996 the grievant became pregnant. In March 1996 she submitted a doctor's letter dated March 5, 1996 (Joint Exhibit 6) to her director, Employee 2. The doctor's note states as follows:

RE: Employee 1

To whom it may concern:

"The above named patient is under my care for intrauterine pregnancy. She can continue to work but should not be exposed to any infectious diseases such as Aids, Hepatitis, Tuberculosis, etc.

Her due date is 09-26-96."

Sincerely Yours,
Doctor 1, MD

Employee 1 believed she would be exposed to infectious diseases if she continued to work one-to-one with the inmates. She informed her supervisor, Employee 3, that she would not enter the wards with the other members of her team. Consequently, she was disciplined on March 6, 1996, charged with insubordination and received a five-day suspension without pay. (Joint Exhibit 4)

A grievance was filed on March 6, 1996 and states the aggrieved's refusal to enter the wards was in accordance with her doctor's orders and she assumed she would be assigned other duties. The grievance requests that the five-day suspension be rescinded and that the aggrieved be made whole.

The grievance was processed through the contractual steps of the grievance procedure and is properly before the arbitrator for a determination on the merits in accordance with the provisions of the Articles 10 and 11 of the Collective Bargaining Agreement. (Joint Exhibit 1)

The grievant returned from her five-day suspension on March 13, 1996. For the next several days she continued to refuse to enter the wards. Management continued to advise her that entering the wards and working with inmates was the central part of her job and that she must do it. There were several meetings to explore alternatives with no result forthcoming. On March 19,

1996 Employee 1 reported to work and again refused to enter the wards. A disciplinary hearing was held. The grievant was charged with insubordination and terminated. (Joint Exhibit 3) A grievance was filed on March 20, 1996 (Joint Exhibit 2) protesting a violation of the Collective Bargaining Agreement and requesting that the termination be rescinded and the aggrieved be made whole.

This grievance also was processed through the grievance procedure and is properly before the arbitrator for a determination on the merits in accordance with the applicable provisions of the Collective Bargaining Agreement. (Joint Exhibit 1)

Was the suspension and subsequent termination of Employee 1 for just cause and, if so, were the penalties of five days and termination within the normally accepted zone of reasonableness?

Evidence and Testimony

Employee 3 testified for the County. Employee 3 was Employee 1's immediate supervisor. He testified that the primary assignment of the Inmate Care Aide is to work one-on-one with the jail inmates. Employee 3 said the Aides are formed into teams of three or four Aides each and that there are a total of twenty-four Aides and six Leaders.

Employee 3 said that, on March 6, 1996, Employee 1 told him she would no longer go into the wards where the inmates were. Employee 3 said Employee 1 told him she was pregnant and fearful for her health and the health of her unborn baby. He testified that, prior to this incident Employee 1 had been a good worker and had caused no problems. Employee 3 also testified that, to the best of his knowledge, none of the inmates had infectious diseases and, further, that the medical records were available for inspection by Employee 1. On cross-examination Employee 3 acknowledged that it would be possible for an inmate to have AIDS or hepatitis -that, in the past,

two inmates had had hepatitis. Employee 3 also testified that all employees, including the aggrieved, had been given the opportunity to receive immunization against hepatitis. Finally, Employee 3 said that he himself did not discipline Ms. Employee 1 but referred the matter of her refusal in a memo (Joint Exhibit 5) to his supervisor, Employee 2.

Employee 2, Director of Health Services, testified that Ms. Employee 1 gave her the letter from her doctor (Joint Exhibit 6) and asked that she be given limited duties. Employee 2 said she told Employee 1 that she could not be given limited duties and that her position required her to enter the wards and work with the inmates. Employee 2 testified that, when Employee 1 continued to refuse, she administered the five-day suspension. She also told Employee 1 that, if she persisted in her refusal, she was headed for termination. Employee 2 testified that, upon her return from the five-day suspension, Employee 1 continued to refuse to enter the wards. Employee 2 said she told Employee 1 that she could look for other positions in the County, but that she had none under her direction for which she was qualified. She also could take a long-term leave without pay. Employee 2 testified that Ms. Employee 1 said she did not want to take an unpaid leave and would not work in the wards.

Employee 2 testified she has 210 employees under her direction including nurses, psychologists, and social workers. She said most are female and that 90% of them work with inmates. Employee 2 said several of her employees have been pregnant and continued to work with inmates. Employee 2 said none were given restricted duties.

Employee 2 testified that she conducted the disciplinary hearing, which resulted in the termination of Employee 1. Employee 2 said that Ms. Employee 1's continued refusal to enter the wards or take a leave of absence left her no alternative. The central responsibility of the Inmate Care Aide position is to work with inmates. This Employee 1 refused to do.

Employee 4, Deputy Director for Health and Community Services also testified for the Employer. He said he was not involved in the discipline of Employee 1 but had represented the Employer in the third and fourth steps of the grievance procedure. He also testified that the act of transferring to another position is the responsibility of the employee and that Employee 1 could have contacted central personnel to explore opportunities for other jobs.

Employee 5, Committeeperson for the union, testified for the Union. She stated that she was aware that, in the past, there were inmates who had tuberculosis and that the employer's testing for tuberculosis was sloppy. She said also that Employee 1 had not been inoculated against hepatitis. Upon cross-examination, Employee 5 acknowledged that, to her knowledge, Employee 1 was the only pregnant employee who refused to work with inmates.

Employee 6, President of the union, also testified for the Union. She said she had not been involved in the discipline but had represented the Union in the fourth stage of the grievance procedure. She said that employees do not have to follow an order if they believe it will jeopardize their health.

Employee 1 testified in her own behalf. She said that she did not want to endanger her baby by working with inmates. She said she had heard that inmates sometimes had tuberculosis and that she was not immunized. She also said that she had not been inoculated against hepatitis. Employee 1 testified also that she had had several problems with inmates, that they were dangerous, and that they would get violent with each other. Employee 1, on cross-examination, testified that she did refuse to enter the wards that she had been told she would be terminated if she didn't, but that she felt there had to be another solution. She was not going to endanger her baby.

Argument of the Parties

The Employer's position and arguments can be stated briefly. The position of Inmate Care Aide requires interaction and contact with inmates. Employee 1 refused to have such interaction. Such refusal constitutes insubordination and, given the aggrieved's consistent refusal, the five-day suspension and subsequent termination was appropriate and necessary.

The Union's position is equally succinct. Employee 1 was pregnant. Her doctor advised her to avoid exposure to infectious diseases. She feared the inmates might have infectious diseases to which she would be exposed if she entered the wards. Accordingly, she had no choice other than to refuse to enter the wards. The Employer should have accommodated her situation rather than resorting to discipline.

Discussion and Conclusion

The central facts of this case are not in dispute. There is no question that the aggrieved refused to perform those duties that were primary to her position. The questions to be resolved are; 1) whether or not she had a contractual right to refuse, 2) and whether or not the Employer had a contractual obligation to, in one fashion or another, accommodate her refusal.

It is a generally accepted rule of industrial jurisprudence that if an employee refuses an assignment on the grounds of health and safety, then the assignment must be proven to be unhealthy or unsafe. If the assignment is not so proven, then any reasonable discipline given for the refusal will stand. This is why, generally speaking, employees are well advised to perform the task and later grieve the health and safety of the assignment. In short, the only defense in refusing an assignment is if the job is proven to be unsafe to perform.

In the instant case there is no evidence that working in the wards is unhealthy or unsafe. Employees work in the wards around the clock, both male and female and on occasion pregnant

females. There is no evidence to indicate that a pregnant female is any more unsafe in the wards than is a female who is not pregnant or a male. If working in the wards is not healthy for a pregnant female than obviously no female should be so assigned during their childbearing years.

The Agreement between the parties does not provide for light or limited duty. More specifically, there is no basis in the Collective Bargaining Agreement to accommodate a pregnant female employee who fears a job may be unhealthy based solely on the condition of her pregnancy. To do so would be to discriminate against other females and males that, for one reason or another, may also not want exposure to the inmates in the wards. Either the wards are healthy for all employees or they are unhealthy for all employees. And again, there is no evidence of an unhealthy condition, no evidence of employees having contracted any infectious diseases by virtue of working in the wards.

Having said the above, it is the opinion of the arbitrator that the employer might have been more sympathetic to the fears of the aggrieved (even though they were not based on fact) and more aggressive in attempting to help the aggrieved locate another position. The employer still, of course, may do this if it chooses.

The arbitrator, however, is governed solely by the terms and provisions of the Collective Bargaining Agreement. There is nothing in that Agreement which required the employer to transfer the aggrieved to another position. There is nothing in the Agreement which required the employer to place the aggrieved on leave until after the birth of her child. The employer was within its contractual rights to insist the aggrieved perform all functions of her position - including working in the wards. Finally, the employer was not contractually wrong in disciplining the aggrieved for job refusal.

Award

Based on the evidence presented, the arbitrator concludes the five-day suspension and the termination of the aggrieved, Employee 1, was for just cause. Accordingly, the grievances are denied.

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Peter S. Wright, Arbitrator

Dated June 19, 1997