

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

LOCAL 150, SERVICE EMPLOYEES  
INTERNATIONAL UNION AFL-CIO, CLC

and

MERITER HOSPITAL, INC.

Case 72  
No. 51775  
A-5303

Appearances:

Mr. Todd Anderson, Business Agent, for the Union.

Mr. Michael J. Westcott, Axley Brynelson, Attorneys at Law, for the Employer.

ARBITRATION AWARD

The above-entitled parties, herein the Union and the Employer, or Hospital, are privy to a collective bargaining agreement providing for final and binding arbitration before a Wisconsin Employment Relations Commission staff arbitrator. Pursuant thereto, I heard this dispute on January 20, 1995, in Madison, Wisconsin. The hearing was not transcribed, and the parties completed their briefing schedule on February 13, 1995.

After considering the entire record, I issue the following Award.

ISSUE

The parties stipulated to the following issue:

Whether the Employer had just cause to terminate the grievant?

FACTUAL BACKGROUND

Roger J. Bakken II, hereinafter the grievant, was first employed by the Hospital in April, 1993, at its Health Care Center where he worked with elderly patients. In October, 1993, the grievant became a Housekeeper I on the p.m. shift. In June, 1994, the grievant transferred to the Adult and Child and Adolescent Psychiatric Units where he worked both during the week and every other weekend.

The Adult and Child and Adolescent Psychiatric Units are located on the 6th floor at the Hospital's Capitol Campus. The Adult Unit is located on 6 West; the Child and Adolescent Psychiatric Unit is located on 6 East. Separating the two units are fire doors. Housekeepers are

responsible for cleaning the facilities, picking up trash, etc., and work largely unsupervised. As a Housekeeper I, the grievant had keys to both the aforesaid Units, including the doors between the Units and any patient rooms. During the weekdays, the grievant was primarily responsible for cleaning the Adult Psychiatric Unit, and he was responsible for cleaning the Child and Adolescent Psychiatric Unit on weekends.

The age range of patients on the Child and Adolescent Psychiatric Unit is three to eighteen-years-old. The patient capacity is 18 beds. Patients who are children often have private rooms. They may be unsupervised during quiet times and other appropriate situations.

The nature of the condition of the patients varies. They all have psychiatric problems; many are under-socialized, are physically abused or are cognitively impaired. A number of the patients are hypersexual; many of them children, but some of the adolescents as well. This means that they have difficulty controlling their urge to masturbate; they are intrusive and may do sexually inappropriate things such as running up and trying to "hump" someone. There are also patients who are bipolar, many of whom are very sexually aggressive as a result of that condition.

On February 18, 1994, the grievant was arrested for first degree sexual assault of a child. The child was the grievant's wife's six-year old brother. The child was sleeping with another child when he was allegedly awakened by the grievant sucking on his penis. When the child attempted to get away, the grievant allegedly picked him up, carried him into the living room, and once again sucked on the child's penis. The grievant then allegedly took out his own penis and attempted to push it into the child's mouth.

On June 23, 1994, the grievant was convicted of this offense. As part of his conviction judgment, he was to have "no unsupervised contact with any minor, or other children unless authorized by a probation agent (with the exception of his own children)."

Alice Butler, the A.M. Operations Manager in the Environmental Services Department at the Hospital, became aware of the fact that the grievant committed this first degree sexual assault of a minor on July 28, 1994. She became aware of it when the grievant's first-line supervisor told her about the incident. Butler then discussed this matter with Cindy Meester, the Labor Relations Manager of the Hospital at which time they attempted to identify other areas in the Hospital where it would be safe to place the grievant. They were unable to identify any positions where the grievant would not have limited supervision or contact with children. Butler next met with the grievant to discuss this matter with him at which time he advised her of the fact that he had been convicted of this offense.

After considering the information received from the grievant and after reviewing court records reflecting his conviction, the Hospital decided to terminate his employment. In a termination letter, effective July 29, 1994, the Hospital set forth the reasons for its decision to terminate the grievant's employment as follows:

The Hospital has reached this decision because in the position as

Housekeeper in Environmental Services, Mr. Bakken frequently worked without direct supervision. His work took him into areas of the Hospital with children and adolescent patients. Additionally, there are children in various portions of the Hospital from time to time. Mr. Bakken's criminal judgement specifically prohibits him from having unsupervised contact with any minors, except under very limited circumstances.

As a result, the Hospital has concerns for the safety of children with whom he may have contact. Further, the Hospital has concerns regarding its potential financial liability should he engage in similar conduct on its premises. Finally, the Hospital has worked hard to develop a positive image with the community. If he were to continue to be employed at the Hospital and his conviction were to be widely publicized, the Hospital would suffer.

Prior to termination, the matter of assigning Mr. Bakken to another area of the Hospital was considered. However, under the circumstances, that option was deemed unworkable and not in the best interest of the Hospital or the community [it] serves. (sic)

## DISCUSSION

The stipulated issue in this case is whether the Employer had just cause to terminate the grievant. While the Union does not "disagree with Meriter Hospital's decision to terminate", it contends that the grievant's termination was not for just cause because the grievant did not have adequate notice that such conduct could lead to discharge. The Employer, on the other hand, maintains that it had just cause to terminate the grievant based upon his criminal conduct, his failure to disclose his arrest or conviction to the Hospital, his working in violation of the restrictions imposed upon him by the court for more than five weeks and his inability to perform his work based on the conditions imposed by the conviction judgment. The Employer cites a number of arbitration awards in support of its position.

It is undisputed that the grievant is a pedophile who poses a danger to unsupervised children. It is also undisputed that the grievant's conviction order requires that he "have no unsupervised contact with any minor, or other children" except as authorized by his probation agent. There is no such authorization in the instant case. Finally, it is undisputed that the minors/children in the unit where the grievant worked were at risk to the grievant's overtures, and that because the grievant worked largely unsupervised, he would have an opportunity to abuse said patients. Based on the foregoing, and the Hospital's interest in protecting the health and welfare of these young patients, the Arbitrator finds that just cause exists for terminating the grievant.

In reaching this conclusion, the Arbitrator rejects the Union's argument that prior notice is required herein. Ordinarily, just cause requires that an individual have notice that his/her actions could lead to discipline, including discharge. However, in egregious situations like the instant one, notice is not necessary. The grievant is a pedophile who poses an extreme danger and risk to unsupervised children and minors. The Arbitrator is of the opinion that the Employer acted properly to protect both its patient population and the younger members of the general public even if the absence of the usual procedural safeguards provided by the just cause standard. In addition, the Arbitrator finds, contrary to the Union's assertion, that the grievant knew, or should have known, that off-duty criminal misconduct in this area would pose a threat to his continued employment at the Hospital where it is undisputed he comes in constant contact with children and minors.

Nor can the Arbitrator find any merit to the Union's suggestion that the Employer failed to do everything possible to find the grievant a job where he failed to come into contact with children and minors in an unsupervised setting. In this regard, the Arbitrator points out that the Employer's witnesses testified un rebutted that they attempted without success to identify other areas in the Hospital where it would be safe to place the grievant. In addition, the Union offered no testimony or evidence regarding possible jobs the grievant could hold without coming into unsupervised contact with children or minors. In fact, Union witness Todd Anderson testified that the Hospital could not guarantee unsupervised conduct. As pointed out by the Employer, in a hospital setting no matter where the grievant worked he would constantly come into contact with young patients and members of the general public. "The potential liability to the Hospital for allowing such a disturbed person to remain in the Hospital's employ is staggering."

Finally, there is nothing in the grievant's employment record which would mitigate the penalty imposed by the Employer in the instant case.

Because the Employer had just cause to terminate the grievant, it did not owe him two weeks payout pursuant to Article XXII, Section 1 (" . . .It is the policy of the Hospital to give two (2) weeks' notice to an employee upon termination, or two (2) weeks' pay in lieu of notice. However, this will not prevent the Hospital from terminating an employe without two (2) weeks' notice and without pay in lieu of notice if the discharge is for just cause. . .") or payment of his accrued Earned Time as of the date of his discharge ("Employees terminated for just cause will forfeit accrued Earned Time." Article XIII, Section 4).

In view of the foregoing, the Arbitrator concludes that the answer to the issue, as stipulated to by the parties, is YES, the grievant was discharged for just cause under the terms of the agreement.

Based on all of the above, and the record as a whole, it is my

AWARD

That the grievance is hereby denied and this matter is dismissed.

Dated at Madison, Wisconsin this 18th day of April, 1995.

By Dennis P. McGilligan /s/  
Dennis P. McGilligan, Arbitrator