

IN THE MATTER OF THE ARBITRATION BETWEEN)	AMERICAN ARBITRATION
)	ASSOCIATION
)	CASE #75-390-00462-10
)	
WASHINGTON FEDERATION OF STATE EMPLOYEES)	
Union,)	ARBITRATOR'S
)	OPINION AND AWARD
)	
and)	
)	
STATE OF WASHINGTON,)	GRIEVANT:
DEPARTMENT OF SOCIAL AND HEALTH SERVICES,)	WANDA RAY
WESTERN STATE HOSPITAL)	
Employer)	

ARBITRATOR: ANTHONY D. VIVENZIO

AWARD DATE: September 8, 2011

APPEARANCES FOR THE PARTIES:

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PROCEDURAL HISTORY

The Washington State Department of Social and Health Services, Western State Hospital, is hereinafter referred to as "the Employer," "WSH," or the "Hospital." The Washington Federation of State Employees is hereinafter referred to as the "Union." Collectively, they are hereinafter referred to as "the Parties." This arbitration addresses the Employer's discharge of a nurse in the employ of WSH, Wanda Ray, hereinafter referred to as "the Grievant," noted by letter of April 27, 2010, from the hospital's CEO, Jess C. Jamieson, Ph.D. Though the letter does not state the effective date of the discharge, language directing the Grievant to " (make) arrangement with your supervisor to return all state issued equipment that may be in your possession" suggests the discharge was to be effective immediately.

The grievance filed by the Union to contest the discharge is based upon the Collective Bargaining Agreement between the Parties, hereinafter the "Agreement" or "Contract," from now on, effective for the period July 1, 2009 through June 30, 2011. The Union filed the grievance regarding the discharge on May 6, 2010. Following unsuccessful attempts at resolution, at Step One of the grievance procedure on May 19, 2010, and Step Two on June 25, 2010, the Union invoked arbitration under Article 29.4 of the Agreement. Using the services of the American Arbitration Association, Anthony D. Vivenzio was appointed as Arbitrator. An arbitration hearing was held at the office of the Attorney General in Tacoma, Washington on June 17, 2011. The Parties stipulated that all prior steps in the grievance process had been completed or waived, and that the grievance and arbitration were timely and properly before the Arbitrator. During the course of the hearing, both Parties were afforded a full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument. The evidentiary record was closed on June 17, 2011. The Arbitrator received timely post-hearing

briefs from both Parties on August 8, 2011. The full record was deemed closed and the matter submitted on August 8, 2011.

STATEMENT OF THE ISSUE BEFORE THE ARBITRATOR

At the hearing, the Parties stipulated the issue before the Arbitrator as:

Did the Employer have just cause for their termination of Wanda Ray on April 27, 2010, and, if not, what shall the remedy be?

BACKGROUND

Western State Hospital (WSH) is one of two state-owned psychiatric hospitals for adults. The hospital provides evaluation and inpatient treatment for individuals with serious or long-term mental illness that have been referred to the hospital through the Regional Support Network (RSN) system. WSH is the regional state psychiatric hospital for 19 Western Washington counties for involuntary commitments under RCW 71.05. The Hospital serves the needs of Western Washington for all individuals who have been committed as a result of a criminal proceeding. WSH is a licensed and accredited hospital, which complies with the requirements of The Joint Commission on Accreditation, and the Centers for Medicare and Medicaid Services. The Hospital is located ten miles south of Tacoma, Washington and one-half mile from the town of Steilacoom. The Hospital campus consists of 56 buildings on 264 acres of grounds. The Psychiatric Treatment and Recovery Center (PTRC) provides inpatient hospitalization for adults that are severely mentally ill and are committed for care by a civil court proceeding under RCW 71.05. Specialized programs within the PTRC include units which provide treatment for: older adults, acutely mentally ill adults, individuals with primary cognitive and dementia-related illnesses, and adults whose mental illness symptoms impede basic

functioning and self-care. The major components of treatment include Recovery, Psycho-Social Rehabilitation Model, Psychotropic Medications, Behavioral Psychotherapy, and Family Education. On May 20, 2009, Wanda Ray, a Licensed Practical Nurse 2, missed giving a patient the twenty-four hour notice of his right to refuse medication before giving him that medication. The notice is a statutory right that acknowledges a patient's right to decline medication unless they are a danger to themselves and others, and also supports their right to aid and participate in their representation in court civil commitment proceedings. Ms. Ray acknowledged that she then took steps to cover up that mistake by making false entries on the form documenting the giving of the "medical rights" to the patient, and in the patient's medical chart. For those actions, the Employer discharged Ms. Ray, resulting in the grievance that is the subject of this proceeding.

PERTINENT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT AND WORK RULES

From the collective bargaining agreement effective July 1, 2009 – June 30, 2011:

ARTICLE 27 DISCIPLINE

27.1 The Employer will not discipline any permanent employee without just cause.

ARTICLE 29 GRIEVANCE PROCEDURE

29.3

D. Authority of the Arbitrator

1 The arbitrator will:

- a.** Have no authority to rule contrary to, add to, subtract from, or modify any of the provisions of this Agreement;
- d.** Not have the authority to order the Employer to modify his or her staffing levels or to direct staff to work overtime.

29.4 Filing and Processing (Departments of Corrections and Social and Health Services Employees)

B. Processing

Step 5 – Arbitration:

If the grievance is not resolved at Step 3, the Union may file a request for arbitration. The demand to arbitrate the dispute must be filed with the American Arbitration Association (AAA) within thirty (30) days. The Arbitrator shall proceed in accordance with Subsection 29.3 C through E.

WORK RULES ADMINISTRATIVE POLICY NO. 18.64

Purpose

This policy establishes standards and guidelines for ethical employee conduct. DSHS requires employees to perform duties and responsibilities in a manner that maintains standards of behavior that promote public trust, faith and confidence.

Policy Requirements

1. What standards of behavior and conduct does DSHS require of its employees?

Employees are required to:

- f. Comply with the requirements of this policy. Failure to comply with requirements of this policy may result in disciplinary action up to and including discharge from employment.

WESTERN STATE HOSPITAL

4.1.1 LEGAL RIGHTS

INVOLUNTARY CIVILLY COMMITTED PATIENTS: (RCW 71.05)

All involuntary patients have the legal right to:

6. Refuse medication beginning 24 hours before a court proceeding.

WESTERN STATE HOSPITAL

NURSING SERVICES STANDARDS MANUAL

TITLE: TWENTY-FOUR HOUR MEDICATION NOTICE PRIOR TO COURT HEARINGS

RCW 71.05 requires that patients have the right to refuse all prescribed medication **twenty-four hours prior to a civil commitment hearing.**

The patient has a choice to remain taking medication OR to decline medication(s). The right to refuse applies to all medications unless omission during the twenty-four hour time period would create a life threatening situation.

Nursing staff is responsible for:

- a. Completing form (WSH 1-46) with patient name, date, and time of civil commitment hearing.
- b. Reading and explaining the form content to the patient twenty-four hours before the court hearing.
- c. Signing and dating the form after the rights have been read and explained.
- d. Providing the form to the patient for his/her signature.

STEPS

C. Day shift medication nurse responsibilities

1. Post the Ward Schedule with the highlighted names for those going to court the next day in a designated location in the medication room.
2. Present and complete the twenty-four hour medication notice form (WSH 1-46) to/with the patient twenty-four hours before the scheduled court hearing during 8:00 a.m. medication pass.

POSITIONS OF THE PARTIES

Position of the Employer

The position of the Employer is summarized as follows:

The Grievant, Wanda Ray, irrevocably broke the trust the Employer had in her by twice falsely entering an inaccurate time into a patient's medical record and into a court document. She did this to cover up the fact that she had not administered medication rights to a patient at least 24 hours prior to his court hearing, as policy and law require. The Employer is the Department

of Social and Health Services, which operates Western State Hospital in Lakewood, Washington. It treats mentally ill patients who come to the hospital through a court commitment proceeding. The court determines whether a patient needs to be involuntarily committed. Under the Constitution and the law these patients have rights, which are before the court, including the right to refuse medication 24 hours prior to their hearing. A variety of staff care for these vulnerable patients: psychologists, psychiatrists, and licensed practical nurses (LPN's) among them. The LPN's administer medication rights to those patients facing court hearings the following day prior to passing medications. The LPN is supposed to check which patients require medical rights for the day and advise any patient who has a court hearing of the right to refuse medication. The patient signs a form noting a specific time and date they were advised of their right to refuse medication. The form is a business record of Western State Hospital relied upon for its truthfulness. The form becomes part of the patient's chart and is ultimately provided to the court and the patient's defense attorney. The LPN also enters into the patient's medical chart when medication rights were administered. A threshold inquiry at a court hearing will be whether and when the patient was advised of their right to refuse medication. LPN's learn the importance of accurate completion of these notices, charts, and business records as part of their training in nursing school. There are ways to deal with errors in administering medication rights that come to the attention of supervisors, rescheduling a hearing for example. Falsifying the record to cover up a mistake creates a number of serious problems for the patient, the hospital, and the court. On May 20, 2009, the Grievant did just that. She failed to find out that a patient needed to be given their medical rights by 9:00 a.m. and gave him medication. After her supervisors questioned her about the medical rights at approximately 1:30 p.m. that afternoon she located the patient and persuaded him to sign the form, stating she had given him his rights at

9:00 a.m. that day. Ms. Ray then made an entry in the patient's chart to make it appear that she was noting at 10:00 a.m. that she'd given the patient his medication rights at 9:00 a.m. In explaining her actions, she alternatively claimed that other LPN's do the same thing when they are busy; that she had done it, but not intentionally; and, as the patient had not been given medication after 9:00 a.m., he still had a chance to have no meds for 24 hours before the hearing, and so, "no harm no foul." In sum, the Grievant abused the trust of the patient, the hospital, the court, and the public.

Position of the Union

The position of the Union is summarized as follows:

This case is really about balancing Wanda Ray's excellent 27 year record at Western State Hospital against the decision to discharge her made by the Employer because of this one mistake she made on May 20, 2009. It is relevant to consider that this workplace is not a normal hospital ward with nurses pushing carts while patients watch television and do crossword puzzles in their rooms. This is the forensic unit, meaning its patients are criminally insane and act out frequently. There are approximate 28 patients for four or six staff. The Hospital wants to paint a picture that it's a perfect place, and that they take their legal obligations very seriously. Perhaps they do take their legal obligations seriously, but whether they follow those practices every day is a different story. Many documents are not completed on time, doctors not timely signing telephone orders, for example. A common practice is that the medication rights notification form is filled out at 9:00 a.m., so 9:00 a.m. is written on the top of the form so that when the nurse goes through the ward and fills out the form they can simply sign that they did it at 9:00 a.m. That is the standard time put on the form. The Grievant was caught up in a shift change on the morning of May 20. If there is a discrepancy in the medication count in the medication room,

the incoming medication nurse is the one responsible for speaking with the medication nurse who was on the previous shift to figure out why a pill is missing. At the morning report, where information is exchanged concerning activity on the ward, who is responsible for taking over medical obligations, etc., Wanda Ray was not able to participate because she was helping to figure out what happened to a pill. This is not a perfect best practices environment. In addition, there were interpersonal issues on the ward that had been going on for about a year and a half. Wanda Ray felt she was under a great deal of scrutiny from her supervisors. These record-keeping practices and interpersonal tensions are not offered as an excuse for her actions on May 20. They are offered to give the arbitrator an understanding of how someone with 27 years of experience and a solid record could make an error so out of character. Management argues that it can no longer trust Wanda Ray, but, although she did not have medical rights duties, during the 10 months she was being investigated, she worked full-time. The Employer had Wanda Ray work all of her shifts, five days a week in the medication room, unsupervised, with total access to patients' medication. By herself, with the door closed, she was opening drawers, pulling controlled substances, and placing them into small cups to be administered to patients. It is difficult to reconcile that the Employer's trust can be irrevocably broken for the conduct at issue, when that trust obviously existed to dispense federally-controlled substances for almost a year thereafter.

DISCUSSION

At the outset, the Arbitrator would like to express his appreciation for the professional manner in which the Parties conducted themselves in the course of the proceedings, rendering vigorous, but courteous, advocacy.

It is well established in labor arbitration that where, as in the present case, an employer's right to discipline an employee is limited by the requirement that any such action be for "just cause," the burden of proving that the suspension or termination of an employee was for just cause falls to the Employer. Therefore, the Employer here had the burden of persuading the Arbitrator that its termination of the Grievant, Wanda Ray, was for just cause.

"Just cause" consists of a number of substantive and procedural elements. Primary among its substantive elements is the existence of sufficient proof that the Grievant did engage in the conduct for which he or she was terminated or disciplined. Factors relevant to this issue include a requirement that an employee knows or is reasonably expected to know ahead of time that engaging in a particular type of behavior will likely result in discipline or termination. The second area of proof concerns the issue of whether the penalty assessed by the Employer should be upheld, mitigated, or otherwise modified. Factors relevant to this issue include the seriousness of the employee's conduct, the existence of a reasonable relationship between an employee's misconduct and the punishment imposed, the employee's work history and potential for rehabilitation, and a requirement that discipline be administered even-handedly, that is, that similarly situated employees be treated similarly and disparate treatment be avoided.

These considerations were summarized in what is now a commonplace in labor arbitration, known as the "Seven Tests," by Arbitrator Carroll Dougherty, pronounced in Enterprise Wire Co., 46 LA 359 (1966):

1. Did the Employer give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?
2. Was the Employer's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the Employer's business and (b) the performance that the Employer might properly expect of the employee?
3. Did the Employer, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
4. Was the Employer's investigation conducted fairly and objectively?
5. At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?
6. Has the Employer applied its rules, orders, and penalties even-handedly and without discrimination to all employees?
7. Was the degree of discipline administered by the Employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the Employer?

While these standards have been tailored to address different work places and circumstances, they serve as a useful starting point for considering this case. Since the enunciation of these standards, arbitrators have recognized additional factors for consideration in determining whether "industrial capital punishment," as discharge is known in the labor relations field, is warranted in a given case. The Arbitrator will consider factors such as the concept of "progressive discipline," and the potential for the employee's return to work, which are refinements of the seventh Test set forth above. The Arbitrator has studied the entire record in this matter carefully and considered each argument and authority cited in the Parties' briefs. That a matter has not been discussed in this award does not indicate that it has not been

considered by the Arbitrator. The discussion, which follows, will center on those factors, which the Arbitrator found either controlling or necessary to his decision.

1. Did the Employer give to the Grievant forewarning or foreknowledge of the possible or probable disciplinary consequences of the Grievant's conduct?

The Arbitrator answers this question: "Yes."

In the Arbitrator's view, the strongest proof of the Grievant's foreknowledge and forewarning is her 27 year history of employment with WSH, her experiences, performance of duties and procedures, and ongoing training. With this background, in this realm, the Grievant unquestionably knew that her acts of falsifying two important documents to cover her error were wrongful misconduct that would rightfully merit severe discipline. In addition to her training at the Hospital, the requirements of integrity, professionalism, and accurate record-keeping would have been impressed upon her during her studies in nursing school. In addition to these, there is Administrative Policy Number 18.64, *Er. Ex.3 G*, mandating ethical conduct and the maintenance of standards of behavior that promote public trust. Failure to comply with that policy "may result in disciplinary action up to and including discharge from employment." Guiding performance specific to the giving of medical rights are Policy 4.1.1, *Er. Ex. 3 B*, confirming a patient's right to refuse medication beginning 24 hours before a court proceeding, and Procedure 250, *Er. Ex. 3 C*, describing the Grievant's performance requirements in mechanical terms.

2. Was the Employer's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the Employer's business and (b) the performance that the Employer might properly expect of the Grievant?

The Arbitrator answers this question, "Yes."

The Employer is a public hospital vested with the responsibility to house and treat severely mentally ill patients. The workplace involved in this grievance is the "forensic unit," where patients may be a danger to themselves and others. The responsibilities and obligations resting upon the Employer and its staff are great, and rightly so. The quality of the custodial care of these patients is of vital importance to themselves, their loved ones, and the community at large. Patients have rights before the law. Violations of those rights, including not being timely informed of the right to refuse medication, diminish the dignity of the patient by removing their freedom of choice, and can later influence a court's decision, for better or worse, regarding continued custodial treatment or release into the community. The Hospital itself is answerable to the courts, and to its regulators and overseers, such as the Joint Commission on Accreditation which performs audits affecting the ability of the Hospital to function, and the Legislature, which is the public's eye on the Hospital through its representatives, vested with ensuring the provision of these custodial mental health services through funding and appropriate regulation.

The Employer's rules and policies set forth above appropriately prescribe overarching principles of ethics and professionalism, and translate those principles into the mechanical activities to be performed by employees in the Grievant's position in furtherance of those principles. Given the role of the Employer in society, and the standards it must observe in order to uphold its mission, its rules at issue here are clearly related to the orderly, efficient, and safe operation of the Employer's business and the performance that the Employer might properly expect of the Grievant.

3. Did the Employer, before administering discipline to the Grievant, make an effort to discover whether the Grievant did in fact violate or disobey a rule or order of management?

The Arbitrator answers this question, "Yes."

At the outset, it should be noted that the Grievant admitted conduct basing the core charges against her in the course of her first meetings with supervisors. Her actions were discovered the same day she performed them, first, when Nurse Gaines noticed in the medication room that there was no documentation that medication rights had been given to a particular patient, and upon questioning, learned from the Grievant that she had not given the required medical rights, *Gaines, Tr. pp. 91, 92*, and later the same day confirmed by Nurse Mayes, who found the patient, from whom he learned the actual facts to compare with the notations entered in the records by the Grievant. *Mayes, Tr. 127-130*. Additionally, she met with Jack Dotson the next day, and confirmed her actions *Er. Ex. 3 D 1*. On May 28, the Grievant again met with Mr. Dotson and confirmed her actions *Er. Ex. 3D 8*. In October of 2009, Nurses Mayes and Dotson investigated whether there was a "culture" among nurses to fill in medication rights forms to reflect 9:00 a.m. as the time they notified patients of their rights, regardless of the actual time, if circumstances made compliance difficult. The investigation was conducted by asking twelve nurses whether they had ever taken that action. None had. *Er. Ex. 3 D 9*. On April 10, 2010, The C.E.O. of WSH met with the Grievant in his office for a pre-disciplinary meeting. At that meeting, the Grievant again confirmed her conduct of May 20, 2009. Given the foregoing, it is clear that the Employer made an effort to confirm that the Grievant did in fact violate the Employer's rules.

4. Was the Employer's investigation conducted fairly and objectively?

The Arbitrator's answer to this question is, "Yes."

The only matter that the Arbitrator would note is the early conversation between the Grievant and a supervisor, Jack Dotson on May 21. Apparently, Ms. Ray had initiated the conversation to discuss interviewing for a position as a LPN4. In the course of the conversation, Mr. Dotson directed the conversation toward the events of May 20, and proceeded with direct questioning. The conversation became sufficiently investigative in nature to suggest observation of the protections of NLRB v. Weingarten, Inc. 420 U.S. 251 (1975). An employee may then consult with a Union representative who may advise and counsel the employee and bear witness to the meeting. In some cases, arbitrators have rescinded discipline where employers have failed to observe *Weingarten*. Given the totality of the evidence, however, this Arbitrator is inclined towards an approach appropriate where substantial evidence has been collected by the Employer outside and beyond the meeting: diminished weight to be accorded to evidence obtained in the course of the interview. Having considered the rest of the Employer's process and its evidentiary product, and the reasonableness of the conclusions drawn by the Employer, the Arbitrator finds the requisite fairness and reasonableness of the Employer's investigation.

5. At the investigation, did the Employer obtain substantial evidence or proof that the Grievant had committed the acts with which she was charged?

The Arbitrator's answer to this question is, "Yes."

The evidence before the Employer that was produced in the course of an investigation which this Arbitrator has found to have been conducted fairly and objectively provided substantial proof that:

On May 20, 2009, the Grievant was assigned to serve as medication nurse for Ward C6 at Western State Hospital. In that role, her duties included administering medications to patients

and to notify them of their right to refuse such medications in anticipation of court hearings the following day. The notice is to be provided by 9:00 a.m. on the day prior to the hearings, and before any medications are administered to a patient. The notification is documented in a form entitled "Twenty-Four Hour Medication Notice." The Grievant, apparently because she needed to attend to errors in a drug count from the prior shift, missed the "morning report" where patient and operational information is conveyed to the oncoming shift. She also did not review the "Assignment of Patient Care" sheet which refers to patients needing to be given their medication rights notification. *Tr. p. 91, Er. Ex. 3D6.* The Grievant then proceeded to administer medication to patient who was scheduled for a court hearing the following day, and was entitled to timely notification by 9:00 a.m. of his right to refuse such medication. In the course of visiting the "med room" while the Grievant was at lunch, a coworker, RN 2 Charge Nurse Kerry Gaines found there was no indication that rights had been appropriately given to the patient facing the court hearing. When she asked the Grievant about this, of the Grievant replied that she had not notified the patient of his rights, no one had told her to. *Gaines, Tr. pp. 91-92.* After giving the patient medication without notifying him of his rights, the Grievant then did some charting and went to lunch. *Ray, Tr. pp. 235-236.* Nurse Gaines informed her supervisor, Bret Mayes, an RN 3, of the situation. At approximately 1 p.m., Nurse Mayes asked the Grievant if she had given the patient his medical rights, and she thanked him for reminding her. He later went to check the chart's notations which indicated that at 10:00 a.m. she wrote that she had provided medication rights to the patient at 9:00 a.m. This constituted falsification of those documents. *Mayes, Tr. 137, 138.* Nurse Mayes then located the patient being given a haircut at the treatment mall. He learned from the patient and the barber that the Grievant had left the barber shop at approximately 1:45 p.m. During her visit she had procured the patient's acknowledgment that he

had been given his rights at 9:00 a.m. *Ray, Tr. pp. 237-238*. Due to her falsification, the supervising psychiatrist and the assistant attorney general who are necessary participants at commitment hearings had to be notified so that the patient's hearing could be rescheduled. *Mayes, Tr. p. 128*. The next day, May 21, the Grievant met with Jack Dotson, the RN 4 who oversees the ward, and in the course of that meeting, admitted her actions, claiming that other LPN's do the same thing when they are too busy processing the meds, but not naming any names. *Er. Ex. 3 D 1*. She repeated her admission the following week, stating it was not intentional. *Er. Ex. 3 D 8*. The Employer conducted a follow-up investigation to determine if, in fact other nurses were cutting corners in administering patients' medication rights. None of the 12 LPN's who were interviewed admitted to ever having missed giving timely medication rights to patients and then covering up their error by falsification. *Er. Ex. 3 D 9*.

Based upon the foregoing, the Arbitrator finds that Employer obtained substantial evidence supporting a finding that the Grievant had committed the acts with which she was charged.

6. Has the Employer applied its rules, orders, and penalties even-handedly and without discrimination to all employees?

The Arbitrator answers this question, "Yes."

The only suggestion from the Union that the Employer might not have applied its rules, orders, and penalties even-handedly and without discrimination to the Grievant came in the form of testimony from other past and present employees of the Hospital. Witness Scott Marshall, a former LPN 3 at WSH, testified that coworkers told him to "always put 10:00 a.m." on the Notice of Medication Rights Form because it is uncertain when a patient will actually go to court. Many LPN's would pre-fill out forms in the morning before they passed the meds hoping to give the rights within the time written on the form. *Marshall, Tr. pp. 181, 183*. Witness

Barbara Baker, a psychiatric security nurse employed at WSH testified that she had seen staff write that the patient had received med rights at 9:00 a.m. when that had not occurred, since the patient had left the ward before the notice was given. She admitted that she, too, had written 9:00 a.m., when in fact she'd given the notice a couple of hours later, because staff were told they had to. *Baker, Tr. pp. 200, 209-210.* Laura Smith, LPN 2 employed at WSH, testified that she was told by a social worker that she should show that the rights form was explained and signed by the patient at 9:00 a.m. even if she could not get the form to the patient by 9:00 a.m.. She had never before seen Nursing Procedure 250. *Smith, Tr. pp. 214, 216.*

While the Arbitrator finds the above testimony to be worthy of some weight in characterizing the working environment that may at times prevail on the wards of WSH, it is not probative in the determination of whether there has been discrimination against the Grievant in a disciplinary context. No case of another employee charged with conduct similar to that of the Grievant, or who faced discipline thereon, was presented to serve as a comparison.

7. Was the degree of discipline administered by the Employer reasonably related to (a) the seriousness of the Grievant's proven offense and (b) the record of the Grievant in her service with the Employer?

This inquiry brings all of the prior considerations to a head in determining whether the discharge of the Grievant was for just cause. The Arbitrator will consider these matters separately.

The Seriousness of the Offense

The Employer, through credible testimony and exhibits, detailed areas of concern that it felt underscored the seriousness of the Grievant's offense, to the point of overcoming a consideration of the favorable aspects of her term of service, or any other factor that might

support discipline short of discharge. That the Grievant's conduct constituted a substantial violation of the Employer's work rules and policies is obvious:

Revised Code of Washington 71.05 establishes a patient's right to decline the administering of medication (psychotropics, anti-psychotics) in the mental hospital setting at least twenty-four (24) hours prior to a hearing considering involuntary commitment as an acknowledgment of the general constitutional rights of a patient to his person, and as supporting a patient's ability to participate and assist in their representation at the hearing. The Grievant administered medications that a patient had a right, by statute and Employer policy, to refuse. She then proceeded, after being questioned by her supervisor, to find the patient and have him sign an acknowledgment of rights form noting the required 9:00 a.m. time, rather than the true time. Next, the Grievant completed the patient's chart to reflect a 10:00 a.m. entry confirming a 9:00 a.m. notification of patient's rights. Had these facts not been discovered, the patient's court date might not have been changed. If the court had proceeded and the falsifications had come to light, the patient's attorney might have moved for the dismissal of the commitment and the release of the patient into the community, putting the patient and the community at risk. The Hospital would then have had to scramble for a re-evaluation from a mental health professional to try to avoid that release. Further, the Hospital's credibility before the court was jeopardized: The notification form is a pleading before the court, which relies upon that pleading for its deliberations, and which, being presented as a "certificate," is subject to the pains and penalties of perjury. While the Grievant, as signer, would be liable thereon, the Hospital, as her Employer, could have had its credibility impacted. Also, had the matter come to light, future patient defense counsel might, if so inclined, argue that having falsified one such document, any future notices the Grievant subscribes should be held suspect, not providing a basis for finding proper

notice was given, and actions based thereon should be dismissed. Finally, inaccurate keeping of the medical record, especially as was done here, presents potential problems with the Joint Commission on Accreditation, the national organization that performs audits to assure hospital compliance with accreditation standards. Last, the Employer was concerned that the Grievant did not seem to appreciate the gravity of her conduct, claiming in earlier interviews, "no harm, no foul," because no medications were administered after 9:00 a.m. and the hearing was rescheduled, *Er. Ex.2.*, not appreciating the gravity of her conduct, *Jamieson, Tr. pp. 174-175*, and changing her portrayal of her actions, stating the day was hectic and she was very busy, her actions were "accidental," or "unthinking," and that it had "become a pattern" to enter 9:00 a.m.

In sum, the Employer's position was that missing the 9:00 a.m. time for the administration of medication rights was one part, a lesser part, of the charges basing discipline. It was the falsification of the notification form and of the chart, the hospital record, that was the greater part of the decision to discharge the patient, as those actions placed patient safety, and the hospital's integrity, at stake. *Jamieson, Tr. pp. 155-169, 262-263.*

The Arbitrator views some of the impacts and the risks outlined by the Employer to be relatively direct and some to be more remote, but, they are for the most part, serious matters of legitimate concern.

That the patient was not given drugs after 9:00 a.m., twenty-four hours before a hearing, or that she was held over because of a drug count and couldn't make the morning briefing, or that the Grievant believed the patient was ready for release and she did not want to hamper that by strictly following protocol, or that the hearing was rescheduled, or the like, are not found by the Arbitrator to excuse the Grievant's actions, or to minimize the seriousness of her conduct.

Testimony was had at the hearing suggesting that the Grievant's conduct was not unusual in the workplace: other nurses had engaged in the same or similar conduct; it was a common practice to write "9:00 a.m." on the patients' rights form well in advance of actually notifying a patient of their rights. None of the witnesses testified that they, themselves, had ever performed the acts attributed to the Grievant, nor did they provide verifiable evidence of staff and coworkers who had performed the acts to which they testified. The Arbitrator finds the testimonial evidence presented to suggest a workplace culture excusing, or encouraging, the acts for which the Grievant was disciplined, while suggestive, is insufficient to excuse the actions of the Grievant. Moreover, the Arbitrator does not need to make a finding validating those claims in order to arrive at the result he has determined in this matter.

In examining the seriousness of the offense, the Arbitrator takes into account the seriousness of the offense from the point of view of the Employer, as indicated not by its words alone, in argument, but by its actions, its treatment of the Grievant subsequent to its completed investigation of that conduct which it asserts justifies her discharge. The Grievant was kept in the employ of the hospital for almost a year after the point in time when the Employer's investigation concluded that she had performed the acts which were later stated by the Employer, and argued to the Arbitrator, as being central to their decision to discharge her.

In sum, the Employer's action retaining the Grievant in the manner it did strikes the Arbitrator as inconsistent with the practices, policies, and positions officially announced by the Employer, and serves, to some extent, to lessen the degree of seriousness the Employer attributes to the Grievant's conduct. After learning and believing all of the facts basing conduct the Employer testified was sufficient to, by themselves, lead to the Grievant's termination, the

Employer's response was to retain the Grievant in a trusted position immediately after the complained of events, and maintain her in that position for almost a year.

The Employer has presented evidence sufficient to satisfy the Arbitrator that the Grievant's actions constituted serious violations of reasonable Employer work rules and policies, contrary to the requirements and expectations of an employee in the Grievant's position as a Licensed Practical Nurse 2. The Arbitrator finds that the Employer had just cause for imposing discipline, even substantial discipline, upon the Grievant for her conduct in this case.

The Record of the Grievant in Her Service with the Employer

In reviewing the record of the Grievant in her service with the Employer, the Arbitrator has reviewed over 82 pages of performance reviews dating from January 12, 1984, through December 3, 2008. *Jt Ex.10*. The body of those evaluations is overwhelmingly positive and consistently portrays the Grievant as someone who has been an asset to the Employer over the years, meeting or exceeding normal expectations. No lesser evaluation such as "meets minimum requirements" or "fails to meet minimum requirements" was found. Nor was there any evidence of any prior misconduct. Of note, and providing some insight into the nature of the workplace, were comments like those of staff who performed a February 17, 2000, evaluation:

Ms. Ray has worked on Ward S-4 since this Ward was created, and has endured many changes. S-4 was established for all male patients with a history of some violence... Ms. Ray has demonstrated the ability to adapt to numerous personnel changes and continue to perform her duties at an outstanding level. Ms. Ray demonstrates initiative in accepting responsibility for her duties assigned and seeks out additional tasks as time permits. Ms. Ray is also knowledgeable regarding ward purpose and goals as well as her duties. She continues to follow nursing protocols and procedures, and accepts directions... Ms. Ray works well with her coworkers and contributes to the overall morale by her friendly and professional demeanor.

The Grievant's evaluation of February, 2004 notes,

Ms. Ray takes her turn in the Med Room and dispenses medication to 30 or more patients with a high rate of accuracy.... As the LPN-3,... Ms. Ray is responsible for making out the non-clinical assignment for subordinate staff. Because of our recent off ward programming, this has become a most challenging duty. Usually there are more tasks to assign than available staff. Out of necessity and with direction, Ms. Ray is learning to be creative with staff resource on hand.

In that same evaluation, the writer noted some complaints of rude and defensive behavior, believed not to be intentional, and later observed to be improved.

Approximately 5 months before the incident leading to this arbitration, the Grievant's evaluator, Bret Mayes, noted,

She is assigned to a sub-acute Ward where clients are unpredictable and potentially dangerous... This ward is sub-acute and acuties of the Ward can be high at times. Wanda is acutely aware of patients' needs and reports any changes in patients' emotional or physical conditions to the RN in charge immediately... Wanda administers medications as prescribed and documents them by using the PYXIS and Medimar ... She has shown extreme flexibility as the LPN 2 on the ward during crisis situations or with minimal staffing... works well with a diverse population and ensures a safe working environment ... Ms. Ray is skilled at de-escalating the most problematic patients thereby alleviating the need for seclusion or restraint... She devotes herself to building solid trust relationships with her patients and staff.

From his study of the these twenty-four (24) years of personnel reviews, the Arbitrator draws a strong inference that the Grievant's conduct in this matter was an isolated incident in an otherwise long and dedicated career.

Gleaned from the text and subtext of these evaluations is a workplace environment that may contain any or all of the following features: a substantial caseload of unpredictable and potentially dangerous male patients suffering significant mental illness resulting in occasional violent outbursts or other crisis situations; frequent programmatic and personnel changes, both staff and supervisory; and, limited resources and staff available to deal with all of the foregoing.

In examining the viability of the Grievant for a return to work, the Arbitrator takes into account the viability of that return from the point of view of the Employer, as indicated not by its

words alone, in argument, but by its actions, its treatment of the Grievant immediately after its investigation found the conduct which it asserts irreparably broke its trust and justifies her discharge. The Grievant was kept in the employ of the Hospital for almost a year after the point in time when the Employer's investigation concluded that she had performed the acts which were later stated by the Employer, and argued to the Arbitrator, as being central to their decision to discharge her. The position she was retained in required and deserved an exceptionally high degree of trust: the acquisition and dispensing of medication, including controlled substances, anti-psychotics and narcotics. If there is a position in a hospital that could present a greater temptation for misconduct, especially for an untrustworthy employee, this Arbitrator is not aware of it. In fact, the position was identical to the job she had been performing until May 21, 2009, save for notifying patients of their right to refuse medication and documenting that notification. The decision so to retain the Grievant was made by personnel who worked closest to the Grievant, possessing presumably greater knowledge of her character, abilities, and reliability, and general history, than those in higher management who made the decision to discharge her. Also, the decision to retain her was made closest in time to the revelations regarding her misconduct, when the institutional response would be expected to be the most acute.

In sum, the Employer's action retaining the Grievant in the position it assigned to her strikes the Arbitrator as incongruous with the practices officially announced by the Employer, and with a position that the Employer's trust is broken, and the relationship damaged, to the point that the Grievant must permanently be removed from the workplace. After one week's worth of investigation, learning and believing all of the facts basing conduct the Employer testified was sufficient to, by themselves, lead to termination, the Employer's response was to retain the Grievant in a trusted position, and maintain her in that position for almost a year. It

may be true that the Employer wanted to have the investigation run its course while investigating other matters, or for the sake of due process. But the Employer had other options open to it: It could have discharged the Grievant, and if further evidence later emerged, discharge the Grievant again, a practice known as “shooting the corpse” in labor relations parlance. Or, the Employer might have placed the Grievant on forced administrative leave. The Employer did neither.

That Dr. Jamieson, the Employer’s C.E.O, who came to be C.E.O. the same month this matter occurred, might have acted differently, does not overcome the fact that the Employer did retain the Grievant. She then proceeded to perform her job, despite the pressures of being under investigation for that extended period, in a manner no evidence shows was anything other than professional.

Among factors frequently considered by Arbitrators in determining whether “industrial capital punishment,” as termination of employment is known in the labor relations environment, is supportable in a given case are the applicability of “progressive discipline,” and whether an employee could viably be returned to their work environment. The essence of the concept of “progressive discipline” is that, where an employee’s conduct and record suggest that discipline may effect correction, the Employer should impose, rather than discharge, a less punitive measure to effect that correction, somewhat akin to “less restrictive care,” a phrase found in the involuntary commitment statute, R.C.W. 70.96A.140. In this case, the Arbitrator finds that, upon the whole record, progressive discipline should have been applied and made available to the Grievant, by way of a substantial term of suspension appropriate to the seriousness of her conduct, the Employer’s response to that conduct, and her work history. The Arbitrator balances this arrangement with an appreciation for the sensitivity and needs of the workplace, and the

appropriateness of supporting the Grievant's successful continuation of employment through her remaining three (3) years to retirement with an incentive in the form of a "Last Chance Agreement," another arrangement frequently utilized in labor relations to support future performance.

The Arbitrator finds that, though the seriousness of the Grievant's conduct and its impact upon the Employer constituted just cause for substantial discipline, they were not sufficient, when viewed in light of the Grievant's substantially solid and positive twenty-seven (27) year work history, the inferences to be drawn from the Employer's actions in retaining her, in the circumstances described, for almost a year after becoming convinced of her commission of the acts complained of, and the likelihood that available disciplinary and supportive measures would provide appropriate correction to permit a return to work, to support a finding that the discharge of the Grievant was with just cause.

CONCLUSION

Based upon all of the evidence surrounding the conduct of the Grievant, its impacts and the subsequent response by the Employer, the accepted standards regarding just cause for discipline, and the record as a whole, the Arbitrator finds that termination of the Grievant's employment was too harsh a penalty under the circumstances, and was not imposed with just cause. The Arbitrator will enter an award consistent with the above analysis and conclusions.

<p>IN THE MATTER OF THE ARBITRATION BETWEEN</p> <p>WASHINGTON FEDERATION OF STATE EMPLOYEES Union,</p> <p>and</p> <p>STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, WESTERN STATE HOSPITAL Employer</p>	<p>) AMERICAN ARBITRATION) ASSOCIATION) CASE #75-390-00462-10)) ARBITRATOR'S) OPINION AND AWARD))) GRIEVANT:) WANDA RAY))</p>
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Having heard or read and carefully reviewed the evidence and arguments in this case, and in light of the above discussions, American Arbitration Association Grievance No. 75-390-00462-10 is granted in part:

1. The Employer had just cause to discipline the Grievant, Wanda Ray, Jr. on April 27, 2010, consistent with Article 27.1 of the Collective Bargaining Agreement between the Parties and associated work rules.

2. The Employer did not have just cause to discharge the Grievant.

3. Upon the execution of a Last Chance Agreement between the Parties and the Grievant, to be consummated within fifteen (15) business days of the date of this Award, the discharge of the Grievant shall be converted to a ninety (90) day suspension. All references to her discharge, or references to recommendations for, or intent to, discharge, shall be purged from all of the Employer's files in whatever form they are kept or may be retrieved, and the same shall instead reflect this suspension. The Grievant shall be made whole for any and all lost wages (with no interest thereon), accrued leave, retirement contributions and benefits that would have been afforded to her with the exception of the time period encompassed by the suspension imposed herein. From any back pay due the Grievant, the Employer may subtract an amount equal to the total of (1) sums paid to the Grievant for unemployment compensation as a result of having been unemployed and (2) sums earned by the Grievant as a result of substitute employment. If the Employer elects to reduce back pay due the Grievant as a result of her having been paid unemployment compensation, the Employer shall pay to whatever governmental agency paid unemployment compensation to the Grievant an amount equal to the amount by which the Employer reduces back pay due the Grievant for unemployment compensation paid her.

4. The terms of the Last Chance Agreement shall include these terms:

A. Upon future findings of fact by the Employer that the Grievant has committed acts constituting violations of ethics rules regarding falsification of documents, she shall be terminated.


B. If arbitral review should follow such a termination by the Employer, the only inquiry before that arbitrator, in deciding whether termination was for just cause and should be upheld, shall be whether the Grievant committed such acts.

C. In any conversations with supervisory personnel that touch upon matters that could lead to discipline, or a recommendation for discipline, the Grievant shall be deemed to have requested the presence of a Union representative, and, if none is present at such conversation, the contents of such conversation shall not be useable or admissible for any purpose.

5. The Employer shall have the option of returning the Grievant to the post she previously occupied, with or without the duty of providing patients their notification rights involving medications, as was done from May 21, 2009 to April 27, 2010, or placing her in a different position of no lesser pay or loss of other benefits or advantage she would have enjoyed in her previous position but for the discharge.

6. The Arbitrator shall retain jurisdiction of this matter until 4:30 p.m., November 8, 2011, solely to resolve disputes regarding the remedy directed herein, if any. If the Arbitrator is advised by telephone or other means of any dispute regarding the remedy directed on or before 4:30 p.m. on November 8, 2011, the Arbitrator's jurisdiction shall be extended for so long as is necessary to resolve disputes regarding the remedy. If the Arbitrator is not advised of the existence of a dispute regarding the remedy directed herein by that time and date, the Arbitrator's jurisdiction over this grievance shall then cease.

RESPECTFULLY SUBMITTED this 8th day of September, 2011.



Anthony D. Vivenzio, Arbitrator

4. The terms of the Last Chance Agreement shall include these terms:

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RESPECTFULLY SUBMITTED this 15th day of September, 2011.


Anthony D. Vivenzio, Arbitrator