

The undersigned was appointed as arbitrator under those procedures. A hearing was held on _____, 2013 at the Board of Mediation's offices located in ZZZ State Capital. The parties attended the hearing. They were represented by counsel, and were afforded full and equal opportunity to offer testimony under oath, to cross-examine witnesses, and to present evidence and argument. The record was declared closed on _____.

Issue

The parties stipulated the issue to be:

Was the Grievant GH discharged for just cause? If not, what shall be the remedy?

Facts

The Undisputed Facts

Respondent operates a hospital in _____, ZZZ. Grievant GH joined its staff as a Transporter, and was responsible for conveying patients throughout the facility. A few weeks before starting work at _____ Hospital, GH signed a Receipt (Respondent Exhibit 2) for the institution's Employee Handbook. (Respondent Exhibit 1.) The Workplace Guidelines section of the Handbook designates prohibited behaviors, which if undertaken subject employees to disciplinary action. (Respondent Exhibit 1, pages 3 & 4.) Among those prohibited behaviors is, "Improper handling, theft, fraud or misappropriation of the Hospital's or another person's property." (Respondent Exhibit 1, page 4.) (Emphasis added.)

Grievant was at work on the morning of _____. Also present in the hospital was CC, a student nurse on a three-month medicine rotation. Toward 10:00am CC (hereinafter the "Student Nurse") was outside of Room _____. The room contained two hospital beds identified as "A" and "B". (Respondent Exhibit

3.) Bed “A” was unoccupied. Bed “B” was assigned to Ms. X, a patient who was unable to walk.

The Student Nurse was awaiting the return of Ms. X from a _____ examination. In time, she saw a gurney moving along the hallway in her direction. The gurney held Ms. X, and was being pushed by GH. Although the Student Nurse had worked with other Transporters, this was to be the first time that she and GH had come in contact.

The events that led to Grievant’s discharge then occurred. See Contested Facts *infra*.

WG, Director of Security, subsequently conducted an investigation. He interviewed Grievant by which time he had in hand a copy of the Student Nurse’s statement. (See Respondent Exhibit 3.) While Grievant conceded that he had no argument to rebut her allegations, he also denied any wrongdoing. WG asked whether this position would change if fingerprints could be lifted from the purse. Grievant replied that it would not. However, a fingerprint examination was never conducted because in WG’s opinion the chain-of-custody had been broken.

Contested Facts

The Student Nurse testified that she made Bed “B” about 15 minutes before she observed Grievant propelling the gurney toward Room _____. She placed a purse, which lay on top of the bed, on an adjacent nightstand. The purse was zippered closed.

When Grievant arrived at the room, with Ms. X in tow, he stated that he was going inside to ready the bed. He left the gurney in the hallway, and the two women talked for the next 5 or 10 minutes. Concluding that Grievant was “taking

to long,” (Respondent Exhibit 4) the Student Nurse entered the room. She approached Grievant, whose “back was to the door.” She testified that Ms. X’s purse was on the bed, and that Grievant’s hand was in the purse. It was also observed by the Student Nurse that Bed “B” had not been moved.

Grievant, on being confronted, told the Student Nurse that he was moving the bed, and had not taken anything. At sometime during their conversation, he moved the purse from the bed to the nightstand.

Ms. X subsequently confirmed to the Student Nurse that nothing was missing. The incident was reported to Nurse Manager M.

Mr. GH testified that while they were returning from _____ he asked Ms. X if she could walk. She replied in the negative.

On arriving at Room _____, he inquired of the Student Nurse whether she wanted to talk with her patient. After she answered “yes,” Grievant situated the gurney half in and half out of the room. This kept the Student Nurse in his line of site. During the next 3 or 4 minutes Grievant prepared Bed “B” to accommodate the wheeled stretcher¹. Grievant neither searched for, nor noticed a purse.

As he was walking out of the room to get Ms. X, Grievant testified that the Student Nurse confronted him. In response to her question, he denied taking anything.

During his participation in the ensuing investigation, Grievant told WG that he had no problem being fingerprinted.

Some days later, on being notified of his termination, Grievant was advised that Respondent’s decision was a matter of “credibility not legality.”

Positions of the Parties

¹ By lowering the bedrail, and moving Bed “B” at an angle to Bed “A.”

Respondent's Position

Respondent emphasizes that the Student Nurse had nothing to gain by reporting Grievant's behavior, or by testifying against him. She acted in accordance with her responsibilities as a member of the nursing profession. It also urges that Grievant's testimony neither dented her *bona fides* as a witness, nor otherwise rebutted its proofs in support of the disciplinary action.

Grievant was observed with his hand in the patient's purse. This was a violation of the Workplace Guideline prohibiting "handling" another person's property. Patients who come to the Hospital for care are entitled to "a sense of security in their possessions which helps promote their peace of mind." (Respondent's Opening Statement.) They deserve better than Grievant's treatment of Ms. X.

Union's Position

The Union ardently contends that Respondent has not met its burden of proof. Correctly anticipating that the Hospital would characterize the Student Nurse as an unbiased witness with no reason to lie, the Union stresses that there is more to the matter than this one argument. For starters, Grievant has consistently denied her allegations, and even was prepared to be fingerprinted. While the Union is concerned with the propriety of WG "bluffing" Grievant by asking about fingerprinting; it notes that by accepting the bluff Grievant showed he had nothing to hide. Why, the Union asks, would Mr. GH agree to be fingerprinted if he was afraid of the results?

Grievant went into Room _____ for the simple purpose of performing his duties as a Transporter. The Student Nurse conceded that she had seen unaccompanied Transporters enter hospital rooms to prepare beds for returning

patients. Additionally, by conceding that she approached the bed on an angle, the Student Nurse revealed that she literally was in no position to observe Grievant's hand.

Commenting that thieves act when witnesses are scarce, the Union sees no basis for concluding that Grievant would have touched the purse when Ms. X and the Student Nurse were nearby. By placing the gurney partially in the room Grievant stayed within the Student Nurse's sightline. Moreover, had Grievant been of a mind to steal, there is no logical reason why he would have reached across the bed. It would have made more sense to leave the purse on the nightstand.

Discussion and Analysis

To prevail in a discharge case employers have the burden of proving that they acted with just cause. Before upholding a termination most arbitrators "require clear and convincing evidence both that the act took place and the actor was responsible for it." *American Steel Foundries*, 94 Lab. Arb. 745, 748 (Seidman, Arb. 1990). Respondent met this burden. GH handled Ms. X's purse, and thereafter lied about his actions making it virtually impossible for management to trust his honesty.

The Work Environment

By virtue of illness or injury, hospital patients are particularly dependent on their caregivers. This vulnerability extends to valuables and keepsakes that they bring to a health care facility. Employees have a duty to respect this property, and administrators have a corresponding duty to implement safeguards to protect patients from theft.

_____ Hospital has opted to safeguard its patient population by promulgating a rule that disciplinary action will follow from “Improper handling, theft, fraud or misappropriation of Hospital or another person’s property.” (Respondent Exhibit 1.) (Emphasis added.) This rule is contained in the Employee Handbook, (Respondent Exhibit 1, page 4), which Grievant received on _____. (See Respondent Exhibit 2.)

What Happened?

As the parties acknowledge this is “a credibility case” requiring a determination of the weight to be assigned to Grievant’s words, and to the Student Nurse’s conflicting testimony. In weighing the discrepancies, the arbitrator acknowledges that any witness may have a motivation to be less than candid. None, however, was apparent in the Student Nurse.

The record reflects that she neither had a prior relationship with Grievant, nor an interest in the arbitration’s outcome. Her demeanor was that of a slightly nervous young woman who was trying to tell the truth. The arbitrator is convinced that she remembered, and to the best of her ability accurately communicated what she saw and heard. Her testimony was in all salient respects consistent with the statement that she handwrote a few hours following the incident. This is not to say that the Student Nurse was a perfect witness.

Her testimony was somewhat impeached with respect to the angle from which she saw Grievant’s hand. Although she had absolutely no doubt that his hand was inside of the purse, the Student Nurse had a restricted line-of-sight². This would be of greater concern if the arbitrator did not credit her testimony that

² The line-of-sight testimony is also consistent with a conclusion that Grievant used his body to shield his actions.

she had earlier placed the zippered purse on Ms. X's nightstand, and saw it open on the bed as she approached Grievant.

There is no evidence that the Student Nurse had a reason to target Grievant. This arbitrator found her to be credible both when she testified, and on later reviewing the record.

Grievant's testimony was not equally plausible. Since Bed "A" was unoccupied, and the Student Nurse was in the hallway with Ms. X, he had an opportunity to yield to temptation. He advanced no reason why he was in the room for 3 or 4 minutes.³ Lowering the rail, and moving Bed "B" at an angle to Bed "A" should have taken no more than 60 seconds. He had sufficient time to act in a manner consistent with the Student Nurse's testimony. Moreover, Grievant's explanation of the incident lacked consistency in critical respects.

On direct examination, GH said that he situated the gurney half in and half out of Room _____. However, a few minutes later, Grievant testified that the Student Nurse was "outside," and confronted him as he was walking from the room to get the stretcher. Had the gurney been partially in the doorway, he would have had no reason to retrieve it from the hallway. The gurney could not occupy two spaces at the same time.

Forgetting the laws of physics, Grievant's rendition of events is psychologically inconsistent. After being challenged by the Student Nurse, Grievant testified that he did not speak of the incident until the investigatory interview. Most people if wrongly accused of a misdeed, e.g., "Did you do this bad thing?" either protest indignantly, or quickly confide in a friend, colleague, or union representative. Grievant, however, remained silent for at least three hours.

³ Accepting *arguendo* his statement of elapsed time, as opposed to the 5 or 10 minutes that the Student Nurse said had passed.

He first talked about the incident when he was questioned as part of Respondent's formal investigation. Even during the hearing, his flat affect and matter-of-fact tone were inconsistent with an innocent person who had been falsely accused.

Conclusion

In sum, the evidence demonstrates that Grievant removed the purse from the nightstand, placed it on Bed "B," and was caught moving his hand in its vicinity. In the language of the Workplace Guidelines he was "[i]mproperly "handling...another person's property." Rather than admitting to a "mistake in judgment," and/or showing remorse, Grievant defended himself by denying culpability. This lack of candor makes it impossible to determine whether he understands the nature of his misconduct, and is committed to reform. Reinstating Grievant may place future patients at risk from repeated dishonest acts.

Certainly, there is a world of difference between "improper handling," "theft," "fraud," and "misappropriation." Depending on the hearing record each of these prohibited behaviors, if proven by clear and convincing evidence, might justify different levels of progressive discipline. In this case, however, little mitigates against the discharge penalty. Grievant is not a senior employee with years of honest, loyal service to the Hospital. He is a recent hire who when caught in the act attempted to cover his tracks rather than admit that he had handled the purse. Had he done so, the resulting discipline may have been less

severe. As matter stand, Respondent should not be “second guessed” for losing confidence in Grievant’s commitment to its patients.

The Grievance is denied.

Patrick R. Westerkamp, Esq.
Labor Arbitrator

**REDACTED SAMPLE ARBITRATION OPINION
WAS DISCHARGE FOR JUST CAUSE?**