Thomas P. Kruglinski
Arbitrator and Mediator

FEDERAL MEDIATION AND CONCILIATION SERVICE

IN ARBITRATION PROCEEDINGS PURSUANT TO

AGREEMENT OF THE PARTIES*

In Arbitration Proceedings Between: Nitnany Regional Medical Center and Service Employees International Union Local 131 Re: Suspension of Kevin Hyer	))))))))))	FMCS Case No. xx-xxxxx-xx ARBITRATION OPINION AND AWARD DATE: MARCH 12, 2021

APPEARANCES

Doreen Davis, attorney for Nitnany Regional Medical Center AND

Paul Whitehead, attorney for SEIU Local 131

ISSUE

Was the employee, Registered Nurse, Kevin Hyer, suspended for just cause?

*Note: This opinion is in a mock arbitration. It was written as part of the course requirement of "Becoming a Labor Arbitrator," conducted by the Federal Mediation and Conciliation Service in the Winter of 2021. This version of the opinion incorporates the feedback given by the instructor, Arbitrator Jeanne Charles.

INTRODUCTION

This arbitration is pursuant to the Collective Bargaining Agreement ("CBA") between Nitnany Regional Medical Center ("Center" or "Management" or "Employer") and SEIU Local 131 ("SEIU 131" or "Union") and concerns a five-day suspension given to Kevin Hyer ("Grievant"), a Registered Nurse at the Center. Hyer was charged with refusing to carry out the direction of his supervisor to move a post-op patient from a gurney to a bed. Hyer maintains his refusal was on the grounds that, given his back condition, the order was unsafe. Management imposed a five-day suspension on the Grievant on the day of the incident, February 15, 2020, for refusing a direct order as well as for neglecting a patient. The Grievant is the union shop steward for the unit in the Center where the incident occurred.

The Union grieved the suspension under Article 9 of the CBA. The Center denied the grievance at Steps 1 through 3, which resulted in the parties, per Article 9, Section 2 of the CBA, requesting a list of arbitrators from which this arbitrator was selected to hear the dispute. The date of the notification was January 14, 2021. The parties agreed that this dispute was properly before the arbitrator.[1] The hearing was held on February 5, 2021 at the Greater Nitnany Holiday Inn, at which the parties presented their cases, offered both joint and separate exhibits, and called a total of four witnesses (two each for the Center and the Union). The parties agreed to close the record after closing statements by the advocates. There was no court reporter present and, consequently, no written transcript of the hearing was created. The contents of

[1] Student note: assumed, but not stated in the video. I would confirm this were I to actually hear the case.

this Opinion and Award are based on extensive notes taken by the arbitrator during the hearing, as well as on the exhibits entered into the record.

Witnesses for the Employer

Olivia Martinez, Charge Nurse for Surgical Unit on 4 East
Lanik Richards, Senior Vice President of Human Resources at Nitnany Regional

Witnesses for the Union

Kevin Hyer, Grievant, Registered Nurse on Surgical Unit, 4 East
Alicia Barber, Registered Nurse on Surgical Unit, 4 East

Exhibits

Joint Exhibit 1—collective bargaining agreement
Joint Exhibit 2—grievance package
Employer Exhibit 1—Nurse Martinez notes taken three weeks before incident
Employer Exhibit 2—Kevin Hyer's job application

Relevant Provisions of the Collective Bargaining Agreement

Article 4 Management Rights

The Union recognizes the right of the Medical Center to operate and manage its affairs in all respects in accordance with its responsibilities. Any power or authority which the Center has not officially abridged, delegated or modified by this Agreement is retained by the Center.

The Union recognizes the exclusive right of the Center to establish reasonable work rules. The Center will notify the Union in advance of changes in written work rules except in emergencies. Any dispute with respect to these work rules shall not in any way be subject to final and binding arbitration, but any dispute with respect to the reasonableness of a work rule involving matters primarily related to wages, hours and conditions of employment may be subject to final and binding arbitration and in such cases the arbitrator's decision shall be strictly limited to a determination of reasonableness. This provision is intended to

expand but not to limit the right to arbitration set forth elsewhere in this Agreement.

Article 7 Discipline and Discharge

Section 1. Purpose: Disciplinary action may be imposed on employees only for just cause and shall be corrective where appropriate.

Section 2. Union Representation: The center shall not meet with an employee for the purpose of questioning the employee during an investigation that may lead to discipline of that employee without first advising the employee of the nature of the investigation and offering the employee an opportunity for Union representation.

Section 3. Disciplinary Action: Discipline includes only the following, but not necessarily in this order:

1. Oral reprimand.
2. Written reprimand.
3. Suspension, paid or unpaid.
4. Discharge

If the Center has reason to reprimand an employee, it shall do so in a manner that will not embarrass the employee before other employees, supervisors or the public. Oral reprimands shall be identified as such to the employee.

When any disciplinary action more severe than an oral reprimand is intended, the Center shall, before or at the time such action is taken, notify the employee in writing of the specific reason(s) for such action.

Article 9 Grievance Procedure

Section 1.

Only matters involving the interpretation, application or enforcement of the terms of the Agreement shall constitute a grievance under the provisions set forth below.

Section 2.

Grievances as defined in Section 1 shall be settled in the following manner:

. . .

Step 4. Arbitration. In cases referred to Step 4, unless otherwise agreed, the parties shall request within ten (10) days a list supplied by the Federal Mediation and Conciliation Service. After the parties have received the list, they shall alternately strike names until there is one arbitrator remaining who shall preside over the hearing.

The arbitrator shall set the time and place for the Step 4 hearing, the method of procedure and make all rulings.

The arbitrator shall have no power to add to, subtract from, or modify any of the terms of the Agreement or to any agreement made supplementary hereto, and shall only be allowed to rule on those cases that apply to the definition of a grievance as described in this Article. The decision of the arbitrator shall be binding on both parties.

Article 11 Safe Patient Handling Practices

Section 1.

When there is insufficient or unsafe lifting or handling measures and/or equipment available and/or the lack of trained personnel, health care employees shall not be subject to disciplinary action by the Center or any of its managers or employees.

Section 2.

Employees may refuse, without fear of reprisal, patient handling activities believed in good faith to impose an unacceptable risk of injury to an employee or patient.

Section 3.

An employee may report, without fear of discipline or adverse consequences, being required to perform patient handling believed in good faith to expose the patient and/or employee to an unacceptable risk of injury.

BACKGROUND

The Grievant, Kevin Hyer, is a Registered Nurse employed at Nitnany Regional Medical Center, a 200-bed acute care facility, located in Nitnany, New York. The Grievant works on one of the Center's surgical units, designated as 4E, and has done so for about two years for this Employer. He has been a registered nurse for about seven years. The Grievant also serves the Union (SEIU Local 191) as Unit 4E's shop steward and regularly meets with management about member concerns and grievances.

On February 15, 2020, while on duty, the Grievant was asked by his supervisor, Charge Nurse Olivia Martinez, to move a patient from a gurney to a hospital bed, a routine task performed by nurses following patient surgical procedures. In this case, the patient was obese and the Grievant set about to find someone to help him move the patient, stating that his back was acting up, and that he could not perform the task by himself. His supervisor, noting that the unit was short staffed, and the patient needed to be moved immediately, directed the Grievant to move the patient by himself. The Grievant refused, arguing that his back condition that day prevented him from moving the patient without posing a safety risk to himself and/or the patient. Charge Nurse Martinez told Nurse Hyer to either move the patient or take a five-day suspension. The Grievant then clocked out and went home, indicating he would grieve the matter. The patient was subsequently moved by another nurse. Charge Nurse Martinez then consulted with the Senior Vice President of Human Resources, Lanik Richards, and it was decided that the Center would impose a five-day suspension on Mr. Hyer for 1) refusing a lawful and direct order by his supervisor to move a patient from a gurney to a bed, and 2) neglecting the patient who needed to be moved immediately.

The Grievant served the five-day unpaid suspension and returned to work on or about February 24, 2020. He then filed the grievance in question, citing contract language that allows him to refuse to perform unsafe work, management failing to adhere to contractually agreed upon progressive discipline policy, and union animus on the part of his supervisor.

MANAGEMENT'S POSITION

Management holds that this is a simple, straightforward case of refusing a legitimate order and patient neglect, which is very much in violation of management's right to direct work as it sees fit, per Article 4 of the collective bargaining agreement[2] and consistent with the central mission of the Center to appropriately care for patients. It maintains that the disciplinary action taken in response to the Grievant's actions on February 15, 2020, was done properly and reasonably, within the bounds of Article 7, Section 3[3] of the CBA.

While Management acknowledged hearing Grievant's complaints about his back problem, and sometimes allows Grievant to obtain help in lifting heavy patients, it maintains 1) there was a staffing shortage on the day in question which made help not feasible, and 2) Grievant never presented any documentation of his back injury or a legitimate request for an accommodation per the Center's disability process. Management presented testimony that an accommodation was never authorized because Mr. Hyer never told Human Resources about his

[2] CBA, Article 4, Management Rights
[3] CBA, Article 7, Discipline and Discharge, Section 3. Disciplinary Action

back problem, as he should have done, to trigger the Center's disability accommodation process.

The Center maintains that the training all nurses receive periodically instructs them on how to properly lift a patient, relying on the use of their legs and not their backs. It maintains that using proper patient lifting technique, the Grievant should be able to move a patient comfortably and safely without assistance. Management notes that Grievant received this training two years before the incident, when he was newly hired, and was given a refresher just three months previous to the incident that gave rise to the grievance. Management presented testimony that the task Grievant refused to do was performed, after Grievant's exit, by a slightly-build nurse co-worker on Unit 4E without any assistance by using the prescribed technique. In short, Management maintains that Grievant was fully capable of moving the obese patient by himself but refused, demonstrating insubordination.

Management presented testimony from Grievant's supervisor that Grievant, who she had been supervising for about two years, had a problematic work record that ultimately led to his legitimate suspension. Testimony was presented that on two separate occasions his supervisor counseled him for improperly extending his breaks (he doesn't, she said, think the 10-minute break rule applies to him), and for not completing his tasks in a timely manner. This includes, Management holds, another previous incident Grievant of not moving a patient quickly enough. Management maintains that these conversations constituted the first two

steps of the collective bargaining agreement's prescribed discipline process[4], first an oral reprimand (for the overly long and too-frequent breaks), and written reprimand (for his previous failure to move a patient in a timely manner). Management submitted to the record the supervisor's notes[5], taken three weeks prior to the February 15 incident as the required Step 2 written reprimand, because she had advised Grievant that she was "taking notes." The third step, taken on February 15, appropriately called for the suspension that the Grievant received. In any event, Management argues that the Center has a past practice of sometimes skipping steps in the grievance process for particularly serious offenses like fighting, implying that this situation was similar in severity.

The Center denies the Union's contention that the Grievant was disciplined in part because of the union animus of Charge Nurse Martinez. Ms. Martinez testified that she may not like unions but would never do anything illegal to interfere with them. Management presented testimony that the five-day suspension was unrelated to the Grievant's union duties and was simply given because he refused to do routine work.

Finally, management called the Grievant's credibility into question, pointing out, during the cross examination of the Grievant, that he either lied on his job application[6] about his affirmative ability to perform all of his job's essential functions or lied in his testimony that he had received the back injury prior to his employment at the Center. Management counsel further called Grievant's credibility into question by pointing out what she referred to as his

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[4] CBA, Article 7, Discipline and Discharge, Section 3
[5] Employer Exhibit 1: Nurse Martinez notes taken three weeks ago.
[6] Employer Exhibit 2: Hyer Job Application.

"glib and evasive" demeanor during his testimony. Management suggests that this Arbitrator should take Grievant's demeanor into question when rendering his decision.

UNION'S POSITION

The Union argues that the Grievant, Kevin Hyer, is an experienced nurse with a clean discipline record who has a legitimate back problem that his supervisor had recognized and accommodated in the past. The Grievant testified that the back problem was caused some nine years ago in a skiing injury and that he sees a chiropractor regularly to treat the problem. He testified that, while the problem does not always interfere with his duties, on days when the injury acts up, as it did on February 15, he does need help moving heavy patients. The Union argues that in the past, his supervisor has allowed him to get help from other employees when moving patients.

The Union argues that the collective bargaining agreement explicitly allows employees to "refuse patient handling activities believed in good faith to impose unacceptable risk of injury to an employee or patient,"[7] and so the Grievant was fully justified in politely declining his supervisor's direction to move the obese patient by himself on February 15. The Grievant testified that, had he attempted to move the patient by himself, there was a significant risk that he would injure his back further and/or potentially drop a postop patient, perhaps resulting in an injury to the patient. The Grievant testified that he made his assessment of the safety

[7] CBA, Article 11, Safe Patient Handling Practices, Section 2.

hazard known to his supervisor during the incident and that his safety risk assessment was a reasonable one.

The Union argues further that that the confrontation that led to Nurse Hyer's suspension was the product of union animus on the part of Charge Nurse Martinez, i.e., she does not like unions, has a history of contentious meetings with the Grievant while acting as union steward, and was looking for a confrontation with Mr. Hyer on the day of the suspension. On cross examination, Ms. Martinez testified that in fact she does not believe that unions belong in healthcare settings and that their "silly rules" interfere with good patient care. The Grievant testified that he believed that this was a case of "old fashioned union animus," and that the February 15 incident was provoked by a history of contentious meetings he had with Charge Nurse Martinez about employee issues in his role as steward. The Grievant believes that his supervisor does not like dealing with employee grievances because they make work for her. The union argues that Mr. Hyer is the face of the union on Unit 4E and that if his employment is affected by this discipline, then it may remove the union from the unit.

The Union argues that even if this arbitrator finds that the discipline was imposed for just cause, there is an additional issue: Management failed to follow the Discipline and Discharge process in the contract[8] by skipping the first two steps, an oral and then a written reprimand, and jumping to Step 3, suspension. This by itself, argues the Union, supports granting the grievance.

[8] CBA, Article 7, Section 3—Disciplinary Action.

The Grievant testified that at no time did his conversations with his supervisor—either about his alleged overly long breaks, or about his previous slowness in moving a patient—constitute formal discipline. He believes that they were informal discussions about "best practices." In the first correction. regarding breaks, his supervisor did not inform him that he was being disciplined or that an oral reprimand was being issued. In the latter, regarding his pace of work, the Union argues his supervisor's personal notes do not constitute a written reprimand. The Union states that any argument that these discussions are steps in the required formal process should be rejected. They are, it argues, illegitimate "stealth loopholes" in the contract.

ANALYSIS AND FINDINGS

The basic facts are not disputed in this case. The parties agree that on February 15, 2020, an obese patient was brought to the unit from surgery and needed to be transferred from a gurney to a hospital bed. Consistent with the acknowledged regular duties of a Registered Nurse, the Grievant was directed by his supervisor to execute the move. The Grievant attempted to enlist help due, he says, to the "acting up" of his back injury and the large size of the patient. His supervisor, arguing that they were short staffed, and the patient needed to be moved immediately, ordered the Grievant to move the patient by himself, i.e., without assistance. The Grievant declined and cited his back as the reason, whereupon the supervisor issued an ultimatum to carry out her order as stated or take a five-day suspension. The Grievant responded by clocking out and going home. The record shows that all these facts are agreed upon by the parties.

Moreover, the parties agree on the main issue in this case: whether the five-day suspension was for just cause. The Union raises a second issue, seemingly independent from of the dispute over just cause, namely that the contractually mandated discipline was not followed when Management led with a suspension without adequately forewarning the employee, rejecting Management's claim that the two conversations about unacceptable behavior by the Grievant constituted formal disciplinary steps. These two issues are, in fact, linked. Two of the key elements of just cause focus on whether the discipline imposed was part of a progressive, corrective approach and that the employee was adequately forewarned.[9] As such, whether the CBA's discipline and discharge process was followed goes directly to the issue of just cause. Accordingly, these two issues will be considered together.

Finding # 1: Under the circumstances, Grievant was within his rights under the CBA to refuse an order to move the patient.

It is necessary to acknowledge the extreme importance of hospital staff following the direction of superiors given the central mission of the Center to provide high-quality medical care to its patients. Insubordination or refusal to follow the direction of a superior is potentially life-threatening in a hospital environment and Management is within its legitimate rights to insist that personnel follow orders scrupulously.

However, that need is balanced by a commensurate need on the part of staff to scrupulously adhere to the CBA. The contract states, in Article 11, Section 1:

[9] See, for example, Koven & Smith, Just Cause: The Seven Tests, 3d ed. (BNA Books 2006).

> When there is insufficient or unsafe lifting or handling measures and/or equipment available and/or the lack of trained personnel, health care employees shall not be subject to disciplinary action by the hospital or any of its managers or employees.

In addition, Article 11, Section 2 states:

> Employees may refuse, without fear of reprisal, patient handling activities *believed in good faith to impose unacceptable risk of injury to an employee or patient* (emphasis added).

I find it credible that the Grievant, due to his back injury, *believed i*n *good faith* that moving such an obese patient without assistance posted an unacceptable risk of injury.

Management maintains properly that appropriate lifting technique, using one's legs, instead of one's back, makes it possible for even smaller employees to lift heavy patients from gurneys to beds, as revealed by testimony that following the incident, Nurse Barber moved the patient without assistance. However, while it presented testimony that the Grievant received training in the technique, the Center presented no evidence of a medical evaluation indicating that *he was able* to do so safely with a back injury. Had the Center's established process in dealing with employee disabilities been followed, perhaps there would have been medical evidence that it was safe for Mr. Hyer to move the patient. But there was no medical evaluation. A key question is, then, whose responsibility was it to initiate a medical evaluation of the Grievant's condition and determine what duties he could and could not safely perform?

While it is undisputed that the Grievant did not provide medical evidence of his disability, which would have triggered a medical evaluation by management and possible accommodations, it is also undisputed that the Grievant made his condition known for some time to his supervisor, for whom he had been working for two years, and that his supervisor, Ms. Martinez, sometimes accommodated his request for help in lifting patients. Management

presented no evidence that the Grievant was trained in internal HR procedures regarding disabilities. Moreover, it is the responsibility of Management to train its supervisory personnel in such internal procedures and hold them accountable to ensure they are followed. Had that happened, Ms. Martinez's skepticism about Nurse Hyer's back condition could have been evaluated and his specific limitations, if any, clarified and perhaps reasonably accommodated, or not. Ms. Martinez apparently did not direct the Grievant to HR for such an evaluation, but instead accommodated it when it was convenient to do so and issued a suspension on February 15 when it was inconvenient. Accordingly, we must give the Grievant's claimed limitations the benefit of the doubt.

Finding 2: Management did not properly follow the CBA's discipline and discharge process.

Management presented no evidence that the verbal correction issued to the Grievant with regard to his alleged overly long breaks constituted an "oral reprimand." The contract states that, "Oral reprimands shall be identified as such to the employee[10]". Nothing in the record, other than acknowledgement by both parties that a conversation took place around the issues of breaks, indicates that formal discipline took place. The supervisor, Charge Nurse Martinez, did not say, for example, words to the effect that, "I am issuing you an oral reprimand (or oral warning or formal warning, etc.) for taking too-long and too-frequent breaks. Had she done that, the standard set by the contract would have been satisfied. Because she did not, I

[10] CBA, Article 7 Discipline and Discharge, Section 3. Disciplinary Action, paragraph 2, last sentence.

find that the Grievant's characterization of the talks as informal "best practice" discussions is the more valid description of the exchange.

Further, the second incident cited by Management as a step in the disciplinary process is the discussion with the Grievant around his slowness in moving the previous patient. It is unclear from the record whether Management believes that this discussion, documented by the supervisor's notes, is a valid written reprimand per the disciplinary process. The Charge Nurse Martinez indicated that she thought her notes sufficient to constitute a written warning. However, Management's witness, Ms. Richards, SVP of HR, testified on direct examination that there was not "technically" a written warning. In any event, no testimony was presented that the Grievant was given anything on paper that would suffice for a formal warning within the plain language requirement of a *written warning*. Accordingly, I find that in the situations presented, Management did not follow the discipline and discharge process prescribed in the contract.

Management contends that, regardless of whether previous discussions with the Grievant (the latter with documentation in the form of supervisor notes) on his work behaviors constituted steps in the discipline process, the five-day suspension was justified. In the presentation of its case, Management did not discuss the language in Article 7, Section 3 that the steps need not necessarily be followed in numerical order[11]. It did, however, cite a past practice of skipping steps in cases where the offense is especially serious. It cites only one

[11] CBA, Article 7, Section 3 reads, "…Discipline includes only the following, *but not necessarily in this order*: 1. Oral reprimand. 2. Written reprimand. 3. Suspension, paid or unpaid. 4. Discharge (emphasis added).

previous example of skipping steps, when the alleged offense was fighting on the job. The union argues that one incident does not a past practice make. I agree with that position. Moreover, I disagree that the act of civilly declining to follow an order on safety grounds is comparable in severity to physical workplace violence. Management did not make the case that significant harm to the patient resulted from the delay between the time the Grievant was given the order to move the patient and when the patient was *actually moved* off the gurney and onto the bed by Nurse Barber. Had it done so, the severity of the work rule infraction, i.e., disobeying a supervisor's order to move the patient immediately, could be seen in terms of harm as comparable to the example of fighting. No such evidence was presented. Incidentally, I believe that the intent of the parties who negotiated a specific, multi-step grievance process in their CBA with no mention of "skipping" [12]numbered steps, would sanction such a violation of the procedure. There is language in the discipline and discharge article that says the steps need not necessarily occur in the specified order. However, I do not read steps occurring out of order to be the same as skipping steps.

This analysis indicates that in the current grievance, management failed to follow the discipline process required in the CBA, thus undercutting a central element of "just cause," i.e., that the Center did not give to the Grievant adequate forewarning or foreknowledge. Management may believe that Ms. Martinez's ultimatum constituted adequate foreknowledge. If so, I disagree. It was not.

[12] SVP Richards testified that the contract was "vague" on skipping steps and that the Center's practice had been to "skip steps" where the offense is serious. My reading of the contract language sees no indication that skipping steps was considered permissible.

Finding #3: There is no direct evidence that union animus played a significant role in the decision to suspend the Grievant.

This finding does not imply that there *was no union animus* on the part of Charge Nurse Martinez. Her testimony on cross-examination that she does not believe unions are appropriate in a healthcare setting and their responsibility is to care for patients, not to worry about "silly little rules in a book" suggests either animus or ignorance about the legal obligations of her employer under the CBA. While this attitude could well have influenced her decision to discipline the Grievant, there is no direct evidence that it was a significant factor. It is more likely that her negative view of Nurse Hyer and his work ethic (including frequent and overly long breaks, not moving as quickly as she would have liked on some tasks, and her skepticism about limitations resulting from an alleged back condition) produced a desire to hold the Grievant accountable for substandard work performance.

Finding #5: The Grievant was suspended without just cause.

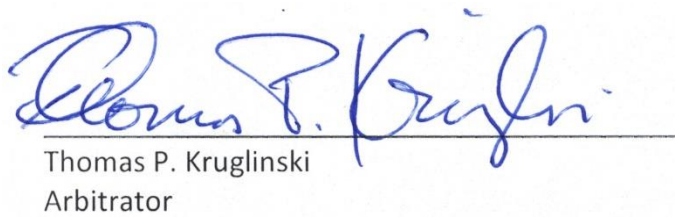
The first two Findings, above, that the CBA[13] expressly gives an employee the right to refuse patient handling orders that they believe in good faith to impose an unacceptable risk to either the employee and that Management of the Center did not properly follow the negotiated discipline process[14] and, are dispositive in this case. I find, therefore, that the Grievant was suspended without just cause.

[13] CBA, Article 11, Sections 1 and 2
[14] CBA, Article 7, Section 3

AWARD

The grievance of the Union and of Grievant Hyer is awarded in whole. The Center violated the collective bargaining agreement Article 7, Section 1 requiring that disciplinary action should be imposed only for just cause. The Grievant will be made whole financially for time lost during the five-day suspension with appropriate accrued paid time off added to his bank. Finally, his personnel record shall be cleared of any reference to the suspension. The arbitrator retains jurisdiction for sixty (60) calendar days effective with the date of the Award for purposes of remedy only.

Signed and dated this 10th day of March, 2021 at Gardiner, New York



Thomas P. Kruglinski
Arbitrator