

**Case: SCHNEIDER #1**

AMERICAN ARBITRATION ASSOCIATION

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IN THE MATTER OF THE LABOR  
ARBITRATION BETWEEN:

Grievance/Issue: Mike  
Flower/Discharge

Union,

-and-

HOSPITAL, Employer.

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BEFORE:

Arbitrator Karen Bush Schneider

:

**ARBITRATOR'S OPINION AND AWARD**

## **INTRODUCTION**

This matter involves a claim by the Union that the Hospital (hereinafter referred to as the "Employer") discharged Grievant, Mike Flower (hereinafter referred to as the "Grievant"), in violation of the collective bargaining agreement and Employer policy. Grievant's employment was terminated on or about January 19, 2004. Thereafter, the Union filed a timely grievance challenging the termination. Arbitrator Karen Bush Schneider was appointed by the American Arbitration Association as the neutral in this matter. An evidentiary hearing was held on October 21, 2004.

Following the hearing, the parties submitted Post Hearing Briefs to the American Arbitration Association on or about December 7, 2004. The American Arbitration Association declared the record closed and the deadline for issuance of the Arbitration Award to be January 14, 2005.

This Award is issued pursuant to the foregoing grievance history.

## **ISSUES**

- 1. Did the Employer terminate the employment of Grievant on or about January 19, 2004, in violation of the collective bargaining agreement and Employer Policy?**

The Employer submits the answer to be, "No."

The Union/Grievant submit the answer to be, "Yes."

- 2. If the Grievant's termination did violate the collective bargaining agreement and/or Employer policy, what is the appropriate remedy?**

The Employer submits that the grievance should be denied.

The Union/Grievant submit that the Grievant should be reinstated with full back pay. The Union/Grievant further request that the Arbitrator retain jurisdiction in this matter.

## **RELEVANT CONTRACT PROVISIONS**

### **ARTICLE 1**

#### **PURPOSES AND INTENT**

It is the purpose of this Agreement to reduce to writing the understanding of the parties regarding wages, hours and working conditions of employees of the Hospital covered by this Agreement. The parties agree that the total welfare of the patients of the Hospital is of paramount importance. Both parties pledge to devote their wholehearted and best efforts to serving the patients of the Hospital. All employees of the Hospital shall be of fit character at all times and shall conduct themselves in exemplary fashion. The conduct of each worker shall be such that no time shall such person's actions, speech or the manner in which their duties are performed, reflect unfavorable to the best interests of the Hospital.

The Hospital recognizes that its employees covered by this Agreement are entitled and should receive wages, hours and working conditions consistent with efficient and economical administration and consistent with the area and community level of wages, hours and working conditions and the rendering of optimum service at the least cost possible to patients using the Hospital's service.

The Hospital and the Union agree not to discriminate against any employee because of race, color, national origin, sex, marital status, or religious affiliation and the Hospital will not discriminate against any employee for their Union activity provided this paragraph shall not be the origin of a grievance and all grievances relating to this paragraph shall be referred by the Union to all appropriate administrative agency or agencies charged with statutory authority to administer the relevant civil rights statutes.

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It is further understood and agreed that only the Hospital Chief Executive Officer or Chief Operating Officer may issue policies which are binding on the Hospital and then only if in writing and signed by the issuer.

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## ARTICLE 7

### DISCIPLINE

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Section 2. In cases of discipline, the Hospital will not take into account prior infractions charged against an employee that have occurred prior to eighteen (18) months before such discipline unless within the eighteen (18) month period there was a recurrence of the same or related infractions.

## A R T I C L E 2 1

### MANAGEMENT RIGHTS

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The Hospital retains the sole right to decide the number and assignment of employees; to maintain order and efficiency; to hire, layoff, assign, transfer and promote employees and to determine the starting and quitting time and the number of hours to be worked, subject only to express regulations or restrictions governing the exercise of these rights which are provided in this Agreement. The Hospital shall have the right to administer all matters not specifically and expressly governed by this Agreement without limitations, implied or otherwise.

## REVELANT PROVISIONS OF THE EMPLOYER'S EMPLOYEE HANDBOOK

### Corrective Action Policy

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Any employee whose behavior results in a correction action meeting and documentation process four (4) or more times in any 18-month period (18 months preceding the most recent corrective action process) is considered to have unresolvable problems aligning his or her behavior to the HOSPITAL and may be discharged.

Some examples of behaviors (not an all-inclusive list) that can lead to corrective action are:

- Failure to abide by smoking and/or parking regulations.

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### **POSITION OF THE EMPLOYER**

The Employer takes the position that it had just cause to terminate the employment of Grievant Mike Flower on January 19, 2004. It presented the following facts at the hearing:

The Employer hired Grievant Mike Flower as a day housekeeper on or about May 10, 1991. Grievant's duties involved maintaining Hospital property in a sanitary condition.

While a housekeeper, Grievant's employment was governed by the collective bargaining agreement between the Employer and the Union (Joint Exhibit "1"), the Employer's Employee Handbook (*see* Joint Exhibit "5"), and various administrative policies and procedures, such as the policy and procedure entitled, "Corrective Action." (See Employer's Exhibit "3.") Both the Employee Handbook and the Employer's Administrative Policy and Procedure regarding corrective action recognize the Employer's right to terminate an employee who receives corrective action four times within an 18-month period. (*See* Employer Exhibit "3," p. 6, and Joint Exhibit 5," p. 18.) Further, both the Employee Handbook and the Employer's Administrative Policy and Procedure regarding corrective action identify terminable offenses as including failure to realign behavior as required by the Corrective Action Policy, engaging in behavior that is detrimental to the business interest or harmful to the reputation of the Employer, insubordinate behavior, including refusal to follow supervisory work direction,

assignments and Hospital policies, and failure to abide by regulations, including "smoking" regulations.

Grievant received corrective actions for failure to follow job instructions on November 5, 2002, January 30, 2003, and March 19, 2003. (See Joint Exhibit "2.")

On or about March 27, 2003, the Employer's Housekeeping Manager, C. Moon, held a conference with Grievant regarding tobacco usage in the work place. Mr. Moon advised Grievant that due to "the unsanitary conditions and the image of our Department and Hospital, there will be no more use of chewing tobacco during working hours. You shall be limited to break times, lunch times, and only in designated break areas." (See Employer Exhibit "8.") Following the conference, Mr. Moon prepared a conference memorandum which referenced the foregoing, as well as the fact that Mr. Moon had spoken with Grievant regarding tobacco usage in the work place on a prior occasion(s). (Id.)

On or about August 7, 2003, Grievant was issued a Discussion Letter by Mr. Moon, regarding chewing tobacco on the job. (See Employer Exhibit "6.") Grievant had been observed using chewing tobacco on the Employer's premises during working time. Grievant was advised that he would receive a corrective action if he were observed with chewing tobacco in his mouth on a future occasion. (Id.)

Subsequently, on or about December 18, 2003, Mr. Moon observed Grievant with tobacco in his mouth while walking down the smoking area hallway on the Employer's premises. When Mr. Moon confronted Grievant, Grievant admitted to the tobacco usage, but stated that he had forgotten about the previous warning since he had been absent on FMLA leave. (See Employer Exhibit "7.") Rather than issuing

Grievant a corrective action, Mr. Moon gave Grievant another Letter of Discussion and warned him that further tobacco usage would result in a corrective action. (Id.)

On or about January 13, 2004, Grievant was observed by the Employer's Director of Housekeeping, T. Window, removing tobacco from a tobacco canister while on the Employer's premises and placing the tobacco in his mouth. Mr. Window e-mailed his observations to Grievant's supervisor, Mr. Moon, on the same date. (See Joint Exhibit "4.") Mr. Window did not confront Grievant at that time since he was unsure what prior directives Grievant had been issued regarding chewing tobacco during working hours. (Id.) Mr. Window asked Mr. Moon to follow-up with corrective or other action as appropriate. (Id.)

Subsequently, on or about January 19, 2004, the Employer issued Grievant a fourth corrective action for Failure to Follow Job Instructions Written or Verbal as follows:

On January 13, 2004, Greg was seen by a Director in this hospital putting chewing tobacco in his mouth in the front corridor on Two West. Greg has been counseled on August 7, 2003, and on December 18, 2003, that there would be no tobacco used during non-break times or in unauthorized areas. (See Joint Exhibit "2.")

The corrective action noted that it was Grievant's fourth corrective action in an 18-month period.

On the same date, Grievant was advised of his dismissal pursuant to Hospital policy. (Id.) The Employer maintains that Grievant had four corrective actions within an 18-month period and that it exercised its discretion appropriately in terminating his employment on or about January 19, 2004. The Employer asks that the Arbitrator deny the grievance in its entirety.

## POSITION OF THE UNION

The Union asserts that although the collective bargaining agreement does not expressly require just cause in connection with the discipline/termination of bargaining unit members, such standard is understood by reason of inclusion of other provisions in the contract, such as the grievance procedure, discipline provision, and probationary period. The Union and Grievant maintain that the Employer did not have just cause to terminate Grievant's employment.

Grievant had been employed by the Employer for 13 years. Although as of January 1, 2004, Grievant had three corrective actions on his record within an 18-month period, none of those corrective actions related to the use of chewing tobacco. The Union and Grievant contend that Article 7, Section 2 of the collective bargaining agreement requires that for four corrective actions to act as a basis for discharge, they must be the same or related infractions. While the Employer maintains that all corrective actions involve a failure to follow job instructions, the Union and Grievant assert that they do not all relate to the use of tobacco.

Further, the Union and Grievant contend that receipt of four corrective actions within an 18-month period does not mandate the dismissal of an employee, but only gives the Hospital the discretion to do so. In the instant case, the Union and Grievant maintain that dismissal was an abuse of the Employer's discretion.

Grievant denies that he used chewing tobacco in contravention of Hospital directives on or about January 13, 2004. While Grievant acknowledges that he saw Mr. Window on that day, and that Mr. Window passed approximately three feet away from

him, he states that Mr. Window did not observe him place a piece of chewing tobacco in his mouth.

Grievant testified that as of January, 2004, he was attempting to withdraw from the habit of using chewing tobacco. As a psychological trick to break the habit, he placed Nicorette or a similar type of gum in a Skol container. When Mr. Window passed him on January 13, 2004, Grievant was removing Nicorette gum, not Skol, from his chewing tobacco container. At no time did Mr. Window confront Grievant to ask what substance he was placing in his mouth. If Mr. Window had done so, Grievant maintains that he could have established he was using Nicorette gum, rather than chewing tobacco.

Grievant also maintains that the issuance of the Letters of Discussion in August and December of 2003, were unwarranted under the circumstances. (Employer Exhibits "6," and "7.") With regard to the Letter of Discussion issued in August of 2003, Grievant denied having chewing tobacco in his mouth. He stated that when J. Car walked past him, he had gum in his mouth, not chewing tobacco.

Further, with regard to the incident in December of 2003, Grievant maintains that he had been cleaning the smokers' area. He states that he had been permitted to chew tobacco in the break area and smokers' area. However, there were no spittoons in the smokers' area. He either had to get rid of the chewing tobacco by spitting it on the ground or in an ashtray. He was actually on his way to the bathroom to get rid of the chewing tobacco when he was observed by Mr. Moon with chewing tobacco in his mouth. He denied telling Mr. Moon that he had forgotten that he had been warned about using chewing tobacco outside of the break and smokers' areas.

As of January of 2004, Grievant testified that he was trying to end his chewing tobacco habit. He testified that his wife had been after him to quit the habit due to the expense. He stated that he began chewing Nicorette around Christmas time and had substantially cut down his use of chewing tobacco by January. During and after work, when he got a craving for chewing tobacco, he would chew gum. He kept it in a chewing tobacco container to mimic the chewing tobacco habit. He testified that he would tuck the gum in his mouth to simulate chewing tobacco in an attempt to squelch the urge to chew tobacco. As of the date of the hearing, he had been tobacco-free for approximately five months.

Grievant further testified that a Step 2 of the Grievance Procedure, he told the Employer's representatives that he had been chewing gum and not tobacco on January 13, 2004. He had not been given that opportunity to tell his side of the story on the day he was terminated. No one ever asked him what he had in his mouth on January 13, 2004, prior to his termination.

The Union and Grievant maintain that the Employer did not have just cause to terminate Grievant's employment and that it violated the provisions of the collective bargaining agreement, handbook, and administrative policies and procedures by such termination.

### **OPINION**

After carefully reviewing the testimony of the witnesses, the exhibits, and the arguments of the parties in their Post Hearing Briefs, the Arbitrator determines to deny the grievance in its entirety.

Grievant was clearly on notice that his use of chewing tobacco, in other than certain restricted areas of the Hospital, was forbidden. Grievant does not dispute that he was advised by his supervisor in March, August, and December of 2003, that chewing tobacco could not be used during working hours and could only be used during break and lunch periods in designated areas of the Hospital, such as the break area and smokers' area. (See Employers Exhibits "6," "7," and "8.") Even accepting Grievant's recollection of the events which prompted the Employer's discussions with Grievant in March, August, and December of 2003, as true, Grievant was clearly placed on notice that he could not use chewing tobacco during working time on the Hospital premises, except in very restricted areas.

It cannot be gainsaid that the Hospital's restriction of chewing and smoking tobacco on its premises is a reasonable use of its discretion. The Employer is in the business of providing medical services to the public. The use of chewing and smoking tobacco are clearly contrary to its main mission, that is, to maintain health. Further, the use of chewing and smoking tobacco interferes with the Employer's obligation to maintain a sanitary environment. Thus, its prohibition of the use of tobacco during working time and its restriction of the use of tobacco to certain limited areas of the Hospital were clearly within its rights and a proper exercise of its discretion.

Grievant was also on notice that his receipt of four corrective actions within an 18-month period of time could result in the termination of his employment. While the Employer's Administrative Policies and Procedures and Employee Handbook speak in permissive terms of discharge, the discretion rests with the Employer, not with the employee. Employer witness, Pat Cat, Director of Employee Relations, and

Union witness, J. Dog, Chief Steward, both acknowledged that Hospital employees had been fired in the past for receiving four corrective actions within an 18 month period. They further acknowledged and agreed that the corrective actions did not need to be for the same infraction. The Union and Grievant's argument that Grievant's termination was flawed since earlier corrective actions did not address tobacco usage is not persuasive. On the contrary, both Employer and Union witnesses confirmed that the corrective action provision had been applied in prior cases, regardless of whether the violations were related or unrelated. Thus, there can be no claim of inconsistent treatment in connection with Grievant's termination.

Lastly, the Arbitrator has carefully reviewed the evidence, including Mr. Window's and Grievant's testimony, regarding the incident of January 13, 2004. For the reasons which follow, the Arbitrator credits the testimony of Mr. Window, over that of the Grievant, regarding what occurred that day.

Mr. Window testified that, from a vantage point of appropriately three feet away from Grievant he observed Grievant holding a tin of chewing tobacco, removing a brown substance from the tin and placing it in his lip as one would when using chewing tobacco. Mr. Window was adamant that he did not observe Grievant remove a piece of white chewing gum from the tin, but rather a piece of brown "chew." Mr. Window stated that he was certain the substance was tobacco since, prior to his tenure at The Hospital, he had spent two years in the state of Kentucky and was quite familiar with the habit of chewing loose tobacco. He had personally observed the color and texture of the substance, as well as how and where individuals would place it in their

mouths. He left no doubt that the substance he had seen Grievant place in his mouth on January 13, 2004, was chewing tobacco, not Nicorette gum.

There was no evidence of any bad blood between Mr. Window and Grievant which would account for Mr. Window having a motive to get rid of Grievant. Neither the Union nor the Grievant offered any motivation for Mr. Window to accuse Grievant falsely. Further, Mr. Window refrained from taking any action against Grievant himself, but merely advised Grievant's supervisor of what he had personally observed on January 13, 2004. He testified creditably that he did not know where Grievant was in the counseling or disciplinary process and thus refrained from confronting him directly.

Further, it appears that the Employer gave Grievant not one, not two, but three warnings to cease the use of chewing tobacco during working time on Hospital premises before issuing a corrective action. These warnings occurred over a nine month period of time. Thus, it does not appear that the Employer was rushing to judgment in an effort to propel Grievant out the door.

It is also significant that Grievant received his third warning against the usage of chewing tobacco on working time less than a month prior to the fourth incident. Even if Grievant had forgotten in December that he had received a warning against using chewing tobacco during working time on the Hospital's premises in August, he certainly would not have forgotten in mid-January that he had received a similar warning, a scant month earlier. Grievant admitted that even though he was attempting to quit using chewing tobacco at the time, he was still using half a can of chewing tobacco on a regular basis in mid-January, 2004. Thus, it is likely he would have had chewing tobacco on his person on January 13, 2004.

Neither Grievant's length of service nor the commendable fact that he has ceased using chewing tobacco since his termination can be used by this Arbitrator as a mitigating factor in evaluating his dismissal. Article 5, entitled Grievance Procedure, of the collective bargaining agreement substantially limits the power of the Arbitrator to substitute her judgment for that of the Employer. Article 5, Section 2, Step 4 expressly states that:

[t]he arbitrator shall have no power to substitute the arbitrator's discretion for the Hospital's discretion in cases where the Hospital is given sole discretion to act by this agreement or by any supplement hereto or in cases where the Hospital has exercised its discretion unilaterally in the past.

Since it was ultimately up to the Employer's sole discretion whether to terminate Grievant after four corrective actions within 18 months, it appears that the Arbitrator may not substitute her discretion for that of the Employer, even in circumstances where she might have deferred a decision to discharge. Under the provisions of the collective bargaining agreement, once the Arbitrator determines that Grievant has received four corrective actions, her discretion and jurisdiction end.

Article 5, Section 6 of the contract further limits the Arbitrator's jurisdiction by removing her ability to consider an employee's length of service as a mitigating factor in connection with disciplinary penalties. Thus, it is stated "that in no event shall . . . any disciplinary penalty imposed by the Hospital be mitigated in whole or in part, due to the length of the employee's service with the Hospital unless mutually agreed between the Union and the Hospital." (See Joint Exhibit "1.") Thus, Grievant's 13 years of service to the Employer, along with his tobacco cessation, are both facts beyond contractual jurisdiction to consider.

It is certainly commendable that Grievant has ceased using tobacco. It is hoped that he may continue to do so indefinitely. In the end, the loss of his employment may actually be a small price to pay for Grievant's good health and longevity.

**AWARD**

The grievance is denied.

Dated: January 13, 2005



K  
aren Bush Schneider, Arbitrator