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February 9, 2015

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Re: Grievance Arbitration between Sanford Medical Center,  
Thief River Falls, Minnesota and Minnesota Nurses Association  
FMCS Case No. 14-55116-8 (Termination Grievance – Sandra Coltom)

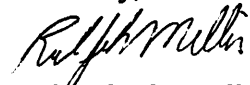
Representatives:

Enclosed for your review and consideration is a copy of the decision in the above-captioned matter.

The Arbitrator's fee and incurred expenses amounted to a total of \$14,894 , with Sanford Medical Center, Thief River Falls, Minnesota and Minnesota Nurses Association each owing the undersigned the amount of \$ 7, 447.

Thank you for allowing me to serve as the Arbitrator. I hope to receive another appointment in the near future.

Sincerely,



Richard John Miller

RJM/hns  
Enclosure





"Employer," "Sanford or "Sanford TRF") and Minnesota Nurses Association (hereinafter "Union") provides for an appeal to final and binding arbitration of disputes that are properly processed through the grievance procedure.

The Arbitrator, Richard John Miller, was selected by the Employer and Union (collectively referred to as the "Parties") from a panel submitted by the Federal Mediation and Conciliation Service. A hearing in the matter convened on October 30 and 31, 2014, at 9:00 a.m. at the Ralph Englestad Arena, 525 Brooks Avenue, Thief River Falls, Minnesota. The hearing was transcribed with reference being designated as "Tr." followed by the page number of the transcript. The Parties were afforded full and ample opportunity to present evidence and arguments in support of their respective positions.

The Parties' legal counsel elected to file electronically post hearing briefs with receipt by the Arbitrator no later than January 9, 2015. The post hearing briefs were submitted in accordance with that deadline date. The Arbitrator then exchanged the briefs electronically to the Parties' legal counsel on January 10, 2015, after which the record was considered closed.

The Parties agreed that the grievance is a decorous matter within the purview of the Arbitrator, and made no procedure or substantive arbitrability claims.

## **ISSUES AS STIPULATED TO BY THE PARTIES**

1. Was there just cause to terminate the Grievant?
2. If not, what is the appropriate remedy?

## **STATEMENT OF THE FACTS**

Sanford Health provides medical services to patients in multiple states including the Dakotas, Minnesota and Iowa. Sanford Health operates a Medical Center in Thief River Falls, Minnesota as well as providing other medical services to patients.

The Parties were signatories to a Collective Bargaining Agreement, which was in effect from October 26, 2011 through July 31, 2014, and governs this case. (Joint Exhibit #1).

Article 34, Management Rights, of the Collective Bargaining Agreement provides that the Medical Center has the right "to establish rules and regulations which do not conflict with negotiated agreements." To that end, EMTALA is the federal law that requires that any hospital which receives Medicare funds must provide a medical screening examination to any patient that presents in an Emergency Room ("ER") regardless of the patient's ability to pay or any other characteristic of the patient.

The Medical Center has promulgated the EMTALA Assessment and Transfer Compliance Policy, which requires compliance with EMTALA and requires that any patient who presents to Sanford's ER must receive a medical screening examination. (Employer

Exhibit #2). This Policy further provides that if a patient's condition requires transfer to another facility, the ER physician is to explain the transfer and sign off on the transfer before it occurs. (Employer Exhibit #2, pp. 1-2). The Grievant admits that she had been trained in EMTALA on multiple occasions and was familiar with what EMTALA requires, including that the attending ER physician is required to do a medical screening examination on any patient in the ER and is required to sign any patient transfer forms in the ER. (Tr. 262-263).

Similarly, Sanford's Medical Screening Examination Policy specifically states that anyone who presents for an unscheduled procedure or evaluation must receive a medical screening examination. This Policy further provides that no patient will be denied triage or a medical screening examination by any employee of the Hospital. (Employer Exhibit #3, pp. 1-2).

Sanford's Sexual Assault Child Policy specifically states that the procedure in dealing with a child who has been sexually assaulted is to first call the ER physician and have a nurse assist with the examination. Nurses are not to conduct an examination or otherwise treat the patient without consulting the physician in the ER. (Employer Exhibit #4, p. 1).

Sanford's Transfer of Patients to Another Facility Policy provides that a patient is not transferred until a receiving

physician at another medical facility has consented to accept the patient. The physician in charge of the patient's case decides the means of the transfer and who is responsible for the patient during transfer. When a patient is transferred to another facility, a transfer for medical necessity form must be completed by the ER physician and it is the physician that orders the patient transfer. (Employer Exhibit #5, pp. 1-2).

Additionally, while not a formal Sanford policy, Sanford has adopted and attempts to follow a Just Culture philosophy which has been used in health care for a number of years. The Just Culture philosophy is designed to ensure that an employee knows what the rules and policies are which the employee is expected to follow and that any penalty for the failure of an employee to follow a rule or a policy has been thoroughly reviewed ensuring that the employee knew she was supposed to follow the rule, that it was possible for the employee to follow the rule, that the employee knowingly violated the rule, and that the employee did not have a mistaken belief that the rule violation was insignificant or justified prior to implementing a serious step of discipline such as termination. This philosophy is designed to ultimately help improve patient care and safety. (Employer Exhibit #26).

The Grievant, Sandra Coltom, began working at Sanford as a Registered Nurse ("RN" or nurse) in July 2005. During recent

years she worked in the Emergency Department ("ED"). At the time of her hire, the Grievant received training and instruction in EMTALA, just like all other nurses. Subsequently, the Grievant received additional training as well as education articles and quizzes about EMTALA at various times throughout her employment at the Medical Center. She received training on EMTALA on December 17, 2009, and was quizzed on it. The Grievant also received training on June 25, 2011, and was quizzed on EMTALA again at that time. (Employer Exhibit #6, pp. 1-2). She also participated in online training on EMTALA on July 12, 2012. (Employer Exhibit #7, p. 3).

The Grievant was well-respected by her peers as a person and as a nurse. She was also recognized by management as a well-skilled and experienced nurse. In fact, her most recent performance evaluation, from May of 2013, indicates that she met or exceeded expectations in all categories. (Union Exhibit #6). She is also an honorably discharged veteran having served in the military for 13 years.

During her time at Sanford TRF, beginning in 2010, the Grievant served as a Union Steward and Union Secretary and was involved in recent contract negotiations in both Thief River Falls and Sanford's Bemidji Medical Center. The Grievant's Union activities involved dealing with Sanford TRF Chief Clinical Officer Janell Hudson.

According to the Grievant, the two did not get along very well, and she felt intimidated by Ms. Hudson due to Ms. Hudson's criticism of her note taking during meeting minutes and the distribution of these minutes after the Collective Bargaining Agreement was settled. (Union Exhibit #4). As a result of the conflict between the two, the Grievant felt that she was unfairly singled out for discipline and unfairly scrutinized by Ms. Hudson. Other nurses who testified on behalf of the Grievant at the hearing shared the same opinion, with one alleging that the Employer was eventually going to find a reason to terminate the Grievant. (Tr. 298-299, 315, 329-331).

Sanford takes its commitment to patients seriously and all employees, including the Grievant, have agreed that they are going to practice certain service commitments to each other and their patients. Among the commitments made by the Grievant were to introduce herself with name and title when talking to someone she does not know, collaborating with physicians and other caregivers in treating patients, asking for input from others before making a decision that may affect other people, taking responsibility for her own action, and communicating the patient's need to a specific caregiver so that the need can be met in a timely manner. (Employer Exhibit #9, pp. 1-2).

While the Grievant's work performance met or exceeded expectations, she did have a history of significant disciplinary



problems during her employment with the Medical Center. On March 3, 2008, the Grievant received a written warning for erratic work behavior and unsatisfactory work performance. In particular, she exhibited unprofessional behavior and engaged in significant use of profanity when she was assigned to do orientation for a new employee. She also made multiple unprofessional comments about her coworkers, and yelled and was rude to her coworkers. (Employer Exhibit #9).

On October 28, 2010, the Grievant received an oral warning for unprofessional behavior and violation of Sanford policy. The Grievant was unprofessional and disruptive in talking with a clinical nurse leader who had offered her the opportunity to work an overtime shift in accordance with the Collective Bargaining Agreement. The oral warning noted that she had previously been counseled about unprofessional communication issues in May of 2007, and three times in March of 2009 as well as the written warning she received in March of 2008. (Employer Exhibit #10).

On July 27, 2011, the Grievant received an oral warning for failing to report for work and not notifying a supervisor of her absence. (Employer Exhibit #11).

Importantly, on February 20, 2012, the Grievant received a written warning for violating Sanford's policy on EMTALA when she refused to ensure that a patient that presented in the ER

received a medical screening examination before leaving the Hospital. The Grievant refused to provide care for a patient who needed a cortisone shot and turned the patient away. The Grievant also told a patient registration employee at the front desk in the ER to destroy the patient's chart. Ms. Hudson was involved in the investigation and discipline of the Grievant for this issue. Ms. Hudson made sure as part of the discipline that the Grievant understood that a medical screening examination was mandated by Sanford policy and federal law for any patient who presented to the ER, and that the Grievant was to ensure that she did not judge the validity of a patient's condition and that all patients were triaged, given a medical examination and the services of an appropriate on-call physician. (Employer Exhibit #12). After this written warning for EMTALA violation in 2012, there is no question that the Grievant knew what was required by Sanford policy and federal law concerning EMTALA.

The Grievant also received a written warning on September 12, 2012, for unprofessional behavior for her degrading, demeaning and disrespectful actions toward her coworkers while at work. (Employer Exhibit #13).

On February 3, 2014, the Grievant was working a 10:00 a.m. to 10:00 p.m. shift in the ER. Also working was nurse Jasmyn Radeke who worked a 6:00 p.m. to 2:00 a.m. shift on the evening of February 3-4, 2014, in the ER. Dr. Amer Qazi was the on-

duty physician working in the ER beginning at 8:00 p.m. on February 3 through 8:00 a.m. on February 4, 2014.

According to both the Grievant and Ms. Radeke, the ED was very busy that evening, and staffing was inadequate enough to prompt the Grievant to later file an unsafe staffing report. (Union Exhibit #4, p. 60). Further, the Medical Center had just "gone live" with the new computer system know as "EPIC" two days earlier and some staff was having difficulty logging on and inputting data.

Between 7:30-8:00 p.m. that evening, nurse Lois Wang received a call about a four-year old girl who was a sexual assault victim who was being brought in to the ER that evening. Ms. Wang took the call from a dispatcher at Thief River Falls Law Enforcement and took down the name and other information about the patient. Although Ms. Wang received the call about the patient, she never saw the patient and had nothing to do with the patient when the patient came in that evening. (Employer Exhibit #16).

Around 8:00 p.m. when the female juvenile patient presented in the ER, the Grievant and Ms. Radeke assumed responsibility for the patient. Typically, the nurse working the 10:00 a.m. to 10:00 p.m. shift is a triage nurse and the Grievant acted as the triage nurse and assigned the patient to Ms. Radeke. Because Ms. Radeke told the Grievant that she did not have any

experience dealing with sexual assault patients and did not have as much nursing experience as the Grievant, it was agreed upon that Ms. Radeke would be the nurse who would stay with the patient in the examination room while the Grievant was the "runner" - communicating with others and obtaining what was needed for the patient because the Grievant's shift was ending soon. (Employer Exhibit #15). The child's mother brought the patient into the ER and explained that the little girl was a sexual assault victim and the circumstances surrounding her assault. The female juvenile patient alleged that her older brother had sexually assaulted her.

Because Sanford TRF does not perform pediatric sexual assault examinations, it was understood that this juvenile would eventually be transported to the Sanford Hospital in Fargo where the examinations are conducted. In fact, Sanford TRF policy specifically dictates that ED personnel must call the Fargo ER in such a situation for instructions on how to proceed. (Employer Exhibit #4).

The Grievant made the first phone call to Sanford One Call to start the transfer process for the patient to go to Fargo. (Employer Exhibit #15). Sanford One Call is the department that is involved whenever a Sanford patient has to be transferred from one facility to another. The Grievant called Sanford One Call and spoke with a nurse named Lance who assisted with

contacting Fargo to see if Fargo could accept a pediatric assault patient. After the Sanford One Call nurse made contact with Fargo, the nurse told the Grievant that they would get back to Thief River Falls ER shortly with information regarding the transfer. (Employer Exhibit #20, pp. 1-3).

Ms. Radeke also later contacted Lance about this flowing situation. (Union Exhibit #1, pp. 009-018). At no time did either nurse identify herself as a RN during conversations with representatives from the Fargo hospital. During these conversations it was agreed that the patient would be transported to Fargo to be seen by Dr. Kantak. Ms. Radeke relayed this information to the Grievant after finishing her phone conversations with Lance at Fargo.

After learning this information, the Grievant testified that she had a brief conversation with the attending ER physician, Dr. Qazi:

I briefly gave a synopsis of what had happened, and he - I said we had a child that was allegedly sexually assaulted, Jasmyn had spoken to Dr. Kantak, he wanted the patient to go to Fargo as soon as possible. Are you going to see the patient? And he said no, we have an accepting physician, I don't need to.

(Tr. 235). The Grievant testified that this conversation took place while Dr. Qazi was seated at the physician's desk and while she was standing behind him. (Union Exhibit #8). The Grievant also testified that Dr. Qazi later told her that he had

observed the child go into the bathroom and come back out, on the evening in question. (Tr. 236).

Immediately following this conversation, the Grievant told Ms. Radeke that she (the Grievant) had spoken to Dr. Qazi and that he had told the Grievant that it was permissible to send the patient to Fargo without him performing an examination. (Tr. 206).

The ER notes for the patient in the electronic patient record keeping chart made by the Grievant specifically reflect that the Grievant claimed she spoke with Dr. Qazi about the patient as well as the fact that Dr. Kantak in Fargo was going to accept the patient. The Grievant further wrote that "due to acceptance of Fargo physician Doctor Kantak, and both nurses feel patient is stable and need to transfer patient as soon as possible, Doctor Qazi did not see this patient." (Employer Exhibit #18, pp. 9-10). The EMTALA transfer form which was filled out by the Grievant and Ms. Radeke about the transfer of the pediatric patient to Fargo, is required to have a physician's signature. That form was not signed by Dr. Qazi but instead the Grievant wrote under the physician signature line "not seen by TRF ER physician." (Employer Exhibit #18).

While the Grievant claims she told Ms. Radeke that she had spoken with Dr. Qazi about the pediatric sexual assault victim, Dr. Qazi testified that he was never informed that there was a

pediatric sexual assault patient who needed to be seen in the ER on the evening of February 3, 2014, he never spoke with the Grievant about it, and never saw the patient or had anything at all to do with the patient. (Tr. 29-36).

Dr. Qazi is known as an ER doctor who takes his duties and responsibilities very seriously. He is meticulous about ensuring that EMTALA is followed, he is meticulous about personally speaking with an accepting physician through Sanford One Call whenever he believes that it is appropriate and necessary to transfer a patient to another medical facility, and he is very particular about ensuring that he personally signs the EMTALA transfer form because that is his responsibility. Not only does Dr. Qazi take his responsibilities very seriously concerning EMTALA and the need for medical screening examination as well as the transfer of the patient, but the nurses who work with him acknowledge that as well. In fact, the Grievant acknowledged that Dr. Qazi does all his medical screenings, personally talks to receiving physicians when a patient needs to be transferred and personally signs patient transfer forms.

The juvenile patient was released with the belief that she would be traveling to Fargo with her mother. Ultimately, staff at the Medical Center learned that this never occurred, as law enforcement decided that a physical examination was unnecessary because the perpetrator had confessed to the sexual assault.

After the patient left the facility, a supervisor named Dianne Seuer approached the Grievant and began asking her questions about the patient, and the perpetrator. Because the Grievant believed that this information was confidential and personal, and that releasing it to Ms. Seuer could in fact violate federal law (HIPPA) she refrained from answering these questions. To her knowledge, Ms. Seuer had not been involved in the patient's treatment or viewed the patient's chart.

The next day, February 4, 2014, RN Faith Moore spoke with Dr. Qazi reminding him that every ER patient must have a medical screening evaluation, nurses do not have the credentials to perform a medical screening evaluation and therefore the doctor must see every patient who presents in the ER. Dr. Qazi acknowledged understanding of his obligations. (Employer Exhibit #29).

On that same day, because the Grievant had concerns about the fact that Dr. Qazi had not seen the patient, she reported the situation to Patient Care Manager Florence Nelson, who is responsible for the ER and various other areas of the Medical Center. The Grievant testified that it occurred to her after her shift that there were EMTALA implications relative to the patient--but again, that Dr. Qazi had said he did not need to see the patient, and that she followed his direct order. (Tr. 243).



Ms. Nelson was concerned about the potential EMTALA violation both because of its seriousness and because she was aware of the Grievant's prior written warning for an EMTALA violation. Ms. Nelson proceeded to inform her manager, Shauna Paulson, who is the Director of Patient Care Services as well as Ms. Hudson about the EMTALA issue. Management began an investigation of the situation the same day Ms. Nelson learned of the EMTALA issue.

Later that day, Ms. Nelson called Ms. Radeke into a meeting and asked her questions about the events that had occurred the evening before, with respect to the juvenile sexual assault patient. Ms. Radeke said that she understood generally that pursuant to EMTALA, a patient needed to be seen by a doctor before leaving the ER, and that she in fact understood this on the evening in question. Ms. Radeke did not witness or did she overhear a conversation between the Grievant and Dr. Qazi. (Employer Exhibit #15).

Ms. Nelson also talked with nurse Wang about her involvement with the patient, which was none. (Employer Exhibit #16).

Ms. Nelson spoke with Dr. Qazi on February 5, 2014. When Ms. Nelson asked Dr. Qazi about the sexual assault patient Dr. Qazi explained that he was aware that a patient was there but he was never asked to see the patient. Dr. Qazi never spoke with

the receiving ER physician in Fargo, Dr. Kantak. Dr. Qazi also explained that he never signed any transfer papers and had nothing to do with the patient. Dr. Qazi told Ms. Nelson that he runs a tight and safe shift and that he knows that it is an EMTALA violation with potentially excessive fines for a patient not to be seen with a medical screening examination or to transfer a patient without a medical screening examination. (Employer Exhibit #17).

Ms. Nelson and Ms. Paulson also reviewed the patient's electronic chart and the EMTALA transfer form. The chart showed that the Grievant spoke with Dr. Qazi, Dr. Kantak accepted the patient, the patient was stable and needed to be transferred as soon as possible. Dr. Qazi electronic chart did not indicate that Dr. Qazi saw the patient and the EMTALA transfer form did not show any physician signature as required under Medical Center policy. (Employer Exhibits #18, 19).

On February 7, 2014, Ms. Nelson and Ms. Paulson called Supervisor Seuer to discuss her involvement in the pediatric sexual assault case. Ms. Seuer explained that she asked the Grievant some questions to get an update on the patient and that the Grievant refused to provide Ms. Seuer with any information and said that she was a "private patient." Ms. Nelson and Ms. Paulson were concerned about this response to a supervisor's questions by the Grievant because they believed this was

insubordination and not how an employee is supposed to answer a supervisor. (Employer Exhibit #21).

Ms. Nelson also called VIP Services to talk to Kelly, the victim advocate who participated in the sexual assault case on February 3, 2014. Kelly was the advocate that reported to the Medical Center upon receiving a call from the ER about the pediatric sexual assault patient. Kelly explained that she was let into the ER by "Supervisor" Sandy and that Sandy gave her a report before Kelly met with the mother and patient in the examination room. After the mother and child left the ER to prepare for the transfer to Fargo, Kelly also left to get a few things before intending to leave and go to Fargo with them. Kelly never did go to Fargo with them as the victim's brother confessed to the assault.

Ms. Nelson and Ms. Paulson also called the Grievant on the morning of February 7, 2014. Notably, the Grievant stated to them that she spoke with Dr. Qazi about EMTALA and that Dr. Qazi's response was "they have an accepting physician and I don't think I need to do an exam" and that according to the Grievant, Dr. Qazi assumed that the pediatric physician in Fargo would do an examination. The Grievant said that the EMTALA transfer form was filled out with the signatures of the Grievant and Ms. Radeke but not Dr. Qazi. Dr. Qazi never went into the examination room. (Employer Exhibit #22).

Subsequently, Ms. Hudson requested the audio recordings of all of the Sanford One Call telephone conversations between Sanford TRF, One Call and Fargo about this pediatric patient on the night of February 3, 2014. There were five of them, which were later all transcribed. There was no evidence of an EMTALA conversation between the Grievant and Sanford One Call nurse Lance. (Employer Exhibit #20).

Ms. Hudson, Ms. Paulson and Ms. Nelson reviewed all of the information gathered during the investigation. There was no doubt that an EMTALA violation had occurred as the pediatric patient did not receive a medical screening examination before leaving the ER on February 3, 2014. Dr. Qazi denied having ever been told about the patient, or being asked to see her. Additionally, Dr. Qazi did not sign any of the paperwork and he did not speak with the Sanford One Call nurse or the receiving physician in Fargo, Dr. Kantak. All of these facts were contrary to everything that Sanford nursing management knew about Dr. Qazi and the way he works in the ER. They knew Dr. Qazi as one who took his responsibilities very seriously and who was known for personally signing off on all patient forms and being personally involved in any patient transfers.

In contrast, Ms. Hudson, Ms. Paulson and Ms. Nelson considered that the Grievant had been previously disciplined for an EMTALA violation less than two years before. The Grievant's

claim that she spoke with Sanford One Call nurse Lance about the EMTALA issue was not supported by the audio recordings of the Sanford One Call communications the night of February 3, 2014, dealing with the pediatric patient. Further, they considered the fact that the Grievant admitted that she refused to provide information to Supervisor Seuer about the pediatric patient when Ms. Seuer asked about the patient and her status. Ms. Seuer was the on-duty supervisor that night, and the Grievant's blatant refusal to answer questions from a supervisor about the patient was construed by them to be insubordinate conduct and unjustified.

Given the seriousness of the EMTALA violation, the Grievant's prior disciplinary history including a prior written warning for violating EMTALA, the Grievant's alleged insubordination in refusing to answer questions from the on-duty supervisor, false information provided to Sanford during the investigation of the incident about whether EMTALA was discussed with the Sanford One Call nurse Lance, and the Just Culture philosophy, nursing management, along with Sanford TRF's COO and CEO, as well as Sanford Health's General Counsel, Beverly Adams, all were in agreement that the Grievant should be terminated since "just cause" existed for her discharge. The Grievant was formally notified of her termination by letter on February 14, 2014. (Employer Exhibit #25).

Ms. Radeke was given coaching and counseling (non-discipline) for her role in this situation for the following reasons. Ms. Radeke was unfamiliar with sexual assault cases. At the time of the investigation, Ms. Radeke told Ms. Nelson that she was essentially assigned to be in the room with the patient on the night of February 3, 2014, by the Grievant while the Grievant was the runner. The Grievant was the person who claimed that she spoke with Dr. Qazi about the transfer to Fargo and that a screening examination was not necessary. In contrast to the Grievant, Ms. Radeke apparently was not certain about what EMTALA required. Ms. Radeke did not provide any false information to management during the investigation, unlike the Grievant and the claim about EMTALA being discussed with the Sanford One Call nurse. Ms. Radeke was not insubordinate to the on-duty supervisor, and Ms. Radeke did not have the discipline history that followed the Grievant. Given all of these differentiating circumstances, Ms. Hudson found it appropriate to merely coach and counsel Ms. Radeke rather than terminate her like the Grievant.

On February 19, 2014, MNA filed a written grievance protesting the Grievant's termination. (Employer Exhibit #27). The remedy sought by the Union was reinstatement to her previous position, and other make whole remedies. Id. The grievance was denied and the Union advanced the grievance to final and binding

arbitration, the last step in the contractual grievance procedure. Id.

After the Employer terminated the Grievant, Ms. Hudson filed a Complaint with the Minnesota Board of Nursing on February 18, 2014. (Employer Exhibit #28). The Grievant appeared before a Review Panel at the Board of Nursing on August 28, 2014, without invitation of the Medical Center. The Review Board declined to take any disciplinary action against her whatsoever. (Union Exhibit #5, p. 66). The Grievant testified that the Review Panel asked her numerous questions about both the 2014 and 2012 EMTALA violations, but in the end determined that she violated neither the federal statute nor the Minnesota Nurse Practice Act in either situation. (Tr. 254-256).

#### **UNION POSITION**

The evidence presented at the hearing does not support termination. The Employer essentially seeks to establish just cause for the termination through the testimony of a single witness, Dr. Qazi. Dr. Qazi's testimony is not credible and should be rejected.

Dr. Qazi knew that the patient in question was in the ED on the night in question. Once he had that knowledge, it was his responsibility to perform a medical screening. He failed to do so. The next day, on February 4, 2014, RN Moore had to "remind" Dr. Qazi that the examination was his responsibility and that

nurses in the ER do not have the credentials to perform such an evaluation.

Dr. Qazi gave the Grievant a verbal order that the patient could be transferred without an examination. As Ms. Nelson and Ms. Hudson confirmed, doctors give nurses orders, and nurses follow those orders. The Employer failed to introduce any policy mandating the Grievant or any other nurse to override a physician's order, or take certain steps to do so, if that nurse disagreed with it. In fact, such behavior in all probability would lead to discipline and/or an invitation for the nurse to sit before a review panel at the Minnesota Board of Nursing. Therefore, no basis for the termination exists.

Further, the Employer's investigation was neither fair nor objective, and was devoid of any serious effort to determine what actually occurred in this case. It falls far short of establishing proof that the Grievant was "guilty" of a terminable offense. The Employer did not apply rules, orders and penalties even handedly as another employee whose actions mirrored the Grievant's on the night in question was not disciplined in any way whatsoever. Finally, a lesser penalty, such as a suspension without pay, could have been utilized by the Employer.

The Employer's decision to terminate the Grievant for violating EMTALA cannot be upheld in the face of the licensing



Minnesota Board of Nursing's decision, especially given the shoddiness of the Employer's investigation, which was unfairly conducted.

For the reasons stated herein, and based upon all of the testimony and evidence in the record, MNA requests that the grievance be sustained, and that the Grievant be reinstated at Sanford TRF without any loss of seniority. In addition, MNA requests that the Employer be ordered to reimburse the Grievant for all back pay due and owing, back to the date of her termination, and be made whole with regard to all compensation, retirement benefits (specifically, including but not limited to, those earned in 2013, payable in April 2014), any personal time off compensation due and owing, and any and all other benefits, and in every way. Finally, MNA requests that any and all references to the Grievant's termination be expunged from her personnel record.

#### **MEDICAL CENTER POSITION**

The issue in this case is whether Sanford TRF has to tolerate repeated misconduct by the Grievant after she violated Sanford policy and federal law by failing to ensure that a medical screening examination was performed in the ER on a juvenile patient. The Grievant was previously disciplined in 2012 for a violation of EMTALA. The Grievant had been previously trained on EMTALA's requirement for a medical

screening examination and Sanford's related policies to ensure that EMTALA is followed.

Sanford chose to terminate the Grievant's employment only after it conducted a thorough investigation, ensured that the Grievant knew what was expected of her and that she violated those expectations in multiple ways by her misconduct on February 3, 2014, and during the ensuing investigation.

The Grievant had been seriously disciplined multiple times in the six-year period prior to her termination, and had many opportunities to display good performance and conduct. Sanford should not have to give an employee who repeatedly engages in misconduct multiple second chances. The Grievant already had many chances to modify her conduct, yet she failed to do so. The Grievant knew that EMTALA violations are very serious issues, and she committed a second EMTALA violation less than two years after receiving a written warning for a previous EMTALA violation.

Because the Grievant violated Sanford's policy and federal law concerning EMTALA, refused to answer questions about the patient from the on-duty supervisor, lied during the investigation, and had a significant prior disciplinary history with Sanford, Sanford made the decision to terminate her employment. Sanford cannot afford to employ a nurse who repeatedly refuses to follow Sanford policies and federal law

concerning the health and welfare of patients. A violation of EMTALA subjects Sanford to potentially significant fines or even loss of Medicare funding which could cause the Medical Center to close, as well as causing potential harm to patients. Under these circumstances, Sanford had just cause to terminate the Grievant as her termination was consistent with Sanford's policies, the Collective Bargaining Agreement, and arbitral principles of just cause. The Union's grievance should be denied.

#### **ANALYSIS OF THE EVIDENCE**

Article 15, Discipline, of the Collective Bargaining Agreement provides that Sanford will generally utilize a system of progressive discipline except in cases where immediate termination is appropriate. This discipline clause articulates four levels of discipline: 1) verbal warning; 2) written warning; 3) suspension; 4) termination. It further states that termination is the fourth step of the disciplinary process and is used in cases of continued documented unsatisfactory performance or misconduct. Sanford's Conduct and Discipline Policy also provides that termination typically is used in cases of continued unsatisfactory performance and/or misconduct following review by Sanford. (Employer Exhibit #24, p. 2).

In any event, whether Sanford utilizes progressive discipline or imposes immediate termination for unsatisfactory

performance and/or misconduct their decision is subject to Article 15, Discipline, of the Collective Bargaining Agreement, which provides that "[n]urses shall not be disciplined except for just cause and nurses shall be entitled to due process." Specifically, Article 34 of the Collective Bargaining Agreement provides that Sanford has the right "to discharge employees for just cause." This "just cause" requirement means that the Employer must act in a reasonable, fair manner and cannot act in an arbitrary or capricious manner. The Employer's discharge of the Grievant must therefore meet the standard of reasonableness.

There are generally two areas of proof in an arbitration of an employee's discipline case. The first involves proof of actual wrongdoing, the burden of which is always placed upon the employer when the contract requires just cause for discipline. The second area of proof, once actual wrongdoing is established, is the propriety of the penalty assessed by the employer.

This case is unique in many ways as most of the essential facts of this case, which surround events that occurred on the evening of February 3, 2014, and ultimately culminated in the Grievant's termination are not in dispute. It is undisputed that the juvenile assault patient was not given a medical screening (examination) by a physician on February 3, 2014. It is also undisputed that this was a violation of both Sanford TRF policy and EMTALA. Thus, the disposition of this grievance is

who was responsible for this violation, the Grievant or the attending ER physician Dr. Qazi.

The Parties agree that the most important determination to be made in this case is whether the Grievant and Dr. Qazi had a conversation that night concerning the juvenile assault patient.

The Grievant testified that a conversation did occur between them, wherein the Grievant informed Dr. Qazi that there was a juvenile that was allegedly sexually assault, and Ms. Radeke had spoken to Dr. Kantak (accepting physician) in Fargo who wanted the juvenile to be transported immediately for examination since this is the Sanford facility that performs pediatric sexual assault examinations. The Grievant then asked Dr. Qazi whether he was going to see the patient and he said no, we have an accepting physician, so there was no need for an examination. The Grievant also testified that Dr. Qazi later that evening told her that he had observed the juvenile patient go into the bathroom and come back out.

Dr. Qazi, on the other hand, categorically denied that the Grievant ever came to him and told him that there was a four-year-old pediatric sexual assault patient who had presented in the ER, who needed to be seen by him. He denied having any conversation at all with the Grievant about this patient or specifically discussing with her whether or not the patient needed to be seen or have a medical screening. He denied

telling the Grievant that no such screening was needed in the situation. He denied having any contact with the Grievant at all concerning this patient.

The critical issue in this case boils down to the credibility of the Grievant and the credibility of Dr. Qazi as to whether this conversation occurred or not. The Arbitrator is therefore charged with the responsibility of determining who is more worthy of belief, the Grievant or Dr. Qazi. If Dr. Qazi's testimony is found credible, then the Grievant has clearly violated EMTALA for a second time and that, combined with her other actions on the evening of February 3, 2014, and her prior disciplinary record, more than aptly demonstrates that there was "just cause" for her termination.

The "guilt" or "innocence" of the Grievant turns on whom is telling the truth"--credibility. Credibility means a determination of who is worthy of belief. One witness, if believed, is sufficient to sustain the position the evidence supports. In assessing credibility, the Arbitrator evaluated the testimony of the Grievant, Dr. Qazi, other Parties' witnesses, and those who were interviewed and/or provided statements during the Employer's investigation on the following recognized criteria, which the Arbitrator has developed over his 35 plus years of serving as an Arbitrator: (1) motive - interest or lack of interest in the outcome of the case; (2)

relationship to the parties; (3) relative strength of witness recollection as to ability and opportunity to know, remember and relate the facts; (4) consistency over time; (5) consistency with prior statements made in other forums; (6) manner and appearance; (7) frankness and sincerity, or lack thereof; (8) evidence bias or prejudice; (9) evident motivations to misrepresent known facts; (10) refusals to respond or evident evasiveness in responses to questions; (11) obvious emotional stress during witness examination; (12) corroborating testimony of other witnesses; (13) reasonableness of testimony considered in its entirety and in relation to other credible testimony offered, which tend to strengthen or weaken the credibility or reliability of the testimony; (14) any impeachment of testimony; and (15) any and other factors that bear on believability and weight.

The Employer argues that Union witnesses, including the Grievant, made multiple admissions that were harmful to the Grievant's case. The alleged significant admissions by the Union include the following:

- The Grievant admits that she refused to answer questions about the pediatric patient from the on-duty Supervisor Seuer.
- The Grievant admits that she knows that a medical screening examination is required by EMTALA whenever a patient comes into the ER.

- The Grievant admits that EMTALA's requirement for a medical screening examination whenever a patient presents in the ER was reinforced when she received a written warning for an EMTALA violation in February of 2012.
- The Grievant knows that a doctor is supposed to sign the patient transfer form after doing a medical screening before a patient is transferred from Sanford to another facility.
- The Grievant admits Dr. Qazi is a stickler for following procedures in the ER, that he takes his responsibilities very seriously and that he personally is the one who always signs transfer forms when a patient is to be transferred from Sanford.
- The Grievant admits that Dr. Qazi personally makes a call to Sanford One Call and talks to the attending physician who is going to receive a patient being transferred from Sanford, and that Dr. Qazi does not delegate these responsibilities to someone else but personally handles these matters.
- The Grievant admits that her knowledge and understanding of how seriously Dr. Qazi takes his responsibilities and what his normal practice in the ER is with regard to medical screening examinations and patient transfer forms is completely contradicted by her claim in this case that Dr. Qazi did not examine the pediatric sexual assault patient, never talked to Sanford One Call or an attending physician in Fargo and did not sign the transfer form on February 3, 2014.
- The Grievant told Ms. Nelson and Ms. Paulson during the investigation that Ms. Radeke had no experience with sexual assault patients, and at the hearing the Grievant admitted that she did not remember what she told Ms. Nelson during the investigation.
- The Grievant admits that even if a Sanford One Call nurse had told her that current charting in a patient's file ought to cover the medical screening examination issue, the Grievant knows that does not make it permissible or appropriate for the patient to be transferred to Fargo without a medical screening examination.



- RN Kayla Knutson told Ms. Nelson during the investigation that Ms. Knutson and the Grievant had a conversation after the pediatric patient left the ER. Ms. Knutson asked the Grievant about sending the patient to Fargo without Dr. Qazi seeing her to do a screening examination and the Grievant replied to Ms. Knutson that Fargo had an accepting physician and that Fargo stated that they would take care of it. (Employer Exhibit #30). During the hearing, the Grievant admitted that she had no recollection of what was said during her conversation with Ms. Knutson.
- The Grievant admits that there was no one from Sanford management who was present at the disciplinary hearing at the Board of Nursing prior to the Board of Nursing deciding not to penalize the Grievant's nursing license.
- RN Wang admitted that Dr. Qazi is a stickler for procedure in the ER, that he is detail oriented, takes his responsibilities very seriously, is meticulous about personally signing any kind of patient transfer forms or making entries in patient charts, and does not delegate the responsibility for talking on the phone with Sanford One Call and the receiving physician for a patient transfer.
- Ms. Wang agreed it would be unusual and out of character for Dr. Qazi not to sign a patient transfer form, for Dr. Qazi not to personally make a phone call to Sanford One Call about a patient transfer and to not personally speak with a receiving physician.
- Ms. Wang admits that an ER doctor needs to know that a patient is present and needs to be examined before an EMTALA examination can be performed.
- While Ms. Wang claims that Dr. Qazi must have known the pediatric patient was in the ER and was going to be transferred to Fargo, Ms. Wang admits that she never personally saw the pediatric patient even though she was working in the ER at the same time as the Grievant, Ms. Radeke, and Dr. Qazi. Ms. Wang further admits that because she never saw the pediatric patient it was also possible that Dr. Qazi might not have seen the patient in the ER.

- RN Barbara Okland admits that she was unfamiliar with the Grievant's work, was unfamiliar with Dr. Qazi and did not work in the ER.
- RN Rita Person admits that Dr. Qazi is very detail oriented and takes his responsibilities very seriously as an ER physician.
- Ms. Person admits that Dr. Qazi personally signs off on patient transfer forms and is personally involved in making a call to Sanford One Call and talking with the receiving physician about a patient that he wants to transfer.
- While Ms. Person has negative feelings about Sanford management and apparently told the Grievant that she thought Sanford would terminate the Grievant at some point, she is not aware of any disputes over the termination of a nurse in at least the past five years.

The Employer argues that these admissions from Union witnesses and others demonstrate that the Grievant and Dr. Qazi never had a conversation that night with respect to the pediatric patient and the Grievant is guilty as charged and should be terminated for "just cause."

Conversely, the Union has proved that the Grievant has asserted no fewer than six times, twice under oath, that the conversation between her and Dr. Qazi occurred:

1. During the night in question, the Grievant told Ms. Radeke that the conversation took place. Ms. Radeke corroborated the Grievant's statement about the conversation that the Grievant had with Dr. Qazi. This occurred within minutes of the actual conversation taking place.
2. The Grievant placed the following entry in her chart at 9:00 p.m. on February 3, 2014: "Spoke with Dr. Qazi current ER physician regarding patient and

circumstances as well as Dr. Kantak accepting patient." (Union Exhibit 1, p. 31).

3. The Grievant repeated this to Ms. Nelson on February 4, 2014, when she "self-reported" her concerns about the events that occurred the evening before with Dr. Qazi.
4. The Grievant repeated that the conversation did occur between her and Dr. Qazi during a subsequent investigatory phone interview with Ms. Nelson and Ms. Paulson.
5. She gave this same written, sworn testimony in an affidavit she submitted to the National Labor Relations Board in support of an unfair labor practice charge MNA filed against the Employer. (Union Exhibit #4, p. 54).
6. She testified under oath at the hearing that she had a conversation about the patient with Dr. Qazi. (Tr. 235).

Clearly, the Grievant's testimony and her subsequent actions, which were corroborated by others and through documentation, establishes that her version that a conversation did occur is more believable than Dr. Qazi's version that this conversation did not occur.

The Union also has proved that Dr. Qazi is guilty of lying or misstating the truth under oath. On direct examination, Dr. Qazi testified that he was not aware that the Grievant had claimed that it was he who made the decision that no medical screening examination was necessary on the night in question, and that he only became aware of the Grievant's claims with respect to this when he was notified that he would be testifying at the arbitration case. (Tr. 42-43). When questioned if he

would have written a glowing letter of recommendation for the Grievant, such as the one dated April 26, 2014 (Union Exhibit #7, p. 138), had he known what she was claiming, he stated: "absolutely not." (Tr. 43). However, on cross-examination, he totally contradicted his own testimony, and revealed that in fact he had known almost immediately afterward what the Grievant was claiming:

- Q. Do you recall how many times either Ms. Nelson or Ms. Hudson spoke with you after the incident about the incident?
- A. Ms. Nelson talked to me once, and Ms. Janell Hudson I think she talked to me a couple times.
- Q. And again, is it your testimony that at no time during these conversations did either Ms. Nelson or Ms. Hudson tell you that Sandy Colton was telling them that you are the one that decided the patient didn't need to be seen that night? They never told you that?
- A. Rephrase your question.
- Q. You testified that you had conversations with Ms. Nelson and Ms. Hudson following the incident, correct, that's accurate?
- A. Yes.
- Q. Is it your testimony that they never said to you, Dr. Qazi, by the way, Sandy is saying you're the one who said the patient can go to Fargo without being seen?
- A. Yes, they told me that.
- Q. They did tell you that?
- A. Yes.
- Q. And that was right after the incident?
- A. Yes.
- Q. So at the time you wrote the recommendation letter in April, you knew that?
- A. Yes.

There are other examples that cast doubt on the validity and accuracy of Dr. Qazi's denial that this conversation took place. Dr. Qazi's branding of the Grievant as a "liar" in

his testimony is contradictory given the fact that he wrote a letter of recommendation for the Grievant in which he refers to her as "one of the most clinically competent nurses I've ever worked with over the last 20 years" and states that he would "recommend her without any reservations". (Union Exhibit #7, p. 138). As noted above, it has been firmly established that his reasons for calling her a liar were known to him months before he wrote this letter. Thus, it makes no sense that Dr. Qazi would write a letter of recommendation for the Grievant if he believed that she was responsible for the EMTALA violation on the night in question. It would be more reasonable to assume that Dr. Qazi's actions were in response to him knowing the responsibility to see the juvenile patient was his, and knew that he had failed to meet that responsibility and that he regretted that the Grievant had suffered the consequence of being terminated.

The conflicting testimony by Dr. Qazi, along with the consistent testimony of the Grievant and other corroborating evidence proves that Dr. Qazi knew that a juvenile sexual assault patient had presented to the ED on the night in question, and a conversation about the patient in question took place between the Grievant and Dr. Qazi on the that evening. There is also convincing evidence that Dr. Qazi, during this conversation, told the Grievant that the patient in question

could be transferred to Fargo without a medical screening. Dr. Qazi's words and actions in the months that followed the incident and the Grievant's termination, as well as his testimony at the hearing, strongly suggest that he knew he had failed in his responsibility on the night in question, and knew that the Grievant was not to blame for the EMTALA violation.

The Employer argues that even if the Grievant's version of events is believable, she is still guilty of violating EMTALA and Sanford's policy. Specifically, even if Dr. Qazi had received direction from Dr. Qazi suggesting that the pediatric patient did not need a medical screening exam, and that Dr. Qazi did not need to sign off on the patient transfer form before the patient was sent to Fargo, the Employer alleges that it was the Grievant's responsibility to demand an examination and have Dr. Qazi sign the patient transfer form.

The Employer's argument fails to recognize that a doctor gives orders that are to be obeyed by the nurses. The Grievant simply obeyed the orders of Dr. Qazi that an examination of the patient was not necessary. Moreover, Dr. Qazi conceded that he is well aware that Sanford TRF policy and EMTALA require a medical screening and signature by a physician before a patient transfer, but he failed to do so in this case. The Grievant cannot be faulted for Dr. Qazi's failure to abide by known Sanford TRF policy and EMTALA.

As to the appropriate remedy in this case, the Medical Center discharged the Grievant for violations of Sanford TRF policies and EMTALA violation, the Grievant's prior disciplinary history including a prior written warning for violating EMTALA, the Grievant's insubordination in refusing to answer questions from the on-duty supervisor, and false information provided to Sanford during the investigation of the incident about whether EMTALA was discussed with the Sanford One Call nurse Lance. The Employer concedes, however, if Dr. Qazi's testimony is rejected, it is clear that the Grievant should be reinstated. Ms. Nelson agreed that if in fact the conversation between the Grievant and Dr. Qazi took place, the Grievant and Ms. Radeke had followed the Sanford TRF sexual assault policy in its entirety, and the Grievant should not have been terminated. (Tr. 124-125). Ms. Paulson and Ms. Nelson both agreed that if the Grievant was telling the truth and Dr. Qazi was not, the Grievant should not have been terminated. (Tr. 148-149, 124-125). Ms. Hudson would not concede the point completely, but at least agreed that further investigation would be warranted if this were the case. (Tr. 194).

The record patently establishes that Dr. Qazi knew that a juvenile sexual assault patient had presented in the ER on the evening of February 3, 2014, and a conversation about the patient in question took place between the Grievant and Dr. Qazi

on that evening. Consequently, there was no "just cause" to terminate the Grievant.

**AWARD**

The grievance is sustained. The Grievant shall be reinstated at Sanford TRF without any loss of seniority. In addition, the Employer is ordered to reimburse the Grievant for all back pay due and owing, back to the date of her termination, minus any earnings and/or unemployment compensation payments, if any. She is also entitled to be made whole with regard to all compensation, retirement benefits (specifically, including but not limited to, those earned in 2013, payable in April 2014), any personal time off compensation due and owing, and any and all other benefits, and in every way. Finally, any and all references to the Grievant's termination shall be expunged from her personnel record.

  
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Richard John Miller

Dated February 9, 2015, at Maple Grove, Minnesota.